THE YELVERTON CASE:—PRELIMINARY STATEMENT.

To make the Yelverton case which follows (*infrà*, p. 745) more easily intelligible to the English lawyer and to the general reader, a word or two of explanation may be useful.

There are in Scotland four distinct modes of entering into matrimony.

The *first* is the regular and legal mode, by a due proclamation of banns and by clerical celebration before two witnesses.

The *second* is by clandestine celebration without banns.

The *third* is by the mutual consent of the parties interchanged *de præsenti*.

The *fourth* is by promise *de futuro, cum copula subsequente.*

The three last modes of entering into matrimony are irregular, and even criminal (*a*).

(*a*) See Hume on Crimes, vol. i. c. 20, where the learned author says, "Although our practice does permit and suffer, yet it by no means approves or would encourage the contracting of marriage in this private and unceremonious fashion, attended as it is with the hazard of rash and unsuitable matches, and even of incestuous or adulterous connexions. On the contrary, it bestows on all marriages of this description the name of clandestine and irregular, and holds none for right or inoffensive, but that which is celebrated by a priest duly ordained by the church and after proclamation of banns. To secure obedience in this particular the Legislature have appointed various penalties. By the statute of 1661, c. 34., the parties are liable to imprisonment for three months, and to certain fines according to their rank. In case of inability to pay the fine, the offender is to be punished with *stocks and irons*." Sir William Scott, however, in the Dalrymple case, held that "the woman carried her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation, as if the matter were graced with all the sanctities of religion." And so likewise Dr. Lushington, in his evidence before the Parliamentary Committee of 1844, said, "He supposed it was but rarely that Scotch marriages took place in the face of the church; at least not very often, so far as he knew." The truth, however (well known to those who have crossed the Tweed), is, that marriages "in this private and unceremonious fashion"

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It is sometimes said that there is in Scotland a fifth mode of entering into matrimony, by what is called "habit and repute;" but this seems to be regarded rather as evidence of marriage than as constituting in itself a distinct mode of entering into matrimony.

Strangers in Scotland are as much within the scope of the law as natives brought up under it (*a*).

An irregular marriage is as binding as a regular one (*b*), the Scotch law pronouncing the *thing done* valid, but the *mode of doing it* a delinquency.

are never resorted to except where there is some disparity in the position of the parties, or some other cogent reason suggesting or requiring the temporary concealment of a mode of entering into matrimony censured by the church and punished by the law. See as to convictions for irregular marriages, 17 & 18 Vict. c. 80. sect. 49.

(*a*) But see Lord Brougham's Act, the 19 & 20 Vict. c. 96, enacting that no irregular Scotch marriage shall be valid unless one of the parties had at the date thereof his or her usual place of residence in Scotland, or had lived there for 21 days next preceding such marriage.

(*b*) *Question.*—Is an irregular marriage in Scotland equally valid with one performed by a clergyman?

Lord Advocate (*now the Lord President*).—Quite so.

Question.—Is it sufficient to constitute a marriage in Scotland that the two parties, being of the proper age, the man fourteen, the woman twelve, should say to each other, "I take you for my spouse"?

Lord Advocate.—That constitutes a valid marriage, if there is no fraud.

Question.—That is to say, if there is real consent?

Lord Advocate.—Quite so, present consent.

Question.—Suppose a young nobleman of fourteen is trepanned into a marriage by a woman of bad character of thirty or thirty-five, and he says, in such a way that it can be proved, "I take you for my wife," and she says, "I take you for my husband at this moment," would that be a valid marriage, and carry a dukedom and large estates to the issue?

Lord Advocate.—It would do so, if it was a deliberate interchange of present consent, for the purpose of constituting the relation of husband and wife.

Question.—No consent of parents or guardians is required?

Lord Advocate.—No.

Question.—Nor any domicile?

Lord Advocate.—No.—[*Evidence before the Lords' Committee Divorce, 19th March* 1844.]

THE HON. W. C. YELVERTON, MAJOR IN H.M. ROYAL ARTILLERY, ... APPELLANT.
MARIA THERESA LONGWORTH, OR YELVERTON, ... RESPONDENT.

YELVERTON *v.* LONGWORTH (*or* YELVERTON).

1864.
June 3*rd*, 6*th*, 7*th*, 9*th*, 10*th*, 13*th*, 14*th*, 16*th*, 17*th*, 21*st*, 24*th*, *July* 7*th*, 8*th*, 28*th*.

Scotch Law of Irregular Marriage.—Case in which an English lady, a stranger in Scotland, asserted a Scotch irregular marriage with an Irish gentleman, also a stranger in Scotland, by the interchange of present consent, and also by words of promise *cum copula subsequente*. She however denied *immediate* copula, requiring, as a Roman Catholic, a prior religious ceremony to satisfy her conscience. Such ceremony took place in Ireland several months after the alleged Scotch promise. Copula took place in Ireland, after the ceremony, and, the Law Peers considered, for a few days before it, and was subsequently continued on the return of the parties to Scotland. The Lord Ordinary decided against the lady; but the First Division of the Court of Session, consisting of three judges, recalled his Interlocutor, and decided in her favour, the Lord President dissenting. The House reversed the judgment of the First Division,—Lord Wensleydale, Lord Chelmsford, and Lord Kingsdown being against the lady on both grounds, and the Lord Chancellor (*a*) in her favour on both. Lord Brougham, who had heard the entire argument, was not present at the decision, but intimated through the Lord Chancellor a clear opinion in favour of the lady.

Much consideration of the question whether the copula must be immediate and consequential, having for its object and intention the actual fulfilment of the promise.

Per Lord Brougham: I do not believe that Lord Campbell said, in the Queen *v.* Millis, that the copula must be with the intention of constituting marriage. The law itself refers the copula to the prior promise, *infrà*, p. 822.

Agreed that both the promise and the copula must be in Scotland, but whether the copula in Ireland was not a *medium impedimentum*, excluding or preventing any matrimonial effect from the subsequent copula in Scotland, *quære*.

(*a*) Lord Westbury.

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Agreed that, although the essentials of the contract must be in Scotland, the evidence of it may be anywhere.

Irish Marriage between a Protestant and a Roman Catholic, 19 Geo. 2. c. 13.—A marriage celebrated in Ireland by a Roman Catholic priest between a Roman Catholic lady and a gentleman of a Protestant family, who had been brought up a Protestant, and who at the ceremony declared himself a Protestant Catholic. Held void by Lords Wensleydale and Chelmsford.

Semble, if in a Scotch Court a party gives up a question of Irish law upon a suggestion of the Scotch Judges that they must treat it as a question of fact only, being foreign law, it is not competent to that party to argue the question of Irish law in the House of Lords upon Appeal from the Scotch Judgment. Per the Lord Chancellor.

Quære, when the Scotch Judges avowedly abstain from deciding the question of Irish law, whether the Court of Appeal, having no original jurisdiction, and exercising its reviewing jurisdiction only, can decide it?

Per Lord Brougham: As the Lord President was against the Scotch marriage, he ought to have decided upon the Irish one, *infrà*, p. 821.

After the Law Peers had delivered their opinions, but before the question for judgment was put from the woolsack, the lady's Counsel asked and submitted that the cause should be remitted back to the Court below, in order that the points at issue might be referred to the oath of the gentleman. The House refused this application.

The litigation between the above-mentioned parties was commenced by the Respondent, Maria Theresa Longworth or Yelverton, who on the 7th of August 1858 brought an action in the Court of Session against the Appellant, Major Yelverton, concluding for declarator that she, the above Respondent, was the lawful wife of him, the above Appellant, by reason that they "were on the 15th day of August 1857 regularly and lawfully married in the chapel of Kilbroney, near Rostrevor in the diocese of Dromore, by Bernard Mooney, priest of the parish of Kilbroney, in the pre-

sence of Richard Sloan and Elizabeth Brennan, witnesses, and of various other parties, and that thereafter they lived and cohabited as husband and wife till the month of April 1858."

On the 8th June 1859 an action was commenced by Major Yelverton in the Court of Session, praying to have it declared that he, Major Yelverton, was "free of any marriage with the said Maria Theresa," and that she "ought to be put to perpetual silence thereanent in all time coming."

On the 13th of January 1860 the said Maria Theresa commenced a new action in the Court of Session, praying that she might be declared the wife of Major Yelverton, by reason of a marriage had in Scotland, and alternatively by reason of a marriage had in Ireland as alleged in her first action. Her original suit she abandoned. The two others were afterwards conjoined, and a record was made up and closed in both, on the 18th of July 1860.

The following representation of the facts of the case, and of the proceedings in the Court of Session will, it is hoped, satisfy the legal, and perhaps the general, curiosity. Those who desire to peruse the correspondence at length, and to examine the evidence taken by deposition in Scotland and Ireland, must be referred to the printed matter laid upon the table of the House, and consisting of 559 quarto pages (*a*).

(*a*) There are two reports of the case published by the editors of the Court of Session Cases, "Third Series;" one compendious; the other copious, giving the material parts of the oral and documentary evidence in chronological order.

The course adopted in the following Report is to set out so much only of the letters and other evidence as is shown to have operated on the judicial understanding.

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SUMMONS of DECLARATOR OF MARRIAGE. MARIA THERESA LONGWORTH or YELVERTON against MAJOR YELVERTON, signeted 13th January 1860.

Summons of Declarator.

VICTORIA, &c.—Whereas it is humbly meant and shown to us by Maria Theresa Longworth, otherwise Yelverton, wife of the Honourable William Charles Yelverton, Major in our Royal Artillery, and lately residing at No. 12, Randolph Road, Maida Hill, London, and now in Cork,—Pursuer; against the said William Charles Yelverton, lately residing in Edinburgh, and now in Cork, her husband,—Defender; in terms of the Condescendence and Note of Pleas in Law hereunto annexed: Therefore it ought and should be Found and Declared, by decree of the Lords of our Council and Session, that the Pursuer and the said William Charles Yelverton, Defender, are lawfully married persons, and that the Pursuer is the lawful wife of the said Defender: And the Defender ought and should be Decerned and Ordained to make payment to the Pursuer of the sum of 100*l.* sterling, or such other sum as our said Lords shall modify, as the expenses of process to follow hereon, conform to the laws and daily practice of Scotland used and observed in the like cases, as is alleged.

Prayer that she be declared the Major's lawful wife.

Statement of M. T. Longworth, or Yelverton.

STATEMENT of MARIA THERESA LONGWORTH or YELVERTON (from the PLEADINGS).

Social position of Miss Longworth.

I. The Pursuer (*a*) is a daughter of Thomas Longworth, Esquire, of Smedley Park, Lancashire, now deceased. Mr. Longworth was a gentleman of ancient family and of large property.

Origin of her acquaintance with the Major in 1852.

II. In the year 1852 she became acquainted with Major William Charles Yelverton, while travelling from France to England. She was accompanied to the steamboat at Boulogne by her brother-in-law and her sister, Monsieur and Madame Lefevre, and their servant. M. Lefevre requested the captain of the steamboat to take charge of the Pursuer, and the captain thereupon introduced her to some ladies on board, who proved to be friends of the Defender, and through whom she first made his acquaintance. The Pursuer was at this time on her way to London to visit the Marchioness de Belinay, Baker Street, Portman Square.

His first letters to her were in 1853.

III. The year after the acquaintance was thus formed between the Defender and the Pursuer a correspondence commenced between them. The Defender's first letters to the Pursuer were from Malta, where he was stationed during part of the year 1853. The Pursuer was at that time residing at Naples. After this the Defender frequently corresponded with the Pursuer, and professed love and affection for her. The correspondence was kept up until the time of the Defender's pretended marriage with Mrs. Emily Ashworth or Forbes, which will be afterwards adverted to.

His professions of love and affection.

The Major goes to the Crimea in 1854.

IV. The Defender went to the Crimea in the summer or autumn of 1854 from Malta, where he had been stationed with his regiment, and the Pursuer returned to England about that time. But after the commencement of the Russian war the Pursuer, who had been educated in a convent, and had been there impressed with the

(*a*) Throughout the pleadings Miss Longworth is called the *Pursuer* and the Major is called the *Defender*.

high importance and interest of the vocation of a nurse to the sick and wounded, conceived a strong desire to go out to the Crimea as a nurse. Accordingly, she joined the French Sisters of Charity, and went to Constantinople, and acted as a nurse along with them at the Galata Hospital. The Defender had returned to England before the Pursuer sailed, and it is believed and averred that the same ship which took the Pursuer to Constantinople had previously brought the Defender home.

And she goes to Constantinople.

V. The Defender afterwards came to Turkey, and sought out and met with the Pursuer in Constantinople, in or about the month of August 1855. He then paid his addresses to the Pursuer, and courted her for his wife, professing the most sincere love, esteem, and regard for her, and his purpose and intention of marrying the Pursuer, and he then promised and engaged to marry her. He thereby gained the Pursuer's affections, so that she promised to intermarry with him, and to accept him for her husband: and these mutual promises of marriage were frequently afterwards renewed by the parties. The Pursuer required, however, that the marriage should not take place till after the termination of hostilities, and upon this footing an engagement to delay the marriage was entered into between the Defender and the Pursuer.

He seeks her out at Constantinople in August 1855.

Promises there to marry her, and acceptance, but the marriage to be delayed.

VI. In 1856, and when hostilities had ceased, the Pursuer went to the Crimea on a visit to Mrs. Straubenzee, the wife of General Straubenzee, who then commanded the Light Division of the British army. While she was there she frequently saw the Defender, and the engagement which they had made at Constantinople was often the subject of their conversation. It was understood and believed by General and Mrs. Straubenzee, under whose protection the Pursuer then was, that the Defender and she were to be married. On one occasion, in the Crimea, the Defender informed the Pursuer that he was in great pecuniary embarrassment, and dependent upon an uncle who did not wish him to marry, and would give him no further assistance if he did. He stated, as the reason why his uncle wished him not to marry, that, as the Defender's only brother was then unmarried, and in bad health, there was a prospect of his uncle's son eventually succeeding to the title of Lord Avonmore, which prospect would be defeated if the Defender should marry and have a son. Upon receiving this information, which had not been communicated to her before, the Pursuer proposed to break off the engagement, but the Defender would not agree to this, and endeavoured to persuade her to agree to a secret marriage. Among other suggestions, the Defender proposed that they should be married privately in the Greek chapel at Balaklava. But the Pursuer would not consent to this or any other scheme for a secret marriage at that time, and she left the Crimea without any definite arrangement having been made between her and the Defender as to the time of their marriage.

She goes to the Crimea in 1856.

The Major's uncle wished him not to marry.

She proposed to break with the Major, but he would not.

VII. When the engagement to marry was entered into, as stated in Article V., the Pursuer communicated the intelligence to her sister Mrs. Bellamy, and to her brother-in-law Mr. Bellamy, a gentleman of fortune, residing at Abergavenny Castle, in Monmouthshire. When she made that communication, she had not been informed by the Defender that there were the obstacles to a public marriage between them which he afterwards stated to exist.

She mentioned the engagement to her sister and brother-in-law.

VIII. After leaving the Crimea, the Pursuer remained for some months in the East, and had much correspondence with the Defender on the subject of their engagement, and the obstacles

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which he said existed to their public marriage. The Pursuer believed that if the engagement continued to subsist without any definite prospect of these alleged obstacles being removed, and a public marriage taking place, she would be exposed to misconstruction on the part of her friends. Accordingly, during this period, and at subsequent times, she frequently offered to give up the engagement, and to carry out a design of going into a convent in the Rue du Bac, Paris, which she had formed before going to the Crimea. The Defender, however, would not accept these proposals, and continued to write to her in the same affectionate terms as before, and on the footing of the engagement still subsisting.

The Major's refusal to accept her offer to release him.

IX. In the autumn of 1856, and some time after the Defender had returned to England, the Pursuer met with some old friends in Constantinople, being the family of Sir James Close of Cheltenham, who invited her to travel with them for some time in their yacht. She agreed to do so, and remained with them for six or eight months, during which time she was travelling from place to place, and heard but rarely from the Defender. She arrived in England in or about January 1857.

She arrives in England in January 1857.

And repairs to Edinburgh for the first time.

X. In or about January 1857 the Pursuer came to Edinburgh, accompanied by a friend, Miss Arabella M'Farlane, now a nun; and took lodgings in the house of Mrs. Gemble, No. 1, St. Vincent Street,—Miss M'Farlane living with her.

The Major at this time at Leith.

XI. The Defender was at that time stationed at Leith Fort. He renewed his acquaintance with the Pursuer almost immediately on her arrival, and visited her daily at her lodgings in St. Vincent Street. He again paid his addresses to her, and courted her for his wife, and promised to marry her, which promise she accepted; but he explained that he was still anxious to prevent his uncle from hearing of his marriage, and he therefore proposed that they should be married privately, without the proclamation of banns, or the intervention of a clergyman. And he promised, so soon as he could safely do it, to enter into a public marriage with the Pursuer.

Promise of marriage and acceptance.

XII. On or about the 12th day of April 1857, the Defender and Pursuer, within the said house, No. 1, St. Vincent Street, Edinburgh, solemnly acknowledged and declared each other to be husband and wife, the said Defender solemnly acknowledging and declaring that the Pursuer was his wife, and the Pursuer that the Defender was her husband. They, further, read through the marriage service of the Church of England together; and at the conclusion of it the Defender said to the Pursuer, "This "makes you my wife according to the law of Scotland," or used words of similar import.

Actual marriage in Edinburgh, 12th April 1857.

English marriage service being read, the Major said, "This makes you my wife."

XIII. The Pursuer, who is a Roman Catholic, entertained conscientious scruples about the propriety of a marriage not celebrated by a priest, and accordingly she refused to cohabit with the Defender without having gone through the ceremony of a marriage by a priest of her own faith. The Defender expressed great displeasure at this refusal, and a good deal of discussion took place between him and the Pursuer on the subject. The Defender ultimately became so pressing in his solicitations that they should cohabit together as husband and wife, that the Pursuer left Edinburgh about ten days after the acknowledgment and declaration mentioned in the last article.

Her Roman Catholic scruples.

His solicitations and displeasure; and her consequent departure from Edinburgh about the 22nd April 1857.

XIV. Shortly after the Pursuer left Edinburgh she sent to the Defender the marriage cards of a Mr. and Mrs. Shears. The

Story of the marriage cards.

Defender was at that time angry and offended with the Pursuer, because she had refused to cohabit with him until a marriage should be solemnized according to the forms of the Roman Catholic Church, and he affected to believe that the Pursuer was the person who had been married to Mr. Shears, and wrote her the letter on the subject which is No. 43 of process. The Pursuer replied to that letter, indignantly denying the charge of unfaithfulness brought against her, and the correspondence between her and the Defender then returned to its former affectionate tone.

She goes to Hull and Abergavenny Castle.

Letters from the Major inviting her to Ireland.

XV. When the Pursuer left Edinburgh, as above mentioned, she went first to Hull, and afterwards to reside with her sister Mrs. Bellamy, at Abergavenny Castle, in Monmouthshire. She remained there till about the end of July 1857. During this time she received letters from the Defender, who was then in Dublin, saying that he was now prepared to agree to her demand that the marriage should be celebrated formally by a priest of the Roman Catholic Church, and inviting her to come to Ireland that that might be done.

She goes to Ireland.

XVI. The Pursuer accordingly agreed to go to Ireland, and went there in the end of July or beginning of August 1857, and met the Defender at Waterford. The Defender still retained his objection to the proclamation of banns, lest, as he said, it should be the means of letting his uncle hear of his marriage; and as the priests to whom they applied refused to dispense with the proclamation of banns without special authority from their bishop, some time elapsed before the marriage ceremony could take place. A dispensation of the proclamation of banns having been obtained from Bishop ——, generally known as the Roman Catholic Bishop of Newry, the marriage was ultimately performed upon the 15th day of August 1857, within the chapel of Kilbroney, in the parish of Rostrevor, and in the Roman Catholic diocese of Dromore, by Bernard Mooney, Roman Catholic priest of the said parish, and in presence of Richard Sloan and Elizabeth Brennan, witnesses, and of various other parties, according to the rites and ceremonies of the Roman Catholic Church. The Defender was then of the Roman Catholic religion, or, at least, he professed himself to be of the Roman Catholic religion, and he stated this to the said priest by whom the marriage was celebrated, at the time of the ceremony. The said marriage was duly and regularly solemnized, and was, in all respects, a legal and binding marriage according to the law of Ireland, if it should be found that the parties had not been already married by the foresaid declaration in Scotland. By the law of Ireland, a marriage celebrated according to the rites and ceremonies of the Roman Catholic Church, by a Roman Catholic priest, who is a person in holy orders, between two persons of the Roman Catholic religion, or professing the Roman Catholic religion, is a valid marriage to all intents and purposes whatever; and by the said law, if the Roman Catholic priest celebrated a marriage between a Protestant and a Roman Catholic, he would be guilty of felony. Farther, by the law of Ireland, either of the parties to such a marriage would be a competent witness in any action or suit for the purpose of declaring the marriage, or in which the fact of marriage was put in issue.

Marriage at Rostrevor, 15th August 1857.

He then professed himself a Roman Catholic.

The Irish marriage was good if the Scotch marriage should prove bad.

XVII. The Pursuer had taken with her to Ireland a good many of the Defender's letters, and particularly the whole or most of the letters which she had received from the Defender subsequent to the date of her leaving Edinburgh in April, as above men-

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tioned; and upon one occasion, in the inn at in Ireland, where the parties were staying, the Defender happened to see the packet containing these letters in the Defender's (*a*) hands. He then said that they ought to be destroyed, as they were of no further use, and might, if lost, expose him and the Pursuer to ridicule, or even be the means of letting his uncle hear of the marriage; and they were accordingly, with very trifling exceptions (of letters which the Pursuer had not with her at the time), destroyed by the Defender.

Packet of letters destroyed by him.

Cohabitation after the Irish marriage.

XVIII. The scruples of the Pursuer having been set at rest by a solemn marriage, celebrated according to the rites of the Roman Catholic Church, following the promises of marriage and the marriage which had been entered into in Scotland, the Defender and Pursuer thereafter lived and cohabited together at husband and wife, in Ireland, Scotland, England, and France, from the said 15th day of August 1857 to the month of April 1858, during which period the Defender frequently renewed his declarations that they were married persons. There were in their married life during this period no other interruptions than such as were rendered necessary by the Defender's professional avocations, and by a visit which he paid to his friends in Ireland, as mentioned in the next article.

Her visit to Edinburgh after the Irish marriage.

XIX. After the marriage on the 15th of August 1857, the Defender and Pursuer travelled together for a few weeks in Ireland as husband and wife, and then the Defender went to visit his relations in that country, and the Pursuer returned to Edinburgh, where it had been arranged that she should take lodgings for herself and the Defender, and that the Defender should join her in a few days. Accordingly, on arriving in Edinburgh, the Pursuer asked Miss M'Farlane, then in the convent at Morningside, to stay with her, took lodgings in the house of Mrs. Stalker, No. 31, Albany Street, and stayed there with Miss M'Farlane till the Defender's arrival; and the Defender, who arrived a few days afterwards, cohabited with her there at bed and board, and lived with her as his wife. Miss M'Farlane stayed with them till they left for the Highlands, as after mentioned; and they were visited by Mr. and Mrs. Thelwall, of Hull, who had been for many years intimate friends of the Pursuer, and to whom the Defender consented that the secret of the marriage should be communicated by the Pursuer. The marriage was accordingly communicated to Mr. and Mrs. Thelwall, but they were cautioned to keep it secret from the uncle of the Defender, and from all persons who would be likely to communicate it to him.

The Major follows, and they cohabit as husband and wife.

The marriage disclosed confidentially.

Their tour in the Highlands as husband and wife.

XX. After residing for a short time together in the said house in Albany Street, the Defender and Pursuer, about the end of September or beginning of October 1857, went on a tour through the Highlands on horseback. During the whole of that tour they travelled together as husband and wife, and they were received as such at the various inns which they visited in the course of their journey. The Defender frequently spoke of and addressed the Pursuer as his wife. Among other places, they visited and slept at Linlithgow, Falkirk, Stirling, Callander, Dunblane, and Dunfermline, and at all these places the Defender and Pursuer were held and reputed to be husband and wife, and were received as married persons, and the Defender treated and spoke of and to the Pursuer as his wife.

(*a*) *Quære*, Pursuer's.

XXI. In the course of their said tour, the Defender and Pursuer visited Doune Castle, and there the Defender wrote their names in the visitors' book as "Mr. and Mrs. Yelverton."

Entry by him in the visitors' book of "Mr. and Mrs. Yelverton."

XXII. On returning to Edinburgh, which they did after about a fortnight's absence, the Defender and Pursuer again went to Mrs. Stalker's house in Albany Street, and they resided there and cohabited together at bed and board, till about the beginning of December 1857, as husband and wife, and as having been lawfully married. During all this time, as well as on the previous occasion of their living in Mrs. Stalker's house, they were held and reputed to be husband and wife by the landlady and servants in the lodgings, and by other persons with whom they came in contact.

Return to Edinburgh, and there received as husband and wife.

XXIII. About the beginning of December 1857, the Pursuer sailed from Leith to Hull on board the steamer "Brilliant." She was accompanied to the vessel by the Defender. On arriving at Hull she went to the residence of the said Mr. and Mrs. Thelwall, and resided with them for a considerable time. She was there joined by the Defender on or about the 31st day of December 1857. The Defender remained for a week or two, and then returned to Leith, his leave of absence having expired; but having obtained a renewal of his leave, he returned to Hull shortly afterwards, and resided in the house of Mr. and Mrs. Thelwall till about the day of . During the whole of the time that the Defender and Pursuer thus resided with Mr. and Mrs. Thelwall, they cohabited together at bed and board, and were held and reputed to be husband and wife by Mr. and Mrs. Thelwall. The said Mr. and Mrs. Thelwall would not have received the Defender and Pursuer, or allowed them to remain in their house, except as married persons.

Her voyage from Leith to Hull in the beginning of December 1857.

The Major joined her at the Thelwall's, but returned to Leith.

He afterwards came back to Hull, and there he and she passed as husband and wife.

XXIV. Before the Defender came to Hull on the 31st of December, as above mentioned, the Pursuer had written him a letter, intimating that she believed herself to be pregnant, and that in the event of her having a child, she could not any longer keep their marriage a secret from her relations. To this letter the Defender replied on the 25th of December 1857. In that reply the Defender says, "If you do feel any love for me, you "must change that resolution. If I depart this life, you may "speak, or if you do, you may leave a legacy of the facts; but "whilst we both live, you must trust me and I must trust you."

Her announcement of pregnancy

His answer on 25th December 1857.

XXV. Early in the year 1858, the Defender and Pursuer went to the Continent together. Before going, a passport had been obtained for the Pursuer by the Defender, and the name he inserted for her was that of his wife, viz., Mrs. Theresa Yelverton. They travelled together in France until the month of April 1858; and during the whole time that they were abroad, they were held and reputed by all the persons with whom they came in contact to be husband and wife. The Defender's leave expired in the said month of April, and he then was obliged to leave the Pursuer at Bordeaux, as she was ill and unable to travel. Her illness brought on a miscarriage. The Defender returned to Leith, and the Pursuer, as soon as she could travel safely, went to Boulogne, to her sister Madame Lefevre. A very constant correspondence was kept up between them until the month of June, and the Pursuer wrote several letters to the Defender, in which she spoke of their marriage and called herself his wife. One of these letters was opened by the Defender's mother, or some other member of his family. The Defender informed the Pursuer of this circum-

They proceed to the Continent together early in 1858.

The Major gives for the passport the name "Mrs. Theresa Yelverton."

A miscarriage.

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stance, and exhorted her to continued secrecy; and she, in reply, entreated him to take his mother into his confidence, and tell her the whole truth, and said, "You will recollect that I told "you before I consented to keeping the marriage secret, that this, "and this alone, was the only sacrifice that I could not willingly "make for you."

Her reply to his injunction of secrecy.

XXVI. The Pursuer having partially recovered her health returned to Edinburgh in June 1858. By this time the reason which the Defender always gave for keeping his marriage with the Pursuer secret had ceased to operate, as the Defender's brother had then married or was about to marry. But it appeared that the Defender had become acquainted with a lady whose fortune he thought was larger, and more at her command than that of the Pursuer, and that his views had been affected thereby. When they met, the Defender at once, and abruptly, informed the Pursuer that their imprudent marriage had ruined him, and beseeched her to make another sacrifice to save him. The sacrifice which he asked the Pursuer to make, was to renounce her *status* as his wife, and to leave the country and her friends for one of the colonies. After making this extraordinary proposal, which the Pursuer indignantly rejected, he left her, promising to return the next day. He did not return, however, but the brother of the Defender called on the Pursuer the following day, and renewed the attempt to get her out of this country, and tried to persuade her to go to New Zealand. The Defender's brother also wrote her several letters, urging her to take that course. The Pursuer has never met the Defender since, except in the Calton Jail, where she was taken by the Procurator Fiscal, for the purpose of identifying him when he was apprehended on a charge of bigamy.

Her third visit to Edinburgh in June 1858.

He tells her their imprudent marriage had ruined him.

He tries to persuade her to go to the Colonies.

And recommends New Zealand.

He marries Mrs. Forbes, June 1858.

XXVII. Notwithstanding his marriage to the Pursuer, the Defender on or about the 8th day of June 1859, raised and instituted before this Court a summons and action of declarator of freedom and putting to silence against the Pursuer. The Defender stated in the condescendence annexed to that summons, that he had been married in Edinburgh, in June 1858, to Mrs. Emily Ashworth or Forbes, relict of the late Professor Forbes, of Edinburgh; and the summons concluded, that it should be found and declared that the Pursuer (the present Defender) was free of any marriage with the Defender (the present Pursuer), and that she ought to be put to perpetual silence thereanent in all time coming. The said summons and action was duly executed against the Pursuer, and the same is now in dependence.

XXVIII. The Defender thus refuses to acknowledge the Pursuer as his wife, and avers that she is not his wife, and was never married to him; and the present action is necessary in order to have the *status* of the Pursuer, as the wife of the Defender, judicially declared. In the event of the Pursuer failing to establish the foresaid marriage by consent *de præsenti*, she avers that the parties were married by mutual promises of marriage, on the faith of which *copula* followed; and she refers to and founds upon the letters which passed between the parties as containing the said promises.

Basis of Theresa's case: 1. Consent *de præsenti*; 2. Promise *cum copula*.

XXIX. The Pursuer is a lady of considerable fortune, as well as of an ancient family, and the marriage between the Defender and her was an equal and suitable one, so far as their social position was concerned. In regard to fortune the advantage was altogether on the side of the Pursuer. The Defender, whose family are in very straitened circumstances, has been for many

Equality of the circumstances of the parties.

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years in great pecuniary difficulties. He has never had any means of his own beyond his pay as an officer in the army, but has been involved in debt, and constantly dependent on the bounty of others. After he became acquainted with the Pursuer, and both before and after he married her, he took advantage of her affection for him to induce her to supply him with money. The whole costs of the journey to and in Ireland, and of the tour in the Highlands, and of the housekeeping in Edinburgh, and of the visit to England and to the Continent, and of the residence there, set forth in previous articles, were borne by the Pursuer. When the Defender deserted the Pursuer he went through a pretended marriage with the said Mrs. Emily Ashworth or Forbes, who is, as the Pursuer believes, a lady of considerable fortune, which is more under her own control than that of the Pursuer is, and thus more accessible to the Defender. Since that pretended marriage the Defender has been living with Mrs. Forbes, and deriving from her funds his principal means of support.

She paid hotel bills and travelling expenses for him.

STATEMENT of MAJOR YELVERTON (from the PLEADINGS).

Statement of Major Yelverton.

I. The Defender, the Honourable William Charles Yelverton, is a younger son of Viscount Avonmore, of Belle Isle and Hazle Rock, in the kingdom of Ireland. He entered the army in 1843, having in that year become a lieutenant in Her Majesty's Royal Artillery, and he is now a Brevet-Major in that branch of the service. The Defender in 1856 was appointed to the command of a company of that corps stationed at Leith Fort, and he continued in that position till 20th August 1859, the said company having in the meantime been formed into a field battery. At the latter date the quarters of the battery under his command were removed to Cork. From 1856, when the Defender took the command of the company at Leith Fort, till his removal to Cork on military duty in August 1859, the Defender resided in Edinburgh or at Leith Fort.

Major Yelverton's antecedents.

II. The Defender became acquainted with the Pursuer in the summer of 1852, on board of a steamer in which they happened to be passengers from Boulogne to London. Both were travelling alone. The acquaintanceship, like the meeting, was purely accidental, there having been no introduction on either side; and it was due to the circumstance that her shawl fell off when the Defender happened to be near, and that he lifted it and assisted her to replace it upon her shoulders. This act of politeness led to an exchange of courtesies, and these were followed by a conversation, which kept the Pursuer and the Defender upon deck the greater part of the night. On the arrival of the steamer at London the Pursuer invited the Defender to accompany her to her lodgings, which he did accordingly, and he remained with her there for several hours. The Defender did not meet with the Pursuer again till the autumn of 1855, when he saw her in the French hospital at Constantinople, as after mentioned, nor did he write to her, nor communicate in any form with her, till after the receipt of a letter from her, referred to in the following article of the present statement.

Origin of his acquaintance with Theresa in the summer of 1852.

She invited him to her lodgings.

III. Though the acquaintanceship of the parties was of this casual description, and the Defender had shown no desire that it

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should be kept up, having neither seen nor written to her, nor communicated in any form with her in the interval, she, in the spring of 1853, abruptly opened a correspondence with him, by sending a letter from Naples, where she then happened to be, to the Defender at Malta, where he was stationed at the time on military duty. The excuse given for this freedom on her part was alleged to be a desire to have a letter—which she sent inclosed to the Defender—posted at Malta for a person at Monastir, whom she then called, and in several subsequent communications represented to be, her brother, but who, as has since been ascertained, was not her brother. The Defender, as a matter of course, executed this commission; and having sent an answer to the Pursuer's letter by a friend, who was going to Naples in his yacht, that it might serve as an introduction, the result was a correspondence, which was kept up, from time to time, for several years. The letters of the Pursuer were the more numerous, and she was truly the person by whom the correspondence was maintained,—the Defender generally having been dilatory in writing, and having left many of her letters unanswered.

She opened a correspondence with him in the spring of 1853, with a false representation.

The Major goes to the Crimea in 1854.

IV. The Defender, on the outbreak of the war with Russia in 1854, went to the Crimea on military duty; but having received promotion, he was obliged to return to England in the spring of 1855. He, however, went back to the Crimea in the autumn of that year; and the Pursuer, who had gone to Constantinople some months before, ostensibly as a nurse, and was living in one of the French hospitals in that quarter, invited him to call upon her on his way. He did so accordingly, and this was the second occasion on which he had seen her. The interview was short; but in consequence of the advances made by the Pursuer great familiarities ensued. The Pursuer afterwards, without invitation or solicitation from the Defender, came to the Crimea, professedly to visit Mrs. Straubenzee, the wife of General Straubenzee, but in reality to throw herself in the Defender's way. The Defender did not call upon her at first, being displeased with her for coming to the camp upon such an errand; but he met her by invitation about a fortnight after her arrival, and he saw her on several subsequent occasions, the last of these being the night before she sailed from Balaklava on her return to Constantinople, on board the steamer in which she was to make the voyage. Great familiarities again ensued on this last occasion.

She also went as nurse, and invited him to call upon her.

He retreated from her.

There was no matrimonial engagement.

V. There was no marriage engagement nor promise of marriage between the Pursuer and the Defender, nor did he lead her to expect marriage. On the contrary, upon any occasions when expressions which she used seemed to point to such a result, she was distinctly warned that it could never be realised; and more than that, the Pursuer having led the Defender to believe that she had made some communication to her sister, Mrs. Bellamy, regarding the Defender, he wrote to Mrs. Bellamy, intimating, as he had previously told the Pursuer herself, that no marriage could ever take place between the Pursuer and him. The Pursuer was made aware at the time of this communication to Mrs. Bellamy. Nevertheless, in the full knowledge of the Defender's resolution, she not only pursued the Defender with her correspondence, but, in order to bring about an increased intimacy, suggested a connexion between them of a very different sort. For example, in a letter written in May 1856, she said,—"I conclude you will not entertain "any of my plans. I have another, which might gratify your "wishes and satisfy my conscience, but I have not now the courage

She was warned.

But she pursued the Major.

Specimens of her letters, showing immorality.

" to propose it." In another letter, adverting to her being unable to return to her sister, she says,—" If, before you arrive, I feel I " can do without you, I leave word at the post-office. Oh, I know " it is wretchedly weak of me, but I can't help it now, *so you must* " *be my friend.*" In another letter, written in July 1856, there was the following passage,—" I have always had a feeling, that your " fate, and mine in connexion with you, must be out of the beaten " track; it has been so far—and as we cannot get it straight " would it not be wisdom to enjoy it crooked?" . . . " I shall " seek no farther apart from you—I have but one intention, you " know it." . . . In the same letter she writes,—" I tell you " solemnly earnest that I am irresistibly impelled to do what you " wish, and if you did not recklessly contradict yourself in alter- " nate letters (leading to the supposition that you labour under " some aberration of mind *de temps en temps*), I should much " sooner submit, save me a great deal of misery of fever, nuits " blanches, all terminating in a cough." Again, in a letter written in October 1856, she said,—" If for yourself you have any definite " wishes with regard to me, one desire might have been fulfilled, " which would have been a gleam of sunshine on my dismal life, " and would not have interfered with your liberty, present position, " or future prospects." The result, as explained in subsequent articles, was conformable to these, and many other similar declarations in other letters. The Pursuer, notwithstanding repeated remonstrances against her resolution to throw herself upon the Defender, which were contained in his letters now withheld by the Pursuer, persisted in pressing her company upon the Defender, and illicit intercourse ensued, as afterwards explained. The only thing ever arranged between them, beyond the promise of secrecy relative to their intimacy, was, that he should visit the Continent with her, and spend in her company there, or elsewhere, as much of the time embraced in his leaves of absence from military duty as could be conveniently thus employed.

Leading to and followed ultimately by illicit intercourse.

VI. The Pursuer was still at Constantinople when the Defender finally left the Crimea; but the latter, in place of going by that route, returned to England by the Danube, for the express purpose of avoiding her, as he informed her by a letter written from Vienna. Some time after his return home the Defender went to Edinburgh to take the command of the company of artillery stationed at Leith Fort; and the Pursuer, who had subsequently returned to England from the East, and had, after her return, unknown to him, inquired after and discovered the Defender's address, came to Scotland, uninvited, unsolicited, and unexpected, for the purpose of meeting with the Defender. Having been written to by the Pursuer after her arrival, he called upon her at the Ship Hotel, Leith; and thenceforward, while she remained in Edinburgh, he visited her, and was occasionally visited by her at Leith Fort. In February 1857, or about that time, sexual intercourse between them was begun, and this was repeated as opportunity offered during her stay. The exact dates of the several acts cannot, from want of precise recollection, be specified by the Defender. The house of Mrs. Gemble, No. 1, St. Vincent Street, Edinburgh, in which the Pursuer then lodged, and where the Defender frequently called upon her, was the place in which this intercourse occurred. This intercourse was secret and illicit. There never was a marriage, nor a marriage engagement, nor a promise of marriage, between them.

The Major returned from the Crimea and went to Edinburgh.

She followed on invited.

In Feb. 1857 sexual intercourse began at Leith and in Edinburgh.

There never was a marriage or promise.

