clauses can be construed in a way so different from their natural and proper meaning as the pursuer maintains.

"It would have been easy for the pursuer to have made the stipulation clear if it had been intended to bear such a construction. The ambiguity (so far as there is any) is caused by himself, and the defender is entitled to the benefit of it on the double ground that *in dubio* the deed, which was framed by the pursuer's agent, is to be considered *contra properentum*, and that the presumption is in favour of freedom."

The pursuer appealed to the Court of Session.

At advising—

Lord Gifford—I have come to the same opinion as the Sheriff, that the clauses founded on by the pursuer do not entitle him to recover. The obligation is in very general terms. The defender is bound by the feu-contract "to pay one-half of the expense of forming and constructing such common sewers or drains as the first party may have already formed, or which he or his foresaids may have already formed, or which he or his foresaids may hereafter form, in Wilton Street;" "as also to form and causeway, so far as not already done, one-half of Wilton Street." In general, in such circumstances the intention of these clauses is to free the superior of the expense of feuing. At the beginning the superior is at the expense of forming the streets, but does not intend to lie permanently out of his money but to get it back from the feuars, and he takes an obligation for payment of half the expense from the feuars on each side of the feu. In general, therefore, these are clauses of repayment or indemnity: the pursuer cannot recover under them a sum which he has not expended. In 1850 a bargain was made between the superior and Bain, who wanted two things—an access to the New City Road, and an access for the sewage from his property. He agreed with the pursuer to get an access, and that in consideration thereof he should continue the drain from his grounds through the pursuer's grounds, and form the street by which access to the City Road was to be obtained. No money passed between them. That was more than 20 years ago, and part of the contract was implemented long ago. This was in view of the parties when the feu-contract of 1873 was entered into. If it had been the intention to get from the defender any part of the expense, nothing could have been more simple than to state it; I think it was not intended. The agreement with Bain is expressly stated in the feu-contract, and the superior puts Robertson exactly in place of Bain. Two things are done by the contract—the privileges are given as well as the burdens. The burdens signify the right of access, and the privileges signify the benefit, namely, the formation of the drain. Had the making of the drain remained *in contractu* merely, Robertson could have compelled Bain to make it; and could M'Clelland after that have said, you must put the money in my pocket? Would Robertson require to pay that which he had compelled Bain to disburse? M'Clelland got the drain for nothing. Is he entitled to compel Robertson to repay an expense which he has never been at? I think he is clearly not entitled, and therefore I am for adhering to the Sheriff's judgment.

The other Judges concurred.

Counsel for Pursuer and Appellant—Dean of Faculty (Watson)—Wallace. Agents—Gibson Craig, Dalziel, & Brodies, W.S.

Counsel for Defender and Respondent—Balfour—Asher. Agents—J. & A. Hastie, S.S.C.

Wednesday, June 28.

SECOND DIVISION.

[Lord Craighill, Ordinary.

LOCKYER *v.* FERRYMAN AND OTHERS.

Res judicata.

Res judicata can be pleaded in consistorial actions as in other actions; and there is no exception to this rule in the case of a judgment, founded on as *res judicata*, which decided that a marriage had not been contracted.

Summons—Revised Condescendence—Consummation.

An action of declarator of marriage was in the summons laid on consent *de presenti*. In his revised condescendence the pursuer averred that there had been consummation; and a proof of his averments generally was allowed.—*Held* that the pursuer, against whom judgment was given, was not entitled to bring a new action founding on consummation, this being a ground of action remitted to probation in the first case.

Fraud—Reduction.

Allegations of conspiracy, perjury, and subornation of perjury, on which it was sought to reduce decrees of the Court, *held* to be insufficient, inasmuch as they did not disclose any new knowledge on the part of the pursuer, nor specify when, how, and by whom he was furnished with information said to be new to him.

Opinions that the rule contained in instructions to commissaries, A.D. 1563 (art. 20), ratified by the Act 1862, c. 64, by which reductions were excluded unless brought within year and day of the date of decree, does not apply to Court of Session judgments.

Opinion (*per* Lord Neaves) that the present action was barred by *mora*, and, in particular, that there is no precedent for sustaining an action of declarator of marriage founded on promise *subsequente copula* when the other promiser is dead.

In the year 1842 the pursuer Edmund Beatty Lockyer raised an action of declarator of marriage against the late Miss Janet S. T. Sinclair of Freswick, Caithness-shire, and on 3d March 1846 a judgment of *absolvitor* was pronounced by the Second Division of the Court. The reports of the case are referred to for the circumstances and the grounds of action (*A B.* v. *C. D.*, June 14, 1844, 6 D. 1148, and 16 Jurist 500; *Lockyer* v. *Sinclair*, March 3, 1846, 8 D. 582, and 18 Jurist 290). Miss Sinclair died in June 1870, and the present action was directed against the trustees acting under her trust-disposition and settlements. The summons concluded (1) for de-

clarator that the pursuer and Miss Sinclair were married persons; (2) for reduction of the decrees pronounced in the former action; and (3) for reduction of Miss Sinclair's trust-settlement and deeds relative thereto.

The grounds on which the pursuer sought to obtain declarator of marriage were substantially the same as those founded on by him in the previous action. He averred that a contract of marriage was executed by him and Miss Sinclair in August 1839; that immediately thereafter *de presenti* matrimonial consent passed between them, evidenced by written declarations in which they acknowledged each other to be husband and wife; and that *copula* followed upon the promises and engagements entered into by them. The pursuer averred that the consummation of the marriage by *copula* did not form one of the grounds of action in the previous case, there having been no averment of it made in the summons, and that though it was introduced into the revised condescendence he was prevented from proving it. He therefore maintained that the first action was based exclusively on the marriage contract, and on the acknowledgments or declarations of marriage.

The pursuer further averred that "the sole evidence adduced by the defender, the said Janet Sinclair or Lockyer, against the pursuer in the said declarator of marriage was that of Maria Sinclair and Jane Sinclair, and the Court, in construing the said contract of marriage and the said acknowledgments, and the whole attendant circumstances, proceeded upon the evidence of these said witnesses; but the pursuer has ascertained, and now avers and offers to prove, that both of the said witnesses committed wilful and corrupt perjury throughout the course of their evidence, and in particular portions thereof bearing directly upon the construing of the said contract and acknowledgments, destroying the same by explaining them away—that is to say, in the whole substance of their evidence, in so far as it was material and relevant, and in so far as it formed a ground for the judgment of the Court, both in the Outer and Inner Houses, they were suborned to commit perjury by the said Janet Sinclair or Lockyer, and in all the matters hereinafter detailed wherein they committed perjury they acted in concert with her." He then proceeded to condescend on numerous passages in the evidence of Maria Sinclair and Jane Sinclair in which he averred that they committed wilful perjury, and maintained that "the decree of the Court in the previous action in regard to the pursuer's marriage, in so far as it proceeded upon oral testimony, was procured by conspiracy, fraud, perjury, and subornation of perjury, and that the said Janet Sinclair or Lockyer repeatedly previous to her death confessed to various persons that she had led her sister and Aunt Maria to swear falsely."

The pursuer averred, lastly, that at the date of the previous action of declarator it was impossible for him to procure witnesses to prove consummation; that the family and friends of Miss Sinclair had conspired together to destroy or withhold evidence of the marriage which had been completed; that the domestic servants of the Sinclair family were intimidated, bribed, and put out of the way; and that only since the death of Sir John Sinclair and the said Janet Sinclair had witnesses been found willing to give evidence for the pursuer of their knowledge of the marriage relationship subsisting between the parties, and particularly of sexual intercourse.

The defenders in their statement of facts referred to the averment of consummation in the revised condescendence in the previous action, and to the plea in law founded upon it. They narrated the judgments of the Lord Ordinary and the Second Division in that action, from which it appeared that the pursuer had by his counsel at the bar, in the argument before the Inner House, admitted that he did not insist as any part of his case in the averment of consummation of the alleged marriage by conjugal intercourse. They stated that these interlocutors were appealed by the pursuer to the House of Lords, but by a judgment of that House in February 1850 the appeal was dismissed, and that no attempt had been made by the pursuer to set aside that judgment. The pursuer in his answer admitted that he appealed to the House of Lords, but explained that the appeal fell through the failure or neglect of his agent to lodge the printed cases in due time, and that no judgment in the appeal was ever given by the House of Lords.

The defenders further stated, that in consequence of the great lapse of time which had taken place they had been deprived of a great deal of most important evidence, as many of the persons who were acquainted with the real facts of the case, and who were alive when the former action was in dependence, and for some time thereafter, were now dead.

The pursuer pleaded—"1. The pursuer is entitled to decree of declarator of marriage in terms of the first conclusion of the summons, in respect of either (1) the interchange of matrimonial consent *de presenti*, or (2) in respect of promises between the pursuer and the deceased Janet Sinclair or Lockyer followed up by *copula* on the faith of the promises. 2. The decrees ought to be reduced, in respect (1) that, in so far as the said previous decrees may be pleaded in bar of the conclusions of the present action, they deal with and decide matters that were not embraced in the former action, and were not remitted to probation; and (2) in respect that they proceed upon admissions of counsel which were either not made at all or were made without the pursuer's knowledge or authority, and are incorrect in point of fact. 3. The decrees ought to be reduced, in respect that they were obtained by and through the fraud of the late Janet Sinclair or Lockyer and others. 4. The said decrees ought to be reduced, in respect that they were obtained and pronounced upon the evidence of witnesses who gave false evidence wilfully, and who were suborned to commit perjury by the said Janet Sinclair or Lockyer and others. 5. New evidence being now available to the pursuer, not at the date of the previous action known to exist, or not procurable, and sufficient to prove the existence of his marriage, he is entitled to sue and obtain decree in the present action of declarator. 6. The trust-disposition and deed of settlement executed by the said Janet Sinclair or Lockyer ought to be reduced and set aside, as (1) she was a married woman at the time, and

executed the said deed without her husband's consent; and (2) had by her previous contract of marriage effectually conveyed to her husband, in the event of his survivance without issue, all right and title to the subjects and others conveyed by the said trust-disposition. 7. The said trust-disposition and settlement being null and reducible, the other deeds sought to be reduced are also reducible, the same being dependant upon the said trust-disposition and settlement. 8. The decree in the former action having been obtained by the defender therein by fraud and subornation of perjury, the pursuer is entitled to reduce the same, notwithstanding the expiry of year and day from date thereof. 9. The plea of *res judicata* stated against the present action is untenable, because the decree was obtained by the defender in the former action (1) by subornation of perjury; and (2) because the matters of fact alleged in the present action have been emergent since the said decree, and have come to the pursuer's knowledge thereafter; and (3) because the present action is founded upon different *media concludendi* from those proponed in the former action. 10. The whole averments of the pursuer being well founded in fact and law, he is entitled to decree of declarator and reduction, in terms of one or more of the conclusions of the summons, with expenses."

The defenders pleaded—"1. The defenders are not bound to satisfy the production, and the action ought to be dismissed, in respect that this action was not raised, and that no action of reduction of the said decree of *absolvitor* was raised, within year and day of the date of the decree. 2. At all events, and until the judgment of the House of Lords dismissing the pursuer's appeal in the prior action is set aside, the present action of reduction is incompetent. 3. The pursuer has no title to sue a reduction of the deeds libelled. 4. The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. 5. The action is excluded *exceptione rei judicatæ*. 6. The action is also excluded by *mora*, taciturnity, and acquiescence. 7. The pursuer's whole material statements being unfounded in fact, the defenders ought to be assoilzied, with expenses."

