Friday, February 21.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DAWSON *v.* M'KENZIE.

Parent and Child—Affiliation—Proof of Paternity—Opportunity—Corroboration.

In actions of affiliation and aliment opportunity alone will not amount to corroboration of the pursuer's evidence unless it is of such a character as to bring in the element of suspicion, or has a complexion put upon it by statements made by the defender which are proved to be false.

Dicta in *Macpherson* v. *Largue*, June 16, 1896, 23 R. 785, 33 S.L.R. 615, *approved.*

Helen Dawson, 3 Fingal Street, Maryhill, Glasgow, brought in the Sheriff Court at Glasgow an action of affiliation and aliment against William M'Kenzie, postman, 13 Holmhead Street, Glasgow.

A proof was allowed. The facts proved, and the nature of the evidence, the Arbuckle mentioned being a fellow-postman of the defender's, are given in the note (*infra*) of the Sheriff-Substitute (DAVIDSON), who on 28th November 1906 assoilzied the defender.

Note.—"I consider this a very narrow case. The evidence shows that the pursuer and defender became acquainted at Arbuckle's marriage in March 1905; that they left the house in which the wedding festivities were held about three or four the next morning; that they walked about together till after seven, when the pursuer went home; that thereafter they met with some frequency at Arbuckle's house and elsewhere, generally by appointment; that they took walks together, and that some correspondence passed between them; that the last occasion on which they met and walked together was on 3rd June 1905, after a picnic; and that on 12th March 1906 the pursuer's child was born. She charged the defender with the paternity in the end of June 1905; she has never charged anybody else, and he has always unequivocally denied it. There is absolutely no evidence (apart from the pursuer's own) of any sort of familiarity, or even affectionate address, between the parties. The earlier of the two letters (*v. infra*) from the pursuer which the defender produces no doubt points to considerable intimacy; but it must be observed that that letter was written after the meetings between the parties had ceased, and that it is not evidence against the defender. The second letter certainly does not read as if it embodied a false charge; but it too is not evidence against the defender. My conclusion is that though there is strong reason for suspicion in the case set forth by the pursuer, it lacks that element afforded by evidence of familiar relations existing between the parties which is essential to turn suspicion into proof."

The two letters referred to were recovered by the pursuer from the defender under a diligence. The defender was not examined upon them. They were in the following terms:—

"3 Maxwell Street, 12/6/05.

"Dear Willie,—Just a few lines. Did you forget to come up to St George's Cross on Saturday. I waited from 8·30 till 9 o'clock on you; it was such a lovely night to go for a spoon down by the Kelvinside in the gloaming; you can sleep better after a good night's spooning. My sister-in-law told me last week to ask you up to her house next Sunday. I told her I would see you on Saturday and let you know. As I didn't see you, that's the reason I have written, as I do not want her to know you did not come. Hoping you will find it suitable. You could miss your meeting for one Sunday. I will meet you about six coming up New City Rd. Mr and Mrs Arbuckle are also coming up. As it is going to be great, you might let me know as soon as you can, as I have to let Mrs D. know if it suits you. If you don't come I am not going either, but I hope you will come. I will now draw to a close, for you will be thinking I have said enough, hoping you are well, as I am as well as can be expected under certain circumstances known only to myself. You are well off with the long sleeps you are getting this good weather. I could do very well with a good day's sleeping at present, but such a luxury is not for me. Write as soon as you can, and oblige. For old times sake,
x x x x x x "NELLIE."

"Mr Mackenzie—You would be thinking the letter I sent you the other day was a terrible one. No wonder. Had you been placed that night as I was you would have done the same yourself. I had nowhere to go that night, for when the people I was living with in Cambuslang found out what was wrong they soon told me I was long enough there. One has always plenty of friends until they are needing them. I have found out who are my friends at this time, for home I daren't go, although that night I was standing at the close when my brother was going into the house and he told my mother so. I got in for that night, and I got up through the night and took salts of sorrell, but I had taken too much of it, as it sickened me at once. They thought they would have to send for the doctor as I would not tell them what I had taken; but I am sorry I did not manage it this time, for I would be better dead than what I am suffering. But a lot you care anyway, for you are as cruel as the grave, and that is cruel enough. But mind it is not my mother's fault that I am out of the house, for there is no love like a mother's. Consider what your own mother's feelings would be if the same happened to your sister through one of my brothers. I know what I would do—I would get vitrol and blind them. I would let them know they would not make a fool of another girl the same way, and its what you should get too. I was told that morning I had not to come back near the house again. It's

