her illicit and disreputable connection with that person, might have been an insufficient defence of her present action. But quite different must the effect of those considerations be, holding the evidence she has adduced, so far from being clear, satisfactory, and consistent, to be of a vague and inconclusive character. The kind of evidence requisite in such cases was described by Lord Moncreiff in Lawrie *v.* Mercer, thus—"The present consent," his Lordship says, "necessary to constitute marriage may be effectually and satisfactorily established by a long or continued course of open cohabitation of the parties in the avowed character of husband and wife," regard being had, first, "to what in general constitutes the cohabitation of persons bearing that relation, and then to the habite and repute, the reputation in which the parties have been held by their friends and connections, and the community in which they live. When such a cohabitation for a length of time, with the distinct character affixed to it by the open acts and conduct of both parties, is proved by credible and consistent evidence, no more satisfactory proof can be required that the present consent to marriage has been given in the face of all the world."

A few observations will suffice to demonstrate that the case, presented by the pursuer in the proof before the Court, cannot be held in any essential respect even to approach to what the law thus requires in such cases.

The Lord Ordinary has gone over the evidence with great minuteness, and the result of his examination of it may be summed up in these propositions—(1) That there are inconsistencies, contradictions, and inaccuracies pervading the statements of very many of the witnesses examined for the pursuer to an extent more or less affecting their credibility; (2) that while a great body of the witnesses, relatives of the pursuer and others, swear to the pursuer and Sceales having cohabited together in the various lodgings and places in which they successively resided, and to their being known and occasionally addressed as Mr and Mrs Sceales, —so that, in a vague and general way, the people with whom they lived and other parties that came about them, thought and understood them to be married persons, thère is in truth no satisfactory statements, even by these witnesses, of any general reputation by their friends and neighbours of their being married persons; (3) that, even at the times and places to which the evidence of these witnesses applies, the parties assumed other names than Sceales—the names of Blair, Stewart, and Huntly having been at various dates assumed for the purpose of concealment; and (4) that in the draft of a settlement by Sceales, executed in 1855, the original of which is lost, he referred to the pursuer as the mother of his "natural" son, while the birth of a son who is still alive, was in 1855, entered in the register as of an illegitimate child, and the entry bears attached to it the signature of the pursuer as "Helen Darsie," as well as that of "St. Sceales."

A perusal of the proof has satisfied me, that these observations of the Lord Ordinary on the statements of the pursuer's witnesses, are substantially correct; but the evidence adduced by the defenders applicable to the same period, viz., 1853 to 1858, has established, on the other hand, (1) that the friends and relatives of Sceales knew nothing at all of the alleged marriage between the pursuer and the deceased; (2) that those of them who did come into contact with him, and knew of his connection with the pursuer, regarded it as illicit and discreditable; (3) that this was also the belief of all those with whom he was brought into contact in his occupation, first as an officer of revenue, and afterwards as a book canvasser; and (4) that to some of these parties, when asked on the subject, he repudiated the idea that he would ever marry the pursuer.

Taking the proof thus led by the defenders along with that of the pursuer, and judging of the evidence as a whole—the best that can be said of it is that while some of the witnesses examined regarded the cohabitation of these parties as that of man and wife, others of them regarded it as illicit; and that the habite and repute of their being married persons during that cohabitation was partial and divided. But it is an established principle that when a case rests on repute, it must not be an opinion of A contradicted by B; it must be founded, not on singular, but on general opinion; for that sort of repute which consists of A B C thinking one way and D E F thinking another, is no evidence on such a subject. And if this be the conclusion to which the evidence applicable to the period between 1853 and 1858 would all but certainly have led—supposing that Stewart Sceales had died in that year, and that judicial proceedings had been then resorted to by the pursuer—the considerations, to which I have adverted at the outset, lead irresistibly to the conviction that, so far from there being ground for the pursuer's contention that she has established facts and circumstances to support her alleged marriage—the more just inference is, that her connection with Stewart Sceales was, from its commencement to its close, that of parties who were living in a state of concubinage and illicit intercourse; and that, when she separated from Sceales and went to live with Dr Price in 1858-9, no marriage vow was broken, but only one paramour exchanged for another.

