seems that the Act of 1891 is, from the expression of its 5th clause, a very conclusive authority upon this question. Parliament in the Act of 1889 asserted in so many words that in the matter of borrowing the county council was the local authority. Section 5 of the Act of 1891 begins thus—"The county council as the local authority may in addition to the powers conferred by section 89 (6) of the Public Health (Scotland) Act 1867 borrow money" as follows—that is to say, it says "The county council as the local authority has already powers of borrowing; we give it more." The Commissioners in the decision which is appealed against have gainsaid that statement, and denied the express declaration of Parliament that the County Council in this matter are the Local Authority. I am therefore for reversing the first decision.

The second case is a little more complicated, but not much. It stands thus. The powers exercised are borrowing powers for the purposes of water supply, which again are purposes of the Public Health Act. It is true that the power of borrowing is in this instance primarily conferred upon the County Council by a local Act, but why? Merely because, in the history of the administration of the Act of 1867 there had been set up in this part of Lanarkshire certain special water supply districts. Now, those districts are always set up as a sort of exception from, or an excrescence upon, the normal system of adminis ration of the Public Health Act. Under the Act of 1867 the normal system is that each parish has its own water supply that provides for the wants of the district comprised within the parish; but where there are exceptional geographical conditions or conditions of population, the Sheriff is to set up special districts, each of which may include part of one parish or parts of several parishes, and those districts form separately governed and administered water districts. Now, that system had been found to be inconvenient in this part of Lanarkshire, and an Act of Parliament has been passed which has the effect of dissolving special water supply districts. The result is that the Act delivers back to the district committees, which are the lawful successors of the parochial boards, merely what had been diverted from those parochial boards by the formation of the special water supply districts. In short, the Act simplifies the administration of the Public Health Act, and brings it back to its normal type. I cannot conjecture how that can be said to place borrowing powers outside the operation of the Public Health Act. I think, therefore, here again that the County Council are acting as the local authority, and are recognised by Parliament as the local authority in the matter of borrowing in this case as in the previous one; and accordingly in this case again I think the decision must be reversed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court reversed the determinations of the Commissioners.

Counsel for the County Council of Lanark—Ure—Anderson. Agents—Bruce & Kerr, W.S.

Counsel for Commissioners of Inland Revenue—Sol.-Gen. Shaw, Q.C.—A. J. Young. Agent—The Solicitor of Inland Revenue.

Friday, May 24.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

TULLOH'S TRUSTEES *v.* COLES.

Husband and Wife—Parent and Child—Evidence—Presumption—Pater est quem nuptiæ demonstrant.

Evidence upon which the Court *held* that the presumption *pater est quem nuptiæ demonstrant* had been rebutted.

Proof—Competency—Letters of Person not Examined Admitted as Evidence.

In an action raising the question of the legitimacy of children born *stante matrimonio*, in which the mother appeared as a defender but was not examined as a witness by any of the parties to the cause, *held* that letters, which were admitted to have been written by her and received by those to whom they were written at or about the dates they bore, were admissible in evidence.

By the settlement of Robert Tulloh of Burgie, who died on 17th June 1841, the trustees were directed to pay the free annual income of that estate to his eldest son Alexander, and in the event of Alexander dying leaving lawful heirs to dispone the estate to his lawful heir. In the event of his not leaving heirs of his body alive at his death, they were directed after certain destinations, which failed, to make over the estate to the truster's daughter Mrs Coles and her heirs and assignees whomsoever.

Alexander Tulloh died on 24th March 1890.

In November 1893 Mrs Coles raised an action of multiplepoinding and exoneration in name of the trustees under the settlement of Robert Tulloh in order to determine who was entitled to the estate of Burgie. She herself claimed the estate on the ground that Alexander Tulloh had died without leaving heirs of his body. Competing claims were lodged by Mrs Homer and Miss Ward, who claimed the estate as heirs-portioners of Alexander Tulloh, the former representing herself to be his daughter, and the latter the child of a deceased daughter Mrs Ward. Mrs Tulloh, the wife of Alexander Tulloh, put in a riding claim, claiming, as mother of Mrs Homer and grandmother of Miss Ward, to be ranked on the fund *in medio* to a reasonable alimentary provision. Mrs Coles

admitted that Mrs Homer and Mrs Ward were the children of Mrs Tulloh, but denied that Mr Tulloh was their father.

Proof was led. Mrs Tulloh was not examined as a witness by either party. A great number of letters between Tulloh and his own agents (Messrs Hunter, Blair & Cowan, W.S.), and Mrs Tulloh and her husband's agents, extending over the period during which Mrs Homer and Mrs Ward were born, were produced and admitted as evidence.

The result of the evidence was as follows—Mr and Mrs Alexander Tulloh were married on 11th August 1843. A son named Robert was born of the marriage on 29th July 1844. He died on 8th June 1881. In April 1848 the spouses executed a voluntary deed of separation *a mensa et thoro*. This contract was brought about by the resolution of the husband, the wife, as appeared from her letters, being unwilling to enter into it. It was never revoked, and Mrs Tulloh continued afterwards to draw aliment under it. The child of the marriage was left in charge of the wife, and the husband bound himself to pay to her £4 per month for her own maintenance and the maintenance of the child.

Mr Tulloh went to Australia in July 1848. He returned to London about 1st July 1849, where he lived till the summer of 1850, when he went to Kirkcaldy. He resided there till June 1851. He then removed to Rosefield, Annan, where he remained till June 1852. He then returned to Australia and remained there till 1857. He came back to Scotland in October of that year and resided at Rosefield till October 1859, when he removed to Dollar.

In 1849 Mrs Tulloh went to Ireland and resided there until about 1860, when she returned to Scotland and took up her residence in Edinburgh. While residing in Ireland she had three children—(1) Mrs Homer, born on 1st April 1851; (2) Mrs Ward, born on 1st July 1852; and (3) William Francis, born on 2nd December 1858, who died on 12th March 1871. They were all born in Ireland. The two elder were baptised as the children of Tulloh. The third was baptised as illegitimate.

The child Robert remained with Mrs Tulloh till June 1851. In that month he was removed by Mr Tulloh's agents, and thereafter resided with his father. In consequence of his removal Mrs Tulloh's allowance was reduced from £4 to £3 per month.

Mr Tulloh's letters showed that he had lost all regard for his wife, and had resolved not to live with her again, and was distressed with the fear that she might discover his place of residence. His letters and other evidence also showed that it was extremely improbable that he was in Ireland during the period of conception of either Mrs Homer or Mrs Ward. The evidence on this point is fully referred to in the opinion of Lord Rutherfurd Clark.

There was no evidence to show that Mrs Tulloh had ever communicated to her husband or to his agents the fact of the birth of her children, or that any increase of her allowance had ever been demanded on the ground of their being his children. After the child of the marriage, Robert, was removed in 1851, Mrs Tulloh often wrote to her husband's agents making inquiries for her son, but no allusion was made in these letters to her other children. No letter from the wife to the husband was produced; all communications appeared to have passed between the wife and the husband's agents.

In 1858 the existence of the children born to his wife in Ireland came to be known to Tulloh. He at once repudiated them and took proceedings to divorce his wife on the ground that she had committed adultery with persons in Ireland, and had given birth to three illegitimate children. The case is reported in 23 Dunlop 639. Mrs Tulloh lodged defences in which she denied the adultery. After some preliminary proceedings Mr Tulloh was allowed a proof of his averments. Mr (afterwards Lord) Gifford, who acted as counsel for Tulloh, advised his client as follows—"When the case comes to be judged of on evidence, it rather seems that the pursuer will be held bound, since he has not condescended on the paramour, to prove that the pursuer could not possibly be the father of the children—that is to say, we must satisfy the Court that during the whole period of conception the pursuer never was in Ireland and the defender never out of that country. If we lose sight of either of them for so much as a couple of days the Court may, and I fear will, take hold of this to say that we have failed to prove our case, because, abstractly, two or three days are enough to go to Ireland and back." In consequence of this advice, of want of funds and of the difficulty of obtaining evidence, Mr Tulloh, while still denying that he was the father of the children, abandoned his action, which was consequently dismissed. In 1861 Tulloh himself was not a competent witness in such an action.

