102. The case had virtually been dismissed here, and the Sheriff had not applied his mind to the subject, but had practically disposed of the whole case.

At advising—

LORD JUSTICE-CLERK—In my opinion we must dismiss this appeal as incompetent.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court dismissed the appeal as incompetent.

Counsel for the Appellant—Jameson—Burnet. Agents—Henry & Scott, W.S.

Friday, May 29.

FIRST DIVISION

[Lord Kinnear, Ordinary.

COLQUHOUN AND OTHERS *v.* COLQUHOUN.

Parent and Child—Presumption—Pater est quem nuptiæ demonstrant — Circumstances in which the Presumption Pater est quem nuptiæ demonstrant was Held to be Overcome.

Three weeks after their marriage a husband and wife separated, though they continued to live in the same town. Five years after the separation the wife bore a child. The husband died nineteen years later, and after his death an action was raised by certain of his relatives to have the child declared illegitimate. It was proved that the husband had repudiated the paternity and declined to support the child; that his wife, though in very poor circumstances, had taken no steps to compel him to support it; and that she had submitted to a charge made against her by the kirk-session of her church of having given birth to an illegitimate child, and to a consequent suspension from church privileges.

Held that the inference to be drawn from these facts was strong enough to displace the presumption in favour of legitimacy, even though there was some vague evidence of the spouses having met on several occasions during the two years preceding the child's birth.

George Colquhoun, cooper, Paisley, and Christina Alexander were married on 12th May 1865. They lived together for about three weeks after the marriage at the house of an aunt of Mrs Colquhoun's in Paisley, and there separated, Mrs Colquhoun remaining with her aunt, and George Colquhoun going to the house of a brother in Paisley. After that time the spouses never kept house together. On 24th June 1870 Mrs Colquhoun gave birth to a female child, whom she called Christina Alexander Colquhoun, and registered as the child of George Colquhoun. On 5th December 1889 George Colquhoun died intestate leaving certain heritable and moveable property.

In January 1890 the present action was raised by Mary, Agnes, and Janet Colquhoun, nieces, and Mrs Taylor, a grandniece of the said George Colquhoun, claiming to be the whole parties interested in his moveable estate, against Christina Alexander Colquhoun, her mother Mrs Colquhoun, and Robert Colquhoun, nephew and heir-at-law of the deceased George Colquhoun, to have it declared that the said Christina Alexander Colquhoun was not the lawful child of George Colquhoun, and had therefore no title to any of the legal rights which would have been competent to his lawful children.

Christina Alexander Colquhoun lodged defences. In answer 2 she admitted that her mother and George Colquhoun had had no intercourse for three years after they separated from one another, but averred that thereafter they "met each other now and again at night, and walked together, and that this intercourse continued until five months before this defender was born."

Proof was led. The following were the strongest points established against legitimacy. George Colquhoun repudiated the paternity both in private and to the kirk-session of the Reformed Presbyterian Church to which he belonged. He also declined, on the application of the parochial board, to contribute to its support, and his wife took no steps to compel him to do so, though in such poor circumstances that she was obliged to apply for relief to the parochial board, from whom she received a few shillings. It further appeared that Mrs Colquhoun's case had been inquired into by the Reformed Presbyterian Church, to which she belonged, and that Mr Symington, one of the elders of the church, had been sent to see her with regard to the child's birth. His report to the kirk-session, as it appeared from the minutes of that body, was to the effect that Mrs Colquhoun had acknowledged to him that the defender was not the child of George Colquhoun. Mr Symington also deponed that he had no doubt that this admission had been made to him, though he could not recall the language in which it had been conveyed. In consequence of Mr Symington's report to the kirk-session Mrs Colquhoun was suspended from church privileges, and remained suspended for a period of 17 years. At the end of that period she was readmitted, but according to the evidence of Mr Clazey, the minister of the church, who had visited her with regard to her readmission, only upon her making profession that she had undergone a spiritual change, after he had alluded in what he considered an unmistakable manner to the fault for which she had been cut off from church privileges. The pursuers attempted to establish that Mrs Colquhoun had had improper relations with other men than her husband, but the evidence of this was of a vague kind, no individual being mentioned. No evidence was adduced by the defender that Mrs Colquhoun had ever

before the birth of the defender communicated to her husband the fact of her pregnancy.

