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Friday, July 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TENNENT *v.* TENNENT.

Proof — Presumption — Pater est quem nuptiæ demonstrant.

A husband and wife having agreed to separate, lived apart, but within such a distance as rendered access not impossible. *Held* that the presumption of law in favour of the legitimacy of a child begotten and born during the separation may be rebutted not only by evidence to show that the husband had not intercourse with the wife, but also by evidence of their conduct, such as that the wife had been guilty of adultery at a period corresponding to the conception of the child, that she concealed the birth of the child from her husband, registered it as the son of her paramour, and for years represented it to be illegitimate; that the husband when made aware of the birth of the child repudiated paternity, and was thereafter estranged from his wife in a way in which he had not been before; and that the wife's paramour acknowledged liability for the child's maintenance.

Question, whether affidavits emitted in the course of other judicial proceedings by persons since deceased were admissible as secondary evidence of the deponents in a question of legitimacy.

Opinion (*per* Lord Fraser) that such affidavits were admissible.

Opinion (*per* Lord M'Laren) that such affidavits were not admissible as secondary evidence of the deponents even in a case of pedigree, where they bore internal evidence of having been drawn by a solicitor and merely sworn to by the deponent.

This action was raised by George Dreadnot Tennent against Mrs Hamilton Dunbar Tennent, "designing herself of Pool, in the county of Lanark." The pursuer sought to have it declared that he was the only lawful and legitimate son of the deceased Major James Tennent of Pool, and Mrs Louisa Brown or Tennent, his wife, and that as such he was entitled to all the rights and privileges of children born in lawful wedlock, as regards inheritance, succession, or otherwise, and particularly that he was entitled to succeed to the whole heritable estate which belonged to his said father.

The defender denied that the pursuer was the son of Major Tennent of Pool.

The result of the proof is given very fully in the opinions of the Lord Ordinary (Fraser) and Lord M'Laren.

In the course of the proof the pursuer objected to the following documentary and parole evidence being received—(1) Affidavits emitted by Mrs Tennent, and other parties since deceased, in the course of proceedings before the Court of Probate and the Court of Chancery in England with regard to the administration and distribution of the estate of Major Tennent, who had died intestate; (2) certificate of registration of the pursuer's birth by Mrs Tennent, in which Mr Petherick was stated to be the father; (3) evidence of statements having been made by the mother of the pursuer that he was not a son of her husband.

In repelling these objections the Lord Ordinary delivered the following opinion:—"The first and most important objection is as to the admissibility of two documents, viz.—a certificate of the registration of the birth of the pursuer, and the affidavit of Mrs Tennent, of date 22nd June 1865.

"The certificate of birth bears that the registration was made upon information of Mrs Tennent, and it states that the father was Thomas George Petherick. It is proved that Mrs Tennent did register the birth and did sign the register. With regard to the affidavit, this was emitted in a Chancery suit for the purpose of distributing Major Tennent's estate, he having died intestate. It was instituted at the instance of William Turquand, accountant, London, who had been appointed by the Probate Court administrator. In this suit (in which Mrs Tennent was the defendant) she was examined on affidavit. It came out in the course of the proceedings that she had been delivered of a boy, who was stated to be illegitimate. In consequence of such statement the chief clerk directed advertisements to be inserted in the *Gazette* and other newspapers, calling upon all the next-of-kin who had claims upon the estate to come in and assert them. No appearance was made for the pursuer. The only next-of-kin who did appear was the daughter Julia, and the estate was ultimately ordered to be distributed, one-third to the widow Mrs Tennant, and two-thirds to Julia as the only next-of-kin. In this suit Mrs Tennent, being examined upon affidavit, swears—'And I further say that the only child born of the marriage between the said James Tennent and myself was a daughter, who was born on the 1st day of June 1841, and who was christened Louisa Ann Julia, and who is still living and unmarried.' If the statement in the certificate of registration and this statement in the affidavit are to be believed, then the pursuer of this action is illegitimate. But the first question raised is as to the admissibility of these statements. This objection is founded upon a rule which seems to be quite settled in English law, and which is thus stated by Sir James Stephen in his Treatise upon Evidence (p. 111)—'Neither the mother nor the husband is a competent witness as to the fact of their having or not having had

sexual intercourse with each other, nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not; provided that in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.' The reason assigned for this rule is thus stated by Lord Mansfield in the case of *Goodright* v. *Moss* (Cowper's Reports, p. 594)—'It is a rule founded in decency, morality, and policy that they (the father and mother) shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party. That point was solemnly determined at the delegates.' And this ruling has been commended by all the Judges who have had to consider the point—See *Legge* v. *Edmonds*, 25 L.J., Chan. 125. Baron Alderson said of it, that but for this rule 'it would be opening a door to evidence of the most dangerous description—*Cope* v. *Cope*, 1833, 1 Moody & Robinson, 273; and see section 106 of 1 Taylor on Evidence (8th ed.), 129.

"It cannot be said that there is any authoritative decision upon the point by the Scottish Courts. In the case of *Mackay* v. *Mackay*, February 24, 1855, 17 D. 494, the competency of asking the mother whether her husband was the father of her child was assumed as good law, and undoubtedly the decision in that case finding against the legitimacy mainly rested on the evidence given by the mother. But this must be said, that no objection was stated to the Court against the competency. No such objection is recorded in the proof, and the case cannot therefore be relied upon as a decision in favour of the competency of such evidence. The point, however, was taken in the next case which occurred, viz., *Brodie* v. *Dyce*, November 29, 1872, 11 Macph. 142, and the Court avoided any decision upon the subject, although two of the Judges (Lord Deas and Lord Ardmillan) stated their opinion that it was competent. The interlocutor of the Court, however, was—'The Lords having heard counsel on the record and proof, allow the pursuer (appellant) to lead additional proof by witnesses, other than the pursuer and her husband, for the purpose of showing that the pursuer's husband had no access to the pursuer so as to have connection with the pursuer at such time as would account for the conception and birth of the child born on 9th May 1871; reserving for consideration, when the said additional evidence shall be before the Court, whether the pursuer and her husband, or either of them, ought to be examined as witnesses on the said question of access or non-access.' The point thus reserved did not require to be taken up and disposed of, because the proof was held sufficient by other witnesses for finding the illegitimacy.

"It may be conceded that it is incompetent to put the mother into the witness-box and directly ask her the question whether her husband had access to her so as to be the father of her child. The English courts were influenced very greatly by the danger of allowing a woman—it might be from the most sinister motives—to bastardise one of her children so as to bring into the succession another child whom she better loved; and certainly this danger would be all the greater if, when the mother was asked such a question, she could not be contradicted by her husband, who had died. Indeed, in these circumstances, there would be no means of directly contradicting her. But another objection also, besides the danger arising from sinister motives, exists against the reception of such evidence. It is expressly declared by statute (37 and 38 Vict. cap. 64, sec. 2) 'that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.' It is true that this statute was not in existence before the death of Major Tennent and his wife; but in effect the common law was the same. A witness, according to the law in existence during the lifetime of these persons, could not be compelled to answer any question tending to show that he had been guilty of adultery—*Don* v. *Don*, May 25, 1848, 10 D. 1046. But granting all this, it does not necessarily follow that when there are circumstances corroborating in the very strongest way a confession by the woman of adultery, that such confession shall not be looked at. Although a party in a divorce suit cannot be asked in the witness-box whether he or she has been guilty of adultery, yet confessions made to third parties, or made in documents free from any suspicion of collusion, are admissible evidence. Dr Lushington has observed with reference to admissions in letters by a party said to be guilty containing confession of guilt: 'It has been held that confession, when perfectly free from all taint of collusion, when confirmed by circumstances and conduct, as this admission is, ranks amongst the highest species of evidence. It has been so held on different occasions. It was most truly stated by Lord Stowell in the case of *Mortimer* v. *Mortimer*, 2 Consistory Rep. 315, 'that the Court was inclined to view confession, when not affected by collusion, as evidence of the greatest importance;' and the grounds upon which the Court laid down this principle are too obvious to need any explanation' *Harris* v. *Harris*, 2 Hagg. Eccl. Rep. 409.

