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REPORT

OF

THE PROCEEDINGS

OF THE

HOUSE OF LORDS

ON THE

CLAIMS TO THE BARONY OF GARDNER;

WITH AN

APPENDIX,

CONTAINING

**A COLLECTION OF CASES ILLUSTRATIVE OF THE
LAW OF LEGITIMACY.**

BY DENIS LE MARCHANT, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

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G. WOODFALL, ANGEL COURT, BIKINER STREET, LONDON.

TO
THE RIGHT HONOURABLE
LORD CARRINGTON,
ETC. ETC. ETC.

MY LORD,

IF I had to seek a reason for inscribing this Work to your Lordship, I should find one in the interest, which your Lordship must feel in an account of proceedings undertaken at your own instance, and at your own risk, on behalf of your grandson. Need I add that the unvarying kindness which I have myself at all times experienced from your Lordship, points you out as the person to whom alone, I ought to offer this public testimony of the regard and esteem with which

I have the honour to be,

Your Lordship's

Faithful and obliged Servant,

DENIS LE MARCHANT.

LINCOLN'S INN,
JULY 28, 1828.

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ADVERTISEMENT.

THIS Work was projected during the proceedings which it professes to report. It varies little from similar publications, except in the mode in which it presents the speeches of the counsel. One of these gentlemen addressed the House on the opening and the summing up of the evidence for each claimant, and the importance of the case, as well as the quantity of the evidence, required them to enter into considerable details. In fact, the short-hand writers' notes of their labours would fill all the following pages*. The Editor therefore has ventured to class the principal arguments for the respective claimants under two heads, and to state their purport in his own language. Wherever there was an opportunity of preserving the expressions actually used, it has not been overlooked. The speech of the Attorney-General being in the nature of a judgement, no other liberty has been taken with it, than by the omission of some quotations which he made from works already in print.

The Preface is devoted to an historical and critical review of the legal principles involved in the case. It may be con-

* The short-hand writers' notes of the proceedings filled more than a thousand folio pages. The expenses incurred by the petitioner exceeded 5000*l.*, and a singular question subsequently arose how they were to be defrayed. By one instrument a large property was vested in trustees for the eldest son of Lord Gardner who should attain twenty-one; and by another instrument the same trustees were empowered to apply a certain sum towards placing the petitioner "out in the world, or obtaining any office, commission, or employment, or otherwise for his preferment or advancement." Lord Gardner, as it will be seen afterwards, was twice married. The only issue of his first marriage was the claimant, whose illegitimacy was established by these proceedings. The only male issue of his second marriage was the petitioner. At his Lordship's death both the children were minors; and it was found that no evidence of the illegitimacy could be perpetuated, because the subject in dispute was a peerage and not property. This distinction, the wisdom of which I shall leave others to defend, might have postponed the trial until the witnesses to prove the illegitimacy were all dead; and, in fact, no steps could be taken until twenty-one years after the date of the facts to be proved. The child of the first marriage then coming of age the trustees were at liberty to act. Fortunately none of the witnesses had died, and fortunately the indefatigable exertions of the petitioner's agent (Mr. Freshfield) to trace them were successful. An engagement was entered into by Lord Carrington with the trustees, that they should present a petition on behalf of the petitioner, the expenses of which, in case of failure, should be defrayed by his Lordship. It will surprise the unlearned reader to be told, that some of the most eminent lawyers of the present day were of opinion that to pay the expense of these proceedings to which the petitioner was indebted for his rank and wealth would amount to a breach of trust. The Editor had the misfortune to think differently, and he does so still.

sidered as a supplement to the arguments of the counsel, and it would have been divided into notes, and connected with the text by way of reference, had not the Editor been apprehensive of confusing the reader by the repeated interruptions, which such an arrangement would have made inevitable.

The Appendix contains several cases upon adulterine bastardy never before published. One of them (the Banbury Peerage claim) is the authority on which the moral evidence of the bastardy was held to be admissible in the following proceedings. It has been compiled from notes made at the time by several gentlemen, who attended the proceedings in an official capacity. Of these sources of information, the most valuable was communicated to the Editor by Mr. Bigland, of the Herald's College, who, with great liberality, allowed him to make the most ample extracts from it. This indulgence is the best security for the authenticity of the report, and deserves the Editor's public acknowledgements.

These are not the Editor's only obligations. Mr. Townshend favoured him with the notes and collections of his father, the late Windsor herald, who was professionally employed by the claimant, General Knollys; and Mr. Bicknell, who was solicitor for the same party, gave him free access to the papers in the claim, with permission to avail himself of the manuscript notes with which they were accompanied. The latter, without being intrinsically material, served to confirm the accuracy of the documents of which he was already in possession.

The Editor is unwilling to associate the illustrious names of the Earl of Eldon and Lord Redesdale with any production of so obscure an individual as himself, but he cannot deny himself the gratification of thanking their Lordships for the assistance, with which they have honoured his attempt to prepare a correct report of their judgements, in this memorable trial.

19, OLD SQUARE, LINCOLN'S INN,
28 JULY, 1828.

PREFACE.

IT was the object of the judicial investigation which forms the subject-matter of the following pages, to determine the right to an English Peerage,—and the nature of the question at issue, was the degree of evidence which the English law deems sufficient, for illegitimizing children, born during the matrimony of their maternal parent.

The subject of adulterine bastardy^a, as it is

^a Had this work been intended for general readers, I should have endeavoured to explain the properties of adulterine bastardy, by an historical disquisition on the relation of parent and child. It appears to me that the *civil* importance of this relation has never been sufficiently appreciated. Some writers have confounded it with the obsolete theory of patriarchal government, whilst others have confined its influence to the limited circle of domestic life. They forget that it is interwoven with the various institutions of society, and that it is susceptible of precisely similar modifications. In the

technically called, has been much considered in other countries besides our own, and perhaps some of the reasonings which are subsequently detailed, will be elucidated, if a few remarks are premised which may shew how

more barbarous communities, it corresponds with that instinct, which is the chief ornament of the animal world. The offspring of necessity, it lasts no longer than the wants, it is designed to supply. As man grows more civilized, it assumes a more important character, and brings the union of the sexes within the provisions of the law. This is the first great epoch in the moral history of our species, and produces the recognition of the ties of consanguinity and affinity. The rights of property become more clearly ascertained, the distinctions between individuals grow more determinate, and both are perpetuated by the establishment of hereditary succession. Marriage, originally the protector of the relation of parent and child, is elevated in the progress of society from rudeness to refinement, until becoming one of the land-marks of jurisprudence, it marks the civil identity of every member of the state, and constitutes his qualification for the enjoyment of the most valuable municipal rights. Bastardy and its attendant disabilities result from this triumph of marriage. The French philosophers, in their arguments for the expediency of promoting the unrestrained commerce of the sexes, and the absolute equality of individuals, overlooked the connexion, subsisting between those objects and the relation of parent and child. Plato had more sagacity. His intellectual republic, which they imitated with such servility, had the absence of that relation for its basis.—Πολιτεία, l. 3.

it has been treated by civilians and foreign writers.

The earliest authority on this subject to which we can safely refer, is contained in the Digest, from whence it has descended into most of the codes of modern Europe. The same definition of legitimacy, though expressed in different terms, is given by two of the great Roman jurists. Paulus^a declares "marriage to be proof of paternity", whilst,

^a *Pater est quem nuptiæ demonstrant. Dig. L. 2. T. 4. s. 5.* This passage occurs in the title "*De in jus vocando*", or, as it is interpreted by Huber, *Praelectiones*, l. 459, "Concerning the right of citing an opponent before the judicial authorities for the purpose of trying the question in dispute." It declares that "a son shall not cite his mother, for she may be always ascertained, though she should have conceived amidst promiscuous embraces. But the father is proved by the marriage." "*Filius matrem in jus non vocabit, quia semper certa est, etiam si vulgo conceperit.—Pater vero is est quem nuptiæ demonstrant.*" The subject of the title being wholly technical, and quite foreign to that of legitimacy, the expression quoted can scarcely be considered otherwise than subordinate to the definitions of legitimacy in the preceding book. It is illustrative of a great legal distinction that prevails between the sexes, and nothing more. The demonstration of paternity created by marriage is only presumptive, or it would not be liable to be defeated upon proof of the husband's impotency or non-access.

tion of legitimacy. The Decemvirs^a determined that ten months constituted the extreme limit to which it could be protracted, and we find Paulus^b to have been of the same opinion. Justinian^c enacted that the child of a widow born in the eleventh month after her husband's decease was illegitimate. Paulus^d

^a Decemviri in decimo mense gigni hominem, non in undecimo. Aul. Gellius, iii. c. 16.

^b Post decem menses mortis natus, non admittetur ad legitimam hereditatem. Dig. L. xxxviii. T. 16. s. 3. Godof. in locum.

^c De muliere quæ peperit undecimo mense. Novel de Restitutionibus, 33 Tit. 7. c. 2. It has been contended, indeed, that under this Novel a child could not be illegitimate, unless its birth happened after the completion of the eleventh month—"undecimo mense perfecto". If such a construction be correct, the title ought to be "De muliere quæ peperit duodecimo mense." "Natum undecimo mense a morte patris non dici filium justum habet (Novel de Rest.), nec ad hereditatem admittetur." Zoetius in Pan. L. xxviii. T. 2. n. 56. p. 549. Vide also Gotofred's learned notes on this Novel.

^d Septimo mense nasci perfectum partum jam receptum est propter auctoritatem doctissimi viri Hippocratis, et ideo credendum est eum qui ex justis nuptiis septimo mense natus, justum filium esse. Dig. L. i. T. 5. s. 12. De eo quidem qui centesimo octogesimo secundo die natus est, Hippocrates scripsit; et Divus Pius pontificibus rescripsit justo tempore videri

declares in the Digest, upon the authority of Hippocrates, that the period of gestation could not be *less* than seven months; and he has stated the same fact in another work ^a.

The general rule of law, or presumption in favour of legitimacy being so strong, the evidence to disprove the existence of sexual intercourse between the husband and wife, was necessarily required to be conclusive. No fact that was reconcileable with the child's legitimacy, was allowed to impeach it. The sentence of adultery against the wife was held to

natum, nec videri in servitutem conceptum, cum mater ipsius ante octogesimum secundum diem manumissa esset. Dig. L. xxxviii. T. 16. s. 33.

Reference to the period of gestation occurs frequently in the works not admitted into the Digest. "At hi qui legitime concipiuntur, ex conceptionis tempore statum sumunt." Gaius, L. i. 89.

It appears from a passage in Esdras, iv. 40. that the Jews considered a woman incapable of carrying her child beyond the beginning of the tenth month. Among the Lacedæmonians, the child born after the tenth month was illegitimate: Plut. in Alcib.

^a Septimo mense natus matri prodest, ratio Pythagoræi numeri hoc videtur admittre: et aut septimo pleno, aut decimo mense, partus maturior videtur. Pauli Sententiæ, L. ix. S. 152. l. 2.

be inoperative against her child^a, as her guilt and his legitimacy were not inseparable. The declaration of the husband or the wife against the legitimacy of the child^b, did not possess the same weight with the testimony of either of them in its favour^c. Even the deposition of the mother before the judge that the child was the fruit of an illicit connexion did not determine the status of the child^d. The *repu-*

^a Dig. L. xlviii. T. 5. s. 11. Quæ propter impuberem filium vult dilationem ab adultero impetrare an debeat audiri. Respondi non videtur mihi confugere ea mulier ad justam defensionem, quæ ætatem filii prætenderet ad eludendam legitimam accusationem, *nam non utique crimen adulterii quod mulieri obijcitur infanti præjudicat, cum possit et illa adultera esse, et impubes defunctum patrem habuisse.*

^b Sed si parens neget filium, idcircoque alere se non debere contendat, vel filius neget parentem, summatim judices oportet super eâ re cognoscere: si constiterit filium vel parentem esse, tunc ali jubebunt, cæterum si non constiterit, nec decernent alimenta. Dig. L. xxv. T. 3. s. 5.

^c Etiam matris professio filiorum recipitur. Dig. L. xxii. T. 3. s. 16. Grande præjudicium affert pro filio professio patris. Dig. L. xxv. T. 3. s. 1.

^d Mulier gravida repudiata filium enixa absente marito ut spurium in actis professæ est, quæsitum est an is in potestate patris sit, et matre intestata mortua jussu hæreditatem matris adire possit, nec obait professio a matre irata facta. Respondit veritate locum superfore. Dig. L. xxii. T. 3. s. 29.

diation of the child by the husband (whether verbal or written), or his disinheriting the child by will, on the ground that he was not its father, did not constitute the child a bastard, or bar any of its legal rights. The question of legitimacy was not to be thus decided. The truth was to be ascertained in the mode pointed out by law^a. Cases, however, might occur in which the judge, though not satisfied of the child's legitimacy, could decree the husband to be answerable for maintenance, and this decree for maintenance was wholly independent of the paternity; a clear distinction being recognized between a title to maintenance and to legitimacy^b.

^a Si quis ita scripserit ille quem scio ex me natum non esse, exhæres esto: hanc exhæredationem ita nullius momenti esse ait, si probatur ex me natus. Dig. L. xxviii. T. 2. s. 14.

Idem est si ita dixerit ille illius filius exhæres esto, patrem ei adulterum per errorem adsignans. Dig. L. xxviii. T. 2. s. 145.

^b Meminisse autem oportet et si pronunciaverint ali operere, attamen eam rem præjudicium non facere veritati, nec enim hoc pronunciatur filium esse, sed ali debere. Dig. L. xxv. T. 3. s. 5.

Idem Julianus scribit, si uxore denuntiante se prægnantem maritus non negaverit, non utique suum illi partum effici: cogendum tamen alere.—Ex his apparet sive uxor omiserit

When the study of the civil law engrossed the attention of all the learned men in Europe, a difference of opinion arose upon the construction of those passages in the Digest which relate to the force of the presumption in favour of legitimacy.

Opinion of
some ci-
viliana.

It was contended on the one hand, that although neither the wife's adultery, nor the repudiation of the child by the husband and wife, ought to be conclusive against the legitimacy, yet that these facts, combined with the common opinion of the world, the education, maintenance, and naming of the child by the adulterer, or, in short, with any conduct of the husband, the wife, the adulterer, or the child, tending to create the moral conviction that the child was the offspring of the adulterer,

quæ eam ex senatusconsulto observare oportuit, nihil præjudicare filio si filius est, non tantum in jure sui, verum ne in alimentis quidem, secundum Divi Pii rescriptum; sive maritus neglexerit facere quæ ex senatusconsulto debet: natum cogitur omni modo alere; cæterum recusare poterit filium. Dig. L. xxv. T. 3. s. 1.

The French lawyers consider the tit. de Agnoscendis Liberis as a proof that the civil law admitted illegitimacy to be established on circumstantial evidence. Plaidoyer sur le Sieur de Vinantes, Œuvres d'Aguesseau.

rather than of the husband, were fatal to the legitimacy^a.

This view of the law seems to be warranted by the expression of Ulpian, "that proof of "the husband's not having had sexual intercourse with his wife, either from illness or "*any other cause*," will bastardize the child. This clearly cannot be confined to a physical cause, such as absence, which has before been mentioned as conclusive; so that we must either admit a tautology, or infer that a *moral* cause would come under this designation. The conduct of the parties may establish the absence of sexual intercourse, as incontrovertibly, as can be done by medical evidence of physical inability, which being often of a temporary nature, and always a subject of se-

Observations on their opinion.

^a The opinions to this effect are collected in Menochius de Præsumptionibus, folio, l. 6. p. 54, and also in Menochius de Arbitriis Judicum, p. 253. These learned works, and the Concilia of the same author in seven volumes folio, contain a mass of information upon the civil and canon law. They have been quoted by the late C. J. Mansfield from the bench in terms of the highest commendation. Mascardus de Probationibus, c. 790. may also be most usefully consulted. The title Filiatio an probetur ex nominatione parentum, c. 791, is very full and comprehensive.

crecy, is incapable of being proved, without considerable difficulty. Moreover this moral or circumstantial evidence, so far from being stated to be inadmissible in cases of this description, appears to have been indispensable, for "the birth of the child in the husband's house, and the notoriety of such birth (in "domo natus, vicinis scientibus)," are the instances selected by Ulpian, as insufficient to supply the defect of title, caused by the absence of sexual intercourse. This selection must have arisen from their forming the most important part of the evidence, in support of the legitimacy. Why then should not the want of them, be an equally strong argument to oppose it?

Opinion of
other ci-
vilians.

Some writers have treated the definition of legitimacy contained in the Digest as a legal fiction; which, far from putting any limit, was wholly subordinate, to the investigation of truth*. They divided the *proof* of legitimacy into three branches: 1. conclusive; 2. pro-

* Opponitur quòd supra filiationem non potest dari definitio certa cùm sit impossibile sciri quis sit filius. Non definitur filius secundum veritatem, sed secundum fictionem sui præsumptionem. Balbi. Consilia, C. 437.

Quæ major probatio et urgentior veritatis demonstratio ha-

bable; 3. presumptive^a. The first embracing the relation between the mother and the child, and therefore admitting of no dispute; the second arising from the birth of the child as the husband's child, in the husband's house; and the third to be collected solely from presumptions. The presumption in favour of legitimacy was expressly declared (in this system) not to be a *presumptio juris et de jure*, but one that was liable to be controverted^b: nor was the proof necessary to controvert it required to be of the highest order; for if a wife lived in comparative dis-

beri potest, illa quæ ab ipsa naturâ provenit! Nec aliquâ ratione improbari potest. Menoc. de Arb. Jud. 252.

^a Triplicem esse filiationis probationem, necessariam, probabilem, et præsumptivam: necessariam quoad matrem intelligimus, quæ semper est certa—probabilem quoad patrem, cum domi natus est filius—præsumptivam quæ ex conjecturis colligitur. Menochius de Arbitriis Judicum, p. 250.

^b Illud tamen non concedo quod tradunt Marsil. in prima, s. l. in fin. de quæst. Boer. 299. n. 9. hanc præsumptionem esse juris et de jure, nam falsum hoc est, id quod scriptum reliquit Emanuel Costa Lusitanus in l. Gallus, et quid si tantum in 4 par. n. 45. de lib. et posth. Est enim præsumptio juris quæ probationem in contrarium admittat, quemadmodum L. i. de lib. agnoscendis, et L. iii. si mater ff. de Carbon. Edic. Menochius de Arb. Jud. 253.

union with her husband whilst she kept up a constant intercourse with an adulterer, the child was ascribed to the adulterer, rather than to the husband, on the ground that it was principally the constant intercourse (*assidue moratus*) between the husband and wife that created the obligation of the husband to recognize the child^a.

Such were the arguments used for a liberal construction of the definition.

Contrary
opinion of
civilians.

It was urged, on the other hand, by some very distinguished civilians, that the presumption ought to be conclusive, except upon proof of the husband's impotence or non-access. They denied the justice of allowing an adul-

^a *Limito locum sibi præsumptionem non vindicare si maritus raro adiret uxorem, quia tunc præsimitur filius potius adulteri, qui frequens cum muliere versabatur, quàm mariti, ita tenet Alciat d. tract. de præs. reg. 3. præ. 37. n. 11. ponderans tex. in d. l. filiis, ubi lex considerat quod maritus assidue versatus cum uxore, et ex hâc assiduâ consuetudine adulteri cum muliere, potius præsumi adulteri quàm mariti filium tenet Paris. in Consil. decimo nu. 34. volum. 3. Mascardus de Probation. Conc. c. 759.*

Limito hujusmodi extensionem quando cum illâ communi reputatione concurrat etiam educatio, tractatus, et nominatio tanquam filii adulteri, hoc nempe casu cessaret illa præsumptio de marito, et præsumeretur adulterinus, ita cautum est ab Anchattâ, Mascardus, c. 789. and the authorities there cited.

terer to defeat the legal object of marriage, which would happen, if his acts towards the child, could deprive it of the status attendant on its birth ^a. The law had, under certain circumstances, cast the obligation of paternity on the husband, and he was precluded from divesting himself of it. His testimony could only be received when in support of the presumption; and his wife laboured under the same disability. Where, indeed, the birth of the child during marriage, could not be established; and the title to legitimacy rested on the conduct of the husband and the wife, they were at liberty to explain or to contradict the acts imputed to them, and any evidence to disprove their recognition of the child was admissible. The passages in the Digest which appear to sanction this species of evidence, are all founded on the assumption that the question of legitimacy cannot be decided on the usual grounds, viz. birth, &c. but resort must be had to circumstantial evidence ^b. Fi-

^a Some of them went still further. Alexander 7. Consil. 88. et ibi Molin censent quocumque tempore conceptus natusve sit filius, filium constante matrimonio nihilominus esse legitimum, licet adultera sit mulier. Eustat. L. i. Moravius, Observationes in Dig. L. xxiv.

^b Quæro qualiter probetur filiatio vel fraternitas. Dixi,

nally the presumption arising from birth, was opposed to the presumption arising from the conduct of the parties; the former being described as a maxim which the law had, under certain exceptions, pronounced to be incontrovertible, whilst the latter constituted a mode of proof unavoidably open to error, and therefore only to be adopted in the absence of the former.

Canon law. Whatever may be the proper construction of the works followed by the civilians, we can entertain no doubt of the opinion of the canonists^a. The Decretal altogether overlooks the doctrine of access, and refers the paternity of

circa filiationem sunt faciendi duo articuli: primus de filiatione directo; secundus, de quasi possessione filiationis. Primo, dicam quod talis est natus ex tali uxore in ejus domo vicinis scientibus, secundum formam, &c. (Ulpiani). Secundo, ponam quòd aliqui pater et mater tractaverunt eum ut filium. Ista est quasi possessio filiationis. Bartolus, Codex de Prob. l. xiii. p. 26.

Unde non refert, fuerit uxor publica meretrix, *vel recesserit a viro*, id enim tantum poterit hanc præsumptionem elidere si probetur maritum ad uxorem non *accessisse* illo tempore quo ille filius concipi poterit. Corruvarias, Oper. 210.

Vide also the opinions of Accursius and other glossators in Hofman's edition of the Digest.

^a Mascardus de Probationibus, con. 790, etc.

the child exclusively to the conception of the mother. The sole question is, by whom she conceived. Whether she resided with her husband or with the adulterer, the child was illegitimate, if it could be proved to have been begotten in adultery ^a. The testimony of the parents against the legitimacy of the child was conclusive, unless it could be met by the most clear and unequivocal contradiction ^b. All circumstantial evidence that could possibly elucidate the fact, even the resemblance of the child to the adulterer or the husband ^c was ad-

^a *Illegitima proles est quum vivo viro uxor ex adulterio concepit, sive cum adultero sive cum viro moretur.* Gregor. Decret. 10. 4. 17. 4.

Si constiterit quòd Agatha de Amelina muliere tempore Alani viri sui, ipsa cum eo tanquam cum viro suo merante, vel cum R. patre dictæ Agathæ ipsam A. adhuc habente virum publice tenente nata fuit: eam non fuisse legitimam ejusdem R. filiam judicetis, quia non potuit esse uxor, quæ, viri suorum maculans, alio, dum ille viveret, copulari præsumpuit. Baldus.

^b Dicto parentum creditur nisi manifeste aliud probetur. Greg. Decret. L. iv. T. 17. c. 3. L. ii. T. 19. c. 10.

Notatur ad hoc quòd ex confessione et nominatione parentum propter se factâ, accedentibus aliis indictis, plene probetur filiatio. Barbosa. Collectanea Doctorum in Jus Pontificium univrsam, 2. 574.

^c Etenim quispiam præsumitur illius esse filius, cujus for-

missible. Indeed the spirit of the law almost seems to have preferred the presumption of illegitimacy to that of legitimacy, and a distinguished writer actually considered the physical deformity of the child as a ground on which it might be found illegitimate^a.

Feudal law. The feudal law was different in different

mam et effigiem habet. Paris. Cons. 10, &c.—Alciat.—Mascardus, c. 735, observes upon this doctrine: "Istam nostram sententiam et plurimi rerum naturalium indagatores acerrimi confirmant, si enim in ea sunt opinione, ut existiment illam origini et contextui sanguinis respondere, nec parvum argumentum ex cæteris animalibus trahunt, quæ fere gignentibus similia nascuntur: sic Hesiodus in Ἑρμῶς. Τίτῳ δὲ γένεαις ἰοίκοντα τίνα γένουσιν. Huc respexit Virgil. Æneid. L. iv. dum cecinit:—

Saltem si qua mihi de te suscepta fuisset
Ante fugam soboles, si quis mihi parvulus aula,
Luderet Æneas, qui te tantum ore referret.

Ad quod *sexcenta* alia in medium adducit Tiraq. de Leg. Connub. Leg. 7. Num. 52.

I cite this note as a specimen of the discursive style of these commentators.

^a Barbosa de probat. n. 98. Corruvarias, a very learned Spanish jurist, observes upon this passage. "Ego tamen ingenue fateor hanc opinionem Barbosæ auctoritatem indignam esse, quippe quæ falsa sit manifeste. Non enim decet præsumptionem ita efficacem hac levi et divinum iudicium vere divinante conjectura elidere, audaciam mehercule dicendi potius quàm rationem recti sensus arguit. Cor. Opera. 210.

countries. The local customs of which it was composed being framed at too early a period to comprise many of the questions which result from the approach of refinement, their defects were supplied from the repositories of a more perfect jurisprudence^a. In the absence of customary law, the judge was guided either by the civil or canon law. The Church was the nursery of both, more especially of the latter, so that when they were at variance the contest was unequal. The progress of ecclesiastical power may be silently traced in the disposition of the civilians to reconcile the Digest with the Decretals. The difference between them (according to the modern construction) became ultimately of comparative unimportance. The canon law, under some modifications, was thus followed in Scotland, and in the most flourishing countries of Europe, where it furnished the tribunals with much of their doctrine of legitimacy.

The feudal law^b however disqualified the

^a *Hujus sane juris pontificii magna adhuc apud nos manet auctoritas adeo ut, quoties a civili jure dissidet, jus canonicum præferamus—præcipue in iis quæ ad ecclesiasticam administrationem pertinent.* Craigius de Jur. Feu. 23.

^b *Quod dixi (ex Decretalibus) dicto parentum stari nisi*

mother from being a witness to the legitimacy of her child, and admitted the father's testimony where the child had enjoyed only a short or partial possession of its status. Non-access was not indispensable for proving the absence of sexual intercourse at the date of the conception, but it seems that adultery was insufficient to repel the inference arising from cohabitation.

English law. In England the sturdy independence of our ancestors soon checked the encroachments of the priesthood. Neither the civil nor the canon law ever formed part of the law of the land. They are to be cited as illustrations only; we must look to our own writers for authorities.

contrarium probetur, intelligendum est nisi sit in possessione filiationis (id est, nisi longo tempore ex parentibus eo nomine et tanquam filius altus et educatus sit filiique nomine apellatus), nam filiatio ex parte patris non potest probari, sed semper præsimitur ex cohabitatione, si eo tempore cohabitaverunt quo filius conceptus est, imo quod majus est præsimitur filius etiam si eodem tempore matrem cum adultero rem habuisse constiterit. Nam cum hic qui filius est utriusque filius esse non possit, in favorem tamen filiationis præsimitur mariti. Ibid.

At si tempore conceptionis non cohabitaverint, probarique possit maritum abstenuisse, durum est ut filius dicatur. l. 1. 14. Craig.

But at a time when our principal institutions provided very imperfectly for the varied relations and necessities of civilized life, our lawyers were in the habit of blending with their own sentiments those of the civilians and canonists, so that these jurists indirectly assisted in the construction of our temple of justice. This is particularly remarkable in the works of Bracton and Fleta, the two earliest writers in English law who have treated of the subject of legitimacy.

Bracton's definition of legitimacy is expressed in the language of the digest. "Legitimus hæres et filius est quem nuptiæ demonstrant, esse legitimum." His exceptions^a to this definition are drawn from the same source, and are equally deficient in perspicuity and precision.

^a Si autem violenta præsumptio se faciat in contrarium in prædictis casibus, ut ecce, maritus probatur propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam coeundi, per multum tempus non concubuisse cum uxore, vel si probeatur quòd extra regnum, vel provinciam per biennium et ultra longe extiterit, et quòd vehementer præsumi possit quòd ad uxorem accessum habere non potuit, et cum redierit prægnantem invenerit, vel parvulum habentem anniculum, sive talem advocaverit et nutrierit, vel non, erit talis filius (non immerito) a successione repellendus, quia talis filius, nec hæres esse poterit. Bracton, fol. 63.

All the comments on Bracton that have come under my observation reduce these exceptions to two, viz. the impotence and non-access of the husband at the date of the wife's conception.—It appears to me that they may be extended to four; viz. 1. the impotence of the husband: 2. the absence of sexual intercourse at the date of the wife's conception: 3. the non-recognition of the child by the father: 4. any conclusive presumption arising from physical or moral causes, that the child is the child of an adulterer, and not of the husband^a.

1. The first ground of exception admits of only one construction.

2. The second is left in considerable obscurity: where the question could be raised, the result would depend on the period assigned for the duration of gestation, and the only notice of this important point is to be found in the account of the writ de ventre inspiciendo.—When this writ had been followed by a verdict, the female was liable to be placed in safe custody until the truth of her pregnancy could be ascertained, or rather until there was no possibility of any future fruit of her

^a The third exception is comprehended in the fourth, but I have separated them to prevent any obscurity.

intercourse with her husband.—The duration of her imprisonment was therefore necessarily bounded by the extreme limit of gestation, and what this was we are left to speculate, for Bracton only observes, that in case of the pregnancy taking place, it may be “easily known whether the child is really or presumptively the child of the husband, or of another person; by computing the period between the mother’s delivery and the death of her husband, as well as the period which she had assigned as the date of her conception.—It is said indeed, although others are of a contrary opinion, that a woman cannot exceed the period of gestation by one day, unless the child should have died in the womb, or have caused, by some extraordinary malformation, imminent danger to its parent.”—He admits elsewhere, that if the mother’s delivery is deferred to such a period as that “it is not probable that the child can have been begotten by the deceased husband, then the child is liable to be bastardized.”^a

^a Cum autem mulier sic fuerit caute custodita, et omni suspicione per talem custodiam sublata, si forte pręgnans extiterit, et peperit, de facile perpendi poterit utrum partus ille fuerit viri defuncti, vere vel pręsumptive, vel alterius,

3. The recognition of the child by the husband, did not operate in favour of the child where the legitimacy was opposed by proof of either impotence or non-access, but in the absence of such proof it was conclusive, and when once given it could not be recalled ^a.

computato tempore, scilicet a tempore quo dicebat se concepisse et etiam a morte viri usque ad diem pariendi. Dicunt enim quidam, licet alii sunt in contrariâ opinione, quod mulier tempus pariendi (etiam per unum diem) excedere non potest, nisi partus in utero mortuus sit, vel ad monstrum declinaverit cum discrimine matris. Bract. 70.

Si partus nascatur post mortem patris per tantum tempus quod non sit verisimile quod possit esse defuncti filius, et hoc probato, talis dici poterit esse bastardus. Bracton, de Except. 5. 417.

^a Sed vice versâ, ubi vir sanus erit et incolumis, et semper steterit cum uxore in provincia, in una domo et uno lecto sive partus conceptus fuit ab alio sive suppositus, *et ipse cum nutrierit et habuerit pro filio*, vel etiam ipsum deadvocaverit et amoverit, *si postea ipsum recognoverit* ad filium coram viris fide dignis, qui hoc probaverint, si opus fuerit, ulterius deadvocare non poterit, sed erit filius legitimus et hæres. Et de hac materia inveniri poterit de termino Paschæ anno undecimo R. H. in comitatu Sussex de Johanne de Monte-acuto. Ibid. p. 63.

Si autem cum (pater et mater) diu non cohabitaverint per biennium vel ultra, sive vir generare possit, sive non, et uxor concipere vel non, si uxor ab alio conciperet, vel partum supposuerit ita quod vehementer præsumi posset propter temporis intervallum et distantiam locorum quod vir

The non-recognition^a of the child, evinced by the husband removing it from his house on his discovery of its existence, by his refusal to maintain it as his child, and by his persisting in prohibiting its return, was fatal to a claim of legitimacy made after the husband's death, although these circumstances were unaccompanied by proof of the impotence or non-access of the husband. In a case tried in the county of Lincoln^b, the tenant in possession

talem partum non genuerit, sive talem partum advocaverit sive non, nunquam efficitur partus legitimus. Et licet præsumatur quòd legitimus sit, eo quod nascitur ex uxore, tamen non erit standum tali præsumptioni, nec erit necesse probare contrarium, cum ipsa veritas, si de eâ constiterit quod simul non cohabitaverunt, doceat contrarium. Bracton, Ibid.

^a Cum autem fuerit talis natus, vel suppositus, vir statim talem a domo sua amoveat, nec faciat eum nutriri in domo suo pro filio, nec alibi, nec permittat eum redire ad ipsum. Ibid, p. 63.

^b Et de hac materia inveniri poterit de termino Sancti Michaelis anno R. H. quarto incipiente quinto, comitatu Lincoln. de Barthol. filio Richardi, et ubi tenens paratus fuit se ponere in magnam assisam, vel super patriam, de jure utrum ipse haberet majus jus tenendi terram in dominico quæ petita fuit, an ille qui petiit, sicut ille qui non habebatur pro filio a patre communi, nec nutritus pro filio in domo patris, sed amotus a domo patris, et sicut ille qui nunquam rediit ad patrem in vitâ suâ sicut filius, nec post mortem ad capitalis dominos feodi, facturus iis quod de jure facere deberet, et in

offered issue either in grand assize or per pays, whether he had better right to the land than the plaintiff, the latter not having been regarded as a son by the individual whom they both set up as their common father, nor brought up as such in the father's house, but having on the contrary been removed from the same; and also neither having returned home during the father's life as his son, nor having after the father's death performed the necessary services to the superior lords: and the plaintiff being unable to controvert the premises, the tenant continued in possession without assize, jury, or inquest.

Even the recognition of the child by the husband's heir after the husband's decease, did not supply the omission of the husband^a.

It should be observed that Bracton draws an evident distinction between the husband's repudiation^b and his non-recognition of the child.

quo casu tenens retinuit sine assiza, jurata, vel inquisitione, quia potens non potuit premissa dedicere. Bracton, l. 2. fol. 63.

^a Sed esto quòd vir talem in vita sua adhæredem non recognoscit, sed cum amoverit talem, moriatur, licet post mortem suam a custode, vel ab aliquo cujus hæreditas non fuerit, ad hæredem recognoscatur, non valebit. Bracton, 63.

^b The expression in Bracton is "deadvoco", and accord-

The latter indeed conveys incomparably stronger moral evidence of illegitimacy than the former. The repudiation may be prompted by passion or interest, and it operates on a vested title; for the child has been already affiliated, and publicly enjoyed the privileges of his status. The child may have entered into transactions with third persons, upon the faith of his legitimacy, which nothing but the relation he bore to his ostensible parent could have enabled him to perform. The husband having in fact become responsible for his civil identity, ought not to be permitted to destroy it, unless under circumstances which satisfactorily account for the imposition. The non-recognition, especially when accompanied by concealment of the child, implies fraud both against the husband and the public. It exculpates the husband from any unnatural hatred of the child. It postpones his remedy against a claim which may be unjust, until the means of proving the injustice have passed away. The injury done to society by this sort of intrusion into it, is much greater than the benefit received by the

ing to Ducange he is the only author in whose works it is to be found.

individual who may profit by his legitimacy being established. The disappointment and the confusion which he must necessarily create among innocent parties may be incalculable.

An inattention to this distinction has led to a false construction of a passage in Bracton, in which the author observes ^a, that if a woman should become pregnant by an "adulterer" "whilst she was cohabiting with her husband, "and there was no impediment to her having "become pregnant by him, the child should "be legitimate whether it was acknowledged "or repudiated by the husband."—Now this entirely agrees, and in fact it is introduced by the author as agreeing with the doctrine before laid down of the effect of recognition, viz. that when it has once attached to a child, it must always be conclusive in the absence of proof of the husband's impotence or non-access. The

^a Et notandum, secundum quod superius dictum est, quòd si cohabitaverint vir et uxor, nec sit impedimentum ex aliquâ parte quin generare possent, et uxor de alio quàm de viro conceperit, partus legitimus erit, sive ipsum advocaverit, sive *deadvocaverit*, et legitimus erit propter præsumptionem eo quod nascitur ex uxore. Talis enim præsumptio non admittit probationem in contrarium. Bracton, 70. It should be observed that the expression is *deadvocaverit*, and not *amoverit*.

subsequent act of the husband was not allowed to cancel the first.

It is a striking illustration of the legal efficacy of parental recognition, that among the numerous and somewhat involved cases adduced by Bracton, there is not one in which the legitimacy can be held to have been established in the absence of it, except under circumstances that rendered its absence unavoidable, such as in the process on the writ de ventre inspiciendo. The presumption in favour of legitimacy, arising from the birth of the child during marriage, appears not to have been of any force unless the recognition by the parents had been preliminarily proved ^a.

^a Et in quo casu (of an allegation that D. was not the son of A., by B. his wife) cum comparuerit pater vel mater, vel eorum alter, et talem nutritum produxerint, tunc si talem nutritum, in iudicio, ad filium et hæredem recognoverint, et præsumptio sit pro eis quæ non admittit probationem in contrarium, ut si nascatur de uxore quæ concipere potest, licet ab alio quàm a viro suo concipiatur; vel si forte supponatur cum simul cohabitaverint nec sit impedimentum ex parte viri quin generare possit, nec est impedimentum ex parte matris propter sterilitatem et senectutem, talis filius et partus erit legitimus. Si autem verus hæres docere possit contrarium aliud erit, licet parentes aliud in iure confessi sunt, dum tamen hoc probetur. Debet enim confessio facta in iure naturæ et veritati convenire. Bracton, 70.

4. The account given by Bracton of the proceedings in the execution of the writ de ventre inspiciendo^a, proves the admissibility of circumstantial evidence to controvert the presumption of legitimacy. The female^b whose pregnancy was the subject of enquiry underwent a strict examination by a jury of her own sex, and was obliged to answer a series of questions relative to the legitimacy of the child of which she could prove herself enceinte. These questions being prescribed by law could not contain any irrelevant matter. They are not confined to the access, or even cohabitation or virility of the husband, but assuming these facts until they are disputed, they scrutinize the circumstances of the conception with such minuteness, as to shew the liability of the child to be bastardized as the result of an adulterous intercourse; although the mother

^a The writ de ventre inspiciendo was obviously borrowed from the process defined in the Dig. L. xxv. T. 3. s. 1. 2. 3. But the scrutiny prescribed by our law was much more strict, and its consequences were more important.

^b Et si ipsam invenerint prægnantem vel imprægnantem, diligenter inquirant de tempore conceptûs, quoquo modo, quando, et ubi, et quando crediderit se esse parituram. Bracton, 69.

was living with the husband at the date assigned for the conception, and under no disability of having conceived from him.—The jury were to interrogate her “concerning the time of her conception, *how, when, and where it took place*”, (inquirant de tempore conceptus, quoquo modo, quando et ubi.) If the mother ascribed her conception to an adulterer, and satisfied the jury from the correspondence of time and place of the truth of her statement, there seems no reason for doubting that the fact of bastardy would be treated like any other fact, and pronounced sufficiently proved. The questions would otherwise be nugatory.

Fleta.

The work that bears the name of *Fleta*, has been considered by some legal antiquaries as a servile copy, and by others as an abridgment of *Bracton*^a. Undeniably the contents of both works closely correspond, especially in those parts relating to adulterine bastardy. No variation between them upon this subject can be detected.

^a The definition given of legitimacy by *Fleta* (29) is the same as *Bracton*'s, *legitimus filius et hæres est quem nuptiis demonstrant legitimum*, c. 14. The remainder of the chapter is principally taken from *Bracton*, fol. 63.

Fleta is silent on the period of gestation, and his only notice of the moral evidence by which the presumption in favour of legitimacy can be affected, is with reference to the recognition or non-recognition of the child ^a. Like Bracton he brings forward the recognition by both parents as necessary evidence in support of the legitimacy ^b, whilst he declares that the *possibility of procreation* arising from the access and virility of the husband was not conclusive, unless it was accompanied by the recognition of the child, thus shewing that the non-recog-

^a Legitimantur quandoque per adoptionem de consensu et voluntate parentum; ut si uxor puerum de aliquo conceperit, viro suo hoc ignorante, si vir ipsum in domo sua susceperit, nutrierit, et advocaverit ut filium suum, putagium uxoris tali non præjudicabit, sed ejus erit si posset ipsum genuisse, eo quod nascitur ex uxore: *secus erit si ipsum amoverit ut extraneum vel suppositum*, vel si manifestum sit quod propter distantiam locorum et moram longam, vel infirmitatem, vel coeundi impotentiam, cum uxore non concubuit, quanquam talem advocare vellet ut filium suum; cum ergo talis natus fuerit vel suppositus, statim faciet eum quivis discretus à domo et omni nutritura sua amoveri, quatenus per nutrituram debeat verus exhaeres exhaeredari: ipso namque semel advocato, iterum ipsum deadvocare non poterit. Fleta, 32.

^b Fleta, 32, which corresponds with the passage in Bracton, p. 70, cited supra, p. xxviii.

nition was regarded as proving the *impossibility* of the procreation. With greater perspicuity and precision he classes the non-recognition with such circumstances as impotency and non-access, making each of them equally fatal to the legitimacy of the child.

The partiality for the civil and canon laws, which is so obvious in every page of the writings of Bracton and Fleta, is less characteristic of Britton, who departing with greater boldness from these favourite guides, directed his attention more exclusively to the common law of England.—He deserves the gratitude of his profession, for the particulars which he has preserved of the legal customs and institutions of our ancestors. On these topics his authority is highly valuable.

Bracton and Fleta, in imitation of Ulpian, have each made legitimacy the exclusive subject of one of the divisions of their works.

Britton has viewed it only in its relation to the law of real property, and more especially in the process under the writ de ventre inspiendo, of which he has left us the most detailed account now extant. We learn from him that forty weeks constituted the limit of the

Britton.

period for which the widow could be confined under the writ de ventre inspiciendo, and that the illegitimacy of the child was the inevitable result of the birth being protracted beyond that time. The heir was entitled to demand immediate possession of the fief upon the expiration of the forty weeks, and the right could not upon any pretext be any longer suspended ^a.

The other proceedings upon the writ detailed by Britton, confirm the inference which is obviously derivable from the brief statement of Bracton. The jury before whom the female was examined were directed to ascertain *whether she was pregnant*, and by whom; and whether on the day of her husband's death. Thus proving that the *possibility* of her being

^a Et si ele ne eyt enfant dedans les 40 semaines apres la mort de son baron, ou si ele ne soit trouve enceynte, si soit ele punie par prison et par fyn, et les chefs seigneurs des fees tantot preignent leurs homages des heires sans plus longe de lay faire.—Britton De Gardes, 166. "Beaumanoir in "c. 18. of the Coutume de Beauvois says, that a woman cannot go with child longer than 39 weeks and a day. The "Code Matrimoniale, in 2 Vols. 4to, contains an excellent collection of the authorities on the period of gestation." Note by M. Houard.

with child by her husband, did not preclude the *reality* of that fact being put in issue^a.— But this is not all. If the verdict was favourable to the pregnancy, and the pregnancy

^a Ascunes foils avient que femmes tenautes de la mort lours barons, se feignent estre enceyntes de lours barons, que ne soient mye a grefs damages des heirs. En quel cas nous voulons que tiel remede soient ordine que come ascune de tele deceyte se pleyndra, volons que il eyt de nous brefe al viscont de lieu que il sauvement face venir devant lui et devant les coronours ou plein counte la femme de qui la pleynte est faite. Et soit enquys de lui si ele soit enceynte et de qui, et si il dei de son baron que mourust, tantost face le viscont venir sages femmes et leyaies jesque a 6 au meins, et les face jorer sur saynts de leaument faire et verreyment presenter en les articles devant elles seront charges si part de nous. Et puis soient charges que eux sur leur serment enquerrent de la femme que se fait enseinte par tast de son ventre et des ses mameles, dont eles purront estre certifies le quel ele est enceinte ou non, et puis la preignent privement en que me-son et enquerrent la verité.

Et si les femmes dient que elle est enceynte ou soient de ces en doutance le quel ele soit ou non, adonques volons que le visconte face tele femme mettre en nostre chastel, ou ailleurs, en sauvegarde, issi que nulle femme ou autre de qui suspicion puset estre de fausaine faire, ne lui approche, et illonques demeure a ses propres custages, jesques al heure que el soit enfanter, issint que nulle femme ne vient a li, en le meín temps, fors que la lineage del plaintiff. Ibid. 165 et 166.

should happen within the forty weeks, the legitimacy was not yet secured. The heir, notwithstanding the presumption thus raised against his claim, was still at liberty to aver either that the child was begotten by another person than the husband, or that the husband was absent long before its birth (I presume more than forty weeks), or that the legitimacy was irreconcilable with any other obvious and notorious presumption. And if the heir could establish one of these averments, it is expressly declared that he should not be disinherited through the adultery of the wife^a.

It is obvious that under these averments, every fact that tended to prove the husband not to be the father of the child, would be admissible evidence in opposition to the claim of the child.

^a Si ele eut un enfant dedans les 40 semaines adonque soit cel enfant recu al heritage, si autre heir ne pousse averer cel enfant etre engendre de autre que del baron, ou si il puisse averer que le baron fuit decole, ou inprisonne par deux ans ou par 4 en une autre realme, avant que cel enfant fuit néés, et apres sans approcher la femme ou par autre apparaunce presumption communement temoigne de tous gens et en toutes ceux cas, nous ne voulons mye que les droits heirs soient desherites par les putages de femme. Britton de Gardes, p. 166.

The opinions of Bracton and Fleta on the effect of parental recognition are confirmed by Britton. He makes the husband's disavowal of a child whose birth has been concealed from him ^a conclusive against the legitimacy, if such disavowal is contemporaneous with his discovery of the fraud ^b. Any postponement of the disavowal defeats its effect: for having once recognised the child, the husband is no longer at liberty to disavow it; the recognition being absolute and irrevocable ^c.

The principle of the relief granted to the heir in the writ de ventre inspiciendo extended to the other actions in which the question of legitimacy was agitated. The presumption arising from the birth of the child during marriage, and from its recognition by the husband and wife, might be opposed, not only by evidence of non-access and impotency, but of

^a Ne ausi (soient receyvables ab heritage) ceux que les Barons noveront en leur hostels et desavowes pur lour engendrure. Britton, 166.

^b Et pur ceo volons nous que chescun en tiel cas apertement desavowe et face remuer tele engendrure suppose estre sue si tot come il savera. Ibid.

^c Car puis que il savera avowe pur sue et ceo boit temoigne pur visme il ne le purra jamais desavower. Ibid.

fraud, and if the heir could prove such a conspiracy on the part of the husband and wife, as to establish a clear presumption, or the common belief that the husband could not be the father of the child, he was entitled to a verdict, and the husband and wife were punishable by fine and imprisonment.

Thus the possibility or impossibility of the husband being the father of the child, might be the result of moral evidence, arising from the conduct of the parties, although neither non-access nor impotency could be charged against them ^a.

The principles of adulterine bastardy thus laid down by Bracton, Britton, and Fleta,

^a Mais si les barons de teles femmes que nourrissent enfans pour heires, que ount este issi engendres, jèques les barons este desturbes par aperte malice, ou par distance del lieu del temps, si que aperte presumption et commune fame come avant est dit face encontre tielx barons que ils ne poient mye ceux enfans aver engendre, tout voillent tielx barons, tielx enfans nourrir en leur maisons et avower pur lour, pur ceo nequedent ne soient mye tielx enfans receyvables al heritage. Britt. 166.

Il coviendra au pleintife de monstren certeynes presumptions, pur lui a prover sa entente ou si non soit juge encontre le pleintife. . . . Soit la malice de le baron et de sa femme punye par prison et par fyn. Ibid.

must stand exclusively on the authority of those writers, for no reports of the legal decisions during the period in which they lived have come down to us. The earliest case on the subject^a was decided five years after the death of Britton. An infirm bed-ridden man was married privately, out of church, and without the celebration of any mass, to a woman in such an advanced state of pregnancy that she was delivered of a child twelve weeks afterwards. The child was adjudged a bastard. The verdict must not be ascribed exclusively to the husband's physical inability, for it would then have been unnecessary to have noticed the wife's pregnancy at the date of the marriage, and the clandestine nature of that ceremony, both of which circumstances are dwelt upon with a minuteness that marks their importance. The facts of the case furnished

^a Roll. Ab. 358. 10 Edw. I. B. Rot. 23. Foxcroft's case. Un R. esteant infirmus et en son lect. fuit marria al A. un feme par l'Evesque de Londres, privatement, en nul Eglise ou chappel ne avec celebration d'ascun masse; le dit A. esteant pregnant del dit R. et puis deins 12 semaines puis le marriage le dit A. fuit deliver de un fitz, et adjuge un bastard, et issint la terre escheate al seigneur par mort R. sans heir.

ample ground for presuming a conspiracy, and thus constituted the strongest moral evidence that the child was illegitimate^a.

^a This case was cited by Lord Ellenborough in the *King v. Luff*, 8 East, 299, as establishing, "that where the husband could not by any possibility be the father, that is sufficient to repel the legal presumption of the child's legitimacy." Mr. Starkey (*Treat. on Evid.* 2. 219.) is at some loss how to arrive at this conclusion. The case confines the inability of the father to the date of the marriage, and he *presumes* it must have existed at the date of the conception. Allowing this presumption to be correct, why should the privacy of the marriage have been introduced? Mr. East, in his elaborate note on the *King v. Luff*, does not remove the difficulty, and indeed the case can only be made intelligible by adopting the construction in the text, that the clandestine marriage, the infirm state of the husband at the time of the marriage, and the birth of the child so soon after marriage, created a presumption against the legitimacy of the child, strong enough to overcome the legal presumption in favour of its legitimacy. If the cause were tried by our law as it now stands, it can hardly be doubted that a judge would direct a jury to take all these circumstances into their consideration, and without resorting to the presumption of the husband's inability at the date of the wife's conception, a jury might be justified in treating these circumstances as conclusive against the legitimacy. I need scarcely observe, that the sacramental sanctity attached to marriage by the Catholic Church, made the unusual mode of its celebration in this instance additionally suspicious.

The doctrine on this subject to be collected Year Books. from the Year Books is entirely at variance with the earlier writers. Rules of pleading were laid down which reduced the discussion of the question of legitimacy within very narrow limits. The presumption in favour of legitimacy was treated as conclusive, unless it could be opposed by proof of what was termed special matter, viz. the husband's impotency, or his being out of the four seas during the period of the wife's gestation. There is no case in the year books illustrative of the position laid down by Bracton respecting the effects of the non-recognition of a child by the husband, and this omission may be an argument that the presumption, when unaccompanied by such recognition, was inadmissible. On the other hand, the rules of pleading seem to be directed against all encroachments upon the special matter, and we find the other averments mentioned by Britton as sufficient to controvert the presumption, were no longer received. In one of the earliest cases on this subject, the party disputing the legitimacy tendered an averment that R. was not the son of the husband but of one John de C., and the court, after much argument, rejected it, on

the ground that the marriage precluded their affiliating the child to any other person than the husband^a.

The averment ultimately obtained was, “that the husband had issue, Lawrence, besides whom he had no other son R. engendered of his body during the espousals.”

The same point, however, was raised a few years after with different success, for upon a trial of legitimacy, Shard, J. observed, “If we could find that Alice left her husband, and lived with the chaplain or other person, and that John was begotten by that person and not by Adam, we should have judged him a bastard.”^b But the doctrine is denied by the editor to be law; and this is the last instance in which it was maintained, for Chief Justice Thorpe, towards the end of the same reign, rejected an issue, “Whether the wi-

^a 21 Edw. III. 39. The point was contested with more confidence than in the subsequent cases, and the argument is very deserving of attention. The abridgement of it given in Viner is evidently taken from another abridgement; indeed, the numerous references to the Year Books in that work might have been made more useful by being collated with the original.

^b 33 L. Assize, Pl. 8.

"dow was with child by her husband on the "day of his dying"^a; and his authority was strictly followed by his successors. The policy of the courts appears to have been, that no fact should be tendered in issue from which the illegitimacy was not the immediate and inevitable inference, or, to use the language of a judge of those days, "that all matter was irrelevant which was only argumentative to "prove the bastardy, for the party *ought to conclude and so bastard.*" Impotence and ultra-marine absence are the only facts existing of this description, and consequently the only averments that found any favour. The law was thus greatly simplified, but simplicity and excellence are not always synonymous. One of the strongest *legal* checks upon adultery was removed, and, by a strange inconsistency, the adulteress was deprived of her dower, whilst the offspring of her guilt were provided for at the expense of her injured husband.

It was probably from a sense of the injustice which must have attended a strict adherence

^a 41 Edw. III. The case is stated and commented upon by Mr. Tindall, p. 229, *infra*.

to the principle of these decisions that some judges allowed it to be relaxed, where the birth of the child took place so soon after marriage as to admit of its having been conceived before marriage.

In a case^a decided at the time of Chief-Justice Thorpe, though he does not appear to have taken any part in it, the husband died of the plague two days after his marriage; his wife, who was then pregnant, was subsequently delivered of a child, and on its legitimacy being disputed, the defence set up was grounded on the wife having previously been the mistress of the husband, and Finchden said, "If the mother of Alice (the child) was "enceinte by H. before the marriage, and "afterwards H. married her, the future issue "shall be legitimate; if she was enceinte by "another, it shall be illegitimate." If this decision had been followed, it would soon have affected the presumption in favour of legitimacy, but when the same point was before the court in the reign of Hen. VI. they considered themselves bound by the law laid down by

^a 44 Edw. III. c. 12. pl. 21.

Chief-Justice Thorpe, and decided accordingly^a, and they were imitated by their successors in the following reign^b, and the judges appear to have been disposed to throw additional difficulties on the proof of illegitimacy^c.

^a 1 Hen. VI. (3). This case is stated at length in Mr. Tindall's argument, p. 227, *infra*.

^b Littleton, J. Si un home epouse un femme grossement encinte par un auter, et deins trois jours apres ele est deliver, en notre ley l'issue est mulier, et par le ley de l'Eglise bastard. 18 Edw. IV. 30. There is much curious learning in the arguments on this case.

^c The language of the court on these trials was sometimes more emphatic than decorous. Judge Richill (7 Hen. IV. 9. 13.) improved upon the maxim of civil law in favour of legitimacy, by making it of still more general application. "Whosoever", says he, "bulls my cow, the calf is mine." I am surprised that the sage Sir John Hawkins, who discovered the speech of the Grave-digger in Hamlet to be a plagiarism from a trial in Dyer, did not immortalize Judge Richill and his learned brethren, by making them the prompters of King John, in the following address to Robert Falconbridge.

"Sirrah, your brother is legitimate:

Your father's wife did after wedlock bear him:

And if she did play false, the fault was hers,

Which fault lies on the hazards of all husbands

That marry wives. Tell me, how if my brother,

Who, as you say, took pains to get this son,

Had of your father claimed this son for his?

In sooth, good friend, your father might have kept

Though the year books define so strictly the nature of the access between the husband and wife, sufficient to legitimize the issue of the wife, they are wholly silent as to the duration of such access, or in other words, the legal period of gestation. Some contemporary sources of information have partially supplied this omission*, but the inferences to be drawn from them are very contradictory. Mr. Hargrave, after examining the cases with his usual industry and talent, concludes that the law recognized forty weeks as the *usual* period of gestation, but exercised a discretion of allowing a longer period where it was required by the opinion of physicians, or the circumstances of the case. It is true that Lord Coke has regarded forty weeks as the *ultimum tempus pariendi*, but he refers to an authority which

*This calf bred from his cow from all the world,
In sooth he might: then if he were my brother's,
My brother might not claim him; nor your father,
Being none of his, refuse him: this concludes,—
My mother's son did get your father's heir;
Your father's heir must have your father's land.*

Act I. Scene I.

* These cases are collected in Mr. Hargrave's very learned note to Co. Litt. 123, b. which is discussed by Sir Charles Wetherell, *infra*, 262.

does not go to the full extent of his position, and he is also at variance with the decision of the courts in his own lifetime. These decisions allow forty weeks and ten days as the latest period. During an interval of nearly two hundred years^a the question was not again agitated, until it formed the principal subject of investigation in the following proceedings. It would now be bold to deny that the excess of more than three or four days over the forty weeks would be a physical impossibility.

In these cases, the conduct of the husband and wife was brought forward to strengthen the imputation, against the legitimacy of the

^a The case of *Foster v. Cook*, 3 Bro. Ca. 347, ought never to have been reported. Vide 286, *infra*.

It may perhaps be almost unnecessary to mention the case of *Waterhouse v. Berkeley*, tried at the Oxford Assizes, Easter Term, 1821. It was an action for damages for criminal conversation with the plaintiff's wife. She had been delivered of a child forty-two weeks and a day after her last intercourse with her husband. Mr. Justice Park asked a witness, a medical gentleman named Ward, whether the husband could be the father of such child? The answer was, "I have never known an instance in which it could be said 'it was so.'" The examination did not proceed further, and it was scarcely noticed by the judge in his address to the jury. MSS. Report.

child, caused by the protracted gestation. As the age became more enlightened, the rule of law requiring proof of the husband's access beyond the four seas, where the legitimacy of the child was impeached on the ground of non-access, gradually fell into disuse, whilst the attention of the judge was more exclusively directed to the circumstantial evidence^a. In the claim to the Earldom of Banbury in 1662, the opposition to the legitimacy of the claimant rested solely on circumstantial evidence, but the lawyers of that day treated it as an innovation; and an act of parliament was thought indispensable for bastardizing a child born under circumstances affording moral demonstration of illegitimacy^b. When the same

^a The history of this branch of the law will be found in the judgments of the Lords on the Banbury peerage claim. p. 389—495, *infra*.

^b Acts of this description are not rare in the journals. Some of them are mentioned in pp. 472, 473, *infra*. The last of them was passed to bastardize the poet Savage, 9 & 10 William III. A very interesting account of the act to bastardize the children of Lady Anne Roos, (1666,) is contained in Clarendon's life. I have examined the proceedings in the journals, and can find no objection to have been raised to the Bill on the part of the children, though they were the greatest sufferers by it. Some curious pamphlets were published on

claim was brought before the law officers of the crown in the middle of the last century, they regarded the circumstantial evidence of the illegitimacy as conclusive, and their opinion was confirmed by the decision of the House of Lords in 1813. The question of legitimacy was thus rendered a question of fact, and the investigation of it was disembarrassed of the technicalities which had introduced so much confusion and inconsistency into the administration of justice.

The presumption in favour of legitimacy could no longer be maintained against satisfactory evidence to the contrary. The inquiry into the simple fact of the husband's being the father of the child was left to the jury, who were bound to weigh the evidence against the presumption, and to decide as, in the exercise of free and honest judgement, either might appear to preponderate^a.

The French lawyers (before the revolution) professed to follow the doctrine of civil law

the occasion, deprecating or defending the permission given by the Bill to remarry, but wholly overlooking the injustice done to the children by condemning them unheard and under age.

^a Lord Eldon's judgment in the Banbury claim, 489.

in all cases of adulterine bastardy. They admitted evidence of the conduct of the husband and the wife, and indeed all circumstantial evidence that could elucidate the fact in dispute, but they differed as to the weight which such evidence was entitled to receive. Some of the most eminent judges considered the adultery of the wife and her concealment of the child, together with the nurture, education, and adoption of the child by the adulterer, as insufficient proofs of adultery, unless they were accompanied by evidence of the husband's impotence or non-access. Others regarded these facts as conclusive^a. The precise extent of the legal period of gestation was involved in the same uncertainty. Even so late as the year 1779, the parliament of Rouen, which held the highest rank in France for learning and impartiality, recognized the legitimacy of a child born eleven calendar months and one day after the decease of its ostensible parent^b.

^a Some cases on this subject are collected in note (F) Appendix.

^b Vide note (G) Appendix. The provincial tribunals in France attracted universal ridicule by their decisions on the question of legitimacy. In the year 1637, an arrêt of the parliament of Grenoble was circulated, whereby the legiti-

The Code Napoleon withholds the presumption in favour of legitimacy where the child is born 300 days after the dissolution of the marriage^a, or where its birth has been concealed from the husband^b.

The Frederician Code without absolutely

macy of an infant born during the absence of the husband was recognized, on the ground of the mother having conceived from the force of her imagination. The parliament of Grenoble by an arrêt of the 13th of July 1637, declared this arrêt to be false, unfounded, and malignant, and they ordered it to be torn to pieces by the public executioner and burnt before the palace of justice, and they prohibited it to be reprinted, sold, or bought *upon pain of death*. This unfortunate squib is cited as an authority for protracted gestation in the case of Catherine Berard. Note (D) Appendix.

^a La légitimité de l'enfant ne trois cent jours apres la dissolution de mariage pourra etre contestie. T. vii. a. 315. Code Civil. Observations du Tribunal, Conference du Code Civil, 273. Case of Catherine Berard, Appendix, D.

^b Le Mari ne pourra . . . desavouer l'enfant . . . meme pour cause d'adultère, a moins que la naissance lui ait été cachée, auquel cas il sera admis a proposer tous les faits propres a justifier qu'il n'en est pas le pere.

These articles of the Code are discussed at great length, and with equal ingenuity, in the following essays: *L'exposé des Motifs par le Conseil d'Etat* Bigot Priameneu, No. 25. — *Le Rapport au Tribunal par le Tribun La Hary*, No. 26. — *Le Discours au Corps Legislatif par le Tribun Duveyrier*, No. 27.

declaring children born in the eleventh month to be illegitimate, attaches such conditions to the proof of their legitimacy as make it unattainable. The adultery of the wife is no less prejudicial to the children than her protracted gestation, for a sentence of adultery is conclusive against the legitimacy of the children, who can be presumed to have been begotten by the adulterer*.

This uniformity of the laws of the most enlightened countries in modern Europe upon so important a subject as adulterine bastardy, is a strong argument for their justice. The English law is best defended by the cases which compose the body of this work.

* Frederician Code. Part I. b. 2. t. 5.

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ERRATA.

Page 222, *dele* "2".

250, last line but four from bottom, *for* "in default of marriage", *read* "of the first marriage".

263, in reference, *for* "Britton 16. 6." *read* "Britton 166".

268, *for* "Chief Justice Buller", *read* "Mr. Justice Buller".

276, *for* "saving the rights of all parties and the child Henry Fenton", *read* "all parties except the said Maria Elizabeth and the child".

420, et seq. *for* "Cognac" *read* "Cognot."

495, line 14, *for* "Bambury", *read* "Banbury".

A

REPORT,

ETC.

In the month of March 1824, Alan Legge Gardner, an infant, presented a petition, by his guardians, to his Majesty, stating the following facts :

His late Majesty, George the Third, by letters patent Petition.
under the Great Seal of Great Britain, dated the 27th day of November, in the forty-seventh year of his reign, created Alan Gardner, of Uttoxeter, in the county of Stafford, Esq. (the ancestor of the petitioner), Baron Gardner, of Uttoxeter, in the county of Stafford ; and the heirs male of his body.—Previous to the date of the said letters patent, viz. on or about the 20th of May 1769, Alan Gardner, Baron Gardner, was married to Susannah Hide, the widow of Samuel Turner, Esq. deceased ; and by her, his only wife, had issue, Alan Hide Gardner, his eldest son, who was born in the month of February 1771, and several other sons.—In the month of March 1796, Alan Hide Gardner, then a captain in

B

his Majesty's navy, was married to Maria Elizabeth Adlerley, Spinster.—Alan Hide Gardner and Maria Elizabeth, his wife, cohabited together as man and wife from the time of their marriage until the month of January 1802 (except during the occasional absence of the husband).—On or about the 30th of January, Alan Hide Gardner took leave of his wife, and sailed a few days afterwards for the West Indies, and did not return to England until the 10th day of July in the same year: his wife remaining in England during the whole of that period.—Towards the end of the year 1801, when Alan Hide Gardner was absent on his Majesty's service, his wife entered into an unlawful familiarity, criminal intercourse, and adulterous conversation with Henry Jadis, Esq. which Alan Hide Gardner did not discover until the month of June 1803; after which time he did not live or cohabit or have any intercourse whatever with his said wife.—On the 8th of December 1802, she was, without the knowledge of Alan Hide Gardner, delivered of a male child, which was afterwards baptized by the name of Henry Fenton Gardner, though it was not begotten by Alan Hide Gardner.—In Easter Term 1804, Alan Hide Gardner brought his action in his Majesty's Court of King's Bench at Westminster against Henry Jadis, for criminal intercourse and adulterous conversation with Maria Elizabeth Gardner, and in that action obtained a verdict against Henry Jadis for 1000*l.* damages; final judgment was afterwards entered up for that sum and costs of suit.—He also exhibited a libel in the Consistory Court against Maria Elizabeth, and afterwards obtained a final sentence

of divorce against her, from bed, board, and mutual cohabitation, for such adultery.—In the forty-fifth year of the reign of his late Majesty, an Act of Parliament was passed to dissolve the marriage between Alan Hide Gardner and Maria Elizabeth Adderley, by reason of the said adultery, and to enable him to marry again, and for other purposes, saving and reserving to all persons, except to her and the child born of her body, and baptized by the name of Henry Fenton Gardner, all such rights as they had or might have had in case that Act had not been passed.—Alan Gardner, Baron Gardner, died on the 30th of December 1808, leaving Alan Hide Gardner his eldest son and heir, who thereupon succeeded to the barony, and became the second Baron Gardner.—On the 10th of April 1809, Alan Hide, Lord Gardner, was married to the Honourable Charlotte Smith, daughter of the Right Honourable Robert, Lord Carrington, and by her had issue Alan Legge Gardner, his only son, who was born on the 29th of January 1810, and one daughter.—Alan Hide, Lord Gardner, died on the 22d of December 1815, leaving Alan Legge Gardner his only son him surviving, and thereupon the said barony devolved upon him.—Henry Fenton Gardner attained his age of twenty-one years in the month of December 1823.—The petitioner being an infant only of the age of fourteen years or thereabouts, was apprehensive that some injury might arise to him, should an authoritative recognition of his right to the barony be postponed until he should have attained his full age, and so should have become entitled to a writ of summons to Parliament in respect of the barony

of Gardner, inasmuch as the petitioner might be less able, by reason of the deaths of witnesses and otherwise, to prove the facts before stated.—The petition prayed, that his Majesty would be most graciously pleased either to declare the right of the said petitioner to the said barony by letters patent, or to recognize the said petitioner's said right by ordering his name to be entered on the Parliament Roll as a minor peer, or to recognize it in such other way as to his Majesty in his great wisdom should appear most proper.

Reference.

Upon receiving this petition, his Majesty was pleased through the Right Honourable Robert Peel, one of his Majesty's principal secretaries of state, to refer it to the consideration of his Majesty's Attorney-General, who was to report his opinion, what might be properly done therein, whereupon his Majesty's further pleasure would be declared.

**Attorney-
General's
Report.**

Sir John Singleton Copley, his Majesty's Attorney-General, having considered the case, and having been attended by the solicitor for the claimant, and by his witnesses, made a report to his Majesty, dated the 12th of March 1825, in which, after having stated the substance of the petition, and the evidence given before him in support thereof, he proceeds as follows: "Upon the whole I humbly report as my opinion, that by reason of the absence and separation of the said Alan Hide, Lord Gardner, from his first wife, during the whole of the period from the 7th of February to the 11th of July 1802, whilst employed on his Majesty's service on a distant station, he could not be, and was not the father of the child born of the body of his said first wife on

the 8th of December 1802, and consequently that the claimant has sufficiently established the allegations in his petition, and made out his claim to the barony in question; but inasmuch as the solicitor for the said Henry Fenton, the son of the said Maria Elizabeth, the first wife of the said Alan Hide, late Lord Gardner, hath appeared before me, and declared his intencion hereafter to establish the claims of the said Henry Fenton Gardner to the said barony, and as claims of titles of honour are matters of high importance, which cannot be decided upon with too much care and caution, nor investigated with too much solemnity, and as I have no authority to examine evidence upon oath, I feel it my duty humbly to advise your Majesty, if your Majesty shall be so graciously pleased, before making any recognition of the claim of the petitioner to the barony in question, to refer his said claim to the House of Lords, in order that the said claim may there receive a complete, regular, and judicial investigation."

His Majesty, upon the said report, was accordingly pleased to refer the said petition to the House of Lords, and it came on to be heard for the first time, before a Committee of Privileges, on the 19th day of May 1825.

The order of reference, the petition of the claimant, and the report of the Attorney-General, having been first read, the Solicitor-General shortly stated the case of the claimant.—Evidence was then adduced on the part of the claimant, the object of which was to prove,

Proceed-
ings.

1. The pedigree of the claimant,
2. The illegitimacy of Henry Fenton Gardner.

1. The pedigree of the claimant was deduced from

Pedigree of
Alan Legge
Gardner.

Alan, first Lord Gardner.—The marriage of that nobleman was proved by a person present at its solemnization : registers were produced of his death, and of the birth of his eldest son and successor, Alan Hide, the second Lord Gardner.—A register was also produced of the marriage of the second Lord Gardner with Miss Ad-derley, at Madras, in the year 1796, signed by the offici-ating clergyman ; but it was not admitted until proof had been given that the register had been transmitted to the India House in the usual manner, and that the clergyman by whom it was signed had actually officiated at Madras at the date of the marriage.

The sentence of the Ecclesiastical Court in the action of divorce brought by Captain (afterwards the second Lord) Gardner against Mrs. Gardner, was produced as evidence of that action. The committee declared “ that “ the sentence alone, without the libel and defensive alle- “ gations, was not sufficient. The claimant must proceed “ in the same manner as was done in the bill for the di- “ vorce : the evidence as between Captain Gardner and “ Mrs. Gardner, could not be evidence as against Henry “ Fenton Gardner, unless all the proceedings were pro- “ duced. It was, however, another question, whether the “ production of the proceedings made all the facts con- “ tained in them evidence.”—The depositions, as well as the libel and sentence, were accordingly produced, to-gether with the judgment of the King’s Bench in an action by Captain Gardner against Mr. Jadis for adul-tery, and the Act of Parliament for dissolving the mar-riage, and allowing Captain Gardner to marry again.

The registers produced of the marriage of Alan Hide,

Lord Gardner, with the Honourable Charlotte Smith, of the birth of the claimant, and Alan Hide, Lord Gardner's death, completed the pedigree, so as to confirm the statement of it given in the petition.

2. The evidence to prove the illegitimacy of Henry Fenton Gardner comprised all those circumstances in the conduct of Captain Gardner, Mrs. Gardner, and Mr. Jadis, that could shew the child was the fruit of adulterous intercourse between Mr. Jadis and Mrs. Gardner, and the opinions of the highest medical practitioners, that the period of Mrs. Gardner's gestation was such as to render it absolutely impossible for Captain Gardner to be the father of the child.

Evidence of
Henry Fenton
Gardner's ille-
gitimacy.

James Jennings deposed, that he was Captain Gardner's servant on board his Majesty's ship the Resolution, in the year 1802. Mrs. Gardner joined Captain Gardner on the 10th of January, which happened to be only two days after the execution of nine of the crew for mutiny, so that there was a general satisfaction at her not having come before. Mrs. Gardner quitted the vessel off St. Helen's on the 30th of January, and never returned to it. He recollected distinctly the date of her departure, for the ship's company were paid off two days afterwards, and he knew the 2d of February to have been the pay-day, and *had an entry in his journal made at the time to that effect*^a. Captain Gardner did not accompany Mrs. Gardner to the shore, but left her in the Admiral's tender, which had been borrowed to land her. The ship sailed for the West Indies on the

James
Jennings.

^a The evidence printed in Italics arose out of the cross-examination.

James
Jennings.

7th of February, and neither Captain Gardner nor himself was on shore between that day and the 30th of January. They both remained on board till the vessel reached Barbadoes, and did not come back to England before the 11th of July following.

The log-book of the Resolution was produced from the Admiralty, by which it appeared that on the 2d of February the Commissioners' clerk came on board and paid the ship's company, and that the ship sailed from Spithead on Sunday, the 7th of February, arrived at Barbadoes on the 21st of March, and "made Portland on the 10th of July" following.

P. S. Lawrence.

Paul Sandby Lawrence, Esq. deposed, that he was junior lieutenant of the Resolution, under the command of Captain Gardner, in 1802. He recollected Mrs. Gardner leaving the vessel about six or seven days before it sailed for the West Indies on the 7th of February. He could positively assert, having been himself on board the whole time, that Captain Gardner never went on shore after his wife's departure. The fleet to which they belonged was under immediate sailing orders, and there was an order from the Admiralty that no officer should leave the ship.

Susannah
Baker.

Susannah Baker deposed, that in the year 1801 she went to live with Mrs. Gardner as lady's maid. At the latter end of that year she came with her mistress from Staffordshire to London, and in January 1802 they went from London to Portsmouth, where Captain Gardner was staying at an inn; they afterwards accompanied him on board the Resolution, and continued there until the end of the month, when they returned to town.

Before this journey to Portsmouth, she had seen a gentleman of the name of Jadis in Mrs. Gardner's company, at Lord Strathmore's house in Conduit Street, and also at Captain Gardner's, in Portugal Street; and whilst they were on board the Resolution she wrote the address of a letter to him, by Mrs. Gardner's desire. Immediately after their return to Portugal Street, Mr. Jadis called on Mrs. Gardner, and about a week after she saw him in Mrs. Gardner's bed-room, Mrs. Gardner being there also. On another occasion, about the same time, she saw Mrs. Gardner and Mr. Jadis in bed together. They kept up a constant intercourse during Captain Gardner's absence.

Before Captain Gardner's return, Mrs. Gardner expressed to the witness an expectation that she was to be confined on Captain Gardner's return, in the summer. Mrs. Gardner declared she was with child. *In the autumn her appearance was very evidently that of a woman in a state of pregnancy, and she was treated as such by Captain Gardner; on one occasion in particular, some misunderstanding having taken place between Captain and Mrs. Gardner, the latter quitted the house with witness, and went to Lord Hobart's, at Roehampton; they were followed by Captain Gardner, who used every means to effect a reconciliation. Mrs. Gardner was prevailed on to return home: her chaise was upset close to Lord Hobart's door. Captain Gardner expressed "his great regret and terror lest any thing should happen to her in her then state of pregnancy," or that something "might happen to the child that was likely to be born." The party returned to town that night, and Mr. Chilvers, the family*

Sutannah
Baker.

apothecary was sent for, and attended Mrs. Gardner during the illness consequent on the accident.

Mrs. Gardner tried to forward her delivery, and frequently went over the stones in her carriage for that purpose. She told the witness that Dr. Clarke had advised her to do so, and she meant to follow his advice as nearly as she could. She afterwards told witness that the child would not be brought in in time to be Captain Gardner's child, and that Mr. Jadis must be its father ; and that she would tell the family she was not with child, but had some other complaint. She afterwards told witness that she had told Mr. Adderley (her brother) that her time was near, and had desired him to take Captain Gardner out. He was not in the house when she was delivered, or slept at home that night. Mrs. Gardner was delivered at five o'clock in the morning of the 8th of December. Mrs. Burn, a midwife, Dr. Clarke, and the witness, were the only persons present when the child was born ; the servants Rachael Pullen, Sarah Griffiths, and William Davis, and, witness thought, his wife, were in the house at the time. Mrs. Gardner desired witness to go to Mr. Chilvers and tell him that she was put to bed, and wished to see him, but he was to keep it secret. The child was a boy : it was wrapped up carefully, and taken by Mrs. Burn, at six in the afternoon, to Mrs. Bailey, in Swallow Street ; by the direction of Dr. Clarke, witness accompanied Mrs. Burn, and then went back to Mrs. Gardner, and told her the child was safe. Witness enquired at Mrs. Bailey's the next day after the child, but did not see it ; but a few days after she saw it, and she also went with Mrs.

Gardner to see it ; Mrs. Gardner often visited it whilst it continued in Aldersgate Street. Witness was not present at the christening of the child, but by Mrs. Gardner's orders she desired Mrs. Bailey to get it named Henry Fenton. In the summer of 1803, Mrs. Gardner left Captain Gardner's house, and lived with Mr. Jadis at Bayswater ; and she then went with witness to Aldersgate Street for the child, and took it to her house, where Mr. Jadis treated it as his own. Witness some time after had a dispute with Mrs. Gardner, and left her service.

Susannah
Baker.

The Honourable Herbert Gardner is a brother of the late Lord Gardner ; he was on intimate terms with his brother, and very often at his house. He saw Mrs. Gardner in 1802, and she appeared to him to be with child, and treated herself as a female in that situation ; she afterwards ceased to treat herself so, and told him that she had a dropsy. He was in town in 1802, but did not hear of Mrs. Gardner's delivery ; and the fact was never communicated to him until after the separation between Captain and Mrs. Gardner had taken place.

The Hon.
H. Gardner.

Lydia Bailey deposed, that on the 8th of December 1802, she was sent for to the house of her late mother-in-law, in Swallow Street ; she accordingly went there, and found a child, a few hours old, lying on a pillow ; it was very weakly, and without nails, and, as far as she could form an opinion, not to its time ; it was delivered to her to be nursed, and she took it to her house in Aldersgate Street Buildings. Susan Baker came to see it the next day, and directed it to be named Henry Fen-

Lydia
Bailey.

Lydia
Bailey.

ton by Mr. Parker, the curate of Aldersgate Church, at his house. In about six weeks the mother, Mrs. Gardner, came to see it, and afterwards a gentleman called; she sent twice or thrice a-week an account of the child's health to her mother-in-law, for the satisfaction of Mrs. Gardner. The child was afterwards removed to Bayswater, where the witness saw it, and she afterwards attended at its christening, which was performed by the same Mr. Parker, in the presence of Mrs. Gardner, Dr. Clarke, and a gentleman who had called to see the child when it was in Aldersgate Street. The child was four years old at the christening.

Rachael
Pullen.

Rachael Pullen deposed, that she was upwards of seventy years of age: she lived as housemaid in Captain Gardner's family in December 1802. She recollected Mrs. Gardner's delivery, and that Captain Gardner was not in the house at the time; he had gone out with Mr. Adderley, and was absent that night. She saw Mrs. Gardner the morning after her delivery; Mrs. Gardner said, "I have been very ill, and had spasms, and I was obliged to send for the doctor." Previous to this conversation, she had been in the habit of making Mrs. Gardner's bed, and washing her linen, but for some time after she was not employed about either.

Sarah
Griffith.

Sarah Griffith deposed, that in December 1802 she was cook in the family of Captain Gardner. She recollected Captain Gardner's absence on the night of Mrs. Gardner's delivery. She remembered some persons being brought into the house that night, and heard them go up stairs; she also heard the child cry.

William Henry Davis deposed, that in December

1802 he was a servant in the family of Captain Gardner. He saw Mrs. Gardner go out one night, and return on the following morning; he immediately informed Captain Gardner, who quitted the house the next day.

W. H.
Davis.

William Deards deposed, that he was parish-clerk and shoemaker at Bennington Place, near Hertford. He recollected Mr. Jadis living there in 1803: there were a lady and child with him; the latter was about a year old, and went by the name of Henry Jadis.

W. Deards.

Hannah Palmer deposed, that she recollected Mr. and Mrs. Jadis living at Bennington in 1803: there was a little boy in the family, who went by the name of Henry Jadis, and was treated by Mr. Jadis as his son.

Hannah
Palmer.

Miss Sarah Singleton deposed, that Master Henry Fenton Jadis was a commoner at Westminster School in 1814; his bills were paid, and he was frequently visited by Mr. Jadis, whom she always considered and treated as his father.

Miss S. Sin-
gleton.

The examination of the medical witnesses to prove the impossibility of the claimant, Henry Fenton Gardner, being legitimate, took place as follows * :

Charles Mansfield Clarke (by Counsel).

C. M.
Clarke.

You are an accoucheur ?

I am.

How long have you been in practice as a medical man ?

About twenty years.

* This branch of the evidence is given verbatim from the minutes of the committee. It would not admit of abridgement.

C. M.
Clarke.

Has your experience been very extensive during that time?

My time has been fully employed during the greater part of that time.

According to your experience, acquired from so much practice, what is the full period of a woman's gestation, under ordinary circumstances?

Forty weeks.

In your judgment, is it possible that a child born on the 8th of December, and which has lived, could have been the result of any sexual intercourse subsequent to the 11th of July?

Certainly not, in my opinion.

In your judgment, could a child born on the 8th of December, and which lived, have been the result of sexual intercourse anterior to the 30th of January?

Certainly not, in my opinion.

The period mentioned comprehends 311 days, or forty-four weeks and three days?

So I understand.

Could it have been the result of an intercourse anterior to the 7th of February, being 43 weeks and four days?

Certainly not, in my opinion.

Supposing a woman's labour to be protracted, could that have made such a difference as to have enabled the child to be the result of an intercourse at the dates given?

I never knew a labour protracted to such a period.

How long could a labour be protracted without proving fatal to the mother or the child, or both of them?

I cannot answer that question precisely.

C. M.
Clarke.

As nearly as you can?

Your Lordships will understand that it is a question which it is very difficult to answer; I hardly know how I can answer it. I have no difficulty, excepting the difficulty of the subject. If my answer may be taken as a matter of conjecture, and not as a matter of certainty, I should be very glad to give it. I have known a labour last five, possibly six days; that I should say was the *ultimum tempus*; but it is not to be considered as a precise answer, because a precise answer cannot be given I believe to such a question.

Was the child that was born after this labour you have referred to, a child born at its mature age?

