

issue. Lord Succoth from time to time by successive deeds diminished the minimum sum of money which he directed his trustees to lay out in land, and reduced it from L.30,000 ultimately to L.10,000. He also contemplated the execution of an entail, but he never carried out that intention. I cannot doubt that in the person of Sir Archibald Islay Campbell, on his attaining majority, all the rights in this estate vested, and these rights he transmitted to his brother, Sir George, who became the beneficiary in fee simple. The *jus crediti* was vested in him, and he took it up by drawing the interest of the money and the rents and profits of the lands. My Lords, I am of opinion that Sir George had acquired a complete right to the beneficial interest in this fund, and that he could do with it as he wished, and therefore I should be for answering both questions in favour of the widow.

LORD ORMIDALE—I am of the same opinion. I have no doubt that the whole estate, this L.10,000 and everything else, became vested in Sir Archibald Islay Campbell on his attaining majority. There is a principle of law which has often been recognised, and to which effect has been given in many cases, that if a testator bestows upon his trustees a discretionary power to do a certain thing without fixing an exact time within which that thing is to be done, then in a question of vesting that thing is to be held as done when the time arrives at which the testator contemplated its performance. I may here allude to a case in Bell's Appeal Cases (vol. 6. p. 612), where the principle is well illustrated.

LORD GIFFORD—My opinion coincides with that of your Lordships. The provision in Lord Succoth's will really does not admit of much difficulty when carefully examined. (His lordship read the clause quoted *supra*.) The trustees did make over the lands, but they kept the L.10,000, and paid Sir Archibald Islay Campbell the proceeds until 1866, when he died, he having preferred the interest instead of buying land, as he might undoubtedly have done. The absolute right to this money vested in him, and in like manner it vested in Sir George, his brother, together with the whole of the rest of the estate. Then by his trust-deed in 1873 Sir George disposed of the whole, and it is as the cousin of Sir George, and under his will, that the new Baronet takes. As Lord Succoth's heir, the only way in which he could have a right to this fund, he cannot possibly take.

LORD JUSTICE CLERK—I concur. The question truly is whether the direction to the trustees suspended the vesting. Had there been a period fixed the position of matters might have been very different; the obligation on the trustees to buy land might have been enforced. But that is not so, and I am clear that vesting took place in the person of Sir Archibald Islay Campbell, then above 21, immediately on his grandfather Lord Succoth's death.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the Special Case, are of opinion and find that (1st) until the L.10,000 referred to in the Special Case be laid out in land, the dividends and interest arising therefrom fall to be paid to the parties of the second part, and through

them to Lady Campbell, Sir George's widow; and (2d) that if the parties of the first part now proceed to lay out the said sum of L.10,000 in the purchase of land, the said land will fall under the trust-disposition and settlement executed by the late Sir George Campbell, and the parties of the second part are entitled to dispose of the rents, and afterwards of the lands itself, in terms of Sir George Campbell's trust-deed; allow the expenses connected with the Special Case, of all the parties thereto, to be paid out of the L.10,000, and decern, and remit to the auditor to tax the expenses and to report.”

Counsel for Sir Archibald Campbell's Trustees—J. A. Crichton. Agents—Tait & Crichton, W.S.

Counsel for Sir A. S. L. Campbell—H. J. Moncreiff. Agent—A. M. Hare, W.S.

HOUSE OF LORDS.

Monday, June 7.

(Before Lord Chancellor Cairns, Lords Chelmsford Hatherley, O'Hagan, and Selborne.)

STEUART V. ROBERTSON.

(*Ante*, xi. 427.)

Marriage—Consent de presenti.

Circumstances in which the subsequent words and conduct of the parties to an irregular marriage by *de presenti* consent before witnesses,—*held* (*rev.* judgment of the Court of Session) sufficient to over-ride the meaning of the words of consent.

This was an appeal from a judgment of a majority of the whole Court, establishing the respondent's marriage with the late Major Steuart. The circumstances have been already reported.

The defender appealed.

On pronouncing judgment—

LORD CHANCELLOR—My Lords, in the litigation in Scotland out of which this appeal arises a majority of the learned Judges have determined that a marriage, valid according to Scotch law, was proved by the female respondent Margaret Wilson, now Robertson, to have taken place between herself and the late Major Steuart.

The late Major Steuart was the eldest son of Sir William Drummond Steuart of Grandtully and Murthly, Baronet, now deceased, and the heir-in-tail of landed estates of considerable value. The question of the marriage might and would have involved the title to succeed to those estates had a son of the respondent by Major Steuart lived. That son died an infant, and the present litigation, although deeply important as regards the status of the parties, and the view which it presents of the law of marriage, involves a moderate amount of personal property only. The contest as to this is between the respondents and the appellant as the general donee and executor of Sir William Steuart. The appellant disputes the fact of marriage.

The marriage sought to be established is what is termed an irregular one. It is not founded on

habit and repute, or on a promise *subsequente copula*. It is said to have been made *per verba de presenti*, and the words constituting the marriage are said to have been uttered in a few sentences after a supper on the 13th February 1866, six years before the institution of the present proceedings. There is no written evidence which supports the marriage, but in the parol evidence of what is alleged to have taken place on the 13th February 1866, and in the parol evidence adduced either to corroborate or to throw discredit on what is alleged to have taken place on that night, three hundred pages or more of the print are occupied, and in the hearing of the case in the Courts of Scotland your Lordships were informed that upwards of twenty days of judicial time had been consumed. The argument at your Lordships' bar, which was not longer than the materials required, extended over at least a fourth of that time.

At the time of the alleged marriage the female respondent (whom I will term the pursuer) was about sixteen or seventeen years of age. She was the daughter of George Wilson, a fishing tackle maker, who had a shop in Waterloo Place, Edinburgh. Major Steuart appears to have been at the same time between thirty and forty. He had served as an officer in the 93d Highlanders throughout the Crimean War and in the Indian Mutiny, and had received the Victoria Cross as a reward for his bravery. After returning to Scotland, however, he appears to have led a dissolute and dissipated life. Two women are mentioned in the proof, besides the pursuer, with whom he had cohabited, and by each of whom he had an illegitimate child. His habits of drunkenness were such that several witnesses state they seldom saw him sober; and he gave way to this vice in low company, and in a manner attracting attention and outraging decency in public places. By these habits, which appear to have been confirmed before, and to have continued after the alleged marriage, he undermined his constitution, became subject to fits of delirium tremens, and died on the 18th October 1868 after passing out of an attack of delirium tremens, and apparently in consequence of an injury inflicted on himself during its continuance. I will subsequently examine the relations which appear to have subsisted between Major Steuart and the pursuer prior to the 13th February 1866; but, in the first place, I will direct your Lordships' attention to the evidence of what took place on that night. I will merely premise that it is not averred or proved that before the alleged ceremony of that night any promise or engagement of marriage existed between the parties.

