[20*th Feb.* 1837.]

WILLIAM INNES, and his Tutor ad litem, Appellants.—
Burge—Stuart.

WILLIAM INNES, Esq., and others, Respondents.—
Dr. Lushington—Sir Wm. Follett.

Presumption—Husband and Wife—Parent and Child.—1. In a question as to the paternity of a child born before the marriage of the alleged father with the mother, there is no presumption that he is the father; but the fact of paternity must be proved. 2. Question, whether a child born 301 days after access by the alleged father could be held to be his child?

Proof.—Circumstances in which (affirming the judgment of the Court of Session), in a declarator of marriage and legitimacy, a witness for the defenders having deponed on her cross-examination that she was the wife of a certain individual, and the pursuers not having protested for reprobators, but allowed circumduction to be made, and having thereafter, on the ground of res noviter veniens ad notitiam, applied for leave to adduce proof that the witness was not, and knew that she was not, the wife of the individual she had named, but that he had been previously assoilzied from an action of declarator of marriage at her instance, the House of Lords refused to allow this proposed additional proof to be led.

1ST DIVISION.

Ld. Corehouse.

IN May 1832 an action was instituted before the Court of Session by Janet Rogers, describing herself as the widow of John Innes of Cowie, esquire, and in name of her son, described in the summons as William Innes, the only lawful son procreated between the said John Innes and

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Janet Rogers; setting forth, that the late John Innes was originally married to Une Cameron Barclay Allardice, eldest daughter of the late Robert Barclay Allardice of Ury and Allardice, esquire, that this lady died about twenty years ago, leaving Mr. Innes a widower with a family of three daughters and one son, the latter of whom died about fifteen years ago; that at this time a sister of the pursuer Janet Rogers or Innes was in the employment of Mr. Innes as housekeeper, and continued in his service until a few years before his death; that during the years 1824, 1825, and 1826, the pursuer Janet Rogers or Innes, who was then in business on her own account in Edinburgh as a dress-maker, was in the habit of frequently meeting her sister at Mr. Innes's house in Charlotte Square, and that this became known to Mr. Innes, who on every occasion treated her with attention and respect; that at length, from their frequent meetings, a mutual affection arose between them, and Mr. Innes having promised marriage to the pursuer Janet Rogers or Innes, she, upon the faith thereof, yielded to him the privileges of a husband in the course of the year 1826; that their intercourse was continued at Cowie during the latter part of that year, where, at the desire of Mr. Innes, she went to reside for some time, with the ostensible view of assisting in making dresses for his daughters; that the pursuer Janet Rogers or Innes having become with child to him, she was delivered of a son on the 14th day of April 1827, being the other pursuer, William Innes; that, being in a delicate state of health at the time, the pursuer Janet Rogers or Innes, along with the infant pursuer William Innes, shortly thereafter, by Mr. Innes's desire, went to reside at his estate of Ratho Hall, in the neighbourhood of Edinburgh, where he and his daughters were then resident, and where every attention was paid

by them to the health and comfort of the pursuer and her child; that in the year 1829 the pursuer Janet Rogers or Innes went to reside with Mr. Innes at Portobello, ostensibly as his housekeeper, and that at this period her intercourse with him was renewed; that he continued to treat her with respect and affection, and made repeated promises to get the ceremony of marriage performed with all convenient speed; that the pursuer Janet Rogers or Innes was thereafter twice with child to Mr. Innes, but that on both these occasions she miscarried; that in the course of the year 1830 Mr. Innes removed from Portobello, with the pursuer Janet Rogers or Innes, to a house near to Musselburgh, and that towards the end of that year, Mr. Innes, being at the time in a delicate state of health, determined forthwith to put in execution the wise and just resolution he had some time before deliberately formed, and repeatedly expressed, to render his son, the pursuer William Innes, legitimate, and his connexion with the pursuer Janet Rogers or Innes honourable and indissoluble; that in pursuance of this resolution Mr. Innes made known his intentions in regard to the pursuers to Mrs. Stobie, now residing in Edinburgh, a person with whom he was intimately acquainted; that he informed Mrs. Stobie that on the occasion of a visit to his daughters at Cowie he had intimated to them his intention of marrying the pursuer, Janet Rogers or Innes, and of thereby legitimating the pursuer William Innes; that Mr. Innes farther stated to Mrs. Stobie, that as no marriage ceremony according to the rules of the church had been performed between him and the pursuer Janet Rogers or Innes, he was anxious, with the least possible delay, solemnly to declare a marriage with her in

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presence of witnesses; that with this view, accordingly, Mr. Innes, within his own house, near to Musselburgh, and on or about the 14th day of December 1830, directed Mrs. Stobie to go and bring her nephew Mr. David Johnston, gardener and spirit dealer in Eastfield, near Fisherrow, and his wife Mrs. Johnston, in order that they might be witnesses of the proposed declaration of marriage between him and the pursuer Janet Rogers or Innes; that Mrs. Stobie did accordingly go and bring Mr. and Mrs. Johnston to Mr. Innes's house, who informed them that he had called them to be witnesses to his marriage with the pursuer Janet Rogers or Innes; that accordingly, immediately thereafter, time and place aforesaid, the pursuer Janet Rogers or Innes being present, Mr. Innes did solemnly and deliberately declare her to be and acknowledged her as his lawful married wife, in the presence of Mrs. Stobie, and of Mr. and Mrs. Johnston; that Mr. Innes followed up this declaration by taking a ring off his finger and putting it upon the finger of the pursuer Janet Rogers or Innes; that the aforesaid declaration and acknowledgment of marriage by Mr. Innes was explicitly assented to and acquiesced in by the pursuer, Janet Rogers or Innes, and that thereupon Mrs. Stobie and Mr. and Mrs. Johnston severally shook hands with the parties and wished them joy on the happy occasion; that some short time afterwards Mr. Innes resolved to have the marriage ceremony between him and the pursuer Janet Rogers or Innes regularly performed by a clergyman; that with this view he desired Mrs. Stobie to employ her daughter, Mrs. Captain Barry, dress-maker and milliner at Stockbridge, to make a suitable wedding-dress for the pursuer Janet Rogers or Innes; that this was accordingly done,

and that the dress was made and sent home to the pursuer Janet Rogers or Innes a short time before the day fixed by Mr. Innes for the celebration of the ceremony; that Mr. Innes farther instructed Mr. Johnston, and William Rogers, a brother of the pursuer Janet Rogers or Innes, to enter the names of the parties with George Brown, session clerk of Duddingston, with a view to a regular proclamation of banns, and that Mr. Innes gave Mr. Johnston and William Rogers a guinea to pay the necessary fees; that the banns of marriage were accordingly proclaimed within the parish church of Duddingston, between Mr. Innes and the pursuer Janet Rogers or Innes, on Sunday the 19th day of December 1830, conform to the certificate of the said George Brown, session clerk of Duddingston, herewith produced; that it was arranged that the marriage should be celebrated in the house of Mr. Johnston at Eastfield near Fisherrow; and that by Mr. Innes's direction a company of the friends of the parties were invited to attend, and a suitable tea and supper were prepared for the occasion; that Mr. Innes farther sent a message to the Reverend Mr. Thomson, minister of Duddingston, requesting his attendance for the purpose of performing the ceremony; that the pursuer Janet Rogers or Innes, having put on the wedding-dress with which she had been provided as aforesaid, repaired, along with Mr. Innes, on or about the 28th day of December 1830, to Mr. Johnston's house, where they found assembled Mrs. Stobie, Mrs. Captain Barry, Mr. and Mrs. Johnston, and a Mr. Wallace, all of whom had been invited, by Mr. Innes's express desire, to attend the marriage; that from the short notice given to Mr. Thomson, and from the circumstance of his being somewhat unwell at the

