At advising—

LORD PRESIDENT—I never saw a more clearly proved breach of promise; and I never met with a breach of promise, in the station in life in which these parties are, in which the pursuer was better entitled to damages. The defender has been courting the pursuer for years, and it was understood that the parties were to be married. So far, indeed, had the defender gone in 1865, that he gave in the names of the pursuer and himself to be proclaimed. That is proved by the evidence of Laidlaw, and no attempt is made to cut down that evidence. But for some cause or other the defender chose to withdraw the proclamation, and there was some estrangement between the parties from March 1866 to March 1867. But then again the parties came together, and in August 1867 matters were all arranged, and provision made for giving in the names to the session-clerks of the parishes of Morebattle and Jedburgh, for proclamation on 18th and 25th August. But before the 18th the defender changed his mind; and on the morning of the Sunday he called on the session-clerk for the purpose of stopping the proclamation, which was done. Down to this moment he has not given any explanation of his reasons for so doing. Then see what followed. On Saturday 24th he came to Morebattle, and again professed his affection for the pursuer, and promised to marry her, in presence of several witnesses; and again it is arranged that their names shall be given in for proclamation on the following day. He did accordingly give in the names, and they were proclaimed on the 25th, but before the arrival of the second Sunday, he again interfered and withdrew the names. The Sheriff says that if the pursuer instantly on this had raised the action she would have been entitled to damages. Therefore his reason for refusing damages, must be in what occurred subsequently. Now what occurred was this. After this breach of promise, he came and offered to renew the engagement, but the pursuer would—I think most properly—have nothing to do with him. But is that a reason why she should not have her action of damages? There is neither law nor common sense for that proposition. In such circumstances she had already received great injury, but she would probably have received much more if she had gone on with the engagement. She was perfectly entitled to refuse to have anything more to do with the defender, and also to bring her action of damages. Therefore, I am for returning substantially to the judgment of the Sheriff-substitute, but the question of the amount of the damages is still open for consideration.

The other Judges concurred.

The Court awarded £40 to the pursuer.

Agent for Advocator—David Milne, S.S.C.

Agent for Respondent—J. Somerville, S.S.C.

Thursday, February 18.

MOWAT *v.* YOUNG & SON.

Obligation—Composition-Contract—Illegal Arrangement. Held, on a proof, that a party who had received a payment of money, was bound to deliver goods in return, or pay their value, having failed to prove that the payment was made to him absolutely, in terms of a certain arrangement.

For some time Mr Mowat, a flesher in Glasgow, and Mr James Young senior, tallow-chandler there, were in the habit of dealing together, Mowat receiving from time to time certain sums of money for tallow to be delivered. When Young assumed his son as a partner the same course of dealing was carried on. This was an action raised by Young & Son for delivery of a certain quantity of tallow, which had been paid for, or for payment of £150 as the value. The defence was substantially that the money said to have been advanced for the tallow, of which delivery was now sought, was really given in payment of the balance of an account due by James Young senior, and for which the firm was said to be responsible, as having taken over the *universitas* of the estate of James Young senior. Young & Son replied that Young senior had entered into a composition-contract with his creditors, to which Mowat acceded, for 10s. per pound, which composition had been paid. The defender maintained that he had acceded to this composition contract on the understanding that he was to be paid in full.

After a proof, the Sheriff (BELL), substantially adhering to the judgment of the Sheriff-substitute (GALBRAITH), pronounced this interlocutor:—"Finds that, in October 1862, the individual pursuer, James Young senior, was owing the defender the sum of £213, 5s. or thereby, but about that period the said James Young senior entered into a composition-contract with his creditors, including the defender, whereby they agreed to accept a composition of 10s. in the pound on their respective debts, in consequence of which the said debt of £213, 5s. was reduced to £106, 12s. 6d.: Finds that between October 1862 and April 1863, when the pursuers' firm began, James Young senior received tallow from the defender to the value of £118, 13s. 1d., to account of which £80 was paid in March 1863, leaving a balance of £38, 13s. 1d., which, added to the said £106, 12s. 6d., made the debt due by James Young in April £145, 5s. 7d.: Finds that the course of dealing between the defender and James Young senior, and afterwards between the defender and pursuers, was, that the defender got bills from time to time for a round sum for tallow delivered and to be delivered: Finds that the pursuers accepted the bill, No. 5–1, to the defender for £100, on 12th June, and the bill, No. 5–2, for £200, on 22d June 1863: Finds that the latter of these bills was a renewal of the bill No. 8, also for £200, which had previously been accepted by James Young sen., whose liabilities the pursuers undertook: Finds that the renewed bill was paid by the pursuers on the 23d June to the extent of £50, and, having been discounted by the defender at the bank for £150, was duly retired, as well as the bill for £100 by the pursuers at maturity: Finds that according to the pursuers there was thus paid to the defender the foresaid £145, 5s. 7d., due by James Young senior, and the further sum of £150 for tallow delivered and to be delivered: Finds it admitted by the defender that the tallow actually delivered by him to the pursuers was, as credited in the summons, 38 cwt. 2 qrs. and 17 lbs., amounting in value to £68, 1s. 6d., and leaving still undelivered, if the pursuers' averments be correct, 45 cwts. 2 qrs. and 1 lb., or a value of £81, 18s. 6d.: Finds that defender denies *in toto* that he is under any obligation to deliver said tallow or refund said money, on the ground that, though he acceded to James Young senior's composition-contract, he did so under a private arrangement with him that he was to be paid in full, and that the pursuer, James