"Now then, what circumstances have we here? There is, in the first place, the registration of the birth of the pursuer of this action, which is proved to have been made by the mother who signed the register, and in that register the father of the pursuer is inserted as 'Thomas George

Petherick.' If there was any occasion on which a mother could be expected to state that her husband was the father, it would be when she was called upon to enter the birth in the public register in the town (Worthing) in which she lived. This is followed up by the affidavit emitted several years afterwards on the occasion of the distribution of her husband's estate—an affidavit which was against her own interest, because she thereby deprived herself of all claim for the maintenance of the child against her husband's estate, and the liability for the child's aliment fell, as stated by Mr Low, according to the law of England, upon herself. Now this adds great weight to the evidence given by the witness Mrs Giles (who was Mrs Tennent's servant, and who slept in the same bed with her at Worthing when Petherick did not do so), and also to the confession which she made to Mr Low and others. When the evidence of Mrs Giles and Mr Low was taken, neither the certificate of birth nor the affidavit had been put in evidence, and the simple question was whether or not the statements that she made to her servant and to her man of business could, without any further corroboration, be admitted. The Lord Ordinary is of opinion that these answers which he directed to be sealed up ought now to be read as admissible evidence. No doubt if the questions put to these witnesses were clearly incompetent, not being supported by other evidence of undoubted authenticity under her own hand, the rule laid down by the House of Lords in the *Dysart Peerage Case*, March 7, 1881, L.R., 6 App. Cas. 489, would have to be applied, viz., that you could not prove by hearsay a statement which at first hand was inadmissible. But when the confessions to these witnesses are in harmony with the rest of her conduct, the rule in the *Dysart Peerage Case* is inapplicable.

"Another objection to the admissibility of the affidavit is that a voluntary affidavit is not evidence of its contents; and this is quite true in general, but there are affidavits of a different character. If it be emitted in a process where it is competent, and the only competent evidence, it will be received, on the death of the party who emitted the affidavit, as good secondary evidence, provided there be no bias on the party who emits it to give colour or a twist to the story which it tells. Now, undoubtedly, Mrs Tennant had no interest to bastardise her issue. It is said that she and her daughter Julia had entered into a conspiracy to defeat the boy's rights. So far from being disaffected towards him, it was she who supported him, and she bequeathed by will all that she had to him. The case, therefore, being free from the suspicion of manufactured evidence, which only partially sets forth the truth, it comes within the doctrine laid down in the *Lauderdale Peerage Case* (L.R., 10 App. Cases 692), where a certificate of a clergyman testifying to a marriage and supported by an affidavit was received in evidence as proving a marriage.

"The result of this is that the Lord Ordinary admits the certificate of registration of the birth not merely as evidence that registration was made, but also that the mother then stated that Petherick was the father. He also admits the affidavit for the statement that the mother set forth upon oath that there was no other child of the marriage with Major Tennent than her daughter Julia. These statements no doubt may be contradicted; but until they are so they are most important evidence against the legitimacy of the pursuer.

"There are other documents in the suit in the Probate Court for the appointment of an administrator, and also in the Chancery suit for the distribution of the estate which have been objected to on the ground that the statements therein made, not having been proved to have been seen by Mrs Tennent or by the pursuer, or by anyone on his behalf, they cannot be used as evidence in this cause. They consist of affidavits by persons now deceased, viz., (1) by Alfred Brett, who was long an intimate friend of Major Tennent, and to whom he verbally confided on his death-bed the administration of his estate. In this affidavit by Mr Brett he narrates what he knew about the treatment of the pursuer when a child, and conversations with Major Tennent, who denied that he was the pursuer's father; (2) an affidavit by George Beswick, attorney in London, who was an agent for Major Tennent, who narrates similar conversations to the same effect with the Major. What weight is to be given to these statements is not the present question. They may be admitted *valeant quantum*. They are in noways inconsistent with Mrs Tennent's statement, but confirm and corroborate it, and they show that the advisers of the parties interested in the estate acted on the footing that the child was illegitimate. In like manner, there is embodied in Mr Beswick's affidavit letters from Mrs Tennent to her husband admitting the illegitimacy and confessing her fault, and upon the grounds already stated these letters are competent evidence. In like manner, Mr Beswick depones to statements made by Petherick which are unobjectionable so far as regards admissibility—both parties being dead—provided they be held not to be of the character of precognitions, which the Lord Ordinary holds they are not. He says —'I, on the said 28th day of March last, saw the said Thomas George Petherick at Worthing aforesaid, and questioned him as to his alleged intercourse with the plaintiff, and the said Thomas George Petherick then admitted to me that he had for many months prior to and at and after the birth of the said child carried on an adulterous intercourse with the said plaintiff, and that the said child may well be his child; but that as the said plaintiff about the said times committed adultery with other men, such as policemen and others, he could not say whether the said child was or was not his child, but he was aware that the said child was registered by the said plaintiff as his child.' In like manner, in the Chancery suit, the documents are admissible in order to see in what manner the estate was distributed. A number of these documents,

however, being of a merely formal character, they have been excluded.

"Two letters, Nos. 639 and 347, the first to Julia Tennent, dated 4th June 1864, and the second to Mrs Tennent, dated 21st September 1866, are also admitted being the statement of William Anderson, a person who interested himself in Mrs Tennent's affairs, and who states the import of conversations with Mrs Tennent as to the illegitimacy of the pursuer.

"Some evidence was led as to the repute among neighbours of Major and Mrs Tennent at Worthing of the guilt of Mrs Tennent. This kind of evidence has been found incompetent in an action of divorce in *A* v. *B*, 20th January 1858, 20 D. 407. Evidence of a rumour in a countryside in a question of pedigree was rejected in the *Shandwick Succession Case*, 17th November 1876, 4 R. 132, *aff.* 3rd July 1877, 4 R. (H.L.) 87. The Lord Ordinary attaches very little importance to the evidence, although it cannot be disputed that the repute in the present case was similar to the repute in declarators of marriage founded upon cohabitation with habit and repute. It was a report among the neighbours who saw Petherick, the paramour (who was registered by Mrs Tennent as the father), going in and out of Mrs Tennent's cottage, her husband being away. It was not, therefore, the mere random talk of the countryside, but a repute founded upon very potent sources of knowledge. The boy went by the name of Petherick among some people, and of Tennent among others; and although such a repute may exist, of course its value will entirely depend upon the powers of observation of the witnesses who heard it, and upon their sources of knowledge, and the Lord Ordinary did not see his way to exclude it."

On 15th March the Lord Ordinary found that the pursuer was not the son of the deceased James Tennent of Pool, therefore assoilzied the defender from the conclusions of the action and decerned.

"*Opinion.*—The pursuer claims to be the only lawful son of Major James Tennent, sometime of the East India Company's Service, and that as such he is entitled to succeed to the estate which belonged to his father. The pursuer is undoubtedly the son of Major Tennent's wife, and he was born during the subsistence of the marriage.

"Major Tennent was proprietor of an entailed estate in Scotland called Pool, in the county of Lanark, and was a retired officer of the East India Company's Service at the time of his marriage. That marriage took place on 3rd September 1840. There was unquestioned issue of the marriage in the person of Louisa Ann Julia, who was born on the 1st of June 1841, and died without issue on the 28th of August 1866. The pursuer of this action was born on the 20th of September 1854. Major Tennent died on 7th March 1864, and his wife died on 5th January 1868.