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time, he unfortunately could not attend ; that Mr. Innes was greatly disappointed at his absence, and stated to the company that he had no alternative left but that of performing the part of clergyman himself; that accordingly he rose, and having placed the pursuer Janet Rogers or Innes beside him, he solemnly and deliberately addressed the persons aforesaid in the following words, or in words to the following effect:—" Ladies and " gentlemen, this woman, Janet Rogers, now on my " left hand, is my lawful wife, and I beg you will from " this day forth consider her as such." That the pursuer Janet Rogers or Innes unequivocally assented to and acquiesced in this declaration by Mr. Innes, who thereupon took a gold ring from his finger and put it upon her finger; that Mr. Innes thereafter repeated the same declaration to the company individually, who severally and cordially shook hands with the parties, and wished them joy on the occasion as married persons; that the company, along with Mr. Innes and the pursuer Janet Rogers or Innes, then partook of the repast which had been prepared as aforesaid by Mr. Innes's special desire; that the aforesaid acknowledgments and declarations of marriage, which so formally and seriously passed between Mr. Innes and the pursuer Janet Rogers or Innes, were soon very generally known to their neighbours and acquaintances, by all of whom the pursuer Janet Rogers or Innes was congratulated as the wife of Mr. Innes; that subsequent to this period Mr. Innes on all occasions recognized, acknowledged, and treated the pursuer Janet Rogers or Innes as his wife, and the pursuer William Innes as his lawful son and heir; and that Mr. Innes and the pursuer Janet Rogers or Innes continued to live at bed and board avowedly as man

and wife, till his death, which took place on the 17th of April 1832, and were habit and repute married persons by all their friends and acquaintances; that in consequence of Mr. Innes's decease the succession to all his estates, entailed and unentailed, has, by virtue of certain deeds of tailzie and others, or at common law, opened to the pursuer William Innes, the lawful and only son and heir of the marriage between Mr. Innes and the pursuer Janet Rogers or Innes:—It was therefore concluded, that it ought to be declared that the said John Innes of Cowie, and the said pursuer Janet Rogers or Innes, were at and previous to the time of his decease lawfully married persons to one another, and husband and wife; and that the other pursuer, the said William Innes, is their lawful son, and that the pursuers, the said Janet Rogers or Innes and the said William Innes respectively, are entitled to all the rights and privileges competent to the lawful wife and the lawful son of the said John Innes of Cowie, either by law, or by the rights, titles, and investitures of his lands and estates.

The parties called as defenders were the brother and the sister of Mr. Innes.

To the statements in the summons, with some deviations and additions, (unnecessary in a report to be declared,) the pursuers adhered in a record which was made up.

On the other hand the defenders denied the alleged marriage and the paternity of the child, and made the following statement, which was in part admitted, but generally denied by the pursuer.

The pursuer and her sister May were daughters of the deceased William Rogers, a sawyer, who resided for many years in East Rose Street, Edinburgh, and who

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with his wife let part of their house to lodgers. About the year 1814 Alexander Morrison, a mason, lodged in their house, who married Janet, and of which marriage a son and daughter were born. The pursuers admitted the birth of these children, and that Morrison was the father, but denied the marriage. It was admitted that she adopted the name of Mrs. Morrison. The defenders farther stated that Mr. Innes carried on business in Edinburgh as a writer to the signet, and from his professional emoluments, together with the rents of his estate, was considered as a person in affluent circumstances, but several years before his death he got involved in difficulties, from which he was unable to extricate himself. Mr. Innes was heir of entail in possession of the estate of Cowie in Kincardineshire, which was entailed on heirs male, and his brother the defender, on the supposition that Mr. Innes had no son, was the heir substitute. He was also proprietor of Ratho Hall, near Edinburgh, which he had purchased. He kept a girl of the name of Spence as his mistress; and it was stated that he became acquainted with the pursuer Janet Rogers in consequence of having been employed as a milliner to make dresses for the girl Spence. His daughters were at this time in France for their education, and, as he intended to bring them home, he sent Spence to Montrose, and it was alleged that she was accompanied by a sister of the pursuer Janet, whom he had taken into his service, and with whom he afterwards cohabited. It was judicially admitted by the pursuers, "That, on the morning of the "17th day of June 1826, the deceased John Innes, "Esq., of Cowie, sailed from Newhaven, on board the "Soho steam-vessel, for London, where he arrived on

" the 19th day of said month of June: That he re-
" mained in and about London till the 26th day of said
" month and year, when he sailed from Greenwich, on
" board the Lord Melville or Attwood packet, for
" France: That he remained in Paris and other parts
" of France till about the middle of the following
" month of July: That, on or about the 16th day of
" that month, he landed at Brighton, accompanied by
" two of his daughters, who had been at Paris for their
" education: That thereafter they proceeded to Lon-
" don, in and about which city Mr. Innes resided till
" the 16th day of September following, when he sailed
" from London to Edinburgh in the Soho steam-vessel,
" and arrived in the latter city on the 19th day of said
" month of September." It was at one time alleged that the pursuer Janet had accompanied him to London; but the allegation was disproved and abandoned — the fact being, that in the interval she was in Edinburgh. Morrison, the father of her two children, had in the meantime been married; but he was at this time alive, and resided at Leith. During Innes's absence abroad he wrote letters to the pursuer Janet; but it was alleged by the defenders, and the proof went to establish the fact, that the object of them was to make communications to his mistress (the girl Spence), who could not read, through Janet's sister, May Rogers. Innes remained in Edinburgh till October, when he went to Cowie; and in November he brought the pursuer Janet to Cowie, ostensibly for the purpose of making dresses for his daughters. He returned to Edinburgh in January 1827, and it appeared that both Janet, her sister, and the girl Spence also about the same time came to that city. Janet was delivered there, on the 13th of April of that year, of the pursuer William. Innes, becoming

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greatly embarrassed in his circumstances, conveyed his entailed estate in trust to his brother, leaving an annuity to himself, and appeared to have given himself up to low and licentious habits. It was admitted by the defenders that early in 1830 he commenced an illicit intercourse with Janet; but the evidence carried the commencement somewhat further back, although the precise time was not fixed. The girl Spence, who was examined as a witness, admitted that he had discarded her as a mistress; but stated nevertheless that she resided in the same house with Janet, and stated that she took leave of them when in bed together with the usual civility on the parting of friends. A quarrel about this time took place between Innes and his brother as to the administration of the trust, and in August 1830 he executed a conveyance in favour of trustees, of which part of the purposes was, "they shall pay unto Janet Rogers, "eldest daughter of the deceased William Rogers, and "unto May Rogers, his second daughter, yearly, the sum "of 15*l.* sterling each, during their natural lives." No "allusion was made to the pursuer William in this deed.

A proof was allowed and taken, and among other witnesses there was examined by the defenders a woman called Mrs. Captain Barry, alluded to in the summons, and who had been cited by the pursuers under that name, but whom they did not examine. The woman deposed: "That she is a married woman: That her husband "is a captain in the seventy-seventh regiment, at "present in Jamaica: That it is three years since "she saw him: That she corresponds with him," &c. No protest was taken for reprobator; and it was afterwards discovered that she had raised an action of declarator of marriage against Captain Barry, and that he had been assoilzied. The pursuers, therefore, applied

to the Court to be allowed to adduce evidence to disprove the above statements of the witness. The case, both as to the matter and the merits, having come before the Court, they, on the 16th June 1835[1], refused, in the circumstances, to allow the additional proof to be admitted, and, on the 7th July[2], pronounced this judgment: — 'The Lords, having advised this cause 'with the proof for both parties, and heard counsel in 'their own presence, find, as to the conclusion of decla-'rator of marriage in the libel, that sufficient evidence 'has been given of facts and circumstances to establish 'a marriage between the pursuer Janet Rogers and the 'late John Innes, Esq., of Cowie, and decern and de-'clare in terms of that conclusion of this libel accord-'ingly; and find her entitled to expenses, in so far as 'relates to this branch of the cause, and remit the ac-'count of that expense to the auditor of court to tax 'the same, and to report: As to the conclusion of legi-'timacy at the instance of the other pursuer, calling 'himself William Innes, find that no sufficient evi-'dence has been adduced of his birth as a lawful child 'of the said marriage, or otherwise of his being the 'lawful son of the said John Innes; therefore find the 'said pursuer not entitled to the character or to any 'of the rights of the lawful son of the said John Innes, 'and decern and declare accordingly; assoilzie the 'defenders from the conclusions of the libel at the 'instance of the said pursuer William Innes; but find 'the said defenders not entitled to expenses.'

The defenders acquiesced in the judgment as to the marriage; but an appeal was made on the part of the

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[1] 13 S. & D., 1059.

[2] 13 S. & D., 1050.

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child against it, so far as it denied his legitimacy, and against the interlocutor refusing to admit the evidence in regard to Mrs. Barry. It is unnecessary to detail the argument on the evidence, except as to the points involving matter of law; these related, 1st, to the presumption of paternity arising from the marriage having been established; and, 2d, although the marriage was not perfectly regular, not being celebrated in presence of a clergyman, yet it took place quodammodo in facie ecclesiæ, banns having been duly proclaimed, and a clergyman invited to perform the ceremony, but who, from accidental circumstances, was unable to attend.

