Tuesday, February 6.

FIRST DIVISION.

[Lord Dewar, Ordinary.

LILLIE (DEANS' FACTOR) *v.* DEANS AND OTHERS.

Husband and Wife—Marriage—Proof—Legitimacy—Presumption of Legitimacy.

The success of certain claimants in a multiplepoinding depended on their proving a marriage, alleged to have taken place in 1819, between A, their paternal grandfather, then a young army officer, and B, a straw-hat maker in Glasgow. The precise date of the marriage, which was alleged to have been regular though secret, was unknown. There was no documentary proof regarding it, and the only evidence as to where and when it took place was hearsay, mainly derived from B's statements concerning it. A and B never lived together, and the existence of the marriage was never disclosed, if it ever were, to A's relations until after his death, which occurred in 1825 while he was serving with his regiment in Jamaica. No mention of his wife or child was made in any of A's letters to his family from Jamaica. In the regimental records A was described as unmarried, and on his death his effects were handed over to his father. No application for pension was made by or on behalf of B as his widow. There was evidence, however, that A's father recognised the child of the alleged marriage as A's son when he met him on the street and that he paid for his schooling, and an entry was produced from the baptismal registry of an Episcopal church in Glasgow which might have referred to the son of the alleged marriage, and which it was maintained inferred his legitimacy.

Held that the marriage had not been proved.

Observed (*per* the Lord President) that the presumption of legitimacy applies where the parties are living in the married state, and does not apply where the *de quo queritur* is whether there was a marriage or not.

Evidence—Hearsay—Statements by Deceased Persons who could not, when the Statements were made, have been Competent Witnesses—Admissibility.

Observations (*per* the Lord President) as to the admissibility of statements made by deceased persons who would not, when the statements were made, have been competent witnesses, but who owing to supervening legislation would, if alive, have been competent witnesses at the date of the proof.

Dysart Peerage case (1881), L.R., 6 A.C. 489, *commented on.*

On 18th July 1910 J. A. Lillie, writer, Edinburgh, judicial factor on the estate of the late James Deans, retired Supervisor of Excise, Edinburgh, brought an action of multiplepoinding and exoneration against James Deans, Calderside Cottage, Shotts, and others, in which he, *inter alia*, craved the Court to determine the next-of-kin of the said deceased James Deans, he having died intestate on 12th December 1908.

Claims were lodged by (1) the said James Deans and others, who claimed to be the sole next-of-kin of the intestate, but whose propinquity depended upon proof of a certain marriage alleged to have been contracted in 1819; (2) by W. C. Anderson, Florentine Gardens, Glasgow, as executor-dative of his wife Mrs Christina Deans or Anderson and others; and (3) by Charlotte H. Bell, South Henry Street, Carlisle, and others—the propinquity of the two last sets of defenders, though more remote, being undisputed.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 10th March 1911 repelled the claim of James Deans and others and granted leave to reclaim.

Opinion.—"This is an action of multiplepoinding brought by the judicial factor on the estate of the late James Deans, who died in Edinburgh on 12th December 1908, to have it judicially determined which of the rival claimants is entitled to succeed to the deceased's estate.

"There are in all three sets of claimants—(1) James Deans and others (whom it will be convenient to refer to as 'the pursuers'); (2) William Carrick Anderson and others; and (3) Charlotte Howard Bell and others (whom I shall call 'the defenders').

"The pursuers are the surviving children of the late Adam Deans, shoemaker, Bo'ness, and the question for decision is whether the said Adam Deans was the lawful son of Lieutenant James Deans, who was born in Glasgow on 10th October 1797, and who afterwards became a lieutenant in the 92nd Regiment, and who died in the West Indies on 2nd August 1825.

"The substance of the pursuers' case is this—That when Lieutenant James Deans was a young officer on half-pay he came home to reside with his father Adjutant William Deans in Glasgow. He there became acquainted with and ultimately married a straw-hat maker called Hannah Andrews, one of the daughters of a stage-coach driver, who at one time resided at Langholm. The precise date of the marriage—which is alleged to have been regular—is not known, and there is no documentary evidence of it, but it is explained that this is probably because the records of St Andrews Episcopal Church, Glasgow, where it is believed to have been celebrated, were destroyed by fire. No one is known to have been present at the marriage ceremony, but that, it is explained, is because it is believed to have been a secret marriage; that a child of the marriage (the said Adam Deans) was born on 7th July 1820; that about that date Lieutenant James Deans was summoned back to his regiment, which was then stationed at the Isle of Wight; that he remained

there for some time and then went to Jamaica, where he died of yellow fever at Up Park Camp on 2nd August 1825. Up to this time the marriage had not been disclosed to Adjutant Deans, but it is said that some time after Lieutenant Deans' death Hannah Andrews and her sister Margaret called upon the Adjutant and divulged the secret; that he received them with much kindness, and thereafter paid for the child's education, and when he met him on the street gave him small sums of money. Then the pursuers produced the baptismal record of St Andrew's Church, Glasgow, which shows that James Adam, son of Hannah and James Deens, who is described as a soldier in the 92nd Regiment, was baptised on 13th September 1829. It is alleged that this entry has reference to the baptism of the pursuer's father, and that the form in which it is made shows that he was regarded by the officiating clergyman as legitimate; that Hannah Andrews continued to reside in Glasgow and to carry on her business as a straw-hat maker until the year 1831 or 1833, when she died; that her son was then removed by his maternal grandmother to Langholm, where he resided for two years, and then went to Linlithgow, where he carried on business as a shoemaker; that he married and had six of a family, five of whom (the pursuers) are still alive; that he always regarded himself as the legitimate son of Lieutenant Deans; and that no doubt as to his legitimacy had ever been raised until the present time.

