THE SCOTTISH LAW REPORTER.

THIS Work is mainly a republication from the *Edinburgh Courant* of Cases before the Supreme Courts of Scotland, and of Scotch Cases appealed to the House of Lords. The Reports are prepared by Counsel of eminence at the Scotch and English Bars, with the assistance of professional Shorthand Writers. They are meant to supply a want long experienced by the Legal Profession and the Public, and will present, in an immediate and collected form, trustworthy reports of the business of the Courts. To students of law and others in course of training for the legal profession they will be found to form a useful manual for reference.

On the Public generally, and especially the Mercantile community, the "Law Reporter," it is hoped, will confer an important benefit. Among the numerous transactions which every day arise among business men, difficulties are constantly occurring as to the state of the law affecting these transactions. A column will accordingly be devoted to Correspondence on Points of Law.

The Reports will include Justiciary Cases before the High Court and Circuits, and Jury Trials so far as involving points of law. Important Cases before the Sheriff Courts will occasionally be given.

After the publication of Part I. the "Scottish Law Reporter" will continue to be published in Weekly Numbers every Wednesday, price 2d.; and in Monthly Parts, price 9d. Part I. will contain a full report of the proceedings in the Breadalbane Succession Case.

Subscribers will be supplied either with the Weekly Numbers or Monthly Parts by forwarding their names and Addresses to

W. P. NIMMO, Publisher, Edinburgh; or any Bookseller in Town or Country.

Copies delivered in town free of additional charge.

COURT OF SESSION.

Wednesday, Nov. 1, 1865.

FIRST DIVISION.

THE BREADALBANE SUCCESSION.

CONJOINED ADVOCATIONS—C. W. CAMPBELL *v.* J. A. G. CAMPBELL, BOTH CLAIMING TO BE EARL OF BREADALBANE.

Counsel for the Reclaimer—The Lord Advocate, Mr Patton, Mr Fraser, and Mr Gifford. Agent—Mr Henry Buchan, S.S.C.

Counsel for the Respondent—The Solicitor-General, Mr Clark, Mr Adam, and Mr Berry. Agents—Messrs Adams, Kirk, & Robertson, W.S.

These were competing petitions for service addressed to the Sheriff of Chancery by Charles William Campbell, Lieutenant in the 19th Regiment of Bengal Cavalry (hereinafter called the advocator), and John Alexander Gavin Campbell of Glenfalloch (hereinafter called the respondent). The petitions had been advocated to the Court of Session. Both petitions prayed that the petitioner should be served heir of tailzie and provision of the late Marquess of Breadalbane in the separate entailed estates of Breadalbane and Inverarderan.

A record was made up by separate condescendences and answers. The following were the material averments of the parties:—

The advocator averred that on the death of John, second Marquess and 5th Earl of Breadalbane, on 8th November 1862, without heirs male of his body, the succession to the estates devolved upon the heirs male of the body of William Campbell of Glenfalloch, who deid in 1791. The said William Campbell had seven sons—viz. (1) Colin, who died in 1806, leaving one son who died in 1807, also leaving one son who died in 1812; (2) James, who died in 1806, without leaving any lawful issue; (3) Duncan, who died unmarried in 1810; (4) Archibald, who died in 1806, without leaving any lawful heirs male of his body; (5) William, who died unmarried in 1791; (6), John, who died in 1823, leaving three sons, the eldest of whom was Charles William Campbell, who died in 1861, survived by the advocator, his eldest son, who was thus the nearest and lawful heir male of the said William Campbell of Glenfalloch, his great grandfather. The seventh son was younger than John, and his existence was therefore immaterial in the present question.

The respondent averred that he was the son of William John Lambe Campbell, formerly of Glenfalloch, who was the son of James Campbell, William Campbell of Glenfalloch's second son, by a marriage between the said James Campbell and Elizabeth Maria Blanchard. He was unable to condescend on the date of the said marriage, but averred that his parents were lawfully married previous to the year 1785. In that year the said James Campbell and Elizabeth Maria Blanchard went to reside at Glenfalloch, then occupied by his father's family. They lived and cohabited together there as man and wife in the year 1785 and subsequently, and were habit and repute married persons, and as such were received and treated by the family at Glenfalloch, and by their relations and friends and all who knew them. In the year 1792 or 1793 the said

James Campbell received a commission in the Breadalbane Fencibles, and he remained with that regiment until it was disbanded in 1799. During this time the regiment, or detachments thereof, were stationed at Forfar, Aberdeen, Montrose, Banff, Nairn, Fort-George, Musselburgh, Falkirk, Glasgow, Ayr, and other places in Scotland, at all of which places James Campbell and Blanchard resided together as husband and wife, and were habit and repute married persons. When the "Fencibles" were disbanded, James Campbell was appointed to the "Cambrian Rangers." He went to Gibraltar with his regiment in 1800, leaving Blanchard and his children at Musselburgh. While abroad he corresponded with her as his wife, and when the regiment was disbanded in 1802, he joined her and his family at Edinburgh, where he continued to live and cohabit with her as his lawful wife till his death in October 1806. After his death Blanchard was universally recognised as his widow, and as his widow she administered to his estate and received a pension from Government. For twenty years and upwards, prior to his death in 1806, the said James Campbell and Elizabeth Maria Blanchard were habit and repute married persons. They were received in society as lawfully married persons, and as such visited, and were visited by, their relatives and friends. During the lifetime of the said James Campbell the fact and validity of his marriage was never questioned, and no doubt was expressed on the subject until this competition arose in the year 1862.

The respondent did not dispute that the advocator was the lawful descendant of John Campbell, the sixth son of William Campbell of Glenfalloch.

The advocator averred, in reference to the alleged marriage of James Campbell and Elizabeth Maria Blanchard, that after James Campbell's death in 1806—namely, on 23d June 1807, Blanchard claimed the character of his widow in a letter which she addressed to the War Office for pecuniary assistance, and which contained the following statement: —"I am the Widow of Captn James Campbell, late Qr-Master in the 1st Batn of the Breadalbane Fencibles, at the reduction of which he got a Company in the Cambrian Rangers, and when that Regt was reduced, from ill health he was rendered unfit to enter again into His Majesty's Service, and on the 24th October 1806 my husband died insolvent, and left me with three children without the smallest means of support. I apply'd to the Half-Pay Agent respecting the Widows' Pension, and have made oath before a Magistrate, but, as I unfortunately lost my marriage lines in America, I am enform'd it cannot be procured. My husband was Insign and Lieut in the 40th Regt of Foot during the war with that countrey. At the end of the year 1780 he came to Edinburgh to recruit, and in Sept 1782 I was married to Mr Campbell in Edinburgh, by Mr MacGregor, the Galic Minister (who is also dead), as is Insign Wm. Willox of the 40th, who was the witness to our marriage; and the June following we went to America in the fleet that took out the preliminarys of peace 25 years ago. The present Galic Minister have been wrote to, and he says that he got no register from any of his predecessors. I have administer'd at Doctors Commons for four months' pay due to my husband at his death, and I have a power of Attorney which he sent me from Gibralter at the time he was in the Cambrians Rangers. I beg, sir, you will excuse my being thus perticular, as my motive is to obviate any doubts of my being Mr Campbell's lawful wife."

The advocator further averred that the statement in this letter was 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 Blanchard in or about September 1782. (This date was altered after the record was closed, with the authority of the Court, to 1781.) This was the only marriage, real or pretended, which was ever celebrated or contracted betwixt these persons. After its alleged celebration, and sometime in the year 1783 (altered to 1782), they went to America, where they remained for about a year, and then returned to Great Britain. James Campbell left the 40th Regiment, in which he was a Lieutenant, on or about 19th April 1785, and took up his residence in England, in which country he was domiciled. He resided for a time in Plymouth, and afterwards in Gateshead or Newcastle. When so domiciled in England there were several children born to him there by Blanchard. In particular, William John Lambe Campbell, the respondent's father, was so born in Gateshead in 1788. His parents were then unmarried persons. According to the law of England, the said William John Lambe Campbell was illegitimate. He could not be legitimated by any subsequent marriage between his alleged parents.

The advocator also averred that at the time of the said ceremony of marriage in 1781, E. M. Blanchard was a married woman, and her husband was then alive. She was married to Christopher Ludlow of Chipping-Sodbury, Gloucestershire, in 1776. He survived till 20th January 1784. The pretended marriage between Campbell and Blanchard in 1781 was therefore null and void. In short, Blanchard eloped from her husband with James Campbell, and the pretended marriage was a mere screen to cover their adulterous intercourse. There never was any marriage betwixt Campbell and Blanchard subsequent to the pretended ceremony of 1781.

The respondent on record denied the advocator's averments as to the marriage to Ludlow and its subsistence until 1784, but at the debate they were not questioned. He averred, however, that James Campbell was by birth a domiciled Scotchman, and that he never changed his domicile, which continued to be in Scotland till his death.

The competition betwixt the parties thus turned on the questions whether James Campbell and E. M. Blanchard were lawfully married, and whether W. J. L. Campbell was their lawful son. If these questions were answered in the affirmative, then the respondent was entitled to succeed. If in the negative, it was equally clear that the advocator was entitled to succeed.

The advocator's pleas in law were:— (1) That on the death of the late Marquess the succession devolved on the heirs male of the body of William Campbell of Glenfalloch; (2) That he was nearest and lawful heir male; (3) That the respondent was not; (4) That the respondent's alleged grandfather and grandmother never having been legally married, his alleged father, W. J. L. Campbell, was illegitimate, and could not transmit to him any legal right of succession; (5) That the said W. J. L. Campbell having been born a bastard in England where his father was domiciled, could not afterwards be legitimated; and (6) That he, the advocator, should be served heir as prayed for, and the competing petition should be refused.