The Lord Ordinary pronounced the following interlocutor with note appended, dated 15th February 1876:—

"The Lord Ordinary having heard parties' procurators on the closed record and productions, and having considered the debate and whole process—In the first place, finds that the alleged marriage betwixt the pursuer and the now deceased Miss Janet Sinclair Traill Sinclair sought to be declared in the present action, was the subject of a former action of declarator against her at the instance of the pursuer; that both the grounds on which the declaratory conclusion of the present action is rested—that is to say, the interchange of matrimonial consent *de presenti* and promise *subsequente copula*—were grounds set forth on record, and upon which parties joined issue in the former action; and that from this last mentioned action the said Janet Sinclair Traill Sinclair was assoilzied by the sentence or decree set forth on the record in the present action; therefore sustains the fifth plea in law for the defenders in the present action: In the second place, finds that more than year and day has elapsed since the said sentence or decree of *absolvitor* was given or pronounced, and consequently that, by virtue of the Instructions to Commissioners, A.D. 1563 (art. 20), and the relative Act of Ratification, 1592, c. 64, reduction of said sentence or decree is now excluded; therefore sustains the first plea in law for the defenders in the present action: In the third place, and *separatim*, finds that the pursuer's statements on record are not relevant or sufficient in law to support the reductive conclusion of the summons in the present action, by which the pursuer seeks to have the said sentence or decree of *absolvitor* reduced; therefore sustains the fourth plea in law for the present defenders: And in the fourth place, finds that the pursuer's title to challenge the trust-disposition and settlement of the said deceased Miss Janet Sinclair Traill Sinclair, and relative writs specified in the summons, is based on the contingency of his success in the conclusion for declarator of marriage, and that it cannot be sustained seeing the defenders are now to be assoilzied, therefore sustains the third plea in law for the defenders in the present action: For these reasons, assoilzies the defenders *simpliciter* from the haill conclusions of the summons, and decerns: Finds the pursuer entitled to the expenses of discussing the preliminary defences, and modifies these expenses to the sum of ten guineas: *Quoad ultra* finds the defenders entitled to the other expenses of process: Allows an account of these expenses, in which credit shall be given to the pursuer for the said ten guineas, to be lodged by the defenders, and remits that account when lodged to the Auditor for his taxation and report.

"*Note.*—This action has been raised by Mr Lockyer, the pursuer, against the defenders, the testamentary trustees of the late Miss Sinclair of Freswick, to have declared a marriage betwixt him and Miss Sinclair, and to vindicate rights which, on the assumption of the alleged marriage, are said to belong to the pursuer as the survivor of the spouses. The fact is, however, that this same marriage, upon the reality of which the pursuer still insists, was the subject of an action of declarator raised more than thirty years ago by the pursuer against Miss Sinclair herself, and from which, after issue had been joined and proof led, she was assoilzied. For more than twenty years this judgment was considered to be decisive, but the time came when Miss Sinclair died. The idea of a new attempt to make out what formerly could not be established then occurred to the pursuer, and the result was the institution last autumn of the present action. These particulars explain why it is that this summons contains not only a declaratory but reductive conclusions. Before the pursuer can render available both grounds upon which the conclusion of declarator is laid, assuming that he can succeed in either, he must set aside the decree of *absolvitor* in favour of Miss Sinclair formerly pronounced. Hence that decree is now challenged. The testamentary disposition executed by Miss Sinclair, in the belief that she was a single woman, and left at her death for the regulation of her succession, is also challenged, and the ground on which it is impugned is, that it is, as is said, inconsistent with

rights to which the pursuer may lay claim should the alleged marriage be declared. But as to this last conclusion, nothing requires to be said in addition to this explanation. It is based on an assumption which, as the Lord Ordinary thinks, cannot be realised, and so it falls, because there is not in the pursuer a title on which it can be maintained.

"I. The first of the pleas of parties which it is necessary to consider is the defender's fifth plea, which is, that 'the action is excluded *exceptione rei judicatæ*.' The defenders under this plea contend not merely that the conclusion for declarator now insisted in is the same as that from which in the former action Miss Sinclair was assoilzied, but that both the grounds on which that condescendence is now rested were grounds also to be found in the former action. These grounds are (1) the interchange of matrimonial consent *de presenti;* and (2) promise followed by *copula*. The pursuer admits that the first of these grounds was in the first action; the second he contends was not in that cause a ground of action. The consequence is, that before the comprehension or sweep of the defenders' pleas can be ascertained, it is necessary to determine whether promise *cum copula* was or was not within the former action. Two things which must be considered in disposing of this action are uncontested. The pursuer, on the one hand, admits that promise *cum copula* was on the record. The defenders, on the other hand, admit that it was not disclosed in the summons. If, therefore, its appearance in the summons was essential, it cannot be held that both the grounds on which the present declaratory conclusion is based were in the other action, in the technical acceptation of that expression; while the opposite view leads as certainly to the opposite conclusion. The Lord Ordinary thinks that the appearance of the averment and the relative plea on the record was in the circumstances all that was required. That the introduction of the new ground, as leave to amend the summons had neither been asked nor given, might have been opposed, and probably with success, by the defender, may be allowed. But what the pursuer did was not opposed. On the contrary, it was acquiesced in. Parties consequently joined issue upon all that was in the record, and of all, so far as averments were concerned, a proof was allowed. This, in the opinion of the Lord Ordinary, is sufficient to bar the pursuer from pleading the alleged incompetency of the procedure by which the grounds of action were enlarged. He might have benefited, and undoubtedly he hoped to benefit, by the change, and he exposed his adversary to a new hazard. The consequence is, that as he took the advantage at the time, he must be content to bear now the concomitant disadvantage of the course which he pursued.

"The pursuer seeks to avoid this result by urging (1) that the proof which was allowed was not led; and (2) that the new ground of action was not in the end made a ground of judgment. On the first of these considerations all that the Lord Ordinary will say is, that the opportunity for adducing evidence was afforded, and his failure to improve it cannot circumscribe the area which his proof, had it been led, might have covered. As to the second, if the promise *cum copula* was on the record upon which issue was joined, the accident that the case was so presented in the end by the pursuer as to leave only the alleged interchange of matrimonial consent *de presenti* for judicial determination, does not limit the comprehension or the effect of the decree of *absolvitor* which was pronounced.

"*Dallas* v. *Mann*, 14th June 1853, 15 D. 746, was referred to by the pursuer as an authority by which he was supported in the contention now under consideration. The Lord Ordinary, however, thinks it inapplicable to the circumstances of the present case. There all questions in the original cause were still open; and the position of parties with reference to the point now raised was the antithesis of that which the pursuer and defenders now occupy. In *Dallas* v. *Mann* the objection to competency was not raised by the pursuer. On the contrary, after being suggested by the Court it was adopted by the defender, and thereby became his objection. The personal bar here existing was therefore not raised, and consequently the Court was left free to dispose of the point in the way in which it was decided.

"II. But assuming that the plea of *res judicata* is valid, with reference not to one merely but to both grounds on which the alleged marriage is now sought to be declared, the sentence or decree relied on may nevertheless be impugned. Even decrees *in foro* may be reduced, and the next question is, whether that by which Miss Sinclair was assoilzied can in the present action be impeached? The defenders plead that it cannot, because, as set forth in their first plea, more than year and day has elapsed since the decree was given; and in their fourth plea, that 'the statements of the pursuer are not relevant or sufficient in law to support the conclusions of the summons.' These questions will now be considered.

"In the first place, is the first of these pleas of the defenders well founded? The pursuer says it is not, and he so contends because, as he says, there is no finality in a judgment finding against a marriage. The favour to marriage in his view is so great that any number of opportunities of proving it, whatever the interval between them, may be allowed. This is rather a startling doctrine. It seems strange, and though many strange things are true, this, the Lord Ordinary thinks, is not one of the number. The most anomalous results might flow from its recognition. What would have happened had Miss Sinclair married after being assoilzied, and been the mother of children? Would this marriage have been a nullity and her children declared bastards? This result would be a serious commentary on a doctrine whose only claim to recognition is that it favours marriage. The canonists are said to sanction it, and there seems to be authority for this, and perhaps for something more, in the opinion of Lord Medwyn, to be found in the report, *Norris* v. *Gilchrist*, 14th January 1847, 9 D. 466. The passage referred to is at p. 483. Lord Medwyn undoubtedly is in such a question to be regarded with great respect, but his authority is not conclusive. Be it that the rule of the Canon law was what he represents, by what is it proved that this rule is now the law of Scotland? *Res judicata* is, as the Lord Ordinary understands, a plea for which

foundation may be afforded by decrees as well in consistorial as in other actions. Nor is there any distinction betwixt decrees declaring a marriage and those by which an alleged marriage is negatived. One rule applies to all classes of actions, and to all judgments, whatever their effects on the pretentions either of pursuer or of defender. *Menzies* v. *Menzies*, 14 S. 47, is warrant for this proposition, and the judgment in *Longworth* v. *Yelverton*, 10th March 1865, 3 Macph. 601, and H. of L., 30th July 1867, 5 Macph. 144—particularly when read in the light of the opinions delivered—cannot be reconciled with the idea that a sentence assoilzieing a defender from a conclusion by which an alleged marriage is sought to be declared is one in aid of which, when impugned, the plea of *res judicata* may not by the law of Scotland be invoked and sustained.

"Putting aside, then, the doctrine that there is no finality for a judgment of *absolvitor* from an action of declarator of marriage, what has next to be considered is, whether a year and day is the period within which the challenge of such sentence as that by which Miss Sinclair was assoilzied must be instituted. This also was the subject of a very learned argument. The practice prior to the Reformation, and that by which the Reformation was followed, in the Consistorial Courts were referred to for the purpose of suggesting that the Instructions to Commissaries given in 1563 did not apply to such a judgment as that challenged. These Instructions (par. 20) will be found in Balfour's Practicks, p. 659, and the Act of 1592, c. 64, by which these were confirmed, at p. 676 of the same work. The Lord Ordinary thinks it unnecessary to say more upon this point than that it has been settled by the decision in *Menzies* v. *Menzies*, 21st Nov. 1835, 14 S. p. 47, and by the cases cited on p. 49 of the report. Guided by these authorities, he has sustained the first plea for the defenders, which is a plea rested on these instructions.

"III. If the challenge of the former decree be excluded by lapse of time, it is immaterial whether the statements of the pursuer would or would not be relevant or sufficient as grounds of reduction. But a plea against the relevancy has been stated, and upon this plea the Lord Ordinary has thought it right to give his decision. The only reasons which appear to the Lord Ordinary worthy of consideration are the alleged perjury of witnesses who were examined in the former action, and the alleged subornation of these witnesses by the late Miss Sinclair, the defender in that action. The libelling of these charges was sharply criticised by the defenders' counsel, for the purpose of shewing that it was less full in some things than in the circumstances should be required. This objection the Lord Ordinary would hesitate to entertain, and the truth is that the entertaining of it would seemingly be of small advantage to the defenders, because the particulars desiderated would probably be supplied. That upon which he has proceeded in holding the statements of the pursuer irrelevant or insufficient is the single condition that the alternative presented in the 12th art. of the condescendence and in the first plea of law for the pursuer is inconsistent with that unconditional and absolute allegation of perjury which is indispensable to the relevant libelling of such a case. The idea that a pursuer may charge perjury in so far as witnesses have deponed to facts adverse to the constitution of a marriage contracted by the interchange of *de presenti* consent, and in the same summons bring forward another ground of action involving the implication that there was no *de presenti* contract, and therefore that the things as to which the witnesses charged with perjury are things upon which they may have spoken the truth, is one that, in the opinion of the Lord Ordinary, must be discountenanced and repudiated; and the plea of irrelevancy or insufficiency has, as a consequence, been sustained.

