

Friday, February 27.

FIRST DIVISION.

[Lord Gifford, Ordinary.]

MARGARET WILSON, OR STEUART, OR
ROBERTSON v. SIR ARCHIBALD DOUGLAS
STEUART AND FRANC NICHOLS
STEUART.

Marriage—Consent de præsenti.

Circumstances in which subsequent actings of parties to a marriage by *de præsenti* consent before witnesses—held not sufficient to overcome the meaning of the words of consent sworn to by the witnesses.

This action was raised by Mrs Margaret Wilson or Robertson, wife of Lieutenant Robertson, 7th Hussars, for the purpose of establishing her marriage with the late Major Steuart, and for recovery of her *jus relictae*.

The Lord Ordinary pronounced the following interlocutor:—

“*Edinburgh, 3d December 1872.*—The Lord Ordinary having heard parties’ procurators, and having considered the closed record, proof adduced, and whole process, reduces, rescinds, decerns, and declares in terms of the whole reductive and declaratory conclusions of the libel, and decerns: Finds the pursuers entitled to expenses hitherto incurred, and remits the account thereof to the Auditor of Court to tax the same and report: *Quoad ultra* appoints the case to be enrolled, that the conclusions for count, reckoning, and payment may be proceeded with and disposed of.

“*Note.*—This is an important, and in many respects a difficult case. Whatever view may be taken of the evidence, there is much that is unexplained, and indeed unaccountable, not only in the conduct of the late Major Steuart, but also in the conduct of the present pursuer, Mrs Robertson, and of the various members of her family. Possibly some of the anomalies might have been explained had it been competent to examine the pursuer herself as a witness; and the Lord Ordinary cannot help regretting that, in cases like the present, he has found himself obliged to exclude the evidence of the parties. An ingenious attempt was made to show that the evidence of parties was admissible in a case like the present, notwithstanding the express provision of the Evidence Act; but the Lord Ordinary found himself compelled to sustain the objection to the admissibility of the pursuer and her husband as witnesses.

“After a very careful consideration of the voluminous and elaborate proof which has been adduced, both oral and written, the Lord Ordinary has come to be of opinion that a marriage between the late Major Steuart and the pursuer Mrs Robertson has been sufficiently established. There are no doubt great and serious difficulties in reaching this conclusion, but the Lord Ordinary thinks that the difficulties attending an opposite conclusion are still more serious, and are, indeed, to his mind insurmountable. Applying the law of Scotland as it at present exists to the evidence in the case, the Lord Ordinary has ultimately found himself quite shut up to the conclusion that the late Major Steuart and the pursuer Mrs

Robertson were married persons, husband and wife of each other, and that their child, the deceased William George Drummond Steuart, was their lawful son, and if he had survived he would have been the heir of the Murthly estates. The present action does not involve the question of the succession to these large and valuable estates, but merely to the personalty or moveable succession of the late Major Steuart, which, however considerable, is small compared to the value of the entailed estates. But the Lord Ordinary has weighed the evidence, and has decided the cause, just as he would have done if the child had been still alive and claiming as heir-at-law the whole estates.

“It is not necessary, and is not the intention of the Lord Ordinary, to attempt any analysis of the evidence. Any such attempt would involve details and minute examination of testimony and of circumstances quite unsuitable to a note like the present. It is right, however, that the Lord Ordinary should indicate as briefly as possible the leading grounds upon which his judgment has proceeded.

“There is no question in the present case of a marriage constituted by habit and repute, or by promise *subsequente copula*. Both these modes of proving the interchange of matrimonial consent are excluded by the circumstances disclosed in the evidence. The pursuers rely, and rely exclusively, upon the *de præsenti* interchange of matrimonial consent between the alleged spouses, a consent said to have been given at an irregular ceremony which took place on 13th February 1866, upon what followed immediately upon that ceremony, and upon the solemn, serious, and repeated admissions of Major Steuart, which admissions had all reference to the consent finally interchanged at the ceremony of 13th February 1866.

“The Lord Ordinary thinks that it is sufficiently established in point of fact that there was an irregular ceremony on 13th February 1866, at which Major Steuart and the pursuer mutually accepted of each other as spouses; that this consent constituted actual marriage; that it was followed by cohabitation; and that both parties thereafter acted as the husband and wife of each other. The Lord Ordinary thinks it also sufficiently established that the late Major Steuart solemnly, seriously, and repeatedly stated and admitted that he was married to the pursuer, and that in circumstances which leave no doubt that he really meant and intended what he said, and that his statements and admissions were true.

“(1) In the Lord Ordinary’s view, the turning point of the whole case, upon which virtually everything depends, is the so-called ceremony of 13th February 1866, at which *de præsenti* matrimonial consent was interchanged. If this ceremony and the consent given thereat be sufficiently established—if it be shown that the consent was solemn, deliberate, and serious—that the parties really meant to contract marriage—and that the ceremony and consent was not a mere screen and sham for something else, then actual marriage was thereby constituted. Nothing else is needed. The other evidence in the case may confirm the testimony of *de præsenti* consent having been interchanged—it may exclude pretence and collusion, or deceit or jest—but except for such purposes it is not needed to establish the marriage.

“On the other hand, if the ceremony of 13th

February 1866 is not proved—if it could be shown that that was a mere sham and farce—the parties not intending real marriage—and still more, if the conclusion could be reached that the witnesses who speak to that ceremony—to the consent given thereat, and to the incidents attending it—were false and perjured persons, then, and in such a case, the Lord Ordinary feels very strongly that it would not be very difficult to disregard and set aside all the other evidences of marriage on which the pursuers rely.

“It is all important, therefore, to see and to consider the evidence by which the ceremony and consent of 13th February 1866 is sought to be established.

“There are only two witnesses now surviving who were present during the whole meeting of 13th February 1866, and who saw the whole ceremony—George Wilson, the pursuer's brother, and Mrs Hannah Fyfe or Kellett. Both these witnesses were examined in most minute detail. They were subjected to a most able and sifting cross-examination, and the result upon the Lord Ordinary's mind was that they were truthful witnesses, upon whose testimony reliance might safely, and ought to be, placed. No doubt George Wilson is a near relative, and allowance must be made for this; but the Lord Ordinary could detect nothing which could lead him to suppose that he was wilfully stating anything that was not strictly true. Indeed, the evidence of Mrs Kellett, who is an entire stranger, without any interest whatever in the suit, is in some respects more favourable to the pursuer than the evidence of the pursuer's own brother. The minute variations between the testimony of these two witnesses, in conformity with a well-known rule, rather confirmed the evidence than derogated therefrom, and unless actual perjury is supposed—perjury of the most daring kind—the Lord Ordinary feels compelled to accept as actual fact the statements which the witnesses make.

“Now, pausing for a moment here, the Lord Ordinary cannot help thinking that there is no room for mistake or doubt as to the nature and meaning of what took place. The Major's words, ‘Maggie, you are my wife before Heaven; so help me, great God!’ his kneeling posture, the putting the ring upon the pursuer's finger, and the whole attendant circumstances, exclude every construction but one, or at least throw it upon the defenders to show that what appeared to be a solemn matrimonial consent was a mere device or screen contrived and intended by both the parties to cover and conceal something quite different. This has not been shown, and, the Lord Ordinary thinks, cannot be shown, and the result is, that believing the testimony of George Wilson and of Mrs Kellett, the late Major Steuart and the pursuer, Mrs Robertson, became lawfully married persons on the evening of 13th February 1866.

“But besides the direct evidence of the two surviving witnesses, George Wilson and Mrs Kellett, the ceremony and consent is proved by the hearsay of old Mr and Mrs Wilson, both of whom are now dead. There is really no room for doubting that both Mr and Mrs Wilson constantly, consistently, and without a single deviation or contradiction, not only asserted that the marriage had taken place, but acted on this footing ever after 13th February 1866. Their statements and conduct are proved almost by scores of witnesses,

and no real contradiction is established, although no doubt their conduct is open to very severe animadversion and remark.

“Then there is the very important testimony of the servant Agnes Forbes, a most important witness, and whose evidence is all the more noteworthy as she shortly afterwards left Mr Wilson's service, and was only discovered by advertisement previous to the present trial. Agnes Forbes was not present at the ceremony, but she came into the room immediately after it to put fruit and glasses on the table. She heard words which implied that the marriage had taken place. She saw the marriage ring on the pursuer's finger, and she proved circumstances which afterwards took place, which (unless there had been a deep-laid conspiracy on the part of the pursuer herself to deceive) demonstrate that the marriage had taken place.

“The evidence of Agnes Forbes is so important that the Lord Ordinary was not surprised at the defenders, in the course of their proof, more than a week after Agnes Forbes had been examined, proposing to recal her, not to ask her anything which had been omitted, but for the purpose of discrediting her by setting up contradictions about which she had not been asked at all. The Lord Ordinary, while anxious not to exclude any legitimate light, found himself compelled to disallow this proposal, which, if admitted, would, he thinks, be subversive of all rule in the regular examination of witnesses. The defenders had no excuse if they were not ready fully to cross-examine Agnes Forbes, for even if they had not had an opportunity of precognoscing her, it was all the more necessary that they should be fully ready with evidence of any former statements which she had made. It would be very bad practice if, after a witness was fully examined and cross-examined, the opposite party were to be encouraged to hunt out supposed contradictions, and then, after the trial had gone on for six days, to recal her for the sole purpose of discrediting her. The Lord Ordinary thinks that Agnes Forbes gave her evidence in a most truthful and straightforward manner.

“Still further, the fact of the ceremony and the matrimonial consent is indirectly but most conclusively proved by the evidence of the pursuer's sister, Georgina; the pursuer's sister-in-law, Mrs Alexander Wilson; and the pursuer's brothers, Alfred and Edmund.

“Georgina and Alfred Wilson had been at the so-called marriage party of 13th February 1866, but being young, they had been sent to bed by their father before the ceremony took place. The sending the younger children early to bed was in conformity with old Mr Wilson's usual practice, and though it was rather odd if he really expected the ceremony to happen, there seems no doubt of the fact. Georgina and Alfred had, up to 13th February 1866, occupied the same bed-room with their sister, the pursuer; they missed her from the bed-room that very night, and were told of the marriage next morning. Mrs Alexander Wilson, again, heard of the marriage on calling next day, and actually saw Major Steuart and the pursuer in bed together, and the other brother, Edmund, was informed of the marriage by letter. The most minute details are brought out in the evidence, such as the fish-dinner at Newhaven, and various statements of Major Steuart's, all bearing close and necessary reference to the ceremony of the 13th. Further corroboration is obtained from

statements to third parties, both by the Wilson family and by Major Steuart himself.

"For example, only to take two instances out of many; it is proved by the witness George Mortimer, a butcher from whom Major Steuart occasionally purchased meat, that Major Steuart told him, 'I got married last night,' and though he at first doubted it, he afterwards believed it, and it was in strict accordance with the fact. In the same category may be placed the statements made to John Caw, the messenger-at-arms, who, within a week after the marriage, was employed to apprehend the Major for debt. He found the Major in bed with the pursuer, and was not only told of the marriage, but actually got the debt paid by old Wilson, the father-in-law, in order that the poor Major might not have to spend his honeymoon in gaol.

"Without referring to further evidence in corroboration, the Lord Ordinary thinks that the facts of the ceremony and *de presenti* consent therat, are sufficiently and indeed conclusively established. This conclusion is irresistible, without holding that four or five, and probably seven or eight witnesses, are deeply and deliberately perjured, and that they have got up a conspiracy of the most daring kind to set up a ceremony of marriage which never took place. A supposition like this is utterly inadmissible. Perjury in most, indeed in all the witnesses, is incredible, and no such conspiracy could have stood the test of the sifting to which the witnesses were subjected at the trial.

"(2) The marriage—the ceremony of marriage which actually took place on 13th February 1866, was preceded by a courtship—not, it may be, a very delicate or refined courtship, but still a courtship, noticed, open, and almost avowed—which might very naturally terminate in a marriage. The fact of an attachment having arisen between Major Steuart and the pursuer is well established, and though there was great disparity in the rank of the parties, the Major's circumstances, and still more the Major's habits, were such as might very naturally induce the hope in the Wilsons and in the pursuer that a marriage might be brought about.

"It is not against the pursuer's case, but in favour of it, if there was something like scheming on the part of old Wilson and his wife to bring about a marriage. All that can be said is, that the scheme was successful. The getting Major Steuart as an inmate of Mr Wilson's house, and then at a critical period representing that he must leave it, was not unlikely in the circumstances disclosed in evidence to bring the Major to the point. And even though it should be held that he was entrapped into a marriage, still if he freely and deliberately entered into the marriage with his eyes open, the scheming of the bride's father and mother, or of the bride herself, though it had been a great deal worse than it was, would not annul the marriage. Such things are not altogether unknown in higher circles than that in which the Wilsons moved. One thing is clear, that if the Major was entrapped, he saw the trap laid and baited for him; no deception was practised on him—he was a willing and deliberate victim.

"(3) But it is much more important to notice that the marriage was immediately followed by cohabitation, which cohabitation continued, with

considerable interruptions, till the Major left for England the spring before he died—that is the spring of 1868.

"It seems quite established that no improper conduct, and no improper familiarities, ever took place between the pursuer and Major Steuart previous to the alleged marriage; and that thereafter, that is immediately after the ceremony, they cohabited together as husband and wife. They were bedded on that night, 13th February 1866, according to an old Scotch custom, happily nearly in desuetude.

"The fact that there was no intercourse before the ceremony, and continued and open cohabitation after it, is a striking feature of the present case, which broadly distinguishes it from such cases as that of *Roxburgh v. Watson*, 23d October 1868, 7 M.P. p. 19, where the pursuer was not only a prostitute, but had actually long been the kept mistress of the man with whom she alleged marriage. The Lord Ordinary fully concurs in the opinion of Lord Neaves as to the extreme caution with which the Court should proceed in dealing with alleged marriages got up between a mistress and her paramour, but he humbly thinks that to a large extent these remarks are not applicable to the present case.

"Every case depends on its own circumstances; in every case the question is a pure question of evidence; and the Lord Ordinary thinks it established in the present case. The Lord Ordinary thinks it quite clearly proved that the cohabitation began and continued solely upon the faith of the ceremony of 13th February. No doubt proof that the ceremony was a collusive device would get behind everything, but it would require to be very strong proof, and, in particular, it would require proof that the pursuer was a party to the device, and that she surrendered her person, as she did on the night of 13th February 1866, on another footing than that of marriage.

"(4) And lastly, for the Lord Ordinary purposely omits all minute details, it is established by a host of witnesses, many of whom are above all suspicion or exception, that the late Major Steuart solemnly and deliberately, and under a great variety of different circumstances, admitted his marriage with the pursuer.

"This is proved by about fifty witnesses of every rank and standing, and speaking to the most varied circumstances and occurrences. To examine them in detail would be to go over the whole proof.

"It may be at once conceded that many of these witnesses give comparatively unimportant testimony, although in hardly any case does the Lord Ordinary doubt that the testimony is true.

"Statements made to hotel-keepers or lodging-house keepers with the view of getting apartments do not go for much, as was well exemplified in the *Yelverton* case, and the same may be said of many of the occasions when the Major spoke of the pursuer as Mrs Steuart.

"But even a great deal of this kind of evidence is important in the present case, for the representations to hotel-keepers made by Major Steuart were not made when he and the pursuer were travelling alone, and the hotel-keepers were commonly not strangers, but old acquaintances of the Major. Many important statements were made during the trip to London and Paris, when the spouses were accompanied by the father and the

sister of the bride. It is hardly conceivable to hold that all the Major said was for the purpose of deceiving, and then, when the Major spoke of his child as the 'heir of Murthly,' as he often did, and of Mrs Steuart as the future Lady Steuart, all this is quite different from a person carrying on an illicit amour, and occasionally calling his paramour by his name.

"Even Major Steuart's casual conversations with boon companions are not to be disregarded; for what conceivable motive could he have for telling a boon companion that he was married to the pursuer, if it was not really the fact?"

"Undoubtedly, however, a good deal of the evidence of what Major Steuart said must be taken with careful limitation. But after making every allowance, there is much of this evidence which will not and cannot be explained away.

"As examples, the Lord Ordinary may mention the evidence of Dr Middleton, the evidence of Mrs O'Brien, that of John Alexander, that of Mrs Cunningham, that of Mr Andrew Ramsay, and others of similar character.

"But above all, and on this branch of the case, the Lord Ordinary thinks the strongest weight due to the testimony of Captain Cooper. The Lord Ordinary accepts without any hesitation every word of Captain Cooper's testimony as absolutely true. Not the slightest suspicion can be hinted against him, and he could not be mistaken.

"Captain Cooper was the most intimate friend Major Steuart had in the world. His companion in arms in the same regiment, and co-recipient of the Victoria Cross, Captain Cooper visited Major Steuart on his death-bed, and received his latest statements and charges; and to Captain Cooper Major Steuart stated, under circumstances which excluded the slightest doubt in Captain Cooper's mind, 'that he, Major Steuart, was married to the pursuer.' In effect, Major Steuart died declaring the pursuer his wife, and their child his lawful son. Of course, this *per se* would not make a marriage, but taken with what went beforehand, it really wipes the last doubt from the Lord Ordinary's mind.

"Having thus briefly indicated the grounds upon which the Lord Ordinary has proceeded, it may be right to notice in one or two sentences the opposing grounds, or considerations and circumstances which have to be overcome and disregarded, and these are certainly neither few nor small. The Lord Ordinary thinks they have been overcome, but there is undoubtedly great difficulty in doing so.

"(1) The first and chief circumstances relied on by the defender is the correspondence with the Major, so far as recovered. None of the pursuer's letters to the Major have been found. Major Steuart must have destroyed them all. But there are a large number of letters from the Major to the pursuer, and there are some letters between old Wilson and the Major, Mrs Wilson and the Major, and there are a number of letters between the pursuer and Mr Melville Jameson.

"Now, looking to these letters, and especially to Major Steuart's letters to the pursuer, they create a very serious difficulty and doubt. It is not too much to say that no such letters ever passed between a husband, said to be an attached husband, and his wife, as those addressed by the Major to the pursuer. The mode of expression used in those letters is inexplicable. The Major is represented by all who knew him best as a man of untarnished

honour and integrity, notwithstanding all his vices. He was 'a noble fellow,' 'a most perfectly honourable man,' and 'the bravest of the brave.' The Lord Ordinary is most unwilling even to suspect him of wishing to draw back from his word; but the question does force itself, Were these letters not written with intentional constraint? as if to take care that, although there had been a marriage by oral consent, the pursuer should have nothing under the Major's hand to prove it. It is a damaging supposition for the Major's memory; but, alas! his own conduct has left on that memory many a stain, and were the defence in this case successful, there would lie against his memory a deeper reproach than that which the terms of his letters suggest.

"After all, negative evidence—the non-indication of marriage in letters—can never overcome direct evidence of actual marriage, if this latter is strong enough. The Lord Ordinary thinks it is so in the present case.

"(2) The defenders rely on the Major's own statements. To a great variety of persons, and in various circumstances, the Major stated he was not married to the pursuer, and these statements are relied upon by the defenders.

"Now, the Lord Ordinary has the greatest possible doubts whether mere statements by Major Steuart, outwith the presence of the pursuer, are evidence against her at all. The question first directly arose in the examination of Dr Simpson, but it had previously occurred incidentally. Looking to the circumstances, the Lord Ordinary thought it safest to admit the evidence, reserving its effects. Major Steuart's statements were so much mixed up and interlaced with his *conduct* that it was very difficult to draw the line, and the Lord Ordinary followed what is often in such cases an expedient course—to record the evidence, reserving its effect, and thus save the risk and prejudice of the re-examination of a large, and, it may be, an unknown number of witnesses. Everything is now before the Court, but the question of the effect of the evidence is perfectly open.

"The Lord Ordinary inclines to think that bare statements made by Major Steuart to third parties, not connected with or explaining Major Steuart's conduct, and outwith the presence of the pursuer, are not evidence against the pursuer. Major Steuart, if himself alive, could not have been a witness; and while his confession as a party may be evidence against him, he could not convert his bare and unconnected statements into evidence in his favour. This disposes of a good deal of what the defenders rely on as Major Steuart's mere statements.

"But, besides, it is plain that on some occasions, and from some persons at least, Major Steuart wished to keep his marriage secret. He often said so, and although his conduct in this respect was anything but consistent, this must be attributed to his dissipated and irregular habits, which indeed go far to account for a great deal that is perplexing and for much that is painful in the present case. It is in vain to expect consistency, either in language or in conduct, from one who, however high he once stood, had become the slave and the victim of degrading intemperance.

"(3) But there is some evidence that, even in the pursuer's presence, Major Steuart denied his marriage. Of course this is not conclusive of anything, for if concealment was wished, such denials

might be necessary, or might be thought necessary.

But the evidence as to this is very meagre. It rests chiefly on the testimony of the valet Glover Budd, and of Mr and Mrs Hutton. But all these witnesses are seriously discredited—Budd fatally by Captain Cooper, who directly contradicts him, and Mr and Mrs Hutton hardly less seriously by the evidence of Mr Pople of the Birnam Hotel, and by that of Mr and Mrs M'Lagan. The Lord Ordinary would not feel warranted in resting much weight on the unsupported testimony of Budd and the Huttons.

The evidence of the witnesses now referred to (Pople and the MacLagans) has another bearing. It points to the existence of some kind of document or acknowledgment proving the marriage, which was in, or supposed to be in, Major Stuart's portmanteau, and which has been lost or destroyed. This may be material, not only in itself, but as explaining the pursuer's after conduct, when she found herself without a scrap of Major Stuart's writing to show that she was his wife.

(4) The pursuer's statements at the police trials of 1866 are much relied on by the defenders. But here there is a conflict of evidence, John Alexander and Agnes Forbes being opposed by the Laings, by Torrie, and Hunter. It is difficult to say where the preponderance rests, but it is not at all surprising that in the crowd and confusion of a police court there was, to say the least, room for misconception on the part of the bystanders who were watching the cases before that tribunal. At the worst, this is just one of the circumstances which it is difficult to get over, but which does not shake the independent structure on which the pursuer's case rests.

(5) Not very much weight, it is thought, can be attached to the circumstances attending the registration of the birth and the baptism of the pursuer's child: of the two, the registration of the birth is the most serious circumstance against the pursuer. The child is registered as illegitimate, and the pursuer signs the register. It appears, however (Collett's evidence), that there was an altercation between the pursuer and the registrar as to the legitimacy of the child, the registrar demanding that the father should come to the office before the registrar would enter him as husband and father. Major Stuart would not, at least did not, come, and this is another instance where a breath of suspicion crosses us that he was abstaining from committing himself in writing. No doubt this cuts two ways, but in the Major's absence the pursuer was nearly helpless in the matter of the registration.

The baptism of the child is really of little consequence. Undoubtedly the Reverend Mr Rigg believed the child illegitimate, and registered it accordingly; but nothing was said about legitimacy, and the registry was Mr Rigg's own act, and not the act of the pursuer. Mr Rigg had the name of the child on a slip in Major Stuart's own handwriting, "William George Drummond Stuart," although he only baptised him "William," and entered him as illegitimate.

(6) There is, next, the deed of settlement of old Wilson, which names the pursuer simply by her maiden name, although he mentions the married name of another daughter subsequently married. Here, again, there is difficulty, though only of a negative kind. Something may be attributed to

the manner in which the instructions were given to Mr Denholm, and the mode in which he noted them, but still there remains an awkwardness which the pursuer must get over.

And there is great force in the observation that the case against the pursuer is strongest just where there should be writing, and writing in her favour. Whenever writing appears, it seems to ignore the alleged marriage. It was impossible to put this argument, and indeed the argument for the defenders throughout, more ably than was done by Mr Shand, and the Lord Ordinary was greatly moved by it. But then there was the alternative, and the Lord Ordinary has not been able to find that the defence was strong enough to overcome the pursuer's case. There is a choice of difficulties; the Lord Ordinary has taken the view which he thinks is attended with the least difficulty.

(7) Lastly, and omitting various topics of less weight, the Lord Ordinary was pressed with the pursuer's conduct both before the alleged marriage, during its subsistence, and after its dissolution, as inconsistent with the position and *status* which she claims.

Here again, undoubtedly there is much to be said against the pursuer.

The pursuer's general character was attacked, as well as the character of her father's house and family. This was of somewhat doubtful competency, and led to a question about proof in replication which the Lord Ordinary disallowed. The Lord Ordinary does not think that the character of the pursuer and of her father and his family has been successfully assailed to any extent bearing upon the present issue.

But the pursuer's conduct in not claiming the *status* of widow needs explanation, and perhaps is not fully explained. Her statement to old Mr Stuart may possibly have been in reference to her not possessing any document showing marriage, whereas he was referring to marriage itself. The evidence of the pursuer's sister, and the servant of Mr Stuart, points to this as a possible explanation, and allowance must be made for the pursuer's poverty and helplessness.

But whether fully explained or not, she could not unmarry herself, and even a misconception on her part would not take off the independent evidence of the marriage, if that evidence is to be believed, as the Lord Ordinary thinks it is.

On the whole, the question is a jury question, and the Lord Ordinary, acting as a jury, finds, not without difficulty indeed, but ultimately, and at last without much hesitation, for the pursuer.

This finding necessarily leads to the reduction of the decree in absence formally pronounced *ex parte* by the present Lord Ordinary. The Lord Ordinary has already held the reduction to be competent, and the whole question of the marriage to be open, notwithstanding the decree in absence.

The conclusions for count, reckoning, and payment are still undisposed of, but if this judgment stands these conclusions ought not to lead to litigation."

The defenders reclaimed.

The Judges of the First Division being equally divided sent the case to the other Judges of the whole Court for their opinions. The Lord JUSTICE-CLERK, Lords COWAN, BENHOLME, NEAVES, MURE, GIFFORD, and MACKENZIE sustained the interlocutor of the Lord Ordinary, and Lords ORMDALE and SHAND were for reversing.

The following are the opinions of the consulted Judges:—

LORD JUSTICE-CLERK—The marriage which it is the object of the present action to declare is said to have been constituted by verbal acknowledgments *de presenti*, exchanged in the presence of witnesses. In all cases of this kind the evidence of words spoken, especially if the witnesses give their testimony from recollection, at a distance of time, requires to be carefully sifted. Even if the words are proved, the Court must be satisfied that they expressed serious and deliberate consent. It must be seen whether the surrounding circumstances, and the character and conduct of the persons concerned, were consistent with the evidence so given. Should the claim not be made before the death of one or other of the parties, the attempt to establish a marriage by parole evidence of words spoken will be, of course, more difficult, and the evidence brought to support it must be weighed in more jealous scales.

On the other hand, a marriage so constituted is almost uniformly clandestine. A declaration in private before witnesses is seldom resorted to in preference to a public celebration, except in order to prevent publicity either before or after marriage. In this respect the nature of the evidence on which such cases depend may vary much from that which is necessary to establish a marriage by cohabitation and habit and repute; for the notoriety and publicity which are requisite to the last, it is generally the object of the first to avoid.

In the present case the voluminous evidence before us has some features of considerable perplexity. The twofold aspect of the last three years of Major Steuart's life which it seems to exhibit, comes out, on the first impression of it, in vivid contrast. But, in coming to the same result as the Lord Ordinary, I have found in the main little of the evidence on either side which is not reconcilable with that conclusion.

Major Steuart, the alleged husband, was the next heir of an old and prosperous family, the Stuarts of Grandtully; but at the time this proof opens he had quarrelled with his father, and had sunk, through degrading habits, to a low level in his associates. He held a commission in the army, had served in the Crimea, and in 1865 was on half-pay. He seems from the evidence, while naturally of a high and generous spirit, to have lost himself to a great extent by habitual intemperance. The pursuer, the alleged wife, was a daughter of a person of the name of Wilson, a fishing-tackle maker in Edinburgh. Major Steuart made her acquaintance in 1865, at her father's shop, and it is said that after some period of courtship the acknowledgment in question took place in the house of old Mr Wilson, in Edinburgh, on the 13th of February 1866.

Major Steuart was living as a lodger in her father's house when this incident is said to have taken place. It appears that Mr Wilson was dissatisfied with Major Steuart's position in the house, and had, on the very day on which the occurrence in question is said to have taken place, insisted, or at least suggested, that he should leave it. It seems that on this day there was to be a merrymaking in Mr Wilson's house in honour of Major Steuart's birthday; and that after the repast, and in presence of some members of the family and one guest, Mrs Kellet, it is said that Major Steuart solemnly acknowledged the pursuer to be

his wife; that he thereupon put a ring on her finger; that the company drank their health; and the evening ended by some of those present seeing the couple put to bed, and pelting them with pillows. It is said that thereafter for a considerable period they cohabited as man and wife in the house of the pursuer's father in Edinburgh.

The evidence of this alleged declaration *de presenti* is the following:—George Wilson, who is a brother of the pursuer, and Mrs Kellet, a neighbour, witnessed it, and speak to what they heard and saw. Agnes Forbes, who was Wilson's servant, was present during part of the evening, and corroborates this statement in material particulars. The hearsay testimony of Mr and Mrs Wilson, who are both dead, entirely corresponds with it. Those of the family who, although living in the house, were not present—Georgina and Alfred Wilson,—heard of it next morning. Edmund Wilson, who was absent, heard of it by post. Alexander, who was on a sea-voyage, congratulated his sister immediately on his return, and had also been informed of it.

Without going into the details of what is spoken to by the witnesses, it is sufficient to say that if the account given by them is accurate, the facts proved amount to evidence of the interchange of present matrimonial consent, and constituted a valid marriage.

It has been suggested that marriage could not have been meant, because one of the expressions Major Steuart is said to have used was, that "he could not marry;" and that if a marriage ceremony had been expected or premeditated on that occasion, Wilson would not, as he is proved to have done, have sent the children to bed, and threatened to turn Major Steuart out of the house. I find no inconsistency between these facts and the testimony on which the pursuer founds. The evidence seems to indicate that, with more or less decision of purpose, some such step had been contemplated by Major Steuart for some time. He certainly was pressed by the father, and it is possible that he had promised more than an irregular marriage for this evening, and had again drawn back; that the father anticipated an altercation, and sent the children to bed; and at last, in pursuance of a pre-conceived design, the Major took this way of putting his scruples to rest, while avowing his inability to espouse his daughter openly.

Assuming that the witnesses are worthy of credit, this evidence goes far to support the case of the pursuer. But if it stood by itself I should not have been disposed to found so serious a conclusion on the mere narrative of these persons, at so great a distance of time; and that all the more that so much of the testimony is derived from members of the pursuer's own family. I quite agree with and adopt the general view of Lord Neaves on this subject in the case of *Roxburgh*, referred to in the pleadings; although in the present case some of the persons who were present on the occasion—namely, Mrs Kellet and Agnes Forbes—were not relatives. But the evidence bearing on this specific occurrence by no means stops there, and it is necessary to attend to the rest of it a little in detail.

The event was far from improbable, looking to the habits and mode of life of Major Steuart. On the contrary, the defenders have proved, with some anxiety, that it was one which his friends all along apprehended. Gold, the land-steward on

the Murthly estates, mentions that in December 1865, when Major Steuart, Wilson, and his daughter were in his house, Sir William Steuart desired him to tell Mr Wilson to get the Major to marry his daughter, and Gold delivered the message. Shortly before the 13th of February, Major Steuart stated to two different persons that he had arranged for a private marriage with the pursuer. William Mackenzie Young says that he met the Major about the end of January or the beginning of February 1866, and he then told him he was going to get married to Miss Wilson. They had a long walk, and discussed the disparity of the social position of the Major and the pursuer. He heard of the marriage a month afterwards; and meeting Major Steuart some days after hearing of it, was told by him that he was married to the pursuer, and that it was to be kept private. William Maxwell, a witness holding the office of Depute-Keeper of the Minute-Book of this Court, says that Major Steuart told him, in old Wilson's shop, about the end of 1865, and in the presence of Wilson and his wife and others, that arrangements were being made for his marriage to Miss Wilson. About a month or two after February 1866 this witness was again in Wilson's shop, and "Mr and Mrs Wilson," he says, "were telling me all that took place at the marriage. I think they said they were married on the 13th of February, and they told me all who were there." Major Steuart came in, and introduced the pursuer as his wife. George Mortimer, a butcher in the neighbourhood, says that about the back end of 1865, or the beginning of 1866, Major Steuart came into his shop and told him he had been married "the night before." James Collie, a workman with Wilson, proves that some months after Harry Wilson's death (23d September 1865), George Wilson told him that "Major Steuart and Maggie had been married last night." Mrs Alexander Wilson speaks to the Newhaven fish-dinner described by George Wilson, as having taken place on the second day after the event; to seeing on that day the ring on Maggie's finger, and to the Major calling her on that occasion his wife. On the 19th February 1866, Caw, the messenger-at-arms, going to apprehend Major Steuart for debt, found him in bed with the pursuer in Wilson's house, and he then said she was his wife. Wilson, on coming in, said they were married, but it was to be kept private. He paid the debt, and the cheque, dated 19th February 1866, is produced. Thomas Smith in the year 1865 explained to Major Steuart the state of the Scotch law as to irregular marriages, and mentioned "exchange of consent between the parties in the presence of witnesses" as one mode of constituting marriage. "He seemed," he says, "to know all about it." He met the Major again in 1866, when he told him he had married Miss Wilson; that it was not a Church marriage, but a Scotch marriage—an irregular marriage—and that it was to be kept private.

If what these seven witnesses say be true, and I see no ground to doubt their truthfulness, they corroborate the statement of those who were witnesses to the acknowledgment in the strongest way. They prove that at this precise date some occurrence took place which altered the relations of the pursuer to Major Steuart. They prove that he himself considered, and said immediately after the event that he considered, that this occurrence, whatever it was, constituted a marriage. If this

evidence is true, it excludes the idea that the act was not deliberate, for it was premeditated; or that it was not serious, for he said it was serious; or that it was only a promise, for he said it was a marriage. Adding to this, that it is clearly proved that after this event the parties regularly cohabited at bed and board for a considerable time,—which it is certainly not proved they ever did before,—it seems to me that the facts which are alleged are established, and that they exclude some of the views which are urged against the conclusion they warrant. It has been suggested that all that was meant was to give a cover to an illicit connection, or that no more passed than a promise to marry. The words, the ring, the demeanour of the parties the escort to the bed-chamber, and the contemporaneous statements of Major Steuart himself negative both of these suppositions.

