

purpose, falsely and maliciously alleged that the patent comprehended the mines of which the pursuer is a large proprietor, and that it precluded parties from making paraffine oil from that mineral. Now, there are two things I should desire to see stated before I could support the relevancy of such an action—first, in which respect was this allegation false? and secondly, when, and where, and in what form did the defender make that false allegation? I think the reasoning of the pursuer seems to be this:—"the substance that is dug out of my lands, and it is admitted to some extent out of other lands, is a bituminous shale. Your patent is limited to distillation from coal; bituminous shale is not coal, and my mineral in particular is not coal." He further says—"You knew that your patent did not extend to shale;" and I think that is admitted by the parties; but the other step of the allegation which was necessary was, "that you knew that the substance was shale, and that it was not coal." I don't think that there is a sufficient and distinct allegation of that on this record. I think it was a simple thing to state that absolutely, and I don't think any roundabout way from which it might be deduced is enough from a pursuer asking damages. I think the record defective in that respect. Then, I think it is further defective in respect of the statement of the occasions on which these false allegations are represented to have been made, for, like my noble and learned friend who has addressed the House, I cannot find any such allegation in the condescendence. The other defect in this record is the very peculiar kind of falsehood that is alleged here. It is not a single allegation of a fact patent to any one. It is an allegation, in the first place, as to the construction of a patent—which is matter of law. It is an allegation, in the next place, of a particular class of mineral as being coal or shale—which is a matter more or less scientific—and therefore it required a very definite statement to support the falsehood of such an allegation. Both parties have referred to a case that had occurred between the pursuer in this action and his tenant Mr Russell, in 1853. That case was raised upon the issue stated on this record, as to whether the minerals which Mr Russell was digging out of these lands were comprehended within his lease. He had obtained a lease which gave him a right to various minerals in these lands, one of which was coal, but an action for damages was raised against Mr Russell for digging out of the lands what was not coal; and I think that the pursuer is correct in stating that the result of that case was not any decision upon the scientific question whether this mineral was or was not coal. That question was made the subject of a very great deal of scientific evidence. A great many scientific persons were examined from various parts of the country. I think I sat for six days during merely scientific evidence on the question. I see it reported on this record—there were geologists who described the strata of the ground where coal is found, and where this mineral is found; there were mineralogists who spoke to the colour, lustre, and streak of this mineral; there were chemists who had analysed this mineral, and who had analysed coal, who spoke to the products, who analysed the products and the sub-products of coal; there were gentlemen who, by the aid of the microscope, discovered certain specks in this substance, and spoke to what were to be detected in coal, and what in this mineral. I may say the array of gentlemen on each side was about equal. This testimony

was about equally divided. One division of them said it was coal, the other said it was not coal. I only state this as showing the nature of the question in this litigation. Now, I think it appears further from this record, that after that trial had taken place, and the question was left to the jury, no action was raised for the purpose of setting aside the lease as obtained by fraud. We have also the minute under which the matter was adjusted between the parties, and up to the date of that minute, and at the date of that minute—it appears that was in 1859—it was a disputed question whether this was to be called coal or not. At the date of the trial in 1850 no name had been discovered for it but coal; but at that time, it is stated in the minute, the pursuer insisted that it was not coal, and called it Torbanehill Mineral, and the parties adjusted it by giving it a third name—the Disputed Mineral. All this shows this was not an open and patent fact. But, notwithstanding all these disputes and questions, it is said that Mr Young, the patentee, who was not a party to the action at law, said—I think it was not coal but shale. Well, then, that ought to have been very distinctly stated, not by doubtful inference, on the record; so I also require that a party, in order to entitle him to damages, should show the occasions on which the means were taken of preventing the mineral from being sold. I do not find that here. In regard to these advertisements, they are said to have occurred at the time the trial was going on in this metropolis between Mr Young and somebody else. If that trial was upon the question whether this was coal or not, it is plain that was then a matter *sub judice*; and even if that was not so, the advertisements were only a caution generally not to infringe Mr Young's patent. That is not an obligation that would enable the pursuer to maintain an action for damages. On the whole, I think it would be very unwise, and altogether contrary to the procedure we have been induced to follow in the other part of the island with a view to accuracy of procedure, if we should allow the relevancy of this action. A pursuer should make his allegations so specific that there could be no doubt as to what was meant, and clearly within the scope of the record. I therefore entirely agree that the interlocutor appealed from should be affirmed, and this appeal be dismissed, with costs.

Appeal dismissed, with costs.

Agents for Appellants—Morton, Whitehead, & Greig, W.S., and Loch & Maclaurin, Westminster.

Agents for Respondents—Jas. Webster, S.S.C., and John Graham, Westminster.

Tuesday, July 16.

CAMPBELL v. CAMPBELL.

(In Court of Session, 4 Macph., 867.)

Husband and Wife—Marriage—Legitimacy—Service—Presumption—Proof. In competing claims for service as heir of entail, the title of one of the claimants was objected to on the ground that his father was illegitimate, his parents never having been lawfully married. Held (aff. C. S.), on consideration of the whole evidence, that although the cohabitation of the claimant's grandparents was adulterous in its origin, and continued so for three years, it changed its character some time thereafter, when the parties became free to marry, and

the presumption was that a valid marriage was actually contracted betwixt the parties. *Per* Lord Cranworth, in investigating matters of this sort, after the lapse of so long a time, when all contemporary testimony is lost, if we find enjoyment of property in a particular line of descent, we are entitled to presume that the enjoyment has been rightful, and inquiry is rather, whether the enjoyment has been in error than whether it has been right.

This was an appeal against a judgment of the whole Court of Session, whereby the Court found that the respondent, John Alexander Gavin Campbell of Glenfalloch, was the nearest and lawful heir of tailzie and provision of the late Marquis of Breadalbane.

John, Marquis of Breadalbane, died, without issue, on 2d November 1862. At the time of his death he was vested and seized in extensive estates in Perthshire and Argyshire, which were held by him under two deeds of entail, the Breadalbane entail, dated in 1775, and the Inverarderan entail, dated in 1839. On the death of the Marquis the succession to the estates devolved, under the destination in the deeds of entail, upon the nearest heir male of the late William Campbell of Glenfalloch. Two competitors appeared as claimants. The respondent claimed, as grandson of Captain James Campbell, the second son of William Campbell of Glenfalloch. The appellant, Charles William Campbell (of Boreland) claimed as grandson of John Campbell, the sixth son of William Campbell. It was not disputed that, if the respondent's father was the lawful son of Captain James Campbell, the respondent was entitled to prevail in the competition, but the appellant denied that Captain James Campbell was ever lawfully married to his reputed wife, Eliza Blanchard, and consequently maintained that the respondent's father was not the legitimate son of Captain James Campbell. The appellant accordingly claimed to be preferred in the competition.