"The pursuers' case is largely founded on family tradition, and the main source of that tradition was Adam Deans and his two aunts, Margaret and Jane Andrews, Hannah's sisters. These three parties—who are all dead—had made statements, partly from their own knowledge and partly from what they had heard from others, regarding the reputed marriage to their children, and the children appeared in the witness-box and retold the story. Both parties agreed at the proof that it would be convenient to permit the statements to appear in full on the notes, reserving all questions as to competency. The defenders at the hearing objected to the competency of such evidence, or at least to large portions of it, but I do not think that I require to decide that question, because I have reached the conclusion that, even if it is all admitted, it is not sufficient to prove the pursuers' case.

"The pursuers had no difficulty in proving that they are the lawful children of Adam Deans. There is no dispute about that. The difficulty is to prove Adam Deans' connection with the Deans family. Two of his family Bibles were produced which show that he was born on 7th July 1820, but although the entries are in his own handwriting there is no mention of his place of birth, nor any reference to either of his parents. But it was proved in evidence that Hannah Andrews was his mother. There is some doubt as to whether he was born in Linlithgow, but I do not think this is important, for he undoubtedly spent his early life with his mother in Glasgow, and after her death, either in 1831 or 1833, he was removed to Langholm, where he resided for two years with his maternal grandmother, and then went to Linlithgow and became a shoemaker. His family and relatives thought he had a better education than was common in those days for one in his station in life. He appears to have been a respectable industrious man, although in late life he was obliged to seek parochial relief. I am quite satisfied on the evidence that he honestly believed himself to be the legitimate son of Lieutenant Deans, and frequently said so to his children and others.

"When the judicial factor advertised for heirs of the deceased William Deans, Adjutant of the North British Recruiting District, Glasgow, and who died there on 8th September 1835, the advertisement was seen in the *Weekly Scotsman* by Mr Andrew Buchanan, who is a son of Jane—Hannah Andrews' sister—and he at once wrote to the pursuer James Deans a letter, which is in the following terms:—'This is a cutting from the first column of to-day's *Weekly Scotsman*. It may be of some interest to you if my surmise is right. I have often heard my mother, also your father, speaking of Adjutant Deans who lived in Glasgow, and must have died about that time, he being your father's grandfather. His son, said to have been an officer in the army, had married my mother's sister. I have heard often of the Adjutant riding about on horseback in Glasgow and would recognise your father when a boy on the streets. He also expected the old man to have done something for him, but he died. You might let me know if this is the same, or if you think of making inquiry.' Mr Buchanan is not himself a claimant and he has no special interest in any of the other claimants. He gave evidence, and I was impressed with the care and accuracy with which he gave it. He did not satisfy me that Adam Deans was the lawful son of Lieutenant Deans; but after hearing him and the other witnesses for the pursuers (who I thought all gave their evidence fairly and without exaggeration) I am satisfied that Adam Deans believed that he was, and that the children of Margaret and Jane (Hannah's sisters) had been told the same story by their respective mothers. The substance of Mr Buchanan's evidence is as follows:—He had frequently, when a boy, been told by Adam Deans that Hannah Andrews was his mother and that his father's name was James Deans, who had been an officer in a Highland regiment, and that James Deans' father—old Adjutant Deans—was his grandfather. He often spoke about meeting his grandfather on the street as he rode along on his horse. He would stop his horse and speak to him and give him half-a-crown and tell him to go home to his mother and be a good boy. Adam Deans had also told him that his grandfather had sent him to school, but he did not say what school. Adam Deans

appeared to be educated above his station. His (Mr Buchanan's mother) was a sister of Hannah Andrews. His mother frequently told him that her sister Hannah had married an officer in the army whose name was James Deans, and she also told him that shortly after the marriage he had gone abroad with his regiment to the Indies and had died there. It was never doubted in the family that they had been married. His mother also told him that Adam had been removed from Glasgow to Langholm, where his mother's people lived, when he was about thirteen years of age. Adam Deans also told him that he had called his eldest son James after his own father. The relationship between Adam and the old Adjutant was frequently discussed in the family. Adam was sometimes called the 'Adjutant' by his intimate friends. In cross-examination he admitted that he had never heard how Hannah Andrews became acquainted with Lieutenant Deans. Nor had he ever heard where the marriage took place. There was never any suggestion about the marriage being secret. He had never heard it suggested that Lieutenant Deans had resided with or taken up house with Hannah. He had never heard of Adam Deans being called Adam James Deans. Adam never said he had been at the old Adjutant's house. When Lieutenant Deans was abroad Hannah was earning her living as a milliner. She did not apply to the Adjutant for assistance. He could not explain how she did not claim the pension of an officer's widow. He never heard his mother or any other members of the family speak of Hannah's wedding ceremony. The reason he had heard why she did not go abroad with her husband was that she was in delicate health and he was going to an unhealthy climate.

