JUNE 20, 1867.

MARIA THERESA LONGWORTH or YELVERTON, *Appellant*, *v.* The HON. WILLIAM CHARLES YELVERTON, *Respondent.*

Oath of Party—Declarator of Marriage—Interests of Third Party—Judgment of House of Lords—Competency—*Miss L., in action of declarator of marriage against Y., obtained decree in her favour in the Court of Session, which decree was reversed by House of Lords, and cause was remitted to Court of Session "to do what was just and consistent with this judgment." After application of this judgment, but before extract, she presented petition for a reference of the whole cause to the defender's oath. On the record it appeared that Y., after the alleged marriage with Miss L., married in regular form Mrs. F. a widow, by whom he had children before this action was commenced, and who was no party to the action.*

HELD (affirming judgment), (1.) *That a reference to oath is in the discretion of the Court;* (2.) *Considering, that the interests of Mrs. F., a third party, were involved, the reference was, in the exercise of the discretion of the Court, properly refused;* (3.) *That a reference to oath is as competent after a final judgment of the House of Lords as after a judgment of the Court of Session unappealed from;* (4.) *That a decree under such reference, if allowed, would be a judgment* in rem, *and binding on Mrs. F.*

OPINIONS, *That since* 11 Geo. IV. *and* 1 Will. IV. c. 69, *a reference to oath in actions of declarator of marriage is incompetent, per* LORD CHELMSFORD, L. C., *dub.* LORD COLONSAY.

That in all cases of declarator of marriage a reference to oath is incompetent, per LORD CRANWORTH.[1]

The House of Lords by their order of 28th July 1864 (*ante*, p. 1256) remitted this cause to the Court of Session. The respondent, Major Yelverton, there moved to apply the judgment; whereupon the appellant asked leave to put in a condescendence, setting forth *res noviter veniens ad notitiam.* The substance of the new matter was admissions of a legal marriage made by the respondent. The Court refused the appellant's application, and applied the judgment, declaring, that she was not the wife of the respondent.

The appellant then, after this application of the judgment, but before extract, tendered a reference of the whole matter to the oath of the respondent. The Court refused the reference to oath as improper in the circumstances.

The pursuer, Miss Longworth, appealed against the interlocutor of the First Division refusing a reference to the oath of Major Yelverton, the defender.

The appellant in her *printed case* stated the following reasons for reversing the interlocutor:—1. Because a regular marriage ceremony is no impediment or bar to a declarator or proof of a prior irregular marriage. 2. Because collusion is not to be presumed or made a basis of judgment without proof. 3. Because the marriage of Mrs. Forbes with the respondent was not entered into *bonâ fide*, or without notice of his prior marriage with the appellant. 4. Because the matters of discretion, on which the judgment appealed against is rested, are not such as ought to arrest the operation of a well established rule of law.

The respondent in his *printed case* stated the following reasons for affirming the interlocutor:—1. Because in applying the judgment of the House of Lords of 28th July 1864, the Court of Session carried into effect the directions given to them by your Lordships, and it would have been incompetent for the Court to have granted the appellant's application. 2. Because, irrespective of the remit of the House of Lords, the application was incompetent. 3. Because, even if the appellant's application were otherwise competent, she had not shewn that due diligence had been used by her in bringing it forward, and because, even although she had, the matter sought to be established would not have affected the ultimate judgment pronounced. 4. Because the proposed reference to oath is incompetent, in respect the status and interests of Mrs. Forbes or Yelverton, the respondent's wife, and the issue of their marriage, which are inseparable from those of the respondent himself, are involved in the cause. 5. Because the reference to oath is incompetent in respect of the judgment of the House of Lords of 28th July 1864. 6. Because the reference to oath is incompetent, in respect of the criminal nature of the

[1] See previous report 3 Macph. 654; 37 Sc. Jur. 322. S. C. L. R. 1 Sc. Ap. 218; 5 Macph. H. L. 144; 139 Sc. Jur. 635.

charges involved in the cause. 7. Because even though the reference to oath were competent, it was properly rejected in the exercise of the discretionary power of the Court below.