I do not refer to any particular labour; but I am taking the recollection of past occurrences in a rough way. I am not referring to any precise case.

Supposing a child to be born whose nails are not perfectly formed, does that lead you to conclude whether the child has arrived at its full growth?

There is a vulgar error with respect to the nails of children, upon which no dependence is to be placed. The nails, in common with many other parts of the body, grow more quickly in certain cases than in other cases, and no dependence is to be placed upon that circumstance, to the best of my belief.

Does a child having laboured under a difficulty in sucking afford any rule for judging whether it had arrived at its proper growth before it was born?

I should say, that as weakness is in general in proportion to age, so a child sucking with considerable dif-

C. M.
Clarke.

ficulty is more likely to have been a child prematurely born than one sucking naturally and easily.

Cross-examined by Mr. Attorney-General.

After sexual intercourse, what is the extreme point of time at which labour must of necessity begin ?

Forty weeks, I should say, is the extreme time.

Can that, by any suffering, by any hardships, which a woman has undergone, be protracted beyond the forty weeks, by any treatment she has undergone ?

I know there is a case of that kind on the books ; but I never knew a case of that kind. I can perfectly understand that privation, fatigue, and exhaustion may accelerate, but I cannot see how such circumstances can retard ; neither in my knowledge have I ever known any one instance of a labour having been retarded beyond the period I have mentioned.

If labour must of necessity, according to your judgment, begin at the expiration of forty weeks, what is the extremest point of time to which the continuance of that labour, before the child is born, may be protracted ?

I have partly answered that question before ; but your Lordships will understand I do not give a precise answer to that question, because my answer is founded on the recollection of the general result of a number of protracted labours ; and as far as such an opinion can be of any value at all, I should say that I have never known a labour protracted to a period of time equal to that of five or six days ; and I am not sure that I have known it protracted so long, the child being born living.

Do you conceive it possible that it could be protracted as far as a fortnight? C. M. Clarke.

Possible to the Almighty, of course; but not possible, in the common acceptance of that term.

You were referring to a case which is supposed to have occurred at a former period; what was the name of the medical man that was concerned, that gave evidence upon that occasion?

That I do not know. If I recollect rightly, but I am not sure whether it was the case of Alsop v. Bowtram^a. I do not recollect the name of the medical man; the case I think is in Croke's James.

Though you do not recollect his name, do you happen to recollect whether he was a man of eminence in his profession?

I have merely recorded the fact, having been a teacher of that part of the profession for a number of years. I have recorded the fact for the benefit of the students; I do not recollect any further particulars of the case.

You are understood to say that labour must begin at the expiration of forty weeks after the last sexual intercourse.

Certainly.

How can you ascertain that fact; how has your experience enabled you to state that as a fact?

I should say that the immorality of the age has enabled me in a great number of instances to ascertain that fact; that the fact of the last intercourse has been

^a A very full discussion of this case will be found in the arguments of the counsel for the respective claimants.

C. M.
Clarke.

stated to me by the parties, who alone were acquainted with it, for their mutual advantage; and that I have combined that fact with the knowledge of the subsequent fact of the commencement of the labour; and that I have never yet seen a single instance in which the laws of nature have been changed, believing the law of nature to be, that parturition should take place forty weeks after conception.

Instances of this kind may have occurred; but have you had experience of a great number of instances of this description?

I must answer that question as I did the former, that I have not minuted the number; but I should say several.

And you have in no instance known a deviation?

I have not.

Have you, in the course of your medical studies and inquiries, ever heard of any deviation?

I have heard of a great number of things; but I have not believed them, because they have varied from my experience; and on sifting such cases, I have always found they had not been founded in fact.

The result of your judgment, as a man of science and experience, is, that forty weeks is the extreme time?

The result of my judgment, as a man possessing some experience, I should say is, that forty weeks was the time.

Cross-examined by Mr. Tindal.

I understand you to say that your judgment is formed, as to the first period, that is, as to the time from which

the reckoning begins, from the information of the parties themselves? C. M. Clarke.

Certainly; from their interested communication to myself.

From their communication to yourself?

I say interested, because, where parties have an object to carry, it is not an object, of course, with them, to deceive the person whom they consult.

Have you not known, in many cases, that persons giving you this information have themselves been deceived, and that the event has not happened as they stated it to you?

I should hardly think that the man could be deceived as to the time at which he begot a certain child.

Do you think that is more in the knowledge of the man than of the woman?

I would beg to observe, that when I answered that question, it referred to cases of single connexion, and not to connexions, one of which was stated, but that a single connexion took place, the result of which connexion was a pregnancy, the ultimate result of which pregnancy was a labour, where there was one single act of connexion.

Then the judgment you form depends upon the truth of that information, as to there having been or not having been one single act of connexion?

Certainly; but the result confirmed that statement.

Have you not known in many, I may say in most of the ordinary cases which occur of married persons, that females have been mistaken in the time that they have assigned for their gestation?

C. M.
Clarke,

A great number ; but married persons do not calculate from the moment of conception, but from other circumstances.

Of course the far greater number of cases that come before you are those of married persons ?

Certainly, no doubt.

Therefore the result of your judgment must depend mainly on that which occurs in your daily practice, and not on single and particular cases ?

The result of the particular cases I have stated to your Lordships ; but perhaps that result may be confirmed by an additional fact, which is this, that supposing,—and you will excuse me for employing medical language perhaps,—supposing a woman to menstruate upon a certain day, and her menstruation to cease on a certain day, and that woman to fall with child, that woman must produce a child at the end of forty weeks from the day preceding the next expected menstruation ; proving, therefore, with the other cases (which form by far the greater majority of those which have fallen under my care), that forty weeks is, even in those cases, the *ultimum tempus pariendo mulieribus constitutum*.

Is not the judgment of a medical man made up, not only from his own experience, but from books of authority on the subject ?

In matters of opinion, but not in matters of fact.

Is not the time during which the gestation of the woman is carried on partly composed of matters of judgment, being derived from facts, and partly from books ?

No ; I conceive it to be entirely a matter of fact, provided you can give credit to the assertion of the parties ;

and in the instances from which my opinion has especially proceeded, the parties have been themselves interested in telling the truth.

C. M.
Clarke.

Have the goodness to state the number of instances you can say have occurred to you under those particular circumstances you have adverted to?

I really can hardly mention numbers, because I have kept no account of them—wishing at the same time to state the number, if I could—but I have known a great number.

Have you known as many as ten?

I should say more than ten, certainly; many more than ten—a great many more than ten.

That is the nearest approximation you can make to any actual number?

No, I do not know that. I can state the precise instances. I think I may venture to say I have known of twenty or thirty instances; twenty instances I will say to be within the truth, in which I can be enabled to state precisely the length of time.

Does not the judgment of the medical man in some measure found itself upon the works of authors of eminence, and of experience and ability? ^a

It appears to me, not in matters of fact, where one's own observation constantly contradicts such assertions, provided they are at variance with that experience.

^a In Cowper's case (State Trials), Dr. Crell observed, "It must be reading, as well as a man's own experience, that will make any one a physician; for without the reading of books of that art, the art itself cannot be attained."

C. M.
Clarke.

Was Dr. Hunter a person of eminence in his profession?

Of great experience and great eminence^a, much greater than myself.

Therefore, if this should be laid down by Dr. Hunter in any of his works, that a child may be born perfect and in the natural way after ten months, is not that the dictum of a learned and eminent man, on which reliance can be placed?

It is the dictum of a learned and eminent man.

The Solicitor-General submitted, that this examination was not regular; that the opinion of Dr. Hunter may be adduced in the way of observation, but not in the examination of a witness.

Mr. Tindal submitted, that he had a right, in respect of the judgment of Dr. Hunter, who was deceased, to put questions by way of cross-examination.

The counsel were informed, that they might ask what were the opinions of eminent men.

(Mr. Tindal.)—Do you not know it was the opinion of Dr. Hunter, that a woman may be brought to bed after the lapse of ten calendar months from the time of conception?

I believe Dr. Hunter never taught that doctrine. He may have adverted to cases in which such circumstances

^a William Hunter, M.D.—He was the author of that learned and splendid work, "The Anatomy of the Human Gravid Uterus." The museum he bequeathed to the University of Glasgow, is a noble monument of his professional skill and literary acquirements. He died in London, on March the 15th, 1783.

were represented to him; but if I recollect rightly, Dr. C. M. Hunter never taught that doctrine. Clarke.

Am I to understand you to say he did not state that?

Not as his opinion, I believe I may say.

Are there not some names of authors which are well received, and upon whom reliance is placed in their profession, who have taught a contrary doctrine to that you are now stating, namely, that the time may be longer?

I may refer to Haller^a, who perhaps stood as high as a physician, in his time, as any other, perhaps higher; and who is considered a most respectable authority, as high an authority as can be had upon such a subject; and I believe Haller states forty weeks to be the period.

Have you not learnt from books of authority that the time of gestation of a mother may be longer than the period you have represented?

Certainly; it is stated so in the Book of Moses; but when my own experience is opposed to such a statement, I would certainly give, for the advantage of persons, the result of my own experience, rather than I would offer the Mosaic opinion to guide them in their arrangements.

The question did not refer to so early an authority as Moses, but one more within the reach of our own times; cannot you refer to any practitioners of eminence, within

^a Albert, Baron de Haller—perhaps the greatest name in the philosophy of medicine. His own experience was limited, but his knowledge of the experience of others was unparalleled. His celebrated work, "*Elementa Physiologiae Corporis Humani*", eight volumes quarto, contains an immense collection of medical cases. He died on the 12th of December 1777, aged sixty-nine.

C. M.
Clarke.

the last two centuries, who have thought the same opinion?

Not that a woman goes ten months.

Not that she may go ten months?

Not as his opinion; certainly not.

Does not a very ancient author, and one to whose name one always pays the greatest deference, Hippocrates, lay down that it may be a longer time than ten months?

Hippocrates mentions ten months; and I believe the expression to be, *Γυνὴ φύει δέκα μῆνας, τοῦτο τὸ δὲ καὶ μακρότατον.*

Have the goodness to tell me the nature of the months he would reckon by?

I am not prepared to answer that question.

You know the lengths of their months were different?

I believe so.

Is there an author of the name of Roederer?

I know the name of the author, but am not acquainted with his works.

(Mr. Attorney-General.)—In the reign of James the First, do you know of a practitioner of the name of Chamberlen?^a

He was a practitioner of considerable eminence in this town, and considerable experience.

Do you happen to know that he was the person who

^a Chamberlen.—He was physician to James the First, and probably the inventor of the forceps that still bears his name. His nephew, or grandson, Hugh Chamberlen, was the friend of Atterbury and Sheffield. The latter erected a monument to his memory in Westminster Abbey.

gave evidence in the cause which has been referred to? C. M. Clarke.

No, I do not recollect that.

Re-examined by Mr. Adam.

Is Roederer a person of much reputation in medical science?

In this country he is not much heard of.

Within the last two hundred years has the stock of medical information upon this branch much increased?

I hardly know what answer to give to that question.

Since the death of Dr. William Hunter, has this branch of medical science been much matured and improved?

In some respects considerably, I should say.

(By a Lord.)—You stated that in a common case you counted from the day when you supposed that a woman ought regularly to have menstruated?

Just so.

How can you tell, or is it completely conjecture, from what period between the time she had menstruated, and the time she ought to have menstruated, how many days may have elapsed?

In the ordinary cases in which I might be applied to for information respecting the time at which labour would take place, subject to the difficulty your Lordship has stated, incapable as I should be of seeing whether the party had fallen with child immediately after the last menstruation, or immediately before the expected one, or in what part of the interval between those two dates,

C. M.
Clarke.

I should take the safest mode of giving the average reckoning, by counting the half of twenty-eight days, fourteen, from the last period, and of course fourteen from the next expected one; and I should offer an opinion, that in all probability the effect might follow the cause at the end of forty weeks from that half of the interval; but I should know that it must take place at the end of forty weeks from the day upon which the last menstruation ceased, and before the day of expected menstruation.

(Mr. Attorney-General.)—Did you ever know an instance of a birth of a child being extended more than forty weeks beyond the day preceding that upon which the menstruation ought to have taken place?

I have gone so far,—and once in a case of considerable importance in this country, which is known to a peer now in this house,—I have gone so far as to give an opinion, that a labour of an individual would take place between such and such a period, and the first period which I have mentioned has arrived, and the labour did not take place, and my opinion has been adverted to in the morning, and in the evening of that day the labour did take place.

Did you, in any case, ever know a labour to be protracted beyond forty weeks from the day when the next menstruation ought to have taken place?

No, in no instance.

(By a Lord.)—You said you should think you knew at least twenty cases in which the parties had told you the day on which connexion had taken place, and that your experience is formed upon those twenty cases, and

other cases, that it is limited to forty weeks; is there any case where the parties informed you of the day of connexion, that you ever knew it exceed forty weeks?

C. M.
Clarke.

Never, to the best of my knowledge.

Ralph Blegborough, M.D. by Mr. Solicitor-General.

R. Blegbo-
rough, M.D.

You are a medical man?

I am.

Have you had considerable practice in midwifery?

I have.

How long have you been in practice?

Four-and-thirty years in London.

Is your practice exclusively confined to that line?

No, it is not.

According to your experience, what is the period of gestation?

Generally, it is the inclination of my opinion that it is thirty-nine weeks, but forty weeks I consider the ultimatum.

Has your experience verified those dates?

Certainly.

Has the opinion you have given been the result of experience which has fallen within your knowledge and practice?

Yes.

Have you ever known a case in which gestation has been prolonged to the period of forty-three weeks and four days up to the period of delivery, and in which the child has lived?

R. Blegbo-
rough.

According to my experience, I have no idea that such an event is possible.

You should not conceive it possible that such an event can happen ?

Not according to the laws of the animal economy.

Have you found the laws of the animal economy general, or have you found them to vary with the constitution of the individual ?

I have no idea that difference of age, or difference of management, makes any alteration in the laws of gestation.

You are to be understood that adventitious circumstances do not vary the law of nature to protract gestation ?

Seminal obstruction may for a certain number of days, probably five or six, but in that case it is uniformly attended with hazard, and almost certain death, either to the mother or the child, or both.

You are understood to say, that five or six days constitute the range of departure from what you defined to be the law of nature ?

Certainly.

Are you to be understood, that this departure of five or six days is usually attended with the death of the infant, or the death of the parent ?

Certainly ; because the mother during that period is contending against mechanical opposition ; in which case the womb generally bursts, and the patient is consequently destroyed.

What you call mechanical opposition is some defect or obstruction in the uterus, or in the adjacent parts ?

In the bones, from mal-conformation.

R. Blegborough.

That you consider entirely a deviation from the law and order of nature?

Certainly; insomuch that the effort of labour had commenced at a proper period, and was only delayed by mechanical obstruction.

Does it happen to you to have been consulted in cases where you can ascertain the day of sexual intercourse, on which your reasoning was founded?

I can answer that question very satisfactorily to your Lordships; it is not unusual to be sent to by ladies who have felt a peculiar sensation, have fainted, and have been extremely ill, so as to induce their friends to send to a professional man; upon examining them minutely, and asking them those questions which are proper on the occasion, they will declare certain sensations, by which we know that conception had taken place, and was the cause of those feelings which they represented to us. Upon calculating from that time, I have in such instances invariably found I have been right in my surmises, and that labour has taken place certainly not later, in every instance that I recollect of this sort, than forty weeks from that period.

Could a child born on the 8th of December, and born alive, according to your opinion, have been begotten so late as the 11th of July in the same year?

No, certainly not.

Do you pronounce that to be impossible, according to the general laws of nature?

I do.

R. Blegborough.

Cross-examined by Mr. Attorney-General.

You are understood to say, that labour at all events must begin at the expiration of forty weeks, though the delivery may be protracted five or six days?

Yes.

Your attention has probably been directed to a case supposed to have taken place in the reign of James the First; was Mr. Chamberlen, who gave evidence on that occasion, a man of eminence at that time?

I believe he was a teacher.

Was he a practical man also?

I believe he was.

In that case the delivery is said to have been protracted to the expiration of nearly eleven months; do you remember the facts of the case?

No, I do not.

You have never consulted it?

No, I have not.

Cross-examined by Mr. Tindal.

You were understood to say, that the period of gestation, in your judgment, is forty weeks, reckoning from the time of conception?

Yes.

May there not be some distance of time intervene between the sexual intercourse and the conception?

I should not think it likely at all; I should have no idea of that.

Perhaps you have not formed a judgment decisively, either one way or the other ?

R. Blegborough.

Yes, I have ; we imagine conception to arise from the ova seminalia, the influence of which will very soon be lost, if not applied at the proper period.

When you say " we imagine ", you mean that is your judgment ?

Yes.

Are you not indebted for those opinions, not only to your own experience, but to the works of eminent authors ?

I speak here, and I thought I was called here to speak, from my own opinions, the formation of my own judgment.

The question applies to the ground of your judgment ?

I hear of ladies going to a much later period : but there are cases of extra uteral conception, and the *foetus* never passes per vias naturales, nor in such case is the *foetus* ever born with life.

The question is, whether the judgment of a medical man does not depend as much, or at least in some degree, on works of authority in his own profession, as on his own individual experience ?

Not as to facts, certainly. I speak from my own recollection of facts ; if I were to say all I have heard upon this subject, I should get into a very wide field, and perhaps be very inconsistent with reason.

Are there any books in your profession which are reckoned works of authority at all ?

Yes, there are.

R. Blegborough.

Is it not to be concluded, that, if they are works of authority, the judgments and opinions of men in that profession bottom themselves in some degree on the authority of those works ?

There are very few men of very great eminence who have written books^a. Men who write books have seldom great practice; they are generally detailing the opinions of others, and not their own; and I should be very sorry to be led astray by a great name, such as Baron Haller, who has been mentioned as an authority; who, perhaps, never was attendant on a case of midwifery in his life^b. I should be very dubious of the opinion of such a person. I wish very much to confine myself to my own observations, and the result of my own experience.

Then you are not of the opinion of Mr. Clarke, that the gentleman you have mentioned, Baron Haller, was a man of great authority ?

No, not upon that, certainly.

Doctors differ upon this subject ?

Certainly; he was a general philosopher, writing upon all subjects, but not having particularly attended to this.

Are there in your profession books which are reckon-

^a Yet Sydenham, Mead, Cullen, Currie, Heberden, James, the two Hunters, Cruikshank, and Baillie, passed for men of some eminence, and posterity will confirm the reputation of Home, Maton, Lawrence, Cooper, and Armstrong. The best medical works published in France have been written by the most eminent practitioners. No one can accuse Baron Larrey of want of experience.

^b Dr. Blegborough seems to have forgotten that Haller founded the School of Midwifery in the University of Gottingen.

ed books of authority, on which a practitioner may rely ? R. Elgar-rough.

None, I believe, that relate such a circumstance.

The question refers to no circumstance ?

None certainly, which state the period of uteral gestation at a more distant period than forty weeks.

You introduce a restriction and qualification in your answer, that did not exist in the question ; are there no books of authority upon the practice and principles of midwifery, upon which practitioners may rely ?

Certainly there are.

Was not Mr. Hunter a man of eminence and great skill in that as well as other parts of the profession ?

Yes, certainly he was.

Do you know the works of a certain author, of the name of Roederer ?

No, I do not.

When you were examined by the Solicitor-General, you stated that the time from which your reckoning of the forty weeks commenced, depends upon the information given you by the patients, who call for you ?

Yes.

Are you to be understood, that those were persons who described those symptoms which they felt at the time ?

Yes.

Do those symptoms necessarily follow immediately upon the sexual intercourse ?

Not always, certainly ; but frequently.

Do they not vary frequently considerably according to the nature and constitution of the patient ?

R. Blegborough.

Certainly.

Are there not many cases in which females may not feel those symptoms which you mention, until the period referred to has gone by for some weeks?

Undoubtedly. Certainly the sensations I have considered some ladies may or may not feel at the time of conception; but I am sure I did not mistake in having attributed certain feelings I have described to conception, and my subsequent observation has confirmed the opinion I have formed.

If the time at which those apparent symptoms take place may vary, with regard to the time of sexual intercourse, can you take upon you to affirm positively that the forty weeks you are reckoning commenced from the time of the intercourse?

I have not said that those sensations took place subsequent to conception; I only say that I have had those sensations described to me immediately on contact, which has ended in pregnancy, as I had predicted it would, and the result was labour at the time I expected.

Have you not known that in many instances, even taking the account from those symptoms, you have been disappointed and deceived in the time?

No, I have not; it is not a very common occurrence; but I do recollect such occurrences.

You are understood distinctly to say, that in fixing the period which you assign of the forty weeks gestation, you borrow the first terminus of that period from the symptoms which your patients describe to you?

Yes.

Re-examined by Mr. Solicitor-General.

R. Blegborough.

You have been asked about several eminent midwives; did you ever hear of a gentleman of the name of Hargrave, among a series of accoucheurs, as particularly eminent in midwifery?

No, I have not.

The late lawyer Hargrave—you have never heard of Mr. Hargrave's medical skill?

No.

Probably you will not look into Coke upon Littleton for any opinion about a protracted labour?

Certainly not.

In the instances which you say have not often occurred, in which those sensations or feelings have been described to you, have your dates, in respect to the forty weeks, been verified in those instances?

Yes.

Were those feelings which were described to you, when stated by the parties who did state them, coupled with the period of sexual intercourse; when did they state the period of sexual intercourse?

Immediately preceding their having sent to me.

Those instances were instances where ladies stated the fact of sexual intercourse to have taken place, or rather led you to infer that fact?

Yes; both from the husband and the wife.

In those cases, where the fact of sexual intercourse was stated by the husband or the wife, has the actual

R. Blegborough. delivery corresponded with the period of gestation you have mentioned?

It has never in my experience exceeded the forty weeks.

It has never in your experience exceeded the forty weeks where, from the statement, you were informed of the period of conception?

Never.

R. R. Pennington, Esq. Robert Rainy Pennington, Esquire, by Mr. Le Marchant.

You are an accoucheur?

I am.

Have you been many years in practice?

About seven-and-thirty.

According to your experience, what is the usual time of gestation of a woman?

Forty weeks.

Have you known a delivery to be protracted beyond that time?

Not beyond three or four days.

From your experience, do you think it possible it could be protracted beyond that time without injury to the female or to the child?

Certainly not.

For what reason?

From the effort of the uterus the woman and child would both die during the delivery.

Do you conceive it possible that any agitation of the

mind could protract delivery beyond the period you have just stated? R. R. Pennington.

Certainly not.

Nor any particular disorder?

No, nor any particular disorder.

Nor any mode of treatment?

Nor any mode of treatment.

Do you think it possible that a child can be born on the 8th of December from sexual intercourse on the 30th of January?

Certainly not.

Or, that a child could be born on the 8th of December from sexual intercourse which had taken place on the 11th of July?

Certainly not; not to be alive.

Nor from the 7th of February to the 9th of December?

No, certainly not.

Cross-examined by Mr. Attorney-General.

What is the indication of a child being born without nails?

We have seen children born not exactly without nails at forty weeks, and we have seen them perfect at thirty-seven.

Cross-examined by Mr. Tindal.

You stated that according to your experience, forty weeks is the usual time; forty weeks from what time?

R. R. Pennington.

From the time of conception.

How can a medical gentleman, in practice in this town, know exactly the time when the conception of a female takes place?

From the circumstances stated to us; we always get all circumstances related, and we know that from that time in forty weeks a birth will take place.

Are you never deceived in the account you receive from your patients?

We may be deceived; they may tell us they feel; but we judge from the circumstances, and know from the circumstances that conception has taken place, and that forty weeks terminates the whole.

Do they not very frequently make mistakes in stating that as the time of their conception from which you begin to reckon?

Yes; but then we compare them in that way that we are never hardly deceived. Some come at nine-and-thirty weeks, and some will come in seven-and-thirty weeks; but they never go, according to my opinion, beyond forty.

That is assuming you are right in the period you assign for the terminus of the gestation?

Yes.

Are not females frequently mistaken three, or four, or five weeks in the period they assign themselves as the time of their delivery?

No; I cannot conceive they are.

Have you not known they have been mistaken for some weeks in stating the time when they will be confined?

Yes, that they will do; but then I am quite sure, on inquiring into it, no such thing will take place. R. R. Pennington.

You are assuming that they have stated correctly the time at which the conception began; but may not they have made some mistake, from which a second mistake of the time of their delivery may originate?

No; I do not suppose they do.

The whole then of your judgment is founded on the faith you put on the first account given you by the female?

The first account, and the circumstances which go on after that confirm it; we find that they are not deceived.

Mr. Hunter was a man of eminence and reputation?
Of very considerable.

Robert Gooch, M.D., by Mr. Le Marchant.

R. Gooch,
M.D.

You are an accoucheur?

I am.

How long have you been in practice?

Between sixteen and twenty years.

Have you been in considerable practice?

For some years I was physician to two lying-in hospitals, and for a considerable number of years to one; besides which I have been for a considerable number of years lecturer on midwifery at Saint Bartholomew's Hospital.

According to your experience, what is the usual time for gestation for a woman?

I should say nine calendar months, where the thing

R. Goesh. can be calculated accurately; that is, if pregnancy was known exactly to take place on the 25th of March, for instance, I should expect the birth to take place on the 25th of December—that is just nine calendar months. It is generally stated in the books, I believe, to be forty weeks, but I believe forty weeks to exceed the usual term of pregnancy. The writers say nine calendar months, or forty weeks; now the fact is, nine calendar months is scarcely more than thirty-nine weeks.

You are understood to say that it is generally less than nine calendar months?

Rather less than nine calendar months.

Does it often exceed nine calendar months?

It is sometimes a day or two less and sometimes a day or two more.

Have you known it often to exceed nine calendar months?

A day or two.

Not more than a day or two?

When I say often, it is not very often one has an opportunity of calculating it accurately, because gentlemen ought to consider, that in the way married people commonly live together, having constant access and frequent intercourse with one another, it is utterly impossible to know exactly the time when conception commenced, and consequently utterly impossible to know exactly the pregnancy; but persons of large practice, and that practice continuing for a considerable length of time, are every now and then meeting with instances where the time of conception is accurately known, and therefore the length of pregnancy is actually known;

and those are the cases on which we found our opinion; R. Gooch. and those cases lead us to believe that it is exceedingly accurate, as nearly as possible nine calendar months, sometimes a day or two before, sometimes a day or two beyond.

Have you not met with many such instances, in the course of your practice?

Quite a sufficient number to enable one to form one's opinion upon the subject, as clearly as on any question of natural history.

Those instances confirm the opinion you have just given?

Those instances invariably prove it. It ought to be recollected in our ordinary cases, I mean those cases where married people are living perpetually together, and where it is impossible to know exactly, although they are not strict and accurate experiments, yet it is strict and accurate enough to corroborate our notion, for we have known those cases falling in labour nine calendar months from some period or other, from which we must calculate.

You mean to say it is difficult to form an accurate calculation, in common cases?

It is.

How far does the possible inaccuracy extend?

It is not an inaccuracy.

An uncertainty, how many days?

I say even those cases always come at the nine calendar months, from one period or other of the first month.

Is it your opinion, that a child born on the 8th of December could have been the result of sexual inter-

R. Gooch. course either on the 30th of January or anterior to it, being 311 days?

No.

Do you think it could have been the result of sexual intercourse on the 7th of February, being 304 days?

No.

Do you think it impossible?

I believe it to be impossible; so impossible that it would influence my conduct.

Why do you think it is impossible that it should be so?

Because it deviates entirely from the strict accuracy with which I have found the length of pregnancy in those cases in which I could make the experiment strictly, in those cases where by knowing the exact time of conception I could know the exact length of pregnancy; it has come with singular accuracy a day or two before, or a day or two after, but very commonly a day or two before the nine calendar months.

Are you to be understood to say, that the period is certain, is uniform?

As certain as any point on natural history can be; I know few things about which I am so much satisfied.

Do you think any injury would result to the woman or the child from a protracted labour, if it was possible to take place?

I do not believe a possibility of it.

Do you think a child born on the 8th of December could be the result of sexual intercourse on the 11th of July, or subsequently?

No, certainly not; a full grown child, certainly not.

Or a child that has lived to manhood; could a child R. Gooch.
born on the 8th of December be the result of sexual intercourse on or after the 11th of July?

That is short of five months; I have never seen any thing approaching to it; I believe they may be sometimes born alive, but I have never seen anything approaching to it born capable of living; they have moved, and died in a few minutes.

Were you acquainted with Dr. William Hunter?

Dr. William Hunter died before I settled in London; but everybody knew him by his writings.

You are well acquainted with his writings?

I am well acquainted with his writings.

Have you heard of his opinions upon the subject of protracted labour?

I have. The question was put to him; and the note in answer to that, I believe, is printed in Hargrave's Notes on Coke on Littleton.

Have you read the note in Coke on Littleton on which his opinion was given?

I have often examined the note carefully.

Have you examined the circumstances to which it relates?

It relates to the common circumstances of the case.

Is that case known in the profession?

What case?

Are there not two cases mentioned in that note to have been stated by Dr. Hunter to Mr. Hargrave?

If I recollect the note of Dr. William Hunter rightly, the last clause of it is this,—that he has known one woman who went fourteen days beyond nine calendar

R. Gooch. months, and he believes that there were two who went beyond ten calendar months.

Have you investigated those cases?

I have at home a manuscript copy of Dr. William Hunter's Lectures.

Mr. Tindal submitted that this was not evidence; that the examination must be confined to the general opinion of the person referred to.

Mr. Adam submitted, that if Dr. William Hunter's opinion was to be received, founded as it was on two instances, those two instances ought to be inquired into.

The counsel were informed, that the note in Coke on Littleton was supposed to be a note of Dr. Hunter, but that could be known to the witness only by report; that the question ought to be put on the supposition of such being stated, whether he knew what was the fact.

(By Mr. Le Marchant.)—Within your experience, has any case happened of a woman going in gestation beyond ten calendar months?

I have never known one go ten months; and though I have looked over the reports upon the subject, I have never read one, the internal evidence of which was satisfactory proof; I have never met one that approached it. The greater number of those on record are on the very face of them absurd; cases of three years' pregnancy.

Did you ever hear of a case of nine months and a fortnight?

I never met with one. The only one on record, which I remember at this moment, is the one alluded to by Dr. William Hunter, in his notes.

What case is that?

R. Gooch.

I know nothing more of it than what Dr. William Hunter mentions in the note.

(By a Lord.)—Suppose a woman bore a living child fourteen days later than nine calendar months; how do you reconcile that with your statements?

I have never witnessed a thing of the kind; and in order to satisfy myself about it, I should like to know the grounds on which Dr. William Hunter stated that fact; for after all, he says “I know of one, and believe there were two”; by what means he could know of this one I am at a loss to understand; he must still depend upon the testimony of the female individual.

Supposing such a thing were to fall within your knowledge, on what grounds could you account for it?

On no other ground but the circumstances deviating greatly in some rare instances from the ordinary course of nature; but I beg leave to add, that I have seen none similar to it in the course of my experience.

You do not conceive it possible?

I can only know the possibilities of nature by knowing all nature; and as I do not know all nature, it is impossible for me to be a judge of that. It is quite dissimilar to anything I have experienced. In all the cases where I could calculate the length of pregnancy accurately, I have been struck by the regularity with which it ends at nine calendar months, or a day before or after.

R. Gooch.

Cross-examined by Mr. Tindal.

Dr. Hunter was reckoned a man of very considerable experience in the profession ?

I think Dr. William Hunter was a man of more experience and more talent than perhaps anybody who ever practised midwifery in London, except Harvey, the discoverer of the circulation, whom I look upon as the greatest man.

Was he not also a man of great credit ?

Oh, yes ! There is nothing in the shape of praise which one would not say of Dr. William Hunter.

Was he not a very skilful pains-taking man, and not likely to lay down an opinion, or to pledge his judgment rashly on any subject within his profession ?

Yes ; I think that is an accurate account of his general character.

You are understood to say, that the greater part of your profession lies in cases relating to married women ?

I am extensively employed among pregnant and lying-in women ; but I was for many years physician to two lying-in hospitals. In one of those lying-in hospitals there are two wards kept for single women, so that cases frequently occurred in which I had an opportunity of calculating accurately the length of pregnancy ; besides that, a man in a tolerably conspicuous situation as a practitioner of midwifery in London, will frequently, in private practice, be consulted about persons who are hospital patients, in which the thing can be calculated accurately, because in many instances there were no

grounds for deception. When I say there were no R. Gooch. grounds for deception, I mean that young females in very respectable situations are very often seduced; the intercourse is single; there is no motive whatever for misstating the fact; it is just as unpleasant to come and confess one intercourse, as to come and confess a hundred; there is no motive for fraud there.

That would depend upon the temper and condition of the individual?

I am not aware of any circumstance in the temper and condition of the individual which could afford a motive for deception in a case of that kind.

Can you not suppose a person who has been seduced limiting it to one single intercourse, not liking to confess more than one, on the ground of the frequency of it leading you to suppose there has been a habit of incontinence?

No, not in the cases I allude to. I think no man, in the cases I allude to, would suspect that.

You stated, that the only possible ground on which you can form an opinion rests on the credit due to the testimony of the woman?

Of course I must depend for the accuracy of the facts on which I found my opinion, on the accuracy of the statement of the person communicating those facts.

You have already stated that Dr. William Hunter, when he gave his opinion, also depended upon the accuracy of statement?

Certainly.

Then when he gives his opinion, and you give your

R. Gooch. opinion, you equally depend upon the accuracy of the statement made to you?

As a general observation, I should say yes.

In the case of married women, you have stated that the nine months must date from one period or other of the preceding month?

Yes; but what period of that preceding month I do not think it is possible to say. Our ordinary cases are not strict experiments; I mean by ordinary cases, the cases where husbands and wives are living in constant access, and frequent intercourse.

Are there not in the medical profession many books that are looked up to as works of authority?

Yes; but I know very few that do not contain things which would now be looked upon as manifest errors.

Has there been a new light that has burst in upon the world since the old doctors went off?

In various branches of science there has been, and why should there not be in ours.

Would not the experience of past ages be more necessary in your profession than in any other?

I think there are cases attested by very eminent individuals, about 100 or 150 years ago, which are on the face of them absurd. I can point to a case on record, attested by Winslow, one of the most eminent anatomists of his age, of a pregnancy which lasted two years and eleven months. I think light has flown in upon us since, sufficient to contradict that.

Is he a person alive at this moment?

No; he lived about a century ago.

Your answer has been confined to a particular case, R. Gooch.
instead of a general answer, whether the profession of
medicine do not rely considerably on works of author-
ity that have come down to them?

The profession of medicine used to rely more upon au-
thority than it does now. Men are now much more than
they were, even twenty or thirty years ago, in the habit
of depending upon their own observations, cultivating
the faculty of observation very much on their own ob-
servation and their own meditation. Dr. William Hun-
ter himself said there were no class of men who were
more in the habit of recording unfaithfully than men of
science; he said "They lie like the very devil."^a

I hope he confined that expression to a particular
profession?

The certainties of medicine never expect to equal the
certainties of the law.

David Davis, M.D. by Mr. Adam.

David Da-
vis, M.D.

You are a physician?

Yes.

^a This species of inaccuracy long retarded the advance of knowledge. Bacon taught the importance of facts, and left a specimen of the manner in which they ought to be recorded. Unfortunately there are few such "chroniclers" of nature, and we must not expect many: for as he has energetically told us, "*Nemo adhuc tanta mentis constantia inventus est ut decreverit et sibi imposuerit, theorias et notiones communes penitus abolere, et intellectum abrasum et æquum ad particularia de integro applicare.*"

D. Davis. How long have you practised as a physician?

Between four and five-and-twenty years.

Has your practice tended to midwifery?

During the last thirteen years.

Forming your judgment on the experience you have had yourself, what is the general period of the gestation of a woman?

I should say, as nearly as possible, nine months, nine calendar months; and I should rather incline to one or two days less, than beyond that period.

In your opinion, if a child was born on the eighth of December, could it be the fruit of sexual intercourse which had taken place previous to the thirtieth of January, making 311 days?

Certainly not.

Could a child that was born on the eighth of December be the fruit of sexual intercourse that had taken place on the seventh of February, being a period of 304 days?

I believe not.

Could a child that was born on the eighth of December be the fruit of sexual intercourse that had taken place subsequent to the eleventh of July, being a period of somewhat less than five months?

If it was born and lived, do you mean?

Yes; in each case the child is supposed to have been born alive and survived.

Certainly not, nor approaching to it.

Have the goodness to state, as the result of your experience, within what period after sexual intercourse a woman must be brought to-bed?

Within nine calendar months, a day or two before, or D. Davis a day or two after.

Is that opinion the result of your own medical experience?

It is the result of my own medical experience. I should wish to state that it has happened, in the course of my experience, that I have met with a few cases, several cases, where the parties have reckoned, as their expression is, from a particular coitus; and that in all those cases, without a single exception, they came on the thirty-ninth week, the conclusion of the thirty-ninth week, I cannot say exactly on what day; and in all the others rather before that period, that is to say, within the thirty-ninth week.

How have you ascertained the period at which conception took place?

If your Lordships will give me leave, I will mention a particular instance, and that will reflect some light on the other cases. A poor woman, a patient of the Northern Dispensary, to which institution I was at that time and am now attached as obstetric physician, requested the assistance of one of my pupils in her confinement, which she expected to take place in the course of three or four months from that period; she applied early in her gestation, on account of being subject to discharges of blood. On the whole it was my impression, at the time, that she was not pregnant at all, on account of the occurrence of those discharges of blood. I hinted my opinion to her; but she assured me that she was positive, and nothing that I could say could shake her opinion as to the fact. I saw her several

D. Davis. times in the mean time, and for some weeks afterwards I still remained doubtful as to her pregnancy. "You may depend upon it, Sir," said she, "I shall be confined on such and such a day; I have always been able to reckon very accurately." On that day the gentleman whom I appointed to attend this poor woman, on account of her particular case, at that time a senior pupil, sent a note to me, to say that she was in labour, and she was delivered on that day.

Within your experience, how many days have you known the labour of a woman to be protracted?

I have not known a single instance.

How long have you known a woman to continue in the pains of labour?

In my own practice I should not, as a general principle, allow a woman to remain in labour more than about thirty or forty hours, that is to say, if the labour be a decidedly active labour, and that is going beyond the period that would be generally safe.

After a labour had extended to the period you mention, you would apply the assistance of art?

Yes.

How long have you known the labour to continue?

I believe I did lately publish a case that went to the fourth day.

Is the fourth day the longest period to which you have known it extend?

Yes, I think it is in my own private or consultation practice.

Taking those facts which have come to your knowledge in the practice of your profession?

Just so.

D. Davis.

Do you mean it to be understood that those four days, or whatever period you may state the labour to be extended over, are to be added to the nine calendar months, or form part of them?

To be added; those cases of protraction depending upon some resistance, producing difficulty by confining the space, or some other cause.

By some mechanical obstruction, if it may be so expressed?

Yes.

Cross-examined by Mr. Tindal.

Was the person whom you mentioned in that particular instance—the poor woman—a married woman?

She was.

Though in this particular case she foretold the time of her delivery so accurately, is it not the case that in by far the greater number of instances married women are deceived as to the time?

I do not recollect a single instance where that mistake has taken place, when I had reason to believe that the party had reckoned from any particular intercourse.

That is, if the party had reckoned rightly, there was then no mistake?

When I have believed that she was reckoning from that principle, then there was no mistake.

Then the answer goes no further than this, that when you found by the event she was right, she was right in her reckoning?

My answer goes further; that when she was reckon-

D. Davis. ing from a particular principle, that is, the recollection of the coitus, and having noted that fact in her recollection, she was right as to the time; but when she was reckoning on general principles, as they are from menstruations, which is the general principle, it sometimes happens that they are wrong.

Does not it frequently happen, from whatever mode they reckon, that they are wrong in their calculations?

Yes, now and then; not very frequently.

Is it not a thing quite common, that the doctor has been sent for long before he was wanted?

Yes, because it frequently happens that women are attacked by what are called false pains; those pains not constituting the pains of true labour.

When the doctor arrives, and finds those pains on, does not the female herself state that she expects to be delivered?

They sometimes expect before; but that proves nothing. The female expects from the pain she is in at that moment, from the pain she is suffering; that pain greatly resembling the pains of real labour; but the practitioner, having the opportunity of ascertaining the fact for himself, can instantly say whether she is in labour or not, and thus, from the premises, conclude that she is not in labour.

The doctor thinks one thing and she thinks another?

Yes. The doctor knows, when he has an opportunity of instituting an examination, that she is mistaken, because he finds that the uterus, the lower part of the

womb, has not developed ; that the business of gestation D. Davis, is not concluded.

Does this amount to any thing more than that the lady expecting a particular time has been disappointed in her own calculation ?

That point frequently arises when she has been disappointed ; she sends for her medical attendant very frequently for weeks before she expects to be confined. In most of those cases the pains turn out to be false.

Does she not on those occasions state that she expects to be confined at some future day ?

She is pregnant, and arrived at a late period of pregnancy ; of course she expects to be confined at some future day.

Does she not state to the medical man, that according to her own reckoning she expects to be confined at some future day ?

Very seldom naming the day.

Does she ever name the week ?

Yes ; such a week in such a month is the usual mode of stating the circumstance.

The female herself cannot come nearer the calculation than such a week in such a month ?

That is the ordinary mode.

How can you take upon you to calculate from a particular point, of which you must yourself be completely ignorant ; namely, the coitus ?

I do not calculate myself ; I calculate from the report of the lady. It does sometimes happen that women, from particular sensations which they are capable of being impressed with, from certain circumstances of in-

D. Davis. tercourse, are able to fix the date. I speak from the fact; everybody can account for it as I can; it is to the fact I adhere.

Are not the instances within your experience far more numerous in the case of married persons than of unmarried ones?

My experience generally concerns married women. I was for a number of years a physician to a hospital that did admit unmarried women; but my experience generally is amongst the class of females that are married.

Have not you found that amongst married women there must necessarily be a great degree of doubt as to the particular coitus which produced the child?

I have spoken to only a few cases of coitus; and those are the only cases I can speak to with absolute certainty.

That of course depends upon the credit which you give to the party?

Just so.

THE CLAIM

OF

HENRY FENTON GARDNER.

MR. TINDAL stated the case of the claimant: it rested on the ground that the legal presumption in favour of his legitimacy was conclusive, unless on proof of the absolute physical impossibility of his being the son of Captain Gardner; evidence was then adduced to encounter the evidence given by the other claimant of the existence of such physical impossibility. The examination took place as follows:

Dr. Augustus Bozzi Granville, by Mr. Tindal.

Dr. A. B.
Granville.

You are a physician?

I am.

Are you a member of the Royal College of Physicians?

I am.

Where do you practise?

In London; in Grafton Street, Berkeley Square.

A. B. Granville.

I mean to denote the effect of that access, from which has resulted pregnancy, namely conception.

In your judgment may there be an interval of time, of days for instance, between, of two or three?

That is a question which is even now debated amongst physiologists, but which is not susceptible of demonstration.

Having stated what you conceive to be the ordinary period of gestation, to what extent in your judgment and experience may that period be carried from the access of the husband to the time of labour commencing?

The question refers to protracted time, not premature. Your Lordships will allow me to make one observation, I trust not unbecoming on my part, on this question; that as I have throughout life endeavoured to be precise in every thing which concerns my professional inquiries, I feel great difficulty in assuming to answer questions that refer to numbers of days, to precise facts, and to dates, without looking at the notes, where I have been enabled to make notes, on subjects of this description. The question is by far too important for me to trust to memory; it is too treacherous a record of facts of this kind; and I feel that in giving my evidence before your Lordships I am throwing a great weight of responsibility on my medical character. I trust therefore, if there be any document of which I am in possession, you will not insist upon my using the benefit of my memory, but the benefit of my notes.

The document you desire to refer to, is one you have made yourself?

Notes which I have made myself of various cases referable to my own experience personally. In the first place, if it will not take up too much of your Lordships' time ———

A. B. Granville.

Have the goodness to apply yourself to cases where gestation has been protracted beyond the ordinary period.

I wish merely to state the manner in which these cases are registered, in order that your Lordships may ascertain how far you may rely on their accuracy. Every woman that applies to me with a letter of recommendation from a subscriber to the lying-in charity, and which entitled her to have my advice and assistance in cases of difficult labour, or that of an experienced midwife, answers the following questions, and her history is thus briefly stated and recorded. The nature of that letter she presents is entered; her name; her age; her residence; the date she is admitted at; by whom she is recommended; the cause of her being admitted; the name of the midwife or practitioner who attends her; whether she is attended at her own house, or otherwise; how she is ultimately disposed of; whether single or married; how long married; the profession of her husband or herself, if she has any; when she expects to be confined, or what is the time of her own calculating the time of pregnancy; at what period of pregnancy she has quickened; whether she was suckling when she fell with child; the number of children, alive or still-born, she has had; how long menstruation has stopped, or whether she is actually menstruating, and yet in the family way; how many of the children are now alive, and in short, whether

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any have died, at what age, and from what cause; and whether the children she has had have had the small-pox or the cow-pox; the number of miscarriages she may have had since her marriage, including all the period, three, six, or nine months; how many of those miscarriages were in succession; whether she has had any children before or after, or between the miscarriages; of what nature the labours have been; whether long, tedious, protracted, quick, or difficult, or requiring assistance; and ultimately, whether she is generally liable to any particular complaint, arising from the state of pregnancy. It is upon these documents that I shall have to ground, besides those which have fallen under my knowledge as a private practitioner, the answers that I hope to be able to give practically to questions.

Those examinations are made by yourself?

Those examinations, I may take upon myself to say, with very few exceptions, are all inserted in my own hand-writing; where they have not been so, they have been inserted by one of my assistants and pupils, under my superintendence. I can swear to their hand-writing, with the exception of two or three short absences which I have taken from the institution.

Were they inserted, at the time, in this book, in your own hand-writing?

Each question is put to the woman before I give her an order for admission; and each answer is entered immediately, by myself, in this book.

That is the original entry?

Yes; that is the original entry of all those questions and the answers.

Adverting to your book, have the goodness to state whether there are any instances of protracted gestation beyond the ordinary period.

As it is impossible to wade through a mass of 9000 women registered, I have brought notes; for I admit I did not come unprepared. I should beg leave to refer to notes, as I begged permission of your Lordships to do just now, taken out of those registers, that I may not have to turn to them again.

Have you copied the paper you are now referring to from the book now at the bar of this house?

Having had but two or three days to prepare myself independently of my own avocations, I have selected only two or three cases; for if I can bring forward a case upon the most unimpeachable authority, besides the authority of facts, that case will go for so many thousands. I therefore beg to state that four, if not five, are taken from those cases marked by slips of paper, and others taken from my note book of my own private practice, to which I must beg leave also to refer, independent of this book.

Have you those notes now at the bar?

I have.

Have the goodness to refer to the case itself, using the paper in your hand as an index.

I have not referred to any case yet.

Have the goodness to refer to any case of protracted delivery, referring to your original register.

Here is one case: Mary Ewers, 15, Saint Martin's Lane, attended by myself, was delivered on the 1st of August of a girl. At the time of her being entered,

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which was on the second of June, she expected that month : now taking it that we grant there is an incorrect calculation, and put it at the extreme end of June, we have four weeks beyond the extreme terminus of her own calculation.

What reason have you to know that the party in the ordinary course of nature would have been brought to-bed in the month of June ?

The answer I give to this question is the answer that every medical man must give, whether he calculates a gestation of forty or fifty weeks.

(By a Lord.)—How old was the woman ?

Thirty-three years of age.

Was it her first child ?

The record of this case is not in this book, but I have the record at home with regard to whether it was a first child or not ; I can most probably refer to it. This case is 29,216 ; whereas this particular register begins with the patient 32,923 ; the register referring to numbers before that is in papers at home.

(Mr. Adam.)—Number 29,000 is registered ?

Yes, in this book, but not the particular as to whether she had had a child before that ; I have papers on a file at home.

(Mr. Tindal.)—Will you postpone that case, and go to some other, in which there is a continuation of the account ?

I ought to have been allowed much more than two days to examine such a mass of cases as this ; but I can answer the question as to my private practice, and at a later period shall be prepared with other cases.

Have you your private note-book here ?

A. B. Gran-
ville.

No, not my private note-book ; I cannot submit my own private note-books to the inspection of any person, because I have entered into them facts which are entirely of a confidential nature ; I merely wish to know whether I can refer to cases copied from my note-book ; if I find I cannot, I must refer to my note-book.

Mr. Attorney-General submitted, that it was not competent to the witness to refer to copies of entries made in his note-books.

The counsel were informed the rule of examination was this ; that where a gentleman was called to give his evidence, he might refer to his own notes with a view to assisting his memory ; but having referred to his own notes with a view to assisting his memory, a memory so assisted is that which is to enable him to swear to the fact one way or another^a.

Having referred to my note-books, having had a very few hours to prepare myself, I have taken out the dates ; not being permitted to refer to them, I will refer to my own memory ; but the referring to memory is a great responsibility, which no medical man would wish to take upon himself. I will refer to a case in my own private practice—a case of my own lady. By private practice I mean, though I did not attend the lady myself, nor was to have attended her, there were practitioners who were to attend her whom I shall mention ; I was in the house, and consequently witness to the time of parturition. This lady passed her menstruation on the 7th of

^a Phillips on Evidence, vol. I. p. 296.

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April; on the 15th of August, that is, four months and six, or seven, or eight days, she quickened. In the early part of the first week of January her confinement was expected; labour-pains came on, a message was sent to Mr. Barrow, an extensive practitioner of midwifery, in Davis Street, Grosvenor Square, to keep himself in readiness, he being engaged to attend. Labour-pains went off, and every thing subsided; the lady went on until the 7th of February, when labour-pains came on, and so quick, that thinking it would be impossible to get Mr. Barrow at such a distance, the lady then residing at Brompton, I sent for Mr. Thompson, a practitioner in Sloane Street; he arrived however too late—the child was born; he arrived just in time to remove what is called the after-birth. The child was stronger than usual, was large, and was considered by the lady, and by myself, and by Mr. Thompson, and by every one, as a ten month child; and, as I understand, when referred to medically speaking, as an instance of that kind. I will beg to make an observation which will throw some light upon it. I merely mention it thus because that is the historical part of the case; but an explanation would be necessary in giving a full and comprehensive answer to the question put to me by the learned counsel. Supposing the lady who passed her expected menstruation on the 7th of April 1815 had only conceived the day before, namely, the latest and most rigorous term one could give, thirty days after the last period of menstruation, or twenty-nine days, we have then a case, *primâ facie*, of 306 days from the period of impregnation, or of conception, to the day of birth, 305 to the day pre-

vious to the birth. But every medical man will, I am sure, bear me out, when I say that it is impossible to speak with precision as to the act of conception having taken place the very day previous to the period; it may have taken place the first day after the cessation of the other; or taking it as the most general way of calculating these cases, even where forty weeks is the period contended for, the middle period, fourteen or fifteen days after the last menstruation; we have had a case of 318 days.

A. B. Granville.

That instance you have stated was of Mrs. Granville? It was.

What date, beyond the ordinary time, do you say that extended to, in your judgment?

I have observed before, supposing conception to have taken place the day before the expected and missed period of menstruation, knowing, as I do, that the child was born on the 7th of February 1816, the period, to say the least, is 306 days.

Have the goodness to state some other instances within your own knowledge, where the ordinary time has been exceeded.

The instances are taken from those registers. I have known a case of 285 days from the latest period of supposed impregnation, taking as the point of departure the last day of the month previous to the missed period, that is to say, twenty-eight or thirty days after the last menstruation. I have known a case of 290 and 300 and 315 days. In the latter instance, of 315, there was a doubt in my mind respecting the report made by the

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woman. She stated that she had terminated her menstruation previous to falling with child on a particular day; but, on cross-questioning, she admitted that for five days afterwards she continued to have a discharge. I merely state, on comparison, the 315 days appear; but that, in my conception of the case, or admission of the case, I should say it was only a case of 310.

How long is it since that case occurred, in your experience?

The case of 315; I believe it must have been in 1821; but as to dates I really must speak merely from recollection, the liability to recollection failing.

Have you any other instances, in your own private practice, of protracted gestation, besides the one you gave a little time since?

None, in my own private practice.

You are understood to say that the other instances you take from your practice at the hospital?

Yes; and of course assuming the answers given by the women to my questions to be correct.

Is there any other way of deciding the question at all, but by relying on the testimony of the women who consult you?

No other, except in some few cases, where there is a possibility of ascertaining the very day on which conception took place from any particular circumstances, which I have no doubt have occurred to individuals, and I am myself acquainted with facts, though not peculiar to myself, in my own practice.

Are you to be understood that the only ground on

which the judgment of the medical man must of necessity be founded, is the account which is delivered to him by his patient ?

A. B. Granville.

Chiefly.

Can he also make observations from symptoms which occur to that patient, so as to discover whether she is correct in that account or not ?

Very frequently ; and I can mention a case where I had reason to doubt that she was inaccurate as to the time, owing to one of the symptoms referred to, namely, a coloured discharge having taken place during fifteen days.

Looking at the extent of your practice, and the observations you have made, in your judgment might a child be begotten on the 30th of January, and born on the 7th of December, that is a period of 311 days : whether it is possible from the course of nature that a child should be begotten on the 30th of January, and born at an interval of 311 days, that is, upon the 7th or 8th of December ?

I am aware of no circumstance that can render it impossible ; indeed, after the relation of the cases that I have given, I cannot be expected to give any other than that answer to the question.

Mr. Adam stated, that as the witness was to be called again to produce his note of the case referred to by him, he would decline examining generally as to these facts, until he produced his books, but that there were some general points on which he would put some questions now.

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Cross-examined by Mr. Adam.

How many years have you practised medicine ?

I have practised medicine since 1803.

Are you a native of England ?

I am a native of Milan in Italy.

Where did you receive your medical education ?

At one of the first medical universities, so acknowledged and considered by all, Pavia ; afterwards at a medical school for two-and-twenty months at Paris ; and subsequently at the hospitals, and under some of the first teachers of medicine and midwifery in this country.

How long did you study at Pavia ?

Four years.

Which were the hospitals in London you attended ?

The Westminster Hospital.

Who had the charge of the hospital at that time ?

Dr. Bradley, Dr. Paris, Sir Anthony Carlisle, and Mr. Lynn.

You say you have practised medicine since 1803 ; was any part of that period spent on board ship ?

It was.

What portion of that time did you serve on board ship ?

From 1807 to 1812 ; the latest period of 1812, when I came on half-pay of a surgeon in the navy ; and I am at this moment in that capacity.

Where did you practise medicine before you went on board ship in 1807 ?

In various parts of the continent.

Will you favour me with the place ?

I travelled in capacity of physician to Mr. Hamilton, the late under-secretary of state, through Greece and Turkey. I continued to practise there, after he left it, at Constantinople and various other parts, until 1805.

Do you include the time you travelled with Mr. Hamilton in the time you state you practised medicine ?

Decidedly so ; for independently of taking care of his health, which required it much, I was consulted in most of the towns where we were travelling.

What portion of the time you were with Mr. Hamilton did you continue in Greece ?

From 1803, about seven, or eight, or nine months.

He was an unmarried man at that time ?

He was.

There was no female accompanying him ?

No.

How long have you been physician to the hospital you refer to ?

To the Westminster General Lying-in Hospital I have been physician-accoucheur since 1817, the 16th of December ; to the Benevolent Lying-in Hospital I have belonged as physician-accoucheur since March 1822.

How long have you practised as an accoucheur in private practice ?

Since December 1817.

Cross-examined by Mr. Attorney-General.

How old were you when you left Pavia ?

I was a little more than twenty.

A. B. Granville.

You began your studies at Pavia when you were sixteen ?

Yes.

Where did you go to immediately from Pavia ?

To Genoa, Venice, and afterwards embarked for Turkey, where I met Mr. Hamilton, to go to Greece.

How long was it after you left Pavia before you joined Mr. Hamilton ?

I presume about a year or fifteen months, perhaps a year.

How long did you remain with Mr. Hamilton in the whole ?

From six to seven months.

Practising in the different towns through which Mr. Hamilton passed ?

Occasionally consulted.

Not to any great extent, probably, in the place where you were a chance resident ?

If the learned counsel were acquainted with the eagerness with which a foreign physician is sought in those parts, particularly for consultation, upon his merely passing through, especially where he attended a person who had a sort of public character, as he was then attached to the embassy, he would admit that the opportunities could not have been few. I can take upon myself at random to state that scarcely a day passed that I had not two or three patients to visit or to consult upon during the different periods that we resided in Greece and Turkey.

Do you confine that to Greece and Turkey ?

Those were the only places where I travelled with **A. B. Granville.**
Mr. Hamilton.

At the expiration of this time where did you go to?

I resided two years in Constantinople, and then travelled on my own account to Egypt and Asia in search of knowledge, and particularly directing my attention to natural history, and occasionally practising.

To what place did you go after the expiration of these travels?

I practised as a physician in 1805 at Malaga in Spain.

Was that the first place?

After arriving from the Levant.

How long did you remain at Malaga?

About thirteen months.

Had you much practice at Malaga?

Not much practice.

You left it, perhaps, in consequence of not having much practice?

I did not; I left it for a good reason, in search after knowledge; and wishing to travel through Spain, I went to Madrid, where I remained a few months without practising.

To what place did you go next?

I then went to Lisbon, where I embarked on board the *Raven* sloop-of-war; I embarked as surgeon. At the peace in 1815 I endeavoured, as many others did, to settle as a medical man, in Charles Street, Grosvenor Square.

How long did you continue there?

I remained there till 1816, immediately after the birth of the child to whose case I have alluded, when I re-

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moved, at the desire of Sir Walter Farquhar, and at his suggestion and recommendation, to Paris, where I resided two-and-twenty months, studying more particularly midwifery, but attending to natural history, and the lectures of all the medical men living there. In 1817 I returned, and have settled, and have now been before the public as a physician, and physician-accoucheur, from that time to the present.

Re-examined by Mr. Tindal.

Is the School of Midwifery at Paris one that is looked up to in the world?

I believe it is admitted on all hands, and I wish it rather came from others; my fortuitous birth abroad being alluded to, it may be supposed I answer partially, when I say that it is looked up to as the very first School of Midwifery.

There you settled two years?

Two and twenty months, not in the hospital, out attending the hospital.

Examined by a Lord.

Have you a degree in medicine?

I have.

Where did you take your degree?

At Pavia.

In what year?

In 1801.

What age were you at that time?

A little more than twenty.

A. B. Gran-
ville.

When you were last at the bar of this house you referred to certain documents or registers which you had not at the time with you ; have you since brought them ?

Those registers I had with me, I beg to observe, only I was not prepared to point out the precise cases which I submitted to the house I had known in my practice. I am now prepared to point out those very cases ; and since the house and the counsel have been good enough to allow me sufficient time, which had not been the case before, I have moreover ascertained, and I trust in such a way as to convince the house of the reality of those cases, four more ; making, therefore, altogether, eight, in these registers of from eight to nine thousand pregnant persons ; and one case, in looking over the notes of my private practice, besides the one which was improperly attributed to my private practice, namely, that which fell under my private notice, that of my lady.

Will you refer to those books, and point out the particular cases to which you allude ?

The first case, the particulars of which I shall detail from the register, is that of Elizabeth Chapman.

Will you now take up the book, and read from that the questions put to her, and the answers which were given by her ?

This case stands under number 33,916.

(By a Lord.)—Is that a patient belonging to the Lying-in Hospital ?

Belonging to the lying-in institution of which I am physician-accoucheur.

Which is that ?

A. B. Gran-
ville.

The Westminster General Dispensary. "33,916 Elizabeth Chapman, aged 28, residing at No. 37, Charles Street, admitted on the 18th of December 1824, recommended by a governor of the institution, Mrs. Elizabeth Lumley." The cause for which she was admitted was pregnancy. She was attended by Mrs. Finlay, one of our midwives acting under my directions. "Attended personally"; that is, that she was herself in attendance upon me, whether at home or abroad; that is, whether she was attended at her own home, or came to the infirmary itself. "Was delivered of a girl February the 2d." In the other book it appears that she was a married woman; "had been married nine years. The profession of her husband was that of a crier." She stated that she expected to be confined in about three weeks. Upon being questioned at what period she quickened, she answered, "I do not recollect, or the time is unknown to me." Upon being asked how long it was since she was last unwell, namely, had seen her menstrual period, she says, "nine months ago." In answer to the question, "Whether she was suckling at the time that she fell with child?—No." In answer to the question, "How many children had she had born alive at the time of birth?—Four. Any still-born?—None. How many of those children are alive now?—Two. Of what cause, and at what age the other two had died?—One from accident, when two years old; the other from fever in teething, when fourteen months old. Of those now alive how many have had the small pox naturally, inoculated, or the cow pox?—One had had none of those diseases; the other had had the small pox na-

turally. Had she had any miscarriage since her marriage?—Yes; two at six months. Were they in succession?—Yes. To what did she attribute the cause of miscarriage?—To the carrying of heavy loads. Had she had any children before and after miscarriages?—Yes. Were all her labours lingering, or quick?" The column stands "active labour, and passive labour." The active ones are those which are terminated without assistance, and they are subdivided into labours that last twelve hours, and labours that go beyond twelve hours, and yet terminate without assistance; she has had four of them. "Had any passive labours, or labours requiring assistance?—None. Is the patient subject to any habitual disease?" The answer is "I am well." Now I have made my calculations of this case, and your Lordships will find that it comes out that she carried her child, deducting a whole month subsequent to the last time she was unwell, forty-one weeks and five days.

A. B. Granville.

From what day do you date the conception of this woman?

I date, as I have already observed, from the last day.

(The Attorney General and Mr. Adam.)—We object to this evidence. It does not appear that the witness had any personal knowledge of the period from which the calculation is to take place; the truth of his statement, depends on the accuracy of the woman, who related to him facts that happened seven or eight months before; the defect can only be supplied by calling the woman herself, and there is this additional ground of suspicion, that according to the rules of most

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ville.

of these institutions, no female is admitted until a certain period before she is to be delivered; therefore a woman will naturally say, if she desires to come into the hospital, that she comes within that period. She has an interest to misrepresent the fact.

(Mr. Tindal.)—It is in every day's practice, in a court of law, to admit evidence of the account which persons give to the party attending them, where that party has been called in after an accident or an act of violence. In an indictment for murder the medical attendant may state to the court and jury that which the person who called him in stated of his own feelings at the time; and in a case^a which turned on the goodness of a life which had been proposed for insurance, viz. whether it was a sufficiently good life within the meaning of the terms of that insurance office, the principal evidence was of the medical man who had attended the person (a female) whose life had been insured: and it was decided by the court that everything stated in the course of the investigation of that person's feelings, and of the symptoms which affected her frame, was admissible and good evidence to the point which was under discussion; and your Lordships will take a very narrow ground, and one quite unprecedented, if you receive no more of the account than that which occupies the precise time when the medical attendant is called in, and discard the account given by the female of her *former* feelings, connected with the subject then under investigation. The opinion of the

^a Avison v. Lord Kinnaird, 6 East, 193.

doctor is founded not merely on the present, but on the former symptoms, of which the female is the only person who can give the information. Why has the term of 280 days been fixed by the doctors on the other side for the period of gestation? Because those doctors relied on the circumstances stated by the females themselves: no one proposed to call the females, there being no motive for deception on the part of the females, and no ground for imputing fraud or deceit to them; the cases are precisely parallel, and your Lordships will impeach the evidence you have admitted on the ordinary period of gestation, if you reject the evidence now offered at the bar.

A. B. Granville.

The latter objection resting on the interest of the woman to misrepresent her situation, being a matter of fact, I shall not advert to it at present.

(The Attorney General.)—I apprehend with respect to the argument and the authorities, they do not apply in the least to the present question; the representations of the patient to his doctor are only admitted when the latter has an opportunity of observing whether those representations correspond with the symptoms to which they refer; the patient stating the symptoms of the disorder, and the medical man being present for the purpose of verifying the truth of this statement. My learned friend is now giving an insulated fact, or rather a date with respect to a circumstance which took place several months before the medical man was called in, and which he had no means of verifying. With respect to the insurance case, the patient was dead, and therefore could

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not be called; these females are not dead, and may easily be produced.

I deny that evidence of a similar description has been received on the other side; no *particular* instance of a particular individual was spoken to by any of the witnesses; they stated as the result of long experience, and long observation in their profession, that their opinion was so and so; and I recollect in particular Doctor Clark, in being cross examined, said that he could tell, by observations at the time, that the representations made to him were correct; he spoke therefore not from representations alone, but from representations checked and corrected by his own observation. Though the representations now sought to be given as evidence may have been made, still they may have been unfounded; the female may have had a motive for making them, or she may have been mistaken: the question is not whether they were made, but whether they were true; and this can only be ascertained by the examination of the female herself, the facts on which her belief rested ought to be fully developed before her inference can be held to be just: it is very different taking it from her representation to Doctor Granville, and taking it on her evidence here, subject to being sifted according to those rules which experience has proved to be so useful in separating truth from error.—The committee determined in favour of the objection. (By a Lord.) Did you take down the answer of this woman?

I beg to answer, in a distinct manner, that with some

exceptions the whole of those answers are in my own hand-writing, and where it is not in my own hand-writing it is written almost entirely under my inspection, the questions being put by myself, and the answers taken by a pupil; in the present case it is my own hand-writing.

A. B. Granville.

In the present case do you recollect putting the question yourself to that woman?

Most positively.

(Mr. Attorney General.) Do you recollect the person of the female?

As to recollecting the person, if the learned counsel alludes to physiognomy, I should make the same observation I made the other day with respect to picking out particular cases out of 9000,—it is impossible for me to say I could recollect her, but I can boast of some means of recollecting individuals; I will not take upon myself to say, that if Elizabeth Chapman were presented to me, I should recognize her.

Then how can you state that Elizabeth Chapman gave you those answers?

Because I can state, on the oath I have taken, that every one of those cases in which the answers are written in my own hand-writing, the questions were put by me, and the answers taken down in my own hand-writing.

You do not recollect the particular case, but you swear to it merely because it conforms with your general habit?

I remember it merely because I have taken the best means of remembering it, that of making memorandums, and not trusting to memory.

A. B. Granville.

(By a Lord.) Are there not many cases where your pupils took a note of the examination, and you subsequently entered the result in the book in your own handwriting?

Not one.

(By a Lord.) When patients are admitted into a lying-in hospital, is not there a rule that they shall not be admitted till they are within a certain time of their delivery?

The rule respecting the lying-in institution to which I belong does not apply to the hospitals; this is the Westminster General Dispensary and Lying-in Institution for delivering them at their own habitations, not for receiving them into the hospital, to deliver them by a midwife, or by myself.

Mr. Tindal expressed a hope that in a case of so much importance the committee would not reject this evidence, but would receive it, as evidence was sometimes received in committees of privilege, *de bene esse*.

(By a Lord.) Have you any means of knowing whether this female is now alive?

From the date merely, I should presume she is alive; I should also add, that most of those women, a month after their delivery, are obliged to appear before me, to return thanks for having been attended at the expense of the Charity, and it is very probable that Elizabeth Chapman did comply with that rule.

The counsel were informed, that in the opinion of the committee this was not evidence.

(Mr. Tindal.) Have the goodness to turn to some other instance.

No. 33,907.

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ville.

(By a Lord.) Is that a patient applying to the same hospital?

A patient applying to the same institution, not a hospital, called the Westminster General Dispensary; the name is Margaret Sullivan.

How early did you first know the woman to whose case you are now about to speak?

On the 16th of December.

Is that entry in your own hand-writing?

This is not in my own hand-writing.

(Mr. Tindal.)—In whose hand-writing is that?

This is taken by an assistant of mine, whose name and hand-writing I can speak to.

Was it written down in your presence from the examination of the woman, you examining the woman?

No, it was not.

Then turn to another.

No. 32,938.

Is that your hand-writing?

The particulars in this register are all in my own hand-writing: the name is written in my presence, just before I put the question, by one of my pupils.

What is the name?

Those two registers being kept, I find it convenient that one of my pupils should write the particulars from the recommendatory letter, and I then ask the questions I have stated to your Lordships, and the answers to which are put down in my own hand-writing.

Was that written by yourself immediately after?

A. B. Granville.

Yes.

(Mr. Attorney General.) Are all those entries in the hand-writing of your pupil?

Yes; in this page.

What is your pupil's name?

I have several.

Who wrote this particular entry?

It is Mr. Elston, who is now practising at Ormskirk in Lancashire.

You mean to say that all the entries relative to this particular female, in this book, are in the hand-writing of that gentleman?

Yes.

Will you take upon yourself to swear that you saw and read the entry after it was made by him?

I will take upon myself to swear that I saw Mr. Elston copy those particulars out of the letter the patient brought, recommending her to our consideration.

Will you take upon yourself to swear that you compared the letter with the entry at the time?

No, that I will not; I take it for granted —

Never mind taking it for granted; the entries are made upon the faith of that letter, which was produced to your pupil?

That was produced to me, and handed over to my pupil for the purpose of being copied.

You did not examine the entry here with the contents of the letter?

No, I did not.

Mr. Attorney General submitted, that this entry could not be received in evidence.

(Mr. Tindal.)—Does it purport to be the day of the date on which she is received? A. B. Granville.

It does.

That is the very day on which the very entry, as you describe it, is put into the book?

The very day.

Of course the entry of the time of her being brought to bed could not be made at that time?

No.

Who was it that wrote in this column, which states the date of her being delivered?

Either myself or one of my pupils.

Look to that particular entry, and to that particular instance.

In this particular case, it is in the hand-writing of one of my pupils.

What is his name?

I believe this to be the hand-writing of the same gentleman I mentioned before.

(Mr. Adam.)—Are you not certain whose hand-writing that date of delivery is?

I believe it is Mr. Elston's.

How many pupils had you at that time?

I have several every year. They go away after they have learned their profession.

How many had you in the habit of writing for you?

Mr. Elston, Doctor Morgan, now practising in Westminster, and Mr. Langhorn, who is still practising with me; but I cannot exactly recollect whether it was one or the other.

A. B. Granville.

Mr. Attorney General submitted, that the evidence in this case also could not be received.

(Mr. Tindal.)—Will you go to another instance?

No. 31,146, Mary Keys.

In whose hand-writing is that?

This appears to be in the same hand-writing as the other.

Will you turn to another?

There is a case, No. 1,583, of another institution, namely, The Benevolent, for delivering married women at their own habitations?

(Mr. Attorney General.)—In whose hand-writing is this entry?

In my own.

Every part of it?

Yes.

(Mr. Tindal.)—Have the goodness to read it.

The date of the birth is not in my own hand-writing, I see; but I can produce the letter from the midwife who delivered her.

You say the date of the entry, the date of the birth, is not in your hand-writing?

It is not.

How far back is it?

1824.

Have you any recollection of the fact?

I have no recollection of that individual's case any more than the others.

The registers produced by Dr. Granville were inspected by counsel: in some of them the entry of the birth of the child proved to be merely a copy by the

surgeon of a certificate signed by the midwife, the surgeon having had no personal knowledge of the circumstances of the case; in others the surgeon had made the entry from the answers of the female to the questions he addressed to her. The former entries were abandoned, and the others being disputed, Dr. Granville, in order to remove all objections, undertook that some of the females whose cases were the strongest in support of his theory should appear at the bar.

A. B. Granville.

Dr. Conquest, by Mr. Tindal.

Dr. J. Conquest.

You are a physician ?

I am.

Where were you graduated ?

In Edinburgh.

In what year ?

About thirteen years since.

Have you been in practice from that time to the present ?

I have.

Where have you carried on your profession ?

Principally in London during the last eleven years.

Have you an extensive practice in this city ?

Pretty extensive.

Have you applied your mind at all to subjects connected with the gestation and birth of children ?

Principally.

Is the department of Midwifery that in which your principal practice is carried on ?

I principally practise as an accoucheur ; I have been

J. Conquest. for some years a lecturer at one of the public hospitals of this city, St. Bartholomew's.

Are you able to state, from your own experience, any judgment you have formed on the ordinary time of the gestation of children?

I presume the majority of cases are completed with the termination of the ninth calendar month; but unquestionably I have met with some cases which have far exceeded this date.

Will you have the kindness to state the particular circumstances of any of those cases which have exceeded the ordinary date?

I presume I have met with not fewer than twenty cases where there has been very confident assertion on the part of the women, that they have exceeded the ninth month; but I have taken great pains with two or three cases, sufficient to justify my speaking with the greatest confidence.

Will you confine what you are going to say to those two or three cases which you have had so completely under your own observation?

One woman was certainly pregnant for at least ten months.

Will you give the name of the woman, if you remember it?

I put the question, before I was called to this bar, to the attorney, Whether it was necessary for me to give the names and residence of individuals? because I am confining my remarks entirely to cases of private practice.

Will you state when this first case happened?

The case to which I refer is that of a woman who has

borne six children. She is a woman possessing an unusual share of good common sense; and she engaged me to attend her during her second confinement before the period of quickening; she also engaged her nurse. She felt so confident that she should be confined at the anticipated time, that she had her nurse in her house; and it was not till the expiration of nearly five weeks from the time at which she expected to be confined that she was delivered, and delivered of a child of an unusual size. At that time I disbelieved all the cases which I had previously heard; I had been in the habit of laughing at them as a public lecturer; but so strong was the evidence, from the most minute investigation of this case, that I was compelled to admit the accuracy of this woman's statement, and my former convictions were very much shaken. The same thing occurred to this woman at her subsequent confinement; she exceeded the time then, certainly, four weeks; she has since borne three children at the expiration of the ninth month; the three last children have been considerably smaller than the two intermediate children.

J. Conquest.

When you received this account from the person to whom you refer, were there any symptoms or appearances from which you could judge, yourself, whether such account was correct or not?

I took no trouble to investigate the case until she had passed the ninth month.

That is one case you have mentioned; have the goodness to state the circumstances of any others.

The case I have mentioned refers to the cases of two children by one woman.

J. Conquest.

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Have the goodness to state any other case that fell under your own immediate observation.

The other is the case of a lady who has borne nine children, and who, on some account or other, has been able five times to determine exactly the day on which she should be confined, and her predictions have been verified in those cases; but in one confinement she exceeded the time by a month and two days, and this woman brought forth by far the largest child I had ever seen, after a very protracted labour; her labours in general being so slight, that in by far the majority of cases, the children have been expelled before either nurse or medical attendant could be at hand.

To what cause do you attribute this protracted gestation; is it a cause that relates to the mother, or the foetus, or to both?

Does the question apply to those particular cases, or to other cases of protraction?

Take it first as a general question.

I have not been able to make up my mind as to the correctness of the notion of the assigned causes of the protraction; but with one exception, I certainly have seen several cases similar to the last one to which I have referred, the one to which I am now adverting, in which there has been, from some accidental cause, an occasional loss of blood during pregnancy, and this has appeared to interfere with and to protract the gestative process.

Whatever may be the cause, are you or are you not satisfied, in your own mind, that there may be a protracted gestation?

I have no doubt of it.

J. Conquest.

What reason have you for answering that you have no doubt there may be such protraction?

I found the opinion on the accumulated evidence which may be adduced from numerous ancient and modern writers, on my own personal experience, and on reasoning from analogy, knowing that the same facts are constantly occurring in the brute creation; on the evidence which I should consider satisfactory in the investigation of any other question in natural history.

To what period beyond such ordinary gestation are you satisfied the protraction may by possibility extend?

Does that question refer to my personal experience, or a matter of investigation, or a matter of history?

The question refers first to the fact of your judgment.

If I am to credit the statements of such men as Livy and Pliny, Hippocrates, Haller, Hunter, Bourdileau, Mauriceau, Lamotte, and many others whom I could mention, I am bound to believe that eleven months has been exceeded.

Suppose the father and the mother are together on the 30th of January, and a child is borne by the mother on the 7th or 8th of December, that is, after a period of 310 or 311 days, is it possible, or is it not possible, in your judgment, that such child could be the offspring of those two parents?

I am bound to admit its possibility and its probability, because I have stated a case in my own experience, where I believe that term was exceeded; but I consider

J. Conquest. those cases to be a departure from the ordinary course of nature.

Do you know the opinion which Dr. Hamilton publicly gives in his lectures upon the subject of the gestation of women?

The Attorney General objected to this question, Dr. Hamilton being living, and one of the witnesses proposed to be called.

Mr. Tindal submitted that he might put that question, intending to follow it by another, Whether the witness agreed to that opinion?

The counsel was informed that he might ask the witness what his own opinion was.

(Mr. Tindal.)—You are a member of the College of Physicians?

I am.

And of some other societies?

I am a Fellow of the Linnean Society, Physician to the City Road Lying-in-Hospital.

Cross-examined by Mr. Attorney-General.

Was the first female a married woman; the female who had five children, two of which children were born after the expiration of nine months?

A married woman of very high respectability in the city.

Living with her husband?

Yes, living with her husband.

Is not menstruation very often suspended by cold and other causes?

It is frequently; but my opinion of her case was by J. Conquest.
no means founded upon the question of menstruation,
but on the confirmatory evidence which several other
points supplied to me.

Will you state what those are; were they facts com-
municated by the female herself?

They were communicated to me in consequence of
questions which I put to her, and which I should not
have thought myself justified in putting to any respect-
able woman, but on the ground of professional confi-
dence, and extreme anxiety as a public lecturer, to make
up my mind as to the correctness of the opinions which
had been advanced by others; I may perhaps be per-
mitted also to state, that after receiving the order from
this house to be present, I took the liberty to re-examine
this lady, and her impressions are very vivid, and her
statements minute.

The question refers to the facts on which your judg-
ment is founded, in the first place; was it in conse-
quence of protracted menstruation; the interval which
had occurred between the last menstruation and the
birth of the child?

That was one fact.

That you had from her representation?

From her statement.

How long before the birth of the child was it that
you were called in to give your opinion or advice?

I was not called in to give my opinion or advice at
all. This lady applied to me to attend her in her con-
finement, stating that she had not then quickened; that
she had quickened with her former child at the termina-

J. Conquest. tion of the sixteenth week ; and that woman has quickened with six children exactly at the same period.

Exactly at the same time, calculating from what ?

Calculating from the time she supposed herself to become pregnant, the non-appearance of the periodical discharge, and also the time of her delivery.

The calculation, as far as she was concerned, as far as your opinion was formed, was founded upon the time of expected menstruation ?

Not wholly so.

You have not stated any other circumstances yet ; what are the other circumstances ?

This woman is an excessively irritable woman, physically and mentally, and she affirms most confidently that she invariably suffers much constitutional disturbance within one week after impregnation, and the acts of intercourse are so seldom with her husband, that she has in every case been able to date with correctness, with the exception of the two which I have mentioned, and then she took the same data as the ground of her opinion.

What were the data she took then as the ground of her opinion at that time ?

Certain symptoms of constitutional derangement, the non-appearance of the expected discharge, and the period of quickening.

What was the interval before those symptoms were communicated to you ?

I stated before, that I was not induced to make any inquiries into this woman's case until she had passed the ninth month.

How many children had she altogether ?

J. Conquest.

Six children.

In the whole there were only two which deviated from the same symptoms applying to the four ?

And they only deviated as to the term of gestation ; the data upon which she founded her opinion were the same in every instance.

The opinion you have formed was entirely upon this representation of facts made by her ?

Entirely.

And some representations by her which had occurred at a very considerable period before the communication was made to you ?

I have twice mentioned, that I did not institute any inquiries until she had passed the ninth month of gestation ; and that when she became pregnant I still laughed at her, and thought there might be some ground of fallacy ; but the same thing took place again.

How long is this ago ?

It has all taken place within the last nine years.

Were you lecturing at that time ?

I have lectured seven years.

You were not lecturing at that time ?

I think I was lecturing at that time ; I am almost sure I was.

You have read those various authors whose names you have been mentioning ?

Unquestionably I have, as a student.

You stated, that before this communication with the female you quite laughed at the doctrine contained in these authors ?

J. Conquest. I did; and my inquiries into the fact, as a fact connected with natural history, certainly arose in a great measure out of this case.

Out of that single case, formed on a communication made by the woman so long afterwards; have you another case?

I do not mean to state that I was induced to change my opinion by this solitary case; this case shook the opinion I had formerly entertained, and the occurrence of other cases since has induced me to admit it as a physiological principle.

Was the other case you have referred to that of a married woman living with her husband?

Yes.

How soon after conception were you called in, in that case?

I must make the same reply as in the former case, that there was no ground to doubt the accuracy of her statement until she had passed the ninth month.

Then you began to examine her?

Then I began to investigate the grounds upon which she had formed her opinion.

Upon that representation of the woman as to menstruation, probably?

There is no possibility of gaining evidence but by representations of the women themselves.

Was menstruation the principal point upon which your belief rested in this second case?

Menstruation and quickening.

Does quickening take place at any certain interval after conception?

Quickening takes place from the sixteenth to the twentieth week ; but when once a woman has quickened at a certain time, I believe, with scarcely an exception, she invariably quickens at the same period afterwards. .

With how many children have you attended this woman ?

I have attended this lady to whom I last refer either six or seven times.

What was the period from the quickening to the birth of the child, in this second instance ?

The woman quickened at the seventeenth week.

What was the interval between the quickening and the birth of the child ?

My reply will come to the same thing. I am perhaps not sufficiently collected to be able to make a calculation of the dates ; it was the interval between seventeen and forty-five weeks. .

Twenty-eight weeks ?

Yes.

Which twenty-eight weeks, added to the shortest time in which a woman could quicken, cannot be more than nine months ?

I should think ten months.

Ten lunar months ?

Yes.