"James Deans (one of the pursuers) corroborated this generally, and adds that his father (Adam Deans) told him that the old Adjutant had another son William who was a 'gauger,' and that his father had been at his house, having walked from Linlithgow to Glasgow or Paisley when William was there, and that he got half-a-sovereign from him, but the father had never told him that the old Adjutant had also a daughter Mary. Nor did he ever speak of the Adjutant's wife. His father never said that he had been at the Adjutant's house, but his mother and her sister Margaret had been there. His father never said that he had been baptised when he was nine years old. He wrote the name Adam Deans with his own hand in his Bible, and he never said that he was baptised James Adam Deans. His father had never said that he was at Adjutant Deans' funeral. He could not explain why there was no reference in the Bible to his father's parents.

"This account of the family tradition is fully corroborated by a number of other witnesses, and Miss Middlehurst, a daughter of Margaret Andrews, adds some points which were not mentioned by the others. She said that her mother had told her that she was devoted to her sister Hannah and had resided in Glasgow with her. She never said that she had been at the wedding; but she told her that she and Hannah had once gone to a ball with Lieutenant Deans and James Middlehurst and that they had afterwards married these men. She also said that Lieutenant Deans' death had broken Hannah's heart; and that her mother had said that Hannah and she had been at the old Adjutant's house and that he was 'awfully kind.' Her impression was that she had been told the marriage was secret, and that her mother and Hannah had gone to reveal it to the old Adjutant. The witness produced a ring which she had got from her mother, which she at the time thought was her father's ring, but was afterwards told by Mrs Buchanan was Hannah's marriage ring. She knew that Hannah Andrews had left a black box full of papers to her son Adam. She had seen inside this box and knew that it contained papers, but had never read any of them. She had been told that they related to Hannah's affairs. The box and papers had been destroyed. She understood that the old Adjutant had only one son, James.

"This summary contains, I think, all the points in the family tradition on which the pursuers rely, and brings out with sufficient clearness the line of defence.

"In addition to this, the pursuers proved and found upon an extract from the register of baptisms of St Andrew's Episcopal Church, Glasgow, which shows that on 13th September 1829 a boy called James Adam, the son of James and Hannah Deens, was baptised by the Rev. William Routledge. The parents' abode is given as Langholm, and the father's profession 92nd Regiment; and the pursuers proved in evidence that the entry is in the form in which legitimate children are usually registered, and that the rules of the Church require clergymen to satisfy themselves that the child is in truth legitimate before he is registered in this way. The custom appears to be to require documentary evidence of the marriage, if it exists, but if it does not, then the clergyman must satisfy himself in any way he can. The defenders did not admit that this entry referred to the pursuers' father, or, if it did, that the James 'Deens' of the 92nd Regiment was Adjutant Deans' son. But I think that the balance of probability is in favour of the pursuers' view. The spelling of the word 'Deens' may quite likely be a clerical error, and although Adam Deans was never called James in later life, I think it probable, as some of the witnesses suggest, that the James was dropped after he went to reside with the grandmother. It is more difficult to explain why his parents' abode should have been given as Langholm when his reputed father was dead, and his mother at the time was a straw-hat maker in Glasgow; but her people lived at Langholm, and she may have had many reasons for giving that address. I therefore assume that it is an entry of Adam Deans' baptism, and