hard lines that I have had to leave my home over a fancy blackguard like you, for that's all you are; you are no man at all. I don't know what kind of soldier you made, but you are a coward at the heart anyway. Perhaps you thought it was one of your big fat Highland servants you were along with when you were along with me and nothing would happen, as nothing would happen to them as they have that many different men with them. I have learnt a bit of your history when it is too late, but remember you will suffer for what you have done to me. Don't think for a moment you will get slipping, for you will not. I am going to the postmaster soon to see what he will do, for you will suffer as well as me. I will put you out of every place that I know you are in, and that before long too.

"From NELLIE DAWSON,
"c/o Mrs Russell, 218 London Road, Bridgeton."

The pursuer appealed to the Sheriff (GUTHRIE), who on 22nd February 1907 recalled his Substitute's interlocutor and granted decree as craved.

Note.—"The case is narrow, and has, as too frequently happens, been starved in proof. But I am constrained to differ from the learned Sheriff-Substitute. The defender denies too much, and his own friends, the Arbuckles, tell us that appointments were made and meetings took place between the parties during several months in 1905. I also think that the defender's possession of pursuer's letter of 12th June, written about a week after a meeting in Arbuckle's, from which he saw her home at a late hour, is not an insignificant fact. It does not go very far by itself, and would count for nothing if the defender's suggestion that the pursuer was hunting him down were supported. But that is a mere suggestion, and though no doubt the pursuer was rather forward and affectionate, the defender does not seem to have shunned her till danger appeared. But when I consider that there were a number of meetings and such a letter, I cannot but conclude that though no familiarities are proved, yet there was a courtship going on with more than sufficient opportunity for copulation. There is thus such corroboration of the pursuer's evidence as has in the cases been held sufficient, and her testimony is not, I think, open to the remark above made on that of the defender."

The defender appealed, and argued—The pursuer in actions of this class was bound to prove her case in the ordinary way, and she had failed to do so. Her story was not corroborated, and apart from her own statement there was no evidence of familiarity. *Esto* that there was "opportunity," mere opportunity was not enough; there must be proof that the defender's statements were false or evasive. There was no such proof here, for the defender's story was consistent throughout. Reference was made to the following cases:—*M'Kinven* v. *M'Millan*, January 13, 1892, 19 R. 369, at p. 374, 29 S.L.R. 308; *Young* v. *Nicol*, June 8, 1893, 20 R. 768 Lord Trayner at 770, 30 S.L.R. 696; *Macpherson* v. *Largue*, June 16, 1896, 23 R. 785, 33 S.L.R, 615; *Havery* v. *Brownlee*, January 15, 1908, 45 S.L.R. 312. [The LORD PRESIDENT referred to *M'Bayne* v. *Davidson*, February 10, 1860, 22 D. 738].

Argued for respondent—The Sheriff was right. It was proved that the parties were on affectionate terms, that they were in the habit of corresponding, and that contrary to the defender's statements on record they had met by arrangement and walked out together. [LORD PRESIDENT—The defender admits in his evidence that they met by arrangement; it is his procurator who denies it, not himself.] There was ample opportunity, and that, taken along with the fact that the defender denied too much, was sufficient corroboration of the pursuer's evidence.

LORD PRESIDENT—In a case like this I am afraid that the Court will always be left with the feeling that possibly it may not have arrived at the real truth. Yet, none the less, in the consideration of such delicate circumstances it is absolutely necessary for the security of people in general that the Court should not be moved by sympathy or by moral inferences to depart from the rules already laid down by which evidence must be judged. I do not think it necessary to say more as to the rules which prevail in regard to such cases as this than has been said already. The modern doctrine—and the modern doctrine owed its introduction to the alteration of the old law under which the parties were not competent witnesses—was first laid down in the case of *M'Bayne*, 22 D. 738, and perhaps the best expression of it was that given in a more recent decision by the Lord Justice-Clerk and Lord Trayner in the case of *Macpherson*, 23 R. 785, with which I entirely concur. The outcome of it is this, that there must be something more than the pursuer's own statement, and that that something must amount to corroboration. Now, the mistake which the learned Sheriff has made here is in taking the mere proof of opportunity as amounting to corroboration. Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made. I am really only repeating in other words what was said by the Lord Justice-Clerk in the case of *Macpherson*, 23 R. 785. He there said—"No corroboration can be derived from evidence of the defender which shows he is