Appellant.—1. The law of Scotland admits of legitimation per subsequens matrimonium, although the child have been born antecedent to the marriage. It is enough that the child of the woman so married is the child of the husband. Whether it be the child or not of the husband, is a question of fact, to be ascertained in such manner as a fact of that peculiar description is capable of being ascertained; direct and absolute proof may be impossible, and therefore recourse must necessarily be had to presumptive evidence.

In regard to filiation or paternity, the law of Scotland adopts the rule or presumption, pater est quem justæ nuptiæ demonstrant. This presumption is so absolute, that it binds the husband, unless he can prove the presumed fact to have been impossible. It has been said that the maxim applies only to children born during lawful wedlock, or rather to cases in which the conception must have occurred posterior to the marriage ceremony. On what authority this has been said the appellant does not know. The only modification

of which the maxim admits, in relation to legitimation per subsequens matrimonium, is, that the filiation is rendered more dependent on the admission or testimony of the husband. In relation to children procreated after marriage the husband has no choice; the law fastens paternity on him, unless he prove the fact to be impossible. Whereas, in the case of legitimation per subsequens matrimonium, the paternity must be proved against him, if he think fit to deny it. But if he acknowledge the paternity, and marry the mother, then legitimation per subsequens matrimonium takes place; the child acquires the status of legitimacy in a question with all the world, and has a right to plead the maxim. He has proved his filiation by the best evidence possible, that of his father and mother. Nay, some may think that he has proved his status better than always occurs in the case of those procreated during marriage. The husband may in that case entertain jealousy, but the legal maxim is conclusive against him, so that he cannot help himself; whereas, in the case of a child born illegitimately, the jealousy of the father is fatal; he need not marry the mother; and even if he do so, he is not bound to acknowledge any children she may at a former period have borne to another man. He can take his own time and his own measures to satisfy himself that he is the father of the child ascribed to him; and if he do intermarry with the mother, and acknowledge the child previously born, the proof of paternity must be held to rest, not merely on the unyielding severity of a legal maxim, but on evidence carefully weighed, and specially applicable to the particular case. The evidence of the alleged acknowledgments was then detailed, but it was of a contradictory character; and Innes had,

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at the time of them, quarrelled with his brother, had fallen into low and dissipated habits, and was associating with the mother and her relatives.

It may be that the law of legitimation per subsequens matrimonium is attended with inconveniences. It avowedly rests on the hypothesis, that the mother of the child legitimated has been a woman of lapsed reputation,—in what degree, the law takes no account. It adopts what is held to be a remedy in favour of the child; and if this, like most remedies for physical as well as moral evils, have some painful ingredients intermingled with it, the inconvenience is foreseen and encountered by the law, and by the party who avails himself of that law.

2. In regard to the period of gestation, it is admitted that Mr. Innes left Edinburgh on the 17th of June 1826, that he departed from London for the Continent on the 26th of that month, that he returned to Edinburgh on the 19th of September, and that the appellant was born on the 14th April 1827. From the 17th of June to the 14th of April are nine calendar months and twenty-seven days, or 301 days. Betwixt the date of Mr. Innes's return and that of the birth, namely, betwixt 19th September and 14th April, there are 207 days, being seven lunar months and thirteen days, or within three days of seven calendar months.[1] The ques-

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[1] On this subject the following evidence was adduced by the pursuers: "Dr. James Hamilton, junior, physician in Edinburgh, professor of midwifery in the University of Edinburgh, depones, that he thinks that ten calendar months is an unusually long period of gestation, but not by any means without precedent: that in the course of his practice he has had occasion to know a very few cases of such protracted gestation, with regard to which he could entertain no doubt: that he has known one case of a patient passing eleven menstrual periods by seven days: that by calendar months the deponent means consecutive months, beginning at any one month in the year. Interrogated, for the defenders, whether the number of cases which he has known in which the gestation was

tion then is, whether the child, protected in the one view by being born within ten months, when his father and mother were together, and beyond six months, when

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" protracted to ten calendar months has, in his experience, been so great " as one in a thousand? depones, certainly not. Interrogated, whether " it may have been one out of two thousand, or three, or four, or five " thousand? depones, that it is impossible to answer this, because a " person does not think of keeping a list. Interrogated, whether, in " computing the period of gestation, a medical man must not necessarily " depend on the statements of the woman, as to the period from which " conception is supposed to commence? depones, that the information " obtained from the patient relates to the date of her last menstruation.

" John Moir, surgeon to the lying-in hospital, Edinburgh, and phy- " sician in Edinburgh, depones, that he has seen three or four cases in " which, and particularly in one of them, he considered that gestation had " been protracted beyond the usual period: that with regard to that one " case he had no doubt: that there are few cases of the kind in which there " is not room for doubt: that in the one case, as to which he was sure, " the gestation was protracted a fortnight beyond the nine months, and in " the others eight or ten days. Interrogated, what is the opinion enter- " tained by the profession with regard to cases of protracted gestation? " depones, that it is the opinion of some medical men that gestation " cannot be protracted beyond the nine months; but he believes that the " prevailing opinion of the majority, both in number and authority, is, that " it may be protracted. Interrogated for the defenders, depones, that he " has acted as one of the medical officers of the lying-in hospital for about " five or six years, and is aged about twenty-six: That the above case is " the only one in which he is certain of the protraction, of his own know- " ledge: that in this case he took the period from which the time was to " be computed from the information of the woman: that the prevailing " opinion of the majority is in favour of a possible protraction to the " extent of even a fortnight beyond the usual period. Interrogated how " far this prevailing opinion extends,—in particular, whether it goes the " length of a possible protraction of three weeks or a month? depones, " that he thinks it extends to three or four weeks after the usual time. " Interrogated, whether in these cases of protracted gestation the woman " must not know, or have an opinion, as to whether she is beyond the " usual time or not? depones, that he thinks she must suspect it."

The defenders adduced the following witnesses:

" Dr. Thomas Thomson, physician, Edinburgh, (after mentioning that " he delivered the woman, and that when he delivered her she was a " stout, healthy woman,) was interrogated, whether, either then or at any " other time, any thing ever passed which led him to believe or suspect " that the woman had gone more than the usual period with child? " depones, nothing whatever: that nothing of the kind was stated either " by her or by anybody else, and nothing of the kind was hinted by any

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they were again together, has not the benefit of the presumption of law in favour of his paternity and legi-

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" body: that it is usual for women who believe that they have gone with " child, especially if it be for any long period, to mention this to their " medical attendants: that he has been in practice as an accoucheur in " Edinburgh upwards of fifteen years. Interrogated, whether it be " usual for women to go beyond the ordinary period, or whether this ever " occurs? depones, that it occurs very seldom, if it ever occurs at all: " that they may go for a few days longer or shorter, but nothing beyond " eight or ten days: that he thinks the addition of a month totally out of " the question, and thinks so decidedly: that in judging of the period of " supposed gestation, one is obliged to proceed entirely on the statement " of the female: that there are various causes which may make the " female mistake, and which may give them an interest to mislead.— " Interrogated for the pursuers, depones, that he was a muslin weaver " from his sixteenth to his eighteenth year, having previously received a " good education: that the deponent commenced his medical education " after his eighteenth year, and completed it in Edinburgh: that he " received his diploma from Aberdeen: that he is aware many cases are " recorded in the books of medical jurisprudence, of females having gone " ten calendar months with child; but that he believes, and is of opinion, " that no such cases ever truly occurred."

" John Thatcher, physician in Edinburgh, being interrogated, depones, " that he has been in practice as an accoucheur for nearly thirty years, " during which he has delivered above 10,000 patients: that gestation " protracted beyond nine calendar months is a possible, but not a very " probable, circumstance. Interrogated, whether he believes in a ges- " tation of ten months? depones, that two such cases, perhaps three, have " been reported to him; but that he considered these, and considers such " cases generally, as founded solely on miscalculation or misapprehension: " that wherever the woman is of bad character, or has an interest to " deceive, he would most assuredly ascribe the statement, that she had " gone long beyond the ordinary period, to these circumstances. In- " terrogated, whether, in judging accurately of the exact period of " gestation, he is not obliged to depend entirely upon the statements of " the woman, or at least to depend so much upon these statements that " no certain conclusion can be drawn independently of them? depones, " that in general, in respectable practice, certainly he does rely upon the " statement of the woman; but that in the later months of pregnancy, if " required, accurate and scientific examination could be made correctly, " or nearly so, to ascertain its state of advancement, independent of any " statement on the part of the mother; but that if no such examination " be made, the woman's statements are the only guide: that women with- " out any motive of deception are frequently mistaken as to the period of " gestation. Interrogated, whether the woman, when there is any un- " usual protraction, must not be aware of this fact? depones, 'I think " 'she unquestionably must.'"

timacy; and that the circumstance of his being so born does not throw upon his competitor the burden of proving that it is impossible he could be the son of John Innes.