The averments made by the appellant, in support of his claim, were to the following effect:— James Campbell, the respondent's grandfather, died in 1806, and his widow, or pretended widow, Eliza Maria Blanchard, set up a claim, as such widow, by applying to the War Office for pecuniary assistance. She wrote a letter to the War Office stating that she was the widow of Captain James Campbell of the Breadalbane Fencibles, who died insolvent, and left her and three children without the means of support; that she applied to the half-pay agent respecting the widow's pension, but was informed it could not be procured, as she had unfortunately lost her marriage-lines in America; that she was married to Captain Campbell in Edinburgh by Mr Macgregor, the Gaelic minister, who was also dead, as was Ensign William Willox, of the 40th, who was the witness to the marriage. That in June following they went to America in the fleet that took out the preliminaries of peace, twenty-five years ago; that the present Gaelic minister had been written to, and he said that he got no register from any of his predecessors; that she had administered at Doctors Commons for four months' pay, due to her husband at his death; and that she had a power of attorney, which he sent her from Gibraltar at the time he was in the Cambrian Rangers. She added—"I beg, sir, you will excuse my being thus particular, as my motive is to obviate any doubts of my being Mr Campbell's lawful wife."

The appellant alleged that he believed the statement in the above letter to be true, to the effect that a certain ceremony, purporting to be a ceremony of marriage, but which was wholly null and ineffectual, was gone through by the said James Campbell and Elizabeth Maria Blanchard; that after its celebration, and some time in 1782, James Campbell and Eliza Maria Blanchard went to America, where they remained about a year, and then returned to Great Britain; that James Campbell left the 40th Regiment about 1785, and took up his residence in England, where he was domiciled; and that he resided for a time near Plymouth, then at Gateshead or Newcastle, where several children were born to him by Eliza Maria Blanchard, one of whom was William John Lambe Campbell, born in 1788, the father of the respondent, whose baptism is registered at Gateshead.

The appellant further averred, that at the time of the alleged marriage between James Campbell and Eliza Blanchard, in September 1781, she was the wife of Christopher Ludlow, then living, and who was married to her in 1776, at Chipping-Sodbury, Gloucestershire; that the marriage of Ludlow was there registered, along with the baptism of a child of the marriage; that Christopher Ludlow lived till 1784; that, in point of fact, Mrs Ludlow eloped with James Campbell, and the pretended marriage between them in Edinburgh was a screen to cover their adulterous intercourse; that there was no subsequent marriage or ceremony of marriage between James Campbell and Eliza Maria Blanchard; and that their intercourse continued all along to be illicit, and their children were illegitimate.

On the other hand, the respondent, Campbell of Glenfalloch, alleged that he was unable to specify the exact date of the marriage between his grandfather, James Campbell and Eliza Maria Blanchard, but that they were lawfully married previous to the year 1785. In that year, they went to reside at Glenfalloch, where they lived and cohabited as man and wife, and they were habit and repute married persons, and, as such, were received and treated by the family at Glenfalloch, and by all their relations and friends. In 1792 or 1793 James Campbell received a commission in the Breadalbane Fencibles, and he remained with that regiment till it was disbanded in 1799. During all that time James Campbell and Eliza Blanchard lived together as husband and wife. He was next appointed to the Cambrian Fencible Regiment of Rangers, and went with that regiment to Gibraltar about 1800, leaving his wife and family near Edinburgh, where in 1802 he joined them, and continued to live till his death, in 1806. After his death, Eliza Blanchard was universally recognized as his widow. She administered to his estate, and received a pension from Government. James Campbell was by birth a Scotchman, and was always domiciled in Scotland. During his life the validity of his marriage was never questioned. His eldest son, William John Lambe Campbell, was born in Edinburgh in 1787, and on the death of his mother, Eliza Blanchard, administered to her estate. He lived and died in the enjoyment of the status of legitimacy, and died in 1850. When the succession to the Glenfalloch estate opened in 1812, William John Lambe Campbell, as the legitimate son of his father James Campbell, succeeded thereto, which he would not have done if he had been illegitimate; that in 1812, the father of the appellant would have been in the latter event

the lawful heir; nevertheless, instead of claiming the succession, the appellant's father assisted in completing the title of William John Lambe Campbell; that the appellant and his father never raised any dispute as to the illegitimacy of William John Lambe Campbell till the present proceedings; that the late and preceding Marquis of Breadalbane both recognised and acknowledged William John Lambe Campbell as the heir-presumptive to the Breadalbane estates, and in all legal proceedings relating thereto he was named as such.

The appellant contended that, inasmuch as James Campbell's marriage began in adultery or concubinage, so it continued to the end; the respondent, on the other hand, contended that, even assuming that the parties were not legally married when they began to cohabit as man and wife, still they outlived the obstacle which at first prevented their legal marriage, and, as years advanced, became habit and repute married persons, and, by constant and repeated acknowledgments, were, according to the law of Scotland, to all intents and purposes married persons; and their children were legitimate.

The Lord Ordinary (BARCAPLE) gave judgment in favour of the respondent.

On a reclaiming note, cases were ordered to be laid before the whole Court.

The Court (diss. LORDS CURRIEHILL and ARMILLAN, *ex* LORD KINLOCH) adhered to the judgment of the Lord Ordinary; holding, that the presumption of the legitimacy of the respondent's father, arising from the possession of the status of legitimacy during his whole life, had not been disproved, but confirmed by the other evidence in the cause, the marriage of Captain James Campbell and Eliza Blanchard having been established by proof of cohabitation, habit and repute, in Scotland subsequent to 1793, irrespective of the adulterous origin of the cohabitation.

LORD CURRIEHILL, who (along with LORD ARMILLAN) dissented from the other judges, put his judgment on four propositions—1. That the cohabitation of the parties originated in an illicit connection. 2. That, as matter of law, the presumption arising from the mere continuance of such cohabitation, when it is proved to have had such an origin, is not that the illicit connection was subsequently changed into lawful marriage, but that it retained its illicit character until the end. 3. That in the present case that legal presumption not only had not been obviated, but had been shown to be in accordance with the truth by the evidence as to the subsequent domestic history of the respondent's grandparents. 4. That William John Lambe Campbell, the son of that illicit connection, having been illegitimate, the succession to the estate of the late Marquis of Breadalbane cannot be transmitted through him to his son, the respondent.

Charles William Campbell appealed.

Attorney-General (ROLT), Dean of Faculty (MONCREIFF), ANDERSON, Q.C., and J. S. WILL, for appellant.

SIR ROUNDELL PALMER, Q.C., MELLISH, Q.C., YOUNG, ADAM, and BERRY, for respondent.