The birth of the pursuer having occurred during the subsistence of the marriage, he is presumed to be legitimate, and it falls upon the person denying the legitimacy to adduce evidence to show that at the time of the conception of the child the married pair had not sexual intercourse. The presumption will yield to evidence, and such evidence need not be proof of impossibility of such intercourse by reason of absence or by reason of impotency. If the whole circumstances when proved lead to the conclusion that the husband could not be the father of the child of whom the wife was the mother, it will be enough to establish illegitimacy.

"At the time of the pursuer's birth Major Tennent was sixty-five years of age. There is evidence to the effect that his wife complained of him being too old for her; but the challenge of the legitimacy in this case is not rested upon impotency of the husband from age.

"The married life of the couple does not seem to have been happy—at all events when they took up their residence at Worthing, in the county of Sussex. This they did in the year 1849. They lived at a place in Worthing called the Colonnade for some considerable time, and removed from thence to Eden Villa in the same town, where they remained for a year and a half. While resident there the wife made the acquaintance of a man named Thomas George Petherick, a riding-master at Worthing. From him she received riding lessons, and was accustomed to ride out with him into the country once or twice a week. This intimacy between the riding-master and Mrs Tennent excited the jealousy and called forth the reproaches of Major Tennent, and several stormy scenes took place between them in consequence. Some time in the year 1852 a very passionate scene occurred, in which the husband proceeded to personal violence towards his wife. She was defended by her servant, who was in her turn assaulted by the Major, and the result of this quarrel was the citation of the Major to the Police Court at Worthing, where he was fined £5 for the assault upon the girl.

"The important point to ascertain is whether the Major had any intercourse with his wife at the time when the pursuer was procreated, which must have been at the end of 1853 or January 1854. The parole evidence comes to this—so far as it is given by the most reliable and distinct of the witnesses—that the Major left Worthing in 1852, and never returned to it. He dismantled Eden Villa in that year, and stored his furniture with a storekeeper at Worthing. He left his wife at Worthing, and her story was this—Being turned out of Eden Villa Mrs Tennent went to a cottage which had been a stable, at some little distance from the villa, but before the cottage was ready she went to sleep with a ladies' nurse, Mrs Alice Copherd, who says that 'Mrs Tennent went down to live at the stables. I did not go with her the first night, but she sent for me the following day. I stayed with her during the day, and she used to come home to my house and sleep because there was no accommodation at the stables. I used to cook for her in my house, and take her

meals to the stables. This was immediately after she left Eden Villa. I never saw the Major at my house or at the stables. The cottage was the same place as the stables. The stable was converted into a cottage.' And James Swan, a boot and shoe maker at Worthing, says that after the scene at the Police Court 'the Major left Eden Villa . . . and I never saw him again in Worthing. After the Major left, Mrs Tennent went to live at the stables during the day, and she went to the old nurse's to sleep. Mrs Tennent went to London for a short time, and Mr Patching, builder, converted the stables into a cottage for the lady's convenience.' The Major never was at this cottage, although some of the witnesses, speaking of a matter of thirty-five years ago, are got in a hesitating way to say that they have seen him there, and seen him there when Mrs Tennent was pregnant, and the signs of pregnancy visible. In that cottage Mrs Tennent remained during the whole of the years 1853 and 1854 at least. It is not easy from the letters to track her course afterwards, and it is not material for the purposes of this case.

"Mr Gravatt Hobgen, managing clerk to Mr Edmunds, solicitor, Worthing, who did professional business for Mrs Tennent, says that she bought the property with her own money, and that she lived in it till 1855, when, he says, 'Mrs Tennent went to live in Brighton in 1855, and the cottage stood vacant for some time. The state in which it was attracted general attention. It was getting dilapidated, and the fences were being allowed to go to waste.' At an interview between him and Mrs Tennent at Brighton she gave him authority to sell the cottage, which he did.

"Major Tennent (to go no further back) was living at Streatham, Surrey, on 10th May 1853, from which place he writes a letter to his agent Mr Hugh Blair, W.S. He is there also on 29th August 1853. On 14th November 1853 he is at Clapham Road, Kennington, Surrey. On 19th December 1853 (and this is an important date) he writes a letter from the same place to his agent Mr Hugh Blair. And on the 17th, 21st, and 24th February, and on 10th and 17th March 1854, he writes letters from the same place to his wife, all of which letters are addressed to Mrs Tennent at Worthing. On the 21st of April 1854 he is at the same place, and so he is on 4th September 1854, in which month the pursuer was born. There are other letters similarly addressed during the same year, 1854, to Mrs Tennent at Worthing, and in 1855 and 1856. Now, there was no impossibility of Major Tennent, who was living at Streatham, seeing his wife, who was living at Worthing. They did in fact live separate, and whether they ever met as to procreate the pursuer is the question which the evidence is intended to elucidate.

"The Lord Ordinary has already stated the grounds upon which he has admitted the declarations of both parties as to the paternity of the child. The import and effect of these declarations fall now to be considered. And first, as to the declarations by the mother. The most important of these is the certificate of the birth of the pursuer, extracted from the register at Worthing, and which register is signed by the mother Louisa Tennent. This certificate bears that George Dreadnot Tennent Petherick was born on the 20th September 1854; that the name and surname of his father was Thomas George Petherick, and the name and maiden surname of the mother was Louisa Tennent, formerly La Bon (there is some evidence to show that she was brought up in Paris, and her letters indicate a very imperfect acquaintance with the grammar and spelling of the English language); that the rank and profession of the father was a riding-master; and then there is the signature of 'Louisa Tennent, mother, Brighton Road, Worthing.' William Patching, the registrar, proves that this signature was the signature of Mrs Tennent. She was very anxious about this registration, for she writes a letter to her agent, Mr Edmunds, in the following terms—'Will you do me the kind favor of meeting Mr Patching hear to-morrow, Saturday, at 12 o'c., in order to arrange about the registering of my infant, as I am unable to leave home, and am, sir, yours very truly, LOUISA TENNENT. *P.S.*—An answer by bearer will oblige.' Mr Patching explains that in consequence of Mrs Tennent's inability to attend at the office, the registration and the signature were made at Mrs Tennent's house, where he, the registrar, attended.

"The next important document in the case is an affidavit by Mrs Tennent made by her in the Chancery suit which was instituted for the distribution of her husband's estate, and which was emitted on 22nd June 1865. In this affidavit she says, 'And I further say that the only child born of the marriage between the said James Tennent and myself was a daughter who was born on the 1st day of June 1841, and who was christened Louisa Ann Julia, and who is still living and unmarried.'

"Mrs Tennent continued quite consistent in asserting that Petherick was the father of her child until near the close of her life, when she began to change her assertions, whether out of regard for the pursuer or for the purpose of teasing her husband does not very clearly appear. The child was taken away very shortly after its birth, and successively confided to various persons who kept it from time to time. It was boarded with a man of the name of Proctor, a blacksmith; then with a Mrs Biddy; then with Mrs Brown at West Tarring; then with a Mrs Anderson at Worthing. It seemed to have received very bad treatment, for the police of Worthing found it wandering about the streets, and it was taken by them before the bench of magistrates, and, as Mr Hobgen states, 'the police represented to the bench that the child was nearly naked, filthy, and wretched in the extreme, and that he was being brought up to sleep with the dog.' The consequence was that the magistrates intimated that they would issue a warrant for the apprehension of Mrs Tennent for

deserting her child, and Mr Hobgen having found out Mrs Tennent, induced her to advance money to pay for the board due for the child, and to take it away and put it in other hands, which Mr Hobgen, acting under written authority from Mrs Tennent, did. He handed it over to Mrs Mills.

"Proctor, the blacksmith, brought an action in a County Court against Major Tennent for payment of the boy's board and lodging, and in this action Proctor was non-suited. The sum due to him was paid through Mr Edmunds by Petherick, who advanced the money.