VII. The Pursuer on leaving Edinburgh went to England or

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Wales; and while there she, with reference to the sexual intercourse which had passed between them, and which she intended should be resumed, and on the pretence of scruples which she professed to entertain, renewed a suggestion which she had made to the Defender on previous occasions, that some form might be gone through which would satisfy her conscience, and would leave him perfectly free. This subject was referred to in a letter dated 10th July 1857, in which she wrote,—"Perhaps you would prefer "meeting me in the old Cathedral" (at Manchester), "where my "forefathers lie, to our other project? You are unknown, and "have nothing to say or do; my purpose is and would be ignored "by mortal creature. If safety is your object, what I suggest is "merely the same as being present at mass making you a Catholic."

Some form of marriage suggested by her *which would leave him perfectly free.*

This proposal was not entertained by the Defender; but nevertheless the Pursuer, in August 1857, hearing that he was on a visit to Ireland, went there, on her own suggestion, for the purpose of meeting him and renewing the intimacy between them. The Defender found her at Waterford after her arrival, and there the illicit intercourse which had been begun in Edinburgh was resumed. The Pursuer and the Defender, on leaving Waterford, travelled together in various parts of Ireland, and in the course of their journey, during the whole of which illicit intercourse was kept up, she once more revived the proposal above mentioned; and the Defender, in consequence, upon her urgent persuasion, and for the purpose of satisfying the scruples which she professed to entertain, and on the renewed assurance and mutual understanding that he was to continue free, appeared with her before a Roman Catholic priest at Rostrevor, that a form of the nature described, in which she alone was interested, might be gone through. There were no witnesses present. There was no marriage service or ceremony. There was no marriage. From first to last the connexion between the Pursuer and the Defender was illicit.

She follows the Major to Ireland.

Illicit intercourse resumed.

Form of marriage gone through before a Roman Catholic priest.

No witnesses present, and no real marriage.

VIII. The Pursuer's allegations that she was privately married to the Defender in Edinburgh on 13th April 1857, and that she was again married by a Roman Catholic priest in Ireland, are false. With reference to the former, the Defender explains—(1.) That, in a letter written in May 1857, the Pursuer, while deprecating the idea that it would be "a comfort for you to be rid "of me," writes, "You know you are—you have always been "free;" and, (2.) That, in a former process of declarator of marriage, raised by the Pursuer against the Defender in the Court of Session in August 1858, this pretended private marriage was not even mentioned, much less made a ground of action. With regard, again, to the pretended marriage alleged to have been celebrated in Ireland, the Defender explains—(1.) That there was neither marriage nor marriage ceremony celebrated between the Pursuer and him; and, (2.) That the Pursuer being a Roman Catholic, and the Defender having been then, as he always was, a Protestant, a marriage between them, as being a mixed marriage, celebrated by a Roman Catholic priest, would have been null by the law of Ireland.

Scotch private marriage on 13th April 1857 and Irish marriage denied.

Her letter in May 1857, saying "you are free."

IX. In June 1858 the Defender was married, in Edinburgh, to Mrs. Emily Ashworth, or Forbes, now Yelverton, widow of the deceased Professor Edward Forbes, of the University of Edinburgh. Shortly after that event the Pursuer took it upon herself to lodge information with the Procurator Fiscal of Edinburgh, by which she accused him of the crime of bigamy. The ground of this

The Major marries Mrs. Forbes in June 1858.

Theresa charges him with bigamy on the ground of the Irish ceremony.

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accusation was the pretended marriage in Ireland, in support of which she produced a false and fraudulent document, purporting to be an extract from a register of marriages kept for the parish in which she alleges the marriage to have been celebrated, but which register contains no entry whatever of the pretended marriage. The pretended private marriage in Edinburgh was not mentioned in her complaint. After an investigation by the Crown authorities, the falsehood of the accusation, as well as of the pretended proofs, was discovered, and all proceedings against the Defender were abandoned.

She produced a fraudulent and false certificate.

X. Farther, the Pursuer, on or about the 7th August 1858, raised in this Court a summons of declarator against the Defender. Not only was no mention made in this action of the pretended private marriage in Edinburgh, but the idea of the existence of such a marriage was excluded by a statement falsely made, to the effect that the Defender had continued to pay his addresses to her, with a view to marriage, so long as she continued in Edinburgh.

On 7th August 1858 she sues him for a declarator of the Irish marriage, and making no mention of the alleged private marriage in Edinburgh.

XI. The Defender, on the 8th day of June 1859, raised an action of declarator of putting to silence against the Pursuer, and a record in that cause is now in the course of preparation.

The Major's suit for putting to silence.

PLEAS IN LAW FOR MARIA THERESA LONGWORTH, OR YELVERTON.

1. The Defender and Pursuer were lawfully married to each other according to the law of Scotland, by consent *de præsenti* to become husband and wife; or otherwise, the Pursuer was married to the Defender by the declarations and acknowledgments of her as his wife above condescended on.

1. Consent *de præsenti*.

2. In the circumstances of the case, a valid marriage has been constituted between the parties, as proved by cohabitation as husband and wife, and habit and repute.

2. Habit and repute.

3. At all events, marriage has been constituted between the parties by the promises of the Defender and Pursuer to become husband and wife, followed by carnal connexion between them on the faith of such promises.

3. Promise *cum copula*.

4. In the event of the Pursuer failing to establish a marriage in Scotland, then the marriage which took place in Ireland on 15th August 1857, being in all respects a valid and legal marriage according to the law of Ireland, the Pursuer is entitled to decree in terms of the conclusions of the libel.

4. The Irish marriage.

PLEA IN LAW FOR THE MAJOR.

The averments of the Pursuer being false in fact, and her pleas being untenable in law, the Defender ought to be assoilzied from the conclusions of her action, with expenses.

A general denial of Theresa's case.

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Sketch of the Evidence.

The following is a—

SKETCH OF THE EVIDENCE.

It was not competent for either party to be a witness in support of the merits of his or her case;(*a*) but either party was liable to be interrogated by the other as to the possession or loss of documents; and the Defender was so interrogated accordingly. The Pursuer tendered herself as a witness for that purpose on her own behalf, to account for the non-production of some of the Defender's letters, but her testimony was excluded.

Much evidence was given by the Pursuer, for the purpose of showing the respectability of her family, and the honourable nature of the circumstances under which the acquaintance between the Defender and herself had been commenced and continued; and much correspondence between them prior to the year 1857 was proved, in which they addressed each other by terms of endearment such as would be used between acknowledged lovers, "Cara Theresa mia,"—"Caro mio Carlo"; but it will be seen that this evidence and correspondence had but little bearing upon the questions which alone the House was required to decide, namely, what passed after first the parties were both in Scotland, which was not until February 1857.

It will be enough to state that the Pursuer was the daughter of a Roman Catholic mother, but a Protestant father; that both her parents had died, the mother about 1840, and the father in 1854; that she was herself a Roman Catholic, and much accomplished in many ways, an excellent linguist, had travelled abroad much, and had been well received in society, and had a competent income of a few hundreds a year of her own. The Defender, on the

(*a*) See Stat. 16 & 17 Vict. c. 20. s. 4.

other hand, was an officer in the Royal Artillery, and a son of the Viscount Avonmore, a peer of Ireland. His family professed the Protestant religion, although his maternal grandmother had been a Roman Catholic, and one of his maternal relations was so now.

Both Pursuer and Defender were fully 30 years of age in the year 1857.

From about the beginning of February till about the end of April, in 1857, the Pursuer and Miss Macfarlane, a young lady of 22, whose father allowed her to accompany her [and who afterwards became a nun], lived in the lodgings of Mrs. Gemble, who occupied the third flat of the house, No. 1, Saint Vincent Street, Edinburgh. There they employed themselves in studies, needlework, and the accomplishments of music, singing, and painting; and there they were visited very frequently by the Defender, then quartered upon military duty in Leith Fort. Their rooms were only one bed-room, which they occupied in common, and only one sitting-room, except that Miss Macfarlane stated she considered that they were at liberty to use another sitting-room if they pleased; but this it did not appear that they did, in fact; and their usual sitting-room communicated directly with the bed-room; and it was stated by Mrs. Gemble that what was said in one of those rooms could usually be heard in the other. She stated that the Defender never called at the lodgings at any time at which both ladies were not at home; that he never went out with the Pursuer alone, except when they rode together; that Miss Macfarlane never went out without the Pursuer, nor the Pursuer without Miss Macfarlane, except on the occasions of riding just mentioned, and except that Miss Macfarlane went to a German class on Saturday in each week, a day on which the Defender never called; that the Pursuer was very beautiful; that her

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Sketch of the Evidence.

conduct was most exact, and, indeed, exemplary; and that she visited and was visited by persons in society.

There was no direct evidence of the exchange of mutual declarations of marriage *per verba de præsenti*, by reading the marriage service on or about the 12th of April 1857, or on any other day, or otherwise. That precise day was Sunday (Easter Day); and Mrs. Gemble, with whom the Pursuer and Miss Macfarlane then lodged, stated that the Defender called on the ladies nearly every day except Saturday and Sunday, on which days he never called. She stated that on one afternoon she heard the Defender reading in the room, when the Pursuer was in; that it appeared to be earnest reading, and in a religious tone; and that she had never heard him, before that or after, reading in the same sort of tone.

Miss Macfarlane did not support or dis-affirm this statement either way; but on being asked whether she remembered the Pursuer and Defender reading the marriage service together, she answered, No. She, however, stated that she had a Church of England Prayer Book with her during her stay in the lodgings, and that it usually lay in the sitting-room which they used, and that it contained the marriage service. She was herself at that time a Protestant, but was left at the convent at Morningside (Edinburgh) by the Pursuer upon quitting Scotland in April 1857; and, whilst there, she changed her religion for that of the Roman Catholic Church.

The proof, therefore, if any, of an exchange of present consent in Scotland, must be found in the subsequent admissions or representations of the parties.

The Pursuer sailed from Scotland for Hull towards the end of April 1857. In a letter written by her to the Defender, on the 12th of July in that year, occurs this passage, with reference to a proposed arrangement

for the Pursuer's joining the Defender:—"Write by return, and tell me if it must be before the end of this month, or if you have obtained fresh leave, and until when? I *must* see my French sister—is it to be before or after? My ears ache to hear the *mia*, tho' I am convinced you might say it with perfect truth now, and for exactly three months past. This conviction decides me. I cannot be worse off." The evidence did not contain any answer to this letter.

The only other evidence, which appeared to have special reference to the reading of the marriage service, was in the testimony of Miss Crabbe, who had lived with the Pursuer as a companion since January 1859, and who deposed that, being with her at Cork in November 1859, at which place the Defender was then quartered, she met him in the street; and that they, being previously acquainted with each other, entered into conversation, in the course of which he said it was shameful of the Pursuer to put that reading into her Scotch pleading, upon which the witness said, "She has not done so, has she?" and the Defender rejoined, "Oh yes, she has. She took advantage of me in a moment of weakness, and now she is trying to use it against me; but it will do her no good, for supposing she gets it, no one thinks anything of an irregular Scotch marriage."

The interval between the Pursuer's departure from Scotland in April and the time at which, as will be seen, she joined the Defender at Waterford at the end of July, was spent by her, first, with her friends Mr. and Mrs. Thelwall at Hull, and afterwards with one of her married sisters and her husband, Mr. and Mrs. Bellamy, near Abergavenny in Wales. The Defender, during the same months, was absent from Scotland, on leave of absence in Ireland, at first, at a house of his father's, called Gayfield, near Dublin, and then at his

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father's country house in the county of Tipperary; and the correspondence which passed between the parties in this interval referred to various projects for their meeting in England, Ireland, and Scotland.

Several of the letters written by the Pursuer to the Defender in this interval, although put in evidence by her, were referred to by the Defender's advisers, as showing that no complete interchange of present consent could have taken place in Scotland. In one of these, written from Mr. and Mrs. Thelwall's house in Hull, she says, "I am like unto the woman in the Gospel, troubled about many things; troubled not to see you, with the unspeakable longings for an absent loved one; doubts and fears about the durability of requitement; misgivings lest the ardency of attachment was merely the effect of proximity—lest a two months' trial will not prove its emptiness. Doubts of myself, of my state of health. Quiet, quiet, says everyone, with solemn faces . . . . . What is the use of their saying 'you must keep quiet,' when I cannot trust, when by trusting I may lose both life now and life hereafter (or at least the fruits of a life of patient suffering), for if you did deceive me again in that last not to be remedied point, the physical part would give way. On the other hand, my whole nature demands the risk, the trial to be made. It has wound itself too closely about you to give you up now. Even writing about it, I have little sharp nipping pains at my heart. If I made my hand write a farewell, I should have a palpitation there and then. I shall die without you. Is it worse to die by you?"

In another letter she wrote—"I have trusted you with the unbounded faith of my nature, not even suspecting where you yourself hope I should—but to perpetuate trust, there must be no playing upon words of doubtful meaning—no mysterious suppressions of

the truth, or shadows of cowardly designs for future evasion. Oh, all this is so abhorrent to me. I do so yearn for implicit confidence between us. I cannot bear to think ill of you; it makes me quite crazy; and, after all, I believe it only comes of that stupid habit you have of continually talking evil of yourself, and warning me, and telling me never to trust you."

Another letter from her contained this passage,—"Depend upon Shakespeare being right when he says, 'There is a divinity which shapes our ends, rough hew them as we will.' This you have done; and I have weakly attempted to follow suit, but we remain man and woman still, and the two halves of a whole. A te per sempre, Theresa."

Some time after this, the Defender wrote thus, from Ireland, to the Pursuer,—"How are you getting on in health, Carissima? You do not tell me whether you have been to London or not. I have been, and indeed am, very ill too. . . . . I do not know what to write to you. Between doctors, and the necessity of getting more leave through their means, and the family alarm at my proceedings, I do not know when I may be able to move from this country. The business is all settled, and produces a considerable temporary, and small permanent, increase of my pauperism. You must recollect, Carissima, that I am not a free agent, and never shall be, or not for many years. I cannot."

Afterwards, in a letter dated July 10th, which was much commented on at the bar, the Pursuer writes, from Abergavenny,—"We are going to Manchester in a week or ten days, and shall probably remain there about that time, to see about the property. You can fetch me from there if you choose, after they return home here. Perhaps you would prefer meeting me in the old cathedral (where my forefathers lie) to

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our other project? as it would be without any particle of risk to you. You are unknown, and have nothing to say or do. My purpose is and will be ignored by mortal creature. If safety is your object, what I suggest is merely the same as being present at mass making you a Catholic." Another letter, dated "Sunday," as to which it was disputed by the Defender whether it should come before or after that last quoted, but which, if written on its date, "Sunday," must have been written the 12th of July, and which is the letter already quoted as containing the passage, "Write by return and tell me," &c., began with these words—"Caro mio Carlo, I have said the *word;* will do all you ask me, and name the time and place as soon as I am able. This implies that I am trusting you—in fact love, with my nature, cannot exist without it—and I really believe that this very trusting you has had more influence over you than any other consideration. I believe so, from the trouble you have taken to destroy it, and fill my heart with doubts and fears.

Before relating what passed when the parties met in Ireland, it will be proper to state whether there was any and what evidence of a promise in Scotland, *per verba de futuro* (as distinguished from the interchange of present consent). As to this, Mrs. Gemble deposed that, upon one occasion, in her presence, the Defender was looking over the back of the Pursuer's chair at a picture in oil she was painting, and that he then said, "If I marry Miss Longworth, I will marry the cleverest lady in Edinburgh;" and when the witness was required to sign her deposition, she required the words "If I marry" to be altered to "When I marry," before her signature was appended, because that was the expression really used; and this requirement was specially recorded in the deposition.

A further proof of such a promise was suggested as being contained in a letter written by the Defender to the Pursuer under these circumstances. The Pursuer, while at Hull, after leaving Scotland in April 1857, had put in a letter from herself to the Defender the cards of two recently married persons, Mr. and Mrs. Shears, without any remark; and upon receiving them, the Defender wrote to her a letter, which, either assumed, or affected to assume, that she herself was Mrs. Shears. It was thus:—"Cara Theresa, excuse me for continuing (for this one time more) the old style of address in part. I congratulate you, on the step you have taken, most sincerely, as the most likely course to render your future life a contented one; and if ever a remembrance of me crosses your mind, in your new sphere of duties and pleasures, spare me a place in your prayers, and believe in me as one always ready to act towards you as a sincere and respectful friend; and permit me to add, as perhaps you will be pleased to hear that such is really the case, that by your marriage you have earned my lasting gratitude; as, on reflection, I found that I had placed myself in a false position with regard to you, and one of all others the most painful to me, viz., that I had promised to you to do more than I could have performed when the time came. You may think this declaration a new example of the truth of the old fable; but it is not so. I have passed that weakness; forgive me that I still retain that of addressing you on the outside of this by your maiden name, and believe me, ever yours to command, Carlo."

This letter produced one from the Pursuer, beginning—"Caro mio, are you mad, or am I? The first reading of your letter brought me to a stop, mental and physical. My present weakness could not stand such a shock. My heart went still. Now, on recovery,

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I begin to see how it is.—Those cards.—I was going to tell you all I knew about it, but got so faint, my friend made me give it up—so I slipped the cards in. Oh, Carlo, to suspect me of such a thing. I whose very life is ebbing away for you. I who have sacrificed all but God to you. I who have lain at your heart, and in sight of Heaven been called yours. I, whose very soul is yours, to be so mistaken. Oh, Carlo, what could she be, to do such a thing, the vilest hypocrite—the most sensual wanton. Carlo I must go mad. Oh for you not to know me better . . . . . That you should judge me guilty of such an infamous thing; God help me, I do not know how to bear this last blow. Oh that he would take me, and you seem to be glad of it. Oh no, no, don't say that; don't say it is a comfort for you to be rid of me. If it is, you know you are, you have always been free . . . . . Oh Carlo, we have been too dear to part now—we must try and make the best of our lot. All I have borne, all I must still bear, God knows best how much I can; but be you a very devil, I feel I am fast to you; for some good end no doubt, in the far off future . . . . Write me directly, or I must certainly come and find you; it is too late to take you at your cruel word."

After this the correspondence appeared to resume its previous character.

At the end of July or the beginning of August, the Pursuer came from England to Waterford, in Ireland, and there met the Defender, by previous arrangement. The Defender had, on the 25th of July, bought a wedding-ring, in Dublin, of a goldsmith, who proved that he had great difficulty in finding one of the precise size required. This ring the Defender brought with him to Waterford; and the Pursuer and Defender travelled together from thence to Rostrevor, in the

county of Down. The Defender adduced evidence to prove that during that journey the parties cohabited as husband and wife; and it was the opinion of the Law Peers that the evidence showed that to have been the case.

Rostrevor is in the parish of Kilbroney, in which there are two Roman Catholic chapels, viz., at Rostrevor and Killowen. Application was made by the Pursuer to Mr. Mooney, the Roman Catholic parish priest of Kilbroney, to celebrate a religious service of marriage between herself and the Defender, making some statements as to what had passed in Scotland. A difficulty was made about a dispensation with the publication of banns, and ultimately the Roman Catholic Bishop Leahy, of Dromore, gave leave to Mr. Mooney to celebrate such a service in Killowen chapel; and Mr. Mooney deposed that, on the 15th of August 1857 (the Assumption), after mass, and after the dismissal of the congregation, the Pursuer and Defender presented themselves in the chapel, and were received by him in consequence of a previous intimation that they might be expected; that then, the Defender, after looking all round the chapel, said, "Mr. Mooney, there is no necessity for this; it has all been previously settled or arranged, but I will do it to satisfy the lady's conscience," or words to that effect. Mr. Mooney further deposed, "I asked him what religion he professed. He said, 'I am not much of anything.' I then asked him, 'What do you mean by that? Are you a Roman Catholic?' The Defender said, 'No.' The Pursuer then said, 'Don't mind him; he has frequently attended places of Roman Catholic worship with me, but he is not yet confirmed.' I then asked the Pursuer [meaning Defender] again, 'What are you?' He said in reply, 'I am a Protestant Catholic.' I said, 'As you are both willing, I have

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no objection,' and the Defender said 'Yes.'" He deposed that he then gave them a short exhortation after which they both knelt down before the altar, he (the priest) standing within the rails, and that they then reciprocally repeated the words of espousal, with united hands, in the following terms, except that he did not recollect the names that they gave:—"I, William Charles, take you, Maria Theresa, to be my lawful wedded wife, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, till death us do part, if holy church will it permit, and thereto I plight thee my troth;" and that then followed another short exhortation, in the course of which Mr. Mooney observed the Defender turning round a ring on the Pursuer's finger; and that after the ceremony the Pursuer said to him (apparently in the Defender's hearing), "Will you enter it in your private register?" upon which he told her that he had no private register, but that he would enter it in the public register if she wished, to which she replied, "No, that would expose our secret." He also stated that he made no entry of this ceremony in his public register, and that there were not any witnesses present to his knowledge; and that his impression, at the time, was, that he was receiving a renewal of previous consent. He also deposed, "If the parties are Catholic and non-Catholic, and had been previously married, all that I am allowed to do by the church is to receive a renewal of the matrimonial consent."

It appeared, however, in evidence, that, at a subsequent period, a certificate of this ceremony was forwarded by Mr. Mooney to the Pursuer, in terms upon which much comment was made, as well as upon a letter to him from the Pursuer asking for it. That letter was without date, but bore the Hull post mark

of June 10, 1858, and, after referring to the 15th of August last, it proceeded thus:—"I have now the arrival of a little stranger to look forward to, and finding some little difficulties about the baptism abroad, they requiring a certificate from the priest who united the parents, I wish to take my precautions in advance, feeling sure that you will rejoice to bring another lamb to the sheepfold, which but for your kindly help last year would otherwise have gone astray. I must now confide to you my husband's surname, which I was only allowed to do under seal of confession (though I never for a moment doubted that our secret was and is perfectly safe with you). My maiden name was Marie Theresa Longworth. My husband's name is William Charles Yelverton. You will please to add the surname to your own private register, as, of course, the child must be registered under the father's name. But I need not entreat you to allow no one to see it but yourself, unless you had a witness to the marriage. However, I rely implicitly on you, and you will find, when the time comes to proclaim this marriage, that you have not only saved two individual souls, but rendered an incalculable service to the Catholic church. I dare not tell you more at present, but some day I shall come to see you, and tell you all. You will be glad to hear that I have much hopes of my husband. . . . Please address to Miss Longworth, 30, Spring Street, Hull, Yorkshire. It will be forwarded to me at Lunenbach, Germany."

The certificate, furnished by Mr. Mooney to the Pursuer, in consequence of this letter, ran thus:—"E Libro Matrimoniorum Ecclesiæ Parochialis de Kilbroney, Diocesis Dromorensis in Hibernia. Constat Gulielmum Carolum Yelverton in matrimonio legitime cum Maria Theresa Longworth conjunctum esse, juxta ritum sanctæ Romanæ Ecclesiæ, die 15ª

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Augusti, anno Domini millessimo octingentesimo quinquagesimo septimo (1857): testibus Ricardo Sloan et Elizabetha Brennan. Ita testor Bernardus Mooney, Parochus dictæ Parocciæ. Datum apud Rostrevor in paroccia de Kilbroney hac die 15ª Junii MDCCCLVIII."

It was proved that, towards the end of August 1857, the Pursuer came alone to Edinburgh, and there joined Miss Macfarlane; and finding that their old lodgings could not be had, they took rooms at the house of Mrs. Stalker, at No. 31, Albany Street, at which place Mr. and Mrs. Thelwall, of Hull, who were old friends of the Pursuer, came to stay with her on a visit of about three weeks.

The Defender wrote thus to the Pursuer, before he joined her in Edinburgh in September 1857:—"Carissima mia, . . . I purpose to arrive on Tuesday, the 15th, at either 10 minutes past or half-past eight o'clock in the evening, as I shall go viâ Carlisle; but you had better not come to that cold station to meet me, but prepare your landlady for another lodger, and I will go straight to you, and show myself at Leith the next morning. . . . I'll give you an account of my travels (D.V.) on Tuesday night, and many *baccie*, and some. . . ." Here followed some writing, which, in the printed evidence, the Defender's agents stated they considered illegible, but which the Pursuer's agents stated they considered to be "petting, bella sposa mia." At the bar, however, the Defender's Counsel suggested that the words had been substituted for the words "petting, possibilémente," and that this had been done by the Pursuer.

It was proved that on the day before the visit of the Thelwalls ended, the Defender arrived at the lodgings, and was introducedto them by the Pursuer; and that as soon as they had departed, the Pursuer and Defender lived together at those lodgings as man and

wife; and that Miss Macfarlane remained with them on a visit of a few weeks, under the entire belief of their being married; that they then went upon a tour into the Highlands on horseback, when Miss Macfarlane went to London; and that the Pursuer and Defender, after their return from the Highlands, lived again together at Mrs. Stalker's lodgings, until, at the end of the year 1857, the Pursuer sailed for Hull, on a visit to the Thelwalls, where she stayed for some months. Mrs. Stalker proved that the rents of the lodgings were paid by the Pursuer.

It was proved that in the autumn of 1857, the Pursuer and Defender came together several times to the Seafield baths, near Leith, and that once, after taking baths, the Defender said to the female attendant there, "Is my wife ready?" and before she could answer, the Pursuer came out of her bath-room, and said, "Here I am."

It was also proved that, in or about October 1857, the Pursuer and Defender came together on horseback to Craigmillar Castle to see it, and that he then said to the woman in charge of it, "Just hold my horse till I take my wife down;" and again, "My wife's horse is a quiet one;" and that they also visited Doune Castle on horseback, and were shown over it, and that the Defender there wrote their names in the visitors' book, under date November 6, 1857, thus, "Mr. and Mrs. Yelverton;" and that they came also on horseback in the same month to the Dunblane hotel, where they stayed two days, and where their bearing to each other was that of man and wife recently married.

It was proved that in the end of 1857, when the Pursuer was going alone to Hull in a steam packet, the Defender came on board with her, and asked of the stewardess whether she had a berth for his wife; and upon being asked, "Is this the lady?" he said,

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"Yes;" and upon being told that the stewardess had a berth, which she showed to them, he inquired, "Can my wife have it all to herself?" and that in that vessel the Pursuer sailed alone to Hull accordingly.

Shortly before Christmas, the Defender wrote two letters to the Pursuer, of which the first contained this passage, in apparent allusion to her suspicion of pregnancy:—"The cat *must* be kept in the bag just now, for if the fiery devil gets out now, she'll explode a precious magazine, and blow us all to the d——l. In the future, there is hope of being able to loosen the strings. If there is danger to you in the natural course of things, that course must be hastened." The second contained these words:—"What is the necessity for letting the mine explode? Cannot you get abroad? I have my reasons to believe that next June will see you through the scrape; but of that more when we meet."

On Christmas day he wrote thus:—"You say, 'I " 'told you my resolution, in case certain events did " 'occur. You were very angry, but it would be my " 'duty, and if I live I must do it.' Now the fact is, " that it is not a question of mere *anger* on my part, " but your resolution is founded on false views. " 'Where is your duty of keeping faith with me?' " I have never intentionally deceived you, and have " done more than I promised (at great risk). . . . If " you do feel any love for me, you must change that " resolution. If I depart this life, you may speak; " or if you do, you may leave a legacy of the facts; " but whilst we both live, you must trust me, and I " must trust you."

It was proved by Mr. Thelwall that during the Pursuer's stay in Hull, in the early part of 1858, the Defender, who was on duty in Leith or Edinburgh, paid two visits of about 10 days each to the Thelwalls, upon their invitation, for as long as his leave of

absence lasted, and was received and treated by them as married to the Pursuer, and allowed to live with her as such; except that, as their housekeeper had come from a part of the country in which the Defender's family lived, some pains were taken to prevent the fact of their living as married persons being known to the servants; that, during the last of those two visits, an intended tour on the continent by the Pursuer and Defender was talked of, in the course of which it was expected that the Defender must leave her to return to his duty, and that she would continue to travel, upon which she suggested that she might happen to be killed and buried abroad, as to which she said that he must then advertise for her, and have her buried again elsewhere, as he chose, in which case she said that, having been twice christened and twice married, she would also have been twice buried; upon which the Defender laughed, but said nothing of importance.

It being thought necessary that the Pursuer should have a new passport for this journey, although she had one already in her maiden name, Mr. Thelwall asked how her name should be filled up by him in the form of application for it, upon which the Defender said to Mr. Thelwall, "Just write it in full, Mrs. Theresa Yelverton," which Mr. Thelwall did; and when the Defender went with Mr. Thelwall to the office of the bankers in Hull, who were to forward to London the application for the passport, he told the manager of the bank that he wanted it for a relative of his, and being again asked the name, he said, "Mrs. Theresa Yelverton." Accordingly, a passport from Lord Clarendon, Secretary of State, was obtained, dated February 11, 1858, in favour of "Mrs. Theresa Yelverton," and it was one of the documents now put in evidence, with the *visa* of the French consulate in London of the same date, and with a letter

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from the Defender to the Pursuer, dated the 12th, enclosing the passport, and saying, "I send you "your passport *visé*. You must sign it, and take "care with the right name."

It was proved by Mr. Goodliffe, a merchant in London, that early in 1858, he was staying with the Defender at the hotel Chapeau Rouge at Dunkirk, in France, and that the Defender then told him he was expecting his wife from Hull; that in a day or two afterwards the Defender introduced to him at the *table d'hôte* a lady whom he described by the words "my wife," and that that lady was the Pursuer; that on the next day, whilst walking with the Defender, whom he knew, he said, "Well, Yelverton, is this all right? Is it on the square?" To which the Defender answered, "Yes, she really is my wife, but we have been married secretly [or "privately," the witness believed the word was "secretly"].; I am obliged to keep it secret from my family;" and that the Defender then asked him not to mention in society that he had met him and his wife, lest it should come to the ears of his family; and that the Defender made those statements to him gravely and seriously.

A letter was in evidence from the Defender to the Pursuer at Bordeaux shortly after the Defender returned to his duties in Edinburgh. It was addressed, "À Madme. Mme. Yelverton, chez Madame André, No 9, Fossé de l'Intendance, Bordeaux," and bore the Bordeaux post mark of 6th April 1858. It contained this passage:—"Dearest small Tooi-tooi, ' you must get well and strong, and we'll have a lark "next autumn yet, and have no more false alarms (or "real ones). I am very miserable at leaving you, "especially in such a weak state. I began to cry "again when in the Railway."

Three envelopes of letters, addressed by the Defender to the Pursuer as "Madame Yelverton" at the

same house at Bordeaux in April 1858 were also in evidence. Letters from her sister, Madame Lefevbre, to the Defender, written from Bordeaux in May, stating the alarming nature of her illness, and her intention to travel to Boulogne, where the sister lived, as soon as possible, were also proved. Three subsequent envelopes of letters addressed by the Defender to the Pursuer, at Boulogne, as "Miss Longworth," two in May and one in June, were also proved, as were also two of the letters themselves, and a torn part of the third. In one of them, dated from Edinburgh Castle on May 12, after sending his regards to her sister, he adds, "As I am not sure whether this can be forwarded to you, I will not write more now. I am weighed down with the load of suspense I have to bear, and live only in hope of a better future. Sempre penso a te, carissima mia. Addio."

The last letter between the parties put in evidence was without date, but bearing the Edinburgh (Hanover Street) post mark of June 26, 1858, and directed to Miss Longworth, New Ship Hotel, Leith, and was in these words:—"Poor little Tooi-tooi, I cannot go and see you any more just now. You must go to Glasgow, as I asked you. Do not forget the man's name, Gilligan's Livery Stables. My brother has come; I will send him to see you this afternoon, about four o'clock. Addio."

On the same 26th of June, the Defender was married in a small Episcopal chapel at Trinity, within two or three miles of Edinburgh, by Dean Ramsay, to Mrs. Forbes, widow of Professor Edward Forbes, and daughter of the deceased General Sir Charles Ashworth, K.C.B.

On the Defender's part, much evidence was adduced for the purpose of depreciating the social position of the Pursuer's family.

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It was also proved that he had been brought up as a Protestant, and had attended Protestant service in or near Dublin twice, in or about May 1857, and also the service at a Protestant church in the county of Tipperary, twice at least, whilst staying at his father's house there from May to July 1857.

There was no evidence, on either side, of any sexual intercourse between the parties in Scotland before the month of September 1857; nor was there any evidence in support of the Defender's allegations of great familiarities having passed between them at any prior time, unless the correspondence showed it, as to which it will be sufficient to refer to the remarks of the Law Peers, which will be given in due course.

It was not proved that, at the time of the ceremony in the chapel of Killowen, either of the parties was aware that a marriage could not lawfully be celebrated by a Roman Catholic priest between parties one of whom was a Protestant and the other a Roman Catholic, unless any inference on that subject can be drawn from what has been stated to have passed between the Defender and Mr. Mooney in the chapel; but the Defender adduced evidence in the cause, by examining counsel learned in the law of Ireland, that such a marriage had been declared void by the Statute of the Irish Parliament, 19 Geo. 2. c. 13., and that the circumstances of this case were within that Statute.

Lord Ordinary's Interlocutor, 3rd July 1862.

INTERLOCUTOR OF THE LORD ORDINARY (*a*).

The Lord Ordinary having heard counsel for the parties, and considered the closed record in the conjoined actions, proof adduced, productions, and whole process, in the action of declarator of marriage, at the instance of Maria Theresa Longworth, Pursuer, against the Honourable Major William Charles Yelverton, Defender, finds that the said Pursuer has not

(*a*) Lord Ardmillan.

instructed that she is the wife of the said Defender; therefore assoilzies the Defender, Major Yelverton, from the conclusions of the action of declarator of marriage, and decerns: In the action of declarator of freedom and putting to silence, at the instance of the Honourable Major William Charles Yelverton, Pursuer, against Maria Theresa Longworth, Defender, finds, decerns, and declares against the said Defender, Maria Theresa Longworth, conform to the conclusions of the said action of declarator of freedom and putting to silence: Finds the said Major William Charles Yelverton entitled to expenses in both the separate actions and in the conjoined actions; allows an account thereof to be given in; and remits the same, when lodged, to the auditor to tax and report.

The Lord Ordinary's Note.

Judgment against Theresa in both suits,—the declarator of marriage and the putting to silence.

THE LORD ORDINARY'S EXPLANATORY NOTE (*a*).

Two suits conjoined—Theresa's for declarator of marriage, and the Major's for putting her to silence.

The actions in which the Lord Ordinary has pronounced the above Interlocutor are conjoined processes, viz., an action of "declarator of marriage," at the instance of Miss Maria Theresa Longworth, against the Honourable Major Yelverton; and an action of "declarator of freedom and putting to silence," by Major Yelverton, against Miss Maria Theresa Longworth.

The question in both the same—Are the parties intermarried?

The great question is the same in both actions. Has the Pursuer, Miss Longworth, proved that she is, in the words of her summons, "the lawful wife of the Defender, Major Yelverton?"

Its great importance.

This question is, undoubtedly, of the utmost importance to the law, to the *status* and interests of both parties, and to the *status* and interests of other persons, not parties, but necessarily involved in their fate.

Novelty and difficulty of the case.

Under a deep impression of the importance, and, in some respects, the novelty and difficulty of the case, the Lord Ordinary has given to it his most anxious consideration.

Fourfold contention of Theresa.

The Pursuer's grounds of action, as stated in the record, are—1st. Marriage by the interchange of consent *de presenti*; 2nd. Marriage by promise *subsequente copula;* 3rd. Marriage by cohabitation as husband and wife, and habit and repute; and, 4th. Marriage in Ireland, in a Roman Catholic chapel, by a Roman Catholic priest.

Denial by the Major.

The Defender, on the other hand, denies the Pursuer's averments in point of fact; and he especially denies that there was any interchange of mutual consent to marry, or any promise to marry given by him, or any *copula* on the faith of such a promise, or any cohabitation as husband and wife, with habit and repute, or any marriage ceremony in Ireland valid according to the law of Ireland, or seriously understood and intended by the parties as constituting marriage.

The materiality of the correspondence.

In considering the effect of the proof as bearing upon these conflicting statements, great weight has, by both parties, been justly attributed to the correspondence; and it has been urged on both sides that, in judging of that correspondence, it is necessary to bear in mind who the parties were, how they stood related to each other, and what, so far as disclosed, were their habits, tastes, and dispositions; and in order to obtain an aid or key in con-

(*a*) Abridged, but given fully in the "Third Series" of the Court of Session Reports, vol. i.

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struing the correspondence, the inquiry in regard to the parties engaged in it is legitimate and appropriate.

No proof of proposal of a secret marriage.

It is not proved that a secret marriage was ever proposed. That the Pursuer desired a marriage, if she could attain it, cannot be doubted; but that there was any engagement to marry, or that marriage was looked forward to by the Defender and the Pursuer as the only result contemplated, so that the difference between them regarded merely its character as a public or private marriage, is not merely without support in the proof, but is quite inconsistent with the general tone and tenor, as well as with the true meaning of particular passages, in this correspondence.

Warnings to Theresa.

The nature of warnings, given from time to time to the Pursuer, are full of meaning. Certainly it was not without warning of her danger that the Pursuer persisted in seeking the Defender's society.

Reading of the marriage service not proved.

Of the averment made in regard to the reading of the marriage service of the Church of England in Mrs. Gemble's lodgings, proof has been attempted. The attempt has signally failed. Mrs. Gemble herself, called by the Pursuer in order to prove it, has not done so. She says: "I recollect one afternoon of hearing Major "Yelverton reading in the room when the Pursuer was in. I did "not take particular notice how long the reading continued. It "appeared to me to be earnest reading, and in a religious tone. "I had never heard him before that, or after, reading in the same "sort of tone." She also says that Miss M'Farlane was "either "in the parlour or in the adjoining bed-room." From which room, Mrs. Gemble says, "Miss M'Farlane could hear all that "was said." On the other hand, Miss M'Farlane, on being asked by the Defender's counsel—"Did you ever, during your "stay in Mrs. Gemble's, hear the Defender, or the Pursuer and "Defender, read over the Church of England marriage service? "depones, No."

Her going to Ireland in July 1857.

The next step in the story is the Pursuer's going to Ireland in the end of July 1857. In article xv. of her revised condescendence she states that, while in England,—"She received letters "from the Defender, who was then in Dublin, saying that he "was now prepared to agree to her demand that the marriage "should be celebrated formally by a priest of the Roman Catholic "Church, and inviting her to come to Ireland that that might "be done." And in article xvi. she adds, without producing any such letters to which she refers, and which the Defender denies, —"The Pursuer accordingly agreed to go to Ireland, "and went there in the end of July or beginning of August 1857, "and met the Defender at Waterford" (p. 43).

Her state of mind at that time.

Observe the position of the Pursuer. Invited by the Defender to Ireland, promised by him a formal marriage in her own Church, hastening to join him, in order that she might be united to him at the altar, she must have been full of happiness and joyful expectation. But is that the picture which her own letters present? Are these the feelings under which she actually went to Ireland in the end of July 1857?

Conduct after meeting in Ireland before the marriage of 15th August 1857.

The conduct of the parties after they met in Ireland, and before the ceremony at Rostrevor, is abundantly established by evidence. The Defender and Pursuer occupied the same apartment, and the same bed, at the different hotels at Malahide, Newry, and Rostrevor, from the 30th July to the 15th of August 1857, being before the date of the only proceeding bearing the semblance of marriage which the Pursuer has instructed. It is

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not proved that during that period there was any application to a priest, or any attempt to obtain marriage, till they reached Rostrevor; and it is not proved that there was any reason for such delay.

Priest's services secured by her after the fortnight's intercourse.

After leading this life—not matrimonial—for about a fortnight, the Pursuer, having secured the services of the Reverend Bernard Mooney, Roman Catholic priest of Kilbroney, near Rostrevor, took the Defender to chapel on the 15th of August 1857, and there, with very slight variation of the ordinary form, a ceremony of marriage, according to the ritual of the Roman Catholic Church, was performed between the Pursuer and Defender.