That would be the regular time ?

I never understood that women in general went longer than nine lunar months, forty weeks.

What was the interval in the other two instances between the quickening and the birth of the child ?

I have stated that the woman has quickened with the

J. Conquest. six children at the termination of the sixteenth week ; does the question refer to the first or the last case ?

To the instances of the two children born of the same woman ?

That woman invariably quickened at the termination of the sixteenth week in this instance and four others.

You were not yourself present at the time of the quickening ?

Certainly not.

You had that from her recollection of the fact ?

Upon her recollection of the fact, and upon her having since, for my personal satisfaction, repeated it.

How many years ago ?

She has borne those six children within nine years ; she bears children rather quickly.

Cross-examined by Mr. Adam.

How long did you attend the medical school at Edinburgh ?

The usual term of three years before undergoing examinations.

You state that the instances you have cited took place in the course of the last nine years : how long ago did the first of them take place ?

Perhaps between six and seven years.

How long, at that time, had you been in the practice of midwifery yourself ?

About eight years.

You have said that the children upon these occasions were of unusual size ?

In three cases to which I have referred, of unusual size. J. Conquest.

Supposing it possible a child should be born after a gestation of ten months, should you expect that child to be of unusual size, from your experience ?

I do not think that it necessarily follows that the child should be so, for I have reason to suppose some circumstances may protract the duration of pregnancy, without there being any actual addition to the bulk of the child.

You have stated but one cause, so far as your experience goes, which could protract the duration of pregnancy, that is, the loss of blood ?

I am aware there are other causes assigned.

That is the only cause you yourself assign ?

I think there is another cause I have seen operate frequently to the protraction of labour several days.

What is that ?

Any powerful mental emotion ; any physical cause bringing about the death of the child ; that of course does not apply to living children ; except that, powerful mental emotions will sometimes protract.

Have you known any instances of that ?

I have known many instances.

Have you known many instances of mental agitation protracting the period of labour ?

My remark principally applies to the period of labour, those causes operating before the commencement, or immediately before the commencement.

Is that a common circumstance in your professional experience, to find that mental agitation or distress protracts the period of labour ?

J. Conquest. By no means common.

Is it very uncommon?

It is not uncommon for the process of labour to be interfered with and protracted some hours, certainly not.

The question refers to that being produced by mental agitation?

I refer to mental agitation.

In how many instances have you known that to occur?

I really cannot say.

Are you speaking of the period of gestation, or the process of labour itself?

I am confining my remarks principally to the process of labour.

After labour has commenced, have you known the time for its perfection to be extended by mental agitation?

Yes.

That you state not to be uncommon?

I think not uncommon.

In how many instances have you known that to occur?

I should think in fifty cases.

You have known fifty cases of protracted labour caused by mental agitation?

Of protracted labour.

Have you known any case of gestation protracted by mental agitation?

I have known several cases in which the mental affection has been so great as to destroy the vitality of the child.

Have you known any cases of gestation being pro-

tracted by mental agitation, and the child being born alive ? J. Conquest.

Yes, I have.

In how many instances ?

Perhaps two or three; protraction has been but of two or three days.

You have not known a protracted labour to extend beyond two or three days ?

With the exception of one case.

How long did that extend ?

A month.

Do you mean to say the woman was in labour for a month ?

I mean to say that the woman had all the symptoms of labour; that those symptoms left her, and she was not confined until a month afterwards.

The pains of labour came on and subsided; they went off, and she was not delivered until a month afterwards ?

Yes; of course the labour did not continue a month.

You have stated as the only cause for the protraction of gestation, loss of blood; in how many instances have you known that to have been the fact; in more than one ?

Certainly more than one; I have referred to one; I think in two other instances labour was protracted a few days, in one case a week.

You were understood to say you have known gestation protracted ?

I mean gestation.

J. Conquest. You think in two instances you have known it protracted for a week ?

In one case a month, I stated.

The case you originally stated is one of the two ?

One of the three.

How long have you known it extended in the other ?

One a week.

Those are the only instances in which you have known that effect produced by loss of blood ?

Those are among the cases of doubtful protraction I have had occasion to advert to.

(Mr. Attorney-General.)—You stated that the two children born of one mother after this protraction were large children ; how was it with respect to the third child ?

I stated that the third was the largest child I had ever seen.

They were all particularly large ?

Yes.

Do you suppose the child would continue to grow in proportion during the whole period of gestation : a seven months' child is small ?

Generally, but I have known an eight months' child of the ordinary size of children at nine months.

What is your answer as to protracted gestation ; would the child continue to grow during the whole of the period ?

I do not think it an established fact that a child that is born at a protracted period should necessarily be larger than children at nine months.

Does not the child itself grow from the moment it begins to be formed, continue to grow, that individual child ? J. Conquest.

Unquestionably.

Therefore the probability is, that a child at ten months will be larger than a child born at nine months; it would continue to grow in the interval between the ninth and tenth month ?

I do not think we are justified in entertaining such an opinion; there are some children born in perfect health at the usual term of nine months not larger than some children of seven or eight months.

Does not the individual child grow during the whole period that it is in the womb ?

There is no doubt of that; but I should be disposed to bring before this house several other cases of protracted pregnancy, if I could satisfy my mind as to the general question, that a child must necessarily be larger which is not born at the ordinary time.

A child born of one mother may be larger at nine months than the child of another; but the question refers to an individual child, whether it would not continue to grow as long as it was in the mother's womb ?

I presume it would.

Therefore it would be larger at ten months than it was at nine ?

Certainly.

(Mr. Adam.)—With reference to the case you stated of the protracted labour of a month, when the pains came, in the first instance, had you any reason to know that the child was full-grown ?

J. Conquest. . . I could not possibly ascertain that ; nothing short of actual inspection would justify a man in saying that.

Pains of labour may come on, supposing a child to be eight months grown ?

I think that genuine labour-pains may come on, certainly.

Then the coming on of genuine labour-pains, and their cessation for a month, and the subsequent delivery of the lady at the expiration of a month, is no proof that she had gone for nine months at the time the pains came on ?

Certainly not.

Re-examined by Mr. Tindal.

When you state that a child born at a protracted period would be larger than a child born at the proper time, do you mean larger than other children of the same mother, or larger absolutely ?

I mean relatively larger, as compared with other children of the same mother.

In the process of gestation, is the quickening of the child an important time from which the birth is afterwards calculated ?

I confess that I should place much more reliance upon a calculation made from the time of quickening than from any other datum.

Does your experience authorize you to say that ?
Decidedly so.

Then in the course of your practice do you inquire more diligently into the time of the first quickening, as

it appears to the mother, or into the original appearance at the time of conception? J. Conquest.

I am in the habit of depending much more upon the time of quickening. I have a case quite in point, if I may be allowed to state it. I had it in contemplation a few weeks back to leave town on account of ill health, and this very much depended upon a lady, who stated that she became pregnant at such a time; she dated altogether from the non-appearance of the periodical discharge; I dated from the term of quickening, and told her I was very apprehensive she would exceed the time by some weeks; and such has been the result; she is not yet delivered.

You who dated from the time of quickening were right, and the lady who dated from other symptoms was wrong?

Yes.

Does that agree with the general course of your experience?

Yes.

(Mr. Attorney-General.)—You were understood to say the time of quickening would vary four weeks?

In different women, but it corresponds in the same woman; and this woman has borne four children, and every time has quickened at the same period from the birth.

The time of quickening varies four weeks?

Nearly so.

The interval between the conception and quickening is much more uncertain than between the quickening and the delivery?

J. Conquest. Certainly, so far as my experience goes.

(Mr. Tindal.)—In the case you have stated, was the attention of the patient called by any circumstances to the time of quickening?

Certainly, it was by the usual symptoms which indicate the occurrence. I am aware that the circumstance of quickening is not always to be relied upon; many old women who are determined to have children, when they marry late in life, and many single young women, who wish not to have children, are very apt to be deceived; but I am confining my remarks to married women of respectable character.

Are there any instances relating to the quickening of women under those circumstances which can be relied upon?

They are generally of so decisive a character as not to admit of any doubt.

Is the period from quickening to the period of delivery an ascertained period, or is that one which varies?

It must vary, because women do not quicken always at the same time.

(Mr. Attorney-General.)—May menstruation be by cold or illness entirely suspended for an occasion?

The causes which will suspend the menstruous discharge are very numerous. If menstruation becomes suspended from any other cause than pregnancy, it is not likely that the uterine organs would be in a fit state to be impregnated during suspension.

May the menstrual discharge be suspended for a month; it is to commence on a particular day, it will naturally go on for five or six days, and then not occur

again for a month ; may one period of it be entirely suspended by illness, so as to go over to the next month ? J. Conquest.

I think it may.

Then can you take upon yourself to say, that in the interval between the time when that menstruation should have taken place and the next menstruation a woman may not conceive ?

No ; I think the evidence connected with menstruation so uncertain, that, as I have before stated, I found my calculation more in the circumstance of quickening. Women are constantly becoming pregnant whilst performing the duties of nursing, when they do not menstruate, and should not menstruate.

When was it you attended Dr. Hamilton's lectures ?

It must have been about thirteen years since.

Before those particular instances you have referred to ?

Yes.

(By a Lord.)—With respect to those children who you say were particularly large, did you weigh them ?

I did not.

You know the usual weight of a child ?

Yes.

You did not weigh those ?

No.

Had you any conversation with the husbands of those ladies on the subject ?

No.

You never examined them with regard to any of the facts the lady stated to you ?

I did not, because I should place no dependence at

J. Conquest. all upon the statements of those men as to sexual intercourse.

You talk of protracted gestation as originating from loss of blood, have you or not known a woman during her pregnancy menstruate?

I think a woman does not menstruate in the common acceptation of the term. I know that a woman will lose blood periodically; but I believe that those are all cases in which the extremities of certain arteries terminate below the uterus, the upper part of the vagina; and I believe, that in by far the majority of cases of reported menstruation, if the discharge is examined by one or two tests, it will be found to be blood, and not the menstrual secretion, which differs materially from blood.

In those cases where there has been loss of blood, but where you do not allow there was regular menstruation, have you observed protracted gestation?

I believe I have once or twice stated, that I consider all the evidence connected with menstruation of so uncertain a character, that I have not allowed myself to determine upon that.

In those cases where you have observed loss of blood that did not, in your opinion, amount to menstruation, have you witnessed protracted gestation?

The third case to which I referred I believe was a case in point: a woman lost blood frequently, at irregular intervals; and I suppose that the gestative process became interrupted so far as she was concerned, and in consequence of that irregular loss of blood enfeebling the organ.

Did she lose blood naturally, or was it taken from J. Conquest.
her?

Naturally.

Are not you in the practice of frequently recommending bleeding in cases of women in a state of gestation?

Not because they are pregnant; viewing it as a natural process, I do not know why we are to bleed spring and fall.

Are you not in the practice of recommending the loss of blood to ladies in that state?

I can suppose many cases requiring the loss of blood during pregnancy, and which must be treated by the loss of blood irrespective, or almost irrespective, of the state of the woman.

Does it enter into your mind that you endanger a protracted gestation by taking blood from the woman?

Pregnant women are by far the most healthy women we meet with in society; consequently the cases are comparatively so few requiring the loss of blood, that I do not think my experience justifies me in giving an opinion upon that point with any degree of confidence.

In your opinion, may there be a period of some days between access and conception?

Certainly not.

You think conception immediately follows access?

If I understand the question correctly, I should say, yes: conception certainly takes place at the time of coitus. I believe in some twin cases, where there are two ova, one may be developed much earlier than another; so that when those twins are born, one will frequently be of

J. Conquest. the common size of a child of nine months, and one considerably smaller.

(Mr. Attorney-General.)—What is the longest interval you have ever known between the birth of twins?

I have never allowed four hours to elapse between the birth of twins; I am aware that as many weeks have occurred.

By report?

By the report of living medical men.

**J. Sabine,
Esq.**

John Sabine, Esq. by Mr. Tindal.

You are a surgeon and accoucheur?

I am.

How long have you been in business?

My first commencement of my medical studies was in Paris, in the year 1815.

How long have you been in practice as a surgeon and midwife?

Between seven and eight years.

In this city?

In England.

How long have you been in the city of London?

I have been twice in the city of London; this last time about two years.

From the experience which you have had, what do you consider to be the ordinary time of gestation before a woman produces a child?

About forty weeks, or nine calendar months.

Have you any case that has fallen under your imme-

diate observation, in which that time has been exceeded? J. Sabine.

I have the case of my own wife.

Have the goodness to state the particulars of that case, and the length of time to which the protraction extended.

In the year 1817, the last period of her menstruation took place I believe about the 14th of September; on the 14th of October expected menstruation was looked for, it did not take place; immediately after this period all the symptoms of pregnancy followed, such as sickness, heartburn, pains in the breasts, the ring round the navel became dark, which I consider one of the most principal symptoms of pregnancy in the first child. Those symptoms went on until the second week in January, when she quickened; she was not delivered however till the 14th of August following. Her father, who has been a very eminent accoucheur in Norfolk and Suffolk for the last five-and-twenty years, was present with her during this period; it was his opinion as well as mine.

(Mr. Attorney-General.)—You will have the goodness to state your own opinion.

My opinion was that she was in the family-way in October. This book is a memorandum-book of the year 1817, where it will appear that she menstruated regularly from the commencement of the year.

Was that book kept by yourself?

Kept by her.

The entries are hers?

Yes.

J. Sabine. (Mr. Tindal.)—Were you by at the time that entry was made?

I was by at the time.

You saw the entries made?

I did. It appears by this book that she menstruated on the 14th of September; on the 14th of October, or about that time, menstruation was expected; consequently, on the 16th of October is marked "one week", and it goes on regularly "two, three".

(Mr. Attorney-General.)—Do you mean to say you looked at all those entries at the time?

Yes. It goes on throughout the whole year, until on the 25th of December is marked "eleven". She was not delivered till the 14th of August.

(Mr. Tindal.)—From the 14th of October to the 14th of August is ten calendar months?

Yes.

From your judgment, and the observations you made, must the pregnancy or not have commenced before the 14th of October?

It might have commenced only immediately before, on the 13th or 14th of October, just at the period when menstruation ought to have taken place; but it might have been a week or a fortnight previous to that time.

What is the usual course which medical men take in reckoning the time, as to dating from a menstruation which has ceased?

They generally allow a fortnight either way.

Do they in general find that calculation correspond with the truth?

Yes.

Have you any other instance in which you can state a J. Sabine.
protracted gestation to have taken place?

Not with such confidence as the present one.

Have you any other in which you can state it with a
sufficient degree of confidence to justify the statement
of it here?

As I did not anticipate being examined before the
House of Lords on a circumstance of this kind, I did
not make notes of those circumstances.

Combining the experience you had in this particular
instance with your general experience, in your judgment,
could a child begotten on the 30th of January be or not
born on the 7th or 8th of December, that is 310 or 311
days?

From this case and others, I am induced to believe it
possible.

Cross-examined by Mr. Attorney-General.

Have you conversed on this case before?

It has been the subject of conversation with herself,
and her father, and me, ever since it took place.

Not only with her father and herself, but with many
other people, has it not?

Indeed I cannot say.

Have you never conversed with any body?

Since I have been summoned to this house I have.

You continued to live with Mrs. Sabine during this time?

I did.

Where were you living at that time?

At Yarmouth in Norfolk.

J. Sabine.

And you lived with her as usual?

As usual.

Did you put down in the book the date of the quickening?

I did not, because I felt the quickening myself.

When was it your attention was first drawn to consider the date of the quickening?

By my wife's desiring me to feel the motion of the child.

How do you know it was the second of January?

It was the second week in January.

What impressed upon your mind that it was the second week in January?

I recollect the circumstance particularly.

What combined the circumstance with the date; it is a long while since?

We considered the time she would be brought to bed from the time of her ceasing to menstruate, and the time of her quickening.

You would calculate naturally from the time of her ceasing to menstruate?

Not always.

What calculation would you make?

The usual period is sixteen weeks from conception, sometimes it takes place much earlier, and sometimes later.

How much earlier, and how much later?

Sometimes it is protracted to the twenty-fifth week, and instances are on record of so early a period as the twelfth week; I do not speak from my own observation of that, but from the records of other medical men.

From the knowledge you have as a medical man? J. Sabine.

Yes.

Then a calculation from the time of quickening must be much more correct than from the time of conception?

Yes.

What, as far as your own observation and knowledge goes, has been the deviation as to quickening; what is the usual time?

Usually about the sixteenth week.

How far have you yourself known it to go beyond the sixteenth week?

As far as two or three weeks.

How far have you known it to anticipate?

In this case I believe it took place very early.

How many children have you had?

Four.

Was this the eldest?

Yes.

It was the first child your wife had?

Yes.

It was born in 1817?

In 1818.

Of what size was the child when born?

A very large child indeed.

Does a child continue to grow during the whole time it is in the womb after it begins to live?

I cannot answer that question.

You are a medical man?

I am.

J. Sabine.

What is your particular pursuit as a medical man?

As an accoucheur.

As a midwife?

Yes.

How long have you been in practice?

About eight years.

Where has your practice been?

At Yarmouth in Norfolk and London.

How long in Norfolk, and how long in London?

I have been in London about two years. A part of my practice was in Herefordshire, where I had the charge of a dispensary, where I had a great many midwifery patients; afterwards in Norfolk, and afterwards in London.

Where was your medical education?

It commenced in Paris.

How long were you in Paris?

Fourteen or fifteen months.

Where did you afterwards pursue your education?

In London.

You stated that you came from Yarmouth to London to practise?

That was afterwards.

With whom were you in London?

I was a pupil of Sir Everard Home.

For what period?

I was for fifteen months in St. George's Hospital.

Are there cases of midwifery there?

No, none.

Sir Everard Home practises as a surgeon?

He is the surgeon of that hospital.

J. Sablos.

Where did you continue your practice or education as an accoucheur?

I have stated in Herefordshire, at Yarmouth, and in London.

Where was your education in midwifery in London; St. George's Hospital does not afford facilities for that information?

I pursued it in Paris, and in London I attended the lectures of Doctor Thynne.

For what time?

I attended three courses of lectures.

That was the whole of your education in London as to that department?

Yes, as to that department.

The instance of the birth of this child took place in the year 1817?

Yes.

Your medical education began in Paris in the year 1815?

Yes.

Cross-examined by Mr. Adam.

You have stated that you had no conversation with medical men on the subject of your wife's delivery until after you were summoned here?

Except with her father.

With no medical man at all?

With no other.

J. Sabine. Did you ever have any conversation with Doctor Paris upon this subject?
Not till after I was summoned here.

Dr. S. Merriman. Dr. Samuel Merriman, by Mr. Tindal.

You are a physician, and also an accoucheur?
Yes.

Have you been long in the practice of that department of medicine?

About thirty years.

Has your practice been carried on in London?
Entirely.

Has it been carried on extensively?

Yes, I may say it has.

Where did you originally take your degree?

At Aberdeen; an honorary degree from Aberdeen.

How long ago is that?

Fifteen years, I think.

Were you before that practising midwifery as a surgeon?

Yes, I was.

During your experience, what do you consider to be the period of gestation of a female?

The ordinary time certainly about forty weeks, 280 days.

Have you had within your own experience cases in which that ordinary time has been exceeded?

I have had within my own experience cases in which the time from which the female dated has exceeded 280 days.

Assuming those dates to be correct, how long has it exceeded the term of 280 days? S. Merri-
man.

Some 285; some 287; two or three 296; one 303; one 309 days.

Have you any reason to doubt that the information given to you was correct?

I have no reason to doubt with regard to several of the cases; as to some perhaps I have doubts.

Have the goodness to begin with that case in which you feel no reason to doubt; how long was the period exceeded in that case?

I will beg to refer to a memorandum.

Is that paper in your hand in your own hand-writing?

It is.

Is it a note made at the time?

It is a copy from a note made at the time.

A copy from a note in your own book?

Yes.

(Mr. Adam).—From what book?

A book which I constantly keep, and in which I put down occurrences that appear to me extraordinary.

Mr. Adam objected to the witness referring to this paper.

(Mr. Tindal).—Are you able to speak to the dates without looking to the paper before you?

I believe I can, as far as correctness is concerned, but I do not know that I can state the day of the month, or the day of the year; with regard to one of them I can speak.

Bringing your recollection to that case, in which you

S. Merri-
man.

feel no doubt upon the information which was given to you, how long did the period exceed the ordinary time?

The case was this:—A lady had borne six or seven children; she always calculated her reckonings from the last day on which her monthly period ceased; on this occasion she was perfectly well on the 7th of March, and from some circumstances which I did not press to know, she said that she supposed herself to have conceived on the 8th of March. She engaged me about the month of November or October, I am not certain which, to attend her, and said she should lie-in the beginning of the month of December, and she said I am glad it will be so early in the month because the children will not then be at home for the holidays. This lady was delivered on the 11th of January, making it, if I am not very incorrect in my calculation, 309 days.

Have you any other case in your recollection where there has been an excess of the time?

I have no case so strong in my recollection as that where the period has been so long as 309 days; but I have where the period was of a shorter duration, perhaps forty-two weeks and one or two days.

Have the goodness to state the circumstances of that case.

I was engaged to attend a lady who stated that she expected to be confined in the month of July. I had occasion to go out of town in the month of July, and I called upon her to know how long I might venture to be absent before she was likely to want me. She said she certainly should not go more than another fortnight; she however was not put to-bed till more than a month

after the time I saw her, making forty-two weeks and one, two, or three days, I do not exactly recollect which; the notes I have in my pocket would tell me the number of days, but it was about forty-two weeks and two days. S. Merri-
man.

Do you know the date of the last?

I suppose it must have been probably about the year 1817.

Do you recollect any case where you have had the care of a patient for a longer period than the one you have mentioned last?

There is another case of a patient who was 303 days from the time at which she last had seen her monthly period.

When did that case occur?

In the year 1823, I think.

Were you called in at an early part of the case?

I saw the lady, I suppose, when she was about five months advanced?

Did you attend her from that time up to the time of the delivery?

I saw her occasionally, but not once a day, or perhaps once a week; I saw her perhaps every ten days or fortnight.

Did you see her as often as a medical adviser is usually called in?

Yes; there being nothing particular to call for his attention.

Were you able, by any symptoms, to form any idea whether she was correct in the period she fixed for conception?

S. Merri-
man.

I have no reason to think she was incorrect.

Then, assuming her to be correct, an interval of 303 days occurred before her delivery?

Yes.

Are there any other particular cases to which you would refer?

I think those three I have mentioned are equal in strength to any others that I can mention.

Upon the whole, judging by your experience, in your judgment could, or could not a child which was begotten the 30th of January be protracted, as to its birth, until the 7th or 8th of December.

I think such an occurrence is very possible.

Cross-examined by Mr. Attorney-General.

The three hundred and three days you have stated are calculated from what period?

From the time at which the last appearance of the menstruation ceased, from the termination of the monthly period.

Was that the case of a married woman?

The case of a married woman.

It was three hundred and three days from the cessation?

Yes.

Calculating from the next period, you would deduct twenty-eight days from that?

Certainly.

And the intercourse which produced conception might have been the day previous to the next period?

That is possible.

Or at any day during the interval?

That is possible, certainly.

And just as probable, perhaps?

I am not quite sure as to the probability, but possible, certainly.

The one of forty-two weeks and two days, was that the case of a married woman also?

Yes.

In that case you were not called in till a short time before the woman expected to be delivered?

A few months, two or three months before.

The forty-two weeks and two days in that case are also calculated from the period when the menstruation ceased?

Yes.

So that, if the intercourse which produced the child had taken place precisely in the middle, between the two menstruations, it would have been a period of forty weeks?

Exactly so.

Which is all in the regular and natural course of things?

Which is all in the regular and natural course of things.

The first was also the instance of a married woman living with her husband?

Yes.

The calculation is made on the same principle there also?

Precisely so.

S. Merri-
man.

What was the number of days ?

Three hundred and nine days.

Menstruation ceased on the 7th of March, and you calculated from the 8th of March your 309 days ?

I calculated from the 8th of March, because the lady said there were particular reasons which led her to believe that she fell with child on the 8th of March. She was a very virtuous, modest woman ; and it did not become me to ask what her particular reason was.

Though a very virtuous, modest woman, she was still living with her husband ?

Yes.

And though a very virtuous and modest woman, she might have had intercourse with her husband subsequently ?

Yes ; and therefore she had no reason to conceal any fact from me.

How soon did you see her after the 8th of March ?

I am not sure whether in October or November.

You saw her at a long interval after the supposed cause of conception ?

Certainly.

If you were to take the twenty-eight days, the interval between the two menstruations, from the whole number of days, it would be all in the ordinary course of things ?

It would then exceed, by a few days, forty weeks.

By only one or two days ?

One day.

If the intercourse which produced the child had been upon the day preceding the next menstruation, or the

next period of menstruation, the child would have been born in due time? S. Merri-
man.

Certainly.

That observation applies to all the three cases?

Unquestionably.

Cross-examined by Mr. Adam.

The only reason you had to think that conception did not take place the day before the expected menstruation was the statement by the lady, that she imagined she had conceived on the 8th?

Not only on that, because I conceive that impregnation is by no means so common the day before the expected term of menstruation as it is the day after the menstruation has ceased.

One day before the menstruation is not so likely as a longer period?

Certainly not.

But the lady did not state to you the grounds on which she formed the supposition of her having conceived on the 8th of March?

No.

Re-examined by Mr. Tindal.

Although it was so long after as October, did she at once fix upon the date you have stated to the house?

Certainly.

Are there any other circumstances besides that arising from menstruation, from which a medical man can form

S. Merri-
man.

an opinion as to the time of conception, adverting particularly to the quickening of the child ?

There are other symptoms by which he might be led to infer the impregnation ; but all of those, I conceive, are secondary to the grand symptom of the cessation of the menstrual period.

Is there any other ground on which judgment can be formed as to the time at which impregnation takes place, that is, whether it is shortly after the preceding menstruation, or shortly previously to the expected subsequent one ?

I am generally in the habit of calculating from the time at which menstruation ceased ; I reckon 280 days from the time of the cessation of the monthly period ; and reckoning 280 days, I find that I am generally correct in the calculation of the period at which the lady is to be delivered.

Is there any general opinion to which belief is given amongst practitioners, as to the time at which impregnation takes place ?

The general belief I fancy is, that it takes place soon after the menstrual period.

(Mr. Attorney-General.)—Does the child continue to grow in the womb up to the very period of the delivery ?

I presume that it does.

So that if the delivery were protracted beyond the nine, and to the verge of ten months, supposing that possible, the child would be larger than if born at nine months ?

I am not quite sure upon that point ; it depends upon the period at which (admitting the fact that a woman

may go more than forty weeks) there was a cessation of the growth of the child. S. Merri-
man.

The question is, whether the child continues to grow till the labour takes place; is it not nourished till the labour takes place?

Yes; but the question is when the nourishment begins.

At whatever period it commences, as soon as the child is a living child, and begins to grow, does not the nourishment continue to supply it, and does not it continue to grow up to the period of delivery?

Certainly.

So that if the delivery is protracted to ten months it would still continue to grow, and would be in all probability a larger child than if born at nine months?

One must sometimes draw one's inferences from analogy. I have known more than one instance where a child has been inoculated for the small-pox; according to the ordinary course of things, where a child has been inoculated for the small-pox, the virus inserted in the arm of the child will in two or three days produce a vesicle, which ultimately enlarges, and the small-pox is generally diffused throughout the constitution, and the person has a very full eruption of pustules; but though it is the ordinary course of things, though it is, I may say, the law of small-pox inoculation, that the index should shew itself at the end of two or three days, I have known seven, eight, nine, or ten days elapse before it shews itself. I think also that the ovum passing from the ovarium into the uterus may not immediately excite the action of the uterus; it may lie there in a more or

S. Merri-
man.

less dormant state, and the action may not be set up in the uterus for four or five days, or a fortnight afterwards.

The question does not refer to possible and extreme cases ; but would not, in all probability, the child be larger if born at the expiration of the tenth than the ninth month ?

Certainly.

Re-examined by Mr. Tindal.

On the subject of protracted gestation, have there been experiments tried as to other animals, not the human species ?

I cannot speak to such experiments from my own knowledge, only from what I have understood.

What were the experiments which you know of ?

Dr. Leake, who formerly gave lectures on midwifery in this town, states, that in Egypt, where it is usual to hatch chickens by heat, the eggs being put at the same time —

(Mr. Attorney-General.)—Are you speaking of experiments of which you were witness, or the result of which has been communicated to you ?

I stated it was an experiment I had heard of.

The Attorney-General objected to the evidence.

(Mr. Tindal.)—Is Dr. Leake alive ?

He is not.

(Mr. Attorney-General.)—In your judgment, can there be any interval between the connexion which takes place between the sexes and the conception ; does not

impregnation take place immediately, and conception also? S. Merri-
man.

Unquestionably, if impregnation takes place, conception must take place.

Does not impregnation take place either immediately or not at all?

Surely.

So that conception must follow the act of impregnation immediately?

Unquestionably; conception takes place in the ovum, and the ovum descends into the uterus.

You conceive there may be a difference in the descent of the ovum into the uterus?

Yes.

That is mere speculation?

It is known that the ovum does descend.

As to the interval of time, that is conjecture?

That is partly conjecture, certainly.

(Mr. Tindal.)—Are there any books which have been written upon the subject of protracted gestation which are received as books of authority by practitioners?

There have been a great number of works published upon that subject, and some, I apprehend, are no authority whatever.

(Mr. Attorney-General.)—Would you pin your faith on Livy upon such a subject?

Certainly not.

(Mr. Tindal.)—Do you know the works of M. Testier?

I have heard of them, but never read them.

(Mr. Attorney-General.)—Would you pin your judg-

S. Merri-
man.

ment on Mr. Haller's judgment, as expressed in his work upon this point?

Whatever Haller asserts upon his own knowledge I would believe; but there is a great deal in Haller which is not upon his own knowledge.

Mauriceau^a?

Mauriceau relates upon his own authority several cases of protracted gestation. I should be disposed to place some confidence in whatever Mauriceau states.

What was Mauriceau?

A practitioner of midwifery at Paris for many years.

A great variety of causes will suspend menstruation? Yes.

May it be entirely suspended for that term, so as not to occur again till the next stated interval?

I have no doubt such a thing may be.

If that were the case, do you conceive the woman might conceive in the mean time?

I suppose it is possible, but I believe it is very rare.

What would be the difficulty in the way of that?

The uterus would be labouring under some disease, and would be therefore less likely to become impregnated.

Dr. H. Da-
vis.

Dr. Henry Davis, by Mr. Tindal.

Are you a physician?

I am.

^a It should be observed that Mauriceau lived at a period when the science of surgery was much less perfect than at present: he was the contemporary of Dr. Hugh Chamberlen, who translated his *Principles of Midwifery*. He died at an advanced age, in the year 1709.

Where are you established in practice ?

H. Davis.

In London.

How long have you been in practice as a physician ?

Ten years in London.

Were you in the profession before that ?

I have been in the profession these twenty years and upwards.

Where were you educated for the profession ?

Principally in London, in Paris, and Edinburgh also.

Where did you take your degree ?

I am a licentiate of the College of Physicians in London.

Have you been in extensive practice during any part of this time ?

I have practised midwifery upwards of twenty years.

Have you been in an extensive business in midwifery ?

Yes, I have for the last ten years.

Without inquiring into the ordinary time of gestation, of which we have heard so much, in your experience have you known any case of extraordinarily protracted gestation ?

In my experience I have not, except in one instance, and then I was led to believe it was owing to some mistake of the patient.

Although not in your own experience, have you had any case of that sort under your observation ?

One remarkable case.

Have the goodness to state the facts of that case.

(Mr. Attorney-General.)—Were you personally acquainted with all the facts ?

H. Davis. I am perfectly acquainted with the persons who communicated it to me.

You were not yourself present during any part of the scene ?

I did not attend the female as a patient.

(Mr. Tindal.)—Were you from time to time attending upon her, so as to know the facts you are about to relate ?

No, I was not.

What you were about to state is something which has been communicated to you by some female ?

Yes.

You did not yourself attend her ?

I did not.

**Dr. R. B.
Denison.**

Dr. Richard Byam Denison, by Mr. Tindal.

I believe you are a physician ?

I am.

Where do you practise ?

In London.

Has your practice been extensive in the line of midwifery ?

Certainly.

What instances have occurred in your practice in which the natural time of gestation has been exceeded before the birth of the child ?

I merely know one, and I cannot positively speak to the fact of that one.

What do you call the natural time of gestation ?

Nine calendar months, or 280 days.

That being in your judgment the ordinary time, will

you state any instance in which that time has been exceeded? R. B. Denison.

In one particular case a lady went nearly three weeks over the usual time.

At what period of the gestation of that lady were you called in to attend her?

About a month before her expected accouchement.

Did you judge from any circumstances or symptoms that you observed yourself, that that was the period at which her delivery might be expected?

Certainly; it was her third pregnancy.

On what do you ground your calculation that that pregnancy was beyond the usual time?

More particularly from the narration of the lady herself.

You had no means of knowledge, of your own actual knowledge, prior to the time when you were called in?

Decidedly not. Certainly not.

(By a Lord.)—Have you any objection to state the name of the lady?

I should beg to be excused; it is professional confidence.

(Mr. Tindal.)—On what do you ground your judgment that she exceeded the natural time of pregnancy?

From the account she gave me of the expected time of her labour.

What account did she give you?

That she expected about the middle of such a month.

Did you examine her in order to see whether the ground of her opinion was a just one?

R. B. Denison.

Not particularly ; because I had no reason to doubt her accuracy any more than that of any other patient.

Did you ask no question as to other circumstances which would have guided your own judgment ?

It is not a common thing to do so ; when a lady comes to me, I ask when she expects to be confined, and I make a memorandum of it.

(Mr. Attorney-General.)—Do you not find women very often mistaken ?

Decidedly, that they miscalculate frequently ; a fortnight or three weeks is not unusual.

(Mr. Tindal.)—Suppose a period of 310 or 311 days elapsed between the last access of the father and the birth of the child, could that child be the product of that access ?

An instance of that kind has never occurred to me at all.

Have you formed any judgment upon it ?

No, indeed I have not.

Dr. E. J. Hopkins.

Dr. Edward James Hopkins, by Counsel.

You are the principal accoucheur to the Westminster lying-in institution ?

I am.

How long have you been in that situation ?

I have been in that situation five years.

In the course of that occupation have you had considerable experience ?

The average number of patients has been about a thousand a-year ; but I consider the whole of the num-

ber that I attended to amount to that, for I attend the wives of most of the soldiers of the foot-guards, in addition to that institution. E. J. Hopkins.

Altogether your practice amounts on an average to about a thousand a-year?

Yes.

What do you consider, in the course of your experience, the ordinary period of the gestation of a woman?

The ordinary period is about 280 days.

Have you known that time in any instance exceeded?

I have known it in one most positive case.

Have the goodness to state the circumstances of that case.

May I first state a case that occurred to my late father^a?

Were you living with your father at the time?

No; the case occurred about twenty-four years ago.

(By a Lord.)—Is your father alive?

He is not; but the case was most conclusive; but that is not the case which I now refer to: that was what first grounded my conviction as to the possibility.

(Mr. Attorney-General.)—It was reported to you by your father?

Yes.

(Mr. Tindal.)—In the first instance refer to the case which you know yourself.

This was a lady, the wife of a merchant. I was called in ———

(Mr. Adam.)—At what are you looking?

^a This is the case of Mrs. Mitchell, who was the last witness examined.

E. J. Hopkins.

A note of the date.

(Mr. Attorney-General.)—From what is that taken ?
From the lady whom I attended.

Was it taken at the time ?

No, not at the time.

(Mr. Tindal.)—Put the note in your pocket, and state the fact as you recollect it.

I was engaged to attend this lady in September 1821 ; she then stated ——

Mr. Adam submitted, that anything the lady stated previous to the witness being called in was not evidence.

Mr. Tindal submitted, that the condition of the lady at the time she called in the doctor was one of those facts upon which he must be informed, in order to enable him to give medical advice to the female consulting him.

The counsel were informed, that in the opinion of the committee this was merely hearsay, and not evidence.

(Mr. Tindal.)—Will you proceed with your recollection of the case ?

In referring to my note I have made a mistake ; it was in December, not September.

Mr. Attorney-General objected to the witness, who had been told to rely upon his recollection, having referred to the note privately after having been told that he was not to look at it.

(Mr. Tindal.)—Do you recollect the time of the year ?

I was applied to only a few days back, and cannot recollect every particular at the moment.

Was it in the winter time or the summer ?

It was in the winter.

E. J. Hopkins.

(Mr. Attorney-General.)—Was it in September or October?

From the note I have in my pocket ——

According to your recollection it was in September?

I believe it was in December.

(Mr. Tindal.)—Can you recollect whether it was in the one month or the other?

It was in December.

(Mr. Attorney-General.)—Do you recollect that from reference to your note, or do you recollect it without referring?

I now recollect it, because it has been brought to my mind.

You can recollect that it was in December without reference to the note?

Now I can.

(Mr. Tindal.)—From the account given to you this woman was four months gone; what did you observe?

I observed the abdomen very much enlarged, and from every appearance it was a four months' gestation.

From your experience, did her appearance correspond with a four months' pregnancy?

It did most decidedly.

Were you in the course of regular attendance upon that lady from that time until her confinement?

I was, almost every week.

Did the subsequent symptoms that occurred agree with or contradict the opinion you had before formed as to the time of her pregnancy?

The gestation went on, and the abdomen still in-

R. J. Hopkins.

creased in size, and I have no reason to believe otherwise.

When, in point of fact, was that lady delivered ?

She was delivered on the 4th of June in the following year.

Upon the mode of calculation which you have adopted, what length of gestation does that allow ?

That allows ten calendar months.

Is that the only instance you have within your own knowledge ?

That is the most decisive case I ever remember.

Have you had other experience, without going to particular cases, which has enabled you to form a judgment upon the possibility of exceeding the ordinary time ?

Patients very frequently go beyond the time that they calculated at. With respect to this case, she menstruated on the 3d of June, that I recollect most positively, on the 3d of June 1821 ; making in the whole, from the time of menstruation until she was confined, eleven months and a day.

Cross-examined by Mr. Attorney-General.

How do you know that she menstruated on the 3d of June 1821 ?

Because I made an inquiry.

You had that from her representation, and her representation only ?

From her representation only, but there were other symptoms to corroborate.

That was five months before you were called in ?

E. J. Hopkins.

Yes.

The extension of the abdomen varies with different women in the same stage of pregnancy ?

It does ; but it was of that size that I could have been always certain she was that far gone ; it was of a most enormous size.

Does not it vary very much in different women ?

It varies in different women, for it depends in some measure on the size of the child, and the fluid in which the child is contained ; some women have more than others.

Does it not vary very much in different women ?

Yes, it does.

In some women the abdomen would not be more extended at five months than in others at four ?

Or at seven.

Some will not be more extended at seven than others at five ?

Yes.

From the extension of the abdomen your impression was, that she was four months gone with child ?

Yes, combined with her representation, and the answers she gave to some questions I put to her ; one question I put to her was, when she quickened. It appeared that this lady quickened the fourteenth week after conception ; she had prior to this borne five children.

All this is from her representation ?

We have no other way of judging but from the representation of our patients.

E. J. Hopkins.

What was the date at which she had quickened in this case ?

That I do not recollect.

Do you recollect how long it was before you were called in ?

If I was called in in four months afterwards it must have been a very short time.

The interval between the period of conception and the period of quickening varies very much with different women ?

Most decidedly it does in different women ; but the same woman will generally quicken with each child at the same period throughout.

You do not mean to say that it is universally true, though it is generally so ?

Generally so it is, with a very few exceptions ; but that depends upon the size of the bony cavity which the child has to pass through, and also on the size of the child ; but where the children are of the same size they always quicken at the same time.

Had you ever attended this lady before ?

I never had.

Then her period of quickening you had merely from her representation ?

From her representation ; we have no other way of ascertaining.

Was she a married woman ?

She was.

Was she at the time living with her husband ?

She was.

Menstruation is very often suspended by disorder ?

Yes.

By cold ?

By a variety of causes.

Cross-examined by Mr. Adam.

Does your memory serve you as to the time in December when you were called in ?

I do not recollect the date in December, but I remember its being in the winter, and about December, as I have before stated,—in December.

Do you recollect whether it was the 1st of December, or the 31st ?

No, I cannot state that fact.

It might have been the 31st of December ?

No, I do not know that it was.

Does your memory serve you ?

No, I do not recollect at what time in December.

How long had you been in practice at this time ?

I had been in practice then about three years.

Your father was a midwife in his lifetime ?

Of great celebrity.

You stated that you had conceived an opinion as to the period of time of gestation from some conversations with your father ?

From some conversations with my father.

You had, in fact, formed no opinion upon that subject before then yourself; you had formed none on your own experience ?

I had not decided merely upon the case my father

E. J. Hopkins. mentioned; I had an impression that women could go beyond nine calendar months.

And that not from your own experience, but something you had heard from somebody else?

From the experience of my father, and the nature of that case.

(Mr. Tindal.)—When was the conversation with your father, to which my learned friend has referred, and what was the nature of it?

Mr. Attorney-General objected to the evidence of this conversation.

Mr. Tindal submitted, that the conversation having been referred to by Mr. Adam, and the grounds of the witness's opinion, as connected with that conversation, being asked, he had a right to ask to the conversation.

The counsel were informed, that in the opinion of the committee the conversation was not admissible.

(Mr. Tindal.)—You have stated that you had not attended the lady before that confinement?

I did not.

Have you attended her since?

Yes.

How many children has she had since?

One. The child in this instance was considerably larger than any she had hitherto borne; the labour was so tremendous, and had impaired her general health so much, that in this instance I have been obliged to bring on labour at the seventh month; the child was so much larger than it would be in the ordinary course of things.

Was the child born alive at seven months?

It was born alive. Her general health required it;

I am confident she never would have survived if I had not. E. J. Hopkins.

(Mr. Attorney-General.)—The child you supposed to have been born at the expiration of ten months, you described as a remarkably large child?

Yes.

Supposing it possible that a child should go beyond the usual time, the probability is, that the child, the nourishment being continued, would be a particularly large child?

Yes; beyond nine calendar months.

Assuming it to be possible that a woman could go ten months instead of nine, the child would continue to be nourished during that month?

It probably might not get very much larger; but it was in this instance larger.

Is not the probability that it would be a large child?

I should imagine so.

If you were to find a child particularly small, that would be an argument in your mind against that?

No, it would not; because there are exceptions to be made.

Would it not be an argument, though there are exceptions; would it not be a circumstance from which you would naturally infer that the woman had not gone beyond the usual time?

If I were to see the child, I should perhaps form a judgment upon that.

(Mr. Adam.)—You have stated, that in this particular instance the labour was very severe?

E. J. Hopkins.

Very severe.

How long did it last?

It lasted eighteen hours.

(Mr. Tindal.)—When you say that you imagine that the child would be remarkably large, do you mean that it would be remarkably large, absolutely speaking, or relatively to the other children of the same parents?

To the other children; that is what I wish to speak to.

(Mr. Attorney-General.)—When a child is born at seven months, it is very often born without nails, is it not?

I should place very little credit upon the growth of the nails.

How is it when a child is born at nine months?

At times the nails are very perfect, in others not; it is a thing I place very little reliance upon, for sometimes we have children born with teeth.

(Mr. Adam.)—Does the fact of a child not being able to suck with facility give you reason to suppose it was born prematurely?

No, it may be from debility.

Supposing you were to hear or to see that a child sucked with difficulty, should you presume it was born sooner than its usual time?

It might be probably from debility, but there might have been a disease going on.

The question is not whether you cannot account for it in another way, but should you not infer that the child was born prematurely?

No, I would not.

E. J. Hopkins.

(Mr. Attorney-General.)—Would it not be a circumstance?

It would be a circumstance; but I generally look at the parents, and if I find them of a muscular and powerful habit, I judge from that that the children will be large in proportion.

Recollecting that the usual time of gestation is nine months, if you were to see a child born of vigorous parents, but under the size, a difficulty of sucking, and without nails, would not all those circumstances lead you to infer, not conclusively, but fairly to infer that the child had not gone beyond the natural time?

Probably it might; it might have some influence in my decision.

(Mr. Tindal.)—By what would you be most governed in your decision under those circumstances; by the investigation of the parents, or the appearance of the child?

The investigation of the parents most undoubtedly; there is such a difference in the appearance of children, that cannot be relied upon.

(Mr. Attorney-General.)—With respect to the instance you have yourself spoken to, had you any communication with the father?

Yes, I had. It was his opinion that she had gone ten months; but still I had very little reliance upon the opinion of my patient; I thought for myself, by making inquiries.

He was living with her at the time?

He was.

E. J. Hopkins.

And had daily and nightly intercourse with her?

I suppose so.

(By a Lord.)—What was the health of the child when it was born?

Very healthy.

Did it differ in its appearance at all from that of a child at the natural period?

It was much larger than any of the other children, but it had the same appearance.

Did you weigh the child?

I did not.

H. S. Chinnocks, Esq.

Henry Singer Chinnocks, Esquire, by Mr. Tindal.

You are a surgeon and accoucheur?

I am.

Have you the care of any lying-in hospitals intrusted to you?

I am accoucheur to the Brompton and Chelsea district of the Westminster Lying-in Institution for delivering women at their own habitations.

Is that the same institution which Dr. Granville is connected with?

The same establishment that Dr. Granville is connected with; there are four districts, the Chelsea and Brompton district is one, and I am the accoucheur to that.

In the course of your employment in that situation, have you many cases of pregnant women that are brought before you?

A great many.

How many do you think in the course of the year, on an average? H. S. Chinnocks.

The Chelsea and Brompton district is but very lately formed; on the average, I should hardly suppose more than forty; it has been formed only two years.

Have you other practice besides that you have referred to?

I am a general practitioner at Brompton.

In the course of your practice at Brompton, have you or not an ordinary quantity of private business, or what is the quantity of that business?

I have as much as I can reasonably expect, considering the time I have been there.

With all those means of information, what do you state to be the ordinary period for a woman carrying a child?

Perhaps I should wish to be excused giving any theoretical opinion, from being such a junior member of the profession; I cannot well give opinions.

You are not urged into the depth of theory, when you are asked what, in the ordinary course of women bearing children, is your opinion of the time when a child ought to be born?

Nine calendar months.

Have you in your own practice known any instance on which you can depend of that time being exceeded?

I have.

Do you know one, or more than one instance?

One.

You need not state the name of the patient, but the time, and any other circumstances relating to it.

H. S. Chin-
nock.

This patient called upon me about four months previous to her confinement; she was confined on February the 20th, in the year 1824, the last year; that was her first child?

(By a Lord.)—Was she a married woman?

Yes. It was her first child; she was consequently inexperienced when she called upon me, and I think I asked her about what time she expected to be confined, and she told me about the middle or latter end of January; I called upon her about that time, as is usual, and paid her very frequent visits. I was rather surprised to find labour was not coming on; I questioned her more particularly in what manner she reckoned, and she stated that there could be no doubt whatever.

(Mr. Attorney-General.)—Does this refer to menstruation?

No; the time the husband left her.

Mr. Attorney-General objected to this evidence.

(Mr. Tindal.)—Did you know the husband?

I did not.

You do not know the fact of his quitting her yourself?

No, only from her account.

(By a Lord.)—Was this a poor patient, or a person in a superior station of life?

Her husband held some situation in a trader going to America.

(Mr. Tindal.)—Were there any other appearances at the time you visited the party, from which you could form a judgment of the truth of her account?

There were no other symptoms than the usual symp-

toms which accompany pregnancy. I was called in four months previous to her confinement; and the appearance of the abdomen was decidedly large, but not so much so as would warrant me to come to the opinion that she must be confined at that particular time.

H. S. Chinnocks.

How much did she exceed that time?

Eighteen days.

You have no means of knowing the truth of any account she gave you of the time of conception, except that she gave it you?

I have not.

Cross-examined by Mr. Solicitor-General.

How long have you been in practice?

Two years.

(Mr. Tindal.)—Where had you studied before?

In London.

Have you attended any hospitals?

St. George's and the Westminster Lying-in Institution. I was a pupil twelve months previous; I attended there constantly for that period; on an average, I visited every other day.

(Mr. Attorney-General.)—St. George's is not a lying-in hospital?

No.

(Mr. Solicitor-General.) — Your pupilage in this branch was a year before you began to practise?

Yes.

T. C.
Hawkes.

as women, that they go longer with males than with females.

That is your judgment and opinion?

Yes; so much so, that I had two mares that went to the horse one day, and one foaled a fortnight sooner than another; the female colt came first.

Cross-examined by Mr. Solicitor-General.

Male gestation is in your opinion longer than female gestation?

Yes.

That is your theory?

Yes.

(Mr. Attorney-General.)—When you speak of 280 days as the ordinary time for gestation, is that the male or the female gestation?

The female.

(Mr. Solicitor-General.)—What is the ordinary scale of nature; what is the difference?

A week or ten days.

(Mr. Attorney-General.)—Do you mean to state that the ordinary time for male gestation is 290 days?

In some cases; I will not state the number of days. I merely state the case of those two mares; one went a fortnight longer than the other.

The question refers to the gestation of human beings. Do you state that the ordinary time of gestation when the child is a male, is 290 days?

It is more than 280, that I am convinced of in my own mind. T. C.
Hawkes.

How many more?

I cannot say exactly; it may vary from 280 to 290. The reason I state that is, that most of the women I have attended have never come regularly to their time.

(Mr. Solicitor General.)—The people at Oakhampton do not come regularly?

It is owing to the cold weather.

You seem to have particular customs at Oakhampton; do they depend upon the dissolution of parliament at all?

We always find a great number more nine or ten months after that time.

You say there is one season for male gestation, and another for female; suppose the child is an hermaphrodite, what should you take as the time?

That I should take between the two.

(By a Lord.)—You first said that the ordinary period of gestation is 280 days?

Yes.

Then you said that the ordinary period of gestation of males was 290 days?

No; that it extended to that time.

But above 280?

Yes.

Do you think the number of males that is born is greater than that of females?

No; there are more females than males.

(Mr. Attorney-General.)—Has your observation been

T. C.
Hawkes.

so accurate as to know whether the same mother has gone longer for males than females?

Yes.

In what instances?

When she has mentioned the time to me to attend her she has in general gone some days over what she first mentioned to me.

Is that peculiar to the case of males?

I have generally remarked it has been a male child born after that.

That whenever a woman has been mistaken in the time of her calculation, it is a male child that is born?

Yes; I think it has generally been a boy.

Dr. J. Blundell.

Dr. James Blundell, by Mr. Tindal.

Are you a physician?

I am.

When did you obtain your diploma?

About twelve or thirteen years ago.

Have you been in practice from that time to the present?

I have.

Where?

In London.

Is your practice confined to the diseases of women, or have you practised generally as a physician?

Not wholly to the diseases of women, but in a great measure.

Have you had considerable practice in matters relating to the delivery of children?

In cases of difficult parturition I have had considerable J. Blundell.
practice.

Have you known any cases in which the period of gestation has been carried over the ordinary time?

Personally, I have.

Have the goodness to state one of those cases, and to what period it extended.

I have personally known but one case in which pregnancy was protracted beyond the nine calendar months. That was a case in which a lady became pregnant upon the night of the 9th of November, and she was delivered upon the night of the 23d of August. The proofs that she became pregnant at the time mentioned were these, I saw her a few days after the impregnation took place, the catamenia had failed to make their appearance, although, to use the female expression, she had been perfectly regular previously.

Mr. Attorney-General submitted, that the witness could not speak to this statement made to him.

Was this at the time when you were first called in?

It was the day subsequent to this intercourse; there was a good deal of irritation.

Mr. Attorney-General submitted that this could not be evidence, being only on the representation of the woman. The committee determined that the witness might prove the symptoms described to him by the lady when he was called in.

(Mr. Tindal.)—Go on to describe the symptoms.

I cannot describe them more distinctly than to say, that they were symptoms of irritation about the bladder and the parts adjacent.

J. Blundell. In your judgment as a medical man, were those symptoms that she described connected with a state of impregnation at the time?

I should state that such symptoms might have arisen from other causes.

Did you attribute them to other causes at that time?

I did not.

To what did you attribute them at the time?

I have no doubt they arose from the impregnation.

(Mr. Attorney-General.)—You had no doubt, in consequence of what she had told you?

In consequence of my inquiring into all symptoms and circumstances, as it was my duty as physician to do, and thence drawing my inference.

One of those circumstances was the circumstance of the information she had given you as to the intercourse which had taken place?

That was one.

A most material one?

In conjunction with the failure of the catamenia.

(Mr. Tindal.)—Was that you have first mentioned one on which you relied also?

Undoubtedly.

Did you continue to attend this lady from that time to the time of her confinement?

It was within a fortnight of the reputed impregnation that I saw her; the symptoms were so slight I saw her but once or twice.

Mr. Attorney-General submitted, on the grounds before urged, that this statement ought to be struck out of the evidence.

Mr. Tindal was heard in support of the evidence. J. Blundell.

The counsel were informed, that it might stand for the present, with a query against it.

Is the lady alive?

She is not.

Did you continue to attend this lady up to the time of her delivery?

She required but little attendance; what attendance she did require I gave.

The child you say was born on the night of the 29d of August?

Yes, under my own care.

Do you recollect the precise day on which you first attended her?

I do not.

Have you no note from which you could discover it?

I have a note, but not one that would lead me to that.

State any other instance that has occurred in the course of your own practice.

There is but one instance within my personal knowledge.

Have you any other mode by which you have formed a judgment, that the period ordinarily assigned to gestation may be extended?

I have.

Upon what grounds is that opinion formed?

My physiological opinions, and my opinion upon this point among the rest, where I specifically examine and think for myself, are drawn from facts, from observations on the human subject, and experiments upon

J. Blundell. brutes resembling, especially in their organization, and the laws that regulate their actions, the human structure.

Have there been any actual experiments tried on brutes which lead to that result?

In this country but few experiments have been instituted; but in France Tessier has bestowed, I believe, from thirty to forty years of his life in collecting facts from different observations made on different genera of the mammalia or womb animals, in order to shew that in them prolongations of pregnancy do occur.

Have you yourself ever known any facts that led to the same result?

I have none on which I should place reliance, for I have not experimented professedly upon that point.

Have you any other ground on which that judgment you have arrived at is formed?

My observation upon the human female, facts ascertained by the observation of others on whom I could rely, or that single fact, decisive in my own mind, ascertained by myself.

What are the observations to which you refer upon the structure of the frame of the female which had led to that conclusion?

I have stated distinctly, as I humbly conceive, the grounds on which I have rested my conclusion. They are facts taken from the observations of others upon animals, and particularly of Monsieur Tessier, and observations taken from the human female herself.

(Mr. Attorney-General.)—By yourself?

One made by myself.

That one you have mentioned?

J. Blundell.

And others made by persons on whom I can rely.

Dr. John Power, by Mr. Tindal.

Dr. J.
Power.

Are you a physician-accoucheur?

I am.

In the city of London?

In the city of London, or Westminster.

How long have you been in that department of physic?

I have been a physician-accoucheur about six years, but I have been in the practice of midwifery about eighteen years.

Have you during that time had considerable experience?

I probably may have personally attended from fifteen hundred to two thousand cases in that time, and I have superintended many more.

Have you formed any judgment as to the protraction of the period of gestation in the female sex?

I have.

What is the judgment you have formed?

That the period of gestation may be extended beyond nine calendar months.

How far does your judgment lead you to conclude it may be so extended?

I know not how to place a limit exactly to that; I should say, certainly, drawing my inferences from observations, and likewise from rational theory, grounded upon circumstances observed in the generative actions

J. Power.

and the generative process, that it may be extended to eleven calendar months, if not longer.

Can you state more precisely the grounds on which that opinion is formed, separate from any observations which have fallen under your own immediate inspection, from any other source on which that opinion is founded?

I have met with cases which apparently, as far as I could form an estimate upon the facts communicated to me, would warrant me to suppose that the period has been extended to eleven calendar months; and then, when I connect those circumstances with the inferences I have drawn from physiological reasoning, I cannot in my own mind doubt the possibility of the fact.

Do you advert to any particular case, or cases that were under your own observation?

I advert to the cases which have come under my own observation; to more than one case.

(By a Lord.)—To how many?

I could bring before your Lordships several; but unfortunately I have not been so correct in making my notes, in keeping my register, as it might have been, and should have been, could I have foreseen that my evidence would be required upon the subject: if I had, I am disposed to think I could have advanced a much greater number, according to my own feeling on the subject; I should say not less than from thirty to fifty cases.

(Mr. Tindal.)—Do you mean not less than from thirty to fifty cases where the period has been protracted beyond the ordinary time, or beyond eleven months?

Where the period has been protracted beyond the J. Power. ordinary time; somewhere it has been evidently protracted to the eleventh month, if not longer.

Then, looking at both grounds of your opinion, is that the result of your judgment, or not?

My judgment is, that the period of gestation may be extended beyond the ordinary time of nine calendar months.

Cross-examined by Mr. Attorney-General.

As far as your own experience and observation go with respect to this point, is it founded on facts communicated to you?

Of course; those points which can only be gained from the information of the females themselves who communicated; for instance, the period of menstruation, and the time of quickening, could be derived only from information; I cannot conceive any other source.

Or the time of sexual intercourse?

I would not advert to that point; I have no fact to bring forward as to the time of sexual intercourse.

Then, as far as your own observation goes, it is built entirely on the communication made to you by the female, as to the time of menstruation, or the time of quickening?

Not entirely so.

From what other facts?

From facts connected with the generative functions.

In those particular cases?

J. Power.

In those particular cases, and in all cases generally, in application to the exciting causes of labour.

Do you know any instance of gestation having been protracted materially beyond the ordinary period?

As far as I can draw an inference from facts communicated, I have known cases.

When you say, or when you said before, you had known instances of gestation being protracted beyond the ordinary period, you calculated the period from some fact communicated to you by the woman; was that so?

Certainly: I cannot calculate it from any other circumstance.

That fact is from the menstruation, or the period of quickening?

I think I may say another ground.

As communicated by the woman?

As communicated from the woman; only from those points, of course. I think I have seen a case in which labour has apparently come on, if not commenced, at what the woman has believed to be her proper time, and it has been postponed nearly a month after that time.

The communication from the woman must have been as to the time when she expected it?

The woman believed herself at her full period; and sometimes the labour came on, the membranes ruptured, and the labour was deferred for nearly a month.

Is it not common for women to be mistaken as to the time they expect?

I believe it is not uncommon.

Is it not common ?

It is not uncommon.

J. Power.

You say that the information, or the conclusion that you draw from those particular cases which have fallen within your own observation in the manner you have described, have been confirmed by observations you have made upon physiological reasoning ?

I have very deeply considered the subject physiologically, and I have published those facts, I mean my opinion, in a treatise which came out some time back. I have convinced my own mind that I have given an explanation of the exciting causes of labour, which bears the evidence of being, perhaps, physiologically correct.

Will you communicate a little of this information ?

I will do that, if your Lordships will allow me.

Is it founded on facts within your own observation, or facts communicated by others ?

I must inform your Lordships what those facts are, and I may use a little technical language, but I will endeavour to divest my observations of that as much as possible. There is a canal leading externally to the uterus of the womb ; the uterus is situate at the farther extremity of that canal. The uterus may be resembled to a bottle, a wine-bottle, when in an impregnated state. It consists of a body, a neck, and a mouth to it. There is a peculiar supply of nerves to the mouth of the womb ; it is more largely supplied with nerves than any other part of the uterine organs, and I infer there is a peculiar sensibility attached to this part of the uterus. As utero-gestation goes forward, particularly at the latter

J. Power.

part of it, the neck of the womb gradually obliterates, so that at the end of utero-gestation, when the woman has gone her full time, the neck being obliterated, the uterus consists of a mere body with a mouth to it. The theoretical part is this—what I have before advanced are facts—the theoretical part is this, that labour is excited in consequence of the contents of the womb being brought into immediate contact with the mouth; that the neck has been intended to keep off labour until it has been obliterated, until the child is perfected. At the end of utero-gestation labour takes place, in consequence of this stimulus applied to the mouth of the womb. Now there is another cause which excites labour; which is, that just before it takes place there is a subsidence of the uterine tumor; the womb previously has been as it were only three-fourths full of its contents, but now it becomes comparatively as seven-eighths full of its contents; the consequence of which is, that the action, which is thus produced by a kind of insensible contraction of the womb, tends to bear the contents upon the orifice, so as to apply the necessary stimulus to it. It may be replied to this theory, that any cause that could prevent the contents of the womb being pressed upon the orifice would postpone the commencement of labour. I shall endeavour to name some causes which may and do illustrate this by cases in point. If there is an insensibility of the mouth of the womb, it would necessarily have a tendency to postpone labour; a certain impression is necessary to excite it; if the insensible contraction I have alluded to before were deficient, it would fail to excite at that time. In illus-

tration of this point I should name a case in Westminster some time back, in which a woman had gone her full time, as she imagined; when I say her full time, she had gone a month beyond her full time, as she imagined. Viewing the case as arising from this want of due stimulus, I applied a bandage round the belly, with a view of producing a pressure downwards, and in the course of the day labour came on. She had sent to me, not in consequence of having symptoms of labour, but from having uncomfortable, what we call spurious pains. Again, my Lords, if we were to suppose the mouth of the womb situate at the side of the womb, instead of being exactly in the centre, it would be evident then that the gravitation of the child down would not be directly upon the mouth, but upon the sides of the uterus, upon the anterior parts of the sides; this would defer the commencement of labour. In illustration of this I think I can give a case in point.

(Mr. Attorney-General.)—From what is that taken?

It is taken from my case-book in my own handwriting.

(Mr. Tindal.)—Is that before you your case-book?

It is.

Did you copy it out from your note-book for the purpose of saving trouble?

Yes, I did. “Mrs. Reyner, Horseferry Road. This woman had four children before,”—I will give it in the words in which I wrote it down—“and was never less than three days in labour.”

(Mr. Attorney-General.)—Had you attended her before?

J. Power.

Never. That was from her own information. "She had in her own opinion gone two months."

(Mr. Tindal.)—Was this a description of any symptoms, or the account she gave you when she called you in?

She gave me an account that she had gone beyond her calculation two months, and that for the last month she had experienced a great deal of spurious pain.

(Mr. Attorney-General.)—Did she say that she experienced a great deal of spurious pain?

Yes.

Did she use those words?

No; that she had experienced a great deal of pain that I considered to be spurious. I have given the words that I wrote down.

You have read the words that you wrote down?

Yes.

Those are the words you had written down?

Yes.

Then the note is not correct?

Of course, in making out a case with any view to evidence, I give it in the medical language. "The membranes ruptured at three in the morning, at which time labour commenced."

(Mr. Adam.)—Was that a fact within your own knowledge?

I think not. "At nine o'clock she was having regular and strong paroxysms,"—I conclude I got to her at that time—"coming on every five minutes. On examination, the head presented fully upon the anterior parts of the womb." That was a fact within my knowledge. "The os uterinum", the mouth of the womb,

“being so far back towards the sacrum that I could not find it without the greatest difficulty. I at length however hooked my finger into it, it being just large enough to admit it freely; attempting to bring it more central, and at the same time to stimulate it and dilate it; a satisfactory progress was made, and soon after one the child was born.” I adduce this case to prove that obliquity of the os uteri may postpone labour for two months even; that was the inference in my own mind. J. Power.

(Mr. Attorney-General.)—Was that postponed labour or delivery?

The labour was postponed, in my opinion.

(Mr. Tindal.)—You were about to state some other case that led you to the same result?

The belly of a woman being relaxed, so as to produce what we term a pendulous belly, I believe upon this principle will protract labour, protract the commencement of it, in consequence of the child being allowed to gravitate over the front of the pubis in the pendulous belly. May I be allowed to read a case from a treatise I published, not of my own, but my father's?

The witness was informed he could not read that case.

I will give you one of my own.

(Mr. Attorney-General.)—The case you have referred to was not one of your own?

It was from my own practice.

How long were you present?

From nine o'clock to one.

Had you ever seen her before?

I had registered her on an institution-book which I superintended at the time; and I have the evidence

J. Power. there that she gave me; it appeared that she should fall into labour two months before the time she did.

Then the theory you have stated is not formed on facts within your own knowledge?

No facts can be within my own knowledge.

According to your theory the birth might be anticipated, or protracted almost indefinitely, according to your expression, almost without limit?

When I stated almost without limit, I meant that I could not define the limit to it.

From the obliquity of the position of the child it might remain there permanently?

I believe it is the permanent structure of the female, and that it always tends to produce difficult or embarrassing labour, or protracted; I have had several reasons to think that I am correct in that opinion.

Would not your theory apply to anticipated labour as well as protracted labour?

Undoubtedly; and by stimulating the os uteri anticipated labour may be procured, and I believe that is a frequent source of abortion.

Mary Tungate.

Mary Tungate, by Mr. Tindal.

You are a midwife?

I am a midwife to several lying-in institutions, and to the Middlesex Hospital.

How long have you been in the situation of midwife to those institutions?

I have been in practice for myself the last ten years.

In the course of that experience have you had many cases of delivery under you? Mary Tun-
gate.

A great many: from 150 to 200 in a year. Sometimes I have exceeded that, calculating from the money I have received at the end of the quarter.

From the experience you have had, have there been any cases under your own observation in which you can state that the period of the child-bearing has exceeded ten months?

In one case particularly I recollect, which was a woman of the name of Fitzgerald, of No. 6, Falconberg court, an Irish woman. I made inquiry respecting her, and she is gone to Ireland. She was a poor woman. She had her letter signed the 27th day of November, in the year 1823. She came to me, saying, that she expected to be confined in a month.

Was she confined in that month?

No; she was not confined till the 8th day of February. She sent for me twice during that time.

Did she state any ground or reason for such her expectation?

The first time she sent for me, she said she was extremely ill, which I found her; the second time she sent for me, on inquiry, I told her it would be her labour, and I staid with her full twelve hours, and never left her; but she was never confined for three weeks after that.

Did she state any ground or reason for expecting her confinement?

I was rather curious in the matter. She said she was

Mary Tun-
gate.

sure she had gone beyond her time. I asked her, how do you know that? and she said —

The Attorney-General objected to the evidence.

The Attorney-General and Mr. Adam.—This is not a question as to medical judgment or opinion, but as to a fact. The witness asked the woman what reason have you for believing that you have gone beyond your regular time? The answer gave the reason; the fact, on which the woman's belief was founded, the circumstance of menstruation having taken place on a particular day. Now the evidence of this fact coming from the person to whom the fact was communicated, and not from the person to whom it occurred, is clearly nothing more than hearsay evidence, and as such inadmissible. We have no opportunity of cross-examining the individual from whom the fact came, or of ascertaining the truth and accuracy of the information.

Mr. Tindal.—This case falls within the acknowledged exception to the rule against the admissibility of hearsay evidence. Ordinary conversation stated by a third person is not evidence; but there is one exception, and that is where the witness being a medical man is inquiring into the nature of a disorder which he is attending in his medical character, and there it has always been held that the account he receives from his patient of his symptoms or feelings at the time is admissible, unless it is open to any suspicion of fraud. The relative situation of the parties renders it almost impossible for any deception to exist, as it would operate only to the prejudice and injury of the party guilty of it, and be no less

useless than unnatural. If the rule prevails as to contemporaneous or present symptoms, why should it not be extended to those that are antecedent? It is objected that the latter range themselves under a different head, and being facts which are gone by, do not fall within the exception. I answer, that there is no distinction between them; they are so closely connected in the mind of the doctor that he can give no opinion of the one without taking the other into consideration. If he may attach full credit to an account of the symptoms existing to-day, why may he not equally believe the same account from the same mouth of symptoms which existed yesterday? Would you compel him to form his opinion from the very symptoms then on the patient? May he not inquire into the antecedent symptoms? For one symptom may correct and qualify another, and the present symptoms may only be understood by reference to the past; it is the latter that guides and directs the mind of the medical adviser, and if he were to discard them, and to confine his attention to the account of the patient's feelings at the time, he would be unable to distinguish those spurious feelings, of which we have heard, from the real indicia of conception. The past symptoms alone afford him the means of fixing the first period, the date from which the calculation is to take place. What mischief might be done if a witness was restrained to a mere dry statement of the feelings and symptoms then on the patient! Put a case of murder, in which a surgeon after examining the feelings of the party who has received a blow, makes further inquiries, and finds from antecedent symptoms which the

sufferer described that there was some antecedent injury or disorder sufficient to account for the present symptoms, and to occasion the state of the party,—in most cases, the state of the party is so much disguised by the immediate effects of any violent and unexpected cause, that a surgeon must examine many collateral circumstances embracing past and present symptoms before he reaches the truth and determines whether a blow be or be not murder. In the case of *Aveson v. Lord Kinnaird*, it was supposed a fraud had been committed on an insurance office, and evidence was admitted to describe what the woman stated to be her symptoms, not only when the medical man was called in, but at an antecedent time. I rely on this authority, and I repeat that as the facts necessary to make up the judgment of the witness are all of value, the evidence must be imperfect if any of them are rejected.

Mr. Attorney-General.—The case of *Aveson v. Lord Kinnaird* was grounded precisely on the distinction, that what a patient says at the time when she is actually labouring under a disorder either to her doctor or to any other person with whom she has conversation, is part of the *res gesta*; and the court decided on that principle, that as she was confined to her bed labouring under the symptoms which were the subject of the conversation, evidence of it was admissible. Now this question has no reference to any part of the *res gesta*, but to a declaration which a party is represented to have made to the witness, that a distinct and insulated fact had taken place at a particular period.

Lord Gifford.—I understand Mr. Tindal to offer it

not as evidence of a fact, but as evidence of that on which midwives may ground their opinions.

Mr. Attorney-General.—It is admitted on both sides that the ordinary time of gestation is 280 days, but a question of this nature is put to the medical man, “Have you in any instances known the period of gestation extended beyond 280 days?”—‘Yes, I have, in such and such instances.’ “Let us know in what instances those are.”—‘A woman came to me, and said she expected to be confined in the course of a month; she was not confined in the course of a month, and I asked her why she so expected?’—‘Because the last time I menstruated was so many months before.’ The question therefore which is put is for the purpose of leading to the conclusion, that on one particular occasion the period of gestation was extended. It is no question of medical science; it is that from which one person can draw a conclusion as well as another: once satisfy me of the fact that the last time the woman had intercourse with a man was on such a day, and that she was not delivered until such a day, I am just as good a judge whether that interval be ten months, and whether it is possible that the period of gestation can be extended as a medical man can be: therefore it is not a question of medical science, but a particular fact, and the question put to the witness is as to the relation of a distant fact, and not the description of any present suffering.

Lord Ellenborough, in *Aveson v. Kinnaird*, expressly says, that the evidence must be confined to the complaints and symptoms of the patient at the time. He had no occa-

sion to decide the question we are now discussing, as the evidence objected to related exclusively to the disorder which was represented to have caused the death of the patient, and did not involve any facts independent of it. A case was cited in the course of that argument by his Lordship which had occurred before Lord Holt, where, in an action by the husband and wife for wounding the wife, Lord C. J. Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing for her own advantage, to be given in evidence, as part of the *res gesta*; and we admit the representation made by the patient with respect to the cause of the complaint under which she was then labouring was part of the *res gesta*. But this is a very different question here; the woman has stated a fact to an individual at a time that her situation or symptoms afforded no proof of the accuracy of her statement, and when the fact was of such a distant date as to admit the possibility of error, and to preclude the detection of fraud. By the admissibility of this species of evidence we shall be deprived of the privilege of cross-examination where we most require it, and the house may find themselves encumbered with facts which a more strict attention to legal forms would have shewn to be without foundation.

Lord Redesdale.—It appears to me there is very great difficulty, in all cases of this kind, in determining what is evidence and what is not. We must resort to the principle: it admits the *opinion* of the doctors on a subject connected with their profession, but it goes no further. They are called to give their opinion what is the

time of gestation. They give that opinion. It must be formed upon their view of certain circumstances, upon their skill and experience, upon their studies, upon the lights they have obtained through reading, and various other sources of information. Yet this is, strictly speaking, a question simply of opinion. Now if the doctors travel beyond an expression of their opinion, if they state circumstances, the evidence of such circumstances must be given conformably to the established rules, and therefore it is necessary for the circumstances to have happened within their own observation. The evidence assumes a different character, and is no longer within the exception that favours the admissibility of evidence of opinion. It is true that, after all, the opinion of the doctor may be wholly founded on facts which he has received from others, so that the value of his opinion depends on the accuracy of his informants, but as his evidence amounts to nothing more than opinion, it cannot be essentially conclusive. As to the question before us, it is clear that the opinion must be founded on certain circumstances, many of which are not within the observation of the witness; for instance, all the information derived from books: now the instruction which those books have conveyed may have been the foundation of the witness's opinion, and it may have given a direction to his thoughts, or created a bias in his judgment, which would account satisfactorily for his opinion. Now as what is contained in those books is clearly not evidence, I conceive this question cannot be put, more especially as it is addressed to

the witness solely with the object of establishing a fact, and not of obtaining an opinion.

Lord Gifford.—My Lords, I apprehend we cannot receive evidence of particular circumstances in this case. I understand the claimant is endeavouring to establish a case by the hearsay evidence of the person called. This is not a question put to a midwife as to her opinion, as a question of skill, but a question put to her as to what took place with respect to a particular case, and it is endeavoured to obtain evidence of the declarations of the party under those circumstances. I apprehend that the fact cannot be established on any such declaration, and that the evidence is therefore clearly inadmissible.

The counsel were informed that the evidence proposed could not be admitted.

The witness was again called in, and further examined as follows :

Mary Tun-
gate.

(By Counsel.)—Have you formed any judgment or opinion that a child may be born after a period of gestation of ten months ?

I should think it was possible.

Have you formed any decisive opinion upon that, one way or another ?

Yes, I have; by what women have repeatedly told me, when I have put their children into bed to them, that they have been more than ten months.

Have you, from the course of your experience, formed a judgment or opinion upon the subject ?

Yes; I do believe that it is as likely for a woman to

go over nine months, as it is for a woman to come under it. I have had a large family myself; I never went nine months with any of mine. Mary Tun-
gate.

You were about to state some case; do you know the whole of the circumstances of that case yourself?

I have attended the person with three children. She lives in Long Acre. She applied to me to attend her in March; she sent for me in February, the 19th of February, saying that she was very ill, but had a month to go. She got her letter on the 22d of February, and she was not confined until the 13th day of May,—last May.

You had not seen her before that time?

Yes; I met her in July, and she told me she was in the family-way, and should be put to-bed in March.

In the month of July, when you saw her, what was her appearance as to the state of pregnancy?

She complained, as is usual for women to do, of being in the family-way, and that she should want me about March.

Did you observe at all, being an experienced person, what her state was as to pregnancy?

I conceived by the look of her that she was in the family-way; but in that early stage of pregnancy they do not shew it till after the quickening; there is nobody quickens before twelve weeks; from twelve to twenty weeks; I never knew any one exceed twenty weeks.

Nor fall short of twelve?

No, there is no one shorter than twelve; nor I never knew any one to exceed twenty.

Mary Tun-
gate.

Cross-examined by Mr. Attorney-General.

You say it is as likely, in your opinion, that a woman shall exceed the period of nine months as fall short of it ?

Yes.

Is that opinion founded on what women have told you that have been under your care, as to their judgment when they first fell ill ?

Yes, it is ; because many women tell me they were in such a way at such a time ; then they go over that time, and it is impressed upon their minds, if they do not come at the period of nine months, that they go beyond it.

Your opinion is founded on the statement made to you by particular women, as to the time when they were in a particular way ?

Yes.

Cross-examined by Mr. Adam.

In your own instance you have always gone a shorter period than nine months ?

I have come as much as six or seven days within the nine months, but I have never exceeded it ; and I have had twelve live-born.

Re-examined by Mr. Tindal.

You have stated the ground of your opinion ; is it from what you have heard from other women, or what you have heard generally ?

What I have heard generally; I have heard more than a dozen women say they have gone ten months. Mary Tun-
gate.

(Mr. Attorney-General.)—How many have you heard state this?

I cannot say. I heard a woman say she had gone ten months, and she hopes to be put to-bed to-morrow.

Have you ever heard a woman say she had gone eleven?

I have heard of such cases, but they never came within my own knowledge. There is a woman now lies in, who has been confined a fortnight to-morrow, and she says she has gone ten months.

Do you attend one or more hospitals?

I attend the Middlesex Lying-in Hospital out-patients.

At what period are women allowed to come in?

They do not come into the Middlesex Hospital.

Of any other?

In the Westminster Lying-in Hospital they do not give us their letter till they say they are within the last month.

Was the woman you were mentioning in that hospital?

No.

Where is she?

At her own house in St. Andrew's Street.

When they lie-in at home, may they get their letter at any time?

No; they only get their letters about the seventh month, as it is so common for women to come at that period.

Mary Tun-
gate.

From the seventh to the ninth month are they assisted by the hospital?

No, they have no money; it is only for the attendance of a midwife, and a doctor, if necessary, and to supply them with medicines.

Mary Wills.

Mary Wills, by Mr. Tindal.

Have you had any children?

Yes.

What number?

I have had thirteen children.

Have any of those children been born at a longer period of pregnancy than ten months?

Not than ten months; yes, from December to the 17th of November, I had one born.

Are you able to state any particular part of the month of December?

From the 24th of December.

What reason had you for calculating from the 24th of December?

The same as other people in general have for that calculation.

Has it happened to you that the term of ten months has been exceeded in any other instance?

No, only in that one; I quickened the 25th of March.

Cross-examined by Mr. Attorney-General.

Do you mean to say that on the 25th of March you felt the child move?

Yes, I did.

And it was born on the 17th of November following?

Yes.

Are you a married woman?

I am a widow; I was a married woman at that time?

You were at that time a married woman?

Yes, I was.

Living with your husband?

Yes.

Did you make any minute of the date?

Yes; I have got at home a minute of it; it was so far beyond my regular way.

Did you make a minute of your not being in the regular way?

Yes.

Where is it?

I have not got it; I did not expect to be asked for it.

Is it in existence?

Yes, it is.

You say you made a minute at the time of your not being regular?

Yes.

And you have that minute now?

Yes I have, at home.

You are a midwife?

Yes.

Does Dr. Granville recommend you?

Yes; I belong to the dispensary to which he belongs.

Perhaps you have no objection to produce that note?

I dare say I can, of the birth of the child.

Mary Wills. The question refers to the minute of your not being in the regular way ?

I have it at home, I have no doubt.

Do you always make that kind of minute ?

Yes, mostly I did.

Did you make it on any other occasion ?

I do not exactly know, but I can ascertain it.

You do not know whether you did on any other occasion ?

No.

How came you to remember that you did it upon this occasion ?

Because going so long over my time.

The nine months were not expired when you were so irregular ; what was the particular reason you had for making that minute then ?

I did not make it till I was put to-bed.

You did not make the minute until the birth of the child ?

Not till the regular time had elapsed ; nor till after the nine months.

You made that minute of the circumstance which had occurred as you supposed nine months before ?

Yes.

And it is by reference to that minute that you know the time when you were not as you ought to have been in the regular way ?

Yes.

Cross-examined by Mr. Adam.

Mary Wills.

It was nine months after what you call the regular time that you put this down in writing?

Yes.

How came you to know the time to put down?

I could give no other reason than every body else does.

Nine months after the 24th of December would be in the month of September?

No; I expected to go to-bed at the latter end of September or the beginning of October.

In the beginning of October you made a memorandum that you had ceased to have the ordinary occurrence on the 24th of December?

Yes.

How did you know, at that time, that it was the 24th of December that you ceased?

Very well.

From what circumstance?

From the circumstance that I was well.

Was there any particular fact that fixed it in your remembrance?

When I found not my regular return, of course I began to consider what was the matter.

But you did not make a memorandum until nine months afterwards?

No.

What induced you, in October, to put down the date as the 24th of October?

Mary Wills. Because I considered that shortly after that it must take place.

Had any particular fact occurred to bring that to your memory at the particular time?

No.

How many years ago was this?

It was in the year 1774. I was married in the year 1780.

Then it must have been in 1784?

Yes.

That is forty-one years ago?

Yes.

What has become of that memorandum?

I cannot say.

Have you ever seen it?

I have seen it since.

Where is it?

In a book of the birth of my other children.

Have you a register of births of your other children?

It is in a book.

Is it in a Bible?

I believe it is in a Bible; but it is a book in which I have the registers of all their births.

Is it in a Bible?

No, it is not so large as a Bible.

What sort of book is it?

I am sure I cannot tell till I look at it.

How came you to fix upon that book?

It was a German Prayer-Book; and I have got the leaves with the registers of my children.

Has the German Prayer-Book been destroyed?

Yes ; but I have kept the leaves for the purposes of Mary Willa.
my own information.

Where have you kept them ?

In different places. I have been in different situations of life.

Have they been locked up ?

They have been locked up ; I know where to find them.

You have not locked them up ?

No ; I know where to find them.

Are they written on printed leaves or blank leaves ?

On blank leaves.

How shall it be seen they were written on a German Prayer-Book ?

That I cannot say ; it was a good while since I looked at them.

When did you last look at them ; how many years ago ?

Among other family papers, five or six years ago, perhaps.

Does your memory serve you to have seen them within thirty years ?

I have seen them often, within thirty years ; there have been so many things I have had occasion to look to them for.

When was the last time you saw them ?

I cannot say ; it may be four, or five, or six years ago.

(Mr. Attorney-General.)—Have you seen Dr. Granville within the last day or two ?

Mary Willa. No; I had not seen him within the last six months, till I saw him here.