that the clergyman believed that he was legitimate. But without knowing what evidence of marriage was before the clergyman, or what means he had taken to satisfy himself of the truth of any statement which may have been made to him, I cannot hold that it is sufficient proof of marriage. There were 1300 baptisms in St Andrew's Episcopal Church in the year in which this entry was made, and it would be unreasonable to suppose that the clergyman, however exacting, had either time or opportunity to satisfy himself on every doubtful case in such a manner as the law would hold equivalent to legal proof of marriage. It is no doubt an important factor, but at the highest, and taken in conjunction with the other evidence, it amounts to no more than this, that the Rev. Mr Routledge, like Margaret and Jane Andrews, believed that Hannah had been married. There is no evidence to show what this belief was founded on, and the absence of such evidence is, I think, fatal to the pursuers' case. The pursuers, I think, fell into the error—not uncommon in a case of this kind—of attaching too much importance to statements which were made a long time ago. The mere expression of an opinion that two persons were married is of very little value in proving a marriage if there be nothing to show what the opinion was based upon, and it is not of more value because it happens to be old. In the case of *Gifford* v. *Gifford* (17th February 1837, Faculty Decisions, App. p. 49), which in several respects was not unlike this, Lord Cockburn said, p. 71—'In judging of the whole case we are apt to be misled by the mere antiquity of the case. The remoteness—although by no means so great as to be beyond the reach of ordinary evidence, tempts us to overlook its rules, and has a tendency to give a story in itself simple an air of mystery, and to substitute a cloud of romance, fancy, hearsay, and tradition for original and true facts. The proper mode of dealing with such a question is to divest it of all confusing matter, and to consider it as an ordinary recent case depending on the evidence now before us.' Now, if we apply this rule, what is the proof of marriage offered? There is the certificate of baptism which proves that the Rev. Mr Routledge believed that there had been a marriage, and that he had some reason to believe it. There are the statements of Margaret and Jane Andrews that Hannah had been married, and I shall assume that they also had some reason for making them, and the statement, spoken to by one witness only, that Hannah and Lieutenant Deans had been to a ball. Then there are the facts that some of the records of St Andrew's Church were destroyed by fire (and, of course, the record of the marriage may have been lost in this way, although there is no evidence of that), and that Adjutant Deans' two sons were both baptised in that church, and that certain persons named Andrews and Deans had sittings there (see Minute of Admissions No. 149 of process); that Hannah and Margaret Andrews called upon the old Adjutant after the Lieutenant's death, and that he afterwards paid the boy's school fees, and occasionally gave him small sums of money when he met him on the street; that Hannah Andrews left a box of papers to her son Adam; that they were destroyed after his death; that a ring, which is believed to be Hannah's wedding ring, still exists. That, I think, is a fair summary of the pursuers' case. But there is much to be said on the other side. It appears either from the evidence or the minute of admissions that there is no certificate of marriage; no evidence of proclamation in the Parish Church; no one knows when or where it took place, or who were present; there are no witnesses to it; there is no account of when or where or how Hannah Andrews and Lieutenant Deans became acquainted; no proof that they ever met at all (for the statement that they met at a ball was only spoken to by one witness, Miss Middlehurst, and she appeared to have an imperfect recollection of what she had been told regarding this incident); there was no family home; the parties never lived together. The presumption which the baptismal certificate raises in favour of legitimacy is, I think, displaced by other evidence. For example, the alleged marriage made no difference to Hannah's mode of life. She continued to earn her living as a straw-hat maker, and although in poor circumstances her reputed husband did not send her any money. He left Glasgow about the time her child was born, but there is no family tradition—such as one might expect—about the parting, or that he asked anyone to care for her and the child in his absence. From the time he left till the date of his death he constantly corresponded with his father, mother, and sister, and the letters show that he was affectionate and considerate. On the theory that the marriage was secret it is not surprising perhaps that no mention is made of the marriage in these letters, but it is surprising that he should never have written to his wife. But there is no evidence that he did. If the 'black box' had contained such letters, or any other evidence of the marriage, I think it is more than probable that Adam Deans—who was said to be very proud of his parentage—would have shown them to his friends, or at least his sons. Then Lieutenant Deans was all his life described in his regimental papers as a bachelor, and a year after his death his father, in applying for letters of administration, swore in the affidavit that his son had died a bachelor. He did not leave much money, but what he left his father took; he also obtained possession of all his personal belongings—things of no intrinsic value—but which would have been valued by his wife. Yet she got none of them. She never applied for the pension due to an officer's widow. If the old Adjutant had believed that she was the widow of his son, and had been, as is alleged, anxious to assist, I think he would have seen to this. His own widow applied for and

received a pension after his death. But I do not think that the alleged marriage was ever disclosed to the Adjutant at all. Everything points to a different conclusion. Hannah Andrews was never introduced to his wife, or daughter, or his other son—at least no one ever said she was. Her boy was never invited to the house — or he would have remembered that long after he had forgotten that his school fees had been paid. Then the Adjutant was alive when Hannah died, but there is no evidence that he took any interest in that event, and he certainly permitted the boy to be taken by his maternal grandmother to Langholm. He lived for two years longer, but he took no further notice of his reputed grandson—who became a shoemaker. All this appears to me to be so inconsistent with what one would naturally expect to find if the pursuers' theory were correct, and the facts supporting the theory are so few and the evidence so slender that I do not think that it is possible on any reasonable view of the case as a whole to hold that the marriage has been proved.

"But the pursuers argued that as they had proved paternity, legitimacy must be presumed. But I doubt whether they have proved paternity. There is no evidence that Hannah ever said that Lieutenant Deans was the father of her child, and with the exception of the alleged meeting at the ball—with which I have already dealt—he was never seen in her company. In these circumstances I do not see how it is possible to hold that paternity is proved; but even if I am wrong in this I do not think that legitimacy is to be presumed in a case where the parents were never in possession of the status of married persons during the subsistence of the alleged marriage (*Gifford* v. *Gifford, supra*). It is different when, as in the case of *Campbell* v. *Campbell* (5 Macph. (H.L.) 115) on which the pursuers founded, the parents had lived together as man and wife for a long period, and it was generally believed that they were married persons, and where there was an uninterrupted recognition of legitimacy during the lifetime of the child's parents, the presumption of legitimacy then arose from the fact that possession of the status of legitimacy had been enjoyed for a long period, and had not been displaced, but confirmed, by the other evidence in the case. But in this case there are no ascertained facts which raise the presumption of legitimacy, except perhaps the certificate of baptism, and that presumption has not, I think, been confirmed but displaced by the other evidence in the case.

"I am accordingly of opinion that the pursuers have failed to prove that they are the sole next-of-kin to the deceased James Deans, and that their claim should be disallowed."