It may no doubt be contended that the pretended acknowledgment is a mere invention, and that the witnesses are unworthy of credit. I have found no reason to think so. Nothing whatever has been proved impeaching the character of the two witnesses who were present at the acknowledgment. An attempt was made to discredit Agnes Forbes; but it throws more suspicion on the defence than it does on the witness. It does not impress me with its truthfulness. As to the general character of Mr Wilson's household, it is clear enough that the tone of manners and demeanour was not high; but I have found no evidence which should render the members of it unworthy of credit. Nothing specific has been proved against the character of the pursuer herself; and, indeed, one witness called for the defence, who undertook to inquire into some rumours by Major Steuart's desire, said that the result of his inquiry was that everything was proper, chaste, and virtuous on the part of the pursuer. There is exaggeration in this matter on both sides; but no ground for doubting the veracity of these witnesses has been established.

The rest of the evidence for the pursuer refers mainly to a great many occasions, under a great variety of circumstances, on which Major Steuart called the pursuer his wife during the period which elapsed from his leaving Wilson's house in 1866 till his death in 1868. It is needless to go into detail in regard to them. They must receive effect according to the surrounding circumstances. When a man, for the sake of respectability, allows a woman with whom he lives, or travels, to bear his name in places of public resort, this may go very little way in proof of antecedent marriage, as was found in the case of *Yelverton*. Still, the fact that he does so, which may be little by itself, may be of moment in connection with other facts. Some of the instances founded on would by themselves be of no importance. The statements proved to have been made when the parties were in England and abroad, which are numerous and significant, are mainly important because the pursuer's father and sister were of the party; a circumstance to my mind of great weight, for if the pursuer was known by them to be travelling as Major Steuart's mistress, the fact would argue an amount of baseness which nothing which is proved of them would render probable.

But many of these subsequent acknowledgments are subject to no such observation, and were made under circumstances in which there was no object whatever, except the truth of the fact, for making them. Major Steuart had no interest to represent

himself as married to the pursuer if he was not so. On the contrary, he seems to have been warned by his friends of the risk he ran. And if, notwithstanding this, and his proved desire for concealment, he admitted the fact of his marriage in conversation, I should be inclined to conclude that his statement was true.

The last of these instances cannot fail to strike the mind with exceptional force. His old comrade and most intimate friend, Captain Cooper, went to see him at Hythe when he was dying; he sat up with him most of the first night, and remained with him until he died. He tells us that after the paroxysm under which Major Steuart laboured the first night had passed away, and his mind was perfectly clear and collected, the remarkable conversation to which he speaks took place. These are his words: "I remember that on that day the Major made rather a pointed observation to me. He said, You are married, aren't you? I said, Yes, I am; and so are you, aren't you? He said, Yes, I am. He also said, have you got a son? I said, No, not yet. He said he had one; and he said something which led me to believe that he was very proud of his son." Captain Cooper knew very well to what he alluded, for he had heard of his relations with the pursuer, and he asked the witness Budd, his body servant, when he arrived at Hythe, if it was true that Major Steuart was married, and he said he was "married right enough." So completely was Captain Cooper impressed with the truth and nature of the dying man's communication, that he suggested to Major Steuart that he should make provision for his wife and child; and he told Mr Jameson at the time—a very significant observation—that he disliked Scotch marriages. He says he did not approve of the fishing-tackle maker's daughter being mistress of Murthly. It is impossible for me not to give complete credit to this statement; for it is absolutely impossible that the man who dealt so tenderly with his friend and comrade, should falsify what he said to him on his death-bed. Budd, it is true, denies that he made the remark attributed to him: but the denial only tends to discredit him.

If we believe Captain Cooper, and believe also that Major Steuart spoke seriously and collectedly, which I see no reason to doubt, this final scene puts an end to several surmises. The notion of Captain Cooper and Major Steuart being excited at the time has no warrant in the evidence. It becomes, then, quite clear that Major Steuart thought he was married, and that what had taken place was no cover, or blind or promise, but was intended to be what he thought it was—a completed marriage. It also excludes the idea that, as his father had given his consent to the marriage, Major Steuart had no motive for concealing it. As it is very clearly proved that Major Steuart seldom spoke of his marriage without saying that it was to be kept private, his motive, even if we could discover it, would be immaterial. But it is easily conjectured. He was possibly unwilling to set up an establishment, to which neither his habits nor his finances inclined him; and if, as time went on, the inducements which led to the marriage became feebler,—the disparity of position, education, and breeding, more apparent,—and his repugnance to an open avowal stronger,—Major Steuart only acted on impulses on which most men, so placed, have acted before. But the conclusive answer is, that with his

dying breath he admitted he was married, and thus proved the concealment of his marriage also.

I think, therefore, that on the evidence for the pursuer the case is made out.

The evidence on the part of the defender is unquestionably, within its sphere, very complete; but it only affects the conclusion at which I have arrived in one branch of it. It consists, in the first place, of statements made by Major Steuart to sundry persons, to the effect that he was not married, and of various incidents subsequent to the alleged acknowledgment, which are said to indicate that he could not not have been so: *secondly*, it consists of the correspondence, so far as it has been produced; and, *thirdly*, of the conduct and letters of the pursuer herself after the death of Major Steuart.

1. In regard to the statements made by Major Steuart to the effect that he was not married, there is no doubt that as far as such statements are material to the issue they are proved. He unquestionably did say so, very seriously, to persons of great respectability. But after giving those statements full consideration, I am of opinion that they do not detract from the effect of the evidence for the pursuer. It is quite certain that his statements on this subject were untruthful on one side or other, or were at least made with great mental reservation; and I give more weight to the admission of the marriage, which he was avowedly anxious to conceal, than to denials which harmonised with that desire and aided his object. He denied his marriage by his acts; and it is not wonderful that he did so, when pressed, in words also. It is said that he was an honourable man. But all experience shows that the sense of honour decays with the sense of self-respect; and I fear that Major Steuart was not incapable of denying, on such a subject, that which he knew to be true. In short, he deceived Mr Rigg and his other friends on this subject, and he meant to deceive them; and he substantially admitted on his death-bed that he had done so.

2. In regard to the correspondence, as far as relates to the pursuer it only exists from April 1867, and her letters for the most part are wanting. The correspondence is, therefore, imperfect in material parts. Starting from this date, it is quite true that the letters are not such as a man would write to an acknowledged wife. But they are very carefully framed epistles, and, written a year after a clandestine marriage, can excite no surprise. They are very much such letters as a man would write to a woman who had a claim upon him already, and whose claim he did not wish to strengthen. Such is the conclusion I draw from these letters. They are not tender, neither are they unfriendly. They are not such as a man would naturally write to his wife, or naturally write to his mistress. But they are, I think, written with a purpose, and that was to indicate no trace of the real relations of the parties.

In regard to the episode as to the portmanteau at the Birnam Hotel, I may say that I am clearly of opinion that Hutton's testimony on this subject is untrue. That the portmanteau did contain some document thought to be material to the pursuer's position seems to be proved by the pursuer's statement, overheard at the time, by Hutton's statements to the MacLagans, by Mr Pople, the innkeeper, by George Wilson's statement of what his father said on his return home, and by Major Steuart's answer to Mrs Wilson's complaint, which, though undated, clearly refers to this incident.

The third element in the defender's case is one to my mind of much more weight and importance. I find nothing either in the writing or the actings of Major Steuart inconsistent with the pursuer's case; but the conduct of the pursuer herself, and of those who acted for her after Major Steuart's death, is said to form a great impediment in her path. That she should not have asserted her rights when it was most material that they should be recognised, and even abandoned them in such a conjuncture of circumstances, is with force founded on as a most unfavourable feature of her case. She had registered her child as illegitimate—she claimed alimony for him on the assertion that he was so—she was married to her second husband under her maiden name—her father designed her by her maiden name in his will executed after the alleged marriage—and no assertion of the marriage was made for a considerable time. These are no doubt facts of considerable weight. Against them may be set the evidence of Mrs Clarkson regarding the baptism of the child, and the pursuer's letter to Sir William Steuart on the 1st November 1869, in which she directly says she has documents and other proof that Major Steuart acknowledged her as his wife. The adverse facts may perhaps be accounted for by the poverty in which the pursuer found herself—the unwillingness to offend the powerful family of her husband—and the fear, not ill-founded, of being unable to substantiate her true position, as she had no written evidence to show. But giving all weight to these considerations, I am unable to resist the large and consistent mass of evidence on which the pursuer's case depends.

LORDS COWAN and BENHOLME concurred in the opinion of the Lord Justice-Clerk, and in the additional observations of Lord Neaves.

LORD NEAVES—I concur in the opinion expressed by the Lord Justice-Clerk, and in the grounds generally on which it is rested. I shall state shortly the views that mainly influence me.

1. I cannot doubt upon the evidence that the remarkable scene spoken to by the witnesses as having occurred on the 13th of February 1866, did substantially occur on that occasion. I think it impossible to suppose that it is an invention or a falsehood.

2. I see no ground for holding that the particular details mentioned have been exaggerated or perverted. If there was any desire in the witnesses to improve on the actual facts, they could easily have made them much stronger, and probably would have done so.

3. I have no doubt that what passed between the principal parties amounted to a serious and solemn interchange of a mutual *de presenti* consent to marry, such as is sufficient by the law of Scotland to constitute marriage. It seems impossible to believe that the pursuer did not so understand it; and it would be very questionable to allow the parties denying the marriage to suggest that the deceased wished to deceive the pursuer. For the reasons fully given in the Lord Justice-Clerk's opinion, I am satisfied that he had no such intention or idea.

4. I consider it proved that no sexual intercourse had taken place between the parties antecedently to that occasion. No evidence entitled to consideration points to anything affecting the pur-

suer's conduct prior to the date in question; and it would have been a most unprecedented and incredible proceeding that there should have been a formal arrangement or contract for *concubinage* entered into, and followed by a *bedding* in the home and in the presence of the father of the woman, and his family and friends.

5. I consider the conduct of the deceased easily explainable in the way stated in the Lord Justice-Clerk's opinion.

6. I consider that the pursuer's conduct is also capable of a not unnatural explanation. She and her friends might be distrustful of her success in any attempt to establish her marriage, and she might think the most prudent course, at least in the first instance, was not to offend the family on whom she might consider herself and her child dependent for subsistence, and from whose hostility, so far as her claims interfered with their interests, she might apprehend the strongest opposition.

I consider the present case to be essentially different from that of *Roxburgh*, and even in some important points to form a strong contrast to it.

LORD ORMDALE—I have found the question for determination in this case to be attended with great difficulty, and all the greater in consequence of the enormous mass of evidence in which it is shrouded. But although it may be necessary in order fully to appreciate the effect of that mass of evidence, in regard as well to the character of the parties more immediately concerned, as the credibility of the witnesses, carefully to examine the whole of it in all its details, as I have done, I propose now merely to refer, as briefly as I can, to the leading considerations by which I have been influenced in coming to the conclusion that the pursuer has failed to establish her case.

It is important to keep in view that, according to the nature of the action as libelled, and the pursuer's allegations in support of it, the marriage sought to be established was entered into on the 13th of February 1866; and that it was an irregular marriage constituted *per verba de presenti*. That is no doubt one of the modes of contracting marriage recognised by the law of Scotland; but then, in the words of the Lord Ordinary in the note to his interlocutor, it must be shown that the interchange of matrimonial consent was 'solemn, deliberate, and serious.' And it need scarcely be added that the evidence of this must be clear and unexceptionable, especially in a case such as the present, where not only one of the parties to the alleged marriage, but also two out of the four persons who alone are said to have been present at it, had died before this action for having it declared was instituted.

In an action so brought it is also a circumstance worthy of remark that the pursuer has been unable to produce any written acknowledgment of the alleged marriage; and this circumstance is, in my apprehension, rendered all the more important by the unsuccessful attempt made on the part of the pursuer to show that she had obtained from Major Steuart a written acknowledgment of the marriage, but which it is said he, or some one for him, afterwards improperly took possession of and destroyed. For myself, I must own that I cannot but look upon this feature of the pursuer's case as pregnant with suspicion against her. Not one of her father's family, nor any other person, appears to have seen the written acknowledgment referred to. Nor is

it anywhere shown in evidence when, or in what circumstances, it was granted, if it ever was granted at all. And not only is there no evidence worthy of the slightest attention of its alleged destruction, but the pursuer's statements on the subject (Cond. 13, 14, and 15) are in themselves plainly preposterous and unintelligible. She says in article 13 that when the written acknowledgment was executed by Major Steuart, it was "delivered to her;" and in articles 13 and 14 she goes on to say that it was afterwards taken away, not by her, but by the Major, in a portmanteau to Birnam, and that on arriving there, "or some time afterwards, he abstracted and destroyed it." But how, or when, or for what purpose, he got back the writing from the pursuer, or why, having got it back, he did not at once destroy it, if that had been his object, in place of taking it away in a portmanteau to Birnam, there to deal with it, are matters nowhere attempted even to be explained or accounted for. Not only so, but in no instance, and on no occasion, before the institution of this action, does the pursuer appear to have alluded to any such written acknowledgment and its subsequent destruction, although nothing would have been more likely and natural than that she should have done so if any such document had ever existed. The only mention by the pursuer of her having had any written evidence of her marriage that I can find in the proceedings is in her letter to Major Steuart's father, Sir William Steuart, after the Major's death, of date 31st November 1869, where she makes a statement to the effect that she had "letters," besides other proof, "that he acknowledged me as his wife." But the pursuer cannot be held to have in this statement alluded to the written acknowledgment referred to and founded on by her in the 13th, 14th, and 15th articles of her condescendence; for, according to these articles, the written acknowledgment there referred to had been destroyed so far back as 1866. Her letter therefore to Sir William Steuart must necessarily have referred to other written acknowledgments altogether. But if she had any such in November 1869, what has become of them? To this question there is not the semblance of an answer. There seems to be no alternative, therefore, but to hold that the pursuer's statements, as well in her letter to Sir William Steuart as in the 13th, 14th, and 15th articles of her condescendence, are and have been throughout devoid of foundation; and if so, I need scarcely add that the credence which might otherwise have been given to the pursuer's case is very materially shaken.

According to the pursuer's statement in the record (cond. 10), the only witnesses to her marriage were her mother and father, her brother George Wilson, and Mrs Kellett. The mother and father having died before the institution of this action, their direct testimony is wanting. Much therefore depends upon that of George Wilson and Mrs Kellett.

George Wilson, the pursuer's brother, after mentioning that his father, on the night of the alleged marriage, remonstrated with Major Steuart for remaining in his house and thereby compromising the character and reputation of his daughter, goes on to state, "that the Major, with tears in his eyes, said, Wilson, I will show you what I can do; I am poor now, and I cannot marry—he meant to the height of life he was in—but I will marry her

in the Scotch fashion, or words to that effect." Taking this statement by itself, it is difficult, or rather impossible, to hold it to amount to actual marriage then contracted *per verba de presentii*, for the Major expressly said, "I am poor now, and I cannot marry." That he only meant by this, "to the height of life he was in" is not to be assumed, for these are not his words at all, but the words of the witness as expressive of a mere inference on his part which there is nothing to warrant. The Major is, however, said to have added, "but I will marry her in the Scotch fashion," or words to that effect. Here the witness does not profess to give the Major's precise words, and yet everything depends upon the words which were actually used. But taking the witness's statement as it is given, the question occurs, what did the Major mean by saying that he would marry her "in the Scotch fashion?" It is difficult to suppose that he meant he was then to enter into a real and actual marriage according to any mode or fashion recognised as binding by the law of Scotland, for he had just before stated in the previous part of the same sentence, "I am poor now, and I cannot marry," but that he was to do something else. Nor do I think that the matter is materially affected by the Major's going down, as the witness George Wilson says, upon one knee, putting a ring on the pursuer's third finger and exclaiming, supposing he ever did so, "Maggie, you are my wife before heaven, so help me God," for, in connection with this part of the Major's saying, as well as the other about marrying in the Scotch fashion, it must not be forgotten that he had, according to George Wilson's testimony, prefaced both by the clear and unequivocal declaration, "I am poor now, and cannot marry." Nor is it to be overlooked that while Wilson, to his statement just referred to, adds, "after the Major said that, the two kissed one another. She said, Oh Major, and put her arms round his neck. He then said he wished this to be kept private; but that when he got his money he would make it public." Not only is the marriage ceremony, as thus described, more like a burlesque than anything serious, but the witness George Wilson's account of it is inconsistent and contradictory, for, while it will be observed, from the passage which has been quoted, he states that the Major, on the conclusion of it, "said he wished this to be kept private;" he afterwards gives a different version of the matter, and states that when the Major got up he prefaced the whole of his statement by saying, "Wilson, I will show you what I can do to shut up people's mouths." He had been "sitting in a chair crying—the tears coming over his eyes." So that, taking both versions as now referred to, of the words uttered by the Major on the occasion in question, he must in almost the same breath have said that what he did was "to shut up people's mouths," and yet that he desired that the whole matter should be "kept private." And what renders this still more inexplicable is, that according to the pursuer's proof otherwise, the Major and all parties took every opportunity thereafter of publishing the marriage to all with whom they had any communication. It seems, therefore, impossible to avoid the impression, either that the witness George Wilson has not given a correct account of what the Major did say, which is highly probable, seeing that about six and a-half years have elapsed between the time of the alleged occurrence and the date when the witness gave his testimony, or that

the Major was in such a maudlin condition as not to be capable of expressing himself coherently, or entering into any serious engagement whatever.

As to Mrs Kellett, the only other person present at the alleged marriage, who has been examined as a witness, it must be borne in mind that she had left the room with the younger members of the family when they were ordered to bed, that this, she says, would be very near 11 o'clock, and that she might be "out of the room half-an-hour," although she could not "speak to the exact time." According, then, to this testimony of Mrs Kellett, it is clear that she neither could have seen, nor heard, all that passed on the occasion in question; and indeed she expressly says that when she returned to the room the Major and Mr Wilson "did not discontinue what they were saying when I went in. Mr Wilson was not speaking, but the Major was saying that he could not do what he would wish to do at the present time." And then she goes on to narrate what she saw and heard. But in many respects her narrative does not correspond with that of George Wilson, either as to what was said or done. In particular, she does not state that she heard the Major say that "he was poor now and could not marry;" she does not state that she saw the tears coming over his eyes, nor that she heard him say he would marry the pursuer in the Scotch fashion; or that she heard him say "Wilson, I will show you what I can do to shut up people's mouths;" and while she states that the Major, after using the words "I will show you what I can do," filled up the wine-glasses and then went in "front of the wardrobe beside Maggie, and went down on his knee," George Wilson's description of the scene is considerably different. Both, however, seem to concur in what I cannot help thinking the incredible statement that on the occasion in question the Major was perfectly sober; and this although there were wine, ale, and whisky on the table, and that the Major is proved, if anything is proved at all, to have before then become, in the words of the Lord Ordinary, the 'slave and victim of degrading intemperance.'

But whatever may be thought of the evidence of these two witnesses, George Wilson and Mrs Kellett, it seems at least to be indisputable that a great deal more must have been said and done during the three hours the parties were together in the same room on the night in question, of which there is no account whatever,—a defect which could not fail to be material in any case where a marriage is sought to be established by oral testimony, and an all but fatal defect in such a case as the present, depending so much upon the pursuer's own brother, and brought, as has been already noticed, at such a distance of time from the date when it was said to have occurred as six years, and after the death of one of the parties. The present defenders can themselves know nothing of what actually took place on the night of the 13th of March 1866; and it is not incumbent upon them to show what it was. It is enough for them if the pursuer, on whom the *onus* lies, has failed by clear and reliable evidence to prove the marriage alleged by her. That she had so failed, if there had been other evidence than that of the two witnesses George Wilson and Mrs Kellett, I should have been much inclined to hold. But there is a great deal more proof, and many points are disclosed in it which, in my apprehension, militate strongly against the pursuer, and which, indeed, must be

held to show that there could have been no such marriage as that alleged.

In the first place, there is the important evidence afforded by the whole acts, conduct, and statements of Major Steuart, and of the pursuer herself and her father, which is quite irreconcilable with the notion that any such marriage as that in question ever took place.

There is, no doubt, some evidence to the effect that Major Steuart, in loose and casual conversations with his drinking associates and others, alluded to the pursuer as Mrs Steuart, and even stated that he was married to her; but it is also proved by unimpeachable testimony that he on all occasions, with little or no exception, when he appears to have been serious and sober, referred to the pursuer as Miss Wilson, and positively denied that he was married, or had ever intended to marry her. In particular, when residing in St Patrick Square, which, according to the pursuer's own statement in the record was in March or April 1866—that is, within a few weeks after the alleged marriage—he most positively denied to the Rev. Mr Rigg that he had married the pursuer, and that he was on his guard against being entrapped into any such marriage. So also he shortly thereafter made a similar denial to Drs Simpson and Duns-mure, the accuracy of whose testimony cannot, any more than that of Mr Rigg, be for a moment doubted.

There is also the equally distinct and very remarkable evidence of Dr Culbard, who says that he frequently urged upon the Major the propriety of marrying the pursuer, considering that he had possession of her person, but that he said "No that he was not married to her, and that he never would be married to her." And this witness also says that "on the occasion he introduced me to her by the name of Miss Wilson, I said Miss How much? He turned with a very significant look and shrug of the shoulders, and answered, Miss Wilson." And then, on being asked, "Did he say that quite distinctly?" the witness answers "Quite distinctly—markedly; she must have heard it." And as might have been expected, the witness, on being further asked, "What was the view you took of the relation between them, from the way in which he acted towards her?" answered, "that she was simply his mistress."

There is a great deal of further evidence to the effect that Major Steuart frequently to various other persons—the testimony of some if not all of whom—Robert Anderson, for example—is not attempted to be impugned, and at any rate is above suspicion—introduced and otherwise referred to her in her own hearing and presence without any symptoms of disapproval as Miss Wilson. Neither can it be overlooked that with little or no exception any articles purchased—and such purchases appear to have been frequent—by Major Steuart for the pursuer, were addressed and delivered to, and received by her, not as Mrs Steuart, but as Miss Wilson.

It would require, I think, a very strong case on the part of the pursuer to get over the statements and conduct of Major Steuart as now referred to, and to reconcile them with the assumption of his having been married to her in the circumstances, on the occasion, and in the manner alleged by her. I certainly cannot hold that the evidence of his having sometimes spoken of the pursuer as his wife to drinking associates, when

probably not entirely free from the effects of drink himself, or even when sober to persons he had an obvious reason for hoodwinking on the subject, in order to obtain lodgings or admittance to hotels, or for other temporary purposes, is sufficient to do so. Nor am I satisfied that the Major's statement to Captain Cooper, when lying on his death-bed in the hotel at Dover, is entitled in this respect to the importance which appears to be attached to it by the Lord Ordinary. At the same time, I concur with his Lordship in looking upon Captain Cooper as a gentleman of unimpeachable honour and integrity. But Captain Cooper did not state, as the Lord Ordinary assumes, that Major Stuart said "he was married to the pursuer," he merely said "he was married," but to whom he did not mention; nor did he make any other allusion to the subject. What Major Stuart truly meant cannot, I think, be with certainty collected,—his utterances being so few and devoid of all explanation. He certainly did not say that the pursuer was his wife. And I think it scarcely conceivable that such was his meaning in the few words which fell from him, keeping in view that neither to Captain Cooper nor his law agent Mr Jameson, nor any one else who had any communication with him during his last illness, did he express any sympathy or kindness whatever for the pursuer. He did not signify any desire to see her, and he left no message for her. There is great reason, indeed, for thinking that Major Stuart must have been at the time Captain Cooper spoke to him so prostrated, mentally as well as physically, as to be unable to think clearly or express himself intelligibly. At first he mistook Captain Cooper for another person altogether; and then, in the few words he appears to have uttered, he asked Captain Cooper whether he was married,—although he must have been previously perfectly well aware that he was, for Captain Cooper had not very long before written him a letter in which he made express allusion to his wife. In these circumstances, I am unable to hold Captain Cooper's evidence to be of the conclusive importance ascribed to it by the Lord Ordinary. It appears to me, on the contrary, to be quite insufficient to overcome the serious, deliberate, and unequivocal statements on the part of the Major to Mr Rigg, and Drs Simpson, Dunsmure, and Culbard, to the effect that he had not married, and never intended to marry the pursuer.

"But independently of the Major's merely verbal statements, there are those contained in his numerous letters to the pursuer herself, to her mother, to her father, to her sister Mary, and also to his own law agent and friend Mr Jameson, all subsequent in date to the alleged marriage, in none of which is there one word indicative of the pursuer being his wife. On the contrary, the terms and tone of these letters lead to no other conclusion than that such a relation never existed. The Lord Ordinary himself observes, with reference to the Major's letters to the pursuer, that 'they create a very serious difficulty and doubt,' and, that 'it is not too much to say that no such letters ever passed between a husband, said to be an attached husband, and his wife.' But I cannot concur with the Lord Ordinary in thinking, as he appears to do, that such letters may be accounted for on the assumption that the Major, notwithstanding the high character given to him by everybody for honour and probity, desired to withhold from his wife all

evidence, at least all written evidence, of the marriage. Such an assumption is altogether inconsistent with the whole of the pursuer's case as attempted to be established by her. Supposing, however, for a moment, that the Major in writing to his wife, and her father, and mother, and sister, in the terms he used, did so for the deliberate purpose, craftily devised and steadily adhered to, of making it appear that he was not married to the pursuer, or at any rate of withholding any written evidence that he was, how is it possible to account for the pursuer, her father, and mother, and sister, acquiescing in so base a scheme? How can it be accounted for that they, each and all of them, did not at once express their indignation at such conduct, and endeavour, at least, by every means in their power, to bring the Major to a sense of his duty. It may no doubt be suggested that the pursuer's letters to the Major have not been preserved, and therefore that it cannot be known in what precise terms or temper she may have responded to the letters she received from him. This is true, but it is also equally true that enough appears from the letters which have been preserved and produced to show that the pursuer and her family must have acquiesced at the time in the tone and terms of the Major's letters without any complaint or remonstrance whatever.

Not only so, but there is evidence of a very formidable character—so formidable that I confess my inability to get over it—to the effect that the pursuer herself, and her father, conducted themselves in such a manner as to render it impossible to suppose that they or either of them were ever in the belief that any such marriage as that in question had been entered into.

(1) The pursuer's correspondence with Mr Jameson, Major Stuart's law agent, is not such as could have taken place on any theory that can be fairly or reasonably suggested consistently with the assumption of the pursuer having been Major Stuart's wife. In none of these letters—although in most of them she mentions Major Stuart—does she refer to him as her husband. On the contrary, they all contain indications of the strongest description that she was not, and did not, consider herself to be his wife. All of them are written and subscribed, not in the name of Stuart, which they naturally would have been had she been the Major's wife, but in her maiden name of Wilson. All of Mr Jameson's letters, again, were addressed to and received by her as Miss Wilson, without objection on her part. This correspondence also shows that the pursuer was asked for, and gave receipts for, small sums of money from Mr Jameson on various occasions, not as the Major's wife but as Miss Wilson.

(2) The documents connected with the entries in the Register of Births of the birth of the pursuer's child, are also entirely inconsistent and irreconcilable with the truth of the pursuer's case. It is clearly proved that the whole of that matter was transacted by the pursuer herself, Major Stuart having taken no part in it. Now, in these documents the pursuer is mentioned, not as the wife of Major Stuart, but as an unmarried woman, and her child is entered as "illegitimate." Nor do I think the pursuer's explanation of this—to the effect that she could not get the Registrar to make any other entry unless Major Stuart himself appeared before him—in the least satisfactory. It is not said by the pursuer, and there is certainly no

evidence, that the Major was asked or had refused to go to the Registrar, or in some other way to authorise the correct entries to be made. And, at any rate, it is inconceivable that the pursuer should have herself deliberately subscribed false entries in the register to the effect of at once destroying her own character as a virtuous woman and bastardising her child.

(3) There is what appears to me to be also a very distinct and unqualified confession, clearly proved to have been made by the pursuer to Mr Robert Steuart, a cousin of Sir William's, to whom she applied for pecuniary assistance shortly after Major Steuart's death, and when, of course, there could have been no possible reason, but the contrary, for her concealing or disguising the truth.

(4) In the proceedings in the action for inlying charges and aliment at the instance of the pursuer against Major Steuart's executor, she gives a precise and detailed account of her connection with the Major from first to last, and in particular of her intercourse with him resulting in the birth of her child, all upon the footing of there having been no marriage, and of her child being illegitimate. And upon that footing she obtained decree and took payment of what she was entitled to under it. All the receipts—and there are several of them—extending over a period of about a year, are signed by her as Margaret Wilson. And,

(5) In the process of aliment at the pursuer's instance, when she was incarcerated for a debt for which decree had been taken against her as Margaret Wilson, she applies for aliment as Margaret Wilson, and emitted the oath of her destitution, necessary in all such cases, on the footing of her being an unmarried woman. In that oath she expressly swears that no debts were due to her, and that she had no property or effects of any kind, although as the widow of Major Steuart, if she had been his widow, she had then, equally as now, the claims made by her in the present action.

Having regard, then, to the statements of the pursuer herself, after the death of Major Steuart, and when of course she could have had no object or motive for falsifying or misrepresenting matters, I am unable to see how it can be assumed, or that it can now be taken off her hands, that she was married to, or ever believed that she was the wife of, Major Steuart. The pursuer, of all the persons who figure in this case, must have known best whether a marriage took place between her and Major Steuart on the 13th of March 1866, and yet all her statements, acts, and conduct, as now referred to, extending over a very considerable period of time, testify unmistakably, I think, to the fact of there having been no such marriage.

And in perfect accordance with the belief and understanding of the pursuer herself as so manifested, is that of her father, in whose house till his death she all along resided, and in whose presence the alleged marriage is said to have taken place. If there was any individual who, next to the parties themselves, must have known whether there was a marriage or not, it was he. But his statements and conduct, established by incontrovertible evidence, show there was no such marriage, and that he had no belief or understanding that there was. In particular, this is shown by letters and other writings under his own hand. There is, first, his letter of 3d April 1867, which is irreconcilable with the notion that he believed the pursuer was the wife of Major Steuart, or any other notion than that she

had given birth to an illegitimate child, of which the Major was the father; and there is, next, his letter to Messrs Dundas & Wilson, in regard to which the same remark may be made. Then there is the account charged by him for Major Steuart's bed, board, and washing from 8th August 1865 to 7th February 1868, at 30s. a-week, without any mention of, or allusion whatever to, his wife, for whose bed, board, and washing the Major was equally liable from the 13th of February 1866, if the case of the pursuer were a true one. Lastly, there is Mr Wilson's disposition and settlement, executed on 1st March 1869, in which he refers to the pursuer as Margaret Wilson, in the same way in which he refers to his other unmarried daughter Georgina, making no allusion whatever to, or giving the slightest indication of, her being the wife of Major Steuart. And this becomes all the more remarkable when it is observed that he expressly mentions and refers to his only other daughter as Mary Wilson or Wyke, wife of Frederick Wyke, presently residing in Liverpool.

Having now adverted to what appears to me to be the leading features of the proof—at any rate, to those by which I have myself been chiefly influenced,—I have only, in conclusion, to repeat, that I am not satisfied the pursuer has established her case by such clear, reliable, and unexceptionable evidence as was necessary, but, on the contrary, that she has failed to do so; and, in particular, that she has failed to explain or account for acts and conduct, statements and declarations by herself, extending over a considerable period of time before the present action was raised, which must be held very clearly and distinctly to import that she was an unmarried woman, and that her child by Major Steuart was illegitimate.

LORD MURE—I concur in the opinion of the Lord Justice-Clerk, with the additional observations of Lord Neaves.

LORD GIFFORD—After carefully perusing the printed pleadings, and after reconsidering the whole evidence, I remain of the opinion expressed in the Interlocutor and Note now under review and as it would be out of place to go into minute details, I have nothing to add to the Note which I formerly issued.

The additional evidence allowed by the First Division, and by means of which the defenders have endeavoured to shake the credibility of the witness Agnes Forbes, does not, I think, make any real difference in the case. It may be true that the evidence of the witness Agnes Forbes is to be regarded with some degree of suspicion, but no essential part of the case rests upon her uncorroborated testimony, and I still regard her evidence as affording important confirmation of the other independent evidence in the case.

There are unremoved and unexplained difficulties in the case, but I think actual marriage between the pursuer and the late Major Steuart has been sufficiently established.

LORD MACKENZIE—I concur in the opinion of the Lord Justice-Clerk, and in the additional observations of Lord Neaves. I have only further to add, that I cannot find in the circumstances of this case any grounds on which effect can be given to the argument of the defenders, that the words used by

Major Steuart on 13th February 1866 do not afford evidence of a *de presenti* interchange of matrimonial consent, but are suggestive of a rehearsal of something future. The words which the Major then used are, according to the evidence of George Wilson (and very much to the same effect is the evidence of Mrs Kellett)—“Wilson, I will show you what I can do; I am poor now, and I cannot marry; but I will marry her in the Scotch fashion:” and then putting a wedding ring on the third finger of the female pursuer's left hand, and addressing her—“Maggie, you are my wife before heaven, so help me, great God.” The defenders maintain that the words, “I am poor now, and I cannot marry; but I will marry her in the Scotch fashion,” indicate that the Major could not and would not marry the female pursuer at all then, but that he would marry her at some future time in the Scotch fashion. I am not of that opinion. The whole words and acts must be taken and considered together. When this is done, the apparent inconsistency between the first and the last words and the Major's acts is easily explained. It is proved by the witness Thomas Smith that Major Steuart was well acquainted with the modes of contracting an irregular marriage in Scotland. The female pursuer was in a very inferior rank of life, and it is not difficult to find other reasons why he, a Roman Catholic, and heir of an old family, and to one of the finest estates in the Highlands, should be unwilling to enter into a regular marriage with the pursuer *in facie ecclesie*, with its attendant publicity and results. His words were, “I am poor now, and I cannot marry”—that is, looking to what followed, I am too poor to marry publicly, but I will marry your daughter in the Scotch fashion; that is, I will enter into a private irregular marriage by the interchange of mutual consent. This he accordingly then and there did.

LORD SHAND—I am of opinion that the pursuer has failed to prove her averment of a marriage entered into between her and Major William Drummond Steuart; and that the interlocutor of the Lord Ordinary should be recalled, and decree of absolvitor pronounced in favour of the defenders.