The LORD CHANCELLOR, after stating the facts of the case, said—This is an appeal from an interlocutor of the Court of Session, finding that the respondent, John Alexander Gavin Campbell, Earl of Breadalbane, is the nearest and lawful heir of tailzie of the late Marquis of Breadalbane. It is not contended that the part taken by the appel-

lant's father in the service of the respondent's father, as heir to the lands of Glenfalloch, precludes the appellant from disputing the respondent's claim founded on the same title; but it must be admitted to be a very strong recognition of the legitimacy of the respondent's father. Under these circumstances, every presumption is in favour of the respondent's title, and the appellant must be required to overcome that presumption by the proof of facts which are utterly inconsistent and irreconcilable with it. This he proposes to do by proving that the original cohabitation of the respondent's grandfather and grandmother commenced with an unlawful marriage after their elopement; that from that time the habit and repute began which constitutes the only evidence of a marriage between them; that there never was any change in the nature of the cohabitation; and that without such a change a connection which is illicit in its origin cannot become the foundation of such habit and repute as will be sufficient proof of a subsequent marriage having taken place. The appellant's case rests entirely on a letter written by Eliza Blanchard to the War Office in 1807. There may, perhaps, be some doubt whether this letter was admissible as evidence, but, at all events, being written for a particular purpose, the statements in it are not as trustworthy as if they had been made without any motive of interest. I think that the assertions of a marriage with James Campbell in 1781 or 1782 must not be implicitly relied on. In applying for her pension, it was necessary for the alleged widow to state particularly her marriage, and the date of it. This might have suggested the plausible story of the loss of her marriage lines in America. It is also a significant circumstance that though the date of 1782 is mentioned in the letter, yet when she was sworn before a Magistrate she did not mention any date. But whether a marriage actually took place during the lifetime of Christopher Ludlow, or the cohabitation of the parties was merely an adulterous intercourse without any marriage ceremony, the appellant contends that, beginning with an illicit connection, the presumption of subsequent marriage from the continuance of it altogether ceases, and that nothing short of proof of actual marriage, or of such a total change in the character of the cohabitation as will amount to habit and repute of a marriage, will be sufficient to establish the respondent's title, and that on the evidence it appears that the connection between James Campbell and Eliza Blanchard continued the same from the beginning to the end. The cases chiefly relied on for the proposition were those of *Cunningham* and *Lapsley*. (His Lordship then examined these two cases, and continued.) The appellant contends that the habit and repute of the parties being man and wife was the same during the period of the adulterous connection as after the death of Christopher Ludlow, and that it continued unchanged down to the death of James Campbell in 1806. But is this a correct view of the case? It may be assumed that the family believed they were married persons, but that did not amount to habit and repute, which arises from parties cohabiting together openly and constantly as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society of the neighbourhood of which they are members as to produce a general belief that they are really married persons. Now, during the whole cohabitation, down to the death of C. Ludlow, James Campbell and Eliza Maria Blanchard

were not living in the neighbourhood and society of his family, and therefore the reputation in the family of their being married was nothing more than the private opinion of the members of it; but if this is sufficient to constitute the habit and repute so far as the family of the Campbells was concerned, yet, as Lord Redesdale observed, repute must be founded, not in singular, but in general, opinion of relations and friends and acquaintances. The whole family of the Ludlows must have known that the parties could not be lawfully married during the lifetime of Christopher Ludlow. The case, therefore, never began with habit and repute, nor could it have had any origin at all in the sense in which it induces a presumption of marriage until after the death of Ludlow. That event happened in January 1784, and opened the way to a change from an adulterous connection to a lawful marriage. A question was made whether James Campbell and Eliza Blanchard were ever aware of the death of Ludlow; but without entering into any nice examination of probabilities, as any conclusion on the subject must be conjectural, I think we are bound to presume that they had received information of a fact so important to be known by them. From this time the nature of the relation which had subsisted between them was entirely changed, and although from 1784 to 1793 there is very little evidence of their movements, there is nothing to show that an actual marriage by present consent may not have taken place between them from 1796 to 1806. The evidence is clear and distinct of a universal recognition of the parties as man and wife by every member of the family, and by all persons with whom they associated; and there is nothing whatever to break in upon the uniformity of this recognition. If this case was confined to the period between 1793 and the death of James Campbell in 1806, it would be amply sufficient to establish a conclusive presumption of marriage by habit and repute, and it appears to me that it is not competent for the appellant to go back to an anterior period, when an illicit intercourse existed between the parties, in order to show that the matrimonial relation must have been simulated. The argument on the part of the appellant goes the length of contending that, if cohabitation commences in illicit intercourse, a marriage can never afterwards be established by habit and repute; but, as I read the case of *Cunningham*, if the habit and repute had been uniform and general, although the connection in its origin was notoriously illicit, this House would have decided the case differently. After a close and careful examination of the facts of the case, I am clearly of opinion that the strong presumption in favour of the marriage of the respondent's grandfather and grandmother, and of the legitimacy of his father, has not been shaken by any proof adduced by the appellant which is inconsistent with the respondent's title, and that the interlocutor appealed from ought to be affirmed.

LORD CRANWORTH—When the succession of the Breadalbane estates opened by the death, without issue, in November 1862, of John, the second Marquis, there is no doubt that the person entitled to succeed under the entail of 1775 would, if living, have been William of Glenfalloch, the heir-substitute, to whom, and the heirs-male of whose body, the estates were destined by the deed of entail. He, however, had died very long ago, viz., in 1791, and the question therefore was, who was in November 1862 the heir-male of his body? There was a strong presumption in favour of the respondent, for