The words constituting the marriage are said to have been spoken in the presence of Mr and Mrs Wilson, both of whom are dead, and of George Wilson, their son, and Mrs Kellet. And it is stated that Major Steuart and the pursuer cohabited from that time forward, and had not had any sexual intercourse previously. I will refer first to the evidence of George Wilson—he is an elder brother of the pursuer. He was himself married at the time, and living in a house or lodgings of his own. On the evening in question he was at the residence of old Wilson, his father, which was a flat in Clyde Street, Edinburgh. There were living there at the time the father and mother of the pursuer, two younger sisters Georgina and Mary, aged respectively fifteen and fourteen, and a brother

Alfred, still younger, a servant named Agnes Forbes, and Major Steuart, who was lodging in the house under circumstances which I shall afterwards mention. The supper began about 9 o'clock and finished about 10. George Wilson states that there were plenty of eatables and drinkables, and among the latter champagne; that after supper old Wilson sent the three younger children to bed, Mrs Kellet going out of the room with them; that after the children left the room old Wilson told the Major that he would have to leave his house, because he had been too long in it, and it would not do to stay longer, as the people were making complaints, and his daughters were not to have their names ruined by him staying in the house; that the Major sat quiet for a minute or two, and tears came into his eyes; that he then said, "Wilson, I will shew you what I can do; I am poor now and cannot marry, but I will marry her in the Scotch fashion," or words to that effect; that he then went down on one knee, put his hand into his waistcoat pocket, and took out a wedding ring, which he placed on the third finger of her left hand, and said, "Maggie, you are my wife before heaven, so help me oh God;" that the two kissed one another; she said, "Oh Major," and put her arms round his neck. He said he wished this to be kept private, that when he got his money he would make it public; he would buy a house out at the Grange till his father died. Everybody then shook hands and drank their health; that he left the party still in the dining-room when he left the house. The same witness on cross-examination says he supposes his father first thought there was to be a marriage that night when the Major got up and said "Wilson, I will shew you what I can do."

Mrs Hannah Kellet appears to have been a friend of the Wilsons, and a confidential companion of the pursuer. She had been married to her present husband just before the day in question. She had been in the habit of going to balls with Mrs Wilson, and being employed at a hair-dresser's shop she came on the evening in question to dress the pursuer's hair, and remained for supper. She had gone out of the room to put the younger children to bed, and after a short time she says she was called in she thinks by Mr Wilson. When she went in the Major, she says, was saying that he could not do what he would wish to do at the present time, but he said, "I will shew you Wilson what I will do," or "can do." Then he filled up the wine glasses, went in front of the wardrobe beside the pursuer, went down on his knee, and took a ring out of his pocket, put it on the third finger of her left hand, and said, "Maggie, you are my wife before heaven, so help me great God," or words to that effect. They then kissed each other. The Major said he wished what he had seen that night to be kept secret until such time as he would be in a position to make it public. Mrs Wilson gave them a blessing, and said she hoped the Major would be kind to Maggie, and she hoped God would bless them. Perhaps these were not her exact words, but they were her meaning. She continues—"I remember the bedding taking place. I assisted at it. I threw a pillow at them, Mrs Wilson threw one first, and then I threw one, I hit the Major on the head with it. After seeing them bedded we all left." On cross-examination, being asked "How long did the ceremony last," she replied, "So long as the Major spoke, and he

spoke a good bittie. I have stated all he said, as far as I can remember."

This is the whole of the direct testimony to the words by which the marriage is said to have been constituted, and I will assume that there is no doubt that if the words were used in fact, seriously, and with the intention of constituting a marriage, they were sufficient for the purpose. The question is, were the words used at all, and were they used in this way, and with this intention? This is a question of fact involving for its determination the credibility, the accuracy, and the intelligence of witnesses. No direct evidence can be adduced to contradict them, for no other living persons were present. They are, the one the near relative, the other the friend and intimate companion of the pursuer, and both of them deeply interested for their own character and that of the pursuer in maintaining the pursuer's case. They furnish us with one or two sentences spoken at a sitting which continued for an hour or two, and even as to these sentences they only profess to give their effect, and not the precise words. It is necessary therefore to try the evidence of these witnesses rigidly by all the tests to which it can legitimately be subjected. They speak of several other facts and occurrences as to which their evidence can be contrasted with undoubted testimony, and it will be necessary so to contrast it. Your Lordships have spread before you the life of Major Steuart and of the pursuer, their sayings, writings, and doings, from the date of the alleged marriage onward, and the sayings, writings, and doings of those present at the alleged ceremony of marriage, and it will be for your Lordships to consider whether these sayings, writings, and doings can be reconciled with the hypothesis of a marriage having taken place, or having been supposed to have taken place.

My Lords, it is unnecessary to consider minutely whether all that appears to have been said by Major Steuart subsequent to the alleged marriage can be admitted in evidence, irrespective of the question whether the pursuer was or was not present. It is evident from what fell from members of this House in the case of *Jolly v. M'Gregor*, 3 W. and S. 179, that a very wide range of evidence under this head is open; but in the present case no objection has been taken to any of the evidence to which I have to refer, and your Lordships were told at the bar that it was not desired to exclude any part of that evidence.

I will therefore address myself to the history of the case subsequent to the alleged marriage. Major Steuart continued to live in the Wilsons' house until the 24th of February 1866, when he went to live in St Patrick Square, to conceal himself from his creditors. The pursuer remained at her father's house, although there was no reason on the score of secrecy that she should not have cohabited with Major Steuart if his wife, inasmuch as it is stated she went to see him daily.

It is during this time that the first letter of Major Steuart which we have in evidence, that of the 11th May 1866, was written. It is written to old Wilson, whom the witnesses of the pursuer say the Major was accustomed after the marriage to call "father," or "old boy." It is addressed "My dear sir," and signed "yours truly," and contains no trace of familiarity.

While Major Steuart was in St Patrick Square he had some communications with Mr Rigg which appear to me to be of considerable importance.

Mr Rigg is a priest of the Roman Catholic Church, to which church Major Steuart belonged. He was an old friend of himself and of his father, and he was in the habit of seeing Major Steuart frequently in Edinburgh. He says, "He called upon me pretty frequently, and on many occasions I saw him on the street intoxicated. My house is not far from Clyde Street. He was frequently in an excited state when he came to my house, and I thought more frequently under the influence of liquor than not. I have seen him not under the influence of liquor, but I rather think that was the exception." He continues, "I remember him going to St Patrick Square to live. I think his object was to be out of the way of creditors. I visited him there several times, and my recollection is that he was not under the influence of drink, at least not in any degree that could be observed. (Q.) Not to the extent you had seen it previously? (A.) No, certainly not. (Q.) On that occasion, had you somewhat serious conversations with him on the subject of his connection with this woman? (A.) I had. (Q.) What occurred? (A.) I stated that in my former evidence. I told him that there was every probability that a marriage would be proved against him, that he would so commit himself that a Scotch marriage would be proved against him from the way in which he was acting with the girl. He told me that he was quite upon his guard, that the family had made many attempts to get something written from him, but that he was always upon his guard never to give them anything whatever, anything written whatever. He said he had been particularly upon his guard, and that he knew well how easy it was for a man to get entrapped in that way. (Q.) Did you say to him that it was merely by writing that a Scotch marriage might be proved against him? (A.) No. (Q.) Did you understand that he was referring to writing? (A.) Certainly not; he said he would be on his guard, not only in regard of writing, but in regard of anything else that could constitute a Scotch marriage. (Q.) Did he say they would endeavour to entrap him? (A.) He said that they had done so, that they had tried to obtain some writing from him. (Q.) Did he also use the expression that the family had tried to entrap him into a marriage. (A.) I cannot say that he said they had endeavoured to do so by anything else than writing, but he certainly said that they had endeavoured to procure something written from him. (Q.) So far as you recollect, did he use the words entrap him into a marriage? (A.) Yes."