Have you had any letter from him?

No.

Re-examined by Mr. Tindal.

Though you did not put down the minute till the end of nine months, was your attention called to the fact at the end of the first month?

Yes, from indisposition.

At the end of the month after the 24th of December, was your attention called to the fact you have been stating?

It was.

From that time till the end of the nine months, you did not make a memorandum?

No.

(Mr. Attorney-General.)—How many children had you altogether?

Thirteen, not all alive-born; and I have got the register of every child.

On this paper?

I cannot say, indeed. You interrogate me too closely. My children are all registered in Mary-le-bone Church.

You say this was entered in the leaves of a book, which you described as a German Prayer-Book?

Yes.

Together with the births of your other children?

Yes.

All your children?

Mary Wills.

Yes, all that were alive-born.

This will be found among the entries?

Yes.

You saw the paper four or five years ago?

Yes; I have got it by me, and can produce it.

Is it in your own hand-writing?

Yes; a very indifferent one.

Did you suckle your own children?

Yes.

How long before the birth of this child was your previous child born?

I cannot tell, unless I look at the date, for my children came very quick.

How long did you suckle?

A very short time.

Were you suckling or not in the month of December?

No, I was not.

That you swear?

Yes.

What sized book was this?

I cannot say indeed as to the size of it; I think it was about there [an octavo].

How many leaves might there be?

About three or four.

All blank leaves?

Yes.

You recollect very well that you made this memorandum?

Certainly.

Who was it requested you to come here as a witness?

Mary Wills. I do not know. My own daughter ; she is one of the midwives too.

You knew what you were coming about ?

I did not, till Friday.

You did on Friday ?

Yes, when I came here to be sworn.

Of course you had the curiosity to look at this memorandum, to refresh your memory ?

No, I did not give it a thought.

Is not that rather singular ; it was made thirty years ago ?

No, I cannot consider it so ; I did not know what questions I might be asked.

You knew you were going to be interrogated as to a fact that took place thirty years ago, of which you have a memorandum in your possession ?

Yes.

How came you not to look at the memorandum ?

Because I did not feel it to be necessary.

Is your daughter a midwife under Dr. Granville's institution ?

Yes.

Cross-examined by Mr. Adam.

Who desired you to come here ?

My daughter called on me on Friday, and told me that something of this kind was in hand, and Dr. Granville had asked her, did she ever know a case of the kind, of any person going over their time, and she said, " I do not know, Sir, but I think I have heard my mother mention her own case."

In consequence of that you came here?

Mary Wills.

Yes.

What hospital does your daughter attend as a mid-wife?

A good many institutions; Middlesex Hospital, Westminster Hospital, the Queen's Hospital, and Gerrard Street.

Cross-examined by Mr. Attorney-General.

Can you produce the book which you spoke of yesterday?

No, it is not in my power at present.

You said the papers were in your possession?

Yes, I do not say it may be impossible yet.

Do you despair of finding them?

I cannot say indeed about that; I have been so unavoidably embarrassed lately, and shifted about.

Have you looked for them?

Yes, I have.

You said yesterday you had no doubt about finding them?

I have no doubt about finding them now.

The next time their Lordships meet, you will have the goodness to produce them?

Yes, I hope so.

I always entertained a doubt whether we should see them^a.

I never had any doubt; I do not know why you should doubt on the subject. I am sure.

^a The doubt was well founded, for the book was never produced.

Mary Ann
Farrell.

Re-examined by Mr. Tindal.

Are you able to state, from recollection, when that child quickened?

Yes.

When was it?

The latter end of September, or the beginning of October; I cannot remember which exactly.

(Mr. Attorney-General.)—Did you make any memorandum of it?

I went to be bled that very evening.

Did you feel the child move by putting your hand on your person?

Yes; I fainted away, which I always do.

You made no memorandum as to the time?

No, I did not.

That is the best recollection you have upon it?

Yes.

You did not expect to be questioned upon it?

No.

When was it you were first asked about this; on Friday?

Yes.

Never before?

No, never before I came here.

You must have been asked before?

I was asked by Mrs. Fraser.

What is there particularly to impress upon your recollection that the time when you felt the child move was on such a day of the month?

Because I always took a great deal of notice of it.

Mary Ann
Farrell.

What was the day?

The latter end of September, or the beginning of October.

What is there to impress the day, and enable you to recollect the fact that it occurred on a particular day?

I had a labour in hand; that I went to be bled, to get my arm well, that I might go to the labour.

How can you take upon yourself to swear that it was that time?

I am sure that was the time.

(Mr. Tindal.)—Do those circumstances make an impression on the minds of persons; do women in general think upon them before the birth of the child?

Yes.

Did they upon your mind make that impression that you are able to state your recollection?

Yes.

Where do you live?

No. 70, Monmouth Street.

Mary Parker^a, by Mr. Tindal.

Mary Parker.

Are you at present in a state of pregnancy?

Yes.

How long have you been in that state?

^a This is the female whose case was referred to by Dr. Granville, as contained in the register. The doctor observed, "the answer she gave to the questions was, that she expected in one month. On April the 7th that she had not seen any thing for eight months. We are now on the 4th of July, and she carries her child yet."

Mary Parker.

I think nearly, by my account, eleven months.

What ground have you for forming that opinion?

No further than what other women generally count from.

Have you ever had a child before?

Yes, one before.

Have the same appearances and feelings taken place on this occasion that did in the former?

As nearly as possible.

Have you formed your calculation of time from the same appearances now, which you did with respect to the former child?

Yes, as nearly as possible.

Then so forming the conclusion, are you of an opinion you have been the period of time you have mentioned?

Yes, I think so; as nearly as possible eleven months.

How long were you with child with the former child?

Nine months and a week, as nearly as I could count.

Cross-examined by Mr. Attorney-General.

Are you a married woman?

Yes.

Do you live with your husband?

Yes.

Have you lived with him during the last eleven months?

Yes.

As before?

Yes.

You calculated from certain appearances that took place? Mary Parker.

Yes.

Have you made any memorandum in any book as to that?

No; no further than the time I suckled my first little girl. The little girl was very ill; the doctor told me he thought it was full time for me to take the breast from her, for that he thought I was two months then gone.

Did you put down the date of that?

No.

Were you suckling?

Yes, when I fell pregnant.

When did you leave off suckling?

My little girl was fourteen months old, and now she is a twelvemonth and eleven months.

Then it is nine months since you left off suckling?

Yes.

From this time?

Yes.

You know Dr. Granville?

Yes.

Have you seen him lately?

Yes, I saw him on Friday.

Where did you see him on Friday?

I saw him at his house.

Did he send for you?

No, he did not send for me.

How came you to go there?

It was Mrs. Tungate, the midwife who is to put me to bed, sent for me.

Mary Parker.

She desired you to call on Dr. Granville?

Yes.

Had you any conversation with him?

No; I only just saw him in the room.

Had you any conversation with him?

He only told me I was to appear here if I thought proper.

Did he not tell you what he sent for you for?

No; he told me no further than that, that I was to appear here on Friday.

What is your husband?

A bookbinder.

Does he keep a shop?

No; he works with Mr. Grellet.

Do you and your husband live in one room?

Yes.

And one bed, of course?

Yes.

Cross-examined by Mr. Adam.

Had you any conversation with the midwife who sent for you, Mrs. Tungate?

No.

What did she say to you?

She only told me that Dr. Granville wished to see me.

You had no conversation with her about the state you were in?

No; I never had any conversation with her from the time I engaged her.

Did she not ask you how long you had been with child? Mary Parker.

Yes.

When was that; on Friday?

Yes.

Did you tell her?

Yes.

What else did she tell you?

She only said that if I thought proper to take a walk to Dr. Granville, he wished to see me; she did not tell me for what purpose, nor I did not know till I came here.

(Mr. Attorney-General.)—When was it you had indications of the child quickening?

It is five months and a fortnight, going on for six months.

It is five months and a fortnight since you first felt the child move?

Yes.

Did you make any memorandum of that?

No further than that I was very ill at the time I felt it.

You have no entry in any book?

No.

That depends upon your reckoning?

Yes; I counted from that time, and from that time I engaged the midwife.

(Mr. Adam.)—What do you mean by five months and a fortnight; do you remember the month in the year when it was?

No, I cannot say exactly; but what I counted from was, that we moved about four months and a fortnight

Mary Parker.

ago, and it was between three weeks and a month before that.

What makes you think it was three weeks or a month before you changed your lodgings; what makes you fix that, rather than between three months and four months?

That is all I have to reckon from.

You have no particular reason for fixing that date?

No.

(Mr. Attorney-General.)—Do you take your lodgings by the weeks?

Yes.

Then when you say four months or five months, you mean four times or five times four weeks?

No; I count by the regular month.

What do you call a month; four weeks?

Sometimes it is two days over the four weeks.

You do not go by four weeks; you mean five calendar months?

Yes, five calendar months.

(By a Lord.)—Why did you give over suckling your little girl?

Because the doctor that attended my little girl said I was two months gone then; that was Dr. Cox.

Your opinion of your being gone eleven months with child proceeds upon Dr. Cox's having told you you were two months gone then?

Yes.

(Mr. Tindal.)—Have you any other reason for knowing you were then with child?

No further than what other women count from.

Had those appearances taken place so as to induce you to think you were with child ? Mary Parker.

Yes.

Those appearances had ceased to take place ?

Yes ; once since that appearance took place was this time twelvemonth.

Are you able to state when it was that that last appearance took place ?

Yes ; it took place the latter end of this month twelvemonth.

The latter end of July in last year ?

Yes.

(By a Lord.)—Did that appearance take place during all the time you were suckling ?

No ; only that once ; that was all.

You continued suckling afterwards ?

Yes.

And it did not take place again ?

No.

(Mr. Attorney-General.)—During the time you were suckling, were you ever as women usually are ?

Only that once.

When was that ?

The latter end of July last year.

After that you continued suckling ?

Yes ; till this doctor who attended this little girl said it was the milk that made the little girl very ill.

And then you left off ?

Yes.

The milk made your little girl very ill just nine months ago ?

Mary Parker.

Yes.

And then you left off?

Yes.

Did you yourself feel at all different just about that time?

Yes; and so my mother thought the same, from my appearance.

How did you feel?

I felt just the same as I did with my first child.

Mary Summers.

Mary Summers, by Mr. Tindal.

Have you had any children?

Yes.

What number?

Twelve.

What is the longest period during which you have been pregnant before the birth of the child?

The longest was, as nearly as possible, about eleven years ago.

What period of time was it during which your pregnancy continued?

I had my letter to be put to-bed on the 1st of May, and I was not put to-bed till the 4th of August.

Your letter from some hospital?

From Dr. Merriman.

To admit you on the 1st of May?

Yes.

Do you mean, that you supposed you would be confined on the 1st of May?

Yes.

But you were not in fact delivered till the 4th of August ? Mary Sum-
mers.

No.

What reason had you to expect you would be delivered on the 1st of May ?

I was going home with a basket of linen, and was taken in a fit as I thought, and that was on quickening.

When was that ?

About the Christmas week.

You were going home with a basket of linen, and were taken with a fit, as you thought, and the child quickened ?

Yes. From that I thought I should be put to-bed on the 1st of May ; but I was not until the 4th of August.

Was there any other reason besides the quickening of the child that induced you to think you were in the family-way ?

No further ; for I always went from that before and since ; for I have had many children since.

In the experience you have had with a number of children, what has been the general length of time from the quickening to the birth of the child ?

I have gone a month, and I have gone three weeks, and I have gone a fortnight. I have sometimes had frights in those cases ; that has put me out of my reckoning ; but I believe that time has been the longest.

What time do you reckon from the quickening to the birth of the child ?

The number of months was the calculation for me to be put to-bed on the 1st of May, and I was not put to-bed till the 4th of August.

Mary Sum-
mers.

That was making your calculation as you had been accustomed to do before ?

I have never yet to say gone properly to my time ; I have never been so exact, for I have had other troubles and trials, and I have never put down the times.

Cross-examined by Mr. Attorney-General.

Are you a married woman ?

Yes, I am.

What is your husband ?

My husband is dead, and has been dead nearly two years.

You were living with your husband at this time ?

I never lived from him.

At what time generally have you been delivered after you had first perceived that the child had quickened ?

I never was much out of my reckoning, but very little.

Generally what period did you calculate from the quickening to the birth of the child, of your other children ?

I went generally to my time.

What time ?

It is so many years ago, I never could have thought of these kind of things, that I should have been brought to such a place as this ; having so many children, I have had other things to think about.

You cannot tell what is the usual interval, as far as you are concerned, between your perceiving the quickening of the child and the birth of the child ?

In general, whether it was four months or five, I cannot say. Mary Sum-
mers.

You cannot tell whether it was four months or five months?

No, I cannot.

According to your calculation, has it deviated considerably in different cases; has it been sometimes more and sometimes less?

That is the utmost I can recollect.

Were the other cases exactly alike, or did they differ?

They differed; most of my lyings-in differed.

How much?

Generally, I believe, four or five weeks.

They have differed generally four or five weeks?

Yes; and I have had a great change in girls and boys.

In this case your calculation was from the time you supposed the child to quicken?

Yes; and that was the only thing I went by.

Did you make any memorandum of the date?

It was some time in Christmas, but the particular day I cannot remember; it was in the month of Christmas; that is a very remarkable month.

Was it not the month of January?

I cannot swear to it.

What do you mean by the month of Christmas?

It was in Christmas week.

Did you perceive the child quicken in Christmas week?

I did; I felt that which I always did before.

When did you feel the child move?

Mary Sum-
mers.

About three days after that.

From that, and that only, you expected that the child would be born in the month of May ?

I did ; and I was not put to-bed until the 4th of August.

Cross-examined by Mr. Adam.

How do you recollect that it was three days after Christmas you felt the child ?

I know, because the place where I worked at, the public-house, the Windmill, I was to have been there as a cook, to cook the beef.

How does that make you think you quickened three days after Christmas ?

I felt the child.

What circumstance makes you think that feeling came on three days after Christmas Day ?

No ; it was three days before Christmas Day that I felt so.

How do you know it was three days before Christmas Day that you felt so ?

Because I was to have gone to this place to cook the victuals.

Did that prevent your going to cook the victuals ?

Yes, it did, for I was very bad.

You were not bad from the child quickening ?

Yes ; I always had very bad times.

How do you mean very bad times ?

Always in a very bad state of health from the time the child quickened.

You say that the periods have differed very much between your quickening and being brought to-bed? Mary Sum-
mers.

Yes, they have.

Sometimes as much as a month?

Yes.

Re-examined by Mr. Tindal.

Were you in the habit every year of going to the Windmill Inn to cook the beef?

No; I generally went there.

Was there any particular entertainment going on?

Yes.

You say you were to have been there to cook this beef at Christmas?

Yes, I was to have been there to help.

That imprints it upon your memory?

Yes; that is the only thing I have to bring it to my memory.

(Mr. Attorney-General.)—This child born eleven years ago that quickened about Christmas; had you some time afterwards any feeling about that child of the same kind?

I had.

When? How soon after?

For a week after.

Had you after that?

No, I cannot say that I had.

Did you take notice of the child moving afterwards?

I did see a fluttering, as I always did.

You feel a child move by putting your hand upon the

Mary Sum-
mers.

person ; can you take upon you to say you felt the child move so soon after that ?

I cannot.

How soon after Christmas did you feel the child move ?

To the best of my knowledge, I would not wish to say nearer than about six weeks, that I felt it most strongly.

You do not mean to say you ever felt the child move before that, though you felt this fluttering ?

I cannot say that I did, any more than a fluttering.

What were you doing when you felt that fluttering ?

I was in the habit of going out washing, and I rather thought I felt a pain in my side.

It was hard work ?

Yes.

Had you been washing several days ?

Yes ; I used to work very hard.

Were you carrying home any load ?

Yes ; I had a basket of linen, and going across the road I fainted away.

You had been working hard, and were carrying home a basket of linen, and you fainted, and were carried into a house ?

Yes ; and I supposed at that time that I had quickened.

And six weeks after that you first felt the child to move within you ?

Strongly.

Will you swear you ever felt the child move before that ?

No further than a little fluttering.

Mary Sum-
mers.

Did you put your hand upon your person, and feel the child move?

No, I cannot say that I did.

(Mr. Tindal.)—This fluttering you speak of, was that the same appearance, or feeling rather, from which you had before reckoned?

The same, or I should not have reckoned upon that.

Have you felt the same fluttering upon other occasions?

Yes. Dr. Merriman was fetched to me six weeks before I was put to-bed.

(Mr. Attorney-General.)—Have you in your pregnancy felt that kind of fluttering more than once during the same pregnancy?

Yes, I have.

Sometimes at different intervals?

Yes, with the same child.

Have you ever felt it before you felt the child move?

Yes, I have.

Mrs. Mary Gandell, by Mr. Tindall.

Mrs. Mary
Gandell.

You are the wife of a merchant in the city?

I am.

Have you had several children?

Yes.

Has the time of bearing those children in any instance exceeded ten months?

With the last but one.

Mary Gandel.

Are you able to state how long the period was before the birth of that child ?

I conceive that I was pregnant a month gone the beginning of August.

In what year ?

1821.

When was that child born ?

On the 4th of June 1822.

Did a similar case occur with respect to any other of your children ?

No.

You have had seven ?

Yes, I have.

Cross-examined by Mr. Adam.

Where does your husband live ?

Upper North Place, in Guildford Street.

You have stated, that you conceive you were a month gone with child in the beginning of August 1821 ?

Yes.

Will you state your reason for supposing that ?

The reason which every other female has.

Have you any other reason, except that which every other female has ?

No.

Were you living with your husband at that time ?

Yes.

In the same way as you have been ever since your marriage ?

Yes.

Re-examined by Mr. Tindal.

Mary Gannell.

You were attended by Dr. Hopkins, were you not?
I was.

Mrs. Frances Ann Jackson, by Mr. Tindal.

You are the wife of a gentleman who is clerk in a merchant's counting-house?

I am.

You have had several children?

I have had four born alive.

Have any of those children been born after the period of your being ten months with child?

I consider that I have been ten months and a fortnight nearly from the time I was regular.

Has that happened on one occasion only.

On two occasions.

Did you make a note of the different times which you had mentioned to the committee?

Yes.

Have the goodness to state the different notes you have made; are the notes in your hand-writing?

No in my husband's; I told him what to write.

Did you see him write the notes?

Yes, I did.

Looking at the notes, have the goodness to state the first note you have made?

The 24th of September 1823.

Have the goodness to state the meaning of that?

Mary Gaudell

The time when I was last regular.

When was the date of the birth?

The 22d of July.

Is there any note made of the time when the child quickened, as it is termed?

No.

(Mr. Attorney-General.)—Did you perceive when the child quickened?

I cannot tell, but between four and five months.

From the date you have marked there in September?

Yes, I quickened between the fourth and fifth month.

Is it no unusual thing for a woman to be mistaken and considerably mistaken, as to the time of their expected delivery?

I was not mistaken.

The question applies to women in general?

I cannot say indeed.

Isabella Leighton.

Isabella Leighton, by Mr. Tindal.

You are the mother of one of the witnesses, Mrs. Parker, who was examined yesterday, are you not?

Yes.

How many children have you had?

Eleven.

Amongst those children, have any of them been born at a longer period than when you were ten months with child?

Yes.

Do you mean one, or more than one?

With only one; but I cannot recollect how long; it was not the last. I have gone a month, or near six weeks, I think. Isabella
Leighton.

With which?

The last but one.

With your last child but one you went how long?

A month or six weeks nearly.

Beyond what?

Beyond what I thought.

What did you think; at what time did you expect your child would be born?

The last of April or the beginning of May.

Why did you expect your child to be born the last of April or the beginning of May?

Because I thought by my reckoning.

When did you begin to reckon; from how long before the last of April or beginning of May; how many months before that?

Nine months.

Reckoning that way, how long was the child born after the last of April or the beginning of May?

It was born on the 15th of June.

Did that happen on any other occasion, or only on the one you were mentioning?

That was the only one I have thought of in so long.

Cross-examined by Mr. Adam.

Are you a married woman?

Yes.

Were you living with your husband at that time?

Mary Sum-
mers.

person ; can you take upon you to say you felt the child move so soon after that ?

I cannot.

How soon after Christmas did you feel the child move ?

To the best of my knowledge, I would not wish to say nearer than about six weeks, that I felt it most strongly.

You do not mean to say you ever felt the child move before that, though you felt this fluttering ?

I cannot say that I did, any more than a fluttering.

What were you doing when you felt that fluttering ?

I was in the habit of going out washing, and I rather thought I felt a pain in my side.

It was hard work ?

Yes.

Had you been washing several days ?

Yes ; I used to work very hard.

Were you carrying home any load ?

Yes ; I had a basket of linen, and going across the road I fainted away.

You had been working hard, and were carrying home a basket of linen, and you fainted, and were carried into a house ?

Yes ; and I supposed at that time that I had quickened.

And six weeks after that you first felt the child to move within you ?

Strongly.

Will you swear you ever felt the child move before that ?

No further than a little fluttering.

Mary Sum-
mers.

Did you put your hand upon your person, and feel the child move?

No, I cannot say that I did.

(Mr. Tindal.)—This fluttering you speak of, was that the same appearance, or feeling rather, from which you had before reckoned?

The same, or I should not have reckoned upon that.

Have you felt the same fluttering upon other occasions?

Yes. Dr. Merriman was fetched to me six weeks before I was put to-bed.

(Mr. Attorney-General.)—Have you in your pregnancy felt that kind of fluttering more than once during the same pregnancy?

Yes, I have.

Sometimes at different intervals?

Yes, with the same child.

Have you ever felt it before you felt the child move?

Yes, I have.

Mrs. Mary Gandell, by Mr. Tindall.

Mrs. Mary
Gandell.

You are the wife of a merchant in the city?

I am.

Have you had several children?

Yes.

Has the time of bearing those children in any instance exceeded ten months?

With the last but one.

Mary Sum-
mers.

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Isabella
Leighton.

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Yes; I always live with him.

Were you living with him then?

Yes.

You cannot recollect, you say, whether you went a month or six weeks beyond the time you speak of; how long was it since this child was born?

Twelve or thirteen years ago.

Does not your memory enable you to say whether you were a month or six weeks longer than you expected?

I think it was between a month and six weeks.

You are not sure whether it was a month or six weeks, or some period between the two?

No, I looked upon the latter end of April or the beginning of May as my time.

From what period did you begin to count, so as to make you suppose you should be brought to bed at the end of April or the beginning of May; what did you count from?

No more than I thought I should go till the latter end of April or the beginning of May.

Why did you think so; from what circumstances did you begin your counting?

From no more than what other women do.

Was that your only reason?

Yes.

Can you state when it was that that circumstance happened, which you say happens to other women; what was the date of it?

I cannot recollect the date.

What you did count from was that which was com-

mon to all women, but when that happened your memory does not enable you to state? Isabella
Leighton.

No, I cannot state at such a long time.

Do you count from the time when that event did happen, or when you think it ought to have happened?

It ought to have happened sooner, that is all I can say about it.

What ought to have happened sooner?

That I ought to have been brought to bed sooner.

From what event do you begin your counting; from that which is common to women having happened, or from its not having happened?

From what is common to other women.

From the time it did happen?

Yes, but I cannot recollect the time.

You cannot recollect the particular period when it did happen, but it is from that you begin your calculation?

Yes.

And not from the omission of it?

Yes.

Cross-examined by Mr. Attorney-General.

Did you take any notice when the child quickened?

I went longer after quickening than was usual; that is all I can say.

Did you take any notice as to the time when the child quickened?

I cannot recollect that so well.

How long was it after you were as women are to the time when the child was born?

Isabella
Leighton.

It is such a time, I cannot recollect; I did not keep account of it when the child was born.

How long was it from the time when you were as women usually are to the birth of the child; how many months?

I know I went that time; I went beyond my time.

You cannot answer the question now put to you; is that so?

Not so particular as that; I cannot keep that on my memory. When my child was born I know.

In what month was that child born?

The 15th of June.

At what time before that were you as women usually are?

I cannot recollect to a month.

You cannot state how long it was from the time you were last ill to the time when the child was born; is that so?

I cannot say correctly to that.

Re-examined by Mr. Tindal.

Do you recollect when the child quickened; how long before the birth of the child it was that the quickening of the child took place?

I went about five or six months; but I cannot be certain.

But you say that the time exceeded what you had expected?

Yes.

What is the reason you think it exceeded the time you expected? Isabella
Leighton.

I cannot account for it; but I asked the person who was to lay me, and she said there was many a one that used to go as long.

Have you any reason for fixing upon this child having exceeded the time of nine months?

Yes, I was bad for a month, that was one thing; I was bad for a month before I had the child, ill at times.

What do you mean by ill?

I had to send for my midwife two or three times.

You expected the child to be born at different times?

Yes; it was off and on.

Did you make any note at the time of any circumstance connected with your child-bearing?

No further than I did when the child was born.

That is the only note you made on the subject?

Yes, and I always recollect it, before my daughter was brought in, and have mentioned it to several people.

Are you able to give any reason for fixing on the time when the child was conceived?

No, I cannot recollect that at all.

Mr. Tindal applied on the behalf of Mr. Henry Fenton Gardner for time to obtain additional witnesses, but the Committee, on the ground that sufficient time had been already given, and that the claimant, Alan Legge Gardner, would be prejudiced by any further delay, refused the application, and declared the case closed.

AFTER the case of Henry Fenton Gardner had closed, Mr. Tennant, as his counsel, prayed that Mrs. Sarah Mitchell, who had been summoned to attend on the motion of a noble Lord, and who was now in attendance, might be called in and examined.

**Mrs. Sarah
Mitchell.**

Mrs. Sarah Mitchell, examined by the Committee, the questions being suggested by Mr. Tennant.

What is your name?

Sarah Mitchell.

Where do you live?

At Chatham; Ordnance Place, Chatham.

Have you or not been a married woman?

I have.

Is your husband or not now living?

He is dead these fifteen years since.

Have you had one or more than one husband?

One.

How many children have you had?

Eight.

What was the longest period during which, according to your persuasion, you were pregnant with any of these children?

Ten months and five days.

What were the grounds of your persuasion?

My husband left me on the 6th of June, and I was not put to bed till the 11th of April following.

What was the trade, profession, or business of your husband? Sarah Mitchell.

A purser in his Majesty's navy.

Was your husband absent during all that time from you, or were you living together during any part of that time?

No, he was at sea.

Do you calculate from the period when your husband left you, or from what other period do you calculate the commencement of your pregnancy?

The 6th of June as he left me.

That is the reason of your so reckoning then, that your husband left you on that day?

Yes.

Do you recollect any other instance in which the period of your pregnancy exceeded the period of ten months, as you believe?

No, I do not; we were separated four years, and then he came home the 22d of May, and I was put to bed the 31st of March.

From the 22d of May to the 31st of March was your husband cohabiting with you, or at any time after the 22d of May?

Oh yes.

Questions suggested by Mr. Solicitor-General.

When was this; in what year?

The year 1799 my daughter was born.

That is the ten months' case?

Yes, April the 11th, 1799.

Sarah
Mitchell.

Did you make a mark in your almanack when your husband left you?

No, I did not; for I had always a very accurate memory.

You are certain it was the 6th of June?

Yes.

Did you not make a memorandum when your husband went abroad, being a seafaring man?

No.

Did you usually make a memorandum?

No.

You have nothing to state to fix the date of the 6th of June but your memory?

No, for I never thought to be called upon.

When did you think you were to be called upon?

Not till within this fortnight.

Who applied to you?

Mr. Tennant.

Who is your medical man?

Mr. Hopkins was, but he is deceased now, but his son is living^a.

Questions suggested by Mr. Attorney-General.

How old were you at that time?

Twenty-three.

How long had you been married?

^a The remainder of the examination of Mrs. Mitchell is abridged, as it does not relate to any question in the case, but is confined solely to her credit. A few extracts are given to shew the grounds on which it was endeavoured to shake her credibility.

It was the third child.

Had your husband been living with you then?

All the time he was not at sea, when the duties of his profession did not call him away.

Had he been residing at that time a short time or a long time with you?

A short time.

What was your father?

My father was a porter of his Majesty's dock-yard at Sheerness for 20 years, and I lived there until I married; during my husband's absence I lived in lodgings in Westminster, under my mother's care.

Of what ship was your husband purser at the time you speak to?

The Galatea Frigate with Lord Torrington; he was then Captain George Byng.

Have you ever mentioned to any body the fact that you had gone ten months and five days with child?

I have frequently to persons.

Can you state to whom?

I communicated it to a lady only this morning.

You never communicated it to any body that you can recollect?

No, I cannot.

Did you not think it a very extraordinary thing?

I did.

Cannot you recollect a single person to whom you mentioned it, in the course of four or five and twenty years?

No, I cannot.

**Sarah
Mitchell.**

(Suggested by Mr. Attorney-General.) — Is your mother living?

No.

Your aunt, you say, is dead?

Yes, many years.

Is there any person now alive whose name you can recollect, that you ever mentioned this to till lately?

No.

You never took any notice of it till lately?

No, I never took any notice whatever.

Not to your daughter?

Yes, to her.

When?

A long time ago: I did not think fit to tell her that till she was of age, and then I told her.

**Robert Vi-
natt.**

Robert Vinatt, a clerk in the navy office, was examined by the committee. He deposed that he produced the journals of the *Galatea* in 1798 and 1799, by which it appeared that the vessel was moored in the Hamoaze from the 1st of May 1798, to the 9th of July 1798.

**James
Lance.**

James Lance, a clerk in the navy office, was examined by the committee. He deposed that he produced the muster-book of the *Galatea* during the months of May, June, and July 1798, by which it appeared that Francis Mitchell had been present at muster on the 7th, 14th, 22d, and 31st of May, and on the 1st, 4th, 14th, 21st and 27th of June 1798.

END OF THE EVIDENCE.

Mr. Tindal and Mr. Tennant for HENRY FENTON
GARDNER.

The only point to be determined by the House is, whether the claimant, Mr. Henry Fenton Gardner, is the heir to the honours, the titles, and the estates of the late Alan Hyde, Baron Gardner, and that will depend upon the single inquiry, whether he was born within that period of time, when, by the laws of nature, he could be the legitimate son of the late baron. It must be observed, in the first place, that he was born during the continuance of the marriage; for it appears from the evidence that Captain Gardner cohabited with Mrs. Gardner up to the 30th of January 1802. On that day the separation between them took place, and they did not meet until the month of July following. On the 7th of December in the same year Mrs. Gardner was taken in labour, and on the 8th the son, who is the present claimant, was brought into the world. At the time of his birth, and up to the month of June, Mrs. Gardner continued in the eye of the world as the wife of Captain Gardner; for there was no separation from the house, and the parties lived together, certainly at the same board, if not partaking, in the language of the civilians, of the same bed: so that upon the whole here is a question of legitimacy in which, prior to the 30th of January, the parents were living together as man and wife, in which the child was born during the continuance of the marriage, and in which the father continued to live undi-

vorced from his wife, and unseparated, until some months after the birth of the child.

It is right to state another fact in this case, which takes it out of the ordinary course of cases of this nature :— Captain Gardner was capable of being the father of the child ; for there is no doubt whatever of the legitimacy of his second son : Mrs. Gardner was capable of bearing a child, for upon her being the mother of this claimant all parties are agreed. We have therefore not only the case of a father and mother living together previous to and subsequent to the birth, but they were both capable of being parents of a child, or, in the language of civilians, both habiles in matrimonium ; so that there is nothing in those circumstances of the case which would at all impeach the legitimacy of Mr. Henry Fenton Gardner. We contend that a child born under these circumstances is, *primâ facie*, to be taken as a legitimate child, and that it lies on the side of the other party, who are impeaching such legitimacy, to bring such overwhelming evidence of the utter impossibility of the child being legitimate, that this House cannot consistently with common sense and sound reason pronounce in favour of the legitimacy.

This question cannot be discussed with justice to this claimant, unless it is divested of a number of facts which are wholly foreign to it. We are told, in the first place, of the adultery of Mrs. Gardner with Mr. Jadis ; an attempt is made, in the second place, to throw something like a doubt upon the general character of that lady ; in the third place, we are called upon by evidence on the other side to answer something that may appear

suspicious on our part that the child was not legitimate, namely, that from the time of its birth it was concealed from Captain Gardner, and that, from the time of its earliest infancy nearly up to the present time, it was acknowledged by Mr. and Mrs. Jadis as their child, and brought up under their name, and at their expense. These facts can form no ingredient in the judgment of the House ; they cannot operate to the prejudice of the claimant. He was at the time an helpless infant, and it surely cannot be contended that he is to be bound by acts to which he was not a party, by acts over which he had no control, by acts to which he was a stranger, done by third persons, unless, when he came to maturer age, and to the full knowledge of his rights, he had consented to admit himself bound by those acts. This is not a question affecting the supposed father or mother ; the infant alone is concerned, and by his own acts alone ought he to stand or fall. Courts of law have repeatedly rejected evidence of this description, and in so late a case as that of Doe dem. Sutton v. Ridgway ^a, where the question was, whether the dying declaration of A. as to the relationship of the lessor of the plaintiff to the person last seised were admissible evidence, the Lord Chief Justice observed, “ the cases cited are I believe the *only* exceptions to the general rule of not receiving evidence unless upon oath, and with the opportunity for cross-examination, and I am not aware of any other.” The learned judge therefore very properly rejected the evidence. And in the case of Rex v.

^a 4 Barn. and Ald. p. 53.

Mead ², a case is cited of *Rex v. Hutchinson*, tried at Durham spring assizes, 1822, before Mr. Justice Bayley, where a prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion; the woman being dead, evidence was tendered for the prosecution of her dying declaration upon the subject; the learned judge rejected the evidence, observing, "that although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry." These cases are not strictly in point, but they are sufficient to establish the principle, and we may infer from them, that had the learned judges by whom they were tried, been called on to try an issue, whether this claimant was illegitimate, they would in such trial have rejected all evidence of the declarations, as well as acts of Mrs. Gardner or Mr. Jadis, especially under the present circumstances, when both of those persons are alive, and capable of being examined. Indeed, if they were called to the bar, we should have an opportunity of asking questions that might elicit the reasons and motives for which these declarations were made, and it might be proved, as we shall hereafter contend, that the real motives differed wholly from the apparent, so that the former were as favourable to the presumption in favour of this claimant's legitimacy, as the latter are unfavourable.

But how does the fact stand of the concealment of

² 2 Barn. and Cres. p. 605.

this birth, even upon the evidence as it is now before the House? It appears by the evidence of Susanna Baker that Captain Gardner, at one time at least, was not ignorant of the pregnancy of his wife, as, upon the cross-examination of that witness, she admitted, in one particular instance, the anxiety of Captain Gardner relating to the birth of the child, under the circumstance of an accident which had taken place to Mrs. Gardner, the kindness with which he sought a reconciliation, and the anxiety with which he removed her from a comparative distance from London to this town, where she might have better advice and assistance; indeed, the whole evidence shews, from the time of Captain Gardner's return to England up to the time of the delivery, Dr. Clarke, a medical person, whose practice was principally confined to that of midwifery, was in the daily habit of attending at the house of Captain Gardner, and that it was absolutely impossible, in the ordinary course of events, but that that person must have been known, and his character and occupation being known, the nature of his business there must have been well ascertained. It has been proved that the pregnancy was well known to various branches of the Gardner family; in short, that up to a certain period Mrs. Gardner's conduct was such as to create the strongest presumption in favour of this claimant's legitimacy. But how are we to remove the suspicion that arises from her change of conduct? We ascribe it to her guilt, but deny this claimant to have been the fruit of that guilt. When this unfortunate connexion had alienated her

affections from Captain Gardner, she determined to become the wife of Mr. Jadis, and this could only be effected by persuading Mr. Jadis that he was the father of the child of which she was pregnant. It was a very rational, though not a very moral expedient to attain her object, to persuade Mr. Jadis that the child was his, although she knew it to be Captain Gardner's; and it must be admitted that Mr. Jadis was thus placed in a predicament, which rendered it incumbent on him as a man of honour to do what he did, that is, to make Mrs. Gardner his wife.

But the main subject of inquiry upon this occasion is, first, what is to be the ground upon which this House will be warranted to declare this party to be illegitimate, and next, looking at the evidence which has been called, whether that fact of legitimacy has or has not been so made out, that this House will be warranted in deciding against it. Now we contend that this is not a question of the probability or improbability of the legitimacy of this child, but a question upon the impossibility alone, and we shall be able to shew cases from the earliest period of our history down to the very last which occurred in this House, namely, the Banbury Peerage, that where a child is born within the period and during the continuance of marriage, the only question that can be legally put to determine his legitimacy is this, whether there was by the laws of nature a possibility, under the circumstances of access or non-access, that such child can be the real son of the parent from whom he claims to derive his title.

In a very early case that occurred, and which is to be found in the year-books *, a question arose upon a right of dower; the tenant pleaded "that the demandant kept the charter of the land from him, who was the brother and heir of the baron"; the replication was, "that she was then pregnant by the baron of one who would be the heir, and issue was offered that she was not with child by her husband on the day of his dying, and this the party was ready to verify". So that the party who meant to challenge the legitimacy of the child then unborn thought proper to shape his issue that she was not then with child by her husband on the day of his dying. Now my Lord Chief Justice Thorp, who was at that time chief justice of the King's Bench, said, "You cannot have such an issue to bastardize the child"; and then the report goes on to say, "therefore issue was taken whether she was with child on the day of the decease of her husband or not"; thus making the important distinction between the way in which the party had shaped the issue originally and the way in which it was taken afterwards; a distinction that will fully admit the principle for which we are contending, for the party disputing the legitimacy says, the woman who is claiming her dower was not with child by her husband on the day of his dying. The court say, that is not a point to be contested, you shall try whether she was with child on the day of his dying; the woman being living with her husband, and being with child, we will not allow that

* 41 Edw. III. Easter Term, p. 11.

you are in a condition to dispute the other part of the case, whether that child was begotten by her husband or not : either you must shew some specific matter, that the husband was impotent or incapable, or you must shew that he was not within the four seas, or some other reason which shews that he could not be the father, but you must not take issue upon the dry single question, whether a woman living with her husband is with child by her husband or not, though, if her husband dies, you may take it in a more general way, whether she was with child at the time of the death of her husband. Another case followed at a considerable period of time ^a, where the question arose, as it does here, upon the legitimacy of a child who claimed as the tenant in tail, and it may be sufficient to state that the substance of the question that at last arose was, whether a person who claimed as a tenant in tail was or was not the legitimate son of the first taker in tail. Now it appears that the other side, who disputed the legitimacy, put in several facts, some of which amounted to suspicion only, and others which appear to amount to an actual impossibility of the child being the legitimate son of those parents ; and it should be observed how cautiously and carefully the court separated the one from the other, telling the party that they were not to bring forward those matters of suspicion only, it being impossible by the law of this land to mix them up together, but that they must stand or fall by the single question, whether the child could possibly be that of the parent

^a 1 Hen. VI. Michaelmas Term, p. 3.

from whom he claimed. The plea which the party put in to dispute the legitimacy was, that long before the time of the espousals she was great with child, and notoriously by one C. P., namely, the same Hugh, the demandant; and then they go on to say that the father of the demandant espoused her, and then that she eloped from him, and that she lived with the other party in adultery, and remained there a certain time, within which time the demandant was born. The party thus mixing up his allegation of the illegitimacy of this child with mere matter of suspicion, from which it might be inferred that he could not be the legitimate child, namely, that the mother had lived in adultery before the marriage, that she married the husband when she was already great with child, that she quitted the husband, and afterwards went to the adulterer, that she lived with that adulterer, and that the child was born while they were so living together. Now let us see how the wisdom of the court in those early times treated those allegations relating to the suspicious birth of this child. One of the judges says, and he delivered the law of the land, "although she elopes from her husband and remains with her adulterer, yet the son is legitimate, and shall inherit, unless the other party can shew some special matter", that is, an impossibility of access from which the child could be the offspring of its pretended parent. Then further on another learned judge says this: "when an action is brought it is not enough to destroy the legitimacy in this way, for it ought to conclude upon the right, and say he is a bastard, which goes to the action; but this that you put

“ is only matter of evidence, it is nothing otherwise ;
 “ for I say that if you can bring this writ against one
 “ N. son to such a one, whether he is a bastard, the
 “ writ shall not abate unless that fact is brought imme-
 “ diately in issue ” ; and then he goes on to say after-
 wards, “ but as to the elopement, and as to the adultery,
 “ that is only matter of suspicion, it is not a matter
 “ which renders the issue by impossibility the offspring
 “ of the parent.” Those are two of the earliest cases
 which are to be found in our books. There is almost a
 miraculous regularity in which, from that period down
 to the present time, the legitimacy has been always
 made to depend upon the single fact, whether possible
 or impossible, and not whether probable or improbable.

At a later period it is laid down by my Lord Coke^a,
 in the same manner and to the same extent as has been
 cited from the year-books. He says, “ By the com-
 “ mon law, if the husband be within the four seas,
 “ that is, within the jurisdiction of the king of England,
 “ if the wife hath issue, no proof is to be admitted to
 “ prove the child a bastard (for in that case *filiatio non*
 “ *potest probari*, unless the husband hath an apparent
 “ impossibility of procreation, as if the husband be but
 “ eight years old, or under the age of procreation, such
 “ issue is a bastard, albeit he be born within marriage),
 “ but if the issue be born within a month, or a day
 “ after marriage between parties of full lawful age, the
 “ child is legitimate.” So that in the time when Lord
 Coke wrote, it is clear that the common law still ad-

^a 1 Inst. p. 244.

hered to the same mode of determining the question, namely, the single point whether possible or impossible; not indeed whether possible on account of the husband being within the four seas, the negation of which was only an example of impossibility, and put upon the books to shew the extent to which such impossibility was carried, but whether there was an actual impossibility, by the separation of the parties, which prevented the one from bearing, or the other from procreating, or whether for any other impossibility which the mind may suggest to itself, arising from that which the law calls a non-access, for the purpose of procreating children.

The next case in the order of time ^a arose upon an issue out of Chancery to try whether the plaintiff was the heir at law of one Thomas Pendrell. It was agreed that the plaintiff's father and mother were married, and cohabited together for some months; that they parted, she staying in London, and he going into Staffordshire; that at the end of three years the plaintiff was born, and there being some doubt upon the evidence whether the husband had not been in London within the last year, it was sent to be tried: the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access, and it was agreed by court and counsel on the trial at Guildhall, before Lord Chief Justice Raymond, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty

^a Pendrell v. Pendrell, 2 Strange, p. 224.

to consider of the point of access, which they did, and found against the plaintiff; so that there is the same harmony in the law, that the point left to the jury was not on mere suspicion on the one side and the other, but whether the husband had had access to the wife within such time that the issue born from the mother could, from possibility, be that of the husband.

Lord Chancellor.—It may be taken that the cases go to prove that in order to bastardize a child, if there is a marriage, you must prove that it could not be the child of the husband.

Lord Lauderdale.—They all go to the question of possibility, no doubt.

(Argument resumed.)—The same doctrine is laid down with equal clearness by Lord Ellenborough^a, who says, “There are several other cases mentioned from the “year-books of course less questionable, as the age in “those cases was much less. All these establish this “principle, that where the husband in the course of “nature could not have been the father of his wife’s “child, the child was by law a bastard.” Then he goes on to say, afterwards, “From all these authorities I “think this conclusion may be drawn: that circum- “stances which shew a natural impossibility that the “husband could be the father of the child of which the “wife is delivered, whether arising from his being under “the age of puberty, or from his labouring under any “disability occasioned by natural infirmity, or from the “length of time elapsed since his death, are grounds on

^a King v. Luffe, 8 East, p. 202.

“ which the illegitimacy of the child may be founded ;
“ and therefore if we may resort at all to such impedi-
“ ments arising from the natural causes adverted to, we
“ may adopt other causes equally cogent and conclu-
“ sive, to shew the absolute physical impossibility of the
“ husband’s being the father ; I will not say the impro-
“ bability of his being such, for upon the ground of im-
“ probability, however strong, I should not venture to
“ proceed.” All the other learned judges follow in the
same strain, and they all repeat, as their combined and
as their separate judgments, that it is not a question
upon any occasion of mere improbability, but that the
law requires, before a person is deprived of that which
is his birthright when he is born in marriage, that an
absolute natural conclusive impossibility should be made
out by the other side. This doctrine, sanctioned by the
authority of so many decisions, through so many suc-
cessive ages, was recognized by this House in one of
the most important cases that ever engaged its atten-
tion—that of the Banbury Peerage—on reference to
which it will appear, that this rule, so far from being
shaken, was confirmed and corroborated in that case.
Was it not one of the questions put to the judges—
“ whether in every case where a child is born in lawful
“ wedlock sexual intercourse is not by law presumed to
“ take place after the marriage between husband and
“ wife (the husband not being proved to be separated
“ from her by sentence of divorce), until the contrary is
“ proved, by evidence sufficient enough to establish the
“ fact of such non-access as negatives such presump-
“ tion of sexual intercourse within the period when, ac-

“ cording to the laws of nature, he might be the father
 “ of such child?” Now let us see what the learned
 judges say in answer to that question : “ That in every
 “ case where a child is born in lawful wedlock, the hus-
 “ band not being separated from his wife by a sentence
 “ of divorce, sexual intercourse is presumed to have
 “ taken place between the husband and 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 hus-
 “ band could, according to the laws of nature, be the
 “ father of the child.” One need scarcely ask whether
 that question does not put the whole issue of the dis-
 pute between the contending claimants upon the single
 fact, whether there was access within such period of
 time antecedent to the birth of the child, from which
 access, by the laws of nature, the child could be the
 offspring of the parents. Another question in the
 same case affords us a still stronger argument, for the
 judges say, in answer to it, “ that the presumption
 “ of the legitimacy of a child born in lawful wed-
 “ lock, the husband not being separated from his wife
 “ by a sentence of divorce, can only be legally resist-
 “ ed by evidence of such facts or circumstances as
 “ are sufficient to prove, to the satisfaction of those who
 “ are to decide the question, that no sexual intercourse
 “ did take place between the husband and the wife, at
 “ any time when by such intercourse the husband could,
 “ by the laws of nature, be the father of such child.
 “ Where the legitimacy of a child in such a case is dis-

“puted, on the ground that the husband was not the
 “father of such child, the question to be left to the
 “jury is, whether the husband was the father of such
 “child; and the evidence to prove that he was not the
 “father, must be of such facts and circumstances as are
 “sufficient to prove, to the satisfaction of the jury, that
 “no sexual intercourse took place between the husband
 “and wife at any time when by such intercourse the
 “husband, by the laws of nature, could be the father
 “of such child.” Thus the case is reduced to a point
 which depends on the single question, whether the laws
 of nature prevent the claimant from being the offspring
 of Captain and Mrs. Gardner, and not whether there
 are any circumstances in the case from which the minds
 of your Lordships might entertain suspicion—suspicion
 either more or less slight, but upon the balance of which
 the legitimacy of the child is not to be resolved.

It is true that in the statement of this case of the
 Banbury Peerage, the learned person who has reported
 it has stated that there were in some parts of it circum-
 stances of suspicion, but at last, when this House came
 to the very point, no question was submitted to the
 judges upon the circumstances of suspicion, or upon
 the credit due to them, or the judgment to be built upon
 them, but the only question is upon that which cannot
 be contradicted if it exists, the possibility or the impos-
 sibility of the fact, and upon that alone was the case de-
 cided; and no one can be surprised at how it was de-
 cided. The peerage became vacant in the year 1632;
 the claimant appeared at this bar in the year 1808, at a
 time when there had been five intervening generations,

each of whom were entitled to sit in this House, unless they had thought proper to slumber upon their rights, where each successive generation, to use a legal phrase, had admitted itself out of court, by not enforcing the claim when the witnesses were living, and the parties were capable of contradicting the facts which might be stated: these alone were circumstances abundantly sufficient, without further evidence, to warrant the decision of the house on the rights of that claimant.

The last case ^a upon this subject is perhaps the most valuable, as the judges by whom it was decided had before them the opinions of the twelve judges in the Banbury case, and also had their attention particularly drawn to those opinions. It was a motion for the new trial of an issue directed by the Vice-Chancellor on the question whether the plaintiff was the legitimate child of William Head. It was proved at the trial that William Head having separated from his wife, she resided with her uncle, Thomas Randall, who had a son, named James Randall, then living with him; that William Head occasionally visited his wife, and that at their last interview, which took place in July or August 1798, they were alone in a kitchen for some time, and she afterwards became pregnant, and was delivered of the plaintiff on the 7th of May 1799: he was afterwards baptized by the name of James, the infant son of William and Elizabeth Head. His mother, on the death of William Head, married James Randall, and the plaintiff had always borne the name of James Randall, both at school and up to the

^a Head v. Head, 1 Simons and Steuart, p. 150. Turner's Rep. p. 138.

date of the trial. There was no evidence of any familiarity between James Randall and Elizabeth Head previous to the plaintiff's birth. The new trial was moved for on the ground of a misdirection, the judge before whom the issue was tried having laid down the rule in the words of Lord Ellenborough in *Rex v. Luffe*, the effect of which was, that where a child is born of a married woman the husband is presumed to be the father, unless there be evidence to prove the absolute physical impossibility of the fact. And the Vice-Chancellor before whom the motion was first made, declared that "the ancient policy of the law of England remained unaltered," and though evidence of the husband being *extra quatuor maria* was not now required, evidence being admitted tending to the same conclusion, still the evidence must be of a character to exclude all doubt. It may be deduced as a corollary from the opinion of the judges in the *Banbury* case, that whenever a husband and wife are proved to have been together at a time, when in the order of nature the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was *primâ facie* to be presumed, and that it was incumbent upon those who disputed the legitimacy of the after-born child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place, and not by mere evidence of circumstances, which might afford a balance of probabilities against the fact that sexual intercourse did take place. And the Lord Chancellor, when the

same case was brought before him by appeal, recognized most unequivocally the weight of the presumption in favour of legitimacy, and admitted that no rule had yet been established under which the conduct of the husband or the wife prior or subsequent to an opportunity of access, which would account for the birth of the child, had been held to destroy the presumption of legitimacy arising from such opportunity of access. His Lordship agreed with the Vice-Chancellor in refusing a new trial.

If then this be a case merely upon the question of impossibility, we trust that all the circumstances on which it has been endeavoured to raise suspicion, doubt, and uncertainty will be thrown out of the consideration of the House, and the inquiry be limited to the single fact, whether or not upon the evidence this be a possible birth.

In truth nothing can be more dangerous than to allow any additional latitude to the construction of the rules which our ancestors have prescribed as definitions of legitimacy, or that we should both consider whether it is possible or impossible, and also on the grounds of suspicion whether it is probable or improbable, for it is evident they may conflict in different ways, and leave us in a state of uncertainty. Let us suppose a case of a peerage claimed before this House, in which the conduct of the party was perfectly unimpeachable and free from every the remotest suspicion. Let us suppose another case of a birth at the same period of time after the access of the husband, in which there were grounds of suspicion as to the birth of the child; supposing this

House held that it is not impossible that the child might be the legitimate offspring of those parents, and that therefore in the case where there was no suspicion whatever, this House was bound upon the evidence brought before it to come to the conclusion that a child was the legitimate son of those parents; in what situation would this same House be placed when the second case was brought before them, if, on some contradictory evidence or suspicion of the parent, this House was to feel itself called upon to give a different judgment in the latter case from that which it gave in the first? No tribunal can arrive at that opposite conclusion, unless it founds its determination upon the point of suspicion, leaving the question of possibility completely out of its consideration. And that cannot be done without departing from a principle which runs through the whole series of our judicial decisions, and to which the most important laws such as those of descent and inheritance have always been subservient.

The second point in this case is, what conclusion is to be drawn from the evidence which has been brought before the House. Various witnesses have been called on both sides. The witnesses, in support of the claim of Mr. Alan Legge Gardner, all agree that ten months, or 280 days, is the ordinary period during which the mother bears the child previous to its birth. In this we entirely concur, but we contradict, and have endeavoured by our evidence to controvert, their proposition, that this period is invariable, that the rule is inflexible, that it is without exceptions, that it is impossible for the period of gestation to extend to 311 days, and, in short,

that a child born under the circumstances of this claimant cannot be legitimate.

These learned doctors appear to have founded their opinion on rather singular premises. When a question is put to a witness relating to a matter of judgment or skill, the whole value of that testimony depends upon the reasons which he assigns for such skill or judgment. When questions are put to witnesses merely as matters of fact, it is very true, they often give answers that do not convince the minds of the hearers, but they still leave the integrity of the witness untouched; and the truth of the answer he has given as to the fact is in no case to be impeached by a reason that may appear upon the face of it to be somewhat absurd for the ground of his recollection. Nothing is more frequent than that on the evidence of witnesses speaking to the same fact, when they are asked for the reason on which their evidence depends, they assign a reason which has nothing to do with the fact, but they speak from an impression upon their mind, and with a candid mind, that ought not to impeach the integrity of their evidence. But when we come to matters of skill, and judgment, and experience, the question takes another course, and the weight of the testimony depends not on the answer the witness has given in the first instance, but upon the reasons by which he supports it; and if the party speaking to a matter of judgment gives an absurd or insufficient reason for that judgment, you wipe out of the book all the evidence he has given, and you say "that evidence which alone can be supported not by your word, "but by your reasons, is evidence," not perhaps so

worthy of attention as that of a man in an inferior station of life, who could have given a good reason for the opinion he had delivered. Now some of those learned doctors give a very singular reason for tracing out the period, when the pregnancy of the woman commenced. Dr. Clarke, notwithstanding it is apparent to every one that it must be always a matter of very considerable doubt, when the exact moment of pregnancy commences, assigns as a reason, that in his practice, many single persons, or the parties as he called them, have come to him, and have stated to him, the exact time of a single sexual intercourse. This proceeding does appear a little singular, and certainly it is rather contrary to our notions or apprehensions, that after parties have made the first assignation together, the second is an adjournment of it to the accoucheur;—so however, the learned doctor states it. His medical brethren are less circumstantial, for they admit the ground of their opinion to be their general practice only; and that, reasoning on the symptoms detailed to them, and afterwards being present at the birth, they believe they are justified in declaring their opinion, that three hundred and eleven days, which is the longest possible period with which we can have to conflict, is impossible for the legitimate birth of a child.

We are supplied with sufficient grounds for questioning this belief, when we find that it does not rest either on authority or analogy. “But” say our learned adversaries, “we reject authority because it is not founded on experience, because the principal medical works have been written by men who had little or no prac-

"tice." It is true that practical men may not always find time to write books, yet they may commit to paper the results of their observation, for the assistance of those whose studies have enabled them to form general views, and to acquire habits of composition. Many however of our greatest writers were men of business; and from Hippocrates to Hunter we find numberless instances of the highest eminence in theory and practice in the same individual. To the works indeed of these illustrious men, we owe that knowledge which qualifies us for profiting by experience. Without their works what would be the value of our experience, or what proficiency could we have attained in science? Not a day passes without acting on the principles they have laid down; and consequently admitting the accuracy of the facts on which those principles depend. Why should the opinion of Dr. Hunter on this subject be inadmissible, or his statement of facts be disbelieved? His powers and opportunities of observation cannot be questioned, and the impartiality of his testimony is unimpeachable. His name sanctions the most important doctrines in midwifery; and he has been even termed "the Father of the Modern School," in the obstetric art. Why then also reject the light which we derive from a comparison of the structure and functions of the several classes of beings? If we close our eyes to the relation which these bear to each other, we lose one of the great harmonies of nature, which form so strong an argument for the existence of the Deity.—Such, however, is the doctrine of these learned gentlemen; they rely on *personal* experience alone, most of that

experience being grounded on the information of the female. Now it cannot be denied that females, especially those who are married, will rarely be guilty of the gross indelicacy of telling a physician more than the exigency of the case requires. Facts may often have been withheld, as unnecessary to be divulged, which would have removed even the incredulity of these gentlemen, unless their preconceived opinion on the subject had rendered them inaccessible to conviction. When information is thus obscured or suppressed, every fact, of which we can procure any knowledge, ought to be maturely and impartially considered. Because we may see things darkly, we are not to shut our eyes; and where the best evidence is not attainable we must be satisfied with that which is secondary. Nothing is more injurious to science than scientific incredulity, and we generally find it to arise from principles the most opposite to philosophical. We cannot illustrate our meaning more forcibly, than by adverting to what occurred in the House of Commons before the Committee on the Quarantine Laws. Several physicians were examined upon the nature of contagion and infection. The small-pox having been admitted to be a contagious disease, the anticontagionists strenuously contended that no person could have it more than once. Unfortunately for their theory, Dr. Thomas Foster deposed, that he was personally acquainted with a man who had it three times. Yet Dr. M'Clean still protested against the possibility of having it a second time, on the ground "that Nature could not be so inconsistent with herself as to render a few persons

“capable of being affected by a contagious disorder, whilst the great majority of mankind are incapable of being so affected:” and when he was reminded of Dr. Foster’s evidence, he said, “I should in such a case distrust the evidence of my own eyes.”

We are unfortunate in being opposed to gentlemen whose incredulity does not yield to Dr. M’Clean’s, and whose ears and eyes are closed to evidence which amounts almost to demonstration. They reject all testimony but that of their own personal experience, which on this subject we contend to have been a most fallacious guide to them. What is its foundation? They are called to visit a lady, in an early period of her gestation, and the account she gives of herself leads them to surmise that she became pregnant about such a time. They indulge in these surmises until the delivery, when their surmises are sure to be confirmed; for allowing a month as the terminus in quo, the period in which the conception is to be dated, they compute 280 days from the delivery: and whether this brings them to the beginning or end of the month they are satisfied, and though it is as likely to be the one as the other, they boldly assign the *very day*, in defiance of the doctrine of probabilities that opposes so unreasonable a preference. Some cases are mentioned by Mr. Clarke, where the day of connection was stated by the female, and it was only 280 days distant from the day of delivery; but this only proves the general rule, and not the impossibility of exceptions to that rule: the utmost extent to which it can be carried is, that in twenty instances there did not occur a single variation. Such is the constitution of nature, that it is hardly within the

province of human reason to define the exact limits of the laws by which its operations are governed. Because in twenty or twenty thousand instances the course of nature has been uniform, we are not therefore to conclude that it is invariably uniform. We require fresh evidence to arrive at this second conclusion, and these gentlemen do not furnish it. Suppose the inquiry was on the extent of human life, and the question was, whether a human being could live a hundred years? Let us also suppose all registers to be lost, and the object of this inquiry to be an individual, the date of whose birth there was no evidence to authenticate. Now in such a case we should no doubt have a great difference of medical opinion. The gentlemen to whom I have alluded, in order to preserve their consistency, must say "it is impossible for a human being to live so long as 100 years; it is true that there are books which relate the fact, but these books were written by persons without medical practice. We believe nothing but our own personal experience. We have observed many instances of persons dying of old age; and in some of them, perhaps twenty or thirty, we had attended to them so minutely, and enjoyed such opportunities of observation, that we can reason on the abstract point with certainty: we have found invariably in these twenty or thirty instances, that when the patient arrives at fourscore, decrepitude comes on, his muscles wither, his faculties decay, and before he attains fourscore and ten he sinks under the pressure of age, and drops into the grave; not the victim of disease, but of time. We have *never* known a human being live beyond fourscore and ten years, and we regard that

period as the ultimum tempus which vitality can reach." The weakness of this reasoning is obvious, and it is not more open to refutation in this hypothetical case, than in the claim now before the House; it is opposed to the common sense of mankind, and to the decisions of courts of law. One fact is worth a thousand arguments; and if we can produce cases where the ordinary period of 280 days has been materially extended, any one case is evidence of the fact, in contradiction to all the theory, and all the judgment, of these gentlemen, who give their experience, as the ground that no such instance has occurred, or by any possibility can occur.

Now the instances adduced by the learned gentlemen whose testimony we have opposed to that of Mr. Clarke and his associates are clear and decisive. In the cases of Dr. Granville's lady and of Mr. Sabine's lady; the wives of medical practitioners, constantly under the observation of their husbands competent to ascertain the progress of the gestation, were pregnant more than ten months. Other cases are mentioned by other gentlemen, especially by Dr. John Conquest, one of the most eminent lecturers of the day, in his youth a disciple of Mr. Clarke, now a convert to more liberal principles, formed on what would be termed indisputable grounds, for he says, "I have formed my opinion by a consideration of the works of ancient writers, I have carefully examined the works of modern authors, I have examined the analogy of the brute creation, and have looked to my personal experience," and what is the result? "I am satisfied that there have been cases

“ within my own experience where the female has gone “ to the full term, forty-five weeks,” and he then gives a lucid statement of a case in which the ordinary period of gestation was exceeded. And if we look further we shall find, in the evidence of Dr. Merriman, another equally strong and well supported departure from what has been termed this inflexible rule of nature. More cases could have been produced, if the House had not shewn such a disposition to get rid of our medical testimony by declaring the representations of the female to her doctor to be nothing more than hearsay evidence, and therefore inadmissible. We were thus driven to bring females to the bar; and under all the disadvantages that must attend examinations of this description, facts have come forth in evidence which the most zealous partizan of our adversaries must be afraid to encounter. Women have been brought here from their beds, whose appearance corresponded so closely with their statements as to shame incredulity. It is true they were not persons of high rank or distinction,—no one can think that such persons would expose themselves to a cross examination on the details of their pregnancy—they were women, whose cases were known from their having been patients of charitable institutions; and allowance ought therefore to be made for any slight inaccuracies that may appear in their calculations, or confusion in their statements. The last witness came to our assistance in the eleventh hour, and her evidence was so formidable to our adversaries, that they have endeavoured to weaken it by assailing her moral character. They would have her believed an adultress, because her child was

not born within the period which suits their theory. She says her husband left her on the 6th of June, and her delivery took place on the 11th of April following. She does not affect to account for her husband previous or subsequent to his departure; and the examination to which she has been subjected by the other side was not designed for the purpose of attaining the truth, but of leading her into error: it was upon a point quite immaterial, which might easily have escaped her recollection, whilst the dates to which she deposed had too serious an importance to be forgotten.

If any one of these witnesses is to be believed, our case is proved. We do not allege that Lord Gardner *must* have been, but that Lord Gardner *may* have been the father of the claimant; not that his Lordship is the *father de facto*, but *de jure*. We are not obliged to calculate probabilities or to raise conjectures upon legitimacy; the law is too wise to impose on us such a task. Our duty is to shew that it is possible for this claimant to have been the son of Lord Gardner; and we have done so, by the evidence of medical practitioners of the greatest experience, and medical works of the greatest authority. We shall conclude this by an attempt to satisfy the House that, instead of our advancing any new doctrine of law, we are closely adhering to precedent, and that the courts of judicature in this country have, from the earliest periods, recognized the possibility of the ordinary period of gestation being exceeded, and admitted the legitimacy of children born more than nine months after the possibility of access between the supposed parents.

In Radwell's case ^a the legitimacy of the child was contended for, although, according to Mr. Hargrave's interpretation of the record, the birth took place nearly six weeks after the usual period of gestation. And in Alsop v. Stacey ^b a child born at forty weeks and 10 days was held to be legitimate, as my Lord Hale in his note on the case observes, "*quia partus potest protrahi decem dies ex accidente.*"

And in a case much more modern, the judges, with the advantage of the recent improvements in the science of midwifery and natural history before them, arrived at a conclusion, which admits the position for which we contend: it is Foster v. Cook ^c. A question arose in the cause, on the interest of a child who was born forty-three weeks, except one day, after the death of the father. The Lords Commissioners before they came to a decree, directed an issue to try the question of his legitimacy, and the issue was tried, and the legitimacy was established. So that here is a case so late as the year 1783, in which, after the cause had been investigated in the Court of Chancery, the express point was determined that a child born at the distance of forty-three weeks from the death of the testator, minus a single day, that is, forty-three weeks, all but one day, after the death of the party and after the possibility of access, was held to be legitimate.

It would be surprising indeed if our law should be otherwise. The codes from which it has been borrowed

^a Co. Litt. 123 b.

^b Idem.

^c 3 Brown Chan. Rep. 347.

have not made 280 days the ultimate period of gestation: and if we look back to the earliest periods of legislation, and especially to the proudest monument of the great conquerors of mankind, the Roman law, we shall find that if the child was born within eleven months after the death of the parent, it should still be held to be his issue. We do not cite this law as a precedent, but as a confirmation of other authorities which are more entitled to attention from their coincidence with it.

Finally, we leave this case before the House under the conviction that as the only question in it is whether by the law of nature this claimant can be the child of Lord Gardner, the evidence and authorities which we have adduced will insure the solemn recognition of his legitimacy.

Mr. Solicitor-General and Mr. Adam, for ALAN LEGGE
GARDNER.

The pedigree of our client having been proved on indisputable evidence, it follows that he will be clearly entitled to the dignity he claims, in default of male issue of the marriage of his father, the second Lord Gardner. Mr. Henry Fenton Jadis represents himself to be the issue of that marriage, and the truth of his representation, or, to speak more distinctly, the fact of his legitimacy is the only point which the House will have to determine.

Our opposition to the claim of Mr. Jadis resolves itself into three heads; the medical evidence; the law of England; and the moral evidence. We shall examine these heads successively, and endeavour to shew their application to the question before the House^a.

1st. Mr. Jadis having been born 311 days after the last opportunity of access between his mother and her husband, we contend it to be fully established by the medical evidence that it is physically impossible for him to be the issue of that husband^b. We have examined the most eminent practitioners in this country, and they all agree in opinion that the extreme period to which female gestation can be extended does not exceed forty weeks, or 280 days. The reasons they have adduced, and the experiments they have related in support of the accuracy of their computation, remove all the doubts that could ever have been entertained on the subject. Their lives have been devoted to the study of the history of the human foetus, and they have observed an invariable uniformity in the period which nature has prescribed for its confinement in the womb. They have never known a single instance of deviation from that uniformity; they believe an extension of the period to be physically impossible. Thousands of patients have been under their care, and yet no case of exception has occurred. They have been enabled to make

^a I have followed the classification used by Mr. Adam.

^b The medical evidence being summed up at length by the Attorney-General, who took the same view of it as was given by the Solicitor-General, I refer to his speech for the particulars of it.

observations, which give their conclusions a degree of certainty that could scarcely be supposed attainable. The immorality of the age has led them to be admitted into a confidence which, however repugnant to female delicacy, was absolutely indispensable for procuring an immunity from the violation of virtue. Unmarried women have applied for their assistance immediately after the indulgence of passion. The exact moment of intercourse has been communicated to them, and the pregnancy that followed has invariably happened within the period which we have given as the limit of gestation. They state their opinion with unequivocal distinctness, and they pledge their reputations in support of their statement; so that if they are to be believed, the laws of nature must in this instance have been disturbed and its ordinary operations changed, to the utter confusion and disparagement of science, unless we admit the claimant to be illegitimate.

It is true that ours is not the only evidence that has been adduced before the House. Our adversary has produced a multitude of doctors. These learned gentlemen have advanced a multitude of theories, but they have been very sparing of facts. The theories are too vague and inconsistent to be compared with the opinion to which they are opposed. The facts are not proofs of protracted gestation; the most favourable construction of them does no more than lead to the inference of its possibility, if such possibility be in unison with the course of nature. They may all be accounted for on the common principle without resorting to a supposition which is contradicted by daily experience. The evidence

of the females is liable to the same objections; their computation of the time of gestation, was founded on circumstances which do not necessarily lead to the results in these instances ascribed to them; they went upon data which their own doctors admit to be very uncertain, whilst they overlooked the occurrence of the symptoms which are generally held to point with more strict uniformity to the duration of pregnancy. These symptoms, as far as they can now be traced, refute the supposition of the females, and bring their gestation within the ordinary period. There is not one of these witnesses that could give the terminus of the coitus from which the pregnancy proceeded, and it is impossible to fix the terminus from the loose and unsatisfactory statements which they made to the House. One exception perhaps it is right to make, that of the last witness, Mrs. Mitchell; she stated the terminus with a confidence which was not warranted by fact. Her husband, as we proved by the log-books of the vessel in which he served, was absent from her at the date of her supposed conception as well as for some weeks before and after, so that either her memory or her virtue is too suspicious for her to claim much credit.

We are told however, that these are not the only witnesses against us, as the law books abound with cases proving the repeated occurrence of protracted gestation. A great stress has been laid on three of these cases*, and they have been contended to establish the principle

* *Alsop v. Stacey* and *Foster v. Cook*, and a case communicated by Dr. William Hunter to Mr. Hargrave.

from which the conclusion sought by our adverse claimant inevitably flows. In the first case^a, the child was born forty weeks and nine days after the death of its legal parent. It is reported that Sir William Baddy, Dr. Mundford, and Dr. Chamberlen on being examined, deposed that the usual time for a woman to go with child was nine months (that is to say, menses solares) and ten days, and that by reason of the want of strength in the woman, or the child, or by reason of ill usage, she might be a longer time, viz. to the end of ten months or more, as both ancient and modern authors' experience proves; and the Court held that it might be as the physicians had affirmed, that ten months may be said properly to be the time mulieribus pariendi constitutum.

The ancient and modern doctors so far agree, that there is no dispute that nine solar months and ten days or ten lunar months constitute the period of gestation. They are at issue on the excess. The one contend for its possibility, and the others for its impossibility. The one say it may arise from ill usage or debility, and that "a perfect birth may be had at seven months according to the strength of the mother or the child, and *that by the same reason* it may be as long deferred," or rather that the birth may in some cases be deferred to eleven months, *by the same causes* which in others have accelerated it to the period of but seven months. This specimen of medical logic is not all we owe to these

^a Alsop v. Simcoy, Cro. Jac. 541. Godbolt, 281. Palmer, 9. 1 Roll. Ab. 356.

learned gentlemen. According to a contemporary reporter ^a, after having stated that ten months is the usual period of gestation, they added "that twenty days backwards or forty days forward, ne toll le limitation (does "not extend beyond the limitation prescribed by law "for female gestation) coment que constitutum tempus "soit forty weeks"^b. I leave the House to determine the comparative merits of the doctors of James I. and George the IVth., and confidently oppose the names of Gooch, Clarke, and Blegborough to those of Baddy, Mumford, and Chamberlen.

The next and last case to which we are referred is that of *Foster v. Cook* ^c. It contains a very extraordinary decision, and one that would probably have been revised if the infant whose legitimacy was in question had enjoyed any interest which could render the verdict important to the parties in the cause. The trial was directed by the Court of Chancery in order to ascertain the heir, and make the proceedings perfect in a cause then pending, and the verdict was a matter of indifference, except so far as it identified a necessary party.

These cases therefore form a very slender authority against the unequivocal testimony which has been given

^a Sir Geoffrey Palmer's Reports.

^b Among other arguments urged in this case, we find the following: "If "it be objected that our Saviour Jesus Christ was born at nine months and "five days, and who had the perfection of nature, to that it may be answered "that that was miraculum et amplius." Godbolt, 281. It may be right to add, that this is the only argument in the case which the reporter thought worthy of preservation.

^c This case will be found fully explained below.

by the medical witnesses who have appeared at the bar. No one can question their superiority to the witnesses in *Alsop v. Stacey*, and they would probably bear the same relation to the witnesses in *Foster v. Cook*. The case was tried in a poor and ill peopled district ^a, which could contribute but a very small portion of science to the assistance of the jury, and the parties were too indifferent to the issue of the trial to incur the expense of bringing witnesses from London. No report of the trial has been preserved, but there is a tradition that a country apothecary was the sole authority on which the case was decided. If it is now followed, this obscure and nameless individual will have made a peer. It could scarcely have been foreseen at the time, that his opinion would be cited before this august assembly, as establishing a fact which the most eminent members of his profession treated as impossible, and in short that he should have the fortune to discover a new law of nature which was at variance with the observations and experiments of the most learned and scientific philosophers of an enlightened age. We trust that the House will not consider itself fettered by a precedent which rests on such a foundation.

The case communicated by Dr. William Hunter will not detain us long. It was received by Mr. Hargrave from a friend who may or may not have reported it accurately. Without knowing the precise words used by Dr. Hunter, it is impossible to make it a subject of discussion; but if its accuracy was fully established, all we

^a At Buckingham.

learn is, that Dr. Hunter knew a woman who had borne a living child fourteen days later than nine calendar months; a circumstance which will not justify our concluding that she might have borne it alive seventeen days still later.

We find then that the medical evidence, uncontradicted by a single legal authority (except of *Foster v. Cook*), clearly lays down the impossibility of female gestation being extended to the period of 311 days, and consequently the physical impossibility of Mr. Henry Fenton Jadis being the son of his legal parent.

2dly. We contend that the extreme period of female gestation, the *ultimum tempus pariendi*, has not only been fixed by nature, but defined by law, and that unless a child be born within forty weeks from the last opportunity of access between his mother and his legal father, he is by a positive and inflexible rule of law necessarily illegitimate.

This doctrine is laid down in the first Institutes by Lord Coke^a with such precision and perspicuity, that, were the question now discussed for the first time, we should consider any additional authorities quite superfluous. His Lordship gives us the following extract from a case which was decided in 18 Edward I. "In assize by John Radwell against Henry son of Beatrice who was wife of Robert Radwell, quia compertum est quod dictus Henricus fuit natus per undecem dies post ultimum tempus pariendi mulieribus constitutum, and therefore it was adjudged, quod dictus Henricus dici non

^a 1 Inst. 123 b.

“*potest filius prædicti Roberti, secundum legem et consuetudinem Angliæ constitutum,*” and accompanies his extract by the following observations: “now *legitimum tempus* in that case appointed by law at the furthest is “nine months, or forty weeks, but she may be delivered “before that time, which I thought good to mention.”

Lord Coke’s work had been for near two centuries read in the closet and cited in the courts, before any critic came forward to dispute the doctrine laid down in this passage. His last commentator, Mr. Hargrave, is his first accuser, and in a very learned treatise annexed to the *Institutes* he undertakes to prove Lord Coke wrong in his law. Whatever may be the weight of his reasons, or the force of his argument, we feel ourselves bound to notice the opinion of a lawyer, whose learning was perhaps more extensive than that of any of his contemporaries.

It need scarcely be observed that the treatise to which we allude, is written too much in the style and spirit of a partizan. The author apparently espoused his doctrine before he had examined his authorities*, and he sought rather to establish that doctrine, than to establish the truth. His research and sagacity are, in this instance, far more eminent than his impartiality.

Mr. Hargrave attacks with equal vehemence not only Lord Coke’s statement of the law, but his statement of the case. He denies forty weeks, or any other period, to have been prescribed by positive rule for female gesta-

* Mr. Hargrave was counsel in the Banbury case, and advised the claim to be brought forward.

tion, and he accuses Lord Coke of falsifying the record of the case by substituting "ultimum" for "usitatum". And he argues that this case only proves forty weeks to be the ordinary, instead of the extreme period of gestation; and the doctrine in the text being founded on this case alone, cannot stand in its full extent, but must receive a limited construction. If therefore a delivery goes beyond forty weeks, the question of legitimacy still arises, and becomes one of legal presumption only, and being left quite open, it requires absolute demonstration to deprive the child of the status which he had acquired at his birth.

Mr. Hargrave cites only four cases to controvert the position laid down by Lord Coke. The first is from the Journals in the 9th of Edward the Second, where the widow of Gilbert de Clare, Earl of Gloucester, appeared before this House one year seven months and three days after her husband's decease, and asserted herself to be still with child by that husband. The House entertained her claim, which Mr. Hargrave observes they could not have done, if forty weeks had been the *ultimum tempus pariendi*. The next case is in the reign of Richard the Second, where a woman had issue forty weeks and eleven days after her husband's decease; she had married in the interval, and the question was to which husband the child should be affiliated,—the law preferred to the deceased. The third case is that of *Alsop v. Stacey*, where the child was born forty weeks and ten days after the husband's decease, and though the woman was a lewd woman, the child was declared to be legitimate. Finally,

the case of Thecar (in the Court of Wards), where the child was born forty weeks and one day after the husband's decease, the wife having abandoned her husband upon their marriage to return to the embraces of a former lover, with whom she seems to have cohabited during the whole of her marriage state, and yet the child was declared legitimate.

These are the only cases which the industry of Mr. Hargrave, aided by the researches of Lord Hale, who had pursued the same inquiry, has been able to produce, for the purpose of assailing the doctrine laid down by Lord Coke. They are four in number, and only two of them can be considered as applicable to the question, whether Lord Coke was right or not. Mr. Hargrave has omitted to inform us of this distinction; but it will be perceived that the two former cases alone were of an earlier date than Lord Coke's work, so that it is on them alone that his opposition to his lordship must rest. It will be for the House to consider how far two such cases can be held sufficient to countervail an authority like that of Lord Coke's. To examine them more minutely. The case of the Countess of Gloucester is too extravagantly absurd to be discussed. That of 18 Richard II. probably arose from a wrong construction of the legal rule, that where a child is born during a woman's second marriage, at such a time that he may be the child of the first or second husband, the law allows him an election; where the parties were desirous that the election should be made, the time was likely to escape very strict examination, and a judge, especially in a reign in which the judges were notorious for their

venality, may have been induced to prefer the child to a collateral heir. It should be recollected, also, that the child was an infant, and therefore his acquisition of the estate was a benefit to the lord, which the barons were not likely to overlook. The interest of the child was the interest of the lord, of the tenant in dower, and of the tenant in possession; whilst the collateral heir had nothing to depend on but a dry doctrine of law. We cannot be surprised at the result. This is the only case which can be considered as an authority against Lord Coke; and it should be observed how incompetent we, at this distant period, are to pronounce on its real value,—we are ignorant of the judge by whom it was decided; the Court before whom it was tried; the issue of the trial; we know not whether the judgment was reversed, or whether it was afterwards overruled. Lord Coke may have been in possession of facts sufficient to account for his omission of it, and it would be bold to convict him of ignorance or partiality on such slender evidence. If he was correct in his exposition of the law as it then stood, we have a great authority in our favour, and one that must stand, until it is overruled either by the Bench or the legislature. The latter has been altogether silent, and the former has never taken upon itself the responsibility of creating a new doctrine by which this question was to be decided. The books do not contain a single case where the judges pronounced this opinion of Lord Coke to be erroneous; there is not a single instance of its having been treated with disapprobation by the Court; and if subsequent decisions are to be found at first sight not strictly accordant with it, we are not

therefore to presume it to be wrong. The decisions must first be proved to be right, and it is not by a trial at nisi prius, or any other than the highest tribunal, that an exposition of the law by so distinguished a judge as Lord Coke is to be impeached.

The first decision (subsequent to the Institutes) cited by Mr. Hargrave is *Alsop v. Stacey*, or, as it is called in some of the books, *Alsop v. Bowtram*^a. It has been reported by three different writers, and it is difficult to say which of them is most unsatisfactory. The arguments of the counsel and the judgment of the Court are very briefly given, and contain no notice of the authorities by which the old rule of law might have been supported: the law indeed appears to have been treated as a very secondary matter, and it must be admitted that the facts of the case are of such a nature as to have absorbed all the consideration of the jury. The husband had died of the plague, and his brother had taken advantage of the widow's unprotected situation to turn her out of doors, and to possess himself of the house. She had been unable to find an asylum elsewhere, and the season being advanced, her health had been seriously injured. This brother, as heir at law, was the adversary of the infant, and the jury may not have been unwilling to mark their indignation at his unmanly and oppressive conduct. The verdict was a specimen of the pious frauds which the casuists of that day have written so many volumes to defend^b. We next come to the

^a Cro. Jac. 541.

^b The reign of James the First was distinguished by a taste for casuistry.

case of Thecar, which can scarcely be considered an authority against the rule, as the child was born only a few hours after the expiration of the forty weeks: it was not the length of the woman's gestation, but the profligacy of her conduct that created the difficulty. The husband married her when living with another man; he took her to his bed when she was still warm with the embraces of her paramour; so that if she was pregnant, the marriage legitimated the issue. The law has declared the husband to be in such cases the author of his own wrongs, and refuses to relieve him from the consequences of his own folly.

Such are the authorities which inspired Mr. Hargrave with the confidence to enter into a controversy with Lord Coke, and we trust that they will be no longer thought sufficient to justify so bold an enterprise. From the ostentation with which they are brought forward, and the weight which is attached to them, it may be supposed that they are the only ancient authorities on this question; so that Lord Coke's doctrine has the disadvantage of being at variance with them, whilst it is unsupported by any other author,—in short that his lordship must be believed on his word alone. It will probably surprise the House to learn, that this is so far from being the case, that Lord Coke is fully borne out to the utmost extent of his doctrine by an author of almost equal authority, by a judge and writer whose treatise ranks as one of the most important in English law. Britton^a, whom we learn from Lord Coke to have been

^a Britton, 16 b.

Bishop of Hereford in the reign of Edward I., and distinguished for his knowledge of the common law, expressly declares, "that if a woman, upon the death of her husband, gave out that she was enceinte, an examination of her person should take place, and upon the declaration of the examiners doubting or confirming her statement, she should be committed by the sheriff to a castle or some other place of safety (so that no woman or person of whom suspicion could be entertained should have access to her) until her delivery. In case her delivery did not take place within forty weeks from the death of her husband, she should be punished by fine and imprisonment; but if her delivery did take place within the forty weeks, then that the issue should be admitted into possession, and no one be allowed to aver that it was begotten by other than the husband." It should be observed that this was a judicial proceeding^a, the commitment being under a writ addressed to the constable of the castle, suspending the right of the heir to enter into possession until the result was known. The operation of the writ, the period of the confinement, and the abeyance of the ownership of the land were restricted to forty weeks, so that no pretence of legitimacy, where the child had been the fruit of more protracted gestation, could be attended to. Here is a practical remedy against the admission of a surreptitious heir; a remedy founded on writ, not depending on an insulated passage in any particular writer, or on the authority of any particular judge, but emanating

^a Bracton, 69, where the form of the writ is given.

from the king himself, and possessing all his authority for its execution. We here have the rule defined; the period of gestation ascertained. Had it been different, the woman would have been confined, according to our learned friends, eleven months, or according to the Countess of Gloucester a year and a half, or according to the more lax doctrine of Mr. Hargrave, as long as she chose; the heirs being obliged to wait the long delay to which they were subjected by the uncertainty of the law. In fact, nothing could be more unjust or conducive to the perpetration of fraud, than a rule so flexible and so indefinite as that which Mr. Hargrave has laid down. Uncertainty in law is the parent of injustice, and our ancestors have in this instance shewn that they were wiser in their generation than some of their descendants.

