a priori to say how the duty of the Board should be discharged would be in my opinion wrong.

LORD NEAVES—I entirely concur. There are some of these declaratory conclusions that we would require to be careful about adopting, for they could not be entertained without having all the ratepayers here. I think the statute gives us the true criterion. If any ratepayer thinks this has been a surcharge, let him say so. He is not entitled to get behind the scenes. In imposing the assessment the assessor must in some way or other proceed on the Valuation Roll, and the suspender is presumed to know the Valuation Roll for it is made up at his sight. The true deductions here, I think, are less than those given. As to the rest, it just comes to this, that the statute must be observed. There is no use in our declaring that. If by any means the assessor arrives at a sound conclusion, we cannot interfere with the manner in which he reaches it.

LORD COWAN—I have formed the same opinion on the same grounds; and as your Lordships have already so fully stated these views, I shall not detain the Court by recapitulating them. The only view in which the declarator would be justifiable, would be if the Court held the suspension incompetent. But the duty of the suspender was to have brought a reclaiming note and not a declarator.

The respondents were found entitled to expenses, subject to deduction of one-third.

Agents for Suspender—Maitland & Lyon, W.S.

Agent for Respondents—Alexander Morison, S.S.C.

Wednesday, Oct. 20.

SMITH *v.* DICK AND OTHERS.

Parent and Child—Declarator of Bastardy—Presumption—Onus—*Repute.* Circumstances in which *held* that the pursuer of an action of declarator of bastardy had discharged the *onus* lying upon him to overcome the legal presumption of legitimacy and had established the illegitimacy of a party deceased.

This is an action of declarator of bastardy at the instance of William Ebenezer Smith of the city of Aurora in the county of Kane and state of Illinois in the United States of America, against the known relatives of the late Mrs Janet Wilkie or Smith. The Crown is also called as *ultimus hæres* of the deceased. The conclusions of the action are as follows:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the now deceased Janet Wilkie or Smith, sometime wife of the also now deceased Henry Smith, photographic artist in Edinburgh, was a bastard or natural child of the now deceased Helen Galt, thereafter Wilkie, daughter of the late David Galt or Gaat, carter, Grange Loan, Edinburgh; and that the said Janet Wilkie or Smith was not the lawful child of the also now deceased Robert Wilkie, weaver, sometime residing in Kay's Court, Crosscauseway, Edinburgh, and thereafter in New Street there; and that she had no right or title to any of the legal, civil, or other rights which would have been competent to her had she been the lawful child to the said Robert Wilkie; and that having predeceased her husband, the said Henry Smith, without issue, the conveyance in a general disposition and settlement executed by the said deceased Henry Smith upon the 14th day of November 1860, and recorded in the books of Council and Session upon the 21st day of February 1868, whereby he gave, granted, and disponed to and in favour of the said Janet Wilkie or Smith, and her heirs and assignees whomsoever, heritably and irredeemably, his whole heritable and moveable estate of every description has lapsed and become inoperative and ineffectual; or otherwise it ought and should be found and declared, by decree foresaid, that the conveyance contained in the said general disposition and settlement was revoked, recalled, and cancelled, by a codicil thereto annexed, executed by the said Henry Smith on 8th February 1868, and recorded along with the said general disposition and settlement, in the books of Council and Session, of the date foresaid." The pursuer made the following averments as to the status of the said Janet Wilkie or Smith: "(3) The said Janet Wilkie or Smith died on 2d February 1868 (six days before her husband), without leaving lawful issue. She was the illegitimate daughter of Helen Galt or Gaat, daughter of the late David Galt or Gaat, carter, Grange Loan, Edinburgh, and was born there in or about the month of February 1821. Her father's name was Anderson, a mason or marble cutter, in Edinburgh, who absconded at the time of her birth and has not since been heard of. At the time of the said birth the said Helen Galt was unmarried, and resided in family with her father, David Galt, in a small cottage at Grange Loan, near Edinburgh. The said ——— Anderson and Helen Galt were never married, and never lived together as habit and repute married persons. The said child was always known and reputed to be the illegitimate daughter of the said Helen Galt, and was never legitimated by the subsequent marriage of its said parents. (4) In the month of September 1821, the said Helen Galt was engaged by the late Thomas Ireland, accountant, Edinburgh, who was then residing at Blackford farmhouse, to act as nurse for his son, George Ireland, who was born on the 9th day of September in that year. The said Helen Galt continued in the employment of the said Thomas Ireland in that capacity for upwards of two years. It was well known at that time that she had recently given birth to the said illegitimate child, and that it was procreated between her and the said ——— Anderson, while no lawful marriage subsisted between them. After leaving Mr Ireland's service, the said Helen Galt was, for the period of one year, engaged as a general house servant in Watson's Hospital. (5) On the 27th day of April 1824, and about three years after the birth of her illegitimate child, the said Helen Galt was married to Robert Wilkie, weaver, Shoemaker's Close, Edinburgh, at that time a widower, and her child thereafter resided in family with them, and went by the name of Janet Wilkie. She was not the child of the said Robert Wilkie, however, and was born during the life of Isabella White or Wilkie, his first wife, who died upon the 25th day of August 1821, about six months after the birth of the said Janet Wilkie or Smith. The said Helen Galt or Wilkie had no children by her said husband, and she was not married after his death. Her illegitimate daughter, the said Janet Wilkie or Smith, has no 'heirs or assignees,' and the conveyance in the said general disposition and settlement has lapsed and become inoperative and ineffectual, in consequence of her having predeceased her husband, the said Henry Smith, without leaving lawful issue. (6) The defender, the

