disputed mineral." All that shews, that this is not an open or patent fact. Yet we are told, that, notwithstanding all these disputes and questions, the defender, Mr. Young, the patentee, who was not a party to that action, knew of his own knowledge, that this mineral was not coal. That ought to have been very distinctly stated, and not left to be inferred from doubtful expressions in the record. So, also, I require that the party, in order to entitle himself to damages, should allege particularly the occasions on which the patent was made use of, as a means of preventing the mineral from being sold. I do not find such from allegations here. And in particular, with regard to those advertisements, which are said to have been published at a time when a trial was going on in the metropolis, between Mr. Young and somebody else, I would observe, that, if that trial was upon the question whether this mineral was coal or not, it is plain, that that was a matter then *sub judice;* and if it was not a trial upon that question, still these advertisements had reference to a matter that was then in dependence.

On the whole, I think it would be a very unwise thing, and I think it would be going contrary to the course of procedure, that we have been induced to follow at the other end of the island, with a view to securing accuracy and precision of statement, if we were to allow the party to go to trial upon this record. A pursuer seeking damages should make his allegations so specific, that there can be no doubt as to what is meant, and as to their being clearly within the scope of the record. That is not so here, and I entirely agree in the opinion expressed by my noble and learned friend, that the interlocutor appealed from should be affirmed.

Interlocutors affirmed, with costs.

Appellants' Agents, Morton, Whitehead, and Greig, W.S.; Connell and Hope, Westminster. *Respondents' Agents*, James Webster, S.S.C.; Loch and Maclaurin, Westminster.

JULY 16, 1867.

CHARLES WILLIAM CAMPBELL of Boreland, *Appellant*, *v.* JOHN A. GAVIN CAMPBELL of Glenfalloch, *Respondent.*

The Breadalbane Case.

Marriage—Succession—Legitimacy—Cohabitation beginning in Adultery—Presumption of Lawful Marriage—*J. a domiciled Scotsman, while in England, in* 1780, *eloped with Mrs. L., and they cohabited together till J.'s death in* 1806, *having had several children. L. died in* 1784, *but whether J. and Mrs. L. knew of L.'s death there was no evidence. In* 1782 *Mrs. L. accompanied J. with his regiment to America, passing as his wife. They returned to England in* 1784. *Between* 1793 *and* 1806 *and afterwards, J. and Mrs. L., among the relations of J., passed as man and wife, and were acknowledged as such. Their son born in* 1787 *was duly retoured in* 1812, *as legitimate heir to a Scotch estate which he could not have taken if illegitimate, and this estate was still in the possession of J.'s grandson.*

In a litigation in 1862, *the lawful marriage of J. and Mrs. L., and the legitimacy of their son, were put in issue.*

HELD (affirming judgment), *That the cohabitation by habit and repute was sufficient proof that J. and Mrs. L. were lawfully married, though the cohabitation for the first four years was adulterous, and therefore that their son was legitimate.*[1]

This was an appeal against interlocutors of the First Division, whereby the Court found, that the respondent, Mr. Campbell of Glenfalloch, was the nearest and lawful heir of tailzie and provision of the late Marquis of Breadalbane. The cause came before Lord Ordinary Barcaple, who found in favour of the respondent. On reclaiming note to the First Division, that Court ordered cases to be laid before the whole Court. Lord Kinloch declined to take part in the judgment, on account of relationship to one of the parties. Of the rest of the Court, Lord President M'Neill, Lord Justice Clerk Inglis, Lords Deas, Cowan, Benholme, Neaves, Jerviswoode, Ormidale, and Mure agreed with the Lord Ordinary; while Lords Curriehill and Ardmillan dissented.

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[1] See previous report 4 Macph. 867: 38 Sc. Jur. 450. S. C. L. R. 1 Sc. Ap. 182: 39 Sc. Jur. 576: 5 Macph. H. L. 115. See also *ante*, p. 1242.

The proceeding arose in the following manner :—John Marquis of Breadalbane, died on 8th November 1862, without issue. At the time of his death he was seised of extensive estates in Perthshire and Argyleshire, held under two deeds of entail, called the Breadalbane entail, dated in 1775, and the Inverarderan entail, dated 1839. The succession to the estates devolved, under the destination in the deeds of entail, upon the nearest heir male of William Campbell of Glenfalloch, who was one of the substitutes, and had seven sons. The second son was James and the sixth son was John ; the former was the grandfather of the respondent, Mr. Campbell of Glenfalloch ; the latter was the grandfather of the appellant, Mr. Campbell of Boreland. In 1863, Glenfalloch presented a petition to the Sheriff in Chancery, craving to be served heir of tailzie to the late Marquis. Boreland presented a similar petition. Both petitions were conjoined and advocated to the Court of Session, and records made up. It was not denied, that if the respondent's grandfather, James Campbell, had been lawfully married and left legitimate issue, the respondent would be entitled to succeed ; and if James Campbell left no lawful issue, the appellant was entitled to succeed. The appellant accordingly set up a case to the effect, that James Campbell, the respondent's grandfather, had never been lawfully married ; for the person whom he was alleged to have married was a married woman at the time, and consequently this marriage was void, and so the children (including the respondent's father) were illegitimate.

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

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

The appellant further averred, that at the time of the alleged marriage between James Campbell and Eliza Blanchard, in September 1781, she was the wife of Christopher Ludlow, then living, and who was married to her in 1776, at Chipping-Sodbury, Gloucestershire ; that the marriage of Ludlow was there registered, along with the baptism of a child of the marriage ; that Christopher Ludlow lived till 1784 ; that, in point of fact, Mrs. Ludlow eloped with James Campbell in 1780, and the pretended marriage between them in Edinburgh was a screen to cover their adulterous intercourse ; that there was no subsequent marriage or ceremony of marriage between James Campbell and Eliza Maria Blanchard ; and that their intercourse continued all along to be illicit, and their children were illegitimate.

On the other hand, in answer to the above allegations, the respondent, Mr. Campbell of Glenfalloch, alleged, that he was unable to specify the exact date of the marriage between his grandfather, James Campbell, and Eliza Maria Blanchard, but that they were lawfully married previous to the year 1785. In that year, they went to reside at Glenfalloch, where they lived and cohabited as man and wife, and they were habit and repute married persons, and, as such, were received and treated by the family at Glenfalloch, and by all their relations and friends. In 1792 or 1793 James Campbell received a commission in the Breadalbane Fencibles, and he remained with that regiment till it was disbanded in 1799. During all that time James Campbell and Eliza Blanchard lived together as husband and wife. He was next appointed to the Cambrian Fencible Regiment or Rangers, and went with that regiment to Gibraltar about 1800, leaving his wife and family near Edinburgh, where in 1802 he joined them, and continued to live till his death in 1806. After his death, Eliza Blanchard was universally recognized as his widow. She administered to his estate, and received a pension from Government. James Campbell was by birth a Scotch-

man, and was always domiciled in Scotland. During his life the validity of his marriage was never questioned. His eldest son, William John Lambe Campbell, was born in Edinbugh in 1787, and, on the death of his mother, Eliza Blanchard, administered to her estate. He lived and died in the enjoyment of the status of legitimacy, and died in 1850. When the succession to the Glenfalloch estate opened in 1812, William John Lambe Campbell, as the legitimate son of his father, James Campbell, succeeded thereto, which he would not have done if he had been illegitimate; that in 1812, the father of the appellant would have been in the latter event the lawful heir—nevertheless, instead of claiming the succession, the appellant's father assisted in completing the title of William John Lambe Campbell; that the appellant and his father never raised any dispute as to the illegitimacy of William John Lambe Campbell till the present proceedings; that the late and preceding Marquis of Breadalbane both recognized and acknowledged William John Lambe Campbell as the heir presumptive to the Breadalbane estates, and in all legal proceedings relating thereto he was named as such.

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

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

The appeal was now brought against the judgment of the Court of Session.

The *appellant* in his *printed case* stated the following reasons for reversing the interlocutor:—1. The respondent, who seeks to be served heir to the late Marquis of Breadalbane, as being the legitimate great grandson of William Campbell of Glenfalloch, can only succeed in his claim on proving the propinquity averred; and as a necessary part of this proof, must satisfy the Court, on evidence, that his father, William John Lambe Campbell, was the son of James Campbell and Eliza Maria Blanchard *by lawful marriage*. 2. The alleged reputation of legitimacy possessed by William John Lambe Campbell would be insufficient by itself to prove the lawful marriage of his parents; and any presumption derived from such reputation is destroyed and taken away by its being discovered, that the reputation was created by false representations and deceptive conduct. 3. The connexion between James Campbell and Eliza Maria Blanchard being clearly proved to have been in its origin adulterous, and to have continued adulterous during the lifetime of Christopher Ludlow, Blanchard's husband, any presumption of marriage is thereby displaced; and the *onus* lies on the respondent to prove, that a lawful marriage took place between them posterior to Ludlow's death. And this the respondent has failed to prove. 4. Cohabitation and habit and repute do not *make* or *constitute* marriage; but are only circumstances which may be used in evidence to prove, that a marriage had been contracted. And James Campbell and Eliza Blanchard having cohabited together as husband and wife, and been held and reputed such while Blanchard's husband, Christopher Ludlow, lived, the mere continuance of that cohabitation and repute after Christopher Ludlow's death will not, in the absence of all proof of the fact of marriage after his death, infer the presumption, that such marriage took place. 5. The letters of Eliza Blanchard are admissible and competent evidence according to the law of Scotland; and taken in connexion with the other evidence, the letters must be held sufficiently to prove, that James Campbell and Eliza Blanchard went through a ceremony of marriage in 1781 while the woman's husband was alive; and that, at all events, whether they did or did not go through such ceremony, no other marriage ever took place between them. 6. The fair and reasonable inference derivable from the whole evidence in the case is, that James Campbell and Eliza Maria Blanchard having set up a marriage in 1781, and on the footing of that marriage obtained the reputation of being married persons, proceeded after Christopher Ludlow's death to act on the same assumption, and did not consider any other ceremony of marriage necessary or expedient. But, at all events, in the proved circumstances of the case, they could not be held to have been married subsequently to Ludlow's death, without evidence of the actual fact; and of such evidence there is none. 7. The appellant, who has proved his propinquity to William Campbell of Glenfalloch as his legitimate great grandson, ought to be served heir to the late Marquis of Breadalbane; and the claim of the respondent, who has failed to establish such propinquity, ought to be rejected.

The *respondent* in his *printed case* stated the following reasons for affirming the judgment:—1. Because the respondent, on proof of his propinquity to the late Marquis of Breadalbane, was entitled to be served nearest and lawful heir of entail to him in the estates of Breadalbane, and was not bound to prove, that his grandfather and grandmother were married, or that his father William John Lambe Campbell was not a bastard. 2. Because the *onus* of proving, that William John Lambe Campbell was a bastard lay upon the appellant, and he has not discharged himself of that *onus*. 3. Because, having regard to the long established repute of William John Lambe Campbell's legitimacy, the repeated and unequivocal acknowledgments of it by the appellant and his predecessors against their own interest, the delay in bringing the present challenge, and the circumstances generally of the case, it was incumbent on the appellant to prove, that William John Lambe Campbell could not possibly be legitimate, and because he has altogether failed to prove, that such was the fact. 4. Because the respondent has proved, that James Campbell and Eliza Maria Blanchard were married persons, and that William John Lambe Campbell was legitimate.