The respondent pleaded generally that on proof of his pedigree as condescended on, he should be served heir in terms of the prayer of his petition.

The record having been closed, Lord Barcaple allowed to both parties a proof of their respective averments, and to each party a conjunct probation. A most voluminous proof was thereafter led on commission.

On 13th July 1865, Lord Barcaple pronounced an interlocutor, after hearing parties on the proof and the whole case, finding that the respondent was nearest and lawful heir of tailzie and provision in special of the late Marquess in the lands and others described in the petitions advocated; dismissing the advocator's petition for service, with expenses; and remitting to the Sheriff of Chancery with instructions to pronounce decree serving the respondent in terms of his petition for service.

His Lordship explained the grounds of his judgment in a long note to his interlocutor. He held it to be proved that in 1781 James Campbell eloped with E. M. Blanchard when she was a married woman, her husband Ludlow not having died until

1784. He held, therefore, that Campbell and she lived in adultery until Ludlow's death. In reference to the advocator's contention that this adulterous cohabitation formed, by the law of Scotland, a legal bar to any subsequent marriage betwixt the parties, he held that it was not well founded, no such rule being established by the Scotch Act 1660, c. 16, the only statute on the subject. That statute only prohibits the marriage of adulterers where a divorce has been obtained, which was not the case in this instance. The canon law was founded on by the advocator in support of his contention, but the Act of 1660 put the matter on a different footing. His Lordship further held that the respondent's case of marriage, proved by cohabitation as husband and wife and habit and repute, was complete as regards the period after the parties settled in Scotland in 1793. It was maintained by the advocator that the connection betwixt the parties having been illicit at its commencement, it must be held to have continued to be of that character; and further, that any repute which may have existed was to be attributed to the alleged ceremony of marriage in 1781. In support of this argument he founded on the cases of Cunningham *v.* Cunningham (the Balbougie case), 2 Dow, 482, and Lapsley *v.* Grierson, 8 D. 34, and 20, *Scottish Jurist*, 360. His Lordship held that this argument could not be supported unless it could be shown that such habit and repute as is proved to have existed commenced before the death of Ludlow. He also held that the ceremony of 1781 had not been proved. The statement of Blanchard on the subject, in her letter to the War Office in 1807, was not sufficiently corroborated, and was not reliable, because when she made it she may have thought it desirable to assign to her marriage a date prior to her going with Campbell to America. His Lordship also held that, whether the ceremony took place or not, there was such a change in the nature of the cohabitation after 1793, as to take the case out of the principle of the cases founded on by the advocator. The view which his Lordship thus took of the evidence implied that it was not proved, and could not be presumed, that when the respondent's father was born in 1788, his parents were married. But he held that the respondent's father was legitimised by the subsequent marriage of his parents; and, as was essential to this finding, he held that in 1788 James Campbell was a domiciled Scotchman, and that therefore there was room for the application of the law of legitimation *per subsequens matrimonium*, which there would not have been if, in 1788, his domicile had been in England.

These were the grounds on which Lord Barcaple rested his judgment. But he also stated this other and separate view of the case. There was a general presumption in favour of a marriage arising out of a long and uninterrupted reputation that the parties were married and their issue legitimate. This presumption can only be overcome by evidence disproving the reputed and presumed marriage, or setting up an opposite presumption of greater validity. In the present case the reputation and possession of *status* were as strong as could well be conceived; and although it was unnecessary to decide upon this separate view of the case, his Lordship expressed an opinion that the advocator had not succeeded in overcoming the presumption in favour of the marriage.

The advocator having reclaimed against this interlocutor, the debate commenced to-day.

Mr Fraser said he had the honour to appear before their Lordships on behalf of the reclaimer and advocator, Mr Campbell of Boreland. Mr Campbell claimed to be served nearest and lawful heir of the late Marquis of Breadalbane. He had presented two petitions to the Sheriff in Chancery for the purpose of being served in two separate and distinct entails—the entails of Breadalbane and Inverarderan; while, on the other hand, the respondent, Mr Campbell of Glenfalloch, had presented two petitions to be served to the same title. These two petitions were advocated to this Court, and had been conjoined, and voluminous proof had been led under the conjoined records. The two records made up were substantially the same, and he would therefore refer only to the Breadalbane record. In stating the case for the reclaimer against the interlocutor of the Lord Ordinary, he would have a very great extent of ground to travel over both of fact and of law; but, at the same time, he thought he would be enabled to condense his observations very much in consequence of the discussion which took place in the Outer House, from which they saw what were the really disputed matters of fact between the parties. The real question at issue was, which of these two men was the legitimate descendent of William Campbell of Glenfalloch, who died in the year 1791. It was as the heir-male of the body of William Campbell that the reclaimer rested his claim. William had seven sons—the eldest Colin, the second James, the third Duncan, the fourth Archibald, the fifth William, and the sixth John. It was unnecessary to say anything about the seventh. The reclaimer held that he was the grandson of John. There was no doubt as to his legitimacy; and on that both parties were agreed. Colin, Duncan, Archibald, and William had failed, and the question now was, was the respondent, Mr Campbell of Glenfalloch, the legitimate descendent of James? The question was, was his father, William J. L. Campbell, born in lawful wedlock, and, if not, was he legitimised *per subsequens matrimonium?* The first and most singular thing in this case was, that the case stated on the record by the respondent was a totally different one from that which the Lord Ordinary had found to be proved. The case stated in the record was that the father of the respondent was born in Edinburgh. He did not state the date of his birth, but it was proved by the baptismal register that it was 1788; but the respondent averred on the record that his father's father and mother were married before 1785, and, consequently, that he was born in lawful wedlock. That was the case put by the respondent; but what was the case the Lord Ordinary had found to be proved? It was that he was born in bastardy, and that there never was a marriage between his parents for at least five years after his birth, and that there was no marriage whatever until 1793. His learned friends were consistent with the record, but it did not give materials which the Lord Ordinary had found to be true, and it was contrary to the Judicature Act to pronounce any such judgment. The advocator averred that William J. L. Campbell, the respondent's father, was born of a connection between his father, James Campbell, and a woman called Elizabeth Blanchard—that that connection was an illicit connection—adulterous in its origin for three years, and illicit to the last. This woman Blanchard was the wife of Ludlow, a grocer at Chipping-Sodbury, near Bristol, who lived until 1784. A most important thing in this case was to ascertain in what capacity they associated together. Up to this stage the findings of the Lord Ordinary were correct, but he left facts here for fancies, and entered the domain of ingenious speculation in his anxious desire to uphold the legitimacy of William Campbell. After Christopher Ludlow had died, let them see what James Campbell and Elizabeth Blanchard did. Here he had an alternative case—that these parties entered into an ineffectual ceremony of marriage in the month of September 1781 at Edinburgh, while Christopher Ludlow was still alive. The Lord Ordinary had said that had not been proved. The alternative case was, that during these three years these parties held themselves out as married persons, and that the repute which followed was a repute based on that false representation. He thought the Lord Ordinary had not sufficiently appreciated the importance of that point. In the whole of his most elaborate note he could not find one single distinct enunciation of what he thought by the law of Scotland proved a marriage by habit and repute. His Lordship appeared to be afraid to state his opinion of what the law was; but he (Mr

Fraser) maintained this as a clear and incontrovertible proposition, that if the origin of the connection was illicit—still more if it was a connection that began in crime—there was no presumption there was a marriage, however long, by repute; and it was indispensable on the part of the respondent not to oppose their presumption by a presumption, but to oppose the presumption that a connection beginning in crime continued in the same way by evidence of an actual marriage. He now came to the debateable question—Was there a marriage between Blanchard and Campbell in 1781? The first piece of evidence was the letter, often quoted in previous discussions, which was written by Blanchard in 1807, on the death of Mr Campbell, to the War Office, in which she referred to her marriage in 1781. The Lord Ordinary said that letter was not corroborated; second, that she had an interest to antedate the period of her marriage; thirdly, that these parties would not have gone through the ceremony, because it would have been bigamy; and fourthly, that there was no register of the marriage now extant. Mr Fraser then pointed out several circumstances which went to corroborate and show the genuineness of Eliza Blanchard's letter:—(1.) The marriage was said to have taken place in Edinburgh in September 1781, and it was proved that the parties were then in Edinburgh. (2.) The clergyman was said to have been Mr M'Gregor, of the Gaelic Church, and the extracts from the Edinburgh Directory proved that there was then such a clergyman in Edinburgh. This fact could have been known to Blanchard only from her marriage by him, as she had never been in Scotland before 1781, and she was only in it then for a short time. (3.) The letter stated that Ensign Willox was the witness at the marriage, and there was abundant evidence that there was an officer of that name in Campbell's regiment in 1781. (4.) The letter, which was not written until 1807, stated that Campbell and Blanchard went to America in June, after their marriage, with the fleet that took out the preliminaries of peace. This date was also proved to be correct. He then entered into details regarding the departure of Blanchard and Campbell to America about the commencement of their cohabitation, and went on to remark that one of the most singular things stated by the Lord Ordinary was that during the period these two people lived in America they lived together not as reputed husband and wife, and were not cohabiting as husband and wife, but as keeper and mistress. What induced that he was totally at a loss to comprehend. This was a most important part of the case, because, if it were true that the repute began while Christopher Ludlow was still in life, the repute was worth nothing, though continued to the death of James Campbell, unless it was proved on the other side that there was actual marriage at the time stated by his learned friends. It must not be left to presumption. To conclude, as the Lord Ordinary did, that she was regarded as mistress, was contrary to the whole facts of the case. She came home to England bearing the name of Mrs Elizabeth Campbell; and that itself, in the absence of explanation, would be conclusive of the footing on which they lived. But that was not all. They had a most important letter of Colin Campbell, written in Glasgow at the time the parties were in Halifax. Colin, writing to his brother Duncan, said this:—"I had a letter from James. He and Mrs Campbell are doing well. All people speak well of her." He must have got that information of good repute otherwise than through James. Then this woman was treated and spoken well of by his brother officers as his wife. Would they have associated with a keep-mistress of their brother officer's, and spoken to her as his wife? These times might have been loose enough, but he did not think they ever showed degradation like that. It was difficult at this distance of time to procure evidence on that matter, and what was the use of making the remark, as the Lord Ordinary did, that the best evidence of the repute in which she was held was that of the officers at Halifax. To suppose that they could get evidence on that matter was a ludicrous absurdity.