"IV. The only other plea upon which it is necessary to say a word is that urged against the title of the pursuer to insist in the conclusions of the summons. The meaning of this plea, as understood by the Lord Ordinary, is that the testamentary deeds of the late Miss Sinclair cannot be challenged because the pursuer never was her husband, and consequently has not the patrimonial rights, the vindication of which is the ultimate, or perhaps in a sense the primary, purpose of the present action. Reading it in this way, this plea has also been sustained. The result naturally, or indeed necessarily, flows from the preceding findings in the interlocutor, by which the pursuer's failure to make good the grounds of his declaratory conclusion is established."

The pursuer reclaimed, and argued—The plea of *res judicata* cannot be maintained when founded on decree of *absolvitor* in a previous action of declarator of marriage. The rule of the Canon law is that a party could come back to the Court any number of times with new evidence. A sentence against a marriage never passed into *res judicata*; a sentence in favour of a marriage might do so, unless there were some inherent vice. The Canon law is the law of Scotland in consistorial cases. *Res judicata* does not apply here, because the case now presented is different from the former case. The rule that reduction is not competent after a year and day originated in the old law that appeal was excluded after that time, but that did not interfere with the principle that certain matters never became *res judicata*.

Argued for the defenders—The Canon law is the basis of consistorial law, but does not embrace the entire superstructure. The Court is no longer an ecclesiastical court, bound to administer the Canon law, but must have regard to social considerations and principles of natural law. The policy of the law is to put an end to strife, because if allowed to go on there might often be painful disturbance of social relationships. The rule of year and day applies to the present case; after that time the parties are entitled to rely on finality. Averments of fraud, conspiracy, and perjury require to be very specific. The person making them must state all the steps by which he arrives at his conclusion.

Pursuer's authorities—*Dallas* v. *Mann*, June 14, 1853, 15 D. 746; *Norris* v. *Gilchrist*, Jan. 14, 1847, 9 D. 466; *Macpherson* v. *Tytler*, May 14, 1839, 1 D. 718; *Shedden* v. *Patrick*, March 11, 1852, 14 D. 721, 1 M'Queen 535; *Duchess of Kingston*, 20 How. State Tr. 535; *Officers of State* v. *Alexander*, May 25, 1866, 4 Macph. 740; Decretals of Gregory IX. book ii. tit. 27, c. 7, and ii.

28, 5; Sanchez, De Sancto Matrimonio, book vii. disputat. 100, sec. 14; Burg. Com. i. 183; Shelford on Mar. and Div. 474; Poynter on Mar. and Div. 157; Riddell's Peerage and Consist. Law, 447; Statuta Ecclesia Scotticana, i. 176; Balfour Const. of Commiss. Courts, 670; *Dalrymple*, July 16, 1811, 2 Hag. Consist. Rep. 81; *M'Adam*, 1 Hume 181; Craig, i. 3, 24; ii. 18, 17 and 21; Stair, i. 1, 16; Fraser, Par. and Ch. (2d ed.) 22; Inst. Jur. Canon. (Lancelot) 14, 15, 16; *Queen* v. *Millis*, 1844, 10 Clark & Finelly, 722; *White* v. *Sibbald*, Mor. 7551; *Murray*, Mor. 7549.

Defenders' authorities—*Longworth* v. *Yelverton*, March 10, 1865, 3 Macph. 648, and (H. L.) 5 Macph. 144; *Donald* v. *Thom*, May 16, 1823, F.C.; *Menzies*, Nov. 21, 1835, 14 Shaw 47; Erskine i. 1, 42; Smith's Leading Cases, (1876 ed) ii. 760; *Meadowcroft*, May 10 and 11, 1844, 4 Moore's Priv. Con. Rep. 386; *Perry* v. *Meadowcroft*, Nov. 1876, 10 Beavan 138; *Irvine* v. *Kirkpatrick*, August 2, 1850, 7 Bell's App. 186.

At advising—

Lord Justice-Clerk—Thirty years ago—that is, in the year 1846—a judgment of *absolvitor* was pronounced by this Court in an action of declarator of marriage, brought at the instance of the present pursuer against the late Miss Janet Sinclair. The alleged marriage was said in the summons to have been constituted by a written contract of marriage and certain other written documents passing between the parties, by which it was maintained that a marriage had been constituted by declaration *de presenti*; and it was also alleged in the summons that this marriage was completed, and that the parties thereafter conducted themselves towards each other as husband and wife. In the record in that action the latter statement was expanded into a distinct averment that *copula* had intervened. But the pursuer made no attempt to prove this assertion, and his counsel at the hearing of the cause formally and deliberately abandoned it.

Since that judgment was pronounced the defender Miss Sinclair herself, and most of the persons concerned in or cognisant of the circumstances, have died. The present pursuer during this long interval has taken no further steps to assert his alleged marital rights; but now that his alleged wife, all her relatives who gave testimony in the former action, and most, if not all, of the other witnesses, have gone to their graves, he proposes now to reopen the whole controversy, and wishes to be allowed to establish all which the judgment of the Court decisively negatived, for the purpose of obtaining right to Miss Sinclair's property against her executors. It is needless to say that the contention is maintained under most unfavourable circumstances, and with all reasonable presumptions against it.

The defenders plead—1st, That the former judgment is *res judicata* as regards the whole grounds of the present action; 2dly, That the action is wholly excluded by a clause in the instructions applicable to consistorial causes, under which all decrees become final after a year and day from their date; and 3dly, They pleaded that the allegations of fraud, perjury, and conspiracy are wholly irrelevant.

The pursuer in reply maintains that the former decree, being one of *absolvitor* in a declarator of marriage, did not pass into *res judicata*, according to the brocard of the Canon law, that *sententia lata contra matrimonium nunquam transit in rem judicatam;* and that therefore, even if this action were brought on the same grounds as those on which the former case proceeded, he is entitled to try the question again. But he further pleads—1st, That the former judgment was obtained by fraud, perjury, and conspiracy; and 2dly, That the allegation of a marriage constituted by promise *subsequente copula* was not competently made, and was not embraced in the former action.

These pleas have given rise to an important and interesting discussion; and it is more from regard to the topics discussed in the argument than from any doubt as to the result that I propose to examine them a little in detail.

The first question, and one of considerable interest, although I think of little difficulty, relates to the plea of *res judicata*, and its application to matrimonial causes. The rule of the late Canon law in regard to *res judicata*, as contained in the Decretals of Gregory IX. is sufficiently distinct. It will be found in the Decretals, b. ii. tit. 27, chap. 7, and is in substance this, as summarised by Corvinus in his Aphorisms—"*Sententia recta lata, post decem dies, si ab ea non fuit appellatum transit in rem judicatam*"—that is the general rule. Then comes the exception—"*In rem judicatam non transit sententia quæ impugnari potest; ut est ea quæ contra matrimonium, aut pro matrimonio, in gradu prohibito contracto lata.*"

In the more expanded exposition of Sanchez the distinction between the *sententia contra matrimonium* and the *sententia pro matrimonio* is not so sharply drawn; but it comes out quite distinctly in section 14 of Disputatio 100, book vii. The *ratio* is simply this, and it is mainly applicable to suits for the annulling of a subsisting marriage in which a sentence *pro matrimonio* passes into *res judicata* by the tacit consent of both parties, who may lawfully remain together if there be no annulling impediment, and that consent may be inferred from the absence of an appeal. But a sentence *contra matrimonium*, either annulling the marriage or separating the parties, never passes into *res judicata*, because if the marriage is lawful it is sinful for the spouses to live separate. His words are—"*Quia sententia illa transiens in rem judicatam foveret peccatum, separando veros conjuges, vel uniendo qui tales esse nequeant,*"—b. vii. t. 100, sec. 1. It is on this ground alone, viz., the duty of the church to provide against the possible sin of separating husband and wife, that this exception in favour of sentences *contra matrimonium* from the general law of *res judicata* is decided in the Decretals and defended by the commentators.

Before considering the grounds on which it has been contended that a law such as this should be enforced in this Court in regard to a purely civil process, I may remark that if we had occupied the place of the superior spiritual courts of which Sanchez writes, I do not think the pursuer would fare in the present action much better than under our ordinary rules. Assuming it to be true, which may be doubted, that the former decree was a sentence *contra matrimonium* in the sense of the Decretals, and that therefore it did not pass into *res judicata*, it by no means follows—and there is no authority to that effect in the Canon law—that the pur-

suer, as a matter of right, would have been entitled to have his case tried again. The very reverse is quite clearly indicated in the very passage in the Decretals to which I have referred. The power of the Superior Spiritual Court to permit or direct rehearing of the case was entirely discretionary, and was more of the nature of a dispensing power than an ordinary exercise of jurisdiction, as very clearly appears from the instances given in the Decretals on which this plea is founded. And so the appropriate proceeding under it was not by raising a new action in the same tribunal, but by a *querela* or complaint to the Superior Spiritual Court. As to this Sanchez says—"In the second place, understand that although the sentence does not wholly pass *in rem judicatam*, it does pass to this effect, that he who wishes to impugn it shall not be heard to do so indiscriminately, but must allege some probable cause of injustice, which the Judge may be led to believe *jure ultimo*, so that the contending parties may not be heard indefinitely."

Now, what have we here? In the first place, one of the alleged spouses is dead, and thus no sin can possibly arise from the former decree subsisting. I suspect this of itself would have been conclusive, for we learn from Sanchez (sec. 12) that where the suit is with third parties and not between the spouses, the exception does not apply. But secondly, the pursuer has delayed to impugn the decree until all the witnesses are dead, and that by itself would be quite sufficient against the exercise of any such discretionary power, unless the pursuer can allege, which I shall consider afterwards, that he could not have brought it sooner. But on the face of this record the pursuer, in so far from shewing reason why the decree should be opened up, has shewn the best possible reason for refusing to disturb it. He has delayed his challenge until, by his own admission, the case cannot be fairly tried. If therefore he was to be judged by the Canon law, it would rather appear that he must fail. But putting this apart, I am quite clear that the rule in question forms no part of our law. It is not said ever to have been acted on in any single case, not even in the Bishops' Courts, during the very questionable period in which, after the Reformation, the consistorial law was administered by them. We are asked to sanction that which in every view is an entire novelty. I need not detain the Court by going into the exhausted controversy of the authority of the Pontifical law in Scotland. I had thought it had been well settled—1st, That it never was adopted in its integrity even in Catholic times; 2dly, That since the Reformation, while our consistorial law has been successively built on the broad lines of the Canon law, we have adopted its principles and maxims only as we adopted those of the civil law—we have done so in so far as these appeared to be just and equitable, and consonant to the general spirit of our jurisprudence, and no further; and 3dly, That matrimonial suits are purely civil causes, and are entertained in this Court as a purely civil tribunal, having no right and no duty to administer any spiritual jurisdiction whatever; and whatever may have been the practice of the Episcopal Court during those troubled years after the Reformation in which Episcopacy was established in Scotland, since the Revolution there has been no such thing as a spiritual sentence pronounced by the civil court, nor is any cause cognisable by us on spiritual grounds. Instead, therefore, of following the argument for the pursuer into the obsolete records of the old Commissary Court, I prefer to rely on the safer authority of Stair and Erskine as to the effect to be given to the Pontifical law. Stair says—"And there is reason for the abrogation of the Canon law at the establishing of the Protestant religion, because in the Popish Church it was held as an authoritative law, but since it is only esteemed a law as to those cases that were acted by it when it was in vigour, and in the rest only as our customs assumed some particulars thereof, according to the weight of the matter." And so Erskine, speaking of the Canon law, says—"It is compounded, on the one hand, of beautiful principles of equity, chiefly borrowed from the Roman law, and, on the other, of a collection of absurd canons and rescripts extolling church authority above all secular powers." I am not at all moved by the dicta ascribed to Lord Stowell and Lord Eldon in the cases of *Dalrymple* and *Macadam*. They are true in the general sense in which alone they were delivered—that our marriage law and that of England rested on the general principles of the Canon law, excepting so far as altered. It was beyond doubt not only a system of rules for churchmen *pro salute animæ*, but a great, and in its better days in some aspects a salutary, code of civil and social jurisprudence. But it must not be forgotten that while the original principles of the Canon law, applicable to marriage exhibit a large and philosophical spirit, there is no part of the whole system of the Canon law as it ultimately prevailed so suggestive of social tyranny or so much opposed to human freedom and happiness as that by which the marriage law came to be encrusted. The whole doctrine of the impediments to marriage, which comprised a long catalogue embracing many matters besides the prohibited degrees, and some of the most arbitrary and frivolous description, and the corresponding doctrine of the power of dispensation, of themselves would have been perfectly sufficient to insure its rejection in this country; and the very brocard with which we are dealing, the result and object of which was to keep in the hands of the ecclesiastical authority for an indefinite time the honour and happiness of many families, is simply one of the worst of those weeds which grew up so luxuriantly round the Pontifical fabric.

