ence to the other heritors being made parties to it. It would therefore be contrary to the most obvious principles of law and equity to allow the pursuer, now that the arbiter has determined against him, to recommence the discussion, just as if no such arbitration as that referred to had ever existed. Nor is it of any importance for the pursuer to say that the other heritors and proprietors in the parish were not parties to the submission, and that the limits or boundaries of the glebe cannot for that reason be held as settled, for there is no heritor or proprietor seeking to disturb the existing state of matters, or indeed has, according to the pursuer's own showing, any interest to do so."

The pursuer reclaimed.

SOLICITOR-GENERAL and ASHER for him.

SHAND and BALFOUR for the defender.

ASHER referred to the case of *Lockerby* v. *Stirling*, 13 S. 978, and argued that, if an action was incompetent by the minister against any individual heritor, on a subject in which all were interested, neither could a submission be valid and binding between the minister and a single heritor on a similar subject.

Without calling for further argument the Court unanimously adhered.

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

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

Wednesday, November 23.

GALL *v.* GALL.

Proof—Marriage—De presenti *consent—Antecedent and subsequent conduct of parties.* Circumstances in which, the defender and pursuer having cohabited for some years without any presumable intention of becoming married persons, and the defender having, on a particular occasion, signed a document acknowledging the pursuer to be his wife, but which document was proved not to have been written or signed with any serious intention whatever on his part, and was not followed by any change in the parties' manner of life,—*held* that such document could not constitute a valid marriage between them. *Held*, farther, that an indorsation by the defender of his name on the back of this document could not effect a confirmation or homologation of the original, or itself establish marriage.

Observed, that such a document and such an indorsation proved nothing in themselves, but depended entirely upon the circumstances in which they were written, signed, and delivered.

Evidence—Competency—Credibility of Witness. Evidence Act 15 *and* 16 *Vict. c.* 27, § 3. *Held*, that where a party is bound to adduce a witness as being an instrumentary witness, or otherwise essential to his case, he is entitled to contradict the testimony of that witness, and break down his credibility, by proving that he gave a different account of any matter pertinent to the issue at some other occasion, from that given in evidence, just as much as if he were a witness for the opposite side and being examined in cross. But *held*, farther, that the precedent conditions laid down by the statute must be complied with in order to the competency of such a course, viz., a foundation for such contradictory evidence must be laid by specific questions put to the first witness.

This was a declarator of marriage brought by the pursuer Elizabeth Gall, against the defender William Gall, farmer at Gilkerscleuch, now residing at Crawfordjohn, both in the county of Lanark. The pursuer's averments were that she had entered the defender's service as his housekeeper or general servant, that he had shortly thereafter begun to pay her marked attentions, and that, relying upon repeated promises of marriage, she had yielded to his solicitations; that she repeatedly urged the defender to have a regular marriage celebrated between them, which he declined to do on the ground of publicity; that, however, in the year 1864, upon an occasion when the defender's cousin, George Milligan, was upon a visit to him, he caused the said George Milligan to write out the following document, which was thereafter signed by the defender:—"Gilkerscleuch, 26th, 1864. Dear Sir,—I bind and oblige myself to keep and support that woman through life. I consider her my lawful wife. (Signed) WILLIAM GALL. Witnesses' hands (Signed) G. MILLIGAN, ELIZABETH GALL." Endorsed on back, "William Gall." The pursuer averred that this document was a deliberate interchange of *de presenti* consent, or otherwise that the defender did thereby deliberately renew his promise. That the said document was delivered to her, and upon the faith of it she continued to live at bed and board with the defender as his wife in all respects, in so far as was consistent with the secrecy desired by the defender. That in the year 1868 she had been obliged to leave the defender's house in consequence of his misconduct, but was induced again to return, when the defender a second time acknowledged her as his wife, and in token thereof endorsed the foresaid document as abovementioned in presence of one of their neighbours. Sometime after this, however, the defender left her, and has since refused to acknowledge her as his wife or to support her. She pleaded that marriage had been constituted by *de presenti* consent, or else by promise *subsequente copula*.

The defender denied all the statements of the pursuer; and, with regard to the document produced, and founded on as constituting a marriage, he explained, that it had been written by the said George Milligan in the course of a drunken frolic, and that he, the defender, was at the time in a state of utter imbecility and unconscious from the effects of drink; and he pleaded that, never having been married to the pursuer, and never having promised to marry her, he ought to be assoilzied from the conclusions of the action.

In the course of the proof led before the Lord Ordinary, a question on the competency of evidence arose. George Milligan, one of the chief witnesses for the pursuer, but also a necessary witness, whom she could not but call, as, besides being the sole witness to much that had taken place between the parties, he was the writer and sole witness to the signature of the document already narrated, having been asked generally whether he had ever given a different account of the writing from that which he gave in evidence, and having replied in the negative, was then asked whether he had ever spoken to a Mr Majoribanks, another of the pursuer's witnesses, at any time about the writing. His reply was, "Not to my knowledge, but it might be." He was then asked, "Did you ever tell him that it had been done quite seriously?" and answered, "I do not mind." When Majori-

banks was called, he was examined to prove the falsehood of these statements of Milligan's. This course of examination was objected to, as not admissible under the Evidence Act, 15 and 16 Vict., c. 27, § 3, for want of specification in the questions previously put to Milligan himself, and on the ground that he was the pursuer's own witness, and that the statute only intended to confer the privilege contained in this clause upon the opposite party when examining in cross. The objection was repelled by the Lord Ordinary, and the examination proceeded. The import of the remaining evidence is sufficiently given in their Lordships' opinions.