Lord DEAS—Does he say he expects that evidence?

Mr FRASER—That is the inference I put on his words; that the proper evidence would be the officers and their wives; and that there was no evidence she was received as a married woman, or attempted to pass off as such.

Lord DEAS—He does not say these people are alive?

Mr FRASER—He does not say that, but he says that is the proper evidence that should be given. Still more, as showing that that repute existed, and that they were recognised as married persons, he directed attention to a document prepared in 1786 by James' brother Archibald, who was a writer in Edinburgh, and appeared to have done his father's professional business, in which Glenfalloch excluded "the issue of James, his second son, by his present wife, on account of the uncertainty of her family or connections, which cannot be supposed respectable, *or in any degree proper*, as he has all along declined giving any further account than that she is his wife." Up to 1786, after their return from America, Blanchard had not been in Scotland, and there was no suggestion of a Scotch marriage. If ever there was a marriage at all in England it would have been registered.

Lord DEAS—Do you argue that there is no evidence of marriage in Scotland?

Mr FRASER—None, on the assumption of my learned friends.

Lord ARDMILLAN—You hold there is no evidence of a marriage except the one which you contend for?

Mr FRASER said he contended that the only marriage that there could have been at all was the ineffectual ceremony of 1781. He thought that was the turning point of the case. There was a recognition of the woman as the wife of Campbell from the period of the elopement all down, and the same existed then as at the time of James Campbell's death. He went to his relations and called her his wife, but refused to give any further information than the simple fact that he was married. Why that concealment if there was any other marriage than that of 1781?

Lord DEAS—This document does not speak of any concealment at that time.

Mr FRASER—No; but on the assumption of the other side, they say there was no marriage in 1781, but a marriage before 1785—not at the time Christopher Ludlow lived, but after his death, between January 1784 and the beginning of 1785.

Lord DEAS—You are speaking of what this document shows and represents. It shows he refused to represent something, but there is not a word about marriage.

Mr FRASER—It shows this, that he represented the woman as his wife in 1786.

Lord DEAS—That is all.

Mr FRASER—He declined giving any further account of her than that she was his wife. The important thing to me is this, that he represented her to be his wife in 1786, and that the repute had continued without interruption down to 1786 that these persons were married, and that that repute existed at the time when Christopher Ludlow was alive. To say that there was no corroboration of that marriage was to have overlooked and not to have appreciated the facts. He then proceeded to remark that there was no occasion for the woman not giving the true date of her marriage to the War Office if it took place about the time supposed by the Lord Ordinary.

Lord DEAS—What is the true date you speak about?

Mr FRASER—The Lord Ordinary found there was a marriage some time between 1793 and 1807, and if there was a marriage between these two dates she might have stated that.

Lord DEAS—Does he say there was a marriage between these two times on a particular date?

Mr FRASER—He gives no date.

LORD ARDMILLAN—What is the date of the marriage when fixed by cohabitation? How was she to fix the date for this kind of marriage to which the respondent alludes?

Mr FRASER—That is an important question, and I will state my views as to habit and repute. There must be a date to every marriage, although it be proved to be by cohabitation and habit and repute. It might be that a party averring a marriage was not required to aver the particular date. A son claiming legitimacy might not be required to aver the date of his parents' marriage, which he might not know; that might be very true, but the man and woman themselves, who knew the circumstances, must know the date of it. That was just one of the things he complained of in this interlocutor — that the Lord Ordinary had fallen into the gross mistake on this point of law, that cohabitation and habit and repute made a marriage, That was at the basis of his Lordship's interlocutor. Cohabitation and habit and repute were merely an indication that a marriage was entered into between the parties by formal consent being given. Elizabeth Blanchard knew when the formal consent was given of marriage between 1793 and 1807, and she would have stated it, and appealed to the cohabitation from that date in proof of it. But he said this, that the fact that she did not refer to any such formal consent or acknowledgment of change in their mode of living, indicated quite clearly that she relied on the old marriage of 1781. Therefore, whatever the repute which followed, it followed from that illegal ceremony which, he submitted to the Court, he had proved. As to the remark of the Lord Ordinary, that the parties would not have gone through the ceremony because it would have been bigamy, he stated that he did not think the parties took that into consideration. As to the want of a certificate, he adverted to the fact that that was accounted for by Blanchard writing to the War Office that she lost her certificate when she was at Halifax; and he alluded to the laxity with which the registers were then kept as sufficient to account for the marriage not being entered there. Mr Fraser then proceeded to trace the history of the parties from the time of their arrival in England in 1784, and maintained that from that time up to 1793, when Campbell joined the Breadalbane Fencibles, their domicile was in England, and that the inference was they had settled down in Newcastle. That he was, as the Lord Ordinary said, at Glenfalloch in 1785, it was not his purpose to dispute; but it was said that, besides being in Glenfalloch himself, he took his wife there in 1785 or 1786. It would have been very important if at that early period he took his wife there, and she were recognised by his friends and relations as his wife, for Christopher Ludlow was then dead; but he contended that that statement arose from a misapprehension on the part of the witnesses and those who read the evidence to that effect. From 1793, when Campbell joined the Fencibles, there was no account of how the parties lived in Scotland; but the Lord Ordinary represented that they were living as husband and wife, and referred to the fact that a child was born to them while the Fencibles were stationed at Inveresk. The Lord Ordinary told them that there was proof of habit and repute from the moment Campbell landed in Scotland, from 1793 down to the period of his death. and therefore came to Scotland with that repute, which began immediately, Now, repute, which began immediately on his coming in 1793, and continued until 1807, could not, as the Lord Ordinary found, prove marriage in Scotland, if the repute existed as firmly at the time of the arrival as at the time of the death. How could the Lord Ordinary assume that there was evidence of marriage here? Many things were founded upon as proving repute in Scotland. In regard to the law of the case, a question arose whether a lawful marriage could be entered into by the common law of Scotland between a man and a woman whom he had polluted in adultery. The Lord Ordinary had said there was not the slightest authority for that proposition in the law of Scotland, and that such an impediment existed only in cases where the marriage has followed a divorce. Therefore he said it was lawful, after the death of Christopher Ludlow, for Campbell and Blanchard to enter into marriage. He thought that the Lord Ordinary had not given the point the due consideration it deserved. Mr Fraser quoted a number of authorities in proof of the doctrine he had stated, that it was the canon Law of Scotland at the date of the Reformation, and it became the common law of Scotland on this subject, unless where expressly repealed. Then, again, the basis of the Lord Ordinary's judgment was that cohabitation and repute made marriage in themselves. His (Mr Fraser's) case was this, that marriage could only be constituted by formal consent. Some countries required that consent to be proved in a way different from others. But the determination of consent from a certain day to take each other as husband and wife must be proved. It followed from that proposition that living together, however long, as husband and wife, was not consent, though it might be a fact from which it might be inferred.

At this stage of Mr Fraser's address the Court adjourned.

Thursday, Nov. 2.

Mr FRASER resumed his address to-day for the reclaimer and advocator in this case, Mr Campbell of Boreland. He began by stating that he begged to impress on their Lordships the cardinal proposition he maintained, that no length of time of living together as husband and wife, and no amount of repute, however universal, would of themselves make marriage. It was essential to constitute that contract—as for the constitution of all contracts—that there should be a formal consent. Under certain conditions, these facts of cohabitation and repute inferred marriage — presumed marriage — but this was not one of the cases in which such a presumption could exist. This was one of the exceptions to these cases. But here he came at once into collision with the law laid down by the Lord Ordinary. As he read the Lord Ordinary's judgment, his view was that there was here, on the one hand, a presumption of marriage arising out of the cohabitation and repute, and, upon the other, another presumption against marriage, arising out of the fact that the connection was originally illicit. He denied that that was the law, and said the moment that it had been established that the connection was illicit in its origin there was no presumption, but the reverse, derivable from cohabitation and repute in favour of marriage. This was not so much presumption of law as of fact and human nature. Possession had already been obtained by Mr Campbell of Blanchard's person, it might be of all he desired; and what ground could there be for stating, no matter how long the repute might have existed, that their original connection had changed into marriage?

LORD DEAS—I do not discover the difference between your law and that of the Lord Ordinary. He says you set one presumption against the other. and lets you fight to see who is the strongest; but then he says, look at the surrounding circumstances. If you say the presumption is in your favour, you are just stating what he says.

MR FRASER—His Lordship says there is a presumption in favour of marriage from long cohabitation and long repute.

LORD DEAS—Until you discover the other.

MR FRASER—I say I admit this general rule; but the moment I prove that the origin is illicit, the *onus* shifts. There is no presumption whatever in favour of marriage, but the presumption is, that, the connection all along having been proved to be illicit at its origin, it continues so until the end.