Having established that forty weeks form the *ultimum tempus gestationis*, we do not deny that the cases which have been cited, and others which we shall hereafter advert to, lead to the inference that the law, without admitting the uncertainty which has been ascribed to it, has departed in some degree from the strictness with which the rule was formerly applied. Sir William Blackstone^a says, "that all children born so long after the death of the husband, that by the usual course of nature they could not be begotten by him, are bastards, but this *being a matter of some uncertainty* the law is not exact as to a few days." It is thus that the learned judge reconciles the authorities; and if we review them,

^a. 1 Commentaries, 457.

we shall find that the law has done no more than allow for the uncertainty of nature. It has recognized, in the admeasurements of time applicable to all changes in the human frame, certain oscillations, or apparent inaccuracies, that require the computation to be less strict, in order to be more sure. The question then is, what is the quantum of time to constitute the variation? In the case decided in the reign of Richard II., it was eleven days, in *Alsop v. Stacey* it was ten days, and in *Thecar's* case it did not amount to forty-eight hours. It seems, therefore, that eleven days was the utmost limit permitted of the variation or excess, for the only instance of it to be found is in the case of Richard the Second^a, of which we have so very brief and imperfect account, whilst in *Radwell's* case, which has been much more circumstantially reported, and has been sifted by such lawyers as Lord Coke, Lord Hale, and Mr. Hargrave, the same excess was held to be fatal to the legitimacy of the child. Can we doubt what would have been the result of an excess of thirty-one days?

sdly. We contend that in the absence of proof of physical impossibility, and in the event of the rule of law being less strict than accords with our construction of it, yet the moral evidence which we have adduced of Mr. Jadis's illegitimacy, is amply sufficient to establish that fact to the satisfaction of the House.

It has been urged against us with great force that our

^a For the reasons above given, which will be seen hereafter to be well founded, no authority is attached to the case of *Foster v. Cook*; it is therefore not enumerated in the list of cases in support of the doctrine of excess.

moral evidence is inadmissible, this being a question of possibility or impossibility, and not of probability or improbability. If the former position is correct, the case ought to have been argued by accoucheurs instead of lawyers, and to have been decided at Surgeons' Hall rather than in this House. But this is not a medical case, and we are not to be confined within the narrow limits that circumscribe the discussion of physical impossibility. The House are entitled to have before them all the moral testimony; all the facts and circumstances which at all contribute to elucidate the question, whether generating access was had, and the child was in truth the child of its legal and ostensible parent. Bracton lays down^a, "*si partus nascatur post mortem patris (qui dicitur post-humus) per tantum tempus quod non sit verisimile quod possit esse defuncti filius, talis dici poterit bastardus;*" and in another passage, "*item dici poterit bastardus si inquiratur per quantum tempus natus fuerit post humatione patris cujus filius esse debuit, ita quod non possit esse verisimile quod sit filius talis;*" and again, "*item dici poterit bastardus ab alio quam a patre progenitus, ubi non sit verisimile aliquâ ratione quod possit esse hæres mariti, ut si pater abfuerit per longum tempus in terrâ sanctâ, quod veritas vincere possit præsumptionem.*" Now our case is proved if the commonly received translation of the word "*verisimile*," which has always been "*probably*," is correct; not in that loose and undefined sense in which it may be used in common speech, but that sort of judicial, or rather moral probability, which is to

^a De Legibus.

convince the mind whether the offspring was or was not the offspring of its legal and ostensible parent. The investigation prescribed by Bracton, the "*verisimilitudo*," "*aliquâ ratione*," cannot be effected without a consideration of all the facts and circumstances of the case; all the evidence medical and moral having any reference to the question. We are to treat the question of legitimacy like any other question of fact, and exclude no testimony that would be admissible on an issue to try a question of fact. Even Mr. Hargrave does not sanction the exclusion of evidence of the conduct of the parties, and the cases cited by him shew such evidence to have been received from the earliest period. In *Alsop v. Stacey*, as reported in *Rolle*, 365, the moral character of the woman, with respect to chastity, was brought before the Court, and in *Thecar's* case the conduct of the female appears to have constituted the principal subject of discussion. The child was born so very soon after the expiration of the forty weeks, that nothing but the grossly immoral life of its mother could have impeached its legitimacy. We come next to the case of *Pendrell v. Pendrell*^a, where these precedents were followed; and Chief Justice Buller^b in a full note of that case, gives us the judgment of the Court on it. "The Chief Justice in directing the jury, observed that the old maxim of presumption *intra quatuor maria* was exploded: that the evidence to overturn the presumption need not be so strong as was insisted on by the plaintiff's counsel; *that the evidence was the same in this as in all other cases; a probable evidence was suffi-*

^a 2 Strange, 925.

^b Buller's Nisi Prius.

"*cient*"^a, and it was not necessary to prove access impossible between them." The jury, without going from the bar, found that the plaintiff was a bastard, upon which the Chief Justice commended their verdict. A later case is still more explicit^b; it gives us the opinion of Mr. Justice Ashhurst, that general character and circumstances are admissible: and it was on such grounds, viz. on reputation, on family tradition, and the conduct of a party and his descendants, that the learned judge, at a considerable period after the death of the party, pronounced him illegitimate. This judgment has been since cited with approbation, both from the Bench and in this House; and it was mentioned during the discussion on the Banbury peerage claim, as agreeing with the case of *St. Andrew's v. St. Bride's*^c, where the question was whether the children were the children of the adulterer with whom the wife cohabited, or the children of the husband of that woman; and it was there argued that as physical impossibility is not the criterion of evidence, strong improbability being alone sufficient to bastardize the issue, a fortiori, the moral impossibility which existed in that case would bastardize also; this argument prevailed.

We now come to the case of the earldom of Banbury, which laid this question of evidence at rest for

^a There is some ambiguity in this language. It might be contended that the evidence related to access alone, which it was no longer necessary to prove impossible. In fact, the case was decided on the improbability of there having been any access between the husband and wife.

^b *Goodright v. Saul*, 4 T. R. 486.

^c 1 *Strange*, 151.

ever. There was no allegation of physical impossibility, much less any proof of it. The legitimacy of the child was impeached on grounds, which, according to the doctrine of our learned friends, were inadmissible. It appeared that Lord Banbury was old at the time of his marriage, and that his wife preferred Lord Vaux, whom she married after his decease. That the children were born at the seat of Lord Vaux, and that Lord Banbury always acted as if ignorant of their existence. That the conduct of Lord Vaux and Lady Banbury towards the children created an irresistible presumption, that the children were the fruit of their adulterous intercourse, instead of being the issue of Lord Banbury. Had there been any evidence of Lord Banbury's non-access, or of his impotency, it would have been wholly unnecessary to have put the question to the judges, "whether the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten, and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?" The records of the House shew, that in the absence of all evidence of impotence and non-access, the issue were held to be illegitimate.

We may safely say that almost all the facts of that case correspond with this. If Mr. Fenton Gardner is declared legitimate, the issue of Lord Banbury ought to have been declared legitimate. The whole of the law of that case is applicable to this. The answer of the Lord Chief Justice to one of the questions addressed to

him by the House, characterizes the evidence which we contend to be admissible. His Lordship said, "that the presumption of sexual intercourse was to prevail, until that presumption was encountered by such evidence, as proved, to the satisfaction of those who were to decide the question, that such sexual intercourse did not take place at any time, when the husband could, according to the laws of nature, be the father of the child." The conduct of the parties affords us the best evidence that the pregnancy could not have been the result of sexual intercourse between the husband and the wife, but between the wife and another person; and surely if the child can be established to be the child of an adulterer, it cannot be affiliated to the husband.

Some cases have been cited in the course of the argument, which are not noticed in Mr. Hargrave's note. One of them is as old as Henry VIth, and is reported in the year-books at an unusual length. We are deeply indebted to the prolixity of the reporter, for had he been as brief as his predecessor in the reign of Richard the Second, we might have been left to conjecture the real grounds of the decision. The question in the case was the legitimacy of an individual, who, it was obvious, was not the child of the husband; but the intercourse of the adulterer and the wife, from which the pregnancy originated, was prior to the marriage. The counsel applied for an issue, whether the woman had not been with child by C. P., and the judge very properly refused it. Under any circumstances, the issue was improper; for though it may be proved *collaterally* that an adulterer is the father, the law will not formally recognize his paternity. It would be an encroachment on

the privileges of marriage to allow the relation of parent and child to result from an adulterous intercourse. The judge felt this strongly, and expressed himself with warmth; departing from the question before him, he *extrajudicially* deprecated the admissibility of evidence of suspicion in trials of legitimacy; and went so far as to doubt whether a case could arise to justify suspicion. In support of his theory, he cited a case from his own knowledge of a woman who had gone with child seven years? This specimen of his sagacity, may dispense us from examining his opinion any further.

A recent case has been cited against us, which is one of the strongest authorities in our favour, *Head v. Head*¹. There all the circumstances of suspicion were admitted at the trial; the familiarity of the wife with the suspected father, their subsequent marriage, and their treatment of the child, all came before the jury, the verdict was in favour of the legitimacy; we do not dispute its justice; the facts, though strong, were reconcilable with the child's legitimacy, and were capable of being accounted for, without ascribing guilt to the mother and disgrace to her offspring. The verdict, however, is a matter of great indifference to both the claimants in this proceeding: for it is only in some of the circumstances of suspicion that the two cases can be said to correspond.

We see, then, that whatever construction the Court may in questions of legitimacy have given to the rule of law respecting female gestation, no doubts can any longer be entertained of the admissibility of the evidence by which these questions are to be tried. There is a

¹ 1 *Simon's and Steuart's Reports*, 150. 1 *Turner's Reports*, 138.

chain of authorities sanctioned by the names of our greatest judges, confirming the position for which we contend, that legitimacy must be tried as a question of fact; and consequently every circumstance, that can form an ingredient of the judgment, which we are to exercise upon the question, is admissible. Assuming this to be the case, the presumption of this gentleman's legitimacy can never stand for a moment; the curtain is drawn, and a flood of light is let in, which exhibits the truth in such a form and character as to exclude the possibility of doubt. Through the whole of the claimant's life he can be identified as illegitimate. For the period of twenty years he has been dealt with by all mankind, as not the son of Captain Gardner. He was at the moment of his birth dealt with, as not Captain Gardner's son. He was christened by another name. He was bred up, not as Captain Gardner's son; he has been educated, not as Captain Gardner's son; he has lived, he has been amongst all persons, named and regarded not as Captain Gardner's son. How comes it, that he was clandestinely born? and that Captain Gardner should be absent from home, at such an interesting moment as the birth of his heir? How comes it, that he should be removed to Swallow Street and Aldersgate Street, before Captain Gardner's return? That he should not be visited by Captain Gardner? That he should not be christened in the presence of Captain Gardner? That he should not be known to Captain Gardner? How are these facts to be accounted for? How can they be reconciled with the supposition that the claimant is the child of Captain Gardner? But we will ask further,

did not Mr. Jadis carry on a criminal intercourse with Mrs. Gardner for nine months previous to the birth of the claimant? Was he not presented almost at his birth to Mr. Jadis? Was he not visited in Aldersgate Street by Mr. Jadis? Was he not christened by the name of Jadis? Was he not sent to Westminster school,—was he not known and called in the world by the name of Jadis? Has he not from his birth to the present moment been treated by Mr. Jadis and Mrs. Gardner as their son? Every circumstance that marks the relation of parent and child has been proved to exist between this claimant and Mr. Jadis, whilst not one single circumstance of a similar tendency connects him with Captain Gardner.

We here have that quality of proof that Bracton terms, “*verisimile*.” These approximations to truth, these indications of truth, this circumstantial evidence, which being considered with reference to human motive as it may be collected from them, constitutes the “*verisimilitudo*.” Bracton has told us that this was the rule, by which questions of legitimacy were to be decided. We have seen how the cases confirm his authority. How circumstances proving the improbability (not the impossibility) of legitimacy have been admitted in evidence, and how they have been held to defeat the presumption of *pater est quem nuptiæ demonstrant*. We have endeavoured to make out a case of moral improbability, amounting almost to impossibility, of this claimant being the child of Captain Gardner, and we contend that it requires a combination of moral phenomena perfectly unprecedented, to reconcile this part of the evi-

dence with the supposition of the claimant's legitimacy. Now the improbability of the claimant's legitimacy that appears on the moral evidence, must be combined with the like improbability created by the medical evidence. We must presume an anomaly in morals, as well as in physics, to balance these improbabilities. We must ascribe to the parties a series of motives, different from those which actuate the rest of mankind: and we must ascribe to nature an irregularity which is inconsistent with her ordinary operations, if we desire to remove the difficulties attending this gentleman's legitimacy. This would be an encroachment on hypothesis, which no court of justice would allow, and which probably has never been attempted. In the earlier cases cited, the moral probabilities were in favour of the legitimacy, and there is not a single instance where the presumption of natural aberration has been met by moral evidence tending to disprove its existence. The peculiarity of this case is, that the moral evidence in it negatives the natural aberration. The conduct of the parties can be urged not in answer, but in aid of the presumption arising from the medical evidence; so that we must commit an outrage upon reason and upon nature, before we can admit the legitimacy of the claimant.

Now the presumption against the claimant's legitimacy that appears on the moral evidence, is to be considered with reference not only to the medical evidence but to the rule of the law. The medical evidence, under the most unfavourable construction of it, creates a similar presumption with the moral evidence, and the rule of law,

however it may be relaxed, does the same. We thus have a combination of presumptions, an union of probabilities.

When the presumption thus arising out of the moral and medical evidence is viewed in reference to the law, we find that the latter becomes its most powerful auxiliary. Our construction of the law may have been wrong; but our application of the law cannot be wrong, when we contend that the period of gestation cannot be indefinitely extended, and that a certain excess of that period creates a strong presumption against legitimacy. We have shewn an excess wholly unprecedented, and we therefore claim the advantage of every presumption afforded to us by the law, the medical evidence, and the moral evidence; and thus armed with a body of proof, which it is not in the power of human reason to withstand, we shall await with confidence the declaration of this House in our favour.

Before we conclude we have to produce the Act which passed for the divorce of Captain and Mrs. Gardner. The House will find that there is a passage in this Act saving the rights of all parties, and the child baptized Henry Fenton; this, of course, deprives the claimant of any right under the marriage.

Lord Chancellor.—This Act is drawn directly contrary to the usual form. The passage alluded to ought to have been struck out, and it is my opinion that such a declaration as this in a private Act, to which the claimant, Mr. Fenton Gardner, was no party, is not evidence against him.

The Solicitor-General and Mr. Adam.

Our case is now before the House, and we trust that it fully supports the confidence we entertain of establishing Mr. Alan Legge Gardner in the undisputed possession of the honours to which we verily believe he is in law and justice strictly entitled.

END OF ARGUMENT FOR ALAN LEGGE GARDNER.

Mr. Attorney-General.

My Lords, it appears to me that I am placed in a very singular position in discharging my duty as Attorney-General on this occasion. In all previous cases I have felt myself bound to resist, to the utmost of my power, the case set up on the part of the claimant; and for this obvious reason, that as the claim has always been contended for, and urged by counsel with the utmost activity, it appeared to me that the best mode of sifting and discussing the subject, and preparing it for your Lordships' decision, was, that I should oppose the claim to the utmost of my ability and power, in order that the case should be fairly laid before your Lordships. But as the question on which this claim is to depend is one single question, namely, as to

the legitimacy of Henry Fenton Gardner; and as it follows as a necessary consequence that if the claimant^a, Mr. Alan Gardner, does not succeed in inducing your Lordship to believe that he is entitled to a seat in this House, then that Henry Fenton Gardner will be entitled, I am in this situation, that every argument I urge against the claimant will be urged in favour of Henry Fenton Gardner; whilst all the opposition I raise to the case of Henry Fenton Gardner, will in fact be raised on behalf of the claimant. The course therefore which I have to pursue is entirely novel, and instead of acting as an advocate, I am called upon to state fairly and distinctly before your Lordships, what is the real impression I entertain as to this case, and the law, and the evidence upon which it is founded.

I shall endeavour, in the first place, to define the rule of law by which this case is to be decided, for it is in vain to sift the evidence until we lay down the rule of law to which it is to be applied, to enable us to come to that conclusion, which law and justice will warrant. I do not assent to the proposition stated by the Solicitor-General, that you are to take the case of Henry Fenton Gardner as a case of law, which is barred by law; or to the principle laid down by the other side, that you must prove a case of physical impossibility before you can pronounce Henry Fenton Gardner illegitimate. I assent to neither the one doctrine nor the other, my course is between the two extremes.

^a Mr. Alan Legge Gardner being the only petitioner, is called the claimant throughout the Attorney-General's argument.

According to the old rule of law, non-access must be proved in such a way as to preclude the possibility of access. The husband and wife might live apart, and the child might be the offspring of an adulterer, yet it was considered legitimate if the husband was within the four seas. No evidence was admitted to repel the presumption of access. In more modern times, the progress of reason shewed this rule to be extravagant and absurd, and the question of legitimacy, like every other question which is to be the result of evidence, was regarded as a fair subject of inquiry, to be established to the satisfaction of the jury or court, by whom it was to be tried. A case of physical impossibility was not necessary to be made out, and all the evidence as to whether, or not, the husband had access to his wife during the time of gestation, and as to the nature of their intercourse, was taken into consideration. In the case of *Pendril v. Pendril*^a, there was no physical impossibility that the husband and wife might have met when the conception took place; but it was for the jury to say, under all the circumstances, whether there had been such an approximation. The jury decided, conformably to the principle I have just stated, upon all the evidence before them, all the circumstances of the case, that the child was illegitimate, and that the husband had not had access to his wife during the period of gestation. And this was not a single or solitary instance, for in more modern times, in the case of *Goodright v. Saul*, we find a precisely similar decision; Mr. Justice Ashhurst there stating the law to be, that it was from a view of the whole case

^a 2 Stra. 4 T. R. 856.

that the jury were to deduce their conclusion of probability. I do not mean vague probability, but a case of strong moral conviction that there had been no access.

Thus, my Lords, the law stood in modern times, and it has never been broken in upon. There is a case of *The King v. Luffe*^a, which has been referred to, and which, if read cursorily and inattentively, might lead to a contrary conclusion; not indeed when you look to the decision, and the point decided, but to the language of some of the judges who pronounced the judgment. According to the old rule of law, wherever the husband might have been at the time that his wife originally conceived, if he returned to his wife, and lived with her at the time of the birth of the child (although he had been with her only for a short period before that birth), it was considered that the child was legitimate. The case of *The Queen v. Murray* had been referred to as establishing that position, and it was for the purpose of overruling it, that the case of *The King v. Luffe* was decided. There the husband had returned only a fortnight before the wife's delivery, and it was contended, upon the authority of the case of *The Queen v. Murray*, that under such circumstances the child was legitimate; and this species of argument was made use of—if a man marries a woman who is pregnant, and in such a state of pregnancy as to be visible to all the world, although the woman should be delivered a week after the marriage, he cannot contend that the child is not his: and it was said that the principle in that case applied to the case of *The King v. Luffe*. This was de-

^a 8 East. Rep. 193.

nied, and very properly denied, by the court ; because, if a man marries a woman visibly pregnant, the child is legitimated by the marriage ; and that is the distinction between the cases of *The Queen v. Murray* and *The King v. Luffe*. In the case of *The King v. Luffe*, Lord Ellenborough said, “ If we may resort at all to “ such impediments arising from the natural causes ad- “ verted to, we may adopt other causes, equally potent “ and conclusive, to shew the absolute physical impossi- “ bility of the husband being the father: I will not say the “ improbability of his being such, for upon the ground of “ improbability, however strong, I should not venture to “ proceed. No person, however, can raise a question, “ whether a fortnight’s access of the husband before the “ birth of a full grown child can constitute, in the “ course of nature, the actual relation of father and “ child. But it is said, if we break through the rule “ insisted upon, that the non-access of the husband “ must continue the whole period between the concep- “ tion and delivery, we shall be driven to nice questions. “ That however is not so ; for the general presumption “ will prevail, except a case of plain natural impossibi- “ lity is shewn.” Now those words are extremely strong ; but when we are considering the judgment of a court of justice, we are to consider the point to which that judgment is directed ; we are not so much to consider the terms made use of, as the point of decision. And what was the point of decision ? There was a case of absolute impossibility, that this man (the husband) could be the father of the child ; and, on the ground of such absolute impossibility, the court were of opinion, contrary to the rule laid down in *The Queen*

v. Murray (notwithstanding the circumstance of the husband living with the wife at the time of the birth of the child), that the child was illegitimate. The only point decided was, that in the case before the court, from the plain natural and decided impossibility alone, the child was illegitimate. That is the whole of the case. The terms are strong: his Lordship says, "I will not decide upon a case of improbability merely; "I decide upon a case of impossibility", which was the case then before the court; and it does not appear, therefore, what judgment that noble Lord and the rest of the court would have formed upon a case like the present; supposing they should have been of opinion that it was not a case of absolute impossibility, but of extreme improbability. Now having passed over that case, to shew my opinion as to the judgment of that noble Lord, and that he meant to confine his judgment to the case then before the court, as it was his duty to do, I must call to your recollection the decision of this House, and the judgment of that noble Lord, in the case of the Banbury peerage. My Lords, the case of the Banbury peerage was not a case of physical impossibility; it was the case of a wife of a very aged man, it was a case of extreme improbability, but there was no evidence to shew impossibility. It was not a case of physical impossibility, for there was no evidence of the husband's impotency, and he was living with his wife during the whole time of the gestation, at the time of conception, and at the time of delivery. Now, my Lords, what course of evidence was pursued upon that occasion, and what were the observations made by noble Lords in this House? The course of evidence was, to introduce

a variety of facts arising out of the conduct of the different parties, to confirm the improbability of Lord Banbury having been the father of Nicholas Vaux, his supposed son. It was argued in this House, by Lord Erskine, that as the parties were living together as husband and wife during the whole time of gestation, it must of necessity follow, as a rule of law, that the claimant was the offspring of Lord Banbury, unless a case was proved of absolute physical impossibility. That doctrine was opposed by many noble Lords in this House, and especially by my Lord Ellenborough, who had delivered the judgment which I have just cited; and it was opposed with sound reason—the noble Lords contending that you were not bound to decide upon the ground of physical impossibility, but to take all the circumstances of the case into consideration, and if, as the result of the whole of the inquiry, arising out of the state of the parties, you were satisfied Lord Banbury was not the father of Nicholas Vaux, then you would be justified in coming to that conclusion; and notwithstanding the parties living together, notwithstanding there was no evidence of physical impossibility of begetting children on the part of Lord Banbury, you would be bound to come to the conclusion that the child was illegitimate.

My Lords, in the course of that inquiry, which gave rise to very warm controversy and contest, certain questions were addressed to the judges, and I will call your Lordships' attention, in confirmation of what I am stating and the doctrine I am laying down, to the opinion expressed by the judges upon the point now before us.

That point, and the only point I am anxious to establish, is, to shew that a case of absolute physical impossibility need not be made out; and, that if you are convinced, not merely upon the balance of probability, but upon the whole of the evidence, if, in short, there is no moral doubt of this child's illegitimacy, you are to abandon altogether the idea of physical impossibility. If you can act upon this principle, you will find that Henry Fenton Gardner is illegitimate.

Now the judges, in their answer to one of the questions addressed to them by this House, declared themselves to be unanimously of opinion that the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born, in the course of nature, may be rebutted by circumstances inducing a contrary presumption. So that, according to the answer given by the judges upon that occasion, in a case less strong than the present, presumption arising from access even during the time of gestation (for that is the principle to which that case applies), may be rebutted by circumstances leading to a contrary presumption.

The facts in that case upon which reliance was placed were these: Lord Banbury cohabited with his wife during the whole period of her gestation, from the conception up to the delivery. He was eighty years of age, and that was the only circumstance, in the absence of evidence of his impotency, from which any physical impossibility was to be inferred; but there was evidence

that the birth of the child was concealed ; it was not communicated to him during his life-time, and he accepted dignities from the king, and made a disposition of his property, absolutely inconsistent with the idea of his knowing he had any children. There was no claim made after his death to his estates by the person alleged to be his legitimate son ; he took the name of Vaux, and there were other circumstances of a similar nature, leading to the inference arising out of the conduct of the parties, that he was not the legitimate son of Lord Banbury.

That case is the same in principle as the present, and that case is an authority to establish the principle for which I am now labouring, that a case of physical impossibility need not be established, but that you are in this, as in all similar cases, to take the whole body of the evidence together, and say what is the result of it. You are to consider the situation and conduct of the parties, because the situation and conduct of the parties was the main ingredient in the case. But my learned friends say that this was not a judgment ; the judges gave their opinion to the House, but it was not a judgment. I apprehend, the opinion of the twelve judges in a case stated for their opinion, and presented to this House after formal and grave deliberation, is entitled to as much weight as the judgment of any four judges in the ordinary exercise of their jurisdiction. But if it be not a judgment, still there was a judgment in that case, because, founded upon that opinion and reasoning, the noble Lords in this House, the highest tribunal in the land, pronounced a solemn judgment against the legitimacy of the supposed Lord Banbury. The opinion of the twelve

judges was given in the progress of that inquiry, and the opinion of the twelve judges corresponded with the ultimate judgment of this House. Never, therefore, was there a decision given under stronger sanction; never was there a case of a more solemn description; never was there a case argued with more activity and intelligence; never was there a case entitled to more weight and authority: founded not upon itself alone, not upon reasoning at the time, but upon the principle of those previous cases which I have already cited^a; my Lord Erskine, with all his powerful talents and eloquence, taking the most active part in the discussion, and the House deciding in opposition to him, that physical impossibility is not necessary to be proved, but that a case of strong moral conviction is sufficient as a governing rule in cases of this description. But we are told that there is a subsequent case, overruling the authority of the Banbury Peerage case, viz. *Forster v. Cooke*.

Lord Chancellor.—In the case of *Forster v. Cooke* I was counsel, and I hold it a case of very little importance. It was a bill filed by Forster, a legatee under the will. He filed his bill to have his legacy paid; and in order to afford that relief in the Court of Chancery, it was necessary that the will should be established, and we cannot establish a will in the Court of Chancery without having the heir at law before the Court. The consequence was, that, inasmuch as that child, if legitimate, was the heir at law, and if not legitimate, another person (who is named in the case) was the heir at law,

^a *Pendril v. Pendril*, *Goodright v. Saul*, &c.

they were both of them brought before the Court, that the will might be established.

It was contended then, that the testator had made a will, and given this property to a child of whom his wife was at the time enceinte, and in case that child died, and left no issue, then he had given his property over to certain defendants of the name of Forster, and others. The child of whom the wife had been enceinte being still-born, it was contended, on the part of a subsequently born child, that, by virtue of the confirmation of the will made by another testamentary paper, he either came in the place of the child who was dead, or, on the other hand, that the event had not happened upon which the estates were given over. The Court of Chancery could not give any opinion upon the effect of the will with respect to the legitimacy, or otherwise, until the will was established, and it became necessary to direct an issue to try whether that after-born child was the heir at law, or, supposing him not to be the heir at law, whether another person, a party in the cause, was the heir at law; and it is clearly proved that the jury found that the after-born child was the heir at law. The cause then came on upon the equity reserved, and my Lord Thurlow was so decidedly of opinion that neither that heir at law, nor the other person, if he had been heir, had any title to the property, that he determined, notwithstanding the objections made to the title of those defendants to whom the estate was given over, that they were entitled to it. I believe I was counsel for the child whom the jury pronounced to be legitimate. I had no objection to that verdict; the person named

Edward Forster found it was not worth his while to take any objection, because he could claim under the construction Lord Thurlow put upon it. Lord Thurlow established the will, taking the verdict as his rule of proceeding, and as he had no motion for a new trial, he could not deal with that question. His Lordship took it to be quite clear, that if the decision was wrong in point of fact, unless E. Forster insisted against the verdict and had it retried, he would be bound by the decision which established the will against both. Speaking with all deference to Lord Thurlow, if I had had a doubt about the verdict, I am not quite sure whether I should not have ordered a new trial before I established the will. If the after-born child was legitimate, then he had a proper person before him, and if the after-born child was illegitimate, then E. Forster thought he had no right to the property.—Such is the history of the case; and there is the authority of a trial by jury, in which, as Mr. Tennant put it, a child born forty-three weeks after the death of its legal father was, under such circumstances, held clearly to be legitimate.

Mr. Attorney-General.—If that case were pressed as an authority, it would be material to inquire before what judge it was tried; whether a common or special jury; and what evidence was laid before the jury as the ground of their decision. Unless you have those circumstances before you, it is impossible that you can consider it a decision which ought to operate upon your Lordships, in the judgment you are about to pronounce on the conflicting claims which have been advanced at the bar.

As to the case of *Head v. Head* having substantially overruled, or being inconsistent with the *Banbury* case, your Lordships have only to advert to that case to see the contrary. The judgment admits and is founded on the same principle, and if I wanted another authority to support the position I am contending for, I would cite the case of *Head v. Head* for the purpose. Your Lordships will find that the husband and wife were separated, not by any formal decision, but by mutual consent; at a time when he might, by the course of nature, have been the father of the child, he was one evening alone with her in the kitchen of the house in which she resided, no other person being present; and he being with her under such circumstances for a very considerable period of time, the case went down to trial, and a decision was found in favour of the legitimacy. The jury were of opinion, upon the facts of the case, taking all the facts together, that there was no sufficient evidence of non-access to bastardize the issue.

I have before already stated that the dictum of Lord Ellenborough in *King v. Luffe*, did not apply to that case. It was adopted, however, by the learned judge who tried the issue in *Head v. Head*, and the jury were charged accordingly. The Vice-Chancellor, as well as the Lord Chancellor (on appeal), both held that it ought not to have been so put by the learned judge upon that ground, namely, impossibility, but that it was to be a case of evidence, as in the *Banbury* peerage. Yet, as it was the opinion of the Vice-Chancellor, that if upon any direction from the judge the jury had found a different verdict, it would have been his duty to have

ordered a new trial, it could not serve either the purposes of justice, or the interest of the parties, to submit the case a second time to the jury, in order to give to the defendant the chance of their coming to a verdict which, if they did find it, his Honor could not adopt.

So that the Vice-Chancellor upon that occasion states and admits, in opposition to the object for which that case was cited by my learned friend, that the rule laid down by the learned judge was too strong, namely, that it was necessary to prove a case of impossibility, but that the true principle was, that a case of strong evidence was sufficient to maintain the decision of illegitimacy: but then the Vice-Chancellor says, "the jury have come to a right conclusion, and though I think the learned judge has laid down the law too strongly, I will not send down the case again, because if the jury were to come to a different conclusion, I think they would be wrong". The result of that case therefore is not to adopt the dictum of Lord Ellenborough in the case of *The King v. Luffe*, for the Vice-Chancellor expressly finds fault with that dictum, as applicable to the case, whilst he adopts the principle of the *Banbury Peerage* case.

Upon these cases and these authorities, I trust I have satisfied your Lordships as to the principle upon which this case ought to be decided. I have endeavoured to inform my mind upon the subject, by looking into it with as much impartiality as I could exercise, where I had no particular interest. I have been desirous of ascertaining this principle correctly, because, until it is laid down to your Lordships' satisfaction, it will be highly nugatory to consider the evidence, for the evi-

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dence must be considered with reference to the principle. If your Lordships are of the opinion stated, let me for a moment call your attention to what the nature of the evidence is, and whether, if you are to decide upon all the circumstances given in evidence, although they do not amount to a case of physical impossibility, your Lordships can fail to come to the conclusion that Henry Fenton Gardner was illegitimate; because that is the issue which your Lordships are now assembled to try.

I took the liberty of referring to a part of the argument addressed to your Lordships by the Solicitor-General, but not very much pressed, because it did not appear necessary to press it. My learned friend seemed to consider that if the forty weeks were exceeded, in that case the child must in point of law be considered as illegitimate; but he afterwards receded from that position, for the rest of his argument was built upon the principle I have already stated, abandoning that as a position which, on cooler consideration, he was of opinion could not be sustained; and indeed, that position is at variance with some of the cases my learned friend himself cited, for in the case known by the name of Radwell's case, to which my learned friend referred, in the note from Coke on Littleton, the child was born ten days after the expiration of forty weeks from the death of the husband, and it was stated as an additional circumstance, that for a month previous to the death of the husband, he had laboured under a severe disease, from which circumstances, referring to the note of the reporter, it was presumed that the child was illegitimate.

So that that was the case submitted to the jury. The jury took all those facts into their consideration: the state of the husband previous to his death, the time of the birth of the child; and they came to the conclusion that the child was illegitimate. If the forty weeks had been in point of law a bar, all the rest of the inquiry would have been superfluous, and therefore that case shews that this excess in the period of gestation, with all the other facts of the case, is to be submitted to the consideration of the jury.

Again, my learned friend cited the case of *Alsop v. Stacey*, from a note in the same book. That was a case where the husband died of the plague, and the child was born at forty weeks and ten days after the death of the husband, and the child was declared to be legitimate, for it was said the period of the birth may by accident be protracted ten days. That is an answer, therefore, to the principle that forty weeks is an absolute bar in point of law.

Another case stated by my learned friend was *Thecar's* case. There the child was born 281 days after the death of Thecar. The wife married at the expiration of three weeks after the death of her husband, and was a woman of loose character. If she had not married again, no doubt the child would have been legitimate as the child of Thecar, though the 280 days had been exceeded, (as I think the report states,) by one day and sixteen hours; therefore there is no positive rule of law upon the subject. The question was submitted to the jury; they found the child the child of Thecar.

Again, in another case which has been referred to,

the case of *Alsop v. Bowtram*, reported in *Croke James*, the child was born nine days after the expiration of the forty weeks.

We come, therefore, as I before stated, to the question of fact, of which all the circumstances are to be taken into consideration; and that being the case, permit me to recal to the recollection of your Lordships what are the facts which the evidence has established. On the 30th of January Mrs. Gardner was on board the *Resolution* at Portsmouth; on the 30th of January she quitted the vessel, went to the neighbourhood of Southampton, and immediately afterwards came to London. Three witnesses have proved that she never was again on board the ship; two witnesses have proved that Captain Gardner never left the ship; there was no possibility of intercourse between them, therefore, after the 30th of January. The child was born on the 8th of December, therefore it was born in the middle of the eleventh month, that being 311 days from the 30th of January to the 8th of December. Now although there are cases which have been submitted to the consideration of a jury and other tribunals, where the child has been born more than forty weeks after the death of the husband, or after the possibility of intercourse with him, there is no case in this country where a child born four weeks and three days beyond the forty weeks has been declared legitimate. There is no case approaching to that. I place no reliance in *Forster v. Cooke*, for the reasons stated by one of your Lordships, and if it be put out of our consideration, the case of the greatest excess in which a child has been declared

legitimate, is ten days after the expiration of the forty weeks. In the present instance your Lordships are desired, upon the bold statement of my learned friend, that you will be justified in point of law, to declare the child to be legitimate, notwithstanding the excess amounts to four weeks and three days beyond the forty weeks, all the witnesses agreeing in this, that the natural time is forty weeks, or 280 days, and that if there is any excess beyond that, it is a deviation from the ordinary established rule of nature. I ask your Lordships, supposing a bare simple case came before you, supposing you had no evidence of the conduct of the parties, are your Lordships prepared to say that a child born forty-four weeks and three days after the separation of the husband from the wife would be legitimate, contrary to everything which has ever taken place or been decided in this country, contrary to the express rule in the law of Scotland, and contrary to the express rule of the civil law, which is to be taken as the general law of Europe?

Having stated the period for which these parties were separated, now let me call your Lordships' attention for a moment to the conduct of the female. While she is on board of the vessel she writes a letter addressed to Mr. Jadis, the contents of which are not stated to your Lordships; she does not choose to direct that letter with her own hand, because, if by accident it had come under the view of Captain Gardner, it might have excited his suspicion; she desires her servant to direct it; and she gives it to a person to take on shore, in order that it may be sent. The instant she parts from Captain Gardner she follows her letter, and almost imme-

diately on her arrival in London Mr. Jadis calls upon her; obviously shewing that the object of the letter was to apprise Mr. Jadis of her intention, that he might have an opportunity of meeting her. Within a fortnight after that period, according to the testimony of Susannah Baker, Mrs. Gardner is found in the bedroom with Mr. Jadis, under such circumstances as to leave it impossible to suppose the act of adultery had not been then committed. Mr. Jadis was left in the bedroom of Mrs. Gardner; the bed was then arranged. Susannah Baker was under some pretext sent away, and when she returned in three-quarters of an hour, Mr. Jadis was gone, and the bed was tumbled. Can any one doubt that the act of adultery had been at that time committed? From that period Mrs. Gardner kept up such an habitual intercourse with Mr. Jadis, that no human being can doubt they were living in a state of adultery. At what period was this? In the month of February and in the month of March. And your Lordships are desired to presume this extraordinary circumstance, that the husband being separate from his wife; being absent, at a distance; having almost arrived at the West Indies, and the female herself being proved to be nightly in the arms of the adulterer, at the time when the child must have been begotten in the ordinary course of nature,—yet to presume the child must have been the child of the husband and not of the adulterer. I think that is a very extraordinary demand to make upon your Lordships' judgment. If I am entitled, then, to consider the conduct of the parties, which has been in all cases taken into account, the House will

have to consider, not the mere character of the woman, as in *Pendrell v. Pendrell*, but the very acts of adultery of the woman at the time when the husband had no access to her, and corresponding to the very period when the child would be begotten, as calculating from the time of its birth.

We have heard that Susannah Baker is not entitled to credit. I see nothing to impeach her testimony, and the most material part of it, viz. the adultery, has been confirmed by proof to the satisfaction of a jury, to the satisfaction of the Ecclesiastical Court, and to the satisfaction of this House. But if these three tribunals were deceived, there was a very easy mode of meeting the testimony of Susannah Baker. Mr. Fenton Gardner had it in his power to produce a witness, competent to elucidate every part of this inquiry. His counsel might have confronted Mrs. Gardner with Susannah Baker; and their failing to do so, their pretext for Mrs. Gardner's absence, is a tacit avowal of their conviction that her absence was absolutely destructive of their argument, and of the cause of their client.—But it is made a matter of reproach that the Solicitor-General had not called Mrs. Gardner. Why was he to call her? He had made out his case by other evidence, and I never heard it used as a reproach, that where a case was satisfactorily established, further evidence was not called to fortify it. But why should he call her? Obviously she would be a very unwilling witness; obviously she would be desirous of overthrowing his case; and I never yet heard it charged against a counsel that he did not call a witness whose inclination and interest were opposed

to his client's success. But, again, if he had called this witness, could she have been compelled to answer? Could she have been compelled, when asked whether she had committed an act of adultery, to answer that question? Certainly not. The counsel, therefore, for Mr. Alan Legge Gardner are not to be blamed for the course they have pursued towards this lady.

But, my Lords, look to the situation in which the counsel for Mr. Fenton Gardner were. If they had called this lady, had she not every possible interest in establishing the legitimacy of her son? What is the claim he is making? To one of the highest dignities in this country; to the large estate that happens to accompany the title. She must be desirous of supporting his claim; she has every interest in establishing his legitimacy.

But then it is said that Mr. Henry Fenton Gardner would never allow his mother to come here in a case of this description. Why, if Mr. Henry Fenton Gardner has instructed his counsel to state to your Lordships that, in addition to having committed adultery, she was committing this gross and infamous fraud; a fraud upon Mr. Jadis, a fraud upon her own son, in which she has persevered for sixteen or eighteen years, are we to suppose that the lady is so very scrupulous as to refuse to come to this Bar, and to clear her own character? The adultery has been established over and over again; nothing could be added upon that head; but she had a very great interest in coming here to assist her son. What was the observation made by my Lord Ellenborough in the Banbury

Peerage Case ? "The natural witness to prove the legitimacy of her son was Lady Banbury." Lady Banbury was not called as a witness at the investigation, and my Lord Ellenborough referred to this, as a strong circumstance, to shew that the child was not the child of Lord Banbury, but the child of Lord Vaux, and therefore the reproach cast upon my learned friend, the Solicitor-General, for not calling Mrs. Gardner, is totally unfounded, and the failure of Mr. Tennant to call that witness, is in my mind decisive, to satisfy your Lordships that the facts stated by Susannah Baker are true, that the child was not, nor could by possibility have been the child of Captain Gardner, but was the child of Mr. Jadis.

Now, my Lords, let us proceed a step further. This adulterous intercourse continued until the month of July, when Captain Gardner returned to this country. It continued afterwards during the time of Captain Gardner's residence in this country, up to the period when she was delivered of the child in question. It is said that Captain Gardner knew of his wife's pregnancy. My Lords, I do not dispute that fact: it appears so upon the evidence; but what did the lady do? Upon his return to this country, she insisted that no intercourse should take place between them; she represented herself to be in such a state of health as that they must sleep in different beds, and in order to prevent any intercourse, her maid servant slept always in the same room: she imagined that she might be enabled to accelerate the birth of the child, so that it might be ascribed to Captain Gardner. What is the

evidence upon that fact? Doctor Clarke, her medical attendant, advised her to drive as much as possible over the rough pavement of London: she stated this, and that the object of it, was to accelerate her delivery. My learned friend Mr. Tennant says, this is not evidence; my Lords, I submit to your Lordships with confidence, that it is evidence; it is a declaration accompanying the act, and explaining the reason for which the act was done; and it is clearly evidence. A strange theory is resorted to, in order to account for this conduct. It is said to your Lordships that Mrs. Gardner was so infatuated with the love of Mr. Jadis, that though she knew her child to be the legitimate offspring of her husband, she was desirous of pretending to Mr. Jadis that he was his son, in order that Mr. Jadis might, out of compassion and out of feeling for herself when a divorce was obtained, unite himself with her in marriage. My Lords, this is all destroyed by the evidence in the cause; and even if it were not, the marriage is now effected, and she might have retraced her steps. If she is bold enough through counsel to avow that to be the fact, why should not she come here to avow it upon her oath? The evidence clearly shews her to be innocent of any such design. It proves that she had a strong desire of anticipating the birth of the child, that she might ascribe the child to Captain Gardner, and escape any imputation of adultery.

She finds at last, my Lords, that all her attempts are ineffectual; she finds that the child cannot be born within such a period as to ascribe it to Captain Gardner. What course does she then pursue? She says, "I am

"not with child, and it is all a mistake." That is in the evidence of Susannah Baker, and it is in the evidence of the Honourable Herbert Gardner, for she then says, "she supposed she has a dropsical complaint, and that "it was a mistake; that she was not pregnant:" so that you find she endeavours by every means in her power to accelerate the delivery. When she finds she cannot accelerate the delivery, she has recourse to another expedient, to conceal her crime from the eyes of Captain Gardner;—Mr. Gardner is asked "when "was it she pretended to have had the dropsy?" and he states "the period which was late in the season, "after she had found the attempts she had before made "ineffectual."

When at last the period arrives for her delivery, how does she act upon that occasion? She sends for her brother, Mr. Adderley; they have a private conversation; and Mr. Adderley goes to the husband, takes him out of the house, and keeps him out the whole day, and the whole of the following night. He does not come home till the next day; and during the intervening period the child is born,—the child is born early in the morning, and, as soon as can be accomplished, is privately removed out of the house. Is it not obvious therefore that she had endeavoured to conceal her pregnancy from Captain Gardner? Sleeping apart from him, pretending that she was not pregnant, getting him out of the way, and putting the child out to nurse, first in Swallow Street, and afterwards in Aldersgate Street. But further than that, she endeavours to conceal it from all the house, for one of the women states, that

she had been accustomed to make Mrs. Gardner's bed. It would not have been convenient that she should have made the bed immediately after the delivery, for that would have spoken; the nurse makes the bed with Susannah Baker, and the woman is prohibited from all access to the room. Another circumstance: her linen had been usually washed at home; it would not do that the linen should be washed at home during that period, it was all sent out: so that the whole system of the establishment was changed for the purpose of effecting this concealment. Captain Gardner comes back afterwards, and it does not appear that he had any certain knowledge of his wife's misconduct till the April following, when he received the communication from Davis, the footman, that caused an immediate separation.

My Lords, how does Mr. Jadis act? Two days after the child is born he goes to Aldersgate Street for the purpose of seeing it, and he visits it there twice. After Mrs. Gardner had been separated from her husband and had gone to Bayswater, the child is brought to her there. The child passes by the name of Jadis, is recognized by Mr. Jadis, and calls him always papa. But that is not all; these parties are afterwards married, they live in Hertfordshire and afterwards in Surrey; the child is during the whole of the period called Jadis, and calls Mr. Jadis by the name of papa or father. He is put to school: by whom? By Mr. Jadis; and we find him as the son of Mr. Jadis, first at Westminster, and afterwards at Croydon. So that during the whole progress of his life up to a late period, he is considered to be the son of Mr. Jadis, both by Mrs. Gardner and Mr. Jadis himself.

These are the facts of the case, and I beg to remark the similarity they bear to the facts in the Banbury case: first, there was an improbability of Lord Banbury being the father on account of his age; here I say there was an extreme improbability of Captain Gardner being the father, by reason of his absence. There the child was born in the house of the husband: the birth concealed: here the birth was in the husband's house, and was also concealed. There the child went by the name of Vaux: here the child goes by the name of Jadis. There the mother was not examined as a witness for the purpose of proving the legitimacy, and that was insisted upon as an objection to their case: here is the same defect in the evidence, and consequently the same imputation. Mark, then, how similar, in the principal points, the circumstances of this case are to the circumstances which occurred in the Banbury case. Thus, then my Lords, it seems impossible, as I say, at all events in the highest degree improbable, that Captain Gardner could have been the father of the child; and I ask, whether, on a consideration of this evidence, your Lordships can entertain any doubt whatever that it was the child of Mr. Jadis. I put it upon this issue, as now put by Mr. Tennant himself, whether your Lordships can entertain any doubt that this was the child of Mr. Jadis, and not of Captain Gardner.

There is a part of the evidence to which I think it my duty to advert; I mean the medical evidence, and when your Lordships come to consider the weight of that evidence, you will find that it makes no alteration whatever in this case, but that the consideration of that

evidence is decisive against the claim of Mr. Henry Fenton Gardner; and I beg your Lordships' indulgence while I comment upon this evidence, which I feel in the discharge of my duty I am bound to do.

First as to the principle. The witnesses on both sides state that 280 days is the extreme of the usual time of gestation. This is not confined to the witnesses on the part of the claimant, every witness on the other side states that the extreme of the usual and natural time, according to the ordinary course of nature, is 280 days; but then, it is said, there may be exceptions, prodigies may happen. Be it so; then it is incumbent upon those who contend for the exceptions to make them out. The onus is on the side of those who say there are exceptions. Am I right in stating,—because I am desirous of putting the question properly to your Lordships,—am I right in stating that this is the mode in which the question is to be considered on the medical evidence? They say there are exceptions, and call upon us to consider this as a case of exception, and therefore the onus of proof is upon them, and the proof must be such as to exclude any reasonable doubt. These prodigies will not be believed on secondary evidence: your Lordships will require clear and decisive, distinct and convincing evidence; and when these pretended cases of exception are examined, it will be seen that there is nothing established in that satisfactory way which ought to be the ground of action in a case so important as the present. I say nothing as to the character of the witnesses. My learned friend, Mr. Tennant, has very properly stated that the witnesses called

on the part of the claimant are witnesses of great honour, of great intelligence, and great experience, and that they state the result of their judgment fairly, truly, and honestly. He has added that they all state 280 days to be, under any circumstances, the extreme period of gestation, and that their grounds for this position are not very good, and he refers to the reasoning of Mr. Clarke. I really can find no fault in the reasoning of Mr. Clarke. Questions are put to the witness, and he gives his answers in the best manner he is able. He says, "from my own experience, as a medical man, I am satisfied 280 days is "the extreme." He is asked, "are there any cases "from which you can speak to that? "Why" (he states) "I have been confidentially advised with by "persons, who, having got into critical situations, have "advised with me for the purpose of protecting their "character. It was desirable to them that the time of "their delivery should be precisely ascertained, that "preparation might be made for concealment; they had "every interest not to mislead me. I have acted upon "that presumption, and I have in all cases found that "which I knew to be the general rule confirmed." Surely any reasonable man would say that was very fair. "My general observation, and my general knowledge, "so far from being contradicted by those individual instances of this striking character, have in various "instances been materially and essentially confirmed." Then again, Mr. Clarke says, "I have always found "that the time was never more than forty weeks from "the day preceding the next expected menstruation,

"and therefore I conclude forty weeks was the time."
 "No," says Mr. Tennant, "that cannot be presumed,
 "because the child might have been begotten previ-
 "ously." But Mr. Clarke says, "out of the great
 "multitude of children born, if the extreme were not
 "forty weeks, there would be a great number of in-
 "stances in which more than 280 days would elapse
 "from that particular period; and as I find no instances,
 "I come to the conclusion that 280 days is the extreme
 "term." I ask whether that observation is not fair, and
 whether my learned friend's observation upon his testi-
 mony is correct?

Then again, an observation is made by my learned
 friend on Dr. Blegborough's evidence. He had been
 asked as to books. He said, "I had rather rely upon
 "my own observation of facts. It is not men of great
 "experience generally who write books on medical sub-
 "jects, they are in great practice, and their time is very
 "much occupied. Men of great intelligence may write
 "books on medical subjects, but they are in general
 "persons not in so much practice, and they must there-
 "fore take their reports from others." My learned
 friend perverts that, and says Dr. Blegborough stated,
 that wise men never write books; that was the phrase
 Mr. Tennant made use of. Dr. Blegborough made no
 such observation; but that it is not men in the greatest
 practice who write books. These are some of the ob-
 servations. I rather take them as a sample of the sort
 of observations on the evidence of the witnesses. I call
 your Lordships' attention to these, not so much for the
 weight of them, as for the sake of the very respect-

able character of the witnesses to whose evidence they relate.

Having, I trust, satisfied your Lordships that this is the correct principle, that both parties are agreed, that 280 days is (to use the expression of one of the witnesses) the general course of nature, the first question is, whether they have made out any exceptions? The first witness called for that purpose is Dr. Granville. I shall say nothing to his disadvantage; but he introduced himself to the attention of your Lordships by a singular statement, that he had waded through 9,000 women, and that he came here with his register books, hoping that he should be able to satisfy your Lordships, as he had satisfied two Committees of the House of Commons, who had established some novel doctrines in consequence of their inspection of those documents; I give them joy of their conclusions. He stated that he had satisfied himself that a woman might go on to eleven months; but notwithstanding his alleged accuracy, he was not able to establish, to the satisfaction of your Lordships, one of those supposed cases, and he was reduced at last to one case which he called a case in his private practice, and which turned out to be the case of his own wife. And what is that case? That was where a child was born ten months from the time when menstruation *ought* to have taken place. Now giving Dr. Granville credit for accuracy, this can scarcely be deemed a fact on which your Lordships can rely, when you recollect how distinctly it has been stated by several of these witnesses, that menstruation may be suspended from a variety of causes, and children may

be begotten during that suspension of menstruation. Dr. Conquest says, "I think the evidence connected with menstruation so uncertain, that, as I have before stated, I found my calculation more on the circumstance of quickening. Women are constantly becoming pregnant while performing the duties of nursing." In another part he says, I believe, "I have once or twice stated that I consider all the evidence connected with menstruation of so uncertain a character, that I have not allowed myself to determine upon it."

Now, my Lords, that is the evidence of one of the principal witnesses called by Mr. Henry Fenton Gardner: he states, "that the evidence arising from menstruation, or the discontinuance of menstruation, is of so uncertain a character that you can place no great reliance upon it." Is he singular in that opinion? Without troubling your Lordships with reading the particular passages, five or six of the witnesses called on the part of Mr. Henry Fenton Gardner depose distinctly to the same point; and I wish, in confirmation of that which is stated by them, to refer your Lordships to the opinion of two persons, whose opinions have been quoted in the course of this inquiry: I mean Mauriceau and Haller. The former is said to have been a man of great practical experience as an accoucheur; he says, "women continually deceive themselves as to the times of pregnancy from taking, as the test of the time of the pregnancy, the appearance or disappearance of menstruation." The words of the original are, "ce qui les trompe ordinairement, est

“qu’elles croyent être grosses depuis le temps de
 “la retention de leurs menstrues, les ayant eües du-
 “rant les deux premiers mois de leur grossesse, ou
 “même quelquefois plus long temps; et d’autres sont
 “pareillement deçues, a’ cause qu’elles leur estoient
 “supprimées un ou deux mois avant que de concevoir.”

So that he says it frequently happens one or two months before the woman is actually got with child, that is to say, before conception takes place, that menstruation may have been suppressed or discontinued; he therefore confirms the testimony of Dr. Conquest, in stating it to be so unsafe a test, that you can place no reliance upon it. Again, Haller says, “cum sola mensium suppressione pro mensura utantur, plusculis nonnunquam mensibus aberrant, sive per graviditatem expurgationes non interrumpantur; sive ante conceptionem menses cessaverint.” So that your Lordships see, that according to the testimony of Haller, women are continually deceived, because menstruation ceases very often a considerable time before conception takes place; and Dr. Denman (also a practical man) confirms the same in his treatise; he says, “the disappearance of the menses is usually the first change which occasions a suspicion of pregnancy, but some women have conceived who never did menstruate, or in whom menstruation had been interrupted for many months.”

Having laid down this, as the principle deduced from the evidence, and confirmed by the authorities to which I have referred, what is the case of Dr. Granville? Supposing his notes and dates to have been correct, it amounts to nothing more than this, that measuring

from the date he supposed it would take place, the woman was not brought to bed till ten months. I think that amounts to little or nothing in your Lordships' judgment.

The case of Mr. Sabine is a case of the same description.

I come next to Dr. Conquest: he states three cases, and it is remarkable that nothing occurred in them which he can state of his own knowledge; he says, "that until the females had passed the ninth month he was not induced to make any inquiries into the particulars of the pregnancy; and it was only then that he began to investigate the grounds on which the opinion of the female was founded;" and he ultimately admits, "that the only possibility of obtaining evidence on the subject, was by the representations of the females." There is nothing therefore decisive in Dr. Conquest's evidence; but Dr. Conquest says, "I have read a great deal upon the subject, and can I bring myself to doubt what such men as Livy, and Pliny, and men of that character have said upon this subject?" A man must certainly be very fond of what was extraordinary, who would select Pliny and Livy as his authorities; they were undoubtedly men very fond of prodigies. I have some extraordinary passages which I have no doubt the learned Doctor had been reading, "*Scuta duo sanguine sudasse.*" "*Gallinam in marem, gallum in foeminam sese vertisse.*" "*Has tam Martis Præneste sua sponte promotam.*" "*Bovem in Sicilia locutum.*" "*Infantem in utero matris, in Marrucinis, 'Io triumphe!' clamasse.*" "*Ex mu-*

"liere Spoleti virum factum." This is one of the grave authorities produced. "Should I doubt", says Dr. Conquest, "what is said by such men as Livy and "Pliny;" Livy being, for a philosopher, if I may make use of the expression (there being no ladies present) one of the greatest old women that ever lived^a.

My Lords, with these observations I pass over this evidence of Dr. Conquest, and come to the evidence of Dr. Merriman, who is known to be in great practice, and it appears therefore desirable to refer to him. He says there were three cases in which the period of gestation was protracted beyond ten months. I need not state the facts as they appear in the first statement, for they are more particularly referred to in the cross-examination. "The three hundred and "three days you have stated, are calculated from what "period?—From the time at which the last appearance "of the menstruation ceased, from the termination of "the monthly period. Was that the case of a married "woman?—The case of a married woman. It was "three hundred and three days from the cessation?—"Yes. Calculating from the next period you would "deduct twenty-eight days from that?—Certainly. And "the intercourse which produced conception might "have been the day previous to the next period?—"That is possible." Now taking the facts as they are here stated, supposing the intercourse which produced the conception to have been twenty-eight days after

^a There are more than sixty of such prodigies recorded by Livy.

the last monthly period, that would reduce the time to 275 days; if you deduct the twenty-eight days therefore, it is five days short of the extreme period: so that with respect to Dr. Merriman's instance, if you assume that immediately subsequent to the last menstruation conception took place, it is ten months; but if it was immediately preceding the next expected menstruation, it would be only thirty-nine weeks and two days. Your Lordships see how material it is to sift these examinations; Dr. Merriman might have reported this to some gentleman who was writing a book upon the subject, and that gentleman might have said Dr. Merriman stated upon his own authority a case he had known of conception after ten months.

Then with respect to the next case, Dr. Merriman is asked, "the one of forty-two weeks and two days, was that the case of a married woman also?—Yes. In that case you were not called in till a short time before the woman expected to be delivered?—A few months, two or three months before. The forty-two weeks and two days in that case are also calculated from the period when the menstruation ceased?—Yes. So that if the intercourse which produced the child had taken place precisely in the middle between the two menstruations, it would have been a period of forty weeks?—Exactly so. Which is all in the regular and natural course of things?—Which is all in the regular and natural course of things. The first was also the instance of a married woman living with her husband?—Yes. The calculation is made on the same principle there also?—Precisely so. What was

“the number of days?—Three hundred and nine days.” So that as to the second case, he states, this being the case of a married woman sleeping every night with her husband, if it took place half way between the two periods it would have been in the regular course of nature.

The third case is of the same nature. I have taken them in the inverse order. “The first was also the instance of a married woman living with her husband?—Yes. The calculation is made on the same principle there also?—Precisely so. What was the number of days?—Three hundred and nine days. Menstruation ceased on the 7th of March, and you calculated from the 8th of March your 309 days?—I calculated from the 8th of March, because the lady said there were particular reasons which led her to believe that she fell with child on the 8th of March: she was a very virtuous modest woman, and it did not become me to ask what her particular reason was. Though a very virtuous modest woman, she was still living with her husband?—Yes. And though a very virtuous and modest woman she might have had intercourse with her husband subsequently?—Yes; and therefore she had no reason to conceal any fact from me. How soon did you see her after the 8th of March?—I am not sure whether in October or November. You saw her at a long interval after the supposed cause of conception?—Certainly.” Then he is asked, “If you were to take the twenty-eight days, the interval between the two menstruations, from the whole number of days, it would be all in the ordinary course of

“ things ?—It would then exceed, by a few days, forty weeks. By only one or two days?—One day.” So that if you were in that case to suppose the conception to have taken place the day previous to the next expected menstruation, the time will have been exceeded only by one day. That is the evidence of a most respectable witness, Dr. Merriman, and so far from the cases to which he refers establishing the exception, they, so far as they go, operate directly the other way.

I am sorry to detain your Lordships, but it appears to me necessary, in a case involving such important consequences, that I should comment upon the evidence of the witnesses called to prove these prodigies. If prodigies, they are to be established by clear and satisfactory evidence ; they are all out of the course of nature ; let us see, then, whether they are proved by satisfactory evidence. Dr. Henry Davis is next called : he has practised midwifery upwards of twenty years, and he is asked, “ Without inquiring into the ordinary time of gestation, of which we have heard so much, in your experience have you known any case of any extraordinarily protracted gestation ?—In my experience, I have not, except in one instance, and then I was led to believe it was owing to some mistake of the patient.”

We then come again,—and he is a most important witness,—to the evidence of Dr. Granville. Objections had been made to his testimony, because the instances he produced were some of them not in his handwriting, and some entered from the books of others. Your Lordships were of opinion the evidence was not legal,

and Dr. Granville was called to supply those defects, and he gave evidence to a considerable length. Objections were made, which were allowed by your Lordships, and the result was, that, on his second examination, Dr. Granville gave no evidence which was admitted by your Lordships. On his third examination—I will take the two together—he says, “I now have a case of a very extraordinary kind, for I have a witness, Mary Parker, whom I will produce before your Lordships; she is now in a state of pregnancy, and she has gone with her child a period of eleven months, and I cannot be deceived.” Now the evidence of Mary Parker is very conclusive on the subject, and shews how important it is to adhere to the rules of evidence. A noble Lord interposed in the course of the inquiry, and said, “All these deductions may be very good, but let us know that the facts are established by legal evidence”; and thereupon it was that my learned friend, the Solicitor-General, and myself, on the part of the Crown, urged, that they must establish the facts before they drew their conclusion. In consequence of that objection this witness was called: and now let me call your Lordships’ attention to the evidence of Mary Parker. When she was produced at the bar she appeared to be with child. She was asked, “Are you at present in a state of pregnancy?—Yes. How long have you been in that state?—I think nearly about eleven months.” Here was a case of eleven months’ gestation, which Dr. Granville was prepared to state as one which had occurred under his own observation. The fact was, she was suckling; during the period of

suckling an appearance took place ; that appearance was not renewed again the next month, but at the expiration of the second month the child did not suck, and the woman therefore gave over suckling. Nearly nine months elapsed from the period of her giving over suckling : how did she reckon then ? “ I had an appearance eleven months ago ; I had no appearance the month after that, and as nine months had elapsed since that time, I add the nine to the two, and I have been in a state of pregnancy for eleven months.” Upon this she was subjected to a further cross-examination, and your Lordships will see how the story tells. “ Are you able to state when it was that that last appearance took place ?—“ Yes ; it took place the latter end of this month twelvemonth. The latter end of July in last year ?—Yes. (By a Lord) Did that appearance take place during all the time you were suckling ?—No, only that once ; that was all. You continued suckling afterwards ?—“ Yes. And it did not take place again ?—No. During the time you were suckling, were you ever as women usually are ?—Only that once. When was that ?—The latter end of July last year. After that you continued suckling ?—Yes, till the doctor who attended this little girl said it was the milk that made the little girl very ill. And then you left off ?—Yes. The milk made your little girl very ill just nine months ago ?—Yes. And then you left off ?—Yes. Did you yourself feel at all different just about that time ?—“ Yes, and so my mother thought the same, from my appearance. How did you feel ?—I felt just the same as I did with my first child.” So that the first thing

that struck her was that her child turned sick, which it would do, in all probability, from the conception: it does not appear that that was longer than nine months before her appearance. Here your Lordships, I am sure, must feel that it is very happy that we have cases of this kind. Dr. Granville says, "I have a clear case of "eleven months; I will prove it from my register." That appeared certainly upon the registers when they were produced. The witness is called herself, and on her examination the whole calculation is overturned, and there is nothing to satisfy any reasonable mind that she had gone more than nine months with child. Do not your Lordships see the absurdity of relying upon such cases to assist the calculation, and the necessity of examining into the cases stated by medical men? And it would be dangerous to adopt their inferences without minute inquiry. It is the character of some men to adopt extraordinary conclusions, rather than to examine into the extraordinary appearances which afford them amusement and pleasure. .

The next witness is Dr. Richard Denison; he is asked, "What do you call the natural time of gestation?—Nine calendar months, or 280 days." "On "what do you ground your judgment that she exceeded "the natural time of pregnancy?"—he having stated one case—"From the account she gave me of the expected time of her labour. What account did she "give you?—That she expected about the middle of "such a month. Did you examine her in order to see "whether the ground of her opinion was a just one?—"Not particularly, because I had no reason to doubt

“ her accuracy any more than that of any other patient.
 “ Did you ask no question as to other circumstances,
 “ which would have guided your own judgment?—It is
 “ not a common thing to do so: when a lady comes to
 “ me, I ask when she expects to be confined, and I
 “ make a memorandum of it. Do you find women very
 “ often mistaken?—Decidedly, that they miscalculate fre-
 “ quently a fortnight; a fortnight or three weeks is not
 “ unusual.” As a proof that this case of Dr. Denison’s
 amounts to nothing, when it comes to be examined, his
 own admission is quite sufficient when he says, “ I find
 “ women frequently miscalculate, and I knew nothing but
 “ what she represented herself.”

Dr. Hopkins states two cases; and I beg your Lord-
 ships’ particular attention to the evidence of Dr. Hop-
 kins. He says, “ There was an extraordinary case oc-
 “ curred, it was not within my own knowledge, but my
 “ father was an accoucheur, and he told me this case
 “ early in life, shewing me that it was an absurd notion
 “ that women could not go more than nine months:
 “ that case”, he says, “ is most conclusive.” Thus
 it appeared on Dr. Hopkins’s statement. After-
 wards, however, the lady appeared at your Lordships’
 bar—they could not discover her in the first instance,
 but they made a search, and they produced Mrs.
 Mitchell, the wife of a purser in the navy,—and she
 gave this extraordinary evidence: I was married at
 sixteen to Mitchell, a purser in the navy; my hus-
 band came up from Plymouth; he was with me a
 fortnight, and left me on the 6th of June, 1798. It
 is suggested that it is a long time to remember this—

“ Oh, I recollect it perfectly ; I am quite certain he was “ with me a fortnight, and left me again on the 6th of “ June, and the vessel afterwards went to Cork.” She is asked by one of your Lordships, “ When did you “ first mention this extraordinary circumstance of the “ child being not born till ten months ?” and she says, “ I did not mention it for a long time, but when my “ daughter was of age, I mentioned it to her. I did “ not think it delicate to mention it to her before that, “ and I never talked of it afterwards.” So that your Lordships see that this conclusive case, upon investigation, turns out to be a case reported by a woman, who never mentioned the extraordinary circumstance to any one till twenty-one years afterwards. Your Lordships would be led to take this as conclusive evidence that she had gone ten months with child. But she told us the name of the vessel, the Galatea, on which we directed inquiry to be made, and we had the Galatea’s muster and the log. There are two musters, one being a muster kept as a check by the officers in the dock-yard, who pledge their accuracy. I apprehend that it was the duty of this man, who was purser of the ship, to muster the vessel, and he was himself mustered regularly. On the 1st of June, when this woman said he was in London, he was on board ; on the 4th of June, when this woman said he was in London, he was on board ; and he was regularly mustered during the whole of the month of May and the month of June. Your Lordships know very well that if a person is absent from a vessel when the vessel is mustered, there is a record—a minute—made of his absence, of the ground of his ab-

sence, and of the place to which he is gone. Captain Byng, now Lord Torrington, who commanded the vessel, had been absent, and that was regularly entered; other persons had been absent on account of sickness, and they were all regularly entered; but there was no entry whatever of Mr. Mitchell having been absent in the month of May, or the month of June, though it was stated by this woman that this man was in London, folded in her arms, fourteen days in the latter end of the month of May, and the first week in June; and eight times in each month this man, Mitchell, actually signed, with his own hand-writing, the muster-book and other documents on board that vessel: so that your Lordships see how little reliance is to be placed upon the facts stated, from which the conclusions are drawn, when you examine into this most conclusive case, stated by Dr. Hopkins to have been communicated to him by his father, and which let in that flood of knowledge of which he has since availed himself.

Now, my Lords, as to the fact Dr. Hopkins states to have fallen within his own knowledge, it is really marvellous how every one of these cases is open to observation, and how little conclusive they are when used for the purpose of establishing this exception to the law of nature. He states that he was called in in the month of December—I beg your Lordships to remark that date—"I observed the abdomen very much enlarged, "and from every appearance it was a four months' gestation." So that, judging merely from the extension of the abdomen, which is different with different women at different periods, he thought she had gone four

months. The child was born on the 4th of June. He did not tell us the period in the month of December that he was called in: if he was called in on the 23d or 24th of December, there would be nothing remarkable in the circumstance; it would be within the time—"I was called in in the month of December; a child was born on the 4th of June." Supposing he was called in in the latter end of December, it was merely a nine months' gestation, but if it was in the early period of December, his conclusion from her appearance, which is admitted by himself not to be a decisive test, was, that it was a ten months' child. I apprehend this case stated by Dr. Hopkins is entitled to no weight, and can carry conviction to the mind of no individual whatever.

My Lords, it appears to me that the evidence of Mr. Hawkes is entitled to but little attention. His distinction between male and female gestation, and his observations on the relative numbers of male and female births, are contrary to the experience of every other practitioner.

Then Dr. Blundell is called; he is a most respectable man, and has had considerable practical experience, and he gives us one instance where a woman went more than nine months. He says he was called in about a fortnight after the supposed impregnation took place, and from the conversation he had with the woman, and from her appearance, he conceived she was pregnant, and if so, he says the period exceeded forty weeks. Now I beg your Lordships' attention to dates: on the 21st of November he was called in; the child was born on the 23d of August, an interval of 287 days; take the

days he states, and it is seven days above the 280 days; on the first impression it appears to have been a fortnight. He was called in a fortnight after the woman supposed she was impregnated, "and from her appearances and declarations," he says, "I think she was with child; but she was a married woman, living during that fortnight with her husband, and there was nothing to shew that the impregnation did take place in the interval." If it had taken place at seven days, instead of fourteen, it is all in the regular course of things, and does not exceed the 280 days; therefore Dr. Blundell's case amounts to nothing. And supposing you had, in one instance, evidence, so decisive as to leave no doubt upon your minds of a case of gestation seven days beyond the 280 days, would that lead your Lordships to say that gestation may be protracted four weeks and eleven days, that is, nearly to the middle of the eleventh month, the period necessary to establish the legitimacy in the present case? I apprehend your Lordships will never come to such a conclusion.

Dr. Power is I think the only remaining witness, except the female witnesses, whom I shall dispose of with a very few words. Dr. Power, your Lordships will recollect, read not a very pleasing lecture at your Lordships' bar on the subject of midwifery. Your Lordships will find that the whole of his cases proceed upon the representation of facts by females, and I think I have satisfied you that not the slightest degree of reliance can be placed upon conclusions formed upon such principles; for the only cases deserving of particular attention, where we had the testimony of the females

themselves, are that of Dr. Granville's case of Mary Parker, and Dr. Hopkins's case of Mrs. Mitchell, and when we come to examine the facts, we find that there is no foundation for the elaborate conclusions that have been drawn from them. Dr. Power states it in the same way: "Do you know any instance of gestation having been materially protracted beyond the ordinary period?" —As far as I can draw an inference from facts communicated, I have known cases. When you say, or when you said before, you had known instances of gestation being protracted beyond the ordinary period, you calculated the period from some fact communicated to you by the woman, was that so?—Certainly; I cannot calculate it from any other circumstance. That fact is from the menstruation, or the period of quickening?—I think I may say another ground. As communicated by the woman?—As communicated from the woman; only from those points, of course: I think I have seen a case in which labour has apparently come on, if not commenced, at what the woman has believed to be her proper time, and it has been postponed nearly a month after that time. The communication from the woman must have been as to the time when she expected it?—The woman believed herself at her full period." That, my Lords, is really the whole foundation for the inference, and your Lordships will find that he goes on with some further observations: "Is it not common for women to be mistaken as to the time they expect?—I believe it is not uncommon. Is it not common?—It is not uncommon." So that his whole inference arises from facts

stated to him by women, as to the time when they last menstruated, and the still more uncertain test, as to the time when they quickened, in which they may be most mistaken, and which varies from twelve to fifteen weeks: It is from these facts Dr. Power draws his conclusion, that the period of gestation may be protracted more than nine months. This is the sort of evidence upon which they seek to establish this prodigy—this deviation from the ordinary course of nature.

I have now gone, my Lords, through the whole of the medical evidence which appears to me of importance. There were some females examined at your Lordships' bar, but, as it seems to me, there is only one which will require any particular commentary, and that is Mary Summers: I will tell your Lordships why: she stated that she quickened about the Christmas week; she says upon going home with a basket of linen she quickened, and that child was not born until the 4th of August. Now if that were so, that was a case undoubtedly of protracted gestation; but she was asked questions on cross-examination that put an end to the case entirely: "You had been working hard, and were carrying home a basket of linen, and you fainted, and were carried into a house?—Yes; and I supposed at that time that I had quickened. And six weeks after that, you first felt the child to move within you?—Strongly. Will you swear you ever felt the child to move before that?"—"No further than a little fluttering." Now, my Lords, if the child did not quicken until six weeks after Christmas, there is nothing to take it out of the ordinary course of nature. I will read to your Lordships

that part of the cross-examination to which I refer :
“ This child born eleven years ago, that quickened
“ about Christmas, had you some time afterward any
“ feeling about that child of the same kind ?—I had.
“ When ; how soon after ?—For a week after. Had
“ you after that ?—No, I cannot say that I had. Did
“ you take notice of the child moving afterwards ?—I
“ did feel a fluttering, as I always did. You feel a
“ child move by putting your hand upon the person ;
“ can you take upon you to say you felt the child move
“ so soon after that ?—I cannot. How soon after
“ Christmas did you feel the child move ?—To the best
“ of my knowledge, I would not wish to say nearer than
“ about six weeks that I felt it most strongly. You do
“ not mean to say you ever felt the child move before
“ that, though you felt this fluttering ?—I cannot say
“ that I did, any more than a fluttering. What were
“ you doing when you felt that fluttering ?—I was in
“ the habit of going out washing, and I rather thought
“ I felt a pain in my side. It was hard work ?—Yes.
“ Had you been washing several days ?—Yes ; I used
“ to work very hard. Were you carrying home any
“ load ?—Yes ; I had a basket of linen, and going
“ across the road I fainted away. You had been work-
“ ing hard, and were carrying home a basket of linen,
“ and you fainted, and were carried into a house ?—
“ Yes ; and I supposed at that time that I had quickened.
“ And six weeks after that you felt the child move
“ within you ?—Strongly. Will you swear that you
“ ever felt the child move before that ?—No further
“ than a little fluttering. Did you put your hand upon

" your person, and feel the child move ?—No, I cannot say that I did." That, my Lords, is the whole of the cross-examination on that point to which it is material for me to direct your attention. So that your Lordships perceive this woman had been working hard for several days ; that carrying home a basket of linen she fainted ; and felt a fluttering, which is no proof that the child quickened. She is pressed, to know when she felt the child move, and she says she cannot say nearer than about six weeks afterwards, which would carry the time of quickening from Christmas to the 1st of February ; and the child was born on the 4th of August ; so that everything is in order.

- With respect, my Lords, to the testimony of the other female witnesses, it amounts to nothing ; all they say is, that they went for ten months, calculating from the period of menstruation. Supposing them to be accurate in their dates, which is giving them great credit for their recollection (for I think one woman speaks of a child forty years ago), it amounts to nothing more than this, that they were mistaken in their calculations ; judging from the period of menstruation, they were deceived. I will give your Lordships a specimen or two, that I may not be supposed to misrepresent the effect of this part of the evidence. Mary Ann Farrell is examined ; she is asked, " What period do you assign for the conception of that child ?—The 13th of June last year. What reason have you for fixing on the 13th of June as the period from which you date ?—What I have always gone by with my other children." It is the same, my Lords, with respect to the other female wit-

nesses in a better condition of life, and therefore it is that I wish to refer your Lordships to the evidence. Mrs. Frances Ann Jackson, having stated that she considered she had gone ten months with child, she is asked, "Looking at the notes, have the goodness to state the first note you have made.—The 24th of September 1823. Have the goodness to state the meaning of that.—The time when I was last regular. When was the date of the birth?—The 22d of July. Is there any note made of the time when the child quickened, as it is termed? —No." So that if you calculate from the period when she was last regular, the 24th of September 1823, to the period of the birth of the child, there are ten months, but if you take off twenty-eight days, the period when the next menstruation would commence, it is reduced to the ordinary period of nine months.

I trust I have satisfied your Lordships that nothing like the establishment of this prodigy has been made out by Mr. Fenton Gardner; and if not, we then come back to the general rule, admitted to be the rule of nature by the witnesses on both sides, namely, that 280 days, according to the ordinary course of nature, is the extreme of the time of gestation with a female of the human species.

It is unnecessary then for me, having confuted these supposed exceptions, or at least having satisfied your Lordships that the evidence which has been adduced to establish them cannot be satisfactory to the mind of any reasonable man; it is unnecessary for me to go over the case again, or to do more than simply call your Lordships' attention to the fact, that here are three

hundred and eleven days which have elapsed, from the period of separation of the husband and the wife, to the birth of the child. I do not say that it is impossible, he might be the father of the child, for to make use of an expression used by one of the witnesses, "to know what is impossible in nature, I must know all nature;" but courts of justice do not speculate upon things which by possibility may exist; they proceed according to the evidence that is consistent with the ordinary and established rules of nature, and unless it could be shewn in this particular case, there was some reason for supposing that those established rules of nature had been deviated from, even if there were no evidence as to the conduct of the female, your Lordships would hesitate before you came to the conclusion that this was a child of Captain Gardner. But why should you do so, when you find that within the ordinary period of gestation she was in the arms of an adulterer capable of begetting a child, and she capable of bearing it? When you try this case by the test laid down by my learned friend, Mr. Tennant, you must establish a case free from any reasonable doubt; then I ask your Lordships, on the part of the claimant, whether a case free from any reasonable doubt has been established?

The only additional observation I shall make to your Lordships, is this: this, my Lords, is a general question, a question not applicable to England, and to the laws of England exclusively, but applicable to the laws of every civilized country. If the laws were precisely defined, and the period of two hundred and eighty days was considered as a legal bar in a question of legiti-

macy, I should not have any right to appeal to the laws of other countries; but that not being so, it is reasonable to see what other countries have considered as the proper rule to be laid down in cases of this kind. They have proceeded upon evidence, they have proceeded upon the observations, and upon the testimony, of medical men, and I do not find that any country has laid down a rule so extensive as to embrace the present case, and establish the point which is here contended for.

A word, my Lords, upon this subject will be sufficient; and first of all as to the law of Scotland. "Our supreme courts" says Erskine in his *Institutes*, "have from the favour of legitimacy adjudged that to fix bastardy on a child, the husband's absence must continue till within six lunar months of the birth." As to the second, that is the other point, "a child born after the tenth month is accounted a bastard." Now it does not appear very distinctly from that passage, especially owing to some matter being interposed, what is meant by the expression "a child born after the tenth month," whether the writer means to calculate by lunar or by solar months; but I apprehend, taking the whole sentence together, he meant to calculate according to the rule of the civil law, namely, by solar months of thirty days; so that the whole period would be three hundred days, and a child born after those three hundred days would be accounted a bastard. There is a note, my Lords, to this effect, "the doctrine here laid down affords a solution of another question, relative to the filiation of natural children. It has been decided that a copula at the distance of

"more than ten months preceding the birth does not filiate;" for which he cites a case known by the name of Stewart^a, in the Faculties College in Edinburgh. Such is the law of Scotland.

The civil law, my Lords, is to the same effect. Your Lordships will find in a note of Gothofred, Nov. 39, Cap. 2. this passage, "*Decemviri decimo mense gigni hominem putarunt*," that is consistent with our law, for the two hundred and eighty days is decimo mense, the tenth day of the tenth month. "*Decemviri decimo mense gigni hominem putarunt post decem menses mortis natus non admittitur*." So that, according to the rule of the civil law, the bar is at the expiration of three hundred days absolute; and no evidence is allowed to be received for the purpose of opposition. Then there is this title, "*De muliere quæ peperit undecimo mense post solum matrimonium morte vel alio modo*,"—"Unde," says Gothofred, "*unde licere colligas partum undecimi mensis defuncto illegitimum esse, hoc est, ei non succedere, sed præsumi alterius esse quam defuncti vel ejus a quo divertit mulier*." So that after the expiration of the tenth month according to the civil law, that is, after the expiration of three hundred days, the bar is absolute.

It may be worth while to read what Huber^b says upon this subject, "*Leges etiam definivere tempus quod foetus in utero longissimum esse queat, decem mensium completorum. Neque in hac re ad auctoritatem*

^a Appendix, note (A.)

^b Huberi Prelectiones, Vol. II. p. 35, Edit. Lovan.

“ medicorum provocant, re ut videntur opinati satis in-
 “ dubitatâ,” so that the civil lawyers would not call in,
 as your Lordships have done, medical men upon that
 subject, considering the rule to be sufficiently established
 by long experience; “ ut videntur opinati satis indubi-
 tata.”—“ Quamvis autem medici id aliquando aliter se
 “ habere nonnulli scribunt, ideo non est quod litem cum
 “ illis de fide talium narrationum reciprocemus: non est
 “ fenestram partibus aperire supponendis quo nihil into-
 “ lerabilius et hereditatibus per occulta stupra cap-
 “ tandis?”

I have thought it right therefore my Lords, as this
 was a general question applicable to all countries, to
 shew your Lordships that the utmost latitude that the
 civil law, which is more extensive and more favourable
 than our own, would give to a case like the present, falls
 short, and that even according to the rule established
 by this House, upon no principle could this gentle-
 man, Henry Fenton Gardner, be considered as the law-
 ful issue of Captain Gardner.

I have thus, my Lords, gone through the whole of
 this case, commenting upon every part of it, which has
 appeared to me to be at all material; and unless I have
 very much deceived myself, for I have endeavoured
 strictly to adhere to the evidence,—unless I have very
 much deceived myself, you will come to the conclusion,
 that no reasonable doubt can be entertained, consider-
 ing the time of the birth, considering the conduct of
 the female, considering the circumstances attending the
 birth of the child, considering the concealment of the
 birth, considering the fact of the mother not now being

called as a witness before you, considering the child to have been always acknowledged as the child of Mr. Jadis, brought up as his child, living in his family, put to school, and maintained at school by him as his child; taking all those circumstances into consideration, I cannot help thinking your Lordships will come to the conclusion that no reasonable doubt can be entertained that this is the child of Mr. Jadis, and not the child of Captain Gardner.