In the end of 1873 Mrs Tulloh raised an action of adherence and aliment against her husband, in which it was stated that Mrs Homer and Mrs Ward were his children. In his defences Mr Tulloh denied this and asserted that they were illegitimate, but the case was compromised. In 1876 Mrs Tulloh raised a similar action; again Tulloh in his defences denied that he was the father of the children and again the action was compromised.

Alexander Tulloh died on 24th March 1890. Since she had taken up her residence in Edinburgh in 1860 Mrs Tulloh had been in the habit of frequently visiting the office of his agents for the purpose of receiving her allowance. In September 1892 she made a statement to Mr Stewart, one of Messrs Hunter, Blair, & Cowan's clerks, to the effect that the children born to her in Ireland were illegitimate, and that a man called Barron, now dead, was the father of both Mrs Homer and Mrs Ward. In October 1892 she made a declaration before a justice of the peace to the effect that a man called Cronin, now dead, was the father of Mrs Homer, and that Barron was the father of Mrs Ward. Mrs Tulloh afterwards denied

the statements in the declaration, and she claimed in the present action on the footing that Mrs Homer and Mrs Ward were both legitimate. The circumstances in which the statement to Stewart and the subsequent declaration were made are fully discussed in the Lord Ordinary's opinion.

The opinions of the Judges contain at greater length the parts of the evidence that seemed to them most conclusive.

On 20th December 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that the claimant Mrs Louisa Mary Tulloh or Homer and the late Mrs Eliza Jane Tulloh or Ward were born during the subsistence of the marriage between their mother Mrs Mary Durney or Tulloh and the late Alexander John Archibald Tulloh: Finds it not proved that they were not the lawful children of the said Alexander John Archibald Tulloh: Finds there is no evidence that the said Alexander John Archibald Tulloh was survived by any lawful descendants other than the claimant Mrs Homer and the claimant Edith Mary Ward, only daughter of the said Mrs Eliza Jane Tulloh or Ward: Therefore repels the claim of Mrs Frances Josephine Tulloh or Coles, and, for aught yet seen, sustains the claims of the said Mrs Homer and Edith Mary Ward: Finds it unnecessary to dispose of the claim of the said Mrs Mary Durney or Tulloh.

"*Opinion.*—The pursuers and nominal raisers of this multiplepoinding are the trustees of the late Robert Tulloh of Burgie, who died on 17th June 1844. The real raiser is Mrs Frances Josephine Tulloh or Coles younger daughter of the said Robert Tulloh. The fund *in medio* is the income and produce of the said trust-estate of the said Robert Tulloh.

"The purposes of Mr Robert Tulloh's trust-disposition and settlement, so far as material, were those—That after payment of debts, annuities, &c., the trustees should hold the free annual proceeds of the residue of the trust-estate in trust for his eldest son Alexander John Archibald Tulloh, being given power to pay over the free annual proceeds to him, or such part thereof as they should think fit, and in the event of his dying leaving heirs of his body, the trustees were directed thereupon to dispone and convey the said lands and estate, so far as not sold, to the heir entitled by the law of Scotland to succeed him in his heritable estate. In case of his not leaving heirs of his body alive at his death, they were directed, after certain destinations, which have failed, to make over all his estate and effects to the present claimant Mrs Coles, and her heirs and assignees whomsoever.

"Alexander Tulloh, who was only once married, viz., to the claimant Mrs Mary Durney or Tulloh, died 24th March 1890, survived by her. Their son Robert Tulloh, who died childless in 1881, predeceased him. During the subsistence of the marriage Mrs Tulloh gave birth to three other children, the claimant Mrs Louisa Mary Tulloh or Homer, the late Eliza Jane Tulloh or Ward, mother of the claimant Edith Mary Ward, and a son William Francis, who died in 1871 without issue. Both Mrs Homer and Mrs Ward were born, as I have said, in wedlock while the marriage between Alexander Tulloh and his wife subsisted, and therefore, if they were legitimate, as must be presumed unless the contrary is proved, the fund *in medio* falls to be divided between Mrs Homer and the claimant Edith Mary Ward.

"But the claimant Mrs Coles, who is entitled to succeed to the whole estate if Alexander Tulloh left no legitimate heirs of his body, maintains that both Mrs Homer and Mrs Ward were illegitimate, and that Alexander Tulloh was not their father. She was allowed a proof of her averments upon that point, the burden necessarily resting upon her of displacing the presumption of legitimacy, and I have now to decide upon the import of that proof.

"There is every reason to suppose that but for the declaration which Mrs Tulloh made in October 1892, and the verbal statement which she previously made to Mr Stewart on 12th September 1892, the present question would not have been raised. It is therefore of the last importance to ascertain whether any weight is to be given to that document and that statement. In my opinion, looking to the circumstances in which they were made and obtained, they are absolutely worthless in this inquiry. I must observe in passing that it is very doubtful whether the declaration is admissible in evidence. Nay, more, it may he doubtful whether the justice of the peace did not act illegally in taking it, looking to the terms of section 13 of the Act of 5 and 6 Will. IV., cap. 62, as it was not in a matter 'the subject of judicial inquiry or anywise pending or at issue before the justice of the peace,' nor authorised by statute, nor made in regard to any of the other matters therein mentioned. But taking it that an affidavit in such a matter is not wholly incompetent and inadmissible, the value to be attached to it was expressly reserved. As evidence for Mrs Coles, in my opinion, its value is *nil;* as against her, it may be appealed to as being in startling contrast in a vital particular to the statement made to Mr Stewart on 12th September 1892.

"The declaration is dated the 5th day of October 1892. In it Mrs Tulloh circumstantially declares that her three children, Louisa (Mrs Homer), Eliza (the late Mrs Ward), and William Francis, who is now dead, were all illegitimate. She states that the father of Louisa was a certain Dr Cronin, Callan, County Kilkenny, and that the father of Eliza was Henry Barron, a clerk in a bank at Waterford, who lodged at Tramore. She declines to say who was the father of the boy William Francis.

"For upwards of forty years before the date of this declaration Mrs Tulloh declares that all three children were legitimate, Alexander Tulloh being their father; not only declared it in private, but maintained it in three separate actions in this Court with such persistence and success that her husband abandoned his contention to the contrary, and died without attempting to prove it. In 1883 she emitted an affidavit

in which incidentally she asserted on oath the legitimacy of her daughter Eliza (Mrs Ward); and so late as the beginning of 1892 she actually wrote to congratulate her son-in-law, Mr Ward, on the prospect of his daughter, her granddaughter, succeeding to a share of the present fund *in medio* as daughter of a legitimate child of Alexander Tulloh. Then came this unexpected declaration; and lastly, to complete the list, we find her putting in a riding claim in this process on the footing that her daughters were legitimate.

"What faith is to be given to the word of a woman who has told such conflicting stories? Whichever story is true, her conduct is equally discreditable. Her declaration has not even the pitiful impressiveness of a deathbed confession. She has retracted it to the best of her ability. It is only charitable to suppose that age and trouble have impaired her faculties. Be this as it may, it is too apparent that now she cannot recognise, or at least does not regard, the line which separates truth from falsehood,-and I am not surprised that neither party has ventured to put her in the box.