The *appellant* argued *in person* (assisted by *J. C. Smith*).—The ordinary rule is to grant the reference to oath in all cases at any stage of the cause before extract. Though in point of form it is discretionary in the Court to allow the reference, yet the Court exercises its discretion on fixed rules, and there is no instance, in which the Court has ever refused the reference in a declarator of marriage. It was allowed in *Dalziel* v. *Richmond*, M. 9407; *Gray* v. *Leny*, Hume's Dec. 414; *M'Innes* v. *More*, 3 Paton, App. 40. There can be no distinction in principle between allowing a reference after a judgment of the House of Lords on a question of fact, and allowing it after a verdict of a jury in the Court of Session—*Clark* v. *Hyndman*, 20th November 1819, F. C.; *Wallace* v. *Robertson*, 2 D. 204; *Binnie* v. *Willox*, 6 D. 520; *Murray* v. *Murray*, 1 D. 484; *Bannerman* v. *Melville*, *ante*, p. 323. The cases of *Reid* v. *Hope*, 4 S. 402, and *Pattinson* v. *Robinson*, 9 D. 226, are no authorities against the appellant.

It is objected, that the reference ought not to be allowed, because it would be to compel the respondent to swear *in suam turpitudinem*. But it does not follow, if he were to affirm all the questions, that he must be guilty of bigamy, for that depends on the ingredient of a *malus animus*, which may be wanting, and would negative any crime; or he may defend himself by declining to answer. The better opinion is, that since 1 Will. IV. c. 37, § 9, and 15 and 16 Vict. c. 27, no person can now object to be a witness on this ground, though he may decline to answer any question that might criminate himself. The cases of *Roger* v. *Cooper*, 2 S. 444; *M'Eachern* v. *Ewing*, 3 S. 9; and *Thomson* v. *Young*, 7 S. 32, were before the former Act.

Another objection to this reference is, that the interests of Mrs. Forbes, a third party, may be prejudiced. But justice to the appellant requires this remedy at all hazards, and Mrs. Forbes, having had notice, cannot set up this objection. Besides, the objection, if good, would equally apply to the ordinary remedy by proof. It is an objection which, if allowed, ought to be set up by Mrs. Forbes being cited as a party, though it seems never to have been the practice to call the second wife—*Jolly* v. *Macgregor*, 3 W. S. 85; *Pennycook* v. *Grinton*, M. 12,677; *Wright* v. *Wright's Trustees*, 15 S. 767. Besides, a reference to oath, being a transaction, cannot be used to prejudice third parties, and could not be used as *res judicata* against third parties—*Kerr* v. *Martin*, 14 S. 1104; *Norris* v. *Gilchrist*, 9 D. 466; *Robertson* v. *Melville*, 22 D. 893; *Gillespie* v. *Russel*, 19 D. 897. Mrs. Forbes would not be barred from afterwards raising an action of declarator of marriage—*Dalrymple*, Ferguson, Rep. No. 1. Another objection to this reference is the fear of collusion; but there can be no force in this objection, when it is perfectly certain there is no collusion in this case.

The *Attorney General* (Rolt), and *Anderson* Q.C., for the respondent.—The House, having made a remit to the Court of Session for the sole purpose of applying the former judgment, had no jurisdiction to allow a reference. There is no evidence of such a reference being allowed after a judgment of this House exhausting the merits. The case of *Reid* v. *Hope*, 4 S. 402; *Pattinson* v. *Robertson*, 9 D. 226, do not prove the contrary. Besides, the application was too late, for the judgment had been already applied. Even if the reference were competent in other respects, it is made incompetent by the Judicature Act—6 Geo. IV. c. 120, § 10, and by 11 Geo. IV. and 1 Will. IV. c. 69, § 36; *Muirhead* v. *Muirhead*, 8 D. 786. The reference is incompetent, because the interests of third parties are involved. The general rule is, that a decree fixing *status* is *res judicata* against all the world, being a judgment *in rem*—*Huguenin* v. *Meddowcroft*, 4 Moore, Pr. C. 386; *Perry* v. *Meddowcroft*, 10 Beav. 122; Bell's Pr. § 2265. In strictness, Mrs. Forbes would be entitled to intervene as a party, on this very ground of the judgment being *in rem*—*Dalrymple* v. *Dalrymple*, 2 Hagg. 54; *Jolly* v. *Macgregor*, 3 W.S. 85. The true principle on which a reference to oath is allowed is, that it is confined to cases where the two parties litigating represent all the interests involved—*Per* Lord Moncreiff in *Adam* v. *Maclachlan*, 9 D. 560; *per* Lord Pitmilly, *Tower* v. *Mein*, 11 July 1829, F.C. In the cases where the reference has been allowed, no interests of third parties were involved—*Pennycook* v. *Grinton*, 15 Dec. 1752, F. C.; M. 12,677; Fergus. Rep. 95; Elch. Notes, Proof, No. 10; *Dalziell* v. *Richmond*, M. 9407; *Gray* v. *Leny*, Hume, 414. And in the first case it was not a reference to oath at all in the strict sense, but only the ordinary oath. A reference, being a transaction, must necessarily bind only the parties to it, and if the necessary result is to bind those parties, then it must be incompetent—Ersk. i. 2, 8; Forbes' Inst. iv. 1, 8; Bell's Pr. § 2263; Stair, iv. 44, 6; Voet, xii. 2, 20; Digest xii. 2, 2-5. Another objection to the reference is, that it involves criminality in the defendant, *i. e.* adultery and bigamy, and therefore is incompetent—Stair, iv. 44, 5; Bankton, iv. 32; Hume's Com. 336; Bell's Pr. § 2263; Ersk. iv. 2, 9.