the following reason:—This William of Glenfalloch was himself heritable proprietor of an estate at Glenfalloch, and in 1784, having seven sons, he executed a deed of entail, whereby he settled this estate, after his own death, on his seven sons, and the heirs-male of their bodies respectively in succession. It is the common case of all parties that Colin was the eldest son of William; that James was the second son; that John, called John of Boreland, was the sixth son; and that Duncan, Archibald, and William, the third, fourth, and fifth sons, all died, and without issue-male, before the year 1811. On the death of William in 1791, his eldest son Colin succeeded to the Glenfalloch estate, pursuant to the deed of entail, and enjoyed it till 1806, when he died, and was succeeded by his only son, William Erskine Campbell. He died in July of the following year, leaving an only son, John Breadalbane Campbell, successively, and on the death of the latter in 1812 the line of Colin became extinct. James, the next heir-substitute, had died in 1806, and the person entitled to succeed under the entail was the heir-male of his body, if there was any such heir-male. In March 1802 William John Lambe Campbell was duly served heir-male of tailzie and provision in special of his cousin, the said John Breadalbane Campbell, as being the only son of the late James, second son of William. This service was duly retoured to Chancery, and William John Lambe Campbell made up and completed his titles by infestment. William John Lambe Campbell enjoyed the estate of Glenfalloch from March 1812 till his death, in June 1850. He was then succeeded by his son and heir, the respondent, who duly made up titles to, and has ever since held, the Glenfalloch property. If these proceedings, subsequent to the death of John Breadalbane Campbell in January 1812, were all regular, i.e., if William John Lambe Campbell was rightly retoured the only son and heir of James, and if he and his son, the respondent, have rightfully been in the enjoyment of the Glenfalloch estate since 1812—then there is no doubt that the respondent is entitled to succeed in the present litigation, for if he is heir-male of the body of James, the second son of William of Glenfalloch, he is certainly heir-male of the body of William himself, and so entitled to be served heir of tailzie and provision to the late Marquis. The appellant, however, contends that all which happened relative to the Glenfalloch estate was the result of error; that William John Lambe Campbell was not the lawful son of James; that James was never married, and so never had a son or, consequently, an heir-male of his body; and therefore that the appellant—who, it is admitted, is the heir-male of the body of John, the sixth son of William, the settler in 1784—ought to have been ever since January 1812 in the enjoyment of the Glenfalloch estate, and ought now to be served heir of tailzie and provision to the late Marquis under the deed of tailzie of 1775. The argument of the appellant proceeds on the ground that James was never lawfully married, and the point to be investigated is, what evidence exists on this subject? That he lived for above thirteen years before his death in 1806 with a woman who passed as wife seems to be proved beyond all doubt. He had originally, during the American war, been an officer in the regular army, but he sold his commission in April 1785. When, however, the Breadalbane Fencibles were raised in 1793 by the then Earl of Breadalbane, James Campbell was taken into that corps by the

Earl, first as lieutenant, and afterwards as captain and quartermaster, and he continued to serve in it in those capacities until its final dissolution in 1799. In that same year he obtained a commission as captain in the Cambrian Rangers, in which corps he continued to serve until it was disbanded in May 1802. After that time he is not shown to have had any occupation, and he seems to have been in great pecuniary distress until his death, in 1806. One important question will be, whether, during this period of above thirteen years, from March 1793 to October 1806, he passed as, and was supposed to be, a married man? In the attempt to investigate matters of this sort, after a lapse of from sixty to seventy-five years, when all contemporary testimony is lost, we must be on our guard against mistaking the spirit in which such inquiries ought to be conducted. If we find a state of circumstances—the enjoyment of property, for instance—in a particular channel of descent, and we then proceed to inquire, even for a collateral object, into the circumstances which have been connected with that enjoyment, in order to discover whether the proper course of descent was followed, we are not to look at the fragments of evidence which may have escaped the ravages of time in order to see whether they are sufficient to explain and justify the course of enjoyment which has existed. We are entitled to assume, *prima facie*, that what has been long enjoyed has been rightfully enjoyed; and in investigating collateral circumstances which happened long ago, our inquiry ought rather to be, whether they show enjoyment to have been had in error, than whether they prove it to have been right. Now, looking to the evidence before us in this spirit, I have come to the conclusion that it shows satisfactorily that, at least from March 1793 up to his death, the appellant's grandfather, James Campbell, was treated by every one as the husband of Eliza Maria, formerly Blanchard, the woman with whom he was living, and by whom he had four children, who survived him, including William James Lambe Campbell, his only surviving son, the father of the respondent. For the purpose of convenience, I will designate his lady simply Eliza Maria, and I will shortly state the evidence to which I mainly refer. Donald M'Naughton, one of the respondent's witnesses, was not himself alive during the period in question, but he tells us that his father died in 1864, at the age of ninety, having been a soldier in the Breadalbane Fencibles, and he often spoke of Captain James and his wife, and said that they always went in and out like man and wife, the same as the other officers and their wives, and that till the present question was raised—*i.e.*, till 1862—he never heard it doubted. His two sisters gave the same testimony. This evidence is strongly confirmed by a letter, dated the 17th of January 1794, from a Mr John Gordon to Lieutenant and Quartermaster James Campbell, Breadalbane Fencibles, Aberdeen. The letter related to some matters of business connected with the regiment, but there is a postscript "wishing Mrs Campbell, you, and family, many happy returns of the season.—I am, dear sir," &c. This shows that they were passing as man and wife in the regiment, and therefore corroborates the testimony given by M'Naughton. Colin Campbell, it will be recollected, succeeded to Glenfalloch in 1791. He was a married man, with a family, and the evidence is very clear to show that he and his family received James, with his wife and children, to visit at Glenfalloch House, and it seems probable,

from the evidence of Peter McCallum and Mary Brodie, that there was a particular room in Glenfalloch House appropriated to them. Many little circumstances are mentioned showing that the witnesses cannot be mistaken. Mrs Frances Clementina Robertson, born in 1800, says that her mother often spoke of the Glenfalloch family, more particularly of Captain James' family. She said she had showed them much hospitality, and she spoke of Mrs James with a great deal of sympathy and respect on account of her struggles with her young family. I am not aware of any other parole evidence showing that Captain James and Eliza Maria were treated as man and wife; but as this evidence is not contradicted, it seems to me to be entitled to great weight. Many things were done during the period in question which I feel it impossible to reconcile with any other hypothesis than that James and Eliza Maria were treated by others as being man and wife. In the first place, the Cambrian Rangers were stationed in 1800 at Gibraltar, and there Captain James executed a power of attorney to Eliza Maria Campbell, describing her as his wife, empowering her to act for him in his absence, and this power was duly registered as a probative writ in the Books of Council and Session. This, at least, shows that he treated her as his wife. After that corps was disbanded, Captain James appears to have been in great pecuniary distress, and to have lived in College Street, Edinburgh, where he and his wife let, or tried to let, lodgings. Whilst so residing, there were at least two sheriff summonses against her for small debts, describing her as spouse of Captain James Campbell; and then, in 1804, there was an inhibition sued out by Captain James, warning the public not to trust her. This could only have been obtained on the ground of her being, or of his alleging that she was, his wife. This appears to me to furnish a strong body of evidence showing that the parents of William John Lambe Campbell were believed and reputed to be man and wife. I will not refer to any further evidence of what happened during the life of James. But after his death many circumstances occurred, all tending to the same result—*i.e.*, tending to show that James and Eliza Maria were believed to have been man and wife. In the first place, she obtained a Government pension as his widow. The circumstances connected with this pension are very important, and are much relied on by the appellant. For the present, I advert only to the fact that she obtained a pension, to which, unless she was his widow, she was not entitled. So, again, she obtained letters of administration of his personal estate to be granted to her as his widow by the Prerogative Court. William John Lambe Campbell, the only son of James, was placed as an apprentice with a surgeon at Edinburgh, but he had run in debt before his father's death, and was, when that event happened, confined as a prisoner for debt in the Tolbooth for several months after the death of James. Letters were written by John, the brother of James and grandfather of the appellant, and other relatives and friends of the family, deploring the unhappy lot of this young man, and urging Lord Breadalbane to assist to extricate him from his difficulties. In these letters he is always described as the son, or the only son, of James. His mother, in writing to Lord Breadalbane, says she is sure his tender heart would bleed to think that any child of the Glenfalloch family should be in such distress. Duncan, in a letter on this same subject addressed to his brother John, speaks of