Young junior acquiesced in this, and that the said £200 bill was renewed and retired for that object; but, Finds that James Young junior has not only deponed, when examined as a witness *in causa*, that he never gave any such assent, but has added that at the end of 1863 he sent the defender an account showing the state of his transactions with the firm, which state was made up on the footing that the defender was to be paid only 10s. in the pound of the father's debt, and that the defender made no objections to the state: Finds that this evidence is corroborated by other testimony, and there is no proof that the pursuers, as a firm, agreed that the old debt should be paid in full: Finds that, in these circumstances, it has been correctly found by the Sheriff-substitute that the defender is barred from pleading his own corrupt bargain with James Young senior as entitling him to throw the composition-contract overboard, and if he cannot do so, then he has been paid all he can claim in respect of James Young senior's debt, and he is still resting-owing, under the said two bills, the above-mentioned quantity of tallow, or its value: Finds that in the interlocutor appealed against the defender has been *per incuriam* ordained to give delivery of the whole quantity of tallow, said to have been originally contracted for, viz., 84 cwts. 1 qr. and 18 lbs., without crediting him with the 38 cwts. 3 qrs. and 17 lbs., receipt of which is acknowledged in the summons: Therefore, so far alters the said interlocutor, and ordains the defender to deliver to the pursuers, within three weeks, 45 cwts. 2 qrs. and 1 lb. tallow, with certification that, failing his doing so, decree will be given against him for the sum of £81, 18s., as the value of said tallow: *Quoad ultra* adheres to said interlocutor; dismisses the appeal," &c.

The defender advocated.

WATSON and MACLEAN for advocator.

SHAND and BRAND for respondents.

The Court adhered. They held that the defender, as founding on the illegal arrangement alleged on record, could not have effect given to his averments without proving that arrangement, even supposing that arrangement, if proved, to be a good defence to the action. But he had entirely failed to prove the arrangement, though he had been examined four or five times in the course of the proof; while, on the other hand, the pursuers gave evidence to the effect that there was no such illegal arrangement as the defender represented.

Agents for Advocator—Graham & Johnston, W.S.

Agent for Respondents—A. K. Mackie, S.S.C.

Thursday, February 18.

FLEMING *v.* FOSTER.

Expenses—Husband and Wife—Declarator of Marriage. In a declaratorof marriage the pursuer founded on a written acknowledgment of marriage, the authenticity of which was denied by the defender. The Lord Ordinary found the marriage proved. The defender reclaimed. Before the reclaiming note was heard, the pursuer (respondent) moved for an interim award of expenses. The defender opposed. The Court awarded £10, 10s. to enable the pursuer to defend the judgment of the Lord Ordinary.

This was a declarator of marriage, in which the pursuer founded, *inter alia*, on a written acknowledgment of marriage subscribed by her and by the defender on the fly-leaf of a bible. The defender denied the authenticity of the writing. The Lord Ordinary, after a proof, found the marriage proved.

The defender reclaimed.

KEIR, for the pursuer, asked an interim award of expenses.

ASHER, for the defender, argued that such a motion was never granted, unless there was (1) a written acknowledgment, the authenticity of which was admitted, and (2) a recognition by the defender of the pursuer's status as his wife, neither of which, he contended, was found here; *Sassen* v. *Campbell*, 20th Jan. 1819, F. C.; *Brown* v. *Burns*, 5 D. 1288; and *Fleming* v. *Corbet*, 21 D. 179, were cited.

At advising—

LORD PRESIDENT—The cases of *Sassen* and *Brown* are not in point.

To grant interim aliment to the pursuer of a declarator of marriage is always a very strong thing, for that is an interim recognition of her status as a married woman; but the motion here is for a sum to enable the pursuer to proceed with her action, and to defend the judgment of the Lord Ordinary. That is a much more favourable position than the other. I do not understand the pursuer's claim to be for a sum of money to cover the expenses already incurred. If that were the motion, I should not be prepared to entertain it; but I understand it to be a motion for a sum of money to be employed in defending the judgment of the Lord Ordinary, and that carries a good deal of appearance of equity with it. I don't think there is anything in the case of *Fleming* inconsistent with that. That was a case where the motion was made in a peculiar position of matters. The pursuer held a judgment of the Lord Ordinary in her favour, but when the case was heard on the reclaiming note, there being then no motion for expenses, the Court found that they could not pronounce judgment on the case as it stood, opened up the record and concluded proof, and remitted to the commissary for farther proof. It was after that that the pursuer made a motion for expenses, and in these circumstances the pursuer could not represent herself as being in possession of the judgment of the Lord Ordinary, for that judgment, though not formally recalled, was practically no longer a standing judgment. Besides, though the writing on which the pursuer founded was said to be dated in 1850, she made no claim for status until 1857, and in the meantime she had dealt with herself and her children as the mistress and the bastard children of the defender. But in the present case the circumstances are very different. All the length I am disposed to go, however, is to make such an award as will enable the pursuer to instruct her counsel and agent for opposing the reclaiming note, and I think £10, 10s. is sufficient for that purpose.

The other Judges concurred.

Agents for Pursuer—Macdonald & Roger, S.S.C.

Agents for Defender—Adam, Kirk, & Robertson, W.S.

Friday, February 19.

MAGISTRATES OF KILMARNOCK *v.* MATHER.

Title to Sue—Sheriff-court Act 1853*—Burgh—Customs—Decree in Absence—Usage.* Magistrates of a burgh sued a tradesman for certain customs per account, &c., "which the pursuers