The *Attorney General* (Rolt), *Dean of Faculty* (Moncreiff), *Anderson* Q.C., and *Will*, for the appellant.—The Court below has relied mainly on the habit and repute existing from 1793 to 1806, but have ignored the previous history of the connexion of James Campbell and Eliza Blanchard. The whole evidence, however, ought to be taken together, and the only result to be deduced is, that the parties never married or intended to marry, but ended as they began in an illicit connexion. Another leading error of the Judges below was this, that they held that habit and repute, *per se*, made or constituted marriage, instead of being taken to be, as it really is, only some evidence of a pre-existing marriage. This fallacy is contradicted not only by the law of Scotland, but that of England and America—the civil as well as the canon law. In no system of law has it ever been held, that habit and repute can make or constitute marriage, or that parties beginning with concubinage can grow insensibly or drift into the *status* of married persons. There is no such thing as marrying by tacit consent or by recognition. The ultimate fact to be arrived at is, that at some moment of time the parties exchanged present consent. That habit and repute is only a presumption of marriage, and not marriage itself, is plain from the words of the Satute 1503, c. 77, which introduced it into the law of Scotland, and from the authorities, Liber Officialis Sanct. Andreæ, p. 21; Stair, i. 4, 6; iv. 45, 19; *Winton* v. *Kingston*, M. 12,096; *Forbes* v. *Forbes*, 4 Br. Sup. 837; Ersk. Pr. i. 6, 3. Erskine's Institutes, (i. 6, 6,) a posthumous publication, is less precise, yet it does not differ; *Cunningham* v. *Cunningham*, 2 Dow, 504; Fergus. Cons. L. 122, App.; *Lapsley* v. *Grierson*, 8 D. 48, *per* Lord Moncreiff; *Lowrie* v. *Mercer*, 2 D. 953. There are only two modes in Scotland of constituting marriage, either *per verba de presenti*, or by promise *subsequente copulâ*—*Dalrymple*, 2 Hagg. 54. Whenever habit and repute is used to establish a marriage, it is used merely as evidence, that an antecedent contract *de presenti* had been entered into. It is at most difficult to prove a marriage in that way, and only two such instances during 200 years occur in the books—*Mackenzie* v. *Mackenzie*, 8th March 1810, F.C.; *Elder* v. *MacLean*, 8 S. 56.

If, then, cohabitation with habit and repute is only evidence, it must be taken in connexion with all the other evidence, and, in particular, it must be traced to its source. Now, the source was admitted to be adultery and elopement, that is to say, the cohabitation at first proved the reverse of marriage. The whole habit and repute, therefore, is not uniform, and therefore valueless as evidence of a marriage. Nay, further, when the cohabitation begins in adultery or illicit connexion, and there are no circumstances to shew a marked change, the legal presumption is, that the cohabitation continued illicit throughout—*Cunningham* v. *Cunningham*, 2 Dow, 501; *Lapsley* v. *Grierson*, 1 H. L. C. 498; 20 Sc. Jur. 362.

Therefore the interlocutor of the Court ought to be reversed.

Sir R. Palmer Q.C., *Mellish* Q.C., *Young*, *Adam*, and *Berry*, for the respondent.—In this case every fair presumption is to be made in favour of the respondent's father's legitimacy, because it has been acknowledged by all parties interested since 1806 or 1784. If, during the latter years of James Campbell's cohabitation, there was ample evidence to support the inference that some time or other he and Eliza Blanchard had exchanged consent of marriage, then it is immaterial whether, at some antecedent period, they had lived in adultery. In favour of long continued possession, such a presumption is not only fair, but necessary.

It is not to be expected, nor is it necessary, that the respondent should be able to put his finger on the precise moment when the contract of marriage was entered into, especially as the marriage must have taken place more than sixty years since, and the ordinary evidences of facts have perished.

The serving of W. J. L. Campbell as heir to Glenfalloch, being a judicial finding of a competent court, is a strong presumption of legitimacy, and at least clear proof of his reputed legitimacy —Bankt. iii. 5, 18; i. 5, 62; Mackenzie, i. 6; Stair, iii. 5, 35; iii. 3, 42; Ersk. iii. 8, 66; *Crawford* v. *Purcel*, M. 12,636; *Hirpet* v. *Scott*, M. 2197.

As to the alleged proposition relied on by the respondent, that, because, when the cohabitation commenced, it was adulterous, therefore the cohabitation continued illicit till the contrary is

proved, that is not and never was laid down by any Judge or Court as a rule of law, but is a mere maxim of evidence, which varies with the circumstances of each case—*Cunningham* v. *Cunningham*, 2 Dow, 504; *Lapsley* v. *Grierson*, 20 Sc. Jur. 362; 1 H. L. C. 498.

The true way to look at this case is to take the whole of the evidence together, and, applying one's common sense as a jury would do to the whole facts, then to ask—Is there reasonable evidence, that these two persons were married at some time when they could legally be so? The Court below was right in holding they were lawfully married.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal from an interlocutor of the First Division of the Court of Session, adhering to the interlocutor of the Lord Ordinary, which is also appealed from, whereby he found it proved, that the respondent, John Alexander Gavin Campbell, Earl of Breadalbane and Holland, is the nearest and lawful heir of tailzie and provision in special of the deceased John, fifth Earl of Breadalbane, in the lands and others described in the petitions, advocated and dismissed the petition of service for the advocator, Charles William Campbell, and decerned.

The appellant and respondent both presented petitions to the Sheriff in Chancery for service as nearest heir of tailzie and provision to the late Earl of Breadalbane in the lands and estates of Breadalbane held under two separate deeds of entail. The Sheriff in Chancery conjoined each set of the competing petitions with reference to each entail, and the two sets of conjoined petitions were carried by advocation to the Court of Session. After the records in the separate processes were conjoined, the proceedings thereafter were conducted as one process.

The question to be determined upon the appeal is, whether the respondent is entitled to be served heir of tailzie and provision to the late Earl of Breadalbane under the designation of heir male of the body of William Campbell of Glenfalloch, and the determination of this question depends upon proof of the legitimacy of Wiliam John Lambe Campbell, the father of the respondent.

The respondent is descended from James, the second son, and the appellant from John, the sixth son, of William Campbell of Glenfalloch. Both parties are agreed, that the descendants of the eldest son of William Campbell of Glenfalloch are extinct.

The claim of the respondent is sustained by evidence, which in itself is amply sufficient to support it.

James Campbell and Eliza Maria Blanchard, the father and mother of William John Lambe Campbell, lived together, and were reputed as man and wife for some years prior to his birth in the year 1788. But the appellant asserts that James Campbell and Eliza Maria Blanchard were never lawful man and wife, for that, at the time of the supposed marriage, Eliza Maria Blanchard was the wife of Christopher Ludlow, who was then living. The only proof of the marriage of the parties, during the lifetime of Ludlow, is contained in a letter written by Eliza Maria, the grandmother of the respondent, after the death of James Campbell, his grandfather, to which I shall hereafter refer.

The following leading facts are sufficiently established by the evidence :—James Campbell was an officer in the 40th Regiment. In the year 1780, and the beginning of 1781, he was on the recruiting service at Bristol, which is about ten miles from Chipping-Sodbury, where Christopher Ludlow resided and carried on business as a grocer and apothecary. From that place James Campbell eloped with the grandmother of the respondent, then the wife of Ludlow, and they afterwards cohabited together as man and wife. James Campbell, in August 1781, was at Glasgow, and in 1781 at Edinburgh, still employed in the recruiting service, and it may fairly be presumed, that Mrs. Ludlow was with him in both these places. In 1782 he went to Nova Scotia with recruits for the 40th Regiment. Mrs. Ludlow was with him there, and was passing as his wife, as appears from a letter from Colin Campbell, the brother of James, to Duncan Campbell, another brother, dated Glasgow, 7th of September 1783, from which he writes, "I had a long letter from James lately from Halifax; he and Mrs. Campbell were both well." James Campbell left Nova Scotia in 1784 in the "Prince of Orange" transport with a detachment of the 40th Regiment, and Mrs. Ludlow embarked with him as his wife, her name being entered on a list of those on board as Mrs. Eliza Campbell. They arrived in England in February 1784.

In the month preceding, an event had happened which has a most important bearing upon the case. Christopher Ludlow, probably in consequence of his wife's elopement from him, determined to leave the country. In July 1781 he went out to New York as an hospital mate, and remained there till the year 1783, and then sailed for England, but died on board the vessel just before she reached Portsmouth in January 1784. From this time, and for some time forward, the evidence as to the movements of James Campbell and his reputed wife is very scanty. They landed at Plymouth from Nova Scotia in February 1784, and appear to have been either there or at Taunton for some months. In April 1785 James Campbell retired from the army. On the 30th of May 1785 they had a daughter baptized at Devonport under the name of Eliza Marlborough, daughter of James and Eliza Maria Campbell, Lieutenant in 40th Regiment.

I can hardly say that there is evidence of James Campbell having been at Glenfalloch in the year 1785.

The tradition given by Mrs. M'Nicoll as to hearing her father and mother speak of William Campbell's sons having been at a flood which is proved to have happened on 26th July 1785, and that one of these was James, and he was very clever at it, was hardly admissible.

But, having been admitted, it proves nothing, as it does not appear that James's reputed wife was with him, and was received by the father as his daughter in law. Little is known of the parties from the time of James Campbell leaving the army until the year 1793, when he joined the Breadalbane Fencibles. In the intervening period two children were baptized at Gateshead: William John Lambe, the father of the respondent, in January 1788, as the son of James Campbell; and in October 1789, Susanna Sophia, as the daughter of James Campbell. James Campbell continued in the Breadlabane Fencibles till the regiment was disbanded in 1799.

On the 11th of October 1796, his youngest son, Breadalbane Gavin, was born, and baptized at Inveresk in the following month of November as the son of Captain James Campbell of the Breadalbane Fencibles and Mrs. Eliza Maria Blanchard.

In or about the year 1799 James Campbell and Eliza Maria Blanchard, with their children, visited at Glenfalloch, where his elder brother Colin and his wife then resided. On the 23d of August 1799, James Campbell received a commission in the Cambrian Rangers, and at the latter end of the year embarked with his regiment for Gibraltar. He left Eliza Maria Blanchard and their children in Scotland, and after his arrival at Gibraltar he executed a general power of attorney to her, dated the 3d of March 1800, in which he describes her as "my wife, Eliza M. Campbell, residing at Musselburgh, near the city of Edinburgh." The Cambrian Rangers returned to England, and were disbanded in the year 1802. On the disbanding of the Cambrian Rangers, James Campbell appears to have resided with his wife in Scotland down to his death in 1806, being compelled upon two occasions to seek protection from arrest in Holyrood. On the 12th of March 1804 James Campbell obtained letters of inhibition in the usual form against Mrs. Eliza Maria Blanchard otherwise Campbell as his wife. He died at Edinburgh 24th of October 1806.

There appears to be the most conclusive evidence, that, from the first period of their cohabitation, Eliza Maria Blanchard passed as the wife of James Campbell, and that for many years they were generally reputed to be man and wife. But the evidence of the reputation of a marriage having existed between the parties does not end with the death of James Campbell.

If they were not married, William John Lambe Campbell was illegitimate, and therefore every acknowledgment of his legitimacy by those who must have been acquainted with the way in which his parents were received and reputed in society, is evidence in favour of their having been lawfully married.