Irish marriage insisted on to keep the point open.

It cannot be maintained successfully, and in this Court it is scarcely maintained at all, except to keep the point open, that the ceremony in the chapel constituted of itself a valid marriage according to the law of Ireland.

The Irish ceremony not a renewal of a previous Scotch marriage.

Nor can this Irish ceremony receive effect as a renewal of a previous marriage, regular or irregular, in Scotland. Of such previous marriage there is no proof, and no acknowledgment of any such previous marriage was made by the Defender to the priest; nor was any statement of such previous marriage so made by the Pursuer, as to imply the acquiescence of the Defender. If no such previous marriage existed, it could not be renewed. There is here no foundation in fact to support the plea that the Irish ceremony, void in so far as founded on as constituting marriage, is yet effectual as confirming or renewing a prior matrimonial engagement.

Character of that ceremony.

Still the scene enacted in the chapel at Rostrevor is a very distressing incident in this case, and cannot be without weight in considering the effect of the subsequent conduct of the parties.

A device to satisfy her conscience.

The Defender's explanation is, that the ceremony was a mere device, such as had been frequently suggested by the Pursuer, to satisfy her conscience, and yet leave the Defender free.

Except the prior purchase of the ring, which had been bought to sustain for them the character of man and wife at the hotels where they lived, and which seems to have been on the Pursuer's finger before the ceremony, not put on it during the ceremony, there does not appear to have been any step taken by the Defender with a view to this ceremony. He did not act as if he meant it to be truly a present marriage: he talked of it as an arrangement, and he never stated or admitted that there had been a previous marriage, of which consent could be renewed.

The Major's promise in the Crimea.

The case put for her on the record and in argument is, that the Defender promised her a private marriage in the Crimea, to which she would not consent,—that the two alternatives in the view of the parties, and mentioned in the correspondence, were a public marriage according to the rites of the Roman Catholic Church, suggested by her, and a private marriage, proposed by him,—that the offer of a private marriage was not only rejected by her, but was felt by her to be an insult and a "humiliation,"—that a private marriage was again offered her in Edinburgh,—that nothing but a marriage by a priest of her own faith would satisfy her.

Private marriage offered her in Edinburgh.

After the Irish ceremony they return to Edinburgh.

Shortly after the Irish ceremony the Pursuer and Defender came to Edinburgh. They did not come together. The Pursuer came first, and appeared at Mrs. Stalker's lodgings, along with her friend Miss M'Farlane, both ladies taking the name of M'Farlane. After passing as Miss M'Farlane for two or three weeks, the Pursuer told Mrs. Stalker that "she expected a friend or a

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"brother," and wished "to have a bed-room for him for a night." The Defender arrived; Mr. and Mrs. Thelwall were in the house; he was introduced to them, but not as the husband of the Pursuer; and, on the Pursuer's making explanations of her own, she and the Defender were permitted by Mrs. Stalker to occupy the same apartment, which they did for some time, under the name of M'Farlane. The Pursuer received a letter as Miss Longworth. By that time the name of Yelverton had been disclosed to Mrs. Stalker, apparently by the Pursuer, who had not at first told the name of the "friend or brother" whom she expected. Mr. Nicolson, who lived in the same lodgings, asked Mrs. Stalker for whom the letter was. She told him that—

Are received by Mrs. Stalker.

Mrs. Stalker's account.

" Mrs. Yelverton had been privately married to Major Yelverton,
" but that, wishing to conceal the marriage from her family, she
" still retained her maiden name."

This statement by Mrs. Stalker had evidently no other authority than communications by the Pursuer: it was brought out in evidence, on examination by the Pursuer of her own witness, and two observations in regard to it occur. The first is, that the Pursuer confessedly retained her maiden name, or at least a maiden name; and the other is, that the professed reason for doing so was a wish to conceal the marriage from *her* family, which is not the story now told at all. Mrs. Stalker, a respectable person, keeping respectable lodgings, does indeed state as was natural, that she would not have permitted the Pursuer and Defender to live together in her apartments if she had not believed them to be married. This is generally the case. A gentleman and lady cannot get access to hotels or lodgings of respectability unless they are believed to be married.

He spoke of her as his wife, but not in the way of declaration.

It is proved that the Defender did, at Seafield Baths, at Craigmillar Castle, and at some other places, speak casually of the Pursuer as his wife; certainly not in the way of distinct declaration, or as acknowledgment of marriage, and not to persons to whom the introduction of a lady as his wife could be important or significant. It is proved that the Pursuer and Defender took a short tour; and that at Linlithgow, Falkirk, Stirling, and other places they lived at hotels together, and were received as married persons, and permitted, on that footing, to occupy the same apartment. It is also proved that, in the course of that tour, they visited Doune Castle, where the Defender entered their names in the visitors' book as "Mr. and Mrs. Yelverton." They then returned to Edinburgh, and after a time the Pursuer went to Hull. During this period the Pursuer was not known, introduced, or visited by any one as Mrs. Yelverton; and the Defender was held and reputed to be a bachelor by all his friends and brother officers.

Entry of her name at Doune.

In no letter does he address her as his wife.

Throughout the whole correspondence there is not one letter in which the Defender addresses the Pursuer as his wife, or subscribes himself her husband; and there is not one letter in which the Pursuer addresses him as her husband, or subscribes herself his wife.

Trip to the Continent.

Passport with her name as "Mrs. Theresa Yelverton."

The Pursuer and Defender then take a trip to the Continent. A passport is taken for the Pursuer in the name of Mrs. Theresa Yelverton; he had a separate passport for himself. Of course they lived together as if they were husband and wife on the Continent; and after the Defender left the Pursuer at Bordeaux, three letters were addressed by him to her there as Madame Yelverton. At Dunkirk, on their way to Bordeaux, an interview

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appears to have taken place between the Defender and a Mr. Goodliffe, in the course of which the Defender is said to have admitted to Mr. Goodliffe that he was "secretly or privately "married" to the Pursuer. As the whole arrangement for this trip from England to the Continent, by parties not Scottish, was a device to facilitate intercourse under colour or semblance of marriage, this conversation with Mr. Goodliffe may be held to be of a similar character, and to be of little weight.

Parties not Scotch.

Semblance of marriage.

The Pursuer states on record that the Defender left her at Bordeaux in April 1858, ill, and unable to travel, and that her illness brought on a miscarriage; and there are letters in process, dated in the beginning of May 1858, from Madame Le Fevre, the Pursuer's sister, mentioning her illness, though not stating the nature of it, or the fact of miscarriage. On the 10th of June 1858 the Pursuer addresses a letter, posted at Hull, to "The Reverend "F. Mooney, Rostrevor, near Newry, Ireland." The whole of that letter is characteristic and important. It is only necessary at present to mention that in it the Pursuer says, "I have now "the arrival of a little stranger to look forward to; and finding "some little difficulties about the baptism abroad, they requiring "a certificate from the priest who united the parents,—I wish to "take my precautions in advance."

Her alleged miscarriage.

Announcement of pregnancy to the priest.

If it be true that the Pursuer had a miscarriage in April or May, it could not be true that she expected the arrival of a little stranger in June, as she wrote to Mr. Mooney. Nor could it be that after the date of that letter she had a miscarriage, because the letter was posted in England; she had left Bordeaux long before its date; and it is not suggested that she had a miscarriage in England.

Commentary.

In April 1858, the Defender writes to the Pursuer, as he quitted her at Bordeaux, "Dearest small Tooi, Tooi, you must get well "and strong, and we'll have a lark next autumn yet, and have "no more false alarms (or real ones)."

Soon after the month of May 1858, and about the time when the letter to Mr. Mooney was written, the Pursuer began to think that the Defender was going to leave her; and then she wrote the only letter in which she states or even suggests a claim to the *status* of a wife.

On the 26th of June 1858, the Defender was married to Mrs. Forbes. The Pursuer lodged information with the Procurator Fiscal, accusing the Defender of bigamy, founding on the alleged marriage in Ireland as the ground of accusation, and not mentioning the alleged private marriage in Edinburgh. No proceedings against the Defender were taken by the Crown. In August 1858, the Pursuer raised her first action of declarator of marriage, in which she did not allege any private marriage in Edinburgh previous to the ceremony in the chapel at Rostrevor. That action was not proceeded with. The Defender raised his action of putting to silence on 8th June 1859, and the Pursuer raised the present action of declarator of marriage, in which she, for the first time alleges the private marriage in Edinburgh in April 1857, before going to Ireland. This action was raised on 13th January 1860.

The Major marries Mrs. Forbes.

Her first allegation of a Scotch marriage.

Marriage is a consensual contract. Consent alone, if freely, seriously, and deliberately given, constitutes marriage. Light words, words of doubtful import, words used merely to give a colour to cohabitation, to escape scandal, or to obtain access to lodgings or hotels, these are not sufficient proof.

Marriage a consensual contract.

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Declarations of marriage.

Proof of verbal declaration of present consent, interchanged in the presence of witnesses, if made with the mutual intention of then and there entering into marriage, is held in law to be sufficient proof of consent, and therefore sufficient to constitute marriage.

Written declarations or acknowledgments of marriage, given and accepted, are sufficient proof of consent, and therefore of marriage—if there be no doubt of the meaning and intention of the declaration, and no doubt of the reality of the present purpose of both parties to enter into the contract of marriage.

But whether the consent to marry be given verbally in presence of witnesses or be in writing it must be present consent—clear, unequivocal, and serious; and it must be mutual. On this point—namely, the necessity of mutuality of consent—there appears to have been some little misapprehension at the bar.

Effect of concealment on one side.

It is said, that if there is a reserved and concealed intention and purpose in one of the two parties not to marry, that would not prevent the effect of a plain declaration of consent. The Lord Ordinary thinks that this proposition is sound, although he is aware that it has been disputed. It would, in his view, be a deception and a fraud on the other party, and therefore not effectual to release from the declaration of consent; since no one can be permitted to escape from a contract by pleading his own deceit, and founding on his own fraud. But if it is known at the time to both parties that, in making the declaration, one of them has no purpose or intention to marry, but makes the declaration (verbal or written) in order to deceive third parties, or to give a colour to cohabitation or to obtain facilities for intercourse, then the mutuality of consent is gone, and, known to be gone, there is no *consensus atque conventio in idem placitum.*

Here there was no present consent.

Now, applying these rules to the present case, it appears to the Lord Ordinary clear that there was here no interchange of mutual consent to marry *per verba de presenti* sufficient in law to constitute marriage. The Pursuer did, no doubt, aim at marriage, if she could accomplish it; but the Defender did not. He never did in writing express, and within Scotland he never expressed in words, any present intention to marry.

Promise *cum copula subsequente.*

It is next pleaded that marriage has been here constituted by promise *subsequente copula.* The statement on record is not very distinct on the subject, for it is not alleged when the promise was given, or when the *copula* followed on it.

Legal proof of promise to marry, and proof that *copula* followed on the faith of the promise, is held to instruct mutual consent, on a presumption that the promise passed into present mutual consent by the act of intercourse. It is not necessary that there be actually a written promise, but there must be proof of the promise by the writing of the Defender.

Here is no express promise.

The Major gave no promise, but did give warning.

In the present case no express promise has been proved. There is no written evidence of the existence of any promise to marry. On the contrary, he thinks that the Defender resisted to a great extent the Pursuer's advances, avoided giving such a promise, and more than once warned her that he could not and would not marry, and that she and he were safest at a distance from each other.

No intercourse on the faith of a promise.

Besides, no intercourse on the faith of any such promise has been proved. The intercourse in Ireland, prior to the 15th of August 1857, is not alleged to have been on the faith of a promise. The only intercourse on which the Pursuer, consistently with the

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case put for her, can found or has founded as attributable to a promise of marriage, must be intercourse after the date of the Irish ceremony. But, prior to that date, it is proved that there was intercourse for many days; denied by her, and not by her attributed to any promise. That fact presents a very serious difficulty to the Pursuer's plea on this head. It is not necessary now to consider whether, under some peculiar circumstances, there may not be a marriage by promise *subsequente copula*, after there had been illicit intercourse. Some lawyers have doubted this. The Lord Ordinary is disposed to think it possible that such a case might occur; he can conceive of circumstances which might raise such a plea. It would be a remarkable and exceptional case when it does occur; but he is quite satisfied that no such case has been presented on this proof, and on this correspondence, read by the aid of the facts here ascertained; and accordingly he is of opinion that the Pursuer has failed to instruct marriage by promise *subsequente copula*.

May there be a marriage by promise and copula after illicit intercourse?

In regard to the Pursuer's next plea, that there was marriage constituted by the Irish ceremony, it is only necessary to say that the validity of that marriage depends on the law of Ireland; and that in this Court, and for the purposes of this action, the Lord Ordinary is bound to take the law of Ireland as matter of fact, according to the evidence of the learned jurists who have been examined.

Irish ceremony.

The only remaining plea for the Pursuer is, that marriage was constituted by "cohabitation as husband and wife, and habit and "repute." This is, undoubtedly, a mode of constituting marriage known to our law.

Habit and repute.

In this case, apart from the mere colour, assumed to escape scandal and procure admission to lodgings and hotels, there has been no habit and repute at all.

Colour to escape scandal—no real "habit and repute."

Upon an Appeal by the Pursuer (Maria Theresa Longworth, or Yelverton) from the *Lord Ordinary's* Interlocutor to the First Division of the Court of Session, their Lordships of that Court, after the usual arguments of Counsel, delivered the following opinions.

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In the record the Pursuer sets forth that the marriage is established in four ways:—1st, by *ex post facto* declarations or acknowledgments of the parties that they were husband and wife; 2nd, by promise of marriage *subsequente copula;* 3rd, by a solemnization of marriage in Ireland on 15th August 1857; and 4th, by habit and repute. But the last of these grounds is now abandoned. And while the Pursuer still maintains that the proceeding in Ireland was *per se* a valid marriage, and says she will urge that view in the House of Lords if the case should be appealed, she admits that in *hoc statu* this Court must assume the Irish law to be adverse to her; and that this ground of action has

Four ways of matrimony set forth, but "habit and repute" abandoned, and the Irish marriage assumed invalid in the Court below.

(*a*) Abridged, but given fully in the "Third Series," vol. i.

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not been established. I shall accordingly assume this to be the case, reserving, however, for consideration the separate effect of that proceeding as an element in the inquiry whether or not the alleged marriage has been proved, either by the acknowledgment of the parties, or by promise *subsequente copula*.

Therefore the question is as to marriage by present consent or by promise *cum copula* while the parties were in Scotland.

Marriage in Scotland may unquestionably be established either by the acknowledgment of the parties, or by promise *subsequente copula*. Although it is not completed without an interchange of *de præsenti* matrimonial consent, yet such interchange of consent may be established either by the deliberate acknowledgments of the parties (whether made at the time or afterwards) that they are husband and wife, or by proving that at the time when cohabitation took place between them, they were under a promise to marry each other, the cohabitation in such a case being held to be equivalent to a celebration of the promised marriage. It is necessary for the Pursuer, in support of her allegation, to prove that the alleged marriage took place in one or other of these modes, while the parties were within the territory of Scotland. This renders the *onus probandi* which is incumbent on the Pursuer peculiarly heavy in this case; because it does not appear that the parties belonged to Scotland either by birth or by domicile, or that they had ever been together in Scotland before the commencement of the present dispute, except on two occasions, first, for a few weeks prior to the middle of April in 1857, and again for about three months towards the end of that year. The question therefore is not only whether the alleged marriage has been established in either of the two ways under consideration, but likewise whether the place where it took place was within Scotland, and whether the time was within either of these two periods. This is what must be proved by the Pursuer. But it is not necessary that the dates of the documents, admissions, or facts and circumstances of which her proof consists, should also be within these periods, for such evidence may retrospectively prove prior events.

Copula is celebration in Scotland.

The parties must be in Scotland, especially as they are both strangers.

The evidence may prove retrospectively prior events.

The prior letters out of Scotland show the purpose of the meeting in Scotland.

But it appears to be also necessary in the present case to go into a preliminary inquiry as to the general import of a voluminous correspondence which took place between the parties prior to their first meeting in Scotland in the spring of 1857, for although that correspondence affords no direct evidence as to what is alleged to have taken place at a posterior date, it serves to indicate the purpose for which that meeting in Scotland took place. The task of interpreting aright that correspondence is one of the most difficult and laborious I have ever encountered.

Commencement of the acquaintance.

The correspondence commenced in 1853, but the parties had become acquainted nearly a year before, by being fellow-travellers in a steamboat from Boulogne to London on a summer evening. An incident, unimportant in itself, led the parties on that occasion into conversation, which they kept up during the voyage, without having been introduced to each other.

Her alleged invitation of the Major to her lodgings not proved.

The Defender inserted in the record an allegation that, on "the "arrival of the steamer at London, the Pursuer invited the "Defender to accompany her to her lodgings, which he did "accordingly, and he remained with her there for several hours." That allegation was calculated to create an unfavourable impression against the Pursuer. I carefully turned to the Defender's proof for his evidence of so serious an accusation; but I have searched in vain. He has not even attempted to prove it. Nor

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nas he ever stated where the alleged lodging was situated. I therefore feel myself bound to deal with that allegation as an unworthy attempt to create a groundless prejudice against the Pursuer.

The parties on their meeting in Scotland in February 1857, on the one hand, were not actually married, nor had there been even a concluded agreement or promise to marry; but, on the other hand, there had been pending for years a treaty of marriage between them, and the very purpose of their meeting was to consider a proposal to complete the marriage in some irregular manner. I have already stated that, in my opinion, the construction of the letters in which that proposal was suggested, as well as the antecedent correspondence, show that such was the true nature of that proposal; and the soundness of that conclusion is perhaps best tested by the conduct of the parties when they did meet in furtherance of it. Both of the parties themselves have felt this to be the case, and they accordingly embodied in the closed record very opposite statements as to what then took place. On the one hand, the Pursuer there averred, that on her consenting to be married privately, in order to prevent the Defender's uncle from hearing of the marriage, he, the Defender, not only promised to marry her, but followed up this promise by actual marriage, inasmuch as they privately interchanged *de præsenti* matrimonial consent, and read for that purpose through the marriage service of the Church of England together. On the other hand, the Defender not only denies these statements, but positively alleges in the record that illicit intercourse commenced between the parties in February when they met, and was repeated as opportunity offered during the period of about six weeks while they then remained in Scotland. As that allegation of the Defender, if it was true, admitted of being easily proved, and would have had a most important bearing on the question, I turned to the proof with some eagerness, in order to make myself acquainted with his evidence in support of this allegation. But, strange to say, I found none. He has not even made an attempt to prove his accusation.

The parties were in treaty when they arrived in Scotland in February 1857.

No proof of illicit intercourse in February 1857.

As was settled in the case of *Ross* v. *Macleod*, and in sundry prior cases referred to in the report of that case, the promise which, with subsequent cohabitation, establishes marriage against a man must be proved by his writing or by his oath emitted on the reference of the other party. Such acknowledgments or proceedings not only are proveable *pro ut de jure*, but are also sufficient although made *ex post facto*. This was found, in conformity with many other precedents, in the late case of *Leslie* v. *Leslie*.

The promise must be proved by the party's writing or by the party's oath of reference.

Acknowledgment *ex post facto*.

Has then the Pursuer established either of the two grounds of action on which she is now insisting? I will begin by considering whether she has shown sufficient acknowledgments or declarations of matrimonial consent *de præsenti;* and I will afterwards inquire whether or not she has proved the alleged promise *subsequente copula*.

Will consider, first, is there evidence of a marriage by consent *de præsenti?* and, secondly, is there evidence of a promise *cum copula?*

On the 25th July the Defender, who was then in Dublin, but must have been just setting off to meet the Pursuer at Waterford, purchased a wedding ring from a jeweller, and he gave that ring to her, a significant symbol of acknowledgment of her as his wife. The Defender has proved that the parties went to a hotel at Malahide, and lived there from the 30th July to the 3rd August; that then they went to Newry, and lived in the hotel there from

The Major gives her a wedding ring.

Cohabitation before sacerdotal celebration of marriage proved.

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the 3rd to the 5th August; that from thence they went to Rostrevor, and lived there from the 5th until after the 15th August; and that at each of these places they lived and slept together. I do not go over the evidence by which this is proved, for to my mind it is clear beyond dispute. If this were a question as to the character of the Pursuer, this evidence would be very unfavourable to her; because she denied on the record that such cohabitation had taken place, and because such cohabitation, before there had been any sacerdotal solemnization of marriage, should still have been as much repugnant to her conscience as it had been in Scotland, and nothing had taken place in the meantime to change her position, except that she had got a marriage ring from the Defender, and she was left alone with him without being accompanied by Miss Macfarlane, or any other female friend. But the question we are considering is not one of character or propriety, but whether or not there is proof of marriage by the acknowledgments of the parties. And this being the case, the proof is in favour of the Pursuer, because the cohabitation at Malahide, Newry, and Rostrevor are parts of a series of such acknowledgments; for it is impossible to read the evidence without being satisfied that at each of these three places the Pursuer was acknowledged by the Defender to be his wife.

The Major's acknowledgments at Malahide, Newry, and Rostrevor.

The Irish marriage an acknowledgment of a prior marriage.

And this brings us to consider the effect of the proceeding at Rostrevor on the 15th August. Although we are not to deal with that proceeding as having the legal effect of constituting *ipsum matrimonium*, yet it may have the different effect of being an acknowledgment of a prior marriage. On that occasion the Defender, kneeling with the Pursuer at an altar, and clasping the Pursuer's hand, solemnly declared in presence of a Roman Catholic priest that he took her "to be my lawful wife; to have and to "hold from this day forward, for better for worse, for richer or "poorer, in sickness and in health, till death us do part, if Holy "Church will it permit; and thereto I plight thee my troth;" and he accepted of a corresponding declaration from the Pursuer. Viewing these declarations even apart altogether from their religious character, they contain unequivocal acknowledgments that the parties were husband and wife. I cannot reject this proceeding as being an acknowledgment of a prior marriage. It is true the priest swears that before the declarations were made the Defender said to him, "There is no necessity for this, it has all been "previously settled or arranged; but I will do it to satisfy the "lady's conscience." And it is likewise true that the Pursuer had previously told both the priest and the bishop of the diocese that the object of the proceeding was to renew, according to the form of the Romish Church, a marriage which had already taken place in Scotland; and that, accordingly, it was at the time distinctly the understanding of the priest, from what both parties had told him, that such was truly the object of the proceeding. But, then, this just makes the proceeding the more clearly effectual as an admission by the parties of their having been previously married. In none of the cases in which marriage has been held to be established by *ex post facto* acknowledgments has the acknowledgment been so clear and so solemn as the one in question. The Defender said there was no necessity for the parties now accepting of each other as husband and wife. And why? He says it was because it had all been previously settled or arranged, which could only mean that what he was about to do

had been previously done. And why, if it had already been done, was it to be done a second time? His own statement was that it was to satisfy the lady's conscience, the very expression, it will be recollected, which she herself had used in the first letter in which she suggested an irregular marriage. And what was the thing in reference to which this proceeding was to satisfy the Pursuer's conscience? Was her conscience to be reconciled to her entering upon an abandoned and vicious course of life by a flagrant desecration of one of the holy ordinances of her religion? I cannot believe this.

Enumeration of ten distinct "particulars" on which Lord Curriehill relies,—six in Scotland and four not in Scotland.

I will enumerate the more important particulars which took place subsequent to their leaving Ireland for Scotland in August 1857:—1. The parties returned to Edinburgh, the Pursuer having arrived first, and finding she could not obtain her former lodgings, she went to the lodging of Mrs. Stalker, Albany Street. She was soon afterwards joined by the Defender, and the parties there for some months cohabited undisguisedly, although unostentatiously, as married persons in every respect. They would not have been received at that respectable lodging had their cohabitation been suspected to be on any other footing. The Defender's home was there; he left it in the morning to attend to his military duties, and returned to dinner, and remained all night. He conducted himself to the Pursuer as a kind and affectionate husband. She was called his "wife" and "Mrs. Yelverton" in his presence with his entire acquiescence. Miss Macfarlane, the respectable young lady who had accompanied the Pursuer on the former visit, was their guest during this second visit, and now resided with them on the footing of their being husband and wife. 2. When so residing together they visited Craigmillar Castle, and the Defender told the keeper that the Pursuer was his wife. 3. He told the same thing to the attendant at Seafield Baths, near Leith, when he was waiting for her there. 4. When they went on an equestrian excursion to the Highlands they lodged as husband and wife at the hotels, and particularly at those in Linlithgow, Falkirk, and Dunblane. 5. On that excursion they visited Doune Castle, and the Defender wrote their names, "Mr. and Mrs. "Yelverton," in the visitors' book. 6. The Pursuer was intimately acquainted with Mr. and Mrs. Thelwall, of Hull. They were visiting her at Mrs. Stalker's lodgings when the Defender joined her there, and was then introduced to him by the Pursuer. After the parties returned from their Highland excursion, the Pursuer went to Hull by sea to visit these friends, and the Defender went to the steam-packet and secured a berth for the Pursuer expressly as his "wife." 7. On the invitation of Mr. and Mrs. Thelwall the Defender joined the Pursuer as a visitor in their house, and he was received by them as the Pursuer's husband; and when his leave of absence expired, he left the Pursuer there, and he afterwards returned and made a second visit on the same footing. On the occasion of these visits some arrangements were made to conceal from the servants that the Pursuer and the Defender were married—the reason being that he had intimated his desire that the marriage should be concealed from his own friends; and the housekeeper of the Thelwalls having come from near their residence, they were afraid she might inform them of the marriage. But notwithstanding this, matters were arranged by Mr. and Mrs. Thelwall so that they cohabited as husband and wife. And on one occasion during that visit she, in the course of conversation, in the Defender's presence, stated that she had been

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twice married as well as twice christened; and he indicated no dissent from that remark. 8. As the parties intended to go to France, the Defender applied for and obtained a passport for the Pursuer, for although she had one already, it was in her maiden name, and the new one was to be in her married name. And accordingly the Defender applied for and obtained the new passport in the name of Mrs. Theresa Yelverton; and in his letter sending it to her he said, "I send you your passport *vise*. You "must sign it, and take care with the right name." 9. At Dunkirk the Defender introduced the Pursuer to a Mr. Goodliffe, a London merchant, as his wife, but told him that they had been married secretly or privately, as he was obliged to keep the marriage secret from his friends. 10. The parties having afterwards gone to Bordeaux, and the Defender having left her there, and returned to Leith, his letters thereafter were addressed by him to her as Madame Yelverton. The last of these has the Edinburgh postmark of 29th April 1858. Thus we find from the proof that for a period of a year after the termination of the first visit to Edinburgh in the spring of 1857, the Defender, notwithstanding the precautions which were taken to prevent the marriage from becoming known to his own family, unequivocally, and on one occasion very solemnly, acknowledged that the Pursuer and he were married to each other; and their conduct in every way corresponded to their professions.

Her revelation of pregnancy treated by him as a breach of faith.

I shall refer to only one other article of evidence, which appears to me to be important. About the end of the year 1857 the Pursuer, while she was at Hull, appears to have announced to the Defender a suspicion that she was pregnant, and that if such were the case their marriage could no longer be concealed. This led to some unpleasant correspondence between them, the fair import of which appears to be that she was desirous that, if her suspicion should be realized, the true state of matters should, for the sake of her character, be made public; but that the prospect of such publication of the marriage created great alarm to the Defender, and he asserted that it would be a breach of faith on her part.

Unequivocal acknowledgments of marriage in Ireland, Scotland, England, and France enough to satisfy the law. Inglis *v.* Robertson and Leslie *v.* Leslie.

Putting together all these unequivocal acknowledgments of marriage in Ireland, Scotland, England, and France, I am of opinion that they are sufficient to satisfy the rule of the law of Scotland, and that the marriage is established. The soundness of this doctrine was recognized by the House of Lords affirming the judgment of this Court in the case of *Inglis* v. *Robertson* in 1786 (Craigie, Stewart, and Robertson, iii. 53), and it was recognized and acted upon in a series of other cases down to that of *Leslie* in 1860, already referred to. Nor is it necessary that the precise time when the marriage so acknowledged shall be proved, as is well stated in that case of *Leslie*.

It is for the Major to prove that the acknowledgments of marriage were disguises for an illicit purpose.

The Defender says that such acknowledgments have not such effect when they are mere disguises for illicit intercourse. That is quite true. But the *onus* of proving that they were such disguises was incumbent upon him. And where is his evidence? I can find none. On the contrary, it appears to me that such a marriage as is established by the *ex post facto* acknowledgments was quite in conformity with the arrangement under which the Pursuer met the Defender in Edinburgh in February 1857, in respect that for four years before there had been going between them a correspondence which, although an imprudent, was an honourable courtship, with a view to marriage, so far as the Defender's meaning was therein disclosed; and that, although the

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marriage had been delayed for a considerable time from difficulties, according to the Defender's statement, arising from complications with an uncle, yet these difficulties were obviated, or rather evaded, by the parties agreeing that the marriage should be a secret one; and that it was for the very purpose of settling such an irregular marriage the Pursuer came to Scotland in 1857.

Lord Curriehill's chief difficulty the want of cohabitation in Scotland in the spring of 1857.

The greatest difficulty, indeed, I have felt in the case arises from the fact that the cohabitation did not commence in Scotland at the first visit in the spring of 1857. But I have become satisfied that this arose from the Pursuer, in consequence of her religious notions as to the sacramental character of marriage, having, for some time, religious scruples against allowing the marriage to be consummated without a sacerdotal solemnity.

Difficulty by reason of expressions inconsistent with a belief of marriage.

The only other thing which I have had any difficulty in reconciling with the conclusion to which I have come is, that in the correspondence between the parties after they left Edinburgh in April 1857, there are expressions not easily reconcileable with a consciousness of the parties that they were there irrevocably married. But, in the first place, there are other passages which indicate the reverse; and the true explanation appears to be that the parties, although they privately interchanged matrimonial consent, may not have been aware of the legal effect of what they had done. This is often the case, even among natives of Scotland, who are so imprudent as to engage in such proceedings. Still more may this be so when, as in the present case, the parties were strangers in Scotland, and probably not informed as to its marriage law. But even if they were in such ignorance, and were led in consequence to use the expressions I have referred to, the marriage would not be the less binding.

They might not have known the law of Scotland.

They were strangers; but the marriage would bind.

The marriage was in Scotland; it was not in Ireland.

It only remains to be stated, as to the marriage which was so acknowledged, that if it did take place, it was in Scotland it took place. For, on the one hand, the correspondence proves very clearly that, when the Pursuer first came to Scotland in February 1857, there had been no marriage, nor anything but an unsettled treaty for a marriage; and, on the other hand, after the Pursuer left Scotland in April 1857, and while she was in England, the parties never met again until they went to Ireland; and hence it was not in England the acknowledged marriage took place. And thus the marriage, which was so acknowledged, as it did not take place either before the parties met in Scotland or after they left it in the spring of 1857, necessarily took place while they were then both residing in Scotland. On these grounds I am of opinion that the Pursuer has made out her case; and if I am right in this view it is not necessary to consider the other ground of action.

Holds that she has made out a marriage *per verba de præsenti*.

Secondly, he deems a promise *cum copula* established.

But if I am wrong in that view, I think the marriage would be established on the other ground of promise *subsequente copula*. There is no question as to there having been cohabitation in Scotland in September, October, and November 1857. And there is no question that in law that cohabitation was as effectual as a regular celebration would have been to establish marriage between the parties, if it be also proved by such evidence as the law requires that at the time of the cohabitation the parties were under a promise to marry each other. The question then is, has it been proved by such evidence that such a promise then existed? If such a promise could be proved *rebus ipsis et factis*, I think there would be good ground for inferring it from the facts as to the state of the treaty between the parties when they met in Scotland in February 1857, followed

The promise must be shown by admission by reference to his oath or by writing under the party's hand.

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by their conduct in this country during the period of nearly two months following, and in Ireland some months later. But it is necessary, in order to satisfy a technical rule in the Scotch law of evidence, that such a promise be proved either by the opposing party's admission, or a reference to his oath, or by some written acknowledgment under his hand.

Letters under the Major's hand show the promise.

In the letter which he wrote to the Pursuer in the mistaken, if not the affected, belief that, after leaving Edinburgh in April 1857, she had married a Mr. Shears, he says, "that by your marriage "you have earned my lasting gratitude, as on reflection I found "that I had placed myself in a false position in regard to you, "and one of all others the most painful to me, viz., that I had "promised to you to do more than I could have performed when "the time came." What had he promised to her? I cannot doubt that it was marriage. That was the only thing from which her marriage with another man could have afforded to him the relief he affected to feel. This is the only meaning which the terms of the letter will fairly bear. And when we construe these terms by the antecedent proceedings which, as already stated, would themselves import such a promise, there is in my opinion no doubt as to that being the promise referred to in this writing. In a subsequent letter of 25th December 1857, posterior to the proceeding in Ireland, he says,—"I have never intentionally de- "ceived you, and have done more than I promised at great risk." I think that the promise here referred to was also a promise of marriage, the Irish celebration being what he says was beyond what was promised. But whether or not this was so, the former letter is sufficient to satisfy the technical rule of evidence on the subject, construed as it may and should be by the surrounding circumstances. That promise could only have been in Scotland; for, as already stated, when the parties met there in February 1857, there certainly was neither actual marriage nor agreement nor promise of marriage existing between them. And between the middle of April, when they left Scotland, until the date of the former of the two letters, no other promise is in the correspondence. This being the case, it is not necessary to consider a question which would not have been free from difficulty—whether, in such a case, the promise as well as the cohabitation must be in Scotland?

The promise was not released before the cohabitation.

Holding such a promise to have been made when the parties were in Scotland on their first visit, it certainly was not recalled or annulled by anything which had taken place before cohabitation took place in Scotland on the second visit. Such a recall was not implied either in the cohabitation, or in the marriage ceremony, which took place in Ireland. On the contrary, these proceedings, if they have any effect at all, in this view of the case would only have the effect of being confirmatory of that promise, and of rendering it still more binding than it was at first. On this ground also, therefore, I think the Pursuer's action of declarator is well founded.

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LORD DEAS' OPINION (*a*).

There are now before us, for consideration and decision, two actions, which have been conjoined. The first is an action of putting to silence. The second is an action of declarator of marriage.

(*a*) Abridged, but given in full in the "Third Series," vol. i.

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It appears to me that the result of the action of putting to silence must depend upon the result of the action of declarator, and I shall therefore say no more of it here, but proceed at once to consider the action of declarator.

The silence suit depends on the Declarator.

It is not necessary that the parties should be what the law regards as domiciled in Scotland. It is enough that they are resident in Scotland for the time being, and that the requisites of the contract, as a purely civil and consensual contract, have taken place in Scotland. What these requisites are, in the case of marriage said to be constituted by promise *subsequente copula*, may be a question of circumstances, admitting of difference of opinion. What they are in the case of marriage said to be constituted by consent *de præsenti*, admits of no dubiety. It is enough that the consent has been mutual, serious, and deliberate.

Domicil not necessary.

Requisites of the consent.

The question whether there was here a marriage by promise *subsequente copula* seems to me to present itself naturally, or at least conveniently, for consideration before the question whether there was a marriage by express mutual consent. After accepting each other as husband and wife, parties would scarcely think of promising marriage *de futuro*.

The history of the parties up to the time when their written correspondence commenced is necessary to be attended to in so far—but in so far only—as it affects the probability whether there was afterwards a promise of marriage, and whether there was an actual marriage.

Materiality of the antecedent circumstances and correspondence.

The Defender is a younger son of an Irish peer—Lord Avonmore. As yet he is without fortune of his own, and throughout his intimacy with the Pursuer his means of livelihood consisted mainly, if not entirely, of his pay as an officer in the army. The Pursuer is the daughter of respectable parents, neither of them now alive, who resided in Manchester. She is a Roman Catholic, and was educated in a French convent. Circumstances, unnecessary to be here detailed, led to her afterwards travelling and living a good deal in foreign countries. The Defender's family are Protestants. He is now, according to his sister's statement, about thirty-six years of age, and the Pursuer is said to be some years, or at least somewhat younger.

Position of both parties.

The correspondence during what may be called this prefatory period—from its commencement till the parties met at Galata—appears to me to warrant the following observations: 1. That the acquaintance formed on board the Boulogne steamer had created a prepossession in the Pursuer's mind in favour of the Defender, which made her desirous to embrace the first opportunity of renewing that acquaintance. 2. That she was at no pains to conceal from the Defender the prepossession she had formed. 3. That her letters during this period were not construed by the Defender as encouraging him to anything but an honourable courtship. 4. That the Defender's short acquaintance with the Pursuer had left on his mind also an agreeable impression, which he was quite disposed to renew when opportunity offered.

General remarks on the earlier correspondence.

Now, pausing at this point of the correspondence, it appears to me a fair remark for the Defender to make upon it—that the Pursuer had made the first advances, and that the Defender had cautiously refrained from committing himself to anything definite in the then imperfect state of their acquaintance.

She made the first advances.

The Pursuer's letter from Bebek, under date July 2, 1856, seems to have been written after she had reason to believe that the Defender had left by the Danube in place of by the Bosphorus,

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at which she expresses great disappointment. It contains the following passages, which the Defender's Counsel construed as a direct invitation to an unlawful intimacy:—"I have always had a "feeling that your fate, and mine in connexion with you, must "be out of the beaten track; it has been so so far; and as we "cannot get it straight, would it not be wisdom to enjoy it "crooked?" She then compares happiness to a circle, roughly broken in two, and says:—"I think you have got the other "half of my circle, but Moloch, that heathen god, won't let us "fit it in all the way round, therefore we can't get the thing in a "state of perfection; but with you, I think, we might bear with "a few nicks and cracks. I almost regret I did not take you at "one of your words at Balaclava." She next says, "to turn to "common sense," that she is irresistibly impelled to do what he wishes, if he would not recklessly contradict himself in alternate letters, as if he laboured under some aberration of mind, adding,—"Tell me at once *de vero et facto* what you would have me to do; "that I shall do it I am morally certain; that it will be right is "equally so; but, if you wish the curtain here to fall between "us for ever, you have but to say so; all my arrangements are "made for entering" (that is entering the convent) "the moment "I receive such intimation, and I pledge you my sacred word "that it shall be decisive, and no murmur shall escape me."

A secret marriage.

The Pursuer's explanation of all this and of several of her letters which follow is, that the Defender had at Balaclava proposed to her a secret marriage. It is impossible to doubt that, to a highly educated and accomplished lady, who aspired to be the wife of a nobleman's son, it was no light matter to agree to a secret marriage, which was not to be disclosed for an indefinite period of years.

Her arrival in Scotland "not uninvited."

The Pursuer seems to have arrived in Scotland not, as the Defender avers in the record, "uninvited, unsolicited, and unex-"pected." The Defender called for and saw her at the Ship Hotel, Leith, on her way from the steamer to Edinburgh. She took lodgings, along with her friend Miss Macfarlane, in the house of Mrs. Gemble, in St. Vincent Street, Edinburgh, and there she remained for about three months or more, during which time, it is proved, the Defender, who was then with his regiment in Leith Fort or Edinburgh Castle, visited her almost daily, except on Saturdays and Sundays; they rode out frequently together; a constant interchange of notes went on between them, he addressing her "Carissima" and signing himself "Carlo;" and it was not doubted in the house in which she lived that he was her engaged suitor.

The Major's theory as to what passed prior to the arrival in Edinburgh.