From the peculiarity of constitution and habits of the human species the period of gestation cannot be precisely fixed, otherwise than by adopting a general latitude; and to this the law has necessarily been accommodated. Questions of filiation necessarily depend on the date of conception; but that date, when the parties are in frequent and common intercourse, cannot be correctly ascertained, because not known to the female herself. In such cases a woman anticipates the date of her expected delivery by counting nine calendar months from the period when her ordinary menstruation ought to have returned but did not return. The physician has no other rule or test. The effect is, that the date of conception remains unknown and uncertain to the extent of twenty-nine days; that is to say, the conception may have occurred, and very probably has occurred, twenty-nine days antecedent to the commencement of the nine calendar months. This is altogether independent of any supposition of accidental or general peculiarity of habit in the woman, or that protracted gestation has taken place. Thus Dr. Hamilton, being interrogated, "Whether, in com-"puting the period of gestation, a medical man must "not necessarily depend on the statements of the woman "as to the period from which conception is supposed "to commence?" depones, "that the information ob-"tained from the patient relates to the date of her last "menstruation;" and in this he is corroborated by the evidence of several of the medical gentlemen examined

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in the Gardner peerage case, where the whole subject was fully investigated.[1]

The law of Scotland, adapting itself to the medical conclusions drawn from experience on this matter, allows the period of ten months for gestation[2], and is derived from the authority of the Roman law.

In this case Mr. Innes married the appellant's mother; he admitted that he was his father; and there is nothing in the period of gestation to support the respondents allegation of impossibility. The presumption of law must therefore receive effect.

3. Admissibility of collateral proof:—It is not easy to gather from the opinions of the judges on advising this branch of the case on what ground the evidence was rejected. It was said that reprobator had not been protested for. It is true that one of the old forms of the Scottish Consistorial Court is, that when a party conceives that a witness is stating what is not true, he protests for reprobator, that is, demands permission to prove the falsehood. But this pretended Mrs. Captain Barry, when attending for examination, had appeared in most respectable attire, and even adorned with costly ornaments, by which those acting on the part of the appellant were imposed upon, and never doubted that her representation of her own status was correct. Hence no protest for reprobator was taken, but after the proof had been concluded the appellant discovered, by communication with Captain Barry, who had been abroad with his regiment, that this woman never had been married to him, that he had been assoilzied in the year 1826 from an action of

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[1] Le Marchant's Report of the Gardner Peerage Case, p. 19, foot.

[2] 3 Stair, 3, 42; 1 Ersk. 6. 49, 50; Routledge v. Caruthers, 4 Dow. 395; Sandy v. Sandy, 4th July 1823, 2 S. & D., 453, (new edit. 406); Robertson v. Petrie, 22d Dec. 1825, 4 S. & D., 333, (new edit. 338.)

declarator of marriage at her instance, and that she had instituted an action against him on his return to Scotland for the aliment of a natural child. The mere form of not protesting for reprobator was apparently relied on by the Court below, although manifestly, as it is thought, against justice, because surely it would go strongly to the credibility of the witness that she swore she was married to Captain Barry, when in point of fact she knew that her claim to the status of his wife had been finally determined against her, that she was prosecuting claims inconsistent with that character, and that she had not corresponded with him at all after he left this country, although she expressly swore to the reverse; and that if within three years preceding she had seen Captain Barry, she must have been in Jamaica, whereas she was at Eastfield near Musselburgh, as proved by herself and the other witnesses to the declarations of marriage. The admissibility of this evidence, if reprobator had been protested, is undoubted; and the omission to protest is, under the circumstances, too narrow a ground for excluding evidence of the truth.

Respondents.—(Merits.) 1. The presumption of legitimacy of a child born in wedlock cannot apply to this case. Both Stair and Erskine, in the passages referred to, when commenting on the brocard pater est quem nuptiæ demonstrant, confine it to the case of children so born, and do not even allude to the case of a bastard legitimated per subsequens matrimonium. And the decisions cited are either cases of the presumed legitimacy of adulterine issue, or of presumed connexion imposing on the suspected father of an illegitimate child the civil obligation to aliment it. There is not a

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single case or opinion which in the least degree countenances the plea that the subsequent marriage of the mother of a bastard shall have a retro-active effect to legitimate her offspring, where the birth of the child is accelerated or protracted against the course of nature. The nuptiæ plainly refer only to a presently existing marriage at the time of the birth, and it is by force of that existing marriage when the issue is born that the paternity is demonstrated. The only meaning of the maxim is, that the man married to the woman, who during the subsistence of the marriage produces or conceives a child, is presumed in law to be the father of that child; it has no reference whatever to children born before the nuptiæ exist. The proof of their paternity rests upon different principles, as they can pretend to no natural rights by reason of their paternity being ascribed to one man rather than to another, and the only object the law regards is to lay down rules for making effectual the civil obligation of aliment.

The appellant endeavoured to argue this case as if the only evidence which was required was such as would be sufficient in a case of filiation to find a man liable for aliment; but this is to confound two cases essentially distinct. In cases of filiation the law of Scotland only requires what is called semiplena probatio of the paternity, in order to lay the foundation for the mother giving her oath in supplement; and as the object of the law is to assist the unprotected female, and ultimately to guard the civil interests of the parish, it sustains merely probable grounds for holding the accused to be the father, as sufficient to introduce into the proof the woman's oath. But this is not a case of filiation: it is one of legitimacy. The appellant claims a status which he has

not hitherto possessed; and under what circumstances does he make the claim? When the appellant was conceived Mr. Innes was not cohabiting with his mother, but keeping a different person as his acknowledged mistress. When he was born Mr. Innes had begun a cohabitation with a sister of the appellant's mother, and which was continued for two years under her very eyes. Then the appellant was not the first child of his mother, but she had previously had two illegitimate children to a married man who was still alive. Under these circumstances it is impossible to pretend that the appellant is to be relieved, by strained analogies run between this case and cases of filiation, or marriage with a concubine, from being required to show incontrovertible proof of his alleged paternity. But there are no acknowledgments to which the slightest weight can be given. Nothing short of clear proof of connexion at the time of conception, of unequivocal acknowledgment at birth, and of uniform recognition down to the time of the woman's marriage, can afford the necessary legal evidence to prove legitimacy in such a case.

2. Then as to the period of conception and gestation, it is admitted, that, supposing Mr. Innes to have had connexion with the appellant's mother on the morning of his departure from Scotland, and that the appellant was the fruit of their intercourse on that day, his birth was protracted to three hundred and one days after conception, or ten calendar months; or supposing intercourse on the day of his return to Scotland, and that the conception is to be calculated from it, the birth was accelerated, and his mother's gestation was only two hundred and seven days, or five days short of seven calendar months. The appellant has thus his choice to

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assert that his birth was either accelerated or protracted, but he cannot in one and the same breath maintain both alternatives. It is open to him to say that his birth was beyond the usual period, but not at the same time to deny that he was a child come to the full time; and the converse is equally plain, that he cannot be allowed to make his case one of premature birth after having represented it as protracted. But it is proved by Dr. Thomson, who delivered his mother, that the appellant was "a full grown child."

The appellant being driven by this evidence from any allegation of accelerated gestation, adduced witnesses to show that it was possible a woman might go with child a month beyond the ordinary period.

From the medical testimony it is established that if Janet Rogers went with child a month beyond her time she must have known it; but there is not a particle of evidence to show that she ever asserted such to have been the case. This, combined with the other facts of the case, supersede the necessity of medical evidence upon the question of the ultimum tempus pariendi. In considering that evidence it must always be recollected that whatever weight may be attached by the law to the doubts of medical jurists where the question is the legitimacy of the offspring of two married persons whose cohabitation was interrupted previous to the beginning of the usual period of gestation, no influence, unless corroborated by other evidence of the strongest kind, if even then, will be allowed to the mere speculations of physicians as to the possibility of protracted gestation, in presuming the paternity of a child born a bastard, where the point is not the civil question of aliment, but to confer on the child the status of legitimacy per subsequens matrimonium.