Such an acknowledgment of the legitimacy of William John Lambe Campbell was made by the grandfather of the appellant in the year 1812. In that year, John Breadalbane Campbell, the only son of William Erskine Campbell, the eldest son of William Campbell of Glenfalloch, died. On his death the heirs male of the body of the eldest son of William Campbell of Glenfalloch became extinct, and the succession to the estate of Glenfalloch opened, in terms of the destination in the investitures of that estate, to the heir male of the body of James Campbell, the second son of William Campbell of Glenfalloch. At this time William John Lambe Campbell was entitled to succeed, if he was the eldest and lawful son of James Campbell. If he was illegitimate, John Campbell of Boreland, the appellant's grandfather, was through the death without male issue of the brothers intermediate between James and himself, entitled to the succession of Glenfalloch. So far, however, from John Campbell making any claim, he accepted a commission and factory, dated the 7th and registered the 12th February 1812, from William John Lambe Campbell, empowering him to do everything that was necessary towards his nephew's being served heir to John Breadalbane Campbell in the lands of Glenfalloch. A claim was accordingly given in for William John Lambe Campbell to be served nearest and lawful heir male of taillie and provision in special of his cousin John Breadalbane Campbell, late of Glenfalloch. On the 18th of March 1812, he was served in terms of his claim. His service was afterwards retoured to Chancery, and his title completed by precept from Chancery, and instrument of sasine following thereupon, of the date of 18th June 1812. By these proceedings it was established, in the words of the retour—quod dictus Gulielmus Johannes Lambe Campbell est unicus filius dicti demortui Jacobi Campbell filii secundi dicti demortui Gulielmi Campbell et legitimus et propinquior hæres talliæ et provisionis dicti Joannis Breadalbane Campbell ejus consanguinei. The respondent's father continued in the undisturbed possession of the lands of Glenfalloch, under his title, until his death in 1850, and the respondent was then served nearest and lawful heir of taillie and provision to his father, and has ever since been in possession.

The lands of Glenfalloch are held under an entail, containing the same limitation to the heirs male of the body of James Campbell, as that which is contained in the entail of the Breadalbane estates.

It is not contended, that the part taken by the appellant's father in the service of the respond-

ent's father as heir to the lands of Glenfalloch, precludes the appellant from disputing the respondent's claim, founded upon the same title, but it must be admitted to be a very strong recognition of the legitimacy of the father of the respondent by a relation who had ample means to know how he was reputed in the family, and the strongest interest to dispute his title to the succession if he thought it did not rightfully belong to him. The evidence for the respondent establishes beyond all doubt that his father throughout his life was uniformly treated and recognized as the legitimate son of James Campbell by all the family of the Campbells, as well as Lord Breadalbane and his relations.

Under these circumstances, every presumption is in favour of the respondent's title, and the appellant must be required to overcome that presumption by the proof of facts, which are utterly inconsistent and irreconcilable with it. This he proposes to do by proving, that the original cohabitation of the respondent's grandfather commenced with an unlawful marriage after their elopement, and from that time the habit and repute began, which constitutes the only evidence of a marriage between them; that there was never any marked change in the nature of the cohabitation, and that, without such a change, a connexion which is illicit in its origin cannot become the foundation of such habit and repute as will be sufficient proof of a subsequent marriage having taken place.

The appellant's case rests entirely upon the letter of Eliza Maria Blanchard to the War Office, dated the 23d of June 1807, containing her application for a pension as the widow of James Campbell.

There may be some doubt whether this letter was admissible in evidence, but at all events being written for a particular purpose, the statements in it are not as trustworthy as if they had been made without any motive of interest.

The material parts of this letter are those in which the writer says, "I applied to the half pay agent respecting the widow's pension, and have made oath before a magistrate; but, unfortunately, as I lost my marriage lines in America, I am informed it cannot be procured. My husband was ensign and lieutenant in the 40th Regiment of Foot during the war with that country. At the end of the year 1780 he came to England to recruit, and in September 1782 I was married to Mr. Campbell in Edinburgh by Mr. M'Gregor, the Gaelic minister, who is also dead, as is Ensign William Wilcox of the 40th, who was witness to our marriage, and the June following we went to America in the fleet that took out the preliminaries of peace 25 years ago. The present Gaelic minister has been wrote to, and he says that he got no register from any of his predecessors."

The appellant proves the truth of some of the particulars mentioned in this letter, but proposes to read the statement of the time of the marriage as September 1781 instead of 1782, because it is shewn that James Campbell was at Edinburgh in the September of the former year. This is to assume, that Eliza Maria Blanchard intended to be perfectly accurate in everything which she stated in her letter. But this is rendered doubtful by the certificate prepared by her agent, by which the time of the marriage is represented to be the 14th of September 1783—she herself, in an affidavit made before a magistrate, merely swearing that she was lawfully married to James Campbell without naming any time. I think the assertion of a marriage with James Campbell either in 1781 or 1782 must not be implicitly relied upon. In applying for her pension, it was necessary for the alleged widow to state particularly her marriage and the date of it, and also to produce her marriage certificate or to account for its non-production. This might have suggested her plausible story of the loss of her marriage lines in America, without that statement necessarily leading to the belief that any such proof of a marriage ever existed. It would not have done to have represented to the War Office that the only evidence she had of a marriage was that of habit and repute, and having to fix a certain time for the marriage, she could not well give a later date than the period when her cohabitation with James Campbell must have been first known to the family, as she would have run the danger of disclosing a fact which was probably unknown to them—the discreditable commencement of her intercourse with him. More especially must she have been anxious to preserve the good opinion of Lord Breadalbane, to whom she referred in the letter in question, and who afterwards gave a certificate that he believed her to be the wife of James Campbell. It is difficult to believe that the parties could have incurred the risk of having the ceremony of marriage performed, which they must have known would not have made them any more lawful man and wife than if they continued to cohabit together, with the reputation of that relation subsisting between them. It was not at all necessary to have any written proof of a marriage, to enable her to embark for America as the wife of James Campbell, and it is rather a significant circumstance, that although the date of 1782 is mentioned in the letter, and 1783 in the certificate prepared for the alleged widow, when she was sworn before the magistrate in the affidavit, she swears that she was lawfully married to James Campbell, which was perfectly true, if at any time during James Campbell's life a marriage had taken place between them.

But whether a marriage actually took place during the life of Christopher Ludlow, or the cohabitation of the parties was merely an adulterous intercourse without any marriage ceremony, the appellant contends, that, beginning in an illicit connexion, the presumption of subsequent

marriage from the continuance of it altogether ceases, and that nothing short of proof of actual marriage, or of such a total change in the character of the cohabitation as will amount to habit and repute of a marriage, will be sufficient to establish the respondent's title, and that upon the evidence it appears that the connexion between James Campbell and Eliza Maria Blanchard continued the same from the beginning to the end.

A great number of cases were cited in support of this proposition of the appellant, but those mainly relied on were *Cunningham* v. *Cunningham*, 2 Dow, 483; and *Lapsley* v. *Grierson*, 1 H. L. C. 498.

The case of *Cunningham* v. *Cunningham*, was an action of declarator of legitimacy brought by the two daughters of Mr. John Cunningham and Agnes Hutchinson, his spouse, and the summons, after alleging, that the complainers were begot in lawful marriage, went on to state, that, at least if the complainers were procreated or brought forth before the said John Cunningham, their father, and the said Agnes Hutchinson, their mother, were actually married, they were afterwards legitimated by a marriage which took place between their said father and mother, and they have been always held and reputed to be lawful children.

In this case the *onus* of proving the marriage of their parents either before or after their birth was upon the pursuers, and the decision proceeded entirely upon failure of the proof on which their legitimacy depended.

The leading facts were, that in 1758 Mr. Cunningham hired Agnes Hutchinson as a servant, and in the following year she bore him a son, for which they were both rebuked for fornication by the order of the kirk session. That from 1760 to 1768 Cunningham lived with Agnes Hutchinson in various places, and in the latter year the succession to Balbougie opened to him as heir male, and they went to live there, and continued till 1770, when Agnes Hutchinson, being ill in health, was sent to Edinburgh, where she died, and was buried in Canongate churchyard as an unmarried woman, Cunningham sending his cowfeeder or bailiff to see her buried. As Lord Eldon describes it, she was buried with hardly the decencies of the most ordinary funeral, and laid in the grave, not in the character of a wife, but of a mistress. Upon the facts of the case Lord Eldon's remarks are pointed and pertinent, but were clearly not intended for general application. His Lordship said, "When the cohabitation of a man or woman was not known to have been in its origin illicit, the presumption was that it was lawful. But where it was at first notoriously illicit, and where a change in the character of the connexion must be operated, and when they found the means employed for that purpose to be such as left half the world in doubt, the servants, the relations, one half thinking one way, the other half the other—at what time, in what circle, could it be said, that there was such a habit and repute as raised the presumption that the parties had mutually consented to be husband and wife?" And Lord Redesdale, after observing, that repute must be founded "not on singular but on general opinion," stated it as his opinion, that there was not there such evidence of repute as was necessary to establish the fact of a marriage by presumption. From the language of the two noble and learned Lords which I have quoted, I gather, that if, notwithstanding the nature of the original connexion, there had afterwards grown up a general reputation, that the parties had become man and wife, they would have been of opinion, that the evidence would have established the presumption of a subsequent marriage. The case of *Lapsley* v. *Grierson*, which in its circumstances approaches more nearly to the present case, depended, as the LORD CHANCELLOR said, on the evidence as to the facts: "That evidence," he added, "establishes the fact, that cohabitation had commenced when William Paul was living. The nature of that cohabitation was not altered by any undoubted and open act of the parties; there was no change in their demeanour after the period at which it is now believed he died," and LORD CAMPBELL said, "The pursuers rely on the marriage of the parents to be established by habit and repute, which may establish a marriage by affording evidence of consent. On the other hand, the defendant relies on the rule of the law of Scotland, which is not disputed, that if the connexion was in the beginning illicit, it must continue to be of this character, unless it is clearly changed by the parties. This rule was established by this House in the case of *Cunningham* v. *Cunningham*, and has ever since been the settled law of Scotland." And his Lordship added, "the connexion was illicit in its origin, and there was not seen to be any reason for saying that its nature was afterwards changed."

The particular circumstances of this case, which it was agreed was one entirely of facts, must be regarded in considering the *dicta* of the noble and learned Lords who decided it. There was no proof that William Paul, the husband of Janet Mackinlay, was not living during the whole of the lifetime of John Lapsley. Janet Mackinlay, within a few months of Lapsley's death, instituted proceedings to establish her rights as a widow, in which she was resisted by the family of the Lapsleys, and the case was decided against her, on the ground that she had failed to prove, that her former husband had died either before the connexion with John Lapsley, or during its continuance. The two children of William Lapsley, a brother of John Lapsley, were in 1819 served heirs of the property to which the children of John Lapsley, if legitimate, were entitled. The property was sold by them in 1826, and ten years afterwards, in 1836, the appellants instituted a suit to annul or reduce the title of the purchasers of the property, and to have themselves

declared the lawful children of John Lapsley. The appellants who had not been reputed legitimate, but the contrary, by the action of declarator of legitimacy, sought to acquire a status which they did not possess, and were bound to satisfy the *onus* upon them by clear evidence of the lawfulness of the marriage of the parents, which they failed to produce.

But taking the rule to be settled by the case of *Cunningham* v. *Cunningham*, that an illicit connexion at the beginning can only be changed in character by some undoubted and open act of the parties, let us consider whether the circumstances of this case, differing as they do from any which has been cited, are not sufficient to establish a marriage between James Campbell and Eliza Maria Blanchard.

It must be remembered, that we are dealing with facts which commenced more than eighty years ago, with an undoubted general repute of marriage for a great number of years, and with an uninterrupted recognition of legitimacy during the whole of the lifetime of the respondent's father. Under such circumstances we are bound to make every reasonable presumption to support the respondent's case.

The appellant contends, that the habit and repute of the parties being man and wife was the same during the period of the adulterous connexion as after the death of Christopher Ludlow, and that it continued unchanged down to the death of James Campbell in 1806. But is this a correct view of the case?

It may be assumed from the letter of Colin Campbell to his brother Duncan, that in September 1783, it was believed by the family of the Campbells that James Campbell was married, and therefore, so far as the family was concerned, that he and Eliza Maria Blanchard were considered to be man and wife. But this did not amount to habit and repute which arises from parties cohabiting together openly and constantly, as if they were man and wife, and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are really married persons. Now, during the whole time of the cohabitation down to the death of Christopher Ludlow, James Campbell and Eliza Maria Blanchard were not living in the neighbourhood and society of his family, and therefore the reputation in the family of their being married was nothing more than the private opinion of the members of it. But if this is sufficient to constitute habit and repute so far as the family of the Campbells are concerned, yet, as according to Lord Redesdale in the case of *Cunningham* v. *Cunningham*, "repute must be founded not on singular but on general opinion" of relations and friends and acquaintances, the whole family of the Ludlows must have known that the parties could not be married during the lifetime of Christopher Ludlow.