"But further, the circumstances in which the declaration was taken from her were not satisfactory. From a very early date Robert Tulloh's trustees, and the old firm of Hunter, Blair, & Cowan, W.S., whose partners were throughout trustees, took up a position antagonistic to Mrs Tulloh in regard to the legitimacy of these children. At least the firm acted for her husband Alexander Tulloh when he brought an action of divorce against her in 1859; and they again acted for him when she raised actions of adherence and aliment against him in 1874 and 1876. The partners of the new firm of E. A. & F. Hunter & Company, who are all trustees, are not personally conversant with the older history of the trust. But they have in their service as cashier Mr Alexander Stewart, who has been in that office for fifty years, and is thoroughly conversant with the history of Alexander Tulloh and his wife. One would have thought this was the very last man to whom Mrs Tulloh would have made such a disclosure, and that he would have been the last to allow her to make it without independent advice and without warning. But according to Stewart's evidence she, on 12th September 1892, unsolicited by him, and without any questions being asked, but without any caution being given by him, made a confession as to the paternity of her children, some of which at least was subsequently embodied in the declaration. I endeavoured to ascertain from Mr Stewart what led to this statement being made, but in vain. I asked him '(Q.) Had her statements anything to do with her getting her allowance? (A.) No, but she was very fond of talking.' And again '(Q.) What was it led up to this extraordinary confession? (A.) She was always dropping into the office, and we were glad when she went out.' Stewart's own account of her is that she is loquacious, importunate, fond of talking at large; and he adds that he had not much faith in her, and was afraid she might misrepresent what he said. And yet he did not hesitate to take this important declaration from her, and get her to swear to it 'for what it was worth.' Lastly, although the matter was not in the strict sense of the word litigious, the succession had opened, and it only required this statement immediately to give rise to this litigation in which the trustees, or at least the firm of which they are partners, as might have been expected, support and act for the claimant Mrs Coles, who impugns the legitimacy of Mrs Homer and Mrs Ward. In those circumstances I must say that in my opinion, looking to the previous attitude of the trustees and the firm, Mr Stewart, when Mrs Tulloh began to make her declaration, should at once have refused to listen to her until her own agent was present. Instead of which, without one word of warning, he drew her story from her—whether by silence or questioning is immaterial—and noted it in writing for future reference. He says that he did not ask her any questions. I have difficulty in accepting this. It is true that after she made the statement the matter was mentioned to her agent, Mr Considine, who was taken into counsel before the declaration was extended and sworn to. But by that time it was too late. Mrs Tulloh had fully committed herself by making the statement to Mr Stewart, who had taken a note of it in writing. And I may here observe that Mrs Coles, who is propounding this declaration, was bound to put Mr Considine in the box in order to throw every light upon a very unusual and remarkable proceeding.

"Lastly, no notice was given to those who were acting for Mrs Homer and Edith Ward of the fact that Mrs Tulloh had made a statement as to the paternity of her children until some days after the declaration was sworn to; and this, although Messrs Hunter were in correspondence with some of them at the time, and were actively trying to obtain information as to the grounds of their claims, the terms of certificates in their possession, and the memorial to counsel.

"Coming now to the contents of the declaration, counsel for Mrs Coles maintained that the statements in the declaration were corroborated by independent evidence; in particular, that it was proved that the persons therein named were real persons who lived at or near the places where the children must have been begotten. That does not carry us very far. Falsehoods are often circumstantial to give them an appearance of truth. It is true that there is evidence that in the year 1850 a Dr Cronin lived at Callan, not far from Kilkenny, where Mrs Tulloh resided. But Dr Cronin is dead, and there is no further evidence about him. It is also true that in the years 1851-1852 there was a gentleman of the name of Henry Barron, who was clerk in a bank at Waterford from June 1851 till July 1863; and that Tramore, where Mrs Tulloh lived in 1851, was only six miles from Waterford. But there is no evidence

that this man (who also is dead) ever knew Mrs Tulloh, and the witness Carrol says of him, 'He was married and had a family of three daughters, all of whom are alive. He had a good character when I knew him, and I never heard anything against him.' Thus, although it is true that Mrs Tulloh named as fathers of her children two real men who once existed, and might possibly have been their fathers, she might just as well have named any man then resident in Kilkenny or Tramore, because there is no evidence to connect them with Mrs Tulloh and her children except her statement in the declaration.

"Fortunately there are the means of to some extent tracing the genesis of this declaration in the jottings taken by Mr Stewart, which form a very curious and suggestive record. Under date 12th September 1892 this entry appears in the jotting then made by Stewart:—'T (that is Mrs Tulloh) admitted to me that *the father of both the children* was Henry Burn or Barn (this should be Barron), clerk in a bank at Waterford, near the Quay. He lodged at Tramore when the acquaintance commenced.' And in his evidence Stewart repeats that statement. After making that statement as to the paternity of Louisa and Eliza, Mrs Tulloh must have remembered, or some one must have reminded her, that when the first child, Louisa, was begotten she was not living at Tramore, and that therefore Henry Barron could not have been the father of that child, and accordingly another name had to be substituted.

"It will here be convenient to note one or two dates. Mrs Tulloh resided at Kilkenny from June 1849 to November 1850; at Carlow from November 1850 to October 1851; and at Tramore from October 1851 till September 1852, when she went to Waterford. Louisa was born at Carlow on 1st April 1851, and therefore must have been begotten in June, July, or August 1850, at which time Mrs Tulloh was living at Kilkenny. Eliza was born at Tramore on 1st July 1852, and therefore the time of conception must have been in September, October, or November 1851, at which time Mrs Tulloh was living either at Carlow or at Tramore.

"Now, some time after stating to Stewart that Barron was the father of both Louisa and Eliza, Mrs Tulloh altered her statement, and finally declared, as we see from the declaration, that Dr Cronin, and not Barron, was the father of Louisa. I have not been furnished with direct evidence as to how and when the change was made. Mrs Coles cited Mr Considine, but did not put him in the box. I see, however, from the note of charges against the trustees in connection with the declaration, that a declaration was drawn on 30th September, and that a new declaration was drawn on 3rd October; and in the absence of any explanation, I presume that this was done to give effect to the change in Mrs Tulloh's story. Now this discrepancy between the deliberate statement made to Mr Stewart on 12th September, and the equally deliberate declaration made on 5th October, seems to me of grave significance. It cannot be explained away on the ground of mistake or forgetfulness. The matter was not one which, if true, a woman could have forgotten. But, fortunately, failure of memory as to details is a well-known characteristic of falsehood, and this slip raises such doubts as to the truth of the story as of itself to lead to the declaration being put aside.

"It is needless to speculate as to the motives which led Mrs Tulloh to make the declaration. Mr Stewart says that she said it was her conscience made her confess; but when conscience remains peacefully asleep for forty years, and goes asleep again after a sudden fit of apparent wakefulness, one is not disposed to regard it as the true cause of such a confession. It is significant that for five or six months before this declaration was made Mrs Tulloh's allowance had been stopped by the trustees. She was thus in destitution. She had quarrelled with both of her daughters, and she was dissatisfied with the amount of the sum which her son-in-law Mr Ward was prepared to allow to be paid to her . . . It is therefore suggested with some reason that, actuated partly by spite and partly by necessity, her motive was to conciliate the trustees, who were the paymasters, and obtain from them money which she urgently required. It is said that she received a payment on 7th September before she made the declaration, the trustees having by that time obtained a guarantee from Ward. A note of payments by the trustees to Mrs Tulloh is in process. From that note it appears that from January 22nd to March 9th 1892, she received about £20. Between March 9th and September 7th there is no entry. On September 7th there is an entry of £20, the next entry being £1 paid on 12th October. From 7th September 1892 to 21st November 1893 she received in all about £124. There is no evidence as to the shape in which the payment of £20 was made; but I find that Mr Somerville, writing on behalf of Mrs Tulloh on 7th September 1892 to Mr Ward, says—'With regard to the £40 of aliment which you have authorised Messrs Hunter & Company to pay on behalf of Miss Ward's proportion of the property, Mrs Tulloh is very grateful for the same, but as the sum in question is quite inadequate to meet the outstanding debts which Mrs Tulloh has been compelled to contract, and seeing after her call on Hunter & Company yesterday she received nothing from them, and who explained that they had promised to pay her landlord for arrears of rent, she has asked me to write to see if you could send her some ready cash until once matters are put upon a satisfactory footing.' Probably the £20 went to pay rent; but it will be seen from the passage which I have quoted that Mrs Tulloh on 7th September was not satisfied, and urgently required ready money.

"If to obtain money was not her motive in making the declaration, I can see no other, and none has been suggested, except

he stings of conscience; but, as I have already said, she is now endeavouring to get what she can out of the fund *in medio*, on the footing that that declaration is a lie from beginning to end.

"On the whole matter I have no hesitation in discarding the verbal statement and the declaration. They may be true or they may be false, or partly true and partly false, for the reasons which I have given. They are wholly unreliable, and the case must be considered as if they had never been made.