The Defender contends—and the contention is very formidable, if justified by the fact—that, from the parting on the Bosphorus to the meeting in Edinburgh, the Pursuer was pressing upon him, against his wish, to take her as his mistress; and he draws the natural inference that, after he had evaded or declined this invitation, it is highly improbable that he either promised or agreed to take her as his wife.

She kept pure in Edinburgh.

We are all, I understand, agreed that, during their three months' residence in Edinburgh, she remained pure, as she had been upon her arrival. She was of respectable birth, of fascinating manners, and possessed abilities and accomplishments which might have graced any rank of society. If her fortune had been large enough for his purposes, in place of being a mere competence for her own, I cannot doubt that he would have

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married her readily and publicly; and in no point of view, therefore, can I think it less probable that he should promise and agree to accept of her as his wife, than that she should yield her virtue with the prospect of a life of degradation and shame.

But the question remains—Did he either so promise or agree? And, first, as to the promise. I hold the law to be clear that in the absence of a reference to oath, the promise which is to be founded on, *subsequente copula*, as making marriage, must be proved by the writ of party. The promise need not be in writing, but the proof of it must be in writing; and although the meaning of the writing or writings may be got at by construction, aided by facts and circumstances, as in the case of *Honyman*, the meaning so arrived at must not be doubtful.

The proof of the promise must be by writ or oath of reference. The promise itself need not be in writing.

Now, in the present case, I think there are just two of the Defender's letters produced which can be said directly to prove a promise. The first is the letter which the Pursuer says was written from Edinburgh about the end of April, and which the Defender says was written from Ireland in May or June 1857. The occasion of writing that letter was this:—The Pursuer had inclosed in one of her letters, without remark, the marriage cards of a Mr. and Mrs. Shears. She explains this in her next letter, in which she says, "Could not finish my last letter, was so shaky. "Anne made me give it up, so slipped in the cards instead. Are "men deceivers ever? or did he suddenly feel himself bound to "marry the girl he had promised five years ago." The Defender, on receiving the cards without the explanation, either thought, or (as I rather suppose) pretended to think, that the Pursuer had married Mr. Shears, and that they were her own marriage cards. I shall recur to the question of reality or pretence afterwards, in connexion with another part of the case. Meantime it is enough to notice the terms of the letter in which the Defender says, "By "your marriage you have earned my lasting gratitude, as on "reflection I found that I had placed myself in a false position "with regard to you, and one of all others the most painful to "me, viz., that I had promised to you to do more than I could "have performed when the time came. You may think this "declaration a new example of the truth of the old fable, but it "is not so. I have passed that weakness." Now, I think this must either mean simply that the Defender had promised to marry the Pursuer, or that he had promised to avow a marriage with her already made, at some future time, or upon the occurrence of some future event.

Two of the Major's letters prove a promise. The first as to the "cards."

The other letter, which I particularly refer to, was written from Edinburgh or Leith some months after the Irish ceremony, viz., on Christmas Day 1857. It refers to some threats of publicity on her part, and then bears,—"Where is your duty of keeping faith "with me? I have never intentionally deceived you, and have "done more than I promised at great risk." Now, I think it very difficult to suggest anything which the Defender could mean to say he had done at great risk more than he had promised, except the religious ceremony in Ireland, which may not have been agreed to when the general promise to marry the Pursuer is said to have been made, and which ceremony, no doubt, involved a considerable risk of publicity. I think the natural construction of this letter is, that the Defender had promised to the Pursuer a secret marriage.

The second letter proving a promise written at Christmas 1857 in Edinburgh, after the Irish ceremony.

All the facts and circumstances, which I shall not here go over,

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including the Irish ceremony itself, are, I think, confirmatory of the construction of these letters, as importing the acknowledgment of a promise of marriage. If this be so, I do not think the Defender can be held to have been released from his promise by the Pursuer's letter from Hull, in which she says, "Oh, no, no, "don't say that—don't say it is a comfort for you to be rid of "me. If it is, you know you are, you always have been free." This letter did not import that there had been neither engagement nor promise between them. The Defender did not close with it as a release from his promise. On the contrary, without noticing it, he went on to arrange the meeting in Ireland and the Irish ceremony.

These two letters prove a promise.

Not released by the words "you are free."

The promise to be effectual must have been made in Scotland.

Reserves his opinion were it elsewhere.

I think it clear that the promise referred to in the first of the above two letters, at all events, and I think also in the second, must have been made in Scotland. I shall not therefore speculate as to what might have been the effect of a promise made elsewhere—as to which I reserve my opinion. It is of no consequence where the letters acknowledging the promise were written, because these are the mere evidence of the promise; and if we could take the fact to be as set forth in the Defender's statement, that sexual intercourse took place between the parties in Edinburgh in or about February 1857, I should have no hesitation in referring the promise to the intermediate period after the parties arrived in Scotland, and consequently holding that a marriage had been contracted by promise *subsequente copula*, according to the law of Scotland. But the difficulty I feel on this branch of the case is, that this intercourse in Edinburgh is not only not proved, but has been disproved by the Pursuer, who altogether denies it. The first intercourse proved took place in Ireland; and, although the parties returned to and cohabited in Scotland, the novel question arises, whether the intercourse upon returning to Scotland can be so connected with the promise as to make a marriage? It certainly cannot be affirmed that wherever there is a promise of marriage in Scotland, followed by *copula* in another country, there is necessarily a marriage, even if the parties return to and cohabit in Scotland. On the other hand, I do not think it can be affirmed that, wherever the *copula* immediately following on the promise takes place out of Scotland, this so disconnects the promise with the subsequent cohabitation in Scotland, that there is necessarily no marriage. Take the case of parties domiciled in Scotland. The man gives the woman an express written promise of marriage in Scotland; the same day the parties cross the Border, spend the first night in England, and then return and live and cohabit together in Scotland. I think it would be difficult to say that this was not a marriage. The circumstances here are less favourable; but the question is, do they not come within the same principle?

Intercourse disproved in Scotland, but shown in Ireland.

Novel question, whether the intercourse upon returning to Scotland can be connected with the promise?

Suppose parties domiciled in Scotland.

Offers no opinion as to illicit intercourse before promise.

Now, this is not like the case of a promise after illicit intercourse has begun, whatever might be thought of that case: the promise, if I am right in thinking there was one, undoubtedly preceded the intercourse. All the intercourse which followed may fairly be held to have been in reliance upon the promise. It was a continuous intercourse, begun in Ireland, with the intention, which was carried out, of continuing it in Scotland; and when it was so begun, the parties were temporarily in Ireland for the purpose of a ceremony which implied the following out, and not the abandonment, of the promise. The intercourse which

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preceded the ceremony cannot, of course, be attributed to the ceremony, and the utmost that can be said against the effect of the subsequent intercourse is, that it may be attributed both to the promise and the ceremony. But if the ceremony which would have made marriage proves a nullity because the law does not allow Protestant and Roman Catholic so to marry, this will not warrant us in attributing the subsequent portion of intercourse then current wholly to reliance on the ceremony. On the contrary, if it proceeded on reliance upon both, and the one was a following out of the other, if the one be swept away as a nullity, it follows, I think, legitimately, that the intercourse generally must then be attributed to reliance upon the one which remains, namely, the promise; and subsequently, although upon this part of the case I have great hesitation and difficulty, I concur with Lord Curriehill that there is here a marriage by promise *subsequente copula*.

If the Irish ceremony was a nullity you must infer reliance on the promise.

I come now to a part of the case upon which the law is clear, and the whole question relates to the fact. I mean the question which, I think, the Lord Ordinary has a good deal overlooked, whether there was a marriage by mutual *de præsenti* consent? The interchange of consent must take place in Scotland. It must be serious and deliberate. It is not necessary that it should be expressed in writing. It may be merely verbal. It is not necessary that it should be given in the presence or hearing of witnesses. The absence of writing and the absence of witnesses may make the proof more difficult, but do not affect the validity of the contract, if it can be proved. Marriage with us is a mere consensual civil contract, to which no solemnities, civil or religious, are requisite. It is completed by consent without consummation, although consummation may be material as proving the serious nature of the consent. The interchange of consent may be proved by oath of party, or by subsequent acknowledgments, either written or verbal, of the fact. The whole question is, do they afford satisfactory evidence that mutual consent had been seriously and deliberately interchanged in Scotland? Neither is it necessary that the particular time or place at which the consent was interchanged shall be proved. It is enough that consent shall be proved to have been interchanged in Scotland at a time (although indefinite) prior to the time to which the question at issue refers.

Oversight of Lord Ordinary as to present consent.

Requirements of consent.

Specification of time or place not necessary.

Now, for proof of this I turn, in the first instance, to the evidence of the Rev. Mr. Mooney. It appears from his testimony, and still more clearly from that of the Roman Catholic bishop under whom he officiated, that, by the rules of the Roman Catholic Church in Ireland, a distinction is made between the case of parties who have been previously married without the sanction of that Church, and the case of parties who have not been so married. In the one case the religious ceremony is called "a renewal of "marriage consent," and in the other case simply "a marriage." But the bishop explains that these expressions are in substance equivalent; for he says, "If there had been a previous valid "marriage between the parties, then it would have been a renewal "of marriage consent; but if there had not been a previous valid "marriage, it would have been, to all purposes, a valid marriage "in itself."

The priest Mooney's evidence.

The bishop's evidence.

It is further necessary to keep in view that, as appears from the testimony of the same two witnesses, the Pursuer had twice waited on Mr. Mooney, some days before the ceremony, to arrange for its being performed; that on one of these occasions she had

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accompanied him to the bishop, and to both of them she explained what she alleged to have previously taken place in Scotland; whereupon the bishop says, "I asked questions about the lady's "domicile of the lady herself, and finding she had no fixed domi- "cile or quasi-domicile, I then told her that the relationship "alluded to was a valid marriage in the sight of the Catholic "Church. I then said that I saw no use or advantage in any "other marriage ceremony." But, being pressed by the lady, he gave Mr. Mooney permission to perform the ceremony, and told him that no dispensation with banns was necessary, "as there "had been already a valid marriage between the parties."

The Major's admission that there was a valid marriage already.

With these observations, let us turn now to the deposition of Mr. Mooney. He says the Pursuer and Defender came to him in the chapel on the morning of the 17th August 1857. The Defender "came forward to where I was, and the lady along with "him, and said, 'Mr. Mooney, there is no necessity for this; it "'has all been previously settled or arranged, but I will do it to "'satisfy the lady's conscience;' or words to that effect." Mr. Mooney then questioned the Defender about his religion, to which the Defender latterly answered, "I am a Protestant-Catholic." The witness adds, "I then believed them, from the statements "made by both, to appear before me as man and wife from a "previous marriage in Scotland." Mr. Mooney further depones that the parties then knelt at the altar, that he went through the usual marriage ritual, omitting only certain points, not of its substance, which are usually omitted in mixed marriages of the nature of a renewal of consent; that he exhorted them, both before and after the ritual; and during the last exhortation he noticed the Defender turning a ring on the Pursuer's finger. He says both parties, with their hands joined, and kneeling throughout at the altar, repeated the words of the ritual after him, clearly and distinctly, and in particular the words by which they took each other as lawfully wedded husband and wife, "To have and to hold from "this day forward, for better for worse, for richer for poorer, in "sickness and in health, till death us do part, if Holy Church "will it permit, and thereto I plight thee my troth." "Interro- "gated, Was the impression on your mind at the time that you "were receiving a renewal of consent? depones, It was. I acted "throughout in the belief that the Pursuer and Defender appeared "before me as man and wife." A further answer acquires importance from being brought out by the Defender's own interrogatory. Being asked, on the cross-examination, what the Pursuer had said to him, the witness depones, "She told me she "had been married to a Protestant gentleman in Scotland, and "that she was uneasy in her conscience until she had it renewed "before a clergyman of her own persuasion."

The priest Mooney's deposition.

The Irish ceremony.

What we have to deal with here is, not whether Mr. Mooney is a correct man of business, but—1st, Whether he performed a marriage service, substantially according to the ritual, on the occasion in question; 2nd, Whether both he and the bishop meant and understood this service to be a renewal of consent, applicable to a prior marriage in Scotland; 3rd, Whether Mr. Mooney believed that the Defender so understood it; and, 4th, Whether he (Mr. Mooney) was right in that belief.

Her arrival in Scotland in the end of January or beginning of February 1857.

The Pursuer was accompanied to Scotland by Miss Macfarlane. Miss Macfarlane and the Pursuer lodged together during their stay in Edinburgh in the house of Mrs. Gemble. Mrs. Gemble mentions an incident which occurred (about the middle of March)

Mrs. Gemble's account.

when the Pursuer was copying a painting belonging to the witness, and the Defender was leaning over the Pursuer's chair, admiring her progress, when he said, "When I marry Miss Long-"worth, I will marry the cleverest lady in Edinburgh." This incident is not without importance as affecting the construction of the Defender's letters, which are said to admit a promise of marriage, and likewise as affecting the probability of an actual marriage. In any view, the incident is confirmatory of what both Mrs. Gemble and Miss Macfarlane say of the mutual behaviour of the parties. Mrs. Gemble says the Pursuer and Defender conducted themselves towards each other "in every "way respectfully, such as a lady and gentleman would do who "were engaged to each other;" and being interrogated whether she ever saw "in the Pursuer any lightness of behaviour or any-"thing inconsistent with the demeanour and manners of a lady? "depones, Quite the reverse. She was an example to others, I "should say." In like manner Miss Macfarlane, after speaking to the Pursuer's accomplishments, being interrogated, "Was the "Defender's manner towards the Pursuer polite, respectful, and "attentive? depones, It was." Mrs. Gemble further says that one afternoon she overheard the Defender, when the Pursuer and he were in the parlour, reading in an earnest and religious tone, such as she had not heard him do before or after, but she cannot say what it was he read; and although she thought Miss Macfarlane might have overheard the reading, this does not appear to have been the case.

Mrs. Gemble's evidence as to reading the service.

The assiduity with which the Defender cultivated her society in Edinburgh indicates that the passion which obviously actuated him had increased and not diminished, and renders it not surprising that he should have exchanged with her the consent which made them husband and wife, as the only alternative left to him if that passion was not to be abandoned as hopeless.

The Major's passion for her renders his consent probable.

If this be so, it was natural for the Defender to be disappointed that consummation did not immediately follow, and that, on the contrary, the Pursuer left Edinburgh within a few days after the date she assigns to this interchange of consent, to avoid, as she says, his importunities, till the religious ceremony she had further in view should be conceded to her and arranged. It may be that she had a further reason, viz., a desire that the evidence of their union should not rest entirely on the veracity of the Defender, to whom she had written in a letter, the date of which is disputed, but which shows her caution, "I have trusted you with "the unbounded faith of my nature—but to perpetuate trust "there must be no playing upon words of doubtful meaning; no "mysterious suppressions of the truth, or shadows of cowardly "designs, for future evasion." I think that the fears she meant to indicate were fears that she might be constrained to yield without the sanction of religion, and that the Defender's love was not what he had professed it to be, otherwise he would not ask that sacrifice.

His importunities.

Her caution.

The parties accordingly met at Waterford, apparently about the 27th July 1857, although the Defender seems to have been a day or so later in arriving there than he intended. He had evidently, however, been in good humour, as the Pursuer says, at the prospect of her arrival; for, on the 25th July 1857, he had purchased in Dublin the marriage ring. And now, when everything had been amicably arranged—when the parties were actually on their way from Waterford to the place where the religious cere-

Their meeting at Waterford.

Purchase of the marriage ring.

Intercourse then allowed, though before the religious ceremony.

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mony was forthwith to be performed—the Defender does seem to have succeeded in prevailing on the Pursuer, at two or three of the hotels at which they slept, to allow him the privileges of a husband. I can easily understand that, to keep herself right in the eyes of her religious superiors, the Pursuer may have been unwilling to state or admit this fact on the record. But I think it is sufficiently proved; and I think further, that, in point of law, the fact is favourable for the Pursuer's case, for it gives rise to two important observations: 1st, That while as yet there had been no marriage ceremony in Ireland it is highly improbable that a person of the Pursuer's character and position would have yielded to the Defender the privileges of a husband had nothing passed in Scotland which led her to believe herself to be his wife; and 2nd, If mutual consent to that effect had been exchanged in Scotland, this consummation, although not essential to the completion of the contract, affords the best of all evidence that the consent so interchanged had been serious and deliberate. I am quite alive to the force of the argument, that yielding at any time before the religious ceremony is inconsistent with the importance which the Pursuer alleges she attached to that ceremony. But after the marriage ring had been bought, the ceremony finally agreed to and arranged, and the parties actually on their way to the place where it was to be celebrated, it is not difficult to understand how the Pursuer should have felt that without risking a breach between them, she could not well allege any further doubt that faith would now be kept with her, and that the religious ceremony would immediately follow. In this expectation she was justified by the event. The ceremony was performed on the 15th of August; and now having seen what preceded that ceremony, we must attend briefly to what followed upon it.

Her return to Edinburgh—Mrs. Stalker's lodgings.

The parties travelled together in Ireland for eight or ten days, and then the Pursuer returned to Edinburgh, where, after spending two or three weeks with his relations in Ireland, the Defender joined her in Mrs. Stalker's lodging-house in Albany Street, where she and Miss Macfarlane had taken a parlour and two bedrooms, in consequence of Mrs. Gemble's house being at the time shut up. The one house and locality were equally respectable with the other. When the Defender arrived, Mr. and Mrs. Thelwall from Hull had been paying a visit to the Pursuer, and were to leave next day, which they did. Mrs. Thelwall could not be examined in consequence of the state of her health; but Mr. Thelwall states that he knew the Defender was expected, and who he was, and that he took for granted "they were married people." On the day after the Defender arrived the Pursuer communicated to Mrs. Stalker the relation in which they stood to each other, and consequently Mrs. Stalker fitted up for them the bed-room which had been occupied by the Thelwalls, where they slept together as husband and wife till the beginning of November, when they left for a trip to the Highlands, or some other places of interest in Scotland. During the two months or upwards they thus lived in Mrs. Stalker's, they were understood in the house to be married persons, and were addressed accordingly. At first they allowed themselves to be called Mr. and Mrs. Macfarlane, but very soon took the names of Major and Mrs. Yelverton, which they afterwards retained. Mrs. Stalker being interrogated how they conducted themselves towards each other in her house, says "very lovingly;" and being asked if she understood them to be

They took the names of Major and Mrs. Yelverton.

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married, she answers, "Oh yes, Sir." Interrogated, "Did they "conduct themselves towards each other as married persons? "depones, Oh, dear, yes; and they were very happy indeed." As regards Miss Macfarlane, she concluded at once, on seeing the marriage ring on the Pursuer's finger when she returned from Ireland, that she was married, and to whom; and the Pursuer confirmed her in that conclusion. And being interrogated, "During the time you were in Mrs. Stalker's lodgings, did you "associate with the Pursuer and Defender as husband and wife? "depones, I did." Interrogated, "If you had entertained any "other belief, would you have left the house? depones, In-"stantly."

Miss Macfarlane's evidence.

Two little incidents occurred during the period above referred to which are worth noticing. The one was the Defender's inquiry for the Pursuer at the keeper of Seafield Baths, Leith, in autumn 1857—"Is my wife ready?" And the other, the Defender's remarks to the gardener's wife at Craigmillar Castle in October 1857—"Just hold my horse till I take my wife down;" and "My wife's horse is a quiet one." The Defender being a stranger at both of these places was not called upon to say whether the Pursuer was his wife or not; and, if it had been equally unnecessary so to represent her on all the other occasions when he did so, it would have been difficult to say that the Pursuer was not entitled implicitly to rely on these representations, even if she had had little else to rest upon.

The Major's inquiry "Is my wife ready?" His direction to hold his horse "till I take my wife down;" and his remark "My wife's horse is quiet."

The trip to which I have alluded seems to have occupied about the first half of November 1857. Being performed on horseback, the places visited could not be very numerous. We have the parties traced at Linlithgow, Falkirk, Stirling, Dunblane, and Doune Castle. At all these places the parties represented themselves as married persons. No such representation was necessary to be made in order to get access to the ruins of Doune Castle; and the entry by the Defender in the visitors' book there of their names as "Mr. and Mrs. Yelverton," must therefore be regarded as a voluntary written acknowledgment, of a somewhat public nature, made by the Defender, in the knowledge of the Pursuer, that he and the Pursuer were husband and wife. They were announced to Mrs. Stalker on their return as Major and Mrs. Yelverton, and the Pursuer was addressed as Mrs. Yelverton in the Defender's presence as before.

In the beginning of December (1857) the Pursuer went to Hull to visit the Thelwalls. The Defender accompanied her to the steamer at Leith, and asked for a berth for his wife, adding, "Can my wife have it all to herself?" This incident is subject to the remark already made, that the Defender, who was not to accompany the Pursuer, had no call to volunteer the statement that she was his wife. But a more important fact follows. The Defender joined the Pursuer at Mr. and Mrs. Thelwall's for about eight or ten days in December 1857, and again for a like period in February 1858, and during both periods they slept together in the house on the express footing and avowal that they were husband and wife. The fact of the marriage was concealed from the servants lest they might divulge it. But no secret was made of it to Mr. and Mrs. Thelwall.

I must here pause for a moment to remark that the Defender's allusions to the first week of January—obviously as the probable period of quickening—and to June as the period of anticipated delivery—afford a remarkable corroboration of the Pursuer's

The Major's allusion to her probable pregnancy confirmatory of her statement.

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denial that sexual intercourse took place in Edinburgh in February, March, and April 1857—the Defender having calculated the usual nine months of pregnancy from August 1857 to June 1858, on the footing of pregnancy being impossible till the parties met in Ireland, and being unwilling to believe that it could have occurred even then.

The name Theresa Yelverton in the passport.

Travelling on the Continent.

The Defender sent the Pursuer a passport to enable her to accompany him to the Continent. He said, you must sign it, and "take care, with the right name." The right name was Theresa Yelverton, as we see from the passport itself. The parties went to the Continent together about the middle or end of February 1858, most probably in consequence, or partly in consequence, of the supposed pregnancy, the Defender having apparently prevailed on the Pursuer to keep silence in the meantime. On the Continent, as in this country, they travelled together as husband and wife, until the Defender's leave expired, when, the Pursuer having fallen into very bad health, he left her at Bordeaux, in the house of a Madame André, in April 1858.

The way in which the Defender's conduct and acknowledgments, subsequent to the Irish ceremony, seem to me to tell most strongly upon the question of the Scotch marriage as resting upon *de præsenti* consent, is this: They go, I think, to prove that the Irish ceremony was not understood between the parties to be a mockery and a farce, but was understood by the one party to be a sacrament, and by the other to be a solemn religious matrimonial ceremony.

If this be so, what ground is there for holding that all which the Pursuer knew and did about it was not equally known by the Defender? She could have no object in representing to him what had passed with the bishop and the priest in one light rather than another,—that she had arranged a full and original marriage rather than a renewal of consent given in a prior marriage. If both were serious in their purpose of being married,—if there was no fraud in the Defender's heart (and he does not allege that there was) of which the Pursuer was ignorant,—it is inconceivable that the arrangement she had made with the bishop and priest should not have been freely communicated to him—as his own words, on entering the chapel, to the priest, just reiterating what had been said to the Pursuer by the bishop, indicate to have been the case. But if the Defender knew that the nature of the ceremony was a renewal of consent as from a previous Scotch marriage —if he really meant what his own words to the priest naturally indicate that he meant, that he was there to acknowledge and renew the consent given in a previous Scotch marriage, to satisfy the lady's conscience, although he deemed this to be unnecessary —there seems to me to be an end of this case. Suppose two credible witnesses had heard the Defender make his acknowledgment, at the altar, of a previous Scotch marriage, in express terms, nobody doubts, I suppose, that that, if believed, would have been sufficient. And if the fact be satisfactorily proved, it will just be as little doubted that it is of no consequence how it is proved.

Conclusion that they are married by promise *cum copula* and by present consent.

I think it is satisfactorily proved that the Pursuer and Defender are married persons, husband and wife of each other,—1st, By promise, *subsequente copula;* and, 2nd, By *de præsenti* consent.

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I concur with your Lordships in thinking that there is nothing on the face of the early correspondence to lead to the conclusion that the Pursuer's object was not marriage. She appears to have at times expressed a readiness to relinquish that object, and direct her mind to a future apart from the Defender; but I do not deduce from the correspondence that her views, with reference to a connexion with the Defender, were limited to something short of marriage. I also think that there is no such inequality between the positions of the parties, and no such inequality in their education and accomplishments, as to make it improbable that the acquaintance which began in the steamboat, and afterwards warmed into friendship and attachment, might have resulted in marriage. There are throughout the whole correspondence expressions of equivocal meaning; and one difficulty that I have encountered in this case is, that the character of the correspondence is so different from what we are accustomed to see in such cases. The letters are written in a style of metaphor and allegory—of figurativeness and of obscurity of expression of purpose—that I have seldom witnessed. In one of her letters to the Defender the Pursuer says, "You certainly must take me for a Sphinx to get at the "meaning of your metaphorical letters." I confess that I have difficulty in ascertaining the meaning of the metaphors of either the Pursuer or the Defender. I think there is great difficulty in ascertaining the true import of these letters. It is one of the difficulties and uncertainties that characterize this case. The difficulty is increased by the circumstance that some of the letters have not been produced. It is still farther increased by the circumstance that some of the letters which have been produced are in a mutilated or vitiated state. But we must deal with the case as it is presented to us.

Her object was marriage from the first.

No real inequality in the position of the parties.

Equivocal meaning of the correspondence.

The letters metaphorical, figurative, and obscure.

Some letters not produced;

and some mutilated.

The demand of the Pursuer is to have a marriage declared—a marriage which she says rests upon various grounds. One of these is, that a marriage had been celebrated between the parties in Ireland. Another is, that there was a marriage constituted in Scotland by one or other of the modes by which an irregular marriage may be constituted. There is no allegation of a regular marriage in Scotland—it is an allegation of an irregular marriage. As to the marriage in Ireland, it is not demanded of us that we shall pronounce judgment in favour of the Pursuer. I understood from the bar that she does not at present ask for that; and in the state of the evidence before us as to the religion of the Defender and as to the law of Ireland, I would have had great difficulty indeed in pronouncing in favour of the Pursuer on that part of her case. At the same time we are told by the Pursuer that that point is by no means abandoned—that she still maintains that there was a valid and effectual marriage in Ireland; and although we, sitting here in a Scotch Court, can only consider that question as one involving the law of a foreign country, to be established to our satisfaction by evidence as to the law of that country, yet if this cause goes elsewhere—to the higher tribunal to which it may be taken—then the Judges in that tribunal are themselves judges of the law of Ireland as well as of the law of England and Scotland; and upon their own knowledge of the law they can

Theresa's demand —what it is.

No allegation of a regular marriage in Scotland.

The Irish marriage not abandoned.

The House may decide upon it, though the Court below does not (*b*).

(*a*) Slightly abridged, but given fully in the "Third Series," vol. i.
(*b*) Can the House decide, where the Court below has not decided? See the Lord Chancellor's opinion, *infrà*.

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overrule the views that have been stated by the counsel learned in the law of Ireland who have been examined as witnesses in the case, and may yet declare in favour of the Irish marriage.

The Scotch marriage.

Then, in regard to the Scotch marriage, the summons is laid, as is not unusual in such cases, upon all the grounds that constitute irregular marriage in Scotland. I do not think that the taking of alternative grounds in the summons is anything against the pretensions of the Pursuer. It is a common course in consistorial actions to state the case in the summons as resting upon consent of parties, upon promise *subsequente copula*, and upon habit and repute, which last, though often separately stated, is, I think, more properly to be regarded as evidence of marriage than as constitution of marriage. With that last ground, however, we have here nothing to do. It is not maintained that there was such continued cohabitation in Scotland as man and wife, and such undivided repute in the estimation of those who knew them, as would establish a marriage by habit and repute. We are therefore to consider the other two kinds of irregular marriage. I understand your Lordships to have arrived at the conclusion that there is established here a marriage as having taken place by interchange of consent *per verba de præsenti*; and, further, that supposing what passed in Scotland did not amount to consent *de præsenti*, it at least amounted, according to the evidence, to a promise which was followed by *copula* in such circumstances as to complete marriage according to the law of Scotland. I do not think there is anything incompetent in putting a case in that alternative manner. It may sometimes be difficult to say whether what passed between parties, as appearing in a written document, is consent *de præsenti*, or is only a promise *de futuro*. That may be matter of doubt on the construction of the document, and has been so in several cases. Even in the case of *Dalrymple* (*a*) a doubt of that kind was suggested. In such a case it may even not be very material to solve that doubt, if it be clear that *copula* has followed upon the faith of the document, because then, whichever be the construction put upon the document, the marriage is necessarily complete. In the present case, however, there is no such document, and no such state of circumstances. Although it is not incompetent to consider cases of marriage in alternative views, yet, when we come to deal with them in judgment, it is in most cases, and, I think, especially in this case, quite essential to justice that each of the grounds of marriage alleged shall be separately considered and dealt with.

Alternative allegations allowable.

Habit and repute out of the case.

The Court below has to consider two modes of irregular marriage.

Domicil not necessary.

I may further remark that this case does not involve the element of Scotch domicil. There was no Scotch domicil. But a marriage may be established by consent *de præsenti*, in Scotland, between parties who are foreigners, and have no domicil in Scotland.

The consent required to make a marriage;

The consent which is to constitute marriage must be mutual consent of parties, unequivocally and seriously expressed, with the view and for the purpose of constituting the married relation—interchange of consent *de præsenti*, to be as from that date husband and wife—constituting as from that moment, by that interchange of consent, the relation of husband and wife. It is not necessary towards the constitution of marriage in that way that it shall have been followed by cohabitation. Such I hold to be the established law of this country. I think that after the views that were stated in the case of *Dalrymple* (*a*) and in the case of *Macadam* (*b*), there was no longer room for question in that matter.

cohabitation not necessary.

(*a*) 2 Hagg. Con. 54. (*b*) 1 Dow. 148.

Accordingly the law has been so regarded, I think, in all the cases that have occurred since the date of these decisions. It has been the understood law of Scotland ever since I have had the honour of being a member of the profession; and I think I recollect an occasion on which one of the lawyers who had indicated an opposite opinion in the case of *Dalrymple*—afterwards a very eminent and distinguished Judge in this Court—judicially expressed his opinion in conformity with the decisions to which I have referred.

The mere consent all-sufficient.

It is then the fixed law, as well as the universal understanding, of this country, that consent interchanged, such as I have described, constitutes the relation of husband and wife—constitutes it from that moment—and that thenceforward the parties are married parties. I have said that the consent must be deliberate and serious, and intended to constitute marriage; but it is not necessary that it be reduced to writing at the time, or that it be established by writing between the parties. It may be proved otherwise. It may be evidenced by letters or other writings after the date of the alleged consent. It may be proved by other evidence that such consent did take place, but still it must be directed to an immediate constitution of the relation of husband and wife as at the date of the consent. I further think that the evidence which is to establish the consent, whether it be correspondence or other evidence, need not necessarily in all cases be particular and precise as to the time or the spot at which that interchange of consent took place. There may, for instance, be in letters or other writings of the man clear and unequivocal acknowledgment that such interchange of consent did take place between him and the woman who seeks to have herself declared his wife; and although such acknowledgment may be silent as to the time and place at which the consent was interchanged, it may, in certain circumstances, be presumed to apply to a time and place alleged, or within the scope of the allegation. Now, the case, as stated upon the record by the Pursuer, is this,—"On or about the 12th April "1857 the Defender and Pursuer, within the said house, 7, St. "Vincent Street, Edinburgh, solemnly acknowledged and de- "clared each other to be husband and wife, the said Defender "solemnly acknowledging and declaring that the Pursuer was his "wife, and the Pursuer that the Defender was her husband. "They further read over the marriage-service of the Church of "England together, and at the conclusion of it the Defender "said to the Pursuer, 'This makes you my wife according to the "'law of Scotland,' or used words of similar import." It was said in the opening of the case by the then Solicitor-General, that the Pursuer had not alleged or pretended that there was any particular time and place at which there was an interchange of mutual consent, but that her case rested on a general allegation of declarations and acknowledgments by the parties. I do not understand how that can be maintained. Subsequent declarations or acknowledgments are merely circumstances of evidence tending to instruct that consent had been interchanged, or rather that marriage had been in some way contracted at some previous period. But if, as alleged in this case, marriage was contracted by interchange of consent *per verba de præsenti*, there must have been a time and place at which the consent was interchanged. Such time and place must be known to the Pursuer, and accordingly her allegation in that respect is quite explicit. I have said that I do not think it necessary in all cases that the evidence of the fact of consent should be quite full and precise as to the time

A writing not necessary.

Specification of time and place not indispensable.

How the interchange of present consent is alleged in the pleadings.

Subsequent acknowledgments are but evidence.

The allegation of present consent is sufficient.

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and place; but when, as here, the Pursuer specifies time and place, and some particulars approaching to a ceremony, I think that some proof must be brought to support that statement; and if there be no such proof,—still more, if there be anything in the evidence not reconcileable with that statement, or if that statement admits of being supported, if true, and is not supported, but rather discredited,—I would not in such a case feel myself authorized to deduce as a legal conclusion that, at some other time and place not alleged or suggested, there must or there may have been another interchange of consent constituting marriage, and that therefore marriage should be declared. The Pursuer has made her allegation. It is quite explicit; and the question is, whether she has proved it.

The question is, Does proof exist?

No interchange of writings. This almost unprecedented.

Written consent not alleged, and certainly not proved; nor is it alleged or shown that anyone was present.

Having made these observations, I shall notice briefly what appears to me to be the evidence in regard to this branch of the case. In the first place, it is not said, and certainly is not proved, that there was any writing interchanged, or that there was any person present at the alleged interchange of consent. That is a very remarkable feature of this case, almost without precedent in the history of irregular marriages constituted by interchange of consent *de præsenti*. Persons in the rank of life of these parties, and even in a humble sphere, having the serious intention to constitute in this manner the permanent relation of husband and wife, to be bound each to the other in lawful wedlock, rarely omit to preserve evidence of it by interchange of writings, or by the presence of confidential witnesses. Omission to do so would not be very consistent with the intelligence and foresight which, in any view of this case favourable to the Pursuer, must be ascribed to her; yet it is not surmised that, in regard to this alleged marriage, any writing passed which has since been lost or destroyed, or that any witnesses were present who have since perished. The alleged reading over of the marriage-service is attempted to be supported by evidence; but the attempt has, I think, altogether failed. It is proved that there was a prayer-book in Mrs. Gemble's apartments in which the Pursuer lived. It is not strange that two ladies living there for weeks—one of them a Roman Catholic, and the other an Episcopalian—should have a prayer-book in the room they occupied. It would have been strange if they had not a prayer-book. Mrs. Gemble states in her evidence that, upon one occasion, she, not being in the room, heard a sound of reading of a more than ordinarily solemn kind, but she did not distinguish any words, or draw any inference from the sound she heard. Now I think that all that amounts to nothing. There is another piece of evidence, of an indirect kind, which has not been alluded to by either of your Lordships, and I do not wonder at it, because I regard it as worthless—I refer to the evidence of Miss Crabbe, who was not in Edinburgh at that time, but who appears to have been, since 1859, a hired servant or agent of the Pursuer, much employed in matters connected with this case. She seems to have been very active, and to have made it part of her business to interfere with the due course of evidence, for the purpose of disturbing the stream, in order to obscure the truth, and, if possible, prevent the discovery of it. She appears to have gone about personating the Pursuer, in order to confuse and perplex witnesses and prevent the proof of facts in regard to the Pursuer, as to the truth of which none of your Lordships have the slightest doubt. To the evidence of such a person I can pay no regard. I shall, therefore, not stop to point out other circumstances appearing on

Proof of the reading of the marriage service has failed.

Mrs. Gemble heard a sound of reading, but distinguished no words.

Miss Crabbe's evidence not to be regarded.

the face of it which make it little reliable. Then, where is the evidence of the alleged marriage? Mrs. Gemble's evidence is of some importance the other way. Mrs. Gemble proves that the conduct of the Pursuer was very correct while she lodged in her house. She says that the Defender called upon the Pursuer almost every day, except Saturdays and Sundays, but that he never called on either of these days; that Miss Macfarlane went to a German class for an hour on Saturday, "which was the only "time she left the Pursuer alone." Then she states that the Pursuer and Defender sometimes walked together, and went out to drive together, but that Miss Macfarlane was always with them. She also states that "Miss Macfarlane was invariably in the room "when Major Yelverton called," and that even if she was in the room adjoining, she must have heard what took place. Now, then, as Miss Macfarlane was constantly there, she must have heard this interchange of consent and reading over of the service, if it took place. I turn to the evidence of Miss Macfarlane, and does she say that she ever heard anything of the kind? "Interrogated, Did you ever "during your stay in Mrs. Gemble's hear the Defender, or the "Pursuer and Defender, read over the Church of England marriage "service? depones, No." Therefore one person at least, who must have been a direct personal witness to that occurrence if it did take place, negatives it absolutely; while, on the other hand, I find no direct evidence to support the allegation of interchange of consent, or reading of the Church of England service, a species of ceremony which would give a very marked character to an interchange of consent, if any such thing did take place. I think, farther, that there are other circumstances which go very strongly against this allegation being held as established. One of the things most to be expected as an immediate consequence of marriage is consummation; but here there was no sexual intercourse while the parties remained in Edinburgh; for I agree with your Lordships that such is the import of the evidence on that point, and it is also the statement of the Pursuer. Then, again, neither Mrs. Gemble nor Miss Macfarlane, who was the *confidante* of the Pursuer, had the slightest suspicion that a marriage had taken place between the parties. Further still, I think that the letters which passed between the parties after the Pursuer left Edinburgh, so far as I understand them, are inconsistent with the supposition of their being at that time husband and wife. If, during that period, there is any one letter clearly inconsistent with the relation alleged, its effect cannot be overcome by any number of letters compatible with, or even suggestive of, that relation. There is no expression in that correspondence indicating that they regarded themselves as husband and wife—a very singular feature in the correspondence of married parties in such circumstances, and not explained by the suggestion of extreme caution in parties who had previously introduced into their letters allusions such as are to be found in some of them. In one letter at this time the Pursuer says,—"Don't say it is a comfort to you to be rid of me. If it "is, you know you are—you have always been free." I think that is inconsistent with the parties understanding and holding that they had already contracted the relation of husband and wife. Did she consider herself free? If she was not free, he was not free. If he considered her his wife, she was not free, and no more was he. I think that letter is quite inconsistent with the relation alleged. In a letter which he wrote after that unfortunate event —the sending of the marriage cards of Mrs. Shears—he states

Miss Macfarlane negatives the reading of the marriage service.

Agrees with the other judges that there was no sexual intercourse in Edinburgh following the alleged marriage by present consent.

There is nothing to show that by force of a contract *de præsenti* they considered themselves married;

but very much to the contrary.

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that he had placed himself in a false position—one of all others most painful to him—namely, that he had promised more than he could perform when the time came. Now, the effect of this as bearing on the question of promise is a different matter; but it obviously implies anything but the concluded relation of husband and wife, and her answer implies that he had never been otherwise than in the same false position as then. There are a number of other letters which go all to the same effect, and show that the parties were not corresponding at all on the footing of being husband and wife. For example, there is a letter dated the 12th July 1857, in which she talks of the alternative being still before her of union with him or a convent life, plainly inconsistent with the concluded relation of husband and wife. In another letter she says,—"My whole nature demands the risk, the trial to be made; "it has wound itself too closely about you to give you up now; "even writing about it I have sharp nipping pains at my heart; if "I made my hand write a farewell, I should have a palpitation "there and then." This, and the whole of the correspondence at this period, shows that the relation of husband and wife had not yet been constituted—that something remained yet to be done before that relation could be constituted; and there is throughout a total absence of any of those expressions indicating the married relation which always mark the correspondence of a husband and wife.