The case therefore never began with habit and repute, nor could it have had any origin at all in the sense in which it induces a presumption of marriage until after the death of Ludlow. That event happened in January 1784, and opened a way to a change from an adulterous connexion to a lawful marriage. A question was made whether James Campbell and Eliza Maria Blanchard were even aware of the death of Ludlow. But without entering into any nice examination of probabilities, as any conclusion upon the subject must be conjectured, and even if the parties possessed full knowledge of the events, the respondent must be unable to prove it, I think we are bound to presume, that they had received information of a fact so important to be known by them. From this time the nature of the relation which subsisted between them was entirely changed, and although from 1784 to 1793 there is very little evidence of their movements, and for some part of the time they appear to have been residing near Gateshead, where two children were baptized as legitimate children of James Campbell, yet there is nothing to shew, that during these many years they may not have visited Scotland, and that an actual marriage by present consent may not have taken place between them. That this is not altogether improbable appears from the affidavit which Eliza Maria Blanchard made before the magistrates upon her application for a pension, to which I formerly referred. In her letter to the War Office, it was necessary for her, in order to obtain her object, to assign a date to her alleged marriage which she must have known to be false. But in her affidavit she merely swears, that she was lawfully married to James Campbell, which was true, if she was married to him after the death of Christopher Ludlow, but false if she meant to refer to the date in her letter, or if no marriage took place between them after Ludlow's death.

From 1793 down to 1806, the evidence is clear and distinct of an universal recognition of the parties as man and wife by every member of the family, and by all persons with whom they associated; and there is nothing whatever to break in upon the uniformity of this recognition. In the letter of Eliza Maria Blanchard, upon which the appellant founds his opposition to the respondent's claim, she says, "Lord and Lady Breadalbane know me, and I have frequently had the honour of dining with them while my husband was in his Lordship's regiment." It is not to be supposed that she would have been thus received if she had not been known, or at least believed, to be the wife of James Campbell. If the case were confined to the period between 1793 and the death of James Campbell in 1806, it would be amply sufficient to establish a conclusive presumption of marriage by habit and repute. And it appears to me, that it is not competent for the appellant to go back to an anterior period (no matter how distant) when an illicit intercourse

existed between the parties, in order to shew, that the matrimonial relation must have been simulated. The argument on the part of the appellant goes the length of contending, that, if cohabitation commences by illicit intercourse, a marriage can never afterwards be established by habit and repute. But as I read the case of *Cunningham* v. *Cunningham*, if the habit and repute had been uniform and general, although the connexion in its origin was notoriously illicit, this House would have decided that case differently.

After a close and careful examination of the facts of the case, (for, like the cases which have been cited in the argument, it depends entirely upon facts,) I am clearly of opinion, that the strong presumption in favour of the marriage of the respondent's grandfather and grandmother, and of the legitimacy of his father, has not been shaken by any proof adduced by the appellant which is inconsistent with the respondent's title, and that the interlocutor appealed from ought to be affirmed.

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

There was a strong presumption in favour of the respondent, for the following reason: This William of Glenfalloch was himself heritable proprietor of an estate at Glenfalloch, and in 1784, having seven sons, he executed a deed of entail whereby he settled this estate, after his own death, on his seven sons, and the heirs male of their bodies respectively, in succession. It is the common case of all parties that Colin was the eldest son of William, that James was the second son, that John, called John of Boreland, was the sixth son, and that Duncan, Archibald, and William, the third, fourth, and fifth sons, all died without issue male, before the year 1811. On the death of William in 1791, his eldest son, Colin, succeeded to the Glenfalloch estate, pursuant to the deed of entail, and enjoyed it till 1806, when he died, and was succeeded by his only son, William Erskine Campbell. He died in July of the following year, leaving an only son, John Breadalbane Campbell, who died in January in 1812, a minor of the age of only ten years. Titles were regularly made up to the Glenfalloch estate by Colin Campbell, William Erskine Campbell, and John Breadalbane Campbell successively; and on the death of the latter in 1812, the line of Colin became extinct. James, the next heir substitute, had died in 1806, and the person entitled to succeed under the entail was the heir male of his body, if there was any such heir male.

In March 1812 William John Lambe Campbell was duly served heir male of taillie and provision in special of his cousin, the said John Breadalbane Campbell, as being the only son of the late James, second son of William, the settler. This service was duly retoured to Chancery, and William John Lambe Campbell made up and completed his titles by infeftment. William John Lambe Campbell enjoyed this estate of Glenfalloch from March 1812, till his death in June 1850. He was then succeeded by his son and heir, the respondent, who duly made up titles to, and has ever since held, the Glenfalloch property.

If these proceedings, subsequent to the death of John Breadalbane in January 1812, were all regular, *i.e.* if William John Lambe Campbell was rightly retoured the only son and heir of James, and if he and his son, the respondent, have rightfully been in the enjoyment of the Glenfalloch estate since 1812, then there is no doubt but that the respondent is entitled to succeed in the present litigation, for if he is heir male of the body of James, the second son of William of Glenfalloch, he is certainly heir male of the body of William himself, and so entitled to be served heir of taillie and provision to the late Marquis.

The appellant, however, contends, that all which happened relative to the Glenfalloch estate was the result of error; that William John Lambe Campbell was not the lawful son of James; that James was never married, and so never had a son, or consequently an heir male of his body; and therefore that the appellant, his father and grandfather, ought to have been ever since January 1812 in the enjoyment of the Glenfalloch estate, and ought now to be served heir of taillie and provision to the late Marquis under the deed of tailzie of 1775. The argument of the appellant proceeds on the ground, that James was never lawfully married, and the point to be investigated is, What evidence exists on this subject?

That he lived for above 13 years before his death in 1806, with a woman who passed as his wife, seems to me to be proved beyond all doubt. He had originally during the American war been an officer in the regular army; but he sold his commission in April 1785. When, however, the Breadalbane Fencibles were raised in 1793 by the then Earl of Breadalbane, James Campbell was taken into that corps by the Earl, first as lieutenant, and afterwards as captain and quartermaster, and he continued to serve in it in those capacities until its fatal dissolution in 1799. In that same year he obtained a commission as captain in the Cambrian Rangers, in which corps he continued to serve until it was disbanded in May 1802. After that time he is not

shewn to have had any occupation, and he seems to have been in great pecuniary distress until his death in 1806.

One important question will be, Whether, during this period of above 13 years, from March 1793 to October 1806, he passed as, and was supposed to be, a married man? For the attempt to investigate matters of this sort after a lapse of from 60 to 75 years, when all contemporary testimony is lost, we must be on our guard against mistaking the spirit in which such inquiries ought to be conducted. If we find a state of circumstances, the enjoyment of property, for instance, in a particular channel of descent, and we then proceed to inquire, even for a collateral object, into the circumstances which have been connected with that enjoyment, in order to discover whether the proper course of descent was followed, we are not to look to the fragments of evidence which may have escaped the ravages of time, in order to see whether they are sufficient to explain and justify the course of enjoyment which has existed; we are entitled to assume *primâ facie*, that what has been long enjoyed has been rightfully enjoyed; and in investigating collateral circumstances which happened long ago, our inquiry ought rather to be, whether they shew the enjoyment to have been in error, than whether they prove it to have been right.

Now, looking to the evidence before us in this spirit, I have come to the conclusion, that it shews satisfactorily, that, at least from March 1793 up to his death, James Campbell was treated by every one as the husband of Eliza Maria formerly Blanchard, the woman with whom he was living, and by whom he had four children who survived him, including William James Lambe Campbell, his only surviving son, the father of the respondent. For the purpose of convenience, I will designate this lady simply Eliza Maria, and I will shortly state the evidence to which I mainly refer:—Donald M'Naughton, one of the respondent's witnesses, was not himself alive during the period in question, but he tells us that his father died in 1864 at the age of 90, having been a soldier in the Breadalbane Fencibles, and he often spoke of Captain James and his wife, and said they always went in and out like man and wife the same as the other officers and their wives, and that, till the present question was raised, *i.e.* since 1862, he never heard it doubted. His two sisters give the same testimony.

This evidence is strongly confirmed by a letter dated the 17th of January 1794, from a Mr. John Gordon to Lieutenant and Quartermaster James Campbell, Breadalbane Fencibles, Aberdeen. The letter relates to some matters of business connected with the regiment; but there is a P.S. "wishing Mrs. Campbell, you and family, many happy returns of the season, I am, dear sir," &c. This shews not only that they were passing as married persons, but that they were living as man and wife in the regiment, and therefore corroborates the testimony given by M'Naughton.

Colin Campbell, it will be recollected, succeeded to Glenfalloch in 1791. He was a married man with a family, and the evidence is very clear to shew, that he and his family received James with his wife and children to visit at Glenfalloch House, and it seems probable from the evidence of Peter M'Callum and Mary Brydie, that there was a particular room in Glenfalloch House appropriated to them. Many little circumstances are mentioned, shewing that the witness cannot be mistaken.

Mrs. Frances Clementina Robertson, born in 1800, says, that her mother often spoke of the Glenfalloch family, more particularly of Captain James's family. She said she had shewed them much hospitality, and she spoke of Mrs. James with a great deal of sympathy and respect, on account of her struggles with her young family.

There is other parole evidence to which I need not refer, shewing that Captain James and Eliza Maria were treated as man and wife. But as this evidence is not contradicted, it seems to me to be entitled to great weight.

Many things were done during the period in question, which I feel it impossible to reconcile with any other hypothesis than that James and Eliza Maria were deemed to be, and treated each other, and were treated by others as being, man and wife. In the first place, the Cambrian Rangers were stationed in 1800 at Gibraltar, and when there, Captain James executed a power of attorney to Eliza Maria Campbell, describing her as his wife, empowering her to act for him in his absence; and this power was duly registered as a probative writ in the Books of Council and Session. This, at least, shews, that he treated her as his wife. After that corps was disbanded, Captain James appears to have been in great pecuniary distress, and to have lived in College Street, Edinburgh, where he and his wife let, or tried to let, lodgings. Whilst so residing, there were at least two Sheriff's summonses against her for small debts, describing her as spouse of Captain James Campbell; and then, in 1804, there was an inhibition sued out by Captain James, warning the public not to trust her. This could only have been obtained on the ground of her being, or of his alleging that she was, his wife.

This appears to me to furnish a strong body of evidence shewing, that the parents of William John Lambe Campbell were believed and reputed to be man and wife, and that no suspicion was ever raised to the contrary.

I will not refer to any further evidence of what happened during the life of James. But, after his death, many circumstances occurred, all tending to the same result, *i. e.* tending to shew, that James and Eliza Maria were believed to have been man and wife.

In the first place, she obtained a Government pension as his widow. The circumstances connected with the grant of this pension are very important, and are much relied on by the appellant. For the present, I advert only to the fact, that she obtained a pension to which, unless she was his widow, she was not entitled. So again, she obtained letters of administration of his personal estate to be granted to her as his widow by the Prerogative Court. William John Lambe Campbell, the only son of James, was placed as an apprentice with a surgeon at Edinburgh, but he had run in debt before his father's death, and was, when that event happened, confined as a prisoner for debt in the Tolbooth. For several months after the death of James, letters were written by John of Boreland, the brother of James, and grandfather of the appellant, and other relatives and friends of the family, deploring the unhappy lot of this young man, and urging Lord Breadalbane to assist in extricating him from his difficulties. In these letters he is always described as the son, or the only son, of James. His mother, in writing to Lord Breadalbane, says she is sure his tender heart would bleed to think that any child of the Glenfalloch family should be in such distress. Duncan, in a letter on this same subject addressed to his brother John, speaks of having received a distressing letter from poor James's widow. Lord Breadalbane did interfere, through Patrick Campbell his agent, who, in writing to Lord Breadalbane, describes William John Lambe Campbell as Glenfalloch's cousin.