From the 12th May to the 3d July 1866 Major Steuart was a prisoner for debt in the Calton Jail. During that time he was, of course, kept in a state of sobriety. Dr Simson, the physician attending at the jail, gives the following evidence:—"I was in the habit of seeing him frequently, but one day I went and expressed my regret at seeing a person of his position there, and I said that if he would give up drinking, and have nothing to do with Miss Wilson, I was authorised to pay all his debts. He asked me how that was, and I said he had no business to know anything about it, but that I would undertake to have them paid, and that he might take my guarantee for it. I showed him what a respectable man he might be if he gave up his dissipated habits and his connection with Miss Wilson. After reasoning the matter, he admitted the whole of it. (Q.)

What did he say? (A.) He said that certainly drink was a very bad thing, but that I was not aware of the pleasure now and then of getting drunk; and as to his connection with Miss Wilson, I said that a man who drank as he did, and got involved as he did, would be sure to be taken in for a marriage. He said, 'Ah, they have tried that often before, but they have never succeeded.' I said, 'But they may succeed.' He said, 'Ah, I will take care of that.' (Q.) Who did he refer to as having tried? (A.) I said the relations would do it, and he said, 'Oh, they have tried that again and again.' (Q.) Did you use the word relations? (A.) I have no doubt I used the word 'relations.' He did not use the word 'relations,' but he said 'they' have tried. (Q.) Whose relations did you refer to? (A.) Miss Wilson's, of course. After he got out of prison I have frequently seen him going about in the streets. He was very different on the street from what he was in prison. He was very often shabbily dressed, and also under the influence of drink. (Q.) Was it quite obvious that he was under the influence of drink? (A.) He was sometimes very bad. (Q.) Was he so bad as to attract the notice of the public? (A.) I was walking one day with a lady when he came up to me, and after he went away she said, 'What blackguard is that you were speaking to?' He was very bad that day, both in dress and appearance. (Q.) Have you seen him very frequently under the influence of liquor. (A.) I would not say very frequently, but frequently. (Q.) During the day? (A.) Yes."

After leaving Calton Jail on the 3d July 1864 Major Steuart would appear to have returned to the house of the Wilsons' in Clyde Street. About the middle of September 1866 Major Steuart and old Wilson went to Birnam, close to the residence of Sir William Steuart, for the purpose of fishing. On the 25th of September Mr Wilson sent a telegram to his wife to send some fishing materials, and the next day the pursuer uninvited brought them to Birnam. Major Steuart and old Wilson were lodging in Birnam at the house of Mrs Hutton.

Major Steuart introduced the pursuer to Mrs Hutton as Miss Wilson, in the presence of her father. I do not go through the details of the twenty-four hours during which the pursuer remained at Birnam, of their ejection from Mrs Hutton's house, of their irruption in the middle of the night into the residence of Sir William Steuart, and of the pursuer's departure the next day by railway to Edinburgh.

The evidence as to this part of the case leaves no doubt on my mind that neither the pursuer nor Major Steuart supposed or represented that they were husband and wife.

It is at this point of the narrative that the episode as to the portmanteau, founded on in the condescendence, and to which some of the Judges have attached more or less weight, comes in. The true version of what occurred as to this portmanteau might have remained in some doubt on the parole evidence, but, fortunately, the letter of Major Steuart to Mrs Wilson, at page 507, the date of which is fixed by the internal evidence to be about the 1st of October 1866, puts the matter beyond controversy, and shows that the story told in the condescendence, and attempted to be supported by some of the evidence of the pursuer, is absolutely without foundation. But I cannot look

upon this episode as if it had never been introduced. It was made a part of the pursuer's case, and it is impossible that she can have believed in its truth. It appears to me to have been a reckless attempt to provide facts which might be fitted on to some silly gossip about missing or abstracted documents, which had prevailed at Birnam, and the attempt having failed cannot but suggest a distrust of the manner in which the pursuer's case has been put forward.

The pursuer returned, as I said, to Edinburgh, and Major Steuart continued to reside at Birnam until the beginning of the year 1867. During this time no letters from him to the pursuer are produced, but there are several letters from him to Mrs Wilson, the mother. In none of them does he address her otherwise than as Mrs Wilson, nor in any of them is there any trace whatever of any connection by marriage with her daughter.

During the residence of Major Steuart at Birnam a remarkable incident in the history of the pursuer occurred. Alexander Laing and his wife, neighbours of the Wilsons, were proceeded against in the Police Court of Edinburgh by the pursuer, styling herself Margaret Wilson, on the ground that they had behaved to her in a disorderly manner and using opprobrious epithets. The evidence of the pursuer states that the epithets used were words suggesting that the pursuer was the kept mistress of Major Steuart. This complaint was met by a cross-complaint from Mrs Laing against Jane Wilson (who is stated to have been a sister of the pursuer) for throwing earth upon her out of one of the windows, and committing a breach of the public peace. These two complaints are heard on the same day. Jane Wilson was fined £1 sterling, and the complaint against Mrs Laing was dismissed. What, however, is important is, that the witness Torry states that while defending the case for Mrs Laing the pursuer on her oath admitted that she cohabited with Major Steuart in the house, and being asked whether she was married to him said she was not. The witness Alexander indeed states that when Torry put this question the pursuer replied she was lawfully or legally married to Major Steuart, and Agnes Forbes, the Wilsons' servant, says that she was in Court and heard her say she was legally married to Major Steuart. Agnes Forbes, however, says she was not in Court when the pursuer's case came on, and that it was in Jane's case she heard the pursuer say she was legally married, and that her statement that she was legally married to Major Steuart was not made in answer to any question put to her by any one in the case, but in reply to a remark which was made by a man there.

Mr and Mrs Laing on the other hand, state distinctly the details of the examination, and corroborate Torry's evidence, and so does the witness Hunter, and it is indeed obvious that that evidence must be correct, for if the pursuer had stated that she was legally married to Major Steuart she would at once have been met by her own complaint, which was taken out in her name as spinster.

