discriminating as regards the reasons of reduction proponed by the pursuers. He has held that all the reasons of reduction are, as grounds of challenge of the decree of valuation, cut off by the negative prescription. It may in the end be found to be so; but it seems to me that the interlocutor is in this respect somewhat premature and illogical.

The reasons of reduction are summarised, though not completely expounded, in the 3d, 4th, 5th, 6th, and 10th pleas. But these pleas, taken in connection with the allegations in fact, show distinctly what the true character of the different reasons of reduction is. The 8th plea, I think, is irrelevant as a reason of reduction, and all the other pleas are of the nature of replies to the defences. Now, of the reasons of reduction, those represented by the 3d and 10th pleas are in my opinion extended by the negative prescription, because they impugn the merits of the decree of valuation sought to be reduced, and are not founded on any intrinsic nullities or objections of incompetency arising on the face of that decree. But as regards the 4th, 5th, and 6th pleas, taken in connection with the allegations in fact on which they are rested, they appear to me as stated to raise objections to the decree of a different kind—objections of incompetency appearing *ex facie* of the decree itself. I have formed no opinion whatever as to the merits of these objections. They may turn out to be utterly untenable as objections of incompetency appearing *ex facie*. And if this shall be so, they will of course be repelled in respect of their own inherent weakness. But I cannot hold that these reasons of reduction as stated are cut off by the negative prescription. I think the negative prescription affords no answer to them as stated. The defender seems to contend that they ought to have been stated otherwise, looking to the grounds of fact and evidence on which they are based; and that, if so stated, they would have opened the way to a plea of negative prescription. But until these reasons of reduction are advised on their own merits, we can only take them as they are stated; and, as stated, they appear to me to be objections of radical incompetency appearing *ex facie* of the decree of valuation sought to be reduced.

The result of my opinion is—(1) That the objection to the title of Mr Dalrymple of Hailes as titular ought to be sustained; (2) That the objection to the title of the Earl of Wemyss, the Earl of Hopetoun, and Sir David Kinloch, as heritors, ought to be sustained; (3) That the objection to the title of Sir D. Kinloch as patron, and the Rev. J. M. Whitelaw as minister of the parish, ought to be repelled; (4) That we should find that all objections to the decree of valuation under reduction other than those founded on incompetency or nullity appearing *ex facie* of the decree are cut off by the negative prescription, and sustain the plea of negative prescription in so far as regards the reasons of reduction embraced in the 3d and 10th pleas in law for the pursuer; and as regards the other reasons of reduction, remit to the Lord Ordinary to hear parties on these reasons of reduction which are embraced in the 4th, 5th, and 6th pleas for the pursuers, and to proceed otherwise in the cause as shall be just.

The other Judges concurred.

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agent for Defender—John T. Mowbray, W.S.

SCEALES AND OTHERS *v.* SCEALES.

Husband and Wife—Declarator of Marriage—Habite and Repute. Circumstances in which held that a marriage grounded on habite and repute had not been proved.

This is an action of declarator of marriage at the instance of Helen Darsie or Sceales, residing in London, widow of the deceased Stewart Sceales, formerly of the Customs, Leith, latterly residing in Aberdeen; and Helen Fleming or Darsie, widow of the late Walter Darsie, Sibbald Place, Edinburgh; and is directed against the representatives of the said Stewart Sceales and others. The pursuers make the following statements:—

"The said Stewart Sceales became acquainted with the pursuer in or about the end of 1852, or beginning of 1853, while she was in service in the house of his sister, Mrs Ritchie, near Newhaven, where he resided. He then commenced and carried on a courtship of the pursuer, with a view to marriage. The said courtship was well known to the mother and other relatives of the pursuer, and the purpose thereof was frequently mentioned by the said Stewart Sceales to the said relatives, and to his acquaintances.

"While this courtship was proceeding, and in or about the end of 1852, or beginning of 1853 aforesaid, the said Stewart Sceales repeatedly promised and engaged to marry the pursuer, and he persuaded her to leave her situation in Mrs Ritchie's, in order that they might get married. The pursuer accordingly left her situation at the request of the said Stewart Sceales, and for the said purpose, and thereafter, on the faith of said promises, the said Stewart Sceales induced the pursuer to permit him to have carnal connection with her.

