

March 1842.
Second Division.—(G. D. F.)

No. 166.— James Milne, Defender and Advocate, v. Mary Cobban or Blacklaws, Pursuer and Respondent.

Aliment—Parent and Child—Filiation — Bastard — Semiplena Probatio — Proof—Evidence held insufficient to constitute a *semiplena probatio* in a question of affiliation, and along with the oath of the mother, emitted thereafter in supplement, not sufficient to establish the alleged paternity.

The nature of this case of aliment, at the instance of the mother of a bastard child, is sufficiently explained in the following interlocutors and notes of the Sheriff, and of the Lord Ordinary in the case.

30th June 1841 The Sheriff-substitute having considered the closed record, so far as relates to the question of the paternity of the pursuer's child, mentioned in the libel, together with the judicial declarations of the parties, the proof adduced on both sides, and the minutes of debate. Finds facts and circumstances proved, amounting to a *semiplena probatio* of the defender's being the father of the pursuer's child, and entitling the pursuer to give her oath in supplement thereof; allows the pursuer to give her oath accordingly, and assigns 14th July next for her appearing to depone."
(Signed) "Hugh Fullebtos."

"Note—It appears from the proof, that for a considerable time prior to the occasion on which the pursuer's child is said to have been begotten, the defender had an eye to the pursuer; that he had her in his thoughts, and felt an inclination towards her; and as he states upon his oath, that he entertained no purpose or idea of marriage, the nature of his penchant for the pursuer cannot admit of much doubt.

"Mrs Kinneur, and her son John Kintear, prove, that on one occasion, soon after the pursuer's husband's death, the defender was in their house in Laurencekirk, and after having had some drink, and paying his reckoning, mounted his horse and rode away; but having met the pursuer on the street, he returned with her to their house, which the parties entered, and had some whisky together, and a good deal of jocular conversation passed between them.

"The defender, on two different occasions after the pursuer's husband's death, spoke to the witness, Ann Croll (Mrs Hutcheon), about the pursuer, calling her a fine 'widow wife,' and expressing himself in a way denoting that he admired her; and the witness, Mrs Croll (Mrs Hutcheon's mother), repeatedly heard the defender speaking about the pursuer since her husband's death, and on one occasion heard him say to Mrs Hutcheon 'that he knew few young women like the pursuer.'

"The pursuer states that the child in question was begotten on her by the defender in her own house in Laurencekirk, on the evening of 1st August 1839, being the day on which the market of Saint James' Fair of Garvock, in that neighbourhood was held. It appears in evidence that the defender, who had been in that market, left it in the afternoon, and proceeded along the road through Laurencekirk, having been preceded by his friend Mr Durie, farmer at Muiryloan, whom (according to the defender's statement) it was his object and expectation to overtake. In this pursuit, however, he does not seem to have been very zealous. Having fallen in with one David Clark, a ditcher, the defender went in with him to George Henderson's public-house in Laurencekirk, where they sat for some time, and drank one or two gills of whisky together. From Henderson's, the defender proceeded westward to another public-house in Laurencekirk, kept by John Kinnear, where he put up his pony and entered the house. Margaret Walker, who was then in charge of the house, depones that the defender, on coming in, asked her 'if any of her folk (meaning the Kinnears) were come home from the market;' and on her answering in the negative, the defender said 'he would away down and see His Blacklaws (the pursuer), and thereupon left the house.' And the witness farther states 'that she does not recollect that the defender said anything about Mr Durie of Muiryloan.'

"The defender then proceeded straight to the pursuer's house, where he found her alone, and having fastened his pony to the paling in front of the house, went in. He states in his decision that his purpose in calling at the pursuer's house was to buy some snuff, and to see if his friend Mr Durie was there; but it does not appear that he either bought snuff or inquired about Mr Durie; and from what he had said just before to Margaret Walker, his real object was to see Mrs Blacklaw.

"That the defender, on this occasion, was alone with the pursuer in her own house; and that, after being either in the kitchen or the front room, he retired with the pursuer into a small back bed-room, where they remained some time in privacy together,

appears to be satisfactorily established. No doubt there are some discrepancies in the proof; but the evidence of Margaret Laurence, George Croll, and George Charles, seems to the Sheriff-substitute sufficiently to instruct the material facts, and to outweigh the evidence of the defender's witness, Charles Robertson (in itself auspicious), so far as his evidence is at variance with theirs. Now, what possible reason, except one, could the defender have had for retiring with the pursuer into this back bed-closet, where they were shut up together? The pursuer's front room, where her customers were usually received and entertained, was empty; and if the defender only wanted drink, he could have got it in that room with much more convenience and propriety than in a back bed-closet, into which, for that purpose, he had no earthly occasion to retire. There is the strongest ground for presuming that the defender had another purpose, and that he accomplished it at that time, and in that place (viz., the back bed-closet), by having canal connection with the pursuer, as averred by her. Previous inclination, temptation, and opportunity, all concurred—add to which the incitement occasioned by liquor; for it is proved that the defender was, to a certain degree, intoxicated.