LORD DEAS—That is the presumption until you

look at the circumstances; but having got the presumption, are you not to look to the circumstances as the Lord Ordinary does?

Mr FRASER—True; you are to look at the circumstances; but he does not acknowledge this doctrine which I contend for, that the *onus* has entirely shifted.

LORD DEAS—He says nothing against that.

MR FRASER—I think he does, because he says there is a balance of presumption.

LORD DEAS—Well.

MR FRASER—He holds that that presumption of marriage continues to the end. I say there is no presumption of marriage at all on the evidence, and that the moment I have proved the illicit connection at the beginning, then the party averring the marriage must prove it as a fact without the aid of any presumption at all.

LORD DEAS—But you are not to forget the fact that there was cohabitation and repute. All I want is to have precisely the difference between the Lord Ordinary and you. I do not see any difference.

Mr FRASER—If your Lordship will allow me to proceed I will show that; I put it in another way. Having established that this connection was illicit in its origin, the *onus probandi* has shifted—it is incumbent on the respondent to prove marriage as a fact—cohabitation and habit and repute are not sufficient. That is my proposition. You must prove it as actual fact, and you are not entitled to the presumption which might be derived in ordinary circumstances from habit and repute. Mr Fraser then proceeded to quote extracts from judgments in favour of his arguments. Lord Eldon in the Balbougie case said he could not admit that the mere cohabitation as man and woman—(he meant there also with repute)——

The LORD PRESIDENT—The words "with repute" are not in the report.

Mr FRASER—No.

The LORD PRESIDENT—Give us the words of the report.

Mr FRASER—He could not admit that mere cohabitation as man and woman was a cohabitation as man and wife. He (Mr Fraser) then read the opinion of Lord Redesdale in the same case, which, he held, was to the effect that the presumption of marriage only existed if the origin of the connection had not been illicit; and that, however long might be the cohabitation, and however universal the repute, it was nothing at all—a marriage *de facto* must be proved to get clear of the illicit origin. They could not in such a case rest upon presumption alone. They must go further; and what further could they go, except by establishing the fact of marriage by witnesses who were present, or by acknowledgments duly made at the time?

LORD CURRIEHILL—The Lord Ordinary has dealt with this case on the ground of legitimacy *per subsequens matrimonium* established by cohabitation and habit and repute. I would like to direct attention to this, whether there were not acknowledgments which are not so much matters of inference as repute. The acknowledgment of each other as man and wife would do quite well without having repute. Were there not acknowledgments during the period between 1793 and 1806? We have, for example, a power of attorney, in which he calls Mrs Campbell his wife. When they had acknowledgment they must also have mutual consent, and they might consider that the woman gave her consent when she acted upon that power of attorney.

Mr FRASER stated that he would subsequently refer to that. He then proceeded to quote a large number of authorities in favour of his argument that, as the connection had begun when it was illicit, simple cohabitation and habit and repute were not sufficient to establish marriage. He cited the opinion of the present Lord Justice-Clerk in Fleming *v.* Corbet, 21 D., 1044; the opinion of Lord Fullerton in Lang, 3 D., 980; the civil law as expounded in the Code, 5-4-9, and in the Digest, 23-2-24; the English law as proved by Conran *v* Conran, 1 Lee, 638; the Irish law by Maxwell *v* Maxwell, Millward's Reports, 292; the American law by Cram *v.* Burnham, 5 Greenleaf's Reports, 213. He also cited the opinions of Lords Wensleydale and Chelmsford, as given when this case was formerly in the House of Lords, on the question as to the appointment of a judicial factor. It is, however, said that after the death of Christopher Ludlow there was a change in the mode of life of James Campbell and Eliza Blanchard. The Lord Ordinary says that they had Campbell's friends at the baptism of their child, who was born at Inveresk; that they rented and occupied for some years a house in College Street, Edinburgh; and that they went to Glenfalloch together to visit his brother Colin. But had they not done as much before in England? Was there really any change? He contended there was no proof that such was the case, and that there was no motive for going through the ceremony. There was no such splendid prospect before them as the present. They had not anything to lead them to adopt any conclusion more than this—that they came to Edinburgh satisfied with the status they possessed, and continued it, but never once went through any formal ceremony which made marriage.

LORD DEAS—Are you not rather accounting for why they trusted to habit and repute?

The LORD PRESIDENT—Mr Fraser thinks that if they were going to rely on habit and repute, they were trusting to a broken reed. (A laugh.)

LORD ARDMILLAN—You think they rested content with the same cohabitation and the same character of repute as that from which, for nine years, no inference of marriage could have been drawn?

Mr FRASER—That is what I have endeavoured to prove. Mr Fraser then touched upon the evidence alleged to be afforded by an inhibition and power of attorney as to the acknowledgment of Blanchard as the wife of Mr Campbell. These, he said, were items of evidence unquestionably showing the relationship in which these parties were standing towards each other, but they would not make marriage of themselves. They must be held as referring back to the marriage formerly entered into — the connection which commenced in adultery, as stated by the woman herself, in 1781. In regard to the inhibition, it was in the handwriting of Archibald Campbell, James' brother, and it stated "that the petitioner was married some years ago." That could only refer to the marriage ceremony of 1781.

LORD DEAS—If you had been writing the petition, how would you have expressed yourself if you meant to refer to a marriage by cohabitation and habit and repute?

Mr FRASER—I would have said that "the petitioner is the husband of" so and so.

LORD DEAS—The distinction is rather shadowy.

Mr FRASER—The last point I have to state is that, as at the date of the birth of the respondent's father his father was domiciled in England, the subsequent marriage of his parents in Scotland, even although at the time that marriage was entered into the domicile was in Scotland. He concluded by asking their Lordships to reverse the judgment of the Lord Ordinary.

Mr Fraser concluded his speech about half-past twelve, and as the Court was to rise at one in consequence of a meeting of the Faculty of Advocates for nominating two gentlemen for whom the curators of Edinburgh University should elect a successor to Mr Moir in the chair of Scots Law, it was resolved that further hearing of the case should be postponed until to-morrow (Friday).

Friday, Nov. 3.

Mr RUTHERFURD CLARK addressed the Court this morning for the respondent. He said that the advocator in this case was not pursuing any declarator, but was in Court for the purpose of settling his claim to the entails of Breadalbane. An incidental question had arisen in the proof taken on both sides

whether Wm. Campbell, late of Glenfalloch, was or was not legitimate. Mr Campbell had long enjoyed not only the reputation of legitimacy, but maintained the estates for years. Notwithstanding, the advocator wished to make out to their Lordships' satisfaction that Wm. Campbell was illegitimate. The respondent says that he is able to overcome the question in dispute by the presumption in the law of Scotland of marriage by cohabitation and habit and repute; in the second place, by the presumption of all law, that persons who had lived together as man and wife, and enjoyed the reputation of being married, were to be considered as being legally married persons. It seemed to him that the history of this case might be divided into two parts. In the first place, the history of the parties prior to 1793 when James Campbell joined the Breadalbane Fencibles; and, second, the history of the parties subsequent to that date. The first period prior to 1793 was more or less open to dispute; but he should take in the first place the history of the parties subsequent to 1793, with the view of throwing light on the events which preceded. It was admitted that James Campbell and Mrs Campbell lived together after 1793, except when James was abroad with the Cambrian Rangers. It was proved that for the greater part of that period their residence was in Scotland. He gave a narrative of the leading incidents in the proof, showing that the parties were recognised during that period as husband and wife. He alluded to the power of attorney which was given to the woman, and to an inhibition, prepared, not by a stranger, but by James Campbell's own brother, showing that he not only regarded Mrs Campbell as James' wife, but that she was known to be his wife by other members of his family. There was also the fact of the baptism of a child at Inveresk in 1796, and the statement that she had often dined with the Earl of Breadalbane when he was with the Fencibles. After James' death she was acknowledged on all hands as his widow. He then entered into details as to the succession to the Glenfalloch estates by William, and said that he was not only recognised as legitimate, but succeeded to valuable estates simply in respect that he was legitimate. While the advocator was quite entitled to establish illegitimacy, he thought in this case he was hardly entitled to the benefit of any presumption. On the contrary, he thought he (Mr Clark) was entitled to say that he had a right to have his status of legitimacy recognised as it had been heretofore recognised, unless his learned friend should be able to show it was impossible that William Campbell could be legitimate. This challenge of William's illegitimacy had not been made until every person was in his grave who could give evidence in the matter—fifty years after the date of William Campbell making up his title to Glenfalloch, sixty years after James Campbell's death, and long after the decease of Mrs Campbell, which took place in 1828. Nor was it unimportant to notice the circumstances in which the challenge had been made. If they were to believe one of the witnesses on the part of the advocator in this case, one was led to the conclusion that the challenge was designedly postponed. If there was any suspicion, as was said by Mrs Campbell, the mother of the advocator, as to William's legitimacy, why was the challenge not made at his succession to Glenfalloch in 1812, when there would have been the best means of answering that challenge? The reason for that not being done was that it was known the challenge would not be made with any success.

LORD DEAS—It was not matter of fact but matter of law that was in dispute, and prudence is, I think, the reason given for not trying the question.