"Another action was brought against Major Tennent in December 1862, in a different County Court, at the instance on this occasion of Mrs Mill's husband. The result of this action was a verdict for Major Tennent on the ground that there was no contract on his part to pay the plaintiff for the board of the child. In November 1863 Mills raised another action in another County Court against Major Tennent, and again a verdict was returned in favour of the latter. These proceedings caused Major Tennent very great discomfort and annoyance, and brought about a total change in his mode of addressing her in his letters.

"On 18th December 1855 Major Tennent, in a letter to Mrs Tennent, says—'I heard on the 7th Nov. about a child that you wanted to place out to nurse; the party appeared to know something about 3 Atkinson's Place, Brixton. I told Julia I did not like the report.' Atkinson's Place, Brixton, was a lodging belonging to a man of the name of Peters, where Mrs Tennent was living alone. Plainly at this time the Major had no knowledge of the birth, a circumstance always material in considering whether the husband is the father of the child.

"Mrs Tennent was very much exercised by Proctor's action having been brought against Major Tennent, and in a letter of hers, dated 5th September 1856, she says—'Now, dear Major, this is indeed a sad affair, but it is no use my repeating over and over again the ground-work of it, the question is the present point. If you entertain vindictive feelings towards, of course I am unable to help it. I have admitted I am wrong, and I regret the wrong; I can do no more. . . . I should then do you justice over this affair to the utmost, only let me clearly understand how this matter is to be met. I consider it unfair for you to support his child, as such had you better not let a professional gentleman answer the summons at the court. If so let him see me, and I will put him in such a position as will inshure his success. I suggest Mr Lamb, he is clever, and has acted against him for other parties. If you wont have him, I shall engage him myself. If it becomes necessary, I would send a notice into the court and postpone the affair for the following month, but not being the party summoned I am not yet likely so to do, and the court will not let a married lady declare her children not in wedlock, the court should set its face against the act. You can send a notice in, and I think would at once throw the affair in such a position as to enable the Judge to make the father provide for it. Do please let me know your intention, as I do not like to act till I have them, and it is not well to drive everything off to the last. I am in possession of a good deal of information, and know the points that would be used against you, so pray let me see you if it is possible, and only for half-an-hour. I give you my word of honour I shall take no advantage of it, as we can speak plainly. It would be better if you are not disposed to act towards me, you had then better help me to manage for that I cannot out of what I have, you know, dear, that well enuf. Why not stick to me? I would be above taking an advantage kindness shown towards myself. I never act like that, then I may be revengfull if injured without cause. I hope, sad as this affair has, is the honour observed by me all throw. It shall now convince you how rong you were towards me at the villa. You were there led away by imaginations and false interested parties; all was rite till you deserted me at Brighton, and so unkindly treated me there. I came to you at the house; you were worse in that treatment were revengful fellings, and at wonce to Worthing. I went where the false acquaintance was formed, determined to no longer suffer without cause, up to that my head was clear, so now, dear Major, permit me to ask who has been the cause of it; not a bad disposition. Oh, should I have withheald my acquaintance, as I have done ever since you have been more kind towards me, so must conclude, still yours affectionately, LOUISA TENNENT. *P.S.*—Excuse the remarks I am now about to make. I conceive it extraordinary you should have made severalt efforts to leave that house, and appear unlikely to do so; as also the marked unkindness from the first. *A coppay of the notice I should send to the Court.* Notice is hereby given that Major James Tennent has been seperated from his wife Louisa Tennent since 1845, and the child in quaistion was born at Worthing on the 20th of September 1854, and undoughtly is the offspring of Mr Thomas George Petherick, Ridingmaster of Worthing, Sussex, as evidence can be adduced, therefore Major Tennent declines to support the child. Given under my hand, this day 1856, to the County Court held at Worthing, the 22nd of September 1856. Will you kindly let me know this servant's name you alluded to in yours.'

"Mrs Tennent, besides writing to her husband in regard to Proctor's claim, wrote also to her agent Mr Edmunds, solicitor in Worthing. In this letter she says—'If you could see that Mr Petherrick, I wish you would due me the favour of traying to bring him to a rite feeling and and understanding with respect to his dear little son, who is a child anyone should be proud of, he is a fine boy, and will be 5 months come the 20 of this month, and that unatural young man as not yet contribeted in the slitest way towards its comfort, which I

think very unjust towards his child, and ungraitfull to me, for I am shore I have bestoed kindness enuf upon him in every way. I studed him trouthfuly with my heart and soul. I hear, in addishon to this very bad conduct, he is goin about telling scandelous storeys over me with no other object than to avoid doing his duty towards his own flesh and Blude, and that seems to be his generall plan. I shall have an opportunity perhaps some day of fixing him in his own storeys, and he shall repent of it.' Again on 3rd September 1855 Mrs Tennent wrote to Mr Edmunds—Dear sir,—I did hope to have seen you ere this, when I should have said something to you about Mr Peterwick, as I feel I have the gratest injustice imposed upon me. It is unnecessary for me to repeat to you the trouble and expenes he has caused me my having told them you in many former letters, now the fact is this, his genrell immorall conduct has ingered his child, who is a very heavey expens, and will require constant meddicall care, and I cannot but feel he ought to contreapot towards so heavy a trouble and injustice and injury. When the child was placed out to nurse, it was by his wish and promis to pay the expens of it, a circumstance that can be well affirmed, as he came to me the evening preveaus to arrange and send the infant with other parties in his own Filey to the nurses, but he has never yet given one shilling of it. There is now more than £12 do under such arrangemt, independent of other expence I have born, and considering the money and favours he has had from me, he ought to be made du something. Now, dear sir, I blive this and all I may have stateted I blive to be on grounds of solemn trouth, althou he has practiced falshoods for his halp, and am, dear sir, yours very truly, L. Tennent. To Mr G. Edmonds.' And in another letter to Mr Edmunds, on 25th September 1856, referring to the fact that Petherick had not appeared as a witness in the case at Proctor's instance, says—'So Mr Petherwick could not face the matter and deny his child. I only wish he had, as all was ready for him. He has paid Mr Proctor's demand, which I am surprised at, after his saying the child was not his.'

"These letters of Mrs Tennent, written at a time when it did not occur to her to set up the legitimacy of the pursuer, are in entire accordance with her intercourse with the various professional gentlemen with whom she had to deal. Her solicitor in London was Mr Edwin Low, whose letters to her, and from her to him, have been produced. This gentleman was a most patient professional adviser and a most unwearied friend of Mrs Tennent, as is shewn by his letters. To this gentleman Mrs Tennant confided all her history, and in answer to the question, 'Did she tell you who was the father of the pursuer?' he said 'She told me Petherick was the father.' But Mrs Giles is a far more important witness even than Mr Low. She was a servant, and the only servant, of Mrs Tennent from September 1852 till May or June 1853, and again from August 1853 until August 1854. She is now a widow, and lives upon heritable property left to her by her husband, consisting of cottages at Tottenham, and is the mother of children. This person gives evidence of the most important character, and if she is to be believed it is conclusive of this case. In the first place, she states that she never saw Major Tennent in the house occupied by his wife from the time she entered—which was September 1852—until she left in August 1854. She further states that Petherick was almost a daily visitor at the house; that he very frequently stayed all night in the house and slept with Mrs Tennent, and in particular that he did so at or about the time the pursuer must have been procreated—at Christmas 1853. She further states that when Petherick did not sleep with Mrs Tennent, she, the witness, did, and that Mrs Tennent then and there confided to her the fact that she was with child, and that Petherick was the father of it. Now, the evidence of this witness is in the opinion of the Lord Ordinary entirely truthful. She is a respectable woman who gave her evidence with distinctness and moderation, though she made one or two blunders as to years when the Tennents migrated from the one place to the other, as all the witnesses did. But upon the main points in this case there was no hesitation whatever. Of course she was examined as to the infamy of her conduct in residing in a house where she saw adultery committed, and as to the revolting character on her part of staying in a house where there were such goings on, and so forth, and so forth. She was a servant girl upon wages. She was kindly treated by her mistress, and she says, what might very naturally be concluded, that it was no business of hers to make any *esclandre* about her mistress. She ultimately did tell her father and mother, and when they knew the facts they took her away from the service. When she was a married woman and had revisited Worthing, she went to see her old mistress, whom she then found living at Chapel Road Cottage. 'She told me I knew all her troubles, and asked me to come back to Worthing and stay with her. I told her I didn't want to come back to Worthing again. (Q) Did she mention Petherick's name?—(A) She asked if I had seen him, and I told her I didn't come to look for Mr Petherick. (Q) Did she say anything about the Major?—(A) I asked if she had seen the Major or heard from him, and she said no. (Q) Since when—from the time you had left her?—(A) From the time I had left her. (Q) And she said she hadn't?—(A) And didn't want to. (Q) Did she say anything about what would happen if the Major were to slip away—to die?—(A) She should marry Mr Petherick. She didn't mention the child at all. I knew from my mother it was being brought up by strangers."