[LORD CHANCELLOR.—How could an oath extorted under a reference of this kind be used in a criminal prosecution?]

The better opinion is, that it would be good evidence in a prosecution against the party who emits the oath. Courts have always refused to allow questions on oath which are *in suam turpitudinem*—*Roger* v. *Cooper*, 2 S. 444; *M'Eachern* v. *Ewing*, 3 S. 410; *Maccallum* v. *MacCall*, 3 S. 551.

But admitting the competency of the Court to grant a reference, still it is not a matter of right, but of discretion, and in the exercise of a sound discretion the reference should be refused—*Ritchie* v. *Mackay*, 3 W. S. 484; Bell's Pr. § 2863; *Pattinson* v. *Robertson*, 9 D. 226. The reasons for refusing are the injury that may be done to Mrs. Forbes without her being represented; it would put a dangerous power in the respondent, and might lead to renewed litigation; if the respondent refused to answer on the ground, that his answer may criminate him, he would be taken as confessed, and the same injury would indirectly result to Mrs. Forbes. Therefore, on all the points, the Court below rightly refused this reference.

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—This is an appeal from an interlocutor of the First Division of the Court of Session, refusing to sustain a reference to the oath of the respondent upon a minute of reference tendered by the appellant for that purpose, and finding the appellant liable to the respondent in the expenses incurred by him since the 12th of December 1864, the date of lodging the minute of reference to oath. The proceedings which had taken place in the cause (which was a conjoint action of declarator of marriage and putting to silence) before the proposed reference to oath must be shortly recalled to your Lordships' attention. The two actions having been conjoined and debated before the Lord Ordinary, his Lordship, on the 3d of July 1862, issued an interlocutor finding, that, in the action of declarator of marriage, the appellant had not instructed that she was the wife of the respondent, and assoilzied the respondent from the conclusions of the action, and, in the action of declarator of freedom and putting to silence, declaring against the appellant, conform to the conclusions of the said action. The appellant presented to the First Division of the Court of Session a reclaiming note against the above judgment of the Lord Ordinary, and on the 19th of December 1862, the Lords pronounced an interlocutor recalling the interlocutor of the Lord Ordinary, and in the action of declarator of marriage finding, that the appellant had instructed, that she was the wife of the respondent, and in the action of declarator of freedom and putting to silence, assoilzieing the appellant from the conclusions of the said action. This interlocutor was brought by appeal to this House, and after long argument at the bar your Lordships ordered, that the interlocutor complained of be reversed, and declared, that the Inner House (First Division) of the Court of Session ought to have refused the reclaiming note of the present appellant against the interlocutor of the Lord Ordinary of the 3d of July 1862, and to have adhered to the said interlocutor of the Lord Ordinary, save as to damages and expenses, and further ordered, "that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration, direction, and judgment."

The respondent presented the usual petition to the Court to apply the judgment, which was opposed on the part of the appellant, for whom a note was lodged, praying the Court to supersede consideration of the petition in the mean time, and craving leave to put in a condescendence of *res noviter veniens ad notitiam*. The proposed condescendence alleged, that, since the judgment of this House, the pursuer was informed, that Major Yelverton, the respondent, when on a visit to his deceased brother, the Hon. Frederick Yelverton, in the presence of Sarah Mallin, who was at the time attending the brother as a sick nurse, acknowledged and admitted, that he had married the appellant in Scotland, and renewed his marriage vows in Ireland; that Sarah Mallin died in the Meath Hospital, and when she was in a dying state, and attended by the Rev. Edward George Campbell, informed him what had passed between the two brothers, and Mr. Campbell communicated it to the appellant. The Court of the First Division, after argument, pronounced an interlocutor on the 10th of December 1864, by which they refused the desire of the appellant's note, and applied the judgment of this House.