Without trespassing on the historical ground, my opinion on this plea of *res judicata* is, that as this is a purely civil action, and as the Court is a purely civil court, it must be regulated by the general principles applicable to our civil jurisprudence, and cannot be affected by the manner in which any spiritual court decided or dealt with spiritual causes on spiritual grounds.

I am therefore of opinion that the judgment in the former case stands in the way of the consideration of the present by the exception *rei judicatæ*. I am further of opinion that the decree in the former action is applicable to the whole ground embraced in the present. It was contended on the part of the pursuer that his former action did not embrace the ground of a

marriage constituted by promise *subsequente copula*. If it had not embraced it, it would not have been surprising, seeing that such a ground of declarator on the part of the man is, if competent, to say the least of it, very unusual. But I have no doubt whatever that the summons quite sufficiently embraced, and indeed necessarily embraced, the ground in question so far as it was competent. He alleged, indeed, in the former summons *sponsalia de presenti;* but that necessarily includes a promise *de futuro* also; and then he alleges that the marriage was completed, and that the parties conducted themselves to each other as husband and wife. Had the pleadings rested there they would have been sufficient; but in the condescendence the allegation is specifically made. It was the subject of a special allowance of proof obtained on the part of the pursuer without objection on the part of the defender, and therefore I have no doubt that this ground was sufficiently pleaded, and was negatived by a final and effectual judgment. I may observe that the same objection was taken and disregarded in the well-known case of *Honeyman* v. *Campbell*, 5 Wilson and Stair, 123. Lord Justice-Clerk Boyle says in that case—"The objection taken is of this nature—that in the summons while the pursuer concludes for decree of declarator of marriage she confines herself to one particular species of marriage, viz., a marriage said to have taken place in 1813 by declaration *de presenti* between the parties as husband and wife, and that that is the only ground in the summons on which she lays her case. But after attending as closely as I can, and being free to admit that according to the rules of strict procedure which we now observe in this Court, I was at first sight struck with the importance of the objection, yet upon consideration of the whole of that summons and the objections taken to it I am of opinion that they are not good." The Lord Chancellor deals in a similar way with the objection taken to the summons, and says—"In this case the whole matter is brought, and all the ways in which a party may be married are set forth, without very distinctly specifying on which of those several ways it is; but reliance is mainly placed in the latter part of the summons; still within the four corners of the summons I find enough to let in evidence of the kind of marriage now relied on." And the case was decided on this ground.

But even if I had been of a different opinion, I should have been prepared to hold that the course which the pursuer has followed on this matter is one which cannot be permitted to succeed. The pursuer in the former case deliberately raised and deliberately abandoned this ground of action as a substantive fact. We learn this from the opinions of the Judges, who expressed themselves very strongly on this subject. I apprehend that by thus abandoning the allegation he (the pursuer) admitted its falsehood, or at least barred himself from again asserting its truth. He would not have been permitted to have raised this question on appeal to the House of Lords in the former case, not because the judgment was final, but because the pursuer was confessed on this specific allegation. Now, what is proposed here. The pursuer made a grievous imputation on the character of Miss Sinclair—an imputation which, if false, was base in the extreme. The lady denied the charge, and defied her antagonist to the trial of it. After taking a judgment allowing him to prove it, he made no attempt to support it by evidence, but deliberately abandoned it in Court, and during the five-and-twenty years which elapsed before the lady's death he never re-asserted it. Now he proposes to blast her memory when she is in her grave. It is sufficiently doubtful whether such an action is competent at all after the death of one of the parties; but I am quite clear that in this case the pursuer is conclusively barred from maintaining it.

On this preliminary plea, therefore, I am very clearly of opinion that the former judgment is *res judicata*, being a judgment in an action between the same parties relative to the same subject-matter, and brought on the same grounds. But I have still to consider the allegations of fraud, conspiracy, and perjury, by which the former decree is said to have been obtained.

I entertain no doubt that an allegation relevantly made, that a decree was obtained by the successful party having induced or bribed the witnesses to depone falsely, is, like any other fraud, sufficient to rescind or subvert a decree so obtained. If a man obtains a decree by bribing the Judge, or by personating the creditor in a debt, the judgment so obtained must yield to a proof of the fact. This is not controverted for the first time. In the 1st vol. of Sir George Mackenzie's works, page 42, there is a pleading by that accomplished lawyer in the case of *Milton* v. *Milton*, which raised the question in what case a sentence may be reduced by a reprobator of the depositions of the witnesses, whereupon the sentence was founded. In this pleading he deals with the whole question of how far an allegation of conspiracy and perjury is relevant, and refutes with great detail all the suggestions which were urged from the bar in this case. He quotes a passage from the Pandects, book 42, art. 1, and law 43, *de re judicata*, which is precisely in point: "*Nadrianus aditus per libellum a Julio Tarentino et judicante eo falsis testimoniis conspiratione adversariorum, testibus pecunia corruptis, religionem judicis circumventum esse, in integrum causam restituendam; in haec verba rescripsit, exemptum libelli dati mihi a Julio Tarentino mitti tibi jussi; tu, si tibi probaveris, conspiratione adversariorum, et testibus pecunia corruptis, oppressum se, et rem severe vindica; et si quæ a judice, tam malo exemplo circumscripto judicata sunt, in integrum restitue.*" The authorities dwelt upon from the law of England as to collusion seem to have no application to this matter. The question which arose in these cases was not what effect the ecclesiastical court would give to its own sentences, or on what grounds they would set them aside, but what effect another court which could neither pronounce them nor set them aside ought to give to them. It would rather seem, on principle, that the sentence while it stood should receive effect. But in these cases when the sentence appeared to have passed by collusion the difficulty was avoided by holding it not to be a sentence at all. But whatever the logic of these cases, this is a totally different matter. I entertain no doubt that a court which has the power of pronouncing or reducing its own sentences is entitled to set aside any decree which

is relevantly challenged on the ground that the party has obtained it by the procuring of false testimony; and there is abundant authority to that effect.

A qualification, however, must be observed here. If the ground of challenge or the assignment of perjury be merely the repetition in another form of the contention or plea which was proponed and repelled in the former suit, or the assertion of facts which were within the knowledge of the party at the time the decree was pronounced, this can form no ground for impugning the decree. It is so laid down by Voet in words which are clear and precise. He says—"*Quod si sententia ex falsis instrumentis aut testimoniis alusque documentis lata sit, rescindi potest, ubi falsitas probata fuerit, quæ lite pendente neque adversario neque judici innoluerat, sic ut religio judicis per lingusmodi falsitatem circumventu fuerit; petita ad id per modum querelæ vel accusationis (non per actionem ordinariam) restitutione in integrum, ut sententia, per restitutionem enervata, perdat deinceps annem rei judicatæ auctoritatem, ac causa ex integro examinetur, perinde ac si judicatum non esset.*"

Voet rightly restricts this remedy to grounds of which neither the party nor Judge were aware, and he goes on to say that it will not be sufficient to entitle the party to this remedy to allege that he has since found documents which will enable him better to prove his case. Now, applying this rule to the allegations in the present summons (which the pursuer proposes to amend), I find nothing whatever stated which amounts to a relevant allegation of fraud. The truth or falsehood of the statements of the witnesses was the question which was tried in the former case; so was their honesty or credibility; and the alleged falsehood must have been quite well known to the pursuer at the time. To say now that they swore falsely is to say no more than he said then. To say that the lady and the witnesses knew these statements to be false is merely to repeat what the pursuer says that he knew, and what he maintained before. Nor is any new aspect given to the allegation by saying that Miss Sinclair and her aunt and her sister acted in concert in giving and promoting this evidence. The pursuer knew that they acted in concert, and probably had they been alive they would have avowed that they did so. It would have been a totally different matter had the alleged false testimony related to something not within the pursuer's knowledge at the time, and in regard to which he could point to specific sources of information by which the truth was at last revealed to him. But no such allegation is to be found from beginning to end of this record. He says he has been informed of this conspiracy since Miss Sinclair's death. But he was bound to have said when, and how, and by whom he was so informed. He says that one of the witnesses had repeatedly said that he was bribed; but he nowhere makes the specific allegation that the witness was bribed, neither does he say—what was essential—how and from whom he had this information.

Divested therefore of its generalities, I find nothing in this assignment of conspiracy and perjury but that which was perfectly well known before, namely, that these witnesses gave evidence which the pursuer says they knew not to be true, and that they all acted in concert in doing so. As to their knowledge of their evidence not being true, it is certain that the pursuer knew as much about that when the evidence was given as he does now.

An advantage, no doubt, the pursuer would have in a re-trial of the case. The evidence he impugns could not be repeated; nor could the parties assailed defend themselves; but this is hardly an advantage to which the pursuer is entitled.

It only remains that I should say one word on the plea which the Lord Ordinary has sustained, founded on the Instructions given to the Commissaries at different periods during the existence of that Court, and the cases of *Donald* v. *Thom* and of *Menzies* which were referred to. I have the greatest respect for the Judges who decided the case of *Donald* v. *Thom* and the subsequent case of *Menzies*; but I am not satisfied that these Instructions have the effect there attributed to them. The Instructions relate, not to matrimonial causes only, but to questions as to teinds, as to testaments, and a variety of other important branches of jurisdiction. We are asked to say that no judgment pronounced by this Court in any such causes can become final until a year and day has elapsed. Whatever may have been the operation of these Instructions in the old court of the commissaries, I am inclined to think that they do not apply to judgments of this Court; and I am not aware of a single example in which any such application of them has been made; but it is quite unnecessary to decide that matter. With this exception, I am for adhering to the judgment of the Lord Ordinary.