From the language and tenor of all these letters, it is impossible to believe, that the writers of them had any doubt as to the legitimacy of the person whose cause they were advocating. The whole correspondence shews, that all the members of the family regarded the children of James as distressed and indigent relatives in whose welfare they ought to take an interest, and that they treated Eliza Maria as his widow. And Lord Breadalbane seems to have assisted the son with money while he was serving at sea as midshipman, evidently treating him as a distant relative in pecuniary difficulties. I have already mentioned, that William Erskine Campbell, the only son of Colin, died in July 1807, and as he left an only son, John Breadalbane Campbell, a child of very tender years, it became necessary to appoint guardians. Several letters passed on this subject between John, the sixth son of William of Glenfalloch, usually designated John of Boreland, and Lord Breadalbane, and in one of them, dated the 8th of December 1807, John of Boreland writes, "My brother Dun., in Jamaica, is the heir at law, as James's son is not of age." When John wrote this he must have supposed that the son of James was legitimate.

John Breadalbane Campbell, the son of William Erskine Campbell, died in January 1812 at the early age of 10 years, on which event William John Lambe Campbell was admitted to succeed as the nearest heir male of the body of William the settler, in 1784. There seems to have been a rather angry correspondence on the subject of who should act as factor for William John Lambe Campbell in making up the titles to Glenfalloch, and attending to the property during his absence, he having married and established himself in London as a medical man. He had at first placed his affairs in the hands of a man named John Campbell, and described as John Campbell, Quartus, but John of Boreland by some means induced him to transfer the management of his affairs from John Campbell, Quartus, to him John of Boreland, representing that some expense would be thereby saved. Throughout the whole business of making up titles and procuring infeftment, John of Boreland acted as agent and factor for William John Lambe Campbell, whom he constantly represented as being the son of James and his own nephew, describing himself as his uncle. This is a very important circumstance, for if William John Lambe Campbell was not legitimate, not only was he not the person to succeed to Glenfalloch, but John of Boreland was himself the person entitled. It seems to me impossible in such circumstances to believe, that John of Boreland had any doubt as to his nephew's legitimacy.

There is another head of evidence not unimportant—I allude to legal proceedings against William John Lambe Campbell, as tenant in tail in possession of the settled estate of Glenfalloch. The estates were burdened with several debts created by William of Glenfalloch, the settler; and John of Boreland having become interested in these debts twice instituted proceedings in the Court of Session, first in August 1814, and secondly in March 1817, against William John Lambe Campbell, as heir in tail in possession, and obtained decreets for payment. One of the sums thus recovered was a sum of £300 due to John of Boreland, as representative of his deceased brother William, and which would be divisible among William's next of kin. And there is in evidence a missive signed by John of Boreland, by which he binds himself to pay over to William John Lambe Campbell the share to which he, as one of the next of kin of his uncle, would be entitled,—another clear recognition of his legitimacy.

There is also a petition in 1818, by the widow of William Erskine Campbell, praying for an alimentary provision, which also assumes William John Lambe Campbell to be properly infeft as tenant in tail.

In 1828, Eliza Maria, the mother of William John Lambe Campbell, died, and on the 6th of

February 1828 letters of administration of her goods and effects were granted by the then Prerogative Court to him, as one of her natural and lawful children.

There was a proceeding in 1842 strongly shewing the opinion of the family as to the legitimacy of William John Lambe Campbell. Jane the widow of Archibald, the fourth son of William of Glenfalloch, the settler, who had been appointed in 1835 *curator bonis* to her daughter Jane, a person of unsound mind, died about 1842. It became necessary, therefore, to have a fresh curator appointed; and by an interlocutor of the Court of Session made on the 10th March 1842, William John Lambe Campbell was appointed, with the approbation of the family, curator in her place. In order to shew the expediency of this appointment, there was produced to the Court a written declaration made by the late Mrs. Jane Campbell, dated in 1837, whereby she expressed her desire, that in the event of her death William John Lambe Campbell should be appointed curator, as being the person best qualified, not only from his near relationship, but from his integrity, and the esteem which she knew her daughter entertained for him.

Proceedings were on several occasions taken by both the first and the second Marquis of Breadalbane for placing certain sums which they had laid out in improvements as charges on the Breadalbane settled estates, and in all these proceedings William John Lambe Campbell was made a party as the next heir of tailzie, entitled under the deed of 1775, on the death without issue male of the second Marquis.

I will only add, that on very many occasions, and in various ways, the late Marquis recognized William John Lambe Campbell, and afterwards his son the respondent, as the person next to himself and the heirs male of his body in the Breadalbane entail, and he advanced money, and in various other ways brought him forward as being the person to succeed on his death.

The evidence to which I have thus adverted, (and there are many more details all pointing to the same result,) satisfies me, that from the beginning of the year 1793 to November 1862, when the late Marquis died, James Campbell and Eliza Maria were always supposed to be and to have been, and were during their lives treated as, man and wife; that after the death of James, Eliza Maria was treated as and was believed to be his widow; and that William John Lambe Campbell was, up to the day of his death in 1850, believed to be and treated as being the lawful child of his parents. The respondent, his eldest son, succeeded his father, and has ever since been in the enjoyment of the Glenfalloch estates. He was duly retoured heir in special to his father, and his titles were regularly made up. No question was ever raised, nor, so far as I can discover, was any doubt ever suggested, as to his having been rightfully in the enjoyment of the Glenfalloch estate as heir male of the body of William Campbell, the settler, until after the death of the late Marquis in November 1862.

On that event happening, the succession opened to the Breadalbane estates, and the present appellant, as grandson of John of Boreland, the sixth son of William, the settler of Glenfalloch, set up a claim to them as being heir male of the body of William of Glenfalloch, the substitute named in the deed of entail of 1775. If the respondent's father was rightfully retoured, in March 1812, heir of taillie and provision to John Breadalbane Campbell, then it is certain, that the appellant cannot be, as he claims to be, heir male of the body of William of Glenfalloch, the substitute; but the appellant undertakes to shew, that this retour, and all which followed on it, was founded in error; that James Campbell never was married; that William John Lambe Campbell was not his lawful son; and, consequently, that he was not heir male of the body of William of Glenfalloch.

The question is, whether the appellant succeeds in establishing that for which he so contends.

The ground on which the appellant rests his claim is this: He says, that there are circumstances which shew, that James could not have been the husband of Eliza Maria, the woman with whom he lived as his wife, and who was the mother of William John Lambe Campbell, the respondent's father. She was, he says, in the year 1781, a married woman, the wife of one Christopher Ludlow; that James Campbell eloped with her in that year, and lived with her under the pretence that she was his wife, concealing from his friends and relatives the origin and nature of their connection; that in that year he went through the form of marriage with her at Edinburgh, but which had no operation whatever, as Christopher Ludlow was then alive; that although Christopher Ludlow died in January 1784, there is no room for supposing that any marriage took place after that date, and so, that the issue that resulted from their cohabitation were all illegitimate. He contends, that these conclusions follow from the facts that he has established in proof, considered in connexion with certain rules of law on which he relies.

I will first endeavour to satisfy myself as to the facts, and then consider his propositions of law.

Before doing so, however, I think it right to advert to the fact, which, in this inquiry, must be constantly kept in view, namely, that James must be taken to have lived and died a domiciled Scotchman. His domicile of origin was certainly Scotch, and I will endeavour to show presently, that he retained that domicile to his death. The evidence of the appellant establishes very satisfactorily, that on the 5th June 1774 Christopher Ludlow of Chipping-Sodbury, grocer, was married by license to Eliza Maria Blanchard, spinster. She was under age, and the marriage would,

therefore, have been invalid without the consent of her father or guardian. In fact, there was the consent of a lady described as her grandmother or guardian, and I think that, at this distance of time, we should consider that to have been a valid consent. It is further proved that, on the 21st of May in the following year, they had a son baptized by the name of Daniel.

Several members of the Ludlow family advanced in life have given evidence of family reputation, that this Eliza Maria, the wife of Christopher Ludlow, eloped with an officer named Campbell, leaving her child Daniel behind her. The suggestion is, that James Campbell, the father of William John Lambe Campbell, was the officer who so eloped with her. The evidence shews, that this James was, in the year 1780, a lieutenant in the 40th Regiment of Foot, and was stationed at Bristol in command of a recruiting party during the year 1780, and certainly as late as 29th January 1781. On the 12th March 1781 he is shewn to have been engaged on the same service at Glasgow, and it is suggested, that he is the officer of the name of Campbell who is said to have eloped with the wife of Christopher Ludlow, and that the elopement must have taken place in the year 1780, or early in the year 1781, before he moved from Bristol to Glasgow. Bristol, it must be observed, is only fourteen miles from Sodbury, where Christopher Ludlow lived, and we may well believe that there would be easy intercourse between the two places.

The reputation as to the elopement does not fix the date, save only that it is said to have occurred when the son Daniel was very young. One witness speaks of him as having been only a baby; another as in his cradle; in fact he was between three and four years old at the end of 1780, which sufficiently tallies with the reputation. The witnesses say, that they heard that Christopher was so cut up by the elopement of his wife, that he went to America. Now, it appears from the books of the Corporation of Surgeons, that, on the 21st June 1781, a person named Christopher Ludlow passed his examination as mate to an army hospital, and in the following month of July, we find from the books of the War Office, that a sum of £23 was paid to him on his going out as an hospital mate to New York, where a part of the British Army was then serving. All this makes it tolerably clear, that the elopement must have taken place either in 1780, or early in 1781. In the following year, 1782, James Campbell went out and joined his regiment in Nova Scotia, where he remained till after the peace.

In November 1783, he sailed from Halifax with his company on board the "Prince of Orange" transport on his return to this country, and was disembarked at Plymouth on 27th February 1784; and there are documents shewing clearly, that from that date he remained with his regiment until 19th April 1785, when he sold his commission and quitted the army. There is no direct evidence to shew, that Mrs. Ludlow accompanied him to Nova Scotia; but if she did not, she must probably have followed him there speedily, for there is a letter from Colin to his brother Duncan, dated Glasgow, 1783, from which it is clear, that James was then living with a woman as being, and who apparently was received as, his wife; and when he returned in the "Prince of Orange" transport, there were among the persons victualled on board the ship seven women, the first being named Eliza Campbell. He quitted the army, as I have already mentioned, on the 19th April 1785, and there is an entry in the parish register of Stoke Damerel, dated the 30th May 1785, of the baptism of Eliza Marlborough, daughter of James and Eliza Maria Campbell, lieutenant of the 40th Regiment.

The appellant relies strongly on all this evidence as shewing, that James Campbell was the officer who eloped with Eliza Maria Ludlow, that he passed her off as his wife in Nova Scotia, and obtained a passage back for her to England in a Government transport as his wife. It is certain, that during this period, up to the month of January 1784, she could not, if she was the person who had eloped from her husband, Christopher Ludlow, have been the wife of James Campbell, for Christopher Ludlow, her husband, was still alive. He did not die till January 1784. His death is mentioned in the "Bristol Journal" of the 3rd January, and his will, dated the 24th June 1783, was proved in the Prerogative Court of Canterbury on the 26th February 1784. If the evidence as to the identity of Mrs. Ludlow, and the person who afterwards was treated as being the wife of James Campbell, had been confined to the facts I have already adverted to, I should not have thought it altogether satisfactory, but, coupled with all which happened after the death of James, I think her identity is established beyond any fair doubt.