After this interlocutor, a minute of reference to oath was tendered on behalf of the appellant, which minute was in the following terms:—"The pursuer in the said declarator of marriage hereby refers the whole cause to the oath of the defender, the said William Charles Yelverton;" and a petition was presented, praying the Court to sustain the minute of reference to oath. The Court of the First Division, on the 10th of March 1865, pronounced the interlocutor appealed from. Against this interlocutor and a subsequent one approving of the auditor's report on the account of the expenses, this appeal is brought.

It must be taken as a settled rule of law in Scotland, that there may be a reference to the oath of a party at any time between the closing of the record and the extracting of the decree, although every other mode of proof has been previously tried and has failed. If the reference to oath is made originally, there can be no subsequent trial, because, as Lord Stair says, (iv. 44, 2,) "the party to whose oath of verity a point is referred may refuse to swear till the adverse party not only renounce all other methods of proof, but depose, that he knows of none, and particularly, that he is possessed of no probative writing by which he may make good his plea."

But, however strange it may appear to those who are unaccustomed to the practice of the Scotch courts, that a party having attempted to prove a case by testimony, and having failed, should be allowed, almost at the last moment, even after final judgment, to resort to a new method

of proceeding of which he had his choice from the first, yet such being the law we are bound not to question but to administer it. The reason why this reference to oath is allowed at so late a stage of the proceedings seems to be, that until judgment is extracted the cause is still in Court. This being so, there can be no difference in principle between the case where a judgment is final in the Scotch Courts because not appealed from, and a final judgment of this House, which equally requires extract before execution can issue. It was argued for the respondent, that the appeal from the interlocutor having brought away the whole record, the cause is as much out of Court as it is after extract. But this is not correct. Pending the appeal, the record was taken away from the Court, and all proceedings upon it were suspended; but upon the judgment of the House being pronounced, it was ordered, "that the cause be, and is hereby, remitted back to the Court of Session, to do therein as shall be just and consistent with this declaration, direction, and judgment." So that after the judgment of the House, the record was sent back to the Court of Session, and was exactly in the same position as if a final judgment had been pronounced by that Court, which was either unappealable or unappealed from, and the cause remains in the Court until extract. I think, therefore, that the appellant's reference to oath was competent in respect of the time at which the minute was tendered.

But it was contended on the part of the respondent, that a reference to oath is inadmissible in a case of declarator of marriage, and especially where, as in this case, the interests of third persons are concerned. With respect to the competency of a reference to oath in a declarator of marriage, I am strongly of opinion that, whatever may have been the practice formerly, since the Statute 11 Geo. IV. and 1 Will. IV. cap. 69, such a proceeding is incompetent. The 33d section of this Act enacts, "that all actions of declarator of marriage," and other enumerated consistorial actions, "shall be competent to be brought and insisted upon only before the Court of Session." And by the 36th section, "no decree or judgment in favour of the pursuer shall be pronounced in any of the consistorial actions therein before enumerated until the grounds of action shall be substantiated by sufficient evidence." In the case of *Muirhead* v. *Muirhead*, 8 D. 786, which was an action of separation *a mensâ et thoro*, brought by a wife on the ground of ill usage, the husband admitted on the record conduct which in the opinion of the Lord Ordinary was sufficient to justify the conclusions of the action. Upon the case coming before the Court upon a verbal report by the Lord Ordinary for instructions, Lord Mackenzie said, and the rest of the Court concurred, "I read the words 'sufficient evidence' as meaning sufficient evidence independent of the admissions of the party. I think the Act meant entirely to exclude admissions, and requires extrinsic evidence." Now, it is quite clear, that an admission upon the record can never be regarded as evidence, but the Court could not have meant to say, that if proof had been led in the case admissions proved to have been made by the husband, that he had ill used his wife, would not have been evidence, and might not have been sufficient evidence. But an oath upon reference is not evidence at all. As my noble and learned friend Lord Colonsay said in this case in the Court of Session, "A reference to oath is not what we are accustomed to regard as testimony proper. It is neither parole nor documentary evidence. An oath taken upon a reference is not the examination of a witness. It is what is technically called oath of party." And again, "It is not to be taken in connexion with documentary or parole evidence, that has been adduced. It may be hostile to all other evidence. It is to be judged by itself; and the question for the Court to determine, upon an oath emitted under a reference, is not what upon the aspect of the whole cause appears to be the truth of the matter, but it is, What has the party sworn?" As a party by referring to the oath of his adversary renounces all other species of proof, and as the "oath emitted under a reference" is not evidence, a decree pronounced in a declarator of marriage, founded upon this mode of proceeding, would be a violation of the express words of the Statute, as the grounds of the action would not have been substantiated by "sufficient evidence." A reference to oath, therefore, cannot, in my opinion, be competent in this description of action.