having received a distressing letter from poor James' widow. Lord Breadalbane did interfere, through Patrick Campbell, his agent, who, in writing to Lord Breadalbane, describes William John Lambe Campbell as Glenfalloch's cousin. From the language and tenor of all these letters, it is impossible to believe that the writers of them had any doubt as to the legitimacy of the person whose cause they were advocating. The whole correspondence shows that all the members of the family regarded the children of James as distressed and indigent relatives, in whom they ought to take an interest, and that they treated Eliza Maria as his widow; and Lord Breadalbane seems to have assisted the son with money while he was serving at sea as midshipman, evidently treating him as a distant relative in pecuniary difficulties. I have already mentioned that William Erskine Campbell, the only son of Colin, died in July 1807, and as he left an only son, John Breadalbane Campbell, a child of very tender years, it became necessary to appoint guardians. Several letters passed on this subject between John, the sixth son of William of Glenfalloch (usually designated John of Boreland) and Lord Breadalbane; and in one of them, dated the 8th December 1807, John of Boreland writes:—"My brother Duncan, in Jamaica, is the heir-at-law, as James' son is not of age." When John wrote this, he must have supposed that the son of James was legitimate. John Breadalbane Campbell, the son of William Erskine Campbell, died in January 1862, at the age of ten years, on which event, William James Lambe Campbell was admitted to succeed as the nearest heir-male of the body of William, the settler. In 1784 there seems to have been a rather angry correspondence on the subject of who should act as factor for William John Lambe Campbell, in making up the titles to Glenfalloch and attending to the property during his absence, he having married and established himself in London as a medical man. He had at first placed his affairs in the hands of a man named John Campbell, described as John Campbell *quartus*, but John of Boreland by some means induced him to transfer the management of his affairs from John Campbell *quartus* to him, John of Boreland, representing that some expense would be thereby saved. Throughout the whole business of making up the titles and procuring infestment, John of Boreland acted as agent and factor for William John Lambe Campbell, whom he constantly represented as being the son of James and his own nephew, describing himself as his uncle. This is a very important circumstance, for if William John Lambe Campbell was not legitimate, not only was he not the person to succeed to Glenfalloch, but John of Boreland was himself the person entitled. It seems to me impossible, in such circumstances, to believe that John of Boreland had any doubt as to his nephew's legitimacy. There is another head of evidence not unimportant. I allude to the legal proceedings against William John Lambe Campbell, as tenant in tail in possession of the settled estates of Glenfalloch. The estates were burdened with several debts created by William of Glenfalloch, the settler, and John of Boreland having become interested in these debts, twice instituted proceedings in the Court of Session—first in August 1814, and secondly in March 1817—against William John Lambe Campbell, as heir of entail in possession, and obtained decreets for payment. One of the sums thus recovered was a sum of £300 due to John of Boreland, as representative of his

deceased brother William, and would be divisible among William's next of kin; and there is in evidence a missive signed by John of Boreland, by which he binds himself to pay over to William John Lambe Campbell the share to which he, as one of the next of kin to his uncle, would be entitled—another clear recognition of his legitimacy. There is also a petition, in 1818, by the widow of William Erskine Campbell praying for an alimentary provision, which also assumes William John Lambe Campbell to be properly in the seizan as tenant in tail. In 1828 Eliza Maria, the mother of William John Lambe Campbell, died. On the 6th of February 1828 letters of administration of her goods and effects were granted by the then Prerogative Court to him, as one of her natural and lawful children. There was a proceeding in 1842 strongly showing the opinion of the family as to the legitimacy of William John Lambe Campbell. Jane, the widow of Archibald, the fourth son of William of Glenfalloch, the settler, who had been appointed in 1835 *curator bonis* to her daughter Jane—a person of unsound mind—died about 1842. It became necessary, therefore, to have a fresh curator appointed; and by an interlocutor of the Court of Session, made on the 10th of March 1842, William John Lambe Campbell was appointed, with the approval of the family, curator in her place. In order to show the expediency of this appointment, there was produced to the Court a written declarator made by the late Mrs Jane Campbell, dated in 1837, whereby she expressed her desire that, in the event of her death, William John Lambe Campbell should be appointed curator, as being the person best qualified, not only from his near relationship, but from his integrity, and the esteem which she knew her daughter entertained for him. Proceedings were on several occasions taken by both the first and the second Marquis of Breadalbane for placing certain sums which they had laid out in improvements, as charges on the Breadalbane estates, and in all these proceedings William John Lambe Campbell was made a party, as the next heir of tailzie entitled under the deed of 1775, on the death, without issue-male, of the second Marquis. I will only add, that on very many occasions and in various ways the late Marquis recognised William John Lambe Campbell, and afterwards his son, the respondent, as the persons next to himself, and the heirs-male of his body in the Breadalbane entail; and he advanced money, and in various other ways brought him forward, as being the person to succeed on his death. The evidence to which I have thus adverted (and there are many more details all pointing to the same result) satisfies me that from the beginning of the year 1793 to November 1862, when the late Marquis died, James Campbell and Eliza Maria were always supposed to be, and were during their lives treated as man and wife; that after the death of James, Eliza Maria was treated as and believed to be his widow; and that William John Lambe Campbell was up to the day of his death, in 1850, believed to be, and treated as being, the lawful child of his parents. The respondent, his eldest son, succeeded his father, and has ever since been in the enjoyment of the Glenfalloch estates. He was duly retoured heir in special to his father, and his titles were regularly made up. No question was ever raised, nor, so far as I can discover, was any doubt ever suggested, as to his having been rightfully in the enjoyment of the Glenfalloch estate, as heir-male of the body of William Campbell, the settler, until after the death of the