The evidence in favour of legitimacy was as follows—Mrs Colquhoun deponed that she and her husband began to meet in 1868 after three years' separation, and met frequently in 1869, and in particular that on the October Fast Day 1869—*i.e.*, the Friday before the first Sunday in October—he went with her to Greenock, that they there called on an acquaintance, Mrs Thomson, and after seeing her went to Glasgow, where they lodged together till the following Sunday, when they returned to Paisley. In cross-examination Mrs Colquhoun specified several occasions on which she had met her husband in 1868, and, *inter alia*, stated that she had in February or March met him and taken him up to her father's house, and that in July she had gone to his shop to buy a tub. Mrs Colquhoun denied that she had ever had connection with any other man than her husband, or that she had admitted the illegitimacy of the child to either Mr Symington or to Mr Clazey. With regard to the interview with Symington, she said—"He spoke to my aunt and me about the child, and said that George had denied it. He asked me if it was George's. I neither said yes or no, for I cried at the idea of being suspected, and at George denying me." She further said that it had not been reported to her that she was suspended by the session; that she could not go to church because she "had to stay at home and attend to the child, and so on;" that she did not understand that Mr Clazey thought the child illegitimate; that after the child's birth she had sent her father to George for money, but had failed to get any; and that in the winter after the birth she applied to her husband for money, and received 5s. from him on one occasion, and 2s. 6d. on the other.

Mrs Colquhoun's story of the visit to Greenock was corroborated by Mrs Thomson, who said that she remembered the Colquhouns calling upon her at Greenock three or four years after their marriage, when she was housekeeper to a Mrs Tough; she thought that the day on which they visited her was the Paisley Autumn Fast; she heard of the birth of the child shortly after it was born, and thought that it was the autumn before that that the Colquhouns had called upon her in Greenock; she left her situation just about the time the child was born.

Another witness, Mrs Littlejohn, deponed that she was married in 1871; remembered Mrs Colquhoun's child being born, and remembered calling at Mrs Colquhoun's aunt before the child was born, "on the Sunday after the Autumn Fast, Mrs Colquhoun was not at home, and her aunt said she had gone away on the Friday to meet George, and had not come home yet. I did not think that strange, because I knew she was in the habit of seeing him occasionally."

A half-sister of Mrs Colquhoun—Mrs Cameron, aged thirty-seven—deponed that she had seen Mrs Colquhoun and her husband together in her father's house in the spring of 1868. She remembered her father, who was dead, once saying that he had been at George to get money for the support of the child, but could do nothing with him.

Mrs Elizabeth Green deponed that she was married in August 1869, and remembered when walking with her husband shortly after her marriage meeting Mr and Mrs Colquhoun together.

Miss Brown, aged thirty, said that before the child's birth she went with Mrs Colquhoun to George Colquhoun's shop to buy a tub, that he carried it for his wife, and that they walked off together "quite friendly." She thought it would be about three years after the separation, but could give no reason for saying so.

On 29th May 1890 the Lord Ordinary (KINNEAR) assoilzied the compearing defender from the conclusions of the summons, and decerned.

"*Opinion.*—The evidence adduced by the pursuers is not sufficient to overcome the presumption in favour of the legitimacy of a child born in wedlock.

"The strongest points against the legitimacy are that the husband and wife had ceased to live together within a few weeks of their marriage, and about five years before the birth of the child; that the husband repudiated the paternity; that the wife took no steps to compel him to support the child; and that she submitted to a charge made against her by the kirk-session of her church that she had given birth to an illegitimate child, and to the suspension of her church privileges in consequence of that imputation. The evidence as to the proceedings of the kirk-session is relevant in so far only as it bears upon the conduct of the parties. But in that point of view it is not immaterial.