said Mrs Janet Wilson or Dick, is a cousin by the mother's side of the said deceased Janet Wilkie or Smith, and the defender, the said Joan Wilkie or Park, claims to be the only surviving sister of the said deceased Robert Wilkie. The other defenders, the said David Ridley, James Ridley, and Joseph Ridley, are children of the deceased Mary Wilkie or Ridley, wife of James Ridley, boat builder, Leith (also now deceased), who is also said to have been a sister of the said Robert Wilkie. The defenders are the only known relatives of the said Janet Wilkie or Smith. The Crown has been called for its right, if any, as *ultimus hæres* of the said deceased Janet Wilkie or Smith."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—The Lord Ordinary having heard Counsel for the parties, and considered the argument and proceedings, including the proof, finds, as matter of fact, that the deceased Mrs Janet Wilkie or Smith, whose legitimacy is in question, was, during her life, generally reputed to be and possessed the *status* of a lawful daughter of Robert Wilkie and his wife Nelly or Helen Galt or Wilkie: Finds farther, that the pursuer has failed to prove that the said Mrs Janet Wilkie or Smith was not the lawful daughter of the said Robert Wilkie and Nelly or Helen Galt or Wilkie: Finds, therefore, that the defenders are entitled to absolvitor from the first alternative conclusions of the Summons, which proceed on the assumption or footing that the said Mrs Janet Wilkie or Smith was a bastard. Assoilzies them accordingly, and decerns: Appoints the case to be enrolled, that the remaining conclusion of the Summons may be taken up and disposed of, reserving, in the meantime, all questions of expenses.

"*Note.*—That Mrs Janet Wilkie or Smith was, down to her death, reputed to be, and possessed the *status* of, a lawful daughter of Nelly or Helen Galt and Robert Wilkie, is, the Lord Ordinary thinks, clear from the proof. And if this be so, the *onus probandi* is on the pursuer to establish that she was a bastard. The authorities bearing on this point are referred to by Mr Fraser (Domestic Relations, vol. ii., p. 8), and they show that the *onus* which must be held to lie upon the pursuer cannot be satisfied except on very satisfactory and conclusive grounds. In the case of *Walker* v. *Walker*, 23d January 1857, 19 D. 290, the legitimacy of a person was held to be established, although his mother was only married to his father after his birth, and although the mother, after her husband's death, had emitted a declaration of his illegitimacy.