The Lord Ordinary (MURE) "found that the pursuer had failed to prove facts and circumstances relevant to infer a marriage betwixt her and the defender," and therefore assoilzied him from the conclusions of the action.

The pursuer reclaimed.

SHAND and R. V. CAMPBELL for her.

FRASER for the respondent was not called upon.

At advising—

LORD PRESIDENT—The first thing which strikes one in this case is the great discrepancy that exists between the record and the proof. The pursuer avers, in the second article of her condescendence, that she entered into the defender's service, that he paid her marked attentions, and that she ultimately yielded to his solicitations. There is no evidence to support this article, and there is a good deal, moreover, contained in it which is not true. She was not in the service of the defender, and all these statements about courtship, etc., are perfectly inconsistent with the circumstances of parties. She goes on, in the third article, to make certain statements about the origin and intention of the document upon which she founds; but these statements are entirely negatived by the evidence of Milligan. She farther, in article 6, makes a statement connected with the indorsation of that document. First, that it was indorsed in the presence of Mrs Dickson; and secondly, that she and the defender thereafter again cohabited. Both allegations are entirely unsupported by the evidence The case, therefore, comes very much to this, that in and previous to 1864, the defender and pursuer were living in a state of concubinage, that in or about Dec. 1864, the document already mentioned was written by George Milligan, and subscribed by the defender, that from the date of the said document the parties continued to live in the same state of concubinage as before, until they separated in 1868, and that upon an occasion after they had separated the defender's name was written across the back of the said document by himself, and they never lived together afterwards. It is needless to say that a document of this kind proves nothing by itself. Every thing depends upon the circumstances in which it was written, signed and delivered. And neither does the writing of a name across the back of a document such as this prove anything at all by itself. It is not a bill or mercantile instrument that can be indorsed. The question, therefore, is whether in either case the thing was done with a view of establishing marriage between the parties. Now take the two periods separately; and first, that at which the document was made. Milligan is, and probably could be, the only witness; and does he prove the purpose of making a marriage? I think he proves the very reverse, —that the parties, and certainly the defender, entertained no rational and serious purpose of establishing a marriage between them. If Milligan is not to be believed, there remains no evidence applicable to this period at all. But then it is said that the document was validated by the indorsation made upon it in 1868. On this point there is only one witness also. In fact, the evidence led is altogether very scrimp. The pursuer avers that by this indorsation the defender intended to acknowledge, confirm, and, at any rate, establish the marriage. Now what does Mrs Dickson, who is the witness supposed to have been present, say,—"I mind him writing on the line. . . . He asked for a bit paper, and she gave him the line. I went into my house for pen and ink, and brought them to her. She let me see that he had signed his name across the back of the line. . . . I don't know why he wrote his name. He said she desired, or had a right to, some of his siller, and that she was to keep the line, as she would maybe need it. . . . They did not live together after that." And this is what the pursuer calls making a marriage. It is really quite unnecessary critically to examine this evidence, because what it amounts to is simply that he wrote his name on the back of this piece of paper, and that the witness who is brought to prove the marriage says she does not know what was the purpose of it, but that she inferred it was to enable the pursuer to obtain some money, and that nothing of a matrimonial character followed upon it. Under these circumstances, I am of opinion that the pursuer has totally and hopelessly failed to establish her case.

LORD DEAS—There are two occasions material in this case. The first, the signing of the lines; and the second, the signing of the indorsation on the back of them. I think that Milligan much exaggerates the condition in which he and the defender were at the time of writing and signing these lines, and I think this is farther proved by the evidence we have of what he said of the occurrence afterwards. I am not disposed to hold the evidence of Majoribanks as to what Milligan told him to be incompetent. I think it is quite competent since the passing of the Evidence Act—whether it would have been before the Evidence Act or not I do not need to say. I cannot hold that the pursuer is not entitled to found upon Milligan's evidence so far as it is in her favour, while endeavouring to contradict it where not so. But, taking it so far as possible in her favour, the question still remains, whether he proves anything which materially supports the case of the pursuer. No doubt the pursuer and defender were living in open concubinage, and upon one particular occasion, when the defender and Milligan were drinking together, the writing and signing of this document took place, the immediate object being to prevent the stoppage of their supply of liquor. Now, under any circumstances, these lines would require to be very different from what they are if they were to operate an marriage; and when we recollect that they were signed by a man in a state of semi-intoxication, and for a purpose quite different from that of marriage, they lose all force whatever. Now, they go on living after the signing of these lines just in the same manner as before, and some four years after they separate for some reason, and during the separation she gets him to write his name upon the back of the document. This does not go very far in favour of the marriage, for the

reason given for the indorsation by the only witness present was quite different from marriage. Had they resumed cohabitation thereafter it might have been argued that this was an homologation of the original writing, but they did not; on the contrary, she goes away immediately, and does not appear to have ever lived with him again. The defender's substantial defence is, not that he was drunk and did not know what he was about, but that there is no evidence of a serious and clear purpose of marriage with this woman; and, taking it in the most favourable view for her, I cannot but hold that the evidence discloses a perfectly different purpose from marriage altogether.