"I do not think that there is any dispute as to the law on this question, apart from the admissibility of affidavits. A statement made by a husband or wife as to the legitimacy or illegitimacy of a child born *stante matrimonio*, if made in circumstances free of suspicion, and proved as part of the conduct of the reputed parent is not only competent but the best evidence that could be obtained. The case of *Mackay* v. *Mackay*, 17 D. 494 (1855), is a good illustration of a case where such declarations were admitted. But in that case Lord Deas said (page 506)—"If I had the slightest doubt of the truth of the statements attributed to the husband and wife—if I found anything startling, incredible, or mysterious, or unexplained in the evidence, I should reject the whole of it so far as adverse to the pursuer, and give effect to the legal presumption of legitimacy." Accordingly in *Walker* v. *Walker*, 1857, 19 D. 290, the declaration of the mother was rejected, she being, when she made it, old and feeble and of deteriorated habits, and under the influence of a younger son. And in the case of *Gardner* v. *Gardner*, 1876, 3 R. 695, the statements of both husband and wife to the effect that the child was illegitimate were disregarded.

"The case of *Tennent* v. *Tennent*, 17 R. 1205, is just the converse of this. There, until near the end of her life, the wife consistently admitted the illegitimacy of the child, just as here Mrs Tulloh until 1892 consistently maintained the legitimacy of her children. Towards the end of her life, Mrs Tennent for the first time began to talk of her son as legitimate; as here Mrs Tulloh after forty years suddenly did the reverse. The Court disregarded the later statements by Mrs Tennent as open to suspicion, preferring her earlier statements and conduct as evidencing the truth of the case.

"*Tennent's* case is also valuable as showing the strength of the presumption, because there Mrs Tennent was proved to have committed adultery about the very time of conception, and the child was registered by her as the paramour's son, and he acknowledged and paid for it as his; and yet the case was anxiously argued and considered before it was held that the presumption was overcome. Both cases show that it would be dangerous to allow the legitimacy of a child to depend upon the caprice, the spite, or the necessity of a parent in her old age, in contradiction of her previous conduct and statements regarding it.

"Mrs Tulloh's declaration cannot be regarded as a natural part of her conduct. It was made and obtained under exceptional circumstances, which, in my opinion, deprive it of all credit.

"The incident of the declaration does not leave the case exactly where it stood before. It practically deprives the parties of the evidence, if it be competent, of probably the only living person who knows the truth of the matter. But the loss, such as it is, must fall upon the party upon whom lies the burden of proof, viz., Mrs Coles.

"I shall now proceed to consider the evidence apart from Mrs Tulloh's declaration. If I do so somewhat briefly, it is not because I under-rate the importance of the evidence, such as it is, or the force of Mr Ure's comments upon it. It would be idle to say that the evidence does not raise doubts of the legitimacy of Mrs Homer and Mrs Ward. It does raise doubts—serious doubts; and if the question were a thing of yesterday the evidence might be sufficient to induce reasonable conviction. But I cannot so regard the case; all that is known now, and probably much more, was known to Alexander Tulloh's advisers upwards of thirty years ago, and yet the action at his instance against his wife was abandoned, because in the opinion of his skilled and able advisers the evidence was utterly insufficient to warrant decree of divorce. It was abandoned after the pursuer had successfully met the pleas to jurisdiction and relevancy, and when the way was cleared for a proof upon the merits.

"It is urged for Mrs Coles that at that time, 1861, a stricter view was taken as to the burden of displacing the presumption *pater est quem nuptiæ demonstrant*, and that counsel and agents for the pursuer were alarmed by warnings from the Bench as to the strictness with which the evidence for the pursuer would be scrutinised. In particular, it is said they were alarmed by the remark of Lord Benholme:—"It seems to me that the pursuer must prove the *locus* of every moment of the defender's existence for ten years, or at least of every half-hour. As to the pursuer's own whereabouts during that period of time, it will be necessary that he should prove not only where he lived, but also how he journeyed or voyaged when he went from one place to another."—23 D. 646. As to the latter observation, perhaps not much exception can be taken. As to the former, it will be seen that the Lord Justice-Clerk (Inglis) at once expressed his inability to concur.

"Now, in the first place, no one could accuse Lord Gifford (Tulloh's senior counsel) when he was at the bar of being a timid counsel; he was a bold and fearless pleader, and the last man to give up a case which he had a chance of winning. He was also in large practice, and necessarily conversant with recent decisions. I think it is a mistake to say that in 1861 there had not been a relaxation as to the nature of evidence by which the presumption might be overcome. The case of *Mackay* v. *Mackay*, 17 D. 494, which was decided six years before, viz. 24th February 1855, marks a departure in this matter; and that case must have been

within the knowledge of Lord Gifford, as it certainly was within the knowledge of Lord Justice-Clerk Inglis, who was senior counsel for the successful claimants. The rubric correctly states the principle upon which the case was decided—"Although the legal presumption *pater est quem nuptiæ demonstrant* remains in full strength and effect, there is considerable relaxation as to the nature of the evidence by which that presumption may be overcome; and if there be such clear evidence as completely satisfies the tribunal which has to decide the question that *de facto* a husband is not the father of his wife's child, that child will be held to be illegitimate, although neither impotency nor the utter impossibility of access be established by that evidence." In the subsequent case of *Brodie* v. *Dyce*, 11 Macph. 142, Lord Ardmillan refers to the case of *Mackay* as an authority for the law which he there lays down with much force and clearness (page 145)—"But it is necessary to go further than this, and I do not hesitate to do so. I think it is now recognised as sound law that the fact that access or intercourse was physically possible is not of itself sufficient to fix the status of legitimacy. The cases must be very rare, indeed, where access or intercourse is proved to have been physically impossible. I do not think that necessary. I do not think it reasonable to expect it. If the result of a careful consideration of all the facts and circumstances proved be that the Court was satisfied that there actually was not access or intercourse at or about the period when the child must have been procreated, and if the Court is also satisfied that another man had access and had intercourse with the wife at that time, then the presumption from the maxim *pater est quem nuptiæ demonstrant* cannot receive effect in the face of such evidence. The presumption is rebutted by such evidence as is sufficient to satisfy the judicial mind that the husband could not be the father of the child. If there be clear evidence to the satisfaction of the Court that *de facto* a husband had not intercourse with his wife, and could not be the father of his wife's child, that child will be held illegitimate, though the utter impossibility of access be not established by the evidence. It may be physically impossible, and yet in the circumstances, and according to the evidence, the possibility may be excluded. Nothing less than complete satisfactory evidence can be sufficient; but if there be such evidence, then in the face of it the presumption cannot receive effect. There is plenty of authority for this in the more recent decisions, both in Scotland and in England. It is the opinion of Lord Curriehill as Lord Ordinary in the case of *Mackay* v. *Mackay*, 24th February 1855, and that opinion is accepted as correct, and authoritatively approved by Lord President Colonsay, who expressly states it to be 'sound law.' Lord Ivory and Lord Deas expressed in that case the same opinion."

"We must therefore seek for some other reason for the abandonment of the action. As I have said, Alexander Tulloh's advisers had before them the whole of the evidence, and in particular the whole of the correspondence which is now before the Court. They had been making searching inquiries in Ireland, and they had even had Mrs Tulloh watched by detectives. It cannot be suggested that they were not fully alive to the significance of the evidence obtained, and in particular to the important bearing of the letters which passed between the trustees on the one hand and Mrs Tulloh on the other; and yet they advised their client to abandon the action because the evidence was 'utterly insufficient.'

"It will be observed that it would have been sufficient to entitle Alexander Tulloh to obtain decree of divorce if he could have shown that any one of the three children was illegitimate. In order to do that, he had simply to account for his residence and movements during a period of two or at most three months, during which the child must have been begotten. I take it that the action was abandoned simply because he was unable to do so. I can imagine no other reason. His advisers knew well with whom they had to deal. I gather from the correspondence that Alexander Tulloh was by no means a reliable or trustworthy man; that he was flighty, fond of wandering, and by no means a man of strict morality. His advisers knew that at the periods during which all of the children were begotten his residence was either in England or Scotland, and thus within a very short journey of the place where his wife was living. It is plain that the evidence of the persons with whom he resided cannot have been deemed sufficient to account for his time. That evidence has now been lost, and that is one serious objection to the question being reopened now.