LORD CHANCELLOR.—It may be necessary to state to your Lordships shortly, the form in which this case comes before the House. A petition was presented by two gentlemen, as the guardians of Alan Legge Gardner, stated to be an infant under the age of twenty-one years; that petition was presented to His Majesty, and it prayed that His Majesty would be pleased either to declare the right of the petitioner to the barony in question, by letters patent, or to recognize the petitioner's right by ordering his name to be entered on the Parliament Roll as a minor peer, or to recognize it in such other way as to His Majesty should appear most proper.

The petitioner in the first instance followed the course that had been laid down in the case of my Lord Howard de Walden, on whose behalf a petition had been presented to His Majesty during his minority with a similar prayer; that petition, as well as the petition of the claimant at your Lordships' bar, was referred to his Majesty's Attorney-General, and the advice humbly

offered to his Majesty was, that he should take the advice of the House of Lords: it was accordingly so referred; and the House of Lords came to this resolution, "that
" it appears to this Committee, that the petitioner
" Charles Augustus Ellis, is sole heir of the body of
" Lord Thomas Howard, who was summoned to Parliament by writ, in the 39th year of the reign of
" Queen Elizabeth, and took his seat accordingly as
" Lord Howard de Walden, and thereby acquired the
" barony of Howard de Walden to him and the heirs
" of his body; and it is the opinion of this Committee
" that the petitioner hath made out his claim to the
" title, dignity, and honour of Howard de Walden."
The House did not take upon itself to state what ought to be done in consequence of having come to that resolution; and therefore by another resolution they order that the said resolution and judgment be laid before his Majesty, and referred to the wisdom of the Crown, what steps ought to be taken in consequence; and I should apprehend if your Lordships should be of opinion that the claim has been made out on the part of the present claimant, Alan Legge Gardner, that you would think it right to pursue that precedent. The consequence of that is with a view of bringing before the House the question upon which it is to decide; I should propose that they should come to this resolution, (that is, should your Lordships think the claim of Alan Legge Gardner is made out) namely, "that Alan Legge Gardner the
" petitioner by his guardians, whose petition by his
" guardians has been referred to this House is the only
" son and heir of the body of Alan Hyde Gardner, his

“ father, which last-named Alan Hyde Gardner was
 “ the eldest son of Alan Gardner of Uttoxeter, in the
 “ county of Stafford, who, by Letters Patent dated the
 “ 27th of November 1806, was created Baron Gardner
 “ of Uttoxeter, in the county of Stafford, to him and
 “ the heirs male of his body; and that the said Alan
 “ Legge Gardner, the infant, hath made good his claim
 “ to the title, dignity, and honour of Baron Gardner, in
 “ being heir of the body of his father, Alan Hyde Gard-
 “ ner; whose father Alan Gardner was so created Baron
 “ Gardner, by Letters Patent, of the date of the 27th
 “ of November 1806.” And then by another resolu-
 “ tion, “ that your Lordships do order that that resolu-
 “ tion and judgment of your Lordships’ House, if you
 “ think proper to make that resolution and to come to
 “ that judgment, should be communicated to His Ma-
 “ jesty in the same manner as the resolution and judg-
 “ ment were in the case of my Lord Howard of Wal-
 “ den.”

My Lords, it is not my intention by any means to do much more at this moment than to declare my perfect conviction that this infant has made out his claim. There are a great many nice questions that arise certainly in a case of this nature; almost the whole of which were considered in the Banbury peerage. It happened to be my duty at that time to give the utmost attention to that case; and without entering into a detail of these questions, without entering into a discussion on the ultimum tempus, I am perfectly satisfied that not only the evidence of medical men, but that evidence of conduct, and of declarations connected with conduct,

are to be considered with a view to enable your Lordships to come to a just determination upon this subject ; and taking the whole of the evidence together, I think it enough for me to declare for myself (subject certainly to any alteration of opinion, which debate in the House may produce) that I have no doubt in the world that this case has been made out. Having said so much, my Lords, there I shall leave it, unless by debate arising I should think it necessary to give it further consideration. If any of your Lordships are of opinion that this case has not been made out, it is impossible that you can come to the resolution I have proposed, but if no noble Lord is of that opinion, it may be then adopted. I do not think that much can be added to the argument which has been pressed from the bar ; my own individual opinion, subject only to any alteration that may be produced, is an opinion upon which I profess at this moment to entertain no doubt whatever.

Lord Gifford.—If it should appear, that any noble Lord present does not hold the opinion expressed by the noble and learned Lord, it may be necessary for me hereafter to enter into an investigation of the case ; as present I merely rise to say that though I have not been present during the examination of many of the witnesses, yet, after a very anxious and attentive perusal and consideration of the facts of this case, as they appear upon the minutes of the evidence, I fully concur in the opinion which has been expressed, namely, that I entertain no doubt whatever that the claimant has made out his claim ; and therefore, my Lords, unless I hear a contrary opinion expressed by any noble Lord

present, it is not my intention, particularly after the very able exposition of this case, which your Lordships have this day heard, to go into any of its details. I think I should be unnecessarily trespassing upon your Lordships' time, if I entered into a detailed consideration of the circumstances of this case; it is sufficient for me to say this, I fully concur in the opinion expressed, that the claimant, Alan Legge Gardner, has satisfactorily made out his claim.

It was moved to resolve, that the chairman report to the House that the Committee have met and considered the matter of the petition of Alan Legge Gardner, infant, by his guardians, to His Majesty, referred to this House, and heard witnesses and counsel, as well on behalf of the petitioner, as also on behalf of Henry Fenton Gardner, opposing the claim; and also His Majesty's Attorney-General on behalf of the crown, and have come to the following resolution: viz. "That
 " Alan Legge Gardner, an infant, is the only son and
 " heir male of the body of Alan Hyde Gardner, his
 " father, which last-named Alan Hyde Gardner was
 " the eldest son of Alan Gardner of Uttoxeter, in the
 " county of Stafford, who by Letters Patent, dated the
 " 27th day of November 1806, was created Baron
 " Gardner of Uttoxeter, in the county of Stafford, to
 " him and the heirs male of his body, and that the
 " first-named said Alan Legge Gardner is the heir male
 " of the body of Alan Gardner, so created Baron, as

“aforesaid; and therefore that the said infant has made
“good his claim to the title, dignity, and honour of
“Baron Gardner of Uttoxeter, in the county of Staf-
“ford, created by the said Letters Patent;” which being
put, passed in the affirmative.

APPENDIX.

NOTE (A.)

THE law of Scotland, respecting the period of gestation, is fully discussed in the case of *Stewart v. M'Keand*, which is here transcribed, for the convenience of the reader, from the Faculty decisions, that work being rarely to be met with in English libraries.

STEWART v. M'KEAND, 132 DECIS. AUG. 6, 1774.

An action was brought against the defender, at the instance of Jean Stewart, before the sheriff of Wigton, for payment of a certain sum, as the maintenance of a bastard child of which she was delivered on the 3d of January, 1772, with the expense of inlying and of process.

The defender having denied that he was the father of the child, the pursuer authorized her procurator to refer to his oath, if, or not, he had carnal knowledge of her within twelve months prior to the birth of the child?

It was argued for the defender, that he was not obliged to depone in terms of this reference, as no law could father a child upon a man because he could not purge himself of guilt with a woman for twelve months prior to the birth. The sheriff, however, ordained the defender to depone, leaving the merits of objection to after-consideration. Accordingly the

defender deponed as follows: "Depones and acknowledges to have had carnal knowledge of the pursuer eleven calendar months preceding the 3d of January last, being the time condescended on in the libel for the birth of the child, but not posterior to that time." Upon advising this oath the sheriff assolizied.

The pursuer then brought her cause, by advocacy, before this court, upon the following grounds: 1mo, that the defender had expressly acknowledged his having carnal dealings with the pursuer, and no regard could be had to his quality as to the time, because it was not to be supposed that his memory could be exact in that particular. 2do, that it was possible a woman might go for eleven months with child, particularly with the first child. Upon a motion of the pursuer's the defender was also re-examined, upon special interrogatories, by authority from the lord ordinary, who afterwards reported the case to the court.

The pursuer admitted, that upon this last examination nothing very material had occurred. It only appears, that the eleven months the defender had formerly deposed to were as scrimp as possible. But the question between the parties resolved into this short one. Whether, when a woman produces a bastard child, averring that a particular person is the father of the child, and that person acknowledges that he has had carnal intercourse with the woman, but that eleven months intervened between such intercourse and the birth, is that person to be considered in law as the father of the child, so far as to subject him to the maintenance thereof?

Upon this point, so far as the defender had founded upon the Roman law, particularly L. 3. § 11. Dig. de suis et legit. hæred. the pursuer pleaded: 1mo, that the rules of the Roman law concerning the duration of pregnancy, could by no means be admitted in this country, where the climate, and the habit and

constitution of the bodies of the inhabitants, was so extremely different from what prevailed in those countries for which the Roman law was calculated. That questions of this kind depended not upon the opinions of lawyers, nor upon any positive institution, but upon inquiries into the operations of nature, which were different in different countries; and in the colder climates, in those matters particularly which respect procreation, much more slow than in warm climates.

Now, in this climate, it was by no means a very extraordinary thing for women to remain pregnant for a longer term than ten months. In the course of this question the cases of four other women have been condescended on, which had fallen under the immediate observation of those in and about the town of Wigton; and if so narrow a corner of the country produced so many instances of this sort, it was not to be doubted that a more general inquiry through the country of Scotland would show, that it is no uncommon thing in this climate for the duration of pregnancy to run out to a much longer period than ten months.

2do, A question concerning the maintenance of a bastard child, was of a very different nature from a question concerning the right of succession to an estate. In the former case, it is by no means the interest of the public, that any particular period should be fixed as the complete term of pregnancy. The interest of the public requires, that if there can be shown from the course of nature, a simple possibility of the pregnancy being owing to the acknowledged intercourse, the person who has had the intercourse, and in so far has infringed the laws of society, should be subjected to the expense of maintaining the child rather than the public, who is only to be subjected *ex necessitate*, when no other person on whom an obligation lies can be pointed out. And on this head the pursuer referred to the authority of *Paulus Zachius*, in his

Questiones Medico-Legales, who, though himself a Roman physician, admits the possibility of women continuing pregnant for the space even of twelve months, or upwards; yet, in his title, *De Partu Legitimo*, says, that in questions of legitimacy, such cases are not attended to on account of their unfrequency, *Lib. I. Tit. 2. Quæst. 6. No. 4.* But though this has appeared to be a reasonable rule for determining questions of legitimacy in more southern climates, the same rule has not been followed by more northern nations, of which there is a strong instance in *Sande's Decisiones Frisicæ, Lib. 4. Tit. 8. Defin. 10.*

Answered, upon the first point: It is clear, that the time of the defender's connection with the pursuer is precisely ascertained from his oath before the sheriff, and what he says expressly in the subsequent oath, "that the last time he had carnal knowledge of her was upon the 3d or 4th of February, 1771, new style, that it was at his own house, and that he had no acquaintance with her since;" which stands corroborated by collateral circumstances referred to in his oath. And the pursuer herself did plainly betray her consciousness of the fact, by making her reference in the above terms, going back to the distance of no less than twelve months.

The cause, therefore, comes entirely to the second point, whether the defender can be held to be the father, because he lay with the mother at the distance of eleven months prior to the birth of the child? or in other words, whether it can be presumed that this child lay eleven months in the mother's womb, from the time of conception to its birth?

Such a presumption would be most unnatural and violent. That mistakes sometimes happen with regard to the woman's going with child, may be true. Nothing can be more uncertain than the opinions and conjectures of women on this head. But the present question is entirely of a different nature; for

that the periods are fixed and ascertained, so that either the pursuer must have gone eleven months, or it is impossible that the defender can be the father.

That nine months are the natural duration of a woman's pregnancy, is a proposition which cannot well be disputed, because it is consistent with the knowledge of the whole world; and it is laid down by writers on this subject, that every birth which happens before or after that period is preternatural. Vide Dr. Johnson's *System of Midwifery*, published in 1769, p. 186. And the defender has been informed by gentlemen of knowledge and practice in midwifery, that there is not one well vouched instance to be found of a woman being delivered of a living child after ten months from the time of conception; a birth cannot be protracted so long, unless either the woman or the foetus is diseased.

In questions concerning bastardy, the law has been so far favourable to the state of legitimacy, as to presume for the child being lawful, if born at any time within ten months after the husband's death; because, naturally, the ninth month ought to be elapsed before the child is produced; and if the birth happens at any time within the currency of that month in which it ought to happen, the law considers it to be no great stretch in favour of legitimacy, to hold this birth to be lawful; but still the rule is limited to the currency of the tenth month, and no lawyer ever carried it farther. Vide *Bankton*, B. I. Tit. 2. § 3. *Erskine*, p. 108, § 50.

It requires no argument to evince what must be consistent with daily experience and observation, that the usual term of pregnancy in this country is nine months; and that the climate of Scotland has by no means the effect which the pursuer would ascribe to it, of protracting the time of child-bearing to eleven months from the time of conception, or at all beyond the time of nine months. The rule laid down by our

lawyers is founded upon nature itself, and it would be absurd to suppose it derived its only authority from the civil law.

Neither will the court enter into the fanciful distinctions which the pursuer endeavours to make, between questions of succession and questions concerning the maintenance of bastard children. The defender can observe no ground, either in reason or in law, for supposing that a pregnancy may last eleven months in the one case, and not in the other.

The case quoted from *Sandes* is nothing to the purpose. This foreign decision, attended with so many particular circumstances, and so clearly against every principle, can have no weight with this court in the present case.

Lastly, the pursuer's character is a circumstance which ought to have some degree of weight in the cause. It was averred in the inferior court, that she was a woman of loose character, and was well known to have connections with others. The defender is ready to prove this if necessary, and that, even since this cause came into court, she has had a bastard child, of which she will not pretend to say the defender is the father.

Nota. The last-mentioned circumstance was admitted to be true at advising, of which a minute was ordered to be taken down.

The Lords "assolized the defender."

Act. CROSBIE. Ald. ILAY CAMPBELL.
Clk. TAIT.

NOTE (B.)

* In the year 1731 Francis Carruthers, Esq. of Dormont, a gentleman of a very ancient and once opulent family, intermarried with Margaret, the eldest daughter of Sir William Maxwell, of Morneith, Bart.

In the year 1740 Mrs. Carruthers was discovered to have for some time carried on an adulterous intercourse with several individuals of very low rank, one of whom was a menial servant in the family. Mr. Carruthers was often obliged to be abroad on business. In the beginning of the month of August 1740 he left his home, and did not return to it till the following November, during which interval his wife and himself continued always apart.

It was only on Mr. Carruthers's return to his home in November that he received the intimation of his wife's infidelity, and of its consequences. He discovered that she was now, for the first time, pregnant. A separation immediately took place, and the injured husband instituted proceedings in the Ecclesiastical court for a divorce. Before the sentence could be obtained, his wife was delivered of a daughter, on the 28th day of May, 1741.

Mr. Carruthers was only partially relieved by the divorce; further steps were necessary for dissolving the tie between him and the child born during his marriage. He was advised by counsel to sue for a declaration of bastardy, but his very limited circumstances, already reduced by the expenses of the proceedings against his wife, rendered it impracticable for

* *Routledge v. Carruthers*, 4 Dow, P. C. 395, and Lord's cases in Lincoln's Inn Library, for the year 1815.

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him to pursue this course. His fortune barely amounted to one hundred pounds a year.

The child was placed at nurse and supported, during infancy, by Mr. Carruthers, and when she was seven years old he placed her with a farmer in a remote part of Cumberland, where she was treated as a domestic, and called by the name of Betty Robson. She was never once seen by Mr. Carruthers, or acknowledged as his child.

In the year 1758 the child intermarried with Henry Routledge, the son of a neighbouring farmer, and having gained some information of the rights that accrued to her as the issue of the marriage of Mr. and Mrs. Carruthers, she in the same year sued the former for the sum of £1000, which she alleged to be due to her under the marriage settlement. A condescendance was given in and proof adduced, that Mrs. Carruthers was delivered of a female child on the 28th of May, 1741, and that the pursuer was that person. When the cause was in this state the parties agreed to settle the matter without further legal proceedings, and Mrs. Routledge executed a deed, releasing all right of succession or other claim which she could or might have under the settlement.

In the year 1806 the issue of Mrs. Routledge brought a suit in the Scotch courts for setting aside this release, and for the recovery of the hereditary estates of Mr. Carruthers.

The case was argued at great length. It turned on two points; one, the legitimacy of Mrs. Routledge; and the other, the effect of the deed of release. The opinions of the judges, as far as they related to the former point, are as follow.

^a LORD CRAIG.—I have no doubt of this child's legitimacy.

^a The MSS. from which these judgments were transcribed were communicated to me by Messrs. Spottiswood and Robertson, of Great George Street, whom I take this opportunity of thanking for their assistance.

That her mother was a bad woman, and was on many occasions guilty of adultery, is certain; but on the other hand, it is perfectly clear, that this lady must be held to have been the lawful and legitimate daughter of her parents. The maxim *pater est quem nuptiæ demonstrant* is founded on reason and expediency, and in this case, however great may have been the guilt of the mother, however uncertain it may be who was the real father, still at the time the child was begotten the parents were married, and there was no defect stated, no physical impossibility from distance or otherwise, of the husband being the father. It would be most dangerous, in circumstances of that nature, to enter into any investigation or into any proof that the child was not a lawful child. The law holds that she was lawful on good principles, and it would be attended with the worst consequences to institute any inquiry that must shake the security of marriages. It is said that the father was from home some forty or fifty miles. It is not stated when he went away^a or when he returned, and therefore it is clear in law, in reason, and in expediency, that this child must be held to be legitimate.

LORD SUCCOTH.—Although I concur entirely in the opinion just delivered, yet I think it proper in a case of such importance as the present to state the grounds on which I come to that conclusion, and it is the more especially necessary in this case to do so, because we are told that that opinion is contrary to cases which have been solemnly decided in this Court. I shall take up very little time with the question of legitimacy, because it does not appear to me to be attended with any difficulty: connected with that question, is the question of identity, on which I shall say nothing, except

^a The *precise day* of Mr. Carruthers's departure from home certainly does not appear in the pleadings.

that I think it clear that the mother of the pursuer was the child born by Mrs. Carruthers, of Dormont, during the dependence of the process of divorce. With regard to the legitimacy, I concur entirely in the maxim *pater est quem nuptiæ demonstrant*, which is founded on strong reasons of policy as well as of law, and cannot be got the better of, unless it be made out clearly that there was an impossibility of the husband being the father of the child. In this case I do not think that this is clearly made out; I think it necessary, in order to get the better of that sound and salutary maxim, that the husband should be clearly established to have been absent from his wife for a considerable time both before and after the birth of the child, and at such a distance as rendered any connection impossible. I do not think that either the one or the other of those points has been proved. As to the first, we have the evidence of two or three witnesses, and the one that swears most distinctly states that the husband left home about the term of Lammas, which may apply to a few days after it. In this respect the proof is by no means precise, but it is still more deficient in the other particular, and certainly does not shew that the husband was at any very great distance from his wife. I do not know that it is the law of this part of the island, that the husband must be beyond seas, but at all events it is necessary that he should have been at such a place, or at such a distance from the wife that any intercourse was impossible. It is said that he had gone to England, but your Lordships see that his own house is not far from the border, and that in the course of a very few hours he might be both in England and at home. The proof therefore is not sufficient upon that point.

LORD WOODHOUSELEE.—Whatever doubts I may have in my own mind, whether the pursuer's mother was really the daughter of Mr. Carruthers, I have at least no doubt as to

the law which must presume so, unless circumstances be proved which render it impossible for him to have had connection with the mother at a time that would account for the birth of the child. No such circumstances have been proved; Mr. Carruthers was married to the child's mother, and the presumption of law arising from the father living and cohabiting with her ten months before the birth, is conclusive. It does not take off this presumption, that acts of adultery have been proved against the woman during that period; for the law notwithstanding gives effect to the presumption, which nothing short of impossibility is sufficient to overturn. I cannot conceive myself at liberty to make any doubts of my own, the ground of deciding the question; the law holds this child to be in possession of its legal *status*. It is plain that the full period of maturity, ten months, is sufficient to bring it within the time of the husband's cohabitation with the wife.

LORD BANNATYNE.—Upon the first question, namely the legitimacy of this lady, I have no doubt. It is the presumption of law that she is legitimate, and there is nothing proved in evidence to take off that presumption; indeed the father acted as if he himself was convinced that she was his lawful daughter, for if she was not, she was not entitled to grant the discharge ^a.

LORD BALMUTO gave his opinion to the same effect.

LORD PRESIDENT BLAIR.—^b This is a case of considerable moment to the parties, and also as being connected with several

^a With great deference to the learned judge, the acts of the father, if father he can be called, create a very different presumption. He never recognized the child, and he accepted the discharge in order to be more satisfactorily secured from claims, which, however unjust, might still be successful.

^b The copy from which the text is taken was revised by his Lordship.

important branches of the law. I shall therefore give my opinion fully upon the several questions that have been agitated, taking care to avoid repetition as far as that is practicable where different judges are speaking to the same points. The first question in this case is the legitimacy. This gentleman Mr. Routledge, comes before us claiming as heir under the marriage contract entered into between Francis Carruthers and his spouse in the year 1735. In order to make out his claim, it is necessary to prove that he is a lawful descendant of that marriage; not an immediate descendant, but that he is the grandson of the parties, or the son of one who, he must shew, was an immediate lawful descendant from them.

The *onus probandi* lies upon this gentleman, and in what manner does he make it out? With respect to his own legitimacy there is no doubt; but this is not enough, he must shew that his mother was a lawful child of the marriage betwixt Francis Carruthers and Margaret Maxwell, who were the parties to the contract under which he claims. Now in what manner is this proved? We have direct evidence that Margaret Maxwell (Mrs. Carruthers), during the subsistence of the marriage on the 28th of May, 1741, was delivered of a female child, and it is proved beyond a doubt by a very singular concatenation of circumstantial evidence, that the mother of this gentleman is that identical child born under such inauspicious circumstances; the child of misfortune we may call her from her infancy, tossed about by various casualties till at length she is married. Then it being proved that this child was born of Mrs. Carruthers, there the proof stops, and there it must stop in every case, because it never can go further. It is proved that during the marriage she was delivered of this child; and in place of pursuing further, the pursuer refers to the legal maxim which I say is the foundation of every man's birth and *status*; his birth is a fact

that may be proved by witnesses, but the conception is a fact which never can be proved, and he therefore stands in the same situation as every other man possessing the legal character of legitimacy. He proves that he is born of this lady, and having proved this, the law takes him under its protection, and says, *pater est quem nuptiæ demonstrant*. It refers to a plain and sensible maxim which is the corner-stone, the very foundation on which rests the whole fabric of human society, and if you allow that to be once shaken, there is no saying what consequences may follow. It is said that this lady was not very correct in her manners: but does this take away the legal presumption? No, my Lords, the counsel for the defender had too much good sense ever to dream of such a thing, to suppose that a man claiming to be served heir to his ancestor, must before making out his legitimacy, stand trial for his mother's delinquencies, that until her character come out pure and immaculate, he is to be denied his service, or that under such circumstances, a proof should be allowed of her whole conduct and gallantries. In a licentious age the consequences would be monstrous! But then does this presumption which is of so much importance, yield to nothing? Is there no way in which it can be got the better of? These questions, Lord Stair, that oracle of the law of Scotland, has long ago answered. He tells you that the presumption holds in every case, unless you can prove the impossibility of connection. He rather seems to ridicule the idea that prevails on the other side of the Tweed, that there must be a separation between the parties; that the sea must be between them. He says that the law of Scotland does not require this: it only requires proof of the impossibility, whether by distance or otherwise, of the party being the father of the child. He states it as sufficient to take off the legal presumption, if during the time when the child must necessarily have

been conceived, there was an impossibility of the father having begotten it. This does not depend upon the distance merely: for suppose the father and mother were confined in separate prisons for a twelvemonth, where it is utterly impossible for them to have access to each other. In this, and other such cases, the presumption must no doubt give way to the fact, wherever a kind of impossibility of intercourse between the parties is proved. Let us see how this turns out, because we have here an absence of the husband alleged, which it is said made it impossible for him to be the father. The law holds,—whether right or wrong is a physical question—that the longest period of gestation is ten months. That the law holds that such a child born at the distance of ten months, is a lawful child, and the shortest period is six lunar months, from the favour which the law shews for legitimacy; so Lord Stair says it has been decided. He does not indeed mention any of these decisions, and I own I do not know where they are to be found. But he states it as having been so decided, and such is the undoubted rule of law. Let us apply this to the present case. Mr. Carruthers is said to have gone to England in August 1740, on what day of the month does not appear from the depositions of any one of the witnesses, or from the pleadings on either side, but he himself has furnished us with complete evidence on this subject, because in a memorial given in to his own counsel he states the day to have been the 18th of August. Now the child was born on the 28th of May, and counting back from that date to the day of his departure from Dormont, in place of ten months, you have only nine months and ten days from that time, an irregularity which very frequently happens, and from which no person could ever pretend to infer an impossibility of his being the father. Suppose Mr. Carruthers had died, that in place of going to

England he had gone to the other world, would this have prevented the child from being lawful? I apprehend not, no court of law on earth would have held it to be illegitimate. Again, count the six lunar months back from the 28th of May, and this brings you almost clear of the month of November. It is admitted that he returned in November. Suppose he had returned on the very last day of November, still the six lunar months have elapsed; so that, take it the one way or the other, the child is still a lawful child. But we are going a great deal too far here, because what was the absence in this case? All that we are told about it is, that he went to England, or that he was on the border, a distance I suppose of twenty miles from his own house. How far he went into England, what he was doing there, or whether his absence was without intermission, we are left to conjecture. Where was the impossibility that he might not have stepped back from the border to his own house, and had intercourse with his wife? We have no proof where the lady was during this time; we get a sight of her now and then, it is true, and she does not seem to be employed in the best manner. But is there any impossibility in her having contrived to go to the border? And whether the man goes to the lady, or the lady to the man, I presume there is very little difference; the general question goes deep into principles of law, and for that reason it is necessary to have a full view of the facts (here his Lordship proceeded to observe on the legal effect of the deed of release). It only remains therefore to give judgement in favour of the pursuers. Something has been said of the hardship that must follow from this, but it is a hardship which arises from the law, and which must be felt in every case where the righteous heir is restored to the inheritance of his ancestors.

The defendant appealed to the House of Lords, and the cause having been heard before their Lordships, the Lord Chancellor (Lord Eldon), on the 29th of June, 1816, delivered his judgment, in which he declared that he concurred with all the judges below, that in point of law the child must be taken to be the legitimate daughter of Francis Carruthers.

NOTE (C.)

SMYTH v. CHAMBERLAYNE.

^a This was a cause in the Prerogative Court of Canterbury, for the administration of the effects of John Newport, Esq. who had died intestate. The sole question was respecting the legitimacy of the deceased. Ralph Smyth claimed as his next of kin against the king's proctor, who sought to establish a bastardy.

John Newport was the only son of Ann, the wife of Ralph Smyth, eldest son of William, Lord Bishop of Raphoe. He was born whilst his mother (being separated from her husband) was living with Lord Bradford as his mistress, and he had been bred up and educated by that nobleman as his son; he had inherited a splendid fortune from his reputed father, and had assumed his name ^b under an Act of Parliament.

^a The papers from which this report is compiled were communicated to me by Messrs. Gostling and Son, of Doctors' Commons. I cannot sufficiently express my sense of the kindness with which these gentlemen have aided my inquiries.

^b Newport is the second title of the Earl of Bradford.

Ralph Smyth had separated from his wife some years previously to the birth of Mr. Newport, and they continued to live apart ever after. He occupied a single apartment in an obscure lodging in Holborn, whilst she maintained two expensive establishments in the west end of London and in Hammersmith. It appeared, that they had occasional interviews for the payment of a small annuity, which he had engaged to allow her when they separated, but none of these interviews were alleged to have occurred within a considerable period of Mr. Newport's birth. Both parties acted as if their marriage had long been dissolved. He rather promoted than interrupted her commerce with Lord Bradford, and he was never known to take the slightest notice of Mr. Newport.

Mr. Newport, upon his return from his travels, sunk under a mental disorder, to which the two brothers of Lord Bradford had been already victims. The jury that found him a lunatic, also found that they did not know who was his heir at law. His property was placed under the administration of the Court of Chancery, and suits were instituted respecting it, to which Ann Smyth, as a legatee under Lord Bradford's will, and Ralph Smyth, as her husband, were made parties. The latter had frequent opportunities of recognizing Mr. Newport as his son, and would have derived great pecuniary advantages from the existence of such a relation between them; but he studiously avoided any declaration to that effect, and he both acted himself and allowed the Court to act, as if no doubt could be entertained of Mr. Newport's illegitimacy.

Mr. Newport was placed by the Court, as long as he lived, under the superintendence of some of the members of Lord Bradford's family. He survived his mother and her husband, and died in 1784, possessed of property, which the ac-

cumulations of interest during his lunacy had increased to an immense amount.

The claimant (Smyth) was the grandson of a brother of Ralph Smyth.

The cause was argued at great length by Sir William Scott, Dr. Harris, and Dr. Crompton, for the claimant Smyth, and by the king's advocate on the part of the crown.

On the 4th of December, 1792, the judgment of the court, as far as it related to the legitimacy of the deceased, was thus delivered by

SIR WILLIAM WYNNE.—I come now to the question between the parties alleging themselves to be the next of kin of the deceased (and as such entitled to his effects), and to the question respecting the crown. The counsel for the next of kin expressed a doubt respecting the jurisdiction of the court to determine the question, at the same time declaring it was not their intention to deny or make a point of it. The only thing hinted as a ground for the doubt was, that no case was remembered in this court in which the legitimacy of a person, admitted to be the son of a married woman, came in question^a, and I certainly do not remember any such instance; but I cannot perceive any principle or other reason for such a doubt, than that the case has not occurred; because, if the king's proctor appeared for the crown, and denied the pretended next of kin's interest, what was the court to do? It must either inquire, whether the next of kin's interest was well founded or not, or it must be shewn to the court that there was some other way of making the inquiry; and what other court could make the inquiry, I own I can-

^a It appears from the year books, that such cases were frequently decided by the court in former times.

not conceive. In a case where it has come in question before the Court of Chancery, whether a man was heir at law to an estate or not, that court has authority, and that court does frequently exercise the authority of directing an action to inquire, whether the party was the son? And, whether the circumstances of the case were such, as that he was supposed to be so? Whether there was access between the husband and the wife, or not? But this court cannot direct an issue of that kind; this court must either try a cause on the question of administration, or the matter would go untried. It cannot be tried by the Court of Chancery; the Court of Chancery can only direct an issue to try a question, on the return of which, that court is to do some act. Therefore, as this court has no other means of making the inquiry, of doing that which is necessary in order to do justice between the parties before it, it can do no otherwise, than to enter into the question in the ordinary course and exercise of its jurisdiction.

To enter into the question,—and without doubt it is a question more properly in the cognizance of this court—the parties claiming as next of kin are put on the proof of their pedigree, and they have proved it to the satisfaction of this court, and also of the crown. It being contended by the latter that John Newport, deceased, though he was the son of Ann Smyth, born during her marriage with Ralph Smyth, was not begotten by Ralph Smyth, but by another person with whom she had an adulterous connection, and consequently he was a bastard, and that neither the relations of Ann Smyth nor any other, can have any interest, as he died a bachelor.

There are two questions which arise, 1st, whether the law will admit of an averment, that the child of a married woman, born during the life of her husband, was not begotten by her husband? And 2dly, if such an averment is by law admissible, whether it is in the present case proved?

Without doubt the rule of the law of England, with respect to the children of a married woman, is the same as that of the civil law, and must be the same in every country—*pater est quem nuptiæ demonstrant*. But though this is the law of England as well as of all other countries, it has always admitted of some exceptions. I shall not think it necessary to inquire into those ancient writers on the law of England, which have been mentioned. I only begin with the law as stated by Lord Coke, in his Comment on Littleton, p. 244: he states the law to be in these words, "If the husband be "within the four seas," that is within the jurisdiction of the law of England, "if the wife has issue, no proof is to be admitted to prove the child a bastard (for in that case, *filiatio non potest probari*, unless the husband has an apparent im-
"possibility of procreation)." Rolle ^a lays it down more strongly, and there are several passages in his work to the same effect. Now, it appears from those passages that the two exceptions to the rule,—namely, that of the husband being beyond the seas, and an apparent inability of procreation,—are laid down by Lord Coke and Rolle, not by way of instances liable to be extended, but as confining the exceptions strictly to those two. Lord Chief Justice Hale appears to be the first authority for extending the instances of exception. It was his opinion that if the jury found by special verdict that the husband had no access, then the child would be a bastard ^b. And the same rule may be inferred from the case of *St. George's v. St. Margaret's*, where it was laid down that even where the parties are separated, the child

^a 1 Abrid. 358.

^b *Dickens v. Collins*, cited in *St. George's v. St. Margaret's*, 1 Salk. 123. Probably the case mentioned in the debates on the Banbury claim, under the title of *Hospell v. Collins*.

shall be legitimate, for access will be presumed ; unless the separation is by a divorce a mensâ et thoro, as then the child shall be a bastard. This last decision being in a settlement case, the court may be suspected of acting with less precision and exactness than they exercise on matters of inhabitancy ; but in the case of *Pendrill v. Pendrill* ^a, the question came directly before the court, and Sir John Strange, who was counsel in the cause, (and therefore his report of the cause is particularly to be attended to,) says, that it was agreed by the court, (by Lord Chief Justice Raymond,) and the counsel, that the old doctrine was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff, although born in wedlock. The king's advocate produced a fuller note of the evidence in this cause, by which it appears that some of the witnesses swore, that they saw the husband in London, and that the wife herself swore, on being examined, that her husband had actually lain in bed with her, several times about the time of the pregnancy. But it clearly appears that those witnesses were utterly discredited, for it is stated that there was evidence given to the court, that the husband was a man subject to fits, that he was constantly watched on that account, that he had never been absent from his house in Staffordshire more than a night at a time, and it was impossible that he should have had access to his wife ; and I rely in a particular manner on the case of the *King v. Reading* ^b, which was tried within three years after the decision in *Pendrill v. Pendrill*, for it shews how far the doctrine of access could be limited, and it contains the authority of the Chief Justice, that there was the strongest evidence imaginable in that case to prove the non-access of

^a *Strange*, 925. 3 P. Wms. 275.

^b *Cas. Temp.* Lord Hardwicke, p. 82.

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the husband. Mr. Justice Buller, in his *Law of Nisi Prius*, states, that the judge told the jury that the old notion in *quatuor maria* was exploded, and that probable evidence was sufficient. Now I do not understand those words, "that probable evidence was sufficient"; I do not understand the judge or Mr. Justice Buller to have meant, that evidence of whatever kind,—that it was more probable that the child was begotten by some other person than by the husband,—was sufficient, but I take it to be his meaning, that *probable evidence of non-access* was sufficient. This is very much confirmed by the following passage, where the chief justice lays it down, "that probable evidence is not sufficient, and that if "you can only prove that it is improbable that from habit of "body the husband can have begotten the child, and cannot "prove it to be impossible, it will certainly not do." Nothing can more fully establish that, than the case of *Lomax**, in which all that is stated to have been proved is, that the husband was frequently in London, where the wife lived, which created the necessary presumption of the access, and put an end to the question.

Several other cases have been quoted and alluded to, but none I think relied on as differing at all from the doctrine laid down, except a very late one of *Goodright v. Saul*^b, where the verdict was against the legitimacy; but a rule was obtained to shew cause why there should not be a new trial, and the counsel was interrupted by Mr. Justice Ashhurst, who admitted that the rule must be made absolute. Now it appears to me that this cause, after it had been so reconsidered by Justice Ashhurst, on consultation with the Court of King's Bench, is exactly conformable to the doctrine laid down in *Pendril v. Pendril*, and *Lomax v. Holmden*.

* *Lomax v. Holmden*, Stran. 940.

^b 4 T. R. 357.

In *Pendrell v. Pendrell*, the chief justice told the jury they were at liberty to consider of the possibility of access; in the other case it was held that access was presumed. In *Goodright v. Saul*, the judge having told the jury it was incumbent to prove that the husband could not by any probability have had access to his wife at the time, on reconsideration said he was convinced he laid too much stress on the rule; that the husband left the wife, and went to reside at another place, as was believed in London; that there was certainly no direct evidence of the access; and there were other circumstances which went strongly to rebut the evidence of access, and to shew that the son was a bastard. Now from this state of the case I think it is clear, that if it had been proved that Simon Colburn resided at Norwich during his wife's cohabitation with Joseph Hale, access must have been presumed.

The civil law, especially the commentators, are certainly much more lax on this subject; *Menochius* in particular*. The king's advocate did not think fit to cite this authority, and I am sure he would not have taken upon him to maintain that this was the law of England. I am sure he would not enforce such a doctrine, for it is this:—if a woman cohabits with an adulterer, and the husband has access to her, though it be but seldom, in that case the court are to presume that the child is begotten by the adulterer, and not by the husband. The law of England therefore on this subject, as now settled, I take to be this:—that if such proof can be given, of whatever kind, as shall satisfy legally the mind of the court, that the husband had no access to the wife at the time when the child must have been begotten, the child is a bastard, though born of a

* 6 L. 68 Pres. 19 Sect.

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married woman in the lifetime of her husband ; but if the husband and wife were so circumstanced that access between them must be presumed, as if they lived in the same town or place, and cannot be proved by persons who have watched them never to have come together ; if direct evidence can be proved that they had access to each other ; in such a case I take it the son is legitimate, notwithstanding any circumstantial evidence that may be given to the contrary. It remains, then, to be considered, whether the point of illegitimacy, as set up by the crown, is supported by legal proof.

It appears, that Ann Smyth was married to Ralph Smyth, the first cousin of James Smyth, on the 28th of June, 1704. That he took his wife to Ireland in that year, and that they resided together with his relations there as late as the month of May, 1705. There is no evidence of the length of their stay in Ireland, or of their subsequent course, but there is a paper in Ralph Smyth's hand-writing, having a memorandum at the top of it in these words: " My wife and " I went to live with my cousin Smyth, at Stanwell, in 1708, " and had one servant there."

How long they lived together after 1708, has not been ascertained, and indeed we lose sight of them altogether until the 8th of May, 1711, when a deed of that date is executed, reciting, " that Ann Smyth and Ralph Smyth had for some " time lived apart, and that Ralph Smyth had agreed to settle " a maintenance on his wife during their joint lives, in case " such separation should continue"; granting an annuity of 84*l.* to trustees for her use, during the continuance of the separation. This indenture is attested to be signed and sealed by the within-named Ralph Smyth and Ann Smyth, in the presence of the witnesses, at the same time: so that they were together and executed this instrument in 1711.

Whether they lived separate or together from 1711 to

1720, I do not find any direct evidence. Elizabeth Thompsons says, "*that previous to Ralph Smyth's coming to lodge with her (in 1727), he lodged, as he used to say, at Mr. Darling's, a glazier, in Windmill Street, Piccadilly.*" Six letters have been exhibited, two being letters of Ralph Smyth to Ann Smyth, his mother, in Ireland, dated the 5th of April, 1720, and the rest dated in May and June, 1720, and all of them directed "*to Ralph Smyth, Esq. at Mr. Darling's, in Angel Court, Windmill Street, near Piccadilly, London.*" It has been truly observed, there is not the least mention made in any of them of Ralph Smyth's wife, which certainly forms a strong presumption that he did not then cohabit with her; and this presumption is considerably strengthened by the deed-poll of the said Ralph Smyth, dated the 16th of July, 1720, which confirms the former deed of separation, and contains a power to the said Ann Smyth to dispose of her property by deed or will, "*as fully and effectually as if she were sole and unmarried*". About seven months after the execution of this deed, viz. on the 2d of February, 1721, the deceased was born at the house of a Mrs. Taylor, in Martlet's Court, Covent Garden. A witness has deposed to Ann Smyth's living at Shrewsbury for some time previous to the birth of the child, but I think her evidence cannot be much depended on. She says that she "*well remembers hearing talk at Shrewsbury of a lady who went by the name of Miss Smyth, and had the general reputation in Shrewsbury of being the mistress of the said Henry Newport, otherwise Lord Bradford, and she has often heard her father, in talking to the said Lord Newport about the said Miss Smyth, ask him why he did not marry her; that she was a fine woman, and it was a pity he did not marry her, for if he did not, his children by her would be illegitimate, and disinherited, and other expressions to that effect. That the said Miss Smyth re-*

" moved from Shrewsbury whilst this deponent was yet a girl, and, as deponent then heard it reported, went from thence to Turnham Green, in the county of Middlesex, to a house taken for her there by Lord Newport, and was with child, when she so left Shrewsbury, and went from thence to Turnham Green to lie in. And the deponent now well remembers that on such occasions she asked her father whether Miss Smyth was going to be a naughty woman, and to have a bastard like Dorcas, which Dorcas the deponent saith was a notorious prostitute, then living in Shrewsbury. And the deponent further saith, that she lost her father when very young, and upon his death came up to London and has now been settled at Hammersmith sixty-three years. That upon the deponent's so coming up to London, being acquainted among the servants of the said Henry Lord Newport, who then had a house in Saint James's Place, she went immediately there, and then learnt that the said Lord Newport was then just dead, and was at that very time carrying down to his seat in Roxeter to be buried. That upon the deponent's settling at Hammersmith as aforesaid and for some years after, but how many she cannot say, there was a lady living at a large house a little beyond the turnpike there, who went by the name of Lady Smyth, and whom the deponent learnt from common report there, to be the lady who had been the kept mistress of the aforesaid Henry Lord Newport then deceased, and the deponent then and ever afterwards understood, and now verily believes, she was the same person who had lived at Shrewsbury by the name of Miss Smyth as predeposed, and was reputed there to have been the kept mistress of the aforesaid Henry Lord Newport, but the deponent saith she had no personal knowledge of the said Miss Smyth or Lady Smyth."

Now it has been observed on this evidence by the counsel

for the next of kin, that she cannot be speaking of the time when the deceased was born, for she describes herself as a girl, and mentions an expression, which it is improbable that a woman grown up should have used, whilst she must have been at the time she speaks of (in fact when the deceased was born) twenty-one years old. But there is an objection of much stronger consequence: she says, when she came to London, sixty-three years ago, that Lord Newport was just dead, and they were at that time carrying him down to the country, whereas the will of Lord Newport bears date in 1730, and it appears that he died in December 1734. Now if a witness is so grossly mistaken in a matter of that kind, to which she deposes positively, her testimony is very little to be depended on; and indeed were it free from this suspicion, it would amount to no more than this, that the Miss Smyth, the person she speaks of, had, during some part of the time she was with child, a lodging at Shrewsbury.

The witnesses,—those who seemed to have the earliest knowledge of her in London,—are Margaret Holmes and Mary Phelps. The former says, “*that when she first became acquainted with the said Mrs. Smyth, she lived in a house in Chapel Court, King Street, Grosvenor Square, that she afterwards went to live in Clarges Street, Piccadilly, at Hammersmith, and at Chelsea, in the same county. That during the time the deponent so knew the said Mrs. Smyth, she understood that before the deponent became acquainted with her she had been married to a Mr. Smyth an Irishman, and had been in Ireland, but had separated from him before the deponent so became acquainted with her, and the deponent saith she never knew any man of the name of Smyth, appearing as the husband of the said Mrs. Smyth, and has no idea that her husband (if living) had any personal intercourse or acquaintance with the said Mrs. Smyth*

“ during any part of the time the deponent knew her, by reason that deponent does not recollect to have heard said Mrs. Smyth speak of him as having a knowledge of, or intercourse with him.

“ And this deponent further saith, that after she so became acquainted with the said Mrs. Smyth, it was commonly reported and looked upon, and she had in general the reputation of being the kept mistress of the Earl of Bradford, and continued so to be till the time of his death, and that he used to visit her and sleep with her at the several houses she lived in, at different times. That deponent remembers having been many times at Mrs. Smyth's house in Clarges Street in particular, and at Hammersmith, when she understood that the Earl of Bradford was in the house with Mrs. Smyth, and has sometimes herself seen him there accidentally, particularly at Hammersmith, but never was in company with him; that the Earl of Bradford's house was very near Clarges Street, and the deponent used to hear at Mrs. Smyth's house that the Earl of Bradford used to make a practice of coming to dine, and stay the night with her there, and go home in the morning. And the deponent further saith, that the first she knew of the said John Newport, Esquire, formerly Smyth, and afterwards Harrison, the party in this cause, deceased, was when he was a child about four years old as the deponent thinks; at which time he was in a house at Turnham Green in the county of Middlesex, where the deponent remembers going to see him in company with the said Mrs. Smyth.”

Now whether the witness speaks of her acquaintance with Mr. Smyth before or after the birth of the deceased, does not clearly appear from this deposition, but she says she went to Turnham Green when he was about four years old. The other witness says *“ her mother had an intercourse and ac-*

"quaintance with a Mrs. Smyth, who then lived first in a house the corner of Chapel Alley in King Street, aforesaid, and afterwards in another house in the same street, and who had also a country house at Hammersmith, Middlesex; and the deponent remembers when very young having been several times to the said houses of the said Mrs. Smyth both in King Street and Hammersmith, and to have seen and been in company with her; and the deponent remembers at that time having often heard it mentioned and talked of, that the said Mrs. Smyth was a married woman, but that she lived and cohabited with the Earl of Bradford as his mistress, and was universally reputed so to be, and that Lord Bradford had bought her of her husband."

Thus then stands the evidence of access between Ann Smyth and Ralph Smyth her husband: he is proved to have been in London at Mr. Darling's, to have written and received letters in that place, from the month of April to the month of June 1720. Ann Smyth was delivered of the deceased in London, in Martlet Court, Covent Garden, in February 1720-21. She had a house in Maddox Street in September 1722, and in King Street, Golden Square, in 1724, and if we except the inconsistent and imperfect recollections of Mrs. Ellard, there is not the least evidence of her having ever resided any where but in London, Hammersmith and Chelsea, from 1708 to 1724.

If the evidence had rested here, it would I think fall very little if at all short of the case of Lomax v. Holmden: here the husband is proved to have been resident in London in 1720, the wife was delivered in London in the same year, and there is every reason to believe that her usual residence was at that time, in London likewise. But the evidence in this case goes a great deal further, for from the time that Margaret Holmes first knew Mrs. Smyth, which must have been before the deceased

was four years old, she proves Mrs. Smyth had a constant residence in London, and the depositions of Martha Cleeter and other witnesses establish that Ralph Smyth went, in 1727, to lodge in Warwick Court, and continued there till his death in 1755, and here I think there is a direct and full evidence of his having had frequent access to his wife. Elizabeth Thompson, the woman with whom he lived says, "*the said Ralph Smyth was a married man when he first came to lodge with the deponent, but was separated from his wife, and he used to allow her an annuity as was understood by this deponent. And this deponent further saith, that after the said Ralph Smyth came to lodge in this deponent's house, a lady whom this deponent ever understood was his wife, used to come to him occasionally, and this deponent from declarations made by the said Ralph Smyth himself, understood that his said wife's name was Ann, and that she came for the annuity which he allowed her, and that she visited the said Ralph Smyth for several years, and until the deponent understood she died. And when the said lady came for her annuity as aforesaid, this deponent always left her and the said Ralph Smyth together in the room of the said Ralph Smyth, which was a bed-room, and that they were frequently alone together in the said bed-room for half an hour at a time.*"

Now it has been said, that Elizabeth Thompson does not pretend to know Ann Smyth, therefore the lady may have been some other woman, but the evidence of Martha Cleeter, &c. fully I think establishes the identity, for she says, "*whilst she was a servant of Mrs. Smyth (1739-40), that the said Mrs. Smyth used to go out in her coach and get out in Holborn, and order the coach to wait for her, and that as she was much inclined to the Pretender, the town servants in the house used to say that she so went out to meet a gentleman on behalf of the Pretender, and that she furnished him with money; but this*

"deponent heard from Mr. Mellecup, who was Master Smyth's tutor, and also from Mrs. Colville, the housekeeper, who are both dead, that Mrs. Smyth was a married woman, and was separated from her husband, and that he allowed her an annuity, and they thought she went to receive it." The same witness deposes to another fact, which though it is not a direct proof of Ann Smyth's meeting of her husband, yet it becomes in a high degree probable that she sometimes met him at her own house in Hammersmith, for she says, "that during her residence in Mrs. Smyth's family, she sometimes received orders to go down to Mrs. Smyth's house at Hammersmith to get a dinner prepared there: that on such days Mrs. Smyth used to come down to Hammersmith to dinner in her coach, but unattended by any servant, and a gentleman who was unknown to this deponent, and who appeared to be turned of forty years of age, used at such times to come to the house in a hackney coach, and that the said gentleman and Mrs. Smyth did usually at those times dine together." And in confirmation and explanation of this, Sarah Quinten says, "that whilst she resided at Hammersmith at a public-house called the Red Cow with her grandfather, she remembers a middle-aged gentleman came in a carriage to the house of the said Mrs. Smyth, that the servants came to the Red Cow with some of Mrs. Smyth's servants, and the deponent remembers they said that Mr. Smyth was come, and there seemed to be a joke among the said servants on that occasion which the deponent observed, but did not understand." Now to be sure if the fact was that Mrs. Smyth was at this time separate from her husband, and known to have a commerce with Lord Bradford, and yet had a private intercourse with her husband, it was natural enough that the servants should joke about it.

These depositions form a chain of evidence amounting in my

opinion to a direct and full proof that Ralph Smyth had access to his wife at the times mentioned by the witnesses: it is true that this was some years after the birth of the deceased, but I am of opinion that the proof of the access in and after the year 1727, strongly corroborates the presumption (arising from Ralph Smyth's living in London) of access before that time. If there had been no proof of any access till after the Earl of Bradford's death, it might have made some difference, but the time Ralph Smyth went to lodge at Mrs. Thompson's was seven years before his Lordship's death, and four years before the date of the will, so that the reason of her avoiding any access to her husband under any apprehension of its coming to Lord Bradford's knowledge and giving him offence, was full as strong in 1727 as in 1720.

It was said by the counsel, that by the word access in the cases that have been mentioned was meant nuptial access, and that it was not sufficient to prove that they were together, if there was not sufficient ground from circumstances to believe that they had conversed as husband and wife. But I do not find the least assertion of this doctrine in any case. I take it that it has always been held to be sufficient, if it could be proved, that the husband and wife had been together, or that they *might have been* together by being frequently in the same town or place, and in Lomax's case there is a pretence of evidence, that they were never at the same house, only that the wife resided in London and the husband was proved to have been frequently there. But in the present case, to be sure, it is a great deal stronger, for Thompson says, they were together without any other witnesses frequently in her house, in the bed-chamber, upwards of half an hour together. Now there being such evidence therefore, both presumptive and positive, of the access of the husband to the wife, I consider the circumstantial evidence (however strong

it may be), that the deceased was not begotten by the husband, but by another man, insufficient to rebut it.

The counsel for the next of kin have justly observed, that the *criminal intercourse* of Mrs. Smyth with Lord Bradford is very slightly proved by direct evidence. It can only be inferred from the general reputation of her being his Lordship's mistress, and of the deceased being his Lordship's son: in short, from circumstantial evidence alone; from the will of Lord Bradford; from the expensive manner in which he was bred up, and from his taking the name of Newport by Act of Parliament; and it must be admitted that there can be no doubt that the Earl of Bradford did believe the deceased to be his own son, which gives strong probability to suppose that it was so. Yet, when you consider the circumstances of the case, there are facts that do certainly detract from that probability; such as the constant communication between the parties, and the secrecy with which it was attended, and more especially the nature of the separation. It has been truly observed, that there is no evidence to show that they parted with feelings hostile to each other, or that they ceased to live on an amicable footing. The instruments executed by Ralph Smyth in 1708, 1711, and 1728, giving up all right in his wife's property, appear to have been voluntary acts; and although they may have been prompted by no very honourable motives, they surely indicate the absence of animosity towards his wife. We must also recollect that he acquiesced in her living with Lord Bradford, and that he never lost the power of calling upon her to cohabit with him, or took any steps for obtaining a separation.

The circumstances that have been principally relied on in this case are the declarations. There is one declaration, which is an affidavit of Mary Prole, who says "*she knew Ann Smyth when she was the mistress of Lord Bradford, and heard and*

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"always understood from her, that she had no lawful issue, but
"that she had a son who was the illegitimate child of Lord
"Bradford." Then there is the answer given in by Ralph
Smyth in chancery, to the bill of revivor brought after the
death of Ann Smyth, in which he notices the deceased as "a
"person called in the said bill John Newport," and after-
wards says "he does not know who is the heir at law of Ann
"Smyth," which would not have been true if he had regarded
the deceased as legitimate; and lastly, his recognizing the
proceedings in chancery respecting the lunacy of the deceased,
which abound with the most distinct and unequivocal state-
ments of his being illegitimate. All this has been urged to
be a direct disavowal by the husband and wife, in proof
that the deceased was not their son. But this disavowal by
the father or mother was not, I conceive, such as they were
by law allowed to make. Lord Mansfield says the law of
England is clear, that the declaration of a father or mother
cannot be admitted to bastardize the son born after marriage;
and this is a rule, notwithstanding what has been said of it,
which in my apprehension is entitled to the utmost deference,
not only from the authority which belongs to every thing de-
livered by that great judge, but from its conformity with the
earlier decisions, and its tendency to preserve order, and to
prevent confusion, in the descent of property and in the ad-
ministration of justice. It is a rule, not only in the law of
England, but in the 47th Title. It may at first sight appear
oppressive to the husband, but we should recollect that a
husband who is injured by his wife may obtain a separation
from her, and thereby escape all danger of a spurious progeny.
If a husband connives at his wife living with another person,
he exposes himself to the consequences of such baseness, and
access must be presumed, in the absence of proof to the
contrary. This is not the only case of a similar nature in

which the law rejects evidence opposed to a presumption, though such evidence shall amount altogether to full proof. If a woman, big with child by A., be married to B., it is clear that the latter becomes the legal father *. And let no one reproach the law; the rules it has laid down have been wisely framed for the security of families, for the protection of marriages, and for the general extension of public convenience. It is an evil inseparable from the most perfect of human institutions, if, in particular circumstances and to particular persons, they may operate to mischief.

Some late cases have been mentioned, where children presumed to be adulterine bastards have been bastardized by the Act of Parliament which dissolved the marriage of the mother. But those being cases of Acts of Parliament alone, and not of sentences in a court of justice, they cannot be used as precedents here.

Upon the whole, I am of opinion, that from the proofs in the cause, the mother of the deceased must be presumed to have had access to her husband, at the time she became pregnant of the deceased; and consequently the deceased must be considered to be legitimate, and not a bastard. I therefore pronounce for the interest of Robert Waller and James Smyth, as the representatives of James Smyth, the next of kin of the deceased.

* Roll. 358.

NOTE (D.)

RECUEIL DES CAUSES CELEBRES, Tom. VI. p. 94.
Paris, 1809.

Catherine Berard was married on the 25th of July, 1806, to Francis Chapellet, who six months afterwards was attacked by a pleurisy, of which he died in eight days.

Upon receiving intelligence of his decease, which took place on the 20th of January, 1807, his family, who had always opposed his marriage, established themselves in his house, though his wife was entitled to live in it in addition to a life interest in the moiety of the property settled on her by her husband. Far from offering any consolation to the unfortunate widow of their kinsman, they overwhelmed her with the most cruel outrages, though she expressed her belief that she was then pregnant.

On the 26th of February following, upon an inventory being taken, in the presence of the whole family, of the property of the deceased, Catherine declared that she was still uncertain as to the fact of her pregnancy; a diffidence which did honour to her sincerity and virtue. The death of her husband had followed so close upon her conception, that she could not divest her mind of the most distressing associations, and was thereby incapable of perceiving the symptoms incident to incipient pregnancy.

These symptoms soon became more decided, and this certitude only served to increase the cruelty of her kinsmen; their cupidity rose to such a point as to stifle the cries of weakness, humanity, and innocence. They possessed themselves of the cellar, the granary, the live stock, and the keys of the different buildings: they had the inhumanity to refuse this un-

fortunate woman a mere sustenance in her own house, and even attempted to drive her away from it, by threats of beating her, if she remained there any longer. It was at the close of the eighth month of her pregnancy when, in the darkness of the night, they broke into her chamber, and grossly insulted and ill-used her, in order to force her to withdraw from her home.

It can be easily conceived that under these circumstances the foetus of a mother exposed to so much suffering was likely to be arrested in its growth. The death of her husband, and constant persecutions, must have affected her frame; much less indeed might have sufficed to cause the death of herself and her child.

When her pregnancy had reached the ordinary term, that is, the ninth month, Catherine Berard was attacked by the pains that precede child-birth. She called for the assistance of her friends; her relations arrived; but they were attracted only by the most sordid motives. The spectacle afforded by extreme suffering did not mitigate their anger; they gave way to the most violent excesses, and their conduct became such, that all the individuals who had hastened thither from feelings of benevolence, were obliged to retire from the house.

Every thing indicated an approaching delivery; and the same pains returned in the middle of the tenth month with the same violence as at the end of the ninth. The neighbours again hastened to offer their assistance. M. Falquet, a surgeon, now in the army, was called in; he was preparing to assist her, but this second scene ended like the first; the relations again stormed and threatened, and every one was obliged to retire.

From this period she was in a state of constant suffering to the moment of her delivery. She was reduced to such extreme indigence, as to be indebted to charity for her support.

The relations, in the hope of impeaching the legitimacy of the child, placed no bounds to their inhumanity: at the moment when the agony was at its crisis, they caused her to be summoned before a court of law, to give security for the moiety of the life interest, under the penalty of forfeiture, and they declared on this occasion, that they disregarded the reports, which she had circulated of her being pregnant by her husband.

In the midst of these domestic calamities, and after intense sufferings, Catherine Berard gave birth to her child. A midwife of the pariah was present on the occasion, whose observations on the state of the mother and child would have been important: unfortunately she died almost immediately after. However, it was observed that the child, whose resemblance to her father was *extraordinarily* striking, was larger and better formed than infants in general. The unusual size of the child, which is one of the principal signs of protracted birth, was so remarkable, that it was the subject of general conversation in the neighbourhood.

The husband died on the 20th of January, 1807, and the child was born on the 3d of December in the same year; thus making an interval of 316 days. We can only wonder that the birth was so slightly protracted, when we recollect the sufferings of the mother.

Though this child had cost its mother so dear, it was from that circumstance additionally beloved by her: to be a mother has charms under every vicissitude: she was its sole nurse, and she often bedewed it with her tears, on thinking of its unhappy fate, if the unassisted voice of innocence and virtue should fail before the tribunal of justice. She discharged towards it all the parental duties with exemplary fidelity, and the first wants of infancy having been supplied, she hastened to place it under the protection of the law and of religion.

She caused it to be baptised, and afterwards sent it by the midwife to be registered by the civil officer. It is unfortunate that her messenger was ignorant how to make a regular declaration. The child received the name of Rosalie, and was described as "a child born of Catherine Berard, widow of "Chapellet."

Notwithstanding the provision made by her husband was, independent of her dower, perfectly adequate to her support, the widow continued a prey to the most frightful want. She was reduced to the necessity of presenting a petition to the tribunal at Chambéry, that one moiety of her husband's goods might be given up to her, and the other placed under sequestration, until judgment had been given upon the legitimacy of Rosalie. She also demanded some satisfaction for the injuries committed against her, and claimed the restitution of the keys of the different buildings. The tribunal, by a decree dated the 11th of January, 1808, directed the petition to be heard; and it having been notified to her opponents, they on their side subpoenaed the widow, and also the guardian of the child.

The discussion turned on the legitimacy of Rosalie. The mother and the guardian offered to prove all the facts relative to the cruelty of the family, and the pains of labour of the mother at the end of the ninth month and towards the middle of the tenth.

The guardian urged that the family had failed in the respect they owed to justice, and had violated the rights of property in taking possession of the goods and stripping the house, and that nothing belonged to them as long as the question respecting the legitimacy of the infant remained undecided.

The widow defended herself with all the energy and courage, that truth, innocence, and maternal affection can inspire. She related the circumstances which had preceded the death of her husband. She explained the nature of his dis-

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order, its apparent insignificance, and the vigour he had preserved almost to the last moment of his life. She detailed the various outrages, of which she had been the victim, and endeavoured to demonstrate from these facts, that the late birth of the child might be naturally accounted for.

Her adversaries admitted their having taken possession of the property, and having removed part of the goods. They did not deny the facts which had been tendered in evidence. They treated with contempt the notion of the child being the issue of the husband, and they rested their case on the civil code, on some fragments of the Roman law, and on some isolated judgments that appear amongst the numerous authorities, which more modern and enlightened times have furnished in opposition to their claim.

The following are the reasons for the judgment which was pronounced on these arguments :—

“ Whereas the article 315 of the Code Napoleon declaring
 “ that the legitimacy of the infant born 300 days after the
 “ dissolution of the marriage is open to be disputed, invests
 “ him with a provisional legitimacy, and with the rights of
 “ such legitimacy, until the contrary be established, by a
 “ combination of facts and of particular circumstances, the
 “ effect of which is to remove the doubts of the physiologist
 “ and of the judge on the point in question.

“ Whereas, also, the relations of the husband have adduced
 “ no grounds for establishing the illegitimacy of the child be-
 “ sides the presumption arising from the protracted birth,
 “ which only gives them the power of disputing its legitimacy;
 “ they have not charged the mother with any act of inconti-
 “ nence, immorality, or impropriety, during or after her mar-
 “ riage, which can tend to prove the child not to be legitimate.

“ Whereas, also, the interval of time between the death of
 “ the husband and the birth of the child does not exceed that

“ which, according to the opinion of the most celebrated physicians, is the possible terminus of protracted birth.

“ Whereas, also, the admission of the family that they had possessed themselves of the husband's property, and disposed of a portion of the stock and goods which were on the premises, might have produced a state of distress and debility capable of retarding the growth of the foetus.

“ Whereas, also, the demand of Catherine Berard is so much the more urgent, from the income to which she is entitled being indispensable for her own support and that of her family.”

On the 14th of April, 1808, a definitive judgment declared the legitimacy of Rosalie, and condemned her adversaries in damages for the injuries they had committed against her mother. This decision having been appealed from, M. Metral and his opponent, of whose name we are unfortunately ignorant, pleaded before the High Court of Appeal with an eloquence and erudition worthy of the highest eulogium.

The limits of our work preclude our giving the details of the defence ; we must confine ourselves to a short analysis.

“ If nature ”, said M. Metral, “ had fixed an invariable period for gestation, there would be no instances of protracted or advanced births. The existence of the one supposes the existence of the other ; for if there be an extreme point on the one side there must also be one on the other, or there can be no mean period. If in all the works of nature we can find no instance where its laws are invariable, then the period of human birth cannot be so circumscribed ; the infant whilst in the bosom of its parent cannot form an exception to the laws of nature, and indeed the existence of protracted and advanced gestation has been universally admitted.

“ The usual limit of premature delivery has been fixed at

“ seven months, as that of protracted delivery at eleven, for
 “ both in one and in the other there is a departure from the
 “ ordinary course of nature.

“ Hippocrates believes the usual period of gestation to be at
 “ the ninth or tenth month; but we find by various passages
 “ of his works where he treats of the disorders of women dur-
 “ ing pregnancy, that it is possible for gestation to extend
 “ perhaps beyond the eleventh month. ‘ *Mea sententia pars* ‘
 “ ‘ *in undecim mensibus mensis est.*’ Tit. de Septimestri.

“ There is also another passage which is not less precise.
 “ ‘ *Cum enim ultra plenilunium mulier concipit, hoc totum*
 “ ‘ *undecim mensem attingere necesse est ut quidem ad ex-*
 “ ‘ *tremum circuitum perveniat.*’ Tit. de Octimestri.

“ In modern times, four celebrated schools, the faculty of
 “ Leipsic, the faculty of Giessen, and those of Ingolstadt and
 “ Montpellier, have considered that a woman might be de-
 “ livered after the twelfth month.

“ It was admitted by a decree of the faculty of Leipsic dated
 “ the 4th day of December 1688, that a delivery might be
 “ protracted to one year and thirteen days.

“ The faculty of Giessen has decided a posthumous child
 “ of twelve months to be legitimate: founding its decision on
 “ the authority of Pliny, Cardan, Spiegel, Skinkius, and various
 “ celebrated doctors.

“ The faculty of Ingolstadt has decided a child of twelve
 “ months and eight days to be legitimate.

“ Fontanus, a great doctor, cites the authority of several
 “ writers, and of the school at Montpellier, that a delivery
 “ may be protracted to eleven or twelve months.

“ Teichmayer, *Inst. Med. Leg.* p. 62, says that there are

* Hippocrates, *Frankf. edit.* p. 216.

“ doctors who have known cases of delivery at eleven or twelve months.

“ A girl at Leipsic professed to be pregnant by a young man of large fortune: she was confined and watched by order of the magistracy; at the end of sixteen months she was delivered of a child that lived two days. The fact is recorded by Bartolinus.

“ Bayle, a doctor at Toulouse, says, in a dissertation delivered in 1678, that a woman after pregnancy of nine months felt the pains of labour, and struggled to accomplish her delivery, but it was prevented by a hernia from taking place until the tenth month.

“ All medical men have heard of those celebrated foetus at Joigny, Sens, Dole, and Toulouse, which have petrified, dried, or gangrened in the womb of the female, after remaining there, more or less time.

“ A woman was delivered at Verny in the diocese of Bruges of a child at the expiration of nine months, and of another six weeks after. They both lived.

“ Madame Reflatin a midwife at Nevers, delivered on the 17th of January 1773, the wife of a butcher who had borne her child eleven months. The first symptom shewed itself on the 20th of January, four months and a half after she felt the child move in her womb; at the end of October she was attacked by the usual pains of child-birth, but the delivery did not take place till the 17th of January following.

“ Pranen, a doctor at Arles, declares that his wife bore her male children nine months, and her female children ten months, and sometimes longer. Skinkius in his work ‘*De Part. de Decimo et Undecimo Mense,*’ informs us that the parliament of Rouen inserted in their register, by way of precedent, that a woman who had experienced the pains of child birth in the ninth month, was not delivered until the eight-

“eenth. The Encyclopedia, under the article ‘Accouche-
 “ment’ says, that ‘females are delivered at the end of seven,
 “eight, nine, ten, and eleven months.’ Buffon in his Na-
 “tural History observes, ‘that the appearance of a new born
 “child will not always shew how long his birth has been re-
 “tarded; that a child may be born at ten months, and yet
 “be not more full grown than one who is born at nine
 “months.’

“The Emperor Adrian admitted the legitimacy of a child
 “who was born eleven months after the death of the husband,
 “and his decision was founded upon the opinions of the an-
 “cient naturalists and physicians; the woman, it should be
 “added, was virtuous. The Novell. 39, cap. 2, declares that
 “the infant born in the eleventh month is legitimate. ‘Mulier
 “undecimo mense perfecto peperit, ut non esset possibile
 “dicere, quia de defuncto fuisset partus, neque enim in tan-
 “tum tempus conceptionis extensum est.’ It is clear that
 “the text relates to a woman whose gestation extends beyond
 “the expiration of the eleventh month; the words ‘mulier
 “undecimo mense perfecto,’ the title of the Novel, leave no
 “doubt of it: so that the legitimacy of a child born during the
 “eleventh month was indisputable. Godefroy in his note on this
 “Novel, mentions a case which occurred in his own house at
 “Chappes, of a widow who was delivered eighteen months after
 “the death of her husband: the child was declared legitimate
 “on account of the integrity of the mother, against whom no
 “imputation was raised by her opponents.

“The Roman laws contain a devise by one Gallus ex-
 “pressed in these words, ‘Si filius meus vivo me morietur,
 “tunc si quis mihi ex eo nepos si quæ neptis, post mor-
 “tem meam in decem mensibus proximis quibus filius meus
 “inoreretur, natus natave, hæredes sunt.’ L. 29. de lib.
 “posthumis.

“ By the last laws of Rome, an infant born in the eleventh month was unquestionably legitimate.

“ In France, the parliamentary courts have always been favourable to cases of protracted gestation. On the 20th of August 1649, a daughter born ten months and nine days after the absence of the husband, was declared legitimate by the parliament of Paris. It was urged by the collateral heirs that Jean Pellors (the husband) had fallen into a paralysis some years after the marriage, and that in the hope of recovery he had been carried in a litter to the waters of Barbotau in Gascony, where he remained ten months and nine days, from whence they inferred that he could not be the father of the child. They added that the woman, overcome by the reproaches of her husband, had made a declaration before a notary, that the child in question was not begotten by him.—In the Journal of Audience, Vol. I. l. 7. c. 27. René Villeneuve was declared legitimate by judgment of the 6th of September 1653, although born eleven months after the decease of the husband. The circumstances which amongst others had great weight were, 1st, the excellent and pious education of Jacqueline Dubrier the mother, who had been placed in a monastery during her infancy, remained there until the age of twenty-six, under the care of her aunt who was the prioress. 2dly. That it was in the ninth month that she first felt the pains of labour. 3dly. That the pains at the delivery were unusually severe. 4thly. That the matrons and surgeons had during her confinement declared it to be a case of protracted delivery. 5thly. That the law has not fixed any precise limit to the period of gestation; that a gestation of twelve months was possible: it depended on the influence of the stars, differences of constitution in the father and mother, whose children would be variously affected by

“ their weakness or vigour, on the formative power^a, or on
 “ the infinity of causes, in consequence of which the gestation
 “ of males is usually shorter than that of females.

“ Boutelier has preserved a judgment of the great chamber
 “ of the parliament of Paris delivered in 1745, which declared
 “ a woman legitimate although born eleven complete months
 “ after the departure of her father on a voyage beyond seas.
 “ The heirs were condemned to costs of the suit, as guilty of
 “ conduct highly vexatious and oppressive. Choppin (sur
 “ artic. 44. of the court of Anjou) says that, ‘ a suit to redeem
 “ a mortgage’ being brought on behalf of a child of which the
 “ mother was then enceinte, it was decreed in his favour,
 “ though the birth did not occur till eleven months after the
 “ date of the petition. This doctrine was so free from all doubt
 “ that we find it briefly laid down by Domat. Liv. II. lib. 2.
 “ sect. 1. N. 5.

“ The legislators of the Code Napoleon were sensible of the
 “ impossibility of fixing an invariable limit; since nature
 “ knows no such restrictions. The art. 315 of Code Nap.
 “ says, ‘ the legitimacy of a child born 300 days after the dis-
 “ solution of the marriage may be disputed.’ Nothing can be
 “ more clear or energetic than this expression; the law does
 “ not declare the child legitimate, neither does the law declare
 “ it illegitimate. The counsel for the government who de-
 “ veloped the object of the law, used these words, ‘ the charge
 “ of protracted birth may be raised against a child if it be
 “ born 300 days after the dissolution of the marriage; but the
 “ presumption resulting from it will only be decisive against
 “ the child in cases where it is not rebutted by other

^a The ancient philosophers admitted the existence of a vis formatrix from which the form of all bodies originated. Dict. de Trev.

“ ‘ circumstances.’ So that a birth after ten months does not fix illegitimacy on the child ; his status is only doubtful : he “ is neither legitimate nor illegitimate.”

M. Metral finished by saying that the law having in similar cases empowered the judges to decide according to the particular circumstances before them, all of them in this case combined to entitle his client to a decision in her favour. Her virtue had been too fully established for it to be supposed that she would have prostituted herself at so awful a moment as the decease of her husband : whilst her sorrow, and the cruelty with which she had been treated by the heirs, furnished the real ground of her tardy delivery.

The counsel for the relations of the deceased opposed to the authorities cited by M. Metral the opinions of Hippocrates in his work “ *De Naturâ Pueri*”, where he fixes 280 days as invariably the longest period of gestation ; of Galen in his work, “ *De Semine*, cap. 4.” and of many other learned men, such as Bartholin, Peyronnel, Diogenes Laertius in Pythagorâ, Salamanticus, Johannes Golopedus, Bangenes Levinus, Lemmius, Mercurialis Puza, Vannette, Dionis, Harvey, Haller, Bouvard, Louis, &c. He also stated some provisions of the Roman laws, and three sentences, one delivered by the parliament of Paris, on the 22d of August, 1626, another by the parliament of Rouen on the 10th of August, 1632, and the third by the parliament of Grenoble on the 3d of April, 1626.

Finally, he argued that the provision of the 315th section of the Civil Code, made it impracticable for the courts in any case, to declare a child legitimate if born after the 300 days. As the grounds he relied on are stated in the judgment of the Court of Appeal of Grenoble, dated the 12th of April, whereof a copy is subjoined, we consider it unnecessary to detail them.

COPY OF THE JUDGMENT.

Whereas the 315th section of the Code Napoleon is thus expressed, "The legitimacy of an infant born 300 days after the dissolution of the marriage may be contested"; we consider it may from this article be inferred, that the legislature intended to fix at 300 days the extreme limit of tardy births, and the most protracted pregnancies.

Although the law does not expressly declare an infant born 300 days after the dissolution of the marriage to be illegitimate, and merely says that its legitimacy *may be contested*, we can only infer from this, that it requires, in order to declare it illegitimate, that the question of illegitimacy shall be raised by a party interested in contesting the child's status, for these reasons, "That every private right, if disputed, ought to be so by an individual having an opposite interest; that the law does not, unless duly called upon, pretend to redress an injustice; and finally, that the status of the infant, if not attacked, remains protected by that silence, which no one is interested to break."

We also think, that if the text of the 315th article cited above be open to some doubts, they will be immediately removed by considering the spirit of this law more clearly developed, in the 228th and 229th articles of the same code, which provide, that "widows, and wives who have been divorced, shall not marry again until *ten months* after the dissolution of their former marriage;" shewing that the law, always anxious to prevent confusion of lineage, has fixed at 300 days the extreme limit of pregnancy.

The spirit of this law is still further testified by the 312th article providing, that "the husband may disown the infant if he can prove that, for the ten months preceding its birth,

" he was under a physical impossibility of cohabiting with his " wife ;" the law therefore thus making the illegitimacy of the infant in this case, depend on the *simple disavowal* of the husband, accompanied by proof of the impossibility of his having cohabited with his wife for ten months preceding its birth, it clearly follows that the period of ten months is the extreme limit fixed by law for tardy births.

We also are of opinion that the 315th article, in giving to the heir of the husband the right of contesting the legitimacy of a child, born 300 days after the dissolution of the marriage, intended to give such a proceeding on their part, the same effect, as the simple disavowal of the father, in the case provided for by the 312th article.

That these two words, to *disavow* and to *contest*, ought to be taken in the same sense and have the same effect, since, in the cases specified in the 317th and 318th articles, the law assimilates these two expressions, draws from them the same inference, and gives them the same force.

We think that the law having already admitted an addition of thirty days to the term of nine months, which is the ordinary course of nature, to extend this term still further beyond 300 days, would be at once to relax the restraints of morality, disturb the tranquillity of families, introduce an unlimited latitude of decision, and restore to the courts that arbitrary discretion, which it is the particular object of the new code to take away.

We think, that even admitting the 315th article to be not so decisive, but that extraordinary circumstances may concur in which a child, though born 300 days after the dissolution of the marriage, might be declared legitimate, still it unquestionably raises a legal presumption of illegitimacy against the child, and that in such a case, facts must be averred sufficiently weighty and conclusive to rebut the presumption

arising from the law ; that such extraordinary circumstances must be extremely rare, and do not appear on these proceedings, nor in the facts which the guardian demands to be admitted in proof.

Finally, we think that Rosalie Berard born 318 days after the decease of Francis Chapellet, cannot bring the time of her conception within the status of the matrimony, nor, by consequence, raise a legal presumption of her being legitimate.

For these reasons the court (the judges being assembled at a solemn audience after a previous adjournment occasioned by an equal division^a) rejects the appeal, and by a further judgment forthwith declares Rosalie Berard is not entitled to be considered the daughter of Francis Chapellet, or to claim as his heir.

And the court decrees to the parties claiming as collateral heirs of Chapellet, the property and enjoyment of his estate, reserving to Catherine Berard her jointure, and the bequests made to her by her husband, after payment of the costs.

This decision is undoubtedly one of great weight, coming as it does from the whole court ; but with great deference to the learning and talents of the judges of which it is composed, we submit they are mistaken in deciding that the 315th article of the Code expressly declares, a child illegitimate when born 300 days after the dissolution of the marriage,

^a "Vider le partage" is a technical term, that cannot be correctly translated by any expression in English equally concise ; its meaning will best appear from the 118th article of the Code de Procedure Civile. "En cas de partage on appellera pour le vider un juge ; à défaut du juge au suppléant ; à son défaut un avocat attaché au barreau, et à son défaut un avoué ; tous appelés selon l'ordre du tableau ; l'affaire sera de nouveau plaidée." Though if the Court of Appeal was a Cour Royale the proceedings in such adjourned session would be regulated by the 468th article of the same Code.

and our opinion in this respect is founded on the arguments delivered both *by the Advocate-General, and the counsel for the crown*, and some members of the bench. All agreed that the word "may" used in this article, merely gives a discretionary power, and that the presumption of illegitimacy is not sufficient to deprive a child of its rights.

The courts then, in cases of this nature, are invested with a discretionary power, in the exercise of which, they are necessarily bound to take into consideration, all the circumstances favourable to the mother, and also to consult those able authors, who have recently treated this subject.

Had the Court of Appeal of Grenoble taken this view of the law, they must have attached great importance, as well to the irreproachable conduct of the widow Chapellet, as to the ill treatment she experienced, which may have retarded the birth of her daughter, and also to the doctrine laid down by two learned physicians, (M. Vigarous, professor at Montpelier, and M. Fodéré*,) on which M. Métral, counsel for

* Nature (says M. Vigarous in the 387th page of his Elementary Treatise on the Diseases of Women) has fixed no certain period for the developement and maturity of the foetus. The advancement or retardation of the process, will be influenced by the state of the mother's constitution, by the circumstances attending the conception, by the greater or less degree of tranquillity during the period of gestation, and finally by the sex of the infant; for the experience of ancients and of moderns, as well as that of women who have had numerous families, affords us daily proof that males are more rapidly formed than females. In general, all the above circumstances influence the foetus in the speedy or tardy attainment of its full growth; hence it is that some are completed at five, six, seven, and eight months, and at every intermediate period, while others are not perfected until after the usual and more ordinary period of nine months, as the tenth or even the eleventh month; and the

the appellant, mainly relied. The opinion of these two writers would no doubt have little influence in a case, where the chastity of the mother was doubtful; but it should have great weight in a case like the present, where the character of the wife is untarnished, and where deep chagrin may have retarded her delivery, and where, moreover, at the instant of her husband's decease she declared herself pregnant. It is much to be wished, that the Supreme Court may have an opportunity of pronouncing its opinion on this important question.

greater or less maturity of the foetus has a particular influence on the time of the delivery.

Let us now see how M. Fodéré expresses himself in his "Essay on Positive Physiology" printed in 1806, 3 Vol. § 796.

"The ordinary time of delivery is at the end of the ninth solar month. But this time is not so invariably fixed but that a woman may be delivered at an earlier or later period without injury to herself or her child, as at the end of the seventh, tenth, or even eleventh month, of which I have given several instances in my Legal Medicine. I must however observe, that it appears to me, such deviations cannot take place unaccompanied by some physical derangement, and that the delivery therefore in the ordinary and natural course of things, may be considered as fixed about the 282d day."

Nothing can be more positive than the language of these two enlightened writers, and we think their opinion entitled to great attention, in cases when the decision may fix an infamous stigma on a virtuous woman, and deprive her infant of its status and its rights. (Original note.)

NOTE (E.)

PROCEEDINGS in the HOUSE OF LORDS on the CLAIM to the EARLDOM OF BANBURY.

The Earldom of Banbury has been regarded by the House of Lords as an extinct peerage, from as distant a period as 1632. In that year, William Earl of Banbury died, and the fact, whether he left any issue, has been the subject of dispute in the House, more frequently than any other fact, that has ever engaged their judicial attention. There have been, at different times, no less than eight petitions to establish the claims of individuals, representing themselves to be the legitimate descendants of the nobleman, who last enjoyed the privileges of the earldom.

The history of these claims has now become exceedingly obscure; they can only be traced on the records of the House, an authority not implicitly to be trusted, as the minutes of the committees of privileges were formerly made in a very careless manner, and ceased to be considered of importance when the committees had dissolved^a. Few of the minutes have come down to us perfect, and those relating to the Banbury peerage bear evident marks of mutilation; they are checked however in many instances by the proceedings of the House, as detailed in the journals; and though they do not enable us to collect all the particulars of the successive claims, they afford considerable assistance towards our obtaining a

^a The minutes were made on loose papers, for the convenience of the committee, without any view to future reference. It is only by accident that any have been preserved.

just apprehension of the grounds of the judgment, which was ultimately delivered by the House.

Journ.