The question of promise is a different matter.

Prior to the meeting of the parties in Ireland, there is nothing to mark the relation of husband and wife *per verba de præsenti.*

Therefore, upon the evidence prior to the meeting of the parties in Ireland, I am unable to find anything to support the averment of the Pursuer that a marriage was constituted by interchange of consent *per verba de præsenti*, as alleged by her.

The proceedings in Ireland.

There are other circumstances bearing on that question which must be looked into, and which are deduced from the proceedings in Ireland. We have the evidence of the bishop and Mr. Mooney. It appears from the evidence both of the bishop and Mr. Mooney that the Pursuer represented to these persons that there had been marriage constituted in some way between herself and the Defender. They both speak to that matter, and I think the evidence shows that there was such a statement made by her to them. The object of that statement, or how far it might facilitate the obtaining a celebration of marriage, or the performance of a religious ceremony, in Ireland, does not distinctly appear. The parties, it is said, were in the position of being the one a Roman Catholic, and the other a Protestant, and it would appear that there is some difference in regard to the preliminaries and ceremony when such is the case. The Bishop will not say that in so many words he told Mr. Mooney that what he was to do was to receive a renewal of marriage consent. He could not say whether he told him it was to be a "ceremony of marriage," or a "renewal of marriage consent," but he tells us that they would have meant the same thing. He says, that if there had been a previous marriage, then this ceremony operated as a renewal of consent; and if there was no marriage before, it operated as a complete and valid marriage in itself. I do not know how that may be dealt with elsewhere. It may be found elsewhere that such is the true state of matters, and that the ceremony at Rostrevor did constitute a valid marriage. Mr. Mooney also had conversations with the Pursuer without the presence of the Defender. But the important part of Mr. Mooney's evidence, relied on as instructing that there had been a marriage by interchange of consent in Scotland, is that in which he describes his meeting with the Defender in the chapel. According to the

The Bishop does not say whether "a ceremony, or a renewal of consent."

Mr. Mooney's evidence as to what the Major said.

statement of Mr. Mooney, when the Defender came into the chapel, he said there was no necessity for this; that it had all been previously settled or arranged, but he was willing to do it to satisfy the lady's conscience, or words to that effect. Mr. Mooney did not mention in the presence of the parties that what he was going to do was a renewal of marriage consent. He states that positively. He did not speak of a marriage in Scotland; neither did the Defender. Therefore the whole value of this comes to depend on the accuracy, first, of Mr. Mooney's recollection of what was said by the Defender; and, secondly, the accuracy of his application of the words that were used. Nay, more, Mr. Mooney does not profess to remember the exact words that were used. He says the Defender used these, "or words to that effect." Now, in a matter so critical, so much depending on the precise words used, I should have liked to have the "words to that effect," because Mr. Mooney's mind was impressed with this as a fact, that, in the ceremony of marriage he was about to perform, he was going to renew a marriage consent, or previous marriage, and he did not doubt that the Defender likewise understood so; and an expression may have been used, which, in these circumstances, might convey a certain impression to Mr. Mooney's mind, though not so intended, and might therefore have been misconstrued by him. I think there is nothing in the evidence applicable to the period anterior to this that will make out a marriage, or that is not adverse to the constitution of a marriage in Scotland. To make the case turn upon this as an admission by the Defender of a marriage in Scotland,—not mentioned by him or in his hearing,—to infer marriage from an expression so vague as this,—spoken to at a distance of time by a single witness, whose recollection is not perfect as to the words used,—whose position was such as to give an impression or turn to his mind different from what may have been in the mind of the party speaking,—does appear to me to be going a great deal farther than has been done in any previous case. I think it would be a dangerous thing to proceed on such an inference as this, and I cannot feel myself justified in relying upon it as an admission that there had been a marriage by interchange of consent in Scotland. Besides, Mr. Mooney, whose evidence in other particulars is very open to criticism, and who has been characterized by one of your Lordships as not a very accurate man of business, may have been not very precise in his observation. We see that he is not a very accurate man of business from the way in which he acted in regard to the certificate he gave of this Irish marriage. We see that on the application of the Pursuer he furnished a certificate of the marriage, in which certificate he states that there were two witnesses to the marriage —persons of the name of Sloane and Brenan. But, in his examination on oath, he now admits that, so far as he knows, neither of these persons was present. One of them, Brennan, was a woman who had some office about the vestry, but was not present at the time, and Sloane was not there at all. Now, there is here—to say the least of it—a looseness of understanding as to what it is the duty of a person to do when he is going to certify to a fact,—there is indicated a tendency to take unwarrantable liberty with the facts,—to supply at his own hand what is wanting in reality; and when I find a person of that looseness of understanding as to what his duty is when he is certifying a fact, speaking in this vague manner in regard to a matter of distant recollection and doubtful apprehension at the time, I confess that

The Major did not speak of a marriage in Scotland.

Nothing to show a marriage by consent *de præsenti*.

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I feel less disposed to rely upon his testimony than I would on the recollection or apprehension of a person who had not been so tainted with inaccuracy in giving written evidence of a fact. It may be true that when Mr. Mooney gave that inaccurate certificate, he did not know that it was intended to be used against the Defender. He may have been deceived and imposed upon by the very artful letter of the Pursuer, in which she untruly represented that she was about to be delivered of a child, and that she desired the certificate with a view to its baptism. But although that circumstance may implicate the Pursuer in a scheme of deceit and falsehood, it cannot absolve the witness Mr. Mooney from the discredit that attaches to his having misrepresented facts, relative to the occasion in question, in the interest of the Pursuer. One of your Lordships seemed to think that on the journey from Waterford to Rostreyor the Defender acknowledged the Pursuer to be then his wife. I do not find in the evidence any trace of such acknowledgment. Hotel-keepers, waiters, and others, at the several stages at which the parties slept, give an affirmative answer to the question whether they "lived as man and wife," meaning thereby neither more nor less than that they occupied the same bed. That is clearly no acknowledgment of marriage. There were also things referred to that happened after the parties returned to Scotland. I have already said that when they left Scotland, neither Mrs. Gemble, who seems to have known a good deal about their doings, nor Miss Macfarlane, who seems to have been in the intimate confidence of the Pursuer, had the slightest notion that a marriage had taken place between them. It was the appearance of the marriage ring on the finger of the Pursuer, when she came back from Ireland, that suggested to Miss Macfarlane that there had been a marriage. Then what took place after they came back? There was a certain amount of cohabitation as man and wife. They lived in respectable lodgings in Mrs. Stalker's, who considered them married persons. There is also the fact that in various inns and places where they went they represented themselves as husband and wife, or allowed themselves to be so regarded, and the Defender wrote her name in a visitors' book as Mrs. Yelverton. These things are not founded on as in themselves constituting marriage. They are confessedly quite insufficient for that purpose. The way they are used is this, they are appealed to as importing an acknowledgment that a marriage had by that time taken place. But I desiderate any sufficient reason for referring these *indicia* to an interchange of consent alleged, but not proved, to have taken place in Scotland, instead of referring them to a less remote ceremony of marriage which is proved to have been gone through and consummated in Ireland, and which the Pursuer still maintains to be a valid and effectual marriage. The continuance in Scotland of intercourse, which confessedly commenced in Ireland, where the parties went through a formal ceremony of marriage, does not by any necessary or reasonable inference imply that there must have been another marriage in Scotland anterior to their going to Ireland, and I do not see in this case any ground for coming to that conclusion. There is proof that the marriage ceremony took place in Ireland, there is proof that the marriage ring was purchased and used there, that the sexual intercourse commenced there; and there is the fact that Miss Macfarlane plainly understood the marriage to have taken place during their absence from Scotland. She had no idea of any other marriage. To my mind these things

No acknowledgment of marriage on the journey from Waterford to Rostrevor.

The circumstances relied upon by Theresa may be referred to the Irish ceremony, and not to any supposed prior contract *de præsenti* in Scotland.

sufficiently account for the conduct of the parties on their return from Ireland, without any necessity for surmising or conjecturing that they must also have been married before they went there, though no one knew it or suspected it, not even themselves, if we can judge from their conduct and correspondence. On the whole I have been unable to satisfy my mind that the evidence instructs the Pursuer's allegation as to a marriage having been contracted in Scotland in the spring of 1857 by interchange of consent *per verba de præsenti*. I think that the preponderance of evidence on that point is the other way. But it is unnecessary to say more than that the Pursuer has failed to instruct her allegation.

No evidence of marriage in the spring of 1857 by consent.

Another important question still remains, and that is, whether the evidence does not instruct that there was a promise of marriage, and whether that promise was not followed by *copula* under such circumstances as to constitute a Scotch marriage. That is an alternative view of her case presented by the Pursuer. Her first view is a Scotch marriage before the Irish marriage. Her second or alternative view is a Scotch marriage after the Irish marriage, or rather partly before and partly after it, the Irish marriage and the other things that took place in Ireland being in that view considered as a sort of interlude between the acts of the Scotch marriage. It is scarcely necessary to point out that these views cannot both of them be correct. They are incompatible as regards both fact and law. Either may be adopted, if the facts and the law permit; but both cannot be adopted together. The adopting of either involves necessarily the rejecting of the other, but the rejecting of either does not lead necessarily to the adopting of the other. Both may consistently be rejected, though both cannot consistently be adopted. In regard to the evidence applicable to this branch of the case, I think that the correspondence at an early period, while the parties were in the East, indicates that there had been an attachment; that marriage had been talked of between them, and that an obstacle to marriage had been raised on the ground of the Defender's circumstances; and I think there is evidence of great generosity on the part of the Pursuer in reference to the removal of that obstacle. But I am not satisfied that there is enough in the evidence applicable to that period to support the allegation of promise of marriage. Courtship does not of necessity imply promise. It is a settled proposition in Scotch law that courtship, or the expectation or understanding of marriage in the minds of the parties, or even the expressed intention to marry, does not constitute a promise of marriage. These things may have a bearing, more or less important, on the other evidence; but they have an existence separate from promise, and do not themselves make promise. This was clearly and forcibly laid down in the House of Lords by the Lord Chancellor (*a*), in the case of *Honyman* (*b*). I have difficulty in seeing that anything is proved by the early correspondence to have taken place in the East, which if it had taken place in Scotland we could have regarded as a promise of marriage. If there had been clear evidence of such a promise before they came to Scotland, that might have raised a question, of perhaps some nicety, which has been glanced at, namely, whether, if nothing is proved to have passed amounting to a promise, or the renewal of a promise in Scotland, the promise antecedently made elsewhere, in a country where

Then as to the alleged promise *cum copula*.

The Irish marriage an interlude.

Courtship is not a promise, nor is expectation, nor understanding only, nor even an expressed intention.

It would have been a question of some nicety if there had been evidence of a promise before they came to Scotland.

(*a*) Lord Brougham, 3rd March 1831. (*b*) 5 Wilson & Shaw, 92.

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promise has not the same legal quality and effect, would be held to have while the parties were in Scotland the legal quality and effect of a promise originally made in Scotland; and whether its character would again change if the parties removed to another country, and again revive if at some future period they came back to Scotland. I am not prepared to adopt that view of the law. I think that marriage in Scotland by promise and subsequent *copula* means that the whole marriage takes place in Scotland, that the two things which constitute the marriage are in Scotland, and that it is not sufficient that a portion of what constitutes the marriage takes place in Scotland.

The whole must be in Scotland.

Holding, then, that the promise must be a clear and unequivocal promise of marriage, and that it must be either originally made in Scotland, or clearly and unequivocally renewed in Scotland, what evidence have we of such a promise in this case? Circumstances, more or less slender, may, to minds more or less speculative, suggest theories of probability as to a promise; but, in administering the law of marriage, what we require in regard to promise is very distinct and clear positive evidence of it, and we even require that there shall be written evidence of the promise founded on. It is not necessary that the promise itself should be reduced to writing, but there must be evidence of it, either in writing under the hand of the party alleged to have made the promise, or by his judicial admission of it. That rule existed in the time of Lord Stair, and has been frequently repeated from the bench. In this case no question is raised as to that rule, and I allude to it only to observe how strict the rule is in regard to proof of promise of marriage. The law does not trust in that matter to the recollection or impressions of witnesses, or to their understanding of the import of expressions used. Now, in the present case it is not said that the alleged promise itself was reduced to writing. The contention is, that the Defender's letters afford evidence under his hand that he had in Edinburgh promised marriage. That evidence is not to be found, and is not said to be contained, in the letters that passed between the parties in the spring of 1857, while either of them was in Edinburgh. The correspondence in Edinburgh is meagre, and seems to have reference to riding—to illness preventing him from going out—that he cannot travel to-morrow—that the doctor had said so and so. There is no importance in these letters. The letters written after they left Edinburgh have more bearing on the question of promise. I have already expressed my opinion that these letters negative the idea that marriage had been already constituted by interchange of consent. But I think there may be extracted from them expressions indicating that a promise of some kind, not then fulfilled, had been made to the Pursuer at some time and place. Some of these expressions may perhaps be construed as having reference to a promise bearing more or less directly on the matter of marriage—whether an actual promise of marriage, or a promise to do something which might facilitate marriage—whether an absolute promise or a qualified promise—a promise qualified it may be, with conditions which have not been purified, is, I think, by no means clear. It is not as in the case of *Honyman* (*a*), far from it. There the correspondence was natural, and the Defender's letters were plain and scarcely mistakeable. Here the whole correspondence is artificial and enigmatical. A correspondence between an Irish gentleman in Ireland and an English

There must be written evidence of the promise, though it is not necessary that the promise itself should be in writing. The writing must be under the hand of the party charged, or there must be a judicial admission.

The letters indicate a promise of some kind.

A correspondence between an Irish

(*a*) *Ubi suprà*

lady in England, plainly cannot constitute a promise in Scotland, It may, perhaps, afford evidence of a promise having been made in Scotland or in England or in Turkey, where a promise is also alleged to have been made, or in Russia, or in some place unknown, not named or described in the correspondence. The last of these is, I think, the utmost that can be gathered from the correspondence in this case; and, therefore, although it could be read—which I do not think it can—as having undoubted reference to an absolute promise of marriage, it would not establish the other essential point, that such promise was made in Scotland. The letters are far from being so definite and precise as I should like to see made the basis of a declaration of law in this important matter. The law cannot afford to be further relaxed. If there is not satisfactory evidence of such a promise as can safely be made the foundation of a Scotch marriage *subsequente copula*, it is unnecessary to go further.

gentleman in Ireland and an English lady in England cannot constitute a promise in Scotland, though it may afford evidence of one.

Though the correspondence may show a promise, it does not show that the promise was made in Scotland.

But supposing that it should be held that the Defender's letters do contain an admission of such a promise made in Scotland, something more is required to constitute a marriage. There must be sexual connexion following on that promise, and attributable to it. Here, again, I think that the Pursuer's case fails. There was no sexual intercourse between the parties while they were in Edinburgh in the spring of 1857, at which time the promise is alleged to have been made. The first sexual intercourse between them was in Ireland—months afterwards; and there they did undoubtedly cohabit for some time. Now, if the matter had stopped there, it is perfectly plain that there would not be marriage according to the law of Scotland. Promise in Scotland, followed months afterwards by *copula* in Ireland, would not make marriage. I agree with your Lordships in thinking that the intercourse in Ireland commenced before the date of the celebration in Rostrevor. The Pursuer has all along denied that. The denial was apparently essential to her theory of the case, and we see the efforts that were made, and the artifices that were resorted to, to stifle the proof and hide the truth; but I think, with your Lordships, that the evidence is irresistible. It has been remarked that the fact of her yielding before the religious ceremony indicates that she must have been relying on a previous promise, as well as on the progress that had been made towards getting the marriage solemnized in a Catholic chapel. I do not desire to exclude that charitable suggestion, but I may observe, in the first place, that the Pursuer herself rejects it, for she denies that there was any such yielding; and, in the second place, I may observe that the yielding in Ireland could not make marriage by reason of a promise in Scotland, any more than by reason of a promise in Ireland; and, consequently, it does not afford the slightest presumption that the promise, if any, was in Scotland, where she did not yield, rather than in Ireland where she did yield. One thing is clear, namely, that the commencement of their sexual intercourse was in Ireland, several months after the date of the alleged promise in Scotland. Such intercourse cannot, in law or to any legal effect, be coupled with any supposed promise in Scotland, or be regarded as having anything to do with the constitution of marriage. The sexual intercourse was to all legal effects and consequences, in the question of marriage, dissociated from the supposed promise in Scotland. I am not indisposed to lend a favourable ear to any suggestion tending to excuse or palliate the premature yielding of the Pursuer to the

Supposing a promise in Scotland, there must be intercourse in Scotland.

She yielded before the ceremony at Rostrevor. This shows that she relied on the prior promise.

Copula in Ireland would not make a marriage by reason of a promise in Scotland.

Intercourse was several months after the date of the promise.

The *copula* in Ireland cannot availably be coupled with a promise in Scotland.

The Irish *copula* is dissociated from the supposed Scotch promise,

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importunities of the Defender. If excuse can be found in her confidence that the day of marriage was at hand—relying on the Defender's assurances to that effect, and his supposed honour for the fulfilment of them—let it be received. In that extenuating view, the purchase of the ring and the other preparations for an immediate celebration may have a bearing on this incident in the Pursuer's history, and tend to explain the fact of her having then yielded, while she had till then abstained. But by no theory or fiction of law can that yielding be elevated into the completion of a marriage, or be made to connect with any promise that would give it that effect. Here, then, we have a course of cohabitation commenced and carried on in Ireland, which cannot, in law or in fact, be referred or attributed to, or made to connect with, any promise of marriage in Scotland, actual or supposed. I am at a loss to understand how any subsequent intercourse can be referred back to that supposed promise, overlooking or ignoring all intervening events. But further still, there was no intercourse in Scotland till after the religious ceremony in Ireland. Now, if that ceremony in Ireland was regarded by the parties as a valid and effectual marriage—as the Pursuer maintained and still maintains it to be, and as must be presumed to have been the view of the Defender also, unless he had in contemplation to escape through some hole in the statute law which the other party was not aware of—if the parties celebrated a marriage of this kind in Ireland, and cohabited there, and if on coming to Scotland they continued their cohabitation, I think it is far more reasonable to refer such continued cohabitation to what took place in Ireland, than to attribute it to reliance on any antecedent promise;—it is far more reasonable to refer it to a positive celebration of marriage, accompanied by cohabitation, than to refer it to a supposed promise at an antecedent period. I think it would be unreasonable to suppose that, when the parties came to Scotland in September 1857, they would have discontinued their cohabitation, had it not been for a promise alleged to have been made some months before they went to Ireland. I therefore cannot ascribe either the commencement of the intercourse, or its continuance, to the alleged promise. It has been suggested by one of your Lordships that the cohabitation in Scotland may be ascribed to two things,—namely, the religious ceremony of marriage in Ireland, and the supposed antecedent promise in Scotland,—so that, in the event of one of these supports failing, the Pursuer may rest on the other. I do not agree in that. I think that when the parties, not having had intercourse on the faith of the promise, entered upon a course of carnal intercourse, clearly not attributable to the promise, the continuance of the carnal intercourse so commenced without any renewed promise, cannot be referred back to the antecedent promise. I know of no authority for doing so—no authority for holding that marriage by promise *subsequente copula* is constituted, not by the first intercourse after the promise, or the first period of intercourse after the promise, but by some subsequent act of sexual intercourse without any alleged or proved renewal of the promise. Neither am I disposed to give effect to another view of the Pursuer's case that has been suggested, namely, that the marriage ceremony at Rostrevor, though it should prove ineffectual to constitute marriage, may nevertheless stand good as a promise and consent, which may be held to have been somehow imported into Scotland, and by some fiction of law be presumed to have been renewed or repeated whenever the parties had intercourse in

and cannot be referred back to it.

No intercourse in Scotland till after the religious ceremony in Ireland.

More reasonable to attribute the *copula* to what took place in Ireland rather than an antecedent promise.

Semble, that the first *copula* after the Scotch promise must be in Scotland.

The Irish ceremony cannot be a promise imported into Scotland.

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Scotland, and thereby to constitute a Scotch marriage. If that view be sound, it would seem to be of very wide application. Does it apply to every pair married in Ireland or in England, who may have afterwards at any time visited Scotland and cohabited there, and to all married foreigners visiting Scotland with their wives? Are they all by some fiction of law to be held as married over again in Scotland? or is the supposed fiction limited to cases in which the Irish or English or other foreign marriage was ineffectual by reason of some flaw? and if so limited, does it hold in cases where the flaw was unknown to the parties, and they believed themselves to be already married, and in no need of a second marriage, and never even dreamt of such a thing? I know of no authority for the propositions involved in this view of the Pursuer's case, and I am not disposed to accept either the importation of promise, or the fiction of renewal. I think that, in such circumstances as occur in this case, there is no legal presumption in favour of a revival or renewal of an antecedent promise. It would require to be alleged and proved; but here it is neither alleged nor proved. The inscribing of the name "Mrs. Yelverton" in the visitors' book, and the other circumstances referred to as indicating an acknowledgment of the relation of husband and wife, after the return of the parties from Ireland, are, I think, explained by what I have already said.

There is no legal presumption in favour of the revival or renewa of the Scotch promise through the efficacy of the Irish ceremony.

I have now stated the grounds of my inability to concur in the judgment about to be pronounced. The *onus* of proof rests on the Pursuer. The matter in issue is one as to which, more perhaps than any other, the law requires that the evidence shall be clear and satisfactory. In this case it is not so. It is, I think, eminently the reverse. The correspondence, on which much has been rested, is so mystical—so vague and figurative—that the real meaning and intention of the writers is left in obscurity and uncertainty. Instead of plain matters being stated in ordinary language, we are asked to extract marriage and promise of marriage from metaphors, riddles, dreams, imaginary dialogues, and vague allusions to unexplained occurrences. Instead of treading on solid ground, we are launched upon a sea of conjectures. I do not feel myself at liberty to substitute conjectures for the proofs that are wanting, or to accept of theories of probability as to what such parties would in certain circumstances do or say, in place of proof of what they actually did or said; yet I cannot help feeling that much of what has been pressed upon our attention is of that character. There are also in the case features and incidents calculated to excite distrust of a different kind. Some of these I have already alluded to in passing; others were noticed in the argument from the bar; I shall not occupy time by going over them again. Having anxiously applied my mind to the consideration of the case, and having listened with attention to the very full opinions now delivered, I have the misfortune not to be able to arrive at any other result than that which I have indicated. I think that the Pursuer has failed to establish her allegation that in April 1857 a marriage was contracted in Edinburgh by interchange of mutual consent *per verba de præsenti*. The evidence appears to me to be, upon the whole, opposed to that allegation; but it is enough that the Pursuer has failed to establish it. Then, as to the alternative allegation that a marriage was constituted in Scotland by promise *subsequente copula*, I am of opinion that the Pursuer has not satisfactorily proved any such clear and unambiguous promise as the law requires for the basis

Onus of proof is on Theresa.

The law requires the evidence of a matrimonial promise to be clear. Here it is not so.

Mystical character of the correspondence.

The Court is asked to extract matrimony from riddles and metaphors.

Conclusions:
1. Theresa has failed to establish a marriage *de præsenti* in April 1857 in Edinburgh.

2. She has produced no clear evidence that a promise *de futuro* was given or renewed in Scotland.

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of this ground of declarator of marriage, and still less has she proved that any promise, whatever was its character, which may have been at some time given, was given or renewed in Scotland, which I hold to be essential. If I am right in these views, the Pursuer has failed on this branch of her case also. But further, in reference to this branch of the case, I am of opinion that the sexual intercourse of the parties having had its commencement in Ireland when they met there several months after they had both left Scotland, such intercourse, commenced and for some time continued in Ireland, cannot in law be ascribed to, or made to connect with, any supposed previous promise in Scotland, so as to constitute marriage. That I hold to be a perfectly clear proposition. I am likewise of opinion that the intercourse having so commenced in Ireland, and having been continued there after a ceremony of marriage performed there, which the Pursuer upholds and founds upon as a regular and valid marriage, but which may or may not be found to be so, the sexual intercourse of the parties at a subsequent period in Scotland cannot be referred back to, and made to connect with, a supposed promise anterior to all that took place in Ireland, so as thereby to constitute a Scotch marriage. The attempt to bring into immediate relation, and combine into a legal unity, elements so disconnected—eevnts separated and dissociated by such intermediate occurrences—is a novelty in our law which I do not feel myself at liberty to sanction. Neither can I sanction the notion that the promise or consent implied in the marriage ceremony at Rostrevor is to be held as imported into Scotland, and by some fiction of law be presumed to have been renewed there whenever the parties repeated the sexual intercourse they had been practising in Ireland, and that thereby a marriage was constituted in Scotland. In short, I have been unable to overcome the difficulties, in fact and in law, that appear to me to beset the Pursuer's case in either of the alternative views of it that have been presented for our decision.

3. The Irish sexual intercourse cannot be ascribed to any supposed promise in Scotland.

4. It is impossible to bring into a legal unity the supposed Scotch promise and the proved Scotch *copula*, because they are separated by the intermediate occurrences in Ireland.

5. The Irish ceremony cannot by any known legal fiction be regarded as constituting a marriage in Scotland.

From these elaborate opinions it appears that the *Lord Ordinary* and the *Lord President* were both against the lady on all the points of Scotch law raised by her; while on the other hand Lord *Curriehill* and Lord *Deas* (the colleagues of the *Lord President* in the Second Division) held that she had established a marriage by consent *de præsenti*, or, alternatively, a marriage by promise *cum copula subsequente*.

In the Court of the First Division there were present at this adjudication but three Judges. The final decision, therefore, was carried by a majority of two to one—the *Lord President* being overruled in his own tribunal.

The formal decree thus pronounced by the First Division was as follows:—

DECREE OF THE FIRST DIVISION OF THE COURT OF SESSION APPEALED AGAINST TO THE HOUSE OF LORDS BY MAJOR YELVERTON.

Decree of the Court of Session appealed from by Major Yelverton.

19th December 1862.—The Lords having heard Counsel for the parties on the whole conjoined actions,—Recall the Interlocutor of the Lord Ordinary reclaimed against :. In the action of declarator of marriage at the instance of Maria Theresa Longworth, Pursuer, against the Honourable Major William Charles Yelverton, Defender, find that the said Pursuer has instructed that she is the wife of the said Defender; therefore find and declare that the Pursuer, Maria Theresa Longworth, and the said William Charles Yelverton, are lawfully married persons, and that the Pursuer is the lawful wife of the said Defender, William Charles Yelverton, and decern : In the action of declarator of freedom and putting to silence at the instance of the Honourable Major William Charles Yelverton, Pursuer, against Maria Theresa Longworth, Defender, assoilzie the said Defender therein, Maria Theresa Longworth, from the conclusions of the said action of declarator of freedom and putting to silence, and decern : Find the said Major William Charles Yelverton liable to the said Maria Theresa Longworth in expenses in both the separate actions and in the conjoined actions; allow an account thereof to be given in; and remit the same, when lodged, to the auditor to tax and report.

Against this decision of the First Division Major Yelverton forthwith appealed to the House. But the cause did not come on for hearing till June 1864.

Mr. *Rolt*, Mr. *Anderson*, Sir *Hugh Cairns*, and Mr. *W. A. Clark* were of Counsel for the Appellant.

Mr. Rolt's argument.

Mr. *Rolt* in opening the case observed that it was most important to show in what position in life the parties were. The Respondent stated that she was the daughter of Mr. Thomas Longworth, of Smedley Park, Lancashire, whom she described as a gentleman of ancient family and of large property; and she stated that all the expenses of the various tours and of the housekeeping at Edinburgh were paid out of her pocket, the Appellant having nothing to depend upon besides his pay. Now the result of an examination of the evidence was to show that she was certainly the daughter of a Mr. Longworth, a manufacturer at Manchester. He appeared to have had six children—three sons, William, Thomas, and John, and three daughters, the Respondent, Mrs. Bellamy, and Mrs. Lefevre. It appeared that there

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was no such place in Lancashire as Smedley Park, and that her father was a respectable but not a first-class manufacturer in that county, living at a villa—perhaps Smedley villa—in the neighbourhood of Manchester. Her mother died when the Appellant was very young, so it appeared that she had not the advantage of a home education under the watchful care of a mother. The children after their mother's death were sent out to nurse, and then the Appellant was sent to a convent in Staffordshire, and eventually to another in Boulogne, where it was undoubted that she received an exceedingly good education. The evidence further showed that her brother William carried on a business at Nottingham as a draper and tailor, in which he was assisted by his two brothers, Thomas and John, but it did not turn out very successful. The Respondent, in her peculiarly powerful language, described her father as being the most godless man the world ever saw. At his death he left property in which she shared, but it was not to a very large amount. It appeared that after she left the convent she led a wandering life; he did not use the expression in any offensive sense, but he merely meant that she moved about the continent without male protection, and therefore in a very different position from that of a young lady guarded by the watchful eye of a devoted mother. She was left at large upon the world, was in communication with a large number of persons, and had scores of correspondents, to use her own words.

The LORD CHANCELLOR inquired what means the lady had of living.

Mr. *Rolt* replied, the means she had received at her father's death. They were not so abundant as she endeavoured to make out, but they were sufficient to keep her in respectability. He was quite prepared to admit that her father, although not a millionaire, was

a thriving man. Coming to the correspondence, he thought it would not be out of place to say a word or two upon its general character. It showed most strongly what he must call the woman's art, which turned every subject that it touched to the woman's one thought—love and matrimony. Her nuptial suggestions were ignored by the Appellant, who repulsed them as he found them become stronger and stronger. The lady threw herself into the correspondence with an ardour he could not describe, making use of an expression of passion which was unequalled by the most amourous works that had ever been written, and eventually offering to make the last sacrifice a woman could make. He, on the contrary, although he had taken up the matter as an amusement, began to grow a little cautious, and told her that he was a confirmed bachelor, and only looked forward to his arm chair in the United Service Club, which was all he should ever want. Finding that she did not take the hint, he plainly told her that he could never marry her, and that the only terms upon which he could ever take her was that she should become his mistress. There was no doubt that his letters showed an equal cleverness with hers, and a quickness of repartee which made him quite her match in that respect.

The Appellant maintained that the lady had, notwithstanding his remonstrances, forced her company upon him, and that sexual intercourse had followed; the only conditions between them being that their connexion should be kept secret, and that they should visit the continent together whenever his military duties permitted. While in Wales, however, she renewed her suggestion of a Roman Catholic marriage for the purpose of satisfying her conscience, while at the same time it would leave him perfectly free, and she went

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to Ireland for the purpose of carrying out this scheme. The first letter bearing upon this part of the case was one from the Appellant to the Respondent in answer to hers enclosing Mr. Shears's wedding cards. In that he said:—

Permit me to add, as, perhaps, you will be pleased to hear, that such is really the case that, by your marriage, you have earned my lasting gratitude, as on reflection I found that I had placed myself in a false position with regard to you, and one of all others most painful to me—viz., that I had promised to you to do more than I could have performed when the time came.

The LORD CHANCELLOR.—If there had been sexual intercourse between them, and no promise of marriage, how do you interpret the Appellant's words, "I had promised you to do more than I could have performed when the time came?"

Mr. Rolt.—Those words referred to a promise that they should live together, and that he should spend with her all the time he could. The Appellant in his statement alleged that the Respondent came over to Ireland at her own suggestion for the purpose of renewing the intimacy between them. The sexual intercourse commenced at Edinburgh was resumed, they travelling together through various parts of Ireland, and sleeping together every night. After some time she renewed her request that some sort of ceremony should be gone through to satisfy her conscience, while it would leave him perfectly free, and in consequence of her earnest solicitation he consented to go to a chapel at Rostrevor. There were no witnesses present, and no marriage ceremony or service was gone through between them. Under these circumstances, it was absolutely necessary for the Respondent to show that no sexual intercourse had taken place between them until after the ceremony at Rostrevor, and yet it had been clearly proved by numbers of witnesses that before that time, during their

Irish tour, they had slept together every night at the various hotels they had stopped at. Upon this point Lord *Currichill* and Lord *Deas* strangely enough thought the proof of that fact, which it should be remembered the Respondent denied, was favourable to her case.

Mr. Rolt's argument.

Lord KINGSDOWN remarked that the point of habit and repute had been given up in the Court below.

The *Attorney-General*, in reply to a question of the *Lord Chancellor*, said that he should only rely upon those circumstances so far as they were evidence of an acknowledgment.

Mr. Rolt.—It was necessary, if his contention was right, that both the promise *de futuro* and the cohabitation must take place in Scotland, or else the contract *de præsenti* would not take place there. No promise *de futuro* made in Ireland, even if followed by a subsequent cohabitation in Scotland, would be sufficient to constitute a marriage. He did not mean to say that a letter written out of Scotland, containing an acknowledgment of a promise, would not be evidence, but it must be most carefully weighed as such, before it was admitted to be conclusive of such promise.

Sir Hugh Cairns' argument.

Sir *Hugh Cairns* followed on the same side, and contended that there was no proof of a marriage in Scotland *de præsenti*, nor any evidence of a promise, *copulâ subsequente*; and as to the Irish marriage, he maintained that it was invalid under the Acts of Parliament, which declared null and void the marriage by a Roman Catholic priest of a Roman Catholic and a Protestant, or a person who had within twelve months professed himself to be a Protestant.

Lord BROUGHAM.—As the *Lord President* was against the Scottish marriage, he ought to have decided upon the Irish one.

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Sir Hugh Cairns' argument.

Sir *Hugh Cairns* then adverted to the allegations as to the Scotch marriage. The acknowledgments and admissions relied upon by the Respondent proved, she said, that a marriage had taken place between herself and the Appellant before the 15th of April 1857, at which date they left Scotland; and yet in the July following she declares—"You know you are—you have always been free." This sentence alone, he contended, was a sufficient answer to those alleged admissions and acknowledgments. It was not a release from a promise, but a declaration of freedom.

Then as to copula; what says Lord Campbell in the Queen *v.* Millis? (*a*). He says, "You must look "to the intention of the parties; for if the woman "in surrendering her person is conscious that she is "committing an act of fornication instead of consum- "mating her marriage, marriage will not thereby be "constituted."

[Lord BROUGHAM.—I do not believe that Lord Campbell ever said that the copula must be with the intention of constituting marriage. The law itself refers the copula to the prior promise.]

The incident regarding her passport, where the Appellant told her to sign it "Theresa Yelverton," also proved that she was not in the habit of using that name, as she would have had a right to do if married. The alleged admission by Major Yelverton to a Mr. Goodliffe, that he had married the Respondent, could not be relied upon; neither could any sound argument be raised upon the fact of the Appellant addressing the Respondent's letters "Mrs. Yelverton" while she was abroad. The Respondent

(*a*) 10 Clark & Finn, 782.

had never gone by the name of Mrs. Yelverton until she went abroad, nor had the Appellant ever distinctly told any person that they had been married. The relations of the Respondent had always treated her as an unmarried woman; and even when she was at Boulogne had addressed her as "Miss Longworth." Another strong circumstance in favour of the Appellant was the conduct of the Respondent herself, when informed that the Appellant denied this marriage. She did not tell his brother not to insult the wife of his brother by offers of money, neither did she assume to sign herself "Yelverton," but simply "Maria Theresa." The Respondent having preferred a charge of bigamy against the Appellant, relied entirely in the course of that proceeding upon the Irish marriage alone, and not a single allusion was made to the Scotch marriage; and the same peculiar circumstance occurred in her first action of declaration of marriage, there being again no mention of the Scotch marriage. Having abandoned that action, she took no further steps until some months after Major Yelverton had commenced his action for "freedom and putting to silence." All the letters produced by Major Yelverton were in a perfect state, while most of those brought forward by the Respondent were mutilated. Sir *Hugh Cairns* further remarked strongly upon the fact that the Respondent had employed a Miss Crabbe, who was very like her, to go to the places she and Major Yelverton had stopped at before the Rostrevor marriage, and pass herself off as Mrs. Yelverton, so as to get rid of the evidence of the hotel-keepers called by the Appellant, by confronting them with Miss Crabbe on being put into the witness box. That circumstance showed that the Respondent was conscious of the weakness of her case, and was desirous of bolstering it up by any means in her power.

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The Counsel for the Respondent were the *Attorney-General* (*a*), the *Lord Advocate* (*b*), Mr. *Whiteside*, Mr. *Hennessey*, Mr. *Campbell Smith*, and Mr. *D. Bruce*.

The Attorney-General's argument.

The *Attorney-General*, after indignantly repelling the imputations which had been cast upon the Respondent, observed that her letters, so much commented on, were intellectual and refined, he might almost say spiritual but certainly not impure. They indicated a mind naturally brilliant and sentimental, and highly, but at the same time peculiarly, cultivated. The detestable and abominable constructions which had been put on particular passages would not occur to any ordinary reader, but were the natural progeny of an excessive and perverse ingenuity, straining to fortify, by forced interpretations, a case felt to be infirm. The real character of this unfortunate lady could not well be appreciated without adverting to her origin and early education. She was the child of a Protestant father and a Roman Catholic mother, and had been brought up in the seclusion of a convent. Singularly gifted, she was a skilful musician and artist; and was devoted to the study of poetry of a dreamy intellectual class, such as the writings of Tennyson, Shelley, and Longfellow, in which the sentiment was very prominent, but in which there was not the slightest tendency to grossness. Partly from romantic and enthusiastic notions thus acquired, and partly from her inexperience of the world, consequent on such a bringing up, she was not sufficiently sensible of the importance of an absolute submission to the restraints of society. Such a nature, so reared, would be likely to take many romantic steps; but it was the very last that would submit to the degradation and abasement which his learned friends, under the pressure of

(*a*) Sir Roundell Palmer. (*b*) Mr. Moncrieffe.

necessity, had alleged to have been courted by this lady. The Appellant, it would appear, was of a temperament somewhat similar to that of the Respondent,—fond of the same pursuits, and having a mind capable of sympathizing with that of the lady. The correspondence was commenced by her writing a letter to the Appellant requesting him to forward a letter to her cousin. That letter may have been a mere pretence to give him an opportunity of renewing the acquaintance if he chose, or it may have been written *bonâ fide* for the purpose she stated. At any rate he availed himself instantly of the opportunity offered. He wrote asking her to write to him, and expressing his disappointment at not being able to go to Italy to see her. Therefore it was he who virtually opened the correspondence, and who expressed a strong wish that it should be continued, a fact totally incompatible with his statement that she had thrust herself upon him. With respect to their meeting in the Crimea, when the Appellant alleged that he told the lady he could not marry her, and also alleged that gross liberties took place between them, the Respondent denied that such liberties took place, or that any improprieties were permitted by her; and she moreover asserted that the Appellant wanted her to marry him secretly in a Greek chapel, but that she had refused to do so. The evidence confirmed her statement most materially, for it showed that the family she was visiting had throughout received Major Yelverton as the lady's suitor; and dare he have accepted their hospitalities under such a pretence if it had been false? The letters also showed that he had discussed with her the pecuniary and other difficulties which stood in the way of their marriage.

It had been considered important to show the previous relations in which the parties stood. There-

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fore, if their Lordships accepted the allegation of his learned friends that the lady had previously proposed or agreed to cohabit illicitly with the Appellant, it would materially affect the evidence as to what had taken place in Scotland.

The LORD CHANCELLOR.—The Appellant does not pretend that there was any illicit connexion between them until they met in Edinburgh.