On these grounds, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The other Judges concurred.

Agent for Pursuers—A. P. Scotland, S.S.C.

Agents for Defenders—Melville & Lindesay, W.S.

Wednesday, Feb. 13.

SECOND DIVISION.

PAGAN *v.* NORTH BRITISH RAILWAY CO.

Reparation — Culpa — Relevancy — Issue. Allegations of negligence which held relevant to infer damages. Issue adjusted.

This is an action at the instance of George Hair Pagan, bank agent in Cupar-Fife, against the North British Railway Co., concluding for £250 in name of damages, for an injury sustained by him while travelling in the defenders' railway from Edinburgh towards Dundee, on the 23d of December 1865.

The pursuer makes the following averments :—

"During the stoppage of the train, the engine was standing at a water-pillar situated at or near the north end of the said west platform of the said station, and was then, or had just been, taking in a supply of water from that water-pillar. At this time the said engine-driver was on the ground attending to his engine, and was somewhat in advance or to the north of the said water-pillar, this water-pillar being about three feet six inches distant from the line of rails.

"In proceeding from the railway carriage towards the said engine, the pursuer kept on the

west side of the said water-pillar, being the side farthest from the line of rails; and immediately on passing the water-pillar he turned sharply eastwards towards the line of rails to speak to the engine-driver, and instantly fell into an open pit or drain, about two feet deep, situated immediately to the north of the said water-pillar; this pit or drain is about two feet long from the water-pillar northwards, and about fifteen inches broad from east to west, and was concealed by the said pillar (which is about two feet in diameter at its base) from the view of the pursuer, going towards it from the south, the night also being dark and the place insufficiently lighted. In this way the pursuer, who was walking pretty smartly, was not aware of the existence of the said pit or drain, until he fell into it as aforesaid.

"The said platform at or towards its northern extremity descends by an incline to or nearly to the level of the rails, this incline being nine feet long, and the height descended being two feet four inches. At the bottom of the incline there is a level space running northwards from the incline to and beyond the water-pillar, the distance from the bottom of the incline to the water-pillar being nine feet or thereby. This level space is nearly on the level of the rails, and is used as part of a level crossing by passengers and others at the said station, and is also used on occasion for setting down passengers. For many years it was the sole level crossing, but some time ago a bridge was constructed at the other (south) end of the platform underneath the railway, which is now used by many persons as a means of crossing from one side of the railway to the other. This station being at a junction, passengers have more occasion to cross from one side of the rails to the other than at ordinary stations. There is no fence or anything else to prevent passengers on the western platform going as far northwards as the said water-pillar and pit or drain, and for many feet beyond the same. The place where the said pit or drain was situated was one to which the public had full and legal access, and which the defenders were bound to have in a safe and suitable condition for the safety of the passengers and the public, and also of their own servants."

The pursuer having proposed an issue and the parties having failed to adjust it, the Lord Ordinary (Barcaple) reported the case, and to his interlocutor reporting appended the following note:—

"The defenders maintain that the pursuer has not set forth a relevant case of fault on their part causing the accident in question. It appears to the Lord Ordinary that there is no case on the record of neglect of duty by the railway company, as public carriers, towards the pursuer as their passenger. According to his own statement, he left the carriage unnecessarily, and for a purpose quite unconnected with his conveyance from Edinburgh to Cupar by the defenders' train; and in furtherance of that purpose he went to a part of the line where it was neither necessary nor proper for him as a passenger to be. It is not alleged that he went there by mistake, through the station not being properly lighted or otherwise, though when there the darkness was the cause of his falling into the drain. It is a different question whether, apart from any special duty as carriers to their passengers, the company were guilty of culpable neglect in having an open drain in the situation described in the record. The Lord Ordinary does not think that there are averments on record to raise such a case. It is not said that either the general public or passengers leaving the train were entitled to go there; and there is nothing in the averments from which that can be inferred. On the contrary, the inference from the pursuer's statements seems to be that the accident occurred at a place where he was not entitled to be, either as a passenger or as one of the public. If this is the true nature of the case, he must be held to have gone there at his own risk, without being entitled to rely on any protection from the company. For these reasons, the Lord Ordinary is disposed to think that the pursuer is not entitled to an issue, though he considers the case to be one of some nicety, from the immediate proximity of the drain to the station."