Lord Neaves—This is a case of no difficulty, unless it be the *embarras de richesse*, the difficulty of choosing between the grounds available for assoilzieing the defenders. There are several fundamental and insuperable objections to the pursuer's contentions, the first being that of *res judicata.*

The pursuer maintains that this plea is excluded, because under the Canon Law a judgment against marriage is not *res judicata* in the sense of being a bar to a subsequent action. The argument on this point has raised very important general questions—for instance, as to the effect of the Canon Law on the law of Scotland. I think there has been exaggeration in tracing principles in our law to the Canon Law—seen, for example, in the judgments of Lord Stowell and Lord Eldon—and especially with regard to the principle that marriage is constituted by mere *de presenti* consent to marry. I do not think the Canon Law had anything to do in establishing this principle in Scotland. I think it comes from the law of Nature, the Canon Law, and every other law where common sense prevails. So, too, legitimation *per subsequens matrimonium* is not from the Canon Law. It is certain that after the Reformation the authority of the Canon Law was greatly weakened, and no wonder, being the *jus pontificum.* When we got rid of the Pope and the Ecclesiastical Courts we got into the rules of the civil law. Among others, we adopted, with regard to marriage, the civil law rule of *res judicata.* It cannot be denied that to allow perpetual review of decrees against marriage would be most hurtful, and the Canon Law is, at the highest, only the law of Scotland where its principles and rules are *secundum bonum et æquum.*

Now, under our civil law rules, is there *res judicata* here? Is there substantial identity of the grounds of action? I think decidedly there is. The pursuer pleads that as in the previous action he gave up the extension of the summons so as to cover promise *subsequente copula*, allowed him by the Court, and further, ought not to have been allowed so to extend his summons, he is entitled to advance that ground now. But that extension was needed to make the record relevant. A marriage-contract is not a present consent to marry, but only a future one, and something equivalent to an averment of acting as man and wife was necessary. Again, *res judicata* is not to be got over by an addition of a detail, for instance, one other act of *copula*. The cause of marriage is indeed favoured, but such a result as is arrived at here would be most unfavourable to marriage.

A second sufficient ground for giving the defenders *absolvitor*, in my opinion, is the *mora* that has taken place in raising this action. In particular, I know of no precedent for sustaining an action of declarator of marriage founded on promise *subsequente copula*, where the other promiser is dead. The Styles immemorially contain a conclusion for solemnization. When one promiser is dead, the meaning of the promise may be construed in a sense different from the original meaning; even the connection between the promise and the *copula*—an essential point—may be mistaken. The old Styles are, as Mr Walter Ross has observed, the best guides to the practice of our ancestors, and generally to what are the *essentialia* of contracts. Apart from this special point, there has been great *mora* here: every one is dead who knew about the alleged facts. *Mora* is a most important thing in all questions of delicacy—such as this is—where answers might have been given at the time.

Mora is fatal also to the pleas of fraud and perjury. The pursuer knew from the first the truth of the matters spoken to by the witnesses in the former action, and was bound to raise this issue immediately. But the averments themselves as now made are not sufficiently specific to be entertained, even if there were no *mora* in the question.

Lord Ormidale—Although this case raises some questions of importance and interest, I cannot say that I think it is attended with difficulty.

The present is a second action at the instance of the pursuer, having for its object to establish that a marriage had been entered into between him and the late Miss Janet Sinclair. His first action was directed against Miss Sinclair herself, and was instituted in this Court in 1839. It was defended by Miss Sinclair, who denied that there had been any marriage between her and the pursuer. A litigation ensued, in the course of which the parties joined issue on the question whether there had been a marriage or not; and the litigation did not terminate until 1846, when a judgment of the Lord Ordinary assoilzieing Miss Sinclair from the pursuer's action was unanimously adhered to in the Inner House. And it was only in August last (1875) that the present action was brought by the pursuer, directed against Miss Sinclair's testamentary trustees, the leading conclusion of which is, like that in the former action, a declarator of his marriage with Miss Sinclair. Not only has the present action been brought after such a lapse of time, but also about six years after the death of Miss Sinclair herself, and after the death of her sister, her aunt, and her uncle Mr Sinclair of Barrock, as well as others, being all the parties who on the pursuer's own shewing could be expected to throw any material light upon the disputed question.

It is in these circumstances, generally stated, that the Lord Ordinary has pronounced the interlocutor reclaimed against, assoilzieing the defenders from this second action of the pursuer, on the ground that the judgment in the former action is conclusive against him on the principle of *res judicata*, and for the other reasons stated in his interlocutor and relative note.

It was contended on the part of the pursuer, in support of his reclaiming note—1st, That according to the Canon law, which he represented as being also the law of Scotland, there is no prescription or finality of a judgment pronounced adversely to the marriage status; or, in other words, that the pursuer neither was nor could be precluded on the principle of *res judicata*, or on any other ground of finality, from insisting in the present or in as many more actions as he might choose to bring, that he was married to the late Miss Sinclair; 2d, That his present action is not exposed to the defence given effect to by the Lord Ordinary, founded either upon the finality of judgments in consistorial cases referred to in the Instructions to Commissaries, of 1653, or upon the plea of *res judicata*, or upon any other ground; and 3d, That whatever effect the plea of *res judicata* might in other circumstances be entitled to, none can be given to it in the present case, where the judgment in the former action was, as he maintained, obtained through conspiracy and fraud.

(1) In regard to the pursuer's contention founded on the Canon law, I have no hesitation whatever in rejecting it. The Canon law may, no doubt, be said fairly enough to be the basis of the consistorial law of Scotland, but that all its rules and principles are to be held as imported into and to form part of the consistorial law of Scotland I entirely dispute. No authority, no decided case, not even the *dictum* of any of the Institutional writers, was referred to by the pursuer in support of his contention. On the contrary, all the authorities, at least all of them entitled to any weight or consideration at the present day, appear to me to be very clearly and unmistakably opposed to the pursuer. Thus, Lord Stair, in the passage of his great work (b. i, t. 1, sec. 16) commented on in the argument, says that none of the rules in the Civil, Canon, or Feudal laws "have with us the authority of law, and are therefore only received according to their equity and expediency, *secundum bonum et æquum*;" and Mr Erskine again, who followed Lord Stair at a later period, says (b. i, t. 1, sec. 42) in reference to the Canon law, "that since the Reformation it has declined fast in its authority, so that it is now little respected except in questions of tithes, patronages, and a few articles more of ecclesiastical right, where the canons are consistent with the protestant principle." And although I am not aware of any judicial decision or other direc or express authority to the effect that

the rule of the Canon law, that there is no finality of a judgment adverse to the marriage status—if there be such a rule, of which I am not satisfied, at least in the absolute and unqualified sense in which it was urged for the pursuer—I can entertain no doubt that this arises from the circumstance that so startling and unjust a rule—one so entirely opposed to what in modern times must be held to be in the words of Lord Stair *secundum bonum et æquum*—has not been attempted to be founded on or enforced. The present action, indeed, suggests very forcibly the inexpediency of adopting the rule of the Canon law referred to, if there be such a rule, for supposing that Miss Sinclair had married another person by whom she had children during the 30 years which intervened betwixt the termination of the pursuer's former suit and the commencement of his present action, what complicated relations and interests might have arisen—relations and interests which, supposing the pursuer were right in his contention, would probably, if not inevitably, have led to results of the most painful and distressing description.

But although, for the reasons which have been now alluded to, there may be no express or direct decision on the point, nothing, I think, can be more conclusive on the subject than the case of *Shedden* v. *Patrick*, in which both this Court and the House of Lords proceeded on the assumption that such a rule formed no part of the law of Scotland. And in the later case of *Longworth* v. *Yelverton* (10 March 1865, 3 Macph. 648) the Lord President observed, in reference to an argument such as that maintained by the pursuer in the present case—"I think Mr Smith" (the pursuer's counsel) "carried it a little further, and seemed to suggest that in consistorial suits of this kind there was very little element of *res judicata* at all, and that the judgment might be opened up at any time. I do not think that that is a sound position according to our law, and I do not see any good reason why in consistorial questions of this kind in regard to status there ought to be less conclusiveness or *res judicata* than in other cases." The case of *Norris* v. *Gilchrist*, cited by the pursuer, is also, I think, when fairly considered, an authority against rather than favourable to him; for, as I read the report of that case, the validity of the plea of *res judicata*, where the circumstances admitted of its application, as in the present case, was distinctly recognised by all the learned Judges, although in that case it was quite consistently held that failure in a service could not found a defence of *res judicata* to an action of declarator of legitimacy—the object of the two proceedings being essentially different, the one being a step of procedure merely towards the vindication of patrimonial rights and interests, and the other having for its direct and sole object the establishment of personal status. I cannot say, therefore, that I have been the least moved in the present case by that of *Norris* v. *Gilchrist*, the decision in which I must regard as inapplicable.

(2) I have been unable, however, to satisfy myself that the defence of finality given effect to by the Lord Ordinary, founded upon the Instructions of 1563 to Commissaries, can be safely relied upon; and, fortunately for the defenders, it is not necessary for their defence that it should be. I doubt very much whether the Instructions referred to were intended to do more than regulate the mode and extent of review of the judgments of commissaries in the processes themselves in which these judgments were pronounced. And in this view the case of *Donald* v. *Thom*, cited at the debate, and *Menzies* v. *Menzies*, referred to in the Lord Ordinary's note, in both of which a review in this Court by way of reduction of the judgments of Inferior Commissaries was sought, cannot be available as precedents in the present case, where a reduction is sought of a former judgment—not of any Inferior Court or Commissary, but of a judgment of this Court, and on grounds different, as the pursuer represents it, from the grounds on which the Court proceeded in pronouncing the former judgment. Besides, since the date of the two Commissary judgments sought to be reduced in *Donald* v. *Thom* and *Menzies* v. *Menzies*, all actions of declarator of marriage, as well as some other consistorial actions, have been made competent to the Supreme Court alone by the Statutes 4 Geo. IV. cap. 97, and 1 Will. IV. cap. 69. Accordingly, the judgment now sought to be reduced was pronounced, not by the commissaries to whom the Instructions in question were addressed, but by the Lords of Council and Session. Having regard, then, to the enactments of the statutes just referred to, and in particular to section 9 of the former and section 33 of the latter, I am disposed to think that since the passing of these Acts, if not before, the finality referred to in the Instructions to Commissaries, on which the Lord Ordinary founds, is on longer applicable.

(3) But if that be so, the defence of *res judicata*, also sustained by the Lord Ordinary, becomes all the more important. In regard to this defence (which I cannot doubt is equally available in such a case as the present as in any other) the only answer made to it by the pursuer, as I understood his argument, was, that although the object of his present action is in its leading conclusion the same as that of his former one, they are laid upon different grounds—that is to say, that while the former action was libelled exclusively upon the alleged marriage having been completed by the interchange of matrimonial consent *de presenti*, the present action, in addition to that ground, is also laid upon the separate ground of the marriage having been constituted by promise *subsequente copula*.

Now, whether in the very peculiar circumstances in which the present action has been brought, and especially keeping in view the lapse of time which occurred between the termination of the former suit, the death of Miss Sinclair and other parties during that time, and consequent loss of evidence and change of circumstances, there might not have been a good and sufficient defence to the present action even although laid, as averred by the pursuer, upon grounds different from that libelled on in the former, I think it unnecessary to consider, because I am quite clear that the pursuer is not in a position to maintain that his present is laid upon any grounds different from those of his former action. The way in which the pursuer endeavours to maintain the contrary is not a little singular; for while he admits that in the record, as ultimately made up and closed in the former action, and on which the parties joined issue and went to proof, both

grounds of action—promise with *copula* as well as interchange of consent *de presenti*—were expressly and unequivocally founded on by him—he says he committed an irregularity in doing so, in respect that the latter ground of action was alone in the summons. This is the very singular way in which the pursuer endeavours to avoid the plea of *res judicata*. But I am very clear, in the first place, that there is no room for the distinction on which he founds between his summons and record in the former suit; and, in the second place, that even if there were, he is barred from now availing himself of it.