The *Attorney-General* said that was perfectly clear; but, unless he misunderstood the arguments on the other side, they alleged that the letters he was referring to contained proposals on the part of the lady that they should cohabit without marriage, and that the visit to Scotland was to carry out that project, and not for the purpose of entering into a contract of marriage. He confidently and indignantly repelled and repudiated such an interpretation of the correspondence, and he was prepared to vindicate all the equivocal, or apparently equivocal, passages, and to show that they were entirely consistent with the utmost purity on the part of the lady. The prudence of the Respondent's conduct in Edinburgh, the fact that she took Miss M'Farlane with her as her companion, that she invariably received Major Yelverton in her presence, and never visited him except in her company; were proofs of purity. The letters which passed between the parties during the separation which preceded their meeting in Ireland fully bore out the statement of the Respondent that a marriage had been contracted between them, but that she had not permitted the Appellant to enjoy the rights of a husband, because, for the satisfaction of her conscience, she required the performance of a religious ceremony by a priest of her own faith. Major Yelverton had evidently been entreating her to give him the full priviléges of a husband before the performance of such a

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ceremony; and in reply she said, "By trusting, I may lose both present life and life hereafter." What meaning could be attached to those words if, as Major Yelverton asserted, she had already yielded to his wishes? He appeared to have treated her desire for a religious ceremony as a piece of conventionality, and it was doubtless in reply to such a suggestion that she wrote "Conventionality is *not* the question between us." The letters which arose out of the affair of the wedding cards were equally favourable to his client's case. In Major Yelverton's affected letter upon the receipt of the cards, in which he pretended that he thought the Respondent was the bride, he admitted that he had made her a promise of marriage. "I had promised to you to do more than I could have performed when the time came." And although in her answer there occurred the phrase which had been so much relied upon by the other side—"Don't say it is a comfort for you to be rid of me; if it is, you know you are—you always have been—free;" that meant, not that there was no contract between them, but that she did not wish to enforce it if he was really anxious to get quit of her.

There had been a marriage *de præsenti*, or a promise followed by cohabitation also in Scotland, whether after an interval or not did not matter, neither was it material whether the cohabitation commenced in Ireland or Scotland, so long as it took place at one time or another in the latter country, and was referrible to the promise. The evidence showed that over and over again the Appellant had represented the Respondent as his wife, on occasions when there would have been no necessity for doing so had they not really been married. Thus cohabitation was going on in Scotland, accompanied by acknowledgments that they were husband and wife, which, he contended, distinctly

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referred to the promise made in Edinburgh. The letters which passed between the parties after they went abroad were also strongly confirmatory of this view. The gentleman's letters were the only ones they had to guide them upon this part of the case, as only one of the lady's had been produced. In one he said, "The cat must be kept in the bag just yet, for if the fiery devil gets out now, she'll explode a precious magazine, and blow us all to the d——l. In the future, there is hope of being able to loosen the strings." In another he referred to a letter of hers, in which she said, "I told you my resolution, in case certain events did occur. You were very angry, but it would be my duty, and I must do it." He then warned her that if she broke faith with him, "You will never from that moment have one hour of even tolerable content during the rest of your life," and continued "If you do feel any love for me, you must change that resolution. If I depart this life, you may speak; or if you do, you may leave a legacy of the facts, but while we both live you must trust me and I must trust you. When I find my trust misplaced, if you have any affection for me, I do not envy you the future. Your duty lies this way—not that." Was this the language of a paramour to his mistress, or of a husband to his wife? It had been attempted on the other side to show that Major Yelverton had prostituted the word "duty," as he had done the services of the Church, but he hoped their Lordships would not in their judgment cast such a slur upon that gentleman. The fact of her being addressed as "Miss Longworth" while at Boulogne showed the fidelity with which the lady had kept her husband's secret, but was no evidence against her statement that they were married. On the contrary, it could not be supposed that if her sister had believed that they were not married she would have received

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the Respondent, and written to the Appellant asking him to write. In her last letter to the Appellant the Respondent said, "Tell your mother the truth; you will recollect I told you, before I consented to keep the marriage secret, that this, and this alone, was the only sacrifice I would not make for you." This referred to the loss of her reputation.

If their Lordships were not satisfied that there had been a marriage *per verba de præsenti*, he should rely upon the promise,. *subsequente copulâ*. The Scotch promise was the cause of the Irish marriage. The promise, the ceremony, and the cohabitation were all parts of one transaction. It was in fulfilment of the promise that that ceremony took place; and the promise was kept in view throughout. All the circumstances of the Irish marriage gave the lie to the theory of the Appellant. His declaration, as proved by Father Mooney, established the fact that the Irish ceremony was considered by both of them to be a solemn confirmation of that which had already taken place.

The Attorney-General's argument.

The Lord Advocate's argument.

The *Lord Advocate*, following the *Attorney-General* on behalf of the Respondent, observed that there had been an honourable courtship, and that at the end of it there had been difficulties raised by the Appellant, who proposed a secret marriage. This the pursuer objected to, but ultimately her scruples were overcome, and they exchanged consent in Edinburgh, and subsequently carried out a religious ceremony in Ireland. The points to which he would address himself were, first, that there was a promise of marriage in Scotland; secondly, an interchange of consent in Scotland; and thirdly, a marriage in Ireland. The first two depended upon the construction of the law of Scotland, and he contended that the promises and subsequent *copula* in this case constituted a Scotch marriage. The law of Scotland was the old canon

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law of Europe, by which consent, as in this case, was sufficient to constitute marriage. It was not necessary to show the time of the consent, but quite sufficient to prove that there had been a promise and subsequent *copula.*

Lord CHELMSFORD.—There was a promise in Galata.

The *Lord Advocate* said that there was a promise there, but there was a subsequent rupture, and the whole affair was broken off. The promise was afterwards renewed in Edinburgh.

Lord BROUGHAM.—If two witnesses proved that there was a promise, do you mean to say that writing was necessary?

The *Lord Advocate* said that it certainly was not.

Lord BROUGHAM.—Would you say clear evidence of the promise is as good as writing.

The *Lord Advocate.*—Yes.

Lord BROUGHAM.—If you had an acknowledgment out of Scotland referring to a promise in Scotland, would you consider that sufficient evidence?

The *Lord Advocate* said that he should. In *Sim* v. *Miles* (*a*) a marriage was held to have been constituted by promise and subsequent *copula,* although the parties had been in a course of connexion for years prior to the promise, and although no *copula* was proved to have taken place between them till the expiration of nearly eight months after the promise; still the Court of Session held that such *copula* was the result of the promise and in reliance on it. In the case now before their Lordships everything went on the faith of the promise made in Scotland.

The LORD CHANCELLOR.—Must it not be clear that the lady consented to cohabitation on the faith of his promise?

(*a*) 8 Shaw & D., 89.

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The *Lord Advocate's argument.*

The *Lord Advocate.*—The strongest case is that of a mistress living with a man, and then a subsequent promise, to which he had already called their Lordships' attention.

The letter from Major Yelverton, dated Christmas Day 1857, contained expressions which could mean nothing but marriage. After stating "I have done more than I promised (at great risk)," he said, "If you do feel any love for me you must change that resolution. If I depart this life, you may speak; or, if you do, you may leave a legacy of the facts; but whilst we both live, you must trust me and I must trust you. When I find my trust misplaced, if you have any affection for me, I do not envy you the future —your duty lies this way, not that." No one could for a moment suppose that he was telling her to leave a legacy of her disgrace.

Mr. *Rolt* replied.

The following opinions were delivered by the Law Peers.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

MY Lords, in offering to your Lordships my opinion on this very painful case, it is my desire to make no observation that is not necessary for the decision of the legal rights of the parties.

The Respondent sought in the Court below to establish the fact of a marriage between herself and the Appellant, first on the ground of a present engagement to become husband and wife mutually exchanged between the parties when in Scotland; secondly, in the alternative, if the evidence be not sufficient to prove an immediate present contract, the Respondent

(*a*) Lord Westbury.

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pleads that there was a marriage by a promise to marry given in Scotland, followed by cohabitation on the faith of that promise.

The Respondent also affirms on the record that a religious ceremony took place between the parties in Ireland which amounted to a marriage if there was none before; but she was content in the Court below to have it assumed that this ceremony did not *per se* constitute a valid marriage, and having so submitted, it is not competent to her to maintain a different view of the case before this House as a Court of Appeal.

I shall therefore give no opinion on the question whether what passed between the parties in Ireland was sufficient of itself to constitute a marriage, it being plain that the point was withdrawn by the Respondent from the consideration of the Court below. In this all the Judges agree. I shall regard the acts of the parties in Ireland merely as part of the *res gestæ*, which may or may not tend to prove or disprove the case of a Scotch contract of marriage. The case of the Respondent, therefore, is reduced to the two propositions already stated, the first of which is that there was an immediate present contract of marriage by the interchange of mutual consent made at Edinburgh during the month of April 1857.

As to the nature of the consent which is to constitute marriage, I accept the observation of the *Lord President*, that it must be deliberate and serious, and given mutually with the view and for the purpose of creating thenceforth the relation of husband and wife. It is not necessary that a contract so made should be followed by cohabitation.

With respect to the evidence that shall be sufficient to prove a marriage so constituted, great latitude is allowed by the law of Scotland. It was said in this House by Lord *Cottenham* (then *Lord Chancellor*),

in the case of *Hoggan* v. *Craigie* (*a*), "It is not necessary to prove the contract itself; it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle, the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage."

And again, the rule is stated more fully by Lord *Brougham*, when advising this House in the case of *Honyman* (*b*), a case which in many respects is similar to the present.

When a marriage is alleged to be constituted by deliberate consent mutually exchanged, it is reasonable that there should be some certainty in the allegation as to the time and place when the contract was made; and in this case such certainty is found in the pleading of the Respondent. But I cannot agree with the *Lord President* in what seems to have been his opinion, that if the Respondent's evidence fails to substantiate the exchange of present consent *at the particular time and place which are assigned*, but is sufficient to warrant the conclusion that there was a deliberate interchange of consent in Scotland, but without proving the time and place that are assigned, the Court is not warranted in declaring that a marriage was contracted between the parties. In my judgment, when a marriage is pleaded as having been contracted by parties in Scotland by means of the interchange of deliberate present consent, it is not necessary to allege the particular place in Scotland or

(*a*) McLean & Rob. 942.

(*b*) *Honyman* v. *Campbell*, 5 Wil. & Sh. 92, and 2 D. & Clark, 265, where letters containing no direct promise, but accompanied by conduct and followed by copula, were held by the House, under the advice of Lord Chancellor Brougham, sufficient to establish a Scotch marriage.

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the exact day where and when such consent was exchanged. And further, if the particular time and place are alleged, such allegation will not detract from the sufficiency of evidence that proves a marriage by the deliberate interchange of present consent made in Scotland, although it does not extend to prove the particular time and place which are pleaded. The strict rule applied by the *Lord President* in this respect appears to me to weaken very much the force of his judgment upon this part of the case.

The Respondent has pleaded that there was a solemn interchange of consent to become husband and wife on Sunday the 12th April 1857 at the house of Mrs. Gemble in Edinburgh. The form adopted was, as the Respondent states, the reading aloud by the Appellant from a prayer book of the marriage service used by the Church of England.

The *Lord President* casts discredit on this statement, because it is neither said nor proved by the Respondent that there was any writing interchanged, or that there was any person present at this alleged interchange of consent. The *Lord President* insists on the fact that persons, even in a humble sphere of life, when contracting marriage in such a manner, rarely omit to preserve evidence of it by interchange of writings, or by the presence of confidential witnesses; and he dwells on the omission to do so as inconsistent with the intelligence and foresight of the Respondent.

It is true that this omission has very much weakened the Respondent's power and means of proving her case, but the omission itself is entirely in accordance with the truth and consistency of that case. Her case is, and it is proved by various parts of the correspondence, that the marriage between herself and the Appellant was to be kept secret, and not even avowed in their

mutual letters for fear of accident, a caution which seems to have been observed until their visit to the Continent in 1858, when we find the Appellant for the first time writing to the Respondent as Madame Yelverton.

It would have been inconsistent with the case on both sides if we had found *that*, the want of which is made so great an objection by the *Lord President*.

But there occurs in the subsequent correspondence a remarkable confirmation of the statement that some engagement or promise relating to marriage took place on the 12th of April, and, inasmuch as it arises from an undesigned coincidence, it is the more convincing.

In a letter written by the Respondent to the Appellant on the 12th of July, being exactly three months after the alleged engagement on the 12th of April in Edinburgh, the Respondent uses these words: "My ears ache to hear the 'mia'" (that is, to hear the words "my own"), "though I am convinced you might say it with perfect truth now and for exactly three months past." That is to say, the Respondent reminds the Appellant that his right to call her his own commenced exactly three months ago, namely, on the 12th of April.

I regard this letter of the 12th of July as full of proof of the truth of the Respondent's chief allegations, namely, that there had been a marriage by mutual consent, or at all events a deliberate mutual sacred promise to marry entered into at Edinburgh on the 12th of April 1857, but that there had not been cohabitation in consequence of the refusal of the Respondent to consent to cohabitation until a religious ceremony had been performed. The Appellant indeed affirms that there was sexual intercourse between himself and the Respondent before she quitted Edinburgh in April 1857, an allegation

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which the Judges in the Court below refused to give credit to. And it is to me a strong proof of the truth and honour of the Respondent that she has denied that which the Appellant affirms. For it was plainly her interest to have admitted that cohabitation did take place before she left Scotland in April 1857, inasmuch as it appears to me (and such I infer from his judgment would have been the opinion of the *Lord President*) that there would then have been no difficulty in arriving at the conclusion, upon the evidence of the Appellant's subsequent letters, that there had been a promise to marry given in Scotland, on the faith of which cohabitation also in Scotland had taken place between the parties.

But before examining further in detail the evidence for and against the conclusion, that there was a marriage by present consent in Scotland, it is necessary to advert to the argument so much pressed on the part of the Appellant, that it is in the highest degree improbable that any matrimonial connexion would be formed between the Respondent and Appellant, inasmuch as it is evident from the correspondence which took place between himself and the Respondent for three or four years anterior to the arrival of the Respondent in Edinburgh, that the Respondent had made the most indelicate advances to the Appellant, and was willing to become his mistress without requiring any promise or ceremony of marriage. Many hours were spent by the Appellant's Counsel in the attempt to give this colour to the correspondence. I abstain from making any other observation upon this, the most laboured part of the Appellant's contention, than that it is in my deliberate judgment most unwarranted and unjust.

An amatory character is first given to this correspondence by the letters of the Appellant. In his third letter to the Respondent he addresses her as "My dear

Theresa." When the lady proposes that the correspondence should terminate, the Appellant insists that it should be continued, and the character which the Respondent gave to it, and her expectation and belief of the Appellant's meaning and purpose cannot be more justly or more seriously expressed than by the Respondent in her letter shortly before leaving the Bosphorus. "So, when I tell you the curtain is about to fall between us, you hasten to avert its fall by inspiring me with hope, which you must have known and felt could only be construed in one way by me. You knew that to secure my affections there was only one way; therefore at that time you could not have seen the utter impossibility of the realization of those hopes. Then you lose me again, and when you begin to see that I am really gone, which you do at the expiration of five months, you leave no stone unturned to find me; instead of once in three months, it is three times in as many weeks you write. I cannot mistake you any longer; you warn me of obstacles, but encourage me not to be daunted by them. 'Tis but a rock, and the ocean is not far distant where the two streams must meet, and we may be again fellow travellers.' Again you say, 'If your lucidity can make out the plot, I have only to say, Amen, so be it.' It is not possible, dear Carlo, you could have coolly written this to me, knowing it to be vain and false? You could not so wantonly cheat me, even on the supposition that you were a very wicked man (which I know you are not); such a measure would have proved quite absurd and useless, as I was entirely beyond your reach in a convent, and quite *à l'abri de toute épreuve.* You come to Galata and renew *vivâ voce* what you have written. It was no effect of impulsive feeling. You came with the intention, as far as it was then possible, of binding me to your fate, and had I had a brother

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or a father to have consulted, I think he would have considered it so."

I feel bound in justice to the Respondent, in giving my opinion on this, the most earnest part of the Appellant's argument, to cite two short passages from subsequent letters. In a letter written at an advanced stage of the correspondence she says, "All these reflections lead me to surmise that there is something more than the money difficulty, which you have not had the courage to tell me, mio Carlo. I cannot doubt your feelings towards me, but there may be family feelings and considerations, pride of birth, &c., &c. If so, I have only three words to say, for God's sake let this be the end. I am of an old and good family, that is all, and will never be a firebrand in any family. *If it is so we must not meet again.* It would be too painful; and as I know your former weakness, let me know, that I may get out of your way in time. I told you nothing in the shape of money obstacles could appal me, and I cannot think that your uncle can entertain the absurd notion that you will not marry—you are certain to do sooner or later. In your position it is the simplest thing in the world to find a woman ready to pay your debts if you chose to set about it." And again, in a letter of the 2nd of July 1856, the Respondent writes to the Appellant, "If you wish the curtain here to fall between us for ever, you have but to say so. All my arrangements are made for entering, the moment I receive your intimation; and I pledge you my sacred word that it shall be decisive, and no murmur shall escape me."

I concur in the judgment of Lord *Curriehill*, that it was at the request or through encouragement from the Appellant that the Respondent came to Edinburgh in the month of February 1857; that there had not

then been any final agreement or promise to marry, but there had been pending for years an honourable courtship and treaty of marriage; and that they met to consider the mode in which this treaty could be carried into effect without injury to the prospects of the Appellant.

In my judgment, therefore, there is nothing in the antecedents of these parties to render improbable, but, on the contrary, much to render probable, the allegation of a secret marriage having taken place, or, at all events, a final and absolute promise to marry having been mutually given during this residence in Scotland.

I return to the inquiry, whether the Respondent has given sufficient legal evidence of a marriage in Scotland by the exchange of *de præsenti* matrimonial consent.

The assertion of the Appellant is that an illicit intercourse commenced between himself and the Respondent shortly after her arrival in Edinburgh, in the month of February 1857, and that it continued on every opportunity during her stay there. The Appellant has not even attempted to sustain this charge by any evidence. It was, as I have already stated, disbelieved by the Judges in the Court below, and it appears to me to be wholly unjustifiable.

The falsehood of this defence should not be entirely laid aside in considering the case of the Respondent. During the Respondent's stay in Edinburgh she resided in a very respectable house belonging to a widow lady named Gemble, and she was accompanied by a Miss McFarlane, a young lady of unexceptionable character, as a companion. The Respondent has examined Mrs. Gemble and Miss McFarlane in support of her case, but they fail, in my opinion, to prove the allegation of the Respondent, or any circumstances from which the fact of the interchange of present matri-

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monial consent can be inferred. They prove only that the Appellant was a constant visitor at the house where the Respondent resided, and was regarded by the persons who were acquainted with the parties as the Respondent's avowed and accepted suitor.

The proof, therefore, of an actual marriage by the exchange of present consent must, if it exists, be found in the subsequent acts, conduct, and correspondence of the parties.

I take first the correspondence between the time of the Respondent leaving Edinburgh, about the 16th or 17th April 1857, and her joining the Appellant at Waterford in Ireland at the end of July following.

In considering these letters, it is most material to bear in mind that fact of which I am fully convinced, in common with all the Judges of the Court below, namely, that no sexual intercourse had taken place between the Appellant and Respondent during the residence of the Respondent in Edinburgh. The Respondent alleges that she left Edinburgh to avoid the importunities of the Appellant for the consummation of the marriage. She appears to have been resolved that this should not take place until there had been some religious ceremony in a Roman Catholic place of worship, which would be satisfactory to her conscience. And the desire to have this object accomplished, together with the fact that there had hitherto been no consummation, appear to me to interpret and render intelligible the whole of the subsequent correspondence up to the meeting in Ireland. But in examining the subsequent correspondence, with a view to collect evidence of what had passed on the subject of marriage, much difficulty arises, from the fact of many of the letters having been destroyed or at least not being produced; and also from the circumstance that, the letters being expressed, as they

naturally would be, in general terms, it is difficult to say that particular expressions indicate more than a solemn engagement or promise to marry.

In the letter written apparently in the beginning of May 1857, the Respondent, after an offer to supply the Appellant with money, writes thus in reference to their separation:—"I cannot bear it; you know it is not in nature, and you swore before God, and you will not perjure yourself, but I'll go if you wish it;" words which certainly point to the fact of a solemn engagement.

On receiving a letter from the Respondent which contained the wedding cards of two persons, Mr. and Mrs. Shears, who had lately married, the Appellant affected to believe that the Respondent had married Mr. Shears; and in a letter written in May 1857 he uses these words, "By your marriage you have earned my lasting gratitude, as on reflection I found that *I had placed myself in a false position with regard to you, and one of all others the most painful to me, viz., that I had promised to you to do more than I could have performed when the time came.*" I am unwilling to found much on these expressions, because I think it clear that the letter was not sincere, but a piece of affectation, written probably under some feeling of irritability at the Respondent having left Edinburgh. The words, however, appear to me to indicate clearly that a promise had been given in relation to marriage, and that it must have been either a promise of marriage *de futuro*, or else a promise to meet the wishes of the Respondent by consenting to a religious ceremony in a Roman Catholic place of worship.

It is urged by the Appellant's Counsel that the answer to this letter is not such as would have been written by the Respondent if there had been a mar-

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riage. I cannot concur in that remark. Remembering always that the Respondent had refused cohabitation, that, in the language of one of her letters of this date, she was shrinking from the thing she yearned for, it might well be that she did not know or believe that what had passed was in law a binding final marriage. The same thing has occurred in several of the reported cases (*a*).

(*a*) In the Dalrymple case (2 Hagg. Con. Rep. 109), Sir William Scott thus alludes to Miss Gordon's misgivings:—"She had," he remarks, "her hours of doubt, and even of despondency. 'You will never see me Mrs. Dalrymple,' she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be a matter of great surprise if, in the view of a prospect so remote and cloudy, some expressions of dismay, and even of despair, should occasionally betray the discomposure of her mind." In more homely phrase we find Lord Eldon expressing the same sentiment in *Laing* v. *Reid*, 1 Shaw, 451, where he said, "In all probability this girl (a domestic servant) did not know that a copula would make a marriage." It seems probable she did not. Sometimes the intelligence of the marriage is concealed from the wife until she has become a widow.

The husband may retain in his own power the evidence by which the contract is to be proved. He may withhold that evidence entirely, or he may prevent its disclosure till after he has himself departed from the scene, as in *Hamilton* v. *Hamilton*, 9 Cla. & Finn. 327, where the man wrote a letter in these words:—

"MY DEAREST MARY,—I hereby solemnly declare that you are my lawful wife, though for particular reasons I wish our marriage to be kept private for the present.

I am your affectionate husband,

A. HAMILTON."

This letter was addressed by the writer on the back "Mrs. Hamilton." It was not, however, delivered to her, nor did it clearly appear that she even knew of it at the time, but it was committed to the care of a friend of Hamilton's, with an injunction that he should keep the document and show it to no one; and there was also a significant instruction that, in the event of the depositary dying, care should be taken that the document should afterwards come back into the hands of Hamilton only. The friend, on receiving the document from Hamilton, sealed it up in an envelope, on which he inscribed these words: "To be delivered

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But, whilst I consider the language of the Respondent's answer as consistent with either hypothesis of an actual marriage or final promise to marry, I construe it as more in accordance with a state of things that could no longer be altered than with an engagement that might be released or abandoned by both the parties to it, or broken by either. Her words are, "I, whose very life is ebbing away for you, I, who have sacrificed all but God to you, I, who have lain at your heart and in sight of Heaven been called yours." "It is too late to take you at your cruel word." These expressions exactly agree with the Respondent's present allegation. They refer to some solemn occasion when they had plighted their troth to each other in the sight of Heaven, but which in the mind of the lady still required the sanction of a religious ceremony. The Respondent therefore might well write those words in this letter which have been much relied on by the Appellant, "Don't say it is a comfort for you to be rid of me. If it is, you know you are, you always have been free." As the final step of cohabitation had not been taken, she supposes and is willing that if he repented of what had passed, he should, and, with her consent, would be free. But a subsequent sentence shows clearly her sense of their relative position: "Oh, Carlo, we have been too dear to part now, *we must try and make the best of our lot;* all I have borne, all I must still bear, God knows

into the hands of A. Hamilton, Esq., unopened." Some time afterwards Hamilton died. His friend the depositary attended the funeral, and at opening of his testamentary papers produced the above document, on the strength of which the woman "Mary," to whom it was addressed, forthwith claimed the character and asserted the rights of widow to the deceased. The Court in Scotland held that her claim was just, and this decision was affirmed upon appeal by the House of Peers. See also *Hoggan* v. *Craigie*, decided by the House of Lords in 1839, McLean & Rob. 942.

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best how much I can, but be you a very devil I feel I am fast to you, for some good end, no doubt, in the far off future." This is the language of natural emotion, unpremeditated, undesigned, no word of which could have been written with a view to the use which is now made of it. But as truth is always consistent, so these words naturally fit and square with the case now made by the writer, and are utterly irreconcileable with the case of the Appellant.

This letter was much insisted on by the Counsel on both sides, and was rightly made one of the cardinal points in the case. It appears to me to be full of confirmation of the present statements of the Respondent.

It seems to have been answered in an affectionate manner by the Appellant, and matters were restored to their former footing. Many of the letters that passed between the parties previously to the Respondent's meeting the Appellant at Waterford on the 29th or 30th July 1857, are alleged by the Respondent to have been destroyed at the instance of the Appellant. That there were many other letters is admitted, but of this destruction there is no proof.

In the letters which remain there are some expressions which are in accordance with the present case of the Respondent, and particularly the letter dated Sunday, on which I have already commented.

From the whole, with the light derived from the subsequent acts of the parties, I have drawn the conclusion that the Respondent, after a struggle, consented to cohabit with the Appellant as his wife, and to meet him in Ireland for that purpose, depending on the promise of the Appellant that a religious ceremony should be had in a Roman Catholic chapel in that country. In confirmation of this, I may refer to the

circumstance that the Appellant purchased a wedding ring in Dublin, when on his way to meet the Respondent at Waterford. And this brings us to the most important part of the case, namely, what was said and done by the parties in the chapel at Rostrevor.

Before examining the evidence on this subject, I am obliged to say that I cannot give credit to the Respondent when she affirms that no intercourse took place between them previously to this ceremony. It is, I think, the result of the evidence that immediately on their meeting at Waterford they cohabited as man and wife, and passed and were accepted as such. In my judgment the Respondent, instead of denying the fact, had a right to say that she consented to this cohabitation on the faith of the contract or promise of marriage that took place in Edinburgh, and of the Appellant's assurance, that he would no longer object to a marriage ceremony in a Roman Catholic place of worship.

In examining the evidence respecting this ceremony, the first and a very material part of it is the testimony of the Roman Catholic bishop. What passed between the Respondent and the bishop is not evidence against the Appellant, who was not present; but on the very material inquiry to which I shall presently come, whether the Respondent in cohabiting with the Appellant relied on the Scotch contract or promise or on the Irish ceremony, the Respondent is entitled to the benefit of this fact, that she stated to the bishop, either by herself or Mr. Mooney, what had passed between her and the Appellant in Scotland, and was told by the bishop that it was a valid marriage in the sight of the Catholic church, and that he saw no use or advantage in any other marriage ceremony. But upon being pressed by the lady the bishop consented that a religious ceremony should be performed, con-

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sidering that it would be a renewal only of the marriage consent. This is plain from that portion of the bishop's testimony in which he says that he told Mr. Mooney it was not necessary to grant a dispensation with the publication of banns, as there had been already a valid marriage between the parties.

The evidence of Mr. Mooney, as to what took place in the chapel, is in accordance with the testimony of the bishop. Mr. Mooney states very distinctly that he believed the parties, *from the statements made by both*, to appear before him as man and wife *from a previous marriage in Scotland*, and that the ceremony he performed was a renewal of the matrimonial consent, several points of the regular ceremonial of marriage being omitted.

Much observation was made, and justly, on the conduct of Mr. Mooney in sending to the Respondent, in the following year, a certificate which purported to be a copy of an entry in the marriage register of the parish of Kilbroney, but in which register there was no such entry, and also to be a certificate of marriage, and not of renewal of consent, in the presence of two witnesses, although it would seem that no such witnesses were present. It is said by way of excuse, that this certificate was given, not for the purpose of being used as between the Appellant and Respondent, but to be exhibited abroad on the occasion of the baptism of the child which the Respondent represented she would soon give birth to, and the baptism of which abroad could not be otherwise obtained. Whatever excuse may be pleaded, the giving of this certificate was undoubtedly a most reprehensible thing, and if proper questions had been put to Mr. Mooney (which was not done) and he had failed to explain it, I certainly should have refused to attach any value to Mr. Mooney's evidence on any point on which he was not distinctly

confirmed by other testimony. But the clear and positive testimony of Mr. Mooney is that there was a religious ceremony performed, differing from the ordinary ceremonial of marriage, so as to amount to a renewal of marriage consent, and that this was done in consequence of the parties stating that they were already, by reason of pre-contract made in a Protestant country, in the relation of husband and wife. And thus far his evidence is confirmed by the testimony of the bishop, and in some degree by the admission made by the Appellant, that there was an imperfect religious ceremony, and I find it stated in the judgment of Lord *Curriehill* that it was, as he understood, fully admitted by the Appellant at the debate in the Court below, that the proceeding did actually take place as stated by Mr. Mooney.

This being so, I cannot find that any element is wanting to constitute a deliberate admission by the parties of the fact of a previously existing marriage contract. And I entirely adopt the remark of Lord *Curriehill*, "In none of the cases in which marriage has been held to be established by *ex post facto* acknowledgments has the acknowledgment been so clear and so solemn as the one in question."

It appears to me to be clear that each party knew and felt that the ceremony was of no avail as a legal solemnization of marriage, but it was done, as the Appellant truly said, to satisfy the lady's conscience, and for that purpose he acknowledged her as his wife in the church and before a clergyman of her own religion.

On their return to Scotland shortly after this ceremony the Appellant and Respondent lived openly as husband and wife. The various acknowledgments and declarations of the Appellant that the Respondent was his wife are carefully enumerated by Lord

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Curriehill in his judgment (*a*), but I think it unnecessary to detail them; and I will advert only to the argument of the Appellant that both parties knew them to be insincere pretences, intended only to conceal an illicit intercourse, and that they have therefore no effect or validity in law.

The answer to this seems to be furnished by some of the letters of Major Yelverton to the lady, when, believing herself to be pregnant, she had declared her resolution to make the fact of their marriage publicly known.

The nature of these communications by the Respondent cannot indeed be collected otherwise than from the citations and statements in the letters of the Appellant. For it is a significant fact that the Appellant has not produced a single letter of the Respondent addressed to him since the ceremony at Rostrevor in Ireland.

In a letter written in November 1857 by the Appellant to the Respondent when at Hull are these expressions:—"I think there will be an advantage in remaining until the time I said, as the fact is, there will be no certainty of an enemy until that time, as false alarms often do not declare their falsehood before a period which, as I calculate in your case, about that time. I cannot quite comprehend your wish to be alone. The fact of an unexpected responsibility and '*chance of row*' do not make me wish to be away from you, but more anxious to stand by you and assist you through the emergency. The cat *must* be kept in the bag just now, for if the fiery devil gets out now she'll explode a precious magazine and blow us all to the d——l. In the future there is hope of being able to loosen the strings. If there is danger to

(*a*) See Lord Curriehill's enumeration of ten particulars, *suprà*, p. 789.

you in the natural course of things, that course must be hastened." "What is the necessity for letting the mine explode? Can you not get abroad? I have every reason to believe that next June will see you through the scrape, but of that more when we meet. Till then, *Penso a te*, Carlo." And in a letter written by the Appellant to the Respondent, and dated Christmas Day, 1857, are these passages:—"You say, 'I told you my resolution in case certain events did occur. You were very angry, but it would be my duty, and if I live I must do it.' Now, the fact is, that it is not a question of mere *anger* on my part; but your *resolution* is founded on false views—'Where is your duty of keeping faith with me?' I have never intentionally deceived you, and have done more than I promised (at great risk). I told you the event we fear could be avoided, and you certainly cannot doubt that it is equally unwelcome to me as it can be to you; but if the future proves that I have been deceived by others, that will not absolve you from your faith, the which, if you break with me, you will never, from that moment, have one hour of even tolerable content during the rest of your life. If you do feel any love for me you must change that resolution. If I depart this life you may speak; or if you do, you may leave a legacy of the facts; but whilst we both live you must trust me and I must trust you. When I find my trust misplaced, if you have any affection for me, I do not envy you the future. Your duty lies this way, not that."

My noble and learned friend Lord *Brougham*, who has been compelled to leave London, has desired me to state, that after a laborious examination of the case, he is satisfied that there had been in Scotland that exchange of consent which constitutes marriage *per verba de presenti*, and he has desired me to state to

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your Lordships the principal reasons of Lord *Curriehill* in pages 494 and 495, and of Lord *Deas* in page 544 (*a*), as adopted by my noble and learned friend in support of his opinion.

Lord CHELMSFORD: My Lords, I humbly rise to order. I do not believe it is a usual or correct thing to state any opinion of any absent Lord; we are here assembled as the House, expressing our opinions, and I believe that no opinion of an absent Peer can be admitted here. I know that sometimes, with the general consent of the Peers present, when there is any noble and learned Lord who had heard the whole case, and whose opinion agrees with the opinion given by the House, it is usual to state that such a noble Lord is unable to be present, but that, having heard the whole case, he agrees in the opinion which has been expressed by the House; but I never knew a case in which a statement of the reasons of a noble Lord who has been absent, or even a statement of his opinion, if it happened to differ from that of the majority of the House (which appears likely to be the case upon the present occasion), has ever been admitted. I believe it to be a very irregular and improper course.

The LORD CHANCELLOR: My Lords, I have in my own personal experience a great number of times seen this practice followed, but that undoubtedly will not sanction the practice if it is exposed to any objection. A noble Lord who is absent may request another Peer who is present to state his reasons, or his concurrence in the opinion given by another noble Lord. He cannot add to that his vote, nor will his opinion be counted

(*a*) These pages refer to the Appendix of the Appellant's printed case, in size corresponding with an ordinary volume of the "Encyclopædia Britannica."

at all in determining the judgment of the House; the decision must be by the votes of the noble Lords who are present. But I would rather make no controversy about the matter, though I must say it is a perfectly novel thing to me to hear the objection taken. And I cannot but think that it would be satisfactory to any noble and learned Lord who has heard the case, but has been compelled to leave before the judgment was delivered, to have an opportunity of stating that he had considered the case, and had come to a certain conclusion upon it, though undoubtedly, as I have already observed, that statement would not weigh in the determination of the House. I think, my Lords, I may add that I have known it done twenty or thirty times in my own personal experience.

Lord CHELMSFORD: I beg my noble and learned friend's pardon. It has only been done, I am quite sure, in cases where the opinion of the noble and learned Lord who has been absent has agreed with the judgment pronounced by the House.

The LORD CHANCELLOR: How is any noble and learned Lord to know what judgment will be pronounced by the House before it is delivered?

My Lords, resuming my own opinion, I will read the substance of the reasons of Lord *Curriehill* as part of my address to your Lordships:—"Putting "together all these unequivocal acknowledgments of "marriage in Ireland, Scotland, England, and France, "I am of opinion that they are sufficient to satisfy the "rule of the law of Scotland, and that the marriage is "established. That rule, as already stated, is that the "interchange of matrimonial consent, which consti-"tutes marriage, is held to be proved by the acknow-"ledgment of the parties; that such acknowledgments "have this effect whether made at the time or *ex* "*post facto*, and whether made verbally or in writing,

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" or by the subsequent cohabitation of the parties " avowedly as husband and wife. The soundness of " this doctrine was recognized by the House of Lords " affirming the judgment of this Court in the case of " *Inglis* v. *Robertson* in 1787 (*a*); and it was recog- " nized and acted upon in a series of other cases down " to that of Leslie in 1860, already referred to (*b*). " Nor is it necessary that the precise time when the " marriage so acknowledged shall be proved, as is " well stated by the *Lord President* in that case " of Leslie. The Defender says that such acknow- " ledgments have not such effect when they are " mere disguises for illicit intercourse. That is quite " true. But the onus of proving that they were such " disguises was incumbent upon him. And where is " his evidence? I can find none. The cohabitation " commenced in Ireland in July 1857, and was con- " tinued there, in Scotland, in England, and in " France until the spring of 1858, but from beginning " to end on the avowed footing of the parties being " husband and wife. In the proof I find no evidence " of any cohabitation by them on any other footing. " How then does the Defender attempt to deprive " the acknowledged cohabitation as husband and wife " of its legitimate effect? All he alleges in the record " is that before it commenced the Pursuer had agreed

(*a*) Paton's Reports, 53.

(*b*) 16 March 1860, 22 Sec. Ser. 993. The rubric or heading of that case is as follows:—For upwards of 30 years a man and woman corresponded with each other, at first as "betrothed husband" and "betrothed wife," but after a few years they signed their letters as "husband" and "wife." No one ever knew of their being married; and the man, who was a minister of the Church of Scotland, had subscribed to the Widows' Fund, and registered himself as a bachelor. After his death the woman brought a declarator of marriage, founding on the correspondence; no copula was established. The Court of Session decided that the marriage was proved, and consequently that the "woman" was a widow.

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" with him to be his mistress. The question then " is, Where is the evidence of that allegation? After " sifting the evidence with the most anxious care, I " have found nothing to support that allegation; and " have been compelled to the belief that it is disin- " genuous as well as groundless. On the contrary, it " appears to me that such a marriage as is established " by the *ex post facto* acknowledgments we have " been considering, was quite in conformity with the " arrangement under which the Pursuer met the De- " fender in Edinburgh in February 1857, in respect " that for four years before there had been going " between them a correspondence, which although an " imprudent, was an honourable courtship with a " view to marriage, so far as the Defender's meaning " was therein disclosed; and that, although the mar- " riage had been delayed for a considerable time " from difficulties, according to the Defender's state- " ment, arising from complications with an uncle, yet " these difficulties were obviated or rather evaded " by the parties agreeing that the marriage should " be a secret one; and that it was for the very " purpose of settling such an irregular marriage the " Pursuer came to Scotland in 1857. The greatest " difficulty, indeed, I have felt in the case arises from " the fact, which, as I think, is clearly proven, that " the cohabitation did not commence in Scotland at " the first visit in the spring of 1857. But I have " become satisfied that this arose from the Pursuer, " in consequence of her religious notions as to the " sacramental character of marriage, having for some " time religious scruples against allowing the mar- " riage to be consummated without a sacerdotal " solemnity. When she first hinted at the conces- " sion she was willing to make, she expressly stated " that it would be one which would satisfy her con-

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" science; and then, when the sacerdotal solemnity
" was about to be performed, the Defender himself
" told the priest that such a solemnity was quite un-
" necessary, and that the purpose it was to serve was
" only to satisfy her conscience. The only other thing
" which I have had any difficulty in reconciling with
" the conclusion to which I have come is, that in
" the correspondence between the parties after they
" left Edinburgh in April 1857 there are expressions
" not easily reconcileable with a consciousness of the
" parties that they were there irrevocably married.
" But, in the first place, there are other passages, to
" some of which I have already referred, which in-
" dicate the reverse; and the true explanation appears
" to be that the parties, although they privately
" interchanged matrimonial consent, may not have
" been aware of the legal effect of what they had
" done. This is often the case even among natives
" of Scotland who are so imprudent as to engage
" in such proceedings. Still more may this be so
" when, as in the present case, the parties were
" strangers in Scotland, and probably not informed
" as to its marriage law. But even if they were in
" such ignorance, and were led in consequence to
" use the expressions I have referred to, the marriage
" would not be the less binding. In the case of
" *Dalrymple*, Lord *Stowell* stated the law on this
" subject thus: 'Supposing that Miss Gordon really
" 'did entertain doubts with respect to the validity
" 'of her marriage, what could be the effect of such
" 'doubts? Surely not to annul the marriage if it
" 'were otherwise unimpeached. We are at this
" 'moment inquiring, with all the assistance of the
" 'learned professors of law in that country, among
" 'whom there is a great discordance of opinion, what
" 'is the effect of such contracts. That private per-

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" ' sons compelled to the necessity of a secret marriage
" ' might entertain doubts whether they had satisfied
" ' the demands of the law, which has been rendered so
" ' doubtful, will not affect the real sufficiency of the
" ' measures they had taken.' In the case of *Hony-*
". *man* (*a*), again, Lord *Brougham*, referring to acts
" of the Pursuer in that case, indicating her want
" of confidence in her being married, says:—' She
" ' may have been ignorant of the law, and ignorant
" ' of her rights, as she says herself, and her ignorance
" ' of her legal rights does not impeach them, nor im-
" ' pede her in the course she takes to have them
" ' established.' And several cases in Scotland have
" been decided on that principle. It only remains to
" be stated as to the marriage which was so acknow-
" ledged, that if it did take place, it was in Scotland
" it took place; for on the one hand the correspon-
" dence proves very clearly that when the Pursuer
" first came to Scotland in February 1857 there had
" been no marriage, nor anything but an unsettled
" treaty for a marriage; and on the other hand, after
" the Pursuer left Scotland in April 1857, and while
" she was in England, the parties never met again
" until they went to Ireland, and hence it was not
" in England the acknowledged marriage took place.
" And thus the marriage which was so acknowledged,
" as it did not take place either before the parties
" met in Scotland or after they left it in the spring
" of 1857, necessarily took place while they were
" then both residing in Scotland. On these grounds,
" I am of opinion that the Pursuer has made out her
" case. And if I am right in this view it is not
" necessary to consider the other ground of action."