But supposing a reference to oath to be admissible in an action of declarator of marriage, it ought not to be permitted in any case where the rights and interests of third persons would be prejudiced by a decree founded upon an oath affirmative of the reference. That would be the necessary consequence of such a decree in the present case. It appears upon the record, that after the time of the alleged marriage with the appellant the respondent was married in June 1858, in Edinburgh, to Mrs. Forbes, the widow of Professor Forbes. A decree, therefore, establishing the validity of the marriage of the appellant and the respondent must necessarily deprive Mrs. Forbes of the status which she acquired by her marriage with the respondent; and this consequence would be the result of what is called a "transaction" or "judicial contract" between persons engaged in a litigation to which she is no party.

It was said, however, by the appellant, that the reference to oath could not prejudice Mrs. Forbes, because the oath affects the parties to the transaction only; and that no judgment on it could be *res judicata* against her, being *res inter alios acta*. It is quite true, that the oath of verity would not affect third persons; but there may be cases in which it must of necessity prejudice, if not conclude, the rights of strangers to the proceeding. In such cases the reference to oath is

not admissible, for, as was said by Lord Moncreiff, in *Adam* v. *Maclachlan*, 9 D. 560, "the general case of reference to the oath of party is where the party referring and the party referred to stand with opposed interests on the matter referred, and where no other interest is involved." Upon this point I may borrow the language of Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. 58, where he says, "the lady of the second marriage is not here made a party to the suit. She might have been so in point of form if she had chosen to intervene. In substance she is, for her marriage is distinctly pleaded and proved, and is as much, therefore, under the eye and under the attention and under the protection of the Court as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction, that if the first marriage be legally good, the second marriage must be legally bad." If upon the oath of reference in this case a decree were made, establishing the marriage of the appellant and respondent, there can be no doubt, that it would be binding upon Mrs. Forbes. It would be a judgment *in rem*, which has been defined to be "an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose" (2 Smith's Leading Cases, 439); and the characteristic quality of a judgment *in rem* is, that it furnishes in general conclusive proof of the facts adjudicated, and is binding on all persons whomsoever. If the reference to oath were to be admitted in this case, Mrs. Forbes might be deprived of her status as a wife by a decree made behind her back, and which she would never afterwards be able to question.

But there is a further objection to the reference to oath in this case—that the answer to it in the affirmative (an answer which the appellant must be taken by her reference to expect to receive) necessarily involves an admission by the respondent of criminality. If the respondent were to admit the alleged marriage between himself and the appellant, he must confess, that he has been guilty of bigamy. And this necessary effect of an affirmative answer plainly appears upon the record, where the marriage of the respondent with Mrs. Forbes at a date subsequent to the time of his alleged marriage with the appellant is pleaded. The appellant says in her *printed case*, "There are cases in which a reference to oath was refused on the ground, that a party should not be compelled to swear *in suam turpitudinem*. But all these cases were prior in date to the Act 1st of William IV., cap. 37, the ninth section of which abolished infamy as a ground of incompetency of a witness. The Act 15th and 16th of Victoria, cap. 27, further removes all impediments to the admissibility of the evidence of persons convicted of crime. In the present state of the law of evidence it is obvious, that in the cases of *Roger*, 2 S. 444, *M'Eachern*, 3 S. 9, and *Thomson*, 7 S. 32, the parties who were not obliged to swear *in suam turpitudinem* would now be competent and compellable witnesses in similar cases, with the option of declining to answer any question, that might criminate themselves." Such is the argument of the appellant upon this point, which leaves out of view one very important consideration. It is true, that the party in a case of reference to oath may refuse to answer, if thereby he would criminate himself. But then the effect is, that he is taken to have confessed the facts which are referred to his oath, and exactly the same benefit results to the party making the reference as if he had obtained an affirmative answer. In the present case, therefore, the respondent, if he answered affirmatively, would have admitted himself to have been guilty of bigamy; or, if he had refused to answer, Mrs. Forbes would have been conclusively deprived of all the rights which she had acquired by her marriage with the respondent.