As this view is opposed to that entertained by a considerable majority of the consulted Judges, I shall state fully the grounds on which my opinion rests.

Whatever difference of opinion may exist otherwise, there is a general agreement as to the remarkably contradictory character of the evidence, which to a very large extent consists of accounts given of the statements and conduct of Major Steuart and of the pursuer herself. I can find no good reason to account for such contradictions if the parties had been really married.

This feature is so marked in the case that although Lord Gifford has held the marriage to be established, he has fairly stated that there is one part of the evidence, to which I attach the highest importance—I mean the correspondence produced, and particularly Major Steuart's letters to the pursuer—which, in the view which he has taken of the case, appears to be inexplicable.

The fact that the acts of the parties are of so contradictory a nature, and that the terms and mode of expression of the letters which passed between them during their alleged married life are inexplicable in the view that they were

married persons, is to my mind fatal, or almost fatal, to the conclusion, which it lies with the pursuer to establish, that a marriage did take place. There is, I think, on the other hand, no such difficulty in reconciling the apparent contradictions in the evidence if the view be taken that the pursuer cohabited with Major Steuart as his mistress in the hope—apparently not without considerable foundation—that she might yet be raised to the position of his wife. This view of the case is entirely consistent with the correspondence, and particularly with the letters of Major Steuart to the pursuer herself. The statements made by members of the pursuer's family, and on frequent occasions by Major Steuart also, to the effect that he had been married, or that the pursuer was “Mrs Steuart,” or his wife, may be quite accounted for by a desire on his part to save the pursuer from scandal—sufficiently extensive at any rate—which had arisen from her cohabiting with him in another character. There is nothing more common in ordinary life than that a man, cohabiting with a mistress should with this object on many occasions use such expressions, but without any serious intention, either on the part of himself or his mistress, of thereby acknowledging or contracting marriage. It appears to me that, on the one hand, there are facts and circumstances in the case which it is impossible to reconcile with the view that marriage was entered into; but that, on the other, there is nothing in the acts or statements of the parties which does not admit of a natural explanation, taking the view which I have done, that the marriage has not been proved.

The proof for the pursuer, and particularly that with which the case opens, is I think calculated to produce a first impression in favour of the pursuer's case which it is necessary to guard against until the voluminous proof has been read and fully considered as a whole. I allude particularly to the evidence for the pursuer with which her case commenced, of the ceremony or scene—for it cannot properly be called a ceremony—which, it is said, took place in the house of the pursuer's father, Mr Wilson, on 13th February 1866. The circumstantial account given of this is *prima facie* calculated to produce the impression that an irregular marriage then took place, or at least may have taken place—for the variance of a single expression or word as given in the recollection of the witnesses who spoke to what occurred would make all the difference. This evidence presents itself in a consecutive form, and was spoken to more or less by three witnesses—the pursuer's brother, her friend and companion Mrs Kellett, and the servant Nancy Forbes. In this shape it is fitted to make more impression at first than a great deal of the evidence given at a much later stage in the proof, which directly contradicts the existence of a marriage relation between the parties. This arises from the circumstance that the latter evidence, consisting of important acts and statements by the parties, is scattered at intervals throughout the voluminous proof, and not presented in a consecutive form; and is to a material extent contained in writings, which are not calculated to produce the same impression in the first instance as the oral testimony to which I have alluded, but which are really far more to be relied on, being real evidence, recorded at the time, as to the relation which subsisted between the parties. The full strength of the written evidence produced,

every particle of which is entirely against the truth of the pursuer's case, only appears after a careful consideration of its terms and of the circumstances in which the letters and other documents produced were written. On a careful examination of the proof, it appears to me that there are many acts and circumstances proved which demonstrate that whatever took place on the occasion of the alleged ceremony, the parties did not then and there enter into the relation of marriage; and that there is much even in the circumstances and nature of the alleged ceremony itself, as narrated by the witnesses above-mentioned, to lead to the inference that present marriage was not thereby intended.

The question in the case, as stated by Lord Gifford, is whether on the 13th of February 1866 the late Major Steuart and the pursuer mutually accepted of each other as husband and wife, their intention being deliberate and serious, with the purpose of making marriage, and nothing short of this. Each part of the evidence in the case is important only in so far as it bears on this question. If there was a marriage on that day the pursuer is entitled to succeed in her action; if there was not, she must fail. The evidence bearing on what occurred after that date is not of any value for the purpose of establishing a marriage by acknowledgment or consent given after the occasion referred to, or by habit and repute. The case is not so put by the pursuer; and the proof of what took place subsequent to the alleged ceremony is only to be referred to for the purpose of obtaining light reflectively, showing whether what then took place was a serious interchange of *de presenti* consent to marry, or was intended to cover another connection between the parties—in the words of the pursuer's brother, "to stop people's mouths," in the hope, it might be, on the part of the pursuer and her family, that Major Steuart would be induced ultimately to enter into marriage with her.

On the evidence which has been given it certainly appears that something of the nature of an irregular ceremony, or form, or appearance of ceremony, as I should prefer to describe it, took place between the parties; and the vital question in the case is, whether what then occurred was a ceremony of marriage, or an arrangement or cover for another object. In considering this question the evidence is naturally to be considered, first, with reference to the statements of the witnesses who were present on the occasion as to what then occurred; and, secondly, with reference to the subsequent statements and actings of the parties interested, keeping in view that the matter for determination is one as to the state of their minds, viz., whether they then intended to become married, and actually concluded marriage. On this question it cannot, I think, be suggested that any distinction arises on the evidence between the state of mind of the one party and the other. It is not a case in which the suggestion can be made that the pursuer meant marriage, and Major Steuart, seeking to deceive the pursuer, intended concubinage. But it appears to me, as the result of the evidence as a whole, that the pursuer was willing and agreed to live with Major Steuart in another capacity than his wife, in the expectation on the part of her parents and herself that her influence over him would yet give her that position.

In considering what the parties meant by the

occurrence at the supper-party on the 13th February 1866, it is most material to trace the previous history of the parties, their habits and character respectively, and the relation which had subsisted between them down to this time, in so far as these can be gathered from the evidence. If the case were one in which the pursuer's father, though of much humbler position than Major Steuart, the next heir to an old family estate producing a rental of a good many thousands a-year, was yet very watchful of the training and conduct of his children and of the relations which they formed, and who, from all that could be ascertained of him, would obviously have scouted any relation with one of his daughters except that of marriage, proof of an alleged irregular ceremony, though open to much criticism, must be regarded as of the highest importance. But the evidence in support of such a ceremony, if not absolutely clear, and if contradicted by important acts in the subsequent lives of the parties, must have much less significance in the case of a daughter belonging to an ill-regulated household, whose father showed no anxiety to preserve her from sources of contamination. If it be the case, even, that the pursuer's father, for the sake of wealth, or of possibly obtaining at a future day a social position which would be high for her, was content to allow his daughter to associate, with little if any restraint, with a man in a different position of life from herself, who had given himself over to habits of gross intoxication, and openly consorted with loose women, it is not a very great step further to suppose that, in order to gain his end, he might consent to an improper connection going on, in the hope that marriage might ultimately result; and all the more so if he found that the extent of unchecked familiar intimacy and intercourse which he had permitted had led to the natural result of a connection having sprung up which had gone beyond his control. The view which Lord Gifford takes of the pursuer and of her father's conduct and motives may be gathered from the passage in his Lordship's note, that "it is not against the pursuer's case, but in favour of it, if there was something like scheming on the part of old Wilson and his wife to bring about a marriage," and in which he subsequently refers to "scheming of the bride's father and mother, and of the bride herself," if it existed, as a circumstance which would not annul marriage, because, in that view, if the Major was entrapped, he had seen the trap laid and baited for him, and was a willing and deliberate victim. This seems to indicate an opinion that Wilson, at all events, was of a moral tone or character so low that he would become a party to a scheme by which his daughter should sacrifice herself by forming a close attachment to a man certainly of loose and intemperate habits, in order to entrap him into a marriage which might bring wealth and position with it. It is, no doubt, going a considerable way further to suppose that, in order to gain his end, he might even consent to a dishonourable connection, which he hoped or believed might be temporary only; but it is a circumstance of importance in considering whether that was not what truly occurred, that, in the view of the Lord Ordinary, who thinks a marriage was established, there was scheming to bring it about, and that the connection hoped for was one with a man whose habits were so degraded as has been clearly proved to have been the case with Major Steuart.

On the question whether the alleged ceremony is to be regarded as an actual marriage, or a proceeding intended to cover a different connection, the conduct and mode of life of the pursuer's father and his family have an important bearing; and I have accordingly examined the evidence to see what it discloses on this point.

On this branch of the proof, it is to be kept in view not only that the question of the existence of the alleged marriage has been raised a considerable time after Major Steuart's death, and after a great many actings on the pursuer's part entirely inconsistent with the notion of marriage, but that the defenders appear to have been entire strangers to Major Steuart's life, and must therefore have had to make their inquiries in relation to the pursuer's family at great disadvantage. This disadvantage must have been much increased by the fact that, as appears from the evidence of the various members of Mr Wilson's family, they lived an unusual and peculiar life, having scarcely any friends with whom they kept up familiar intercourse, and who could be appealed to to speak to their mode of living. The different members of the family were examined on this subject, and they seem to have been unable to name any one who was in the habit of visiting them as friends or acquaintances, with the exception of two or three persons at the most; and there is scarcely a single witness, excepting members of the family, examined for the pursuer, who associated with the pursuer or the family in domestic or social life. The defenders appear in these circumstances to have had recourse to inquiries regarding the Wilsons from persons, strangers, who had lived in their immediate neighbourhood; and the evidence which these persons have given is certainly most unfavourable, and indeed damaging to the family, including the pursuer.

This is, in my opinion, a point of much consequence in its bearing on the origin and nature of the connection between Major Steuart and the pursuer; and I shall briefly notice what appears to me to have been proved with reference both to the period immediately before and after the alleged marriage. The conduct of the parties after that time has a direct bearing on the question of Wilson's character, and the probability, or the reverse, of his admitting of the connection which I think subsisted between the parties.

1. It appears, then, that when Major Steuart became acquainted with the Wilsons in 1865 they resided at the corner of Clyde Street and Elder Street, where they continued until May 1867, when they removed to a house in Leith Street Terrace, where they lived till after his death. It is proved that both of these houses are in streets in which there are a number of brothels; and, indeed, that the first of them was in the immediate neighbourhood of several houses of this kind, the windows of some of which overlooked the Wilsons' house. The selection of such localities for the home of his family by the father of a number of young and attractive daughters just entering womanhood, shows an entire and gross disregard of care for the moral training of his children, if it show nothing worse; for whether looking out of the windows of the house, or in going out and in, they must have been accustomed to scenes of impropriety, if indeed they did not themselves experience insult.

2. Again, the occupation in which Wilson employed his daughters was one which required an

amount of circumspection on the part of their parents which was evidently not given. It appears from the evidence of George Wilson that while his sister Polly kept a refreshment-stall at the Theatre Royal for a time, remaining there until its close, the pursuer and her sister were employed in the afternoons in dressing flies in the fishing-tackle shop which their father kept, and were in use to serve the customers in the shop, who were, from the nature of the business, almost entirely gentlemen, with more than one of whom the pursuer and her sister appear to have been allowed to converse and even to associate very freely. There is repeated reference throughout the proof, and particularly in the evidence of George Wilson, Frank Simpson, and others, to the fact, that while Major Steuart was improving an acquaintance which he had begun with the pursuer at the counter of Wilson's shop, Captain Affleck, of the 42d Regiment, was paying similar attentions to her sister Mary, and was also received as a visitor at Wilson's house; for George Wilson and his sister Georgina both speak of him as a visitor there.

3. There is a good deal of evidence, further, to show that the conduct of the family was such as might be expected in the locality chosen, and could only be permitted in a very ill-regulated and loosely brought-up household. The pursuer's brothers and sisters deny that their father was in the habit of drinking freely; but it is clear from the evidence otherwise that at times this was the case. Dr Balfour and Dr Middleton, who were successively medical attendants on Mr Wilson, both refer to this; and the witness Powell speaks to repeated occasions when he and Old Wilson and his son had drinking bouts together, one of which ended in all of the parties being taken to the police-court and fined for assault. The subject is also alluded to in a letter by Major Steuart to the pursuer, of 1st June 1867, in which, writing to the pursuer under the name by which he almost always addressed her in his letters—"My dear Miss Wilson," he says "I thought of sending him (her father) a sample of the best whisky made here, but as he has been abstaining I shall not do so, for fear I should be the cause of harm." In another letter of the 1st of January of that year, to Mrs Wilson, he speaks of "that little escapade when your husband was down here," apparently referring to the occasion spoken to in the evidence, when Wilson was at Birnam,—a midnight trip, when the Major and he, both considerably under the influence of drink, drove to the Murthly grounds, the pursuer being with them. There is clear evidence also to show that rough swearing language, so loud as to disturb the neighbours, came frequently from the members of Wilson's household, including Mrs Wilson; and it is proved that the pursuer herself made frequent use of such language. The Rev. Mr Rigg speaks of Major Steuart having used very strong terms in informing him of this habit on the part of the pursuer; and there is evidence both by the neighbours in Clyde Street and Leith Street Terrace on this subject.

4. The light conduct of Wilson's daughters, including the pursuer, at each of the three places mentioned in the proof—the shop, and the two houses above referred to,—was also the subject of remark and of evidence. Mr Waddie, a highly respectable witness, who had a shop in Waterloo Place, speaks not only of Major Steuart's habits at the time he was going about Wilson's shop,

and about the time of the alleged courtship and marriage—a period before Major Steuart was incarcerated in Calton Prison—but had his attention repeatedly drawn to the pursuer and her younger sister walking up and down the street, and, as he expresses it, “larking” with Major Steuart and another young man of about the Major’s age. At the house in Clyde Street, surrounded as it was by houses of loose character, the girls were seen by the neighbours frequently leaning over the windows, sometimes very slightly dressed, or, as the witness Mrs Hunter states, in regard to the two eldest, “sometimes half naked,” and attracting the notice of the students of a neighbouring Veterinary College and other men passing by. The opinion which he had formed of the house is given in rather expressive terms by the witness James Hunter, an agricultural implement maker, who no longer lives in Edinburgh, where he says that he thought it a very curious house; and being asked whether he thought it was a good house, replied—“Not altogether; I could not prove anything; but in my opinion I thought it was not a good house.” And again, “Did you think it a bad house?” answered—“I thought it betwixt the two,” an expression which conveys precisely the impression which the evidence has produced on my mind on this subject. The witness Mrs Laing, who lived on the opposite side of the street, tells also of the noise which frequently came from the house, and speaks of old Mrs Wilson as a very coarse woman, whom she had heard swearing often.

(5) The evidence as to the conduct of the family in the house in Leith Street Terrace, to which they removed, is if possible even more decided. The witness Ormiston, who was engaged all day at his duties in the Bank of Scotland, explains particularly how he used to find Wilson’s daughters in the evenings “often loafing about the foot of the stair,” and running out and in from their own house, down stairs, “without bonnet, or shawl, or cloak, bareheaded,” to a shop in the neighbourhood in which eating and drinking went on, to which young gentlemen resorted, and which was also resorted to by gaudily-dressed women, whom he believed from their appearance to be women of the town. And he speaks very strongly of the pursuer’s habit of swearing as being something quite remarkable—a fact also noticed in the evidence given at a later time by Powell and Sanderson. It may be true that this habit on the part of the pursuer increased after her marriage; but it is impossible, I think, to look at the different pieces of evidence to which I have referred without coming to the conclusion that there was a loose and irregular life going on in Wilson’s household, which was most adverse to the formation of any but the lowest standard of moral conduct on the part of his daughters. On this part of the case the evidence of Dr Dunsinure, who speaks to two visits to Major Steuart in the Clyde Street house in February and March 1867, and again to the house in Leith Street Terrace in July 1867, is very important. Speaking of the former of these houses, he says he did not like the appearance of the people or of the house; and then, when he got into it, his impression was that he had got into an improper house. Of the house in Leith Street Terrace his impression was that it was even worse; and he explains that as he was going to see Major Steuart he saw the girls in other rooms. He thought they were dressed loosely, and did not like their ap-

pearance altogether, but thought they were like loose women. The evidence of Powell, also, as to the pursuer’s conduct in the house in which she and Mary Harris lived in Prospect Place after Major Steuart’s death, although applying to a later period, is to be kept in view on this branch of the case; and the same remark applies to the scene in Leith Street Terrace house, spoken to by Glover Budd, when Major Steuart and Mr Wilson were both lying drunk, and the pursuer going about in men’s clothes—a light blue suit, trousers, and a short round jacket.

Such is the general character of the evidence obtained from the only source available to the defenders in regard to the Wilsons’ mode of life, beyond the members of the family themselves; and the next question that naturally arises is,—What was the nature of the relation which sprang up between Major Steuart and the pursuer before the alleged ceremony?

The evidence on this subject is derived almost entirely from the pursuer’s statements on record, and from the Wilsons themselves. It is, perhaps, given most in detail by George Wilson, who explains that the acquaintance was struck up in the shop, where Major Steuart, who seems to have indulged an extraordinary fancy for purchasing sticks—for upwards of a dozen in a month are repeatedly charged against him in Wilson’s account—gradually refused to make purchases from any one but the pursuer, and commenced to pay her marked attention. From this beginning of an acquaintanceship—which her father, if at all solicitous about his daughter, would have regarded with some jealousy, if not anxiety, looking to Major Steuart’s habits and the difference between his position in life and his own, and which he would consequently have checked—a very great intimacy was allowed to spring up; and many interviews took place in the shop, which the Major frequented, and where, it is explained, the pursuer waited always on him, leaving other customers, who frequently complained of her doing so. The pursuer’s parents must have encouraged this intimacy; for Major Steuart having asked them and the pursuer to drive with him, although they did not themselves go, yet so early as July 1865, according to George Wilson’s account, being about seven months before the alleged marriage, they sent the pursuer off to drive with him alone; and on this, the first occasion of their going out thus together, they were absent two or three hours. Wilson adds—“Major Steuart came back again in two or three days, as near as I can remember, to take Margaret out for another drive. He did so with my father and mother’s consent. . . . These drives gradually increased in frequency” —Mr and Mrs Wilson sometimes going also. All this is represented as the beginning of an honourable courtship, with a view to marriage; but it appears to me, looking to the loose way in which Mr Wilson brought up his family, the habits into which Major Steuart had fallen, and the disparity in the social position of the parties, that the intimacy permitted and encouraged was evidently more likely to end in the pursuer’s forming an improper relation with Major Steuart than becoming his wife.

Some months after the first drive above alluded to, and after the intimacy between the parties had grown considerably, Major Steuart, who was completely idle, having no occupation of any kind in Edinburgh, and given up to habits of drinking,

was taken into the Wilson's house to live, the only other inmates, besides Mr and Mrs Wilson, being the pursuer and her sisters and a younger brother. It is worthy of notice here that before he went to live at the Wilsons', Major Steuart had applied to the witness Mr Collett, who keeps supper rooms at Calton Hill, to be taken into his house. Collett says on this subject—"I remember his telling me in 1865 that he had ceased to live in Rampling's Hotel; he spoke to me as to whether I could conveniently take him to live with me, but seeing he was fast in his character, and rather noisy, I thought he was a little more than I could manage. He then went to live with the Wilsons. He told me so." Yet, though a little more than Mr Collett could manage, being fast and rather noisy, he was taken into Wilson's house, and left to become a constant companion of the pursuer, with whom he must often have been left much alone. Here, again, as stated by Georgina Wilson, he and the pursuer went out frequently alone—no one knowing where they went, "perhaps for a drive, and sometimes for a fish dinner at Newhaven," remaining out "two hours at a time, and sometimes more." This witness afterwards qualified her statement about fish dinners by saying her father went with the parties till after the marriage; but there is enough in her evidence, and that of her brother, to show that Major Steuart was allowed and encouraged to take the pursuer about, and to associate with her in the house in which they both lived, in which, as appears from the condescendence and the letters produced, she acted for a time as his nurse, in a way which any father with the least anxiety to protect his daughter from evil would have avoided. It is true that much freedom of intercourse, in ordinary circumstances, is usual in the humble ranks of life between betrothed persons; but this observation is of no weight as applicable to the relation which sprung up between Major Steuart and the pursuer, when the circumstances which I have already alluded to in regard to each of them is considered. If there was scheming to bring about a marriage—a trap laid and baited for Major Steuart—I can only say that I think the whole actings of the pursuer's parents and of herself up to this time, as disclosed in the evidence, appear to me to have been much more likely to lead to an improper intimacy than to marriage. There is one remarkable scene about this time as to which the evidence is derived from another source than the members of the family, I mean the occurrence at Birnam in the end of 1865, spoken of by Gold and others. What then occurred goes far to show that even at that time Major Steuart treated the pursuer with much want of respect and great familiarity. For, in the first place, he and the pursuer's father, both in an excited state from drinking, drove the pursuer about after midnight, and at three o'clock in the morning waked up Mr Gold's family without any intelligible reason for coming at such an untimely hour, and burst into the house, where they afterwards sat drinking whisky and water till six o'clock, the pursuer sitting with them. The coarse remark which Major Steuart uttered on this occasion to Gold with reference to the pursuer, who was to be left in the house, in the witness's own words, "that if I wished a woman I might have it, or something of that kind," was of course not said seriously, but was said and understood "as a joke;" but it was a joke which no man would have uttered of any one whom he regarded or treated with any

respect; and when taken with the whole circumstances of that escapade, it leaves little room for the idea of an honourable courtship going on, which is said to have been followed some months after by a ceremony of marriage.

It has been observed that it seems quite established that no improper conduct and no improper familiarities ever took place between the pursuer and Major Steuart previous to the alleged marriage. Those members of the Court who consider the marriage to be proved have expressed the same view, holding it as proved that no sexual intercourse had taken place between the parties before the alleged ceremony; and obviously much reliance is placed on this circumstance in reaching the result at which they have arrived. I cannot take the same view of the result of the proof on this point. The evidence as to the extent and nature of the close intimacy, association, and intercourse which took place between the pursuer and Major Steuart before February 1866, when the alleged marriage took place, is derived entirely, or almost entirely, from the members of the Wilson's family alone; and there is in my opinion enough in that evidence, when taken with what has been proved from other sources, as to the character of Wilson's house and the training of his daughters, on the one hand, and as to Major Steuart's habits and life, on the other, to lead me to think that prior to February 1866 familiarities must have occurred between the parties, and that sexual intercourse did not take place between them for the first time after the alleged marriage. It is, of course, not proved by any direct evidence that such intercourse had taken place; and it is also true that even familiarities have not been proved; but, nevertheless, I think it a reasonable inference to be drawn from the evidence that sexual intercourse did take place, and that it is certainly not proved that sexual intercourse had not taken place. The evidence given entirely by the pursuer's nearest relatives, shows that intimacy between the parties was very great, and their intercourse was quite unrestrained. The pursuer, a young girl, brought up in the loose way I have noticed, was made the companion for a number of months of an idle man of Major Steuart's habits, living in the same house with him, and with no one to check or to warn her. Major Steuart from the first was encouraged to continue his intimacy and attentions, and he and the pursuer were frequently absent from the house alone for several hours at a time, no one knowing where. It was only natural, and in accordance with all ordinary experience and observation, that the neighbours and others should form the opinion that an improper relation existed between the parties; and that such an opinion very generally existed, as I think on very reasonable grounds, is not only not disputed, but asserted by the pursuer, or by members of her family; for the very peculiar and somewhat inexplicable ceremony of alleged marriage is said to have been precipitated and brought about by Mr Wilson's desire to stop people's mouths, and allay the scandal which had sprung up in consequence of Major Steuart living in his house and associating so much with the pursuer, although he must have all along known that such a scandal must be the inevitable result of the intimacy and proceedings which he himself encouraged and brought about.

Turning now to the proof of the alleged ceremony itself, it is a very obvious remark that the

evidence in a case like this, raised after the death of the alleged husband and of two of the four persons who are said to have been present on the occasion, must be very closely weighed and scrutinised. If this be true, as undoubtedly it is in the general case, the observation applies with even greater force when the relations which subsisted between the pursuer and Major Steuart immediately before and at the time of the marriage are considered. If it be assumed—as I think it may reasonably be assumed on the grounds I have stated—that an improper connection had sprung up between the pursuer and Major Steuart before the day of the alleged ceremony, a great part of the reasoning in support of the conclusion at which the majority of the consulted Judges has arrived, would entirely fail; and I doubt whether in that view they would be disposed to give judgment in favour of the pursuer. It cannot, I think, be doubted that there is room, if not reason, looking to the previous history and conduct of the parties, for the conclusion that it is at least quite probable that intercourse had taken place between the parties prior to 13th February 1866: and, in this view, the evidence as to the alleged ceremony is to be regarded with considerable jealousy; for something of the kind must have become necessary in order to enable the parties to continue to live as they had been doing.

In the case of *Roxburgh v. Watson*, October 23d, 1868, 7 M.P., p. 21, Lord Neaves, in dealing with a case in which an attempt was made, after the death of the alleged husband, to set up a marriage by parole evidence of an irregular ceremony, by means of the evidence of relatives and close friends of the woman, has stated in distinct and forcible language the manner in which such evidence ought to be received by the Court; and it is remarkable that the language there used, in which I fully concur, as a statement of the aspect in which evidence of an alleged irregular marriage in circumstances like the present should be regarded, should apply so closely to the circumstances of the present case. His Lordship says, with reference to the evidence in that case:—

“But although admitted, it is not only competent but incumbent upon the Court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner—to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth. Nothing would be easier than for a vicious and designing woman to fasten a marriage on a man by the evidence of her own relations and associates, and this more particularly when the man was dead, and his representatives are necessarily at a great disadvantage in disproving the alleged facts and detecting the imposture. Still more, if the man who is the subject of the fraud has led a libertine life, and is of drunken habits, and if the woman who forms the scheme against him has been his mistress, additional facilities for fraud and falsehood are afforded, which make it specially the duty of a Court to look with suspicion on the case. It is obvious, too, that a false marriage may easily be trumped up in this way, not merely by inventing the whole story, but by taking as a foundation some facts that in reality may have occurred quite insufficient to make a marriage, but which admit of being so coloured and dressed up by a liberal *suppressio veri*, and a very

slight *suggestio falsi*, so as to assume a relevancy and importance not truly due to them.”

The first observation that occurs to me in regard to the extraordinary and somewhat absurd ceremony alleged to have occurred after the supper-party in Mr Wilson's house on the 13th February is, that there appears to be no good reason on the evidence for a marriage having taken place in this most unusual and peculiar way, if it was seriously intended that there should be marriage at all. There is an entire absence of any good or intelligible reason against the marriage being celebrated in the usual and regular form, if an honourable courtship had been going on, as is represented, and it had been arranged that the pursuer should become Major Steuart's wife. There was nothing, so far as I can see, in Major Steuart's relations towards his father to lead to a marriage being entered into in an irregular or secret manner, or being concealed after it was entered into. On the contrary, there is a good deal of evidence to show that, so far as Sir William Steuart was concerned, he would have been perfectly satisfied to learn that his son had been married, and thus so far settled in life, and that he had made up his mind even to a marriage with the pursuer. George Wilson's evidence is conclusive on that subject. After the visit by his father and the pursuer and Major Steuart to Birnam in the end of 1865—two or three months before the alleged ceremony—and referring to what had occurred at the house of Gold, the land steward, he says, “My father told me that Mr Gold came, and by Sir William's orders told me to get his daughter married to the Major immediately, as it would settle him down. My father said they were at Gold's house when that message was given, and that they had stayed there all night. I have a distinct recollection of my father telling me that.” This evidence is corroborated by Gold. It is clear that Sir William Steuart on repeated occasions spoke in the same way, and that Major Steuart was made aware of this, no doubt at a later time, as appears from the evidence of Mr Rigg and of Dr Culbard.

It thus appears that there was no reason whatever for a secret or irregular marriage so far as Sir William Steuart was concerned. The only other reason suggested in the evidence is, that Major Steuart was then possessed of little means, and desired to delay a public marriage until he was possessed of money. It did not, however, require money to enable him to be married in regular form; and Mr Wilson appears to have been quite ready, looking to his prospects, to supply him with what he wanted. I cannot therefore accept this as an intelligible, or at least a reasonable, ground for saying that a marriage, seriously entered into, was contracted in the unusual circumstances and extraordinary manner alleged. Farther, even if a temporary want of means could possibly account for the absence of a religious ceremony and the ordinary publication of the marriage, surely something of a very different character from that which has been described by the witnesses would have occurred. It is proved that Major Steuart was aware of the Scotch law of marriage, and no doubt old Mr Wilson knew it even better. How does it happen, in these circumstances, that there was no written declaration—no writing of any kind between the parties—and that there was not a single witness of such position and respectability as one

would expect on such an occasion, called in to be present at the ceremony? Even the witness Mortimer, who mentions that on the following day Major Steuart spoke of having been married to the pursuer the night before—a statement which, however, he did not believe, having seen the parties, as he thought, already living as man and wife for some time—observed to Major Steuart that it would have been better “if he had got me, or the like of me, as witnesses.” The remark is one suggested by common sense and all ordinary experience, and supplies a strong reason for seriously doubting that any marriage had occurred. I regard it as one of the elements of strong suspicion against the alleged ceremony as having been intended as a ceremony of marriage, that not only there was no writing between the parties, when writing was so easy, and would have put the matter beyond all question, but that there was no witness present beyond the pursuer’s father and mother and brother, excepting a young woman, a companion of the pursuer, who had been requested to come in, not to attend a marriage, but to dress the pursuer’s hair. If marriage had been intended, surely at least one of Major Steuart’s friends or acquaintances would have been present; and, taking the absence of writing and of any such friend or acquaintance, with the evidence of what is said to have taken place, I cannot regard the alleged ceremony of marriage as having been proved.

In may be suggested, in answer to those observations, that the marriage after all was a surprise, and that it was part of the scheme or trap which Mr Wilson had laid for Major Steuart that, under the threat of suddenly turning him out of the house and away from his daughter’s company, Major Steuart had at length yielded, and consented to an immediate marriage. This view, however, does not account for the absence of a written declaration. It is, moreover, inconsistent with the case stated by the pursuer herself, with the evidence of Wilson’s family as to the honourable courtship which had been going on, and the repeated promises of marriage he had made, and with the evidence that he had a marriage ring ready in his pocket on the occasion. If he was so provided and prepared for the marriage and ready to enter into it, it is scarcely conceivable that neither Mr Wilson nor he had a single friend present on the occasion. The whole circumstances appear to be much more such as might be expected where an apparent ceremony or scene of some sort was to be gone through to enable the family to put a stop if possible to the statements and reports by the neighbours in Clyde Street, and to which, according to the evidence, Mr Wilson so repeatedly referred in his conversations with Major Steuart, than such as would have occurred if a marriage was to be entered into.

The ceremony itself is represented by George Wilson as having been somewhat unexpected. He had no doubt been informed, as he says, by his mother, that a marriage might take place that evening; but nothing of the kind was spoken of or appeared likely to happen until, as he says, his father, after sending his other daughters to bed—a very remarkable circumstance, looking to the ages of the two older girls, when so important an event was just about to take place—remarked to the Major: “You will have to hook it, for the people are complaining to me; I am getting a bad

name with your staying in my house among my three daughters, and you will have to leave.” The witness Kellett also speaks in the same way. She had left the room without any idea that such a thing was to take place, and certainly, so far as appears from the evidence, she had no information from the pursuer herself that she expected to be married that evening. All this stands out in remarkable contrast with the pursuer’s statement as made in the original record in this case, in which she gave some details in regard to the alleged ceremony which, no doubt from motives of prudence, were withdrawn when the record was adjusted and closed. These details, containing the pursuer’s own account of an alleged ceremony, are important, not only because they differ from the statements to which I have just referred, given by George Wilson and Mrs Kellett as to the sudden way in which the marriage was brought about, but, also, because the statement of what is now said to have really occurred is in material respects different. The pursuer, in the original condensation 10, made the following statement, which was deleted when the record was closed:—

“For some days previous to the marriage after-mentioned, Major Steuart went to various shops, at which he ordered sundry articles, and in various other ways made preparations for the said marriage. About this time Mr Wilson was pressing Major Steuart to say finally when he would marry the said pursuer. Accordingly, Major Steuart determined to enter into a private contract of marriage with the said pursuer in her father’s house, and this resolution was carried out on the evening of Tuesday, the thirteenth day of February, eighteen hundred and sixty-six. On the afternoon of that day he caused the said pursuer to put on a black silk dress which she had received from him in a present, to have her hair dressed by a hair-dresser, and otherwise be prepared for her wedding; supper was then served up in the sitting-room; and when it was over, and in the presence of Mr and Mrs Wilson, the pursuer’s brother George, and Mrs Kellett, Major Steuart filled the wine-glasses all round; he then went down on his knees, and for the purpose of carrying through a marriage between him and the pursuer, he said to the pursuer, ‘Maggie will you be my wife?’ the said pursuer replied, ‘Yes’ and then and there accepted the said Major Steuart as her husband, and they became married persons. He then took a plain gold marriage-ring from his vest pocket and placed it on the third finger of her left hand, after which he held up his right hand, and, while still on his knees, said—‘I swear by the Almighty God that I take you for my wife.’ The health of the married couple was proposed by Mr Wilson and drunk by all present. On the same occasion he stated that the marriage was not to be made public till he had money.”

It is thus expressly stated that the marriage was one for which preparations were made by Major Steuart for some days before, and that the pursuer was requested by him to *dress herself for her marriage*. The evidence of Mrs Kellett and of George Wilson appear to me to be inconsistent with the truth of this statement.