There were other persons besides Mrs Giles and Mr Low to whom Mrs Tennent made confessions, and among others Mr Denny, a surgeon at Kingsland, to whom she confided

the custody of the pursuer after she finally got possession of him. Mr Denny, who was appointed guardian under the will of Mrs Tennent to the pursuer, depones—'I was informed that the said George Dreadnot Tennent Petherick Tennent was the illegitimate child of Mrs Louisa Tennent. I do not think the word "illegitimate" was actually used, but I was told that he was not the son of Major Tennent. I was told so by Mr Petherick, Mr Peters, and Mrs Tennent. Thomas George Petherick did state that he had had connection with Mrs Tennent before the birth of the said George Dreadnot Tennent Petherick Tennent, and that he was the father.' And in answer to the question, 'Did Mrs Tennent state that the child was illegitimate, and that the said Thomas George Petherick was the father?' Mr Denny replied, 'She stated that Thomas George Petherick was the father of the child.'

"So much for the statements of Mrs Tennent. With regard to Major Tennent, the evidence from first to last is perfectly decisive—that he repudiated the paternity altogether. His suspicions were aroused, as stated in the letter of the 18th of December 1855 already referred to, and in all the letters that he wrote to Mrs Tennent on the subject he describes the whole affair as 'disgraceful' and 'infamous' upon her part. In his letter of 6th September 1856 he calls upon her to state on oath who is the father of her child. On the 10th September 1856 he describes the affair as 'infamous,' as he again does on 19th September 1856. He is very indignant at the idea of her bastard child claiming Julia's rights, as set forth in the letter of date 17th October 1856, and so in other letters of that year, when the fact was distinctly brought home to him, in consequence of the actions that were brought against him for the maintenance of the pursuer. Up to this date he had addressed her in his letters as 'Dear Louisa,' and 'Yours affectionately,' but after September the 'Dear Louisa' is dropped, and so is 'Yours affectionately,' and she is simply called 'Mrs Tennent.'

"Mr Brett was the intimate friend of Major Tennent, and was requested by the Major upon his deathbed to look after his affairs. In an affidavit emitted by Mr Brett, in regard to the administration of the estate of the Major, he states that the child was born two years after the parties (husband and wife) had separated, and that it was disowned by the Major all along; and in another affidavit by Mr Beswick, solicitor in London, who was agent for the Major, he depones—'That more than two years after the said separation, and after the said James Tennent had wholly ceased to live with the said plaintiff, she was delivered at Worthing, in the county of Sussex, of a male child, which said child was commonly reputed to be the child of one Thomas George Petherick, then a riding-master at Worthing aforesaid, and the said child was always disowned by the said James Tennent, and was not, as I was informed by the said James Tennent, and verily believe, the child of the said James Tennent; and the said plaintiff then caused the birth of the said child to be registered in the Registry of Births at Worthing aforesaid in the following form.' And then an excerpt is given from the register of births as already stated. In the bond of provision and disposition in security by Major Tennent, dated 13th October 1863, in favour of his daughter Julia, he describes her as his 'only child now living.'

"With reference to Petherick, the facts brought out by the proof are that he never denied, but on the contrary admitted, that he was the father of the pursuer. Mr Beswick called upon him, and requested information from him on the subject, which he did on the 28th of March 1864, when he saw Petherick 'at Worthing aforesaid, and questioned him as to his alleged intercourse with the plaintiff [Mrs Tennent], and the said Thomas George Petherick then admitted to me that he had for many months prior to, and at and after the birth of the said child, carried on an adulterous intercourse with the said plaintiff, and that the said child may well be his child, but that as the said plaintiff about the said times committed adultery with other men, such as policemen and others, he could not say whether the said child was or was not his child, but he was aware that the said child was registered by the said plaintiff as his child.' The charge here made by Petherick of promiscuous intercourse is not supported by any other evidence in the case, and is contrary to that given by Mrs Giles, who says that during the whole period when she was in the service of Mrs Tennent no man entered the house except Petherick and the doctor. But still the fact remains that Petherick claimed and was proud of his intercourse with Mrs Tennent. 'He was,' says Joseph Pack, 'rather pleased when you chaffed him about it.' Petherick seems to have fallen into very poor circumstances at last. He had been away from Worthing for some time, and he was met by the witness James Swan about five years ago, and Swan says, 'I met him about the college where the child was taken first. "Mr Swan," he said, "have you got a sixpence in your pocket? I have not a penny in the world, and am hungry." I said, "Tommy, I will give you sixpence; I am sorry to see you broken down like this." I said, "Where is your son?" He said, "My son is in London, Mr Swan, and he is being brought up too much of a gentleman to recognise or take any notice of me."' Before he had fallen so low as this, Petherick did contribute something for the support of the pursuer. No doubt Mrs Tennent's letters, so far as they can be read—for they are very difficult to decipher—complains of his not doing enough in this respect. When Proctor was non-suited in his claim against Major Tennent, Petherick came forward and paid the claim for the pursuer's board through the medium of Mr Edmunds, the brother of the solicitor. He also paid Mrs Brown and Mrs Mills for their charges in regard to the maintenance of the pursuer.

"No doubt Mrs Tennent latterly took up

a different cue from that which her letters indicated. She seemed to have taken a liking to the pursuer. She left him by will all that she possessed, and he obtained thereby upwards of £600, and in order to support his claim as being the child of Major Tennent she drew up two papers which she confided to Mr Low, and which he produced, giving fanciful dates as to the periods when she was residing with her husband and when she was absent from him.

"Besides the evidence of intercourse between Petherick and Mrs Tennent which has been referred to, there is a large body of evidence to the effect that Petherick frequented the cottage where Mrs Tennent was staying alone at all hours, especially late at night, and was seen leaving the cottage in the mornings, and all this was done so openly that it was matter of common talk in Worthing, and surprise was expressed by no one at the repute which Petherick got of being the father. This outside evidence is very important as corroborating the direct evidence of Mrs Giles, and as supplementary to Mrs Tennent's own statements in her letters.