Solicitor-General and Monro, in support of the relevancy of the action.

Clark and Shand, in answer.

At advising,

Lord Justice-Clerk—The question which we have to dispose of is whether the averments of the pursuer raise a relevant case of neglect of duty on the part of the defenders as having caused the accident to the pursuer. Now, the Lord Ordinary takes a very decided view of the subject. He says there is no case of neglect of duty by the defenders as public carriers, and he thinks that the substance of the pursuer's statement is that he left the carriage for a purpose quite unnecessary, and unconnected with the purpose of his conveyance, and that he went to a part of the line where it was neither necessary nor proper for him to be. If I could so construe the statements of the pursuer, I might perhaps arrive at the same conclusion. And at first sight there is something in this view, for there is a great deal in the record which is perfectly useless and not a little ambiguous, and the grains of relevancy are difficult to pick out. But after an analysis of these statements I cannot concur with the Lord Ordinary that their substance is that the pursuer left the carriage unnecessarily, or that when he left the carriage he was not exercising his rights as a passenger. While he was there he was under the protection of the law, having a contract of safe carriage. Nor is the Lord Ordinary quite right in saying that the substance of the pursuer's statements is that he went to a part of the line where it was neither necessary nor proper for him to be. There is some defect in his statement here. What he means to aver is that the part of the line where the accident happened was a part of the line where, as a passenger, he was entitled to be. But the averment is not so defective that I would take the case out of the hands of a jury. The points for the consideration of the jury will be—(1) Whether at the time of the accident the pursuer was on a part of the premises of the defenders where, as a passenger, he was entitled to be? and (2) Whether being there lawfully as a passenger he met with injuries through negligence on the part of the defenders.?

Lord Cowan dissented, being of opinion that there was no relevant allegation of negligence on the part of the defenders.

Lords Benholme and Neaves agreed with the Lord Justice-Clerk.

The following issue was adjusted:—

"Whether, on the 23d day of December 1865, the pursuer, being a passenger on the defenders' line of railway from Edinburgh to Cupar-Fife, and having got out of the carriage in which he was travelling during the stoppage of the train at Ladybank Junction Station, fell into a pit or drain, which the defenders had wrongfully left uncovered or unfenced, at a place in or near the said station, where the pur-

suer as a passenger travelling on their railway was then entitled to be, whereby his leg was injured, through the fault of the defenders—to his loss, injury, and damage?"

Damages laid at £250.

Agents for Pursuer—Murdoch, Boyd, & Co., S.S.C.

Agent for Defenders—Stodart Macdonald, S.S.C.

Thursday, Feb. 14.

FIRST DIVISION.

MARSHALL *v.* WINK AND WOTHERSPOON.

Bankruptcy — Appeal — Competency—Process. A party having appealed against a trustee's deliverance *rejecting* his claim to a fund, objection to the competency of the appeal that there was no appeal against another deliverance *sustaining* the claim of another party to the same fund repelled.

This was a question arising in a competition to be preferentially ranked on a sum of £200, belonging to the sequestrated estate of Archibald Livingston, writer in Glasgow. The parties to the competition were John Marshall, S.S.C., and William Wotherspoon, S.S.C. Mr Wink, the trustee, sustained Mr Wotherspoon's claim, and by another deliverance rejected that of Mr Marshall. Mr Marshall thereupon appealed to the Lord Ordinary the deliverance of the trustee rejecting his claim. The trustee pleaded :—

"1. The fund *in medio* being exhausted by the deliverance in favour of Mr Wotherspoon, and the appellant not having appealed that deliverance which is now final, the present appeal is incompetent and should be dismissed.

"2. At least the deliverance in Mr Wotherspoon's favour is *res judicata*, in reference to the fund in dispute.

"3. The appellant not having made Mr Wotherspoon a party to the present appeal it is incompetent; at least the appellant is bound to call Mr Wotherspoon as a party and dispute his preference with him."