MR CLARK said that for whatever reason they kept back the allegation that Wm. Campbell was not legitimate, it was never mooted until 1862. He also remarked that the Glenfalloch papers in 1812 fell into the hands of the family of Boreland, including those of James Campbell, but that when the family removed from Boreland to Edinburgh in 1850, many of these letters were burned, and they could not say whether any of them could have thrown light on the case or not. Coming to deal with the first period to which he had referred, he said that the advocator sought to have it proved that James Campbell eloped with Mrs Ludlow in January 1781, that they then came to Scotland together, went through the ceremony of marriage in September 1781, and went out to America in June the following year. The evidence that these parties eloped with each other was derived from mere rumour and report. There were no witnesses who actually knew the parties themselves; but it could not be disputed that there was a general report by members of the Ludlow family to the effect that they had heard that James Campbell had eloped with Mrs Ludlow and afterwards married her. And the only evidence that the parties then came to Scotland was the statement in her letter to the War Office that the marriage took place in September 1781. The advocator must make out to demonstration that James and Mrs Campbell lived together prior to 1784, or he necessarily failed in his case. The fact that he was living with a woman prior to that date was no proof that Eliza Blanchard was that woman. If the story on the other side was to be regarded as true, let them observe the period when the connection commenced in 1781. When did they hear of any family arising from that connection? The eldest known in the family was born in May 1785, more than a year after Campbell returned from America.

The LORD PRESIDENT—When did Ludlow die?

MR CLARK said it was in January 1784.

Lord CURRIEHILL—Let me make a remark which has suggested itself to me about this letter. The question is whether there was a contract of marriage between James Campbell and Eliza Blanchard. It is a question of consent between these two parties — whether these two parties entered into a contract of marriage. Now, she was not a witness in this matter of contract. This is a letter by one of the contracting parties, saying there was a contract of this date, 1781; but was it not also, according to its fair meaning, a statement by one of the contracting parties that there was no other contract? That is a question that occurs to my mind as not having been dealt with by the Lord Ordinary—the dealing with it as a piece of evidence, not by witnesses, but by one of the contracting parties.

MR CLARK said he would endeavour to keep that in view. He then proceeded to maintain that the statement in the letter as to the marriage was made for a purpose—not for giving a description of the marriage alone, but giving a description of the circumstances with the view of getting a pension and avoiding the necessity of producing a certificate of marriage, which was necessary in ordinary circumstances. It was written by her when, according to the advocator's theory, it must be reasonably presumed to have been known in the War Office that she had been living with Campbell from 1781 downwards, and that she had gone out with him in 1782 to America. They might have refused the pension altogether if they had known she had been living with him in adultery up to 1784; and, still more, refused to dispense with a certificate if they knew the connection commenced in this illicit way. As to the question whether there was bigamy, it was not likely the parties would have gone on with a ceremony that would have made them liable to bigamy. There was no ostensible reason why they should put themselves within the reach of the criminal law. It was said that Willox, one of Campbell's brother officers, witnessed the marriage; but was it possible to conceive that he was ignorant of the fact that the woman had fled from her husband with him? and was it possible he could be a witness to bigamy? They had, however, no proof that Willox had been present at the marriage, and it was incumbent on the advocator, in order to show that this letter was a true statement, to have proved that he was present. It

was stated in the letter that the ceremony was performed by Mr Macgregor, a clergyman in Edinburgh, to whom must have been produced a certificate of the proclamation of banns. On a search, however, it had been found that there was no record of any such proclamation of banns either in Edinburgh or Glasgow. Mr Fraser had stated that the want of a certificate might be accounted for by the loose manner in which registers of marriages were then kept. This, however, was not the case with the registration of banns; and if the ceremony had been performed by a clergyman, they would have found the certificate of the proclamation of banns in some of the registers which they had examined. On that subject he might notice a peculiarity in the expressions she used in the letter, as regarded the register, in giving an account of what Mr Macgregor's successor was said to have stated to her. He would ask if that was a likely letter to have been written by a Scotch clergyman, although not unlikely by an Englishwoman?

The LORD PRESIDENT—She may be translating the clergyman's language.

Mr CLARK said that Mrs Campbell stated that the successor of Mr Macgregor told her he "had got no register from any of his predecessors." That was very like what an Englishwoman would say of the ministers there, who were successively custodiers of the registers, whereas the ministers of the Church of Scotland were not custodiers of the registers, and got none from their predecessors. He thought that was a piece of important evidence against the statement made in the letter, because it showed she was pretending to quote from a letter which the successor of Mr Macgregor never had written. He then alluded to the fact that she was not herself clear about the date of the marriage, for while she stated in the letter it was 1782, the army agent in a subsequent communication stated it was 1783, and he did not see how that gentleman could obtain that statement except from herself. The advocator, on the other hand, found that it took place in neither 1782 nor 1783, but in 1781. He submitted that that letter was not proof. It was a statement made by her, and by one of the contracting parties, for a purpose, and therefore not to be taken against him to the effect of disturbing the reputation of legitimacy which his client had enjoyed. In the next place, when they examined the minute particulars, in no one instance did they find the marriage supported by considerations which would give effect to it; while, on the other hand, there were many things which indicated that it was not likely to be true. The next question was, whether there was repute prior to Christopher Ludlow's death that they were married persons. The only piece of evidence which they had of that was the statement in the letter of Colin to his brother, that James and Mrs Campbell were doing well. It must not be held that there was undivided repute as to their being man and wife, considering the origin of the connection, which must have been known to the officers of the regiment. This brought him down to 1784. On Campbell's return to this country, they found that he left the army in 1785, and that in July of that year he was at Glenfalloch; and there was a summons issued against him in Scotland in 1786 by a London tailor, from which they might presume he was resident there before that time. In fact, it appeared that William Campbell, his son, was born in Edinburgh, although he was registered as baptised at Gateshead, as in the register of the ship in which he sailed there was an entry to that effect. There was other visits to Glenfalloch, and the result he came to was that they had fair proof that they were both at Glenfalloch during the lifetime of the old man, and also during the lifetime of Mrs William Campbell of Glenfalloch, who died in 1793. He had therefore to submit that the facts on which his learned friend rested his case had not been proved—either that there was a ceremony of marriage in 1781, or that they were living together as man and wife by general repute prior to 1874. Mr Clark next proceeded to advert to the objection brought forward by Mr Fraser as to the legality of a marriage having its origin in an adulterous intercourse; and he maintained that the Act of 1660 only prohibited such marriages in cases where a divorce had been obtained. The advocator held that as they had been man and wife prior to 1784, therefore they could infer nothing from cohabitation or habit and repute which followed subsequent to that date. Now he (Mr Clark) maintained that the pursuer was not entitled to presume that there was any undivided reputation prior to 1784, seeing that it must have been known to the officers who were along with Campbell that the connection between the parties commenced with the elopement. There was no reason for supposing that the woman was not well known by every officer in the regiment as being the wife of Mr Campbell; but there was every reason to suppose the contrary. There was no reason for supposing there was any repute whatever, except the simple sentence in Colin's letter, which had been already referred to, and the circumstances connected with the writing of which were unknown.

Lord CURRIEHILL asked Mr Clark what answer he gave to the question he formerly put?

Mr CLARK said he must hold that he did not think the letter was of any weight; and being untrue, he did not see how they could make use of it for anything else.

Lord CURRIEHILL—Do you abide by the date of the marriage which the respondent gives in the record—viz., 1785?

Mr CLARK—I submit that there is proof of marriage taking place previous to 1785. It may be they went through a ceremony; I cannot tell; but I say there is enough in the general repute before 1785 downwards to entitle me to presume they were married persons then.

Lord CURRIEHILL—Your statement is that William Campbell was born legitimate?

Mr CLARK—I say he was born legitimate in 1787. We found that, not upon Scotch law of habit and repute, but general law, which from a course of living in cohabitation infers marriage.

Lord DEAS—There is a difficulty in my mind. There is great importance attached to those written declarations Lord Curriehill called attention to. Supposing they were declarations of marriage, and supposing there is enough of habit and repute to infer marriage, I take it our law does not require absolutely, either for the one marriage or the other, a particular date—it is enough if a marriage be in a past time; but if there be a past time when that marriage was totally null and illegal, how does the matter stand there? I think that one of the most puzzling points in this case, and wish you to consider it deliberately.

The Court then adjourned.

Saturday, Nov. 4.

Mr CLARK, on the meeting of the Court, cited two English cases confirming the proposition he maintained yesterday, and concluded by stating that in regard to the question then put by Lord Deas, he had nothing to say beyond what was involved in what he had already stated.

Lord DEAS remarked that he would have liked to have heard something on the point to which he referred, as he thought it was a most difficult point in the case, and he did not wish to form any decided opinion upon it without getting all the assistance he could.