(*a*) 5 Wil. & Sh. 92, and 2 D. & Clark, 265.

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My Lords, I pass on to consider the remaining portion of this case, viz., that if the evidence fails to establish a marriage by the mutual interchange of present consent, there is sufficient to prove a promise to marry, followed by *copula* on the faith of that promise, and both given and occurring in Scotland.

It is objected that these alternative modes of stating her case by the Respondent are inconsistent and even contradictory. But I concur entirely with the opinion of the *Lord President* that this objection is wholly unfounded, and that nothing is more common than this mode of stating a case in consistorial actions. In fact, it is not in law the statement of a different contract or cause of action, but a different mode of proving the fact of marriage.

There is but one principle of law, viz., *consensus facit matrimonium.* This may be proved by evidence of the actual exchange of consent, or it may be proved by the aid of a presumption of law. For where there is proof of an antecedent promise of marriage followed by sexual intercourse which can be referred to the promise, the Scotch law (if the thing be done in Scotland) furnishes a *presumptio juris et de jure* that at the time of the *copula* there was an interchange of matrimonial consent in fulfilment; and thus, on the same ground of *consensus*, declares that which has passed to be *ipsum matrimonium.* This, therefore, is another mode of proving matrimonial consent, and the only difference is in the rule of evidence, the law requiring in the case of a promise *subsequente copulâ* that there should be evidence of it, either in writing under the hand of the party who is stated to have made it, or by his judicial admission on oath. It is not necessary that the promise itself should be in writing, but there must be some acknowledgment in

writing of the fact that a promise is or has been made or given.

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The words in which the judgment of this House was given in the case of *Honyman* (*a*) are here again necessary to be referred to:—"A promise, like all other acts, may be proved by two several ways—either by direct evidence or circumstantial evidence. There may be direct evidence by the testimony of witnesses who heard the promise given; there may be direct evidence in writing proved to be of the hand of the party giving it; but the promise, like all other facts, may be proved by circumstances; it may be proved without either witnesses to support it or the handwriting to remain of record against the party promising. Circumstances may be proved by evidence, circumstances may be proved by the testimony of witnesses, or by written evidence; and if those circumstances are sufficient to convince the Court trying the question, as a matter of fact, that a promise did take place, the promise must be taken to have been made as much as if it had been established by the other more direct and immediate proof; nay, sometimes [indeed our law very much in its practice proceeds on that assumption] circumstantial evidence is stronger, and less liable to doubt, than direct evidence, inasmuch as it is more difficult to make out a circumstantial case by curiously contrived perjury, than it is to make out a direct case by one or two witnesses, who may easily swallow, as it were, an oath false to the fact."

Tried by this rule, the letters of the Appellant, to which I have already referred on the other branch of the case, do, in my opinion, when taken in connexion with the acts and conduct of the parties, prove con-

(*a*) *Honyman* v. *Campbell*, 5 Wil. & Shaw, 92, and 2 D. & Clark, 265.

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clusively acknowledgments by the Appellant that he had promised to marry the Respondent.

The same conclusion is to be derived from the letter of the Appellant written on Christmas Day 1857. If this last letter stood alone, it would satisfy the rule of law requiring evidence in writing from which the alleged promise may be inferred. The *Lord President* says that the promise referred to might be, not a promise of marriage, but a promise relating to marriage, possibly not an actual promise, but a promise qualified with conditions. I confess I see nothing to warrant a judicial hypothesis of any such subtle distinction, nor is there any suggestion of the kind to be found in the pleadings of the Appellant.

Such an hypothesis, if it could be judicially suggested, would be entirely refuted by the Appellant's letter to the Respondent, wherein he combats her resolution to disclose their real situation in the event of her proving to be with child.

One difficulty remains, namely, that to establish marriage on this ground there must be not only proof of a promise, but also proof of sexual connexion in Scotland attributable to that promise. The *Lord President* says that the sexual intercourse in Ireland cannot be attributed to the promise in Scotland. *De lege* it cannot, so as to give rise to that *presumptio legis* which makes *copula* in Scotland evidence of consent; but *de facto* it may, so as to exclude the supposition of the connexion having arisen from any other cause; and I think that in this case it clearly appears that the Respondent, in consenting to cohabitation in Ireland, relied on what had passed in Scotland, although she desired it to be hallowed by a religious ceremony.

The *Lord President*, if I understand his judgment, appears to be of opinion that even if there was a pro-

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mise to marry given in Scotland, followed by cohabitation in Ireland, which is renewed and continued in Scotland, such cohabitation cannot be attributed to the promise. No direct authority is cited for this proposition, and it appears to me to lead directly to unreasonable consequences. For instance, suppose a promise of marriage given *per verba de futuro* in Scotland, and that the parties having crossed the border for a day, have sexual intercourse for the first time in England, returning immediately and cohabiting as man and wife in Scotland, the *Lord President's* doctrine would of necessity involve the denial of there being in the case supposed a valid marriage, which I cannot but think is a conclusion which the law does not render necessary.

Finally, the *Lord President* seems to think that the religious ceremony in Ireland interposes an insuperable barrier between the antecedent Scotch promise (assuming that there was one) and the subsequent cohabitation in Scotland. But I think it clear that neither of the parties regarded what passed in the Roman Catholic chapel as a valid legal solemnization of marriage. And it would be as unreasonable to interpose it between the Scotch promise and cohabitation, as it would be to refuse to refer the marriage of parties to a Gretna Green ceremony, as its origin and date, because they had subsequently gone through the ceremony of marriage in a parish church in England. If the ceremony was a form of religious sanction not entering into or constituting a contract of marriage, the case is reduced to the question whether the cohabitation in Scotland cannot be referred to the antecedent Scotch promise by reason of its having had its commencement in Ireland. Upon this point I concur with the majority of the Judges in the Court below.

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Upon the whole, my Lords, I feel bound, after anxious consideration, to give my judgment that a valid marriage was constituted in Scotland, and that these parties are now husband and wife.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, this inquiry, which has occupied your Lordships for an extraordinary, may I not add with truth, an unnecessary, length of time, has now concluded; and the true question to be decided lies in a very small compass.

We have heard a long narrative of the first accidental acquaintance of the parties, its progress, and its result, and it is impossible not to have heard it without painful interest, and not to have formed an opinion as to the propriety of the conduct of both the parties. We are not called upon to express that opinion, nor to decide a question of morals, and pronounce on whom and in what degree the greater share of blame is to be attributed. Our province is to decide a simple question of fact, whether the Appellant was married to the Respondent at the time of the commencement of his suit for declarator of freedom and putting to silence, which was instituted on the 8th June 1859, the burden of proof lying on her.

The summons on the part of the Respondent of declarator of marriage was signeted on the 13th January 1860, but as there is no attempt to say that a marriage took place between the first and second proceeding, the question is, whether a marriage had taken place before the first-mentioned day, and this we are to decide as a simple question of fact, bringing our minds unbiassed to the consideration of that question by any other feelings than the desire to do justice and act according to the rules of law.

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As we have to decide whether a legal marriage has taken place, we must first clearly ascertain what constitutes a legal marriage in this case. There is no doubt that in Scotland, according to the ancient law prevalent in most of Europe from a very early period, a marriage between two parties *per verba de præsenti*, serious, deliberate, and mutual, constitutes a valid and binding marriage.

Secondly, a promise *per verba de futuro, subsequente copula*, connected with that promise, and taking place on the faith of it, constitutes a valid marriage. To prove that promise, the evidence must be in writing, or it must be proved on the oath of the party against whom the proceeding takes place. The promise must be made in Scotland, but the proof of it may be writing of the party promising made anywhere.

Thirdly, in all cases the fact of a marriage *per verba de præsenti* may be proved either by a person present at the time, or any other legal evidence that satisfactorily shows the fact. And under this head may be included that of habit and repute, by which, without any other evidence, a marriage in Scotland may be established. It is admitted by all the Judges, and not denied in the argument before us, that there was no sufficient evidence of acknowledgment amongst the members of the family and those connected with them to constitute a proof of marriage by habit and repute. The further consideration of that part of the case may, therefore, be dismissed altogether.

Fourthly, if a valid marriage had taken place anywhere, though the suit is in Scotland, that no doubt would constitute a sufficient answer to the suit for declarator of freedom and putting to silence; and it is made a part of the Respondent's case that such a marriage took place by a Roman Catholic priest at Rostrevor in Ireland on the 15th August

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1857. But it appears that there was in force in that country an Act of the Irish Parliament of 19 Geo. 2, chapter 13, section 1, which provides that every marriage, if celebrated by a Popish priest between a Papist and any person that hath been or hath professed himself to be a Protestant at any time within twelve months before such celebration, shall be null and void to all intents. I cannot feel any doubt that according to that law this marriage was void. The Appellant, having been born and bred a Protestant, of a Protestant family, and always treated as such, must be deemed to have continued so, unless he had done something to denote a change of his religious persuasion, and nothing of that sort appears. I have no doubt that he was a Protestant within the meaning of that Act, and am fully supported in that opinion by those of the learned Judges *Christian* and *Keogh*, which I have read since the hearing of the case, and which are extremely full, able, and satisfactory. They are reported in the 14th volume of the Irish Chancery and Common Law Reports, *Thelwall* v. *Yelverton*, page 188. He did not say he was a Roman Catholic to the priest, but that he was *not*, but a "Protestant Catholic." Had he said he was a Roman Catholic, it would have raised the question reported to have been decided by Baron *Alderson*, in *Regina* v. *Orrell* in 1839 (9 Carrington and Payne, p. 80), whether he was not estopped by his declaration that he was a Roman Catholic. I must say I doubt greatly of the propriety of that decision, and agree with an opinion of Chief Justice *Monahan* to that effect, referred to in the argument. That his statement in that case would be evidence against him is undoubted, but that it operates as an estoppel is a very different proposition. But it is not necessary now to be discussed and decided.

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I think it clear, therefore, that there was no valid marriage in Ireland. The preparation for that marriage, which had been arranged and agreed upon before, by the Appellant purchasing a ring at Dublin on the 25th July 1857, clearly carries the case no further than the marriage itself on the 15th August. Whether what passed between the Appellant and Father Bernard Mooney prior to the marriage, operates as an admission of a *prior* marriage between the Appellant and Respondent, or is to be relied upon as proof of it, is a different question, and must be fully considered.

The two important questions to be considered, upon which the case depends altogether, are these:—Whether there is sufficient proof of a marriage *per verba de præsenti*, and that in Scotland? and, secondly, Is there sufficient proof of a marriage *per verba de futuro* in writing, written anywhere, and of a *copula* connected with that promise in Scotland? It is admitted on the part of the Appellant that the writing need not be in Scotland, if the promise which it proves and the *copula* which followed were both in Scotland.

After the most careful attention to the evidence, I do not feel any doubt that there is no proof of a marriage *per verba de præsenti* in Scotland, nor of a promise to marry *in futuro*, with a subsequent *copula* connected with it anywhere. I agree with the *Lord President* and Lord *Ardmillan* entirely in the view they have taken of the case.

Upon the first question, I have to say there is clearly no direct proof of the actual fact of marriage *per verba de præsenti*. The Respondent states that on or about the 12th April 1857 she and the Appellant acknowledged and declared each other to be husband and wife at Mrs. Gemble's lodgings in

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Edinburgh, and read through the marriage service in an English prayer book. But the proof did not make out that fact. It failed altogether; and it is the less to be believed, because it was not mentioned in the process of declarator of marriage raised by the Respondent in August 1858.

But though the direct proof of marriage in Scotland *per verba de præsenti* fails, it is said there is proof of acknowledgment by both parties, which, if sufficient, no doubt will establish such a marriage, and can any one say that there is any such evidence in this case of a prior completed contract of marriage in Scotland?

It is sad to think that in the nineteenth century the law of marriage in Scotland should be left in such a state that the proof of that most important relation in life should be sometimes left to depend upon the loose recollection of witnesses, of conversations so often misunderstood and imperfectly remembered, and sometimes on the meaning of an amatory expression and impassioned letters. We must, however, take the law as we find it. But in dealing with these questions, I think that evidence of this character should be closely examined, and should not be acted upon unless no reasonable doubt is left as to the truth of the facts to be proved on the minds of those who are to decide such an important question.

The circumstances of occasionally representing each other in their tour in Scotland at inns and lodgings where they otherwise would not have been admitted, or at villas which they were permitted to see, are of no weight. As they do not in any way establish a marriage by habit and repute, they are of no weight to prove the actual fact. The same may be said of the Appellant subsequently representing her as his wife at the hotel of the Chapeau Rouge at Dunkirk. The statement to Mr. Goodliffe himself, when he met

him at the same inn, goes further, for he stated that she really was his wife, but that he had been married secretly or privately, and that he wished Mr. Goodliffe not to mention in society that he had met him and his wife, lest it should come to the ears of his family. But it is perfectly uncertain whether that statement refers to a marriage that had already taken place in Scotland or to one elsewhere, and it may just as well relate to that marriage, which undoubtedly had taken place in Ireland, in August 1857, and which he did no doubt wish to keep secret. To establish a marriage in Scotland, evidence pointing more clearly to that country ought to have been produced.

Let us consider the rest of the evidence by which that proposition is sought to be supported. The main evidence on which reliance is placed is the declaration to Mooney, the Roman Catholic priest; and some mention is also made, but not much relied upon, of a statement made by her in the Appellant's presence, and not at once contradicted by him, that she had been "*twice married.*"

It appears to me that this evidence is entirely insufficient to form a serious and credible acknowledgment on the part of the Appellant of a previous marriage anywhere, so that we could believe that it actually took place. There still would be defects in the proof that the marriage so acknowledged took place *in Scotland;* but if the evidence amounted clearly to a statement that he had been married before the Irish Roman Catholic marriage took place, by a valid marriage in another country, it *might* be sufficient to enable us to refer it to Scotland, as he had made no promise before he came to Scotland, and had been but a short time in Ireland. But as neither of the parties were Scotch, such promise must, to be valid, be made in Scotland, after one of the parties had been

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there for 21 days next preceding the marriage, by the statute 19 & 20 Vict. c. 96. But the evidence of Mooney seems to me to be quite unsatisfactory, and wholly insufficient to prove that the Appellant acknowledged a previous marriage anywhere. When closely examined, all that is really proved by Mooney amounts to no more than this, that the Appellant said that there was no necessity for this ceremony, it had all been previously settled or arranged; "but I will do it to satisfy the lady's conscience." That statement made by the Appellant is all that can be used as evidence against him. What the priest understood from his previous conversation with the Respondent is of no weight, and it is out of the question that what the Appellant said amounts to any acknowledgment of a previous marriage anywhere.

As little can any reliance be placed on the supposed acknowledgment by his not contradicting her in some conversation in the presence of Mr. Thelwall, in which she said she had been twice christened and twice married, and it was very possible she might be twice buried, at which the Appellant laughed. He said nothing of importance. It is impossible to attribute the slightest weight to such an occurrence as serious acknowledgment of a previous marriage. Indeed, little or no reliance was placed on that circumstance in the argument before us.

It seems to me, therefore, that there is no sufficient proof, or anything approaching to it, by the acknowledgment of the parties, of any previous marriage, at any time, anywhere, still less in Scotland, so as to prove a regular Scotch marriage *per verba de præsenti*. I concur in the observations of Lord *Ardmillan*, that it is remarkable that through the whole correspondence between the parties, there is not one letter in which the Appellant addresses her as his wife, and

the Respondent addresses him as her husband, save one, which contains words written on an erasure "petting *sposa bella mia,*" which I doubt not were originally "petting possibilémente." It is impossible, at all events, to say that there is any satisfactory proof by circumstantial evidence of a complete contract *per verba de præsenti.*

It was however principally contended that there was a promise of marriage, *per verba de futuro,* in Scotland, evidenced by writing in Scotland or out of it, followed by a *copula* connected with that promise in that country.

I am clearly of opinion that this proposition also is not made out in the evidence.

In the argument before us I may, I think, say that some days were consumed in stating and commenting on their first acquaintance in September 1852, their respective conditions in life, their subsequent conduct when the Appellant was at Malta, and the Respondent at Naples; afterwards their meeting at Galata in 1855 and in the Crimea; his return by the Danube, and her coming to England. That she then went into Scotland, and they were both there and in Ireland, and each of the letters that passed between them were made the subject of a long comment. Whether she was the more active party in beginning and continuing the correspondence; whether the ambiguous expressions in some of her lively and impassioned letters were always directed to a future regular marriage, or to a different relation between them, was discussed at great length; whether he was desirous of discontinuing the correspondence at one time, and endeavoured to put an end to their intercourse by coming to England by Vienna and abstaining from answering her letters for long periods; whether he invited her on her return to this country to come to

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Scotland where he was quartered, or she came without invitation in order to carry her plans into effect; these different matters were made the subject of very long and elaborate discussion on both sides.

It seems to me, I confess, wholly useless to decide these various questions. Upon a careful consideration of the whole evidence, it is impossible not to come to the conclusion that, whatever had been said or thought or designed by either of the parties, the Appellant and Respondent had never made a complete unconditional promise of marriage to each other before his return into Scotland and her arrival there in the beginning of 1857.

Up to this period it is impossible to contend that there was any promise of marriage proved by the correspondence or other direct evidence *per verba de futuro*. Indeed it is perfectly clear that any marriage, if contemplated at any time, was put an end to, as appears by his letter of 16th August 1856 and her letter of August 1856. Besides, if the correspondence contained evidence of a promise anywhere, it was of a promise out of Scotland. Indeed, the *Lord Advocate*, in his most able address to your Lordships, was obliged to admit that upon that previous correspondence he could not rely, and must show that promise by the evidence of that which occurred afterwards.

The question is whether there is to be found in the subsequent correspondence any promise made in Scotland of a future marriage, or any written acknowledgment of any previous promise of marriage in Scotland by him to her, or I may say, indeed, of a promise anywhere? I must say that I think there is no satisfactory proof of any such promise or acknowledgment. There are some ambiguous statements which must be carefully considered. I think their meaning may be

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conjectured with great probability of the truth of that conjecture, without attributing to them the meaning of being a promise of marriage or the acknowledgment of one. But, at all events, they are much too ambiguous and obscure to constitute a step to so important a relation as that of husband and wife.

In answer to a letter of hers, which was probably sent from Hull in May 1857, containing the marriage cards of Mr. and Mrs. Shears, he congratulates her on her supposed marriage with Mr. Shears, and says that by that marriage she had earned his lasting gratitude, as, on reflection, he had placed himself in a false and painful position with regard to her; that he had promised to do more than he could have performed *when the time* came.

It seems to me that it is impossible to hold this to be satisfactory evidence of any prior future *unconditional* promise of marriage which he was then bound to perform. It may be reasonably supposed to refer to a promise of marriage of some sort, somewhere made,-because the occasion of writing the letter is her supposed marriage to Mr. Shears; he congratulates himself upon being released from a false position; but it may be a reference to a promise of marriage upon conditions which he could not have performed, as the sufficiency of his fortune, or the consent of his relatives. And her answer shows that she had no promise that she could insist upon, for she says that "he knew he *was* and always *had been free.*" The precise date of that letter is not, as far as I can learn, ascertained, but it must have been soon after the receipt of that to which it was an answer, written in May 1857.

But the greatest reliance was placed by the Respondent's Counsel on the letter written by the Appellant on Christmas Day 1857, in which he says he had

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never intentionally deceived her, and had done more than he had promised ("at great risk"). It is entirely conjectural what that promise was, whether it referred to *marriage* at all. Certainly it was not a promise of marriage *in futuro*, for the promise referred to had been already performed. It would be quite unsafe to rely upon it as an admission of a marriage already complete *per verba de præsenti*. It must in that case have been a marriage agreed upon and carried into effect since the dates of the letters last referred to, at which time she acknowledged that he was then entirely free. It is a mere conjecture what promise is referred to. It may be something that was connected with her then present condition which he was desirous to conceal, and which she wished to disclose; an event "which could be avoided and which would be equally unwelcome to him and to her," and he strongly urges upon her her duty to keep it secret. He says in the closed record that the letter referred to her threat to disclose the illicit intercourse if she had a child.

If we are to treat the statement of that letter as an acknowledgment of a previous marriage, it may possibly refer to the marriage at Rostrevor, which he had concurred in at her request, and which had caused him to incur a great risk by the danger of offending his relations and injuring his pecuniary prospects. But as to a promise to marry *in futuro*, the letter seems to me, I own, wholly insufficient to prove it.

In the absence of any proofs of a promise of marriage, evidenced by writing, it becomes unnecessary, in my mind, to consider whether any *copula* referable to it, and so connected as to make it valid, ever took place in Scotland.

There is no proof of *copula* in Scotland prior to August 1857 which can be judicially relied upon. She

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denies it altogether, and the proof of it by some expressions in a letter of hers as to what occurred on the fifth story of Mrs. Gemble's house, and which the Appellant insists upon as proof of a *copula* there, cannot, I think, be considered as proof of that fact.

In July, or the beginning of August 1857, they met at Waterford, in Ireland; and at Malahide, Newry, and Rostrevor, from that time to the 15th August, on which day the Roman Catholic marriage took place, they unquestionably cohabited together as man and wife. Any promise subsequent to the first of these days, if made in Scotland (which it must be in order to constitute a step towards a Scotch marriage), could not be a complete marriage by a subsequent *copula* in Scotland, forming a part of a series in an illicit concubinage begun and continued for a considerable period of time out of Scotland. I do not dispute that according to the authorities such a previous habit of long illicit intercourse, if laid aside and repented of, might render a promise with a subsequent *copula* on the faith of it, a sufficient marriage according to the law of Scotland, as is explained by Lord *Glenlee* and Lord *Pitmilly* in the case of *Sim* and *Miles* (*a*). The same question is also discussed in the case of *Hoggan* and *Craigie* (*b*). I do not think it necessary, however, to discuss this question, as no promise to marry in future can be proved; nor is it necessary to consider the very important question whether, if there was a marriage by *verba de futuro* in Scotland, *subsequente copula* there, it was by the law of Scotland anything more than a binding agreement, not an actual marriage, and was put an end to by the subsequent regular marriage to Mrs. Forbes in the month of June 1858.

(*a*) 8 Shaw & Dunlop, 97.
(*b*) McLean & Rob., 942-971.

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My opinion in this case, which I have formed after due care and so as to entertain ultimately no doubt upon it, is founded entirely upon the dry and simple question of fact that there was nothing like satisfactory proof of a marriage in Scotland *per verba de præsenti*, nor of any by promise of future marriage there, or indeed anywhere, with a subsequent *copula* in that country connected with it. And therefore I am bound to give my advice that your Lordships should reverse the judgment of the Court of Session, and affirm the sentence of declarator of freedom and putting to silence.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, in these conjoint actions of declarator of freedom and putting to silence, and of declarator of marriage, the question to be decided is the same, viz., whether the Appellant and Respondent are lawfully married persons?

The onus of establishing a lawful marriage rests in each case upon the Respondent, and it can only be satisfied by clear and satisfactory proof of the fact.

The Respondent asserts that she became the wife of the Appellant either by reason of a contract of marriage by interchange of consent *per verba de præsenti*, or by a promise of marriage *subsequente copulâ*, or by a regular marriage, with due religious ceremony, in Ireland. It is to be observed that the two first grounds upon which the existence of a marriage is relied upon are to a certain degree inconsistent with each other. It does not seem very probable that there should exist at the same time an actual marriage *per verba de præsenti*, and a marriage resulting from a promise followed by *copula*, whichever of the two is supposed to have preceded the other. And it is not a circumstance favourable to the Respondent, that, at the

close of the argument, her Counsel have not been disposed to rest her case upon any one ground, but have contended that in this, or that, or the other way, a marriage is proved to have taken place. Even with regard to the acknowledgments supposed to be derived from the correspondence between the parties, they have been unable to adopt a decided line, and say whether they must be taken to relate to an actual marriage or to a mere promise of marriage. And with respect to the marriage in Ireland, they have used it either as valid in itself, or as proof of the recognition of a previous marriage. The whole of the voluminous evidence is thus thrown loosely before your Lordships, in order that you may extract from it proof of a marriage in one or the other of the ways insisted upon by the Respondent.

It appears to me that there was a great deal of preliminary matter dwelt upon at considerable length in the course of the argument on both sides, which is not very material to the question to be decided. For instance, it could hardly be necessary to occupy time in ascertaining the exact condition in life of the parents of the Respondent, which at best could have only a remote bearing on the probability or improbability of a marriage taking place between the parties. If the fact of the marriage is proved, the question of antecedent probability or improbability is entirely put aside, and if it is not proved, all previous speculations about it are useless. So, and for the same reason, I think it unimportant to settle the exact mode in which the parties originally became acquainted, when they met on board the Boulogne steamer. Nor is it necessary to enter into any consideration of the propriety of the Respondent's conduct, or the object which she had in view in renewing a single day's acquaintance after an interval of ten months, by means of a letter which it

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may be supposed could as easily have reached her cousin through the regular channel as through a private and almost unknown hand. There seems also to be no occasion to dwell upon the correspondence immediately after its commencement, or to ascertain with any accuracy which of the two, the Appellant or the Respondent, was more forward to adopt a familiar and intimate style of address to the other. The character of the early part of the correspondence is certainly unusual, and not exactly what might have been expected between persons who, when it began, had been only once in each other's company ten months before, and who continued to write in the same strain for more than two years without having met again. It must be admitted, whatever opinion may be entertained of their ultimate objects and intentions, that both parties were indulging in rather a hazardous interchange of sentiment and feeling. Whether from the beginning there was a preconceived design on the part of the Respondent to entangle the Appellant in a matrimonial engagement, and the Appellant (as his Counsel alleges) was not unwilling to amuse his leisure hours in this imaginative and romantic intercourse, but without any ulterior views, I will not stop to consider. The only use made of the earlier correspondence is to endeavour, from the tone and character of it, to establish the great probability that if the parties ever met again, a more intimate relation would be established between them. All that has a direct and more immediate bearing upon the question of marriage will be found after the period when the parties met in Edinburgh in February 1857. I should therefore have omitted all notice of the previous conduct and correspondence of the parties if they had not been regarded by one of the learned Judges of the Court of Session, Lord *Curriehill*, as serving "to indicate the purpose

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for which the meeting in Scotland took place." But the remarks which I shall make upon the early intercourse between the parties must be considered rather as an introduction to the case than as any substantial part of it. Whether the object of the Respondent in joining the *Sœurs de la Charité* and going to Constantinople was in order to be nearer the Appellant, and whether she availed herself of the invitation of Lady Straubenzee too forwardly and eagerly, that she might have an opportunity of meeting him, are circumstances which may be dismissed from consideration, as having no bearing upon the question of a subsequent contract or promise of marriage. The occasion of their meeting at Galata seems to have been produced by the Appellant himself. The Respondent says he sought her out and met with her there. The Appellant alleges that she furnished him with her address, and asked him to call, but it clearly appears that her address was communicated to him on his arrival in the Bosphorus at his own request. It is at Galata, the Respondent asserts, that the first mutual promise and engagement to marry took place. This assertion is denied by the Appellant, and there is not only no proof of it, but subsequent circumstances render it highly improbable. And one can hardly avoid an observation in passing upon the way in which the Respondent invariably alleges upon every occasion when she meets the Appellant that he promised her marriage. If any such promise was made at Galata, it is utterly unaccountable that when the Respondent availed herself of Lady Straubenzee's invitation to the Crimea, she should have arrived there, and been near the Appellant for several days without his taking any notice of her. The fact appears from one of her own letters written after she had left the Crimea, in which she says, "It is useless to tell you what attracted

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me to the Crimea, at the risk of being frozen to death. It is to no purpose recapitulating what secret instinct pointed out to me your little hut; how in spirit I begged and prayed to be let in for mercy's sake, for pity's sake. No, you were invulnerable for a whole fortnight; you resisted the small plaintive voice." The Respondent alleges that during her stay in the Crimea the Appellant told her he was in great pecuniary embarrassments, and dependent upon an uncle who did not wish him to marry; that she proposed to him to break off the engagement which had been entered into at Galata, to which he would not agree, and endeavoured to persuade her to a secret marriage, and, among other suggestions, proposed that they should be privately married in the Greek chapel at Balaklava. All this is denied by the Appellant, but he asserts that in their interviews in the Crimea "great familiarities ensued between them." What actually happened there may be in some degree collected from the correspondence which afterwards passed between the parties. It appears to me to be clear, from a letter written by the Respondent after they parted in the Crimea, that there must have been some talk (at least) about marriage, and that the Appellant had interposed a difficulty with respect to money matters, and his obligations to his uncle. All these things are alluded to in this letter, and it has never been alleged by the Appellant that they were the mere imagination of the Respondent. Whether the circumstances connected with the debt and the promise to the uncle were true, or were a mere pretence and excuse for putting off a marriage, is another question.

With respect to the Appellant's assertion of familiarities in the Crimea, it is sufficient to say that there is no evidence on the subject. The conclusion which I draw from the correspondence at this period is, that

the interviews at Galata and in the Crimea, but more especially at the latter place, had raised an assurance in the mind of the Respondent that the Appellant was willing to marry her, if the suggested obstacle which he had interposed could be removed; and that her feelings, not to say her passions, had been highly excited by the expectation which had been thus created, and that her mind dwelt strongly and expressed itself passionately upon the prospect of the anticipated gratification of her wishes.

The letters of the Appellant, on the other hand, were of a character to elicit from the Respondent frequent complaints of their coldness, whether their tone and manner were designedly adopted by the Appellant for the purpose of checking the hopes which he had previously raised, or indicated the real state of his feelings towards her. Certainly nothing could have occasioned greater discouragement to the Respondent than the non-fulfilment of the Appellant's promise to visit her at Bebeck on his way home from the Crimea, and his returning by the Danube and Vienna, for the avowed purpose of avoiding a meeting. Whatever engagement may have been entered into at this period is of small importance, as it was entirely at an end when the Respondent left the Crimea,—a fact which appears from the evidence of Lady Straubenzee, and which was distinctly admitted by the *Lord Advocate* in his able argument for the Respondent. Lord *Curriehill* himself says that, on the parties meeting in Scotland in February 1857, there had not been a concluded agreement or promise to marry; so little foundation does there appear to be for his conclusion that the meeting in Scotland was for a purpose indicated by anything which had previously passed, or for supposing that it had been arranged beforehand.

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The early period of the history of the parties having been, thus shown to have a very slight influence (if any) upon the important part of the case upon which I am entering, I shall dismiss all that has been urged in argument with respect to the Appellant's correspondence with Mrs. Bellamy, the Respondent's sister, in which it is said he intimated to her that no marriage could ever take place between them, with this single observation, that the purport of the letter may have been exactly what the Appellant asserts, and yet that, having been written in the year 1856, it is not inconsistent with the fact of the alleged subsequent contract or promise of marriage in Edinburgh in the year 1857. To this period then, when the material part of the case really commences, I now proceed.

I collect, from the condescendence of the Respondent, and from the evidence, that the Respondent went to Scotland not upon any invitation of the Appellant, but that having heard that the Appellant was stationed at Leith Fort, she proceeded to Edinburgh with her friend Miss Macfarlane, for the sole purpose of having an opportunity of meeting the Appellant again. Be this as it may, the parties are now brought together in a place where alone the Scotch marriage could have been contracted, and where the evidence therefore becomes of essential importance.

Before entering upon the case as applicable to this period, it may be useful to consider shortly the two modes by which irregular marriages may be contracted in Scotland. The one is by a deliberate expression of mutual consent *de præsenti*, which may be proved by witnesses who were present at the time, or by the subsequent serious and intentional acknowledgment of the parties, whether verbal or otherwise. The other is by a written promise of marriage followed

by a *copula* occurring in consequence of the preceding promise. This species of marriage may, like the other, be proved by subsequent acknowledgment, but only by an acknowledgment in writing.

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It was argued on the part of the Appellant that a promise, *subsequente copula*, does not amount to a contract of marriage, but is only evidence of it. I collect, however, from the text writers upon the subject, that a promise of marriage followed by *copula* together constitute marriage, from a presumption or fiction that the consent *de præsenti*, which is essential to marriage was, at the moment of the *copula*, mutually given by the parties in consequence of the anterior promise. It would seem, therefore, that the contract cannot be referred back to the antecedent promise, but can be dated only from the time when the mutual interchange of present consent is supposed to be given. As this description of marriage is peculiar to Scotland, it is obvious that everything which is essential to the contract, viz., both the promise and the *copula*, must have taken place there, and must be distinctly proved, either directly or by written acknowledgment, to have each of them this local requisite. These being the two kinds of irregular marriages in Scotland, with their modes of proof, I proceed to examine the evidence by which the Respondent endeavours to establish that in one or other of these ways she became and is the lawful wife of the Appellant.

The Respondent went to Edinburgh in January or February 1857, and took lodgings at Mrs. Gemble's in Saint Vincent Street. The Appellant was in the habit of visiting her there; but Mrs. Gemble says that "Miss Macfarlane was always present when he called, either in the room itself or in an adjoining room, from which everything that passed could be overheard." Under these circumstances it is alleged by the Respondent

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in her condescendence, that on or about the 12th April 1857, in this house in Saint Vincent Street, the Appellant and Respondent solemnly acknowledged and declared each other to be husband and wife; that they read through the Marriage Service of the Church of England together, and at the conclusion of it the Appellant said to the Respondent, "This makes you my wife according to the law of Scotland," or used words of similar import. If clear and satisfactory evidence of this solemn acknowledgment and declaration could have been adduced, it would not be very material that the Respondent happens to have stated it to have occurred on the 12th April, which (on turning to the almanack for the year 1857) appears to have been Easter Sunday, Mrs. Gemble having deposed that the Appellant "visited the Respondent every day, Saturdays and Sundays excepted, on which days" (she adds) "he never called."

But the only evidence in support of this important allegation of the Respondent is derived from this witness, Mrs. Gemble, who says that "she recollects one afternoon hearing Major Yelverton reading in the room where the Pursuer was. She did not take notice how long the reading continued. It appeared to be earnest reading, and in a religious tone." It is unnecessary to say that such a statement as this is wholly insufficient to establish the truth of the Respondent's allegation. And all circumstances considered, it seems highly improbable (even if Mrs. Gemble heard the Appellant reading in a solemn tone at any time) that it could have been what the Respondent describes. It has already been proved by this same witness that during the Appellant's visits at her house, Miss Macfarlane was always in the room with them, or in another apartment which opened into it, "from which she could hear all that was said."

But Miss Macfarlane, upon being rather boldly interrogated by the Appellant's Counsel "whether she ever, during her stay at Mrs. Gemble's, heard the Defender, or the Pursuer and Defender, read over the Church of England Marriage Service," distinctly answered, "No." Now, if this solemn declaration and acknowledgment had been previously arranged and was seriously intended, but was not meant to be divulged until some future occasion, it is unaccountable that it should have been made in a place where it was certain to be overheard by Miss Macfarlane; and if it were not intended to be kept secret, and was the result of a deliberate purpose of matrimony, it is difficult to understand why she was not called in to witness it. According to Mrs. Gemble, there had been a previous distinct avowal on the part of the Appellant of his matrimonial intentions towards the Respondent, for he said to her on one occasion, "If I marry Miss Longworth, I will marry the cleverest girl in Edinburgh." These words she afterwards changed to "When I marry," &c., making them amount to a declaration by the Appellant that a marriage had been agreed upon. I own that I am always suspicious of the accuracy of a witness who undertakes, after a great lapse of time, to speak to expressions which (as appears by this instance) may be turned to a different meaning by the alteration of a single word, and I am compelled to doubt whether the Appellant made the remark to Mrs. Gemble either in the one form or the other, when I find that Miss Macfarlane, when questioned upon the subject, and having the very words put to her, has no recollection of having heard them, and when they are inconsistent with the Respondent's whole case as to the secresy of their matrimonial engagements. There appears, therefore, to be an entire want of direct evidence of this

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alleged mutual interchange of present consent, and the allegation itself is attended with great improbabilities; but the deficiency of proof and all the difficulties suggested by the circumstances may, of course, be removed by subsequent distinct and unequivocal acknowledgments of its having taken place.

Before proceeding, however, to consider the letters immediately following the Respondent's departure from Edinburgh, which are relied upon as furnishing evidence to this effect, it is necessary to advert to the other ground of marriage, which also belongs to this period, viz., a promise of marriage in Scotland, followed by *copula* there; because the supposed acknowledgments are indiscriminately and indifferently applied both to the actual contract of marriage in Edinburgh, which we have been considering, and to a promise of marriage alleged to have been there made. There is no distinct allegation of the exact time to which this promise is to be assigned, but I assume that it must be referred to a period before the alleged solemn acknowledgment and declaration, as there would seem to be no reason or occasion for it afterwards. A promise of this kind must (as has been already stated) be in writing. It is not pretended that there is any direct evidence of the requisite description, and the proof that any such promise was made in Scotland must therefore be found (if at all) in the letters subsequently written by the parties. It must be borne in mind that it is a part of the Respondent's case that this supposed promise was not immediately followed by *copula;* for she alleges, in her condescendence, that she "entertained conscientious scruples about the propriety of a marriage not celebrated by a priest, and accordingly refused to cohabit with the Appellant without having gone through a ceremony of marriage by a priest of her own faith,

and that the Appellant became so pressing in his solicitations that they should cohabit together as husband and wife that she left Edinburgh about ten days" (in fact two days) "after the acknowledgment and declaration before mentioned."