"After leaving the pursuer's house on that night, the defender never entered it again ; and between eight and nine calendar months thereafter the pursuer was delivered of the child mentioned in the libel, the paternity of which, at an early period of her pregnancy, and uniformly and solemnly, she imputed to the defender, and to him alone.

"Considering the whole circumstances then as appearing in evidence, and taking also into view the terms of the defender's judicial declaration, the Sheriff-substitute is humbly of opinion that a semiptena probatio is established, and that the pursuer is entitled to give her oath in supplement."

"14th July 1841—Appoints the reclaiming petition for the defender to be answered against 28th inst."
(Signed) "Hugh Fullerton."

"Stonehaven, 4th August 1841 Having considered the reclaiming petition for the defender, with the answers thereto for the pursuer, refuses the desire of the said petition; adheres to the interlocutor reclaimed against, and decerns [to enter a judicial decree]; and prorogates the term for the pursuer's appearing to give her oath in supplement till the 18th instant." (Signed) "Hugh Fullerton."

" Stonehaven, 21st August 1841 The Sheriff having advised this process, dismisses the appeal, affirms the interlocutors complained of, and appoints the pursuer to appear and depone on the 6th September 1841."

(Signed) "George Douglass."

"Note.—This case having resolved itself into a mere question of paternity, instead of a complicated action of damages for breach of promise of marriage, the said action becomes reduced to a very narrow compass, and must be entirely decided according to a fair construction of the evidence adduced, as well as the general conduct of the parties towards each other. The Sheriff has therefore, after mature consideration, come to the conclusion that there are, upon the whole, sufficient grounds for finding a *semplena probatio* established, and the petitioner entitled to give her oath in supplement. In the first place, the statements of the defender, contained in his deposition and declaration, betray obvious inconsistencies, and are at variance with the proof adduced on both sides, which circumstances go far to support the pursuer's plea; and in the second place, the total absence of any evidence of the charges against the pursuer's moral character, so profusely thrown out by the defender, tends much to render his veracity questionable, in so far as the circumstances of this case are concerned."

"6th September 1841 On the motion of parties, prorogates the term for the pursuer's appearing to depone in supplement till the 9th instant." (Signed) "Hugh Fullerton."

"14th September 1841 Having considered the pursuer's oath in supplement, and advised with the Sheriff-depute: Finds that the same supports the previous *semplena probatio* adduced by the pursuer, and completes the proof of the defender's being the father of the pursuer's child mentioned in the libel: Therefore repels the defences stated on the head of paternity, and decerns against the defender for £3 of modified inlying expenses, and also for aliment for the said child at the restricted rate of £7 Sterling yearly, payable quarterly, and in advance, and with interest as levelled, until the said child attain the age of ten years complete: Decerns also for the dues of extract: Finds the defender liable to the pursuer in expenses of process, So far as incurred by her in establishing the paternity of her said child: Finds the pursuer liable to the defender in the expenses incurred by him in defending himself against that part of the pursuer's action which relates to damages; and in regard to which a decree of *absolvitor* was pronounced in his favour on the 3d day of February last; and appoints the parties to give in

accounts of these expenses respectively against the 28th instant."

(Signed) "Hugh Fullerton."

Thereafter in the advocation:

"18th December 1841 The Lord Ordinary having heard counsel in this advocation, and thereafter considered the proof adduced in the Inferior Court, and whole process, finds it established by the proof, and the oath of the pursuer in supplement thereof, that there was carnal intercourse between the pursuer and defender on the evening of the 1st of August 1839, and that the pursuer was delivered of the child libelled on, upon the 13th of April 1840, being only a few days less than nine lunar months, posterior to the said connection: Therefore approves of the interlocutor of the Sheriff complained of, finding that the defender was the father of the said child: Repels the reasons of advocation, and remits the cause simpliciter to the Sheriff: Finds the pursuer entitled to expenses, as the same may be taxed by the auditor, and decerns.