"Well, the action was abandoned, and Alexander Tulloh never thereafter made any attempt to obtain a divorce, although he was fairly challenged to do so in 1874, and again in 1876, by which time at least the law was sufficiently matured, and under a recent statute he might have given evidence for himself. In the end of 1873 Mrs Tulloh raised an action of adherence and aliment against him, in which it was stated (cond. 2) that the children Louisa and Eliza were his children. In the defences the defender denied this, and asserted they were illegitimate, but the case was compromised, the defender agreeing to pay £70 of aliment per annum. Again, in 1876 Mrs Tulloh raised another action, and Louisa Tulloh also raised an action against Alexander Tulloh on the footing that she was his lawful daughter. In the defences Alexander Tulloh denied the paternity, but these actions were also compromised; and thus the matter stood at the death of Alexander Tulloh on 24th March 1890.

"It is in the light of this history that I have felt bound to consider the evidence laid before me, and while taken by itself it is formidable and raises serious doubts of the legitimacy of the children, I do not think that the burden has been discharged. The case for Mrs Coles is put thus—Alexander

Tulloh and his wife separated in 1848, and it is not proved that they ever met again. She went to reside in Ireland. He went to Australia in 1849, and afterwards returned to this country. It is not proved that thereafter he was ever in Ireland. It is not proved that his wife was ever out of Ireland. By far the most telling evidence for Mrs Coles is to be found in the correspondence, which consists of letters passing between Alexander Tulloh and the trustees, and Mrs Tulloh and the trustees. To judge from that correspondence, Alexander Tulloh positively hated his wife, and was anxious to prevent her knowing where he was. She, on the other hand, was anxious to find out where he was. Again, Mrs Tulloh does not inform the trustees of the birth of the children, although she was always in want of money, and the children, if legitimate, would have been a good ground for her demanding an increase of her allowance. She mentions only one child, the son Robert, who was admittedly legitimate. On the other hand, the letters contain little that tells in favour of legitimacy. There is one letter, however, to which I was referred, written by Mr Blane, one of the trustees, 18th June 1850 (just at the time when Louisa was begotten), in which the words occur—'If he and his wife live together again, as I have understood to be the case.'

"But it is said for the other claimants that Tulloh and his wife had never really quarrelled; that they were both afraid of the trustees, on whom they were dependent, and who did not desire that they should come together again; and Mrs Tulloh formerly declared, and in 1883 said to the witness Samuel Ward, that her husband used to come over to Ireland and visit her. On this matter, while I feel the force of Mr Ure's comments on the letters, I also feel that if the case had been brought to trial in 1861, evidence not now available might have been forthcoming to remove the doubts which the letters undoubtedly create.

"There is one point in favour of Mrs Coles which it is right to mention. A certificate is produced from the baptismal register from the St Nicholas Church, Francis Street, Dublin, of the baptism of the child William Francis Molloy, born 2nd December 1858, the father's name being James Molloy and the mother's Mary Durney. This entry looks suspiciously like the entry of the baptism of Mrs Tulloh's son William Francis, who was born just at that time. The entry has not been proved to apply to that child, and it is not proved that it was made on information supplied by Mrs Tulloh; but it is a significant fact. But even if it does apply to that child, it is by no means conclusive in regard to the present question. It does not follow that the children born in 1851 and 1852 were illegitimate because a child born in 1858 was. Again, Mrs Tulloh caused her children Louisa and Eliza to be registered as the children of her husband Alexander Tulloh. If they were not legitimate, it is difficult to see why she made any distinction between them and William Francis. As she registered the older children as legitimate, one would have expected that she would have done the same in the case of William Francis. She was presumably not less hardened. The whole matter is left in obscurity, but the certificate is a point against the legitimacy of the other children whatever its worth may be.

"As I have indicated, I have been much influenced by the lapse of time, the abandonment of the action in 1861, and the acknowledgment implied in Alexander Tulloh's failure to raise another action that his case could not be proved. If the legitimacy of a child born in wedlock is to be challenged, in common fairness it should be challenged at once while the means exist of proving or disproving the charge. But when the question is now again raised after an interval of upwards of thirty years, things are no longer entire. Both children, Louisa and Eliza, married, and one of them is dead. If it cannot be said that their legitimacy was never impugned, it can be said that it was not successfully impugned; that the attack upon it by their reputed father was abandoned, and that, at least until after the dissolution of the marriage by his death, their mother maintained it.

"Alexander Tulloh is dead; he can no longer be subjected to examination or cross-examination; and evidence as to his residences and movements at the critical periods has been lost.

"From age or other causes, Mrs Tulloh's word cannot now be accepted on either side, and the persons whom, for the first time, she named in October 1892 as the fathers of her children Louisa and Eliza, viz., Dr Cronin and Mr Barron, are both dead and have no opportunity of clearing themselves or helping to maintain by their evidence the legitimacy of the children.

"On the whole matter, although the case is by no means free from doubt, I think the safer course is to find that Mrs Coles has not overcome the presumption, and that therefore her claim falls to be repelled."

The claimant Mrs Coles reclaimed, and argued—The presumption *pater est quem nuptiæ demonstrant* had been overcome. The Lord Ordinary would have decided against the legitimacy of the other claimants but for the fact of the proceedings for divorce having been abandoned in 1861. But it was plain that they were abandoned on account of the opinion expressed by Lord Gifford. That opinion contained a totally erroneous view of the law, viz., that Mr Tulloh would have to account for every day of his own and his wife's time during the period of conception. That was not the law. Even if the impossibility of access on the husband's part was not proved, still, if there was sufficient evidence to convince the Court that the husband was not in fact the father of the children in question, the child would be held to be illegitimate. In this case the evidence, on the ordinary principles of probability as applied to human conduct, was sufficient to show that the husband was

not the father of either Mrs Homer or Mrs Ward. Even although Mrs Tulloh was alive and had not been examined as a witness, her letters could be used as evidence in the case. She was a party to the case and her letters had been admitted by the counsel in the case. Letters admitted as passing between the parties at the time were the best testimony of their views at that time. The testimony of both parents as expressed in their letters showed that these children were illegitimate—Stair, iii. 3, 42, and iv. 45, 20; *Mackay* v. *Mackay*, February 24, 1855, 17 D. 494; *Brodie* v. *Dyce*, November 29, 1872, 11 Macph. 142; *Gardner* v. *Gardner*, May 30, 1876, 3 R. 695; *Montgomery* v. *Montgomery*, January 21, 1881, 8 R. 403; *Steedman* v. *Steedman*, July 20, 1887, 14 R. 1066; *Tennent* v. *Tennent*, July 18, 1890, 17 R. 1205; *Morris* v. *Davies*, 1837, 5 Clark and Finelly, 163.

Argued for the claimants Mrs Homer, Mrs Ward, and Mrs Tulloh—Mrs Tulloh had not been called as a witness, therefore her declaration before a justice of peace was incompetent evidence and could not be looked at. It was admitted that the letters produced were written by her and passed between the parties, but they were incompetent as proof of the facts contained in them. Oral testimony was best, and Mrs Tulloh should have been called by the other side if they wished to found on her evidence. As regarded the merits of this case, the duty of the reclaimer was to make it clear to the Court that the husband was not the father of the child. There must be a certainty that he was not, either produced by proof of absence or by other evidence giving the same result. The question to be decided was, "Is the evidence so clear and conclusive as to satisfy the Court that another person and not the husband was the father of these children." The Court must not be satisfied merely that all the facts proved pointed in one direction, but must be satisfied all the facts were before them. It was a most weighty ground for holding the children to be legitimate that the husband had abandoned the proceedings for adultery against his wife in 1861. Evidence was then obtainable which was now lost for ever, and that evidence would weigh with him in determining not to proceed with the case. The case of *Mackay* was not in point, as in that case both parents were dead, and the Court proceeded on declarations and statements made by the parents. In *Tennent* also both parents and paramour had treated the child as the paramour's. *Brodie* was an action of filiation, and *Montgomery* and *Steedman* were actions of divorce, and were therefore not in the same category as an action of bastardy. The evidence in this case was totally insufficient to upset the presumption, and the Lord Ordinary's judgment should be affirmed.

At advising—

LORD JUSTICE-CLERK—This case relates to the legitimacy of two women who are alleged to have been the daughters of Alexander Tulloh by his wife, now his widow, who is a party to this present case. He was married to her in 1844, and they had one child about which there was no dispute. That child died in 1881. In 1848 the spouses were separated. The case on the one side is that from that time they never met. The case on the other side is that the presumption in favour of the husband being the father of the children has not been set aside by any sufficient proof.

