is any failure of intelligence or of memory. The one claimant is her daughter, and the other is her grand-daughter. They do not call the only witness who must certainly know the truth. It is difficult not to draw an unfavourable inference. They are no doubt entitled to rely on the presumption; but when it is encountered by a strong body of evidence it would have been wise to have examined Mrs Tulloh if she could have given any favourable testimony. One is more disposed to rely on the natural inference to be drawn from the evidence, when it is not contradicted by the only person alive who knows the truth.

I do not think that it is worth while to notice her statements to Stewart, nor her affidavit. I am not disposed to make use of either.

The respondents founded largely on the fact that Tulloh did not proceed with the action of divorce which he raised against his wife on being informed that she had borne children in Ireland. They say that the abandonment of the action was a recognition of their legitimacy, and that by the efflux of time they are now trying the question at a disadvantage. They also refer to the action of adherence and aliment brought by Mrs Tulloh in 1876, and the actions of aliment at the instance of the daughters, all of which were compromised on the footing that certain payments should be made by Tulloh. In each legitimacy was asserted by the pursuers, and in each it was denied by Tulloh. But we must keep in view that we are trying the right of succession to the estate of Burgie in a case between the reclaimer and the respondents. Until the succession opened the reclaimer had no title to challenge the legitimacy of the respondents. Nor is she responsible for Tulloh's acts. Of course they affect her in so far as they are evidence of the legitimacy of the respondents, but in no other sense.

I am satisfied that Tulloh abandoned the action of divorce with extreme reluctance. He retained a settled conviction of his wife's guilt, and his motives were (1) the difficulty of obtaining evidence, and (2) the expense of the inquiries which he was unable to defray. Nor ought we to forget that at the time when the divorce was in dependence he was not a competent witness. Being under that disability he was advised that if he could not account for every day of his life about the time of the conception he must fail. I do not wonder that he despaired of success. But it is, I think, out of the question to say that he ever recognised his wife's children as his own, or treated them as such.

It is said that a strict inquiry was made into the conduct of Mrs Tulloh, and nothing was found out against her. I doubt it. I do not think that Tulloh had the means of making such an inquiry. But as I have said, the reclaimer is not bound by the acts of Tulloh. They may furnish evidence against her. They can do nothing more. We must decide the case on the proof before us, and in my opinion the children of Mrs Tulloh were not the children of her husband. She did not treat them as legitimate, and I am satisfied that there was no opportunity of sexual intercourse. We are entitled to consider the evidence on the last point in the light which her conduct throws upon it. Taking the direct evidence alone, I can come to no other conclusion than that the spouses had no opportunity of intercourse at the time when the children were conceived. Reading it along with the rest I am convinced that that conclusion is true.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor reclaimed against: Find it proved that the claimant Mrs Louisa Mary Tulloh or Homer and the late Mrs Eliza Jane Tulloh or Ward were not the lawful children of the deceased Alexander John Archibald Tulloh: Remit the case back to the Lord Ordinary to proceed thereon."

Counsel for the Claimant Mrs Coles—Ure—Wilson. Agents—E. A. & F. Hunter & Co., W.S.

Counsel for the Claimant Mrs Homer—W. Campbell—Graham Stewart. Agent—Wm. Considine, S.S.C.

Counsel for the Claimant Miss Ward—Burnet—Cosens. Agent—W. B. Glen, S.S.C.

Counsel for the Claimant Mrs Tulloh—Maclaren. Agent—Robert Broatch, L.A.

Agents for Mr Tulloh's Trustees—E. A. & F. Hunter & Co., W.S.

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*Tuesday, June 4.*

## FIRST DIVISION.

[Sheriff-Substitute at Glasgow.

## CONROY *v.* A. & J. INGLIS.

*Process—Sheriff—Appeal for Jury Trial—Competency—Judicature Act* 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

A labourer brought an action of damages in the Sheriff Court against his employers, on account of injuries averred to have been sustained by him while in their service. The Sheriff-Subsitute before answer allowed a proof on the question of employment. The pursuer appealed for jury trial. *Held* that, as the Sheriff's interlocutor was one allowing proof, the appeal was competent under the 40th section of the Judicature Act.