"It is said, however, that the Major was perfectly well aware of the pregnancy of his wife, and showed this in a very marked way by attending with her at a baby-linen warehouse in London, where she bought the necessary articles of clothing for the coming child. Mrs Westphall, the daughter of a Mr and Mrs Peters, from whom Major Tennent and his wife had furnished lodgings, states that when a girl at school she accompanied upon one occasion Major and Mrs Tennent to a shop in the Strand, where purchases were made of a baby-linen character, and were paid for by the Major. The pursuer put suggestive questions to the witness to show that this took place in the year 1854, in which year the pursuer was born, but it is perfectly plain that the incident did not take place in 1854 but in 1852. The witness herself states that 'there is nothing to fix the date of the visit to the baby-linen shop in my mind except that it was when I was home for the vacation from Brixton Hill School. The season of the year is also fixed by the fact that I recollect that it was warm weather. It was apparent to me that she was in the family way, because she was fidgety and uncomfortable.' The Major and his wife did live at Brixton in 1852, and the wife was pregnant on the occasion when she was in the baby-linen shop as described by the witness. Mrs Westphall's father, William Peters, of 28 Brixton Place, Brixton, was examined upon affidavit for Mrs Tennent in support of her claim to be appointed administrator to her husband's estate. In this affidavit he describes how he became acquainted with Major and Mrs Tennent, and how they took lodging in his apartments in the year 1852, and the fourth article of this affidavit is in these terms—'In September of the same year (1852) the Major and his wife took my house furnished, No. 3 Atkinson Place, Brixton, where they both resided together, and Mrs Tennent was confined there in December 1852 of a still-born child.' Mrs Tennent refers to this child in several of her letters. In one of these, dated Brixton, March 22d, she says—'As I am now writing I will take the opportunity of naming a few little things omited by me on Saturday evening. First, the three deeds you spoke run thus—first, the deed of seperation destroyed by many years, in a home living again with my late husband, and the birth of my little son still-born while living with him. The second deed, while living with my husband, is on the Scotch property,' &c. And in another letter she again refers to the birth of this dead child.

"The circumstances of this case are such that the Lord Ordinary has no hesitation in coming to the conclusion embodied in his interlocutor, and this notwithstanding the great weight that must be given to the presumption in favour of legitimacy."

The pursuer reclaimed, and argued—1. *As to the admissibility of the affidavits*—Voluntary affidavits were not evidence of their contents, and where there was any suspicion that statements made by deceased persons were coloured or one-sided, either from their terms or the circumstances in which they were made, they must be rejected. In the present case the affidavits objected to should not be admitted in evidence—Dickson on Evidence, ii., sec. 1534; Starkie on Evidence, 61, 409, 448; *Magistrates of Aberdeen* v. *More*, June 17, 1813, Hume's Dec. 502; *Simpson* v. *Macfarlane*, September 23, 1822, 3 Murray, 193; *Glyn* v. *Johnstone & Company*, December 5, 1854, 13 S. 126; *Gordon* v. *Grant*, November 12, 1850, 13 D. 1; *Geils* v. *Geils*, February 10, 1855, 17 D. 397; *Macdonald* v. *Union Bank*, March 29, 1864, 2 Macph. 963; *Aitchison* v. *Aitchison*, June 16, 1877, 4 R. 899; *Davidson* v. *Davidson*, February 11, 1860, 22 D. 749; *Yelverton* v. *Longworth*, June 28, 1864, L.R., 1 Sc. App. 218, 2 Macph. (H. of L.) 49, and 4 Macq. 745; *Marianski* v. *Cairns*, July 1, 1852, 1 Macq. 212; *Lauderdale Peerage* case, July 22, 1855, L.R., 10 App. Cas. 692; *Lord Advocate* v. *Smith*, 1857, 2 Irv. 641. 2. *As to the admissibility of statements by Major and Mrs Tennent*—Confessions of spouses, though admissible in consistorial actions between spouses, were not competent evidence in questions of legitimacy, and statements by spouses were not admissible evidence to rebut the presumption of legitimacy—11 Geo. IV.; 1 Will. IV. cap. 69, sec. 36; 16 and 17 Vict. cap. 20, sec. 4; Stephen on Evidence, p. 111; Taylor on Evidence (8th ed.), sec. 106; *Cope* v. *Cope*, 1833, 1 M. & R. 269; *Goodright* v. *Moss*, 1777, 2 Cowper, 591; *Muirhead* v. *Muirhead*, May 28, 1846, 8 D. 786; *Legge* v. *Edmonds*, 25 L.J., Ch. 125; *Mackay* v. *Mackay*, February 24, 1855, 17 D. 494; *Tulloh* v. *Tulloh*, February 22 and 28, 1861, 23 D. 639; *Brodie* v. *Dyce*, November 29, 1872, 11 Macph. 141; *Dysart Peerage* case, March 7, 1881, L.R., 6 App. Cas. 489; *Wright* v. *Holdgate*, 3 Carr & Kerw. 158; *Anon.* v. *Anon.*, 22 B. 481. 3. *On the result of the evidence*—Non-access was not proved,

and that being so, the other evidence in the case was not sufficient to rebut the presumption in favour of the pursuer's legitimacy—*Steedman* v. *Steedman*, July 20, 1887, 14 R. 1066; *Routledge* v. *Carruthers*, May 19, 1812, F.C.; *Mackay* v. *Mackay*, *supra*.

Argued for the defender and respondent—1. *As to the admissibility of the affidavits*—There was no absolute rule that affidavits could not be admitted in evidence. That question was quite different from the question whether evidence in one case should be admitted in another. The fact that an affidavit was a written statement was no objection to it. It was the more likely for that very reason to be correct secondary evidence of the deponent. In the case of Mrs Tennent's affidavit, also, the agent who drew it was examined as a witness in the present case. On the other hand, if it could be shown that Mrs Tennent when she emitted the affidavit had a motive to put a gloss on what had occurred the affidavit would fall to be rejected, but there was no room for such a suggestion—*Lauderdale Peerage* case, July 22, 1885, L.R., 10 App. Cas., *per* Lord Watson, 706, *per* Lord Selborne, 710. 2. *As to the admissibility of declarations by Major and Mrs Tennent*—Statements of spouses were admissible evidence to rebut the presumption of legitimacy as part of the *res gestæ* and conduct of the spouses both in English and Scottish law—*Goodright* v. *Moss*, 2 Cowper, 591; *Morris* v. *Davies*, 1827, 5 Cl. & Fin. 163; *Dysart Peerage* case, March 7, 1881, L.R., 6 App. Cas. 489; Stair, iii. 3, 42; *Walker* v. *Walker*, January 23, 1857, 19 D. 290; *Gardner Peerage* case, Le Marchant's Report, *per* the Lord Chancellor, 333; *Banbury Peerage* case, in app. to *Gardner Peerage* case, *per* Lord Redesdale, 432, 443, *per* Lord Erskine, 490; *Legge* v. *Edmonds*, 25 L.J., Ch. 125; *Mackay* v. *Mackay*, February 24, 1855, 17 D. 494; *Steedman* v. *Steedman*, July 20, 1887, 14 R. 1066. What could not be proved in English law by declarations of the spouses was non-access after marriage—*per* Lord Mansfield in *Goodright* v. *Moss*, 2 Cowper, 594. 3. *On the result of the evidence*—It was not incumbent on the defender to prove impossibility of access—*Mackay* v. *Mackay*, and *Morris* v. *Davies*, *supra*. The spouses had lived separate for more than a year prior to the pursuer's birth. The best evidence of the legitimacy of a child was the conduct of the spouses regarding it, and that in the present case was all against the legitimacy of the pursuer. The proof of Mrs Tennent's adultery with Petherick was also evidence against the pursuer's legitimacy, though not of itself sufficient to rebut the presumption in his favour. On the whole, the evidence led irresistibly to the conclusion that the pursuer was not the son of Major Tennent.

At advising—

Lord M'Laren—This case comes before us on a reclaiming-note against the interlocutor of Lord Fraser, who found that the pursuer is not the son of the deceased Major James Tennent, and assoilzied the defender, Major Tennent's representative, from the conclusions of the action under which the pursuer seeks to establish his legitimacy.