Now, Dr. Hamilton, the eminent professor of midwifery, "depones, that he thinks that ten calendar "months is an unusually long period of gestation, but "not by any means without precedent; and being "interrogated for the defenders, whether the number "of cases which he has known in which the gestation "was protracted to ten calendar months has in his "experience been so great as one in a thousand? "depones, certainly not. Interrogated, whether it "may have been one out of two thousand, or three or "four or five thousand? depones, that it is impos-"sible to answer this, because a person does not think "of keeping a list. Interrogated, whether, in computing "the period of gestation, a medical man must not "necessarily depend on the statements of the woman as to "the period from which conception is supposed to com-"mence? depones, that the information obtained from "the patient relates to the date of her last menstruation."

Dr. Moir, a young man of little experience, merely says that he has seen three or four cases in which, and particularly in one of them, he considered that gestation had been protracted beyond the usual period; that in the one case the gestation was protracted a fortnight beyond the nine months, and in the others eight or ten days, and that in the four cases he took the period from which the time was to be computed from the information of the woman.

Dr. Thatcher "depones that he has been in prac-"tice as an accoucheur for nearly thirty years, dur-"ing which he has delivered above ten thousand "patients; depones, that gestation protracted beyond "nine calendar months is a possible, but not a very "probable, circumstance. Interrogated, whether he "believes in a gestation of ten months? depones,

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" that two such cases, perhaps three, have been re-
" ported to him, but that he considered these, and
" considers such cases generally, as founded solely on
" miscalculation or misapprehension. Depones, that
" wherever the woman is of bad character, or has an
" interest to deceive, he would most assuredly ascribe
" the statement, that she had gone long beyond the
" ordinary period, to these circumstances."

Dr. Thomson, who delivered the appellant's mother, upon this subject " depones, that he has been in prac-
" tice as an accoucheur in Edinburgh upwards of fifteen
" years. Interrogated, whether it is usual for women to
" go beyond the ordinary period, or whether this ever
" occurs? depones, that it occurs very seldom, if it
" ever occurs at all; that they may go for a few days
" longer or shorter, but nothing beyond eight or ten
" days. Depones, that he thinks the addition of a
" month totally out of the question, and thinks so
" decidedly; that in judging of the period of supposed
" gestation, one is obliged to proceed entirely on the
" statement of the female. Depones, that there are
" various causes which may make the female mistake,
" and which may give them an interest to mislead."

This is the whole medical evidence which was taken; and did the proof of the appellant being the son of Mr. Innes depend alone upon his establishing the possibility of gestation being protracted to the tenth month, the respondent submits that there has been an utter failure in making out that point of the appellant's case.

3. Admissibility of collateral evidence:—The respondents oppose this as incompetent on two grounds; first, that reprobators were not protested for; and, second, that it is collateral to the issue on the merits.

First, It is an established rule of the law respecting parole proof, that objections which go to the admissibility, or to affect the credibility of a witness, must be stated before the examination of the witness in causa. These objections may be supported either by the evidence of others, or by the admissions of the witness, in the examination in initialibus. In either case it is for the Court to judge to what extent the objection goes, either as stated, or proved, or admitted, and to determine whether the witness shall be rejected as inadmissible, or, being received, the deposition in causa shall be considered that of a witness omni exceptione major, or received only, cum nota, impaired in credit, according to the degree of weight which may be attached to the circumstances which the Court has held as legally diminishing the credit of the witness, without reference to the evidence which may be given by him in causa. If, however, the party objecting to the witness is unprepared with proof to support his objections, or to contradict the denials of the witness in his initial examination, then he may protest for reprobators before the examination in causa, which will entitle him afterwards to lead a proof of any relevant objection then stated, or to contradict the statements made by the witness in initialibus, or generally to prove that the witness, though purged in the usual form, by his own oath, of partial counsel, malice, and bribery, has sworn falsely on all or any of these points. But if no objection is stated, either to the admissibility or credibility of the witness before examination in causa, it is not competent afterwards to offer any evidence to affect either the one or the other. If an objection to the admissibility has been overlooked, and the witness examined, it is too late afterwards to

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raise it; the party objecting is presumed to acquiesce in the witness being called, and his testimony must remain on record. If the objection went to the credibility only, the party objecting has lost his opportunity, and will not be allowed to bring forward evidence in the course of the after proceedings to affect the credibility of the witness. But, independent of this, the proposed reprobatory proof is not to be applied to the initial testimony, but to answers made on cross-examination.

No objection was taken to the admissibility or credibility of the witness. The pursuers examined her in initialibus to prove that her mother, a previous witness, had told her the evidence she had given. In this they failed; and, the pursuers stating no objection, she was examined in causa by the defender. In cross-examination they put certain questions to her as to her marriage to Captain Barry, which were not cross to her examination in chief, but entirely out of the case, and which she was not bound to have answered unless she chose.

But there is no authority in the law of Scotland admitting of reprobatory proof against statements by a witness in cross-examination. All the authorities imply the contrary, and connect invariably reprobatory proof with the initialia testimonii.[1]

Secondly, But supposing that reprobators had been protested for, and that the objection was to the initial testimony, the respondent submits that as the issue, whether the witness was married or not to Captain Barry, was

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1 4 Ersk., tit 2, sec. 29; 4 St. 43. 11; 4 Bankt. tit. 31.; Mor. Dict. 12097, et seq.

altogether collateral to the issue in the case before the Court, extrinsic evidence was inadmissible. The rule is distinctly established in England, as laid down by Mr. Phillips, who says, "A witness cannot be cross-"examined as to any fact which, if admitted, would "be collateral and wholly irrelevant to the matter in "issue, for the purpose of contradicting him by other "evidence, in case he should deny the fact, and in this "manner to discredit his testimony. And if the "witness answer such an irrelevant question before it is "disallowed or withdrawn, evidence cannot afterwards "be admitted to contradict his testimony on the col-"lateral matter. Such a course would often produce "great confusion and embarrassment. The simplest "issue on record might thus branch off into a variety "of collateral issues, perfectly immaterial. In the "application of this rule of cross-examination the "principal thing to be considered will be, whether the "question is irrelevant to the points in issue between "the parties."[1]

LORD CHANCELLOR.—My Lords, although this case involves matter of extreme importance undoubtedly to the pursuer, and, during some part of the discussion, appeared to me to involve questions of the utmost importance to the law of Scotland, yet it has occupied so many days in discussion that your Lordships probably have had an opportunity of following the evidence which has been adverted to at the bar in the interval between

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[1] 1 Phillips, p. 272, 7th edit.; 7 East, 108; 2 Camp. 637; Whish and Woollat v. Hesse, Haggart's Eccles. Rep., vol. iii. p. 680; Sargeaunt against Sargeaunt, 18th Nov. 1834, Curteis Rep.; Rex. v. Watson, 1817, Starkie's Rep., vol. ii. p. 149.

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the different hearings, and I presume therefore that your Lordships are now prepared to give your opinions upon the case, as it is now brought before you for decision.

My Lords, the question between the parties turns upon how far a marriage between the mother of the pursuer and a person who had been her husband before his death operates to legitimize the other pursuer, who unquestionably was her child, leaving the question for consideration, whether by the law of Scotland he is to be considered as the child of her husband?

My Lords, it is very satisfactory to me to find that, in the course of the discussion, that which might have been misapprehended in some parts of the argument has been very satisfactorily cleared up this morning, and that it is no question now for your Lordships to consider, whether by the law of Scotland a marriage taking place between a man and a woman, the woman having a child, raises any presumption of law in favour of the legitimacy of that child. It is admitted to be a question to be proved. That proof may arise from the inference to be deduced from the parties having lived together, by which of course must be meant exclusively living together; because, if the woman had lived, not only with the person whom she afterwards marries, but had lived promiscuously with other men, no inference could be drawn from the fact of this woman and the person whom she afterwards married having cohabited; but if there be an exclusive cohabitation, — if there be, therefore, a reasonable inference of fact arising, either from positive proof, or a deduction, from the circumstance of their having exclusively lived together, that a child born previous to the marriage is the child of those two persons,

then unquestionably, by the law of Scotland, that child will be legitimized by a subsequent marriage.