late Marquis in November 1862. On that event happening, the succession opened to the Breadalbane estates, and the present appellant, as grandson of John of Boreland, the sixth son of William, the settler of Glenfalloch, set up a claim to them, as being heir-male of the body of William of Glenfalloch—the substitute named in the deed of entail of 1775. If the respondent's father was rightfully retoured in March 1812 heir of tail and provision to John Breadalbane Campbell, then it is certain that the appellant cannot be, as he claims to be, heir-male of the body of William of Glenfalloch, the substitute; but the appellant undertakes to show that this retour, and all which followed on it, was founded in error, that James Campbell never was married, that William John Lambe Campbell was not his lawful son, and consequently that he was not heir-male of the body of William of Glenfalloch. The question is whether the appellant succeeded in establishing that for which he so contends? The ground on which the appellant rests his claim is this:—He says that there are circumstances which show that James could not have been the husband of Eliza Maria, the woman with whom he lived as his wife, and who was the mother of William John Lambe Campbell, the respondent's father. She was, he says, in the year 1781 a married woman, the wife of one Christopher Ludlow; that James Campbell eloped with her in that year, and lived with her under the pretence that she was his wife, concealing from his friends and relatives the origin and nature of their connection; that in that year he went through a form of marriage with her at Edinburgh, but which had no operation whatever, as Christopher Ludlow was then alive; that, although Christopher Ludlow died in January 1784, there is no room for supposing that any marriage took place after that date, and so that the issue which resulted from this cohabitation were all illegitimate. He contends that these conclusions follow from the facts which he has established in the proof, and on certain rules of law on which he relies. I will first endeavour to satisfy myself as to the facts, and then will consider his propositions of law. Before doing so, however, I think it right to advert to the fact which in this inquiry must be constantly kept in view,—viz., that James must be taken to have lived and died a domiciled Scotchman. His domicile of origin was certainly Scotch, and I will endeavour to show presently that he retained that domicile to his death. The evidence of the appellant establishes very satisfactorily that, on the 5th of June 1776, Christopher Ludlow of Chipping-Sodbury, grocer, was married by license to Eliza Maria Blanchard, spinster. She was under age, and the marriage would therefore have been invalid without the consent of her father or guardian. In fact, there was the consent of a lady described as her grandmother and guardian, and I think that at this distance of time we should consider that to have been a valid consent. It is further proved that, on the 21st of May, in the following year, they had a son, baptised by the name of Daniel. Several members of the Ludlow family, advanced in life, have given evidence of a family reputation that this Eliza Maria, the wife of Christopher Ludlow, eloped with an officer named Campbell, leaving her child Daniel behind her. The suggestion is, that James Campbell, the father of William John Lambe Campbell, was the officer who so eloped with her. The evidence shows that this James was in the year 1780 a lieutenant in the 48th Regiment of Foot, and was stationed at Bristol in command of a

recruiting party during the year 1780, and certainly as late as the 29th of January 1781. On the 12th of March 1781 he is shown to have been engaged on the same service at Glasgow, and it is suggested that he is the officer of the name of Campbell who is said to have eloped with the wife of Christopher Ludlow, and that the elopement must have taken place in 1780, or early in the year 1781, before he moved from Bristol to Glasgow. It must be observed that Bristol is only about 14 miles from Sodbury, where Christopher Ludlow lived, and we may well believe that there would be intercourse between the two places. The reputation as to the elopement does not fix the date, save only that it is said to have occurred when the son Daniel was very young. One witness speaks of him as having been a baby, another as in his cradle; in fact, he was between three and four years old at the end of 1780, which sufficiently tallies with the reputation. The witnesses say that they heard that Christopher was so cut up by the elopement of his wife that he went to America. Now, it appears from the books of the Corporation of Surgeons that on the 21st of June 1781 a person named Christopher Ludlow passed his examination as mate to an army hospital; and in the following month of July we find from the books of the War Office that a sum of £23 was paid to him on his going out as an hospital mate to New York, where a part of the British army was then serving. All this makes it tolerably clear that the elopement must have taken place either in 1780 or early in 1781. In the following year, 1782, James Campbell went out and joined his regiment in Nova Scotia, where he remained till after the peace. In November 1783 he sailed from Halifax, with his company, on board the Prince of Orange transport, on his return to this country, and was disembarked at Plymouth on the 17th of February 1784; and there are documents showing clearly that from that date he remained with his regiment until the 19th of April 1785, when he sold his commission and quitted the army. There is no direct evidence to show that Mrs Ludlow accompanied him to Nova Scotia, but if she did not, she must probably have followed him there very speedily, for there is a letter of Colin to his brother Duncan, dated Glasgow, 7th September 1783, from which it is clear that James was then living with a woman as being, and who apparently was received as, his wife; and when he returned in the Prince of Orange transport there were amongst the persons victualled on board the ship seven women, the first being named Eliza Campbell. He quitted the army, as I have mentioned, on the 19th of April 1785; and there is an entry in the parish register of Stoke Damarel, dated the 30th of May 1785, of the baptism of Eliza Marlborough, daughter of James and Eliza Maria Campbell, lieutenant in the 40th Regiment. The appellant relies strongly on all this evidence as showing that James Campbell was the officer who eloped with Eliza Maria Ludlow, that he passed her off as his wife in Nova Scotia, and obtained a passage for her back to England in a Government transport as his wife. It is certain that during this period, up to the month of January 1784, she could not, if she was the person who had eloped from her husband, Christopher Ludlow, have been the wife of James Campbell, for Christopher Ludlow, her husband, was still alive. He did not die till January 1784. His death is mentioned in the *Bristol Journal* of the 3d of January, and his will, dated the 24th June 1783, was proved by his father

in the Prerogative Court of Canterbury on the 26th of February 1784. If the evidence as to the identity of Mrs Ludlow and the person who afterwards was treated as being the wife of James Campbell had been confident of the facts I have already adverted to, I should not have thought it altogether satisfactory; but coupled with all which happened after the death of James, I think her identity is established beyond any fair doubt. There is very little evidence as to where James and Eliza Maria were living between the birth of their daughter at Davenport in May 1785, and his joining the Breadalbane Fencibles in 1793. There can be little or no doubt that he was with his parents at Glenfalloch in September 1785, for there was at that time a severe flood which did great damage, and the tradition is that James was active in saving some of the sheep, which would otherwise have been lost. Moreover, in the month of October 1786, a London tailor, named Cooper, brought an action against him for a sum of nine guineas alleged to be due for "cloaths" supplied to him in August 1785; and the summons was served at Glenfalloch, which leads strongly to the inference that he had been residing, or at all events staying, there when the goods had been supplied. The probability, however, is that he was not living there permanently, for in 1787 and 1789 two of his children, William John Lambe and Susan Sophia, were baptised at Gateshead. The greatest probability, therefore, is, that at that time they were living there. But what were the circumstances which brought them there, or how long they were there, does not appear. There is also the evidence of Mrs Sutton, a daughter of Eliza Maria, another child of James, that her mother used to say that she was born in the barracks at Newcastle. These circumstances were relied on by the appellant in showing, or tending to show, that England and not Scotland was the domicile of James. But giving them their full weight, they altogether fail to satisfy me that this is a fair inference. The domicile of origin was certainly Scotch, and it is on those who allege a change to show that there was an intention to make England the permanent home to the exclusion of Scotland. The evidence is far too weak to warrant such a conclusion. While James was serving in England—and his poverty and destitution may well account for his having for many years led a wandering and unsettled life—there is nothing to show that he had any business or occupation at Gateshead; and what Mrs Sutton's mother told her—namely, that she was born in the barracks at Newcastle—rather leads to the supposition that, though he had sold his commission in the Army, he might have succeeded in getting some employment which enabled him to have quarters in the barracks. Be this as it may, the evidence is altogether insufficient to prove any change of domicile between 1785 and 1793; and from the latter date the domicile was always in Scotland, either at Fisherrow, which is part of Musselburgh, or in Edinburgh. In November 1806 James died in Scotland, and Eliza Maria then came to London and established herself there as her home. Daniel, the child of Christopher Ludlow, had been brought up by his grandfather, and had become a medical man in London. I do not think it necessary to go into the evidence in detail which shows that he was there recognised by Eliza Maria as being her child. He was treated as her child by what she described as her first marriage, and therefore as being the half-brother of