All the preceding objections to the reference to oath in the present case naturally lead to the conclusion at which I have arrived—that the Court of Session was right in refusing to sustain the reference. There can be no doubt, that a reference to oath is not the absolute right of a party, but that it is in the equitable discretion of the Court to admit or to refuse. Lord Moncreiff, in the case of *Pattinson* v. *Robertson*, said:—"I could not, perhaps, go quite so far as Lord Congleton did in the case of *Robertson*, though in that approved by LORD CHANCELLOR LYNDHURST, that the reference to oath is in our law a mere appeal to the equitable discretion of the Court; but I agree so far, that, though regarding it as a legal right to appeal by motion to the Court to that mode of proof as an ultimate *remedium*, it may still be in the discretion of the Court to allow it, under the circumstances of any particular case." Now, assuming, that there may be a reference to oath in an action of declarator of marriage, yet where, as in this case, the interests of a third person are affected, and may be irrevocably bound, and where the effect of the reference may be either to compel the confession of a crime or to conclude the rights of another by a refusal to answer, I think, that the Court of Session were perfectly justified in the exercise of a sound judicial discretion in refusing to sustain the reference to oath in this case, and, that their interlocutors ought to be affirmed.

LORD CRANWORTH.—My Lords, my noble and learned friend on the woolsack having had the goodness to communicate to me an outline of the opinion which he was about to deliver in moving the judgment of your Lordships' House, and concurring as I do with my noble and learned friend in the whole of that judgment, I do not think I am called on to trouble your Lordships with many, I might say perhaps with any, observations.

I wish it, however, to be understood, that though my noble and learned friend has referred to the Statute of 11 Geo. IV. and 1 Will. IV., transferring the consistorial jurisdiction in Scotland to the Court of Session, as being in some respects the foundation of his judgment; and although it may be very truly said, that that Statute confirms the view which may be otherwise taken on the subject, I must confess, that, independently of that Statute, I cannot believe, that it can be the law of Scotland, that in such a case as this there should be a reference to oath. The principle on which that reference is allowed is so clearly stated by Lord Moncreiff in *Adam* v. *Maclachlan* in the passage quoted by my noble and learned friend, that I should be willing to rest my judgment on that authority, even if the Statute had not existed. "The general case" (he says), "of reference to the oath of party is where the party referring and the party referred to stand with opposed interests on the matter referred, and where no other interest is involved."

When that is the case, there is perhaps no absurdity, (so to say,) even at the very last moment of time, in allowing the reference to the oath of a party. But the moment you get beyond that, the moment you get a case in which the interests of third parties are involved, it appears to me to be a proposition that cannot be sustained even upon the authorities which have been referred to, that such can be the law of Scotland or of any civilized country.

There is no doubt that there have been consistorial cases which have been referred to, in which a reference to oath has been admitted, but there has been no such case in which the doctrine has been affirmed by this House, and I cannot admit that that is a principle that could have been properly recognized and acted upon in those cases, if they involved, as I believe some of them did, the interests of third persons, as certainly is the case here.

Even if there had been no marriage with Mrs. Forbes, I very much doubt whether in any case of a question of status, there can be such a reference to oath, because the interests of third persons are necessarily involved. When the question is, whether a person is or is not a married woman, the interests of all the creditors who have trusted her must be involved. Therefore, I think general principle goes far to exclude it in all cases.

But even if that were not so, the last observation of my noble and learned friend seemed to me to be perfectly satisfactory, namely, that it is clear on all the authorities, that such a reference is not the absolute right of any party, but only a right which the Court in its discretion may or may not allow; and it would have been a highly improper exercise of its discretion to have allowed it in this case.

LORD WESTBURY.—My Lords, it is not my intention to give any vote on this question. I was compelled to be absent during part of the argument. As some reference has been made to that absence, I may say it was involuntary, constrained by a severe domestic misfortune. But I had the advantage of hearing the whole of the appellant's address, and if I had felt that there was any reasonable ground for believing that this appeal could be sustained, I should, out of feeling for the appellant, have struggled very much to compel myself to attend during the rest of the argument. But I am obliged to say, that I felt after that address, from the impression which I then received, that there was no ground on which this judgment of the Court below could be questioned. I will not, however, give that in the form of a judicial opinion. I say these few words only as an explanation of the reason of my having failed to attend the whole of the argument.

LORD COLONSAY.—After the expressions of opinion which have now been given, this case is practically decided. Whatever view I may have of it, whatever view I may express, if I express any opinion at all, the judgment must be the same. But in a case of this kind, which I view as one of vast importance to the law of Scotland, I think it incumbent on me to express the opinion that I entertain.