"In the present case, the evidence adduced by the pursuer is entirely of a hearsay character, and not, in any view the Lord Ordinary can take of it, of a very reliable nature. It is true that some of the witnesses speak to having been told by Mrs Smith's mother that she was illegitimate, while others speak to having been told so by Mrs Smith herself. But nearly all of them concur in stating that such communications were made to them, not for the purpose of disturbing the *status* and reputation which Mrs Smith possessed, of being the lawful daughter of Robert Wilkie, but, on the contrary, for the purpose, as they say, somewhat oddly and inconsistently, of preventing any such result. The precise words used by Mrs Smith and her mother in the communications referred to are not given, and it is not improbable, the Lord Ordinary thinks, that, in so far as they may be founded in truth at all, they arise out of, and had reference to, the circumstance, in support of which there is a good deal of evidence, that Mrs Smith, although the child of Nelly or Helen Galt and Robert Wilkie, may have been born before the marriage of these persons. Some of the witnesses, no doubt, say not only that Mrs Wilkie mentioned to them that Robert Wilkie was not the father of Mrs Smith, but that her father was John Anderson, a marble-cutter. On the other hand, however, other of the witnesses state that they never heard the name of the father mentioned; while one of them says that she heard he was a person of the name of Wilson.

"The Lord Ordinary can give no effect to the attempt of the pursuer to show that Robert Wilkie was a married man at the time Mrs Smith was born, there being nothing like sufficient or reliable evidence to that effect. The Robert Wilkie referred to in the certificate of the burial of Isabella White, No. 13 of process, has not been proved to be the Robert Wilkie who married Helen Galt.

"On a consideration of the whole proof, and keeping in view, 1st, that Mrs Smith, if she was not born in wedlock, lived with her mother and Robert Wilkie from her infancy till her own marriage; 2dly, that during all that time she went by the name of Janet Wilkie, and was never known to have had any other name; 3dly, that she was always treated and talked of by Robert Wilkie as his child; and 4thly, that she was entered in his family bible as such;—the Lord Ordinary cannot arrive at any other conclusion than that the pursuer has failed to establish that Mrs Janet Wilkie or Smith was a bastard; and he has accordingly assoilzied the defenders from the conclusions of the summons which have that for their object."

The pursuer reclaimed.

SOLICITOR-GENERAL and ORPHOOT for him.

GIFFORD and HARPER in answer.

At advising—

LORD JUSTICE-CLERK—We have to consider the argument we have heard upon this reclaiming note, and the statements in support of an application for additional proof and alteration of the record. In regard to the last of these matters, I shall not indicate an opinion adverse to the parties; but in the position of the case that is not necessary, for I have a strong impression that the interlocutor of the Lord Ordinary is not well founded upon the evidence. This is a declarator of illegitimacy, and undoubedly in every case there is a presumption of legitimacy, and the *onus* of proof lies with the party alleging the reverse. The presumption of legitmacy may be accompanied with a presumption from reputation, and the defenders in this case stand upon that.

I am of opinion that the pursuer has overturned the presumption, and has sustained the burden of proving the illegitimacy of the party in question. In the first place, it is quite clear that this person, Janet Wilkie, was born out of wedlock; there can be no question as to that. It seems to me that the admission of that fact has a material bearing on the question of legitimacy, on the legal presumption of legitimacy, because, if the case of legitimacy is rested on legitimation by subsequent marriage, the question never arises of the paternity of the child. That is a matter which depends on evidence, and there is nothing presumed in that direction. No doubt reputation and acknowledgment may have a material influence in considering that evidence. I am referred by my brother Lord Neaves to the case of *Innes*, in the House of Lords, in 1837, reported in 2 Shaw Maclean, p. 417, where that very matter is adjudi-

cated upon. The rubric of the case is as follows:—"In a question as to the paternity of a child born before the marriage of the alleged father with the mother, there is no presumption that he is the father; but the paternity must be proved." Therefore, I think that the presumption of legitimacy is considerably shaken by the fact that the child was born illegitimate.

The next question is one of status, as founded on reputation. But, on considering the evidence, I do not think there is undivided evidence of reputation; at the very least the reputation is divided. No doubt the child lived with Wilkie, but that does not go very far, and the neighbours around did not hold the child to be legitimate, so that, upon the whole, there is not much to be rested on legal presumption, and the question therefore is, what is the import of the proof.