I cannot but attach great importance to this incident. It was an occasion on which the pursuer would at once have established her case and cleared her character by showing that she was Major Steuart's wife. She evidently desired to support her case by denying cohabitation, and it was only when she found that Torry was in possession of

evidence as to that cohabitation that she abandoned that ground and did not replace it by the assertion of the marriage.

Major Stewart appears to have been in Edinburgh from the beginning of 1867 until the 22d of March of that year, when he returned to Birnam.

The evidence of Dr Dunsmore is material as to this point. Major Stewart consulted him frequently, and always in connection with the effects of drinking. He was summoned to him at Clyde Street on the 17th of February 1867. He told him he had sent for him to examine Miss Wilson to know whether she was in the family way. "He called her Maggie Wilson. I told him she would not allow me to examine her, and that I could not do it without her permission. He said, 'Oh, but I will insist on it.' I made an examination and satisfied myself that she was pregnant. Major Stewart asked me to attend her during her confinement. Before I gave him any answer I asked him whether he was married to her. He said, 'No, certainly not; that he would be very sorry,' or words to that effect. This took place in the house in Clyde Street on 17th February 1867. (Q.) Did he say anything else indicating the nature of his relationship with her. (A.) When he had hold me what he had sent for me for, he said laughing, 'A man must have a companion,' or something of that kind. When he told me they were not married I refused to attend at her confinement, and I did not do so. If he had said they were married it is possible I might have attended her, but I did not care about doing so. (Q.) When you went to the house did anything strike you about the appearance of it and its inmates? (A.) I did not like the appearance of it; it was such a house as I was not accustomed to go to, and I did not like it. (Q.) What struck you about its inmates? (A.) I did not like the appearance of the people or of the house. (Q.) What do you mean? (A.) It is difficult to say. I did not like its appearance. (Q.) Did they look respectable, or the opposite? (A.) I did not know where I was going to at first, but when I got there my impression was that I had got into an improper house. (Q.) Was that from the appearance of the house and the inmates? (A.) That was my impression. (Q.) Did you see girls going about? (A.) I did not see them going about; I saw them in another room, and I did not like their appearance. (Q.) Were they loose looking? (A.) Well, I thought so." We are told that Dr Dunsmore was lately President of the College of Physicians in Edinburgh. His evidence, which is beyond criticism, is of importance as showing that on an occasion of great interest, and apparently in the presence of the pursuer, the idea of marriage was repudiated, even where doing so deprived the parties of the professional service which they desired.

In connection with this part of the case I turn to the evidence of Dr Balfour, who was the physician that did attend the pursuer in her confinement. He had been in the habit of attending the Wilson family professionally, and he visited the pursuer on the 2d of April 1867, when her child was born, and for some days subsequently. The name entered in his book is simply "Wilson, 27 Clyde Street." He says if he had supposed she was a married woman he would have put her married name. He was engaged to

attend her about a month before the birth, and he remembers quite distinctly that Mrs Wilson said to him *the Major intended to marry her*. He does not remember whether the pursuer was present when he said so or not. She was present during part of the conversation, but he does not know whether she was present at that particular time.

Major Stewart was at Birnam when the child was born. He had gone there on the 22d of March, and remained till the 30th of June. On the 3d of April old Wilson wrote him a letter in these words:—"Major Stewart, dear sir,—I drop you those few lines to let you know that our Maggie has been very bad, and brought a son—a stout healthy child, on Tuesday night, about 12 o'clock p.m. Hoping you are well, I remain, your humble servt., George Wilson.—In haste, Wednesday, April 3, 67." The letter of Major Stewart, which has the Dunkeld post mark of the 8th April, appears from its internal evidence to have been written on the 7th, and (to be an answer to the letter of old Wilson. I do not delay your Lordships by reading it, as it has been so recently before you, but I must say of both these letters that they appear to me to be absolutely irreconcilable with the idea that either Major Stewart or old Wilson supposed that the pursuer had been married, or that the child was legitimate. Major Stewart continued at Birnam, as I have said, till the 30th of June, and during that interval, on the 28th April, Mrs Wilson, the mother of the pursuer, died. There are two letters written by Major Stewart from Birnam to Mrs Wilson before her death, and three to old Wilson, and all of them open to the remarks which I have already made on the letter before adverted to.

How was this child registered? As the illegitimate child of the pursuer. She attended the registrar herself, and signed the entry stating it to be illegitimate, and giving its surname as Wilson. The registrar states in his evidence that she wanted it to take the father's surname; that he explained to her it could not be so registered unless the father acknowledged the paternity and signed the books in company with the mother. She then wanted to have it delayed to see if she could get the father to accompany her. He delayed for some days, when she came back without the father, and signed the books. It is clear, looking at the Act of Parliament on the subject, and at this evidence, that there was no allegation or suggestion of marriage. If there had been, the child would have been entered as a legitimate child of the marriage. The question was as to its paternity without reference to marriage, and I cannot look on the evidence of Collett as throwing any serious doubt on the statement of the registrar.

It is to this part of the history that eight of the letters addressed by Major Stewart to the pursuer appear to belong. There is considerable ground for doubting whether all the letters to the pursuer from Major Stewart which were in her possession at his death have been produced. Mr Galletly states that she handed to him to read, and he returned to her, from thirty to fifty such letters; only fourteen are now produced, and in the eight written before the 30th June 1867 there is not a word which would suggest the relationship between the parties. In every one of them he addresses her as "My dear Miss Wilson," and there is not a reference in any one of them to the

child. Some suggestion was made that Major Stewart desired to avoid committing himself in writing to anything which would be evidence of a marriage. It is not likely such a course would have been submitted to by the pursuer without remonstrance, and the suggestion is entirely at variance with the character attributed to Major Stewart by the pursuer and her witnesses, nor would it account for the style of old Wilson's letter, which is as inconsistent with marriage as those of Major Stewart.

On the 17th of June 1867 the pursuer paid Major Stewart a visit at Birnam. She came at 12 o'clock in the day and left at 6 in the evening. Mrs Hutton, in whose house he was lodging, says she announced her as Miss Wilson, that she remained in the sitting-room all the time; that the Major went into his bed-room, rang the bell, and desired her to ask Miss Wilson if she would take a cup of tea. She left by the train, and the Major did not go to the train with her.