My Lords, the course taken by the pursuer in this case proves that there is no such presumption of law; if it were a presumption of law, such as we know to exist in the case of children born during marriage, where no fact is to be proved by previous cohabitation or positive proof, — but where the law raises the presumption that the child born during coverture, during the legal marriage of the father and mother, is the legal child of that couple. But the pursuer adopts the course of entering into evidence to prove the paternity of the child (otherwise, why prove the cohabitation?)—the pursuer supposes it necessary to prove the cohabitation for the purpose of raising the inference of the child being the child of the man whom the woman afterwards married. It is therefore a question of fact; and your Lordships are now to consider whether you are satisfied, from the evidence in this case, that the pursuer is to be considered as the child of Mr. Innes, who married, subsequently to the birth of the child, the mother of the pursuer.

Now, my Lords, some facts are free from all doubt and question: that this woman had lived with a person of the name of Morrison,—that she had been with child by that person, — that the child in question was called Morrison after the marriage which was contracted between herself and Mr. Innes, — is a matter without dispute. It was not till a subsequent period (one of the witnesses states it to have taken place after what she describes the second miscarriage of Mrs. Innes,) that they began to call him Innes, but that she herself went by the name of Morrison from the time of the birth up

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to the marriage, and that this child went by the same name as the other two children, who were called, by all persons connected with the family, by the common name of Morrison.

Now, my Lords, there is the evidence of a medical gentleman, of whose credit there is no impeachment, that on the day of the birth of this child Morrison came into the room where the mother was, and that the mother stated, "that is the father of my child." It is very true that another witness, Miss Spence, states, that Mr. Innes came into the room; but they do not, however, describe the man, whoever he was, that came into the room, as the same party, but represent that on the same day Mr. Innes came into the room, and Mrs. Morrison said, "that is the father of my child." Now, it is quite impossible that both stories can be true, yet both these individuals are stated as having been introduced to the medical man; so that it would appear that on the same day the same woman had stated that the very same child was the child of the two parties. Now, if your Lordships had to choose between the testimony of Dr. Thomson and the testimony of Miss Spence, I am persuaded that your Lordships would not long hesitate to which of the two your Lordships would give credit. The story of Dr. Thomson exactly corresponds with all that was done afterwards. If Morrison was the father of the child, the child was naturally called Morrison. If Mr. Innes was the father of the child, it is very extraordinary that a woman supposed to be living under the protection of Mr. Innes should for this child have borrowed the name of a person with whom, according to the statement of the pursuer, she had ceased to cohabit.

My Lords, so far the evidence goes as connected with the supposed paternity of Mr. Morrison. Now, my Lords, how does the evidence stand of the supposed paternity of Mr. Innes? Why, that he left Edinburgh on a particular day, the 17th June, and that the child was born at a period which would leave 301 days from the day of his leaving Edinburgh to the day of the child's birth. My Lords, it is not an immaterial part of this case that the mother, who must have known whether she became pregnant by Mr. Innes in the month of June or not, had not made up her mind, at the time this suit was instituted and the pleadings were prepared, whether she should call this a ten months child or a six months child. She leaves it entirely open. She could not be mistaken upon that, because in the interval between June, when the supposed father left Edinburgh, and September, when he came back, she must have had ample opportunities of knowing whether she was pregnant or not; but she leaves that to take the chance of how the evidence may turn out; and it is also part of her case that the child was not a full-grown child, although according to the evidence it was a ten months gestation, and although, as my noble and learned friend reminds me, Dr. Thomson states it to be a full-grown child; but there is no doubt upon that, because the evidence that she produces is to support the case of a ten months gestation.

Now, the state of the law or of medical science leads to this conclusion, that that is not conclusive against the legitimacy of a child born in marriage. It is within the period, as the counsel have stated, which other nations have assigned as the ultimate period of gestation. It is, however, very near the confines; but even in marriage,

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where any other evidence exists raising a question, it is always considered as a fact of the utmost importance, and which, coupled with other evidence, will be sufficient to show a child to be illegitimate, although the child have all the benefit of the legal presumption arising from the fact of the child being born in the marriage of the parents. To consider it, therefore, as any thing less than a matter of extreme improbability, and requiring strong evidence to establish the fact of paternity, with such a fact against it, would be to contradict all that was said in the Gardner case, and every thing in fact that is reasonable upon such a subject.

Now, my Lords, with regard to Mr. Morrison, there was not the least difficulty of his being the father of the child, for there is no evidence that he was not able at this period to have easy access. She was living at Edinburgh, and he was living at Leith. I consider the evidence quite conclusive that she did not go to London with Mr. Innes. I find that she was not long afterwards at Montrose; nor is there a trace of evidence of her having been in London; nay, the letters that are relied upon are very strong evidence that she did not go to London, that she never was with Mr. Innes from the time that he left Edinburgh; and the expression that is to be found in one of those letters about the journey north, with respect to which I made some inquiry when the letter was first mentioned, seems to me extremely strong to show that the facts were, that Mr. Innes was living with another woman, Miss Spence,— that Miss Spence was removed to Montrose during his absence from Edinburgh,— that Miss Janet Rogers was some time at Montrose during that interval, — and that she was made the channel of communication between

Mr. Innes and the woman with whom he was then living. Now, the letter to which I particularly allude, is the letter of the 22d July 1826, in which he writes to her in these terms: (Now one question is, whether at this time he was living with Mrs. Morrison, or whether he was living with Miss Spence, using Mrs. Morrison as the channel of communication with Miss Spence, who, it appears, could neither read nor write) — " Mrs. " Morrison, I am returned here — all well — write me, " in course, the accounts of your journey north, and " anything that has occurred since I left Edinburgh." That is, " you, that have been at Edinburgh, write to " me the account of anything that has occurred; and " you, who have been at Montrose with Miss Spence, let " me know of your journey north," (which I consider to mean the journey to Montrose,) " and anything that " has occurred since I left Edinburgh." Very natural language for a person to use who was writing to an individual who had remained in Edinburgh after he had left it.

Then, in the same style, he writes on the 12th August, addressed " Mrs. Morrison." — " Write to the " north, and say you will pay a visit soon, and make a " very agreeable communication. Of course you will " not leave Edinburgh till I have seen you, which I " expect will be Friday next week." Now there can be no doubt to whom that communication was to be made, when he says, " Write to the north." It was to inform Miss Spence, who was living with Mr. Innes as his mistress, of Mr. Innes being then about to return. He directs Mrs. Morrison to make this communication to Miss Spence, with whom he had been cohabiting before he left Edinburgh, and with whom, unquestionably, he

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intended to cohabit again, and with whom the evidence proves that he did cohabit again.

Now, it is a very singular state of circumstances if prior to this time any cohabitation had taken place between Mr. Innes and Janet Rogers. There is undoubtedly evidence of the fact; that is to say, Miss Spence speaks to the fact, and two other witnesses, Gow and Miller, speak to that which may be considered also as evidence of the fact, though not very positive; but it is to be observed, with regard to the two last witnesses, that the circumstance of Mr. Innes going to the house where Janet Rogers was living is inconclusive, if we once arrive at the fact that he was cohabiting with Miss Spence. The house where Janet Rogers was to be found occasionally was the house where Miss Spence was living; his visits to the house, therefore, would prove nothing. I believe one of the other witnesses says she went into the parlour, where there was a bed, and where Janet Rogers slept. She does not go the length of Miss Spence, who, according to her own supposition, was a discarded mistress, but still was permitted to live in the house where Mr. Innes was living with the mistress who had supplanted her; and they were altogether on such friendly terms, and there was so little concealment between them, that Miss Spence walks into the parlour at four o'clock in the morning, and very goodnaturedly bids Mr. Innes and Janet Rogers good bye, and then saw them in bed together. Not a very probable transaction to have taken place between a discarded mistress and a mistress who had usurped her place.

Now, my Lords, it also appears that Mr. Innes having cohabited with Miss Spence at all events up to the

period of his return from London to Edinburgh, at the period of his return, namely, September, Miss Janet Rogers was actually with child. She was then pregnant. There is evidence of that time, of her being so far advanced in her pregnancy as to exhibit the appearance of it to any casual observer. That would be a very strong objection to the case which she intended at one time to have put forward, namely, of conception having taken place after the return of Mr. Innes from London in the month of September; for the evidence proves that she was at that time actually pregnant with the child which was actually born; and then comes the evidence of what took place at the period of his birth.

My Lords, after the birth of this child, when, according to the evidence, Mr. Innes, though he did not call it by his own name, recognised it, and treated it as his own, we find, in January 1828, he makes a deed, disposing of his property, in which he provides a small annuity of £15 a year for each of the two unfortunate sisters, with whom he had, at some time or other, cohabited, but he takes no notice whatever of this child. Mrs. Morrison had two other children; and he takes no more notice of this child than he does of the other two; but he provides £15 a year to be paid to Janet Rogers, and £15 a year to be paid to May Rogers.