LORD ARDMILLAN—The position of parties up to the time when these lines were signed, and the evidence on all the other points, are totally against the pursuer. This is not a case where there is any presumption of the woman yielding, relying on the man's promises; nay, the presumption is rather against the man's entertaining any idea of marriage. Without explanation, the document founded on does not constitute a declaration of marriage; and I see no evidence at all importing a serious intention of marriage at any time, nor do I find any alteration of the manner of life of these parties, either after the signing of these lines or after their indorsation, which could support the pursuer's allegation of their purpose and object.

LORD KINLOCH— I have a strong opinion against the competency of Marjoribanks' evidence as to what Milligan told him. The case, I think, does not come under the Evidence Act at all. The effect of this clause in the Evidence Act is to enable a party to break down an opposite witness, not to contradict one of his own whom he finds going against him. Besides, the Act requires conditions precedent which do not exist here. On the merits of the case, I entirely agree with your Lordships.

LORD PRESIDENT—Since this question of the competency of Majoribanks' evidence has been raised by your Lordships, I think it right to say that I cannot entirely agree either with the opinion expressed by Lord Deas or with that given by Lord Kinloch. In the view which I take, I agree partly with one, partly with the other. I quite agree with Lord Deas that before the passing of the Evidence Act it was quite competent in examining a witness to ask whether upon any previous occasion he had ever given a different account of the transaction, and if an affirmative answer was obtained, no doubt the testimony of the witness was shaken; if, on the other hand, a negative answer was returned, the party examining most likely damaged his own case. As often as not the answer benefited neither party. But the object of the Evidence Act of 1852 in its 3d section is to enable a counsel, under certain conditions, in the event of his getting a negative answer to such a question put to a witness, to show that that answer was false, and that the witness had in fact given a different version of the story at another time. This provision of the Evidence Act was an innovation, and it was made competent on certain conditions only—namely, that the witness himself shall have been asked in his own examination whether on any specified occasion he has made a statement on some matter pertinent to the issue different to the evidence already given by him. Now there are two things to be noticed, First, that the privilege here given is not confined to cross-examination in particular. On the contrary, a party may be obliged by the position in which he is placed to produce a witness who may turn out hostile to him; nay, who in many cases must *a priori* be expected to do so, and the party producing him is entitled to treat that witness as if he were examining in cross, and I am of opinion that this clause in the Evidence Act applies just as much to this case as to ordinary cross-examination. While I differ from Lord Kinloch on this point, I am still of opinion with him that Marjoribanks' evidence was incompetent; and here I come to differ from Lord Deas. It is a precedent necessity according to the statute that a foundation be laid for the introduction of such contradictory evidence. The witness must be asked whether he made a different statement, and on a definite occasion. It is not sufficient to state one of the occasions intended afterwards to be referred to, but all must be stated. The reason is very obvious. It is that the memory of the witness may be aided, so that he be not taken at a disadvantage. What then was done here. The witness Milligan, after a general interrogatory on the subject, is asked, "Have you ever spoken to Mr Majoribanks' at any time about the line?" and answers, "Not to my knowledge, but it might be." "Did you ever tell him that it had been done quite seriously?" "I do not mind." This is all that is done, and then, when Majoribanks is produced, he is examined to contradict these statements of Milligan's by showing that Milligan had spoken to him on the subject, and had then given a different account of the transaction in question. Now, I do not think that this course of examination was competent. The precedent conditions which the statute requires did not exist, in as much as there was no foundation for the questions laid, and no specification of time, place, or occasion.

LORD DEAS—I am glad that your Lordship has taken occasion to notice this point. It would never do for it to be supposed that the law was anything else than that which your Lordship has laid down, and in your Lordship's statement of it I quite concur. As to the incompetency in the present case, for want of due specification in the questions put to the witness Milligan, I am also inclined to agree. I am not aware that I said anything which indicated an opposite opinion, and I certainly never intended to do so; though I must add that I do not think the questions were quite so general and wanting in specification as your Lordship makes them out. But that was not the point to which I alluded. I was considering the competency of the pursuer endeavouring to break down her own witness, and on that point I am clear that she was, under the circumstances, entitled to do so if she could. At the same time, I am as clearly of opinion that she was bound to lay a sufficient foundation for the course which she was going to pursue, and this she failed to do.

LORD ARDMILLAN intimated his concurrence in the views of the law on this subject expressed by the Lord President.

Agent for Pursuer and Reclaimer—T. F. Weir, S.S.C.

Agent for Defender and Respondent—Robert Denholm, S.S.C.