I have no hesitation in saying that the evidence is conclusive. In the first place, it is clear that this child was born in 1821, illegitimate, before the marriage of its mother, and that is a fact proved by extrinsic evidence and not by mere hearsay. And then there is, in addition, the most important evidence that Mrs Wilkie stated to several witnesses, not only that the child was illegitimate, but was not the child of her husband. Judging of this as a matter of evidence, and looking to the reasons stated for the disclosures made to friends, I see no room to doubt her testimony. I hold the import of the proof therefore to be, both that the child was born before the marriage, and that the husband was not the father. There is unquestionably a matter beyond that, which it is not necessary to deal with as a ground of judgment, but it corroborates the result of the evidence. I think it is reasonably proved that at the date in question Wilkie was a married man, and therefore there is a presumption of law that he was not the father. The Lord Ordinary says that certificate was not sufficient. I don't say that if the question had related to the validity of the first marriage it would have been enough. But it is enough for the purposes of this case.

There might have been important questions arising out of the fact of the first and alleged second marriage of Wilkie. But whatever the law might have been if it were proved that Wilkie was the father of the child, he being married, and afterwards married again and acknowledge the child, it is unnecessary to determine, because by the evidence it is proved that Wilkie was not the father of the child. I would therefore be prepared to propose to your Lordships that the interlocutor of the Lord Ordinary should be altered, and that we should find that the deceased Mrs Jane Smith or Wilkie was illegitimate.

LORD COWAN—I am of the same opinion on the first ground stated by your Lordship. The *onus* of proving illegitimacy lay with the party alleging it, and I think he has discharged it. With reference to the proposal of additional proof upon *res noviter*, I beg to reserve my opinion on the question, not only against but for receiving it.

LORD NEAVES concurred.

Agent for Pursuer—John Keegan, S.S.C.
Agent for Defender—M. Lawson, S.S.C.

Thursday, October 21.

FIRST DIVISION.

ALLAN *v.* KERR AND ANOTHER.

Caution—Postnuptial Deed—Revocation—Trustees.

By postnuptial deed a lady and her husband assigned to trustees her right to a bequest in her favour by her grandfather, directing the trustees to pay the interest of the money to the spouses, and the survivor of them, and the principal to the children of the marriage. Thereafter the spouses, with the concurrence of the only child of the marriage, executed a revocation, which the trustees declined to recognise, and, at the bar, offered caution for repayment in the event of other children being born. Caution refused, and action dismissed.

By last will and testament, dated 5th February 1818, George Simmers, residing in Aberdeen, bequeathed the residue of his whole estate and effects to his daughter, Mary Simmers or Adamson, in liferent, and her children in fee. Her only child, Mary Adamson, married Hugh Allan, cabinetmaker in Aberdeen; and on the 1st February 1853, Mr and Mrs Allan assigned to trustees Mrs Allan's whole interest in her grandfather's bequest. The trustees were directed to pay the interest of the money to Mrs Allan during her lifetime, and thereafter to her husband, if he survived her, with power also to advance not more than half the principal sum to Mrs Allan, or Mr Allan if he survived her. But it was expressly declared that this was to be done for the sake of the better maintenance of the spouses and the children of the marriage, and that Mr Allan's interest therein was not to be assignable nor affectable by his debts and deeds. The fee was to belong to the survivor of the spouses, if there were no children of the marriage; but if there was any child, or the issue of any child, then the fee was to go to such child or children on the death of the survivor of the spouses, majority being the time of payment. On 8th July 1868, Mr and Mrs Allan, with the consent and concurrence of their daughter Mary Simmers Allan, executed a revocation of this trust-deed and assignation; but as the trustees refused to denude themselves of the trust, Mr and Mrs Allan, with their daughter's concurrence, brought an action of declarator of the validity of the revocation.

They contended that, as Mrs Allan was forty-nine years, and therefore unlikely to have more children, and as the daughter was of full age, and gave her consent, that the only persons having a *jus crediti* in the trust-estate were themselves, and that the deed was therefore revocable by them.

The trustees replied that it was not certain that the purposes of the trust had been fulfilled. The pursuers might have more children, or, even if they had no more, if their daughter left children, and died before her parents, the succession would open to the children, and not to their mother, who had given the consent to this revocation. The trustees further contended, that the trust-deed and assignation was a delivered deed, and was not *suâ naturâ* revocable.

The Lord Ordinary (MURE) assoilzied the defenders, holding that though there was a *jus crediti* in the fee of the trust-estate in the child of the pursuers' marriage, and her issue, yet that no right to any share of it vested during the lifetime of