Argued for reclaimers—(1) The presumption of legitimacy had not been displaced. The *onus* of proving illegitimacy lay on the respondents, for the law presumed everyone to be legitimate—Dickson on Evidence, 3rd ed., secs. 27 and 35; Stair, iii, 3, 42; *Hirpet* v. *Scot* (1618), M. 2197; *King's Advocate* v. *Craw* (1669), M. 2748; *Crawfurd* v. *Purcels* (1642), M. 12,636; *Sommerville* v. *Stains* (1680), M. 12,638. This *onus* they had not discharged. The legitimacy of the claimant's ancestor had hitherto been undisputed, and where that was so the clearest negative proof was required — *Campbell* v. *Campbell*, June 26, 1866, 4 Macph. 867, at p. 929, 2 S.L.R. 102, *affd.* July 16, 1867, 5 Macph. (H.L.) 115, at p. 126, 4 S.L.R. 214; *Smith* v. *Dick*, October 20, 1869, 8 Macph. 31, at p. 33, 7 S.L.R. 7; *The Lauderdale Peerage* (1885), L.R., 10 A.C. 692. Where, as here, that repute was of long standing less evidence was required to sustain it—*Macpherson* v. *Reid's Trustees*, November 17, 1876, 4 R. 132 at p. 138, 14 S.L.R. 66; *affd.* July 3, 1877, 4 R. (H.L.) 87; *Wallace* v. *Ross*, December 8, 1891, 19 R. 233 at p. 236, 29 S.L.R. 223; *Barnet* v. *Barnet*, May 27, 1873, 10 S.L.R. 452. (2) The certificate of baptism inferred legitimacy, for there was a duty on the officiating clergyman to satisfy himself of that fact. (3) The circumstances of the case supported the reclaimers' contention that there was a valid though secret marriage. For the families were respectable; the lady took her husband's name; and the child of the marriage was recognised by his paternal grandfather, who paid for his schooling out of his slender means.

Argued for respondent—The Lord Ordinary was right. (1) Where, as here, the reclaimers merely set forth facts from which marriage might be inferred, there was no presumption in favour of legitimacy —*Dysart Peerage Case* (1881), L.R., 6 A.C. 489, at pp. 510 and 512; *Campbell* (*cit. sup.*) at 4 Macph, p. 923; *Gifford* v. *Gifford*, 1837, 12 Fac. App. 49; *Swinton* v. *Swinton*, March 20, 1862, 24 D. 833. The reclaimers were in error in thinking that less evidence was required in pedigree cases, for there was no relaxation of the rules of evidence in such matters; *Barnet* (*cit. sup.*); *Attorney-General* v. *Köhler*, 1861, 9 H.L. Cas. 654; *The Lovat Peerage*, 1885, L.R., 10 A.C. 763, at pp. 789 and 801; *Shedden* v. *Attorney-General* (1860), 30 L.J. (P. M. & A.) 217. The evidence of Hannah and her sisters was inadmissible, for they could not have been witnesses at the time of the alleged marriage, and that being so their testimony was incompetent now—Evidence (Scotland) Acts 1840 (3 and 4 Vict. cap. 59), 1852 (15 Vict. cap. 27), 1853 (16 Vict. cap. 20), 1874 (37 and 38 Vict. cap. 64); *Dysart Peerage Case* (*cit. sup.*) at pp. 449, 505, and 515. There was no general repute of the marriage. Such repute as there was existed only in the lady's family, and that was not sufficient—*Petrie* v. *Petrie*, 1911 S.C. 360, 48 S.L.R. 225. Nor was it sufficient to prove paternity—Bell's Prin. 2060; *The Lauderdale Peerage* (*cit.*); *Alexander* v. *Officers of State*, March 30, 1868, 6 Macph. (H.L.) 54, at p. 62, 5 S.L.R. 475; *Crouch* v. *Hooper* (1852), 16 Beav. 182 at p. 184. The baptismal certificate was not conclusive, for even if it applied to the reclaimers' ancestor (which was disputed) the clergyman might have been misinformed. In any event the reclaimers had

not complied with the provisions of the Act 10 Anne, cap. 7, sec. 6, as to registration. *Esto* that the entry in question was proof of the baptism, it was not the proof of the child's legitimacy—*Beattie* v. *Nish*, March 19, 1878, 5 R. 775, 15 S.L.R. 453. (3) The facts were in the respondents' favour. There was no mention of the lady in the Adjutant's letters to his family; no letters had been produced from him to her as his wife; no pension was claimed by her or on her behalf; and on his death his effects were handed over to his father as his administrator-in-law.

At advising—

LORD PRESIDENT—The question between the parties in this case turns upon one fact and one fact alone, namely, whether James Deans, sometime lieutenant and adjutant in the 92nd Regiment of Foot, did or did not marry Hannah Andrews in or about the year 1819. One set of claimants are undoubtedly descended from James Adam Deans, who is the son of Hannah Andrews; and if Hannah Andrews and James Deans, adjutant, were married, they are undoubtedly nearer relations to the intestate James Deans, retired Supervisor of Excise, than the other claimants. On the other hand, if that marriage is not proved, then the other claimants are bound to prevail.

The Lord Ordinary has written a very careful note, which not only shows, I think, that he had adverted to all the circumstances of the case, but shows—if I may use the expression—that he had quite a sympathetic interest in the view put forward by the claimants who are the reclaimers, but he has come to the conclusion that these claimants have failed to prove the marriage. I have come to be of the same opinion, and I really should not think it necessary to add anything to what the Lord Ordinary has said had it not been that the case was very carefully and very ably pled before your Lordships, and that naturally it is one of great interest to the parties concerned.