"The said Stewart Sceales, however, delayed the celebration of his marriage with the pursuer *in facie ecclesiæ*, for fear, as he alleged, of giving offence to his relatives, and of losing money which he expected to come to him by succession. Within a few weeks after the pursuer had left her situation, he took up house with her, and he and the pursuer continued from in or about the end of 1852, or beginning of 1853, to in or about the years 1859 or 1860, to live and cohabit together as man and wife in various places, in Edinburgh, and also in the shire of Fife; and during that time they were habite and repute, and treated and considered as man and wife by their friends, neighbours, and acquaintances. Amongst other places they lived as man and wife, and were habit and repute as such during said period, in Cumberland Street, Bedford Street, Horne Lane, Park Gate, Amphion Place, and Middle Arthur Place, all in Edinburgh, and Markinch, in Fifeshire."

The pursuers then state that on numerous occasions the said Stewart Sceales acknowledged her as his wife, and addressed her as such in the presence of various persons, and that children were born of the intercourse which were recognised as legitimate.

The discussion before the Lord Ordinary turned mainly on the evidence, partly oral and partly written, which was very voluminous, as to cohabitation and habite and repute as married persons. The case as rested on promise *subsequente copula* was not insisted in, nor as based or separate acknowledgment. The Lord Ordinary (Ormidale) found that facts and circumstances were not proved from which it could be inferred that the parties were married.

The pursuers reclaimed.

LORD ADVOCATE, SCOTT, and BRAND, in support of reclaiming note.

MONRO for the defender was not called on.

At advising,

Lord COWAN—This action of declarator was instituted in April 1865, several months after the death of Stewart Sceales, with whom the pursuer seeks to have her marriage declared. His death occurred in November 1864.

As the legal result of her statements in the record, the pursuer pleads constitution of her alleged marriage (1) on the ground of promise to marry, followed by copula; (2) on the ground of "*de presenti* acknowledgment" of her to be his wife; and (3) on the ground of the parties having lived and cohabited as man and wife, and of their having been "habite and repute held to be married by their friends, neighbours, and acquaintances."

As to the 1st and 2d of these pleas urged in support of marriage, little requires to be said.

The first has plainly no foundation in the facts of the case, and has accordingly not been insisted in by the pursuer.

With regard to the second—viz., alleged *de presenti* acknowledgment—holding article 5 of the condescendence to be relevantly stated, as to which I entertain very considerable doubt, from the want of specific allegation and the vague generality in which it is expressed—there is no evidence to support it, as an independent ground of action.

Marriage is constituted by *de presenti* interchange of mutual consent of parties to take each other as husband and wife. No such constitution of marriage is alleged in this record. What is alleged is that on various occasions, and in the presence of various parties, Stewart Sceales acknowledged the pursuer to be his lawful wife, and addressed and spoke of her as such—from which, if proved, it is pleaded there is room for inferring that the parties had interchanged, prior to these acknowledgments, matrimonial consent. I am far from saying that such acknowledgment, when clearly and unequivocally established, may not be enough to entitle the party to have the marriage declared. But, after carefully considering the statements of the several witnesses referred to at the debate, I am quite satisfied, as the Lord Ordinary has been, that no case of the kind is established by this proof. What these witnesses state as to the pursuer having been called Mrs Sceales in the presence of the deceased, as to his having addressed her under that name, and as to her having been treated and spoken to as his wife, may be of more or less importance in the question of habite and repute. In that part of the case such statements require to be considered; but, as grounds for declaring marriage, they are quite insufficient and inconclusive.

The remaining ground of action, however, is that on which the pursuer has mainly relied.

The connection of the parties commenced in January 1853, or within a few weeks after the death of Stewart Sceales' wife, who died in Nov. 1852. It was undoubtedly illicit in its origin, but the allegation is that during the period it subsisted the parties cohabited together and were habite and repute man and wife. This connection is averred in the record to have subsisted till about the years 1859 or 1860. On the evidence it is shown to have subsisted to no later date than the beginning of 1858, or it may be for some months longer. That it terminated in 1858, however, is certain.

