cohabitation in Ireland rests upon testimony equally objectionable and unworthy of credit. And it is positively contradicted by the evidence of the officers of the regiment while in Ireland, and of Ensign Heriot's most intimate acquaintances, Mrs. Kelly, M'Gregor, and Weston. It is clear therefore that there was no such cohabitation as is necessary to establish marriage.

So, 3. Although a repute of marriage between the parents, and of the legitimacy of the issue, may also go to establish marriage and legitimacy, yet the evidence in that case must be of general repute. Not only general, but uniform and long continued, and unshaken for a length of time. There is no such general and uniform repute proved in this case; but the contrary. And the evidence against the marriage far outweighs that brought to establish it.

In a case like this, it is of great consequence to attend to the conduct of the parties, as from thence inferences of a nature the best possible may be drawn. In a few months after the alleged marriage, Ensign Heriot left this woman with child, and destitute, though he was in affluence. When she joined him a year after, he denied she was his wife, and she immediately disappeared, without persisting. From that time to the period of his death,—a space of twenty-seven years, there is not the least credible proof of his having acknowledged her as his wife, or the appellant as his lawful child. On the contrary, it is proved that he repeatedly, solemnly, and uniformly disowned the connection; and, particularly, he did so in a letter to his brother, Dr. Heriot, when adjured to disclose the truth.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *R. Dundas, Wm. Macleod Bannatyne, Henry Erskine, John Burnet, M. Nolan.*

For the Respondents, *Sir J. Scott, R. Blair, Wm. Grant, Wm. Adam.*

ADAM STEWART, Writer in Edinburgh, *Appellant;*
LIEUT. JAMES M'DUFF, - - - *Respondent.*

House of Lords, 21st May 1799.

AGENT AND CLIENT—NEGLECT.—Circumstances in which an agent raised a reduction of a bond, omitting to observe, from the know-

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ledge in his possession, that this step had been already taken, and the decree of reduction already in his possession. In an action for the expense of this second reduction; held the client not liable.

A bond for £50 had been granted by the respondent to Colonel William Robertson, and to set aside which he had brought an action of reduction, on the ground that it was unduly elicited from him by the colonel, while under interdiction, and without the consent of his interdictors, or full value given.

In this action of reduction the colonel did not appear, and decree, reducing and annulling the bond was pronounced and extracted.

An action of furthcoming had been at the same time brought by a creditor of Colonel Robertson (Colonel Crawford) who had arrested the £50 bond; and to this action a plea was stated, founded on the reduction, yet the Lord Ordinary, in the furthcoming, sustained the bond, though reduced in *spreta interdictione*, and found the defender liable to the extent of £20, in respect that the defender had admitted that this sum was due, independently of the bond, and decerned accordingly; and Colonel Crawford, the arresting creditor, obtained a decree in his favour for that sum. He proceeded to do diligence, when the appellant, as a law agent, was employed to settle the matter for the respondent; which he did by paying the £20 and obtaining a discharge of the same.

Some three years afterwards the same matters in dispute were raised by a son of Colonel Robertson; and the appellant, instead of founding on the matter as finally closed, pretended ignorance of the effect and nature of the previous procedure, entered into a long correspondence, proposed a reference to arbiters, and finally brought a second reduction of the bond, although he knew the bond was finally voided by an extracted decree of reduction. In this second reduction, the bond was reduced on the ground stated in the former action, namely, as being in *spreta interdictione.*

In these circumstances, the present action was raised by the appellant against the respondent for his account of expenses incurred in these latter proceedings. In defence, it was maintained that the second action of reduction was totally unnecessary, and highly injurious to the respondent, and that it could only have proceeded from ignorance of the

effect of the former reduction, and from neglect to observe that the bond had been already reduced. 1799.