There is very little evidence as to where James and Eliza Maria were living between the birth of their daughter at Devonport in May 1785 and his joining the Breadalbane Fencibles in 1793. There can be little or no doubt that he was with his parents at Glenfalloch in September 1785, for there was at that time a severe flood which did great damage, and the tradition is, that James was active in saving some of the sheep, which would otherwise have been lost. Moreover, in the month of October 1786, a London tailor named Cooper brought an action against him for a sum of nine guineas, alleged to be due for clothes supplied to him in August 1785; and the summons was served at Glenfalloch House, which leads strongly to the inference, that he had been residing or, at all events, staying there, when the goods had been supplied. The probability, however, is, that he was not living there permanently, for in 1788 and 1789 two of his children, William John Lambe and Susannah Sophia, were baptized at Gateshead; the great probability therefore is,

that at that time they were living there. But whatever the circumstances that brought them there, or how long they were there, does not appear. There is also the evidence of Mrs. Sutton, a daughter of Colina Maria, another child of James, that her mother used to say, that she was born in barracks at Newcastle.

These circumstances were relied on by the appellant, as shewing, or tending to shew, that England, and not Scotland, was the domicile of James. But giving them their full weight they altogether fail to satisfy me, that this is a fair inference. The domicile of origin was certainly Scotch, and it is on those who allege a change to shew, that there was an intention to make England the permanent home, to the exclusion of Scotland. The evidence is far too weak to warrant such a conclusion. While James was serving in the 40th Regiment, there would be no change of domicile from the mere fact of his serving in England, a d his poverty and destitution may well account for his having for many years led a wandering and unsettled life. There is nothing to shew, that he had any business or occupation at Gateshead, and what Mrs. Sutton's mother told her, namely, that she was born in barracks at Newcastle, rather leads to the supposition, that, though he had sold his commission in the army, he might have succeeded in getting some employment which enabled him to have quarters in the barracks. Be this as it may, the evidence is altogether insufficient to prove any change of domicile between 1785 and 1793; and from the latter date the domicile was always in Scotland, either in Fisherrow, which is part of Musselburgh, or in Edinburgh.

In November 1806 James died in Scotland, and Eliza Maria then came to London, and established herself there as her home. Daniel, the child of Christopher Ludlow, had been brought up by his grandfather, and had become a medical man in London. I do not think it necessary to go into the evidence in detail, which shews, that he was there recognized by Eliza Maria as being her child. He was treated as her child by what she described as her first marriage, and therefore as being the half brother of William John Lambe Campbell. The appellant properly relies on the subsequent recognition of Daniel as clearing up all doubt which might have been felt on the evidence connecting her with the elopement. It seems to me to put that part of the case beyond doubt.

The facts of the case, therefore, as represented by the appellant, are these: In 1780 or 1781, James Campbell eloped with Eliza Maria, the wife of Christopher Ludlow, and lived with her in adultery, passing her off as being, and leading his relatives and friends to believe that she was, his wife. This system of deception continued up to his death; and though in January 1784 Christopher Ludlow died, and the intercourse ceased to be adulterous, yet the appellant contends there was no change of circumstances which justifies the belief, that any marriage ever took place between them after marriage had become possible. That the connexion was, as alleged by the appellant, adulterous in its origin, seems to me to be satisfactorily made out; and the only question is, whether there are circumstances which ought to lead your Lordships to concur with the decision of the great majority of the Judges below in the conclusion, that a lawful marriage ought to be presumed to have taken place after it had become possible by the death of Christopher Ludlow in January 1784.

It was properly argued at your Lordships' bar, and not, as I understood the counsel for the respondent, disputed, that marriage can only be contracted in Scotland by the mutual agreement of both parties to become husband and wife. There is, however, no particular form or ceremony by which such agreement must be manifested, except, indeed, that the parties must, in order to constitute a marriage *de præsenti*, be in the presence of each other when the agreement is entered into, and it must be an agreement to become man and wife immediately from the time when the mutual consent is given. I do not understand the law as ever requiring the presence of a witness as being essential to the validity of a marriage, though without a witness it may be difficult to establish it. The great facility which the law of Scotland affords for contracting marriage has given rise to rules and principles, which have been sometimes considered peculiar to that law. By the law of England, and I presume of all other Christian countries, where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours, there is a *primâ facie* presumption, that they really are and have been what they profess to be. If after their death a succession should be open to their children, any one claiming a share in such succession as a child would establish a good *primâ facie* case by shewing, that his parents had always passed in society as man and wife, and that the claimant had always passed as their child. If the validity of the parents' marriage should be disputed, it might become necessary for the person claiming as their child to establish its validity, and inasmuch as in England all marriages are solemnized in public and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else to explain why he is unable to do so. The principle is the same in Scotland; but as marriage there is not necessarily celebrated in public or recorded, it is much more probable than it would be in England, that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide, after the death of parents, on the legitimacy of children, must, much oftener than in

England, have to rely solely on the *primâ facie* evidence afforded by the conduct of the parties towards one another, and of their friends and neighbours towards them. This sort of evidence is spoken of in Scotland as habit and repute.

Persons are sometimes said to be married persons by habit and repute.

I agree, however, with the argument of the appellant, speaking with deference to those who think otherwise, that this is an inaccurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties and of their friends and neighbours, in other words, habit and repute, may afford strong, and in Scotland, attending to the laws of marriage there existing, unanswerable evidence, that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say, that habit and repute in any case make the marriage. Repute can obviously have no such effect. It is perhaps less inaccurate to speak of habit creating marriage, if by the word "habit" we are to understand the daily acts of persons living together, which imply that they consider each other as man and wife, and it may be taken as implying an agreement to be what they represent themselves as being. It seems, however, to me, even here, to be an improper use of the word to say that it makes marriage. The distinction is perhaps one rather of words than of substance, but I prefer to say, that habit and repute afford by the law of Scotland, as indeed of all countries, evidence of marriage, always strong, and in Scotland, unless met by counter evidence, generally conclusive.

In the present case, the evidence of habit and repute would have established conclusively to my mind the title of the respondent, if there had been no evidence of anything prior to 1793. The question is as to the effect of the evidence establishing the adulterous origin of the connexion between James Campbell and Eliza Maria Ludlow. Now, considering this first on principle and independent of authority, I cannot treat the question as one of law. Where a man and woman have lived together as man and wife at a time when they could not be man and wife, and they continue to live together in the same manner after it has become possible for them to become man and wife, the question whether they have become man and wife is a question not of law but of fact. The law permits them to create that relation between themselves, and whether they have done so must be decided like any other question of fact. The circumstance, that they represented themselves to be man and wife when they knew they were not so, may reasonably be taken into account in estimating their subsequent conduct. It may neutralize the effect which would otherwise have been properly given to their subsequent cohabitation, that is, it may do so as a matter of fact. I cannot think it must do so as a matter of law, and if that be so, then all which any tribunal can do which has to deal with such a question is to look to all the circumstances of the case, and consider whether they do or do not lead to the conclusion, that the parties did contract marriage at some time after it was possible for them to marry.

Now, here, as Christopher Ludlow died in January 1784, there was nothing to prevent James Campbell from contracting marriage with this widow after that date. There is no direct evidence, that they knew of his death, but the question of his being or not being alive was one of deep interest both to James and to Eliza Maria. Christopher Ludlow was well known at Chipping-Sodbury. His death was noticed both in the "Bristol Journal" and the "Bath Chronicle," and I cannot hesitate to come to the conclusion, that it could not have long remained a secret to his widow, or to Captain James Campbell. If, then, they could have contracted marriage at any time after January 1784, and in fact lived together as man and wife from that time up to the time of the death of James, above 22 years afterwards, why are we to assume, that their status is not what they represent it to be? If they had never lived together previously to the death of Christopher Ludlow, if they had only become acquainted when her status was only that of a widow, I can hardly think it could have been doubted, that there was such long and uninterrupted habit and repute as to afford conclusive evidence of their being man and wife. How is this conclusion affected by the circumstance, that they passed themselves off as man and wife when they were not so? I cannot say that this circumstance leads me to think there was even an improbability that they would marry when it was possible they could contract that relation with each other. It must be borne in mind, that as he was always a domiciled Scotchman, and for the last 13 years of his life living in Scotland, except during the short time he was with his regiment at Gibraltar, marriage contracted at any time before his death would be sufficient to give the status of legitimacy to his children. It seems to me, that he had the strongest motives for desiring to be married, and none operating in a contrary direction. He always represented Eliza Maria to be his wife, and introduced her as such in society. He must have known, that he was the next heir in the Glenfalloch entail, to succeed in case his brother Colin should die without issue male. Colin, it is true, left a son, but still the chance was by no means remote, that his son might die without issue male, the event which in fact happened six years after his own death. The evidence to which I have already referred shews very clearly, that Eliza Maria was strongly attached to her children, and went through severe struggles in bringing them up. I see no reason to doubt that he had the same feelings towards them as she had. If he knew that he was not and desired not to be her husband, I cannot understand his

conduct in issuing the inhibition warning the tradesmen not to trust her. It would have been very easy for him to give notice that she was not his wife.

The hypothesis is, that though he certainly desired that the world should suppose him to be her husband, he might not desire really to be so, that he might wish to be able at any time to get rid of the connexion. To such a suggestion I can only say, that it is one which may always be made in the case of persons who have passed their lives as husband and wife, but as to whom there is no direct evidence when and where the marriage contract was entered into—persons, in short, who, in the language of Scotch law, are said to be married persons only by habit and repute; and it is a suggestion to which it is very dangerous to listen after the death of those who, if it had been made in their lifetime or the lifetime of either of them, might have been able to clear up all doubts.

Even if, at an earlier stage of their connexion, James Campbell might have been desirous of being released from it, it is very difficult to suppose he could have had such a wish when she had given birth to many children, all of whom were born when they might have been, what he certainly represented them to be, his legitimate children. How often do we find when a man has been living with a woman as his mistress, under the impression, that he will be glad to get rid of the connexion at some future time and to be at liberty to contract marriage with another, if the conduct of the woman has been irreproachable except in her connexion with him, and he has lived long with her, and more especially if he has a family by her, his feelings become bound up with her, and there is hardly any sacrifice he would not make to be able to convert the illicit into a lawful connexion to cause the woman to have been his wife from the first, and to remove from his offspring the taint of bastardy. In England this cannot be done. In Scotland it may. I will not on this occasion make even a single observation on the policy of the Scotch marriage law. But, that law being such as it is, the presumption seems to be very strong, almost irresistible upon all the evidence before us, that during the 22 years after the death of Christopher Ludlow, during which Eliza Maria lived with James Campbell as his wife, and bore him six children, and was received and treated as his wife by his family and his friends, and so far as appears by all who knew them, he must have desired to make her his wife, and his children legitimate, and this he might have done at any time during that long period.

I must add, that the circumstance of his having introduced her as his wife during the life of Christopher, when she certainly was not his wife, does not lead me to any conclusion different from that at which I should have arrived, if that had not been the case. I am not sure, that it does not rather strengthen than weaken the presumption of actual marriage. It shews a strong desire, that she should occupy a respectable position in society; and it is hard, therefore, to believe, that having for above twenty-two years the daily opportunity of giving her the status, which even, when she did not rightfully enjoy it, he was anxious to have it believed that she had acquired, he should not have profited by the law, which put it in his power to confer it upon her.