"The facts, however, are not conclusive, and the inference of illegitimacy, to which they might otherwise have led, appears to me to be excluded by evidence that the husband and wife, although they were not living together, were in the habit of meeting occasionally during the years 1868 and 1869, and in particular, that they went on a holiday trip together to Greenock and Glasgow, without the company of any third person, in October 1869, about the time when the child must have been conceived. The visit to Greenock is proved by the independent evidence of Mrs Thomson. I see no reason to doubt the credibility of this witness, and if she is to be believed, as I think she must be believed, her statement leaves no room for question either as to the fact or as to the date of the visit. Irrespective altogether of what Mrs Colquhoun says as to the visit to Glasgow, I think the visit to Greenock, which I hold to be proved, is conclusive against the pursuer's case. If a husband and wife, who have been living apart for some years, are proved to have gone together on a holiday excursion to a place at some distance from the town in which they lived, and to have been alone together on that occasion, it is out of

the question to say that intercourse cannot have taken place. The presumption of fact and law is to the contrary. It is therefore impossible to say that the husband cannot have been the father of the child."

The pursuers reclaimed, and in the Inner House they lodged a minute, in which they averred and offered to prove that the witness Mrs Thomson was not housekeeper to Mrs Tough in Greenock in the autumn of 1869, as Mrs Tough left Greenock in 1869, and Mrs Thomson was married in the same month, and afterwards resided in Greenock with her husband.

The defender lodged answers, in which she admitted the facts set forth in the minute, but explained that the deceased George Colquhoun, in company with his wife, visited Greenock twice in 1869, on the Spring Fast Day and on the Autumn Fast Day; that on the former occasion they called on Mrs Thomson, whose evidence was correct except as to the date of their visit; that on the latter occasion they had intended to call upon a farmer near Gourock, a cousin of Mrs Colquhoun's aunt, but as they did not know the road to the farm, they failed to reach it, and turned back as they were afraid of darkness settling down upon them; and that accordingly they returned to Greenock, and took train to Glasgow, where they remained till Sunday. In the event of further proof being allowed, the defender offered to lead further evidence to prove that George Colquhoun and his wife were meeting and associating in 1869 and 1870.

Additional proof was allowed. The pursuers succeeded in establishing the facts averred in their minute.

Mrs Thomson was again examined for the defender. She deponed that she was now satisfied that Mr and Mrs Colquhoun's visit to her in Greenock was not, as she formerly stated, on the Autumn Fast Day 1869, but on the Spring Fast Day of that year; that she had previously said it was on the Autumn Fast Day because Mrs Colquhoun had told her so, and she thought she must know.

Mrs Colquhoun gave the new version of her story, which was embodied in the defender's answer to the pursuers' minute, and said that when previously examined she had forgotten her second visit to Greenock. She also said that she remembered the witness Mrs Bruce meeting her when she was walking with her husband in James Street, Paisley, and greeting her in passing, that this meeting took place before her child was born, she thought shortly after the New Year 1870.

Mrs Littlejohn was again examined. She now deponed that Mrs Colquhoun's child was born after witness' marriage, that she was married in April 1870, and that her call upon Mrs Colquhoun's aunt took place on the Autumn Fast Day immediately preceding her marriage. She undertook to produce her Family Bible, which contained the date of her marriage. When produced the Bible showed her marriage to have been in April 1871.

Two other witnesses were examined for the defender. Mrs Gillan spoke to having seen George and Mrs Colquhoun together in Causewayside, Paisley, on the evening of a day in November 1870. She remembered the time because she "had a baby about two months afterwards."

Mrs Bruce said that she had seen the Colquhouns together after dark in James Street, Paisley, on a day after the New Year of 1870, and had spoken to Mrs Colquhoun in passing. She remembered the circumstance because it was odd to see them walking together.