About the 1st of July 1867 Major Stewart went to Edinburgh and lived with the Wilsons in a flat in Leith Street Terrace, to which they had removed, and he remained there till some time in August of the same year. It was during this period that a circumstance took place to which I attach considerable importance. Dr Rigg tells us that some messages came to his house asking him to go to Leith Street Terrace, and he refers to a letter which he wrote at the time to Mr Condie, giving an account of the circumstance, which is in these words—"St Mary's Catholic Church, Edinburgh, Thursday evening. Dear Mr Condie, I am sorry to say that poor Major Stewart is again making a sad hand of himself here; on Tuesday three several messages were brought requesting me to go to see him at Wilsons', 5 Leith Street Terrace. Of the first two I took no notice, but by the third messenger I sent a note asking what the Major wanted, and telling him that he knew my dislike to visit him in such lodgings. To this he returned no answer. In the evening, however, I met him in Register Street very very drunk, and looking as if he had come down a chimney. His appearance was truly deplorable, and I could not help saying 'could nothing be done to rescue the miserable man from such a state of degradation.' He made some incoherent remarks about marrying the girl Wilson, which made me suspect that she and her friends had wished me to go to the terrace regarding some affair of that kind, but he was so bad that I could really make no sense out of anything he said."

Simpson, who was employed in the shop of old Wilson, speaks of the same occurrence, and though he fixes the date in June 1867, that must be a mistake for July, because in June Major Stewart was at Birnam. He says, "I remember George Wilson coming to my house in Farquharson Place, Preston Street, just at the back of seven o'clock in a summer morning. I was just out of bed. I had not got breakfast, and I told him so. He said, 'Never mind, come away, you will have a breakfast in our house.' (Q.) Did he tell you what he wanted? (A.) He said, 'the Major is going to marry Maggie.' He told me that in the lobby. He wanted me to come away directly. I went with him. (Q.) Was he in a very excited state? (A.) No, I cannot say that he was. (Q.) Did he seem anxious that you should come at once? (A.) Yes, he wished me to come at once. (Q.) Did he

shew great interest in what he wanted? (A.) Apparently he did. (Q.) When you got to the house did he tell you that the Major was going to marry Maggie? (A.) Yes, and he asked me to go to a place at St Mary's Chapel for the Rev. Mr Rigg. He said, 'Go down and tell Mr Rigg to come up, that the Major wished to see him very particularly.' I went for Mr Rigg before I got breakfast. I went at half-past seven o'clock in the morning. I did not see Mr Rigg at that time. I then went back to Wilsons and got breakfast. He then told me to go down again for Mr Rigg. I saw Mr Rigg that time. I also saw him on a third occasion. I went down three times that day. I gave him the message that Major Stewart wished to see him very particularly. The third time I went was just before dinner, some time before one o'clock I think. The second time Mr Rigg said he would be up shortly. (Q.) Are you sure of that. (A.) I am almost sure of it. The first time, as far as I recollect, he said he would be up in a short time. (Q.) Did you see him at all the first time? (A.) No; I saw himself the second time; and the third time he said he would be up immediately. I had no communication with anybody except George about that. I had none with the Major."

Mrs Hutton tells us of a conversation she had with the pursuer in February 1868 to this effect:—"I said to Miss Wilson, 'are Major Stewart and you married, Miss Wilson.' She said, 'No.' I then said, 'It is a wonder you never tried to get Major Stewart when he had got whiskey.' She said that he would never write when he had got drunk, but that the priest had been sent for once to come to the house to get them married, but that it did not take place." Now, my Lords, I ask for what purpose was Mr Rigg on this occasion sent for? It could not have been to celebrate a public marriage, for no preparations had been made or steps taken for a public marriage. It could not be to super-add a religious ceremony to a marriage already validly contracted, for the Wilsons were Presbyterians and Dr Rigg a priest of the Roman Catholic Church. It must have been in order to make an irregular and clandestine marriage between the pursuer and Major Stewart, which, if her evidence is to be believed, had been already accomplished in a manner satisfactory to all the family.

The baptism of the child occurs next in order of date. It was baptized by Dr Rigg, and the certificate of baptism, dated the 4th August 1867, describes it as the illegitimate son of Margaret Wilson. Neither father nor mother were present at the baptism. There were present Mary Wilson, now Mary Wyke, the sister of the pursuer, who is not produced as a witness, Margaret Clarkson, who was employed in old Wilson's shop, and a young man, a billiard marker; the two latter being sponsors for the child. What makes this more important is a conversation which Dr Rigg states had previously taken place between him and Major Stewart. Major Stewart, he says, told him the girl Wilson had had a child that he believed was his. "Afterwards he asked me to baptize it. I said to him we had a decided objection to baptizing illegitimate children when the improper connection was continued between the parties. I also said we considered baptism as essential, and were most unwilling to allow a child to die without baptism, therefore I would baptize the child; but he must understand it was simply for the child's sake, and

not for the sake of the father or mother." It was after this intimation from Dr Rigg that Major Stewart and the pursuer sent the child to be baptized in the manner I have mentioned.

Major Stewart appears to have continued with the Wilsons till some time in August 1867, when he went again to Birnam, and remained there till about the 1st October. He lodged on this occasion with Mrs Maclagan. Some highland games took place at Birnam in the last week in August, and during this week the pursuer came to Birnam and remained for four days, lodging at the house of William Harris. The character in which she was received by Harris I prefer to take from the account rendered by him to Major Stewart, rather than from his own evidence, to which, after reading his cross-examination, I am unable to give much weight. The account charges for apartments for Miss Wilson for four days and attendance, and Harris states that this account was made out with the name of Miss Wilson by her own desire, as it was to be rendered to Mr Melville Jameson, and the marriage was not to be made public before the Major had a home to take her to. But Mr Melville Jameson was the Major's own confidential adviser, as the pursuer very well knew, and whatever reasons she may have assigned to Mr Harris, it appears much more probable that the account, if rendered in any name but that of Miss Wilson, would not have been received or paid by Mr Jameson.

I may now refer to two witnesses whose evidence in connection with the residence of Major Stewart at Birnam appears to me most deserving of attention. One is Dr Culbard, a doctor of medicine practising at Birnam. Dr Culbard says, "While he stayed at Birnam I saw him very frequently. I should think he never was in Birnam without my seeing him. I saw him very frequently, both professionally and otherwise; he used to come to my house frequently. His habits gradually got more and more dissipated. I remember his living in the house of James Hutton. I have known the Huttons all the time I have been in Dunkeld. They are respectable people. I visited him in that house frequently. It was the only house in which I visited him as his lodgings. I have frequently seen him very much the worse of drink, and that for a length of time—for days. I have seen him in that state both in the house and going about in the streets. I remember seeing Miss Wilson, but I cannot mention the date when I first saw her. (Q.) Was it within a couple of years of his death? (A.) It was not so long previous to his death, but I cannot give the date. I have seen Major Stewart and her going about Birnam, but not frequently. I have frequently heard people in Birnam speak of them. She was spoken of as Miss Wilson by the people in Birnam. I never heard her called anything else. I have seen her going about with him when he was the worse of drink; but I have not seen that repeatedly. I heard it reported that there was a marriage between them. (Q.) Was it after that that you spoke to him on the subject. (A.) I cannot condescend on whether it was before or after. (Q.) Where was it that you spoke to him first of Miss Wilson? (A.) I spoke to him in his own lodgings, and also in my house. It was a subject of frequent conversation. As stated in my former evidence, Major Stewart introduced me to her in her lodgings. She occupied separate lodgings from Major Stewart, in Harris the coach-