As to what really did occur on the occasion, it is very obvious that the variance of a single word or expression in the language used by Major Steuart would make all the difference between marriage and no marriage (for the pursuer is not said to

have uttered anything excepting the words, "Oh, Major!" spoken to by George Wilson); and yet these words, given after the lapse of between six and seven years, from the recollection of two witnesses only—one the pursuer's brother, with all the interest which his close relationship gave him, and the other her intimate friend and companion—are to be accepted as constituting marriage. The pursuer's own account is different from that of either of the witnesses examined. She has stated that in presence of her father and mother, her brother George, and Mrs Kellett, Major Steuart first filled the wine-glasses, then went on his knees and asked her—"Maggie, will you be my wife?" to which she replied "Yes" on which he took a ring from his pocket, put it on her hand, and swore by the Almighty God that he took her for his wife. Not a word of the first part of this occurs in the evidence of either George Wilson or Mrs Kellett; on the contrary, Wilson states that Major Steuart, after being called upon to leave the house in the rough language already stated, "sat quiet for a moment or two" in his chair, "crying, the tears coming over his eyes," and that his first words were—"I am poor now, and I cannot marry; but I will marry her in the Scotch fashion," and that afterwards going on his knees, he said—"Maggie you are my wife before heaven, so help me Oh God." The words spoken to by Mrs Kellett are, again, different. She says that when she came into the room "the Major was saying that he could not do what he would wish to do at the present time; but he said 'I will show you, Wilson, what I will do, or I can do.' I don't know which of the two words he used," and that thereafter he went on his knee and put the ring on the pursuer's hand, saying, "Maggie you are my wife before heaven, so help me great God."

Taking even these statements as given from memory after the lapse of so long a time, and even assuming Major Steuart to have been sober, and that the tears coming over his eyes were not caused by his having been drinking freely, the words used appear to me, especially in the light of the other evidence as to the way in which the parties had been living and acting, to fall far short of what would be necessary to establish marriage. There was no solemn question put to the pursuer as she alleged—"Will you be my wife?" and an affirmative answer by her. The first declaration Major Steuart makes is that he *cannot marry*; or, in the words of Mrs Kellett, that he *could not do* what he wished to do. These expressions strongly confirm the view which I entertain, that whatever occurred, marriage was not intended; but that the real purpose of what was said was to give Wilson and the family the power of speaking as if some ceremony had occurred; and the same thing may be gathered from Wilson's frequent reference to the way in which his daughters had been spoken of, and Major Steuart's remark in the course of the evening, some time after the alleged ceremony, addressed to Wilson—"I want no more squabbling now." The witness George Wilson gives his own explanation of the words "I cannot marry," by adding, "he meant to the height of life he was in;" but the words used convey no such idea; and it would be rather much to take from the pursuer's brother a meaning which the words do not naturally convey, with the result of holding that a marriage had been concluded. The other words spoken to by the witnesses are quite susceptible of shades of meaning which might make all the

difference in the question of marriage. Thus, according to George Wilson, Major Steuart said, "I will marry her *in the Scotch fashion*." Did that necessarily mean marriage at all? or might it not refer to a different connection, especially as it was immediately preceded by the words "I cannot marry?" Again, Mrs Kellett speaks distinctly to the words, "I will show you, Wilson, what I *will* do, or can do. I don't know which of the words he used." If he used the former of these expressions, "what I will do"—was the reference not to something future rather than present, and substantially a statement that he could not marry then, but he would show what he could do at some future time? And even the closing words of the alleged ceremony, in which both witnesses say that, addressing the pursuer, he said, "You are my wife *before heaven*," are just such words as even a lover might use towards his mistress; meaning that although they might not be married according to conventional rules, or in the eye of the law, yet before heaven they were as married persons, from the connection which subsisted and would continue to subsist between them. The words used thus appear to me to fall short of a present solemn declaration of marriage. They admit of the observation that it was distinctly stated that marriage was not intended, and of the view that at the utmost a future marriage was spoken of, and, it may be, even promised. But at least I think it may fairly be asserted of the language spoken to, that the evidence as a whole suggests very strongly that the slightest turn in the expression actually made use of would make all the difference; and it would, I hold, be dangerous to give to such expressions, in the circumstances, and after the lapse of time in which they are now brought up, the force of constituting a concluded marriage between the parties.

I cannot rely on anything said by the witness Agnes Forbes as corroborating the evidence of the alleged ceremony. Three witnesses have sworn that shortly after she left the Wilsons' service in March 1867 she spoke to them of the pursuer going to Major Steuart's bedroom at night after her sisters were asleep, and of her having led them at the same time to understand that the pursuer had not been married to Major Steuart. These witnesses are unconnected with the parties in any way. Their account of what Agnes Forbes told them is consistent with what I think may be fairly inferred to have gone on in the house, for the reasons I have given; and, at least, they contradict Forbes so distinctly as, in my opinion, to render it unsafe to proceed to any extent on her evidence.

In the observations I have made against placing reliance on the evidence of the alleged ceremony, I think it right to say I have no doubt had in view, to some extent, the other evidence in the case. I am not prepared to say that if it had been shown that a course of statements and conduct by both the parties, entirely consistent with the idea of marriage, had gone on during the succeeding two years of their lives, the evidence of the alleged ceremony would not have been sufficient. On the contrary, I think, in that case, it would have been so; but if the evidence, apart from what is proved as to the alleged ceremony, is such as to lead even to a reasonable doubt as to the effect of what really occurred on the evening of the 13th of February, I cannot, for my part, accept what is spoken to as amounting to evidence of a marriage ceremony. It

can, I think, only be safely or properly accepted as such if the evidence of the subsequent acts and conduct of the parties entirely corroborates that view. And I am of opinion that, on the contrary, there is a greatly preponderating mass of evidence of this kind against the conclusion that marriage was then entered into.

I. The proof on which the pursuer mainly relies, of what occurred after the ceremony, consists—first, of statements made immediately after to different persons, that a marriage had taken place; secondly, of statements made by Major Steuart during the succeeding two years, before he left Scotland in February 1868, to third parties, to the effect that the pursuer was his wife; and, lastly, of the statement by Captain Cooper of what Major Steuart said during his last illness.

(1) In regard to the first of these, it will be found that statements made very shortly after the 13th of February occurred in conversation generally with people who, like Mortimer, lived about the doors, and had already formed their own views of the connection which subsisted between the parties, or were made to persons, near relatives or intimate friends of the pursuer, or who had gone into the Major's bedroom and found the pursuer in bed with him. This was the case with Mrs Forman or Wilson, and also with Mr Caw, the messenger-at-arms. The statements referred to were thus elicited, either because circumstances made it necessary that some explanation, if possible consistent with decency and propriety, should be given, or are to be quite accounted for from the necessity which Mr Wilson felt had arisen for putting a stop to the scandal about the house.

(2) The second class of evidence, consisting of statements to third parties made at a later time, is of a very desultory and unsatisfactory character. The witnesses who speak to it as a whole are, with few exceptions, of an inferior class—people with whom Major Steuart had no acquaintance beyond that of joining them in drinking during the forenoon in public-houses, or casually conversing in the street, or on the road near Birnam. Many of the witnesses were of a class to whom it is scarcely to be supposed that Major Steuart was addressing himself seriously in the remarks he made, as, for instance, a groom and a coach-driver at Birnam. To this class of evidence I attach almost as little importance as I do to the representations which Major Steuart made to hotel-keepers, and the lessees of theatres and refreshment-rooms, during his stay in Dover, when it was only to be expected that, travelling as he was, he would speak of the pursuer as his wife. He was frequently in a drunken state when the conversations occurred; and although witnesses, such as William Mackenzie Young, the book-cavasser, with whom Major Steuart had no acquaintance beyond speaking to him at times in the streets, who narrates such a conversation, states that Major Steuart was sober on the occasion, I feel disposed to accept the statement with more than usual caution, when it appears that the parties immediately adjourned to a neighbouring public-house, and consumed two bottles of champagne.

(3) The evidence of Captain Cooper, however, I regard as of much more consequence; and if it had formed the conclusion of a series of statements and actions all consistent only with the view that a marriage had taken place, it would probably have been conclusive. But I concur in the view which

Lord Ormidale has taken as to this part of the case; and am of opinion that it would be unsafe to accept any statement made by Major Steuart in the state in which he was during his death-bed illness at Hythe, as satisfactory, or as a statement on which reliance can be placed as the true utterance of his mind in a state of perfect consciousness. Captain Cooper arrived at Hythe on the night of Friday the 16th of October, and Major Steuart died about forty-eight hours after, on the night of Sunday the 18th. On the Friday night Major Steuart was in *delirium tremens*, and unable to talk rationally. On the following day (Saturday) Mr Jamieson arrived; and he has recorded in a letter written at the time to Mr Galletly the state in which the Major was. In his letter of 19th October he says:—"With the exception of an occasional look and word of intelligence, he was not in a state to make any settlement of his affairs." Even from Captain Cooper's statement it appears, as noticed by Lord Ormidale, that Major Steuart showed a want of intelligence, and of memory, or a confusion of mind; and I cannot therefore attach any real importance to the disjointed conversation of which Captain Cooper has given an account, and in which it is said he spoke of being married.

II. The evidence which has been adduced by the defenders, on the other hand, as to the acts and conduct of the parties after the alleged ceremony, appears to me strongly to contradict the notion that a marriage had taken place.

(1) The first thing which strikes me is the remarkable circumstance that although on many occasions, even during Major's Steuart's life and after his death, during the time when Mr Wilson survived, it was of the utmost importance that the alleged ceremony should be referred to, not a word was said about it until this action was raised in April 1872—three and a-half years after Major Steuart's death. I refer particularly to the registration of the birth of the pursuer's son, which occurred during the Major's life; to the claims which were made, and the legal proceedings adopted, against Sir William Steuart during Mr Wilson's life; to the pursuer's written application made to Sir William Drummond Steuart and to his cousin Mr Steuart of St Leonard's Bank, Perth; and other similar circumstances. If a ceremony of marriage had really occurred on the night of the 13th of February 1866—and the pursuer dated her marriage from that day—it is to me inconceivable that one or other of the occasions to which I have just referred would not have produced a reference to it. The letter to Sir William Steuart—written by the pursuer herself with the aid of her friend Mary Harris, now Mrs Smith, with whom she seems to have kept up a remarkable intimacy—would surely have elicited from the pursuer the statement that she had been married by a formal though irregular ceremony; yet what she says in that letter is, not that any such ceremony ever took place, but "I have letters and other proof that he (Major Steuart) acknowledged me as his wife, also his child." This is an assertion of marriage by acknowledgment, not by ceremony, and unfortunately for the pursuer, it is a false assertion; for when she wrote it she knew that she had no letters or letter in which Major Steuart acknowledged her as his wife. The same remarks may be made, with even greater force, with reference to the legal proceedings to which the pursuer and her father were parties, and in which it is obvious that the

ceremony would have been referred to if it had taken place as a marriage ceremony.

(2) The next matter that strikes my mind with great force, as contradicting the notion of marriage, is that there is an entire inconsistency in the whole of the pursuer's case as to the secrecy which she alleges was enjoined by Major Steuart in regard to it. I have already referred to the fact that there was no reason for concealing the marriage from Sir William Steuart; and it is really difficult to suppose, even according to the pursuer's view as now presented on the proof, that the alleged marriage was to be concealed from him, for part of her evidence was adduced to show that in and about Dunkeld it was publicly spoken of both by Major Steuart and herself. The inconsistency of the pursuer's case lies in this, that whenever Major Steuart is found to deny that any marriage existed, or by his actings to contradict the alleged marriage, this is at once accounted for by saying the marriage was to be kept secret, while at the same time great part of the pursuer's proof is occupied by an attempt to show that Major Steuart went about publishing the marriage in every possible way, not only in Edinburgh, but in the immediate neighbourhood in which his father lived. It is, I think, impossible to explain away Major Steuart's acts and statements, many of them in presence of the pursuer herself, which are altogether inconsistent with the notion of marriage, by saying that his object was to conceal the marriage; first, because I think no reasonable or satisfactory ground has been stated for such concealment; and, secondly, because, according to the pursuer's own case, her marriage was published far and wide. It is a much more reasonable view of the evidence to hold that Major Steuart and the pursuer by many acts and statements negatived the existence of a marriage, because in fact a marriage had never taken place; while, at the same time, such statements or acts as are of a different colour, which have been proved, are to be accounted for by the fact that it was desired if possible to keep down the scandal which arose from the true nature of the connection that was going on.

(3) The next observation that occurs to me on the evidence is, that the cohabitation which followed the alleged marriage is altogether unlike that of husband and wife. If Major Steuart had married the pursuer as is represented, after an honourable courtship, with the view of having the companionship of the pursuer as his wife, it is reasonable to expect that he would not only treat her with the respect to which that relation entitled her, but that he would have taken care that after her marriage she should reside constantly with him. The evidence, however, shows that between February 1866, when the marriage is said to have occurred, and October 1868, when Major Steuart died, a period of upwards of two years and a-half, his cohabitation with the pursuer was comparatively little, and took place at broken and irregular intervals. In April 1866, two months after the alleged marriage, he went to lodgings in St Patrick Square to be out of the way of creditors. If the pursuer had been his wife, it is natural to suppose that arrangements would have been made for her accompanying him; but she was only an occasional visitor to him during his residence there. He was for some time after this in prison, and shortly after getting out, in accordance with a

promise he made to Mr Rigg, he went to Birnam, where it is proved that he resided in the Hutton's house for upwards of six weeks. Again, if he had been married, surely his wife would have accompanied him; but she remained in Edinburgh, with the exception of two days in the end of September, when she appears to have come to Birnam at Major Steuart's request; and it was during this time that she accompanied Major Steuart, when he was much under the influence of drink, on a midnight visit which he made to the hospital where Sir William Steuart lived, and created a disturbance, which is described by several witnesses. The pursuer and her father seem to have urged Major Steuart to return with them to Edinburgh at this time, and after he declined to do so, carried off his portmanteau with his clothes in it, and the portmanteau was only recovered by a servant sent by Major Steuart to take it out of the railway carriage. This incident, spoken to by Mrs Hutton, is referred to in a letter by Major Steuart to Mrs Wilson, in which he says:—"Mr Wilson departed with all my fishing gear, and, not content with that alone, he must pack up my things as well, and had them conveyed to the station, for what reason he best knows himself, for I never told him I was going to Edinburgh. I was forced to break open my portmanteau, as Mr W. also thought fit to take my keys with him. Let me have my letters and keys, and I think I will manage to do something; without them I am useless."

When he left Birnam (where he continued to live alone) in October or November 1866, he went, not to Edinburgh, but to Glasgow, and in December of the same year, as appears from Mrs Hutton's evidence, he returned for a week to her house, where he stayed till immediately before New Year's Day. Thus, taking the period of the year 1866 after the date of the alleged marriage on 13th February, Major Steuart was really little with the pursuer, who continued as formerly to be an inmate of her father's house; and it appears to me to be very difficult to reconcile his mode of life with the idea that he had made the pursuer his wife with a view to companionship, and from the deep affection he entertained for her. Again, in 1867, the same kind of life went on: he returned to Birnam on the 23d March, and remained there for three months. During this time the pursuer was delivered of a son; Mrs Wilson died; and the family removed to the house at Leith Street Terrace. From the end of June until August he appears to have been away from Birnam, and probably spent most of his time in Edinburgh, living at Leith Street Terrace; but again, in August and September, he appears to have been in Birnam, for part of the time living with the Maclagans, and another time at Mrs Hutton's. During the Birnam games in September he sent for the pursuer, who came to Birnam, but remained only two nights. She was not received as she would have been had she been his wife, but lived in the house of Mr Harris; and the record of her stay, and Major Steuart's visits to her at Harris's lodgings, is to be found in the account No. 246 of process, which, in addition to the charge for her apartments, contains also charges for whisky, brandy, soda-water, and breakage; the pursuer's meals having apparently been got at a hotel, or sent from the Hutton's house. It was with reference to this occasion that the pursuer has brought evidence to show that Major Steuart took her to the Birnam games, and osten-

tatiously went about speaking of her as his wife,—amongst other acts, taking her with him to the stand, which was resorted to by ladies and gentlemen. If she really had been his wife, it is difficult to understand why she lived in another house, remained only for two days, and then returned to her father's. It was after this occasion that Major Steuart, having got the price of his commission, made an excursion with the pursuer and her child, her sister, and her father, to Paris, and on his return he appears again to have found his way back alone to live at Mrs Hutton's at Birnam. Just before New Year's Day he went to Edinburgh for a time, but in February he returned to Birnam. On this occasion he was accompanied by the pursuer, who again took up her abode at the house of William Harris, while Major Steuart lived at Mrs Hutton's. It was while living here that he left suddenly, on Mr Jamieson's suggestion, for England, and he never returned to this country, or saw the pursuer again. He did not inform the pursuer that he was going away, and carefully refrained from even allowing her to learn his address; and the only communication she had with him directly between February 1868 and his death in October following appears to have been the brief letter, No. 138 of process, written from Bristol on the 26th of July, in which he addressed her as "My dear Miss W.," and requested her to send her letter to Perth, that is, addressed to Mr Jamieson, in order that it might reach him. Such being the character and the comparatively limited extent of the cohabitation of the parties from the alleged marriage in February 1866 till Major Steuart's death, I can only say that it appears to me to be quite unlike what would have occurred if a marriage had really taken place, while it is quite in keeping with the view that the connection between the parties was of an improper nature.

(4) The next element of proof is one to which I have already adverted, and to which I attach, perhaps, more importance than to anything else in the case: I refer to the correspondence to which Major Steuart and the pursuer and other members of her family were parties. Lord Gifford, after remarking that the letters create a very serious difficulty and doubt, has added: "It is not too much to say that no such letters ever passed between a husband, said to be an attached husband, and his wife, as those addressed by the Major to the pursuer." The same view is taken by the majority of the consulted Judges, who observe that it is quite true that the letters were not such as a man would write to an acknowledged wife. But the view which I take of them goes the length of holding that they are inconsistent with, and indeed exclude, the notion of marriage.

It is true that none of the pursuer's letters to Major Steuart seem to have been preserved, which is to be regretted, but is not to be wondered at considering the life that Major Steuart led. It is also true that Major Steuart's letters to the pursuer previous to April 1867 have not been preserved. But before that date there are a good many letters from Major Steuart to the other members of the Wilson family. These begin in May 1866, and were written from Birnam to Mrs Wilson during her life, and to her husband until May 1867. In addressing Mrs Wilson, in place of the affectionate terms "Mother" and "Mamma," by which the Wilson family say he always addressed their mother, she is in every letter addressed as "Dear Mrs Wilson," and the

subscription is "Yours truly." When he refers to the pursuer, which is but rarely, he speaks of her as "your daughter;" and generally concludes "with kind remembrances to all," "or with kind regards to all." In a letter of 1st January 1867, addressed to Mrs Wilson, he speaks of Mr Wilson, whom the family represent as having always received after the marriage the name of "Father" from Major Steuart, as "your husband." His letters to Mr Wilson are of the same character, beginning, "Dear Mr Wilson;" and ending, "Yours truly;" and in one of them, dated 8th April 1867, he concludes, referring to the pursuer, "with kind regards to all, particularly to my kind nurse.—Yours truly," (Intid.) "W. D. S." There is one letter to which I attach much importance.—I mean that in which Mr Wilson announced to Major Steuart the birth of that son who is spoken of throughout the proof as the heir of Murthly. It is in these terms:—

"Major Stewart,

Dear Sir,—I drope you those few lines to let you know that our Maggie has been very bad and brought forth a son—a stout healthy child—on Tuesday about 12 o'clock P.M. Hoping you are well. I remain your humble servt.

(Signed) "GEORGE WILSON
"in haste"

This letter was written upwards of a year after the alleged marriage, at a time when it is represented that the most affectionate relations subsisted between Major Steuart and the Wilson family, and it appears to me that, if it stood alone, it would contradict a mass of parole evidence, and serve to throw great doubt over the whole case presented by the different members of the family. It is, to my mind, the letter of a man announcing to Major Steuart—to whom he could not address himself at all familiarly—the birth of an illegitimate son, and not a letter such as Mr Wilson would have written if Major Steuart had called him father, or if his daughter had been married to Major Steuart, and an heir had been born to the Murthly estates. Not a word is said to Major Steuart about his wife, nor of a son and heir having been born. The words are, "Our Maggie has been very bad and brought forth a son;" and Mr Wilson, who wrote it, began with the words, "Dear sir," and signed himself, "your humble servant."

If these observations be justified by the letters to which I have just alluded, even stronger inferences are to be drawn from the letters of Major Steuart to the pursuer. Starting from the date of 1867, as they do, they invariably begin with "Dear Miss Wilson," or "My dear Miss Wilson," with, in one or two later cases, "My dear M.," and concluding with the last of all, already alluded to, written from Bristol, again "My dear Miss W." They are subscribed "Yours very truly;" and there is not a word from beginning to end of them which would bear the suggestion that they were the letters of a husband to a wife. If the pursuer and Major Steuart had been married in February 1866, what explanation can be given of this? It is said he desired to keep the marriage secret, and this might possibly be said to explain statements inconsistent with the idea of marriage, made to third parties; but when letters *intended only for the eye of the recipient*, or, at the most, for her family, who knew all that had taken place, when there is no room for the suggestion that concealment could be an object, it is, I think, not conceivable that the letters should be without one

word acknowledging the pursuer's position as a wife, but, on the contrary, should be addressed to her throughout under her maiden name—"My dear Miss Wilson," if a marriage had ever taken place. The only suggestion that has been made in order to explain these letters consistently with the view that the parties were husband and wife, is, that they were written with a purpose, and that was to indicate "no trace of the real relations of the parties." I cannot adopt this explanation, for which I humbly think there is no room in the proof. If they were written with such a purpose, and not in accordance with the true relations between the parties, the pursuer must have seen it; and I cannot suppose that if she had the status of a wife, knowing that a ceremony of marriage had taken place, she and her father would have submitted to her receiving letters written for the purpose of defrauding her of her lawful rights, and addressed to her throughout in her maiden name. These letters are, in my opinion, real evidence—of more value, perhaps, than all the parole testimony in the case together. They were written before this question was raised. They were the natural and ordinary communications which passed between the parties; and I think their effect is not to be got rid of by assuming that they were written with any purpose other than appears on their face. To suppose that they were written by Major Steuart to his wife for the purpose of enabling him to deny a marriage which had actually taken place, is to credit him with an amount of untruthfulness and dishonesty for which I see no warrant in the proof, and, at the same time, to credit the pursuer and her father, who was an acute business man, with an amount of simplicity and weakness which is quite unlike what might be expected from all the evidence which has been adduced, particularly in regard to the character of old Mr Wilson. It is remarkable that several witnesses have taken the opportunity, in the course of the evidence, of saying in the strongest and most emphatic terms, in regard to Major Steuart, that, however much he had become degraded by habits of drunkenness, he was to the last distinguished for truthfulness and honourable conduct. I refer particularly to what has been said by Mr Rigg, Mr Jamieson, and Captain Cooper, each of whom had frequent intercourse with him—much more intercourse than almost any of the other witnesses. With such testimony as to Major Steuart's character, I do not think that it is satisfactory or reasonable to reject this evidence and adopt a different theory, in order to explain away, not only the writings to which I have referred, but many of the important acts and statements of Major Steuart's life, and to say that he must have fallen so low as to have utterly disregarded truth, and become so dishonourable that after knowingly contracting marriage he deliberately, and under his own hand, denied it. This reasoning is, I think, all the more unsatisfactory when it is kept in view that the letters which Major Steuart wrote in the terms above noticed, were written to and received by the pursuer and her father without challenge or observation. It commends itself to my mind as the more reasonable and the true explanation of the evidence in these respects, that Major Steuart had quite given the pursuer to understand that she was not his wife, whatever in the future she might become; and that any statements which may be construed in a

different way were made for the purpose, as far as possible, of saving the pursuer from the scandal which had been raised against her.

(5) While referring to the written evidence adduced, I may make the observation, that whenever writing can be appealed to in the case—and there are a good many writings of various kinds produced—it is invariably in favour of the defender. The certificate of registration of the pursuer's child; the note at the time of the boy's baptism; the written claim sent to Sir William Drummond Steuart after Major Steuart's death; Mr Wilson's own deed of settlement, in which he describes one of his daughters by her married name, and the pursuer by her maiden name; the records in the actions to which the pursuer was a party, besides the letters above referred to, and the pursuer's letters to Mr Jamieson—all, without exception, strongly support the defender's case, and all bear some testimony against the marriage, while there is not a scrap of writing in favour of it. There is a great deal of such evidence; and I cannot think that the parole evidence to which I have alluded, in support of the alleged ceremony, or otherwise in support of the pursuer's case, can for a moment be regarded as of the same weight. On this part of the case, particularly as regards the judicial proceedings and other acts in which the pursuer took part, I adopt the views of Lord Ormisdale, in whose opinion generally I concur.

(6) I have not yet noticed a large and important body of evidence to be found in the conduct of Major Steuart, which appears to me of itself, and even without the writings to which I have referred, greatly to outweigh the parole evidence in favour of the alleged marriage on which the judgment has proceeded. On this subject I refer particularly to the evidence of Mr Jamieson, Mr Rigg, Dr Simpson, Dr Culbard, Mr Collett, Miss Margaret Marshall, Mrs Hutton, Dr Dunsmure, and some others. Each of these witnesses, I think, without exception, speaks to one or more important occasions on which, if a marriage had taken place, it is only natural and reasonable to suppose that Major Steuart would have said so. To Mr Rigg, and Dr Culbard, and Miss Margaret Marshall, when he was addressed on the subject, he stated his knowledge that the Wilsons were making attempts to have a marriage entered into, and would do their best for that purpose, but that he was quite on his guard, and would take care of this. Mr Rigg in his conversations with Major Steuart informed him that if he would only marry and settle in life his father was ready to give him a residence on the estate,—then in the occupation of the Rajah Dhuleep Singh. And if the pursuer's case were true, I can see no reason why this offer should not have been closed with, and why Major Steuart should not have stated that he was married. The same observation applies to evidence coming from an entirely different source—I mean Dr Culbard. Again, Mr Rigg gave Major Steuart to understand that his child would be baptised as illegitimate. If he had been married, and regarded the boy as the heir of entail of Murthly, he would surely have mentioned his marriage then. He seems to have had a great affection for the child, and, if married, it is most difficult to suppose that he would not have had the baptism conducted very differently. The child's legitimacy would have been recognised, and the parents would have been present on the occasion, in place of sending the child to the

church with a billiard-marker, a comparative stranger, and the pursuer's cousin, as the sponsors. The conversation on the subject of the baptism, and the circumstances of the baptism itself, are, I think, alone of far greater weight than all the loose expressions by Major Steuart to casual acquaintances, or members of the Wilson family about the young heir of Murthly; and it is worthy of observation, on the evidence of Mr Jamieson as to what occurred with Major Steuart at Hythe, that while nothing appears to have been said about any provision for the pursuer, and while a provision for the boy was spoken of, nothing was said to suggest that Major Steuart regarded him as the rightful heir to the Murthly estates. Other instances are to be found in some number throughout the voluminous proof in which Major Steuart spoke and acted in the same way. I shall only refer to two cases, in which it appears to me that if Major Steuart had been married he would have said so. The one is during his stay in Birnam—where the Huttons would have received the pursuer to live with him if he had said she was his wife. The other occurred in Clyde Street—when he asked Dr Dunsmure to attend the pursuer during her confinement. This last occurrence took place in February 1867—a year after the alleged ceremony. Major Steuart evidently wished Dr Dunsmure to give his attendance, and Dr Dunsmure, though he disliked the appearance of the house and its inmates, would have acceded; but having been introduced to the pursuer as Miss Wilson, he says, "Before I gave him any answer I asked him whether he was married to her." He said, "No; certainly not; that he would be very sorry," or words to that effect. . . . When he told me what he had sent for me for, he said, laughing, "A man must have a companion," or something of that kind.

(7) Again there are similar circumstances in the conduct of the pursuer, apart from the serious matters arising out of the judicial proceedings already referred to, which are not only contradictory of the alleged marriage, but which do not seem to admit of an explanation consistent with her case, that the marriage had taken place. Thus, she was not only called "Miss Wilson" on numerous occasions in her own presence, and so addressed at shops to which she was accompanied by Major Steuart, but she was so introduced and addressed when she called at Mr Collett's and at Mr Gelatly's in Edinburgh, and also at Mr Jamieson's in Perth; her whole correspondence with that gentleman down to the last took place in that name, by which she also subscribed the receipts which she granted to him for money paid to her on Major Steuart's behalf. She was introduced by Major Steuart by the name of Miss Wilson on the occasion of her midnight visit to the Hospital in the end of 1866; and introduced herself in the same name at St Leonard's Bank after Major Steuart's death. She was also expressly called Miss Wilson in her own presence, and without remonstrance, in Mr Harris' house at Birnam, in answer to a pointed question put by Dr Culbard, who remarked the great want of respect exhibited in Major Steuart's demeanour towards her throughout his visit. Dr Balfour, also, who seems to have been for years in attendance professionally on the Wilson family, attended the pursuer at her confinement on the understanding that the child was illegitimate, and consequently recorded his attendance between the

2d and 12th April 1867, under the name "Wilson." It is a remarkable and important fact, particularly when considered with the matter to which I have next to allude, that Mrs Wilson said to Dr Balfour that the Major intended to marry the pursuer, as he remembers quite distinctly in a conversation, during part of which the pursuer was present, and which took place a month before the birth, and, consequently, upwards of a year after the alleged ceremony. If the pursuer had been married to Major Steuart, I cannot understand that the fact would not have been mentioned to Dr Balfour, who might, if it had been thought necessary, have been enjoined to keep the information secret, and less still is it intelligible that Mrs Wilson would say that Major Steuart merely intended to marry the pursuer. It is surely a very strong piece of evidence against the alleged marriage that Dr Dunsmure refused to attend the pursuer in her confinement because Major Steuart would not acknowledge her except as "a companion;" and that Dr Balfour, the family physician, who did attend her, understood she was unmarried, but that Major Steuart intended to marry her, which may have been perfectly true.

(8) There is still farther a matter of importance proved by the defenders, of which George Wilson should, I think, have given some account, and as to which the pursuer refused to allow him to be recalled and examined after the facts had come out. I refer to the evidence of the witness Frank Simpson, who was for several years in old Mr Wilson's shop employed as a tackle-maker. The witness John Powell, who had been previously examined, stated, with reference to conversations and occurrences in the Leith Street Terrace house, that, as far as he could remember a certain statement made by the pursuer it was that "she was not married to the Major, and could not claim anything of him if he was dying. I have heard George Wilson speaking angrily, and fighting with the Major about not marrying his sister. He said he ought to marry her." Simpson's evidence is to the effect that, in May or June 1867, George Wilson called at his house about seven o'clock in the morning, just as he had got out of bed, and hurried him out, saying, "The Major is going to marry Maggie;" and he afterwards explains that he was sent to Mr Rigg three times that day to bring that gentleman to the house to perform the ceremony, but did not succeed in doing so. He had never before that occasion heard of a marriage, though he had heard the pursuer called Mrs Steuart. On the afternoon of the same day he saw Major Steuart in the house, but nothing was said on the subject of his messages. Mr Rigg speaks also to this occurrence; and two days after it he wrote to Mr Condie of Perth the letter No. 258 of process, in which he refers to the messages he had got, and to the miserable state in which Major Steuart had appeared that evening in the street "very, very drunk, and looking as if he had come down a chimney." This incident appears to me to be very important, and to be very unlike what would have occurred if a ceremony had already taken place. It is so inconsistent with the pursuer's general case that I am not surprised that the pursuer refused to allow Wilson to be recalled to explain it. Nothing had occurred in regard to Major Steuart's circumstances between February 1866 and June 1867 to make it more likely that he would have a marriage ceremony by

a clergyman at the later date than formerly. It is possible that he might have agreed to have a ceremony in fulfilment of a hope to that effect held out to the pursuer, or in fulfilment of the intention referred to by Mrs Wilson in her conversation with Dr Balfour; but this supposition excludes the idea of a *de presenti* marriage in February 1866. Even for this supposition there appears to be little or no room, seeing the Major did not speak either to Simpson or to Mr Rigg on the subject; and the incident is probably best explained as being one of those attempts against which Major Steuart said to several persons that he was on his guard—attempts to have a marriage really entered into,

(9) There is but one matter farther in the evidence to which I shall allude in conclusion—the attempt to give to the incident about Major Steuart's portmanteau much importance, as an opportunity taken by Major Steuart or the Huttons to destroy some paper containing evidence of the alleged marriage. I concur in the views expressed by Lord Ormildale on this subject. I think it a suspicious feature of the pursuer's case that such a use has been attempted to be made of this occurrence. The truth is evidently contained in Major Steuart's letter to Mrs Wilson, to which I have already referred, in which he complains of the attempt by the pursuer and her father to take him and his portmanteau to Edinburgh against his will. If such a document as the pursuer alleges had been granted, it would certainly have been referred to by the pursuer or her father, at least after Major Steuart's death, and before this action was raised; while, so far as I can discover, it was never so mentioned. The expression said by the witness Crerar to have been used by the pursuer in order to induce Major Steuart to accompany her to Edinburgh, if correctly remembered by him, is not very intelligible, but cannot, I think, be accepted as a reference to such a writing. The fact that the parties thought of such a document shows their knowledge of the importance of having a writing to evidence the marriage: and no reason has been given why such a writing was not given and taken on the 13th day of February 1866, if marriage was then intended. If the alleged document had been improperly destroyed by the Huttons, there was no reason why another should not have been granted in the same terms; for it is not suggested by the pursuer that Major Steuart ever refused to own his marriage, or that at any time after September 1866 he would not as willingly have signed such a document as in August of that year. In the absence of allusion to such a document till this action was brought, I can only suppose that advantage was taken of some loose statements, apparently made by Hutton, who probably understood from Major Steuart that it was of extreme importance to him to get back his portmanteau, and may have consequently thought that it contained papers of consequence, to build up a theory which has no foundation in fact.

On the whole, I have come to the conclusion, on the grounds I have stated, and as the result of a very careful consideration of the evidence, that the pursuer has failed to discharge the *onus* which lay upon her of proving the alleged marriage. I could not concur in a judgment affirming the marriage without giving what I conceive would be undue weight to parole testimony, not only against simi-

lar evidence of at least equal weight, but against a series of important writings to which the pursuer and Major Steuart were respectively parties, all of which must be explained away on grounds which I think unsatisfactory and insufficient; and although differing from a considerable majority of the consulted Judges, I cannot say that my opinion has been arrived at with doubt or hesitation.

At advising in the First Division—

The LORD PRESIDENT said that his opinion in this case was in accordance with that of the majority of the consulted Judges, and the merits of the question at issue had been so well summarised and stated by the Lord Justice-Clerk that he was able to content himself by saying simply that he adopted the reasoning of the Lord Justice-Clerk.

LORD DEAS—The late Major Drummond Steuart died in October 1868. Three and a-half years thereafter, viz., in April 1872, the female pursuer, whom for brevity I shall simply call the pursuer, instituted the present action against Major Steuart's representatives, to have it found and declared that she had been married to the Major on 13th Feb. 1866, and that she was consequently entitled to the pecuniary or beneficial rights of his widow.