The pursuers argued that the inference to be drawn from the actings of the spouses was so strong, and the contrary evidence proved to be so unreliable, that the presumption in favour of legitimacy was rebutted — *Montgomery* v. *Montgomery*, January 21, 1881, 8 R. 403; *Morris* v. *Davies*, 1837, 5 Cl. & Fin. 163.

The defender argued that the presumption was not displaced, there being evidence in favour of access having taken place, and referred to *Steedman* v. *Steedman*, July 20, 1887, 14 R. 1066.

At advising—

Lord President—When this case came before us on the pursuers reclaiming against the Lord Ordinary's interlocutor of 29th May 1890 we were very much pressed by the reclaimers to allow them to lead additional evidence in order to contradict the evidence of Mrs Thomson, an important witness on whose deposition the Lord Ordinary greatly relied, and indeed who might be represented as the only very important independent witness in favour of the defender's case. After a minute had been lodged by the reclaimers showing that they were prepared to adduce evidence to prove that Mrs Thomson's story could not possibly be true, we allowed additional proof to be taken, and we are now disposing of the case with the advantage of this additional proof as to the accuracy or veracity of Mrs Thomson.

Of the general facts of the case there is very little doubt. The husband and wife ceased to live together within a few weeks of the marriage, and had been living separate for five years before the child whose legitimacy is in question was born, and the husband repudiated the paternity of the child. The mother's conduct admits of a good deal of unfavourable observation, but one fact above all others militates against her credit and honour, and that is that she admitted to a member of the kirk-session of the church to which she belonged that her husband was not the father of the child. As I read the Lord Ordinary's note he would have given effect to these considerations had he not been moved by the evidence of Mrs Thomson as an independent witness, and it seems to have been in respect of her evidence that he pronounced the interlocutor he did, which otherwise he would not have pronounced in consideration of the other circumstances of the case. Now, the additional proof shows

that Mrs Thomson's original story is not consistent with fact, and that it is impossible that the visit of the spouses to her, of which she spoke, could have taken place at the time at which she said it did, and that removes the main support of the Lord Ordinary's judgment.

There remains some evidence to show that the spouses came together once or twice in the course of the five years preceding the child's birth, but the statements of the witnesses are very vague and unsatisfactory. No particular time is fixed at which the interviews took place, and indeed no part of the evidence tends to remove the conclusion which we are bound to draw from the main facts of the case.

I am therefore for recalling the interlocutor of the Lord Ordinary and decerning in terms of the libel.

LORD ADAM—George Colquhoun and his wife were married on 12th May 1865. The child whose legitimacy is in question in this action — Christina Colquhoun — was born more than five years after, on 24th June 1870. George Colquhoun died on 5th December 1889, and the reason why the question for our decision is now raised is that he left moveable estate to the value of £600. If Christina Colquhoun is found to be legitimate, this estate will go to her, subject to Mrs Colquhoun's claims on her husband's estate, but on the other hand, if Christina Colquhoun is proved to be illegitimate, the pursuers will have right to the estate in question, under burden of the wife's legal claims. In the first case these claims would amount to one-third, in the second to one-half of the estate.

Now, this being a case of a child born during the subsistence of a marriage, the presumption in favour of legitimacy is very strong, and therefore we cannot, as in other cases depending on evidence, come to a conclusion merely by considering which way the balance of evidence turns. The Court must be satisfied beyond any reasonable doubt, as is often said in cases before the Court of Justiciary, or must be "completely satisfied," as was said in the case of *Steedman* v. *Steedman*, that the child is a bastard before deciding that it is so.

In considering the evidence bearing on the question of the child's legitimacy it is most material to inquire what were the acts of the husband and wife when the child was born, because it is not and cannot be suggested that there was any reason why the child, if legitimate, should have been treated as if it were a bastard, and so as to lead to the conclusion that it was a bastard.

We know, then, in the first place, that the child was born when the husband and wife were living apart from one another. There is no dispute that they only lived together for a few weeks after their marriage, and that for five years prior to the birth of the child, though living in the same town, they did not live together but separately.