builders. It was late in the evening when I was introduced to her. I received a message to call on the Major, and went to his own rooms, but found that he was out. I remained there for some time, and then Mrs Hutton sent to Harris' lodgings to say that I had called. I then went to Miss Wilson's lodgings, and he introduced me to her as Miss Wilson. I had previously spoken to him about her frequently. (Q.) What had you said to him? [Pursuer's counsel objected to the line of examination, in respect that conversations with Major Stewart, without the presence of the present pursuer, are not evidence. Objection repelled, reserving all questions as to the effect of the evidence?] (A.) I frequently urged on him the propriety of marrying the girl—that was the substance of our conversation. (Q.) Did you say why? (A.) Because having had possession of the woman, I thought he ought to do what was right and proper by her. (Q.) What did he say in reply? (A.) He said No, that he was not married to her, and that he never would be married to her. On the occasion when he introduced me to her by the name of Miss Wilson, I said, Miss how much? He turned with a very significant look and shrug of his shoulders, and answered, Miss Wilson. Then the conversation got general, and continued general during the few hours that I remained with him that evening. (Q.) Did he say that quite distinctly? (A.) Quite distinctly—markedly. She must have heard it. (Q.) Did it strike you that Major Stewart treated her as his wife that evening? (A.) Most certainly not. (Q.) Was his conduct to her at all such as you would have expected from a husband towards his wife? (A.) I would have hardly expected such conversation and conduct before a wife. (Q.) Did that strike you at the time? (A.) Very much so. (Q.) What was the view you took of the relation between them from the way in which he acted towards her? (A.) That she was simply his mistress. When I left that evening the Major and I walked about on the road for a considerable time, and he then asked me to go into his rooms at Hutton's. He did not stay with Miss Wilson that night. (Q.) Was it about the time of the Birnam games, in 1867 or in 1868, that this conversation took place? (A.) I am sorry I cannot condescend upon dates, I saw him so frequently. (Q.) When you went into his lodgings what took place? (A.) Previous to entering the room Major Stewart seemed as if he had quite enough of drink, and immediately on our entering he turned and locked the door, and said to me, "What did you mean by putting the question so directly? I understood that he had referred to the question I had put, Miss how much? I said that I wished to test him. He got rather angry, and said, did I not believe him, did I not believe the previous conversations we had had, had I ever found him out telling me a falsehood, and was that the reason why I should put the question so pointedly to him? (Q.) Did he say that angrily? (A.) Yes, but apparently perfectly soberly. (Q.) Seriously? (A.) Yes; he seemed to think that I had not trusted him. Nothing further was said about it, and I sat and smoked a little with him. It was early in the morning that this conversation took place. (Q.) In any of the conversations you had with him about Miss Wilson did he ever say in so many words that he was not married to her? (A.) Distinctly, and that he never would be. He ap-

peared perfectly sincere when he said so. I have had such conversations with him both when he was sober and otherwise. (Q.) Have you ever spoken to Sir William Steuart about his son living in the way he was with this woman? (A.) Not with reference to this woman, but it was my endeavour frequently to reconcile father and son. At first this woman was not referred to in our conversation. (Q.) Did Sir William know quite well of the connection with Miss Wilson? (A.) Distinctly. (Q.) Did he ever express to you a wish that his son would marry? (A.) Yes; he said there might be a prospect of his settling down if he got married. (Q.) What did he say as to the person that he should marry? (A.) Latterly he was indifferent. I mentioned to the Major the conversation which I so had with Sir William. I told him that his father would be pleased if he would marry, whoever he might marry. The Major said he would choose for himself, and take his own time to marry. I have spoken to him about his boy; he owned the paternity, and was proud and very fond of him." John B. Pople is the owner of the principal hotel at Birnam. His evidence is this—"I knew the late Major Steuart, Sir William Drummond Steuart's son. He called at my hotel occasionally, and I had frequent conversations with him. I have heard him speak of a Miss Wilson. I never heard him speak of her as Mrs Steuart. He always called her Miss Wilson. (Q.) On the last occasion he was at Birnam, about the end of 1867, did he make any remark to you about the Wilsons thinking to get hold of him? (A.) Yes; he stated to me that he had no doubt they were desirous of getting hold of him, but that he was not married to Miss Wilson, neither did he intend ever to get married. I know that they lived in separate lodgings in Birnam. I have seen them walking together. I never on any occasion heard Major Steuart speak of Miss Wilson as his wife." I will now pass rapidly over some months of Major Steuart's life. He sold his commission in the army in September 1867, and out of the proceeds paid old Wilson £150 on account of his claims against him for board and lodging, and articles supplied in his trade. He then made an excursion to Paris accompanied by the pursuer, the child, old Wilson, and the sister Georgina. He returned to Edinburgh in November, and about the 24th of December Major Steuart went alone to Birnam. For some weeks previous he had not been with the Wilsons, and no one appears to have known where he was. He came up from Birnam about the 1st January 1868 to the Wilsons, remained there till the 7th February 1868, and then went back to Birnam accompanied by the pursuer and the child. There is the evidence of Dr Middleton, applicable to January 1868, which I ought not to pass over. Dr Middleton was acquainted with the Wilsons for more than twenty years, and had been old Wilson's medical attendant. He was attending old Wilson in January 1868, and was then asked to prescribe for Major Steuart, who was in bed suffering from bronchitis. He says—"It appeared to me there were none but young females about him, and I thought they were not proper persons to attend him. I therefore asked the Major who was to attend him, to make the poultice and put it on. He turned and said, 'Mrs Steuart.' I said, Who is that, Mr Steuart? He said, 'Maggie.' She was standing beside him at the time. That was the first time I knew about a

marriage." Now, what makes this evidence remarkable is that Dr Middleton states also that he was asked to visit Major Steuart's child, and did so on December 9th, 10th, 12th, and 14th 1867. He knew the family, and knew the mother of the child. He knew it was called Major Steuart's child, and yet although intimate with and attending upon the family he never was told or knew anything about a marriage before January 1868.

When Major Steuart arrived at Birnam, on 7th February 1868, Mrs Hutton says—"When he came he was very much the worse of drink. He brought Miss Wilson into the house. I gave them dinner in the dining-room. They did not stay long in the house after dinner. Miss Wilson went to Mr Harris's for lodgings. I thought she wished to stay at my house, and I went to Major Steuart and asked him if they were married; if they were I was quite willing to give them a room in my house. He said they were not married; that I might please myself about giving her a room, but that he did not ask me to do it. She then went to the Harris's." On this occasion also the pursuer is described in Harris's account as "Miss Wilson." On the 20th February 1868 Major Steuart left Birnam and Scotland, and never saw the pursuer again. He left without telling the pursuer, or taking leave of her.