I have examined the summons and record in the former suit, and I am quite satisfied that promise *cum copula* as a ground of action was not only condescended on in the record, but also libelled on in the summons. The written contract of marriage was expressly libelled on, and particularly that part of it whereby the parties agreed to marry, and "promised to solemnize the bond of marriage with all convenient speed." And then, after setting out the interchange of lines to the effect that the parties held themselves as married, the pursuer goes on to libel that "they afterwards considered themselves as married, and conducted themselves towards each other as husband and wife." I think there was here a sufficient libelling of marriage on both the grounds referred to; and, at any rate, that any room for doubt on the subject must be held to be cleared up and removed by the statements and pleas in the record as subsequently made up and closed. And that it was so understood by both parties in the former suit is beyond all question, for not only did the pursuer obtain an order or allowance to prove all his averments in his closed record, but he did so without objection on the part of the defender. Nor do I think it of any consequence that the pursuer did not lead any parole evidence, but contented himself with what he had in writing and obtained in the cross-examination of the defender's witnesses. That the Lord Ordinary in the cause held that the pursuer had libelled as one of his grounds of action promise *subsequente copula* is clear from the terms of his judgment on considering the proof and whole cause; for it appears from the report of the case (8 D. 589) that he expressly found "that the pursuer has totally failed to prove that any consummation of the said intended marriage ever took place, as alleged in the libel and record." And the interlocutor containing this finding (p. 627 of report) was adhered to by the Court. But the matter does not rest there; for I find from the same report (p. 508) that the Lord Justice-Clerk in giving judgment in the Inner House on the pursuer's reclaiming note against the Lord Ordinary's interlocutor stated that he had abandoned his allegation of consummation, and that "the case was most distinctly stated to us as one in which it was not possible, or intended, to allege that any conjugal intercourse had followed on the declarations which are said to constitute, and to have been granted for the purpose of constituting, actual marriage, as of the date between the parties." Lord Cockburn also (642) refers to this abandonment by the pursuer. Accordingly, the formal judgment of the Court contains an express finding to the effect that "the pursuer by his counsel at the bar expressly admitted that he did not now insist as any part of the case in the averment that consummation of the alleged marriage between him and the defender by conjugal intercourse had ever taken place, and that he did not mean to represent any part of the proof as intended to prove the same, even indirectly." And it was further expressly found "that the pursuer by his counsel at the bar stated that he did not insist as any part of his case in the averment that the alleged marriage had been made known to any of the relations or domestics of the defender; and therefore refuse the reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against; and of new assoilzie the defender from the whole conclusions of the libel, and decern."

In this state of the matter it is impossible, I think, for the Court now, on any statements which are made in the present record, to hold that the judgment in the former suit is not *res judicata* against him, or that he is not barred and precluded from insisting in the present action.

(4) But the pursuer argued that the plea of *res judicata* stated against the present action is untenable, because the judgment in the former suit was obtained by fraud, conspiracy, and subornation of perjury; and I do not say, having regard to the opinions of the learned Judges in this Court, and of the noble and learned Lords in the Court of last resort in *Shedden* v. *Patrick*, that a case might not be laid upon fraud and conspiracy and subornation of perjury so as to require investigation; but I am very clearly of opinion that the present is not a case of that description. In order to demonstrate this, I consider it unnecessary to go over the pursuer's averments in any detail, especially after the observations which have been already made on the subject by both your Lordships who have preceded me in delivering your opinions. I may observe, however, that he nowhere avers that there was conspiracy or collusion of any kind between him and the defender Miss Sinclair in the former action having for its object to impose on the Court and to obtain a judgment as in a fictitious or mock suit. That is not the nature of his case at all. At the very most his averments amount merely to some very vague statements and general charges of conspiracy and collusion between the defender and her sister and her aunt, all of whom are now dead. And these statements or charges are manifestly so vague and wanting in precision as to be clearly untenable and unavailing in any view that can be taken of them. On this point it is sufficient to refer to the opinions delivered in the House of Lords in the case of *Shedden* v. *Patrick*, and also in the case of *Irvine or Douglas* v. *Kilpatrick* (7 Bell's Appeals, p. 186). These opinions are, I think, conclusive to the effect that the pursuer's averments, as well in the record as closed as in his proposed amendments, are quite insufficient, as not shewing with the requisite relevancy and precision of what the alleged fraudulent conspiracy consists—how, when, and where it was entered into or carried out, if it ever existed, which I see no reason for believing it did.

In the circumstances, and for the reasons now stated, I am of opinion that the pursuer's reclaiming note ought to be refused, and the Lord

Ordinary's interlocutor adhered to, except as regards its second finding, which I think should be recalled as unnecessary.

Lord Gifford—On 5th April 1842, being now upwards of 34 years ago, the present pursuer Mr Edmund Beatty Lockyer raised an action of declarator of marriage against Miss Janet S. T. Sinclair, of Freswick, in Caithness. The summons concluded to have it found and declared that the pursuer and Miss Janet Sinclair were lawfully married persons—husband and wife of each other—and there were the usual ancillary conclusions for adherence, and otherwise.

The action was defended by Miss Sinclair, who denied that any marriage had ever taken place, or that anything had ever followed on the antenuptial marriage contract which had been executed by the parties, or on certain writings which had thereafter passed between them. In the summons the pursuer had not averred specifically that the alleged marriage was ever consummated, or that any sexual intercourse had ever taken place. He contented himself with averring generally in the summons that the parties, after *de presenti* consent to marry had taken place, "considered themselves as married and conducted themselves towards each other as husband and wife."

In the revised condescendence, however, the pursuer made this general statement specific, and averred a number of times and places when and at which connection was said to have taken place. These averments Miss Sinclair denied, as the record bears, "in the most solemn and positive manner," and the record was then closed between the parties; the pursuer founding his case that marriage had taken place (1) On the averment that solemn and serious *de presenti* consent had been interchanged between him and Miss Sinclair, and (2) That even if this were not so, actual marriage was completed by written promise to marry *subsequente copula.*

A very long and very keenly-contested litigation followed and continued for four years. The whole of the pursuer's averments in his revised condescendence were remitted to proof. A very long proof was led, consisting not only of documents and correspondence passing between the parties, but also of parole testimony, and although the number of witnesses was not great, consisting (including the pursuer's conjunct proof) of only five witnesses in all, yet the examination of these witnesses was very minute and protracted, extending to upwards of 300 pages of print.

After a long struggle in the proof, in the course of which numerous questions as to competency were raised, and after very full argument, the case was decided against the pursuer—first by the Lord Ordinary, and afterwards by the unanimous judgment of the four Judges of the Second Division. The whole Judges were of opinion that no marriage had taken place between the pursuer and Miss Sinclair, and it is important to note, in reference to the contention now maintained by the pursuer, that the judgment of the Second Division contains the following very express and specific finding:—"Find that in stating his case on the merits of the declarator, the pursuer by his counsel at the bar expressly admitted that he did not now insist as any part of his case in the averment that consummation of the alleged marriage between him and the defender by conjugal intercourse had ever taken place, and that he did not mean to represent any part of the proof as intended to prove the same even indirectly; and further find that the pursuer by his counsel at the bar stated that he did not insist as any part of his case in the averment that the alleged marriage had been made known to any of the relations or domestics of the defender." It was besides perfectly clear upon the proof which had been led in the case, (and this is noticed by all the Judges) that the pursuer had utterly and absolutely failed to prove any of his averments regarding the consummation of the alleged marriage, and had even failed to raise the slightest suspicion that any connection had or might have taken place. On this point, and as an example, I may notice what was said by Lord Justice-Clerk Hope. Speaking of the pursuer's averments of consummation, his Lordship says—"It is right to add (but I beg to state that I only do so lest any inference should be drawn from the omission to make the statement; not in the least degree because I think it in any respect necessary for the vindication of this lady from any imputation, or because I think she can suffer from anything this pursuer has said) it is right however to add, that looking to the whole proof, I not only utterly disbelieve the statements on this point which the pursuer chose to place on the records of the Court—I disbelieve them not merely as a Judge examining evidence, but as a man scrutinizing narrowly the conduct of a female—I not only disbelieve them, but I am satisfied that they were truly placed by the pursuer on record for the purpose, by intimidation, of driving the defender into marriage, or of attempting to dishonour the lady by whom he had been rejected." Others of the Judges expressed themselves to the same effect.

The pursuer's action, then, of 1842, after the fullest investigation, and after a keen and protracted litigation, failed on both the grounds on which he relied, and final decree of *absolvitor* was pronounced by this Court on 3d March 1846. The pursuer took an appeal to the House of Lords, but after considerable delay he failed to follow it forth, and the appeal was finally dismissed by the House of Lords in February 1850. The result of these judgments was to find that the pursuer and Miss Janet Sinclair were not and never had been married persons; that both of them were single and unmarried and free to marry any persons with whom they might choose to contract.

The final judgment of the Court, pronounced in 1846, stood unimpugned and unchallenged for 30 years, until the present action was raised on 9th August 1875. Miss Janet Sinclair died on 18th June 1870, understood and reputed to be an unmarried person, and as such she executed as her will a trust-disposition and settlement in favour of Mr Ferryman and others, the present defenders, who are her representatives administering her estate in terms of the settlement. The aunt and sister of the said Miss Janet Sinclair, who were the principal witnesses in the action of 1842, are also now dead, and it cannot but be that after the lapse of 37 years from the date of the occurrences in dispute death must have re-

moved many of the persons who might possibly have thrown light upon, or given evidence regarding, the occurrences which then took place.

It is in these circumstances that the pursuer now, in 1876, seeks to open up the decree of *absolvitor* pronounced in 1846. He asks this Court to retry the whole question which formed the subject of keen and protracted litigation 30 years ago. He demands that the question whether there was any marriage between him and the late Janet Sinclair in 1839 shall be investigated into and determined of new, just as if no proceedings had taken place during the four years 1842 to 1846, and just as if he was now raising the question for the first time. He now proposes to lead new evidence to prove (apparently principally by hearsay of witnesses who are now dead) facts and circumstances which he failed to prove in 1842. He says he will establish that Miss Sinclair's aunt and sister, who were examined and cross-examined at such length in 1843 and 1844, gave false evidence—that the late Miss Sinclair herself induced them to do so, or conspired with them that they should swear falsely, and he now asks the Court to declare, after Miss Janet Sinclair's death, that she was the wife of the pursuer in 1839, and that the pursuer now, as her surviving husband, has right under the contract of marriage to Miss Sinclair's whole means and estate, heritable and moveable. In short, having failed to substantiate the marriage during Miss Sinclair's life, he proposes to do it now that she is dead, to the effect of carrying off her whole property. The demand is a very startling one—I think I may say that it is unprecedented—and it would require to be supported by very strong and special grounds.

I am of opinion that the pursuer has failed to state any relevant or sufficient grounds for setting aside the final decree of 1846, that the pursuer is not entitled now to raise or to try the questions embraced in this action, and that the defenders are entitled to decree of *absolvitor*. I am therefore for adhering to the judgment of the Lord Ordinary.

The first plea relied on by the defenders is that the judgment of 1846 constitutes *res judicata* between the parties and their representatives; that that judgment is binding upon the present pursuer, and that he is barred and estopped thereby from trying over again the question which was then, after full trial, finally decided against him. I think this plea is well founded.