William Viscount Wallingford and Baron Knollys^a was, by letters patent, dated 18 Aug. 1627, created Earl of Banbury, with a privilege that he should rank next after Francis, Earl of Westmoreland, and before Henry, Earl of Manchester, notwithstanding any previous patent of his Majesty to the contrary. His lordship did not immediately take his seat in pursuance of this patent, and on the 23d of March in the following year it was moved the House to consider, "whether the prece-
" deny granted to the earl by his patent, over some other earls

^a Francis Knolles, in 30 Hen. VIII. obtained a grant of the lordship of Rotherfield Gray, commonly called Greys in Com. Oxon, in fee, and in 34 Hen. VIII. was one of that king's gentlemen pensioners. Upon the Reformation being set on foot by Edward VI. he became so zealous in the cause, that when Queen Mary began to reign, and grew severe towards the reformed, he fled into Germany, and there remained until the accession of Queen Elizabeth; in the first year of whose reign he was appointed one of her privy council, and shortly afterwards vice-chamberlain of her household, next, captain of the guard, treasurer of her household, and lastly, knight of the garter. In the 11 Eliz. he was entrusted with the custody of the Queen of Scots, then prisoner at Bolton Castle, and in 29 Eliz. he was one of those, who by commission sat in judgment upon that unfortunate lady. [His influence with the crown enabled him to procure for the inhabitants of his town of Wallingford an exemption from tolls and serving on juries.] By Catherine his wife, daughter of William Carey, Esq. ancestor of Lord Hunsdon, by Mary, daughter of Thomas Bullen, Earl of Wiltshire, and sister to the Lady Anne Bullen, mother of Queen Elizabeth, he had William his heir, and divers other children.

William was created, on 13th May, 1 James, Lord Knolles, of Grays, and on the 7th November, 14 James, he was raised to the dignity of Viscount of Wallingford, and on the 18th Aug. 2 Charles I. he was created Earl of Banbury. He first married Dorothy, daughter of Edmund, Lord Bray, and widow of Edmund, Lord Chandos, by whom he had no issue; and afterwards Elizabeth, eldest daughter of Thomas, Earl of Suffolk.—Mr. Townshend's MSS.

" of older creation, was not prejudicial to the inheritance of the
 " peers of the kingdom." It was referred to a committee of
 privileges to report their opinions thereon to the House. The
 report which followed this reference pronounced the precedence
 directly contrary to the stat. 31 Hen. VIII., but stated " that
 " whilst the committee were in debate of the measure the king
 " sent a gracious message, shewing the occasion of his granting
 " the said precedence to the said earl, and the king's desire that
 " the earl being old and childless, might enjoy it during his
 " time," and promising never thereafter to occasion the like
 dispute. On the 10th day of April following an order of the
 House was passed, reciting the admission by his majesty of the
 rights of the peers ; and it states " that his majesty resolved
 " to confer the dignity of earl on his lordship, at the same time
 " with others then advanced, and he being the first in quality
 " of them, was therefore to have had the first creation, but he
 " being casually forgotten, and his majesty being afterwards
 " remembered of him, he did but assign to him, the said earl,
 " the first intended rank, without the least thought to injure
 " any in present, or even to do the like in future." Then the
 order proceeds to state, " that as his majesty desired that this
 " might pass for once in this particular, considering, *how old a*
 " *man this earl was, and childless*, so that he might enjoy it
 " during his life, with the assurance that his majesty would
 " never more occasion the like dispute, the lords were con-
 " tented." And it was particularly provided by the said order
 that the said earl should hold such precedence for his life only,
 and that it should not go to his heirs.

Five days after the passing of this order, i. e. on the 15th
 day of April, the Earl of Banbury was brought into the House
 between the Earl of Suffolk (his brother-in-law) and the Earl
 of Sarum, and took his seat.

Lord Banbury died in 1632.

Journ.

On the 13th day of July 1660, the House was moved, "that there being a person that now sits in this House that is not a peer, who, as is conceived, has no right to the earldom of Banbury, it is ordered that this business shall be heard at the bar by council, on Monday come next se'nnight (23d July)."

Journ.

Nicholas Knollys (the person alluded to) attended the house on that day, and was named to a committee, and he continued to be employed on public business of the same description until November following, when it was ordered that "the Earl of Banbury have leave to be absent for some time."

Journ.

In the same session, an act was passed "to enable Nicholas, Earl of Banbury, to sell Boughton Latimer for the payment of his debts."

1st claim.
Journ.

On the 6th of June, 1661, the petition of Nicholas, Earl of Banbury, was laid before the house. It stated the creation of Sir William Knollys to the dignity of Earl of Banbury on the 18th of August, 2 Charles I., and that the said earl, after marrying with Elizabeth, daughter of the Earl of Suffolk, had by her, Edward, his eldest son, who died without issue^a, and Nicholas, the petitioner, who was born in January, 1630. That the petitioner had sat in the last parliament, but having no writ of summons to the present parliament, he had forborne to sit there. The petition prayed in the usual form for the writ of summons.

Journ.

The petition being read, the chancellor acquainted the house that his Majesty had signified his pleasure to him, that no writ should be issued to summon the Earl of Banbury to this parliament, upon some questions that were made in the last parliament concerning him.

^a He was killed in France.

The petition was referred to a committee for privileges which met on the 10th of June, 1661.—The proceedings of this committee appear to have been as follows * :—

“ 2^o Caroli 1st E. Banbury created. Edward. Min.

“ Anne Dalavill saith she knoweth him to be the son of Wm. E. of Banbury, being at his birth.

“ 3 Jan. 1630, Nic. E. of Banb' borne. Wm. dyed in 1632.

“ She knoweth nothing but that he was owned by the E. of Banbury as his son. She knows nothing but that he knew shee lay in.

“ Did shee ly in publickly ?

“ All the house she was in, knew it. She lay in at Haraden, in North'tonshire. Haraden is L. Vaux's house.

“ Did Wm. E. see the child ?

“ I was not there to know it. The lady was there before to take the waters of Wellingborough, but whether at this time I know not.

“ I dare say a child was borne then of the lady.

“ All withdraw.

“ Called in again.

“ Who were godfathers, &c. ? Dalavill knows not.

“ How old was Wm. E. of Banbury ?

“ Know not. He rode a hawking and hunting within a yeare before his death, and all other sports.

“ Mary Ogden.

“ I know Nico. E. of Ban. He was born a year and 4 before old E. dyed. I was at his birth. I was his nurse, but was not at his Xt'ing, bec. I was not of their opinion. I nursed him 15 months in the house at Haraden.

* This evidence is also set forth in the “ Report from the Committee of Privileges on the Banbury Peerage of the proceedings heretofore had touching the said title.—1808.”

Min.

" Did Wm. E. ever see him ?

" I know not.

" I know not whether Wm. E. knew his lady lay in,—but
" he visited her.

" What was the child called ?

" Nicolas ; and was carried ordinarily up and down the
" house.

" Did strangers see him ?

" The household saw him.

" How know you that this petic'oner is the child you
" nursed ?

" I have known him all along as well as my owne child.

" What was he called in his brother's lifetime ?

" Nicolas. I know nothing else.

" I never knew him called Nic. Vaux in my life.

" Anne Read.

" I know he is the Lady Banbury's son, borne in the be-
" ginning of Jan. 1630. His father died one year an half
" after.

" Did the E. of Banbury and his lady converse in bed to-
" gether ?

" Dalavil saith she hath seen them often in bed together.

" Were you not enjoyned to conceal his birth ?

" Answ. They know no cause of concealment.

" Were you not cautious to keep the child secret ?

" I was never commanded to keep him secret.

" Edward Wilkinson.

" I know the present E. ; he is the son of Wm. ; because
" he was one year and quarter old when Wm. dyed^a. I saw
" not the now earl till after his father's death.

^a This does not accord with the real date of Nicholas's birth.

" What was this Nicolas called at his father's death ?

Min.

" He was called Nicolas Knowles. What should they call him else ?

" The earl and his lady agreed very well together.

" I know not that the E. Wm. did know that he left any issue.

" Council.—We have cleared the title. Pray he may enjoy the liberty and privilege of a peer.

" Coke 1st Inst. 244. not to be disputed whether son or no, if father be within the four seas, though wife be adultery.

" Mr. Attorney p' Rege, confesses the law clear. The case is the king's not sending a writ by reason of his father being reputed childless ^a.

" You have heard circumstances (after death) of Wm. Lady Paget and Lady Willoughby found his heirs ^b.

" This seconded by an order of the house. The order read, and both sides agree to the office, and the lands he now hath were the Lord Vauxes settled by conveyance ^c.

" The first office cannot be avoided without a traverse or melius inquirend ^c.

" All withdraw.

" Ordered to report the matter of fact. That according to the law of the land he is legitimate.

" The report made to the house the 1st of July, 1661, that the opinion of the committee is, that the Nicolas, E. of Banbury, is a legitimate person."

^a The reputation was probably proved by the journals, containing the circumstances connected with Lord Banbury's precedency.

^b The minutes do not specify the production of any documentary evidence, but there can be no doubt that the inquisitions alluded to are the inquisitions which will be found in pp. 409, 410.

^c The conveyance by which the land was so settled will be found abstracted in p. 415.

The counsel were again heard on the 9th of July; the Attorney-General, (Sir Geoffrey Palmer) Serjeant Maynard and Serjeant Glyn for the crown, and Sir Peter Ball^a, Mr. Reeves and Mr. Calthorp for the claimant.

Min. "On the 10th of July, it was ordered that no writ be sent to the Earl of Banbury to parliament, and that Mr. Attorney-General do prepare a bill to prevent things of this kind for the future."—"The Earl of Banbury's business re-committed to the committee of privileges to consider of the matter now in debate."

Min. "Monday, 15th July, 1661. Committee of Privilege. 'To report that the E. of Banbury in the eye of the law (is legally) the son of the E. of Banbury, and therefore the committee think it to be fit that the house should advise the king to send the Earl of Banbury a writ to come to parl^t."

"That he ought to have his place according to the Stat. 31 Hen. 8. and not according to the claim.

"Lord Stafford had a patent to be Baron Stafford. The House w^d not allow him the precedency of the ancient barony, but yet allowed him the barony and place according to the date of his patent.

"The committee are of opinion, to report that Nicholas, Earl of Banbury, being in y^e eye of the law son to W. late Earl of B. the House should therefore advise the king to send him a writ to come to parl^t.

"Carried in y^e affirmative."

Journ. The report of the committee to the above effect was carried up by Lord Northampton, and it was thereupon resolved that the House should take it into consideration on the following

^a Attorney-General to the Queen Mother. A lawyer of great eminence.

Monday, and it was afterwards deferred to the 28th day of November.

On the 9th day of December, a bill was read for the first Journ-
time, intituled "an Act declaring Nicholas, Earl of Banbury,
"to be illegitimate." The said bill recited that the said earl
did in his old age take to wife Elizabeth, late Countess of
Banbury, which said countess, during that coverture and in-
termarriage, had issue of her body, Edward and Nicholas, who
were never acknowledged by or known to the said earl in his life-
time as his children; he reputed himself childless. But their
birth and breeding were altogether concealed from him, they
the said Edward and Nicholas, during the life of the said earl
and long after, being commonly called and known by the names
of Edward and Nicholas Vaux. And about the space of a
year after the death of the said earl, an office of inquisition was
taken, whereby it was found by the oaths of the jury that the
said earl had died without issue. And the said countess many
years after the finding of the said office, did first produce the
said Edward, and declared him to be Earl of Banbury, not
pretending at that time to have any other issue male inherit-
able to the said earldom; and after the death of the said Ed-
ward without issue, she the said countess did produce the said
Nicholas, and declare him likewise to be Earl of Banbury.
Now, in respect of the notoriety of the fact, and to the end
that a practice so much to be abhorred may receive a public
discountenance, and others may thereby be deterred from the
like for the future, and for that the illegitimation of children
born in wedlock can noway be declared but by act of parlia-
ment, be it therefore enacted, that the said Nicholas shall be
and is hereby declared and enacted to be illegitimate to all in-
tents and purposes whatsoever.

No further notice of the said bill is contained in the journals.

On the 26th of October, 1669, it was ordered to be referred Journ.

to a committee of privileges to examine why the Earl of Banbury's name was omitted in the list of peers, he having formerly sat as a peer in the House, and to peruse all former proceedings of the House concerning him, and to report to the House.

Journ.

The committee met and reported to the House on the 25th of November, 1669, that they had examined Sir Edmund Walker, king at arms, who produced a book out of the Herald's office, whereby it appeared that the said earl had married two wives, and died without issue in the year 1632. Likewise he produced a roll, being a procedure of the king and peers to parliament in 1640, in which list there is no Earl of Banbury mentioned^a: and upon these grounds Sir Edward Walker had left out the name of the Earl of Banbury in his list given to this House.—The committee also stated the proceedings of the former committee in 1661, and the said bill.

2d claim.
Journ.

On the 23d day of February, 1669, Nicholas presented a petition to the House praying for his writ of summons, which was referred to a committee of privileges. No further proceedings followed.

3d claim.
Journ.

On the 10th of June, 1685, Charles, Earl of Banbury, presented his petition to the House, stating that he was the eldest son of Nicholas, and praying the House to represent his case to his Majesty that he might be relieved according to right. The petition was referred to a committee of privileges, who reported to the House, the proceedings in the previous claims; counsel were appointed to be heard for the

^a Nicholas was then a minor. The Earls of Oxford and Winchelsea, Lords Delaware, Chandos, Petre, and Teynham, were also minors, and their names are also omitted.—Mr. Townshend's MSS.

crown and the petitioner on a future day; before the day arrived parliament was prorogued.

On the 7th of December, 1692, Charles Knollys was indicted by the name of Charles Knollys, Esquire, for the murder of his brother-in-law, Captain Philip Lawson.

On the 13th day of the same month, Charles Knollys presented a petition to the House, alleging himself to be Earl of Banbury and a peer of the realm, and to be indicted for the murder of the said Philip Lawson^a; and praying to be tried by his peers. 4th claim.
Journ.

Sir Thomas Powis for the petitioner, said "We have the Min.
" patent whereby Earl William was created; the only question
" is, whether Earl Nicholas was born in wedlock, which I do
" not find questioned. If children are born in wedlock, there
" is no question to be made in it. There was a claim made
" in 1660.—Nicholas sat in the convention parliament, and
" served on several committees.

" The Attorney-General for the crown.—The thing having
" been before the House several times, the king does not think
" fit to interpose in it, but leaves it to the judgment of the
" House, and when the House has determined he will do
" what is proper."

The Heralds' book containing a certificate of Lord Banbury's decease, and the above-mentioned two inquisitions were again examined^b. It was proved that the only part of the Banbury property inherited by the claimant consisted of the Bowling-place at Henley.

^a The petition is referred to but not set forth in the Journals. It is recited fully in the pleadings on the indictment.

^b For further particulars of these documents, see pp. 409, 410, 415.

Min.

Sir Thomas Powis said that the certificate was entitled to little credit. He asserted that Sir William Dugdale had printed what was false, that the certificate was signed by the countess. The claim was more important than any other that had preceded it on the same subject, as a man's life was now at stake.

The Attorney-General for the crown objected to the form of the petition, in applying for a privilege of peerage, before a writ of summons had been granted. He said, that it was sixty years since Lord Banbury's decease, and since any Lord Banbury had been recognized by the crown. It was not pretended that Lord Banbury knew that he had a son, nay that he even knew his wife had a son. An inquisition held in his own county found him childless, and Dugdale states that the Countess herself subscribed a certificate on her oath to that effect. It might be said that there was a second inquisition, but that was an artifice, as the first was never quashed.

All that was contended for these children, was that they were born in wedlock. Nicholas was not heard of for many years. *Hospell v. Collins* in the Common Pleas, shewed that a child who is not heard of during the coverture, and whose mother is not known to have had a child, is not legitimate^a.

Nicholas never inherited any part of the Banbury estates, whilst he enjoyed those of Lord Vaux. His sitting in the convention parliament was immaterial.

As to the proceedings in parliament respecting the claim; the Committee was of one opinion, and the House of an-

^a This case is noticed in the judgments of the peers more minutely.

other, as appears by bringing in the bill. It would be *Min.* very strange to admit the petitioner's claim after this proceeding.

Mr. Finch was heard in reply as follows:—"The matter desired is very great. This question does not decide the title to the lands. It is strange (says Mr. Attorney,) at this time to set this matter on foot, but the occasion is great, as the petitioner lies under the misfortune of being thought to have killed a man."

It was afterwards moved to call in the judges, which was *Journ.* negatived. The question was then put, whether the petitioner had any right to the Earldom of Banbury, which was resolved in the negative; and it was ordered that the petition should be dismissed. Fifteen peers dissented.

It was during these proceedings, that an address was voted *Min.* to his Majesty, that the Attorney-General for the time being should attend all committees of the House on questions of peerage.

The dismissal of the petition having taken place, Charles Knollys was brought up to the bar of the King's Bench in Hilary Term, 1693, when he pleaded a misnomer, in abatement. Sir John Somers, then Attorney-General, made a replication insisting on the resolutions of the House on dismissing the petition: to this replication Charles Knollys demurred, and Sir Edward Ward, who had become Attorney-General, joined in the demurrer.

The proceedings against Charles Knollys having taken this turn, the Lords passed an order on the 22d of March, 1693, that the Attorney-General should give to the House an account in writing of the proceedings in the Court of King's Bench against the person calling himself Earl of Banbury. The Attorney-General complied with the directions of the House, and an order was thereupon passed for the

Min.

justices of the Court of King's Bench to attend the House; the parliament however was prorogued before they attended, and the new session did not commence before the 12th of November, 1694.

In the mean time the Court of King's Bench took into consideration the sufficiency of the Attorney-General's replication to the plea of misnomer put in by Charles Knollys, and ultimately decided against it, and quashed the indictment. Lord Holt delivered the judgement of the Court at great length. The general principle of it is, that the resolution of the House of Lords upon the petition so presented to that House, instead of being first addressed to the King, and referred by his Majesty to the Lords, was not conclusive upon the defendant, and could not be replied as a legal judgement destructive of his right^a.

5th claim.
Journ.

In 1697, Charles Knollys presented a petition to his Majesty stating his title to the Earldom of Banbury, and imputing the failure of the claim of Nicholas to the influence of the late King James the Second, and urging the opinion of Lord Holt in favour of his name and title, and praying for his writ of summons.

Journ.

The petition being referred by his Majesty to the House on the 29th of January, 1697, a committee of peers was appointed to draw up a representation to his Majesty of the former proceedings respecting the said claim.

Journ.

A representation was accordingly reported to the House, in which the proceedings on the petition in 1692, were fully set

^a The proceedings of the Court of King's Bench in this case, are very fully reported in Skynner's Reports, 517. 1 Raym. Rep. 18. See also "the arguments of Lord Chief Justice Holt, and Judge Powell in the controverted point of peerage, in the case of the Queen v. Charles Knollys "Earl of Banbury. London, 1716," a pamphlet; and Lord Hale's Jurisdiction of the Lords House of Parliament, pref. 183.

forth, and it concluded with the expression "that the judges
"ment come to by the Lords on the said petition, they had
"great reason to believe was not made known to his Ma-
"jesty at the time of his making the said reference." Journ.

This representation was submitted to his Majesty, and the Journ.
House afterwards proceeded to call on the judges to account for
their judgement on the indictment of Charles Knollys. Lord
Holt peremptorily refused to give any reasons in so extra-
judicial a manner. He said, "that if the record was removed
"before the peers by error, so that it came judicially before
"them, he would give his reasons most willingly; but if he
"gave them in this case, it would be very prejudicial to all
"judges hereafter in all cases."

The committee met several times to deliberate on the Journ.
course to be pursued towards the judges, but nothing was
ultimately done.

* In the year 1711, Charles Knollys presented a petition to Journ.
Queen Anne, dated the 19th of March, 1711, stating the
grounds of his claim to the Earldom of Banbury, to the effect
stated in the before mentioned petitions, and complaining
that the representation of the peers, in 1697, did not set
forth the proceedings in the journals which were in his fa-
vour, nor the judgement given for him by the judges. And
the petition prayed that if her Majesty should be advised
not to send him a writ of summons, her Majesty would be
pleased to give such directions to the Attorney-General that
the matter might be brought judicially before the House. 6th claim.

By an order in council dated the 3d day of April, 1711,
it was thereby ordered that it be referred to a committee of
the council, to examine the matter of the said petition, and

* Papers delivered by Lord Hawkesbury on the 27th of June 1806, by his
Majesty's command, pursuant to an address of the House.

such committee having heard the petitioner, were then to report the state of the case to her Majesty.

No further traces have been discovered of the fate of this petition.

7th claim.

* On the accession of George the Second, in 1727, Charles Knollys presented a petition to his Majesty, stating that he had never had a favourable occasion to state his case in a true light until his Majesty's reign, and praying his Majesty to direct the Attorney-General to give him a full statement of the proceedings in parliament relating to the petitioner's right of peerage, as also what proceedings were had in the inferior courts of judicature in Westminster Hall, and to lay the same before his Majesty in council, that his Majesty might be truly apprised of the justice of the petitioner's case, that he might be relieved according to right.

His Majesty by an order dated the 24th of November, 1727, referred the petition to the Attorney-General, (Sir Philip Yorke, afterwards Lord Hardwicke,) who by his report dated the 9th of January, 1728, fully detailed the facts relative to the preceding claims, and concluded, "that as the House of Lords in their representation to King William in 1697, had expressly termed their resolution in 1692 a judgement of their House, and on that account declined entering into the merits of the reference made to them by his said Majesty, whether under these circumstances his Majesty would think fit then to make a new reference to the Lords, was a consideration not of law, but of prudence, which must be left to his Majesty's royal determination." No reference was made.

8th and last
claim.
Journ.

In the year 1806, William Knollys presented his petition to his Majesty George the Third, claiming the Earldom

* Papers delivered by Lord Hawkesbury, ut *supra*.

of Banbury, stating that Sir William Knollys was created Journ. Earl of Banbury and Viscount Wallingford, by letters patent dated 2 Chas. I. That the said Earl had died in May, 1632, leaving issue two sons; Edward, who died under age and without issue, and Nicholas, the ancestor of the claimant.

That Nicholas sat as a peer in the parliament of 1660, but his writ having been withheld in the parliament of 1661, he presented a petition to his Majesty, which was referred to a committee of the House, who came to a resolution in his favour.

That from various circumstances Nicholas failed in procuring a recognition of his rights. The claim however was renewed after his decease by his son Charles, who petitioned for his writ in 1685. The petition appears to have been improperly addressed to the King, instead of the House. The parliament was prorogued before it could be taken into consideration.

That the said Charles being sometime after accused of the murder of Philip Lawson, he was indicted for the same in December, 1692, by the name of Charles Knollys, and having removed that indictment into the Court of King's Bench, his Lordship pleaded his peerage in abatement. The Attorney-General replied to the said plea, that the said Charles had exhibited a petition to the Lords, thereby alleging that he was a peer, and being so indicted, he might be tried by his peers; and it was thereupon resolved that the said Charles had no title to the Earldom of Banbury, and that his petition be dismissed. To this replication the Earl demurred, his demurrer was allowed, and he was discharged from the indictment.

That a few years afterwards, the said Charles presented another petition addressed to his Majesty, praying for a writ. The petition was referred to the House, and a committee appointed to consider it. This committee drew up a repre-

sentation which was approved by the House, representing to his Majesty, "that the House had, upon the previous petition of the petitioner, come to the resolution that he had no right to the title of Banbury, and ordered his petition to be dismissed, which judgement the Lords had great reason to believe was not made known to his Majesty, at the time of making the said reference."

That the effect of this representation must necessarily have been that of exciting an idea that the proceedings in 1692, were regular, legal, and constitutional, and that the decision then pronounced, was final and conclusive against the petitioner, and all claiming under him, and it hath hitherto operated as an effectual bar to all further inquiry.

But the said petitioner humbly craved leave to represent to his Majesty, that the House of Lords has not any original jurisdiction in matter of inheritance, and consequently cannot pronounce upon any such matter upon an original application from any individual whatever.

That peerage is a matter of inheritance originating in a grant from the crown.

That no claim to a peerage can be made to any, but the King.

That the petition upon which the House of Lords on the 17th of January, 1692, came to the resolution in question, ("that the petitioner hath not any right to the title of Earl "of Banbury") was not a petition addressed to the King, and by his Majesty referred to the consideration of the House, (which your Majesty's petitioner humbly contends to have been the necessary course, to give the House a power of pronouncing upon its merits,) but was a petition addressed immediately to the House, and as appears from the representation above mentioned did not contain a claim to the title, *but prayed that he, being really by hereditary right Earl of Banbury, might be admitted to his trial by his peers.*

That upon such a petition it was not competent to the House to pronounce judgement, that the petitioner had not any right to the said title, and therefore such judgement, so given, cannot legally affect the rights of any person, who can prove himself to be heir according to the terms of the patent of the person, to whom the dignity was originally granted.

That no other doubt was ever advanced or suggested, with respect to the legitimacy of the claimant. The petitioner prayed that his Majesty would be graciously pleased to grant him a writ of summons to parliament as Earl of Banbury, or to take such other steps as to his Majesty's great wisdom should seem meet, for the purpose of producing a full investigation and final determination of his case^a.

The petition was referred to the Attorney-General, Sir Vicary Gibbs, who by his report dated the 25th of January, 1808, stated the previous claims, (save and except those made by Charles Knollys in 1711 and 1727, which were not known to him at the time of making his report,) and concluded by reporting that two questions arose in the case:—

1. Whether the resolution of the House of Lords upon the petition presented to them in 1692, by Charles Knollys was conclusive?

2. Whether the petitioner had made out his claim to the dignity by the evidence which he had produced?

As to the first question, he was of opinion that if the judgement which seemed to have occasioned much dissatisfaction to many of the peers was erroneous, it might have been removed by a writ of error to the House of Lords, and there reversed, but no steps were ever taken for reversing it; therefore he felt himself bound by so high an authority to re-

^a This petition was drawn up by Sir Samuel Romilly, Mr. Hargrave, and Mr. (now Mr. Justice) Gaslee.

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port that the said resolution was not a conclusive judgement against the said Charles.

Upon the second question, he was of opinion that the descent of the petitioner from Nicholas was satisfactorily proved, but that the legitimacy of Nicholas was left in a considerable degree of doubt.

Min. The petition and the report were referred by his Majesty to the House of Peers, and the case was heard before the committee of privileges for several days, in the years 1808, 1809, and 1810.

The following evidence was adduced by the claimant.

Min. The letters patent dated the 18th of August, 2 Caroli I. creating Viscount Wallingford and Baron Knollys to be Earl of Banbury, reciting that in consideration of his services to Queen Elizabeth, with whom he is mentioned to be related in blood, his Majesty James I. had raised him to the dignity of Viscount Wallingford; and his Majesty (Charles I.) having fixed on advancing some of his nobles to be earls upon his coronation, he resolved that Viscount Wallingford should be one of them, but that in respect not only of his advanced age, but of his extreme illness, King Charles found it convenient to defer his purpose for a time. The letters patent joined a grant to the said Earl and his heirs male of a rent of 20*l.*, with a clause that the said Earl should have the same precedence as if he had been advanced to the Earldom according to his Majesty's first intention, and that his station should be next to Francis Earl of Westmoreland, and before Henry Earl of Manchester, notwithstanding any previous patent of the same King to the contrary.

The marriage settlement of William Earl of Banbury, dated the 23d day of December, 3 James I. whereby Lord Banbury, in consideration of his marriage with Lady Elizabeth Howard, and for a competent jointure to be made to

her, and for the continuance of his manors, &c. in his name Min. and blood, and for other considerations, covenanted with trustees to convey the manors of Caversham, Chorley, &c. to the use of him the said Lord Knollys and the said Lady Elizabeth Howard, and the heirs male of the body of the said Lord Knollys, on the body of Lady Elizabeth Howard to be begotten, and in default of such issue, then to the use of the heirs male of the body of the late Sir Francis Knollys, deceased, (father of the said Lord Knollys,) and in default of such issue, to the use of the right heirs of the said Lord Knollys for ever.

An indenture dated the 3d of November, 5 Caroli I. and made between the said William Earl of Banbury of the one part, and Henry Earl of Holland, and Edward Lord Vaux of the other part, whereby the said Lord Banbury covenanted with the said trustees to levy a fine to them of the said manor of Caversham, to the use of the said Earl and the said Lady Elizabeth and of their heirs, and of the heir of the survivor of them for ever.

An inquisition dated 9 Caroli I. the 22d of May, taken at Burford in the county of Oxford, finding that the said Earl and Countess of Banbury had been jointly seised of certain premises therein mentioned, and that the Earl was sole seised of others, all of which were so settled and conveyed, that upon the death of the said Earl they did not descend to his heirs. And further, that the said Earl was also seised at the time of his death of a messuage and three acres at Henley, called the Bowling Place. That the said Earl had died at Caversham without heirs male of his body, leaving the said Countess, then living at Caversham, him surviving; and that Lady Diana Paget and Lady Anna Willoughby, being the co-heirs of Sir Henry Knollys deceased, the elder

Min.

brother of the said Earl, were the next heirs of the said Earl.

An inquisition dated 17 Caroli 1^{mi}. the 9th of April, at Abingdon in the county of Berks, finding that the said Earl had died seised of the said messuage so called Bowling Place, and that the said Earl had died on the 25th of May in London, (8 Chas. I.) leaving the said Countess him surviving, and that Edward now is, and on his death became Earl of Banbury, and that he was the son and heir of the said William Earl of Banbury, and that he was five years and fifteen days old at the time of the death of his said father.

A licence to travel dated June 1641, in the following terms:—

“ A Licence to travel.

Countess of } “ Alike to the Countess of Banbury and her
Banbury. } “ youngest son, and to take with them twelve
“ servants, 200*l*. in money, and her necessary charges. By
“ warrant and pr^d. ut sup.”

Evidence was then offered of the proceedings in Chancery upon a bill filed by William Earl of Salisbury, as the guardian and next friend of Edward the second Earl of Banbury, in which five witnesses were examined, four of whom appeared from their depositions to have been in the service of the Earl of Banbury for several years before the birth of his two sons, and also when they were born, and to the time of the death of the said Earl, and the other was a physician who had been in intimacy with him for several years prior to the birth of the eldest of his two sons, and continued to be connected with him till his decease.

The Attorney-General objected to the admission of this evidence on two grounds.

1. Because the suit was *res inter alias acta*.

2. Because it did not appear that the witnesses were connected, in the manner stated by them in the depositions, with the persons respecting whom they deposed: the admission of hearsay evidence in cases of pedigree being confined to relations interested in the state of the family, and persons intimately connected with it.

The counsel on both sides having been heard at great length, the following questions were submitted to the judges.

“ Upon the trial of an ejectment brought by E. F. against G. H. to recover the possession of an estate called Black Acre, E. F. to prove that C. D., from whom E. F. was descended, was the legitimate son of A. B. (and which fact it was necessary to prove,) offered to read in evidence a bill in Chancery, purporting to have been filed by C. D. in the year 1640 by his next friend, such next friend therein styling himself uncle of the infant, for the purpose of perpetuating testimony of the fact, that C. D. was the legitimate son of A. B.; and which bill states him to be such legitimate son, (but no persons, claiming to be heirs at law of A. B. if C. D. was illegitimate, were parties to the suit, the only defendant being a person alleged to have held lands under a lease from A. B., reserving rent to A. B. and his heirs,) and also offered to read in evidence depositions taken in the said cause, some of them purporting to be made by persons styling themselves relations of A. B., others styling themselves servants in his family, others styling themselves to be medical persons attendant upon the family, and in their respective depositions stating facts, and declaring, among other things, that C. D. was the legitimate son of A. B.; and that he was in the family of which they were respectively relations, servants, and medical attendants, reputed, esteemed, and taken so to be.”

“ Are these proceedings, viz. the bill in equity and the depositions respectively, or any, and which of them to be re-

Min.

ceived in the Courts below upon the trial of such ejectment, (G. H. not claiming or deriving in any manner under either the plaintiff or defendant in the said Chancery suit,) either as evidence of facts therein deposed to, or as declarations respecting pedigree? And are they, or any, and which of them evidence to be received in the said cause, that the parties filing, and making the depositions respectively, or any, and which of them sustained the characters of uncles, relations, servants, and medical persons respectively, which they describe themselves therein sustaining?"

"2d. Whether any bill in Chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill so filed in Chancery?"

"3d. Whether any depositions, taken in the Court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses or otherwise, would be received in evidence in a court of law, in any cause in which the parties were not the same parties as in the cause in Chancery, or did not claim under some or one of them?"

* The Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the judges upon the said several questions as follows:—

"To the first question the judges answer, that neither the bill in equity, nor the depositions stated in this question are to be received in evidence in the Courts below, on the trial of such ejectment as is mentioned in the question, either as evidence of facts therein deposed to, or as declarations respecting pedigree; neither are any of them evidence to be received in the said cause, that the parties filing the said bill or

* See Phillips on Evidence, Vol. I. p. 246, (Edit. 1820,) where the authorities on this point are collected.

making the said depositions respectively sustained the character of uncle, relations, servants, and medical persons, which they describe themselves therein sustaining." Min.

"The judges also are unanimously of opinion that it would make no difference as to what ought to have been their answer to the first question, if the bill in equity stated to have been filed by C. D., by his next friend, had been a bill for relief."

"To the second question the judges answer, that generally speaking a bill in Chancery cannot be received as evidence in a court of law, to prove any fact either alleged or denied in such bill as filed. But whether any possible case may be put, which would form an exception to such general rule, they cannot undertake to say."

"To the third question, the judges understand the question to be this. Whether depositions taken in the court of Chancery in consequence of a bill to perpetuate the testimony of witnesses or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent, as if the same were sworn to at the trial of an ejectment by witnesses then produced? To which question the judges answer, that no such depositions would be received in evidence in a court of law, in any cause in which the parties were not the same parties, as the parties in the cause in Chancery, or did not claim under some or one of them."

It was also proposed that the following question be put to the judges:—"Whether that, which is not capable of definition or precise description, ought in any case to be considered as part of the common law of England?"

This being objected to, it was put to the vote, and decided in the negative.

The original journals of the House were produced in order to prove the facts above mentioned, relative to the Earldom of Banbury.

The original minute books, journals, and original proceedings before the committee of privileges, and also proceedings before other committees containing matters relative to the said Earldom were also admitted in evidence, after some opposition from the Attorney-General^a.

The claimant established to the satisfaction of the House his lineal descent (as heir male) from Nicholas, whom he alleged to be the son and heir of William Earl of Banbury.

The following documents were produced on behalf of the Crown:—

Inquisitio post mortem of Sir Francis Knollys, K.G., taken at Reading, 39 Elizabeth 1597, whereby it appeared that the said Sir Francis Knollys died seised in his demeane as of fee tail to himself and the heirs male of his body, with the reversion in the crown, of the manor and advowson of Rotherfield Greys, and that Sir William Knollys, Knt., was his son and heir male, and of the age of fifty years or thereabouts at the taking of the said inquisition; and that Lettice Knollys and Elizabeth Knollys, both infants, and the only children of Francis Knollys, deceased, the eldest son of the said Sir Francis, are the co-heirs of the said Sir Francis.

An indenture dated the 4th of March, 1630, between William Earl of Banbury and Elizabeth his wife, of the one part, and Sir Robert Knollys, who was nephew to Lord Banbury, of the other part; whereby the uses of a fine levied by Lord and Lady Banbury of the manor of Rotherfield Greys, in Oxfordshire, (which the Attorney-General observed had been granted by the crown to the father of Lord Banbury,

^a Similar minutes had been read in evidence, in the claims to the peerages of Howard de Walden and De Roos.

and the heirs male of his body, as a reward for services, so that it was within the protection of the statute 34 and 35 Henry VIII. c. 20,) were declared to Sir Robert Knollys in fee. Also the fine levied in pursuance thereof, Trin. Term, 7 Car. I. 1631.

The register of the burials of the said Sir Robert Knollys, and of his eldest son William Knollys, and of his only son Robert Knollys. Divers deeds shewing that the manor and advowson of Rotherfield Greys had descended from the Earl of Banbury to Sir Robert Knollys, William Knollys, and Robert Knollys successively.

Letters patent dated the 20th of August, 36 Carol. II. 1684, reciting the letters patent, whereby Sir Robert Knollys (pursuant to the said grant of the Earl of Banbury, dated the 4th of March, 1630,) became seised in his demesne of the said manor and premises, in tail male, with remainder to his brother Francis Knollys, and his uncle Sir Francis Knollys, successively in tail male, with reversion in fee in the crown; and also reciting that Lettice Kennedy and Katharine Haldanby were the heirs general of the said Sir Robert Knollys, that is to say, sisters and co-heirs of Robert Knollys, deceased, who was the son and heir of William Knollys, deceased, who was the son and heir of Sir Robert Knollys, the patentee; his Majesty in order to effectuate a decree in Chancery, (dividing the said estates between the said sisters in equal moieties,) granted the reversion in the crown depending or attendant on the said estates tail to them and their heirs.

A book^a from the Heralds' office, containing funeral certificates, in which was entered a certificate of the funeral of William Earl of Banbury, stating that he had been twice

^a This book seems to have been read in evidence in the claim in 1692. See *supra*, p. 399.

married, and never had any issue ; but it not appearing that the certificate from which this entry was made, was signed by any relation of the deceased, or by the chief mourner, it was rejected.

The will of William Earl of Banbury, leaving all his property to his wife, and making no mention of Edward or Nicholas Knollys.

Also an indenture dated the 19th of October, 1646, executed by Lord Vaux and the Countess of Banbury, then the wife of Lord Vaux, by which Lord Vaux covenanted to levy a fine of an estate at Harrowden, to the use of Lord Vaux and Lady Banbury for their lives, with remainder to the use of Nicholas, who is thus described in the deed : " The Right " Honorable Nicholas, now Earl of Banbury, sonne of the " said Countess of Banbury, heretofore called Nicholas Vaux, " or by which soever of the said names or descriptions the " said Nicholas be, or hath been called, reputed or known."

Counsel for the crown. The Attorney-General (Sir Vicary Gibbs) and Mr. Tripp.

Counsel for the claimant. Sir Samuel Romilly, Mr. Hargrave, and Mr. Gaselee.

Sir Samuel Romilly *.—The illegitimacy of the ancestor of the claimant is sought to be established on the presumption of his being the son of Lord Vaux. It is admitted that he was the son of Lady Banbury, that he was born during wedlock, and that no evidence can be proved to have transpired during the life of Lord Banbury, to charge Lady Banbury with an adulterous intercourse with Lord Vaux, or any other individual. There is no evidence of divorce or even of separa-

* I have made great exertions to obtain a more perfect report of a speech which is said to have been one of Sir Samuel Romilly's happiest efforts. His papers contain no note of it.

tion between Lord and Lady Banbury ; whilst there is ample evidence of their having lived upon the most affectionate terms, up to the time when their union was dissolved by his Lordship's decease. If upon the day before that event, Lady Banbury had been tried for adultery with Lord Vaux, can it be said that she would have been found guilty ? If her guilt could not then be established, it must be by some newly discovered rule of law, that she should now be judged by acts which had not been committed at the date of the imputed offence, and that every material part of her conduct through life, should be referred to an imaginary motive, identifying it with a fact, which cannot be proved to have ever taken place. The fact indeed is highly improbable. Lord Vaux was the friend of Lord Banbury, and the only relation in which he appears to have stood towards Lady Banbury during her husband's life, was that of trustee in the settlement of the Caversham property in favour of Lady Banbury ; and it should be observed, his lordship held that office jointly with Lord Holland^a, a most distinguished nobleman, and one who was very unlikely to be involved in so dishonourable a transaction, as this would be if the charge against Lady Banbury is well founded.

The evidence that William Earl of Banbury was not the father of Nicholas, may be reduced to these points :—

1. That he was of an advanced age.
2. That he was childless in 1628.
3. That he never knew that he had such a son.
4. That there is no evidence of the baptism of Nicholas ; and that he was treated as the child of Lord Vaux.
5. That the *inquisitio post mortem* finds him to have died without issue.
6. That Rotherfield Greys did not descend to Nicholas.

^a The Lord Holland whose name has been immortalized by Clarendon.

The objection to the age of Lord Banbury may at once be dismissed. The law of England admits of no age at which a man may not become a father, and many medical authorities may be cited to shew that this rule is founded on reason. Dr. Gregory, of Edinburgh, whose name must be familiar to all admirers of science, says, upon this subject, "*Magna autem de his rebus differentia, decantantur enim exempla senum in castris Veneris strenue merentium, postquam centum annos compleverant; neque sane dubium, aut adeo rarum octogennarium patrem fieri.*"^a Haller likewise pronounces a man of ninety to be capable of procreating^b. Parr became a father in his 140th year. In short, the liberality of the law on this subject is excessive, for there is no age from seven upwards, at which a man is denied the privilege of having children.

The proceedings before the House related only to a point of precedence. It was stated by the King that the Earl was old and childless; and this was the fact, at the date of the patents of the noblemen over whom the precedence was conferred; at the date of Lord Banbury's own patent; and most probably at the date of Lord Banbury's representation to the King to that effect. Edward's birth took place a year after the date of the patent, and only a few weeks before the King's message. Lord Banbury might have considered himself aggrieved at being excluded from the creation in February 1626. He might have resolved to keep his precedence upon any terms. He might have entertained some scruples at resigning an honour which the House had treated as so important. He might have felt a morbid delicacy at avowing before his youthful peers this unexpected addition to his family. He might have suffered a statement to be made by the King which he would not have made himself. He might have been a weak, or even an un-

^a *Conspectus Medicinæ Theoreticæ*, Vol. II. p. 7.

^b *Elementa Physiologiæ Corporis Humani*, 4to, Vol. VII. p. 375.

principled man. But be this as it may, the fact cannot prejudice Nicholas our ancestor; he unquestionably was not born until the following year: and it would be bold to infer, that if one child of a marriage cannot be proved to be legitimate, all the subsequently born children must consequently be illegitimate. This would indeed militate against the old and approved maxim of *pater est quem nuptiæ demonstrant*. If all these presumptions are rejected, and Nicholas is involved in the suspicion which attaches to his brother, I would remind the House, that the clearest demonstration, that the child was concealed, and that it had been kept in total secrecy by its mother, would only lead to an inference, which, after all, is of less weight than an express declaration of its illegitimacy by the mother. The law has wisely ordained this species of evidence to be inadmissible. A mother is an incompetent witness to prove her child's illegitimacy. Upon that point her mouth is closed; and God forbid that it should be otherwise. A vicious woman is too likely to make an unnatural mother^a, and as the nature of her guilt must necessarily cause her own testimony to be conclusive, she would retain a power over her children which her hatred for her husband might induce her to exercise to their destruction, without any regard to truth. It would be superfluous to cite the numerous authorities in support of this proposition^b, but I cannot help adverting to a case in France, which may be found in the pleadings of the celebrated D'Aguesseau, where this doctrine was completely established after much discussion^c.

^a *Neque femina amissa pudicitia alia abnuerit.* Tacit. Ann. l. iv. c. 3. in relating the intrigues of Sejanus with Livia, the wife of Drusus.

^b The cases are collected in Starkie on Evidence, P. iv. 123.

^c "Plaidoyer pour le Sieur de Vinantes"—Œuvres D'Aguesseau, one of the most beautiful specimens of judicial eloquence that has ever been given to the world.

The facts were as follow:—The husband held an office about the court, which required his frequent absence from home. His wife after many years of marriage proved unfaithful to him. She became pregnant, as she believed by her paramour. She was clandestinely delivered, the child was reared and educated by its real father, and it was baptized as an illegitimate child. The pregnancy of the mother, the birth, nay, even the existence of the child was long unknown to her husband. He at length discovered the guilt of his wife, and its consequences. He resorted to legal proceedings. His wife made an ample confession which included the most explicit declarations of the illegitimacy of her child. A divorce was granted, but the guardians of the child refused to release the husband from the obligations imposed upon him by his marriage contract. They sued him before the parliament of Paris, and that learned body established the legitimacy of the child. There are similar cases in the French books. One of an earlier date (that of Madame de Cognac) has been cited in this House by Lord Nottingham with marked approbation. These decisions do not rest on local usage or technical rules; they are founded on the civil law, which is the source of all the authorities that will be cited on this occasion. They draw a just deduction from the principles laid down in those authorities, and one that we may safely follow, though delivered by a foreign tribunal. Reason is reason everywhere. But these principles are not new in this House, for Lord Nottingham, in the claim of the viscounty of Purbeck^a, one of the most important cases ever agitated here,

^a The following extract from Lord Nottingham's MSS. was very kindly furnished me by Mr. Swanston.

“*Ex parte Villiers*.—Robert Villiers, Esq. did heretofore petition the king during his minority by the name of Viscount Purbeck, for leave to attend in the

and argued by the most eminent lawyers, expressly pronounced the declaration of the father or mother to the prejudice of a

House of Peers at their debates, behind the chair of state, which hath been the constant privilege of all infant peers of the realm, and of peers' eldest sons."

"The king referred the matter to the House of Peers then sitting, who made many difficulties, and questioned whether the petitioner's father were the legitimate son of the grandfather, and this point was mainly insisted on by the Duke of Bucks, the Earl of Denbigh, and all that interest, who seemed very much to apprehend the danger of allowing the petitioner's pedigree, lest it might one day entitle him to succeed, though not to the dukedom, yet to the marquise of Bucks and most of the duke's estate."

"Others of my lords objected that his father, having levied a fine of his honour to the king, had extinguished it, and took notice that the king's learned counsel had certified to his Majesty in 1660, which certificate was subscribed by Mr. Serjt. Glanville, Mr. Attorney Palmer, and myself, being then the King's Solicitor. But this the lords who were against the petitioner would not hear of, as considering the right of all peers to be involved in this point, and cited a judgment of this House to the contrary in 1641, in the case of Lord Grey de Ruthyn, which still remains upon the journals. All my lords conceived that the petitioner's interest to stand behind the chair at the debates of the House, was not so considerable as to oblige the lords to come to a present decision of the point, though the rest of the privileges of an infant peer did very much depend upon it; so the debate was laid aside for three years, till the petitioner should be of age, but special care was had, that no entry in the journals should mention the petitioner by that style which he gave himself, viz. Viscount Purbeck."

"When the petitioner came of age he presented another petition to the king praying his writ of summons, and complaining of me, that I made some scruple of sealing it, by reason of the debates, which had been in the Lords House. The king referred this to the House of Lords, who heard counsel on both sides at the bar, touching the matter of fact, and then appointed a day for Mr. Attorney to be heard, what he could say for the king against the petitioner's claim."

"At that day before Mr. Attorney argued, the Duke of Bucks desired to offer some further evidence as to matter of fact, and shewed how the petitioner's father had exhibited a bill in chancery against the grandfather, and the grandfather by his answer upon oath denied him to be his son, and insisted that

child's legitimacy was not to be endured, inasmuch as *filiatio non potest probari*. His lordship cites the case of Madame de

the father could not be the son of the grandfather, for that he was christened by the name of Robert Wright, and took a patent from the usurper Cromwell to be called Danvers, and afterwards at the bar of the Lords House renounced the name of Villiers." (*Mr. Wallop argued the matter of law on the effect of the fine, which, not relating to the subject of this work, I shall omit.*) "Mr. Attorney concluded for the king, and said, first as to the illegitimation of the petitioner's father, he could not say much, for without question the wife's son is the husband's son, if the husband were *infra quatuor maria*, &c. the only use to be made of the evidence in this case is to consider, how far it goes towards disproving him to be the wife's son." (*The Attorney-General then proceeded to discuss the effect of the fine.*)

"Now this being the last day wherein the House were to give judgment, I delivered my opinion thus *. The question whether there be a legitimate succession to this honor is a question of fact, wherein the doubt is not, whether the petitioner be legal heir to his father, but whether the father were so to the grandfather; and therein it is admitted that the father is legally the son of the grandfather, if he can prove himself the son of the grandmother, and this fact is now called in question, and the grandchild, after fifty or sixty years elapsed, is put to prove, not that his father was lawfully begotten, (every one sees the danger of that,) but, which is all one in consequence, that his father was begotten of his grandmother. This ought not to be endured, for—1. *filiatio non potest probari, nec debet*;—2. it tends to defeat purchases made of the father as heir;—3. he hath been found heir to the land, and son of the grandmother, by a special verdict in 1653, in *Wegg v. Villiers* †, when matters were more capable of proof, old witnesses being since dead;—4. this should have been questioned if ever in the father's life, for he that is certainly a bastard, as being born before wedlock, yet, if he die with the reputation of true heir, he cannot be bastardized afterwards, but his issue shall carry away the land from the legitimate heir. *Litt. 2. Descents.*—5. strange questions are sometimes raised for crowns where armies dispute; but where a coronet only is at stake, it is not to be suffered. The great objections are, that he was baptized by another name,

*. That part of the judgement only is inserted which relates to the legitimacy of the Petitioner. See Collins, 283. Journ. Vol. XII. 673. XIII. 182. Show. P. C. 1.

† The reports of *Wegg v. Villiers* do not notice the question of legitimacy. See 2 Roll. 708. 2 S.M. 54.

Cognac, where the child having established her legitimacy in the mode prescribed by the law, her disavowal by her mother was not allowed to have any weight. Lord Ellenborough has repeatedly maintained the same doctrine in the Court of King's Bench.

It has been urged that because Nicholas is called Nicholas Vaux in the deed of 1646, that he must have gone by that name from his birth up to the execution of the deed. This is a very strained inference. We must recollect that during part of his infancy, the troubles of the day rendered it more safe for him to go under any appellation, rather than that of Earl of Banbury, and there is nothing extraordinary in his assuming the name borne by his step-father and benefactor. Is there the slightest evidence in any of the proceedings, that he was called Vaux during the life of Lord Banbury, or until he came to live with his adopted father? There are numerous instances of such adoptions, and even of changes of name resulting from them ^a, but this is the first that has been ascribed

and that the grandfather denied him to be his wife's son; but though it may be a good cause to suspect adultery where too much secrecy is used at baptism, it is no case to make illegitimation. Again, the grandfather's denial upon oath is nothing, for if the grandmother had herself denied him to be her son, yet it had not been material, for still it is capable of disproof. It is disproved here by the verdict, by the nurse and midwife then ^{*} produced, by the old Lady Hatton owning the child, who could not be in the secret, and by constant reputation. In the parliament of Paris in the case of Madame de Cognac †, it was adjudged that the mother's disavowing her child should not prejudice the child, who was able to disprove her. Nay, if the father himself had disclaimed his own legitimation, this ought not to prejudice the grandchild."

^a Sir Robert Agsborough, alias Townshend (the first person that received the honour of knighthood from King Charles II. after his coming to Lon-

^{*} At the trial.

† The case of Madame de Cognac is shortly stated in a note annexed to this report.

to such an unworthy motive. Before I quit the deed of 1646, I wish to state that Nicholas was no party to it, and the most unfavourable construction of it ought not to prejudice him, it being open to the objections that apply to the declarations on the part of Lady Banbury.

The legitimacy of Nicholas can be the result of presumption, only in case of the absence of proof. Like every other fact, it must be established by evidence, either direct or circumstantial. The former, if sufficient to satisfy the judge, is conclusive, although it may be irreconcilable with the latter. We must not overlook the dangers of trusting too implicitly on circumstantial evidence. If the connection between cause and effect in the material world has so long baffled every philosophical inquirer, surely we ought to approach with diffidence a similar investigation in the moral world. Who can pretend to ascribe to each act of man its real motive, and to hit with an unerring aim the hidden and indefinable source of human impulse? Let us not be roving after shadows of truth. Let us collect it, not by fanciful and imaginative deductions, but by the safer and surer method of examining the testimony of the witnesses who were called to the bar of the House in 1661. One of these persons (Anne Delavill) had seen Lord and Lady Banbury in bed together. Another (Mary Ogden) was present at the birth of Nicholas. It was deposed^a that Lord Banbury had seen the child and

don in 1660), was the only son of William Agaborough, a merchant in London. He was only three months old when his father died. His mother shortly after married Aurelian Townshend, a near relation of Lord Townshend. Sir Robert having lived with and been educated by his stepfather, was generally known by the name of Townshend, and by a public instrument, dated 12 March 1662, he was authorized to assume the name and bear the arms of Lord Townshend.—Mr. Townshend's MSS.

^a By Anne Delavill.

owned it, and what perhaps was supererogatory, that his lordship hunted and hawked until half a year before his death. These facts constitute *the legal demonstration* of Nicholas's legitimacy, and it was unnecessary for the claimant to do more. His case was *prima facie* proved. It was for those who opposed it to controvert his facts, by impeaching the veracity of the witnesses. It does not appear from the journals that they did so. They did not attempt to prove the impotency of Lord Banbury, or his separation from his wife. They asked a few questions respecting his recognition of the child; these were answered it is presumed satisfactorily, for they called no witnesses, though they had the power of doing so, and many peers were then in the House who were capable of affording every information. If the reputation had existed that Nicholas was not the son of Lord Banbury, the legal officers of the crown were bound to have brought it before the House in a proper shape. They ought to have proved such reputation. Nicholas could not be expected to prove a negative, and it is doubly cruel to impose this necessity on his descendants.

To revert to the evidence of suspicion. We are asked for the register of Nicholas's baptism. I reply that registers of baptism of so early a date, were then kept with extreme irregularity, and that the registry at Harrowden has not been preserved up to that time*.

If any of the peers had known any facts prejudicial to Nicholas, they would probably have declared them. It was their duty to have given their knowledge as witnesses, and not as judges. Nothing could be more criminal than to allow their private prepossessions to influence their judgments. They were not justified in depriving him of the state and condition to which he was born by any other than legal means, and it

* This was proved in evidence.

was illegal to see or to hear any thing relative to the case, out of the court in which it was tried.

The resolution of the peers was, that Nicholas was legitimate in the eye of the law. I am yet to learn what other legitimacy there can be, than legal legitimacy. Why should the expression excite surprise?

The inquisitions were *ex parte* proceedings. They might be quashed or defeated in more ways than I can profess to state, not having devoted my life to such inquiries.

It seems to me very questionable whether a legitimate son of Lord Banbury could have recovered Rotherfield Greys from the heirs of Sir Robert Knollys. I contend that the estate might be alienated notwithstanding the tenure. It is clear that if the king granted an estate, and did not specify in the grant that it was for services rendered, the issue might have been barred. The grant must be by way of reward. In this case no such consideration is expressed. The question depends on the construction of the statute, and is not without difficulty.

The parliamentary proceedings subsequent to the year 1661 are so far important, as they disprove any acquiescence on the part of the ancestors of the claimant in the non-recognition of their title. The claim has never slept. It has been kept alive by repeated applications to the House, the effect of which has been to leave the right, as it originally stood at the death of William Earl of Banbury. The report of Lord Hardwicke was merely to prevent a repetition of the disagreeable contest that had taken place between two superior courts. It referred wholly to the dispute between the judges and the Lords. At that time it would have been most impolitic to agitate such a question.

Sir Samuel Romilly concluded by a most pathetic appeal to the feelings of the House.

The ATTORNEY-GENERAL *.—The proposition upon which Sir Samuel Romilly seemed most to rely, was, that I had undertaken to prove that Nicholas was the son of Lord Vaux, and that I had failed in establishing that fact. The House must not be thus misled. My argument rested on a broader base; I drew my deduction from a series of circumstances in the conduct of Lord Banbury, Lady Banbury, Lord Vaux, and Nicholas Vaux, wholly irreconcilable with the claim being well founded. Your Lordships must recollect the position in which I stand. I come here in a semi-judicial capacity, without any other object, than to secure the triumph of truth. My duty calls upon me to point out the defects of the claimant's case, and to continue my opposition as long as those defects exist. No proposition originates with me. The question is not, whether any of the circumstances I have stated are adequate to prove the illegitimacy of Nicholas, but whether on the whole, the claimant can make out the legitimacy of his ancestor. If I deny that he was legitimate, it is not incumbent on me to shew negatively, that he was not the son of Lord Banbury, but the onus is on the claimant, to shew that he was, and also to shew, that the claim has not been extinguished, either by the former proceedings in this House, or by the length of time during which it has lain dormant.

11th June,
1810.

Age may not be proof of impotency, but it is evidence of it. The probability of the Earl's begetting a child at eighty is very slight, and it is not increased by the appearance of another child two years later. Instances have been adduced of these extraordinary births, but none have been cited, in which a man at eighty-two having begotten a son, had concealed the birth of such son. Would not he seek publication rather than concealment? Besides, at the birth of children in

* I have searched Sir Vicary Gibbs's papers in vain for his notes of this argument.

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families of distinction, it is generally an object of much anxiety to have the event authenticated. Some registry is made of it. None has been found here after the most diligent search. If the register is lost, the date may always be supplied by the banquets and festivities with which it is contemporaneous. Why! the whole county would have resounded with the ringing of bells; you would have had processions of old men upon the anniversary of such a prodigy. It would have excited as much surprise as if a mule had been brought to bed! It reminds me of the lines of Juvenal:—

*Egregium sanctumque virum si cerno, bimembri
Hoc monstrum puero, vel mirandis sub aratro
Piscibus inventis, et fœtæ comparo mulæ.*

Sat. xiii. 65.

In no register, in no will, in no document is there any notice of this wonderful production. And then, not content with one, the miracle must be multiplied. It was not enough that one child should be born to a man at eighty-two; he must have another when he was eighty-four. And nature consummated her prodigality, by lavishing on these children the strength and vigour, which she usually denies to the offspring of imbecility.

The King's message to the house of peers must have created a strong feeling in a numerous and jealous body to inquire, whether the Earl had really a child, and if the fact had been so, had he been so incomprehensibly foolish as to make a false representation to the King, the secret must soon have been divulged.

Lord Vaux's christian name was Edward, which was the name of Nicholas's elder brother. It appears by the deed of 1646, that Nicholas passed in his childhood by the name of Vaux. The coincidence may be accidental. I can only say

that I should have a great jealousy of any friend of mine whose names I thus found fixed to two of my children.

If this question had been tried before a court of law, I think it would be impossible for any rational jury to decide otherwise than against the claim, or to believe, as has been insisted, that such a decision would endanger the title of any family, that possess an hereditary seat among your Lordships.

LORD ERSKINE stated the case, and concluded by moving that the committee should resolve that the claimant had made out his claim. 8 April, 1811.

EARL STANHOPE.—I think it highly important to ascertain the law by which this case is to be decided. I cannot agree with the noble lord (Erskine) that the circumstances of this case are so anomalous, that it will be impossible for the decision to establish any dangerous principle; for whatever we may choose to suppose, the affirmation or negation of the principle regulating the effect of *access*, must be inseparable from our decision. The subject is of the utmost importance in point of fact, and of interest in point of principle. We are at present so divided in opinion on matters of law, that I shall move some questions to be submitted to the judges, and I beg leave to state the grounds on which I have prepared them.

There is a rule of law called *Quatuor Maria*, and its application is limited by exceptions, such as impotency and nonaccess, to which exceptions we must look to find the force of the rule. They may all be consolidated into one, i. e. nongenerating access, which includes impotency of every kind, from nonage, malorganization, &c. It also embraces both physical and moral access. By physical access, I mean instances such as where a man is in prison, and is permitted to see his wife, but is not

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so permitted, as to admit the supposition of his being a father. By the term of moral access, I mean that nature of access, which may be opposed to physical access, as in the question whether a will be or be not a forgery; one branch of the evidence of the forgery may be, that the testator detested and was in the habit of abusing and execrating the legatee. There is no case to which non-generating access will not apply. It is the necessary issue, and no other. Now the object of my question is, to learn from the judges what case can be brought upon that issue, and whether the same evidence applies to that issue, as does to every other case, when a physical fact is proved.

I submit the following resolutions to the House, leaving it to your Lordships to determine whether they shall be proposed to the judges as questions.

1. That the fact of the birth of a child from a woman united to a man by lawful wedlock, is by the law of England *prima facie* evidence of the legitimacy of such child.

2. That such *prima facie* evidence may be lawfully rebutted by evidence of natural impossibility; and that in such case, as in every other case of a *prima facie* evidence of any right existing, the *onus probandi* is on the party calling the right in question.

3. That such *prima facie* evidence may be lawfully rebutted by evidence that such access did not take place between the husband and wife, as by the law of nature is necessary to admit the husband to be the father of the child. (*Some other resolutions followed which it is unnecessary to state, as they were not adopted.*)

LORD ELLENBOROUGH.—These propositions embrace a variety of points too extensive for application to this case. There is no doubt that the presumption of the legitimacy of a child, the husband and wife having access, may be rebutted. In

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 this case, there is no proof of the access of the husband and wife; the question therefore is, whether the presumption of access can be rebutted by any circumstances? This is the abstract point to be ascertained. Until we separate the law from the fact, we shall never arrive at a just conclusion. The fact is to be tried as facts are tried before a jury; the law may be decided on reference to the judges. I certainly think it desirable to have the opinion of the judges whether any circumstances can rebut the presumption of access, and then a question arises whether the circumstances in this case constitute such circumstances?

LORD CHANCELLOR.—I entirely agree with the noble Lord on the expediency of putting this question to the judges. When the law is once settled, there will be no great difficulty in deciding on the evidence of the fact. I do not conceive non-access, or what the noble Earl (Stanhope) terms non-generating access, is to be presumed, because the Earl of Banbury was eighty years old. Swinburne says ^a, that the possibility of issue must not be applied to a case where the husband is eighty; but he is corrected by his annotator, who observes, that to this general doctrine Englishmen of eighty formally protest. I think that an opportunity for considering the proposition ought to be afforded to the House, and the questions may then be submitted to the judges, who may also be asked whether the judgement of the House on a preceding occasion ^b is a bar. This is an inquiry of vital importance to the House.

LORD ERSKINE.—I recommend the propositions to be put in the shape of questions to the judges. The question framed by Lord Ellenborough is unobjectionable, but in this particular case it may lead us very little out of our difficulties. The

^a Swinburne, "Treatise of Espousals", p. 50, which enters into much unnecessary detail upon this point.

^b Alluding to the resolutions passed in 1692.

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answer will be too general. No one can doubt that there are circumstances which will enable a court of justice to rebut the presumption of access, but the judges may say that *no circumstances can be given in evidence.*

LORD REDESDALE.—I agree with the noble Lord on the advantage of further consideration. I apprehend the law to be, that the birth of a child during wedlock raises a presumption that such child is legitimate; that this presumption may be rebutted both by direct and presumptive evidence; that under the first head may be classed impotency and non-access, that is the impossibility of access; and under the second, all those circumstances which can have the effect of raising a presumption, that the child is not the issue of the husband. These circumstances are within the province of a jury, who are fully competent to decide, whether they are sufficient to raise a presumption of law.

I do not see how a question can be so stated to the judges, as to apply to this case. All that the judges can tell your Lordships is, whether the presumption of law can or cannot be rebutted; whether it be a presumption of law, which cannot be rebutted by evidence, which the civilians term *presumptio juris et de jure*, or whether it be one which can be rebutted by evidence. It is impossible to instance a question, where an inference is to be drawn by a jury under the direction of a judge, in which the jury is not called to decide upon the facts.

The following question^a was ultimately proposed to the judges. “Whether the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities

^a The following answers of the judges have been referred to in every subsequent case in which the access of the husband and wife has been the subject of discussion.

of access to each other during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?"

The LORD CHIEF JUSTICE of the Court of Common Pleas having conferred with his brethren, informed the committee that they were unanimously of opinion:

"That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption."

The following question was then put to the judges: "Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always by the law of England *primâ facie* evidence that such child is legitimate; and whether, in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question; whether such *primâ facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence, that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved, and can only be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary by the laws of England that a physical fact be proved?"

The following question was also proposed to the judges: "Whether evidence may be received and acted upon to bas-

tardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child; the husband not being impotent, except such proof as goes to negative the fact of generating access?

“ Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?”

To which the judges answered: “ That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of the child (by which they understood proof of sexual intercourse between them), no evidence could be received, except it tended to falsify the proof that such intercourse had taken place, such proof must be regulated by the same principles as were applicable to the establishment of any other fact.” Afterwards, the following questions were put to the judges:

“ 1. Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place after the marriage, between the husband and wife (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence sufficient to establish the fact of such non-access; as negatives such presumption of sexual intercourse, within the period when, according to the laws of nature, he might be the father of such child?

“ 2. Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce) can be legally resisted, by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but

such non-access can be legally left to a jury, upon a trial, in the courts of law, to repel the presumption of the legitimacy of a child so circumstanced?"

The LORD CHIEF JUSTICE of the Court of Common Pleas delivered the unanimous opinion of the judges as follows:

" 1. That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and 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 laws of nature, be the father of such child.

" 2. That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and the wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child; and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the husband, by the laws of nature, could be the father of such child.

" The non-existence of sexual intercourse is generally ex-

pressed by the words 'non-access of the husband to the wife'; and we understand those expressions, as applied to the present question, as meaning the same thing; because in one sense of the word access, the husband may be said to have access to his wife, as being in the same place, or the same house; and yet, under such circumstances, as, instead of proving, tend to disprove that any sexual intercourse took place between them."

The above answers having been obtained from the judges, Lord Erskine, after some prefatory observations, renewed his motion, that the claimant had made out his claim.

LORD REDESDALE*.—This is a question not simply between the Crown and the claimant; it affects every earl whose patent is of a subsequent date to the patent of William Earl of Banbury. It is a question which has been frequently agitated within these walls, and one hundred and seventy years have elapsed since the cause of discussion arose. Your Lordships are called upon to try a fact which could not be established when the memory of it was fresh, and when, the parties most competent and most interested to prove it being alive, the House was best qualified to give the subject a judicial determination. It must be observed that this delay cannot be imputed to the House, for no obstacles have ever been interposed from that quarter to the prosecution of the claim.

When the petition of Nicholas, the ancestor of the claimant, came under the consideration of the House in 1661, the Committee of Privileges to which it was referred, instead of reporting whether the claimant was legitimate or illegitimate, came to the extraordinary resolution that "he was legitimate in the eye of the law." It may safely be inferred that the

* I have mentioned in the introductory part of this work how deeply the profession are indebted to his Lordship for the authenticity of this report.

expression could only be introduced to shew that the law and the fact were at variance.

Now what was the law which the committee followed on this occasion? Not the law of England, for it would have led them to a different conclusion; but a certain law laid down by Lord Coke in his Commentary on the Institutes. We find by the minutes of the committee that the counsel for the claimant asserted, on the authority of 1 Inst. 244. "That it was not to be disputed whether son or no, if father be within the four seas, though the wife be in adultery", and that the Attorney-General confessed this rule to be clear.

I have a great respect for the memory of Lord Coke; but I am ready to accede to an assertion made by some of his contemporaries, that he was too fond of making the law, instead of declaring the law, and of telling untruths to support his own opinions. Indeed, an obstinate persistence in any opinion he had embraced, was a leading defect in his character. His dispute with Lord Ellesmere furnishes us with a very strong instance of his forcing the construction of terms, and making false definitions, when it suited his purpose to do so. Mr. Hargrave has shewn the statement of the law in the passage which governed the judgement of the committee to be untenable. It is not borne out by the authority referred to by the text, and it is inconsistent with the earlier and later decisions.

I admit that the law presumed the child of the wife of A., born when A. might have had sexual intercourse with her, or in due time after, to be the legitimate child of A.; but this was merely considered as a ground of presumption, and might be met by opposing circumstances. The fact, indeed, that any child is the child of any man, is not capable of direct proof, and can only be the result of presumption;—understanding by presumption, a probable consequence drawn from facts (either certain or proved by credible testimony),

by which may be determined the truth of a fact alleged, but of which there is no direct proof. Thus if A. and A'. are married, and are in such habits of intercourse that A. may be the father of a child born of the body of A', immediately produced as the child of A., and received as such by A., the child is presumed to be his child, though the fact of sexual intercourse cannot be proved; and if the death of A. before the birth of the child prevent its reception by him as his child, yet if the birth happen within a time which in ordinary course is the longest time of pregnancy before birth, the child is presumed to be the child of A.

If a child is born of the body of A'. and alleged to be the child of A., *but not so acknowledged by him*, nor produced on its birth as *his child*, yet if circumstances would admit of sexual intercourse, and the non-production of the child as the child of A. can be sufficiently accounted for, it will be presumed that the child is the child of A.

But in all these cases, the fact that the child is the child of A., is a fact presumed and not proved.

When, therefore, circumstances occur which may tend to rebut the presumption that a child born of the body of A', the wife of A., is his child, then, presumption rebutting presumption, the conclusion must be drawn from the whole evidence. So in Radwell's case, cited by Mr. Hargrave, the illness of the husband for some time before his death was admitted in evidence, and the *presumption* from that circumstance that sexual intercourse had not taken place during that period, being added to the length of time which had elapsed after the death of the husband before the birth of the child, was used to raise a conclusive presumption that the child was not his child. And in a case mentioned by Lord Erskine as having happened during his practice at the bar, where a child claimed as heir of A. begotten on the body of

A'. his wife, and produced as such on its birth, and proof was given that A'. had been married to C. before her marriage with A., and that C. was living after the marriage, and the evidence of the former marriage destroyed the claim of the child as the legitimate child of A., and then a claim was set up for the child to other property as the child of C., who was living and in the neighbourhood of A'. during the time of her pregnancy and until the birth of the child; the jury *presumed*, from the fact of the second marriage, and the production of the child at its birth as the child of A., that it was not the child of C.

Acknowledgement of a child by the reputed father and mother as their child, is generally the only evidence of the fact even that the child is the child of the woman, unless evidence of the persons present at its birth can be produced, and such acknowledgement is sufficient evidence, if not rebutted by clear evidence to the contrary, which was attempted in the Douglas case.

It is therefore of high importance to consider, in a question of legitimacy, whether the fact of such acknowledgment as would demonstrate the legitimacy did take place, or whether by circumstances such acknowledgment was rendered impossible, as by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of such a child, and that the fact of its birth was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse which could have made him the father of such child.

In this case there is the strongest evidence which the circumstances can admit, that the Earl of Banbury was utterly ignorant of the existence of the two children which, a considerable time after his death, were alleged to be his children, and that the countess and her family acted in the earl's life-

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time and after his decease as if the earl had been without children, to the utter ruin of the children if they were really the children of the earl.

Lord Banbury was possessed of two very considerable estates, Caversham and Rotherfield Greys. By his marriage-settlement (23d November 1604, 3 Jac. I.), being then Lord Knolles, he covenanted, in order "to make a provision for his intended wife, and for the continuance of the manors, &c. in his Lord Knolles's name and blood, to settle Caversham to the use of himself and his wife in tail male, with remainder to the heirs male of the body of his father"; thereby shewing that, in default of his own male issue, he contemplated the devolution of his property to the descendants of his father. Rotherfield Greys was the gift of the Crown, and being protected by the statute of Hen. VIII. the entail created by the grant of the Crown could not be barred.

In the year 1627, Edward, the first son of Lady Banbury, came into the world. After marriage of twenty years, Lord Banbury's bed ceased to be barren; a child was born to him in his old age, and a prospect was held out of the transmission of his title to posterity. Can any one doubt that this event must have been the source of the most lively satisfaction to him?

Three years after (in 1630), Lady Banbury was delivered of a second son, Nicholas, the ancestor of the present claimant.

It was at or about the period of the birth of Nicholas that Lord Banbury was induced by his age and infirmities "to put his house in order", so as to rid himself of all worldly cares for the future. His first act was to levy a fine of Caversham, which according to the limitations in his settlement would descend to his eldest son, and to convey the fee absolutely to Lady Banbury. By another deed, he covenanted to

levy a fine of Rotherfield Greys to Sir Robert Knollys (his nephew), his heirs and assigns for ever. It is true that he does not mention Sir Robert in the deed as his heir male, as he is named in a subsequent schedule, but it is evident from the tenor of the instrument that he considered Sir Robert in that light, and as the representative of their ancient family.

By these deeds Lord Banbury deprived himself of the means of providing for his two children, for he wholly denuded himself of his property.

At the same time he made his will, whereby, *without noticing any issue*, he leaves his wife his residuary legatee.

Can it now be doubted that the birth of these children was concealed from Lord Banbury? Can it be believed that he would have left the immediate successor to his title,—the eldest branch of his family,—the offspring of his old age—in unmerited indigence, in order to bestow his territorial domains upon his nephew? That in no one transaction since his marriage, from his settlement down to his will, should he mention his children, whilst he was the fond and devoted husband of their mother?—The presumption arising from such a series of acts on the part of Lord Banbury is almost tantamount to his absolutely declaring himself to be childless, and it can hardly be strengthened by his testimony to that effect. However, the records of the House place the fact beyond the reach of incredulity. His patent of earl is dated the 18th of August 1626. The House was moved to consider the patent on the 27th of March 1627. It was referred to a Committee of Privileges, and the Earl Marshal reported the law to be against the precedence granted by the patent, adding that whilst the discussions were pending, a message was received from the king, in which he desired that this departure from the ordinary privileges of the peerage

might pass for once "in this particular, considering how old "a man the earl was and childless." An order of the House was passed on the 10th of April 1628, reciting these particulars, and on the 15th of April 1628 Lord Banbury took his seat, according to that order.

Edward was born one year after the date of Lord Banbury's patent, so that he was alive at the time when Lord Banbury suffered the King to inform the House that he was childless, and at the time when he took his seat upon the faith of that assertion. We must suppose Lord Banbury to have spoken the truth when he so in effect declared himself childless, or we must consider him to have been guilty of the grossest deception upon the King and upon the House.

Thus Lord Banbury dies, believing himself, and being believed by the world, to be childless. The time was not yet arrived for the developement of this conspiracy.

The first inquisition was held at the proper period, i. e. immediately on the decease of the earl, and at the proper place, i. e. in the neighbourhood where his family had so long resided. Lady Banbury was alive; her connexions, the friends of her deceased husband, occupied the highest posts in the kingdom. The proceedings of the inquisition were public, and must have been well known to the countess, as it found her title to a considerable property; it also found a deed to which she was a party, conveying a large property to a collateral branch of her husband's family, a deed wholly irreconcilable with the legitimacy of her children; and it is also found that, the earl dying without issue, a small property descended to the heirs of the body of his elder brother as his heir at law. What could have produced such findings by the inquisition but a general reputation that the earl had no child? What could have caused the countess to suffer such

findings to remain undisturbed but a consciousness of their truth? Nothing has ever transpired to throw suspicion on the authenticity of this document.

The second inquisition was irregular. It is dated eight years after the first; an interval that afforded sufficient time for contrivance. It could have little weight as long as the first inquisition remained in force, for the parties might have quashed the first inquisition by a writ de melius inquirendo, before they could have properly disputed its veracity.

The marriage of Lord Vaux with Lady Banbury is the prelude to the production of the children. From that period the children seem to have been avowed by that nobleman as the issue of his adulterous intercourse with Lady Banbury. By the deed of the 19th of October 1646, he settles his estate on Nicholas, and it is impossible to devise a more clear designation than that which Nicholas here receives from his mother and the person suspected to be his father. He is not stated to be the son of the late Earl of Banbury, though the countess is described as the earl's widow; and the admission that he had gone by the name of Vaux, leaves no doubt that he had recently assumed the title of Banbury. If the declaration of parents can in any case be evidence, this is an instance in which it ought to be admitted. It is generally excluded, from the apprehension that it may be the result of some unnatural hatred towards the child. Here the motives of the parent were unequivocally parental, and the welfare of the child was the sole object of the declaration. Besides, this was no inconsiderate exclamation—no hasty unpremeditated act,—it was an allegation on a record framed after due deliberation under legal advice, and the veracity of it was attested by Lord Vaux and Lady Banbury themselves coming into court and solemnly acknowledging their deed.

This settlement was not the only instance given by Lord

Vaux of his paternal affection towards the offspring of Lady Banbury. He instituted a suit in Chancery for perpetuating the evidence of the legitimacy of Edward. The depositions of the witnesses having been declared to be inadmissible in these proceedings, I shall make no comment on them, but I ask, why did he not attempt to quash the inquisition which had found Lord Banbury to die without issue, which had designated Lord Banbury's nephews as his heirs, which had sanctioned the disposition made by Lord Banbury of his property to the prejudice of these children? Edward or Nicholas might in succession have established their title by ejectment if it had been valid. The courts of law were as open to litigants during the civil wars as in the most profound internal peace.

All these circumstances combined to rebut the presumption in favour of legitimacy arising from the birth of the children during their mother's marriage, and to afford decisive presumptive proof that they were not the children of Lord Banbury, but the offspring of an adulterous intercourse between Lord Vaux and the countess: the fact of that intercourse, coupled with the concealment of the birth of the children, affording the strongest presumptive evidence that there was no sexual intercourse between the earl and countess the result of which could be the birth of those children.

I may also observe, that after the death of the Earl of Banbury, the dignity of Earl of Banbury was never inserted in the list of peers, according to the common practice, during a minority.

So the question stood at the time of the Restoration. The first notice of Nicholas on the records of this House is on the 13th of July 1660, an early introduction of the subject, considering the circumstances under which the peers had met. It was nothing more than a voluntary meeting of a few mem-

bers, and a committee was appointed to consider to what lords letters should be addressed to desire their attendance. A list was given in, but I have been told that the list which has been produced is not the list which was approved of by the House. It is to be presumed that this list contained only the names of the peers who had previously taken their seats. It appears by the minutes, though not by the journals, that several peers who had not sat in the House since the decease of their fathers attended in the lobby, and offered their attendance if it should be thought proper, and the inference is, that the lords who had not previously taken their seats had no letter sent to them, and consequently Lord Banbury was without a letter, and he must have introduced himself into the House without the sanction of any of the existing authorities. The attention of the whole country was so deeply engaged, that a matter of this description was likely to have escaped notice; and either his sitting in the House, or his obtaining leave of absence from it, creates no presumption in favour of his right.

On the 6th of June 1661 the petition of Nicholas was presented, and the Chancellor stating the King's pleasure that no writ should be issued to him, the House resolved that the petition should be referred to the Committee of Privileges.

This committee met on the 17th of June to examine the witnesses in support of the claim, and out of the nine that appear to have been sworn only four were examined. The minutes are imperfect, but they probably contain the substance of the examination, and we must take them as they stand, their inaccuracy being as likely to favour as to prejudice the claimant.

Of these four witnesses the first is Ann Delavil, who was probably a servant of Lady Banbury at the time of the birth of Nicholas. She is indeed a most feeble auxiliary. Her

answers betray a consciousness of guilt and a dread of detection not easily paralleled. Like false witnesses in general, she denies all knowledge of every thing except the circumstance she is brought forward to prove. When she is asked whether Lord Banbury saw the child, a fact of which it was impossible for her to be ignorant, she says she was not there to know it. There is not one of her answers that does not admit of a double interpretation, and is not equivocating and evasive.

Mary Ogden comes next, and her evidence is of as suspicious a complexion as that of the preceding witness. She was at the birth of Nicholas ; she had nursed him for fifteen months, and she had known him ever since. From her we should expect an elucidation of all the mysteries that had involved this extraordinary transaction. The questions put to the witness are such as to elicit the truth. " Did Lord Banbury ever see him (Nicholas) ?"—" I know not." No one after this could doubt the fraud that had been practised upon Lord Banbury. But this is not all :—this witness, the child's nurse, does not even know whether Lord Banbury ever knew that his lady lay in ; and when questioned as to the concealment of the child, " whether he was allowed to be seen by " strangers ?" instead of returning a direct answer, she says " The household saw him." A jury could do no otherwise than infer that the existence of the child was kept a secret by Lord Vaux, Lady Banbury, and their associates, until the death of Lord Banbury.

Anne Read and Edward Wilkinson are the two remaining witnesses, and they are worthy of their companions. The former being asked whether she was not enjoined to conceal the birth of Nicholas ? answers, that she knows no cause of concealment. The question then is, " Were you not cautious to keep the child secret ?" Answer : " I was never commanded

to keep him secret." And Edward Wilkinson, who has the assurance to depose that Nicholas is the son of Earl William, admits that he does not know whether the earl knew that he left any issue.

This is the whole of the testimony with which Nicholas sought to remove the imputations that hung over his legitimacy. He brought no more witnesses to the bar.

Lord Vaux, at whose house he had been born, and by whose name he had been called in his childhood, was still alive, and the most natural guardian and supporter of his rights. There can be only one reason for his absence.

Where was the register of baptism? If it had been lost, the production of the child from its infancy, the recognition of the child by the husband and wife, its nurture, and its treatment as it grew up, the reputation at home and abroad, the belief of relations, friends, and neighbours, was the evidence which ought to have been resorted to. It was incumbent on Nicholas to combat the general reputation then prevalent that the earl had died without issue; a reputation founded on the earl's disposition of his property, on his representation to the king, on the inquisition held at his death, and on the conduct of Lady Banbury and Lord Vaux, both before and after his decease, confirmed as it was by Nicholas submitting to the penalties of illegitimacy by his acquiescence in the alienation of the patrimony of the earldom. Several questions were addressed to the witnesses respecting the facts by which this reputation had been created, and very unsatisfactory answers were obtained. The presumption against the legitimacy remained in full force. General reputation of legitimacy would have been evidence in favour of the legitimacy of Nicholas, so general reputation that there existed no issue of Lord Banbury was evidence against such legitimacy: and it is to be observed, that the general reputa-

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tion was, not that the children were illegitimate, but that there were no such children ; a reputation which could have arisen but from the concealment of the fact of their birth, which concealment could only have proceeded from the fact that they were not the children of the Earl of Banbury.