My Lords, it appears clearly in proof, after Mr. Innes's return in the year 1827, and after the birth of this child, that he was regularly, and publicly, and notoriously cohabiting with May Rogers, the sister of this woman; and, according to the statement of the mother of the child, who had supplanted Miss Spence, she found herself supplanted by her own sister, who lived in her own house; and she makes no objection to the

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mode in which her sister was at that time living with Mr. Innes.

My Lords, according to the pursuer's statement of the case, a more disgusting scene of profligacy than the whole history of the transaction can hardly be stated; a man living with two sisters, both sisters living together, according to her statement, which would show that the connexion with Mr. Innes was going on and subsisting between the two sisters at the same time, for it is no part of her case that he had rejected her, or had discontinued living with her, but he was living with May Rogers; at all events she was content to live in the same house.

My Lords, so matters go on until the period when, according to the evidence, Janet Rogers, who had undoubtedly become the mistress of this Mr. Innes, is stated to be with child again. A marriage takes place, and according to the evidence there must have been a miscarriage, because she is stated to be with child in the September of one year, and the witness states that she was pregnant twice, and that she understood that she had miscarried; but, however, a pregnancy being supposed to have taken place, the marriage takes place; but still this boy goes by the same name of Morrison.

Now, my Lords, if the case stopped here,—if there was no evidence of declarations,—if it rested upon that simple narrative of a woman having lived with a person of the name of Morrison, the child that was born being called Morrison, the woman having subsequently lived with Mr. Innes, and that the child could not be a child of Mr. Innes unless there had been a gestation of three hundred and one days,—could your Lordships have any doubt of the fact? because your Lordships are called

upon to dispose of this upon the question of fact; could your Lordships have a doubt upon such a state of circumstances that the child was not the child of Mr. Innes. Whether it was a child of Mr. Morrison's or not is immaterial; but upon the fact that your Lordships have to decide whether this is a child of Mr. Innes I apprehend your Lordships could not hesitate as to the conclusion.

My Lords, if we look to the evidence of declarations (which at all times are very unsatisfactory evidence), I think in this case at least the declarations would be strong in favour of the illegitimacy. No doubt there are declarations in favour of the legitimacy, but they come in at a very suspicious time. I find no declaration from the time of the birth up to the time of the marriage. I find no declaration from the time of the marriage up to the spring of 1831, when it appears that expectations which might have been realised had been disappointed by the supposed pregnancy not having produced a child. There are declarations on both sides; there are declarations at that period of his recognizing this boy and calling him his own, but there are exceedingly strong declarations on the other side, quite sufficient in my mind to counterbalance them.

My Lords, it is not my intention to go into the detail of that evidence; your Lordships have had it read, and repeatedly commented upon, and it must be fresh in your Lordships recollections. It appears that his object was to have a son and heir to his estate, and that he did endeavour to have it believed that this child was his son, when he had no expectation of having another, is abundantly clear. There are abundant declarations of his that he could not be the father of this boy, because

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it was begotten when he was in France: that that child was not his, that he had wished to have another son, that he expressed disappointment at not having a son, that he had married this woman, because having had boys before he thought it likely that she should have boys again. I will not occupy your Lordships time by going into the evidence of these declarations, utterly unsatisfactory as they would be if they were all on one side, to counterbalance the undoubted fact upon which the illegitimacy of this child would depend; but they are so balanced by declarations on the other side, of both Mr. Innes and the mother, that they must be considered out of the question. Therefore, adverting to the state of the law which is admitted at the bar, which requires the fact to be proved that the child was the child of the two parties who contracted marriage, I submit to your Lordships, in this case not only is this fact not proved, but it is most clearly disproved by the evidence.

My Lords, it is hardly necessary to say any thing upon the other appeal which has been touched upon at the bar, but I apprehend upon that there can be no question. There is a woman examined,—Mrs. Barry, who describes herself as the wife of Captain Barry,—and she gives evidence very important to the issue between the parties. At a subsequent period it is said to be discovered that she was not married to Captain Barry; that therefore she had assumed a false character, and represented herself as the wife of Captain Barry when she was not; and raising that question—not raised till after the evidence was before the Court—an entirely new suit is instituted; and the parties have gone into evidence upon that collateral issue, whether she was the

wife of Captain Barry or not. My Lords, there would be no end of proceedings if the entering into such collateral issues were permitted. The Court of Session in Scotland considered that that course ought not to be pursued; and I am satisfied that the Court of Session have done that which is necessary for the proper administration of the law in discountenancing a course of proceedings, which not only would make suits interminable, but lead to no good result.

Upon these grounds I submit to your Lordships that both interlocutors ought to be affirmed.

LORD WYNFORD.—My Lords, I entirely agree with my noble and learned friend who has just addressed you. He states that the only reason for not dismissing this appeal with costs is that the appellant sues as a pauper, and therefore it is useless to direct him to pay the costs.

My Lords, this is a very important case; when I say it is a very important case I do not mean that in its decision it is attended with the least difficulty. I have not entertained myself the smallest difficulty since I heard the very able speeches (and very able they were) of the two learned counsel who addressed themselves to your Lordships on behalf of the appellant. If any arguments could have altered the opinion I had formed from reading the papers it would have been the arguments they have addressed to us; but I confess they did not shake in the smallest degree the opinion I had formed from a diligent and attentive perusal of the papers. Still I say that this, though not a difficult, is an important case, for as long as the law of Scotland with regard to marriage continues as it is,—unless some course is taken to prevent such proceedings as have

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taken place in this cause,—no estate is secure of passing the line of the family to which it belongs; and certainly, with respect to the morals of the people of Scotland, this cause presents a very different view of the matter from that which I have previously always entertained.

My Lords, the learned counsel for the appellant, as I understood him, first put this cause upon the ground of legal presumption. He said distinctly, you are to presume for a marriage which legitimizes children upon the same ground as for a marriage which precedes the birth of the children; so I understood. I looked into the law books of Scotland for the purpose of ascertaining this, and I found that where they talk of presumption it is always in cases of marriages which precede the birth, and that there is no case where presumption is alluded to in marriages legitimizing children by taking place subsequent to the birth. The language of Mr. Erskine is very strong upon this; he does not talk of raising a presumption, but he says the effect of marriage after the birth is this;—it gives a status of legitimacy to children that are born before the marriage, who are allowed to have been procreated by the parties so marrying. Establish the procreation by the man and the woman, and then the subsequent marriage legitimizes the child; but until that be established, either by direct or presumptive proof, you cannot legitimize the children. The law of Scotland would be intolerable if it had that effect. If the rule contended for on the part of the appellants were the law of Scotland, it appears to me that if a man had a connexion with a woman at a brothel, and he afterwards married that woman, he would legitimize every bastard born of her after that connexion. I do not know where it would stop. You

must in every case have evidence of the cohabitation of the woman with the supposed father of the children. In those cases, and those cases only, can it ever be safe to hold sequent marriage to give a character of legitimacy to the children.

Now, my Lords, what is this case? There is as I consider no evidence of any cohabitation previous to the birth of this child; when I say no evidence, I am aware that there are three witnesses, as Mr. Burge has told us; there are two witnesses who prove scarcely any thing; one of those witnesses proves that Mr. Innes was at the house, as it is very natural that he should be, and that he was there in company with Janet Rogers; that I do not think would be sufficient for proof of cohabitation, because it is not to be taken that the parties go to bed together because they are in the house together; he went to see his mistress who was living there at the time, and he would necessarily be in the house with Janet Rogers, because she lived there. But is that to raise any inference whatever of any connexion having taken place between them that could render this party legitimate, which could raise an inference of Mr. Innes being the father of the child? The other witness does not go so far. She says she has known them in the parlour, where there was a bed, till one o'clock in the morning. But whose bed is that? Not Mr. Innes's. Does that prove that species of cohabitation which would give birth to a child?

That reduces the proof of cohabitation to the evidence of Miss Spence. She proves cohabitation, and a most extraordinary proof of cohabitation; it is such as no jury would believe, even if it was not contradicted. I am fully persuaded that if it were referred to any jury in

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the world they would dismiss it. This lady admits that she had lived with Mr. Innes as his mistress. She states that she ceased to be his mistress in the year 1826; but she still lived in the house with Janet Rogers, a thing one cannot easily believe, for ladies are generally very angry with persons who supersede them in the affections of their former keepers or lovers. But she is so goodnatured that she goes from her own bed, and gives up her bed-room to her, going herself to some upper room to sleep; and when she is going away she cannot leave the place without walking in and seeing her former paramour and this lady, who had superseded her, in bed together. That is so improbable a story that I should not believe it if it was not contradicted. It is impossible it should be true. But there are so many contradictions to the testimony of this girl, that it is impossible any jury could repose the least confidence in her.