The first observation I would make of a general character is this, that in a case such as this, where the date is such that you cannot have direct testimony of eye-witnesses, the evidence must be of one of two characters, namely, either documentary or hearsay testimony. Now in this case, leaving out of view the entry in the register of baptisms of St Andrew's Episcopal Church in Glasgow, to which I shall afterwards refer, there is no documentary evidence at all in the proper sense of the word, and by that I mean documentary evidence of the proper class to prove a marriage, such as, for instance, a certificate, or say a proclamation of banns, or a reference to the marriage or to the status of the parties as married persons in contemporary letters or deeds or any other documents of the time. Now in this case that class of evidence is completely absent. Well, then, we come next to hearsay evidence. Now with regard to this class of evidence one must make this remark, that multiplicity of witnesses is not equivalent to multiplicity of testimony. When you are inquiring as to the nature of any fact, the more witnesses you have who can depone of their own knowledge that the fact was so and so, the better. I do not mean to leave out of mind the old brocard *testimonia ponderanda sunt, non numeranda*. But still it is the case that if A, B, C, and D all depone of their own knowledge to the same fact, and give a consistent account of it, then you are a great deal further towards the conclusion that it was the fact, because you have got four witnesses instead of one. But when you come to hearsay, then the mere fact that B, C, and D all spoke to something that A said, does not multiply the testimony of A. Of course it does do one thing. There is, so to speak, a double chance of error in hearsay testimony. It is not only that A may be inaccurate, or worse, in the account which he gave of the fact, but B, C, and D may be inaccurate, or worse, in what they say that A said. Assuming, however, that B, C, and D are perfectly accurate, and that all of them say that A said so and so, it does not make it any better than that A did say so.

I think it necessary to say that, because when you apply that canon to this case, you will find that if you take the witnesses, there are a great number who speak to what may be called the family tradition that Hannah Andrews had been married to James Deans, but when you analyse it you find that it comes down to three sources, and three sources only. Through James Adam Deans, deceased, you find that he relates what his mother Hannah Andrews had told him; and you also find from other witnesses the hearsay testimony of Margaret Andrews, who afterwards became Mrs Middlehurst, and of Jane Andrews, who afterwards became Mrs James Buchanan. So the hearsay evidence reduces itself to three sources and three sources alone.

When I come to the next stage I am afraid that one of these sources has to be discarded altogether. The marriage, if it occurred at all, occurred in 1819. The child James Deans was born in 1820. Jane Andrews was only born on 1st March 1819. She was therefore not one year old when the marriage was celebrated, if ever it was celebrated, and poor James Deans, the adjutant, died of yellow fever in Jamaica five years afterwards. It is perfectly evident, therefore, that all that Jane could know about it would be simply a repetition of what (when she became somewhat older) she had heard from her older sisters; and therefore really you do not get Jane as an independent source of testimony at all. Margaret was born in 1809, and therefore at the time of the supposed marriage she would be eleven years old. Well, of course a child of eleven is perfectly able to remember such an event in the family as her sister being married, and therefore I think her testimony, for what it is worth, must certainly be taken. And there is the statement of the deceased Hannah to James, the son, which we have

handed on by the various people who have spoken to James.

A point was very much pressed upon us with regard to Hannah's testimony, as to which I do not think it is absolutely necessary to give any decision in the view I take, but I must mention it in order to show that it has not been overlooked. Certain observations made by Lord Watson and Lord Blackburn in the *Dysart* case were quoted to us in which they distinctly say that if a person at the time of an alleged marriage would not have been a competent witness to speak to the fact of the marriage, it was not possible afterwards to take his hearsay testimony even although in the meantime the law had been altered and he had become a competent witness. There is, I suppose, no doubt that in 1820, if there had been a declarator of marriage, Hannah Andrews could not have been a witness, and certainly, according to what their Lordships say, that would seem to have destroyed her hearsay testimony. Their Lordships' observations were more or less *obiter*, and I am not myself satisfied on the point, but I do not think it necessary to go into it, because whatever we get from Hannah I think we also get from Mrs Middlehurst.

Well now, what do we get from Mrs Middlehurst? We get from Mrs Middlehurst—beoause I quite agree with the Lord Ordinary that the reclaimers' witnesses are perfectly honest witnesses and are telling the truth—we get from them that it was always understood in the family that Hannah had been married to James Deans. But the knowledge of Mrs Middlehurst and of the family upon all else is really blank—that is to say, nobody is said to have been at the marriage. Nobody knows where the marriage took place or how it was celebrated. There is a guess that inasmuch as it was shown that some of the family frequented a certain Episcopal church in Glasgow, called St Andrew's Episcopal Church, it is probable that the marriage took place there. But that is a mere guess. There is no trace of the marriage in the records of St Andrew's Church, which may be perfectly accounted for by the fact that it is said (I think truly) that a great part of the records of St Andrew's Church have perished by fire. But still there it is. It may be the misfortune of the reclaimers, but there it is. There is no record of when the marriage happened. Nay, more, there is nobody who says—in fact, they really say the opposite—that the married persons ever lived together in the sense of living together as married persons with an establishment. Indeed, the exigencies of the case were such that the reclaimers' counsel had eventually to betake himself to the view—and I think he was quite right as a matter of pleading—he had to betake himself to the view that the marriage was a secret marriage in this sense, that none of the husband's relatives knew anything about it, and that the first time that the old father of young James, the adjutant of the regiment — the old father who was always known as Adjutant William Deans and who seems to have been a more or less well-known man in Glasgow, upon what I may call a permanent recruiting staff—that this old father knew nothing about it until his son was cut off by an early death at Up Park Camp, Jamaica. Your Lordships will see, as I have said, that there is a terrible blank about all this. Really, it comes back to this, that this girl of eleven always understood that her sister had been married—and I take it that her sister had given out that she had been married—but when, where, or how is a mystery.