In the next place, with regard to the conduct of the husband there is no doubt that from the first he repudiated the child. When the fact of the child's birth came up before the kirk-session of the church to which he belonged he refused to acknowledge it as his child, and he again repudiated it when he was called upon to contribute to its support by the parochial board, and his repudiation was acquiesced in by these bodies. Indeed, George Colquhoun does not seem even to have known the child by sight, and certainly he appears never to have spoken to it. Therefore as to the conduct of the husband there can be no doubt.

What was the conduct of the mother? In the first place, I gather from the record and proof that she never communicated to her husband, before the birth of the child, the fact of her being with child, as I think she certainly would have done had he been the child's father. I draw the inference that she made no such communication before the child's birth, because a point is sought to be made of the fact that she sent a communication about the child to her husband some months after its birth, while it is neither alleged or proved that during her pregnancy she made any communication to her husband. Then again when the birth of the child was known to the kirk-session of the Reformed Presbyterian Church to which she belonged, it was made matter of church discipline, because it was known that she was living apart from her husband, and doubts were entertained as to the paternity of the child which it was thought required investigation. Accordingly, a member of the kirk-session, Mr Symington by name, was in the ordinary course sent to communicate with her on the subject, and he reported at the time that Mrs Colquhoun acknowledged that her husband was not the father of the child, and his report to that effect is recorded in the minutes of the kirk-session. In his evidence also he says that he has not the least doubt that such an admission was made to him by Mrs Colquhoun, and having read the evidence I cannot say that I have any doubt either on that point. As the result of this interview, Mr Symington says that Mrs Colquhoun was suspended from church privileges, and she remained suspended for a period of 17 years; and again, Mr Clazey, her minister, tells us that at the end of that period, in 1887, she was readmitted after several conversations he had with her because she professed penitence for her past faults, and he also tells us that the particular past fault in question was the fault for which she had been cut off from church privileges 17 years before. Further, we know that Mrs Colquhoun at the time the child was born was in very poor circumstances, and what could have been more natural or in accordance with all human experience, if her husband had been the father of the child, than that she should have compelled him to contribute to its support? She made, however, no claim on him, but bore the entire burden of its maintenance herself, if we except the few shillings she received from the parochial board.

I think only one inference can be drawn from the facts I have mentioned, and that is, that twenty years ago no one recognised the child as being legitimate. All the facts I have mentioned are very material, because if they are established, and I hold them to be proved, it is difficult to see how they are to be accounted for except on the supposition that they represented the truth, and that the child was a bastard. I think, accordingly, that unless the effect of these facts is removed by proof of other facts of a contrary nature the case is proved.

The Lord Ordinary held that certain facts and circumstances were proved which were sufficient to take away the effect of the facts to which I have referred, and if we were considering the case upon the evidence which was before the Lord Ordinary I should probably come to the same conclusion. He held that there was some evidence of the spouses having met two or three times after dark in the course of the two years preceding the birth of the child, but the most material occasion on which he held that the spouses met was once when they went alone on the Autumn Fast-Day, nine months before the child's birth, to see the witness Mrs Thomson in Greenock, and in consequence of her being unable to take them in had gone to Glasgow and spent from Friday to Sunday together there. The visit to Greenock the Lord Ordinary held to be proved on the evidence of Mrs Colquhoun, corroborated by the evidence of Mrs Thomson, whom he considered an independent and reliable witness. If that visit were to be held proved, the presumption of both fact and law would be irresistible—no matter how the spouses had acted since the child's birth—that the husband was the father of the child. That was the view of the Lord Ordinary, and I would have had no hesitation in concurring with him on the facts held proved by him. But the case is in quite a different position now. In the Outer House the defenders' case was that there was only one trip to Greenock, namely, the visit to Mrs Thomson on the October Fast-Day in 1869, but after the case came before us the pursuers offered to prove that it was impossible that Mrs Thomson's story could be true, because she was not living in Greenock at the time of October Fast-Day 1869. Accordingly proof was allowed and the pursuers have beyond doubt been successful in proving that they were right. It is therefore proved that Mrs Colquhoun's story about this visit to Greenock, which the Lord Ordinary believed to be corroborated by independent evidence, is not corroborated at all. That put an end to Mrs Colquhoun's story of this single visit to Greenock, and she then changed her ground, and said that there had been not one but two visits to Greenock; that while it was quite true that she had gone to Greenock and called on Mrs Thomson, that visit had been made on the Spring Fast-Day 1869—six months sooner than she had previously said—but that nevertheless she had gone with her husband on the October Fast-Day 1869 to Greenock to see a friend of hers, a farmer who lived near that town, and that having failed to find the farm she had gone with her husband to Glasgow as she had before said. This was, as I have said, a shifting of the ground, and if Mrs Colquhoun was telling the truth on the first occasion, it was curious that she should not have remembered all along about these two visits, uncommon incidents as they were in her remarkable married life. If she remembered one of the visits, it was strange that she should not have remembered the other.