Thomas Conroy, labourer, Partick, raised an action of damages in the Sheriff Court at Glasgow against A. & J. Inglis, shipbuilders, Partick, on account of injuries sustained by him, as he averred, while in their employment, and in consequence of their fault.

Upon 5th April 1895 the Sheriff-Substitute (SPENS) before answer allowed the

pursuer a proof of his averment that the relation of employer and employed subsisted between himself and the defenders at the time of the accident, reserving thereafter to allow further proof that might seem necessary or advisable.

The pursuer appealed to the Court of Session for jury trial under the 40th section of the Judicature Act.

The defenders argued that the appeal was incompetent. The interlocutor of the Sheriff-Substitute did not allow a proof of all the averments on record, but only of one small preliminary question. The determination of that question might render inquiry into the circumstances of the accident unnecessary. It was unreasonable that the defenders should in this position of matters be put to the expense of a jury trial. In the case of *Shirra* v. *Robertson*, June 7, 1873, 11 Maeph. 660, the opinion was expressed that an interlocutor allowing proof before answer of certain averments by the writ or oath of the pursuer was not appealable under the 40th section of the Judicature Act. That opinion was in the respondents' favour.

Counsel for the appellant were not called upon.

At advising—

LORD PRESIDENT—Mr Watt's point upon the competency of this appeal is, I think, untenable. The 40th section of the Judicature Act allows an appeal to be taken as soon as an order allowing proof has been pronounced. The interlocutor here allows proof no doubt only of a part of the averments on record, but it is none the less an interlocutor allowing proof. The case referred to by Mr Watt was quite different; in it the opinion was expressed that an interlocutor restricting the mode of proof to writ or oath was not appealable under the 40th section of the Judicature Act. That opinion stands on an intelligible and distinct ground. In this case we have an allowance of proof at large albeit only of a part of the record.

I think therefore that the appeal is competent.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Counsel for the Pursuer—G. Watt—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—Crabb Watt. Agents—Dove & Lockhart, S.S.C.

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*Tuesday, June 4.*

## SECOND DIVISION.

[Sheriff of Lanarkshire at Glasgow.

## CAMPBELLS *v.* GLASGOW POLICE COMMISSIONERS.

*Police — Police Commissioners — Gratuity to Children of Deceased Constable—Limit of Age—Rescission of Resolution Granting Gratuity—Police (Scotland) Act* 1890 (53 *and* 54 *Vict. cap.* 67), *sec.* 2, *sub-secs.* 1 *and* 4, *First Schedule, sub-sec.* 8.

By sub-section 1 of section 2 of the Police (Scotland) Act 1890 it is provided that, if a constable dies from injuries received in the execution of his duty without his own default, the police authority "shall grant allowances" to his children. Sub-section 4 provides that, if a constable to whom a pension has been granted dies within twelve months after the grant of his pension, the police authorities may, if they think fit, grant "gratuities" to his children or any of them. Sub-section 8 of the first schedule provides that the "allowance" to a child shall not continue after the child attains the age of fifteen years.

*Held* that the provision of the schedule imposes no limit to the age of the children to whom gratuities may be granted under sub-section 4 of section 2; and that police commissioners, who had passed a resolution granting a gratuity to children of a deceased constable, were not entitled afterwards to cancel the resolution and to refuse payment on the ground that the grantees were over fifteen years of age.

By section 2 of the Police (Scotland) Act 1890 (53 and 54 Vict. cap. 67) it is enacted—"(1) If a constable dies whilst in a police force from the effect of an injury received in the execution of his duty without his own default, the police authority shall grant a pension to his widow and allowances to his children; (2) If a constable dies whilst in a police force from any other cause, the police authority may, if they think fit, grant gratuities to his widow and children or any of them . . .; (4) If a constable to whom a pension has been granted dies within twelve months after the grant of the pension, the police authority may, if they think fit, grant gratuities to his widow or children or any of them."

The first schedule, part 3 (8), of the said Act provides—"The allowance to a child shall not continue after the child attains the age of fifteen years."

Alexander Campbell, inspector in the Glasgow Police Force, retired on 1st October 1894 from the force under the provisions of the Police (Scotland) Act 1890, and in respect of his length of service was entitled to receive a pension of £56, 3s. 7d. per annum.