William James Lambe Campbell, her only surviving son by James Campbell. The appellant properly relies on this subsequent recognition of Daniel as clearing up all doubt which might have been felt on the evidence connecting her with the elopement; it seems to me to put that part of the case beyond doubt. The facts of the case, therefore, as represented by the appellant are these:—In 1780 or 1781 James Campbell eloped with Eliza Maria, the wife of Christopher Ludlow, and lived with her in adultery, passing her off as being, and leading his relatives and friends to believe, that she was his wife. This system of deception continues up to his death; and though in January 1784 Christopher Ludlow died, and the intercourse therefore ceased to be adulterous, yet the appellant contends there was no change of circumstances which justifies the belief that any marriage ever took place between them after marriage had become possible. That the connection was, as alleged by the appellant, adulterous in its origin seems to me to be satisfactorily made out; and the only question is whether there are circumstances which ought to lead your Lordships to concur with the decision of the great majority of the Judges below, in the conclusion that a lawful marriage ought to be presumed to have taken place after it had become possible by the death of Christopher Ludlow in January 1784? It was properly argued at your Lordships' bar, and not, as I understood the counsel for the respondent, disputed, that marriage can only be contracted in Scotland by the mutual agreement of both parties to become husband and wife. There is, however, no particular form or ceremony by which such agreement must be manifested, except, indeed, that the parties must, in order to constitute a marriage, be in the presence of each other when the agreement is entered into, and it must be an agreement to become man and wife immediately from the time when the mutual consent is given. I do not understand the law as even requiring the presence of a witness as being essential to the validity of a marriage, though without a witness it may be difficult to establish it. The great facility which the law of Scotland affords for contracting marriage has given rise to rules and principles which have been sometimes considered peculiar to that law. By the law of England, and I presume of all other Christian countries, where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a *prima facie* presumption that they really are and have been what they profess to be. So it is in Scotland; but as marriage there is not necessarily celebrated in public, or recorded, it is much more probable than it would be in England that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide after the death of parents on the legitimacy of children must much oftener than in England have to rely solely on the *prima facie* evidence afforded by the conduct of the parties towards one another, and of their friends and neighbours towards them. This sort of evidence is spoken of in Scotland as habit and repute. I agree, however, with the argument of the appellant, speaking with deference to those who think otherwise, that this is not an accurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties, and of their friends and neighbours—in other words, habit and repute—may afford strong, and in Scotland (attending to the laws of marriage

there existing) unanswerable evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that habit and repute in any case make the marriage: repute can obviously have no such effect. It is, perhaps, less inaccurate to speak of habit creating marriage if by the word habit we are to understand the daily acts of persons living together, which imply that they consider each other as man and wife, and may be taken to imply an agreement to be what they represent themselves to be. It seems to me, however, even here, to be an improper use of the word to say that it makes marriage. The distinction is perhaps one rather of words than of substance, but I prefer to say that habit and repute afford by the law of Scotland, as, indeed, of all countries, evidence of marriage always strong, and in Scotland, unless met by counter evidence, generally conclusive. In the present case, the evidence of habit and repute would have established conclusively to my mind the title of the respondent, if there had been no evidence of anything prior to 1793. The question is as to the effect of the evidence establishing the adulterous origin of the connection between James Campbell and Eliza Maria Ludlow. I cannot treat this as a mere question of law at all. What any tribunal can do which has to deal with such a question is to look at all the circumstances of the case, and consider whether they do or do not lead to the conclusion that the parties did contract marriage at some time after it was possible for them to marry. Now here, as Christopher Ludlow died in January 1784, there was nothing to prevent James Campbell from contracting marriage with his widow after that date. I cannot say that the circumstance, that they passed themselves off as man and wife when they were not so, leads me to think there was even an improbability that they would marry when it was possible they could contract that relation with each other. He had the strongest motives for desiring to be married to her, and none operating in a contrary direction. The hypothesis is, that though he certainly desired that the world should suppose him to be her husband, he might not desire really to be so, that he might wish to be able at any time to get rid of the connection. To such a suggestion I can only say that it is one which may always be made in the case of persons who have passed their lives as husband and wife, but as to whom there is no direct evidence when and where the marriage was entered into—persons, in short, who, in the language of Scotch law, are said to be married persons only by habit and repute, and it is a suggestion to which it is very dangerous to listen after the deaths of those who, if it had been made in their lifetime, or the lifetime of either of them, might have been able to clear up all doubts. Even if, at an earlier stage of their connection, James Campbell might have been desirous of getting released from it, it is very difficult to suppose he could have had such a wish when she had given birth to many children, all of whom were born when they might have been what he certainly represented them to be—his legitimate children. How often do we find that when a man has been living with a woman as his mistress, under the impression that he will be glad to get rid of the connection at some future time, and to be at liberty to contract marriage with another, if the conduct of the woman has been irreproachable except in her connection with him, and he has lived