The story of the October trip to Greenock now rests entirely upon the evidence of Mrs Colquhoun, unsupported by the evidence of any other witness in the case, if we except the evidence of Mrs Littlejohn, who on the first occasion on which she was examined said:—"I was married in April 1871. I remember a child being born to Mrs Colquhoun before I was married. I remember calling at her aunt's before the child was born on the Sunday after the Autumn Fast. Mrs Colquhoun was not at home, and her aunt said she had gone away on Friday to meet George, and had not come home yet." The inference we are told to draw is that the witness called on Mrs Colquhoun's aunt on the Sunday after the Autumn Fast Day of 1869, and was told the above story by her, and that certainly is some corroboration of Mrs Colquhoun's story, though it may strike one as a little curious that the witness should have remembered the precise words used by Mrs Colquhoun's aunt and the date of her call after so long a time had elapsed. Unfortunately, however, for the defender's case, the witness was re-examined at the second proof, and her additional evidence is worth looking at, as it tests the kind of evidence submitted to us in support of the defender's case. The object of Mrs Littlejohn's re-examination was to prove more specifically the date of the conversation of which she had spoken, and what she says on re-examination is this:—"I remember my husband went away a voyage to sea the summer before, and he came back just at the back of the Fair, just about the time of this visit in the autumn. It was after he came back that I called on Mrs Colquhoun's aunt. I remember the time he came home, because I was married the April following." She had said in her former conversation that she was married in 1871, and therefore she now represents the conversation, which, if it took place at all, could only have taken place in 1869, as having taken place in 1870. Further on in her evidence she says—"I remember Mrs Colquhoun's child being born. It was the year after my marriage." "(Q) You said last time that you remembered a child being born to Mrs Colquhoun before your marriage?—(A) No, after it; I am sure I said after it, and it was after it." She then goes on to say that she was married in 1870, but that the date was entered in the Family Bible, and that she will show the Bible, and in cross-examination she says—"I am quite clear that it was after my marriage that Mrs Colquhoun's child was born. I have known that all

along; I never had any other idea. It was before my marriage that I called upon Mrs Colquhoun's aunt. It was in the autumn, and I was married in the following April. It was in the autumn immediately before my marriage—the Autumn Fast-Day after the Paisley Fair. (Q) How do you happen to remember the exact year when you called at Mrs Colquhoun's aunt?—(A) I was just married about the time that Mrs Colquhoun was that way; that is how I remember." The Family Bible which is produced shows that the witness was married in 1871.

Now, if Mrs Littlejohn had not been put in the box the second time we would have been referred to her evidence as supporting Mrs Colquhoun's story of her trip to Greenock on the October Fast-Day of 1869, but when she is examined the second time Mrs Littlejohn swears positively in her cross-examination that her conversation with Mrs Colquhoun's aunt took place the autumn before her marriage, and that the child was born after her marriage, though she was married in April 1871—a story quite incompatible with the truth of the evidence previously given by her. Perhaps I have examined Mrs Littlejohn's evidence at too great length, but I think it is a good illustration of the kind of evidence produced in favour of the defender's case, in which one witness failed to corroborate the other.