There is, however, a circumstance greatly relied on by the appellant, and which is calculated more or less to cast a doubt on the presumption which the conduct of the parties would otherwise fairly have raised. I allude to the letter written by Eliza Maria after his death, when she applied for a pension as his widow. He died, as I have already stated, on the 24th of October 1806, and she then came to London, being, as I collect from the evidence, in great pecuniary distress. Having obtained from the Prerogative Court letters of administration to Captain James Campbell as his widow, she wrote to the War Office, claiming a pension in the same character. In order to get the pension, it was necessary that she should satisfy the authorities that she had been married to him; and in that letter she stated, that she was married to him in September 1782 at Edinburgh by Mr. M'Gregor, the Gaelic minister. There is evidence to shew, that in September 1781 James Campbell was at Edinburgh. He certainly was not there in 1782, for he was then with his regiment in Nova Scotia; but there are fair grounds for supposing, that the date September 1782 was a mistake, and that September 1781 was intended. Her letter states that she had unfortunately lost her marriage lines in America, and the parole evidence shews, that she had, on different occasions, made a similar statement. The argument of the appellant is, that in this evidence the inference is irresistible, that Mrs. Ludlow had accompanied or followed James Campbell to Edinburgh in 1781, and had then gone through a ceremony of marriage at a time when no marriage could have been validly contracted, for, whether the date is to be taken as 1781 or 1782, Christopher Ludlow, the husband of Eliza Maria, was then alive.

That she meant by this statement to induce the belief, that she had been validly married before she was in Nova Scotia passing as the wife of James Campbell, seems to me not to admit of doubt. But two questions then arise, *first*, Did any such marriage, or rather ceremony of marriage, then take place? *Secondly*, If it did, is that circumstance sufficient to rebut the presumption of a valid marriage after the death of Christopher Ludlow, which, but for the invalid ceremony of marriage, the evidence would have warranted?

As to the first question, I think the evidence preponderates in favour of the conclusion, that such a ceremony of marriage did take place in 1781, though the parties must have known it was

invalid. The woman thereby would acquire what she called marriage lines, and would thus possess against all the world who did not know anything of her marriage with Christopher Ludlow apparent proof of her status as the wife of James Campbell. It is therefore not, I think, improbable that, in order to acquire this advantage, the parties might even consent to run the risk of a prosecution for bigamy.

But assuming such a ceremony to have been gone through, the question still remains behind, whether its existence is sufficient to rebut what would, I think, have been, if it had not existed, the irresistible presumption of marriage afforded by the rest of the evidence. I think not. This bigamous marriage ceremony did not prevent the parties to it from afterwards becoming husband and wife, if they were minded so to do. The letter is but hearsay evidence, and can only be looked to as a declaration by a member of the family made in a matter of pedigree, in connexion with all the other evidence; its effect is to shew, that she was not a member of the family, and consequently not a person whose declaration could be received. I have some doubt whether this letter, if objected to, could have been received in evidence. But I mention the doubt only to prevent its reception being supposed to have received the sanction of the House. I shall deal with it as evidence in the cause. It was a declaration made for a special object, behind the back of all the parties interested in disputing or explaining it. Nothing could be more natural than that the woman, who had for a quarter of a century passed as the wife of James Campbell, should after his death, for the sake of her own honour, and that of her children, wish it to be believed that her marriage preceded the time when she lived with him as his wife; and as nothing whatever was known about her marriage with Christopher Ludlow or her elopement with James Campbell, that she should refer to a ceremony which, if valid, would have established, not only her *status*, but her honour, and the validity of which, she must have known, by the experience of a quarter of a century, there was no probability of any one calling in question.

These considerations lead me to the conclusion, that the inference of marriage afforded by the evidence is not removed by the fact, that after the death of the husband, his widow, to effect a particular object, represented the marriage to have taken place at a different date, and in a different manner, from that which really gave it efficiency. I cannot but infer from all which occurred, with respect to the mode in which these persons lived together, not only that they desired to be husband and wife, but also that they believed themselves to be so. In such circumstances we ought to infer, after their deaths, that at some time during the long period during which they lived together, and in some manner, however informal, they did that which they could do without any difficulty, viz. enter into an agreement to be or become married persons, and so to acquire for themselves and their children a status which the evidence satisfies me they wished to enjoy.

I have considered this case hitherto with reference to what I think ought to be the decision on principle only, and independently of authority. But it was pressed upon us, that we could not come to a conclusion which should affirm the judgment below, without overruling two important decisions in your Lordships' House—one, that of *Cunningham* v. *Cunningham*, generally cited as the *Balbougie case*, determined in the year 1814, when Lord Eldon held the Great Seal, 2 Dow, 483; the other that of *Lapsley* v. *Grierson*, decided in 1848. These cases, it was contended, establish the proposition, that where the connexion between a man and a woman was illicit in its origin, there the presumption of marriage from habit and repute is at an end, or at all events is at an end until some change of circumstances takes place, such as did not exist in this case.

I have examined these cases with great attention, but I cannot think that they warrant any such conclusion. In the *Balbougie case*, the connexion in its origin was between Mr. John Cunningham, Provost of Inverkeithing, and his female domestic servant Annie Hutchinson. She gave birth to a child, both parties were censured for fornication, and Mr. Cunningham stated that he had doubts whether the child was his. The connexion was therefore clearly illicit in its commencement. It continued for above 12 years, when the woman died at Edinburgh. Mr. Cunningham sent his bailiff or cowfeeder to see her buried. She was buried as an unmarried person, by the name of Agnes Hutchinson, and was laid in the grave in the character not of Cunningham's wife, but of his mistress. Cunningham afterwards married. He had issue by Agnes Hutchinson two daughters, and twenty years after her death these daughters instituted proceedings which eventually came up to this House, by which they sought to establish their legitimacy on the ground that their parents were married persons. The Lord Ordinary, and afterwards the Inner House, found facts and circumstances sufficient to infer marriage, but that decision was reversed in the House of Lords. Lord Eldon, in removing the reversal of the interlocutors, examined very closely and with minute accuracy the whole of the evidence from which the Court of Session had inferred the marriage, and finally came to the conclusion, that the facts were not such as to warrant the inference. In the course of the observations which he made, he more than once adverted to the fact, that the connexion was certainly illicit in its origin, and he said that mere cohabitation as man and woman was not cohabitation as husband and wife, and he came to the conclusion, that there was nothing to warrant the inference, that what was certainly in its commencement a mere cohabitation as man and woman ever became anything else.

The decision does not appear to me to have been a decision, that a connexion, which in its origin was only that of man and woman, could not become the connexion of husband and wife, or that any particular forms or acts were necessary to constitute marriage, that but for the illicit nature of the connexion in its origin would not have been necessary. When the connexion is in its origin illicit, more evidence, or different evidence, may or may not be necessary to satisfy a Court, that marriage has been contracted. Still it is a matter which must always depend on the particular facts in proof, and I cannot understand Lord Eldon as deciding more than that in the *Balbougie case* there were no such facts as would justify the inference.

The other case was that of *Lapsley* v. *Grierson*, which was decided in 1848, and is reported in 1 H. L. C. 498. In that case John Lapsley cohabited with a married woman, Janet, the wife of William Paul. The cohabitation commenced in or about 1801, and continued till 1810, when John Lapsley died. There were children the fruit of that cohabitation, born between 1807 and 1810. The report states it as a fact in the case that William Paul was lost at sea in 1804 or 1805, but on referring to the *printed case*, I do not find that to have been either proved or admitted. The children set up a claim in the Court of Session to certain heritable property as being the lawful children of John Lapsley, and the Lord Ordinary found, that the parents of the pursuers "were cohabiting, and generally held by habit and repute to be married persons for three years at least prior to the death of John Lapsley in 1810, and consequently, that the pursuers were entitled to and did possess the status and repute of his lawful children."

That interlocutor was reversed by the Inner House, and your Lordships sustained the reversal. The LORD CHANCELLOR, LORD COTTENHAM, said, that the case depended on the evidence as to the facts. They began to live together when they certainly knew they were not and could not be husband and wife. Even if it was to be taken as proved that William Paul died before 1810, LORD CAMPBELL says he was satisfied that neither of the parents believed that to be so. They lived together believing the nature of the connexion to have continued unchanged during the whole period of time during which it subsisted, and LORD CAMPBELL observed, there was *mala fides* from the beginning to the end of the proceeding. Both of these cases were decided on their special facts, and I do not feel, that they at all precluded the Court of Session from coming to the decision at which they arrived in favour of the respondent.

There is only one further observation which I desire to make ; it relates to the evidence given for the appellant by Mrs. Charlotte Olympia Cockburn Campbell, the appellant's mother. She married his father in March 1832, and she tells us, that shortly afterwards, her uncle, Sir Patrick Campbell, expressed his surprise that her husband, knowing there were suspicions as to William John Lambe Campbell's legitimacy, did not challenge his possession of Glenfalloch, and told him that his (Sir Patrick's) brother could help him in proving his case. But her husband refused to do so, saying he would wait to see whether the Marquis of Breadalbane died without issue male, and if that should happen he would then shew to the world, that he was the right heir, and he told the witness, that he had all the papers and knew the secret.

Taking this evidence to be true, the conduct of this witness's husband, the appellant's father, seems to me open to much observation. We have no satisfactory evidence as to what was the value of the Glenfalloch estate. But in the petition presented by the widow of William Erskine Campbell, praying to have a liferent out of that estate, she states the rental to be nearly £1400 per annum. Even supposing this to be an exaggeration, yet I think we must infer from all the evidence, that it was a property of no inconsiderable value. Now the same evidence which would have shewn the appellant's father to be entitled to the Breadalbane estates must also have shewn him to be entitled to Glenfalloch. His title, if any, to that property accrued on the death of his father in March 1823. At that time Eliza Maria was alive, and was universally received as the widow of his uncle James. William John Lambe Campbell was alive, and no doubt then and for many years afterwards, there were many persons living who might have thrown light on the question, but yet the appellant's father never asserted any title to Glenfalloch, though, if the case which the appellant now makes is well founded, his father knew, that William John Lambe Campbell, who was in possession of it, was wrongfully holding that which belonged to him. It could never enter into the mind of William John Lambe Campbell or of the respondent, that there was any necessity for preserving evidence of their right to what they had been allowed to enjoy without molestation from the year 1812. The appellant's father lived in great intimacy with William John Lambe Campbell, but he never gave him to understand that there was any doubt as to his legitimacy. He kept his evidence on this subject, if he had any, a secret which avowedly he never meant to bring forward till some distant day when all means of meeting or contradicting it would probably be gone. I have thought it right to advert to this circumstance, as adding to the other circumstances on which I rest my judgment. It is to the last degree important, that the Courts of Justice should look with the utmost suspicion on the conduct of parties who intentionally keep secret matters at a time when they might be explained, in order to divulge them only when lapse of years may have made contradiction or explanation impossible.

It is only necessary to add, that I concur with my noble and learned friend in thinking, that the interlocutor of the Court of Session ought to be affirmed.

LORD WESTBURY.—My Lords, by far the greater part of the observations which I had intended to submit to your Lordships have been rendered wholly superfluous by the elaborate opinions which you have already heard. But as this case is one of great importance I am unwilling to dismiss it with a silent vote. And I shall try to prove that I have attended to the appellant's case by some remarks on the principal questions of law and the principal subjects of contention, that were urged by the learned counsel at the bar. For, in truth, this is not quite a question simply of fact: it is a case rather where the facts are not disputed materially on either side; but certain principles have been advanced by the appellant as legal grounds for escaping from those conclusions, which the facts undoubtedly strongly warrant and render almost irresistible.