It is admitted that there was no regular marriage:—no proclamation of banns:—no intervention of a clergyman:—and no religious ceremony of any kind. The marriage is rested entirely on an averment that, upon the evening of the 13th February 1866, the parties verbally accepted each other as husband and wife. That fact, if satisfactorily proved, is undoubtedly sufficient by the law of Scotland to constitute marriage. At same time, the law is considerably jealous of the matter of fact, when that mode of marriage is said to have been resorted to by parties who, with equal facility, could have entered into the contract in a more formal manner, or at least in a manner admitting of being more readily and satisfactorily proved.

Two questions present themselves prominently at the outset. 1st, What were the precise words used upon the occasion in question? 2nd, In what sense were the words which were used intended and understood by the two parties at the time?

All that preceded and all that followed is, however, of great importance, as throwing light upon one or both of these questions.

The natural order of inquiry seems to be to consider—1st, The relative position of the parties at and prior to the 13th February 1866. 2nd, The *res gestæ* of that day and evening;—and 3rd, The subsequent conduct of the parties, as indicative of their understanding of what had or had not then taken place.

In the voluminous print of the proof before us there is, perhaps unavoidably, a frequent want of continuity in the order of time, place, and subject matter, which I have found to render it a work of labour to become familiar with all the circumstances and incidents, none of which can safely be left out of view in such a case. Those which come under the first two heads just mentioned occur within a comparatively short space of time. But those which come under the third head extend over a period of between six and seven years, and the sequence of events is troublesome to ascertain and to remember. Consequently, I found it my

duty to devote to the study of the proof, parole and documentary, a considerable portion of the Autumn vacation, in addition to the attention I had bestowed upon it in connection with the previous oral argument; and if I fatigue your Lordships by dwelling at some length upon the history of the parties subsequent to the alleged marriage, my excuse must be that the real evidence afforded by that history is essential to be taken into view in considering and construing the less reliable evidence, presented to us at the distance of years, of the so called marriage ceremony itself. With this observation, I now proceed to notice the relative position of the parties at and prior to that alleged ceremony.

Major Steuart was the only lawful child of Sir William Drummond Steuart, and consequently, if he had survived his father, he would necessarily have been heir to the Baronetcy, as well as heir of entail to the Grandtully Estates, including what all your Lordships know to be the magnificent residence of Murthly Castle.

The Major's mother had been a person of inferior rank, and the Major had only been legitimated by the marriage of his parents some years after his birth. He had, however, been liberally educated, and brought up according to the rank and position of his father.

Major Steuart had served with his Regiment (the 93rd Highlanders) throughout the Crimean war, and thereafter in India during the Mutiny. He had there distinguished himself by his personal bravery, and was one of three Officers in the Regiment who received the Victoria Cross. After the Major left the army his habits appear to have greatly deteriorated, and it admits of no doubt that before he formed the pursuer's acquaintance he had become habitually dissipated. From September 1863 till the Spring or Summer of 1865 he generally lived in the White Hart Hotel, Greenock, kept by Mr James Macpherson, now the tenant of the George Hotel, Inverary. He then removed to Ramping's Hotel in Edinburgh. Mr Macpherson states that, for about a year before leaving Greenock, the Major had kept a mistress—Jane Macgregor—who had a child to him, and who, after the birth of the child, took the name of Steuart, and gave him a good deal of annoyance. He seems to have brought her to Edinburgh, and to have taken, or intended to take, lodgings for her in Portobello. Almost immediately on coming to reside in Edinburgh, however, he found a new attraction in the pursuer, and what thereafter became of Jane Macgregor and her child does not appear. Neither does it appear what became of a son the Major had educated till the age of 16 or 17, born to him by a previous mistress, who died at Grandtully in 1856.

Such was the position of Major Steuart in Spring and Summer 1865. The pursuer's position at that time, was this:—She was the eldest of three daughters of George Wilson, a fishing-tackle maker, who had a shop in Waterloo Place, Edinburgh, and resided with his wife and daughters in Clyde Street,—certainly an awkward locality for such a family, there having been, as Crawford, the sergeant of police, explains, "a number of houses of ill fame round about where the Wilsons lived."

The three girls were in the habit of attending the shop and serving the customers. In particular, the pursuer, the eldest, did so, and thus became acquainted with Major Steuart, who was fond of angling, and frequently made purchases at the shop. The pursuer is said to have been then about

16 or 17 years of age. The Major appears to have been 35 or upwards. We know, from another case recently before us, that his father Sir William was then upwards of 70. The intimacy between the pursuer and the Major ripened rapidly. In or about July 1865 the Major brought a cab to the shop door, asked, and at once obtained, leave to take the pursuer a drive. Where they went does not appear, but they were absent together from two to three hours. In two or three days afterwards he took her another drive, and then, as the pursuer's brother George states, "these drives gradually increased in frequency," and the parties also took walks together at their pleasure. Presents of dresses, brooches, ear-rings, and other jewellery followed, and, by the end of August, the Major had left his hotel and was installed as a boarder in the house in Clyde Street, in which there was no other male inmate except the father and two children, one of whom died about a month thereafter.

In the end of 1865 the Major and George Wilson, the father, made an excursion to Birnam near Murthly. The pursuer followed, on pretence of carrying bait to them. The Major procured a photograph of the pursuer, in fishing costume,—wrote under it "The Murthly poacher," and sent it to his father,—no doubt by way of a practical joke, which he was fond of indulging in. This, however, did not fully gratify the humour he was then in, for shortly afterwards the land steward at Murthly, Mr Gold, was roused from his bed by a loud knocking at 3 o'clock in the morning, and found a two-horse machine at his door, containing the Major, the pursuer, and her father, who, being admitted, sat there, with spirits and water before them, till six o'clock in the morning, when the Major and old Wilson set off for the Castle, leaving the pursuer in the house, where she wisely went to bed. Mr Gold went with the visitors to the Castle to warn the servants, but the Major dispensed with all ceremony by breaking up the door with his foot. Mr Gold left them there and went home, and Wilson and the Major, after satisfying their curiosity at the Castle, returned to Gold's house, where they had dinner, and left about 5 in the afternoon. Sir William was at this time living in a house within the grounds, called Dalpowie, or, more familiarly, "the Hospital," and, consequently, the parties had not seen him. But before they left Gold's house Sir William drove up to the door, enquired and was told who were there, but on hearing what had been their conduct at the Castle, he was displeased and left without entering the house. Mr Gold distinctly says that up to this time, Sir William and the Major were on good terms, and that the breaking into the Castle was the reason why Sir William did not come into the house while the parties were there.

Mr Gold farther deposes "Sir William told me to tell Miss Wilson's father to get the Major to marry her. (Q) Did he say he might get the Major to marry his daughter if he pleased?—(A) Yes,—for that he did not care who he married, or some expression of that kind. He then drove off. After he had left I told the Major, in presence of Mr and Miss Wilson, what he had said. They all heard it." I shall have occasion to remark upon this passage in the evidence afterwards.

In the meantime, I observe that Major Steuart returned with Wilson and his daughter to Wilson's house in Clyde Street, Edinburgh, and that the Major's habits, at this time, were obviously of the

most irregular description, as may be gathered from the reliable testimony of the Rev. Mr Rigg, the senior Roman Catholic Priest in Edinburgh, who had long been acquainted with the Murthly family, and was much distressed by the Major's conduct. No doubt the Major's visits to Mr Rigg were most frequent when he was under the excitement of drink, and other persons, consequently, saw him in calmer moods than Mr Rigg did. Mr Rigg said to him he had swallowed as much drink as would kill ten men, to which his answer was,—“Ah! but there is a method in drinking as well as in everything else.” This method, however, did not save him from being at times violent and noisy on the streets, as well as in the house, both before and after he went to live with the Wilsons in Clyde Street. Nevertheless the Major was naturally a shrewd and cautious man, not easily imposed upon, and not a likely person to be entrapped into a low marriage, even when in drink. The witness Collett, while he gives a vivid account of the Major's wild life at the time he went to live with the Wilsons, estimates the Major's character, with apparent accuracy, thus:—“I considered him a well educated clever man, who knew precious well how to take care of himself on all occasions, but he generally seemed to be under the excitement of liquor.”

Such being the character and habits of the Major in the end of 1865 and beginning of 1866, I shall now, before going back upon the previous intimacy of the parties, consider the events of the 13th February 1866, on the evening of which day the marriage is said to have taken place.

It must, of course, be conceded to the pursuer, in point of law, that if the words addressed to her on that occasion were calculated and intended to make her believe, and did actually make her believe, that there was a *de presenti* marriage, this is sufficient, whether Major Steuart had a mental reservation or not.

On the other hand, whatever the words used may have been, if it was mutually understood that what then and there took place was to be a mere cover for illicit intercourse, or was, at all events, not a *de presenti* marriage, there was, in that case, no marriage, however confidently the pursuer or her relatives may have looked forward to a marriage at some future time. As Lord Cottenham, with the concurrence of Lord Brougham, observed in *Stewart v. Menzies* (3 W. & S. 592.) the expressions used, though of themselves sufficient words of contract, are of no avail if not intended by the parties to have that effect.”

Perhaps the strongest thing that can be urged in support of the pursuer's contention is, that the Major had previously said that he meant to marry the pursuer, and that he shortly afterwards, and in particular next day, to his butcher Mortimer, said that he had done so.

The evidence, outwith the pursuer's family, of the Major having previously said that he meant to marry the pursuer, is extremely meagre. It is rested, I think, upon the testimony of two witnesses, Maxwell and Young. Maxwell says the conversation he speaks of took place “in the shop, in presence of the late Mr and Mrs Wilson, and I think the clerk in the shop, whose name I forget, but he is here as a witness, and another gentleman, who is also here as a witness.” Maxwell thinks the conversation took place somewhere about the end of 1865. But he farther says—“On the occasion when he said the arrangements were being made

for the marriage, I think the family were living in Leith Street above Littlejohn's.” Now the family were certainly not living either in Leith Street or Leith Street Terrace either in 1865 or 1866; and it is remarkable that, although both Blair, the clerk, and the other gentleman mentioned by Maxwell were in attendance as witnesses, it did not suit the pursuer to call either of them to corroborate Maxwell either as to the import or the date of the alleged conversation, nor to put any question on the subject to Blair when he was afterwards adduced by the defenders in reference to other matters. The conversation which was in Maxwell's recollection is more likely, therefore, to have taken place in the latter part of 1867, when the family were living in Leith Street Terrace, and messages are said to have been sent to Mr Rigg to come and marry the parties, but which he treated as either the result of drink on the part of the Major, or as wholly unauthorized by him. Mr Maxwell was not examined till October or November 1872, and his memory, at the distance of six or seven years, does not seem to be very reliable, either upon this point or as to a subsequent conversation with old Wilson, for he says “I forget who were mentioned as witnesses to the marriage,” and he speaks to terms of endearment passing among the parties which nobody else ever heard them use, and which are more like what his old intimacy with his friends, the Wilsons, from 1854 downwards, would suggest to him as probable and appropriate than what can well be attributed to a retentive and minute memory, which he does not seem to have possessed.

The rambling conversations retailed by Young, the book-cavasser,—an intimate friend of the pursuer's brother George,—and who could discuss with the Major two bottles of champagne in a forenoon and yet part quite sober, are still less satisfactory than those spoken to by Maxwell.

But although there had been much more evidence of this kind than there is, it would not have appeared to me to be of the importance attributed to it. The Major had by this time lived for some months in the house of the Wilsons,—rumours were rife to the prejudice of all concerned, and to say he meant to marry the pursuer was just such a defence of the conduct he was persevering in as a man of his habits might be expected to make, although he had, in reality, no such intention. As to his statements subsequent to 13th February 1866, if we suppose him to have been constrained to accede to an arrangement that a pretence of marriage should be held out so far as necessary to sopite or lessen scandal, it is only what was to be expected that he should, on some occasions at least, so express himself as to humour or aid that object. He played his part, however, in this respect in a very peculiar style. For instance, his intimation of the alleged marriage to Mortimer, the butcher, next morning, was more like a man reflecting on himself after a debauch than anything else. Mortimer says “the morning I have mentioned he was damning and swearing. He had a rough way of speaking. I don't know what he was swearing at. (Q) Did he just curse and swear at large?—(A) He was swearing at himself I believe.” Accordingly, Mortimer says that notwithstanding what the Major said he did not believe there was a marriage till he heard it afterwards. The incongruity is not in the Major's having sometimes humoured the pretence of marriage, but in his not having habitually done so.

One thing is abundantly clear—that, whether Major Stuart ever contemplated marrying the pursuer or not, he certainly had no preconceived intention of marrying her on the evening of the 13th February 1866.

The supper prepared for that evening was not meant by the Major for a marriage feast, but to celebrate his birth-day. The pursuer's brother, George Wilson, says the first notice he got of the supper was from his mother, in the shop, between three and four in the afternoon. He says she told him that, from what she had heard pass between his father and the Major, she thought there would be a marriage that night; and he adds, "When she said that, I said I would be there." But, whatever her husband may have said to her, it is clear that Mrs Wilson could not have inferred that there was to be a marriage that night from anything said by the Major; for the Major was evidently entirely unprepared for any proposition of the kind. George Wilson's deposition bears—" (Q) Was your father in good humour that night?—(A) No; he was commencing to tell the Major the old story about him staying in the house; and he sent off the bairns to bed before he began to speak about that. (Q) Did you see from his face that there was something brewing?—(A) Yes; I could see that in a moment from my father's face. After the children left the room, my father told the Major that he would have to leave his house, because he had been too long in it, and that it would not do to stay longer, as people were making complaints, and his daughters were not to have their names ruined by him staying in the house. He said that quite seriously. The Major sat quiet for a minute or two, and I saw tears coming into his eyes." On the cross-examination, George Wilson explains that what had passed between him and his mother in the shop that afternoon was this—"My mother told me there had been a row between the Major and my father, and that it was the old grievance, and she said 'He ordered the Major out of the house, and by the way the Major spoke to your father I think there is to be a wedding to-night.'" The witness adds, "I understood he had been ordered out of the house that afternoon." Being asked whether he did not think it strange that there was at the same time an arrangement for a supper and an order to leave the house that afternoon, the witness says, "Perhaps my father only told him to leave after the supper, though I did not take it up from my mother in that way." Then, after giving a second and different version from what he had given in the examination in chief, of the language in which his father addressed the Major, commencing with the words, "You will have to hook it," the question is put to the witness—"Then your father had not thought that he was going to marry her after supper when he told him to hook it?—(A) I suppose not at that time. (Q) When do you think your father first thought there was to be a marriage that night?—(A) When the Major got up and said, 'Wilson, I shall show you what I can do to shut people's mouths.' He had been sitting on a chair crying—the tears coming over his eyes."

All this demonstrates that there had been no arrangement or understanding come to, either that afternoon or previously, between old Wilson and the Major that the Major was to marry the pursuer that night. There had been a row between them that afternoon, according to this evidence, and an

attempt made to concuss the Major to propose some alternative rather than leave the house. But the threats of expulsion had not succeeded in their object, and, whatever Mrs Wilson may have thought might result from them that night, it is plain that her husband was the reverse of sanguine on the subject. He was in bad humour throughout the supper, and although he deferred renewing his threats till the drink had time to operate, he continued, even then, in bad humour, because, whatever his purpose was, he did not think he was to succeed in it.

I shall return to that point afterwards. Meantime, I proceed to observe that it is very difficult to say that we can gather from the proof, with any certainty, what the precise words used by the Major were which are proposed to be taken as constituting marriage. If a marriage had been contemplated, Major Stuart would, no doubt, have taken care to have had witnesses present in whom he had some confidence. And if old Wilson had expected a *bona fide* declaration of marriage, and had wished a correct account of it to be preserved, it is to be presumed that he would have arranged with the Major as to who were to be the witnesses. But the only persons present, besides old Wilson and his wife and the female servant, who was going out and in, were the pursuer's brother George, who, unknown to the Major, had been prepared for a mine being sprung that night, and Mrs Kellett, a bosom friend of the family of many years' standing—not invited by the Major, although he was the host of the evening—and who says she spent an hour upon the pursuer's hair and made her look "very well indeed—more handsome than usual." Mrs Kellett confirms George Wilson's account of his father's bad humour that night. There had been two hours of eating and drinking before Mrs Kellett and the two girls Georgina and Mary left the room. Georgina was about 15, and Mary only a year or two younger, and why they were ordered to bed just when the only interesting event of the evening—viz., their sister's marriage—was to begin, has not been explained upon any theory consistent with honesty and propriety. At this time, Mrs Kellett says, Mr Wilson "was very crabbed like," and she was "very glad to get away in consequence of his looks." She was out of the room about half an hour, in the course of which time the pursuer came and told her that "her father and the Major had had words together." The pursuer then returned to the room, and, by-and-bye, Mrs Kellett was called in by Mrs Wilson, and found Mr Wilson still looking angry. She says, "He had an awful face for giving an angry expression, and it was very bad at that time,—a very terrible countenance;" and she further says Mr Wilson and the Major were still having words when she went in,—and then she states the words which she says she heard, and which I shall immediately advert to.

If this be a specimen of the harmony of a Scotch marriage, I fear it will not be thought attractive by our brethren south of the Tweed. The words said to have constituted marriage were words used in the course of a quarrel, and we must now inquire what these words were, or are said to have been. For although Falstaff would, no doubt, in such circumstances, have refused to speak on compulsion, the Major may possibly have been induced to marry on compulsion.

Unfortunately, neither of the two witnesses who

speak to the words can be regarded as quite disinterested and trustworthy. Both of them, for instance, make statements which are quite incredible as to what they had seen and known of the Major's habits, as well as in regard to the sobriety of the party that night. Thus George Wilson says, "I never saw him (the Major) the worse of drink." And again, more emphatically, "During the whole time I knew him I never saw him the worse of drink." Now, George Wilson's place of business was the shop in Waterloo Place, and he was also a frequent visitor in the houses successively occupied by his father. The evidence of Mortimer, whose shop was right opposite to the door of the Clyde Street house, as to the Major "going about drunk and swearing on the street, and having children running after him," is a mere specimen of what habitually occurred in the neighbourhood of the one house; and the evidence of Dickson, the proprietor of the house in Leith Street Terrace, who found the Major breaking up the furniture with an axe, and who used also to see him followed by boys on the street, is a similar specimen of what went on in the neighbourhood of the other house. Waddie's evidence is, in like manner, a specimen of what went on in Waterloo Place; and the Major's riotous conduct under drink, in-doors and out-doors, in each of these three localities, was so frequent and so notorious that for George Wilson to depone that during the whole time he knew the Major he never saw him the worse of drink, is just to state, upon his oath, what he could not but know to be untrue.

Mrs Kellett is only a degree more candid on this subject. For she says that subsequent to her introduction to the Major, in December 1865, he was living "very quiet and very sober;" and although she admits having afterwards seen him affected by drink on the street, she says "I don't think I ever saw him affected by drink in the Wilsons' house; he was always sober and genteel when I saw him there." Now, Mrs Kellett, on her own showing, was very often in both houses, and she says she "saw him there at all times during the day and in the evenings," and how she could have done so and yet never found the Major affected by drink, or otherwise than sober and genteel, any one who has read the proof will be at a loss to imagine.

Then as to the sobriety of the supper party, it will be recollected that, according to Mrs Kellett, "Supper was served a little after nine o'clock," and the children were sent to bed about eleven. There was, she says, champagne and sherry and port on the table, and bitter beer; and George Wilson adds whisky to the catalogue. But both witnesses say that neither the Major nor any body else drank anything but bitter beer till the Major had risen to his feet after Mrs Kellett returned from putting the children to bed, which would be about half-past eleven. Both farther say that everybody was still perfectly sober when George Wilson left at twelve o'clock. Now I confess I am not prepared to believe that these three men, two of them, viz., old Wilson and the Major, decidedly given to intemperance, and the third not disinclined to indulge when opportunity offered, sat for two hours and a-half without partaking of the ample stores of drink provided for them by the Major, whose hospitality was boundless, and that the party broke up half-an-hour later all perfectly sober. The same three men made a very different

use of a similar opportunity, when, after drinking all night, the entrance of a stranger on New Years' Day 1868 found two of them—old Wilson and the Major—in their trousers and shirt, and all three intoxicated, with no end of champagne all round the room, and the pursuer parading about, dressed in men's clothes—trousers, short jacket, and cap—enjoying the scene, which went on in the same style all that day, and which quite accords with George Wilson's statement that his father "liked a drink of champagne," and often sent out for it, and with the evidence of the medical attendants of the family, Dr Balfour and Dr Middleton, the former of whom says old Wilson "was occasionally given to drink," and the latter of whom says he had "outbursts of drinking," and went on the ball or the spree; of which we find abundant confirmation in other parts of the proof.

Keeping in view, then, the unreliable character of the only two witnesses adduced to prove the marriage, I proceed to observe that Mrs Kellett appears to have heard and seen all that can be represented as having constituted the marriage. She did not hear the words which George Wilson says his father addressed to the Major immediately after the children and she left the room,—“You will have to hook it, for the people are complaining to me. I am getting a bad name with your staying in my house among my three daughters, and you will have to leave it.” But she had returned by the time the Major had risen to his feet, which George Wilson says he considered to be the first thing which led his father to think there would be a marriage that night. Mrs Kellett says that when she returned to the room “Mr Wilson was not speaking, but the Major was saying that he could not do what he would wish to do at the present time, but he said I will show you, Wilson, what I ‘will’ do or ‘can’ do. I don't know which of the two words he used. Then he filled up the wine glasses. He was standing on his feet at this time. He went in front of the wardrobe beside Maggie, and went down on his knee and took a ring out of his pocket—I don't remember which pocket—put it on the third finger of her left hand, and said, Maggie, you are my wife before Heaven, so help me, great God! or words to that effect. That is the substance of what he said. They then kissed each other. I don't remember any more that they did.”

The account given by George Wilson is fuller than that given by Mrs Kellett, but cannot be said to be inconsistent with it. George Wilson, however, in his cross-examination, mentions words as having been used about shutting people's mouths, which he did not mention in his examination-in-chief, and it may very well be that other words of importance were used which he has either repressed or forgotten. Indeed, it is certain that this must have been so; for between the opening of the attack by old Wilson with the words “You will have to hook it,” and the time when the Major rose to his feet and Mrs Kellett returned, half-an-hour, as I have just observed, had intervened, and of what was said during that half-hour we have no account at all, although a full and precise account of it would be essential to enable us to understand the real object and meaning of what is said to have followed.

But let us consider the precise words which George Wilson says were used by the Major—omitting the gloss upon them which the witness

had no right to interpolate. In his examination-in-chief George Wilson says—"He (the Major) then said, I am poor now and I cannot marry, but I will marry her in the Scotch fashion, or words to that effect." These words appear to me to be negative, and not affirmative, of an intention then and there to marry. "I am poor now and cannot marry."—Thus far, nothing could be more explicit—"I cannot marry;" and when he adds, "but I will show you what I can do to shut people's mouths," it is just as if he had said—but I will show you something else I can do which will have the desired effect of shutting people's mouths. The well-known nature of our marriage law makes it not difficult in Scotland to bring about a repute of marriage sufficient, partially at least, to shut people's mouths, because no credentials of marriage being necessary, those who are so disposed feel themselves entitled, without compromising their own characters, to assume that there has been a marriage in some shape or other, and to treat the parties as married accordingly. Notoriously, however, in many such cases, after years of cohabitation, it has been judicially decided that there was no marriage. Consequently, to say of a man and woman who are living together that they are married in the Scotch fashion, is, at the best, an ambiguous phrase, and frequently means, ironically, that they are not married at all. The farther words said to have been used—"Maggie, you are my wife in the sight of heaven"—are not less equivocal. That is the language in which a man comforts his mistress when a qualm of conscience agitates her for lost virtue—"You are my wife in the sight of heaven, although not in the sight of man."

I do not doubt that the Major, as well as the Wilsons, knew that by the Scotch law consent, although merely verbal, may make marriage. Accordingly, when Mr Rigg afterwards cautioned the Major on that point, the latter explained, in substance, that the Wilsons had repeatedly tried to catch him in that net, but that he knew better than to fall into it. The plot seems to have thickened on the night of the 13th of February 1866, and George Wilson (the brother) was obviously a party to that plot. When his mother announced it to him he said significantly "I will be there." Mrs Kellett was the only third party who heard any of the words used. But she missed half-an-hour of the conversation and discussion which George Wilson has adroitly suppressed. Neither of them pretends, however, that the Major said he would marry the pursuer according to the Scotch law. Nothing more than that could by possibility have been, then and there, asked from or done by him; and if that had been what he meant to do, he would naturally have said nothing about what he could not do; he would simply have said that he would do it.

It is said that Major Stenart took a ring out of his pocket and put it on the pursuer's finger; but how that ring came into his possession at that opportune moment is not explained. It is clear that the Major was totally unprepared for any ceremony on that occasion, either of one kind or another, and that he was most unwilling to become a party to it. The pursuer, no doubt, had rings, but it does not appear that the Major had any. The purchase by him of a marriage ring cannot be assumed without proof, of which there is none.

What is said to have followed, in the way of

shaking hands, drinking of healths, and so on—supposing we were to believe it,—is equally characteristic of what the Wilsons might be expected to do whether they thought they had succeeded in bringing about a real marriage or not.

The bedding is no doubt a graver matter; and if we could be satisfied that sexual intercourse had on no previous occasion taken place between the parties, it would be important, as favouring the probability that something had passed on the night of the supper on which the pursuer relied, either as a promise *de futuro* or a *de presenti* consent to marriage. But to bar a woman from claiming the benefit of the presumption that she had yielded her person on the faith of such a ceremony as is here alleged, it is not essential to have actual proof of prior intercourse. It is enough that her previous conduct has been such as to destroy all reasonable confidence that the intercourse which followed was intercourse for the first time. In the present case, it appears to me that the proof is not only sufficient to exclude any presumption of that kind, but leads irresistibly to the conclusion that the fact had been otherwise.

The real evidence of facts and circumstances is all that can be expected in proof of prior sexual intercourse in such a case; and to judge of the effect of these facts and circumstances, they must be taken in combination. Here the parties were in a totally different rank of life. Their ages and experience were also different. The pursuer was hardly beyond girlhood, and the Major was more than twice her age—unscrupulous and not inexperienced in the art of seduction, if such art was necessary. The Major's very first request, that the pursuer should drive out with him to the country in a cab, was at once consented to by her—her father not objecting. For six or seven months prior to 13th February 1866 such drives had been repeated as often as the Major chose. The parties were absent on these occasions for hours together—*solus cum sola*,—nobody knew where they went, and nobody knows even now. Although the Major's irregular habits were notorious, he was received and allowed to remain in the house as the only grown-up male inmate (except the father, whose duties were in the shop)—an idle man, with the pursuer for his daily companion, going with him wherever he chose, and in all his varying states of inebriety. The house was in a street where it was impossible to look out or go out without seeing loose women holding dallying conversations from the upper windows with men below—conduct which, as might have been expected, was imitated by the female inmates of the house to some extent, even when in Clyde Street, and culminated to its natural result after they removed to Leith Street Terrace, where the pursuer and her sisters habitually "went out and in without bonnet or shawl or cloak, bareheaded," and were seen in the evenings, along with other young women, gaudily dressed, and young men or gentlemen, sitting round a large table in the interior of a hall conveniently kept by the "stout lady" Mrs Aaronson, having a door which served also for the only window, with "a beggarly account" of sponges, rugs, and skins hanging outside, but no goods inside—what professed to be a shop being truly no shop at all, but a place for promiscuous meetings and unlicensed refreshments. The respectability of some at least of the witnesses who speak to these habits—such, for instance, as Ormiston, the porter

of the Bank of Scotland, and his wife—is undoubted. By that time, at all events, the pursuer had become a “heavy swearer,” and addicted to the use of obscene language; and although this was after the removal from Clyde Street, it cannot be said to reflect no light on her character and habits while living in that street only a few months previously.

The Major, it must be remembered, had been in the habit of keeping a mistress. Two we happen to know of, who had successively occupied that position, each for a period of years, and each of whom had borne a son to him, as the pursuer ultimately did. It was the place of a mistress, and not of a wife, which was vacant. To induce the pursuer to accept of that place, dresses, brooches, earrings, and other jewellery might be useful. But to have induced her to consent to become the Major's wife it is clear that these things, and months of attention, might have been dispensed with. The proposal would, at any time, have met with a ready acceptance; and if this was so, the Major was too much a man of the world not to see it. He was pretty plainly, at the same time, not the man to desire the pursuer for his wife if he saw he could succeed in getting her for his mistress.

One fact remains which seems to me to complete the chain of real evidence, that, prior to the alleged ceremony, he did so succeed. It comes from a witness altogether friendly to the pursuer and hostile to the defence. It was meant by the witness to aid the pursuer's case, but it tells strongly the other way. Agnes Forbes was taken into the pursuer's service prior to her re-examination. She came from the pursuer's house to be re-examined, and returned to it. She was not less desirous to uphold the pursuer's virtue than the Major's sobriety. But she inadvertently lets out a fact of great significance in the opposite direction from that in which she meant it. Being asked whether she told Mrs Kerr “that when the Wilson family were all asleep Maggie used to get up out of her bed to go to the Major's bedroom,”—her answer is, “Maggie, or any of the family, could not get out of their bedroom, for the door was snibbed outside before the Major and she were married.”

The Major's bedroom was on the right hand side of the lobby next the entrance door. The pursuer and her sisters occupied the bedroom immediately opposite. The other sleeping apartments, including that of the female servant, were further in the passage. Now, we all know that a snib inside the door is usual in bedrooms. But a snib outside the door of a bedroom is an unusual and remarkable arrangement. The question occurs. What was it put there for? It might keep the girls in, but it could not keep the Major out, if that had been thought a necessary precaution. It could hardly be meant to protect the Major's virtue from being stormed by the girls. But, if he and one of them understood each other, it was admirably adapted for letting the favoured captive out and keeping the others from inconveniently following. It constituted the Major master of the situation, if the pursuer chose to act in concert with him, and I cannot doubt that they availed themselves of it accordingly.

If that was so, it is of comparatively little moment whether the servant Agnes Forbes knew of this or not. But it is very difficult to doubt that she did know, and that she mentioned the fact of the pursuer going, during the night, to the

Major's bedroom to Mrs Kerr and her brother and sister, as they all three swear she did, at the time she left the service of the Wilsons, and had a lawsuit with them about her wages, although she now denies that she said anything of the kind. Mrs Kerr farther depones that Agnes Forbes told her she had on one occasion opened the Major's bedroom door and seen the pursuer and him in bed together, and that the Major gave her £1, and said “Mum's the word.” Agnes Forbes had admitted, on her original examination, that the Major had used the expression to her “Mum's the word,” but she attributed this to a wish on his part that the marriage should not be talked of—a wish to which, she admits, neither she nor anybody else paid the slightest attention. It was only, however, on her re-examination that the fact was elicited from her that she had really received £1 from the Major; and then she accounts for it by saying it was for cooking what she calls the marriage supper. It is not, however, from any confidence in the details of Mrs Kerr's evidence (which it is very difficult to judge of) that I have formed the opinion that Agnes Forbes is a witness not to be relied on in the pursuer's favour, but from the inconsistency of her evidence with facts, which there can be no doubt about. For instance, on her original examination, being asked—“Did you ever see Major Steuart drunk?” she depones, “Never in my life.” (Q) “But did you ever see him that you could tell there was drink in him the whole time you were there?”—(A) “Never.” Now she was in the Wilsons' service in Clyde Street from October 1865 to March 1867, and these answers, which are applicable to the whole of that period, are obviously utterly false, and must have been known to her to be so. Rejecting her evidence as to the Major's sobriety, I must reject it equally as to the pursuer's virtue; and, upon the real evidence afforded by the facts and circumstances, I come to the conclusion that, whatever may have passed on the night of the 13th of February 1866, that was not the first occasion on which the pursuer yielded to the Major's embraces.

If so, that goes very deep into the question of probability, whether the Major, then and there, submitted to a marriage with the pursuer, and likewise suggests an explanation of why old Wilson, when he saw he could not concuss the Major into a marriage, may have felt it necessary to be satisfied with what the Major was willing to concede,—that a pretence of marriage should be held out to the public, in the meantime, so far as necessary “to shut people's mouths.”

Observe the position in which, at this time, old Wilson stood. I do not suppose that he originally contemplated that his daughter should yield to the Major's unlawful embraces. But he imprudently placed her in circumstances in which nothing was more likely than that she should commit the error young women often fall into, of thinking that to gratify their suitor will tend to ensure an ultimate marriage, which he pretends to be in the meantime inconvenient. That this error had been committed old Wilson must by this time have more than suspected. Indeed, the arrangement of the snib could hardly have been made and continued without his knowledge; and the object of it most probably was to endeavour to conceal from the rest of his household the fact which he could no longer conceal from himself.

Moreover, it is in the highest degree improb-

able that the Major when in his cups had always used the snib so discreetly as neither to attract the attention of the pursuer's younger sisters nor of the female servant. Old Wilson must, therefore, have felt that unless the cohabitation could now be avowed and defended on some pretence or other, he must break entirely with the Major, and all his cherished visions,—associated with "Great Birnam Wood" and "High Dunsinane Hill,"—of his daughter becoming Lady of Murthly, and himself the ancestor of a line of baronets as numerous perhaps as Banquo's descendants, must at once be dispelled. This last was a bitter alternative, and it is not remarkable, looking to the character of the man, that in place of facing it old Wilson should have made the most he could of the only concession he could get,—namely, to shut people's mouths in the meantime by a repute of marriage, retaining the hope in his own mind that an actual marriage might follow afterwards.

To inaugurate this new state of things, the obsolete custom of the bedding was revived, with the additional and novel barbarism of introducing all and sundry into the bedroom next morning to see the parties still in bed together, so that the spectators might go forth and promulgate the publicity of the cohabitation as a proof of its being honest and lawful.

We shall find that this supposition will account for all that followed during the next six and a-half years, including the Major's objection to the repute being spread abroad further than was necessary for the immediate object to be served by it.

The pursuer's theory, on the other hand,—that the marriage was to be kept private,—and by which alone she attempts to account for the subsequent conduct of the parties,—is so utterly untenable that the necessity of resorting to it only betrays the hollowness of her case.