not speaking the truth. If his evidence is not to be believed it must be taken out of the case altogether, and the case must be treated as if he had not been examined." He then refers to the facts in the case before him, and continues—"But if those facts were capable of leading to a certain inference, and if the defender made no answer when that inference was suggested, it is then that that absence of explanation by the defender's evidence would come to be of importance, and in the same way his denial of those facts which are held to be proved is significant, as it gives a complexion to them which they might not otherwise bear if explained." Accordingly, if I had found, or could have found, from the evidence here that the defender had denied things—possibly innocent in themselves — which were affirmed by other witnesses, that might have afforded the amount of corroboration necessary to establish the pursuer's case. That would have brought it within the same class of facts that were present in the case of *M'Bayne*, 22 D. 738, where the thing that turned the scale was that the defender denied ever having seen the pursuer before the occasion when she stopped him in the street and charged him with being the father of her child, while it was held to be established that he had twice met her before, though in circumstances which could not in themselves give rise to suspicion. Those facts seem to me to be an illustration of the minimum that will suffice as corroboration, and it does not appear to me that that minimum is afforded by the facts of the present case.

There is also this, that there appears to be something here which might have been brought out at the proof, but which has not been brought out. There are certain letters, the second of which seems to me to have a strong ring of truth about it. But these are not evidence against the defender though they might have been made available as evidence had they been put to the defender in his cross-examination. That, however, as I say, has not been done.

On the whole matter, therefore, I think that the pursuer has not made out her case, and that the only course open to us is to recal the interlocutor of the Sheriff and restore the judgment of the Sheriff-Substitute.

LORD M'LAREN—I concur in your Lordship's opinion, and it is hardly necessary to add anything. It is a very common state of the evidence in such cases as this that the pursuer's case depends only upon her own evidence, with a certain amount of corroboration as to opportunities, and then the question of fact arises whether these opportunities were such as to raise legal grounds of suspicion, or were merely of the nature of innocent meetings between man and woman. I think that in this class of cases the law laid down by the Lord Justice-Clerk in the case of *Macpherson* comes to be of importance, because I agree with his Lordship that it is not sufficient corroboration if you merely displace the evidence of the defender and show that he has made false statements. There must be corroboration of the pursuer's evidence; yet when the effect of the defender's false evidence, *i.e.*, his denial of circumstances which are otherwise proved, is to show that there is something of which he is ashamed, or something the admission of which he conceived would throw suspicion upon himself, this will put a different complexion on what the Court might otherwise be disposed to regard as innocent intimacy between the parties. Here there is nothing that is calculated to throw doubt on the truth of the defender's statements. Although there is no evidence tending to show to what other person the paternity of the pursuer's child should be attributed, yet I think the pursuer has not established her case against the defender, and the Sheriff-Substitute's judgment is right.

LORD KINNEAR—I am of the same opinion. I think the learned Sheriff proceeds on a combination of two grounds, both of which are grounds of inference of fact and not of legal opinion, namely, first, that there was opportunity, and second, that the defender denies too much.

Now, I think only the first of these two grounds can reasonably be accepted or made out, for when the defender's evidence is compared with the evidence against him, one cannot find that he denies anything which has been really proved, and therefore I think we reach the question whether the bare statement of the pursuer herself, coupled with evidence of opportunity in the sense that both were together in circumstances in which connection was not impossible, is sufficient to prove the pursuer's case. It is not proved that they were alone together in such circumstances as to give rise to suspicion or reproach, and there is no evidence of opportunity in any other sense than that it was not physically or morally impossible that connection might have taken place, and the result therefore is that there is no evidence on which the Court can proceed other than the pursuer's own statement, which, of course, is not enough.

LORD PEARSON was absent.

The Court recalled the Sheriff's interlocutor and assoilzied the defender.

Counsel for the Pursuer (Respondent)—R. C. Henderson. Agent—Alex. White, W.S.

Counsel for the Defender (Appellant)—Orr Deas. Agent—R. M. Scott, Solicitor.