The appellant's counsel began by complaining of the statement of the Scottish law of marriage, so far as marriage is evidenced by cohabitation with habit and repute, which is contained in the opinions of the learned Judges. I think that complaint was without foundation. It is not pretended by any of the learned Judges, that marriage is constituted by cohabitation with habit and repute, but they one and all, I think, treat the evidence upon that subject as evidence to prove that which alone constitutes marriage, namely, the consent of the parties. Some exception may possibly be taken to some few words occurring in one of the judgments, in which cohabitation with habit and repute is spoken of as a mode of contracting marriage. It is quite plain what is meant by the learned Judges; but perhaps it may not be strictly correct to say it is a mode of contracting marriage. It is rather (as I have already observed) a mode of making manifest to the world that tacit consent which, from the conduct of the parties, the law will infer to have been already interchanged between them. If I were to express what I collect from the different opinions on the subject, I should rather be inclined to express the rule in the following language: That cohabitation as husband and wife is a manifestation by daily conduct of the parties having consented to contract that relation *inter se*. It is a holding forth to the world by the manner of daily life, by the conduct and demeanour of the parties, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife. And when credit is given by those among whom they live—by their relatives, neighbours, friends, and acquaintances—to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are reputed to be man and wife. The law of Scotland accepts this combination of circumstances as evidence, that consent to marry has been lawfully interchanged. Probably, therefore, in the correct expression of the law it would be more proper to say, that cohabitation with habit and repute are a mode of proving the fact of marriage rather than a mode of contracting marriage.

If, therefore, this is a mode in which the consent necessary to create marriage may be manifested and proved by law, the question is, whether these parties, James Campbell and Eliza Blanchard, were free to contract that relation, and to prove it in the manner explained.

Now, there can be no possible doubt, that after the death of Ludlow, the first husband, in the year 1784, James Campbell and Eliza Ludlow were free by law to intermarry. There is no pretence of argument, that can be alleged to the contrary from the law of Scotland, for the Act of 1600 has always been confessedly taken to apply only to cases where the husband and wife have, by reason of adultery, been by judicial sentence of a proper Court divorced from each other. The parties, therefore, were unquestionably free to marry.

But the appellant, addressing himself to this mode of proving consent, raises this legal objection, that cohabitation which began during the time when the parties were incapable of contracting marriage, and which was continued without change or alteration in the external appreciation of that intercourse, is a cohabitation which is ineffectual by law to form the basis of the conclusion of fact, namely, that consent to marry was interchanged after the impediment to marriage had been removed. That would be a very important rule if it were proved to be well founded. It would be a rule of very general consequence, and very material undoubtedly to be well considered. But I am unable to find, in the first place, any principle to justify the introduction of such a rule, and, what is more material to the purpose, I am unable to find any case, or any book of authority, in which that principle has been either followed out into a decision, or has been laid down as a rule of Scotch law. It appears to me almost entirely derived by the appellant from what I conceive to be a misapprehension of certain words found in the judgment in the cases of *Cunningham* v. *Cunningham*, and *Lapsley* v. *Grierson*, to which your attention has been directed, or rather (if I may venture to say so) from a misapprehension of part of the marginal note of one of those cases. There is nothing to warrant the proposition, that, because there was an impediment to contracting the marriage existing at a particular period of time, if, after that impediment is removed, the parties continue to live and act in such a way as *per se* would be sufficient to warrant the conclusion of marriage—there is nothing, I say, to warrant the proposition, that the subsequent conduct shall be rendered invalid and ineffectual to prove marriage by reason of the existence, at a previous period, of some bar to the consent being interchanged. It would be very unfortunate if it were so. Marriage may be contracted between parties in a foreign land, where certain ceremonies and observances are required which, from ignorance or mistake, may not have been fulfilled. They may afterwards come to Scotland and reside there for years, con-

tinuing cohabitation which began after the imperfect and informal ceremony. Then it would be a very sad thing, and an unfortunate thing, if such a life, continued perhaps for twenty or thirty years, were insufficient to warrant the conclusion of marriage by reason of an antecedent ceremony having taken place between the parties, which was insufficient to constitute marriage.

There is no foundation for the argument, that the matrimonial consent must of necessity be referred to the commencement of the cohabitation. The argument, as ingeniously put by the appellant's counsel, is, that you require a certain period of time during which cohabitation with habit and repute has existed, in order to warrant the inference of consent. But then that inference of consent, when drawn, must be of consent at some particular period, and the period contended for by the appellant as the commencement of the cohabitation was insufficient. The cohabitation itself having continued without interruption, would warrant no other conclusion than that which would be warranted by the consent interchanged at a time when it was more sufficient. I should undoubtedly oppose to that another, and I think a sounder, rule and principle of law, which is this, that if you infer consent from cohabitation attended by habit and repute, and by credit being given to it, you must infer that consent at a time when the parties were competent to interchange it. You must therefore infer the consent to have been given at the first moment when you find the parties able to enter into the contract. The conclusion, therefore, that I derive, and which unquestionably is consistent with the language of the cases which have been referred to, is the conclusion, that the consent between these parties was interchanged and given, and that the marriage, therefore, in theory of law, took place at the time when, by the death of the first husband, they became competent to enter into the contract.

Now, there is nothing in the language of Lord Eldon, that interferes with that conclusion. On the contrary, when the words used in this House by the noble and learned Lord are considered, they will be found to be necessarily pregnant with the inference, that cohabitation notoriously illicit does not interfere with the proof of marriage derived from the continuance of the cohabitation, if the subsequent cohabitation became as notoriously licit, that is, if the subsequent cohabitation as man and wife was accepted, reputed, and credited, as being such, just as effectually and as extensively as the former cohabitation was regarded as illicit. The words of Lord Eldon, in which I think this conclusion is necessarily involved, are these. He says: "Where it was first" (that is, where the cohabitation was first) "notoriously illicit, and where a change in the character of the connexion must be operated," (that is, in order to bring out the result of marriage,) "and where they found the means employed for that purpose to be such as left half the world in doubt, the servants, the relations—one half thinking one way, the other half the other—at what time, in what circle, could it be said, that there was such a habit and repute as raised the presumption, that the parties had mutually consented to be husband and wife?" And Lord Redesdale, following out the same train of observation, rests his judgment on the fact, that there was not in that case sufficient habit and repute, for if six people were called to affirm that they believed them to be husband and wife, there were other six who might also be called to affirm, that they believed the former illicit connexion to be still continuing. It is therefore palpable, that Lord Redesdale and Lord Eldon both considered, that this connexion, though in its origin illicit, might have become a connexion attended with a different reputation, and which therefore would be sufficient evidence of the fact of marriage.

And the same thing is involved in the other case of *Lapsley* v. *Grierson*, for in that case it is perfectly clear, that the parties began their cohabitation by living in adultery; but if it had been proved to the satisfaction of this House, that that cohabltation was continued after they knew that the first husband was dead, and if, continuing after that event, it had attracted to it the general estimation and belief of the parties having assumed the character of husband and wife when they were free and competent to do so, then it is clear from the reasons given for the opposite conclusion, that those very same reasons would have enured, and would have compelled the noble and learned Lords to arrive at a contrary conclusion to that judgment which was founded on the absence of evidence of the parties having known that they were competent to marry. If that had been so, it is clear, that those noble and learned Lords would have arrived at the conclusion, that marriage was sufficiently proved. Therefore, in the absence of all authority to lead your Lordships to the opposite conclusion, I venture to think, that you are fully justified in holding, that there is no legal foundation (and certainly there is no moral foundation) to justify the argument, that because two persons begin to cohabit when they are not at liberty to marry and the cohabitation continues afterwards and is attended with a different repute, that cohabitation, with habit and repute, shall not avail in the law of Scotland to make them married persons in the eye of the law.

There are one or two other points which I will advert to very shortly, not wishing to weary your Lordships. The appellant founded himself upon the letter of 1807, and drew from it these conclusions:—First, a conclusion of fact. He said it is plain from that letter, giving credit to the fact that it states, of a regular ceremony of marriage, that the matrimonial consent between the parties was interchanged at that time. He further says, that it is impossible to believe or to infer, that any other matrimonial consent had been interchanged between the parties, for it would

have been unnecessary, seeing that they resorted to that ceremony. I think it is plain, particularly after the observations of my noble and learned friend on my right, LORD CRANWORTH, to which I listened with much pleasure, that that mode of regarding the letter is not consistent either with law or reason or common sense. Giving full credit to the letter, which I hold to be no evidence whatever of the fact, but taking the fact to be as stated in the letter, it is perfectly plain, that the only thing which you can derive from the fact of that ceremony having been performed, is this, that the parties were very anxious to attract to themselves the estimation of standing in the relation of married people; and for the sake of gaining that advantage they went through the ceremony, although they must both of them have been perfectly well assured, that that ceremony was insufficient to constitute a marriage. What moral conclusion, therefore, can you derive from that? This only, that they were most anxious to have the character of being husband and wife. How far, therefore, does that operate upon the conclusion derived from their subsequent conduct? Why, it aids the inference, that the subsequent cohabitation when they became free to marry was a cohabitation that necessarily involved that consent to become husband and wife which it is plain that they desired to become, even at that time when there was a bar to their contracting a marriage.

These were the principal topics of the argument. The appellant was bound to admit what has been demonstrated by the Lord Ordinary, and again to-day by my noble and learned friends, that the conduct of the parties from 1793 to 1806 was abundantly sufficient to prove the fact of marriage. To that must be superadded what undoubtedly produces in this case the great moral conviction, that that judgment is the right one, namely, that this question might have been raised between the ancestors of the present parties in the year 1812. At that time the father of the respondent plainly asserted that he was the lawful son of James Campbell, an allegation which involved of necessity the fact, that the father and mother of William John Lambe Campbell had lived in lawful marriage. William John Lambe Campbell accordingly was accepted and taken in a solemn proceeding as being the heir of Glenfalloch by reason of his being the legitimate eldest son of the father James Campbell. It is impossible to imagine any proceeding, especially this being so near the time of the death of James Campbell, and whilst his widow was living, more conclusive of the fact, that James Campbell and Eliza his wife were universally recognized, accepted, and taken as husband and wife, and that there was no ground for disputing the legitimacy of their son. That title has been followed by possession and enjoyment for more than fifty years. It might have been disputed again in 1850, but it was not, and I trust, therefore, that your Lordships, and that all who attend to this case, will be satisfied, that we have arrived at a conclusion consistent with the actual law of Scotland, and that all reason and sense dictate your coming to the conclusion, that this marriage ought not upon any ground to be regarded as open to dispute, and consequently, that the respondent is entitled to retain the judgment which he has obtained.

I concur entirely in the motion of my noble and learned friend.

LORD COLONSAY.—My Lords, I am in the position of having been one of the Judges before whom this case was argued in the Court below. It was my duty there to express my opinion on the result of the evidence, and the arguments which were brought before us. The case underwent very full consideration in that Court; and I then gave my judgment very fully both upon the facts and upon the law, which judgment is printed in the papers now on your Lordships' table. I have since had the benefit of hearing the very able argument which has been addressed to your Lordships by the learned counsel in this case, and of reconsidering the whole case, both on the evidence and on the law, and I see and have heard no reason for altering the judgment which I then delivered, and which led me to the same conclusion, in fact and in law, at which your Lordships have arrived in the judgments which you have now delivered. I therefore think it would be improper for me to detain your Lordships by repeating that which is already in the possession of the parties, and which lies in a printed form on your Lordships' table.

Mr. Anderson.—My Lords, before his Lordship puts the question to the House, may I be allowed to ask your Lordships to indulge me for a moment on the question of costs? Considering the important question at stake here, and that there was a difference of opinion among the Judges below, we could scarcely avoid coming to your Lordships' House.

LORD WESTBURY.—My Lords, I trust your Lordships will not allow this practice of raising discussions on the question of costs to be introduced. Nothing can be more mischievous than to have a separate argument on the subject of costs. Your Lordships, according to my experience, have always deprecated that practice, and I trust you will not think this case an exception to the general rule.

LORD CHANCELLOR.—Your Lordships have not expressed any opinion with regard to costs in this case. What I was going to propose to the House was, that the appeal should be dismissed with costs in the usual way. I see no reason for any deviation from the general rule in that respect.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, Henry Buchan, S.S.C.; Martin and Leslie, Westminster.—*Respondent's Agents*, Adam, Kirk, and Robertson, W.S.; Loch and Maclaurin, Westminster.