The LORD ADVOCATE then proceeded to address the Court for the reclaimer. He stated that he must maintain, as against the Lord Ordinary's grounds of judgment, in the first place, that there was no case decided, and no authority to be found to support the proposition that cohabitation and habit and repute could be evidence of marriage where the connection of the parties begun in adultery had been continued ever since; in the second place, that the principle

on which the law of cohabitation and habit and repute rested, and the legal presumption on which alone it was held evidence of marriage, failed of application here, and were excluded in the case where connection commenced not merely illicitly but in adultery; and, thirdly, even if it were true that habit and repute was not necessarily excluded by reason of the connection commencing in adultery, it is impossible to give effect to that doctrine in such a case unless the cohabitation and habit and repute had been such as to mark clearly and unequivocally a change in the relation of life. His Lordship replied to the complaint of the respondent as to the present challenge having been long delayed, and to the statement that the respondent's status, which was a presumption in favour of legitimacy, and the general repute of his legitimacy, must necessarily exclude the advocator and put the respondent in a favourable position for maintaining his case. It seemed, he said, to have been forgotten what the contention between the parties was. They were not there on a question of status at all; they were not in any way denying that the respondent was the legitimate son of his father. What he was trying to make good was his relation to the late Marquess of Breadalbane—trying to make good his possession to that which was the advocator's right. The respondent brought his claim here to be called the successor of the Marquess, and rested that claim on his pedigree and descent from 1750 downwards. The respondent must prove his pedigree—his predecessors' births, marriages, and deaths—and the reclaimer was entitled to inquire into these. As to the challenge having been long delayed, and that it ought to have been made when the respondent succeeded to Glenfalloch, he had to reply that the advocator's father was then in ignorance of the facts which had now been disclosed. His Lordship then entered at considerable length into the history of the respondent's grandfather and grandmother, whose marriage was disputed. He held it had been proved that Eliza Blanchard (the grandmother) had eloped with Captain Campbell in 1780; that it was certain her former husband lived for three years afterwards; and, as there was not the slightest indication that she even knew of her husband's death, or made any inquiry after his family, until she found her own son in London, twenty-five years afterwards, he held that if the respondent was to found on the good faith of the parties, he must prove that they had that knowledge at the time of the ceremony which they alleged had taken place. He held that the letter written by Mrs Campbell to the War Office in 1807, fixing her marriage at 1781, had not the slightest taint of suspicion. He held that no woman would have given a date for her marriage that could have convicted her of bigamy, if there had been a true marriage in 1785, especially when that marriage would have been as effective at the War Office as the other. His Lordship held that this marriage of 1781 was corroborated by the fact of the two having gone out to America as husband and wife, and the woman having been entered in the ship's books on returning under that name; and also by the statement contained in the letter of Colin to his brother in 1783, who spoke of James and Mrs Campbell being well spoken of. As to the remark about the marriage not being entered in the register, he said that although the fact of the entry in the register would have been a corroboration, he did not think its absence in the least degree implied that the statement was untrue. Indeed, the position in which the parties stood in 1785 was this, that from the day she set foot on the vessel to go to America down to the date of the death of Ludlow in 1784 she was received as the reputed wife of James Campbell, and there was no evidence consistent with the statement made in the record that there was a marriage in 1785. It was said that Campbell had gone to Glenfalloch in that year, but there was not the least evidence that she was there. There was, however, evidence that the father knew in 1786 as much of her as his son chose to tell him, and that proved that she was then taken to be his wife. But what became of the Lord Ordinary's view that there was no repute in 1785—that they were not reputed husband and wife until 1793? There was evidence of domicile in England previous to that date—children having been born and baptised there; and that one of the sons should have stated for the register on board his ship that he was born in Edinburgh was not extraordinary. He had been thirteen months in the jail of Edinburgh just before he joined his ship, having been arrested for debt; and just because Edinburgh was written opposite the name of a young middy as the "county and place where born," was that to establish domicile in Scotland? What he had really come to was this, that although they came to Scotland there was no proof on which they could rely that up to 1799 she ever appeared at Glenfalloch at all. If the view of the Lord Ordinary were correct—if they must take the time when repute first began—he meant when they were in Scotland, and could have been received by the family of Glenfalloch—it must have been 1799 and not 1793. Conceive what kind of a case that was that implied they had been living in concubinage until that time—a period of nearly twenty years!

The Court adjourned.

Monday, Nov. 6.

The LORD ADVOCATE resumed his argument today for the reclaimer. He dwelt at some length on the letter written by Colin Campbell to his brother Duncan in 1783, in which he stated that Mrs Campbell was well spoken of in America, and remarked that it was a conclusive answer to the somewhat extravagant views of the Lord Ordinary, who could see in the evidence nothing at all to indicate that James lived there with Mrs Campbell otherwise than simply as his mistress. He held that during the period from 1793 to 1799, during which James was in the Breadalbane Fencibles—the period of cohabitation on which the Lord Ordinary founded his judgment—the evidence of repute was of the slightest description possible. There was, no doubt, the baptism of the child at Inveresk; but the remarkable thing about that period was that there was no indication of any lady of her own rank consorting with her at all. She stated in her letter to the War Office that she had dined with Lord and Lady Breadalbane. It was possible that might have occurred; but although the proof went down to 1799 or 1800, they had not an indication of her visiting or associating with any person in her own position in life. It was also remarkable that there was not the slightest trace of her having been visited by any person of her own rank subsequent to that date. There was no doubt that they were then in considerably reduced circumstances, for when living in College Street they let lodgings; but that would not have the effect to which he referred. He held that the account she gave of her marriage to the War Office in 1807—that she was married in 1781 — was consistently maintained throughout all her letters. On an application to the Marquess of Breadalbane she got a certificate from him that she was the wife of James Campbell, and succeeded in getting a pension on that statement. If there was not a marriage at the time she stated, the subsequent repute as to the legitimacy of the respondent's father was entirely worthless. The late Lord Breadalbane, and also Glenfalloch, believed him to be legitimate; but if this belief proceeded on the basis of Mrs Campbell's statement in 1807, and the events following upon it, and if their Lordships found the origin of that reputation of legitimacy to have been in a falsehood by the lady, no amount of repute could have the slightest weight at all. His Lordship then proceeded to remark that there was no case on the record such as that founded on by the Lord Ordinary. The Lord Ordinary thought that the evidence pointed at nothing but concubinage down to 1793, to a clear change of relation in that year, and to a case of

habit and repute of overwhelming strength from 1793 down to 1806. That was not the case on the part of the respondent in support of his petition to be served heir to the entails. The respondent maintained that the marriage took place before the year 1785, eight years before the Lord Ordinary could find it established. But, in addition to that, he (the Lord Advocate) said there was no case to be found in the Decisions, and, as far as he could read, there were no *dicta* of the institutional writers which gave the slightest countenance to the doctrine that a connection commenced in adultery and continued in concubinage could possibly be converted into marriage merely by habit and repute. He called attention to that to show that the doctrine which the Lord Ordinary had sustained in this case was sustained for the first time in the law of Scotland. It was attempted in two previous cases, but it never was sustained. He also held that the principles on which the law of habit and repute, and the presumption deducible from habit and repute and cohabitation, rested, were not capable of being applied, but were excluded when the connection commenced in adultery; and all the more if it should turn out that there was, as here, a regular ceremony of marriage pending the life of the first husband. His Lordship then proceeded to cite a number of cases in favour of his argument, that when a connection commenced in adultery the presumption of law was against marriage, notwithstanding any amount of cohabitation and habit and repute—that, assuming it to be legal for the parties to enter into marriage after the death of the first husband, they having during his life lived together in adultery, there must be a ceremony of some kind or other gone through to make a clear and unequivocal change in the relation of the parties. He held that there was no ground whatever on which it could be propounded that anything was done with the intention of indicating to the world that that which had hitherto been illicit had changed in its character through marriage. The question was not merely whether there had been any change in the repute, but whether there had been any change in the cohabitation. Was anything like that proved here, or anything approaching it? He did not think there could be the slightest doubt that there was no change in the mode and manner of the cohabitation. The cohabitation continued in the same way from first to last. It had been assumed in this case that these people knew that Ludlow was dead previous to 1784; but there was no proof that they knew that, or any evidence that Campbell ever intended to give the woman the status of marriage. If they were aware of his death, and Campbell meant to give her that status, that would have been done deliberately, and no one would assume that he trusted to the law of Scotland as to habit and repute.

LORD ARDMILLAN—He may have relied on the marriage of 1781.

The LORD ADVOCATE—The result would be the same in either case; he may either have relied on his former marriage, or he may never have intended to marry.

Lord DEAS—What if he relied on the habit and repute?

The LORD ADVOCATE—It is impossible to believe that, because he lived in England for eight years after he came home from America. What did he rely upon then? The presumption is that he did not mean to make her his wife. Therefore, the argument is this, Can the slender action of this merely crossing the border to visit his brother, or his joining the Breadalbane Fencibles, operate so as to change the intention? He thought that would not do. There was no evidence that they knew that Ludlow was dead. He was just as likely to live as James Campbell. They trusted to the remoteness of the district, the want of communication, and the success with which they kept the secret of where the lady came from. During the eight years they were in England, Campbell could have relied upon nothing unless the marriage that took place when the first husband was alive. His Lordship then proceeded to inquire into the nature of the evidence of acknowledgment between the parties supplied by the power of attorney and letters of inhibition, and held that if these were to be held as proof of any marriage having taken place between the parties they must refer to the illegal ceremony of 1781.

Lord DEAS—The Lord Ordinary thinks there is no habit and repute down to 1793—rather the reverse. Suppose it were to be held to be proved there was habit and repute from the first, I would like you to consider how the case would stand. Then, in the second place, supposing the marriage of 1781 to be proved, how would the case stand? And, in the third place, supposing it did not appear that they knew of Ludlow's death, and it appeared there was a regular ceremony of marriage, how would the case stand then?

The LORD ADVOCATE said, in regard to the first question, that if it was proved that the parties cohabited before Ludlow's death, and if there was no proof of any change of cohabitation, the case was in his favour; and in regard to the second question, if the marriage of 1781 was proved, his case was complete, and the respondent could not get out of it at all; but even if it were not proved, and only rested on habit and repute, he said that, whatever the length of cohabitation, and whatever the amount of repute, it would not avail if the cohabitation was begun when the first husband was alive.

Lord DEAS said his difficulty was whether they did not overcome that objection by habit and repute, if they took into account the whole circumstances of the case.

The LORD ADVOCATE said that in former cases that was not allowed, and there were but two questions considered—first, whether the cohabitation began on a lawful footing? and second, whether it had been changed? In regard to the third question put by Lord Deas, he said that if the parties went through a marriage ceremony without knowing of Ludlow's death, that would show a clear intention, and remove all doubt as to their relations. They might have said they had reasonable evidence to believe he was dead, although they had no direct evidence, and have married in good faith. But that question did not arise here, as there was not the slightest trace of evidence that there was a marriage when they could have thought that Ludlow was dead.