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The Lord Ordinary pronounced this interlocutor:—"In "respect it is sufficiently proved that the pursuer (i. e. "appellant) had at different times in his possession Colonel "Crawford's decreet of furthcoming, which recites a decreet "of certification, reducing Lieut. M'Duff's bond for £50 to "Colonel Robertson for nonproduction, nevertheless the "pursuer, (the now appellant), *by negligence* not having "adverted to that decreet of certification, raised a new "process for reducing the said bond against Colonel "Robertson, wherein production of the bond was made, "and decree in absence obtained; the expense of which "decreet is the subject of the present process; and as that "*second* process of reduction brought by Mr. Stewart's "mistake, was not necessary to be brought in that form, it "would be unjust to lay the whole expense thereof on "Lieut. M'Duff, yet as, on the other hand, the bond was "produced in the second process, and Lieut. M'Duff, by "the decreet therein, is now absolutely out of all hazard of "being disturbed by that bond, he ought to bear some part "of the expense; finds him liable in *one* half thereof, and "also finds him bound to assign to Mr. Stewart the decreet "against Colonel Robertson for expenses, in so far as con-"cerns the half thereof, which, by this interlocutor, had "been laid on Mr. Stewart; finds Lieut. M'Duff liable also "for the other article of £3. 6s. 8d. claimed in this process; "finds himself further liable in the expenses of extract in "the process, but in no other expenses; and decerns, and "dispenses with any representation." On reclaiming peti- May 12, 1796.
tion by both parties, the respondent's petition contending that the claim was incapable of division, and that the Court ought to have either sustained the claim in *whole*, or rejected it in whole upon the ground of negligence. Whereupon the Court "sustained the defences, and assoilzied the defen-"der, and found the pursuer (appellant) liable in expenses." May 18, 1797.
And, on second petition, they unanimously adhered. Feb. 6, 1798.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The sum concluded for was *bona fide* laid out for the respondent on his express employment, and the steps taken were resorted to under the advice of Mr. Ferguson, advocate, the respondent's counsel. Having proceeded under such advice, the agent is exonered

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from all blame and all charge of neglect. And even supposing there had been an error in the proceedings, from the former decree of certification in absence rendering a second process of reduction unnecessary, still it did not follow that this could preclude the appellant's claim for payment of his account. The appellant did not raise the first reduction. He did not act as agent therein; and the only access the appellant had to know of its existence, was from his being called to settle the claim under the decree of furthcoming in favour of Colonel Crawford. The mere drawing a discharge for the debt obtained in that furthcoming three years before the second reduction, was no ground for maintaining the defence against the claim, because a decree of certification in absence is not necessarily final; and there is a solid distinction between the case of an agent culpably neglecting what he knows was essential for the interest of his client, as, for example, to lead an adjudication within year and day of other adjudications, or to expede a confirmation *debito tempore*, and one who, from over anxiety, does more than is strictly necessary. Besides, Colonel Robertson had written letters threatening to insist in his claim, and after these it was not reasonable to expect that he would allow the decree in absence to stand; and, therefore, notwithstanding the decree of certification in absence, it was proper and necessary to raise a process of reduction. This action was successfully pursued to a termination, after appearance made both for Colonel Robertson and Colonel Crawford, and the defender has taken and reaped all the advantage of that decree.

Pleaded for the Respondent.—The appellant has given up his former plea, that the prior decree of certification was utterly *unknown* to him at the time of raising the action of reduction complained of. He now argues, as he did latterly in the Court below, that he was completely in the knowledge of that former decree. The question then is,—Whether the appellant, having full information of that fact before him, could, consistently with the faithful discharge of his duty as an agent, bring a *second* action upon the self same grounds, to the effect of loading his client with the expense of a measure, which he must have been satisfied could answer no purpose, since the object meant to be gained by it was already accomplished by the decree in the first action? All agents are responsible to their client for misconduct in conducting the proceedings which they are employed to conduct.

And it makes no difference in this rule, whether this misconduct consists in *omitting* to do what the agent ought to have known was *necessary*, or in actually doing what he ought to have known was *unnecessary* and injurious; and it being incontestible, that the decree obtained in the first process was amply sufficient for the respondent's security against the effect of the bond, until that decree was reduced *legitimo modo* in a process of reduction, it makes no difference whether the proceedings so taken were ultimately successful, or whether the respondent derived benefit from them or not.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be, and the same are hereby affirmed, with £200 costs.

For Appellant, *Sir John Scott, George Ferguson, Neil Ferguson, Wm. Tait.*

For Respondent, *Wm. Adam, Thomas M'Gregor.*

(M. 12375.)

ROBERT PAUL, ... *Appellant;*

JOHN CADELL, Esq., . . . *Respondent.*

House of Lords, 30th May 1799.

PROOF — WITNESS — PRODUCTION OF BOOKS. — In an action of damages for libel, brought against two parties, the one the publisher, the other the editor and proprietor of the "Scots Chronicle" Newspaper; the defence stated by the latter was, that he was not the proprietor, or any way concerned in the paper. A witness was summoned as a haver, to produce all the account books, ledgers, &c., of the Scots Chronicle office, prior to his becoming the proprietor, in order to prove that the defender was proprietor at the period mentioned. The witness refused, in respect that it would disclose his own private affairs. The Court found him bound to allow inspection of the books to the Commissioner, and to take excerpts. On appeal to the House of Lords by the witness, this was affirmed.

An action of damages was raised against "John Johnstone, as the publisher, and John Morthland, Esq., advocate, as the editor, proprietor, legal adviser, and