For, 1st, the object of shutting people's mouths could not have been accomplished by a marriage which was to be kept private. The associates of the family and the customers at the shop would have been more outraged than ever by the publication of a bedding without a marriage. 2d, The pursuer's main argument, that the marriage was forthwith and perseveringly avowed and promulgated, is altogether inconsistent with the alleged compact of secrecy. 3d, The single reason assigned for such secrecy—viz., the fear of Sir William Steuart's displeasure, had no foundation in fact. Sir William's messages through Mr Gold and the Rev. Mr Rigg show that he would have been glad of the chance which the Major's marriage with the pursuer, or with almost any one else, might have afforded of his settling down from the wild life he was leading. Sir William had obviously come to Gold's house, on the occasion Gold speaks to, with the intention of seeing and communicating with the parties; and it was only the information he then got as to the nocturnal intrusion into the castle which induced him to leave without seeing them. He had, himself, married beneath his rank:—(a fact which I concede to be favourable, so far as it goes, to the probability that the Major might have done the same), and there is nothing extravagant in the supposition that what was said by Sir William was said seriously. Gold, apparently, so regarded the message, and so delivered it. But the serious nature of the message becomes undoubted when we attend to the message Sir

William subsequently sent to the Major by Mr Rigg in the end of 1867 or beginning of 1868. "Tell Mr Steuart from me that he is at perfect liberty to marry any person he pleases,—that I shall offer not the least restriction as to the party he is to choose,—let him marry any woman he likes as a wife, and I shall make him a suitable allowance in money, and I shall give him Loch Kennard for his residence." Mr Rigg explains that Sir William knew perfectly that the Major was living with the pursuer at this time, and he adds, "I communicated to the Major what Sir William had said very shortly afterwards. I spoke to him more than once on the subject, and reminded him of his father's proposal." And, being asked whether he made the Major quite to understand that there was no desire to limit him in any way as to the person he might marry, Mr Rigg says—"Upon that I was most distinct." In answer to a subsequent question, Mr Rigg states that Sir William spoke of marriage as a thing that might settle the Major, and "said he wished to impress the Major with this, that he was anxious that he should marry some one." I accept these statements by Mr Rigg as undoubted facts in the case.

Nor had there been any attempt, from the first, to withhold from Sir William's ears the representations and reports of an actual marriage, although it is plain enough that these did not impress him with its reality. Not only was Birnam a chief seat of these representations and reports, but it is part of the pursuer's case that in spring 1866 a letter (not preserved) was addressed in the Major's name, although "having something of a feminine hand about it," to the gardener at Murthly, requesting that a bunch of flowers should be sent on a day named to the shop in Waterloo Place, "as it was Mrs Steuart's birthday."

The fear of giving offence to Sir William could, indeed, at no time have operated with the Major as a motive for concealing his alleged marriage; for the Major's delight at that time was, not to please but to displease Sir William, on account of the position he had accorded to Mr Franc Nichols in his family. If, notwithstanding Sir William's messages, the Major continued to think that so low a marriage must necessarily annoy Sir William, this would only go still further to account for the total want of any precautions on the part of the Major to prevent the report from reaching Sir William, and even for a positive wish that it should reach him. The Major accounted to Mr Jackson for the pleasure he took in doing many things simply to despise Sir William by saying "place yourself in my shoes, and would you like that infernal yankee to be living on the money I should have. If it was not for that I would not do it." There were, in fact, more avowals of the marriage at Birnam, in the very precincts of Murthly Castle, than in Edinburgh, and this at a comparatively early period, although accompanied, as elsewhere, with contemporaneous assertions to an opposite effect, whenever these last were not restrained by motives of expediency.

There is thus not a particle of evidence, from beginning to end of the case, of a compact to keep the alleged marriage private, either between the pursuer and the Major, or between the Wilson family and the Major. Such a compact of secrecy would be intelligible between parties whose cohabitation was to be secret, but between parties whose cohabitations was to be avowed, it could only have been

a compact for degradation,—humiliating to the woman and disgraceful to the man,—serving no purpose but to enable the Major at his pleasure to call out to the pursuer, as he did in Clyde Street, “What are you but my whore,” and tying up the tongues of his wife and her relations from uttering a word of complaint against such brutal treatment. To account for all the degradation the pursuer silently submitted to during the next six and a-half years of her life, upon the baseless theory of a compact of secrecy, of which there is not a particle of evidence, appears to me to be utterly hopeless; and yet the pursuer presents to us no other.

It has been suggested that we may take all Major Steuart's admissions of a marriage as evidence for the pursuer, and, at the same time, reject all his statements, outwith her presence, as not being evidence against her. I cannot adopt that principle in its entirety.

If we were satisfied that the Major, from change of affection or some other cause, had become desirous to break the tie he had originally acknowledged, there might be good reason for attaching little or no weight to denials made after that change had occurred. But there can be no reason whatever to suppose that when the Major was residing in St Patrick Square, or confined in the prison of Edinburgh, he had any different feeling towards the pursuer, or any other mind in regard to her, than he had a month or two before. The great bulk of the admissions founded on by the pursuer were made after, and many of them long after, that time. His state of mind, so long as there is nothing to suggest a change upon it, forms substantially part of the history of the case, and we must take all the manifestations of it together in ascertaining what that state of mind then was. It cannot even be assumed that had Major Steuart been now alive he would have taken up the position of an adverse party to the pursuer. Had the child the pursuer bore to him lived and been his only issue, who could be put forward as next heir of entail to the Grandtully estates, the Major might have been maintaining that there had been a marriage, as the father did in the *Balbowgie* case, contrary to the truth. The Major's affirmations and denials may carry less or more weight at different periods, but it would be difficult to say that we ought absolutely to shut our ears to any of them. The representations of marriage made at hotels and lodging houses in the course of the trip to London and Paris require no special notice. Those made at Edinburgh and Birnam are more important. What is remarkable, however, is, not that there should have been such representations, but that, (if there was really a marriage), there should ever have been anything else, especially recently after the event; and yet we find that while the parties were still living in Clyde Street, as well as afterwards, Major Steuart just as frequently explained that he was not married to the pursuer as he is said to have represented that he was. It seems to have depended partly on whether there was a purpose to be served by assuming the garb of decency, and partly upon the humour he was in for the moment. But to any one who could speak to him with authority,—such as the Rev. Mr Rigg,—he never denied that he was living with the pursuer as his mistress. Mr Rigg's conversations with him include the period immediately following the evening of the supper. The Major knew what constituted marriage by the law of Scotland. He

told Mr Rigg that the family had attempted to entrap him into a marriage, and that he was upon his guard against it, remarking “that even when he was under the influence of liquor he was quite wide awake.” He told Dr Simpson, the surgeon of the prison, the same thing. These witnesses are both of them perfectly trustworthily. Dr Simpson's opportunities of conversing with the Major were comparatively limited, but they apply to a date as early as April 1866, when there can be no reason whatever to suppose that the Major regarded the pursuer in any different light from what he had done in February of that year; and, what is very important, they occurred during the three months of the Major's imprisonment, when he could not fail to be sober, not having the means of being otherwise. The time when Mr Rigg first categorically asked the Major the direct question whether he was married to the pursuer, and received a decided answer in the negative, was still earlier, being before the Major had been put in jail. He was then living in St Patrick Square, and Mr Rigg considered him to be at the time perfectly sober. He was apparently refraining from drink for fear of neglecting the necessary vigilance to elude the officers who were then in search of him. Mr Rigg's testimony is throughout very valuable, because it is the evidence of a clergyman in this city of known respectability and intelligence, and the attempts made in the argument for the pursuer to disparage that testimony only indicate an uneasy sense of its weight.

Among the remaining Edinburgh witnesses, the depositions of Drs Dunsmore and Balfour require special attention, because each of them speaks to observations called forth by crucial occurrences in the history of the parties,—viz., the ascertainment of the pursuer's pregnancy and her delivery of a son.

Dr Dunsmore, after explaining that all the illnesses for which he was consulted by Major Steuart arose from drinking and satisfied him that the Major “was habitually drinking during 1866 and 1867,” goes on to say that on 17th February 1867 he was sent for to 27 Clyde Street by the Major. “When I saw him on that occasion he told me he had sent for me to examine Miss Wilson to know whether she was in the family way. He called her Maggie Wilson.” Dr Dunsmore further says “I made an examination and satisfied myself that she was pregnant. Major Steuart asked me to attend her during her confinement. Before I gave him any answer I asked him whether he was married to her. He said, No, certainly not,—that he would be very sorry, or words to that effect.” “When he told me that they were not married I refused to attend her confinement, and I did not do so.”

The evidence of Dr Dunsmore, lately President of the College of Physicians, and a well known practitioner in this city, is of great importance—not only because of his undoubted honour and intelligence, but because of the occasion to which he speaks, when, if the Major had been looking for an heir to his ancestral title and estates, he would certainly not have expressed himself in the manner which he did. Dr Dunsmore's uneasy impression, from what he saw of the female inmates on the occasion of his visit to Clyde Street, that he “had got into an improper house,” and his subsequent impression that the house in Leith Street Terrace “was still worse than the house in Clyde Street,”

is also important, as confirmatory of the testimony of witnesses of whose reliability we have not, in every instance, the same complete means of judging as we have of Dr Dunsmore's reliability.

Dr Balfour, again, who had been the medical attendant of the family from 1860 downwards, did not feel called upon to decline to attend the pursuer on her confinement. He was engaged to do so by the pursuer and her mother about a month before the birth. He remembers quite distinctly that Mrs Wilson told him that the Major intended to marry the pursuer, but he does not remember whether the pursuer was present or not when this particular statement was made. He entered the attendance in his book on the occasion of the confinement simply as upon "Wilson," because, he says, it might have been awkward, in the event of his books falling into any one's hands, if he had put "Miss" before the Wilson. (Q.) "If you had had any reason to suppose that she was a married woman would you have put her married name— (A.) Certainly. I also vaccinated the child." Dr Balfour further stated that in April 1866 he had paid seven visits to the pursuer when suffering from a bruise in the side, and the name in his book "in connection with these visits is Miss Wilson."

Now the birth of the child was a still more important epoch in the history of the parties than the ascertainment of the pregnancy, and Dr Balfour's information on the occasion of the birth (and, so far as appears, on the previous occasions also) was derived from the Wilsons themselves, so that from both sides, when the course of events required the truth to be divulged, the revelation of it was the same.

Before passing from the Edinburgh witnesses, I may farther observe that the evidence of James Cooper, a salesman in the well known shop of Romanes & Paterson, is important, because it applies to the whole period from 1865 to January 1868, during all which time the Major habitually ordered articles for the pursuer, who came along with him to the shop on several of these occasions,—the articles being uniformly sent to Miss Wilson, which the witness says "was always the name by which he called her, both in her presence and when she was not there."

Next to the Edinburgh evidence, the Birnam evidence requires special attention. Before commenting on it, in the order of time, I may observe, in connection with what I have just said, that in Birnam and Dunkeld, equally as in Edinburgh, all furnishings made to the pursuer, on the Major's orders, were made to her as Miss Wilson, and that he spoke of and addressed her by that name in her presence without any repudiation upon her part of the designation he gave her. For instance, Robert Anderson says the pursuer came to his father's shop in Dunkeld with the Major, who "introduced her to my father as Miss Wilson." William Low, draper in Birnam, says that, in 1867 and 1868, the Major ordered articles of female attire from his shop for Miss Wilson. "That parcels were sent to her lodgings in that name," so far as she did not take them away herself. Thomas Ellis, grocer in Birnam, says he supplied groceries on the Major's order for the pursuer, which were sent to Mr Harris's house, addressed to Miss Wilson. Dr Culbard states that about 1867, or the beginning of 1868, he was introduced to the pursuer by the Major. "He introduced her as Miss Wilson. She occupied separate lodgings from him. It

was in her lodgings that Major Steuart introduced me to her." The witness farther says—"On the occasion when he introduced me to her by the name of Miss Wilson, I said 'Miss How much?' He turned, with a very significant look and shrug of the shoulders, and answered 'Miss Wilson.' He said this quite distinctly—markedly. She must have heard it." The Major, it will be observed, notwithstanding of his boast to Mr Rigg that there was a "method in drinking as in everything else," required a medical attendant wherever he went on account of that unfortunate habit. Dr Culbard was his medical attendant in the north; and this leads me to observe that we have the reliable testimony of Dr Culbard to the respectability of the Huttons, and that I cannot agree with the Lord Ordinary that the testimony of the Huttons is seriously discredited by that of Pople and the Maclagans. The only discrepancy is in a matter of memory as to a loose conversation which occurred about six years before the witnesses were examined, on the occasion when the Major's portmanteau, containing his clothes, was, by his undoubted orders, brought back from the Railway Station, to prevent its being carried off to Edinburgh by the Wilsons, who obviously wished to concuss the Major to leave Birnam along with them, which he had resolved not to do. Hutton, who was a humorist in his way, says he indulged occasionally in "comical stories" to tantalize those who were inquisitive about other people's business"—and consequently he may or may not have given an exaggerated version to Pople and the Maclagans of his services in recovering the portmanteau. But even upon that matter, except as to what is said to have passed about there having been papers in the portmanteau, he is corroborated and not contradicted by these same witnesses. As regards the pursuer's strange theory that there had been papers in that portmanteau which were destroyed, I refer to the observations of Lord Ormidale, which I do not think it necessary to repeat. I only add to them the single remark, that Hutton's statement, in his deposition, that he did not break open the portmanteau and take papers out of it, is proved to be true by the Major's letter on the subject written, at the time, to Mrs Wilson, in which he states that he had himself been forced to break open the portmanteau, as Mr Wilson had thought proper to take his keys with him. He at same time begs for his letters as well as his keys, in terms which indicate that Mr Wilson had carried off his papers as well as his keys. Moreover, all this about Hutton giving a comical version of the portmanteau story has no application to the depositions of Mrs Hutton and her mother, which are throughout clear, consistent, and corroborated by all the other Birnam evidence.

The pursuer and Major Steuart were four times at Birnam together after the alleged marriage—1st, in September and October 1866; 2nd, in March 1867; 3rd, in December of the same year; and 4th, in February 1868. I shall briefly notice each of these visits in their order.

On the first of these occasions old Wilson and the Major arrived first, and lodged with the Huttons. The pursuer arrived on the 27th September. Nothing was said about her being married on that occasion. Major Steuart addressed her as Miss Wilson in her father's presence. By the Major's request a second bed was prepared for Mr Wilson in the Major's bed-room, leaving Mr Wilson's bed-

room to be occupied by the pursuer. The noise made by the three in the course of the evening was complained of, and, consequently, they all went out after midnight and did not return till next day. In the interval the pursuer and the Major made their unceremonious visit to the Hospital, where Sir William was living at the time, and which led to the interdicts to be afterwards noticed. Some-time after midnight, and when the household were all in bed, the Major smashed in the shutter and pantry window of the Hospital, entered headlong over the sink, and, after some angry words up stairs with Sir William, who did not come down, the pursuer was brought in,—introduced as Miss Wilson to the servants in the pantry, where the Major and she had supper and gin, and remained about two hours, and only got back to Mrs Hutton's about seven in the morning. Mr Franc Nichols was in the Hospital on the occasion of this intrusion. But Shaw, the butler, had locked him into his bed-room on the Major's arrival,—a prudent enough precaution, for although the Major was then humourously mimicking Mr Franc Nichol's style of singing the song "I wish I were a bird," he would have been very apt to try to put the bird to flight, as appears from a telegram he sent to that gentleman—"You must leave my father or meet the son." After returning from the Hospital the pursuer left Birnam with her father the same afternoon. The Major remained behind for about six weeks—the attempt to concuss him to leave by carrying off the portmanteau containing his clothes having failed, as already mentioned.

The *second* of these visits to Birnam was in Spring 1867. The Major arrived at his former lodgings, in Mrs Huttons, on 22d March, and remained till the end of June. On 3d April 1867 Mr Wilson addressed to him a remarkable letter in these terms:—"I drop these few lines to let you know that our Maggie has been very bad and brought forth a son, a stout healthy child, on Tuesday night about 12 o'clock p.m. Hoping you are well, I remain, your humble servant." It rather appears that the Major had been absent on a fishing excursion when this letter reached Birnam, and that he had returned there on the night of Saturday the 6th. At all events the first answer we have from the Major bears to have been written on Sunday the 7th, and cool enough it is in all conscience. The only enquiry it contains is the general one—"How are you all?" and the only allusion to the pursuer is in the concluding paragraph thus:—"With kind regards to all, particularly to my kind nurse," alluding, no doubt, to the illness which had confined him to bed for a fortnight or upwards, shortly after he went to live with the Wilsons, and during which the pursuer had nursed him. Upon his angling operations, present and prospective, he enters zealously into details, but of the announcement of the birth of a son he takes no notice at all. Several letters from the Major to Mr Wilson follow, up to 11th May inclusive. In one of them (postmark 26th April) he says:—"I sincerely trust that your wife and self are better," but in none of them is there the slightest allusion either to the pursuer or her child. All this is left inexplicable, if the child was regarded by the parties as the lawful heir to the Baronetcy and the Grandtully estates. More particularly, Mr Wilson, in his private letter to the Major intimating the birth of the child, could have been under no restraint except that which the truth

of the case imposed upon him. A fact of this kind speaks volumes.

The pursuer in the course of this particular sojourn of the Major at Birnam, joined him only for part of a day. This was sometime in June. She arrived about mid-day, was received as formerly as Miss Wilson, and left about six o'clock in the afternoon, probably on account of the child she had left behind. The Major remained, as I have said, till the end of the month. I take no notice of his having been there for a week by himself about the previous new year, because I am confining my remarks to visits to Birnam in the course of which the pursuer was with him for longer or shorter periods.

The *third* visit of this kind was in August or September 1867—the season of the Birnam games. The Major arrived first and lodged with Mrs Maclagan, as Mrs Hutton could not accommodate him at the time. On the day before the games he took a parlour and bedroom from Mrs Harris for the pursuer, whom he described to her as his wife, who was to arrive by the mail train next morning. On the pursuer's arrival he conducted her direct from the train to the games, under the guidance of Mr Harris, to whom he introduced her as Mrs Stewart, and he did not bring her to Harris's house till the evening. This was upon a Wednesday. The pursuer left for Edinburgh on the Saturday following. Mrs Harris says: "The Major was then living in Maclagans', but he slept in my house" (meaning, no doubt, with the pursuer) "both of these nights." The Major obviously on this occasion required to represent the pursuer to Mr and Mrs Harris as his wife, for two reasons: *first*, to get Mrs Harris to allow them to sleep together there; and *second*, to avoid objections to the pursuer taking her seat (as she did) in the ladies' pavilion to see the games. But, while the pursuer was thus Mrs Stewart in the house of Mrs Harris, she continued to be Miss Wilson in the house of Mrs Hutton, where the Major took her to get soup before she left. He afterwards re-occupied his rooms in the house of Mrs Hutton when they became vacant, and remained for about a fortnight.

I pass over the Major's visit to Birnam in December 1867, along with Budd as his servant, for the reason already assigned. His *fourth*, and last visit to which the pursuer was a party, was in February 1868, when they both remained for a fortnight—the pursuer lodging, as formerly, with Mrs Harris, and the Major with Mrs Hutton. On this occasion the pursuer had the child with her. The Major slept with the pursuer only one night in the course of this visit, and that, of course, was in the house of Mrs Harris, the pursuer still remaining Mrs Stewart in that house and Miss Wilson in the other.

At the end of the fortnight the Major suddenly left, by the advice of his agent Mr Jamieson, having made himself the subject of a criminal complaint for another foolish escapade to annoy his father, by entering Murthly grounds and destroying some plants in the garden.

On his departure with Mr Jamieson, the Major left no address behind him, and does not seem to have even made the pursuer aware of his intention to leave. He separated from Mr Jamieson at Perth, taking Budd with him, and went abroad for a time. At the end of six or seven months he returned to England, and on 27th September 1868 he took lodgings at Hythe in the house of Mr Simpson, but spent most of his time in the bar of the Drummond

Arms' Hotel, kept by Mr and Mrs Frost. He died in Simpson's house on the 19th October following.

This leads me to notice the evidence of Captain Cooper, to which importance is naturally attached on behalf of the pursuer, as importing that the Major in his last illness said to him that he was a married man. Budd, knowing the Major's intimacy with Captain Cooper, and that Mr Jamieson was his agent, had very properly telegraphed the Major's critical state to both of these gentlemen, who arrived within twenty-four hours, or less, of each other. Sir William was also telegraphed for, but did not come. The only conversation which Captain Cooper had with the Major, to which much importance is attached, was on Saturday the 17th October. The account Captain Cooper gives of it is very brief, and I shall quote the whole of it *verbatim*. It is this:—"I was in the room from time to time throughout the day, twenty minutes or half an hour at a time. I spoke to him occasionally. I remember that on that day the Major made rather a pointed observation to me. He said, 'You are married, aren't you?' I said, 'Yes, I am, and so are you, aren't you?' He said 'Yes, I am.' He also said, 'Have you got a son?' I said 'No, not yet.' He said he had one, and he said something which led me to believe that he was very proud of his son. That was the whole conversation."

We see from Captain Cooper's letter to Major Steuart, of 24th February 1868, mentioning that his wife had taken possession of the dog which the Major had presented to them, that the Major must have known quite well that Captain Cooper was married, and it is to be regretted that the Captain had not preserved some of the letters which he had about that time received from the Major.

But it would, I think, be very unsafe to hold that the Major's brief answer, "Yes, I am" (supposing Captain Cooper to be under no mistake about the words), made by the Major in the state he was then in, to a question casually put, with no avowed object, is to be taken as equivalent to a deliberate statement that a marriage had taken place between the pursuer and the Major on the evening of the 13th February 1866, and which there is so much in the interval to gainsay. The Major had deserted the pursuer's society about seven months previous to the date spoken to by Captain Cooper. During that period he had written to her, so far as we see, only one brief letter, viz., the letter bearing the post-mark "Bristol, July 26 /68." still addressing her simply as Miss Wilson, and giving her no cue to find out his whereabouts. It is true that at Hythe he was seen to kiss a photograph, which I have no doubt was that of the pursuer, and when the hotel-keeper, Frost and his wife, expressed surprise that he was not married, he showed the photograph, saying, "I shall never marry. There is my wife." The Frosts say they understood him to mean that he was married already; but that this was his meaning is far from clear. He seems rather to have been playing childishly with the subject, as an amusement to his now vacant mind. Mrs Frost admits that he frequently merely tapped the photograph and said, "That's the girl for me." Mrs Frost says that when he came to Hythe he was very ill, and "like a man whose nerves were shattered by drinking," and both she and her husband try to account for the large quantity of drink they were conscious he got in their hotel by saying he gave away more of it than he swallowed. But, from morning to night, during the three weeks he

was at Hythe, he was habitually within the bar of their hotel, and had become so childish from drink that he submitted without remark to Budd calling him a fool, in the hearing of Simpson, for kissing the photograph; and, as Mrs Frost states, he "cried bitterly" about his father's treatment of him, which was a very different style from that in which he had resented that treatment before he went abroad. By the time Captain Cooper arrived, the Major, as the witness himself states, was suffering from "*delirium tremens*, and injuries from having attempted to put a yard-measure down his throat." Captain Cooper likewise says that on the Sunday, "he spat a good deal and passed blood from his throat. A medical man saw him, and we thought him somewhat better on the Sunday morning." If much was supposed to turn on what passed between Captain Cooper and the Major, one would have expected this medical man to have been adduced as a witness for the pursuer, to prove the state the Major was then in; but, unfortunately, we have no such testimony. The Captain says that after he had learned from Mr Jameson that the Major had been found entitled in a law-suit to a considerable sum of money, he suggested to the Major that he should make a provision for his wife and child, and that the Major said "it would be all right," from which he understood that it would be done. This must, I presume, have been on the Sunday, for the Major is stated to have died on the Sunday night.

Now, while I have no doubt at all that Captain Cooper speaks the truth to the best of his belief, I cannot feel implicit confidence that he rightly apprehended what fell from Major Steuart, in the lamentable state in which the Major then was; and it is to be observed that the gallant Captain's inferences and understandings really make up a good deal of his evidence. I think his enthusiastic character, which no doubt helped him to win the Victoria Cross, led him to enter with some enthusiasm into the notion of a marriage as the more honourable of two theories for the reputation of his friend and companion-in-arms. Even as in a question of accuracy between the Captain and Budd, I am not satisfied that the Captain was the sharper of the two, either in apprehending what passed or in remembering it; and I cannot, at all events, agree with the Lord Ordinary in thinking that there is anything more than a discrepancy of apprehension and memory between them. Captain Cooper says that on his arrival he was shown by Budd into the Major's bedroom,—that before going in, and in answer to his inquiry whether it was true that the Major was married, Budd said that "he was married right enough." But Captain Cooper farther says, "When I came out of the Major's room I saw Budd on the landing. I remarked to him that the Major was very bad; and I said 'Has Sir William been telegraphed for?' I also asked 'if his wife had been telegraphed for.' (Q) What did he say?—(A) He said Sir William had been telegraphed for, but Miss Wilson had not." Now it is very improbable that if Budd had meant to affirm the marriage to Captain Cooper as he was going into the room, he would have called the pursuer Miss Wilson to him as he was coming out. The admitted terms of the last answer rather suggest that Captain Cooper had misapprehended the previous answer, and all that Budd ever said or did on other occasions favours the supposition

that, if he said the marriage was all right enough, he meant that nothing of the kind had taken place.

But, whatever may be said upon this point, I must give the preference to the conclusions drawn by Mr Jamieson from his interviews with Major Steuart over those drawn from the same source by Captain Cooper. Mr Jamieson was there as a business man, to ascertain facts and get instructions with a view to prepare a testamentary deed for the Major, who had come into possession of from £11,000 to £12,000. Mr Jamieson saw the Major both on the Saturday evening and on the Sunday, when Captain Cooper says he was better than he had been on the Saturday. Mr Jamieson drew the Major's attention to the propriety of making a settlement, by informing him of his success in the lawsuit, and suggesting that some provision should be made for the payment of his debts. He suggested no beneficiaries; and all that fell from the Major was, "Well, Cooper and you will take charge of the matter, and pay my debts, and see to the boy." Mr Jamieson says that he understood at the time that this was an intimation of the Major's wish, although it did not amount to an instruction, that the whole money, after payment of debts, should be applied for behoof of the boy. Mr Jamieson prepared a draft of a deed, intending to ask the Major whether it accorded with such instructions as he wished to give, and, if he answered intelligently in the affirmative, to get him to sign it as the operative deed. But, although the Major was considered better on the Sunday, Mr Jamieson did not think him, even then, in a fit state for resuming the subject, and so the draft was never submitted to him. It is a misfortune that Mr Jamieson should have lost or mislaid that draft, although it could only have been a record of his own impressions of what the Major would have sanctioned. But one thing is clear from Mr Jamieson's testimony, that in the course of these interviews the Major neither said to him that the pursuer was his wife, nor said anything which led him to think that the Major considered her to be so. It is plain that Mr Jamieson, who was adduced as a witness for the pursuer, was disposed to be as favourable as he could to any appeal the pursuer might make to the good-will of the Major's representatives. But no expression in aid even of that view appears to have fallen from the Major in Mr Jamieson's presence. Both Mr Jamieson and Captain Cooper were under the disadvantage of being examined as witnesses some four years after the interviews they had to speak to. But, luckily, we have Mr Jamieson's understanding at the time recorded in his letter to Mr Galletly, the Major's agent, dated 19th October 1868, which date is sometimes mentioned as the day of the death and sometimes as the day after the death, in consequence, I suppose, of the death having occurred about midnight. The first portion of that letter is so important that I must quote it. It bears—"Our poor friend the Major, to whose deathbed I was called by telegram on Friday, died at Hythe this morning. With the exception of an occasional look and word of intelligence he was not in a state to make any settlement of his affairs, and unless his father, whom I have seen here, is disposed to give effect to his verbally expressed wishes, gathered from occasional moments of isolated consciousness, the executry must be arranged by law. He intended that his friend Captain

Cooper (a very excellent man, who was also at his deathbed), and I, should be his executors; that we should get the money now due to him, pay all advances and expenses and his debts, and then retain the remainder for behoof of the boy. I had prepared such a document, giving effect to his understood wishes, but he was not so long conscious as to be able to execute it."

We all know enough of Mr Jamieson to be satisfied that although his recollection might afterwards become imperfect, the accuracy of what he thus wrote, when his memory was fresh, may be relied on. The inference is irresistible—either the Major when on his deathbed tacitly but intelligently ignored to his man of business all claim upon him by the pursuer in the character of his wife, or he was in such a condition on that Saturday and Sunday that no value can be safely attached to any of the expressions which led Captain Cooper to infer that he regarded the pursuer in that light.

To suppose, indeed, that the Major at any time seriously considered the pursuer to be his wife, or that she really believed herself to possess that character, would be inconsistent not only with the real evidence of facts and circumstances, but with the inference to be drawn from the whole documents in process, which are still more important in a case of this kind than the parole testimony. It is one of the most remarkable features of the present case that the written evidence is all one way. I shall now proceed to consider it—1st, As showing Major Steuart's belief; 2d, as showing the pursuer's belief; and 3d, as showing (although that is by no means of equal moment) the pursuer's father's belief on the subject of the alleged marriage.

And, *first*, as regards the Major's belief—

The letters which have been recovered, addressed by Major Steuart to Mr and Mrs Wilson and to their daughter Mary, seem all to have been written between April 1866 and the end of September 1867. The letters to Mrs Wilson (who died in April 1867) are eight in number, and those to Mr Wilson, nine in number. To Mary there is only one letter, written apparently after the pursuer had left Birnam in September 1867. The evidence afforded by these letters of the state of the Major's mind as to the alleged marriage is only of a negative character. Still the fact is to be considered, that throughout these letters, whenever he refers to the pursuer he uses neutral terms merely—calling her to her parents "your daughter," and, to Mary, "your sister." He never once calls her his wife, or says anything to imply that he considered her to be his wife.

His letters to the pursuer herself, however, go much beyond the category of negative evidence. They must be held, I think, to afford positive proof, so far as they go, that the Major when he wrote them did not consider the pursuer to be his wife, unless some satisfactory reason can be assigned why a man should uniformly address his wife, and his wife should acquiesce in being addressed, as if she were an unmarried woman. With the exception of one letter, which is undated, all the Major's letters to the pursuer which have been recovered are subsequent in date to the birth of the child. The earliest of them, viz., that of 23d April 1867, is only three weeks after the date of the birth. The latest is dated 26th July 1868, being upwards of fifteen months after the birth

But none of them so much as mention the child, nor contain a word suggestive of the matrimonial tie. They are fifteen in number, including the one which is undated, and which commences with the words "Dear Miss Wilson." The next seven, which are all prior to September 1867, commence with the words "My dear Miss Wilson," and conclude with the words "yours very truly," sometimes repeating towards the close the words "Dear" or "My dear Miss Wilson," and sometimes not. Then there follow six, in the course of September 1867, all commencing "My dear M." (probably abbreviated for Maggie), and ending "Yours" or "Yours ever." There are also three telegrams bearing to be from Major Steuart to "Miss Wilson," the last of which is dated 25th December 1867: Then there is a gap of seven months, during which the parties did not at all communicate, followed by the letter I have already specially noticed, of 26th July 1868, commencing "My dear Miss W.," which is of great importance, as being the last the Major wrote to the pursuer, and bringing down the series to within about three months of his death.

It is said that the style of these letters is equally inconsistent with the supposition that the Major regarded the pursuer as his mistress as that he regarded her as his wife. That can only mean one or both of two things—*first*, that the letters do not contain the endearments which might be expected to be used towards a mistress; or *second*, that they do not contain allusions to the cohabitation which was going on between the parties. In neither view does the remark carry force to my mind. The Major was not a man to write "a sonnet to his mistress's eyebrow." The pursuer was a convenience to him, but there is no reason to think that he regarded her in any more sentimental or different light than he had done her Irish predecessor or the mother of "poor John," whose primogeniture, he explained to Mrs Hutton, the elder, gave him a preferable claim to be his successor. He had obtained possession of the pursuer's person without writing love letters, and it is not surprising that these did not follow. As to the absence of allusions to their cohabitation, these could only have been expected to occur if the Major had written his letters when he was drunk, which it is plain, from the style of them, he did not do. When weakened by drink and *delirium tremens* he may have become a different sort of man. But when vigorous and sober he was like Hamlet when the wind was northerly—he knew "a hawk from a handsaw."

Moreover, whatever might have moved the Major sometimes to pretend and sometimes to deny, to the outer world, the existence of a marriage, it is inconceivable that, in his private letters to the pursuer, he should have uniformly insulted her by addressing her (inside as well as outside) as Miss Wilson, if he had really regarded her as his wife. The suggestion that he could not trust any of the Wilsons with written evidence of the fact of the marriage, lest they should divulge it, cannot possibly be listened to in the circumstances. He had himself aided them in spreading abroad the report of a marriage, and if the marriage had been a reality no satisfactory or even plausible reason has been assigned for making a mystery about it.

The only intelligible theory would be, that on the night of the 13th February 1866, the Major had, intentionally, deceived the pursuer into the be-

lief of a marriage which he had secretly determined to repudiate.

That is not a theory put forward by the pursuer but we shall see, I think, that it could have no foundation in fact, when we pass, as I shall now do, from the consideration of the Major's state of mind, to the consideration of the pursuer's state of mind, on the subject of the marriage, as indicated by the documents in process and the real evidence afforded by the ascertained facts of the case.

And, in the first place, as to the correspondence between the pursuer and the Major,—it appears from Mr Galletly's deposition as a haver that, as agent for the pursuer, he had at one time in his hands from thirty to fifty letters addressed by Major Steuart to the pursuer, all of which he returned to her. She has produced, under her examination as a haver, only fifteen of these, which I have already particularised, and she deposes that, if there were any others, she does not know where they now are. She further deposes that she used to write letters to the Major, and we see from his letters to her that this was so. None of her letters to him have however been recovered, and perhaps that is not surprising, because, while the parties were cohabiting together, the Major seems to have had no separate repositories. There is nothing to warrant the supposition that the pursuer's letters to the Major had been wilfully destroyed by either of the parties. But the terms of the Major's letters to the pursuer, extending over a period of about fifteen months, raise an irresistible inference that she had not repudiated or complained of the style in which he habitually wrote to her. If she had done so, some allusion to her complaints would undoubtedly have appeared in one or more of the Major's letters to her. There is no such allusion, and the pursuer does not allege that she ever made any complaint or remonstrance on the subject either to the Major or to third parties, who likewise addressed their letters to her as an unmarried woman.