When the case was presented to the Court below, the novelty of a proposition of a reference to oath in such a case appeared to me so great, that I thought it right, after having heard a full oral argument on the subject, to suggest, that the parties should again lay before the Court the argument in a written form, in order that it might be deliberately considered, and it was after having had the benefit of those two discussions as I may call them upon it, that I arrived at the conclusion, that the proposal of the appellant to refer this matter to the oath of the defender was one which could not be admitted under the circumstances. Since then the question has been fully argued at the bar of this House. But in the circumstances in which the case of the appellant was presented to us, I deemed it my duty again to consider and revise the opinion which I had formed, feeling, that perhaps the appellant had not all the benefit she might have derived had she selected a different mode of conducting her case. Having again applied my mind to the case, I have failed to find any ground for altering the judgment which has been pronounced in the Court below.

It appears to me to be a clear proposition in the law of Scotland, that in most cases—I will not, after what has been expressed, say in all cases, but in most cases—a party may apply to have a reference to the oath of the adversary after the case has been decided. Whether that is or ought to be the rule in cases of declarator of marriage may be a grave question. But in a case such as this, and indeed in all cases where reference to the oath of a party is proposed, there

is a discretionary power in the Court to allow the reference or not to allow it. The very form of the proceeding implies that; because when it is proposed to refer to the oath of the adversary the proposal is submitted to the Court, and it requires the approval of the Court before the adversary can be put to oath. Therefore the Court is forced to consider the matter on the proposition which is submitted to it before it can give its approval, and that approval is a matter not limited to the mere form in which the reference is presented. It involves also a consideration of the circumstances of the case, and the propriety of allowing the reference. That is clear from all the authorities and from some of the cases which have been referred to by my noble and learned friend on the woolsack.

That being so, the question which we had to consider was, Whether this was a case in which such a reference to oath should be allowed? There, again, several questions were raised: First, as to the competency of a reference under such circumstances; and, secondly, as to the propriety of the Court exercising its discretion in the way of allowing or refusing the reference, even supposing it to be competent.

Upon the question of the competency of the reference, I do not think it is necessary for me to express any decided opinion. There were certain objections taken to the competency of the reference, which I thought at the time, and still think, to be unfounded.

In the first place, it was objected, that this reference could not be made, because there had been a final judgment of the House of Lords in the cause. I was unable to bring my mind to that conclusion. I was unable to see any logical distinction between the power of the Court below, after a final judgment of this House affirming the judgment of the Court below, and the power of the Court below, if its own judgment had been allowed to remain unappealed; for the rule is, that at any time before extract reference is good. But, further, I think such a conclusion is unfounded, for this reason: When a party has lost his cause in the Court below, and has appealed to this House, and this House has affirmed the judgment, I can conceive a very good reason in policy why, in such circumstances, a reference to oath should not be allowed. But when a party has gained a cause in the Court below, and the adversary drags that party here, and gets an alteration of the judgment, why should the party be precluded in that case from referring to oath? She could not have done it in the Court below in the circumstances in which she then was, for she had gained her case. Therefore, I think it would be a hazardous doctrine, and one which I could not acquiesce in, to hold, that, merely because there had been a judgment of the House of Lords in the case, therefore a reference to oath was incompetent. I certainly should not think it expedient, that, when a party has gone through the whole course of litigation, including the leading of evidence, having chosen that mode of investigating the case, whether it be a question of status or not, there should be such a reference.

Then, again, another point was raised, as to which I have more difficulty, and that is the point as to whether the party can be allowed to refer to an oath in a suit of this kind, looking at the terms of the Statute of William IV. I did not think it necessary in the Court below to pronounce any judgment on that point, because I saw sufficient grounds without dealing with it to arrive at a conclusion upon the case; and though I see great force in the argument, I would rather not now commit myself to any opinion on that point. There is much to be said in favour of the view, that that Statute has shut out such references in case of declarator of marriage and other consistorial causes. But that depends on the meaning that is to be attached to the word "evidence" in that Statute, and to the meaning that is to be attached to the word "admission" in Lord Mackenzie's judgment. Now, I think there is great room for holding, that, in Lord Mackenzie's judgment, at least, the word "admission" meant an admission by the party upon the record, that is to say, that the party merely putting on the record admissions is not enough to entitle the Court to proceed to pronounce judgment in a declarator of marriage. That is not evidence given under the sanction of an oath. According to the course of procedure in the Courts in Scotland, where a matter is admitted, the opposite party does not require to lead evidence to prove it. And we know that in consistorial cases of various kinds it would be perilous to the interests of society to proceed upon admission made by the parties. There was a case under our consideration in this House very lately, which I think affords an illustration of what might happen if such matter were admitted—I mean the case of *Cunningham* v. *Cunningham*. In that case, where a party had, during the life of a woman, and at her death, shewn by his conduct, and where the whole circumstances of the case as judged in this House had shewn, that there had been no marriage whatever between the parties, yet, after an interval of time, when it became his interest or inclination to change the state of affairs, he then chose falsely, as the judgment of this House found, to allege a marriage. Now, we see what peril would attach to the interests of third parties if a reference to oath were admitted in such cases, and I hesitate to hold, without further consideration, that the Statute referred to would shut out such reference to oath in consistorial cases, and that in the judgment of Lord Mackenzie the word "admission" meant more than an admission by the party upon the record.