The Court then adjourned.

Tuesday, Nov. 7.

The SOLICITOR-GENERAL said it appeared to him that he should best discharge his duty to his client and the Court by addressing himself to the salient points of the case—few in number as they appeared to him—on which the decision must rest. The first matter was to determine what was the point of controversy between the parties. The Lord Advocate said, and said truly, that this was a competition for the succession to the late Marquess of Breadalbane under the Breadalbane entails. This competition, like every other, must turn on some point, and the present controversy turned upon this question—whatever difficulty of fact and law the consideration of it may involve—was William John Lambe Campbell, the respondent's father, legitimate or illegitimate? It was undoubted that it was the heir of William Campbell, the respondent's father's grandfather, to whom the Breadalbane entails fell; and the advocator's case was that the respondent was not heir of William Campbell at all, because his father—the grandson of William Campbell—was illegitimate. It was conceded that if the respondent was the heir of Glenfalloch at all, he was the nearest, the only case against him being that he was not the heir at all, his father being illegitimate. In 1812, Mr W. J. L. Campbell, the respondent's father, established his character as heir-male of the body of William Campbell, his grandfather, by public ser-

vice. In that character he took up the estate of Glenfalloch, and possessed it from that time until his death in 1850. At that time his son, the respondent, established in like manner in the only proper and competent way, that the character in question was in him—that he being the eldest, or, he rather thought, the only son of his father, was nearest heir-male to the body of William Campbell of Glenfalloch. And in that character, which he so established in himself, he possessed the family estate from 1850 until the present time. The medium through which the advocator proposed to establish his case here was that James Campbell and Eliza Blanchard, the father and mother of W. J. L. Campbell, were never married. The advocator said that in respect of the adultery with which their intercourse commenced, it was to be assumed in his favour that they never were married. There were two arguments, both stated by his friend Mr Fraser, although only one of them was repeated by the Lord Advocate. The first, which Mr Fraser alone stated, the Lord Advocate not having repeated it, was this, that the adultery was an illegal bond, amounting to an incapacity for them to marry, provided—for his friends so qualified it, taking the qualification from the canon law to which he appealed—there was a promise of marriage between them, which he assumed during the lifetime of Ludlow. His friend stated, he believed quite accurately, that according to the more ancient canon law, the marriage between parties who commenced their intercourse in adultery was prohibited; but that it was afterwards modified to this, that the prohibition should have effect only when it was established either that an attempt had been made on the life of the spouse who was wronged by the adultery, or that the parties had promised marriage to each other during that spouse's lifetime. The Lord Advocate's argument was that the evidence of adultery, assuming it to be sufficient, put it upon the respondent, with whom any *onus* lay to begin with, to prove the fact of marriage, and prove it otherwise than by cohabitation and repute. From the circumstances of the case there could be no marriage between these parties prior to 1784, the period of Ludlow's death; and the question appeared to him to be this, had the advocator proved there was no marriage between them subsequent to that date. He concluded, from authorities which he read, that the adultery prior to 1784 was no incapacity to marriage between these parties then. They were free to marry from and after the month of January 1784, and it was incumbent on the advocator to prove that these persons who were then free to marry did not do so. It would not do for him to cast suspicion on the marriage, to fall upon isolated things and say, "Oh! This suggests there was no marriage between these parties—their lives are so remote that really I cannot be expected to do more." The advocator must be able to prove the fact, that their Lordships may affirm it, that the parties never were married; and it was sufficient for the respondent in this case that the advocator had not proved that they were never married.

LORD DEAS—He must prove a negative.

The SOLICITOR-GENERAL—Yes; just as many a one has to do who stands as pursuer on a negative issue; he must show that the respondent's father was not legitimate. The learned gentleman then proceeded to refer at some length to the manner in which the case had been considered by the Lord Ordinary in his note. The Lord Ordinary applied his mind to the evidence that the respondent was able to produce, and found it was only at 1793 that it began to be at all clear. There were many isolated facts previous to that year, but taking the evidence, as he did, and considering it with reference to the question—Was that evidence sufficient to discharge the *onus* of proving marriage by habit and repute? the Lord Ordinary arrives at the conclusion that it is complete and satisfactory as to the period subsequent to 1793; but that with respect to the period before 1793 there was no evidence at all. The Lord Ordinary did not mean to say, and he was surprised that anybody reading his note could have that idea conveyed to his mind, that it was established to his satisfaction that there was no marriage prior to 1793. The advocator here must enable their Lordships by the evidence he laid before them to affirm, not upon the likelihood or unlikelihood, not upon the probability or improbability, but upon the fact of no marriage between these persons. Now, he held that the advocator had not done that. There was no evidence whatever respecting cohabitation of these parties prior to 1785, except only what they might deduce from Eliza Blanchard's letter in 1807, from Colin's letter in 1783, and from an entry in the ship's book in 1784. These three documents afford all the light we have regarding these parties, and the way in which they lived prior to 1785. The evidence in the case properly so called took them up for the first time at a period when they were free to marry. That was a very material consideration. 1785 was a long, long time ago, and they could not have adduced as witnesses any persons who were then of intelligence sufficient to be able to give evidence now; but they had evidence respecting these parties in the form of one of those events in the life of people which stood out a little prominently and remained with somewhat more endurance. A child of their's was baptised in 1785, and was baptised as a lawful child. That was a fact of some importance in the view of the case which he was now considering. In 1785 Campbell sold out, but he did not know where he was from that time until he found him at Glenfalloch in July of that year; and this was attributable to the merest accident—that a flood occurred at that time, and that a tradition still lingered in the country that he had been very useful in saving some of the poor people and their goods at the flood. There was nothing else about him except that. Whether Mrs Campbell was with him they could not tell. There was no evidence one way or other. If there was room for any inference at all, the inference would rather be that she was with the man under whose protection at least she was, and with whom she was said constantly to have resided. She had but shortly before borne him a child in the month of May, which was shortly after baptised as a child of the two as married persons. There was no word of them, then, until November 1786, when they had a trace of him from another accidental circumstance—a London tailor serving a summons on him at his father's house. The summons was executed against him as residing at Glenfalloch in November 1786. Whether he had been there from the time when they just got a glimpse of him in 1785, until this time, without going away, they could not tell. There was no evidence on the subject. But the evidence stood thus—they saw him in his father's house accidentally in July 1785; they saw him there again in November 1786; and but for the flood, and the tailor executing his summons, they should have no trace any more of him than of her. He did not know why the Lord Ordinary said the inference was rather that she was not with him. He did not see any reason for such an inference. He did not say she was, but there was no reason for infering that she was not.

LORD DEAS—Except that those who saw him did not see her.

The SOLICITOR-GENERAL—I do not know that at all. The only tradition was that he was assisting the people; there was no tradition that she was doing that—that is all. There was no trace of them again until 1788, and then there was very little, and that was a statement assumed to be taken down from the lips of the party to whom it referred—namely, William J. L. Campbell—that he was born in Edinburgh in 1787, and there was no evidence to the contrary—

LORD DEAS—Except the baptism.

The SOLICITOR-GENERAL said he was going to refer to that. The man had now been in his grave for fifteen years; but the statement was taken in the ordinary way when he entered the service, and put upon the ship's books that he was born in 1787, in Edinburgh. He did not rest much upon that, but

if it was taken as any evidence at all, it was some evidence as to where his mother was in 1787. They had it recorded that Mr W. J. L. Campbell was baptised in Newcastle in 1788, and it was suggested that that was some evidence that his parents had a residence in Newcastle, even some evidence that he was born in Newcastle. It was quite a common thing for a child to be born in one place and baptised in another. There were a thousand circumstances which might explain how the two events occurred at different places. There was another child baptised at Newcastle; and while that might increase the likelihood, it did not approach to anything like evidence on the subject, that the parents were residing at Newcastle, or resided there during the intervening period. Then the evidence took them on to 1793, and the more it came down within the range of testimony they got clearer light upon them. The light then seemed to be so clear that the Lord Ordinary was prepared to affirm a marriage at that time, even at the instance of the party on whom the *onus* rested. He was not going to say a word as to how the parties lived together, for not a single passage in the evidence would show; but from that time forward, when the evidence throws light upon their connection—all being darkness beyond—they were living together, not as man and woman, but as husband and wife. Children were born to them from 1793 as before, baptised and brought up as lawful. They lived together and acted towards each other as husband and wife. He always acknowledges her as his wife; she always acknowledges him as her husband. In every relation in which such an acknowledgment was to be expected in the ordinary course of things, he acknowledged her as his wife, she acknowledged him as her husband. When he went abroad he granted her a power of attorney as his wife, on which she acts. When he was distressed, as he supposed, by her extravagance, he put himself in a hostile attitude to her as his wife, for he executed letters of inhibition against her. When he died she administered his estate as his wife. Therefore everything they had proved, from a period as remote as human testimony could reach back to, was consistent with the notion that they were married persons, and inconsistent with any other. Now, he came to what the Lord Advocate dwelt upon chiefly, that their Lordships were not to regard this evidence of cohabitation, habit and repute, and mutual acknowledgment as sufficient to lead to the conclusion that they were in point of fact married persons, because they had the same evidence, the Lord Advocate assumed, respecting their cohabitation and conduct towards each other prior to 1784, when they were not free to marry. That was a very gratuitous assumption, even if there were anything in the argument. He held they had no such evidence regarding their cohabitation, their conduct towards each other, or their treatment of each other at the time they were not free to marry. Nothing was more plain in any case than the proposition he stated here, that they had no such evidence. They might conjecture about it, but so far as evidence went all was darkness about the period when they were not free to marry, unless they derived light sufficient to enable them to see their way from Colin's letter to his brother Duncan in 1783, on which he should afterwards say a word. They had proof from military documents that Campbell was at Glasgow at the time they were not free to marry, but there was no evidence that she was there living with him as his wife. Did she occupy one house and he another, or did she come to Glasgow at all? There was no evidence on the subject. In September 1781, a period of from nine months to a year after the elopement, he was in Edinburgh. He would presume from her letter that Eliza Blanchard was in Edinburgh also then. Did they live together as man and wife in Edinburgh? There was no evidence at all on the subject. Here he at present laid aside the letter. Then Campbell was in Exeter and other places in England, and he embarked for America in 1782. Had they any trace of them there? Not the least. The evidence was not available to either party. Had the evidence been available, it might have proved that they lived together as man and wife, or might have proved that they did not. But the advocator said he proved by Colin's letter that these parties cohabited together, and behaved towards each other in America in the same way as they did in Scotland—in the same way as they did subsequent to 1793. The only statement in that letter was that Mrs Campbell was exceedingly well spoken of. After adverting to the circumstances in which that letter was written, he maintained that there was nothing whatever to show that Colin knew how these people lived together—nothing to suggest the idea that he had any knowledge himself. Indeed he could not have. He says himself he never saw the woman. If he had any information on the subject, he (the Solicitor-General) did not know what it was or where he got it. The letter did not even prove that Duncan, to whom Colin wrote, had heard of the marriage, for they did not have his answer to see what he said about it.