It is evident why Nicholas abstained from calling more witnesses to these facts ; and we can only account for the neglect of the committee by supposing that they considered the claim to depend on a question of law rather than a question of fact. Otherwise they were highly censurable in not making further enquiries. The House was dissatisfied with their report, and most justly, for the presumption in favour of the legitimacy of Nicholas from his birth during marriage, still continued to be opposed by the strong presumption against his legitimacy, raised by all the circumstances alluded to in the evidence. A day was appointed for hearing counsel and examining witnesses. Counsel were accordingly heard on the 9th of July. A long debate followed on the 10th, which led to a resolution, sufficiently expressive of the sense entertained by the House of the justice of the claim :—" Ordered, that there be " no writ sent to the Earl of Banbury to Parliament, and " that Mr. Attorney-General do prepare a bill to prevent " things of this nature for the future." " The Earl of Banbury's business recommitted to the Committee of Privileges " to consider of the matter now in debate."

A fresh report was made by the committee, to the same effect as the former, and carrying with it as little weight ; for no additional evidence appears to have been adduced.

On the 9th of December 1661, a bill to bastardize Nicholas was brought in by Lord Northampton. It certainly was not in conformity with the previous resolution, for the object of that was to declare the law to be different from Coke's exposition of it, and to make a prospective provision for persons in

the situation of the petitioner. The bill now introduced was confined to the case of the petitioner, and on that ground was doubtless disapproved of by the House, as a harsh exercise of legislation, and therefore dropped. If however the facts stated in it were true, a jury would now find Nicholas to be illegitimate; and the framer must have supposed the facts to be true, or he would not have so worded the preamble. There was a dispute between the House and the Committee, and nothing further was done.

These proceedings, though not decisive, are yet altogether most unfavourable to the claimant. The report amounts to a verdict against him upon the evidence, as the construction of law which was supposed to have defeated the effect of the evidence is now proved to be untenable. We thus know the opinion entertained by the committee of the fact, as separate from the law, and that opinion being no longer governed by a false conception of law, must operate to its full extent.

The doctrine of law set up in the Committee was not recognized by the House, and it may be urged that the House virtually rejected the claim by not proceeding on the report. The report resembled the verdict of a jury finding *the law* (according to their opinion of the law), as compelling them to find against their opinion as to *the fact*. If a jury had found such a verdict under a mistake of the law, it would have been the duty of the judge to tell them that they were mistaken in point of law, and if the judge had not set them right, the court would have ordered a new trial. The House in fact declared that the Committee were mistaken in point of law. In my opinion the issue of this petition may be considered as a sort of nonsuit in ejectment. The claimant was competent, through the intervention of any member of the House, to bring his claim to a decision, but he tacitly abandoned it. He also abstained from submitting his pretensions

to any other tribunal. It was open to him to bring an ejectment for the recovery of Rotherfield Greys, and the proof of his legitimacy in such a suit would alone have entitled him to a favourable verdict. The bounty of Lord Vaux, had placed him in affluent circumstances, and the proceedings in the House must have inspired him with additional motives for establishing his legitimacy. These proceedings in the House related to Nicholas's title to the earldom of Banbury, and not to his title to the estates. The subsequent proceedings in the House strengthen the presumption against the claim. Why was nothing done from 1661 to 1669? And when Nicholas presented his petition, it was at the close of that very stormy session when the temper of the times was such that an inquiry of this nature could not then be prosecuted with any prospect of success. This was his last attempt; he died in 1673. In 1685 a petition was again presented, and nothing done upon it; but in 1692 a fresh proceeding took place, on the petition of Charles (the son of Nicholas), claiming to be tried by his peers; which to me affords the strongest arguments against the present claim. If Charles Knollys had been a peer, his petition could not have been rejected, and the withholding of the writ of summons would have been a breach of the privileges of the House. The petition led to a review of the evidence which had been given before the Committee in 1661; and the House, with this evidence before them, after having heard counsel for the crown and for the claimant, went into a debate, which seems to have been of unusual length. It was first moved that the petitioner was the son of a supposititious child of Lord Banbury; but this being opposed, probably on the ground that if he was legitimate by law it would be unconstitutional to make him illegitimate by vote, it was moved to call in the judges to consult them on the law. The House

must have been satisfied that the law had formerly been misunderstood, for the motion was negatived; and the question was then put, Whether the petitioner had any right to the earldom of Banbury? and it being resolved in the negative, it was ordered that the petition should be dismissed.

This resolution, passed as it was with great solemnity, ought in my opinion to have all the force of a judicial decision. No doubt can be entertained of the jurisdiction of the House; for surely it had a right to determine whether the petitioner was entitled to be tried as a peer, and this could not be done without ascertaining whether he was legitimate.

The House was not at liberty to assume his legitimacy, and they did not travel out of the petition in inquiring into the fact on which it was grounded. It is true there was no reference from the King, but I conceive this defect is not fatal, for the petition answered the purpose of a reference, and estopped the petitioner from objecting that he did not submit to the determination of the House. Whatever informality may have been committed was to the prejudice of the Crown, and not of the petitioner. This view of the question was adopted by the Committee of the House to whom Charles Knollys's claim was referred in 1697; for after stating these proceedings in their report (calling the said resolution a judgement as well as a resolution), they go on to observe that the judgement was not known to the crown at the time the reference was made, which of course makes it manifest that the House conceived that had it been known it would have been considered conclusive, and as barring a reference. The House in fact treated it in that light, for the claim was dropped. Nothing more of it is heard during the life of this claimant, but it is revived by his son. Lord Hardwicke, who was then Attorney-General, reported upon it, and his report shews that his

opinion coincided with the opinion of the Committee in 1697. He concludes by saying, " But your Majesty hath been
 " pleased to observe that there appears to have been a differ-
 " ence of opinion between the House of Peers and the Court
 " of King's Bench, touching the effect of their Lordships'
 " vote of the 17th of January 1792, whereby it was resolved
 " that the petitioner had not any right to the title of Earl of
 " Banbury ; the Judges of the Court of King's Bench hav-
 " ing adjudged that the same was extrajudicial, and did not
 " conclude and bar the petitioner of his claim to the said
 " title, and the House of Peers appearing to have been of a
 " contrary opinion in their representation to his then late
 " Majesty King William the Third, wherein they expressly
 " called that resolution a judgment of their House, and on
 " that account declined entering into the merits of the refer-
 " ence made to them by his said late Majesty : and whether
 " under these circumstances your Majesty will think fit now
 " to make a new reference to the House of Lords, is a consi-
 " deration not of law but of prudence, which must be left to
 " your Majesty's royal determination."

The reference, to use the words of Lord Hardwicke, was no longer a matter of right ; had it been otherwise, the ministry of George the Second, a Whig ministry, was not of a description likely to concur in withholding any right from a subject. They advised his Majesty not to send the petition to the Lords, and the ground of their advice must have been the deficiency of any new light on a case which had been already decided by the House in 1692. They treated the resolution then passed as deciding the right, and concluding the question. In the view of the King, of the House, and (as far as acquiescence goes) of the claimant, the resolution was considered as conclusive. If the proceedings in this

House are liable to be invalidated on such slight grounds, the House is little entitled to the appellation of a supreme court of judicature.

I cannot approve of the conduct of Lord Holt upon this occasion. The House acted with great propriety. Suppose a person claim the privilege of peerage and to be tried by his peers, and the House determine that he is not so entitled, and he still pleads the fact; if the Attorney-General take issue on that fact, it would come to be tried before a jury, and they might decide that he was so entitled, which would place the House in an awkward position, whilst the delinquent would not be tried at all. I consider the abandonment of the proceedings in 1727 as an abandonment of the claim. If a petition were presented to the Crown in the nature of a writ of right, claiming lands, and the Crown refuse to act on the petition, and refer the question of right to trial in the ordinary way, I conceive the Crown would do wrong, if the claimant shewed a ground of right in his petition; and in 1727 the claimant might have petitioned the House upon rejection of his petition by the Crown. It would have been the constitutional duty of the House, as well as its duty to itself and its members, when informed of that rejection, to have inquired whether the Crown had been rightly advised on this subject.

I think Lord Chief Justice Holt was mistaken, if what fell from him is correctly reported; otherwise the Crown might refuse a writ in a subsequent parliament to any peer now sitting in the house.

The claimant in 1727 not having taken any steps upon the rejection of the petition, the further lapse of time before the last application gives additional weight to the presumption against the claim. This House is governed by laws analogous to the laws of the land. It would be indeed absurd that the acquiescence of the successive claimants in the successive ex-

press and implied rejection of a claim did not impeach the validity of such claim. In law, the failure to bring a matter before a jury when the memory of the transaction is fresh, raises a strong presumption against the right, and it is the duty of a judge, where the statute of limitation does not apply, to point out to the jury the force of this presumption. In cases where the statute does apply, he should lay a stress even on suspense. As enjoyment for a length of time may create a presumption against the Crown, so non-enjoyment for a length of time may create a presumption in favour of the Crown. Suppose an information of intrusion filed in 1661, in which the Crown had not thought fit to proceed, and accordingly no verdict is given on the case. Another information of the same kind is filed in 1692, and a verdict is given thereon against the Crown. A third information is filed in 1727. Would not the jury have told the Crown that the neglect for so long a period created the strongest presumption against its right? Independent of any other part of the case, I think lapse of time a sufficient ground for rejecting this claim, and I am persuaded that it is as important to hold lapse of time on a question of peerage to afford the same objection to a claim of peerage as it does to a claim of any other description. When a peerage falls in abeyance, no one of the coheirs has a right independent of the favour of the Crown, but where the right is entire, and no disability can be suggested, non-claim constitutes a strong ground of presumption (against the right) that the right was barred, or the claim not well founded, though the objection to the claim may not, in consequence of the lapse of time, be clearly shewn. Lord Hardwicke thought that the lapse of time, coupled with the previous proceedings in the House, was conclusive against the claim, even in 1727. Who can question what he would have thought in 1811?

I feel perfectly confident that had I been a member of this House in 1661 or 1692, I should have opposed the claim. I might possibly have considered the decision in 1692 as somewhat defective in point of form, but I should have decided as the Lords then decided, for I am sure that their decision was just. Had I been Attorney-General in 1727 or in 1807, I should have advised his Majesty not to refer the petition to the House, on the grounds that the resolutions of the House in 1692 were final, and that the claim must labour under all the disabilities which the law has attached to lapse of time.

LORD ELLENBOROUGH.—The importance of this case has led me to devote to it a larger portion of time than I could conveniently spare from my necessary occupations. I have thought it my bounden duty to exert my utmost diligence to collect all possible information, so as to enable me to form the most correct judgement that my mind is capable of arriving at, and I trust that I have not toiled in vain. Yet I do not rise without some apprehensions. The honourable character of the claimant and his military connections have begotten a friendly feeling among many members of this house, which has led to a sort of sympathy among others not so connected. I entreat every peer to make a covenant with himself, that affection shall not influence his judgement. If any other motive than a love of justice should actuate the opinion I shall have to offer, I should be unworthy of my place here and of the reputation I have obtained for the impartiality of my opinions in general. I am chained to the law of the land, and if ever I swerve from that, I trust I shall receive the reprobation of the world. I am bound by my oath to try this question according to the best of my judgement, and I consider this obligation as the most solemn by which my conscience can be affected.

The descendant of Nicholas Vaux is now endeavouring,

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after a feverish period of 180 years, to establish the legitimacy of his ancestor. The sole question before the House is, whether Nicholas was the legitimate son of William, Earl of Banbury.

It has been urged, with great force, by a noble and learned lord (Redesdale), that the very remote date of the cause of this discussion is alone fatal to the claim. The case is of such a size, and of so peculiar a nature, that the technical rules followed in other courts of law should be applied to it with caution; yet in the absence of precedents I am disposed to adopt the sort of reasoning upon which all statutes of limitation are founded.

The arguments against the claim have been objected to as fallacious, because they rest only on presumption. All cases of this kind must be governed by the presumptions arising from the fact of marriage. The presumption in favour of legitimacy is sometimes strong, often weak, sometimes irrefragable. But being a presumption alone, and not a rule of law, it is liable to be repelled by circumstances inducing a contrary presumption. Let a man live with a woman as if they were husband and wife, let them have children, let the access, let the production and the recognition of the children be proved;—if evidence could be given that he had not the organs of generation, all this would go for nothing.

It was always open to discussion in the civil law, whether the supposed father was in fact the father. If the child was born of the wife, *viro suo hoc ignorante: si in domo suscepit.*

Bracton and Fleta both shew that these principles were early introduced into our own law, and in the reign of Edward I.* a child was declared illegitimate notwithstanding the coverture and cohabitation of its mother and ostensible father.

* Foxcroft's case, 10 Edw. I., 1 Roll. 359.

The presumption of *real issue* was always open to discussion. (Here his Lordship entered into a very minute examination of the early authorities, concluding with Lord Coke^a.)

It appears to me, and I trust on an attentive examination of the proceedings in 1661 it will appear to all the House, that the committee had little doubt that Nicholas was illegitimate, but they felt themselves bound by a known rule of law which had till then been acted upon, but which ought to have been held null.

Thus the law stood at the time when Coke wrote, and at the time when the committee sat. The authorities have since varied. The case of *Hospell v. Collins*, decided by Lord Hale, left the presumption of legitimacy to the consideration of the jury, who were at liberty to infer whether the husband had access to his wife, from all those circumstances which would have qualified them to determine whether the husband was the father of the child. Unfortunately this case is not reported at length, at least I have not been able to find it after a careful search.

I do not oppose this claim on the ground of the impossibility of procreation by a person so old as Lord Banbury,

^a My notes of this part of Lord Ellenborough's argument are too imperfect to be printed. This circumstance is the more unfortunate as his Lordship possessed a profound knowledge of the subject, and considered himself bound to be very explanatory on this occasion, because his judgement in the *King v. Luffe*, which involved the same principles, had not been universally approved of. If I might venture to draw any inference from the fragments now before me I should say, that his Lordship treated the cases in the year-books as establishing that the presumption in favour of legitimacy might be disputed on certain grounds, which constituted, as it was termed, the special matter why it should not prevail. He argued that this special matter ought not to have been confined to impotency and divorce, but held co-extensive with the rules laid down in Bracton.

though that would be a cogent point. It is on the *moral* and not on the *physical* impossibility of Lord Banbury being the father of the claimant that I rest my objections. When applying the reason of man to the conduct of man, your Lordships must be governed by the induction which reason suggests. If this rule is observed on the present occasion it must lead to the result that it is morally impossible that William, Earl of Banbury should be the father from whose loins either Edward or Nicholas issued.

The case of Corbyn^a, decided by Lord Talbot, is one upon which this doctrine precisely stands. The parties were living under the same roof; they appeared to the world to be living as husband and wife, and to have full opportunities of sexual intercourse. Yet the child was declared illegitimate. And the same verdict was given in *Pendrill v. Pendrill* though there was no divorce, no separation, no physical impossibility, but the jury inferred from the distance at which the parties resided from each other, the infirm health of the husband, and the profligacy of the wife, that it was morally impossible for the husband to be the father of the child. It was not from one fact alone, but from a combination of facts, that they arrived at this conclusion. And we shall find, upon examining the remaining cases, that by the same reasoning, the relative situation of the parties, their habits of life, and many other circumstances, constitute the medium by which the jury may collect the paternity.

The authorities cited by Lord Erskine do not apply. It will be observed, that *to exclude the possibility*, never formed

^a This case is not reported, and I have not been able to discover it among the Hargrave MSS. in the British Museum or the collection in Lincoln's Inn Library.

part of the legal question. Upon this false assertion of the law rests the claim of Nicholas Vaux.

I now come to the facts as they appear upon the evidence. There was a great disparity of age between Lord and Lady Banbury, and they had been married twenty-one years without having any issue. He was created an earl in 1628 with a patent of precedency, which the king in his message to the House excused on the ground of his being old and childless. The period at which the message was sent deserves the particular attention of the House, for Edward had then been born some months. Was it consistent with the character of the earl or of the king that such a message could have been sent, if either of them had known of the existence of the child? The only object of the message was to acquire a precedency, which the earl must have regarded as a trifling consideration in comparison with the privilege of transmitting his newly acquired honours to a male heir. To suppose the earl privy to the birth of the child, would be to suppose a corruption in which the king and the earl participated, and to which the House became accessary. Can your Lordships by your vote declare that they would be guilty of such a fraud, and for so foolish a purpose? Is it probable that so singular an event as the birth of a child, after twenty-one years' marriage, to so old a man, should be unknown to the peers present? You must either assume that the king and the house were fully impressed with the belief that the earl was childless, or come to the other conclusion, that the fact existed, and the earl was utterly ignorant of it. Is it possible that he should be ignorant of it? I might as well be told that Abraham was ignorant of Sarah's delivery. If such an event had happened, would not the earl have hailed a child born in his extreme old age? Would not the first inceptions of pregnancy have been noticed with rapture by him, and all who took an inter-

rest in his welfare? In 1630, when Nicholas is stated to have been born, the same ignorance existed, though he would have had double cause for rejoicing. If conscious of the birth of these children, the most natural duty of the earl was to provide for them. Two considerable estates were settled upon his issue: one of his last acts is to divide these estates between his wife and the individual who was his heir in default of his having issue, and he closes his life by bequeathing the residue of his property to his wife, without noticing any issue in his will.

If this claim is well founded, I ask whether there ever was a case so anomalous? I have never heard or read of such an one, or of such an instance of neglect and undutiful conduct of a parent towards his offspring.

The earl's death is followed by a commission of escheat. The proceedings were before the proper authority, and they are stated in the body of the inquisition. The escheator must have had reference to the deeds in the possession of the countess, for they are recited in the inquisition. The person who framed the answers to the commission must also have had documents. The commission therefore could not have been executed clandestinely, or indeed without the full knowledge of the countess. The language of the inquisition is explicit: it finds the death of the earl without issue, and mentions with some precision the relationship of two ladies, who were his co-heiresses. Edward and Nicholas, though both alive, are both overlooked.

Lord Vaux and Lady Banbury had been some years married before it occurred to them to set up these children. The first step they took was to file a bill to perpetuate the testimony of witnesses supposed to have been present at the birth of Edward. This appears to have been a mere collusion. Who were the witnesses? Lady Banbury, from whose womb

Edward sprung, was not examined. They would not have so acted if they had been conscious of his legitimacy. Edward would have fought, not for the paltry bowling-green at Henley, but for the noble possession of Rotherfield Greys. He might have accomplished this object without filing a bill, either by proceeding in ejectment, or bringing a covenant of lease, or he might have pursued a more compendious course: he might have distrained for rent, and in an action of replevy he might have proved himself son and heir of the lessor. But this would have defeated his purpose. The truth would have come out upon a cross-examination. The deeds respecting Rotherfield Greys must have been produced, the inquisition scrutinized, Lady Banbury must have accounted for her silence.

I would not have alluded to the depositions in 1640, because they have not been received in evidence, had not their exclusion been lamented as injurious to the claimant. The curiosity of the House towards them has been excited by repeated injunctions not to read them. I sincerely wish they had been produced.

No one can doubt from the conduct of William Earl of Banbury, that he was not the father of these children. It is equally clear who was. The early marriage of Lord Vaux with the countess, the affection of that nobleman towards Nicholas, shews the nature of the connexion between them. It was the duty of Lord Vaux to make every reparation to Nicholas for the injury he had done him; his lordship therefore very properly settled upon him all his estates. The deed was enrolled. Lady Banbury was a party to it. If the gift had been made to him by the description of Nicholas Earl of Banbury, he could not have taken, therefore the description of Nicholas Vaux is added. By this industrious description his succession was ensured. I beg your Lordships

to bear in mind this description of Nicholas, when you advert to the evidence of the witness in 1661, who never knew him called by the name of Vaux. If ever there was a name with a pestilence about it, under the peculiar circumstances connecting these individuals, it was the name of Vaux, and that name is assigned to Nicholas by the deed. Is any such description ever given of a person who has not uniformly borne such a name? It proves that the real natural father was settling upon his child the bulk of his property, and that he might not miss his purpose, he gives him every description he can give him, except that he was the son of the Earl of Banbury.

The evidence before the committee does not deserve a moment's consideration. The witnesses manifestly perjured themselves. Mary Ogden was the nurse of Nicholas for fifteen months. Can it be believed that she should never have been present at some moment when the child was exhibited to his father? It was admitted before the committee that Lord Banbury had the reputation of having died childless. Why was not this reputation distinctly and explicitly accounted for or disproved? There could be no difficulty in procuring testimony to meet it. Nicholas was surrounded by his friends and protectors. Lord Vaux was still alive. Lady Salisbury was actually summoned. If the public incredulity was unfounded, they were the only persons to remove it. Their absence confirms the suspicion which must have arisen from the examination of the witnesses. So far from agreeing with the Attorney-General of the day that the claimant's title was clear, I think it was disproved by his own witnesses. They established a case of moral impossibility that Nicholas could be the son of Lord Banbury.

These proceedings may be said to have deprived Nicholas of his peerage, but they had no reference in point of law to

his title to the estates of Lord Banbury. Is it to be supposed that he would have submitted to the loss of property which Lord Banbury had no right to alienate from his issue; that he would not have taken some steps to recover it—if he could have proved his legitimacy!

The determination of the House in 1692 that Charles Knollys had no right to the earldom of Banbury was valid, though it may not have been conclusive against the claimant. The Court of King's Bench ought to have submitted to it: but Lord Holt had some peculiar opinions upon the jurisdiction of Parliament. His argument is very unsatisfactory. Charles Knollys claimed to be tried as a peer. It was a step to the induction, to see whether he was entitled to a writ. I cannot agree that when a man applies for a favour in respect of a quality belonging to him, you should not be at liberty to inquire whether that quality really belongs to him. The question was one of difficult consideration, and the peers were right in seeking the best information; and there was no impertinence in applying to the judges, who were from all circumstances the best qualified to afford it. There was no denial of justice. The claim was the subject of a very long debate; it passed through the committee in the usual form, and in the resolutions which followed, the report is styled a judgement. It was within the prerogative of the Crown, if it was dissatisfied, to have referred the petition back again to the House, and so far it was not conclusive; but in this respect no judgement of this House in questions of this nature can be conclusive.

Upon reviewing the evidence, and the parliamentary proceedings relative to this claim, no doubt remains upon my mind that the claim did not deserve to be referred to the House by the Attorney-General, and that it is incumbent on every member to vote against it.

I entreat your Lordships to let none but a judicial motive place within your walls the person sought to be intruded upon you. As the law was, and as it now is, he cannot be considered as legitimate. It would be a crime committed in a court of dernier resort, to admit such a claim.

LORD ERSKINE.—Notwithstanding all that has been urged by the noble and learned lords opposite, I adhere to the opinion I expressed at an early period of this debate. I admit that the claimant labours under great disadvantage. The facts involved in his case are extraordinary, and the grave has long since closed over all the individuals whose evidence could afford him any assistance. His claim is almost as old as the patent of his ancestor, and successive generations have passed away without a recognition of it by this House. Yet time would be the instrument of injustice if it operated to raise any legal bar to the claimant's right. Questions of peerage are not fettered by the rules of law that prescribe the limitation of actions, and it is one of the brightest privileges of our order, that we transmit to our descendants a title to the honours we have inherited or earned ; which is incapable either of alienation or surrender. But I will go further, and assert that lapse of time ought not in any way to prejudice the claimant, for what laches can be imputed in a case where there has been continual claim? Nicholas, the second Earl of Banbury, presented his petition as soon as there was a monarch on the throne to receive it, and a series of claims have been kept up by his issue to the present hour.

It appears to me of the first importance, that the law by which this case is to be decided should be accurately laid down. The facts of the case are only of importance with reference to the law, and any conclusion that may be drawn from them, which is not applicable to the law, is equally idle and irrelevant. If a former committee endeavoured in their

resolutions on this claim to distinguish the law from the fact, they cannot be too severely censured, as nothing could be more opposed to justice than such a distinction. Legitimacy in law and legitimacy in fact cannot be at variance; they are in every respect identical, and the apparent ground of distinction between them originates in an erroneous notion of the idea they purpose to convey. Legitimacy is the creature of law, and the term has no other meaning than that which is affixed to it by law. It is the designation of a particular status, the qualities of which have been enumerated and defined by law, as best adapted to preserve the order and security of society. When a question of legitimacy arises, and the claimant has proved the facts which constitute his legal title, whatever suspicions may exist to the contrary, the verdict must be given in his favour. These facts may be very far from convincing the judge that the claimant was actually begotten by his ostensible father: yet the judge has no alternative, for the claimant has fulfilled the conditions prescribed by the law. The province of the judge has been circumscribed by the lawgiver, and it would be a breach of his duty were he to extend his inquiry beyond the limits within which the question is confined.

The rules relating to the bastardy of children born in wedlock may be reduced to a single point, i. e., that the presumption in favour of the legitimacy of the child must stand until the contrary be proved, *by the impossibility* of the husband being the father; and this impossibility must arise either from his physical inability or from non-access. It has been urged that strong *improbability* is sufficient, but this I confidently deny. We do not sit here to balance probabilities on such a topic as this. We must not forget that the real matter in controversy is of a very peculiar nature. Suppose two horses and one mare in the same pasture-ground, and no

other horse could obtain access. The mare foals. If it were a question of property to ascertain by which horse the foal had been begotten, the party would succeed that could shew the greater number of probabilities in its favour: the colour, the shape of the foal, and whether the mare had been with one horse more than with another, would come into consideration. But it is not so with the human species; we stand on a higher ground. The obligation and contract of marriage being the source and fountain of all social ties, the law feels itself bound to give confidence to persons so connected, and rejects the imputation of a breach of contract, unless it be proved in either of the ways above mentioned. The coverture creates the presumption of access, and access is synonymous with sexual intercourse, except in the cases of physical inability. It is vain to say, that the presumption of sexual intercourse ought to yield to evidence which shews the fact to be highly improbable. The fact is a necessary concomitant to the status, therefore the presumption would be incontrovertible unless certain exceptions to it had been created by law. A presumption, as long as it stands, is equivalent to proof; indeed, proof is nothing more than a presumption of the highest order. Even the physical inability, by which the presumption of sexual intercourse may be encountered, is only a simple presumption. I cannot contemplate a case where physical inability can be made the subject of demonstration. Men of science, from their observations on the human body, may be able to satisfy their minds of the existence of the physical inability, but in our inquiry into it we must go by the ordinary rules of nature. An infant of seven years of age was lately exhibited that apparently possessed the powers and capacity of manhood^a; but if this monster

^a For a very singular instance of this kind of deformity see Paris, and Fombl. Med. Jurisp. V. I. p. 189.

had been married, would the issue of his wife have been held legitimate, in opposition to the established presumption of law with reference to infants of that age? Unquestionably the presumption would prevail. A chain of evidence may be perfect though every link of it is not equally perceptible. In murder, you must prove generally how the deceased came by his death, as by poison ; but it is not necessary to give evidence of his having drunk the draught ; so in arson, it is not necessary to see the torch put to the dwelling. Having laid down these rules, which the law has established for the protection of this very helpless class of the human race, I take it upon me to say, that to make a child that is born in wedlock legitimate, *there is no necessity to prove actual intercourse* ; for legitimacy is the inevitable result of access, save where the law has established certain exceptions. These principles are unshaken, and while they remain so, the exceptions which rest on the same grounds cannot be extended.

The nature of the presumption arising from the access of the husband being ascertained, it is evident that if access can be proved, the inference from it is irresistible, whatever moral probability may exist of the adulterer being the father : whatever suspicions may arise from the conduct of the wife, or the situation of the family, the issue must be legitimate. Such is the law of the land. Women are not shut up here, as in the eastern world, and the presumption of their virtue is inseparable from their liberty. If the presumption was once overthrown, the field would be laid open to unlimited inquiries into the privacy of domestic life : no man's legitimacy would be secure, and the law would be accessary to the perpetration of every species of imposture and iniquity.

The civil law regards the presumption arising from ac-

cess as insurmountable, except on proof of physical inability^a.

Our law fully supports the principles I have laid down. The rule is not only given by Lord Coke, but by succeeding writers. In the case of *Hospell v. Collins*, Lord Hale held that the issue to the jury was confined to the question of access. In *Pendrill v. Pendrill*, the sole subject of discussion was the access. It was proved that the husband and wife had lived apart, that in fact the presumption of access could be met by proof of non-access. In the case of *Thompson v. Saul*^b, in which I was counsel, the evidence against the legitimacy was not confined to the reputation of three generations to the adultery of the wife and to the treatment of the child. The great point was the non-access. The husband lived in Norwich and the wife in London, and the other circumstances all tended to controvert the access. It was strictly a case of non-access.

Mr. Beachcroft has furnished me with an accurate account of a trial^c which lately took place at Welshpool, in which the sole question was the legitimacy of a child named Lloyd. The husband was a lunatic; the wife lived in adultery with a Mr. Price, who was proved to have slept with her at the time when the issue was supposed to have been generated.

^a Digest, 1. 6. 6. which is confirmed both by the ancient and modern civilians. Zouch, *Question. Civi.* Ed. 1659.

^b 4 T. R. 366. Lord Erskine's statement is confirmed by a manuscript report of this case in my possession, taken by a gentleman at the bar (the late C. S. Lefevre, Esq. M.P.), in which it is expressly stated that Mr. Justice Ashhurst considered the circumstances sufficient to raise a conclusive presumption of non-access, and on that ground alone was of opinion that a new trial should be granted.

^c I have not been able to procure any particulars of this case.

The counsel dwelt strongly on the state of the husband and the adulterous intercourse of the wife. But there was no proof of non-access, and it was imperative on the jury to find for the legitimacy.

The same doctrine was followed by Lord Ellenborough in the case of *Boughton v. Boughton**. It is a case almost parallel to the present. In the year 1774, Salome Kay, the wife of a person in very humble life, left her husband, and became the mistress of Sir Edward Boughton. From that time she continued to live under the protection, and wholly at the expense of Sir Edward, and she ceased to hold any intercourse with her husband or to bear his name, having resumed that of Davis, which was her maiden name. In March, 1778, she was delivered of a girl, who was baptized and registered by the name of "Eliza, daughter of William and "Salome Davis." (William Davis, the brother of the mother, being a servant of Sir Edward Boughton.) Sir Edward brought up and educated Eliza Davis as his child, and by his will, dated the 26th of January, 1794, he devised considerable estates to her, by the description of his daughter Eliza, for her life, and after her decease to the heirs of her body in tail general, provided she married with the consent of her guardians, and the husband she married should take upon him the name of Boughton. After the death of Sir Edward, in 1798, Miss Davis, being still an infant, presented a petition to the Chancellor, stating that she was about to intermarry

* This case was tried at the Middlesex Sitings, K. B. 1807. Lord Erskine stated the case from a report of it in the *Morning Post* (now before me). I have corrected his Lordship's statement by comparing it with the papers in the cause, which a professional friend had the kindness to procure for me. Vide also *Boughton v. Sandilands*, 3 Taunt. 342. where the facts of the case are noticed.

with Colonel Braithwayte, and as her guardians were not competent to consent to her marriage, *she being an illegitimate child*, she prayed that Ann R. and Richard S. might be appointed her guardians, to enable them to consent to her marriage. The Chancellor, by an order dated the 9th day of August, 1798, granted the prayer of the petition; the guardians were appointed, and the marriage solemnized by licence. Doubts were afterwards raised on the legality of the marriage, upon the ground *that Miss Davis could not be considered an illegitimate child, Mr. Kay, the husband of her mother, having been alive at her birth, and therefore her legal father, and the only person qualified to consent to her marriage.* The Court of Chancery directed an issue to ascertain whether the marriage was legal, and the Court of King's Bench decided that it was not. The only question in the cause was the illegitimacy of Miss Davis, and stronger circumstantial evidence of that fact could not perhaps be brought forward in a case of this description. The separation of the husband and wife, the intercourse of the latter with Sir Edward Boughton, and the recognition of the child by that gentleman, were fully established. The baptismal register, the conduct of the mother, the reputation of the world, and the proceedings in Chancery, marked her as an illegitimate child. The single circumstance of the mother's husband being alive was all that could be urged to the contrary. The legal presumption in favour of legitimacy wrung a verdict from the jury, which no one can doubt they would gladly have withheld.

From these principles, supported by these cases, I infer that without proof of non-access, the presumption derivable from access must be conclusive.

Such is the law of England, as it has existed from early times down to the present hour. I am not here to defend the

law, but to administer it. Perhaps the lawgiver may have laid down a rule not always infallible; he may in some instances have diverted hereditary wealth from its proper channel, by enriching the fruit of an adulterous intercourse, and he may thus have created the relation of parent and child where it had no real existence. In my opinion, these occasional and very rare deviations from justice amount to nothing more than the price which every member of the community may be called upon to pay for the privileges of an enlightened code. No laws can be framed sufficiently comprehensive to embrace the infinite varieties of human action, and the labours of the lawgiver must be confined to the development of those principles which constitute the support and security of society. He views man with reference to the general good, and to that alone. He legislates for men in general, and not for particular cases. No one can doubt that the interests of society are best consulted by making a question of such frequent occurrence as legitimacy, to rest on a limited number of distinct facts, easy to be proved but not to be counterfeited, instead of leaving it to be the result of inference from a series of indefinite facts, separately trifling, and only of importance collectively, from the object to which they are applied. Marriage and cohabitation afford us a more sure solution of the question of legitimacy than we could arrive at by any reasoning on the conduct of the husband and wife. The conduct of Lord and Lady Banbury may be satisfactorily accounted for by the supposition that Nicholas was considered illegitimate by his mother; but if she cohabited with Lord Banbury at the time of the conception, she may have been mistaken in her judgment of the father to whom she assigned the child, and it would be monstrous that the status of any individual should be left to the determination of the very party who is ex-

pressly disqualified by law from giving any evidence on the subject.

This was the policy of the law ; and when it appeared to be manifestly unjust in an individual case, the legislature interposed by a special act^a, the effect of which was confined to

Acts.

^a In the year 1542 there passed an Act of Parliament for the bastardy of the Lady Parr's children. Lords Journals, Vol. I. 235.

This Act states that for the last two years she had eloped from her husband (William, Lord Parr, afterwards Marquis of Northampton,) and had not in that time ever returned to him, nor had any carnal knowledge with him, but had been gotten with child by one of her adulterers, and been delivered of such child, " which child being as it is notoriously known begotten in adultery, " and born during the espousals," (between the said William, Lord Parr, and her) "*by the law of this realm is inheritable, and may pretend to inherit all*", &c.

The Act then proceeds to *declare the said child to be a bastard.*

In the same year a similar Act passed to declare the children of Elizabeth Burgh to be bastards. This woman had been the wife of Sir Thomas Burgh, Knt. who died in the lifetime of his father, Thomas, Lord Burgh, and the said Lord Burgh petitioned for and obtained the Act, which sets forth that during the life of her husband she had lived in adultery, not regarding the company of her husband, and in that time had brought forth three children, " gotten by " other persons than her said husband during the espousals", &c. " as she had " confessed," which children " *being so gotten and born in adultery during the said espousals, by the laws of this realm be legitimate*", and will be inheritable and inherit, &c. after the death of the said Lord Burgh.

The Act then proceeds to declare the said three children, named Humphrey, Arthur, and Margaret, to be bastards.

In the year 1666 (five years after the decision in favour of the legitimacy of Nicholas, Earl of Banbury,) an Act passed for the illegitimation of the children of the Lady Anne Roosa. Lords' Journals, Vol. XII. p. 110. Ibid. pp. 15. 17^b. 28^b. 30^b. 38. 67^b. 68. 71. 45, 46, 47, 48^b. 95.

The Act states that the said Lady Anne left her husband's house and lived in notorious adultery, and had been delivered of three male children, " which " children thus *notoriously begotten in adultery, by the laws of this realm are*

the party who was the object of it. Several of these Acts may be found on the records of this House, but none of them were passed except under circumstances which left no doubt that the husband was not the father of the child proposed to be bastardized. I need not observe that these Acts are not declaratory of the law: they create exceptions from the law, otherwise they would have been unconstitutional encroachments upon the functions of the ordinary courts of justice, and an abuse of the jurisdiction of the House. A rule is often ascertained by knowing the exceptions to it. These Acts constitute an unanswerable argument to shew, that had the legitimacy of Nicholas laboured under even more serious imputations than have been raised against it, the law would still have protected it, and nothing short of the special interposition of the legislature was capable of invalidating it. The Act passed to bastardize the children of Lady De Roos expressly mentions that the said Lady Ann had left her husband's house, and lived in notorious adultery, and had been delivered of three male children, which children thus notoriously begotten in open adultery, "by the laws of this realm" "are or may be accounted legitimate," &c. Who can say, in opposition to such a declaration of the law in an Act of Parliament, that Nicholas, who was born when his mother, far from having abandoned her husband, was living upon the most affectionate terms with him, ought to be accounted illegitimate? Indeed, the very Bill which was read to bastard-

"or may be accounted legitimate, and may inherit the honours, manors, Acts.
"lands", &c. and prays that it may be enacted that the said children are bastards; and it is so enacted accordingly.

9 and 10 William III. An Act to annul the marriage between the Earl and Countess of Macclesfield, and declaring the child of which she was then en-ciente to be illegitimate.

ize Nicholas recites, that he was born under circumstances that make him legitimate ; a recital which is fully confirmed by the recitals in former Acts of a similar description, and by the authority of every case in which, either before or since, the same question has been brought under the consideration of a legal tribunal.

I admit that the presumption of access may be combated by proof of impotency ; but what evidence is there of Lord Banbury having been impotent ? There is no statute of limitations on the powers and faculties of man. Instances of robust longevity might be cited still more extraordinary ; Sir Stephen Fox married at the age of seventy-seven, and had four children ; the first child was born when the father was seventy-eight, the second and third were twins in the following year, and the fourth was born when the father was eighty-one. The Earl of Ilchester and Lord Holland can vouch for the accuracy of this statement, and I believe their genealogy has stood hitherto unquestioned^a. Parr^b became a father when

^a The parish register of Camberwell has the following entry :—1656, Rose, wife of William Hathaway, was buried 5th May, aged 103, who bore a son at the age of sixty-three.—Lyson's *Environs of London*, Vol. I. p. 11.

^b Thomas Parr.—He was born in 1483 and did not marry until 1563. He had a son and daughter who both died very young. "In 1588, when he was 105 years old, he did penance for lying with Catherine Milton and getting her with child." His wife having died in 1605, he married in his 122d year Jane, widow of John Lloyd, and lived thirty years longer. The fullest life of him is in the *Encyclopædia Britannica*, article Parr ; it contains the most interesting part of the tract by Taylor in the *Harleian Miscellany*. Granger mentions a print of Parr sitting in a great chair, with a bolster behind him, his eyes half open, with the following inscription ; "The old, old, very old man, or Thomas Parr, the son of John Parr, of Wennington, in the parish of Alderbury, in Shropshire, who was born in 1483, in the reign of Edward IV., and is now living in the Strand, being 152 years and odd months."—1635. This print must have been taken when Parr was living under Lord

even his son was of a more advanced age than Lord Banbury. Moreover his lordship seems to have kept all his faculties both of body and mind in full exercise. Not only does it appear, from the evidence of one of the witnesses, that he went out hawking up to his death ; but the journals of the House furnish us with the best evidence of his attention to more important matters. There are several entries about 1627 of excuses for the absence of peers, but Lord Banbury's name does not occur amongst them ; and when the practice of noting peers who were present by prefixing the letter *e* to their names was resumed in 1628, I find that the Earl of Banbury is so distinguished on the 21st of January, and appointed on a committee for the Bill to preserve his Majesty's revenue^a. On the 20th of February he is appointed to a committee for the defence of the kingdom, and he appears to have been in his place on every other day during the session, except once or twice, when his absence is accounted for by sickness. The parliament was dissolved on the 12th of March, and no other called for twelve years ; in the meantime he died.

I shall not travel through the various acts of Lord Banbury's life, from which it has been inferred that the birth of these children was concealed from him. The instances of human caprice and infatuation that pass daily before our eyes, lead me to regard this conclusion as more specious than correct. It is an abuse of reasoning to apply it to such a case as this, for we are not to infer that certain acts were done because

Arundel's protection, who had brought him up to court for the king's amusement. His lordship, as is well known, was a great lover of antiquities.

Henry Jenkins, of whom there is an entertaining account in Mr. Gilpin's *Northern Tour*, is said to have lived to the surprising age of 169. *Vide Granger*, Vol. II. p. 112. It does not, however, appear that he had any children.

^a Vol. 48.

they ought to have been done. We must observe also, that the acts of Lord Banbury all prove that his fondness for his wife, and his intercourse with her, continued up to the hour of his death. If they lead to an inference of non-access in one view, they destroy it in the other. The concealment of Lady Banbury's pregnancy is perfectly consistent with the existence of the access, and even of the sexual intercourse. One fact however has been overlooked, which somewhat relieves her Ladyship from this imputation. She appeared, along with Lord Banbury, in open court, for the purpose of levying a fine of Caversham, only a few months before the birth of Nicholas^a, when her pregnancy could scarcely have been overlooked by her husband.

I do not attach much weight to either of the inquisitions; they were *exparte* proceedings in an inferior court, liable to be quashed or superseded at any subsequent time. There ^b

^a 23d Dec. 1629.

^b 27 Edw. III. No. 87 in the Tower of London. Thomas Dela Bere complained to the king, that his father, Richard Dela Bere, had levied a fine of the moiety of the manor of Haselbere, co. Somerset, settling it upon himself and Clarissa his wife, with remainder to their several sons, and that he Thomas had succeeded to the possession under that fine. But the king's escheator for Somerset had lately, under an inquisition taken *virtute officii*, seized the same into the king's hands, whereupon he prays restitution. The king orders Thomas Cary, the escheator, to inquire and certify the cause of seizure. Cary answers, that he found by inquiry, *virtute officii*, that king Edward the First was seized of the manor of Haselbere, which he gave to one Alan Flokenet and his heirs; that Alan was a foreigner and a bastard, and had lawful issue, Alan and Joan. Alan, the son, succeeded and married one Sibella (who is still living his widow), and that he died without issue. Joan succeeded and was seized of the said moiety, but she also died without issue; whereby it plainly appeared that said moiety was an escheat to the king, because the said Alan, the father, was a bastard, and both his son and daughter were dead without issue.

Thomas Dela Bere replies, that Alan was neither a foreigner nor a bastard.

are instances of a series of inquisitions alternately establishing and controverting the same fact ; and no one can examine the

but that he was born at Thornton, co. Dorset, of Andrew Dela Bere and Alicia his wife, sister of Robert Walrond. *Anglicanae nationis in legitimis matrimoniiis procreatus.* Henry de Graystock for the king asserts the alienage and bastardy, and a day is appointed. *Another inquisition* is taken before the sheriff of Somerset, wherein it is found that Alan was the son of the said Andrew and Alice, ancestors of the said Thomas Dela Bere, who is the heir, and thereupon a writ of ouster le main et non introm. issues to the sheriff.

See Fine Roll of 39 Edw. III. m. 6. in the Tower of London. William de Kerdeston, a peer of parliament, died 14th Oct., 35 Edw. III. An inquisition taken at Norwich the same year, and another at York the year following, agree in finding that John de Burghersh, Knt., son of Maud, daughter of the said William, was next heir of the said William.

In the 39 Edw. III. an inquisition taken at Woodbridge in Suffolk finds, that the deceased held the manor of Stratford, in that county, of William de Ufford, and that the said John de Burghersh was his cousin and heir, and nineteen years old. Here was a case of minority, and consequently of wardship. But the wardship, as far as this inquisition went, did not belong to the king, because the manor of Stratford was not held of the king, but of Ufford. The inquisition, however, goes on to state, that it appearing by writs out of the Exchequer that the deceased held lands of the king in other counties, which took the wardship out of private hands and cast it upon the crown, the escheator had therefore seized upon the manor of Stratford in the king's name.

Thus far the heirship appears to remain with Burghersh. But in the 44 Edw. III. subsequent inquisitions taken at Norwich and Beccles find, that one William de Kerdeston was son and heir of the deceased, and thirty-five years old. And under these latter inquisitions Kerdeston recovered possession against Burghersh, and kept it till 29 Hen. VI.—*eighty years*, when Kerdeston was ejected by William Dela Pole, Duke of Suffolk, and Alice his wife, as appears by an inquisition taken at Ipswich after the death of Sir Thomas de Kerdeston, grandson of that William who had been found heir in 44 Edw. III. In this inquisition the jury say, that Sir William de Kerdeston, Knt., who died 35 Edw. III., was married to one Margaret Bacon, at Bulcamp in Suffolk, by whom he had two daughters, named Maud and Margaret, born in lawful

respecting both the children in the order of their birth. If she had referred to Nicholas instead of William it would have been unnecessary to say Nicholas Earl of Banbury, in her answer to the second question ;—she would have said “him,” as she does in her answer to the first question. I may add, that the word Edward is at the end of the line which precedes her examination, as if he was the subject of her examination. With this key the whole of the evidence is consistent and satisfactory. The woman had been present at the birth of the eldest son, and her connexion with the family being altered before the birth of his brother, she only knew of the birth of the latter by report, though she could speak positively of his being regarded by Lord Banbury as his child. Mary Ogden was his nurse for fifteen months, but it does not appear from how soon after his birth. She does not know whether Lord Banbury ever saw him. But when it is considered that we are ignorant whether she was his wet-nurse, and whether Lady Banbury might not have been jealous of her interference, it would be bold to presume that Lord Banbury *could* not have seen the child without her knowledge. The evidence of Ann Read requires large interpolations to make it intelligible. The last two answers are obviously in the wrong order. Edward Wilkinson was called to speak to the facts subsequent to Lord Banbury’s decease, and having never known Nicholas until that time, there is nothing extraordinary in his ignorance, whether Lord Banbury knew that he left any issue. I really cannot partake of the scepticism which has been expressed by some noble lords respecting this evidence, and I am confident that had the whole of it been preserved, their impression would have been very different. The facts deposed are conclusive, unless you impeach the veracity of the witnesses. The cohabitation of Lord and Lady Banbury, the birth of the child, his recognition by Lord Banbury, are all fully established.

The counsel might safely say, as they did, that they had cleared the title. It is true Lady Salisbury was not called, but she was summoned, and her absence cannot be construed into an imputation against the title of Nicholas, as her husband was his next friend in the suit instituted in Chancery, for perpetuating the evidence in his favour. The servants were more likely to know what passed in the family upon such an occasion, than persons of a higher station; and it argues no small confidence in his cause, that the claimant should bring them forward. The questions addressed to these witnesses came from the Attorney-General, and it was his duty to elicit the truth, and to present it to the House in such a shape, as to admit of no misconstructions. An examination conducted under his auspices, ought to be regarded strictly, and no facts should be established by way of inference, when they might have appeared on the face of the examination itself. If the House wanted further evidence, why did they not call for it, for they had the power and opportunity of doing so? More than twenty individuals were then alive, competent to prove what was the general reputation in the family, and in the world. The register of baptism, indeed, never existed, as Lady Banbury was a Catholic^a, and her child was probably christened in private, by a priest of her own persuasion.

I do not mean to contend for the immaculate virtue of Lady Banbury. She may have sinned with Lord Vsux and fifty other Lords; but if her intrigues were carried on at the time she cohabited with her husband, the legitimacy of her child is unblemished. She evidently was a very imprudent woman; and scandal may have been busy with her fame, both before

^a Journals of the House of Commons, Vol. III. p. 163:—Resolved, that the Countess of Banbury, a professed Papist, may be secured, and that the Lords' concurrence be desired herein.

and after Lord Banbury's decease. Her early marriage with Lord Vaux, must have deeply prejudiced her son in public estimation, and it may have deterred him, from taking those steps, for the recovery of his property, which would obviously have been beneficial to him. Lady Banbury had certainly never been convicted of an adulterous intercourse with Lord Vaux, and she might have dreaded an exposure, which would have deprived her of her station in society. The provision made by Lord Vaux for Nicholas, must have been an additional consideration for his abstaining from a step, which would probably have been fatal to the peace of that nobleman, as well as of Lady Banbury. It must not be overlooked, that so far was Nicholas from being in affluent circumstances, he was a very distressed man^a.

These are not the only parts of the conduct of Nicholas which have been brought forward by the adversaries of the claim. He has been traced from his cradle to his grave, and every period of his life has been scrutinized, in order to procure evidence of his illegitimacy. The dim twilight of two centuries has gathered round the events of his obscure career, and prevents us from forming a correct estimate of either their intrinsic or relative importance. If, indeed, we could transport ourselves to the troubled times in which he lived, we might venture to draw inferences, from the vicissitudes of his domestic history; but it is now become a most fallacious experiment. Why is the bounty of Lord Vaux to his step-son to be ascribed to another motive, than what belonged to such a relationship? Why is it to be assumed that he has repudiated the title of Banbury, because he had been called in his earliest childhood by the name of Vaux? Why should it not, with equal justice, be assumed that his legitimacy was

^a The act for the sale of Boughton Latimer to pay his debts.

fully acknowledged, because in the licence to travel given to his mother by the Protector, the terms are, "to Lady Banbury and her son", the natural description of a widow and her infant; and because, in the leave of absence granted to Nicholas by the House, as well as in the act passed for the sale of Boughton Latimer, Nicholas is mentioned as Earl of Banbury; and on various trials of property in which he was concerned he always received the same title? ^a These are weak arms to encounter a presumption so strong, as that, which exists in favour of legitimacy. It would have been most unjust, upon such slight grounds, to pass a special act to bastardize the child; and attempts of this description have failed when they were much better supported. One case occurred highly encouraging to him in the very parliament to which he submitted his claim ^b; and there can be no doubt that the act introduced to bastardize him was withdrawn upon the first reading, from the disapprobation naturally excited, by so harsh and unjust an exercise of power.

I trust, my Lords, that I have established that the opinion of the law entertained by the committee in 1661 was well founded, and that Nicholas, the original claimant, ought to have been admitted to the full enjoyment of the privileges of

^a Earl of Banbury v. Wood, 1 Salk. 4, &c.

^b Fitzwalter Barony.—In the year 1550 a bill was read three times in the Commons, touching the adulterous living of Ann Calthorpe, Countess of Sussex, and to bastardize her children. No trace of the bill is to be found in the Lords Journals, but in 1555, on the 9th of November, a bill passed in the Lords for "the debarring of Ann Calthorpe, the late divorced wife of the Earl of Sussex, from her jointure, in case she shall not repair into the realm within a limited time, and make a purgation before the bishop of her diocese." It was thrown out in the Commons. And under these circumstances the lineal descendant of the Earl by the Countess was allowed his writ. Mr. Townshend's MSS.

this earldom. The same rights have descended to the present Petitioner, and I trust they will be recognized by your Lordships.

LORD ELDON, C.—This question, like every other that comes before the House, ought to be decided with impartiality. We sit here as judges, and any resolution we may make, under the influence of feelings for the respectability of the claimant, would be fraught with the deepest mischief. Such a resolution would be wholly inconsistent with the duty, which we owe to the House, and the public. We are bound to look at the facts of this case with the eyes of the law, and if we cannot, with those eyes, discern that Nicholas Vaux was legitimate, we must conclude that the law does not authorize us to determine that he was so.

Upon an accurate review of the evidence, it would seem that from the death of the Earl of Banbury in 1632 until 1661 nothing had transpired to make it probable, that Nicholas Vaux had a right to the earldom. Your Lordships must therefore place yourselves as if you stood in this House in 1661. Had we then been called upon for our opinion, I think that it would have been impossible for any of us, to have declared Nicholas, to be the son of the Earl of Banbury. If we revert to the year 1606, we find Lord Banbury having brothers and sisters, nephews and nieces. He marries in that year, and his settlement demonstrates his anxious desire to secure the perpetuity of his family, or, to use his own words, "the continuance of his manors, &c. in his name and blood." His estates are limited, after failure of his heirs male by his wife, to the use of the heirs male of the body of Sir Francis, his father, who, it appears by a previous inquisition, had settled the same property "to descend in the name and blood of Knollys."

Lord Banbury's property was almost wholly in land. His

Caversham estate was left in his power by the settlement. He could cut off the entail, but his wife could not. Rotherfield Greys had been the gift of the Crown for services rendered in a former reign, and was consequently inalienable: the entail could not be barred. It is thus manifest that the tenure of these estates made the birth of male issue, a matter of the highest importance to Lord Banbury.

In the year 1630, Lord Banbury makes an absolute gift of Caversham to his wife, and by another instrument he conveys Rotherfield Greys to his nephew, who, in default of his having issue, was his heir male. It is almost needless to observe that the latter instrument would have been wholly inoperative against his sons.

In the year 1628 King Charles sent a message to the Lords, requesting them to admit the precedence which had been granted to the Earl of Banbury by patent, *as he was old and childless*: the House assented; and the Earl concurred in this representation by taking his seat shortly afterwards.

The earl did not long enjoy his honours: he died in 1632, and by his will he bequeaths his property to his wife, *without noticing any issue*.

The birth of the children, whose legitimacy is now the subject of discussion, is prior to the disposition made by Lord Banbury of his property, prior to the King's message, prior to Lord Banbury's will. Is it possible to believe that any of these instruments would have been executed, or that the king's message would have been sent, if Lord Banbury had known that he was a father? Is it possible to infer from any part of his conduct that he was aware that he had any issue? His concurrence in the king's message, would have been a fraud of the deepest die. His disposition of his property, would have been unprincipled. The heart of a parent, natu-

rally yearns towards his children. Not so with Lord Banbury, if these were his children. He sinks into the grave, having industriously stripped his supposed issue of all those estates, to which, under the most solemn settlements, they would have been entitled. And this is the act of a man who has a high hereditary honour to transmit to posterity!

No sooner had Lord Banbury descended into his grave than his widow stepped into the bed of Lord Vaux; she became that nobleman's wife on the very day that she proved her deceased husband's will. An inquisition is held, which finds Lord Banbury to have died childless, and designates his heirs. The countess must have been privy to the inquisition, for the jurors find her living at Caversham: some of the deeds, to which they had recourse, were necessarily in her custody; the others must have been produced, for the Crown, on whose behalf the inquisition was made, could draw out of the hands of parties all deeds, affecting the interests of the Crown. If Edward and Nicholas had been legitimate, she would not have abstained from producing them on such an occasion: protected by her second husband, she might boldly have avowed their birth, and claimed their birthright. And, if she had chosen to be silent, where were all the great connexions of these children? Where were the Howards and the Knollyses? Surely amongst these noble families, some one would have come forward to advocate their cause! Inquiry into their title could not have been stifled. I cannot consider this inquisition to be invalidated by the inquisition held in 17 Charles I. The latter proceedings bear every mark of collusion. They differ from the former by making Lord Banbury die in London, instead of Caversham, and contain a very scanty account of his property. No reference is made to any undue disposal of his various possessions. No notice is taken of the first inquisition, though the finding is so

inconsistent with it. If an inquisition be directed in one county, and afterwards held in another, the main finding must be the same as to any issue left by the parties; one inquisition cannot in this respect contradict the other, without shewing strong grounds for such contradiction.

The miserable scraps of evidence of the witnesses in 1661, shew the weakness of the claim. They disprove both the access of the parents, and the recognition of the children by the parents. No one can doubt that, if either of these facts were capable of being established, a multitude of witnesses would have come forward. The evidence of repute would never have been allowed to rest on the veracity of such obscure individuals, when there were six relations nearly allied to the claimant (presuming him to be legitimate), among them three maternal uncles, then in the House. The House conducted the inquiry under a correct notion of the law, for a number of questions were put to the witnesses, which would have been wholly unnecessary, if Lord Coke's doctrine had been well founded. This extensive inquiry would have been supererogatory. They would have had nothing to do, but to require proof of the marriage, and of the parents being within the four seas, before the birth of the children. We see that they did more, and we cannot doubt what would have been the result of their inquiry, if the Attorney-General had not misled them by an erroneous statement of the law.

The Attorney-General ^a was a man of eminence in his profession, yet, in this instance, he was clearly wrong, and I am satisfied that, if the House can convince itself that Nicholas was not *de facto*, the son of the Earl of Banbury, it will have no difficulty in determining that he was not so *de jure*. If

^a Sir Geoffrey Palmer.

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there is any rule of law that compels you to declare Nicholas to be legitimate, you must conform to that rule, even if your conviction should be, that the rule of law may be against the truth of the fact ; but if there be no such rule, and the law allows you to inquire by attending to evidence, then you must carefully examine that evidence, and determine as it shall authorize and require you to determine. If the positive rule of law is that Nicholas must be legitimate, because the Earl and his wife were living when he was born, then there is an end of the question, when it is proved that they were living when he was born : but if the rule of law be not such, and evidence can be received to affect the inference that he was legitimate because the earl and his wife were then living, the question will be, whether the rule will let in evidence, and such evidence as is produced in this case ; and what is the effect of that evidence ?

The passage in Lord Coke must be considered with reference to the authorities by which it is supported. We find from Bracton and Fleta, that the doctrine of the parents being within the four seas did not, even in those times, establish the presumption of the legitimacy of a child of the female parent, so as to exclude all evidence against the presumption. The legitimacy of the child might be questioned in case of the husband's having been so absent from his wife, or of his labouring under any disorder, so that it was impossible for him to be the father. These facts, too, might be looked at concurrently with the wife's adultery, and the non-recognition of the offspring as his, by the husband. Foxcroft's case (10 Edward I.) shews that it was not the partial or permanent impotency of the husband, but the impossibility of his being the father, which was the subject of consideration. In that instance he was an old bedridden man, and the child was born twelve weeks after marriage. It was held illegiti-

mate. There are cases also where a man cannot come to his wife, that implying another kind of impossibility^a. Lord Hale, who was the most learned black letter lawyer that perhaps ever existed, must have been familiar with these authorities, as well as with the opinion of Coke, and he has laid down the law, conformably with my construction of it. He decided (in *Hospell v. Collins*) that the issue for the jury was as to the *fact of access*, or, as I understand him to mean, *sexual intercourse*. For the access in question is of a peculiar nature; not being access in the ordinary acceptance of the word, but access between a husband and wife, viewed with reference to its result, viz. the procreation of the children. It is true that the proof of access of another sort, is a ground for inferring sexual intercourse, but the inference is only a highly probable and strong one. A jury (and your Lordships here perform the functions of a jury) ought to be told, that where the husband and wife have had the opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that the child in question is its fruit; but it and your Lordships ought also to be told, that this is but a very strong presumption, and no more; that a strong presumption may be rebutted by evidence, and that it is the duty of a jury and your Lordships to weigh the evidence against the presumption, and to decide according as, in the exercise of free and honest judgement, either may appear to preponderate. It is necessary, however, to consider what evidence is admissible to rebut this presumption. This is a question of some nicety and deserving of the utmost attention your Lordships can give to it.

Your Lordships are aware that many facts, which become

^a 48 Edw. III. 7 Hen. IV. 9.

the subjects of judicial inquiry, are facts done in secret, facts done at a moment selected more especially, because there is no eye witness present. Of this nature are almost all crimes, and indeed many actions, which are not criminal. In all such cases the law, perceiving the impossibility of obtaining direct evidence, contents itself with indirect or circumstantial evidence.

Your Lordships well know that circumstantial evidence is nothing more than evidence of those circumstances, which usually accompany facts, from the proved existence of which circumstances, both law and reason infer the existence of the facts themselves. A murder is committed—nobody saw the deed done, but many persons saw, or were acquainted with several circumstances, constituting what is called circumstantial evidence; these persons give their evidence, and from that evidence, law and reason deduce a conclusion, respecting the fact really in issue, namely, whether the prisoner did or did not murder the deceased.

Here the question for the jury, formed as it were by your Lordships, is, had the Earl and Countess of Banbury sexual intercourse at such time as that in the course of nature, Nicholas Knollys could have been the fruit of that intercourse? Here, as in the case of the murder, your Lordships cannot have direct evidence: from the very nature of the case (independently of the length of time, which has elapsed) it is impossible your Lordships can have direct evidence as by the testimony of witnesses speaking directly to the fact, then I say your Lordships may hear, and are bound to hear, circumstantial evidence.

Evidence of the conduct of the supposed parents of the child appears to me to be admissible evidence upon this question.

My Lords, when two women each claimed a particular

child as hers, and called upon a person to decide between them, he ordered that the child should be severed into two parts, and that each take half. The true mother instantly waived her claim; and he decided upon that, that the child was hers. What is the lesson which this story teaches? Not perhaps that mere declarations are evidence in such a case, for such declarations may be made for a temporary purpose—in that case both women made declarations, and one of course made false declarations,—but it teaches that the conduct of a parent, the feelings of a parent—those feelings, being inferred from such conduct—afford us some evidence assisting us in arriving at a right conclusion as to the matter in controversy.

It has been argued at the bar that mere declarations of parents on such subjects, are not admissible evidence to affect a question of legitimacy—and that conduct is precisely the same thing: that it is substantially nothing more than a declaration; that it is only a declaration by deed, instead of by word. I will not say that all simple declarations are evidence in such a case, but I will say that the conduct of a husband and wife, towards a person claiming to be their legitimate child, is in some cases admissible evidence upon the question whether the husband and wife had sexual intercourse at such time, as, by the course of nature, that child might have been the fruit of that intercourse. It is often a most material species of evidence. It is not always, but it is frequently a safe ground for inference, for it comes from the least suspicious source, that is, from the very individuals who are the most interested to give a different testimony. If there ever was a case, where circumstantial evidence of this description is admissible, it is this.

Such I conceive to have been the law, when Nicholas Vaux presented his petition to Charles II.; and the cases which have

since been decided establish the principle I have just laid down so unequivocally, that I am astonished to hear it disputed. (Here his Lordship reviewed at some length the cases of *Pendril v. Pendril*, *St. Andrew's v. St. Bride*, *Lomax v. Holmedon*, *King v. Luff*, *Goodright v. Saul*.) This principle is founded on reason as well as on law: there is no absurdity into which we might not be led by adopting the doctrine of Lord Coke. There was a case lately before us on a divorce Bill: I allude to Lord Gardner's. Can it be doubted, that if the son of Lady Gardner should appear before your Lordships in a question of legitimacy, whether he would or would not be determined to be illegitimate?^a

I have hitherto inferred the illegitimacy of Nicholas from the conduct of Lord and Lady Banbury: my inference is confirmed by all the other facts of the case.

Nicholas brought no ejectment for Rotherfield Greys. The son of Lord Banbury was entitled by the patent to an annuity payable out of the Exchequer. Nicholas never claimed this annuity: in short he avoided all proceedings, in which the Crown was immediately interested, for the truth must have then come out. He never possessed the undisturbed enjoyment of his title. He walked into the House asserting that he was Earl of Banbury, but he had not been there three days before there was an arraignment of his right.

Charles Knollys petitioned in 1692 to be tried as a peer. If he was a peer, he had a right to be so tried; and it was a regular proceeding, nay, it was the duty of the House to inquire into the merits of his petition. They entered into the necessary inquiry, which led them to a resolution to dismiss

^a This case was brought before the House in 1824, and, as will be seen above, his Lordship's prediction was verified. The child of Lady Gardner was declared illegitimate.

the petition. The indictment pending against the petitioner having been removed into the Court of King's Bench by certiorari, he pleaded a misnomer in abatement. To this plea Sir John Somers, then Attorney-General, replied that the petitioner ought to answer to the indictment, for that the House had resolved that he had no right to the Earldom. To this replication the petitioner demurred, and Sir Edward Ward, who in the mean time had become Attorney-General, seems to have joined in the demurrer. Lord Holt and another of the judges were of opinion that the replication did not avoid the plea, inasmuch as this judgement of the House, whether true or false, was not such a judgement, as, by the law of the land, they were bound to recognize as a bar to the plea. They quashed the indictment, not so much on the original question of right or no right to the peerage, but upon the insufficiency in their opinion of the replication, which seemed to proceed upon a supposed original jurisdiction of the House in matters of peerage. This left the question of legitimacy precisely in the situation, in which it had stood before the investigation, and the present claimant cannot take the least advantage from the proceedings in the King's Bench, which quashed the indictment in that plea. It has been said that the resolutions of the House on the petition were extra-judicial, as the object of the petitioner's not being to establish the legitimacy of Nicholas, the House had nothing to do with it. I think differently. If a Scotch peer should claim to vote as one of the Scotch peers, or an Irish peer as one of the twenty-eight, and we thought his title so to vote doubtful, we must necessarily investigate his qualifications. We must inquire whether or not he is a peer, before we can determine, whether or not he is entitled to vote. So far, and so far only, the House entered into the question of the legitimacy of Nicholas.

The report of Lord Hardwicke is most important. One

must perceive plainly from it, that he would not have subscribed to the doctrine of Lord Coke. It was probably made with the full concurrence of the law authorities of the day, and I cannot cite more illustrious names. Lord King was Lord Chancellor, Lord Raymond Chief Justice of the King's Bench, Sir Joseph Jekyl Master of the Rolls, and Charles Talbot Solicitor-General. No one who is acquainted with public business, can suppose that such men could be ignorant of a proceeding of this description, involving as it did, so important a doctrine of law. And they must have understood the ultimate opinion of the House to be, that the legitimacy or illegitimacy might be proved by circumstances alone, in contradiction to the doctrine of Lord Coke.

To sum up these circumstances ; Lord Banbury was a person of the highest station :—the relations of himself and his wife were also persons of the highest consideration :—a child was born of the body of his wife in his extreme old age, after twenty-one years unfruitful cohabitation : the place of its birth, baptism, and nurture ; its general treatment from the day of its birth to that of its death, concealed. The conduct of Lord Banbury towards the child shews that he was either ignorant of its existence, or capable of gratuitously imposing on the King, the House, and the country. Finally, we shall have to account for his stripping his innocent offspring, and his hereditary dignity, of the wealth, which he had always been so anxious to preserve in his own blood and name. Thus far with respect to Edward, and if he was illegitimate, no one can contend for the claim of Nicholas. There are additional arguments against the latter. The place of his birth was Lord Vaux's house, his first name of reputation was the name of Vaux, his fortune was entirely derived from the bounty of Lord Vaux. He never claimed the estates annexed to the Earldom of Banbury, and he failed in establishing his claim to the title.

I have struggled to arrive at a proper decision upon this

question, and, had it come before me in the Court, in which I have the honour to preside, I could have given no other judgement, than that which I now state to the House—that Nicholas was not the legitimate son of William Earl of Banbury.

If those, who now exercise the functions of royalty, think proper to create this respectable gentleman (the claimant) a peer, I know no reason against it—but for God's sake let not this House make peers.

The Committee of Privileges then divided, and it was determined by the majority, that the petitioner had not made out his claim. On the 18th day of June 1813, the House resolved, that the petitioner was not entitled to the title, dignity, and honour of Earl of Bambury.

A protest on this resolution (drawn up by Lord Erskine) signed by three Princes of the Blood Royal, and seven other peers, was recorded on the journals^a.

THE CASE OF MARIE COGNOT^b, referred to by LORD CHANCELLOR NOTTINGHAM in his judgement in the Purbeck Case. *Supra*, p. 420.

Joachim Cognot in the year 1590 married Marie Nassier. There was a difference of thirty-one years in the ages of the parties; the husband being sixty, and the wife twenty-nine.

^a This protest is a very eloquent composition. It is too long to be inserted in this work, but it will be found in *Journals of Lords*, Vol. XLIX. 178:

^b *Les Plaidoyes et Harangues de M. Le Maître*. 3d Edit. 1656. p. 116. The author of this work, one of the most celebrated advocates of his day, retired from the bar in 1697. He was still alive at the publication of the work, which appears to have been superintended by M. Bignon, the Advocate-General. It consists of thirty-eight speeches, all abounding with inge-

The marriage was more fruitful than happy : Madame Cognot had several children, but they all died except a son. This was not her only misfortune : her husband suspected her of infidelity. In the year 1597 he left her at Bar, and went to live at Fontenay. She however joined him in the following year, and on the 24th of July, 1598, she was delivered of a daughter, whose name was entered in the baptismal register as Marie, daughter of Joachim Cognot, M.D. and Marie Nassier, his wife.

Marie Cognot did not participate in the affection which her parents had shewn towards her brother. Dr. Cognot having been appointed Physician to Margaret, Queen of Navarre, established himself with his family at Paris in 1601, and instead of bringing his daughter with him, he left her under the charge of a woman at Fontenay named Judith Maurisset, with whom she remained for ten months, when (in May, 1601,) she was given up to a man who applied for her in the Doctor's name, in order that she might be brought to Paris. The child was placed in a box for more safe conveyance, and her nurse saw her no more.

In the month of May, 1601, Dr. Cognot, accompanied by a man carrying a little girl three years old in a box, came to Francoise Fremont, the wife of Jean Bontit, a locksmith, in the Cordeliers at Paris, and engaged with her, for the board and maintenance of the child, at the rate of four livres a month. He mentioned that its Christian name was Marie, and that its surname was not to be asked. He departed without giving his own name or address. The stipend for the child's support was not paid, and she was entirely abandoned by Dr. Cognot. Not so by Francoise Fremont. This poor woman brought her up with maternal affection, and when she was old enough to earn her livelihood, placed her in service. She always went by the name of Marie.

Fourteen years after the interview between Dr. Cognot and Francoise Fremont, the latter happened to be talking to a neighbour, when she saw the doctor pass by. She immediately recognized him, from the peculiarity of his

nuity and learning of a very high order, and unfortunately with equal sophistry and pedantry. The reader is often reminded of the beauties and faults of the English writers of the same period. As this appears to be the only detailed report of Cognot's case, I suppose it is the authority, to which Lord Nottingham referred. His Lordship was a man of very general reading. He assisted Burnet in the History of the Reformation. Vide Introduction to Vol. III.

dress, which was that worn by the Faculty; and called out, "That is the man who gave me Marie to nurse." Having learned the name and residence of the Doctor, she called on him, and desired that he would pay for the child's board, and take charge of her for the future. It was with some difficulty that she could prevail upon him to admit her claim, but he ultimately did so, and a contract was entered into by which he undertook to pay her 400 livres, "in order to avoid litigation, he having happened by chance to be present when some individual had entered into the engagement with Françoise Fremont, under which she had received the child." It was added, "that the child was not his, and that he paid the money out of charity."

Dr. Cognot now removed Marie from service, and took her to his own house, where she was treated by himself and his wife as their daughter, though she was not actually recognized as such, for she still went by the name of Marie only, and continued ignorant of her real condition. In the year 1625 Dr. Cognot died, at the advanced age of eighty-six. His will threw no light on this mystery. It contained a bequest of 600 livres to his servant Marie Croissant, but took no notice of any daughter.

The Doctor's death made no change in the situation of Marie. She received the same marks of affection from the widow, who gave her 1500 livres as a marriage portion, and was a party to the contract. She was designated in the contract as the god-daughter of Madame Cognot, and it was probable that she would have remained content with that description, had not Madame Cognot entered into a second marriage, and transferred her tenderness to the children of her husband.

Marie instituted a suit against Madame Cognot, in the parliament of Paris, for a share of Dr. Cognot's property as his daughter. She asserted that she first became acquainted with her rights some time after Doctor Cognot's decease, by the accidental discovery of a letter from Madame Cognot to her husband, dated in May 1601, in which Madame Cognot says, "I recommend our children to you, particularly little Mary; see her often; I am busy in making linen for her." This led to an *éclaircissement* with Madame Cognot, in which the latter acknowledged Marie to be her daughter, and deplored the necessity of her withholding a public recognition of the fact: she said that her honour would suffer from her divulging the secret after she had so long kept every body in ignorance of it, and that she had obtained absolution for it at the grand jubilee in 1625, upon promise of treating Marie as her child, and of bequeathing Marie her property at her decease; which she intended to do:—a promise which would have fully satisfied Marie had not

the second marriage of Madame Cognot's shewed how little she was to be trusted. In the interval she had obtained possession of the letters.

Madame Cognot denied most unequivocally that Marie was her child, and insisted that the infant, of whom she had been delivered in 1599, was long since dead; though she could give no more particulars about it, than that her husband had told her it was dead. She knew nothing of what Dr. Cognot had done, and as to her own treatment of Marie, it had sprung solely from charitable motives, and from her wish to reward the good conduct of a domestic. She added that Marie's character was quite unexceptionable, and that she should have been too happy to have had her for a daughter.

The parliament of Paris declared Marie to be the legitimate daughter of Dr. and Madame Cognot.

It appears from a note of the Editor, that this cause excited a very general and deep interest, and he is therefore induced to publish some of the official documents relating to "a dispute so famous, so original and so extraordinary." He adds, "I say original, and extraordinary, not believing that there has ever been witnessed in France (to say nothing of Greek or Roman antiquity, where these causes are very rare) an instance in which a daughter disavowed by her father and mother and treated by them as a servant; declared such by the one in his will, and by the other in a solemn and deliberate statement before a court of justice, could, notwithstanding all their opposition, sustain her right to her legitimacy, and establish the truth of her allegation, after a very warm and protracted discussion, to the entire satisfaction of a most enlightened tribunal."

The law of France applicable to cases of supposititious children, is admirably discussed by M. Cochin, in his *Plaidoyer pour Demoiselle Ferrand*. *Œuvres de Cochin*, 4. 469. This production almost raises its author to an equality with D'Aguesséan. It is indisputably his masterpiece.

NOTE (F).

IN the case of François Lecourt, the presumption in favour of the legitimacy of a child born during the marriage of

its mother was made to yield to circumstantial evidence. The following report of it is abridged from the *Repertoire Universel*, p. 264.

Claude Lecourt married Mary Leclerc at Provins on the 20th of January, 1704. They parted three months afterwards, and it does not appear that there ever was any renewal of their personal intercourse. Marie Lecourt established herself at Paris, where she resumed her maiden name. On the 2d of September, 1715, she was delivered of a boy, who was baptized by the name of François, child of Remi Raillart and Marie Leclerc : Remi Raillart being a person with whom she was suspected of intriguing. After her death, this child claimed to be her legitimate child by Claude Lecourt, on the ground of his birth, during the marriage of his mother and ostensible father.

The Procureur, Joly De Fleury, stated to the court, that the presumption in favour of legitimacy could not be supported against a moral impossibility, resulting from the actual status of the child, and the presumptions against the paternity. In this case the child had never resided with its mother or her husband : the former had acknowledged his illegitimacy by giving him her maiden name ; the latter had come forward with an offer to make a public declaration that he was not the father. The court declared the child illegitimate.

The case of Louis Guerin, which was decided some years before, by a provincial tribunal of high repute, is precisely parallel with that of François Lecourt. It is reported in the same work, p. 289.

There are however numerous cases in French law which support a different doctrine, and one of the most remarkable

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is that of Madame De Pont, the particulars of which are given at great length in the work to which I am indebted for the above extracts. The following is a very brief analysis of the report. It will shew how far the presumption of *pater est quem nuptiæ demonstrant* has been carried.

Monsieur Alliot, an Aulic counsellor, and Commissary-General to Stanislaus, King of Poland, contracted to marry his daughter with the son of Monsieur De Pont, a counsellor of the sovereign court of Nancy. This alliance happened to be particularly revolting to the parties most deeply interested in it, and they used every possible exertion to defeat the designs of their parents. The marriage however ultimately took place, but, according to the declaration of the bride and bridegroom made at the time, it was never consummated. Their aversion to each other was confirmed, and it became so notorious, that the parents a few weeks after, agreed to allow a separation. Monsieur De Pont immediately quitted the place, and from that period all intercourse between him and his wife was entirely at an end. They never met again.

In the year 1759, eight years after the separation between Monsieur and Madame De Pont, the Chevalier de Beauveau, a young nobleman of high rank and great personal accomplishments, having had frequent opportunities of visiting Madame De Pont, succeeded in gaining her affections. She became pregnant, and her lover spared no effort to procure a dissolution of her marriage before the birth of the child. On the 3d of January, 1760, Monsieur De Pont (it may be presumed at the instigation of the Chevalier De Beauveau) served her with process in a suit against her for nullity of marriage before the court of Toul, and on the 26th of February following she admitted all his allegations. In the interval, she was delivered of a son on the 11th of January, 1760. The infant was baptized in the church of St. Magdalen by the

name of Basile Amable, natural son of Ferdinand Jerome De Beauveau and Madlle. Louisa Alliot. The Chevalier signed the baptismal register.

The family of Beauveau, highly disapproving of the union which the Chevalier was preparing to contract, instituted legal proceedings to maintain the validity of the marriage between Monsieur and Madame De Pont. They procured an advocate to be appointed guardian to the infant, and by their instructions he opposed in that capacity the sentence of nullity, on the ground that it *would bastardize his ward*. Witnesses were examined. The Chevalier De Beauveau declared himself the father of the child, and Madame De Pont confirmed his declaration. Monsieur De Pont, on the other hand, disavowed the child, and asserted it to be absolutely impossible that he could be the father of it. The counsel for the guardian used the following arguments in answer to this evidence.

“ The testimony of the witnesses is not of sufficient weight to defeat the maxim of *pater est quem nuptiæ demonstrant*. Nothing but absolute physical impossibility of the husband being the father can bastardize a child born in wedlock. Moral impossibility is too vague and indefinite to be admissible, it is founded entirely on circumstances, and the effect of these circumstances may be different upon different minds. The object of the law has been to lay down a rule which is wholly independent of individual discretion, and not to expose the judgement of the Court to the sophisms or the uncertainties which must attend such a discussion. Physical impossibility, is the safest rule that human ingenuity could devise for this purpose, and it has been invariably adopted by our tribunals. Two instances have been cited of moral impossibility, one in 1701, the other in 1745. In the first, a husband instituted an action of adultery against his wife; she

was thrown into prison, and during her imprisonment she became pregnant; and she urged her pregnancy as a proof of her reconciliation with her husband. She was unable to prove that her husband had visited her in prison, and the judges consequently treated her allegation as a falsehood. The second case is equally irrelevant. It is that of a child who was baptized and educated as an illegitimate child, and had to encounter all the presumptions arising from his previous title to illegitimacy, and his long submission to all its disabilities. He justly failed. These cases form no exception to the old established maxim, which has been sanctioned by the highest authorities. The great Advocate-General Talon, says, 'though the heirs who contend for the exclusion of the child might justify themselves upon the ground of the mother's adultery,' yet, this would not impeach the status of the child; for it is sufficient to make the child legitimate, that a mere possibility existed of the husband having seen his wife; that the declaration of mothers could not affect the births of their children, as marriage alone constituted the proof of legitimacy; that as the proof of filiation had been regarded by lawyers as almost an impossibility, they had determined that an infant was fully qualified to establish his legitimacy, if he could prove that he was born during marriage, or at least, unless there was absolute proof to the contrary, or unless there was a natural and physical impossibility that he could be the child of the person under whom he claimed." The Court, after repeated appeals, ultimately declared the child legitimate.

NOTE (G).

THE subject of protracted gestation has frequently been discussed before the French tribunals. Some of the most

important of these trials are noticed in Beck's Medical Jurisprudence, an American work of considerable merit. *Le Répertoire Universel de Jurisprudence*, vol. 7, under the title 'Legitimité' contains many additional cases. That of Marie Rose L'Absolue, the wife of Robert Le Sœur, decided in 1779, is curious both from the circumstances which it involved, and the argument to which it gave rise. The husband died of apoplexy on the 16th of May 1771, his widow was delivered of a child on the 17th of April 1772. The legitimacy was contested not by any imputation against the mother's chastity, for the testimonies to her moral conduct were not attempted to be disproved, but on the ground of the impossibility of the deceased being the father.

The counsel against the legitimacy, urged the opinion of Hippocrates, coupled with that of many of the most eminent modern physicians, against the possibility of protracted gestation, and contended against any deviation from the maxim of civil law, *pater est quem nuptiæ demonstrant*. He concluded that however hard and apparently unjust the verdict against the legitimacy might be in a particular case, yet *salus populi suprema lex*. The interest of the individual must yield to that of the public.

The following answer was delivered by the widow after a very elaborate reply to the objections against protracted gestation. It is a sophism to suppose that the interests of any individual can ever be at variance with the interests of the public. There is an implied contract between every individual and the public, which comprizes all the contingent sacrifices to which the former may be imposed, and gives him advantages as well as disadvantages. In a fire, a house is pulled down to prevent the communication of the flame. The proprietor had tacitly subjected himself to the contingency of this loss, by taking a house which was joined to other houses. It might have hap-

pened that his neighbour's house had been pulled down to save his, or he may at some future period resort to this measure for his safety. An honest man lends 100 livres in the presence of ten witnesses to a sharper who denies the debt. The law requires written proof in cases above 100 livres, so that there is no relief. But on another occasion, the same law enables him to resist an unjust demand for a sum which he had never borrowed. There can be no instance in which the disadvantages under which an individual may labour are not relative, either to his engagement towards society or to the laws by which it is governed. Here there is no reciprocity, if the infant is despoiled of his inheritance, and the mother of her character. Neither party had entered any contract that could lead to such penalties. They have all to lose, and nothing to gain by it. The danger of recognizing protracted gestation is only imaginary. Is it probable that a widow should quit her husband's corpse to fly into the arms of a paramour, or that she should select that very time for the gratification of her passions, which must most expose her to public indignation, and prove most prejudicial to her interests? In fact, protracted gestation occurs very rarely, and it has been almost overlooked in works of jurisprudence. So many circumstances must concur for the question to arise; the conception must be cotemporaneous with the husband's decease, the husband's decease must be sudden, and it may be admitted that even these coincidences would not be conclusive if the character of the wife lay under any imputation. A virtuous woman whose testimony upon any other point would have the greatest weight, makes a solemn assertion, which is supported by all the moral evidence that circumstances can afford. If she is disbelieved, she is convicted of falsehood and profligacy such as long experience in guilt could hardly exceed. An inconsistency of this nature is al-

most incredible, and we should pause before we resort to it. The visionary speculations of philosophy are not sufficient grounds for our depriving this woman of her rank in society, and condemning her child to indigence. The Court rescinded the last sentence, and declared the child legitimate by a sentence of December 1779.

It is right to observe, that this was a mere judgement by default, and not conclusive on the opposite party: but it does not seem to have been afterwards set aside.

THE END.

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