I may now refer to the correspondence between the pursuer and Mr Melville Jameson, the agent of Major Steuart. One of the letters is in October 1867, acknowledging £10 sent to her on account of Major Steuart, and signed "Margaret Wilson." Besides this there are twenty-seven letters passing between Mr Jameson and the pursuer from the 27th February 1868 till the 19th October 1868, when Major Steuart died. All these letters address the pursuer, and are written by her, as "Miss Wilson," and "Margaret Wilson." They concern her relations with Major Steuart, and her claims upon him, but they nowhere suggest that those relations or claims are in any way founded on or derived from marriage. Major Steuart died, as I have said, on the 18th October, and I shall have presently to refer to some of the evidence connected with his death, but I proceed to complete the written and undisputed evidence. Among the undisputed facts, I take to be an interview which the pursuer had a week or ten days after Major Steuart's death with Mr Robert Steuart, a cousin of his father's. This interview is spoken to by Mr Robert Steuart, and by his housekeeper, but it is also spoken to by Georgina Wilson, the pursuer's sister, after the evidence of Mr Robert Steuart had been taken in the action of declarator. I think it clear from this evidence that the pursuer announced herself as Miss Wilson, a friend of Major Steuart's. She wished Mr Robert Steuart to induce Sir William to make some provision for her child in bringing it up, and I think it clear upon the evidence that she stated she was sorry to say there was no marriage between her and the Major; and even if the exact expression was as Georgina represents, "she was sorry she had no documents to show there was a marriage," it was the same idea that these words were meant to convey. Both Mr Steuart and Georgina agree that the pursuer said if the Major had lived it would have been all right, which again tallies with the evidence of Christina Kay, that in a letter to Mr Steuart from the pursuer, written about the same time, she said she would swear

that had Major Steuart lived he intended to make her his wife.

On the 18th December 1868, in reply to a letter written on behalf of the representatives of Major Steuart, inquiring whether he had any property which belonged to Major Steuart, old Wilson stated that he had nothing, Major Steuart having taken all his property with him at various times when going to the North. He added these remarkable words—"He got away several articles which belonged to me, also some books and two pictures, one of his son's and one of my daughter's, the child's mother, which was a New Year's present." Can this letter have been written by a witness at a ceremony which he believed to have constituted the pursuer the wife of Major Steuart? Old Wilson died on the 11th July 1869. His testamentary disposition, dated the 1st March 1869, takes notice of all his children. The daughter Mary, who was married at the time, he styles—"Mary Wilson or Wyke, wife of Frederick Wyke, presently residing in Liverpool;" but the pursuer he styles throughout "Margaret Wilson," as if she were unmarried.

We come next to a multiplepointing raised for distribution of the succession of Major Steuart, in which a claim was lodged by Robert Denholm as testamentary trustee of old Wilson. Denholm claimed for goods sold to Major Steuart, for moneys lent, and for board and lodging. The seventh article of the condescendence lodged by Denholm states as follows—"While boarding in Mr Wilson's house Major Steuart became very intimate with his said eldest daughter Margaret Wilson. The claimant believes and avers she had a son to him, who is still alive and is now about three years of age. Major Steuart and Margaret Wilson were in the habit of sometimes travelling about and living together. During his residence in Mr Wilson's house Major Steuart was extremely irregular and drunken in his habits, so much so that frequent efforts were made to get him to leave the house, but without avail, till finally an exposure of his conduct was threatened, when he left." As to this statement, Denholm depones that the claim was made on intimation given him by Wilson before his death, except perhaps as regards the insertion of the word "extremely." Copies of this record were communicated to pursuer and the other members of the family, and no objection appears to have been taken to them.

In June 1870 the pursuer was imprisoned on a decree obtained against her by Mackay, a jeweller, for articles supplied to her after Major Steuart's death. She was proceeded against by the name of "Miss Maggie Wilson," and in that name she presented a petition for aliment under the Act of Grace, signing it as "Maggie Wilson," and on making oath that she had no means to pay her debts she was released.

In the same month of June 1870 the pursuer raised a summons of aliment in her unmarried name as Margaret Wilson against Sir William Steuart, as executor for Major Steuart, of inlying expenses and aliment in respect of her child. The claim in the condescendence in that action is made upon the footing not of marriage but of illicit connexion, and a decree upon that footing was made by the Lord Ordinary, and a receipt signed by the pursuer in her name as Margaret Wilson for the sum awarded to her. The subsequent receipts for aliment are signed by her quarterly in the same

name. In the same month of June 1870 Sir William Steuart raised an action of declarator and putting to silence against the female pursuer and her child, in which she did not appear; evidence was adduced in that action, and a declarator against the marriage was made, which in the present action is sought to be reduced. I have only further on this part of the case to refer to the marriage of the pursuer with her husband Lieutenant Robertson. This took place on the 12th March 1871. She avers in her condescendence that before her marriage she fully acquainted him with the whole state of matters between herself and the deceased Major Steuart. The certificate of her marriage is in evidence signed by herself. She is married as "Margaret Wilson," aged twenty-two years, spinster.

I have now, my Lords, gone through the evidence in the case founded on written documents, on facts and conduct as to which there is no dispute, and on the evidence of witnesses whose credibility and accuracy cannot be questioned. It is scarcely possible to conceive a stronger body of negative testimony against a marriage. Nothing in my opinion could countervail such a body of testimony except the clearest affirmative evidence, consistent with the probabilities of the case, and coming from witnesses impartial and unprejudiced on the score of interest and sympathy, showing that they spoke with accurate recollection, and consistent in their narrative of the facts to which they depose. I return to the evidence by which the alleged marriage is attempted to be established, in order to see whether it complies with all or any of these conditions.

Before, however, making some observations upon that evidence, I ought to remind your Lordships of what we are told as to the relative position and as to the character of the two persons principally concerned. Of the character of Major Steuart I have already spoken. His conduct in a moral point of view entitled him to nothing beyond a very low place in the social scale; but as the heir of an old family, and the future possessor of large estates, his worldly position was greatly above that of the pursuer. He appears to have been at least double her age, and although he appears to have admired her, there is little if any trace on either side of any romantic attachment between them. Of the character of the pursuer I do not desire to say more than that, looking to the evidence before us, the life which she appears to have led, the atmosphere in which she lived, the scenes which she witnessed, the language which she heard, and in which, unfortunately, she sometimes seems to have joined, cannot be supposed to have been otherwise than unfavourable to the development and cultivation of moral principle and conduct. The acquaintanceship between her and Major Steuart, looking to their relative age and position, their character, and the temptations which were certain to accompany it, was one from which her parents might well have been expected rather to have withdrawn her than to have encouraged her in it; but they appear to have promoted the acquaintanceship by every means in their power. The evidence of the brother and sister of the pursuer, though given with a manifest desire to tone down the facts as to this part of the case, sufficiently shows that Major Steuart was permitted by the parents of the pursuer to take away the pursuer for hours at a time, sometimes on foot, sometimes

in carriages, when and where he pleased. The narrative of an excursion to Murthly made by Major Stewart, the pursuer, and her father, in December 1865, when they arrived at Perth at midnight, drove on through the night to Murthly, got into the house of Gold, the land steward, at three o'clock in the morning, the men being under the influence of drink, and continuing to drink whisky there, and ending by breaking open the door of Murthly Castle, is a narrative which cannot be read, especially in connection with the conversation which took place, without astonishment and pain. When to this your Lordships add that old Wilson, knowing the character of Major Stewart, and that he was ejected by reason of his conduct from the hotel in Edinburgh where he had been living, received him without remonstrance, and certainly without any reason or arrangement which could justify so unusual a course, into the small floor of rooms where Major Stewart and the pursuer might at any time, and must have been, left together alone, and would always naturally be closely associated. Your Lordships will, I think, be of opinion that the utmost which could have been done was done to place danger and temptation in the way of the pursuer, and opportunity in that of Major Stewart.