"Note.—The Lord Ordinary coincides almost entirely in the views of this case expressed by both of the learned Sheriffs, in the interlocutors and notes now brought under review. He conceives it to be established—1. That the previous character of the pursuer was unblemished, and more especially that the advocator has totally failed to prove (as he averred) either any looseness, or even levity of behavior on her part, towards other men. 2. That the defender had previously expressed that sort of general attachment or penchant towards the pursuer, which was likely to seek indulgence when the parties were off their guard. 3. That on the evening when the child was probably conceived, the defender, after being considerably excited with drink, went to the pursuer's house, found her alone, even her children being absent from the house, and remained in a room containing a bed, alone with her, for a space varying from half an hour to an hour; and 4. That the oath of the pursuer (which the defender allowed to be taken before advocation) is positive and consistent in itself, and completes the proof of the pursuer.

"The anxious pleading for the defender in this Court, was chiefly directed to various supposed inaccuracies in the deposition of Margaret Lawrence, who, from her residence as a lodger in the pursuer's house in 1839, and the charge she took of her children on the night of the fair, was necessarily a material witness for the pursuer. Her evidence is attempted to be impeached by an appeal to the testimony of Charles Robertson, the principal witness for the defender. But on a careful perusal

of the testimony of both witnesses the Lord Ordinary is of opinion that Margaret Lawrence is the more credible of the two. Robertson is a person in the occasional employment of the defender; his very call at the pursuer's house on the night in question, seems to have been suggested by suspicion or curiosity; and his refusal, when precognosced, to tell the agents of this poor woman what he could say on oath, was not consistent with the feeling of a fair and impartial witness.

"At the same time, it would be going too far in this, or in any case of the kind, to hold that any of the witnesses could be exempt from a few mistakes, as to minute particulars of what passed in a house, on an evening, at the distance of many months prior to the investigation. When it is kept in view that the witnesses were not called on to swear as to the facts for nearly two years after they happened, no one tasking their own recollection as to the minute incidents after a long interval, will hastily ascribe trifling discrepancies in the testimonies of such witnesses as were necessarily adduced here, to a wilful breach of veracity.

"With a small allowance, however, for errors in the calculation of time, the proof on both sides is perfectly reconcilable, and the Lord Ordinary has been much impressed with two circumstances mentioned by the witnesses of the defender, which have appeared to him to corroborate very strongly the statement of the pursuer and her witnesses. Thomas Durie, a near neighbour and friend of the defender, who was at Garvock fair with him on the 1st of August, swears that the defender and he agreed on that afternoon to ride home together, but that the defender was detained by speaking to another man, and desired Durie to ride on and he would soon overtake him."

And the witness adds, he thinks it may have been between four and five o'clock when he left the market. If a quarter of an hour he allowed for the detention of the defender, he must have left the market (which is said to be about two miles from Lawrencekirke) at or about five o'clock. This being fixed, the next witness-, James Watson (the defender's own servant), swears that he looked his watch when the defender came to his farm on the night of the fair, and he found 'it was about half after seven o'clock on said evening he first saw the defender arrive at his own house.' Thus, between the time that the defender left the fair, and the period that he reached home, a space of between two and three hours elapsed. After making all allowance, therefore, for the time passed by the defender in Henderson's public house, and for the usual pace at which horses generally

return to their own stable, there was left more than half an hour for him to pass with the pursuer on the night in question. "A separate point was urged here, of some importance in practice. The defender allowed the pursuer to give her oath in supplement (no doubt under protest) without applying to the Sheriff for leave to advocate. The respondent pleaded that the advocator was now barred from objecting to her oath, and the Lord Ordinary certainly does not see how the Court can now throw it out of view; but he has not placed his decision on that ground, as he apprehends that, before the oath was taken, there was a *semplena probatio* to entitle the pursuer to give her oath in supplement."

Milne reclaimed, when the Court pronounced the following interlocutor:

"Recall the interlocutor submitted to review; advocate the cause; and find that the evidence adduced by the respondent is insufficient to constitute a *semplena probatio*, and find that the evidence, together with the respondent's oath in supplement, is not sufficient to establish that the advocator is the father of her child: Dismiss the original action ; assoilzie [acquit] the defender, and decern; but find no expenses due."

Lord Ordinary, Cuninghame Act. H. J. Robertson ; James Harness, S.S.C., Aycnt Alt. Solicitor-General (M'Neill); Cuningham and Bell, W.S., Agents F. Clerk[G. D. F.J]