The Appellant, on the other hand, asserts that secret and illicit sexual intercourse with the Respondent occurred during her residence at Mrs. Gemble's. And it is one of the many strange circumstances connected with this extraordinary case, that the fact of *copula* at this period, which would be favourable to the Respondent, so far as she relies upon a mere promise of marriage, and therefore prejudicial to the Appellant to the same extent, should be denied by her, and asserted by him. It is sufficient upon their contradictory allegations to say, that although some stress has been laid upon an unexplained expression in one of the Respondent's letters, reminding the Appellant of "the little room, five stories high, where they had been so happy" (the Respondent's lodgings at Mrs. Gemble's being a flat upon the third floor), there is nothing beyond the assertion of the Appellant to prove that there was any sexual intercourse between them at this period.

The Respondent then leaves Edinburgh, having (as she alleges) not only received the Appellant's promise to marry her, but having actually become his wife, by a solemn and binding contract of marriage, into which they had both deliberately entered. Direct evidence of either the promise or the contract is wholly wanting. But the Respondent contends that they are both unequivocally proved by the letters which afterwards passed between her and the Appellant.

The most convenient mode, perhaps, of examining this part of the case will be to consider the effect of the correspondence down to this period, in which, if

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acknowledgments are found, they can refer only to the alleged marriage or promise of marriage in Scotland, separately from the letters written after the religious ceremony in Ireland.

It is reasonably to be expected that the greatest light will be thrown upon the doubtful question of the Scotch marriage, upon which the parties are at issue, by the earliest letters which passed after they separated in Edinburgh. According to the Respondent's case, the object of her long-cherished hopes and aims had been attained, so far at least as that the Appellant had become irrevocably bound to her by the sacred tie of marriage. In the very first of her letters after this event, we should naturally look for some expression of satisfaction, if not of happiness, that, so far, her wishes had been accomplished, and such language as the following could hardly have been anticipated:—"I am like unto the woman in the Gospel, troubled about many things; troubled not to see you, with unspeakable longings for an absent loved one; doubts and fears about the durability of requitement; misgivings lest the ardency of attachment was merely the effect of proximity, lest a two months' trial will not prove its emptiness." And again,—"What is the use of their saying 'You must keep quiet,' when I cannot trust; when by trusting I may lose both life and life hereafter (or, at least, the fruits of a life of patient suffering); for if you did deceive me again in that last not-to-be-remedied point, the physical part would give way. On the other hand, my whole nature demands the risk—the trial to be made; it has wound itself too closely about you to give you up now; even writing about it I have little sharp nipping pains at my heart. If I made my hand write a farewell, I should have a palpitation there and then. I shall die without you. Is it worse to die with you?"

It may be observed, once for all, that the enigmatical character of the correspondence, which might be intelligible to the parties themselves, renders it extremely difficult for a third person to be certain that he has put a correct interpretation upon it. It appears to me, however, that the passages to which I have just referred are wholly irreconcileable with the idea of the Respondent having recently become the lawful wife of the Appellant, even if we adopt the suggestion that the uneasiness of mind which it describes arose from the Respondent having denied herself all connubial intercourse with the Appellant until their union had received the sanction of some religious ceremony.

It is a circumstance worthy of remark, that in all the correspondence there is no allusion by either party to the alleged ceremony at Mrs. Gemble's, nor is the name of husband and wife ever given by one to the other. Lord *Deas* accounts for this by saying that "they could not write plainly as husband and wife lest their letters might be seen, and betray what the Defender deemed it vital to conceal." But this supposed continual care to avoid detection is hardly consistent with his view of the unguarded expressions contained in some of the letters which he thinks furnish evidence in themselves that this relation existed between the parties. The tone of the correspondence during this period seems to me to be strongly opposed to the probability of the existence of any marriage or any binding promise of marriage when the Respondent left Edinburgh. I cannot bring my mind to look at the letters which passed upon the subject of the wedding cards of Mr. and Mrs. Shears in the same light in which they are viewed by Lord *Deas*. His Lordship thinks that the Appellant's letter, written upon this occasion, "must either mean

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simply that the Defender had promised to marry the Pursuer, or that he had promised to avow a marriage with her already made, at some future time, or upon the occurrence of some future event." It may here again be remarked, what perplexity and uncertainty are produced by this doubtful and alternative mode of applying the supposed acknowledgments contained in the letters. The passage relied upon by the learned Judge seems to me not to be susceptible of either of the interpretations which he has suggested. The words are, "By your marriage you have earned my lasting gratitude, as, on reflection, I found that I had placed myself in a false position with regard to you, and one of all others the most painful to me, viz., that I had promised to you to do more than I could have performed when the time came." These words evidently point, not to an absolute promise of marriage, but to some unexplained promise with a condition, which the Appellant had previously made at some time and place which are left altogether uncertain, and which promise he then found he would have been unable to perform if the time of performance had arrived. The other interpretation of Lord *Deas* is much less to be accepted, for the language is wholly inapplicable to an existing marriage, and to a promise to avow it at some future time or upon some future event. But I do not consider it so important to determine the exact meaning of the Appellant's words on this occasion, as to observe the way in which the Respondent answers him. It must always be borne in mind that the Respondent's case is, that at this time she was actually married to the man who is congratulating her upon becoming the wife of another. It is not difficult to imagine the indignation which a wife would feel at the degrading idea thus entertained and expressed of her conduct and character. It is

difficult to gather any distinct meaning from the impassioned language of the Respondent, but these do not appear to me to be the natural expressions of a wife exposed to such serious and unjust imputations from her husband. "Oh! Carlo, to suspect me of such a thing! I, whose very life is ebbing away for you! I, who have sacrificed all but God to you! I, who have lain at your heart, and in sight of Heaven been called yours! I, whose very soul is yours, to be so *mistaken!*" And again, "That you should judge me guilty of such an infamous thing! God help me! I do not know how to bear this last blow. Oh, that He would take me! And you seem to be glad of it. Oh, no, no! don't say that; don't say it is a comfort for you to be rid of me. If it is, you know you are, you always have been, free." My noble and learned friend on the woolsack thinks that this letter is consistent with the Respondent's case, as he considers that there had been a promise of marriage given, which had not been followed by *copula.* But he overlooked the fact that according to the Respondent's case there subsisted at this very time an actual marriage, which had taken place in Edinburgh, which bound the Appellant to her irrevocably. How the words, "you are, you always have been, free," can be reconciled with the existence of this marriage, it is difficult to understand.

It is not necessary to dwell upon other parts of this portion of the correspondence, which throughout is certainly not in the usual style of epistolary intercourse between husband and wife. But I must not omit to notice the letter relating to the cathedral at Manchester, to which great importance has been attached on both sides. I do not think, after all the consideration which has been bestowed upon it, that

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we have arrived at the real object which was to be accomplished by the proposed meeting at this place. But I cannot agree in the view of this letter which appears to have been taken by my noble and learned friend on the woolsack. It appears that so early as May 1856 the Respondent had darkly hinted at some scheme which might gratify the Appellant's wishes and satisfy her own conscience, but which she says she has not the courage to propose. She seems to refer to this again in a subsequent letter in October 1856, in which she says, "If for yourself you have any definite wishes with regard to me, one desire might have been fulfilled which would have been a gleam of sunshine on my dismal life, and would not have interfered with your liberty, present position, or future prospects." No further allusion seems to have been made to this scheme, nor do I find any proposal or suggestion afterwards for a meeting for any purpose connected with a religious ceremony. But the parties, a month before the letter which we are about to consider, had evidently arranged a plan for proceeding together upon some expedition, for on the 10th June 1857, the Respondent, writing from Wales, says, "If I do not get rid of my cough, shall I go to France, and you come when you feel disposed, and then can we go the Highland expedition? After which I can either settle in Edinburgh or Hull until we can go to Germany." It appears to me that Manchester was only intended to be a place of rendezvous, to carry out the proposed expedition; for, in the letter in question, she says, "We are going to Manchester in a week or ten days, and shall probably remain there about that time. You can fetch me from there if you choose, after they return home here." Having thus resolved to leave her friends for the society of the Appellant, she seems

to have imagined a mode of giving some solemnity to a step which would so seriously compromise her, by suggesting that he might *prefer* meeting her in the old cathedral where her forefathers lie, to their other project. That this was not to be the occasion of any religious ceremony appears from the Respondent telling the Appellant that he would have "nothing to say or do," and that "if *safety* was his object, what she suggested was merely the same as being present at mass making him a Catholic."

What then can be fairly and reasonably conjectured to have been the Respondent's intentions? It appears to me to be at least probable that what she intended was, that before proceeding upon the proposed expedition, the necessary result of which may be anticipated by what afterwards occurred in Ireland, she wished to bind the Appellant closer to her by a solemn vow of fidelity pledged to him in some consecrated place, which might "satisfy her conscience," to use her own expressions in the letter of May 1856, and would not, in the words of the letter of October 1856, interfere with the Appellant's "liberty, present position, or future prospects," and would clothe their intercourse with the appearance, at least, of a religious sanction. That it had nothing in view of a more binding obligation is apparent from the ease and tranquillity with which the Respondent, when this plan is defeated, turns almost flippantly in her next letter to another. "Manchester scheme" (she says) "all over. Do not know when they will go. The steamer, I believe, calls at Belfast; would that do better for you? If so, say, and arrange everything for me to do."

The meeting in Ireland is stated by the Respondent to have been the result of a proposal contained in

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letters of the Appellant, who was in Dublin, saying that he was now prepared to agree to her demand that the marriage should be celebrated formally by a priest of the Roman Catholic Church, and inviting her to come to Ireland that this might be done. No letters of this description have been produced, but that an arrangement had been made for their meeting at Waterford, I think, appears clearly from a letter of the Respondent, in which she says, "I will write you again directly I get off, and should you not meet me at the steamer on my arrival in Waterford, I will write you to Gayfield, letting you know where I am." I cannot, however, find the least trace of the proposed meeting in Ireland being intended to afford an opportunity for going through a religious ceremony. On the contrary, the letter which the Respondent wrote upon arriving at Waterford, and not finding the Appellant there, leads me to the conclusion that no such object was then in the contemplation of the parties. She there says, "If you cannot come, will you send me a telegraphic message where I am to go? I shall never return home; it is all over there." But why, it may be asked, should it be all over at home, and why should she never return there, if her visit to Ireland was for the purpose of obtaining a religious sanction to a marriage which had legally existed before? And it seems to me that the most complete refutation of the Respondent's allegation upon this subject is to be found in the fact, that upon the parties meeting in Ireland, sexual intercourse immediately took place, and they began to cohabit together as man and wife.

Having brought the case to the point at which a new scene is opened, and a new ground laid for establishing the Respondent's allegation that she is the lawful wife of the Appellant, it may be as well to

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pause for a moment, and to observe again that hitherto no evidence is to be found, either directly or by acknowledgment, of any marriage or promise of marriage in Scotland. And this is the more important to be noticed, because it renders it in the highest degree improbable that any expressions contained in the letters written after the religious ceremony at Rostrevor were meant to apply to this antecedent period.

The absence of that species of evidence which might be expected to be derived from the letters written after the supposed marriage in Scotland seems to have struck Lord *Curriehill*, who says, "The only other thing which I have had any difficulty in reconciling with the conclusion to which I have come, is, that in the correspondence between the parties after they left Edinburgh in April 1857, there are expressions not easily reconcileable with a consciousness of the parties that they were irrevocably married." But his Lordship, after stating that there are other passages in the letters which indicate the reverse (which I confess my inability to discover), suggests as an explanation, "that the parties although they privately interchanged matrimonial consent, may not have been aware of the legal effects of what they had done." But is there any reason for supposing that the Respondent would not have been perfectly aware of the effect of such an acknowledgment and declaration as that which she alleges in her condescendence to have taken place in Edinburgh, if it had really taken place?

Returning, then, to the meeting of the parties in Ireland, the Respondent feels that the intercourse between her and the Appellant previous to the ceremony at Rostrevor is almost destructive of her case. She therefore labours hard to disprove it. She alleges in her condescendence, and in her answer to the

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Appellant's statement of facts, that sexual intercourse was not commenced until the 15th August, the day of the ceremony at Rostrevor, and she endeavours, by a device, which I am unwilling to characterize, to baffle and perplex the persons who were likely to be called as witnesses to prove the earlier intercourse, by procuring Miss Crabbe to personate her to them. But whatever denial may be made of this intercourse, or whatever contrivance may have been resorted to, to prevent the evidence of it, it is too clearly and distinctly proved by many disinterested witnesses to admit of the slightest doubt. It is impossible to deny that the cohabitation of the parties at this period has the most important bearing upon the whole of the Respondent's case. It entirely disposes of the reason alleged for the absence of intercourse after the supposed marriage in Edinburgh, and throws an additional doubt on the existence of such marriage. It tends very strongly to show that the object of the meeting in Ireland was not to remove an impediment to cohabitation by giving a religious sanction to a previous marriage, but that the ceremony at Rostrevor was the result of an after arrangement.

The purchase of the wedding ring on the 25th July does not at all militate against this supposition, because, as the parties were to travel together as man and wife, it was necessary to provide the Respondent with this indication of the relation which they were to assume.

These observations bring me to the consideration of the last ground upon which the Respondent rests her case, the effect of the religious ceremony at Rostrevor, either as a valid marriage, or as an acknowledgment of a previous marriage or promise of marriage, subsisting between the parties.

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In considering this question, it appears to me that the evidence of Bishop Leahy may be altogether put aside, except as to his opinion of what is necessary to constitute marriage by the laws of the Roman Catholic Church. What passed between him and Father Mooney, or between him and the Respondent in the absence of the Appellant, cannot possibly be used as evidence against him.

With respect to Father Mooney, I am reluctant to dwell upon the part which he played in this transaction, except so far as it may be necessary to suggest caution with respect to his testimony, not indeed as to the ceremony itself, but as to the prior declarations of the Appellant. It seems very strange that, having been led by the Respondent to understand that the Appellant was a Protestant, Father Mooney should have thought it necessary immediately before the ceremony to ask him whether he was a Roman Catholic, and should have been satisfied with his answer that he was a Protestant Catholic, and then think himself at liberty to proceed at once to celebrate a marriage which he must have known to be void if the Appellant was a Protestant, and which was attended with the unusual condition of having his surname confided to him only under the seal of confession.

It seems to me to be unnecessary to say more than a very few words upon this marriage, which clearly has no validity. The Act of 19 Geo. 2. c. 13. draws a strong line of demarcation between Papists and persons who have been, or have professed themselves to be, Protestants, within twelve months before the celebration of a marriage. The Act says nothing about a person professing himself to be a Roman Catholic, and therefore if the Appellant had in the

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strongest and most unequivocal language told Father Mooney before the ceremony that he was of that religious persuasion, it would not have had the slightest effect upon the validity of the marriage. I think it is abundantly proved that the Appellant was a Protestant within the meaning of the Act of Parliament. He was born of Protestant parents, and was brought up by them. Whenever proof is given of his attending any religious service, it is always in a Protestant place of worship; and it would not have affected the conclusion to be drawn from these circumstances if it had been proved that he was remiss in his attendance at church, or expressed any carelessness or indifference about religion.

But this ceremony at Rostrevor and the circumstances attending it are pressed into the service of the Respondent's case, as proof of the existence of a previous marriage in Scotland. Even what passed in the ceremony itself has been insisted upon as amounting to an acknowledgment that such a marriage existed; but, looking to the words said to be used by the parties from the marriage ritual of the Roman Catholic Church, this position can hardly be seriously maintained. It is upon the previous declarations alleged to have been made to Father Mooney that the principal reliance of the Respondent is placed. This renders it necessary to consider the degree of credit to which Father Mooney's testimony in that respect is entitled. If the marriage of the parties depended merely upon the ceremony which he had performed, he must have known that it was utterly void. But if it were the religious complement of a previous marriage, it was not without its efficacy. The Respondent, in her letter asking for a certificate, appeals to Father Mooney by the strongest motives that would be likely

to influence him. She first appeals to his feelings upon a false statement of the expected birth of a child, as to whose baptism abroad she expects to have some difficulty. She then assures him that he will find, when the time comes to proclaim the marriage, that he has not only saved two individual souls, but rendered an incalculable service to the Catholic Church. And she adds an additional motive by telling him that she has "much hopes of her husband." Father Mooney yielded too readily to her solicitations, and gave a certificate, the purport of which he knew to be false, as it never was extracted from any register, and no witnesses at all were present at the ceremony. He had so far, therefore, committed himself to an act of great impropriety before he was examined as a witness. At that time, he had also been informed by another letter from the Respondent that her object was to establish the existence of a previous Scotch marriage at the time of the Irish ceremony.

Under these circumstances, I cannot help looking at any statement made by Father Mooney of the Appellant's declarations with some suspicion. His evidence is that the Appellant said, "Mr. Mooney, there is no necessity for this; it has all been previously settled or arranged, but I will do it to satisfy the lady's conscience," or words to that effect.

Upon this statement it may be observed, that a very slight alteration in the words attributed to the Appellant would make the whole difference in their meaning. Then the understanding of Father Mooney, that the observation referred to a Scotch marriage, is, of course, no evidence; and it appears upon his cross-examination that the Appellant never used the words "Scotch marriage." I think, therefore, that much reliance cannot be placed upon the accuracy of Father

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Mooney's recollection of the Appellant's expressions. But, assuming his correctness to the letter, and that the Appellant intended to refer to a previous Scotch marriage, the words could only have been used as an inducement to Father Mooney to perform the ceremony in order to satisfy the Respondent's conscience; and being made with this object, they cannot be regarded as such a deliberate and intentional acknowledgment of the previous marriage as the law requires.

Having satisfied myself, upon a careful and anxious consideration of all the evidence, that down to the time of the ceremony at Rostrevor there is neither proof nor acknowledgment of the existence of a marriage in Scotland, and that the *copula* which took place in Ireland was not connected with any supposed previous promise, I proceed to consider whether the later correspondence can be fairly applied to any other relation between the parties, except that which arose out of the circumstances occurring in Ireland. The Respondent's Counsel laid considerable stress upon a letter of the Appellant said to be written in the month of November 1857, in which allusion is made to the Respondent's probably being in the family way, and to the necessity of keeping "the cat in the bag just now;" and they contended that the language of the Appellant was expressive of his apprehension that the secret marriage which had taken place might be discovered. I see no reason to doubt that their view in that respect is perfectly correct. There is nothing in the evidence to show that the Appellant knew precisely the effect of the ceremony at Rostrevor. But whether it constituted a binding marriage or not, he might be, and probably was, equally anxious at this period that it should not be disclosed. His expressions, therefore, would naturally be applicable to the appre-

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hended consequences resulting from the intercourse in Ireland, and they do not require, even if they admit of, any further reference.

The greatest stress, however, is laid by the learned Judges of the Court of Session, whose judgment was in favour of the Respondent, and by her Counsel at your Lordships' bar, and also by my noble and learned friend on the woolsack, upon the letter of Christmas 1857, as amounting to a clear and distinct acknowledgment, either that a marriage or a promise of marriage had taken place between the parties in Scotland. The passage of the letter which is considered to be decisive upon this point is the following: —"I have never intentionally deceived you, and have done more than I promised, at great risk." Lord *Deas* says, "I think the natural construction of this letter is, that the Defender had promised to the Pursuer a secret marriage, and that he had done more than this promise implied by submitting to the Irish ceremony, at great risk of its being known." And Lord *Curriehill* speaks to the same effect.

But why should the promise to which the Appellant refers be marriage? Why should it mean anything else than that he had done more than he promised, by going through the ceremony at Rostrevor? At the best, the meaning ascribed to this passage is entirely conjectural, and, in my opinion, is far too uncertain to form the foundation of a sufficient acknowledgment of a promise of marriage made in Scotland. I use the words here, "promise of marriage," because neither Lord *Curriehill* nor Lord *Deas* considers the language of the letter as amounting to an admission of an actual marriage, but only of a promise, which, of course, would be incomplete without subsequent *copula* in Scotland.

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Upon the subject of acknowledgments, it is impossible to overlook the attempt of the Respondent to supply their deficiency by tampering with one of the Appellant's letters, and changing the word "possibilémente" into "sposa bella mia." This act not only throws suspicion on the Respondent's case, but indicates her impression that it wants the support which is supplied by the fraud, and renders more striking the observation which must be repeated upon this later stage of the correspondence, that there is no interchange of the title of husband and wife to be found in it, nor any express mention of marriage, except in the concluding letter of the Respondent. This Lord *Deas* himself will not dwell upon, "because" (as he says) "it may be open to the observation that it may have been written after a breach was anticipated." And the less weight should be given to it, because the answer which the Appellant returned to it, in which it may fairly be presumed that he either admitted or denied the existence of a marriage, has not been produced, but only the envelope in which it was contained.

It must be quite unnecessary to consider in detail the various recognitions by the Appellant of the Respondent as his wife, both before and after the ceremony at Rostrevor. It was obviously impossible for them to travel together either in Scotland or on the Continent, with the semblance of respectability, without his giving her nominally that character; and any number of acknowledgments made for this purpose would be quite insufficient to constitute or to prove a marriage.

The Respondent has, however, one more ground upon which she rests her claim to have it declared that she is the lawful wife of the Appellant. She

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contends that having, after the ceremony at Rostrevor, returned with the Appellant to Edinburgh, and having there cohabited together as husband and wife, this *copula*, coupled with the preceding promise made in Scotland, is sufficient to constitute marriage. I have already observed that the proof of any such promise in Scotland as that which is here assumed is wholly wanting, and I am unable to adopt the reasoning of the *Lord Advocate*, that a promise made anywhere out of Scotland and not broken off is a continued promise, and must be taken to have been renewed when the parties came to Edinburgh. No doubt, a promise is, in general, transitory, but a promise which, being followed by *copula*, constitutes a Scotch marriage, is essentially local, as all that is requisite to the marriage must take place in Scotland. Even if such a promise is proved by writing (which is essential to its validity), it cannot in any intelligible sense be supposed to have been made in Scotland, merely by the parties afterwards coming into the jurisdiction with the promise unfulfilled, but without any express renewal of it.

But supposing this difficulty to be overcome, and that it should be admitted that a sufficient promise of marriage had been in some manner proved, what *copula*, it may be asked, has there been in Scotland, which can possibly be connected with this promise, so as to be considered as the fulfilment and completion of it? It cannot be disputed that, in order to constitute a marriage by the combination of a promise with a subsequent *copula*, the *copula* must be clearly and distinctly referable to the promise. If the *copula* has taken place before the promise, and is merely continued afterwards, it is of no avail. So, if, after the promise, the *copula* commences out of Scotland, and

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is afterwards continued without interruption when the parties come into Scotland, it is difficult to understand how the character of the *copula*, which, at its commencement, was only illicit connexion, the moment it occurred in a place where, if it had originally begun, it would have had a legal effect, could be at once and entirely changed. In the present case it appears to me that to connect the *copula* in Edinburgh with any antecedent promise supposed to have been given there, would be utterly opposed to the Respondent's whole case. She alleges that after the contract of marriage at Mrs. Gemble's, she refused, from conscientious scruples, to cohabit with the Appellant without having gone through a ceremony of marriage by a priest of her own faith. When the connexion, therefore, began in Ireland, it could not have been by reason and in consequence of what had antecedently passed, but (looking at the circumstance most favourably for the Respondent's character) she must have yielded to it in anticipation of the religious ceremony which she expected would shortly take place. It seems therefore impossible to refer the cohabitation, which continued after this ceremony, back to any promise in Edinburgh, when the Respondent has expressly stated that she never would have consented to it on the footing of the promise itself.

I entirely agree in the view taken by the *Lord President* on this point of the Respondent's case, that "when the parties, not having had intercourse on the faith of the promise, entered upon a course of carnal intercourse clearly not attributable to the promise, the continuance of the carnal intercourse so commenced, without any renewed promise, cannot be referred back to the antecedent promise." And I consider with him, that it is far more reasonable to refer the con-

tinued cohabitation of the parties, when they arrived in Scotland, to a positive celebration of marriage, accompanied by cohabitation, than to refer it to a supposed promise at some antecedent period.

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At the close of this long examination of the circumstances of this case, one more observation must be made, to complete the view of the body of negative evidence against the existence of a Scotch marriage in either of the modes founded upon by the Respondent. It appears that, soon after she had armed herself with the false certificate of Father Mooney, the Respondent commenced an action of declarator of marriage, which she afterwards abandoned. In this first declarator the Respondent relied entirely upon the ceremony in Ireland, never making the slightest suggestion of any marriage or promise of marriage in Scotland. And this is the more striking, as in her condescendence in this declarator she expressly mentions proposals of marriage made to her by the Appellant at Constantinople, and alleges that the Appellant subsequently continued his attentions while she resided in lodgings, in the house of Mrs. Gemble in St. Vincent Street, Edinburgh, thereby showing that the omission to set up the contract of marriage upon which she now relies cannot be attributed to mere oversight. The absence in this first proceeding of all allusion to her right to a declarator of marriage founded upon a contract or promise in Scotland strikes me as furnishing a strong additional presumption against the case subsequently advanced, and which appears to me to be utterly destitute of proof.

I have examined the whole of the evidence in this case with the utmost anxiety, and have weighed, as carefully as I was able, the elaborate and able arguments which were presented to the House for several

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days by the Counsel on both sides, knowing what serious interests are involved in the issue of this inquiry. Whatever opinion I have formed has been he result of my own impartial judgment, founded upon a consideration of the whole of the case, and without any prejudice, or even a wish in favour of either of the parties. There is much to regret and much to condemn in the conduct of both of them, but it is no part of my duty, and it is far from my desire, to endeavour to adjust the balance of culpability between them. I have only to pronounce my opinion judicially, that he Respondent has wholly failed in establishing the fact of her lawful marriage with the Appellant, and that the Interlocutor of the Court of the First Division ought to be reversed, and that of the *Lord Ordinary* affirmed.

Lord Kingsdown's opinion.

Lord KINGSDOWN :

My Lords, the question which we have to decide is one of law only, not of honour or of morals. Has the Court below rghtly determined that the Respondent has proved herself to be the lawful wife of the Appellant ? The onus is upon her. The Irish marriage, as a legal marriage, may be laid out of the case ; as a promise of future marriage it is equally out of the case. If it can operate at all, it is only as evidence of a preceding legal marriage. The Respondent must rely upon a marriage in Scotland, either by agreement *per verba de præsenti*, or by promise *sequente copulâ*. Both the promise and the *copula* must be in Scotland, and the *copula* must be connected with the promise.

As to the correspon ence between the parties before the meeting at Galata, on the one hand I can see nothing of serious courtship with a view to matrimony on the part of the Appellant ; on the other hand,

though it is quite clear that the Respondent was anxious for a marriage with the Appellant, there is nothing which indicates that she contemplated any other than a lawful and honourable connexion. They met at Galata in August 1855.

Her allegation on the two records is, that at Constantinople (*i.e.*, at Galata) the Appellant sought out the Respondent, courted her for his wife, gained her affections, and promised and engaged to marry her, and she promised to intermarry with him, and to accept him for her husband; and she says that these promises were frequently renewed, but that she insisted that the marriage should not take place till the termination of hostilities; and upon this footing an engagement to delay the marriage was entered into between the Appellant and Respondent. This statement is not very consistent with the admitted fact that at this time there was only one meeting between the Appellant and Respondent. At this interview nothing is suggested by the Respondent to have been said by the Appellant as to the marriage being secret.

During the visit to Lady Straubenzee she says that difficulties as to the uncle were started, and the Appellant urged her to consent to a secret marriage, which she refused to do.

Now, all agreement or proposal of marriage is positively denied by the Appellant, and there is no direct evidence to prove it. The question is, whether it is to be inferred from the correspondence. The letters show very clearly that the subject of marriage had been discussed between them, and that he had raised obstacles to it, and that she was endeavouring to remove them. But the question is, Do they show that he had pressed or proposed a marriage of any sort, public or private, or show only that he had stated reasons, true or false, why he could not marry?

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The latter seems to me to be the natural inference, as well from what was written as from what was done by the parties. I cannot find anywhere in this part of the correspondence any allusion to objections on his part to a public marriage, or desire for a private one. All her arguments are addressed to removing obstacles to any marriage. He had represented (as he now asserts untruly) that one of his difficulties was an engagement with his uncle not to contract a marriage which might possibly have the effect of excluding the uncle's son from the succession to the title of Avonmore. She believed this objection to be serious, for she argues against its obligation at great length. But this objection would have been just as fatal to a secret marriage as to a public one. Is it likely that the same man, who was urging this objection, should, at the same time, be pressing her to consent to a secret marriage; and that if the question had been between a public marriage which she required and a private marriage which he required, this should never once have been adverted to in plain terms? I think, from the tone of her letters, that she would gladly have agreed to any marriage, and from the tone of his, that he would not have agreed to any marriage which would be legally binding upon him, either public or private. In the letter from Bebek, of the 6th May 1856, she says, "I conclude you will not entertain any of my plans. I have another, which might gratify your wishes and satisfy my conscience, but I have not now the courage to propose it." It is said that this means a secret marriage. How could she want courage to propose a secret marriage, if that were, as she alleges that it was, the very thing which he was urging?

It is clear from her letters at this time that he was writing to her in terms of coldness, with a view, as

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she thought, if possible, to alienate her affection from him. He had seen the danger of the course that he was pursuing, and he determined to stop before it was too late. She had pressed him again and again, in the most warm and passionate language, to visit her at Bebek. In his letter, of which only a portion is produced, 25th May 1856, he clearly indicates that he is determined not to indulge again in the dangerous familiarities which had taken place at the last interview between them. "I fear my self-command, when we do meet, will almost annoy you as much as my want of it when we last met."

On the 2nd July she writes a letter, which can hardly have been an answer to this, but in which she refers to his having talked of fraternal affection for her, and at the same time, in very passionate language, suggests that if they cannot enjoy happiness straight, it might be wisdom to enjoy it crooked. This is the letter which refers to dangerous proximity, odic force, and other matter not necessary to be further alluded to. He receives this, and determines not to trust himself to another interview, and therefore goes back to England by the Danube, avoiding Constantinople.

From Vienna, on the 13th July 1856, he tells her what he had done, explaining at the same time that the fraternal scheme was a physical impossibility. This letter, coupled with that of the 25th May, distinctly informed her of the reasons for his conduct—that he could not trust himself. Before he wrote again he had received two letters from her, but what they were does not distinctly appear. On the 16th August he wrote again from Dublin, much to the same purpose.

The effect of these letters, I think, is,—"I cannot marry you; if we meet again the result may probably

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be your ruin; to avoid this I came round by the Danube; knowing this, you must decide for yourself whether we are to meet again or not." In answer to this she writes a most passionate letter, pressing in the most urgent terms for another meeting, and says, "If for yourself you have any definite wishes with regard to me, one desire might have been fulfilled, which would have been a gleam of sunshine on my dismal life, and would not have interfered with your liberty, present position, or future prospects." This was the 3rd October 1856. She says in this letter that she desires his exact address, that she might not waste time in hunting for him. He did not, therefore, either seek to see her himself, or spontaneously offer her an opportunity of seeing him. It does not appear that they met at this time; and she soon afterwards went on a yachting expedition for several weeks with a family named Close, without having learned his address.

On her return in December, she writes from Valetta, sending him her address at the Marchioness de Belinay, in London, and begging him to write to her there.

In answer to that letter, he writes to her the note now torn, in which he says, "Knowing I cannot gain on your terms, I will not try on mine, necessity-made." This must have been written on the 29th December 1856, and was apparently received by her on her arrival in England. He wrote again a short Italian note on the 5th January 1857. She then went to Abergavenny, he being quartered in Scotland.

At this time it seems to me quite clear, not only that he was not urging a secret marriage, but that there was no subsisting promise of marriage, and that he had done what he could to avoid further personal intercourse with her, telling her why he did so. Yet,

after this, she goes down to Scotland in order to be with him.

I have gone into this part of the case so fully, partly out of respect for the arguments of Counsel, of which so large a portion was addressed to it, and partly because the relation in which the parties stood towards each other at this time has a strong bearing upon the probability or improbability of what is alleged to have taken place afterwards. The examination, I think, shows, that it is in a very high degree improbable that the Appellant would either actually marry the Respondent in Scotland or enter into any engagement to do so.

She alleges that during this visit to Scotland he promised again to marry her, and proposed a private marriage, and also actually did marry her, but that she refused to cohabit till there was a religious celebration of the marriage. This appears to me, having regard to the feelings and opinions of the lady, as they are to be gathered from her letters, utterly incredible.

As to the Irish marriage, it is not necessary to suppose that she, or even he, held it a mere mockery. But did either of them intend or suppose that it was to be a marriage in law, making them legally husband and wife? I think certainly not. She was a Roman Catholic. She considered that the marriage by a priest of her church, though not making her in point of law a wife, would, in a religious point of view, justify or excuse their cohabitation. She thought that she might become his wife in the eyes of God, though not in the eyes of man. Something was to be done which might satisfy her conscience and leave him free. As early as May 1856 she had alluded to some plan which might gratify his wishes and satisfy her conscience,

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but which she had not then the courage to propose. This must have referred to some scheme of this description.

On the 10th July 1857 she wrote referring to some project which they had in view, and suggesting that they might meet in the old cathedral at Manchester. "You have nothing to say or do. If safety is your object, what I suggest is merely the same as being present at mass making you a Catholic." What was to be done there, is, no doubt, left in great doubt; but I think it can only mean that whatever passed then would no more make him a husband than being present at mass would make him a Roman Catholic. When this scheme was abandoned, she wrote, on the 5th July, and said, "I have said the word, will do all you ask me, and name the time and place as soon as I am able."

She afterwards went over to Ireland, met him on the 29th July at Waterford, and they travelled together through Ireland from South to North, cohabiting as man and wife, without any ceremony having been gone through till they reached Rostrevor in the county of Down. Her allegation is that she refused to cohabit till the solemnization of a marriage before a priest, and that he invited her to come over to Ireland that this might be done.

What passed at the marriage ceremony is quite consistent with his statement, that it was intended to have no legal effect, that he went through it to satisfy her conscience. It is consistent also, no doubt, with her statement, that there had been a previous legal marriage. Her allegation on the record is that this was a legal marriage, and that the Appellant then was or professed himself of the Roman Catholic religion, and that he stated this to the priest by whom the

marriage was celebrated, at the time of the ceremony. The statement of the witness is in direct contradiction to this allegation of the Respondent.

The whole importance of Father Mooney's evidence rests on the words which he alleges the Appellant to have used. "There is no necessity for this, it has all been previously settled or arranged; but I will do it to satisfy the lady's conscience." In the first place, these expressions are in themselves ambiguous, and it is impossible to rely on the memory of the witness for the precise language used, even if there were not other serious reasons for refusing to place full reliance on his testimony.

The only evidence in support of the Respondent's case of any value seems to me to be contained in the two letters of the Appellant, so forcibly commented upon by the *Lord Advocate*. First, the letter of May 1857, addressed to the Respondent on her supposed marriage, in which he says, "I found on reflection that I had promised to you to do more than I could have performed when the time came." Second, the letter of Christmas Day, 1857, "I have never intentionally deceived you, and have done more than I promised, at great risk." The first, I think, must, in all probability, refer to marriage, but at what time or under what contingencies or conditions does not appear. Or it may mean, as the *Lord President* suggests, that he had promised to take steps to facilitate a marriage. It may have been a promise to marry after the death of his father or uncle, or in the case of the marriage of his elder brother, or any other contingency. At all events, it does not prove any promise in Scotland. It may refer to a promise at Galata, or at Balaclava, or to a promise contained in some of the letters not produced.

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The second refers, I think, clearly to the ceremony at Rostrevor. Supposing that an absolute unconditional promise in Scotland to marry could be inferred, which I think it cannot, there must, in order to constitute a valid marriage, be *copula* in Scotland, founded on the promise. Here the parties cohabited for some weeks in Ireland, before any *copula* in Scotland. After the cohabitation in Ireland, he went to visit his relations in that country, and she went to Scotland to wait for him. But Scotland was not the domicile, nor the home of either. They went afterwards on a tour to the Highlands, and then, after remaining some time in Edinburgh, they separated, she returning either to Hull or Abergavenny, and he remaining with his regiment. Can it be said that this is a *copula* connected with the promise in Scotland, if any was made there? I think not.

Upon the whole I am satisfied that the Respondent has failed to prove that she is the lawful wife of the Appellant, and I think therefore that the judgment must be reversed in both cases.

The *Attorney-General:* Before the question is put, your Lordships will permit me to make an observation or two upon the form of the judgment. The *Lord Ordinary* pronounced a general judgment, assoilzieing the Appellant from the conclusions of the action of declarator of marriage.

Mr. *Rolt:* Of course, my Lords, if my learned friend is heard, I shall have to be heard upon this afterwards.

The *Attorney-General:* It is a matter upon which your Lordships would wish to be informed. I wish to submit that by the law of Scotland, after a decision given even by a jury, it is competent to refer the

matter to the oath of the party. Numerous authorities have so determined, and in one case it appears to have been done even after your Lordships' House had reversed a judgment, and remitted it to the Court below to proceed with the cause (*a*). All that I desire to submit to your Lordships is this, that the proper decree to give effect to that which I understand your Lordships to decide would be to reverse the Interlocutors appealed from, and to remit the cause with a declaration that the Respondent has failed to prove any valid marriage according to the law of Scotland either by a contract *per verba de præsenti* or by promise of marriage *subsequente copulâ*. Such declaration to be without prejudice to the question whether it is competent to the Respondent, if she should demand so to do, to refer the matter to the oath of the Appellant.

(*a*) Reid *v.* Hope (28th January 1826), 4 Shaw, 405; see also Pattinson *v* Robertson, 9 Sec. Scr., 226; 4th Dec. 1846; where the *Lord Justice-Clerk Hope* said,—"I should have had great difficulty, in the circumstances of this case, in refusing this reference. It would not have been a sufficient ground with me for refusing it, that it was tendered after an appeal;" and where *Lord Moncreiff* added, "It has been a fixed rule of the law of Scotland for centuries, that a party, Pursuer or Defender, even after all other methods of discussion or evidence have failed, may say to his adversary,—'Though I cannot produce other evidence to show the truth, I appeal to your own oath—to your own conscience as a Christian man.' And our law, though different from others, allows this, on the simple principle, that however strong the case a man may apparently have in documents or apparent evidence, he ought not to be permitted to maintain it against conscience; and if he cannot himself swear to the facts as averred by him, and which, if true, must be known to him, or deny upon oath the material averments of his adversary, though not otherwise proved, he shall not be permitted to avail himself of the appearance of evidence on the one side, or the absence of it on the other, to take a judicial sentence contrary to the truth as revealed by his own conscience. This appears to me to be a very reasonable principle, but at any rate it is a fixed principle in our law, that such a reference to oath is in general competent to be proposed, and competent to be proposed at every stage of the proceedings."

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The LORD CHANCELLOR: My Lords, I do not think I can possibly advise your Lordships to accede to any such suggestion. What I have now to do is to ask your Lordships to give your decision upon the question, whether the Interlocutor is to be reversed or not.

The question was then put in the usual way; and thereupon judgment issued as follows:

JUDGMENT OF THE HOUSE.

July 28th, 1864.

Ordered and *Adjudged*, That the said Interlocutor complained of in the said Appeal be and the same is hereby reversed: And it is *Declared*, That the Inner House (First Division) of the Court of Session ought to have refused the Reclaiming Note of the Respondent (Maria Theresa Longworth) against the Interlocutor of the Lord Ordinary of the 3rd of July 1862 in the proceedings mentioned; and adhered to the said Interlocutor of the Lord Ordinary, save as to damages and expenses; this House directing that no damages (*a*) or expenses be given to the Appellant, the Honourable Major William Charles Yelverton, in either action, or in the conjoined actions, up to this time: And it is further *Ordered*, That the cause be and is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this Declaration, Direction, and Judgment.

(*a*) Major Yelverton's summons "for putting to silence," prayed damages.

TIPPETTS & SON—SIMSON, TRAILL, & WAKEFORD.