Can we then believe that either of the two alleged visits of the spouses to Greenock ever took place? The most important, which is said to have taken place on the Autumn Fast-Day 1869, depends entirely on the unsupported evidence of Mrs Colquhoun, and the only conclusion to which I can come regarding it is that that visit is not proved ever to have taken place.

As regards the alleged prior trip, I think it would be material if proved, and its proof depends upon the evidence of Mrs Colquhoun supported by the evidence of Mrs Thomson, who says that at her previous examination she made a mistake in fixing the date of Mrs Colquhoun's visit to her in autumn 1869. I think the general features of the case throw grave doubt upon the possibility of either of the alleged trips to Greenock ever having taken place. The reason I say so is, that it is contrary to all human experience that any respectable married woman should have admitted her child to be illegitimate, as I hold it proved that Mrs Colquhoun did, if she had been in the habit of meeting her husband, and making trips openly in his company during the year and a-half preceding the birth of the child, and when the true relation between her and her husband must have been known to all their friends. The inference, therefore, which I draw from Mrs Colquhoun's conduct is adverse to the credibility of her story with regard to the visits to Greenock.

Again, if it were true that these two visits to Greenock took place, it is strange, as I have already said, that Mrs Colquhoun should not have remembered both of them all along, and that she should have forgotten one of these unusual incidents in her married life. It is curious also that though the defender must have known all along the great importance of these visits, we find no notice at all taken of them on record. All that is said of meetings between the spouses is contained in answer 2, and it is this—"Explained and averred that after the three years above mentioned," that is, the first three years of the separation, "Mr and Mrs Colquhoun met each other now and again at night, and walked together, and that this intercourse continued until five months before this defender was born." I think that if it had been true that such trips took place we would have had them mentioned in the record, and rightly, just as the less important incidents of meetings by night are mentioned.

Therefore, taking all the circumstances to which I have referred into consideration, I have come to the conclusion that Mrs Thomson's evidence is so shaken that I must decline to accept it as reliable.

This only leaves for consideration the evidence of meetings between the spouses at night. It is curious and very improbable I think, to say the least of it, that two married persons should have followed this peculiar method of always meeting in the dark, and I agree with your Lordship that every bit of evidence with regard to their alleged nocturnal meetings is of the very loosest description, and as no two witnesses speak to the same occasion, and the indefinite character of the evidence afforded no opportunity for cross-examination, the evidence cannot in my opinion be relied on.

On the whole case, therefore, considering the evidence as a question for a jury, I am —as was said to be requisite in *Steedman's* case—"completely satisfied" that the defender is not the legitimate daughter of Mrs Colquhoun.

LORD M'LAREN—We had occasion last year in the case of *Tennent* v. *Tennent*, July 4, 1890, 17 R. 1205, to consider the principles and rules of evidence which are applicable to cases of this description, and so far as a decision in one case of fact can be used to elucidate another case of fact, I think the decision in the case of *Tennent* strongly supports your Lordships' view of the evidence in this case. Your Lordships have reviewed the evidence very fully and I do not propose to go minutely into it, but I agree with your Lordship in the chair in attaching great weight to the evidence given by Mr Symington (an elder in the congregation of which Mrs Colquhoun was a member), and also by the minister as to the admissions which Mrs Colquhoun made to them regarding her infidelity and the parentage of her child. I think that when a woman is separated from her husband, and has a child, and when she submits to church censure, or it may be in a different station of life, to social loss by being cut by her friends or subjected to any of the forms of reproachment and humiliation