Farther, it is to be kept in view that although Stewart Sceales did not die till November 1864, no assertion of her marriage or attempt to have it either judicially declared or privately recognised, was ever once made on the part of the pursuer during the six years that thus intervened. Nor need this be regarded with surprise, when the facts clearly established by the evidence bearing on her conduct and history between 1858 and the institution of this action in 1865, are considered.

In 1858, if not previously, when living in Middle Arthur Place, and about the time she and Sceales finally separated, an illicit intercourse commenced between her and a Dr Price. This connection was continued during the years 1858, 1859, and part of 1860, the parties being resident, after leaving Middle Arthur Place, at the Abbey and elsewhere in and about Edinburgh—the pursuer at the places where she stayed at this time being known under the name of Ellen Darsie and sometimes Price. Nay, to one of the witnesses the pursuer stated, in explanation why Price was in the habit of coming to her room, that she was about to be married to him, and would never marry another man in the world. Then from about May 1860 until Martinmas of that year, the pursuer and Dr Price are found living at Norton Place, still cohabiting together. And finally, it is established by the evidence of Mrs Bell, and her husband William Bell, that from April 1861 till December 1865 the pursuer and Dr Price, having removed from Edinburgh, lodged in the house of these witnesses in Gloucester Street, Bloombury, London, representing themselves as Dr and Mrs Price. Under that name of Mrs Price and no other the pursuer was known and addressed during all these years, and it was not until February 1865—*i.e.*, after Sceales' death, and when this action was about being brought—that they ever heard of the pursuer having been married to any other person than Dr Price; and then she for the first time told Mrs Bell that she had been the wife of a Mr Sceales and had eloped with Price. These facts are all deponed to by unexceptionable witnesses examined for the defender, and whose evidence stands uncontradicted.

Without at all doubting that marriage may be declared on the ground stated, even in such circumstances, when supported by clear and unequivocal proof—it is, at least, a rare occurrence, if not unprecedented, that so short a period of cohabitation and habite and repute, should be maintained to be enough to constitute the marriage relation, in a case where, for six years prior to the death of the alleged husband, no steps had been taken by the woman in vindication of her status, but during all that period the parties had been living entirely separate from each other. In all the cases similar to the present, where marriage has been declared, the intercourse has continued for a considerable number of years; and the general doctrine expressed by all the authorities is that a marriage on this ground will not be declared, unless the cohabitation shall have subsisted for a very considerable time, accompanied with habite and repute of the parties being married.

Notwithstanding all this, had the pursuer adduced a body of clear, unequivocal, and consistent testimony in support of her averment—the inference that the consent necessary to marriage had passed between them might have been justified; and could it have been certainly predicated that marriage had been thus constituted between the parties, so that in 1859 they were husband and wife—the subsequent conduct of the pursuer, her separation from Sceales, her adoption of her own name of Darsie till she assumed that of Price, and

her illicit and disreputable connection with that person, might have been an insufficient defence of her present action. But quite different must the effect of those considerations be, holding the evidence she has adduced, so far from being clear, satisfactory, and consistent, to be of a vague and inconclusive character. The kind of evidence requisite in such cases was described by Lord Moncreiff in Lawrie *v.* Mercer, thus—"The present consent," his Lordship says, "necessary to constitute marriage may be effectually and satisfactorily established by a long or continued course of open cohabitation of the parties in the avowed character of husband and wife," regard being had, first, "to what in general constitutes the cohabitation of persons bearing that relation, and then to the habite and repute, the reputation in which the parties have been held by their friends and connections, and the community in which they live. When such a cohabitation for a length of time, with the distinct character affixed to it by the open acts and conduct of both parties, is proved by credible and consistent evidence, no more satisfactory proof can be required that the present consent to marriage has been given in the face of all the world."

A few observations will suffice to demonstrate that the case, presented by the pursuer in the proof before the Court, cannot be held in any essential respect even to approach to what the law thus requires in such cases.