The wife went to Ireland in 1849, and, so far as we can see from the evidence, never returned to this country until 1859. While she was in Ireland she had three children—two daughters and a son. The son died in infancy. Now the parties to this case who are maintaining the legitimacy are a surviving daughter, Mrs Homer, and a daughter of another daughter, Mrs Ward, who is dead. Mrs Tulloh appears in the case to claim aliment. There are certain circumstances in this case which I think it advisable to get out of the way at the outset before considering the case upon its merits.

Some time after the spouses had separated, the late Mr Alexander Tulloh raised an action of divorce against his wife on the ground of adultery; and in the course of that action he got an opinion from the late Lord Gifford, who was then at the bar, and that opinion indicated the great difficulties which counsel thought at that time the pursuer would have in proving his case. Accordingly that case was given up. Except the fact that an action was raised and was not proceeded with I do not think there is any importance in that matter at all. We do not know what the facts were that were before Lord Gifford in the way of precognition—whether his opinion was based upon a sound view of the law as it existed at that date or not. We cannot know that. While it was said by the Lord Ordinary in his note that he was a counsel of great courage, and while his Lordship gives other praises in his behalf, I do not think that we ought to be affected, in considering this case, by anything that Lord Gifford did beyond the fact that in consequence of legal advice at that time the case was not proceeded with.

There is one other matter about which a good deal has been said, and that is that at one time Mrs Tulloh gave a voluntary declaration, which was put in the form of an affidavit, to the effect that the children were illegitimate. I dismiss that altogether from the case. The proper way to get Mrs Tulloh's evidence upon a matter of that kind was to take her evidence in the box as to the state of the fact; but she has not been examined. I think, considering the principles which must guide us in a case of this kind, whatever may have been said in some of the other cases as to the party in such a case maintaining the illegitimacy being bound to prove impossibility of access, it may be held without doubt now that a question of this kind is to be decided upon evidence satisfactory to the judicial mind, just as it would be in any other case. I would only add this, that, of course, the case being one of *status*, any-

one considering it judicially will necessarily do so with the greatest caution and care before coming to a conclusion adverse to the presumption, which undoubtedly is a strong one. I think the view of the law upon that matter is very well expressed in the case of *Brodie* v. *Dyce*, where Lord Ardmillan expressed an opinion in accordance with what had been found in the previous case of *Mackay*, in which Lord Curriehill had used an expression that "the evidence completely satisfied the tribunal," and that that was sufficient without any necessity for proving a strict negative.

Now, that being so, I come to the consideration of what is the evidence in this case. The party who on the one side might have given evidence of actual knowledge is dead, viz., Mr Tulloh. The other party who might have given evidence from actual knowledge is alive. She has not been brought forward by either party to give evidence. That party who is still alive is one of the parties to this case, and is maintaining in her pleadings a certain state of facts adverse to those who impugn the legitimacy of these children. Accordingly, it is not to be expected that they would call her as a witness. But, on the other hand, she is maintaining that these children are legitimate, and the children themselves, or rather the child now alive and the grandchild are maintaining the same thing; and they did not examine her. Perhaps the fairest way to take the case in that view of it is to take it just as if her evidence could not have been taken. Possibly it might be put more strongly against the claimants, her daughter and granddaughter. Then supposing it to be a case in which there is no evidence of the husband or the wife, except the evidence of what they have left behind them in writing, and the evidence of what might have passed with the deceased Mr Alexander Tulloh, which, though not the best evidence, is still the best evidence obtainable now, I think that we have a body of evidence of very great importance and of very great strength. In the first place, Mrs Tulloh herself never throughout the long course of years during which those children were living with her, suggested or hinted that these children were legitimate, or in any way took action upon the footing that she was supporting those children as legitimate children. On the contrary, we find a communication coming from Ireland within about a month after the birth of the first of these girls, in which the boy, whom it was then proposed by the father to take into his own charge, is spoken of as her only child. And throughout the long course of correspondence between Mrs Tulloh and the agents for Mr Tulloh, she is frequently making inquiries as regards her boy—a most natural thing for any mother having a regard for her legitimate son to do, even although she might be living in adultery—she makes constant inquiries, saying that she had not heard from him for a long time. Such a state of things is, I think, very inconsistent indeed with the idea that she was in frequent communication with her husband either by writing or by actual meeting. Then there is a communication of a similar kind made very shortly indeed after the birth of the second child. The son having been taken away, it is very significant indeed, that while she was receiving an allowance of £4 a month during the time she had her son with her, she during the time that she had two other children living with her, who are said to be the legitimate children of her husband, received a reduced allowance of £3 a month; and there is not a trace anywhere of her making any representation whatever that, in respect of the other children that she had by him, her allowance instead of being reduced ought to be increased.

Another significant fact is, as stated in the claim of Mrs Coles, that Mrs Tulloh, by making a false statement that the two children were orphans in the sense that their father was dead, succeeded in getting her two daughters placed in a charitable orphan institution in Ireland. That was an extraordinary course to take in the case of a woman who was not receiving any allowance whatever for them, although she was entitled to such an allowance for the support of those children if they were the legitimate children of her husband. Upon the other hand, as regards the husband there is no trace whatever of any communication with him. There is one letter which was founded on in the argument, in which mention is made of a visit to Ireland, but I think it was conclusively shown in the debate that that letter was written very shortly after the marriage, on the occasion of a visit to Ireland when they were cohabiting together. The only other thing is the mention in one of the trustee's letters about their coming together again, which he says he heard was to take place—a thing of which there is no evidence at all. Even if it were evidence, it would go a very short way indeed towards supporting the case of the daughter and grand-daughter. And certainly throughout the whole of that correspondence, without there being any reason why what he wrote should be contrary to the truth and hypocritical, there is from beginning to end a most manifest determination on no account to meet his wife, and to use every means possible to conceal his whereabouts from her, and to prevent her coming in contact with him.

Now, these are the general circumstances of the case, and in view of those circumstances the question is how the law is to be applied. It appears to me that this is a case stronger in some respects than the cases which have already occurred, in which it was held that children born *stante matrimonio* were nevertheless illegitimate. I refer more particularly to the case of *Mackay* and the case of *Steedman*, in which the case of *Mackay* was approved by all the Judges, for in these cases it was not suggested, and was not capable of being suggested, that there was not ample and easy opportunity for the parties meeting if they desired to do so. Indeed, the

woman in one of these cases was able to aver as to intercourse being quite possible that she was frequently visited at night from time to time by her husband, who lived within easy reach of her—if not exactly in the same village, within very easy walking distance of where she resided. I think in that case the evidence was held judicially to satisfy the Court that, although it was quite possible that the parties had met, and might have had intercourse, yet in point of fact they had not.

Upon the whole case here I have come to the conclusion that it is proved —at least, I hold myself to be judicially satisfied—that the two children that were born in Ireland were not the children of Alexander Tulloh, and that therefore the claimant Mrs Homer, and the granddaughter of Mrs Tulloh, the claimant Miss Ward, are not entitled to succeed. I think that the Lord Ordinary in this case was led away somewhat by the view which I think he rightly took as regards the use which was made of the declaration from looking at the matter in the true light in which it ought to be looked at; and that his interlocutor should be recalled, and that we should find accordingly.

LORD YOUNG — This case depends entirely upon an issue in fact which we have to decide upon evidence, whether two persons who are named Mrs Homer and Mrs Ward were the lawful children of Alexander John Archibald Tulloh. The Lord Ordinary has found it not proved that they were not the lawful children of the said Alexander John Archibald Tulloh; and if that is the right answer to the issue in fact whether they were or were not, then the result follows that they must be held to be his lawful children. But I agree with your Lordships that, according to the evidence, that is not the right answer to the issue in point of fact. I think it is proved that they were not the lawful children of the said Alexander John Archibald Tulloh, having regard to the rules and principles established in our law regarding the judging of evidence upon such a question. I therefore agree that the judgment of the Lord Ordinary must be altered, and judgment given by us upon the footing of that answer to the issue in fact which I have stated.