The Lord Ordinary (Mure) repelled the first plea-in-law for the respondent, and, before further answer, appointed the cause to be intimated to Mr Wotherspoon.

The trustee reclaimed.

The Court, after hearing the counsel for the appellant and trustee, before answer, appointed intimation to Mr Wotherspoon, who appeared and sisted himself, and was thereafter heard by counsel, not only on the competency of the appeal but also on the merits of the dispute betwixt him and Mr Marshall, which involved very delicate and difficult questions as to the effect of an inhibition and the extent of a right of hypothec.

To-day, after having taken time to consider, the Court adhered to the interlocutor of the Lord Ordinary, repelling the first plea-in-law for the respondent, and, as a consequence thereof, they also repelled the second and third.

LORD PRESIDENT—This case is before us along with an appeal against a judgment of a trustee on a sequestrated estate, by which he has rejected a claim of preference made by the appellant Mr Marshall. He has complained of that judgment, and an objection has been taken to the appeal, on the ground that while the appellant's claim was rejected, a claim by Mr Wotherspoon had been sustained, that that claim exhausted the fund, and that the judgment in regard to it had not been appealed and was now final. Mr Marshall says he has appealed the judgment which particularly concerned him, and that that is sufficient to entitle him to have it reviewed. But the trustee, who very properly appeared in the proceedings, takes the objection expressed in his first plea in law.—[Reads.] It was impossible, when that plea was stated, to have brought the judgment sustaining Mr Wotherspoon's claim under appeal, for the statutory period for doing so had elapsed. The Lord Ordinary repelled this plea, and appointed intimation to be made to Mr Wotherspoon. By dealing with the matter in that way, there would be in the field the trustee and also Mr Wotherspoon, who is said to have a special interest in the judgment he had obtained. Mr Wink has reclaimed against that interlocutor. It appeared to us that the proper course to adopt was to have intimation made to Mr Wotherspoon that he might appear if so advised, and accordingly we pronounced an order to that effect before answer. He has appeared and sisted himself, and we have heard counsel for him both on the competency of the appeal and on the merits of the question with Mr Marshall. The discussion on the merits raised a question as to the effect of an inhibition and the nature and extent of a claim of hypothec. I think the first thing we have to do is to deal with the interlocutor of the Lord Ordinary. Now, as to the first plea, we are all of opinion that the Lord Ordinary did what was right, and we are of opinion, further, that the plea is not well founded. We think the appellant did all that was absolutely incumbent upon him under the statute when he brought his own case here. If it was necessary to do more, it might sometimes be necessary to bring appeals in regard to all the creditors on an estate. That is clearly not the meaning of the statute. I think that necessarily disposes of the respondent's 2d and 3d pleas also.

The Court accordingly repelled the first three pleas, and continued the case *quoad ultra*, in order that the parties might furnish the Court with information in regard to certain matters explained to them.

Counsel for Mr Marshall—Lord Advocate and Mr Johnstone. Agents—Marshall & Stewart, S.S.C.

Counsel for Mr Wotherspoon—Mr Gifford Agents—Wotherspoon & Mack, S.S.C.

Counsel for Trustee—Mr Scott. Agent—John Walls, S.S.C.

AIKMAN *v.* AIKMAN.

Process—Reponing Note—Competency. Objection to the competency of a reponing note against a judgment by default in not lodging issues, that the interlocutor ordering the issues was not prefixed, *repelled;* but *observed* that the omission was an irregularity.

This was a reclaiming note against an interlocutor assoilzieing the defenders "in respect of the failure of the pursuer to lodge an issue or issues in terms of the preceding interlocutor of 24th January last."

MARSHALL, for the defenders, objected to the competency that the interlocutor of 24th January was not prefixed to the note as well as the interlocutor assoilzieing the defenders, as required by Act of Sederunt, 11th July 1828, sec. 110.

PATTISON, for the pursuer, replied that what was desiderated by the defenders was not required by the Act of Sederunt; at all events, the want of it did not amount to incompetency.

The LORD PRESIDENT—There is no doubt that