Major Tennent, who was a retired officer of the East India Company's service, married the pursuer's mother on 3rd September 1840, and of this marriage a daughter, Louisa, was born on 1st June 1841. The pursuer was born on 20th September 1854. He is the son of Mrs Tennent, and having been born during the subsistence of the marriage he has the benefit of the presumption in favour of legitimacy. The question of course is whether this presumption is overcome by evidence.

The next important question for consideration is, whether at the time of the conception Mrs Tennent was accessible to her husband, and along with the evidence on this subject we have to consider the relations which subsisted between the spouses at the time, and the evidence which is said to establish that the birth of the pursuer was concealed from Major Tennent.

At the time of the pursuer's birth Major Tennent was sixty-five years of age. For some time previous the spouses were apparently not on good terms. It also appears that Mrs Tennent was aware of circumstances indicating that her husband had improper relations with other women.

In 1849 the spouses went to reside at Worthing in the county of Sussex. While resident at Eden Villa in that town Mrs Tennent made the acquaintance of Thomas George Petherick, a riding-master at Worthing, who was in the habit of accompanying her when she took rides in the country. There is evidence to the effect that Major Tennent objected to his wife's intimacy with Petherick, but it is not quite clear that this was the cause of his leaving Worthing. Whatever the reason was, Major Tennent left Worthing in 1852, and there is no evidence of his having ever returned to it. He dismantled his house, Eden Villa, in that year, and went to live in the south side of London. On 11th September 1852 Major Tennent executed a deed of separation by which he assigned to his wife the household furniture stored at Worthing, and covenanted to pay her an annuity of £100 per annum.

In December of that year Mrs Tennent gave birth to a still-born child. There is very little evidence as to the life of the parties in the year 1853, and it rather appears that notwithstanding the deed of separation the parties lived together at least occasionally in lodgings in the suburbs of London during that year. But there can be no doubt that from the time of the separation Mrs Tennent's usual place of residence was at Worthing, in a cottage which she fitted up for herself after her husband had left Eden Villa. This is proved by the same witnesses who speak to Mrs Tennent's intimacy with Petherick, and it receives indirect confirmation from the circumstance that the furniture at Worthing was assigned by Major Tennent to his wife by the deed of September 1852.

As the pursuer was born on 20th Septem-

ber 1854 the normal time of conception would be December 1853. There are letters from Major Tennent to his wife written in the months of February, March, April, May, June, July, and August 1854. These are all dated from Major Tennent's lodgings in London, and are addressed to Mrs Tennent at Worthing. In none of these letters is there any allusion to visits made or to be made by him to his wife, nor is there any reference to visits by Mrs Tennent to her husband. The general tenor of the letters is inconsistent with the notion that there was any personal intercourse between the parties. Among these letters there is only one which may have been addressed to Mrs Tennent at London or some other place than Worthing—I mean the letter of June 19th. There is documentary evidence (chiefly receipted accounts) showing that in December 1853 and January 1854 Major Tennent was living in London and Mrs Tennent at Worthing.

During this period Major Tennent allowed his daughter to visit her mother at Worthing, and in one of the letters he complains of his daughter staying too long, saying he "disliked her being at Worthing." The letters do not of course prove that it was impossible for Major Tennent to have had access to his wife during the possible period of conception, but so far as they go they are altogether inconsistent with the theory that there was access, and on this subject they constitute a body of evidence more reliable than the depositions of the witnesses who say that Major Tennent was not at Worthing at this time.

It is, however, to be observed that no one has said, and there is no evidence of any kind, that Major Tennent visited his wife at Worthing during the winter of 1853-54.

I come now to the positive evidence regarding the paternity of the pursuer. The next important witness is Mrs Giles, whose evidence is thus summarised by the Lord Ordinary—"Mrs Giles was a servant, and the only servant, of Mrs Tennent from September 1852 till May or June 1853, and again from August 1853 until August 1854. She is now a widow, and lives upon heritable property left to her by her husband consisting of cottages at Tottenham, and is the mother of children. This person gives evidence of the most important character, and if she is to be believed it is conclusive of this case. In the first place, she states that she never saw Major Tennent in the house occupied by his wife from the time she entered—which was September 1852—until she left in August 1854. She further states that Petherick was almost a daily visitor at the house, that he very frequently stayed all night in the house and slept with Mrs Tennent, and in particular that he did so at or about the time the pursuer must have been procreated—at Christmas 1853. She further states that when Petherick did not sleep with Mrs Tennent she, the witness, did, and that Mrs Tennent then and there confided to her the fact that she was with child, and that Petherick was the father of it. Now, the evidence of this witness is in the opinion of the Lord Ordinary entirely truthful. She is a respectable woman, who gave her evidence with distinctness and moderation, though she made one or two blunders as to years when the Tennents migrated from the one place to the other, as all the witnesses did. But upon the main points in this case there was no hesitation whatever."

As the evidence of Mrs Giles was much criticised in the argument addressed to us it is right to say that I accept the Lord Ordinary's estimate of her evidence, and hold that this witness, although inaccurate in her recollection as to certain details, is giving honest evidence, and is therefore reliable in what she states with reference to the illicit relations which subsisted between Mrs Tennent and Petherick. I shall here briefly indicate how these statements are corroborated. Binstead, a tradesman at Worthing, speaks to having seen Petherick going about the cottage constantly for at least a year before the birth of the child. Mrs Copherd, a nurse who was in the habit of giving occasional service at the cottage, connects Mrs Tennent's name with Petherick, and states that Mrs Tennent told her she was with child at this time. In consequence of this statement Mrs Copherd's husband would not allow her to go any more to attend on Mrs Tennent, a significant proof of the belief of these parties that Mrs Tennent's husband could not be the father. Henry Russell, a gardener who worked in an adjoining garden, speaks to having seen Petherick coming out of the cottage in the early morning hours. Besides these there are several witnesses who speak to the belief that Petherick was the father of Mrs Tennent's child.

The statements made by Mrs Tennent herself are a very important element in the case. Without going elaborately into the law of the subject, which may now be regarded as very well settled, I may say that while it would be against principle to allow the presumption of legitimacy to be taken away by the direct evidence of a parent, yet statements of the parents made without reference to present or prospective litigation, and especially of those statements when made under circumstances which naturally called for explanation, are part of the history of the case, and as such are receivable in evidence. I refer on this subject to the cases of *Morris* v. *Davies*, 5 Cl. & Fin. p. 163; to the *Banbury Peerage* case; also the *Gardner Peerage* case, in which Lord Eldon describes this kind of proof as "evidence of conduct and declarations connected with conduct;" and the case of *Walker* in 19 Dun. p. 290. In the present case there is not much difficulty as to the criterion of admissibility.

The most remarkable piece of evidence of this description is the certificate of the pursuer's birth, which is dated 4th November 1854, about six weeks after the birth. In it the pursuer is stated to have been born at Brighton Road, Worthing; the father is designed as Thomas George Petherick, riding-master, and the column headed "Signa

ture, description, and residence of informant" contains the words "Louisa Tennent, mother, Brighton Road, Worthing." Whatever may have been Mrs Tennent's relations with her husband at this time, it is difficult to conceive of a motive which would induce her to register her child as the child of Petherick if he was the child of Major Tennent. In view of this fact it is scarcely necessary to refer to Mrs Tennent's confessions to her solicitor Mr Low, and to other parties. It must be taken that when it was necessary for her to speak she represented the pursuer to be Petherick's child. It is true that years afterwards Mrs Tennent wished it to be believed that the pursuer was her lawful son, but statements made after an interval of years, and apparently for a purpose, cannot weaken the force of the statements made at the time of birth, when all ordinary motives would tend in a different direction.

Along with the registration of the birth (which could not be avoided) we have also to consider the fact that the birth of the child was concealed from Major Tennent. This was not difficult, as the parties were living separate, and Major Tennent had no correspondence with Worthing. The fact that he was ignorant of the birth also has relation to Major Tennent's state of mind on the subject when he came eventually to know of his wife's conduct, and to this part of the case I shall now advert.