LORD RUTHERFURD CLARK—By the settlement of Robert Tulloh of Burgie, the trustees were directed to pay the free annual income of that estate to his son Alexander, and in the event of his dying leaving heirs of his body, to dispone it to his legal heir. The income which Alexander derived from this source seems latterly to have been his only means of livelihood, and owing to annuities and other burdens it was very small. He died in March 1890.

The estate is claimed by the respondents, Mrs Homer and Mrs Ward, as heirs-portioners of Alexander Tulloh. The former represents herself to be his daughter, and the latter claims as the representative of a deceased daughter, Mrs Ward. They are opposed by the reclaimer, Mrs Coles. She alleges that Mrs Homer and Mrs Ward were not the children of Alexander Tulloh, and there is no doubt that if they were not she is entitled to the estate. We have therefore to determine whether Mrs Homer and Mrs Ward were the legitimate children of Alexander Tulloh.

Alexander Tulloh was married to Mary Durney. It is not disputed that she was the mother of Mrs Homer and Mrs Ward, and it is certain that they were born during the subsistence of the marriage. They have therefore the benefit of the presumption thence arising. But it is I think well-settled law that that presumption may be overcome by evidence which satisfies the Court that they were not the children of Mrs Tulloh. "In every case where a child is born in lawful wedlock sexual intercourse is presumed to have taken place between the husband and the wife until that presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such sexual intercourse did not take place at any time when by such intercourse the husband could according to the law of nature be the father of such child." This is the doctrine laid down in the *Banbury* case, and approved of by the House of Lords in *Morris* v. *Davies*. To use the very apt language of Lord Curriehill (*Mackay*, 17 D. 494):—"It appears to be established that if there be such clear evidence as satisfies the tribunal which has to decide the question that *de facto* the husband is not the father of his wife's child, that child will be held to be illegitimate, although neither impotency nor the utter impossibility of access be established by that evidence." The presumption is however a very strong one, and the reclaimer as the condition of her success must furnish evidence which is sufficient to displace it. We have to decide whether she has satisfied that condition.

Alexander Tulloh was married to Mary Durney on 11th August 1843. A son named Robert was born of the marriage on 29th July 1844, who died on 8th June 1881. The spouses resided together till April 1848, when they executed a voluntary deed of separation *a mensa et thoro*. The child of the marriage was left in charge of the wife, and the husband bound himself to pay to her £4 per month for her own maintenance and the maintenance of the child. It does not appear that Mrs Tulloh had any means of her own.

Tulloh went to Australia in July 1848. He returned to London about 1st July 1849, where he lived till the summer of 1850, when he went to Kirkcaldy. He resided there till June 1851. He then removed to Rosefield, Annan, where he remained till June 1852. He then returned to Australia, and remained there till 1857. He came back to Scotland in October of that year, and resided at Rosefield till October 1859, when he removed to Dollar.

In 1849 Mrs Tulloh went to Ireland and resided there for many years. She had three children (1) Mrs Homer, born 1st

April 1851; (2) Mrs Ward, born on 1st July 1852; and (3) William Francis, born on 2nd December 1858, who died on 12th March 1871. They were all born in Ireland. The two elder were baptised as the children of Tulloh. The third was baptised as illegitimate.

Before I consider the direct evidence which bears on the possibility or probability of sexual intercourse, I shall notice certain facts which in my opinion are important. The spouses had separated under a voluntary contract of separation, and the separation, as the contract bears, was produced by the resolution of the husband. It appears from the letter of her agents dated 1st April 1848, that Mrs Tulloh was very unwilling to sign a contract of separation, "as her husband's desertion is in no respect attributable to any fault on her part," and that she was "still willing to live with him." Her overtures were rejected, and the contract was signed. In a letter of her own, dated 19th January 1850, Mrs Tulloh says—"The separation from my husband was not occasioned either by wish or misconduct of mine, but I was forced to the separation."

The contract was never revoked. Mrs Tulloh drew the aliment due under it, and of course it was drawn on the footing that she was living apart from her husband. For that was the only title on which she had right to claim it.

We see from the correspondence that the feelings which produced the separation continued to actuate Mr Tulloh. I need not examine it. It shows, I think, that he had lost all regard for his wife, and that he had resolved not to live with her again. He is even distressed with the fear that she may discover his place of residence. No thought of reunion seems to have crossed his mind. An undated letter of his was founded on by the respondents as a proof of his affection. But by comparing it with his letter of 23rd September 1846, it is clear that it was written in that month. The respondents do not maintain that matrimonial cohabitation was resumed. Their case is that the intercourse took place on the occasion of some passing visit or meeting; and that the probability or possibility of such a visit or meeting has not been excluded.

I have said that after the separation the child Robert was allowed to remain with Mrs Tulloh. It is not clear to what this arrangement was due. The boy was then under four years, and there is some evidence to shew that Mr Tulloh was under the impression that he could not take so young a child from the care of its mother. But he removed him in April 1851, and in consequence Mrs Tulloh's monthly allowance was reduced from £4 to £3.

If we advert to the conduct of Mrs Tulloh, we shall find it very inconsistent with the idea that her children were legitimate. She never communicated to her husband the fact of their birth. She was not examined as a witness, and while there is no evidence to show any such communication was made, I think that we may infer with certainty that until the divorce proceedings, to which I shall hereafter refer, were raised in 1858, she maintained an absolute silence on the subject. The eldest child was born on 1st April 1851, at the very time when the boy was removed from her. We have before us a letter from Dr Cullen, Carlow, to Hunter, Blair, & Cowan, W.S., who were the agents of Mr Tulloh, and from whom Mrs Tulloh was in use to receive the money due under the contract of separation. He says that Mrs Tulloh has latterly been a patient of his; that she has for sometime been in a very delicate state of health; and that he writes at her solicitation to acknowledge receipt of the letter of the 21st requesting her to give up her little boy. He makes no reference to the child which had just been born; though he says that she expects that her present allowance will not be diminished. Many letters from Mrs Tulloh to Hunter, Blair, & Cowan have been produced. They were written during the period from August 1851 to January 1858. She makes constant inquiries about her son, but she makes no allusion to her other children. One is written in July 1852, just when her second daughter was born. She does not refer to that event. She only says, "I hope that you will kindly let me know how my child is."

Even her necessities did not induce her to break her silence. So far as we know, she had no means exeept the allowance which she received under the contract of separation. She submitted to a reduction when her son was taken from her. She never asked for an increase because of the birth of her daughter.

Mrs Tulloh is alive, and as I have said she has not been examined as a witness. It was maintained by the respondents that her letters were not evidence. It is admitted that they were written and received at or about the dates they bear. I do not use them as proof that any statement which is contained in them is true. I take them to be evidence, and, indeed, the best evidence of what she said and of what she did not say. I use them in that sense only. I think it to be very material to the inquiry in which we are engaged, that in the course of a lengthened correspondence with her husband's agents, she never mentions the birth of the children who are now said to be legitimate. If she had no occasion to refer to it, her silence would be of little importance. But the very reverse is the case. She was corresponding with them as the representatives of her husband. If her children were legitimate, she had a legal claim against him, and his agents were the natural channel through whom the claim should be made. For it was through them that she was receiving her annuity, and so far as we know she had no means of communicating with her husband. We see from one letter that she made inquiries as to his place of residence. No letter from her to him has been produced, and she does not say that she knew where he lived, or that she ever wrote to him a single letter.

I cannot draw from this evidence any

other inference than that Mrs Tulloh treated her children as illegitimate. It is true that they were baptised as the children of her husband. This may have been done in order to avoid scandal, or from some other reason which we cannot discover. But to whatever cause it may have been due, it is utterly inconsistent with the rest of her conduct. She concealed their birth. She did not assert those rights which if legitimate they undoubtedly possessed. She took on herself the burden of maintaining them for many years without asking for any contribution from the person who is now represented to be their father. Her conduct is without sense or reason, except on the theory that they were illegitimate. It is true that she asserted their legitimacy when the action of divorce was raised. But in view of her previous conduct, I am disposed to regard the assertion as being made in order to preserve her annuity, just as her silence had been maintained in order not to endanger it.