And here I must go chronologically back to notice a document earlier in date than any of these letters, and to which I cannot do otherwise than attach importance. I mean what bears to be "The complaint of Margaret Wilson, residing in Elder Street, Edinburgh," with concurrence of the Procurator-Fiscal, presented to the Police Court in October 1866, and subscribed by the pursuer in her maiden name "M. Wilson." The persons complained of were two of the pursuer's neighbours, Mr and Mrs Laing, and the opprobrious epithets complained of were chiefly, if not entirely, with reference to her alleged illicit cohabitation with Major Steuart. It is inconceivable, I think, that if the pursuer had then believed herself to be the wife of the Major, she would have come into Court in the avowed character of an unmarried woman, with a written complaint, the substance of which, according to her own witnesses—Agnes Forbes and John Alexander—was that Mrs Laing had called her Major Steuart's whore.

As to what passed in Court—there is some confusion in the evidence, owing partly to there having been two complaints—the one which I have just mentioned, which was dismissed, and the other at the instance of the Procurator-Fiscal against the pursuer's sister, Jane Wilson, for riotous conduct, which resulted in a fine being imposed on Jane of £1, with the alternative of three days' imprisonment. Agnes Forbes and John Alexander both

depone that they heard the pursuer say on that occasion that she was married to Major Steuart, but in other respects they differ between themselves. Agnes Forbes depones that what she heard occurred in the course of Jane's case, and that she is "quite sure the two complaints did not come on on the same day." Alexander, on the other hand, depones that the two complaints did come on on the same day, and in this he is confirmed by the dates of the judgments. Agnes Forbes further says that what she heard "was not said in answer to any question put to her (the pursuer) by any one in the case, but in reply to a remark which was made by a man there," while John Alexander says the statement was made in answer to a question put by Torry, the agent for Mrs Laing. Now Agnes Forbes is a witness in whose veracity I feel no confidence whatever; and Alexander, who seems to have been very friendly with the Wilsons, had obviously, after the lapse of six years, no distinct recollection of the circumstances, for he says, "I think the magistrate was Bailie Skinner;" whereas the record shows that the magistrate, in both cases, was Bailie Mackie.

Against the conflicting and inaccurate testimony of these two witnesses (Forbes and Alexander) we have the concurring testimony of four witnesses, viz., Torry, the agent, Mr and Mrs Laing, and James Hunter, to the fact that Torry asked the pursuer whether she was married to Major Steuart, and that she deponed she was not. The Wilsons seem to have had an idea that the Laings lived in the "gay" house of a Mrs Scott, No. 9 Elder Street, but that was a mistake. The Laings were respectable people, living in No. 11, the husband being a brassfounder in a good establishment, and Hunter seems also to have been a respectable tradesman, and gives his evidence about the Wilsons in a cautious and moderate manner, which impresses me favourably as to his character and credibility. At all events, the written complaint which, in place of bearing to be at the instance of Mrs Steuart and her husband, bears to be at the instance of and is signed by Margaret Wilson as an unmarried woman, is irreconcilable with the supposition that either she or the Major considered that there had been a marriage between them seven or eight months previously, and that they were then living together as husband and wife.

The next document in point of date is one the importance of which cannot well be overrated,—namely the entry in the statutory Registration Book of the birth of the pursuer's child as illegitimate, under date 8th May 1867. It is of little moment whether the pursuer at first proposed to have the child entered as legitimate or not. That is a thing commonly enough attempted, and occasionally with success, by women who know perfectly well the falsehood of the representation they are making. But I have not met with an instance, either in the criminal or civil Court, of a married woman falsely recording her lawful child as illegitimate. The unanswerable fact, in any view, remains, that the schedule bearing that the child was illegitimate was authenticated by the signature of the pursuer, as the mother of the child, under her maiden name of Margaret Wilson, and that the birth stands recorded accordingly.

Then we find that, in October 1866, the violent nocturnal intrusion of the Major and the pursuer, in her avowed character of Miss Wilson, so indecently made into the Hospital, was forthwith

followed by two separate Notes of Suspension and Interdict at Sir William Steuart's instance,—the one against the Major, and the other against the pursuer as "Margaret Wilson, daughter of Alexander Wilson, fishing tackle maker in Edinburgh, and residing with him,"—that interim interdict was granted by the Lord Ordinary against the pursuer, on the 6th of that month,—was continued by Interlocutor dated 1st February 1867, and was declared perpetual on 5th March same year, when the pursuer was personally decreed against for £9, 15s. of expenses, and 13s. 10d., as the dues of extract; and that this decree was extracted on 8th November thereafter, all without objection on the part either of the pursuer or the Major, who would, I take it, have been too glad to have taken the opportunity, if the facts had afforded it, of a little victory over Sir William, by objecting to this decree as incompetently directed against a married woman whose husband was not made a party to the legal proceedings against her.

Next, we have the very important correspondence between the pursuer and the Major's law agent Mr Jamieson, commencing on 15th October 1867, and which I shall consider, in the first instance, so far only as it passed in the lifetime of the Major, and terminated, for the time being, by an intimation of his death on 10th October 1868. In the course of that period we have fourteen letters addressed by Mr Jamieson to the pursuer as Miss Wilson, and an equal number addressed by the pursuer to Mr Jamieson, in all of which she accepts the designation he had given her and subscribes herself "Margaret Wilson." There are also, during the same period, three formal receipts granted by her to Mr Jamieson, in her maiden name, for money received by her, dated respectively 21st February, 23rd May, and 10th October 1868.

In this instance we have both sides of the correspondence; so that we see, upon the face of it, that the pursuer indicated neither surprise nor displeasure at being addressed by the Major's law agent as Miss Wilson, and made no remonstrance whatever on that subject; and that, on the contrary, she homologated that mode of addressing her by habitually responding to it in the same name and character,—thereby at once acknowledging her unmarried position and confirming the inference, if confirmation of it were required, that in her letters to the Major she had been equally acquiescent. How this can be accounted for if she knew she had been married to the Major on 13th February 1866 (and there could have been no such marriage without her knowing it), I am not able to conjecture. The allowances she was receiving through Mr Jamieson were inadequate even for the child, and if she had believed herself to be a wife as well as a mother, it is inexplicable that she should not have said so.

She knew at this time that whatever name she might occasionally have gone under at Birnam, Major Steuart had there branded her as not being his wife in the most offensive of all ways, viz., by placing her in one lodging while he himself lived in another. She knew that on the envelopes of his letters posted there he had uniformly represented her as Miss Margaret Wilson, and by addressing her inside in the same way had shown that this was no mere blind to the public. She knew that his agent, Mr Jamieson, was writing and acting on the assumption that she was the Major's mistress and not his wife: and, knowing

all this, she endorsed the accuracy of that assumption by responding to Mr Jamieson's letters in her maiden name. The very last writing which passed between her and Mr Jamieson in the Major's lifetime was a receipt signed "Margaret Wilson," acknowledging "the sum of £3 stg. to account of alimony for my boy," being the ordinary terms of a receipt for the alimony of an illegitimate child. Nothing could be so galling to a wife as to be subjected to the indignities to which the pursuer would have us to believe she habitually submitted for years in the Major's lifetime, and it would require some very unusual, as well as powerful reason to account for her having patiently done so; especially when her pecuniary interests came to operate in the same direction with the womanly feelings which she must be supposed to have derived from nature. And yet it must, I think, be conceded that of any reason of that kind we have no proof whatever.

Thus much as to the state of matters during the Major's lifetime. But what shall be said of the pursuer's conduct after his death?

Up to that time neither the pursuer nor her father, nor any one on her behalf, had ever brought forward the allegation of a marriage contracted on the evening of the 13th February 1866 as a ground of objection to the Major's insulting conduct and final desertion. But surely the judicial imagination (if the phrase be allowable) which can conjure up some meaningless and unintelligible compact to account for that bitter restraint during the Major's lifetime must be at fault to account for its continuance after his death.

Yet for three years and a-half, or thereby, after the death of the Major, the pursuer's actings and writings continued to be equally inconsistent with the supposition that she believed herself to be the Major's widow, as, in his lifetime, they had been inconsistent with the supposition that she believed herself to be his wife. It does not appear that, until she raised the present action in April 1872, she adopted any active proceeding whatever for asserting her alleged rights, and certainly it was not till then that the allegation of a *de presenti* marriage on 13th February 1866 was specifically and formally put forward.

Before I comment upon the written evidence applicable to the period between the date of the Major's death and the date of the action, it is necessary that I should notice, in the order of time, that Mr Robert Steuart, a cousin of Sir William, and a gentleman of undoubted respectability, deposes that when the pursuer called on him, with her sister and the child, about 8 or 10 days after Major Steuart's death, he asked her if there was any marriage between her and the Major, and she replied "she was sorry to say there was not." There is no contradiction of this by the pursuer's sister, who only says that she did not hear the pursuer say so; and she explains that she was hushing the baby, which was crying, and consequently did not hear all that passed. Mr Robert Steuart farther states that the pursuer had sent in her name as Miss Wilson; and this is confirmed by the housekeeper, Christina Kay, who could be under no mistake upon the point, because she says that when the pursuer gave the name of Miss Wilson she asked whether it was not Mrs Wilson, when the pursuer said "No, Miss Wilson, a friend of Major Steuart." This witness farther deposes that, sometime after this, Mr Robert

Steuart showed her a letter from the pursuer (which was not preserved) asking assistance, and stating that if Major Steuart had lived he intended to make her his wife.

Some six months, or more, after her application to Mr Steuart, the pursuer made a similar application to Mr Rigg, to intercede with Sir William for some allowance for the support of her boy. Mr Rigg being asked—"Did she make any suggestion that she had any claim herself to the position of widow of Major Steuart?" His answer is, "None whatever. (Q) Or that you should make any claim on Sir William on her account?—(A) No; it was entirely in regard to the boy; of that I have a distinct recollection."

Then it appears from Mr Jamieson's letters of 29th October and 17th December 1868 that he had still continued to address the pursuer as Miss Wilson. He had been negotiating with the Major's father, Sir William, for some assistance for the pursuer and her child, but this not being successful, the pursuer, nearly a year thereafter, addressed to Sir William the letter of 1st November 1869, craving pity and assistance for his "own son's child." This letter, which is subscribed in the pursuer's maiden name, bears "I have letters and other proof that the Major acknowledged me as his wife, also his child." This is expressed somewhat equivocally, but I do not think the pursuer meant at this time to put forward a claim to the character of the Major's wife. We know that it is not true that she had letters of the kind here alleged, but it is not, in a literal sense, untrue that the Major had acknowledged her as his wife, inasmuch as he had said to various persons, at different times, that she was so. We have, however, the written evidence just detailed to show that, throughout the Major's lifetime, she had not been induced, either by these acknowledgments or otherwise, to believe that she possessed that character; and we have a great deal which followed this letter to show that her notion upon that point had really not then been changed.

The expression she used in this letter may, however, have contributed to induce Sir William to think it safe, while proof was yet extant, to resort, as he did, to an action of putting to silence, with a view to exclude all doubt of his own right to the executry estate of his deceased son, and all pretensions to legitimacy on the part of the pursuer's child. It is by no means a conclusive fact, but still it is a fact in the case, that no defences were stated against this action, and that, after proof led in it, decree in absence was allowed to go out in terms of the declaratory conclusions of the summons.

A more pregnant fact is, that the pursuer, having been incarcerated in the prison of Edinburgh for non-payment of a debt incurred by her to a Mr Mackay, a jeweller, she presented and subscribed a petition to the Magistrates for alimony, under the Act of Grace, in her maiden name of "Miss Maggie Wilson;" emitted the usual oath, in the same name and character of "Maggie Wilson;" and adhibited her signature to the oath as "Margaret Wilson," and on that footing had an alimony awarded to her under date 21st June 1870.

In the meantime, she had, in the same month of June, raised a summons against Sir William Steuart, which no man of business can read without seeing that it is an action, in the ordinary form,

for inlying expenses and aliment at the instance of one professing to be the mother of an illegitimate child, and altogether inconsistent in its terms with the allegation of marriage now put forward. The interlocutors pronounced upon it, of 20th July and 22d November 1870, proceed accordingly on that footing, and award £10, 10s. of inlying charges, and £14 per annum of aliment, until the child should attain the age of twelve years, when the mother's right to aliment for a bastard child is generally held to cease.

It is not necessary to enter particularly into the question how far the pursuer is to be presumed to have had personal knowledge of the nature and terms of this action, because, whatever might be said on that point, it cannot be doubted that the receipts which followed, signed by the pursuer herself, in her maiden name, are good evidence against her that she knew she was receiving and discharging the money, not as the widow of Major Steuart, but as the mother of an illegitimate child of which he was the father.

The first of these receipts has prefixed to it a copy of the Lord Ordinary's interlocutor of 20th July 1870,—and acknowledges receipt of £10, 10s. decreed for in the action at her instance against Sir William Drummond Steuart “conform to interlocutor of which the foregoing is a copy.”

The second has prefixed to it a state of aliment, with interest thereon, “due by the defender to the pursuer *in causa* Margaret Wilson, Prospect Street, Edinburgh v. Sir William Drummond Steuart,” executor of Major Steuart deceased; and the receipt itself acknowledges payment of £57, 9s. 8d., being the aliment due, with interest up to 2d October 1870, “in terms of Lord Ormidale's interlocutor of date 22d November 1870.”

The third receipt acknowledges payment of £3, 10s. “being quarter's aliment of the male child of which Major William George Drummond Steuart was the father, falling due on the 2d inst.”

The fourth, fifth, and sixth of these receipts are in the same terms with the third, and all of them, as I have said, are subscribed “Margaret Wilson.”

Now, the pursuer, as we see by her letters, is an educated woman. She could not have read these receipts without seeing, not only that they referred to the interlocutors in the action at her instance against Sir William Drummond Steuart, but that they referred to the child and its aliment in terms different from what would have been used had the child been the offspring of a marriage between her and the Major.

No doubt the last three of these receipts are dated subsequent to the pursuer's marriage to her present husband, which took place on 12th March 1871. But that marriage had been celebrated in England, where the parties resided, and had not been made known to Sir William's executors, from whom it was, no doubt, the pursuer's policy to obtain payment with as little trouble as possible, so long as she could get it.

The register of that marriage, now that access has been had to it, is, however, an important document in the case. It was necessary, by the English marriage law, that the parties should respectively state whether they had or had not been previously married, and it appears, from the register signed by the pursuer, and supported by the Registrar's evidence, that on that solemn occasion the pursuer represented herself, not as a widow, but as Margaret Wilson, spinster, and was married on that footing accordingly. However the fact of her sub-

scribing some of the other documents in her maiden name might have been explained away, or the suggestion urged that she might not have attended to their terms, no such explanation or suggestion can be made with reference to this document, which records what she personally declared and deliberately authenticated by her subscription. The signature “Margaret Wilson,” in the register, unquestionably purports that she was not and never had been Margaret Steuart, and, coming after her other signatures in the same form, confirms the natural presumption that these also had been adhibited on that footing.

It may very well be that, both in Major Steuart's lifetime and after his death, the pursuer continued, occasionally, to represent herself to various persons as the Major's wife or widow. But it is not the less remarkable that, whenever writing comes to be used by her, all representations of that kind entirely disappear. If the pursuer had really had a serious and abiding belief that there had been a marriage, it is not to be credited that she would have uniformly committed herself to the reverse in her writings. It is just where we would expect confirmation of her claim, if well founded, that we find the most important contradictions of it,—that is to say, in the written evidence, which, although not all equally strong, is, as I have already said, all one way, and seems to me irreconcilable with the allegation, now exclusively relied on, of a marriage on the night of the 13th February 1866.

But not only is the written evidence inconsistent with the supposition that either of the two principal parties considered that there had been a marriage on the night in question, but it is inconsistent also with the supposition that the pursuer's father entertained any such belief.

Shortly after Major Steuart's death, old Wilson rendered an account to the Major's executors, amounting to £195, for the Major's bed, board, and washing, at the rate of 30s. a-week from 8th August 1865 to 7th February 1868.

He also rendered a separate account, in name of the firm under which he carried on business, for cash lent and articles furnished to the Major, to the amount of £585 odds (exclusive of interest), said to have been incurred in the course of less than three years, viz., between the end of June 1865 and the 4th of May 1868. Many of the items in that account are of an extraordinary description. For instance, within a period of 18 months, viz., between the end of June 1865 and the end of December 1866, the Major is charged for about 170 sticks and canes, varying in price from a few shillings to six guineas each, and this while he was known to old Wilson to be harrassed by his creditors,—part of the time in jail for debt (during which the purchases in question still went on), and all along, if the account be a true account, living upon borrowed money. Unscrupulous, however, as old Wilson obviously was in making up these accounts, there is not in either of them a single item of charge for board or disbursements to or on account of the Major's wife, which is, to say the least of it, very unaccountable if old Wilson believed there was a wife in the case.

But apart from these accounts, we have a document under the hand of old Wilson, which of itself is conclusive that he entertained no such belief. I refer to the deed of settlement executed by him on 26th May 1868, distributing his means amongst his children *nominatim*.

In that deed he describes and designs the pur

suer simply as his daughter, "Margaret Wilson." The draft, which is in process, had been previously submitted to him. It shows the name of another of his daughters (Mary) to have been altered from Wilson to Wylie, in consequence, no doubt, of her being a married woman—her husband being Mr Wylie, an actor in the Operetta House in Edinburgh. This alteration was made, as Mr Denholm, who prepared the deed, explains, on Mr Wilson's information, leaving the other names unchanged. The extended deed was read over to Wilson before it was executed, but he suggested no farther change on the names or designations beyond what had been made on the draft. In the following year, viz., on 19th March 1869, the deed just mentioned was superseded by a trust deed and settlement executed by Mr Wilson, whereby he made special bequests of jewellery, &c., and a distribution of his general means and estate amongst his surviving children, including the pursuer. Mr Denholm says that in drafting this new deed he probably assumed the accuracy of the names as they stood in the former deed, but he also says that he had long consultations with Mr Wilson in preparing the new deed, and we must assume, what no doubt was the fact, that, besides seeing and considering the draft, the extended deed would be read over to or by Mr Wilson, as the former deed had been. Yet here again we find that the pursuer stands named and designed simply as the grantor's daughter, Margaret Wilson.

Now, if Mr Wilson had thought that, on the night of the 13th February 1866, a marriage had taken place, in his presence, between the pursuer and Major Stewart, it is inconceivable that, while directing the name Mary Wilson to be altered to Mary Wylie in the deed of May 1868, he would not have directed the name Margaret Wilson to be altered to Margaret Stewart, and equally inconceivable that, if by some unaccountable overlook, he had omitted to do so in that deed, he would have committed the same error a second time in his deed of March 1869. Mr Wilson was far too sharp a man, and too anxious to have had the Major for a son-in-law, to have neglected either of these opportunities of stamping his own *imprimatur* on the marriage, if he had really believed that there had been a marriage between the parties.

Of course, if the parties themselves did not consider that they were contracting a marriage on the night of the 13th February 1866, it would matter little what Mr Wilson thought on the subject. But if Mr Wilson was conscious there had been no marriage, it would be difficult to suppose, in the circumstances, that the parties themselves thought there had been.

Thus, then, apart from the parole testimony, we have:—

1st, A series of documents, under the hand of each of the two parties, in the course of the two years and eight months during which both of them survived the 13th February 1866, inconsistent with the supposition that either of them considered that a marriage had been contracted between them on that night.

2d, A series of documents under the hand of the pursuer, and of judicial proceedings to which she was a party, in the course of the three years and a-half which immediately followed the death of Major Stewart, still more palpably inconsistent with the supposition that she believed she had been married to the Major on that night.

3rd, Written evidence, under the hand of the pursuer's father, that he knew quite well that there had been in reality no such marriage—Although his belief is, of course, not the point to be determined in the case.

The vital point at issue is, What did the pursuer understand and believe on the night of the 13th February 1866?

And here it must never be forgotten, that according to our law, an irregular marriage, *per verba de presenti*, could not possibly be contracted without the pursuer knowing that it had been so.

In the case of marriage by promise *subsequente copula*, the law presumes the interchange of consent to marriage, and allows no inquiry into the fact. In the case of marriage by habit and repute, although one of the parties may think the repute insufficient, and that there is no marriage, that will not prevent the legal result. But in the case of marriage by the mere interchange of words before witnesses, the knowledge and belief of the parties at the time, that they are then and there contracting a marriage, is of the essence of the contract; and if it appears that the party asserting the marriage did not, at the time, believe that there was a marriage, that party cannot possibly succeed in a declarator of marriage.

No doubt, in a regular marriage *in facie ecclesie*, which, in *Jolly v. M'Gregor*, Lord Eldon defined to be a marriage by a clergyman after due proclamation of banns,—it is still the consent which makes marriage. But the difference is this—that in a regular marriage the parties cannot be heard to say that they did not mean and understand marriage; whereas in an irregular marriage, *per verba de presenti* merely, the understanding of the parties is equally a subject for inquiry and proof with the words said to have been used; and if it appears that the parties did not, at the time, think there was a marriage, the result necessarily is (laying out of view cases of fraud or deception) that the mutual consent is wanting which alone makes marriage.

Of course, if the pursuer was married on the night of the 13th February 1866, she could not unmarried herself by anything afterwards said or done. But if she had known and believed the fact of marriage at that time, it was not a fact which she could have afterwards forgotten; and the competency is undoubted of testing whether she did know and believe it at the time, by inquiring into all which followed, as well as into all which preceded and took place upon that occasion. The conduct of the parties, down to the date of judicially asserting the marriage, is, in fact, part and portion of the proof of the marriage in every action of declarator of marriage said to have been irregularly contracted *per verba de presenti*. The cases of *M'Innes v. More* (2 Paton 598), and *Taylor v. Kello* (3 Paton 56), as decided in the House of Lords in 1781 and 1787, afford examples of this doctrine as applied even to written documents explicit in their terms.

The case of *Jolly v. M'Gregor*, as decided in the same high tribunal, 20th June 1828 (3 W. & S. 85), affords a striking instance of the application of the same doctrine to an irregular marriage, even when celebrated *in facie ecclesie*. The clergyman there deliberately asked and received the assent of both parties in the usual manner, and solemnly declared them married persons in presence of his wife and daughter as witnesses. The only irregularity was that, although a genuine certificate of proclamation

of banns was produced to the clergyman, there had been no actual proclamation, it being then a common practice to give out such certificates without the form of publication being actually gone through; and we all know that innumerable marriages, unchallenged and unchallengeable, were celebrated in that precise manner.

The lady in the case of *Jolly v. M'Gregor* had previously slept upon one occasion in a double bedded room in which her then suitor, M'Gregor, occupied the one bed and she the other,—he had been in the habit of sleeping in her father's house,—she was hesitating at the time between him and another suitor whom she afterwards married,—there was neither force nor fraud resorted to by M'Gregor, and all she alleged against the freedom of her consent was that M'Gregor had said if she did not go with him to the clergyman he would do some injury to her father, and put away the title deeds (which were in M'Gregor's custody) of her father's property, to prevent it from being made over to her, she being a natural child although living in her father's house. This was but a weak story in itself, for she must have known that these things, in so far as within M'Gregor's power at all, might just as well follow a repudiation of the marriage as follow her refusal to go with him to the clergyman. Yet the subsequent conduct of the parties, and particularly M'Gregor's delay in judicially asserting his claim, were held sufficient to show that there had been no marriage.

Lord Lauderdale, in delivering judgment in that case observed—“The ceremony which is proved is such, taking into consideration all the conduct of the parties, before and after, as, in conformity with your Lordships' former decisions, it is impossible you can say proceeded on that free, that deliberate, that real, and that immediate consent to enter into a marriage, which is the species of consent required in an irregular marriage under the law of Scotland.” (p. 187).

The principle thus affirmed was, if possible, still more explicitly enunciated by Lord Eldon, who said—“Now, my Lords, that you may, with respect to what are called irregular marriages, look at prior facts and circumstances; and that you may look at the subsequent facts and circumstances, I take it to be quite indubitable.”

The Lord Chancellor (Lyndhurst) entirely concurred in these opinions. In particular, with reference to the ceremony before the clergyman, he said, “Upon that point you are entitled to look at the conduct of the parties before that meeting, and you are entitled to look at the conduct of the parties subsequent to that meeting.” It was only by doing so that their Lordships came, or could have come, to the conclusion that there was no marriage, for, if attention had been confined to the meeting itself before the clergyman, the marriage could not have been impugned. In that respect the case stands in strong contrast to the drunken ceremony alleged to have taken place here. Old Wilson, with his “very terrible countenance” of wrath—George Wilson watching eagerly for something capable of being construed into what he had come to hear, and shutting his ears to everything else,—the poor Major, with tears in his eyes,—“greetin' fou,”—as our Scotch dialect would graphically express it,—frightened, but trying to look (as Mrs Kellett thought) as if he could be frightened at nothing; and the pursuer and her father, glad of any sort of cover and excuse which might sanction her going to bed

openly with the Major, getting rid of the irksome if not exploded mystery of the snib, and preserving at the same time the hope of a marriage looming in the future, in place of breaking for ever with the Major, by his being driven to the door, sometime about midnight, leaving his cups and his comforts behind him. Such a demonstration surely admits of, or, I should rather say, requires construction by the prior and subsequent conduct of the parties, much more than a marriage ceremony before a clergyman, perfect in all its parts, soberly and solemnly gone through, in the usual and appropriate manner and terms, such as occurred in the case of *Jolly v. M'Gregor*.

Upon the whole, the conclusions I arrive at are—1st, That we can with no confidence hold that we have before us either a full, or, so far as it goes, an accurate account of what passed on the night of the 13th February 1866, particularly as regards the words which are sought to be construed as importing a marriage. 2d, That, even assuming the words relied on to have been used, they do not, in their terms, naturally, and still less, necessarily import marriage. 3d, That whatever the words used may have been, the subsequent conduct of the parties, viewed in connection with their conduct at the time and previously, sufficiently shows that nothing took place between them on the night in question which led them (as Lord Lauderdale expressed it in *Jolly's case*) “in their own minds to the conclusion that they were married persons.” 4th, That in no view is there that full, reliable, and satisfactory evidence of an irregular marriage, *per verba de presenti*, which can alone be held sufficient to establish such a marriage.

I look upon the case as involving the important question whether we are to apply or reject the principle of decision laid down as applicable to all such irregular marriages by the House of Lords, in reversing the decisions of this Court in the three cases I have cited of *M'Innes v. More*, *Taylor v. Kello*, and *Jolly v. M'Gregor*. The principle on which a rule of law is administered is often as important as the rule of law itself. So long as the principle of these judgments is legitimately carried out, our rule of law—that mere consent, however interchanged, and however proved, makes marriage,—although it may be attended with some inconveniences,—is favourable to the ends of truth and justice. But if that principle is to be laid aside,—if, after the death of one of the parties, and at the lapse of a number of years, the necessary consent which is to affect the *status* of the survivor, and the succession of the offspring (if there be any) to the highest titles and the most valuable estates, is to be spelt out of fragments of an occult family revel, then for the first time brought to light, and in the face of the real evidence deducible from the whole subsequent lives and writings of the parties, I confess I think the result must be dangerous to the best interests of society.

My opinion is that the interlocutor should be recalled, and the defenders assoilzied.

LORD ARDMILLAN—The late Major Drummond Stewart died on 19th October 1868. The pursuer Margaret Wilson, now Robertson, sets forth in the first article of her condescendence that in March 1871 she was married at Canterbury to Mr Robertson, and it is proved that she was so married under her maiden name of Margaret Wilson, and

as a "spinster." This action of declarator was raised on 27th April 1872, after Major Steuart's death, and after her own marriage to Robertson, and it is founded on an averment of a marriage between Major Steuart and the pursuer on the 13th of February 1866.

It is to be observed, that among the different modes of instructing the contract of marriage known to the law, there are four modes which are quite out of this case,—not alleged or suggested. 1st There is no public or regular marriage in *facie ecclesiae* or under religious sanction. 2d. There is no interchange of written acknowledgments of present marriage. 3d. There is no proof of cohabitation as man and wife, and of the parties being held and reputed as married persons. 4th. There is no marriage by promise *subsequente copula*, that is, by copula conceded on the faith of a promise.

The first three of these modes of constituting marriage are not in this case alleged or suggested.

It is important also to observe, that the 4th mode, that is the constitution of marriage by promise *subsequente copula*, is not here alleged or suggested. It could not be. The law excludes it. There is no proof by writing of a promise. The man said to have entered into marriage is dead. No action was brought while he lived. No proof of promise competent and sufficient could possibly be now adduced. No action founded on alleged promise could now be instituted. There is no written proof of promise, and the man is now dead. The action on such a ground is excluded. This is all quite settled in law. The importance of it will afterwards clearly appear. At present it is sufficient to observe that while a verbal promise of marriage, if assumed or inferred, might explain some portion of the conduct of the parties, and might during the man's life have sustained in the woman and her family an expectation of marriage, it could not, though followed by copula, constitute marriage; and, besides, after the man's death a promise, however given or proved, as distinguished from the interchange of present mutual consent, could not be founded on as sufficient in an action of declarator.

All these four modes of instructing the constitution of marriage being excluded, one mode remains. That mode is, by proof of the interchange of serious and deliberate consent to a present marriage—a proceeding without previous notice, without the presence of a clergyman, without the solemn sanction of religion.

Such a mode of instructing marriage is recognised by Scottish law; and a marriage, when sufficiently instructed by proof of such a mode of constitution, is as valid and effectual as the most regular marriage. Yet it is only a substitute for a more becoming and more conclusive mode of proof.

Marriage, though in one aspect a civil contract, is a Divine institute. The relation of marriage is a sacred relation. The contract of marriage is the most important, the most solemn, the most abiding contract into which a man or woman can enter; and the certainty of the matrimonial contract, the assurance of it to the parties contracting, and the unequivocal character of the relation formed, and of the subsequent intercourse, is matter of the gravest interest, personal, social, and moral. Marriage is generally entered on in Scotland with the proprieties, the decencies, and the simple solemnity, of a religious service. It is a mistake to suppose

that irregular marriage, in any of its forms, is in Scottish estimation and feeling, even among the humblest classes, held to be as becoming, as desirable, or as respectable, as a marriage under the sanction of religion. It is not so. It is, however true that our Scottish law, proceeding on the principle that, not by the ceremony, but by the mutual consent, is marriage constituted, does recognise as sufficient, when clearly and satisfactorily proved, the verbal interchange of mutual consent. Such mutual consent must be serious, deliberate, and *de presenti*, not *de futuro*, and it must be very clearly and conclusively instructed. It is permitted and accepted by law as a substitute for a more solemn, a more appropriate, and a more becoming procedure. When such proof of interchange of verbal consent is founded on as instructing marriage, then the qualities of seriousness, of mutuality, and of present and concurrent will, must be made manifest. In no case can these qualities be taken for granted, or be lightly assumed. They must be clearly proved. But then, if they all exist, it is not very easy to perceive why the parties mutually, seriously, deliberately entering into marriage, should have proceeded in that manner instead of by regular marriage, and therefore the whole history of the matter must be investigated. In every case, the evidence must be carefully and scrupulously weighed in connection with all the facts and circumstances of the case, previous, present, and subsequent to the alleged marriage; for these, indeed, form the real evidence as distinguished from the testimony of witnesses.

In accordance with the view which I have now explained, I have approached the consideration of the proof in this case under a strong conviction that the burden of proof rests on the pursuer—that clear and conclusive evidence of her averment of marriage must be required—that no material part or quality of the necessary evidence can be easily assumed,—and that the whole conduct of the parties from first to last must be taken into consideration in weighing the evidence. The pursuer's counsel appeared to object to our taking into account the conduct of both parties, and particularly of the pursuer herself, after the date of the alleged marriage and after the death of Major Steuart. I think it important and necessary to take this conduct of the parties into consideration along with the rest of the evidence, and to gather what aid we can from it in seeking for the truth in regard to the alleged interchange of matrimonial consent. I am quite aware that if a marriage by interchange of present consent—serious, deliberate, and mutual—has been clearly proved, then the subsequent conduct of either or of both of the parties cannot annul the marriage. The parties cannot unmarry themselves. But when the matter to be proved is the fact, the character, and the qualities, of a certain procedure stated to amount to marriage, then I think that the subsequent conduct of the parties, as evincing their own consciousness of their true position as married or not married, is of the utmost importance. The question being, whether the parties really did on a particular occasion consent to marry, and did mean to marry, and did believe that they were married then and there, it is on every ground, legal, logical, and moral, quite impossible to leave out of view the subsequent conduct of both parties, and particularly of the pursuer herself, who is here undertaking the proof of marriage.

Having made these general, but as I think not unimportant, observations, I shall now state and shortly explain the opinion which I have formed on this case. I have felt it to be attended with great difficulty, and I have applied my mind to its difficulties and studied the evidence anew since I became aware that I had the misfortune to differ from so many of my brethren. My opinion still is that the pursuer has failed to instruct marriage.

I concur so fully in nearly all the views of the evidence which have been very clearly and ably stated by Lord Deas, that I feel relieved from the necessity of again entering on an analysis of the details of the proof. If I were to do so, I fear that I should only weaken the effect of the instructive and impressive observations which he has made.

I have read the proof over and over again, and read it with especial reference to the correspondence and to the real evidence afforded by the conduct of the parties. It is in some respects conflicting—in some respects not worthy of credence—in some respects left indefinite, incomplete, and unintelligible—in some respects inconsistent with the letters and the conduct of the parties; and, as a whole, it is, in my humble opinion, unsatisfactory and insufficient. I cannot accept it as an adequate substitute for that proof of the consent essential to the constitution of marriage which is afforded by a regular marriage under the sanction of the church. In the search for the truth in this matter I feel that I am bound to withhold my conviction from anything less than complete proof, and complete proof I cannot find here.

The proceeding which old Wilson himself called "a ceremony," and which is now said to be proved and to be sufficient to instruct a marriage, is alleged to have taken place on 13th February 1866. It is averred on the record that from and after that date Major Steuart and the pursuer were held and acknowledged as married persons and lived as married persons. Certainly, and on the most favourable view for the pursuer, this is not quite correct. They were not publicly or generally held, accepted, or acknowledged, as man and wife. Nor did they openly live as such. Even to one another their communication was not on the footing of husband and wife.