with which society in different ranks visits the erring wife, it is in accordance with what we know of human nature and with reasonable probability to believe that she only submits to such imputations and such treatment from a conviction that the facts founded on are true. I see no motive which should induce a married woman, as in the present case, to submit to church discipline as being the mother of a bastard if the child were really the child of her husband. It is not to be overlooked that some weight, though less in degree, ought to attach to the conduct of the father. By natural affection he ought to wish well to his child; and there is also an element of personal motive, because opinion in all times has to some extent made the husband who neglects his wife and exposes her to seduction a sharer in the reproach cast upon her. I see nothing to suggest that although Colquhoun was a peculiar man, his peculiarity took the form of courting the symbolical distinction which is given to the husband of an adulteress. Looking to the legal aspect of the case, I think it may be said that the general fact of non-access may be held proved by the separation and subsequent conduct of the spouses. It will then lie with the defender to prove the possibility of access on some particular occasion. In this case I see no satisfactory evidence of access at the time of conception or at any period so near it as to enable us to extend it by presumption to the date of conception.

I agree with your Lordship that the defender's evidence is of such a trivial and unsatisfactory description as disentitles it to any weight against the strong presumptions arising from the evidence on the other side and the admitted facts of the case. On the whole matter I am of opinion that the presumption in favour of legitimacy has been displaced, and that the pursuers are entitled to the declaratory decree which they seek.

LORD KINNEAR was absent.

The Court recalled the Lord Ordinary's interlocutor, and found and declared in terms of the conclusions of the summons.

Counsel for the Pursuers—Asher, Q.C. —Shaw. Agent—A. B. Cartwright Wood, W.S.

Counsel for the Defender—Jameson—A. S. D. Thomson. Agent—F. J. Martin, W.S.

Saturday, June 6.

FIRST DIVISION.

[Sheriff of Caithness, Orkney, and Zetland.

MOUAT *v.* LEE.

Sheriff—Jurisdiction—Sheriff Court Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 46—*Citation Amendment (Scotland) Act* 1882 (45 *and* 46 *Vict. cap.* 77), *sec.* 3.

Held (1) that a person resident at Fraserburgh was subject to the jurisdiction of the Sheriff of Zetland in an action for the rent of heritage situated within the sheriffdom; and (2) that service of the summons by the pursuer's agent by means of a registered letter, was a good citation of the defender.

Margaret Mouat, of Bressay, Zetland, raised an action in the Sheriff Court at Lerwick, under the Debts Recovery (Scotland) Act 1867, against William Lee, fish-curer, Baltasound, Unst, Zetland, residing at Fraserburgh, concluding for payment of £30.

The facts of the case are contained in the following minute of admissions for the parties—"(1) that the defender, who resides in Fraserburgh, holds a lease of the fish-curing station mentioned in the summons, for a term of five years from and after 1st June 1889, at the yearly rent of £30, payable at Martinmas, beginning the first payment at Martinmas 1889; (2) that the defender entered on the possession of the station as a fish-curer, and cured herrings thereon during the year 1889; (3) that the defender has not been removed from said station nor renounced his lease; (4) that the sum sued for is the rent due for the first year of the lease; (5) that since then the defender has not carried on active operations on the station, but has been in possession thereof, and has thereon fish-curing stock and plant; (6) that the summons was served by the pursuer's agent by registered letter."

The defender pleaded—"(1) No jurisdiction in respect—1st, that the defender has no domicile in Zetland or place of business there; 2nd, that he has not carried on a trade or business within the said county since the month of August 1889; 3rd, that he has not been cited to appear in this action, either personally or at his place of business within said county; and 4th, citation by law-agent incompetent."

On 4th February the Sheriff-Substitute (MACKENZIE) repelled the defender's 1st plea and fixed a diet of proof.

"*Note.*—The preliminary pleas in this case are 'no jurisdiction,' a question which, according to the judgment in *M'Leod* v. *Tancred, Arrol & Co.*, February 18, 1890, 27 S.L.R. 348, must be decided *ante omnia;* and 'no valid citation.' The jurisdiction which is claimed arises from the fact that although the defender resides in Fraserburgh he carries on business within this sheriffdom. From the statement of fact in the joint-minute, I think that there can be no doubt that although the defender's