Well now, that seems to me, first of all, too little upon which to rest proof of the marriage. The baptismal entry in St Andrew's Church goes for very little. It is not certain that it applies. But even if it does, it would do no more than show that Hannah had told the same story to the clergyman as she had to her sister. But I am afraid the matter does not rest there, because you have the fact, which I have already adverted to, of a complete absence of any knowledge of the marriage upon the side of the father's family, and no recognition by the father's family that there ever had been a marriage. No doubt there is a story of the boy meeting this old adjutant in the streets of Glasgow and being clapped on the head and being given half-a-crown and told to be a good boy, and there is also the tradition that to a certain extent the old man helped in his schooling. All that, unfortunately, is just as consonant with the idea of a connection which was not marriage, but which was very likely meant to end in marriage—it is just as consonant with that as with the theory of marriage. And then you have also the fact that not only not to his father but not to his comrades and superiors did James Deans ever confess himself to be a married man. In the regimental records his death is entered as the death of a person who is single. His little effects and his balance of pay were given over to his father, who had taken out letters of administration, with no mention of the person who his proper heir would be, namely, this son. And there is, of course, not the slightest attempt to vindicate anything in the nature of a pension for the widow. More than that, there is in process a somewhat lengthy correspondence, which is still extant, between young James when he was living in Jamaica with the regiment and his people at home. It is an interesting correspondence, and throws a good deal of light upon the regimental life of that period, but is quite incompatible with the view that the man who was writing was all along a married man. It is all written in a style and spirit that do not seem consistent with the idea of his having left a wife and child behind him. Accordingly on these grounds—and this is rather the view that I take—I think the Lord Ordinary is right in holding that the marriage is not proved.

There is one other matter to which I wish to refer. Counsel for the reclaimers quite rightly pressed upon us various authorities in the institutional writers and various

cases which set up what they called the presumption of legitimacy, and they argued that that was so strong that unless the opposite party were able to rebut it any man must be considered not a bastard. I am quite certain, after looking over the authorities and reading the cases, that that view of the presumption of legitimacy is really put forward with reference to another class of matter altogether—I mean to say, the status of a particular person. Most of the cases are cases where there was a brief of bastardy, and if you had purchased a brief of bastardy and wanted to take away the inheritance of a child of certain parents you had got to prove that he was a bastard, and if you failed he would succeed and you not. But it would apply only to persons who are living more or less in the marriage state, and it cannot apply to a case where the *de quo queritur* is whether there was a marriage or not. I am all the more satisfied about this, because I think if there was such a presumption as the learned counsel urged we should have heard a good deal more about it in some case where the stake was a great deal larger than in this case. We should have heard more about it, I think, particularly in the *Murthly* case. I remember hearing the *Murthly* case argued. It was one of the last that Lord Shand argued in the Court of Session. The question was whether Major Stewart and Miss Wilson were married persons or not. There was no question that there was a child, and there was no question that that child was the child of Miss Wilson and that the father was Major Stewart. But it never occurred to all the eminent people engaged in it—and the case went to the House of Lords—to say that the marriage between Major Stewart and Miss Wilson was made out because of the presumption of the legitimacy of the child. And, in truth, when you come to press it, it really seems to me to be an illustration of what is well known as arguing in a circle. If the question had arisen between James Deans and Hannah Andrews—if Hannah Andrews had brought a declarator of marriage against James Deans, surely it would have been neither here nor there to say: "Here is a child which you cannot deny that you are the father of; there is a presumption of his legitimacy, and therefore there is a presumption that we are married." And if she could not say that, isn't it almost a *reductio ad absurdum* that, if the child raised it, it would be able to prove a marriage which its parents could not prove? In point of fact I think in the end it comes to be precisely the same class of argument which Lord Macaulay ridiculed when he said that the Church was the true church because she had the apostolic succession, and that she had the apostolic succession because she was the true church.

On the whole matter, therefore, I agree with the Lord Ordinary, and I think the reclaiming note should be refused.

LORD JOHNSTON—I concur, and wish to add a very few words to what your Lordship has said. There are branches of the evidence which your Lordship has touched upon which have weighed very much with me in this case, particularly the correspondence which Lieutenant Deans had with his family. But there is another similar subject to which I shall afterwards advert.

James Deans, the alleged father, was born on 10th October 1797. He was therefore between twenty-two and twenty-three when James Adam Deans, whose legitimacy is in question, is alleged to have been born in Glasgow, namely, on 7th July 1820. There is nothing in the evidence to show that he had yet left his father's, the old adjutant's house, which was in Glasgow. Now the case for the claimants who are reclaimers is that the marriage had taken place, and that this child, alleged to have been born on 7th July 1820, was thus legitimate.

Now James Deans, the alleged father, was gazetted to the 92nd Highlanders on 20th April, but he did not join the depôt of his regiment, which happened to be at the Isle of Wight, until 9th August 1820, but in the interim was, so far as appears, still living in his father's house. Accordingly on the evidence he must have been in the same town where the mother and child were living at the time of the birth and for some little time afterwards. Moreover, it is undoubtedly in favour of the reclaimers that it is unexplained either in the evidence or in the military papers which are produced why it was that he was so long in joining his regiment. Of course it took a much longer time to reach the Isle of Wight from Glasgow than it would now, but that does not adequately explain the difference of time between the gazetting on the 20th April and the joining on 9th August 1820. And accordingly the suggestion is that he was in Glasgow looking after this young wife and the newly-born child. But starting with that, we have this accurately proved by the military records, that he joins in the Isle of Wight on 9th August 1820, that he remains in the Isle of Wight until 5th November 1821, that he sails for the West Indies, and, having joined his regiment, that he serves in the West Indies until 23rd August 1825.