On 20th August 1856, about two years after the birth of the pursuer, a letter was written to Major Tennent by Mr J. Proctor, who describes himself as a working-man with whom Mrs Tennent's child was boarded. In this letter Proctor states that Mrs Tennent had discontinued paying for the child, neither would she remove it; that she had desired him to send it to the parish, but the parish would neither give relief nor receive the child into the workhouse, stating that the mother was a married woman and that her husband might be sued for the maintenance of the child. This was followed by a suit at Proctor's instance in the County Court at Brighton.

The letters which passed between Major Tennent and his wife on this subject are very material. We have not Major Tennent's first letter, but its purport may be inferred from Mrs Tennent's reply, which is dated 21st August, and her subsequent letter of 5th September. These letters express the sentiments of a guilty spouse seeking to palliate her offence, pleading for forgiveness, blaming Petherick for allowing the case to come into Court, and offering to do what is right to relieve her husband of responsibility for the child. It is evident from the tenor of Mrs Tennent's letters to her husband that he had only become aware of the existence of the child through the claim made by Proctor. There is not a suggestion that he knew or might have known of the birth of the child until then. Major Tennent's letters are equally inconsistent with such a supposition. In these he speaks of "this disgraceful affair," "this infamous affair," using language which plainly implies that the story was new to him, and that he felt deeply aggrieved. In these letters he also urges his wife to appear in Court and swear that the child was Petherick's. I cannot say that this correspondence exhibits Major Tennent as a person of keen sensibility, and actuated by a very refined sense of honour. But that is not the question. He was not anticipating a declarator of legitimacy. If the letters prove anything, they prove that the notion of the child being legitimate had not entered the minds of the spouses at all. They knew quite well who was the father of the child; this is assumed on both sides, and the only question is how to get out of the "disgraceful affair" so as to avoid pecuniary responsibility, and, if possible, also to avoid publicity.

From a letter dated 25th September 1856, written by Mrs Tennent (apparently to her solicitor), it appears that Petherick had eventually admitted liability and paid Mr Proctor's demand. This is at the least corroboration of the evidence that he had committed adultery with Mrs Tennent.

It is noticeable that although Major Tennent was living separately from his wife, yet in his letters to her written prior to the receipt of the communication from Proctor he uses the outward forms of affectionate intercourse. His letters begin "Dear Louisa," and end "Yours affectionately." Proctor's communication caused him to alter his manner of addressing his wife. The letters have no ceremonial beginning or ending, but begin "Mrs Tennent," and end with a bare subscription. All advances on her part towards reconciliation are met with a curt refusal, and this attitude, so far as I can see, was maintained by Major Tennent during the rest of his life. So far, then, as it is possible to draw any inference from the conduct of Major Tennent, that inference is entirely adverse to the legitimacy of the pursuer.

The summary which I have given of the principal facts of the case and their bearing on the pursuer's claim point to the conclusion (which I hold to be clearly established) that the pursuer is not the lawful son of Major Tennent. I have not thought it necessary to enter very minutely into the particulars of the parole evidence, because Lord Fraser in his judgment as Lord Ordinary has given a very careful and complete analysis of the case, discussing fully the parole evidence taken before himself.

It may be noted that the Lord Ordinary has admitted certain documents, chiefly affidavits, on which we intimated at the hearing that we could not safely proceed. Without wishing to express an unqualified opinion as to the admissibility of affidavits, I may say for myself that where an affidavit bears internal evidence of having been drawn by a solicitor and merely sworn to by the witness, I should not receive such a document, even in a case of pedigree, as secondary evidence of the deponent.

But the Lord Ordinary's judgment does not proceed at all on the affidavits, but on the parole evidence and correspondence. I may say in the reasoning of his Lordship's judgment as well as in its results I

generally concur. It seems to me that the pursuer has really nothing to found upon except the presumption arising from the fact that he was born in wedlock. This is a strong presumption, but it is not absolute. In the present case the presumption is displaced by a body of evidence which tends irresistibly to an adverse conclusion—(1) During the year preceding the birth the spouses were living apart in a state of voluntary separation, and non-access is proved in the only way in which the negative of a general fact can be proved. (2) At a period corresponding to the conception of the pursuer, Mrs Tennent is proved to have had adulterous intercourse with Petherick. (3) The child was registered by the mother as Petherick's son, and the birth was concealed from her husband. (4) Major Tennent only came to know of the existence of his wife's child through the demand made for aliment by a third party, and when made aware he expressed himself in the strongest terms as to his wife's conduct, and repudiated the paternity. (5) On this occasion Major Tennent and his wife treated the pursuer as Petherick's child, and Petherick acknowledged liability for its maintenance. (6) From that time until Major Tennent's death there was a complete estrangement between the spouses, as is shown by the alteration in Major Tennent's mode of addressing his wife when he had occasion to write to her, and by the terms of the letters.

Lastly, Mrs Tennent never represented the pursuer to be her husband's child when she had the strongest motives for doing so if she could have truthfully, or even with any hope of imposing on her husband, made such a representation. When she did at a later period of her life assert the pursuer's legitimacy, she did not even then deny the adulterous intercourse with Petherick, but alleged that on one occasion about the same time she had intercourse with her husband, a statement which rests upon her *ex post facto* assertion, unsupported and uncorroborated by any vestige of evidence.

In these circumstances I conceive that the case of the pursuer has entirely failed.

The LORD PRESIDENT—That is the judgment of the Court.

The Court adhered.

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Hay. Agents—Reid & Guild, W.S.

Counsel for the Defender—Comrie Thomson—Low. Agents—Douglas & Miller, W.S.

Tuesday, July 8.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

LEE *v.* CRAWFORD.

Public Company—Title to Sue—Action by One Shareholder against One Director for Repayment of Money to Company.

A shareholder in an incorporated company brought an action on behalf of himself and the other shareholders against one of the directors to have money advanced by them and lost replaced in the coffers of the company.

Held that there being no exceptional circumstances averred, and no allegation that the company had refused to sue, the pursuer had no title to bring such an action.

The Scottish Provident Investment Company (Limited) was founded in 1873, and registered under the Companies Acts 1862-67, "to receive money by way of loan, deposit, or otherwise; to lend money on security of land, houses, or other heritable subjects; to make advances for improving, building, buying or disburdening dwelling-houses or other real or leasehold estate in Scotland, to be heritably secured thereon, and to be repaid within such a period, not exceeding twenty-five years, as may be arranged; and the doing all such other things as are incidental or conducive to the attainment of the above objects." The nominal capital was £100,000, and the subscribed capital was £50,000 in 10,000 shares of £5 each, on which £1 per share was called up at the time of issue.

Bethune John Lee, Duddingston Park, near Portobello, purchased in 1885, when he was not yet of age, 200 shares at 2s. 9d. each.

In March 1889 he brought an action, on behalf of himself and the other shareholders of the said company, against John Knox Crawford, S.S.C., Edinburgh, one of the directors and chairman of the board, to have him ordained, "In the first place, to repay or make payment to the said The Scottish Property Investment Company (Limited) of the portions still due and unpaid of the amounts of the company's funds lent by the defender and his co-directors and officials to (1) Charles Prentice, chartered accountant, lately managing director of said company; (2) to John Christie Deans, Solicitor in the Supreme Courts of Scotland, Edinburgh, lately secretary and law-agent of said company; (3) to Crawford, Beattie, and Deans (the said John Knox Crawford, William Hamilton Beattie, architect, valuator of said company, and the said John Christie Deans), with interest on said loans respectively from the dates when they respectively were advanced until repayment; . . . . and in the second place, to make payment to the said Bethune John Lee of the sum of £1000 sterling, with the interest thereof at the rate of £5 per centum per annum from the date of citation in this