Then there was another ground that was contended for, namely, that by requiring the party to swear in this case, he was required to swear *in suam turpitudinem*. That is, I think, a graver

question. I think there is much in that, as I stated in giving my opinion in the Court below. But when we come to the question whether, assuming the *primâ facie* competency of this reference, the Court is to exercise the discretion that belongs to it in sustaining or refusing to sustain the reference, I confess that I see every principle against sustaining the reference, and no principle in favour of it. I think it is quite clear that such a rule, as referring to the oath of a party after a case has been fully investigated, is one which, if it exists in any system of jurisprudence at all, must be guarded with a discretionary power of the Court to prevent it being abused. That discretionary power exists with reference to the administration of this branch of the law in Scotland, and when we come to look for the principle on which reference to oath is admitted, I quite concur in the view which has been expressed by my noble and learned friend opposite, that the true principle is to settle the immediate question between the two parties in contest, and to go no further. Now, if the question in a suit between two parties be one which necessarily involves the interests of a third party, if it be of a kind that the settlement of the question between those two parties would, or might, greatly injure the interests of a third party, then I think it questionable, in the first place, whether such a reference to oath would be competent, but I also think it quite clear, that any exercise of judicial discretion ought to go in the direction of preventing such risk of injury to a third party.

It is upon these grounds, that I am quite clear, that the judgment of the Court below ought to be affirmed. If, on hearing the argument, I had entertained any doubt on the question, or had come to the conclusion opposite to that at which I arrived in the Court below, I certainly should not have hesitated to concur as I did in a former case in this House, in altering the judgment which I had pronounced in the Court below, but I see no reason to entertain any doubt whatever in this case.

Interlocutors affirmed.

Appellant in person.—Respondent's Agents, Adam and Sang, W.S.; Tippetts and Son, London.

JULY 30, 1867.

Mrs. ANNE JANE HUNTER O'REILY or CARLETON, and Others, *Appellants*, *v.* LIVINGSTON THOMPSON, and Others, *Respondents*.

Trust—Succession—Vesting *a morte testatoris*—Bequest to Class—*Jus crediti*—*Jus accrescendi*—*H., in his trust disposition, directed the residue to be vested in trustees for his daughter, Mrs. O., in liferent, and her children in fee, to be kept in trust by them till they, in their discretion, should settle it safely on her and her children, and, in the event of her decease without issue of her body, then the residue to go to his nieces. Mrs. O. had some children who predeceased her, and two of them were born before the truster's death.*

HELD (affirming judgment), 1. *That a* jus crediti *vested in each of the children of Mrs. O. at its birth, although the amount of the benefit was subject to the contingency of there being more children born; 2. that the share or interest of the children who predeceased Mrs. O. did not accrue to the survivors* jure accrescendi.[1]

The Lord Ordinary and First Division held, that the residue of Dr. Andrew Hunter's estate vested in the children of Mrs. O'Reily *a morte testatoris*. Those interested in the contrary construction now appealed.

The question in the appeal was, What was the true construction of the following words constituting the residuary bequest in the trust disposition and settlement of the late Dr. Andrew Hunter?—

"And the residue of my said estate and effects, heritable and moveable, including the fee of the £10,000 set apart for answering the provisions to my said spouse, I direct and appoint to be vested in my said trustees for behoof of my said daughter, the said Mrs. Isabella Sarah Hunter *alias* O'Reily, in liferent, (exclusive of the *jus mariti* of her husband,) and her children in fee, to be kept in trust by them till they, in their discretion, shall see proper to settle it in the most safe and secure manner on her and her children. And in the event of her decease without issue of

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[1] See previous report 3 Macph. 514; 37 Sc. Jur. 257. S. C. L. R. 1 Sc. Ap. 232; 5 Macph. H. L. 151; 39 Sc. Jur. 640.