It is not and cannot be disputed that the litigation which went on from 1842 to 1846 was a litigation before a competent tribunal—a litigation in which all the proper parties took part, and in which the questions raised were fairly and fully contested. It was in no sense a collusive law suit and litigation in which there was only a pretended contest, and in which, as happened in some of the cases cited at the bar, the pretended antagonists really concurred in obtaining the decision, and the Court was deceived and entrapped into pronouncing a judgment which both parties knew the facts would not justify. Collusion, in the proper sense of the word, is out of the question. There was certainly no collusion in the litigation between the pursuer and the late Miss Janet Sinclair. Instead of collusion there was the keenest, the most strenuous, the most bitter, opposition. Every point was contested. The parties were represented by the ablest counsel then at the bar. No plea was omitted—no averment susceptible of proof was forgotten—every point was contested. In the proof every possible advantage was sought by the pursuer, and every objection to evidence which the pursuer or his advisers thought they might beneficially take was rigorously and even vexatiously insisted in. If the pursuer lost the case finally in 1846, it was not for want of strenuous litigation. Everything that skill and perseverance and energy could do for him was done, and if the judgment of 1846 is not to be final, I can hardly conceive that finality can be predicated of any judgment whatever of any Court.

But the pursuer by his counsel boldly maintained that in a consistorial cause, such as a declarator of marriage or of legitimacy or of bastardy or of putting to silence, there is not and never can be any such thing as a *res judicata*; at least where the judgment denies or negatives the alleged marriage; and this contention was supported by an argument, the learning, the research, and the ingenuity of which I could not but admire, and my admiration was only increased when I felt the hopelessness of the effort.

The contention was, that by the Canon Law in matrimonial suits there never is and never can be *res judicata*, at least when the judgment is against the alleged marriage, and it is urged that the Canon Law on such a subject is the law of Scotland. There is only one text on the subject in the Canon Law itself, that is in the Corpus Juris Canonicum. It occurs in Decretum, book ii. tit. 27, law 7, and although expressed in general terms, the case, and the only case, given is one of a collusive decree, obtained by the device of both the parties, who had combined in deceiving the Ecclesiastical Court and in surreptitiously obtaining a decree. The general rule contended for by the pursuer can only be gathered from the *dicta* of certain canonists or commentators upon the Canon Law; and indeed the chief authority relied upon is that of Sanchez in his work De Matrimonio, and I think most, if not all, the writers quoted by Mr Fraser either merely follow the *dicta* of Sanchez or explain and modify or extend them. I do not think it necessary to enter upon the extremely interesting inquiry into which Mr Fraser led us as to the bearing and extent of the rule which certainly seems to have prevailed among the canonists, that in certain matrimonial causes, and in certain circumstances, the plea of *res judicata*—that is, the finality of the judgment of a court—was not admitted. A distinction was taken between judgments in favour of marriage *pro matrimonio* and judgments against marriage *contra matrimonium*. In the former the matter *transiit in rem judicatam*, in the latter not; but even in the former case there were exceptions, as where a marriage was affirmed or declared between parties alleged to be within the forbidden degrees. There seem to have been other exceptions and sub-exceptions, and, as usual in such cases, successive writers gave play to their ingenuity and subtlety in refining and distinguishing the most shadowy differences. All this is very interesting, but it has really no bearing on the present case, for nothing is more hopeless than to maintain that the *dicta* or disquisitions of canonical commentators are or ever were the law

of Scotland. Even the Canon Law itself, at least since the Reformation, forms no part of the law of Scotland. Even before the Reformation, the weight of authority seems to shew that the Canon Law had not *per se* the force of law, at least where contradicted by local ordinances or customs; and since the Reformation, and I think it perfectly clear in the words of Lord Stair, and no higher authority can be cited, that in Scotland the Canon Law and its rules and principles "have not the authority of law, and therefore are only received according to their equity and expediency *secundum bonum et æquum*," Stair i. 1, 16. If this be true of the Canon Law itself—of the Corpus Juris Canonicum—it is much more true of the treatises of the Canonists and Canonical Commentators. Most certainly everything that Sanchez says is not the law of Scotland. It would be startling indeed if it were; and although in matrimonial questions, and in questions relating even indirectly to Church Law, the Canon will always be listened to with respect, I am not sure that the same can always be said of the *dicta* of Sanchez, or of the crowd of commentators who either preceded or followed him. Speaking for myself, and without claiming more than a very slight acquaintance with this class of writers, I am almost inclined to say that when a *dictum* or principle can only be supported by Sanchez or by his followers, it is rather a ground of suspicion and a call for scrutiny than a reason for acceptance as part of the law of Scotland.

It is satisfactory to think that the reasons given for the alleged canonistic rule against the operation of *res judicata* have no place in the law of Scotland. The *salus animæ*, the safety or eternal welfare of the soul, the mitigation or the shortening of the pains of purgatory, and similar reasons, cannot be listened to here and now. Such considerations are foreign not only to our law but to our modes of thinking, and *dicta* which rest upon such considerations have only to be examined to be laid aside. If the plea of *res judicata* is to be met and overcome, it must be in a different manner and on far different grounds.

I am of opinion, then, that by the law of Scotland the rule of *res judicata* is as completely and as fully applicable to matrimonial, divorce, and consistorial causes as to any other class of causes whatever. No good reason can be given why there should be any difference. Nay, if the nature and specialities of consistorial suits, particularly suits having for their end to constitute, to negative, or to dissolve marriage, be taken into account, there is even more reason why, in a fairly and fully tried cause, honestly contested and fought out to the end, the sentence should be definitive and final. Uncertainty, liability to question, doubt, possibility of change or reversal, are far more to be deprecated in questions relating to marriage than almost anywhere else, and the social misery and confusion which would or which might result if it were impossible to fix and settle such questions can hardly be estimated. A mere pecuniary award, or even the adjudication of an estate, is or may be comparatively a small matter compared with the final knitting or the final severance of nuptial ties—the separation of families, and the *status*, legitimate or otherwise, of innocent offspring.

Wherever therefore there has been an honest, fair, and fully fought litigation, as in the present case—wherever the proper parties, the only proper parties, and all the proper parties, have honestly and without collusion, whether obstinately or not, fought out their rights before a competent court, and in a competent manner, then as between these parties, so litigating, I think the judgment obtained, acquiesced in or affirmed on appeal, has and must have the force of *res judicata*. The question is settled, the judgment has gone forth, and that same question is not to be fought over again between the same parties, and in the same way, and thus judgment made not the ending but the beginning of strife. For the pursuer's contention really is that the suit is to be interminable; no matter how many judgments are pronounced, the pursuer (for he does not concede the same privilege to the defender) can simply try again, taking his chance of new evidence or variations in the mode of giving evidence, of new witnesses or the absence of old witnesses, of a new jury or a new judge, of changes in the law or changes in opinion, and this not even to be ended by the death of the parties, but it may go on for ever as between their representatives.

I cannot listen to such a contention, and I reject without hesitation the pursuer's proposition that there can be no such thing as *res judicata* in matrimonial or divorce suits. In the present case I hold it perfectly clear that whatever was really and competently decided after full and honest litigation in the action of 1842 must now be held in the fullest sense of the words to be *res judicata* against the pursuer.

But the pursuer next contends that although the final decree of 1846 may be *res judicata* in so far as it finds that there was no marriage constituted by the interchange of present consent, it cannot constitute *res judicata* so as to find that there was no marriage constituted by promise *subsequente copula*, for the pursuer maintains that this separate ground of action was not competently embraced in the action of 1842, and was not competently adjudicated upon by the Court. He maintains that the averments which he himself made in his first action as to the alleged marriage having been consummated, and as to intercourse having taken place between the parties, were incompetently made—that all these averments should have been struck out of the record—that no proof should have been allowed regarding them, and that the Judges in the first action should have laid these averments and the proof by which they were attempted to be supported altogether out of view.

Now, I cannot agree with the pursuer in this view of the case. It is true that in the original summons no precise averment was made of consummation, and no particulars were given as to time or place. But there was a general averment that after the alleged marriage the pursuer and the late Miss Sinclair "considered themselves as married, and conducted themselves towards each other as husband and wife."

A general averment of this kind was all that was necessary to be made in a summons drawn according to the old form, and the very object of the condescendence, and revised condescendence which were afterwards allowed, was that this general averment might be made specific, that

full details might be supplied, and that the pleas in law arising upon the facts might be separately deduced, and I think it was perfectly competent for the pursuer to introduce into his revised condescendence, and to place upon the closed record, the specific allegations upon which he ultimately relied, and the pleas in law he deduced therefrom. No objection was taken to his doing so. Issue was distinctly joined between him and the late Miss Sinclair upon these very averments. In that proof the pursuer endeavoured to substantiate them, and although doubtless in this he signally failed, still I cannot doubt the competency of the averments and of the proof, and it is hardly possible to read the opinions of the Judges without feeling that had the pursuer succeeded in establishing, the decision of the cause would probably have been quite different from what it was.

Still further, I think that the pursuer is now completely barred from maintaining that these averments were incompetently made in the first action. It was the pursuer himself who made them; he claimed right to do so, and his right was allowed. He asked a proof of them, and the proof was granted to him. He went to judgment upon those averments and upon that proof, and it is impossible now to allow him to plead that these averments were incompetent, that the proof relative thereto should have been excluded, and that the judgment thereon, which he himself demanded, was incompetently pronounced. I am not moved by the judgment in *Dallas* v. *Mann*. There the objection was taken in the original action, and was sustained in the original action, leaving it to the pursuer to bring a new action upon new grounds. It led to a simple dismissal of the cause, that is, the party was expressly allowed or required to bring a new action, and there never was or could be any *res judicata*. But the principle applied in *Dallas* v. *Mann* is inapplicable to the present case, in which the detailed averments were quite rightly and competently put upon the closed record.

I am of opinion, therefore, that the final judgment of 1846 forms, in the highest sense of the words, *res judicata* against the pursuer. It decided against him the very questions which he now seeks to raise, and disposed definitively and precisely of all the grounds upon which he now seeks to rest the present action. His demand is—I think it is impossible to disguise it—to try over again in 1876 the very same questions, and upon the very same grounds, which were adjudicated upon *in foro contentiosissimo* in 1846.

Now, without saying that a decree *in foro* can never be got rid of, it is enough to say that when once a proper *res judicata* is established, as in the present case, it can only be avoided on very special and specific grounds. What those grounds are belong to a subsequent branch of the pursuer's case.