It appears from the letters and the proof that Major Steuart never once wrote to the pursuer as her husband, nor did he address her in any of his letters, either in the address of the letter or in the terms of the letter, as his wife. It also appears that the pursuer never once wrote to Major Steuart, or of Major Steuart, as her husband—never concluded any letter to him by subscribing herself as his wife,—and never in any letter to him or to Mr Melville Jamieson, or to any other person, signed her name otherwise than Margaret or Maggie Wilson. In all such cases as the present this fact has been viewed as important, and it is quite inconsistent with the pursuer's averment that they were held and acknowledged as married persons.

It is, however, suggested that in the present case this conduct is not inconsistent with marriage, because Major Steuart wished and requested that the marriage should be kept secret, and that it was accordingly kept secret. This alleged secrecy can scarcely be reconciled to the evidence which the pursuer had adduced and expects to be believed, to the effect that the Major announced and proclaimed the marriage in many different quarters and to several persons having no claim on his confidence.

I scarcely know which view the pursuer's counsel takes or wishes us to take of this point. I have therefore considered it in both aspects, for both have been presented. I take it either way. No intelligible explanation has been given of the reason for keeping the marriage secret, if it really took place. It is suggested, and indeed it is the only suggestion, that the reason for secrecy was the fear that the marriage would offend Sir William Steuart. But we have evidence on that point; and it appears to me plain enough that there was no ground for this fear, and that the fear did not exist. Sir William objected to the dissipation of his son's life and habits, but I see no evidence that he ever objected to this marriage. On the contrary, it is proved that on hearing of the Major's intimacy with the pursuer, Sir William said that he did not object. Besides this, I am satisfied that Major Steuart had no fear on that subject, if indeed he had on any subject. He was daring, fearless, reckless; he had no great respect for his father, and he believed himself to be secure in his inheritance under the entail of Murthly; and if he had meant to marry, and believed he had married, he was not the man to deny it, or hide it, or hush it up.

It appears, however, to be now maintained by the pursuer, in the very clever and dexterous argument of Mr Scott, that this matter of the secrecy of the connection has been misunderstood, and it is said that there was no secrecy, and there was truly no wish to keep the marriage secret, and accordingly Major Steuart's statements, sober or otherwise, have been strongly urged. This is an ingenious attempt to escape from the difficulty of alleging and explaining secrecy. But it shifts the difficulty; it does not remove it. I take it as now alleged that secrecy was not intended or maintained. On this view, the pursuer's case is that the parties were known to be married, and that the marriage was not kept secret.

Taking this view, I ask, how can the correspondence between these two parties—said to be openly man and wife—be explained? What is to be made of their subsequent conduct? What can be thought of the fact that a claim for the status and position of the wife of Major Steuart was never openly asserted till six years after the date of the alleged marriage, and above three years after the death of Major Steuart. The pursuer during that period was sometimes in great difficulties, in sore straits for money, in much anxiety about herself and child, and in correspondence with Major Steuart's confidential agent; yet she never once asserted or suggested that she was the wife of Major Steuart; nay, as will afterwards be explained, she adopted proceedings inconsistent with her position as a wife.

I do not, and need not now, quote from the correspondence before us, particularly the correspondence between the parties themselves. The letters are not numerous, but they are very important. They enable us, in some degree, to perceive the mind of both parties, and to note these minds acting in familiar communication. They afford evidence of the personal consciousness of both parties in regard to their true relation to each other.

It is the decided conviction of my mind that the letters of Major Steuart to the pursuer, and the letters of the pursuer to him and to others, were not written by parties who really believed them-

selves to be man and wife. There is not a line, not an expression, in these letters which can be read as instructing or indicating or suggesting the relation of marriage. Even the theory of secrecy, which might explain the fact that the letters are addressed on the outside or envelope to Miss Wilson, cannot explain the language, the tone, the sentiments, of the letters themselves. I need not dwell on this, it is but too plain. One instance, and that well calculated to test the feeling and consciousness of the man, I may however mention. The pursuer is known to be pregnant, and he is writing to her. But, how does he write? There is in his letters no sweet hopefulness, no kind encouragement, no loving allusion to her maternal prospects. She becomes the mother of his child—a son, and said to be his heir. Old Wilson tells him of the birth of the child in a letter which it is very difficult to reconcile with the writer's knowledge or belief of a marriage, and it certainly does not express or suggest the feelings which the birth of a lawful child, the heir of Murthly, must have caused. Major Steuart received that communication—so interesting to him if he were the husband—he receives it without remark—without accepting or reciprocating congratulation—without inquiry for the pursuer's health or safety, or reference to her time of danger and trial—without one word of loving message to the mother of his child. If there was no marriage, the birth of the child might not be a subject so pleasant, and it might have been natural not to refer to it. But if there was, and was known to be, a marriage, his conduct and his letters are without explanation and beyond comprehension.

I think it impossible to reconcile the import and spirit of these letters of Major Steuart, or the pursuer's letters to him or about him, with their own consciousness that they were married persons. I observe that the Lord Ordinary does appreciate to some extent, but I think not adequately, the importance of this correspondence as evidence against the pursuer's case. To my mind it is evidence of great weight. The action rests on alleged consent; and consent cannot be given without knowledge. These parties cannot now be declared to have been married, if they did not mean it, and did not know it. These letters aid me in the search for truth within the minds and hearts of the writers, and they reveal to me the fact that these writers did not believe themselves to be married.

This is not a case of promise *subsequente copula*, where a young woman, ignorant of law, trusts and yields to the promise, and may not know the legal effect of that surrender. Here there can be no marriage if they did not mean it, and did not know it.

But I hasten on to consider the evidence adduced to support the allegation of a private ceremony of marriage within the house of old Wilson on 13th February 1866.

It is important to observe when and how this plan or project of instructing a marriage by proof of a private ceremony in the house was adopted. On that point we have evidence in the testimony of Mr Galletly, a respectable agent, and a reliable witness, who had seen and conversed with Major Steuart frequently, but never once heard him speak of the pursuer as his wife, but always as Miss Wilson. Shortly after Major Steuart's death

old Wilson placed in Mr Galletly's hands a great number of letters, and asked his opinion about them. Mr Galletly replied that he "did not think they would aid them in proving a marriage." Wilson then said, "Never mind the letters, we can prove a marriage, we can prove a ceremony." That ceremony had not been referred to in any of the letters, not even after the birth of the child had made the allegation of marriage necessary for her character, and for the legitimacy of the heir to Murthly.

Thus we have the source and origin of the story of the private ceremony within the house. The intimacy and resulting birth of a child was matter of interest in the family, and a desire to bring about a marriage was very natural, and there are also some indications of a desire on the part of the Wilsons to obtain from the Major some written acknowledgment. In this they did not succeed; no written promise or acknowledgment was ever obtained; and after the Major's death this story of a private ceremony was started in the manner explained by Mr Galletly—started, but shrunk from, not then avowed or acted out—for even after that the claim, for alimony of the child was made on the footing of its illegitimacy. Of such a story, so long delayed and so strangely stated, the burden of proof resting on the pursuer is unusually heavy, and justly so. Every reasonable presumption is against it. Six years elapsed before action was raised; no claim to the status of a wife had been asserted while the Major lived—the whole correspondence is opposed to such a claim—the conduct of both parties is inconsistent with it—the child was registered and baptised as illegitimate—alimony for the child was claimed from Sir William Steuart by the pursuer under the name of Margaret Wilson, and on the footing of the illegitimacy of the child—and the pursuer was herself married to Mr Robertson in 1871 under her maiden name of Margaret Wilson.

Against these presumptions—strong in separate force and overwhelming in combination—is presented the allegation of this strange story of a sort of dramatic ceremony of marriage in February 1866, the scene of which is in the house of the pursuer's father in Clyde Street, and the leading witness of which is the pursuer's own brother, no friend of Major Steuart having been present. I concur in the remarks made by Lord Neaves in the case of *Roxburgh v. Watson*, 23 October 1868, in regard to the suspicion attaching to such evidence, and to the duty of the Court to look on such evidence with great jealousy and weigh it scrupulously. These remarks of his Lordship are all the more applicable and important where, as in one view of the case, no intelligible reason for secrecy has been given, or where, as in another view of the case, last stated for the pursuer, secrecy was not desired or maintained. One cannot help asking where was the necessity for such a proceeding if secrecy was not intended?

I pause here to consider for a moment the character of Major Steuart, on the one hand, and of the pursuer and her family on the other hand, in so far as disclosed on the evidence.

Major Steuart was a man of family, and believed to be the heir to a great estate. He was, I think, about thirty-eight years of age,—a gentleman, a man of honour, and a man of great distinction as a gallant officer, his courage proved on many a field and acknowledged and rewarded by the Victoria

Cross. It seems highly probable that, if he had done himself justice, and lived a more pure and temperate life, the noble and tender qualities which in the heart of a brave man usually accompany courage would have been developed. But no natural gifts can withstand the corrupting influence of debauchery. He fell as many have fallen, a victim to the too common vice of intemperance and dissipation. He was wrecked, degraded, and destroyed by habits of drunkenness,—of this there is clear and sad proof before us. Now, it is to be observed that Major Steuart was in this degraded state when relations were first formed between him and the pursuer. There is no romance, no sentiment, in the story. She had not known and loved him in his better days, and then, like ivy round a rent tree, clung to him in his ruin.—That one could have understood. But the pursuer surrendered herself to him when he was broken down and besotted by habits of drunkenness. His habits and the disreputable state to which they had reduced him, were very manifest, and were known to the pursuer and her parents.

We see in this proof enough to satisfy us that in 1866 a virtuous attachment to him by a virtuous girl was most improbable. But still, though such attachment was out of the question, he retained the attractions arising from his position and his expectations, also known to the pursuer and her parents; and this may well explain the desire of the Wilsons to promote a marriage,—to obtain if possible a written acknowledgment;—and, not having got one, then to allege and attempt to prove this strange and improbable ceremony.

Then, on the other hand. What is the character of the Wilsons—of the pursuer and her family? This is a painful subject. I have no wish to dwell on it, or to express myself severely. The remarks of Lord Shand on this point, and more especially the views now expressed in the very instructive opinion of Lord Deas, are of great weight and importance.

On the whole evidence bearing on the point, I feel compelled to come to the conclusion that, taking the most lenient and charitable view which can reasonably be adopted, the character of old Wilson and of the pursuer, and of the family, is not such as to commend them to favourable consideration, or to rear any presumption in their favour on the question whether this story of a private ceremony is true, or whether it is not wholly or mainly an invention.

If it were not that I am reluctant to traverse again ground already occupied by the opinions of my brethren, I could easily show that there is abundant evidence to support my remark that the character of the pursuer and of her family is, on the one hand, such as to render Major Steuart's illicit connection with the pursuer highly probable, and, on the other hand, such as to render confidence in the testimony of George Wilson in regard to matters within the family, and within the house, very perilous to the cause of Justice. I may however mention, as matter of reference and without quoting, the evidence given by James Hunter and his wife, Charles Waddie, Laing and his wife, James Campbell, John Powell, and Thomas Ormiston and his wife.

These last witnesses, in particular, appear to me to be above all suspicion, and deserving of full credit. Ormiston has been for above seven years a porter in the Bank of Scotland—a situation which he could not have obtained or held without a good

character. He or his wife had no motive to speak untruly, nor had any of these other witnesses, unless, perhaps, Mrs Laing, with whom there had been a difference. Yet it is impossible to read their evidence without coming to the conclusion that the house, the family, and the behaviour, was disreputable. The fact that the pursuer was a profane swearer and an obscene speaker is proved by several witnesses.

I am also under the painful necessity of concurring with Lord Deas in opinion, that prior to the 13th February 1866 Major Steuart must have had illicit connection with the pursuer. Of course that connection was not open or under observation, and direct testimony by eye witnesses could not be expected. But short of such direct testimony, we have nearly all that could be expected. There was certainly sufficient opportunity, and the habits, character, and conduct of both parties render such connection highly probable. Easy and convenient access had been arranged and adjusted, and, as Lord Deas has well explained, had been so adjusted as to afford attractive facility. The passions of the Major were strong, and were intensified by drink, which stimulates the desire for such indulgence. He was lodging in the house with a handsome girl, who was at least frank, forward, and unreserved, and accustomed to such freedom of manners, looseness of attire, and inviting familiarity of demeanour, as to present no obstacle and suggest no restraint to his passions. I must say that his relation, and his conduct to her, were, at all events, very suspicious. There was much to excite and facilitate; there was no difficulty and no scruples. Temptation was strong, resistance was not likely, opportunity was easy, and in the absence of delicacy, decency, or moral principle on either part, their refraining from intercourse between August 1865 and 13th February 1866 is so highly improbable as to be almost incredible. For my own part, I concur with Lord Deas in the opinion, that as matter of fair and reasonable inference from the whole proof there must have been illicit connection between the late Major Steuart and the pursuer before the 13th day of February 1866.

In this case the averment of the pursuer, and the argument maintained for her, to which the Lord Ordinary has given effect, is, that the pursuer did surrender her person to Major Steuart for the first time on the night of the 13th February, and in the house in Clyde Street. But in the action raised by the pursuer against Sir William Steuart in June 1870, it was alleged for her that “on or about 11th February 1866 the pursuer, at his request (Major Steuart's), went to bed with him and allowed him to have carnal connection and intercourse with her in her father's house at 19 Waterloo Place, Edinburgh. Her averments proceed in that action on the footing of such intercourse, and continue to the effect that thereafter,—that is, after 11th February 1866,—down to the birth of a child on 2d April 1867—Major Steuart and she “lived together, occupying the same bedroom and the same bed.” I do not now dwell on this singular fact, that a different and an earlier date, and also a different place, was alleged by the pursuer in that action as the date and place of first intercourse, but I request attention to the far more important fact, that that action was brought for aliment of the child as an illegitimate child, and that in that action there is no allegation of this extraordinary ceremony of marriage, nor of any marriage whatever. The whole intercourse prior to the birth of

the child is therein set forth as without marriage, illicit from beginning to end. Accordingly decree for aliment, as concluded for, was granted by Lord Ormisdale, and aliment was paid to the pursuer on the footing of the child being Major Steuart's, but illegitimate; and these payments were acknowledged by her in receipts signed Margaret Wilson. It is plain that she did not believe herself married, or widow of Major Steuart, at that time.

To me, therefore, it clearly appears that the avowment of this strange ceremony within the house of the pursuer's father, and to be proved by the pursuer's brother, is in startling opposition to the pursuer's statements, and is highly incredible. I cannot understand why it should have taken place. The whole story as told by George Wilson is most unlike a real and deliberate proceeding with the serious intention then and there to marry.

George Wilson says that Major Steuart on the night of the 18th of February was sitting "with tears in his eyes," when told by old Wilson that he must leave the house, nothing strange or new having occurred. George Wilson says that he never saw the Major the worse of drink, and he repeats that statement, and also denies that he ever saw the Major riotous or violent in the house or elsewhere. These statements on oath by George Wilson in regard to the Major's habits are contradicted by the testimony of several, and indeed of nearly all the witnesses. They cannot be accepted as true; and if we do not believe them, but think them wilfully false, that must go far to destroy the credit of his more important statements in regard to this ceremony. That tears should be seen rolling down the cheek of this gallant soldier can only be explained by the shattered nerves and maudlin weakness induced by habits of intoxication. He seems to have been in a fit state to be beguiled or imposed on, and not in a fit state for entering into the most sacred of human contracts. I do not believe George Wilson. But what is it that the Major does and says after all, taking for the present the testimony of George Wilson, such as it is?

George Wilson states that the Major, rising from the place where he had been sitting crying, said—"Wilson, I will show you what I can do; I am poor now, and I cannot marry." Of course I leave out of view at present the gloss or interpretation put on these words by George Wilson, who adds, "He meant to the height of life he was in." That addition is only a conjecture of George Wilson's. It is of no authority. No such words were used by the Major. I leave them out. I take the words which George Wilson says were used, and I take them by themselves. They are the first words, and the leading words in these proceedings, even as related by George Wilson. If George Wilson's story has any truth, these words reasonably and necessarily impress a character on the whole of the subsequent steps in these proceedings. Whatever the Major did mean to do, he did not seriously mean then and there to marry. We have no distinct proof of what he afterwards said or did on that occasion, though even Mrs Kellett states that the Major said that "he could not do what he would wish to do at the present time." Obviously she means, and so the pursuer argued, that the Major could not do as he wished,—that he wished to marry, but could not at that present time. These two passages indicate plainly enough that actual marriage then and there was not meant. But George

Wilson proceeds to state that the Major then said, "but I will marry her in the Scotch fashion," and George Wilson adds, "or words to that effect." Now, on a matter so important as this, the use of such language by a witness, as, "or words to that effect," is not satisfactory. We have not the exact words, and everything may depend upon the words. Whether the other words, if we knew them, would have been to the same effect, may well be doubted. Even a slight variety in expression might have made a serious difference. In cross examination, George Wilson says that the Major used this language, rising from his seat, "with the tears coming over his eyes"—"Wilson, I will show you what I can do to shut up people's mouths."

After this strange introduction to the proceedings, George Wilson goes on to state the details which have been already so fully explained. It is alleged that the Major said, on putting a ring on the pursuer's finger, "Maggie, you are my wife, before heaven, so help me, God." The pursuer's answer is said to have been, "Oh, Major!" and a kiss; an answer which, I presume, had often been given before to the maudlin effervescence of the Major. What were the real facts in this procedure, and what was the real meaning of this procedure, it is difficult to say. As described by George Wilson it is very like a burlesque, and has more the air of a bit of melodrama than of a reality. I cannot imagine, reading this testimony of George Wilson and that of Mrs Kellett together, that there was on that night a serious intention of entering then and there into the contract and relation of matrimony. The matter is necessarily serious, and we cannot permit the supposition that parties can marry in this way without serious intention. If Major Steuart seriously meant then and there to marry, but to marry in secret, why did they not interchange written acknowledgments? If he meant then and there to marry openly (and the pursuer now says there was no secret), why did he proceed in this strange manner? If there was no secrecy, there is no explanation of such a mode of marriage. He was a Roman Catholic, and the sanction of the church to marriage was to him peculiarly important. If he did not desire secrecy, why did he not marry according to the rules of his church? Then it was said that the proceeding of that night was, "to shut up people's mouths." But how was that to be accomplished? If it was secret, and meant to be kept secret, how could it shut up "people's mouths?" On the other hand, if it was meant to stop scandal by a form of marriage to be avowed and used as a protection to character, why was this strange form adopted? Why was no witness there except the family and this woman Kellett? Why was no previous notice given? Why were even the children, not very young, sent off to bed? Why was no friend of Major Steuart's present, or asked to be present? No reasonable answer to these questions has been given.

I cannot perceive any reason for this proceeding, or any explanation of this proceeding, if it was seriously meant as a marriage. Yet it is the only foundation for the claim of marriage. It is so presented by the pursuer. It is so accepted by many of your Lordships. My great respect for your Lordships' opinion, and my unfeigned diffidence in my own, has led me to study the proof again and again. But I cannot, and do not, believe that any proceeding then took place in which marriage was actually

meant by both the parties, and meant to be contracted on that occasion and by that proceeding. The direct testimony which we have cannot be lightly accepted in such a case, or looked at alone. It must be cautiously received, and must be considered in connection with the correspondence, with the rest of the proof, and with the real evidence afforded by the conduct of the parties. But I must say that in any view of the direct testimony, there is not, in my opinion, satisfactory proof of marriage by interchange of deliberate and serious present consent.

The case for the pursuer mainly, and almost entirely, rests on this direct testimony of George Wilson and Mrs Kell-tt. I do not think them reliable witnesses, but in any view they require corroboration; and instead of corroboration, the real evidence furnished by the conduct of both parties is inconsistent with their testimony, and with the inference which the pursuer draws from it, and on which the pleas are founded. Agnes Forbes cannot be viewed as a corroborating witness. If the witnesses Mrs Kerr, Matthew Caldwell, and Mrs Arthur are to be believed, Agnes Forbes is not worthy of credit. The evidence, documentary and parole, in regard to the registration of the birth, and in regard to the baptism of the pursuer's child, is most unfavourable to the pursuer's case, and irreconcilable with the idea of her believing herself married. On this important point I have nothing to add to what has been stated by Lord Deas. The child was registered as illegitimate, and was baptised as illegitimate.

I do not dwell on the proceedings in the Police Court, in the mutual accusations between the Wilsons and the Laings. I make allowance for angry feelings on both sides, but the preponderance of evidence is against the pursuer. The result was, that Jane, a sister of the pursuer, was fined, and that the pursuer's petition against Mrs Laing was dismissed. That petition, dated months after the date of the alleged marriage, was presented in the pursuer's maiden name of Margaret Wilson, and she supported it as a witness under that name. The important part of the proof in regard to these Police proceedings is, that three witnesses, to some extent confirmed by a fourth, deposed that the pursuer was asked, as a witness on oath, if she was or was not married, and she swore that she was not. She knew better than anyone, except Major Steuart, whether she was married or not. Her denial on oath is quite consistent with the real evidence afforded by her conduct and that of the Major, and quite inconsistent with the pleas now maintained.

It is well observed by Lord Ormidale that, in the account charged by Wilson against Major Steuart for bed, board, and washing from 8th August 1865 to the 7th Oct. 1868 at 30s. a week, there is no charge for board, &c. of his wife, and no mention of her, though, if the story now told be true, Major Steuart was liable for such board from and after 13th February 1866, and he had the means of paying it. This circumstance derives additional importance from the remark which one of the pursuer's witnesses says old Wilson made at the conclusion of the alleged ceremony:—"Remember Meg you're married and I have nae mair to do wi' you." That after Wilson said this, and that after this announcement, in presence of the Major, he should during the next two years charge for the Major's board and not for the pursuer's board, if she was the

Major's wife, is highly improbable. The charge was, however, so made for the Major's board only, and it is quite consistent with the whole of the real evidence in the case on the footing of there having been no marriage. This is confirmed by the terms of old Wilson's settlement, where he describes the pursuer as his daughter Margaret Wilson, while he describes another daughter by her married name, thus proving his knowledge that there was no marriage.

The remarks made, and, as I think, seriously made, by Major Steuart to Dr Culbard, Dr Dunsinure, and Dr Simpson, cannot be passed over without a brief notice. These are medical gentlemen of experience and intelligence and of high character. No one can doubt either their power of observation or their credit as witnesses. They were brought by accidental circumstances into communication with the parties; their statements in regard to Major Steuart's communications are clear and reliable, and their testimony, free from bias or prejudice, is most important. It is impossible to read the evidence of these gentlemen without perceiving that they, forming their judgment from Major Steuart's own statements, understood the position of the parties to be illicit and immoral, and it is certain that they themselves spoke and acted on that belief.

The evidence of the Reverend Mr Rigg, Roman Catholic clergyman, is still more important, and has impressed me much. I cannot concur in the severe remarks of the pursuer's counsel on the testimony and the conduct of Mr Rigg. On some points, questions may be raised in regard to accuracy, and it may be that he naturally formed at an early period of this history a very unfavourable opinion of the pursuer and her family, and a very strong and just opinion of the distressing and degrading position to which the Major's habits had reduced him—a position subjecting him to special temptations and entanglements, and it may be that Mr Rigg spoke under that impression. But I see no reason whatever to doubt the veracity of Mr Rigg, and no ground for imputing to him any corrupt or improper motive. If his testimony is accepted as true, its importance cannot be denied. Major Steuart admitted to Mr Rigg the immoral and disreputable nature of his relations with the pursuer; on several occasions he implied so strongly as almost to amount to an assertion, that he was not married, and on one occasion he expressly said so. He admitted that the Wilson family wanted to lead him to a marriage and to "get a writing from him," and said he was on his guard and not to be entrapped. When warned by Mr Rigg that he might be led into a Scotch marriage, he said he would not, he would be on his guard against that. Though speaking freely and confidentially, and though informed by Mr Rigg that Sir William would not object to his marriage, he never once suggested that he was married, and he described the pursuer as a "low pig, and swears like a trooper," and other witnesses prove that she did so swear. He acknowledged that he was the father of the pursuer's child, but never hinted that he was married to the mother; and he even spoke to Mr Rigg of proposing to marry another woman, whom he describes as of good family. Nothing can be to my mind clearer than that Mr Rigg, from his knowledge of Mr Steuart, drew from conversations with Major Steuart the conclusion that his connection with

the pursuer was an immoral relation between an habitual drunkard and a disreputable woman. For such a conclusion I think there are sufficient grounds in the language of Major Steuart to Mr Rigg. It is supposable that a man might speak of his mistress as his wife; it is not within the bounds of reasonable supposition that a man should speak of his wife as his mistress, and speak of her in the manner in which Major Steuart spoke of the pursuer to Mr Rigg.

On the evidence of Mr Melville Jamieson, I only remark that his position was one of delicacy—that his testimony appeared to me very candid—that his conduct to the pursuer was kind and humane—and that he, the confidential agent of Major Steuart, was never told of this marriage, and though sometimes puzzled in regard to her position, and feeling some sympathy for her, he did not really believe that she was married. One of the many proofs of this is, that long after the 13th of February 1866, the date of the alleged marriage, Mr Jamieson advised the Major to marry the girl, and at another time recommended him “to be off or on with her,” which is quite inconsistent with his belief of a marriage. Again, in 1868, Mr Jamieson made an entry in his account with Major Steuart in regard to the Major’s boy, whom he referred to as his “illegitimate son.”

There are many other circumstances of real evidence strongly opposed to the pursuer’s proposition that there was a serious and present marriage on 13th February 1866. But I shall not dwell on these, as most, if not all of them, have been already noticed by my brethren.

I have only now to advert to one other point, and that is one which has been strongly and ably urged for the pursuer, and which did impress me very considerably. I mean the statements made by Major Steuart in his last hours to his friend Captain Cooper, a very gallant officer, of whose truthfulness there can be no doubt. On this subject I have a very few remarks to make.

The *first* is, that Major Steuart did not send for the pursuer when dying, and did not state to Mr Jamieson, his confidential agent, then with him, that he was married to her. This is the more important as he did speak of the boy as his son, which would naturally have led him to speak of the mother as his wife if she had been so.

The *second* is, that the Major had been drinking heavily and was under great excitement and then under great prostration shortly before his death. This is proved by several witnesses, and among others by Budd his valet, whose evidence on other points is not without importance, and in regard to Major Steuart’s state at Hythe is quite distinct, and is confirmed by Mr Jamieson’s letter. Assuming the truth of Captain Cooper’s testimony, which of course I do, the Major’s own statements at that time, brought out in conversation in the manner described, cannot afford reliable evidence of the fact of marriage. I concur in Lord Deas’ observations on this point.

The *third* is, that there are several indications of a desire on the part of the Wilsons to get from Major Steuart a promise of marriage at a future time, and there are several observations by the pursuer to the effect that if the Major had lived he would have put all right, and that it would have been better for her, and that she had that which would make her lady of Murthly. Accordingly, the pursuer’s first move,

and her father’s, was to found on writings such as they had, and it was only after ascertaining that the writings were not sufficient, that the story of a “ceremony” was brought forward. Now if the proceeding on the 13th of February 1866 (assuming for a moment the proof of it) had reference, not to a present but a future marriage, that is, to a promise of marriage verbally given—a view which a slight variation in the words would support, that would reconcile the proceeding with the real evidence more reasonably and credibly than can be done as the case is here presented by the pursuer. But, then, on that supposition there would be no marriage. While Major Steuart lived the hope that a verbal promise would be fulfilled might have sustained the pursuer’s confidence, and would have explained some of her remarks. But proof of a verbal promise could not instruct marriage, and proof of a promise written or verbal cannot sustain an action of declarator of marriage after Major Steuart’s death. These two propositions are settled in point of law. But if, in point of fact, there had been a verbal promise, then it is conceivable that Major Steuart, when dying, may have wished to make the woman his widow, whom he had not made, and knew he had not made, his wife. He did not respect her; I do not think that he deeply loved her; and though drinking had degraded and demoralized him, he still recoiled from marriage with her. But he liked his boy; he may have desired to secure, if he could, the recognition of the boy’s legitimacy, and even to atone by an acknowledgment on deathbed for failure to fulfil a verbal promise. This supposition—not indeed supported by proof, but not excluded or contradicted by the evidence, and far from unreasonable or improbable, may suggest a motive and an explanation of his language to Captain Cooper. But no man can make a woman his widow whom he has not made his wife: and no verbal promise can sustain an action of declarator of marriage.

I shall now add no more. I have occupied, I fear, too much of your Lordships’ time. Although no question of succession is involved, as the child is now dead, the case is important to the parties. But in the view which I take of it the case is of the deepest importance to the jurisprudence of Scotland on the subject of marriage. The great defence of our Scottish law of marriage, and the chief, almost the only protection against the very grave and serious perils, moral and social, arising from uncertainties in matrimonial relations and in succession, is, that the mutual consent which makes marriage must be most clearly proved, and must be proved to be serious and deliberate, and given as present consent to present marriage. This is what the law requires. Nothing less than this can suffice; the burden of proof rests on the pursuer, and in this case is most especially heavy. Neither in regard to the fact of interchanged consent, nor in regard to the serious and deliberate quality of the consent, nor in regard to the *de præsenti* character of the consent, is there room for conjecture. Conjecture cannot be accepted. Proof is required; and there is not, in this case, any presumption to aid the pursuer. The consent which makes marriage must be proved by the pursuer up to the full measure of what the law requires. The contract and the relation of marriage is so sacred, so momentous, and so abiding, that no proof which does not instruct all its essential qualities can be recognised as sufficient.

I am clearly of opinion that the pursuer has not adduced reliable and satisfactory evidence to instruct marriage.

The real evidence from conduct and correspondence is strongly opposed to the averment of marriage; and the parole evidence adduced is, in my opinion insufficient, and to a large extent unworthy of credit.

LORD JERVISWOODE concurred with the LORD JUSTICE-CLERK and the majority of their Lordships.

The Court pronounced the following interlocutor:—

“The Lords of the First Division having advised the reclaiming-note for the defenders against Loré Gifford’s interlocutor, dated 3d December 1872, and heard counsel for the parties, and having resumed consideration of the cause with the additional proof taken before Lord Armillan, and the revised cases for the parties respectively, and having taken the opinions of the Judges of the Second Division and of the permanent Lords Ordinary, they, in respect of the opinions of the majority of the whole Judges, Adhere to the said interlocutor reclaimed against, and refuse the reclaiming-note, and remit the cause to the Lord Ordinary to proceed further as may be just: Find the pursuers entitled to additional expenses: Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and to report to the Lord Ordinary, with power to his Lordship to decern for the taxed amount of said expenses.”

Counsel for Pursuers—Solicitor-General (Millar), Scott, and Brand. Agents—M’Caul & Armstrong, S.S.C.

Counsel for Defenders—Shand and Balfour. Agents—Dundas & Wilson, C.S., and Tods, Murray, & Jamieson, W.S.

JURY TRIALS.

Tuesday, March 24.

FIRST DIVISION.

(Before Lord President Inglis and a Jury.)

ADLINGTON AND ANOTHER v. THE
INVERARAY FERRY COMPANY.

Jury Trial—Injury to Person—Damages.

Circumstances in which a jury awarded damages against a coaching and ferry company for injuries caused to a passenger by the upsetting of a coach.

This was an action brought at the instance of William Adlington, music teacher, Edinburgh, on behalf of himself and of his wife, Emma Giles or Adlington, against the Inveraray Ferry and Coach Company, to recover compensation for injuries sustained by the pursuers through the fault of the defenders, or of those for whom they were responsible. The issues were as follows:—“(1) Whether on or about the 3d of September 1873, the pursuer, Emma Giles or Adlington, was a passenger travelling between Lochgoilhead and St Catherine’s on a coach of the defenders; and whether, in the

course of the said journey, the said coach was overturned, and the said pursuer injured, through the fault of the defenders, to the loss, injury, and damage of the pursuers? Damages laid at £450. (2) Whether, on or about the 3d of September 1873, the pursuer William Adlington, was a passenger travelling between Lochgoilhead and St Catherine’s on a coach of the defenders; and whether, in the course of the said journey, the said coach was overturned, and the said pursuer injured, through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £50.” The injuries in question had, it was alleged, been caused by the capsizing of the Inveraray coach on the banks of Loch Fyne on the 3d September last. Damages were laid at £500—£450 for Mrs Adlington, and £50 for Mr Adlington.

William Adlington, one of the pursuers, deponed that he was a music teacher in Edinburgh. On the 3d September last, his wife and he went to Lochgoilhead, where they found a three-horse coach for St Catherine’s ready to start. On the outside of this they took their places. The road traversed was a very hilly one. The driver was a young man, and no other person seemed to be in charge of the coach. Before starting, one of the horses frequently tried to bite its neighbours. After the coach started, this horse occasionally ran in upon the others, and caused the coach to be drawn towards the side of the road. Immediately after passing Mr Murland’s house, the near horse once more ran in upon its neighbours, and the wheels on one side, consequently, were drawn over on the turf. The horses at this time showed no sign of having been frightened by anything. The coach never got on to the road again, but shortly afterwards the wheels went over a parapet, and the coach was thrown down a depth of between four and five feet to the shore. Witness was hurled to a distance of about twelve feet. On regaining his feet he went to look after his wife, who was taken to Mr Murland’s house. While being carried there she became unconscious, and continued in that state for some time, and she was obliged to stay in a neighbouring inn for two days before she was able to return home. A wheel-barrow was standing at the left-hand side of the road, where the accident occurred, but there was nothing in its appearance that was likely to frighten the horses. From the place where the coach first left the road this barrow could not have been seen at all, as it was at the time of the accident almost entirely screened by bramble bushes, and was only visible from a very short distance. He thought the cause of the accident was inattention on the part of the driver, who was looking back when the coach started from Mr Murland’s house. The coach never went straight from the time when it left Mr Murland’s house, and when the wheels toppled over the bank the horses were going at a slow trot. At times during the last five years Mrs Adlington had suffered from an internal disorder, which frequently prevented her from taking any exercise, but she had gone to Germany for a year previous to last May, and had come home quite convalescent. During the interval between her return and the date of the accident she had been in very good health, but she had since been confined to bed or to the sofa for about two months, suffering much from internal pain, and up to the date of the trial had not been able to leave the house. He had himself been considerably bruised by the accident, and had his wrist sprained. The next