In the first place, as to her own connexion with Mr. Innes, which she states to have been about the year 1824, it is positively proved that she was connected with him in the year 1819; she states that the connexion ceased a little before she went to Montrose. It is proved positively that that intercourse continued during the whole time that she was at Montrose. It is proved by two witnesses that Mr. Innes came to Montrose and saw her, and continued there two days; and it is proved farther, that she was brought back from Montrose, after he returned from France, to live with him. My Lords, if we wanted any thing more to rebut the inference it is to be derived from this letter. Mr. Burge very ingeniously endeavoured to press upon your Lordships that these were love letters

written by Mr. Innes to Mrs. Janet Rogers. No man alive can read these letters and put that construction upon them. I cannot, I confess. My noble friend, the Lord Chancellor, was a little puzzled till the letters came to be explained; and I confess I could not understand the letters. It was clear the language of them was not the language of love letters. I could not believe that "Mrs. Morrison" was the way in which a man would begin a letter to a woman of whom he was passionately fond, and I could not understand the reference to the "journey north," and the "making an "agreeable communication;" but when it was explained that Miss Spence was gone north, that she could not read or write, that Mrs. Janet Rogers was therefore the medium of communication between him and her, the thing was perfectly plain: the correspondence was such as it was not unnatural he should carry on with a woman with whom he had not any particular connexion, with whom he had no connexion, farther than her residing in the same house with the woman with whom he cohabited, and acting as her friend; and it is perfectly natural that he should say to her, "How are "things going on in the north?" and "make an "agreeable communication." Poor foolish man, he thought that it was an agreeable communication that he was coming back to continue that intercourse which had previously subsisted.

Now, here she is directly contradicted by three or four witnesses. Miss Spence tells you that she had lived with Mr. Innes, and she was kind enough to come back to him on the day of the birth of the child. Here she is directly contradicted by Dr. Thomson: she tells you that most improbable story, that she intro-

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duced Mr. Innes into the room, and that she told Dr. Thomson that it was Mr. Innes's child. As my noble and learned friend has said, if Dr. Thomson was told it was Mr. Innes's child, two gentlemen were introduced on the very same day, and it was declared to be the child of each of them. Certainly Mr. Morrison was introduced on that same day as the father of this child, and that in the presence of the mother. Dr. Thomson cannot be mistaken, because he went and wrote down the name of Morrison in the book in which he entered an account of this birth, and made the charge of it to Mr. Morrison. This woman is therefore so directly contradicted by three or four witnesses, that it is impossible to believe one word she has said. Will your Lordships, upon such testimony as this, believe that which it is almost impossible to believe, that this child could be born at ten months after its conception? We all remember that the witnesses in the Gardner case agreed that it was very unusual it should be many days after the nine months. One witness stated he had known an instance of a woman going ten months. One of the doctors examined in this case states that he has known an instance of a birth after ten months; but that he does not believe it occurs once in a thousand times. Then, my Lords, are you to believe that story which is so improbable for the purpose of rendering this child legitimate? Are you to believe that which is so improbable, that this gestation did go on that unusual period of time, when it does not occur once in a thousand times.

Upon these grounds I humbly submit to your Lordships that there is not the least evidence of that species of cohabitation between this man and this woman at

the time of the conception of this child, which would make this child the legitimate child of Mr. Innes by subsequent marriage. It appears to me impossible your Lordships can hold it such a cohabitation as would give the effect to the subsequent marriage of rendering the child legitimate, unless you presume that he is the only man who has cohabited with her. So far from that being the case, there is undoubtedly very strong evidence that he was at that time cohabiting with her sister, and that he was going to the house only because he went to visit that sister who was living in the house, and at the very time when, according to the evidence of Miss Spence, Janet Rogers, who pleads her cohabitation with Mr. Innes, was lying in bed with Mrs. Innes, he was actually sleeping with her sister. Mr. Innes therefore was cohabiting with two women, Miss Spence and Miss May Rogers, at the time he is presumed to have been cohabiting solely with Miss Janet Rogers.

How is it then with respect to Mrs. Janet Rogers? Does she cohabit with any body else? She clearly had a child by Morrison in 1823. There is evidence of Morrison acknowledging this very child; there is evidence of the mother being always called Morrison, and that she was never called Innes till about the time of the marriage. But there is stronger evidence than that. Who at that time lived with Mrs. Morrison at Portobello? It is contended on the part of the appellant that it was Mr. Innes; but it is proved by two witnesses, on the part of the respondent, that it was Mr. Morrison. Mr. Morrison died sometime after this, and Mrs. Morrison, afterwards called Mrs. Innes, is stated to have gone into the north to get some of her late husband's property to pay the

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rent. She got no property whatever, and the rent remained unpaid. If Mr. Innes had been the person cohabiting with her there would have been no difficulty in getting the payment; but there is positive evidence that at this time the person who cohabited with her was not Innes but Morrison.

It is said that there are declarations. Declarations, I agree with the learned counsel at the bar, are entitled to very little credit; and there are some declarations in this case of importance brought forward to repel the declarations on the other side, namely, the declarations of the supposed father and the mother. It is not very likely the father and mother would state the child to be illegitimate unless it was so; the mother may have a strong interest to make the child legitimate, the father may have a strong interest of some kind, but we have declarations on both sides. There are declarations on the part of both, down to the year 1830, treating this an illegitimate child. Why was there a change of conduct in this respect? Undoubtedly it was because some short time after Mr. Morrison died Mr. Innes doubted whether he should get a child from this woman, and then, for the first time, to gratify his spleen against his brother, he thought proper to bring forward this child as his own. Then you have undoubtedly the name marked on the satchel, and you have several declarations, "This is a pretty boy, a nice "boy," and so on; you have indeed plenty of declarations that this child was legitimate when it became convenient for him to say that this child was legitimate for the purpose of cheating his brother out of the estate.

Then, my Lords, we have evidence of the subsequent marriage. Upon that we are not called upon to de-

cide, because the Scotch Courts have decided that it was legal. I do not doubt that the marriage was legal, if the facts which are supposed to have taken place actually did take place, but I confess I think the learned judges in Scotland were too much in a hurry when they came to that conclusion. I do not believe a word of it. I believe this case began in fraud, and was supported by conspiracy throughout the whole of it. I doubt very much whether that marriage ever did take place. It is very extraordinary those two persons should have been so extremely anxious to be married in church, though they were told that another marriage would be equally good, and one would have thought more agreeable in their circumstances. Still they were most anxious to be married in church. A reverend clergyman, it is stated, was requested to attend on a particular day to solemnize the marriage according to the forms of the church of Scotland; but the clergyman does not come; then Mr. Innes says, "I must be the "parson," and he proceeds to marry his wife. There is no excuse given for the non-attendance of this clergyman; there is no reason given why these persons were so anxious to have the marriage legally solemnized according to the forms of the Church of Scotland; or why, if that form was so desirable, he would not wait till another day for this clergyman to come. I can find another reason why he was not there: it might have been very inconvenient for him to be there; he must have been called to give evidence of it if it came in question; and I do not believe that any clergyman of the Church of Scotland would have been procured who would have taken a part in such a transaction; and I believe in my conscience that that is the reason

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why the clergyman was not present. I am perfectly persuaded, looking at this case from the beginning to the end, there is so much fraud, perjury, and conspiracy, that if there be any truth in it it is impossible to find out where that fraud, perjury, and conspiracy ends, and where the truth begins; and this is why I am glad that on the present occasion the marriage is entirely out of the question. With respect to the facts of this case on the point under appeal I entirely agree with the Judges of the Court below. I should hardly conceive it possible that any judges could, for a moment, hesitate in saying this was not a legitimate child; and I do hope that when your Lordships have done justice to Mr. William Innes, in declaring that this person does not interpose between him and his rights, Mr. Innes will do justice, and will make some amendment to the laws of his country, by instituting a prosecution against those persons who have attempted to support so infamous a case as this is by such testimony.

The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors so far as therein complained of, be, and the same are hereby affirmed.

SPOTTISWOODE and ROBERTSON — JOHNSON and FARQUHAR, Solicitors.