In 1858, the existence of the children came to be known to Tulloh. He at once repudiated them and took proceedings to divorce his wife. In a letter to Hunter, Blair, & Cowan, dated 7th September 1858, he says:—"It is, I think, eleven years last February that I started from Troon in Ayrshire, and from that time I have never seen her," meaning his wife. This letter was written when he was contemplating proceedings for divorce, and may be represented as written for a special purpose. But it remains as his statement, and cannot I think, be left out of account in considering the evidence as to the possibility of his being the father.

I now come to that evidence. The eldest child was born on 1st April 1851. The period of conception was therefore about 1st July 1850.

We know from his letters in the earlier months of 1850 Tulloh was in London lodging with a Mr Bishop. He was in debt to Bishop to the amount of £37, 16s. 6d., and, indeed, in a state of extreme poverty. He writes to his agents from London on 27th June. He says—"In my last letter to my sister I mentioned that I was perfectly willing to leave this; but at the same time I did not see how I could do so without clearing with Mr Bishop." He adds that he had made arrangements for removing to Kirkcaldy, where he was to pay 11s. a week for board and lodgings. By letter dated 3rd July his agents send him £40 "to enable him to pay Mr Bishop and remove to Kirkcaldy." He acknowledges it from London on 5th July. He says—"I think I shall be able to come to some settlement with Mr Bishop, and should I receive no help from my sister or aunts, I must just owe a part of the debt to Mr Bishop. I shall, if I can, leave this week. I think I shall take one of the traders, as I may get cheaper by that way than in the steamer. I shall write again when I arrive at Kirkcaldy." On 18th July he writes from Kirkcaldy announcing his arrival there on the previous Saturday, which was the 13th. He adds that he had not been able to discharge Mr Bishop's bill in full; but that he had given him an I O U for the balance, being £11, 14s. 6d.

These letters were written by Tulloh in the conduct of his daily life, and I think that we may take them to contain an accurate statement of his acts, wishes, and intentions. It is impossible to conceive that they were written with any other purpose than that which they express, or that there was any motive for untruth. They merely give an account of his difficulties, and show his efforts for relief. To my mind the natural, and indeed the only reasonable inference is that he resided continuously in London till he left for Kirkcaldy, and we know for certain that he was in London on 27th June and 5th July. It was said that for all that appears from the letters he might have paid his wife a visit in Ireland. I admit the physical possibility, but it seems to me to be clear that he did not. The same reasons which prevented him from going to Scotland would prevent him from going to Ireland. Mr Bishop would not permit him to proceed on the one journey any more than on the other; and it seems to be plain that Tulloh had not the means of leaving London till he received the remittance of £40. Nor can I conceive that when he left London for Kirkcaldy he went round by Ireland in order to pay a visit to a woman whom he wished to avoid. The evidence does not exclude the physical possibility of access. But in my judgment it proves beyond reasonable doubt that there was none.

The second child was born on 1st July 1852, and the date of conception was about 1st October 1851.

Tulloh was living in Annan from June 1851 to June 1852. We see by his letters that he was there on 5th September and 2nd October 1851. His next letter is dated on 4th November. It is worthy of remark that he must have been in Scotland at the most probable date of conception, and there is nothing to suggest that he ever left it. We have some assistance from the evidence of Violet and Janet Graham. They were both young girls in 1851, but they remember Tulloh as a constant visitor at their father's hotel, and they seem to have been intimate with him. They knew that he was married, and that he had separated from his wife. Violet says that "he told us all the places he went to. He did not go anywhere except to Dollar to visit his son." She knew from what he said that he had a dislike to his wife, and "would have gone a long way out of his way not to see her." Both sisters are clear that Mrs Tulloh never was at Annan, and the younger says that Tulloh was never away long enough to go to Ireland and back. I do not wish to put too much weight on the evidence of these witnesses; but it supports and harmonises with the rest. I am satisfied the spouses never met, and that Tulloh was not the father of the second child.

There is one very strange blank in the evidence. Mrs Tulloh is still alive, and is not examined. It is true that she is advanced in years; but it is not said that there

is any failure of intelligence or of memory. The one claimant is her daughter, and the other is her grand-daughter. They do not call the only witness who must certainly know the truth. It is difficult not to draw an unfavourable inference. They are no doubt entitled to rely on the presumption; but when it is encountered by a strong body of evidence it would have been wise to have examined Mrs Tulloh if she could have given any favourable testimony. One is more disposed to rely on the natural inference to be drawn from the evidence, when it is not contradicted by the only person alive who knows the truth.

I do not think that it is worth while to notice her statements to Stewart, nor her affidavit. I am not disposed to make use of either.

The respondents founded largely on the fact that Tulloh did not proceed with the action of divorce which he raised against his wife on being informed that she had borne children in Ireland. They say that the abandonment of the action was a recognition of their legitimacy, and that by the efflux of time they are now trying the question at a disadvantage. They also refer to the action of adherence and aliment brought by Mrs Tulloh in 1876, and the actions of aliment at the instance of the daughters, all of which were compromised on the footing that certain payments should be made by Tulloh. In each legitimacy was asserted by the pursuers, and in each it was denied by Tulloh. But we must keep in view that we are trying the right of succession to the estate of Burgie in a case between the reclaimer and the respondents. Until the succession opened the reclaimer had no title to challenge the legitimacy of the respondents. Nor is she responsible for Tulloh's acts. Of course they affect her in so far as they are evidence of the legitimacy of the respondents, but in no other sense.

I am satisfied that Tulloh abandoned the action of divorce with extreme reluctance. He retained a settled conviction of his wife's guilt, and his motives were (1) the difficulty of obtaining evidence, and (2) the expense of the inquiries which he was unable to defray. Nor ought we to forget that at the time when the divorce was in dependence he was not a competent witness. Being under that disability he was advised that if he could not account for every day of his life about the time of the conception he must fail. I do not wonder that he despaired of success. But it is, I think, out of the question to say that he ever recognised his wife's children as his own, or treated them as such.

It is said that a strict inquiry was made into the conduct of Mrs Tulloh, and nothing was found out against her. I doubt it. I do not think that Tulloh had the means of making such an inquiry. But as I have said, the reclaimer is not bound by the acts of Tulloh. They may furnish evidence against her. They can do nothing more. We must decide the case on the proof before us, and in my opinion the children of Mrs Tulloh were not the children of her husband. She did not treat them as legitimate, and I am satisfied that there was no opportunity of sexual intercourse. We are entitled to consider the evidence on the last point in the light which her conduct throws upon it. Taking the direct evidence alone, I can come to no other conclusion than that the spouses had no opportunity of intercourse at the time when the children were conceived. Reading it along with the rest I am convinced that that conclusion is true.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor reclaimed against: Find it proved that the claimant Mrs Louisa Mary Tulloh or Homer and the late Mrs Eliza Jane Tulloh or Ward were not the lawful children of the deceased Alexander John Archibald Tulloh: Remit the case back to the Lord Ordinary to proceed thereon."

Counsel for the Claimant Mrs Coles—Ure—Wilson. Agents—E. A. & F. Hunter & Co., W.S.

Counsel for the Claimant Mrs Homer—W. Campbell—Graham Stewart. Agent—Wm. Considine, S.S.C.

Counsel for the Claimant Miss Ward—Burnet—Cosens. Agent—W. B. Glen, S.S.C.

Counsel for the Claimant Mrs Tulloh—Maclaren. Agent—Robert Broatch, L.A.

Agents for Mr Tulloh's Trustees—E. A. & F. Hunter & Co., W.S.

Tuesday, June 4.

FIRST DIVISION.

[Sheriff-Substitute at Glasgow.

CONROY *v.* A. & J. INGLIS.

Process—Sheriff—Appeal for Jury Trial—Competency—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

A labourer brought an action of damages in the Sheriff Court against his employers, on account of injuries averred to have been sustained by him while in their service. The Sheriff-Subsitute before answer allowed a proof on the question of employment. The pursuer appealed for jury trial. *Held* that, as the Sheriff's interlocutor was one allowing proof, the appeal was competent under the 40th section of the Judicature Act.

Thomas Conroy, labourer, Partick, raised an action of damages in the Sheriff Court at Glasgow against A. & J. Inglis, shipbuilders, Partick, on account of injuries sustained by him, as he averred, while in their employment, and in consequence of their fault.

Upon 5th April 1895 the Sheriff-Substitute (SPENS) before answer allowed the