LORD DEAS—Is it not clear that James had written to him about her as his wife?

The SOLICITOR-GENERAL said he did not think that even that was clear, or that it could be taken as evidence of what was in James' letter. But was there any pretence for the suggestion that the conduct of these parties was the same towards each other while the impediment to the marriage existed? Subsequent to the time when the impediment ceased—when they were free to marry—there were children who were baptised as legitimate and brought up as legitimate. With respect to change, he thought there was change even in the cessation of the impediment to marriage. He did not rest much upon that, but it was a change.

The LORD PRESIDENT—There is a remark by Lord Campbell on that subject.

The SOLICITOR-GENERAL—Yes. Whereas prior to January 1784 they were not free to marry, subsequently to January 1784 they were so—they were living together in the same house, acting in all respects as man and wife. As to the letter written by the woman in 1807, there was no other proof than it that bigamy took place in 1781, and standing *per se* the letter was insufficient to prove the fact. It could not be appealed to as evidence of the occurrence of any fact in the history which she therein stated. But to say that it was sufficient evidence that the crime of bigamy was committed was, he submitted, entirely out of the question. If it was known to the War Office that she lived with him for a longer or shorter period prior to 1784, when the marriage which the respondent contended for took place, one could see reason for the statement she made about the marriage in 1781. It was a curious time altogether which she fixed upon. It was not to satisfy her conscience prior to the connection commencing, for, according to the case on the other side, the intercourse began nearly a year before that—some nine months at all events. It was only after travelling from Chipping-Sodbury to Glasgow and then to Edinburgh that her conscience troubled her upon the subject, and then it was said she was married by the Gaelic minister, dead at the time of her statement, and the only person present was a young ensign, then dead also. The scene of the marriage and the witness of the marriage are so given as to be perfectly safe against the result of inquiry. The certificate was lost, no record was kept; she stated all these things; but all he was interested to say was that that was not sufficient evidence of the fact, and that was enough for his case. The whole circumstances of the letter strongly suggested that it was an invention on the part of the old lady. The Gaelic Church was in connection with the Establishment. There was no register of marriages in the Established Church apart from the register of proclamation of banns, and every minister of that Church must have known that.

Lord DEAS—Do they ever celebrate marriages in presence of one witness?

The SOLICITOR-GENERAL—I am not aware that they do. If they do, nothing is to be said as to the probability of the truth of the letter on that head; if they do not, that is an additional circumstance against it.

Lord DEAS—I do not think the fact proves much.

The SOLICITOR-GENERAL said he did not think it did; but she said that she applied to the minister of the church, who told her that his predecessor kept no register. He much more than doubted that. He thought the answer she must have got would be that the register was the register of banns, which she did not apply for. They had searched the registers both in Edinburgh and Glasgow, and there was no such proclamation registered there. He had in the course of his remarks answered the question put by Lord Deas to Mr Clark, as a matter deserving of consideration—namely, where you have parties living together at a time when there is an impediment to marriage between them, and thereafter seek to establish marriage between them in respect of cohabitation, by proof of that cohabitation, and habit and repute, to what time are you to refer the fact of the marriage? He thought that must depend on the facts of each particular case; and what he submitted as a legal proposition on the subject was that the existence of an impediment at one time during a certain limited period was no obstacle to the proof in a satisfactory way—and proof of cohabitation and repute was a satisfactory way—that the parties were married after the impediments ceased, and they were free. It was a mere question of evidence, without any positive rule of law on the subject that he knew of. Of course, while the impediment existed there could be no marriage; after the impediment ceased, it was a question of fact whether they married or not. The proof of cohabitation as man and wife—the proof of repute of that cohabitation—may or may not be conclusive, just as it is considered sufficient in the mind of the Judge considering it. His mind would be influenced more or less, according to circumstances, by the nature of the intercourse between the parties when there was an impediment. He had considered that matter in connection with the present case, and if the result of the evidence as to the cohabitation and conduct of the parties at the time that they were free to marry were such as to convince the Judge in point of fact that they both intended, that they both consented, and regarded each other as husband and wife, there was no rule of law that he was aware of to prevent the Judge pronouncing according to the evidence that which was his conviction.

Lord DEAS—We have no case as yet in which the law has been so applied.

The SOLICITOR-GENERAL.—I am not aware of any case resembling the present in many of its features.

Lord DEAS—The difficulty in my mind is this—Assuming for a moment that the *onus* is thrown upon you to prove marriage, you attempt to prove that in two ways; one is by habit and repute, the other is by declarations of different kinds; and in any case marriage might be lawful at any time, but here there was a time when marriage could not be lawful. The difficulty is, whether the presumption in such cases be applicable to a case in which there was a date when marriage would be illegal.

The SOLICITOR-GENERAL—That is a question not regarding admissibility, but sufficiency, of evidence. I exclude any presumption applicable to the period when the impediment existed. I start with the question, Did the parties marry or not when they were free to marry? and what I propound to the Court for their judgment, in the view of the *onus* being on me, is—Did these parties marry subsequently to January 1784? I concede that they could not marry before, but I hold that there was then no legal impediment, and that the evidence leads me to the conclusion that marriage then took place.

The Court then took the case to avizandum.

Wednesday, Nov. 1.

SECOND DIVISION.
EXTENDED SITTINGS.

AITKEN *v.* THE REV. DR KING, ETC.

The pursuer of this action is the collector of the arrears of the annuity tax or assessment for the city of Edinburgh. The defenders called are Dr King, as Moderator of the Synod of the United Presbyterian Church, and as an individual; the Rev. Mr Beckett, of Rutherglen, as clerk of the said Synod, and as an individual; and five other gentlemen who are called as the Synod-house Committee, appointed by the Synod, and also as individuals. The ground of action is the liability of the defenders to pay annuity tax due by them for the premises, No. 5 Queen Street, Edinburgh. To a previous action at the instance of the pursuer "against the trustees nominated and appointed by the body of ministers and elders for the time being constituting the United Associate Synod of the denomination of Christians known by the name of the Secession Church, in Synod assembled, at a meeting held at Edinburgh the 14th of May 1846," the defenders pleaded that in point of fact they had not occupied the premises, and were therefore entitled to *absolvitor;* that they were not liable in the sums concluded for, in respect they had not been assessed or included in the stent-rolls made up prior to the passing of the Lands Valuation Act; and that being mere trustees of the title to the subjects mentioned in the summons, they were not liable as individuals. In the first action the Lord Ordinary (Jerviswoode) held that the defenders, as trustees acting under the trust above set forth, must be held under their feudal title to have been in the occupation of the subjects for the periods to which the action relates, and found them liable in the assessment. The defenders reclaimed. Before judgment they put in a minute to the effect that the premises in question have been occupied by the Synod of the United Presbyterian Church; that the present representatives of the Synod are Dr King as moderator and Mr Beckett as clerk of the Synod; and that the management of the premises has been committed by the Synod to the gentlemen of the Synod-house Committee. At the discussion to-day on the whole case it was pleaded for the defenders that the pursuer had not validly called the occupants of the premises in question, who were, in terms of the minute which they had lodged, the Synod of the United Presbyterian Church, and certain gentlemen as representing the Synod; and further, that the claim was cut off by the quinquennial prescription applicable to ministers' stipend. At the conclusion of the arguments, the Court made avizandum with the case, and with another of a similar nature.

Thursday, Nov. 2.

ADVN.—MURPHY *v.* M'KEAND.

Counsel for the Advocator—Mr Mair. Agent—Mr William Officer, S.S.C.

A point of practice was decided in this case, which is an advocation from the Sheriff Court of Kirkcudbright. On the motion of the advocator the case had been reported to the Inner House, where the record was closed, and it was not therefore an advocation in absence. On the case being called to-day no appearance was made for the respondent either by counsel or agent, and the counsel for the advocator moved for decree in respect of the non-appearance. The Court did not consider that the case could be so disposed of, and appointed special intimation of the fact of the dependence of the case in the roll, and of the non-appearance for the party to be made to the respondent.