There is another ground on which the defenders rely as excluding the present action, and that is, that under the Instructions to Commissaries issued in 1563, the lapse of a year and day from the date of the final decree excludes all subsequent challenge thereof. Now, I admit that there is great room for doubt as to the nature and effect of the Instructions to the Commissaries, and in particular of the special instruction upon which this plea is founded. It is a general principle that decrees in absence may be opened up, even although proof has been led, for a decree in absence is not *res judicata* in the strict sense, or even although there be *causa cognita*, because there has been no contract of litiscontestation; there has been no appearance for the defender. Now, one can see the extreme importance of fixing at least some limit within which a party who does not choose to appear in a consistorial cause may be barred from appearing and challenging a decree after the other party has proceeded upon the faith of it. I think that was the actuating principle upon which the three decisions founded upon by the defenders were founded, and I cannot lay these decisions aside. I feel myself bound by them as establishing a most salutary rule. It is true the regulations apply to all kinds of actions in the Commissary Court, and appear to be applicable to other than mere matrimonial causes, and although as to other causes they are not now observed, still as to matrimonial suits there was a very great desirability in reducing finality within a fair period. I am not prepared to say that I would not apply these three cases as a fair rule to consistorial causes, fixing a year as the period after which a decree in absence at any rate should not be opened up, except on very special cause shewn indeed. But while I cannot discard the principle founded on the lapse of year and day, I think it does not apply to the present case or to any case which has been decided between the parties as the present case has. For the moment a decree is pronounced *in foro contentioso* it is *res judicata*. It may be reviewed if a court of review is open; it may be appealed if it is an appealable judgment; but it cannot be disregarded as a judgment. If it is affirmed on review or appeal, then it is *res judicata*, though only a month has elapsed—or indeed it is *res judicata* the moment a final judgment is pronounced which is acquiesced in or not taken to review. Therefore this rule of year and day does not apply in the least to the judgment in the present case. Its effect upon other rules I shall not say anything of. I think that part of the Lord Ordinary's interlocutor need not enter into our judgment. And this brings me to the next question in the case, which is this—Has the pursuer set forth relevant and sufficient grounds upon which a valid or effectual *res judicata* can be got over? I quite agree with your Lordship in the chair on this part of the case. No doubt a decree *in foro* may sometimes be set aside and the cause be retried. The best instance is the case put in illustration—that of a decree or judgment *in foro* obtained by collusion of the parties. I entertain no doubt whatever that if parties combine to get a judgment, the judgment so got by their collusion, or by deceiving the Judge by the appearance of a contest which does not really exist, will not stand as *res judicata* against any one, or against anybody. I also go along with your Lordship in holding that a judgment obtained by fraud cannot be pleaded upon by the party guilty of that fraud. And that raises what to my mind is the real difficulty in this case—Has the pursuer set forth specific averments of fraud, which, if he proves them, would entitle him to set aside this decree and to try the cause over again? Now, I agree with your Lordship in the chair in all the remarks which you have made upon this

point. I do not think that any of the grounds relied upon by the pursuer are sufficient to entitle him to found upon.

I think the grounds may be classified into four heads. He says the witnesses spoke falsely—were perjuring themselves by speaking what was not true. Now, it is quite plain that that by itself is not a ground for setting aside a judgment. There is contradictory evidence in almost every jury trial, and cases of perjury are not unfrequent in cases where strenuous disputes arise regarding matters of fact; but it is for the jury in each case to judge which of the witnesses to believe and which to disbelieve. And it is quite vain for a party who has been unsuccessful in one trial to say—I want another jury before whom I will prove that certain witnesses have perjured themselves. That must be settled not in a subsequent case, but in the case itself, and means are provided by allowing additional or conjunct proof for exposing or detecting such perjury. Then the pursuer next says that at the time the first case was tried he could not get some witnesses. That is not a good ground for setting aside *res judicata*. He ought to have stated how he could not get them at the time. And it is extremely material to bear in mind, as several of your Lordships have noticed, that all the averments remitted to probation in this case were proper facts within the pursuer's own knowledge, about which he must have known fully and truly whether they were true. He cannot say therefore that in anything that was proved he was taken by surprise, although he may have been surprised at the testimony; and if he was taken by surprise at the testimony he ought to have protested for reprobators, as it is called, and claimed an opportunity of contradicting it. He actually had an abundant and long delay and a conjunct probation, and all that he now avers should have been brought out at the time. He says further that he could not get some witnesses, or that some witnesses were not adduced, but that was a thing he ought to have complained of at the time, and the proper remedy would have been appeal. He would have got whatever time was necessary, and all compulsitor to secure the attendance of witnesses. And now, after the lapse of thirty years, he comes and says that he has got information which he did not possess before. I do not think that it is materially different from the last. Information as to the facts he cannot have got in the sense of their being new—what he means is that he has got new witnesses about them, and found out things afterwards which he might have brought forward in 1846 but did not bring. That is his own fault. It is quite plain upon this record that there were plenty of witnesses who could have proved most material points of his averments if they had been true and if he had chosen to bring them—keepers, coachmen, ostlers, and others at Duntreath, regarding whom it must be presumed he should have known; and the Rev. M. Thoms and others, to whom it is said averments were made by Miss Janet Sinclair. He proposes to bring all these witnesses now because he did not bring them in 1846. It is impossible to sustain that as a ground for opening up *res judicata*. If he was taken by surprise, there was ground for moving for a new trial at that time; but now, after acquiescing in the judgment for a period of thirty years, he is moving for a new trial. The last ground upon which he asks this *res judicata* to be opened up—and that is the only ground upon which I have the least difficulty—is that Miss Janet Sinclair herself was guilty of subornation of perjury; that is, in inducing her sister and aunt to swear to what they knew to be untrue. Now, I concur with your Lordships that this averment is not relevantly or sufficiently made. That they did conspire (as stated in the amendment which the pursuer has made) together to give false evidence is not nearly enough in an inquiry of this kind. It is not said that there was any bribe given them, or any inducement of any kind offered for them to come forward and swear falsely. All that can be said against Miss Janet Sinclair is that, perhaps, she sat by and heard, or that perhaps she knew, what they were to swear to from having conversation with them. Is that the proof we are going to? I do not think that is a sufficient allegation of subornation of perjury. Besides, it would require to be shewn that that perjured information was material in the judgment of 1846. Now, when I look at the opinions of the Judges in that case, I find that they chiefly went upon the correspondence and upon what the parties meant by the interchange of these written *de presenti* consents; for there was also a marriage contract that passed between the parties. That was the chief averment of the case; and the opinions of all the Judges go upon the correspondence chiefly, as shewing that the parties by these *de presenti* written consents did not intend *verum matrimonium*. That was the ground of decision in 1846—not any particular statement made by these witnesses, now said to be perjured and to be suborned by Miss Janet Sinclair—and it is out of the question to allow this averment, even had it been much more specific in itself, to go to proof, to the effect of letting in a new case altogether of judgment which is perfectly well supported by the other. The conclusive answer to the pursuer getting into these matters now is lapse of time and the change of circumstances which have occurred, Why has this matter lain over for thirty years? Why has the pursuer waited until all the witnesses are dead? Why has he waited until death has covered with oblivion all the circumstances not recorded in the former proof, when no party materially acquainted with these facts can be got to speak to them; and he can only get proof of the alleged perjury of the two witnesses and of the alleged subornation by Miss Janet Sinclair by the hearsay evidence of other witnesses who are now dead. I think lapse of time here is sufficient. No party is entitled to lie by for thirty years, and then, when the other party is dead and circumstances have escaped the memory so that it has now become impossible to prove them by essential witnesses, to raise the question now in a new state of the law, under new circumstances, before new Judges, and with different parties. I think the lapse of time is a sufficient answer, even if the averments by which the pursuer seeks to get rid of *res judicata* had been far more definite and specific than they are, or the pursuer can possibly make them. Upon the whole of these grounds, I think the judgment of the Lord Ordinary ought to be adhered to.

The Court pronounced this interlocutor:—

"The Lords, in respect it is unnecessary to decide the question raised by the defenders in their first plea in law, Recal the interlocutor of the Lord Ordinary of 15th February 1876 in so far as it sustains that plea: *Quoad ultra* adhere to the interlocutor reclaimed against, with additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—Fraser—Campbell Smith. Agent—William Spink, S.S.C.

Counsel for Defenders — Dean of Faculty (Watson)—Kinnear. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, June 30.

FIRST DIVISION.

[Sheriff of Edinburghshire.

BATCHELOR *v.* MACKERSY AND PATTISON.

Counsel and Client—Advocate—Liability for Misconduct of Cause.

An advocate in undertaking the conduct of a cause enters into no contract with his client, and what he does *bona fide* according to his own judgment will bind his client, and will not expose him to any action, even if the client's interests are thereby prejudiced.

Agent and Client—Liability for Misconduct of Cause.

An agent must as a general rule follow the instructions of his client, but when the conduct of a cause is in the hands of counsel, the agent is bound to act according to his directions, and will not be answerable to the client for what he does *bona fide* in obedience to such directions.

Relevancy.

Averments of disregard of instructions, improper conduct, and unskilful management, made by a client against his agent and counsel, which were *held* not relevant to support a conclusion for damages in an action by him against both for misconduct of a cause.

This was an action raised in the Sheriff Court of Edinburgh at the instance of Alexander Batchelor, general dealer, Rhonehouse, in the stewartry of Kirkcudbright, against William Mackersy, W.S., and George Handasyde Pattison, advocate. The conclusion of the summons was for a sum in name of damages sustained by the pursuer "through the wilfulness, maliciousness, gross negligence, systematic disregard of instructions, and ill-guided recklessness" of the defenders, the one as agent, the other employed by him as counsel, in their management of an action in the Court of Session.

The circumstances of that action, and the averments upon which the present action was based, were, so far as material, as follows:—The pursuer's father Robert Batchelor, shoreporter, Dundee, had left a trust-disposition nominating trustees, and directing them on the death of his wife to sell his means and estate and divide the proceeds equally amongst his family, six in number. Robert Batchelor died in 1848, and his widow in 1855, at which date nothing had been heard of the pursuer, who had gone abroad for eight or ten years; and on the estate being realised it was distributed as directed. The pursuer's share was consigned in bank, but at a later date it was paid over to his surviving brothers and sisters in the belief that he was no longer alive. On his return home, eventually, he was unable to obtain it nor to make the trustees account for their intromissions, and he accordingly instructed Robert Broatch, writer, Dalbeattie, to get the necessary proceedings raised before the Court of Session for the purpose. The defender Mackersy was employed as Edinburgh agent, and three actions were raised, which were afterwards conjoined in the name of Francis Suttie, to whom the pursuer, for a consideration, had assigned his share of his father's estate. They were directed against the trustees and against Alexander Lindsay, into whose hands the truster's heritable property had passed on its being sold in 1855, as an individual. In the course of the proceedings, upon 7th February 1871, the sale of the heritable property was found, after proof before the Lord Ordinary, to be illegal, and Lindsay was ordained to lodge an account of his intromissions with the rents he had drawn from it since Whitsunday 1855.

In October 1871 the defender Pattison was first employed as counsel in the actions referred to, as the previous counsel, Mr Black, declined to continue to act, on the refusal by his client to listen to a compromise which he thought favourable. The pursuer averred (cond. 5) that it was at this time "that the wilfulness, maliciousness, gross negligence, systematic disregard of instructions, and ill-guided recklessness, in the management or conduct of said proceedings before the Court of Session, began, of one or more of which the defenders, or one or other of them, have been culpably guilty."

The pursuer further averred (cond. 6)—"In carrying out said accounting, and with the view to the proper ascertainment of the pursuer's one-sixth share of his father's estate, the defender William Mackersy was instructed to get the heritable property sold by public roup, as directed by the trust-deed. Instead of obeying these instructions the defenders did, both of them, wilfully and recklessly consent to a remit to a pretended man of skill to value and report upon the heritable subjects. Against this the pursuer remonstrated. Notwithstanding, the defenders lodged a minute craving such a remit, and by interlocutor of 23d January 1872 the Lord Ordinary made a remit accordingly. The defender George Handasyde Pattison was well aware of the instructions that had been given for a sale of the subjects. The pursuer's interests were prejudiced by this remit, and it would have been greatly to his profit had there been a sale instead of a remit." It was admitted that Broatch was present before the reporter, and attended the inspection; the interlocutor making the remit was not reclaimed against, and there was no judicial repudiation of the defender Pattison's actings, nor was his mandate recalled.

Cond. 7 was as follows:—"After said remit had been made, and report obtained and lodged in process, the Lord Ordinary, by interlocutor of