Well, then, in light of these, consider first the correspondence to which your Lordship has referred. It extends from August 1820, when Lieutenant James Deans goes to the Isle of Wight, down to June 1825, which is just six weeks before his death. The letters produced are letters from him to his father and to his sister, and they are couched in such language and are written in such an open-hearted strain, as of a young man just starting in the world, and having recently joined his regiment, telling of the small details of his regimental life, and of the new scenes to which he is introduced, in a tone of such innocent confidence that it is barely possible to conceive—at least it is not natural to believe—that he had left Glasgow with (what I may call) a skeleton in his cupboard. Their whole complexion is difficult to reconcile with the idea of the recent marriage and the young wife and son deserted. For that must be the

inference from the second matter on which I shall say a few words, viz., the regimental accounts, which are extraordinarily complete.

James Deans was a young man without means who joined the army to live on his pay. He had not a farthing beyond. And both in his letters and in the pay-sheets it is made quite clear that his whole pay is accounted for as spent in necessary regimental purposes. There is nothing that can be taken hold of which bears the slightest indication of being a remittance to this country. If it had been otherwise it would have greatly supported the evidence adduced by the reclaimers. But taking it that the marriage is not registered—the birth, of course, could not be registered in those days—the baptism is alleged to have been registered, but if so it is not registered until 1827, when the child was seven or eight years old—that there are no letters produced addressed to the mother, and read these facts and the traditional evidence for the reclaimers—for that is its true character in the light of the correspondence and the regimental accounts to which I have referred—and the conclusion is I think inevitable that the reclaimers have failed to prove their case.

The LORD PRESIDENT intimated that LORD GUTHRIE concurred.

LORD KINNEAR and LORD MACKENZIE did not hear the case.

The Court adhered.

Counsel for Claimants (Reclaimers) James Deans and Others—Morison, K.C.—T. G. Robertson. Agents — J. & J. Galletly, S.S.C.

Counsel for Claimants (Respondents) W. C. Anderson and Others—Mercer. Agent —Alexander Stewart, S.S.C.

Counsel for Claimants (Respondents) Charlotte H. Bell and Others—M'Lennan, K.C.—Wilton. Agents—Gray & Handyside, S.S.C.

VALUATION APPEAL COURT.

Thursday, February 8.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

STEIN *v.* FALKIRK ASSESSOR.

Valuation Cases — Procedure — Appeal — Stated Case—Timeous Lodging of Cases —Preparation of Cases—Duties of Committee and Parties respectively.

Cases stated on appeal for the opinion of His Majesty's Judges must in each year be lodged by the clerk of valuation committees, if not by the 10th October, at least within a reasonable and short time thereafter, and must in any case be in the hands of the Inland Revenue before the date fixed for the sitting of the Valuation Appeal Court.

In the preparation of stated cases the valuation committee are alone responsible for the statement of their determination, and of the facts held by them to be proved, which latter may, however, be submitted to the parties for their observations thereon, so long as no undue delay is occasioned thereby. The parties to the appeal are respectively responsible for timeously lodging, with the clerk to the valuation committee, their reasons of appeal and answers thereto, to be appended to the stated case by the clerk.

This was an appeal against a determination of the Valuation Committee for the burgh of Falkirk with regard to the annual value of a public-house entered by the assessor in the valuation roll for the year ending 15th May 1912.

The annual sitting of the Valuation Appeal Court for the year was fixed by the Judges for 5th December 1911. The Court sat continuously from 5th to 15th December, and heard all the appeals which had been lodged prior to that period.

On 17th January 1912 the present appeal was lodged with the Inland Revenue by the Town Clerk of Falkirk.

A special sitting of the Court was held on 8th February 1912 in order to dispose of it.

On the calling of the case the Court expressed the following ruling as to the proper method of preparation of stated cases on appeal, and as to the date on which they should in future be lodged:—

LORD JOHNSTON—It is necessary, in consequence of the delay which has taken place in bringing this case before the Court, to say something on the subject, not only for the benefit of the Town Clerk of Falkirk, but for the benefit of county and town clerks generally.

We would, in the first place, point out that the Valuation Act of 1854 (17 and 18 Vict. cap. 91), sec. 12, specially provides that the roll, when all appeals have been disposed of, is to be authenticated as therein provided, and is when so completed to be the valuation roll for the year from Whitsunday to Whitsunday. It is manifest that though there are many purposes for which that roll is necessary, the primary purpose is that of the assessment and collection of the year's taxes, and it would be a very strange thing if that roll was to be in a state of incompletion down to such a point of time as the months of February or March and even later, when the year of assessment ends in May. We are of opinion that the statute contemplated something very different.

We need not refer to the provisions with regard to the assessor making up his roll. But the Valuation Act of 1854, secs. 9 and 13, the Valuation Act of 1857 (20 and 21 Vict. cap. 58), sec. 2, and the Valuation Act of 1879 (42 and 43 Vict. cap. 42), sec. 6, provide for appeal from the assessor to the commissioners of supply and the magistrates of the burghs—now to the valuation committees in counties and in burghs