The Lord Ordinary has gone over the evidence with great minuteness, and the result of his examination of it may be summed up in these propositions—(1) That there are inconsistencies, contradictions, and inaccuracies pervading the statements of very many of the witnesses examined for the pursuer to an extent more or less affecting their credibility; (2) that while a great body of the witnesses, relatives of the pursuer and others, swear to the pursuer and Sceales having cohabited together in the various lodgings and places in which they successively resided, and to their being known and occasionally addressed as Mr and Mrs Sceales, —so that, in a vague and general way, the people with whom they lived and other parties that came about them, thought and understood them to be married persons, there is in truth no satisfactory statements, even by these witnesses, of any general reputation by their friends and neighbours of their being married persons; (3) that, even at the times and places to which the evidence of these witnesses applies, the parties assumed other names than Sceales—the names of Blair, Stewart, and Huntly having been at various dates assumed for the purpose of concealment; and (4) that in the draft of a settlement by Sceales, executed in 1855, the original of which is lost, he referred to the pursuer as the mother of his "natural" son, while the birth of a son who is still alive, was in 1855, entered in the register as of an illegitimate child, and the entry bears attached to it the signature of the pursuer as "Helen Darsie," as well as that of "St. Sceales."

A perusal of the proof has satisfied me, that these observations of the Lord Ordinary on the statements of the pursuer's witnesses, are substantially correct; but the evidence adduced by the defenders applicable to the same period, viz., 1853 to 1858, has established, on the other hand, (1) that the friends and relatives of Sceales knew nothing at all of the alleged marriage between the pursuer and the deceased; (2) that those of them who did come into contact with him, and knew of his connection with the pursuer, regarded it as illicit and discreditable; (3) that this was also the belief of all those with whom he was brought into contact in his occupation, first as an officer of revenue, and afterwards as a book canvasser; and (4) that to some of these parties, when asked on the subject, he repudiated the idea that he would ever marry the pursuer.

Taking the proof thus led by the defenders along with that of the pursuer, and judging of the evidence as a whole—the best that can be said of it is that while some of the witnesses examined regarded the cohabitation of these parties as that of man and wife, others of them regarded it as illicit; and that the habite and repute of their being married persons during that cohabitation was partial and divided. But it is an established principle that when a case rests on repute, it must not be an opinion of A contradicted by B; it must be founded, not on singular, but on general opinion; for that sort of repute which consists of A B C thinking one way and D E F thinking another, is no evidence on such a subject. And if this be the conclusion to which the evidence applicable to the period between 1853 and 1858 would all but certainly have led—supposing that Stewart Sceales had died in that year, and that judicial proceedings had been then resorted to by the pursuer—the considerations, to which I have adverted at the outset, lead irresistibly to the conviction that, so far from there being ground for the pursuer's contention that she has established facts and circumstances to support her alleged marriage—the more just inference is, that her connection with Stewart Sceales was, from its commencement to its close, that of parties who were living in a state of concubinage and illicit intercourse; and that, when she separated from Sceales and went to live with Dr Price in 1858-9, no marriage vow was broken, but only one paramour exchanged for another.

On these grounds, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The other Judges concurred.

Agent for Pursuers—A. P. Scotland, S.S.C.

Agents for Defenders—Melville & Lindesay, W.S.

Wednesday, Feb. 13.

SECOND DIVISION.

PAGAN *v.* NORTH BRITISH RAILWAY CO.

Reparation — Culpa — Relevancy — Issue. Allegations of negligence which held relevant to infer damages. Issue adjusted.

This is an action at the instance of George Hair Pagan, bank agent in Cupar-Fife, against the North British Railway Co., concluding for £250 in name of damages, for an injury sustained by him while travelling in the defenders' railway from Edinburgh towards Dundee, on the 23d of December 1865.

The pursuer makes the following averments:—

"During the stoppage of the train, the engine was standing at a water-pillar situated at or near the north end of the said west platform of the said station, and was then, or had just been, taking in a supply of water from that water-pillar. At this time the said engine-driver was on the ground attending to his engine, and was somewhat in advance or to the north of the said water-pillar, this water-pillar being about three feet six inches distant from the line of rails.

"In proceeding from the railway carriage towards the said engine, the pursuer kept on the