long with her, and more especially if he has a family by her, his feelings become bound up with hers, and there is hardly any sacrifice he would not make to be able to convert the illicit into a lawful connection—to cause the woman to have been his wife from the first, and to remove from his offspring the taint of bastardy? In England this cannot be done. In Scotland it may. I will not on this occasion make even a single observation on the policy of the Scotch marriage law, but that law being as it is, the presumption seems to me very strong, almost irresistible, on all the evidence before us, that during the twenty-two years after the death of Christopher Ludlow, during which Eliza Maria lived with James Campbell as his wife, and bore him six children, and was received and treated as his wife by his family and friends, and so far as appears by all who knew him, he must have desired to make her his wife, and his children legitimate, and this he might have done at any time during that long period. I must add, that the circumstance of his having introduced her as his wife during the life of Christopher Ludlow, when she certainly was not his wife, does not lead me to any conclusion different from that at which I should have arrived if that had not been the case. I am not sure that it does not strengthen rather than weaken the presumption of actual marriage. It shows a strong desire that she should occupy a respectable position in society, and it is hard, therefore, to believe that, having for above twenty-two years the daily opportunity of giving her the status which, even when she did not rightfully enjoy it, he was anxious to have it believed that she had acquired, he should not have profited by the law which put it in his power to confer it upon her. As to the letter written to the War Office by Eliza Blanchard, I think that the evidence preponderates in favour of the conclusion that such a ceremony of marriage did take place in 1781, though the parties must have known it was invalid. But assuming such a ceremony to have been gone through, the question still remains behind—whether its existence is sufficient to rebut what would, I think, have been, if it had not existed, the irresistible presumption of marriage afforded by the rest of the evidence. I think that this bigamous marriage ceremony did not prevent parties to it from afterwards becoming husband and wife if they were minded so to do. The letter is but hearsay evidence, and can only be looked to as a declaration by a member of the family made in a matter of pedigree in connection with all the other evidence. Its effect is to show that she was not a member of the family, and, consequently, not a person whose declarations could be received. I have some doubt whether this letter, if objected to, could have been received in evidence; but I mention the doubt only to prevent its reception being supposed to have received the sanction of the House. I shall deal with it as evidence in the cause. It was a declaration made for a special object behind the back of all parties interested in disputing or sustaining it. Nothing could be more natural than that the woman who had for a quarter of a century passed as the wife of James Campbell should, after his death, for the sake of her own honour and that of her children, wish it to be believed that her marriage preceded the time when she lived with him as his wife. These considerations lead me to the conclusion that the inference of marriage afforded by the evidence is not removed by the fact that, after the death of the hus-

band, the widow, to effect a particular object, represented the marriage to have taken place at a different date and in a different manner from that which really gave it efficiency. I cannot but infer, from all which occurred with respect to the mode in which these persons lived together, not only that they desired to be husband and wife, but also that they believed themselves to be so. In such circumstances, we ought to infer after their deaths that sometime during the long period during which they lived together, and in some manner, however informal, they did that which they could do without any difficulty,—namely, enter into an agreement to be or become married persons, and so to acquire for themselves and their children the status which the evidence satisfies me they wished to enjoy. His Lordship then examined the two authorities, relied on by the appellants, of *Cunningham* and *Lapsley*. As to the case of *Cunningham*, it was not a decision that a connection which in its origin was only that of man and woman, could not become the connection of husband and wife. Where the connection is in its origin illicit, more evidence or different evidence may or may not be necessary to satisfy a court that marriage has been contracted. Still, his Lordship continued, it is a matter which must always depend on the particular facts in proof, and I cannot understand Lord Eldon as deciding more than that. In the *Balbougie* case, there were not such facts as would justify the inference. For these reasons I think the interlocutor of the Court of Session ought to be affirmed.

LORD WESTBURY said nearly all the observations he had intended to make on this case had been anticipated by his noble and learned friend. Nevertheless, in so exceptional a case he was unwilling to dismiss it without a few remarks. His remarks were substantially in accordance with the previous judgments.

LORD COLONSAY said he had had an opportunity when sitting as one of the Judges in the Court below to express his opinion fully on the facts as well as the law, and after hearing the able arguments at the bar, and materially considering the whole, he found nothing to induce him to alter his opinion, and therefore he entirely concurred in what had been already said.

MR ANDERSON, Q.C., for the appellant, wished, before the question was put, to make an observation about costs, inasmuch as the appellant had scarcely any alternative but to come to their Lordship's Bar.

LORD WESTBURY interrupted the learned counsel, and said it was a mischievous practice to have a second argument about costs, and hoped their Lordships would not encourage it.

THE LORD CHANCELLOR—I was about to move that the interlocutor should be affirmed; and as I see no reason for departing from the usual rule, that it be affirmed with costs.

Affirmed with costs.

Agent for Appellant—HENRY BUCHAN, S.S.C.

Agents for Respondent—ADAM, KIRK, & BOBERTSON, W.S.

Tuesday, July 30.

LONGWORTH v. YELVERTON.

(In Court of Session, 10th March 1865, 3 Macph., p. 645.)

Process—Declarator of Marriage—Reference to Oath.
Reference to oath in declarator of marriage

against a party who had, previous to the raising of the action, married another woman in *facie ecclesie*, and after judgment of absolvitor by the House of Lords had been applied, refused. (Aff. C. S.) Opinion, per LORD CHANCELLOR, that since the Act 11 Geo. IV. and 1 Will. IV., c. 69, reference to oath is incompetent in a declarator of marriage. Opinions, that, supposing reference to oath to be competent in declarators of marriage, it ought not to be allowed where the interests of third parties would be prejudiced.

This was an appeal against a judgment of the First Division of the Court of Session, whereby the Court refused to sustain a reference to oath of the respondent, Major Yelverton, in an action of declarator of marriage against him at the instance of the appellant, Maria Theresa Longworth.

The appellant appeared in person at the Bar of the House to conduct her appeal.

J. CAMPBELL SMITH also for her.

ATTORNEY-GENERAL (ROLT), Q.C., and ANDERSON, Q.C., for respondent.

LORD CHANCELLOR—This is an appeal from the interlocutor of the First Division of the Court of Session refusing to sustain a reference to the oath of the respondent upon a minute of reference tendered by the appellant for the purpose, and finding the appellant liable to the respondent in the expenses incurred by him since the 12th December 1864, the date of lodging the minute of reference to oath. The proceedings which had taken place in the case, which was a conjunct action of declarator of marriage and putting to silence, before the proposed reference to oath, must be shortly recalled to your Lordships' attention. The two actions having been conjoined and debated before the Lord Ordinary, his Lordship, on the 3d of July 1862, issued an interlocutor, finding that in the action of declarator of marriage the appellant had not instructed that she was the wife of the respondent, and assailing the respondent from the conclusions of the action, and in the action of declarator of freedom and putting to silence declaring against the appellant. The appellant presented to the First Division of the Court of Session a reclaiming note against the above judgment of the Lord Ordinary, and on the 19th December 1862, the Lords pronounced an interlocutor recalling the interlocutor of the Lord Ordinary, and in the action of declarator of marriage finding that the appellant had instructed that she was the wife of the respondent; and in the action of declarator of freedom and putting to silence assailing the appellant from that conclusion of the said action; and this interlocutor was brought by appeal to this House, and after long argument at the Bar, your Lordships ordered that the interlocutor complained of be reversed, and declared that the Inner-House (First Division) of the Court of Session ought to have refused the reclaiming note of the present appellant against the interlocutor of the Lord Ordinary of the 3d July 1862, and to have adhered to the said interlocutor of the Lord Ordinary, save as to damages and expenses; and further ordered that the case be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with the declaration, direction, and judgment; which was opposed on the part of the appellant, for whom a note was lodged praying the Court to suspend consideration of the petition to apply the judgment in the meantime, and craving leave to put in a condescendence of *res noviter veniens ad notitiam*. The