The history of all that occurred from August 1865, when Major Stewart was received as an inmate in Clyde Street, until February 1866, is either not forthcoming, or is spoken of by witnesses who are obviously reticent. Before February 1866 Major Stewart had an illness which confined him to his room. It appears to have been of the usual description. He was, as Georgina Wilson says, "coming off drink." He was nursed by the pursuer, who sat with him in his room. Georgina accompanies this fact with the statement that the door was always open, so that anybody passing could see into the room, and the bed was facing the door. But as to this, inasmuch as she was at school from half-past 8 in the morning, her evidence does not do more than exhibit a natural desire to exclude inferences which are sufficiently obvious. The conclusions which the neighbours appear to have drawn are not to be wondered at. One of the pursuer's witnesses, Mortimer, the butcher, living at the corner of the street, says he told Major Stewart on the 14th February 1866 that there was no person he had a better right to marry than the pursuer, seeing that they were already living as man and wife, and Mrs Janet Forman or Wilson, a sister-in-law of the pursuer, lets fall in her cross examination this singular admission, that when her mother told her on the 14th February "Maggie Wilson is married," she said, "I could have told you that six months ago." There might perhaps be some further inferences of the same kind drawn from other parts of the evidence, but it is enough to say, that although there is no sufficient ground to hold it established that sexual intercourse had taken place between Major Stewart and the pursuer before the 13th February 1868, there was every opportunity for it to have taken place, and it is impossible to hold that the allegation of the pursuer, which is the very foundation of her case, that carnal intercourse between her and Major Stewart took place on the 13th February after the alleged ceremony, and did not take place before, is established.

Then, my Lords, there are some general questions connected with the alleged ceremony of the 13th February 1866, which are upon the surface, and to

which no satisfactory answer has been, or I think can be, given. Why, even if an irregular marriage were necessary or desirable, was no witness outside the family brought to be present? This appears to have been the first observation of Mortimer, the neighbouring butcher, when he was told of a marriage the next morning, and if he could be told of it the next morning it is difficult to see why he could not have been made a witness of it the night before, and if a witness was not to be obtained why could some exchange of writing not have taken place. But further, and above all, what is the theory of the pursuer as to the reason why an irregular marriage was resorted to? The case made on the part of the pursuer in the evidence is, that the intention and arrangement was that the marriage should be kept secret until either by his father's death or by the recovery of some property then in litigation, Major Stewart should be in a better position to maintain a wife, or that it should be kept secret in order that Sir William Stewart might not know of it, and the irregular character of the marriage is attempted to be accounted for by this necessity for secrecy. The same evidence also asserts that the marriage was brought about at the time it was said to have occurred in order to put an end to the scandal which had arisen ("to stop people's mouths" is the expression of George Wilson), from Major Stewart living with the Wilsons and associating as he did with the pursuer. These suggestions are attended with difficulties which appear to me to be insuperable. If the object was to stop people's mouths this could not be done by a secret marriage. The cause of the scandal was open and notorious it was intended to continue, and nothing but a marriage equally open could terminate the scandal. The course, therefore, which is said to have brought the marriage about, ought to have brought about a regular and public, and not a clandestine, marriage. But, on the other hand, can we accept the motive for secrecy which is suggested, so far as Sir William Stewart is concerned? He appears to have placed no impediment in the way of his son marrying any person whomsoever, and although it may appear singular, he is even shewn to have expressed a desire, when he found that his son was going about with the pursuer in December 1865, that he should marry her, and this expression of Sir William Stewart had been communicated to old Wilson. As regards his means for supporting a wife, Major Stewart does not appear to have been much embarrassed by the consideration of what his social position required from him. Living as he was content to do with the pursuer, he would not have been subjected to a greater expense after a regular than after an irregular marriage. And it even appears that as regards the provision of a residence by his father, he would have benefited, and not lost by marrying.

I now come to make a few observations on the witnesses as to the alleged ceremony. The witnesses are two, George Wilson and Kellet. If the bedding is taken as part of the whole ceremony, neither witness was present at the whole. George Wilson left before the bedding. Kellet did not come into the room till after the conversation had commenced. The evidence of George Wilson, being that of a relation, would not according to the former state of Scotch law have been admissible, and both as to this and as to the evidence of Kellet your Lordships will, I think, agree with the force

of the remarks made by Lord Neaves in a case of *Roxburgh v. Watson*, 7 Macph. p. 21.

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

I now turn to the evidence of George Wilson, in order to test the credibility and accuracy of this witness in points as to which he cannot be contradicted. It is necessary to consider carefully his evidence, where he can be contradicted. His object throughout his testimony is to represent Major Steuart as a moral and well conducted man; he says, "I never saw him the worse of drink at any time; I have seen him take a glass or so, but I never saw him the worse of it. He was tidy in his appearance so far as I saw. During the whole time I knew him I never saw him the worse of drink. All the drink I ever saw in my father's house was a glass of ale for supper and sometimes a glass of toddy before bed. I never saw him the worse of drink. I never saw him drink a great deal. He was a very small drinker to my idea." My Lords, if there is one thing which is established in this proof beyond the possibility of doubt, it is that Major Steuart was a confirmed and notorious drunkard, and that he was generally in his appearance disreputable and untidy, and it is quite impossible but that George Wilson, who had constant opportunities of seeing him, must have known that this was the case.

In his narrative of what occurred after supper on the 13th February he states that Major Steuart was sitting in a chair crying, the tears coming over his eyes. He says he was perfectly sober at the time—as sober as when he himself was giving his evidence. It is scarcely possible that both these statements can be correct. In a strong man in middle life there was nothing in what occurred which could account for tears except a maudlin imbecility arising from drink, and your Lordships have no security that the state of Major Steuart at the time was not that which, recurring constantly at other periods, George Wilson describes to be one of sobriety, but which a host of other witnesses call drunkenness.

But there is another detail of the narrative to which both George Wilson and Mrs Kellett give a conspicuous place. George Wilson says Major Steuart went down on one knee, put his hand into his waistcoat pocket, and took out a wedding ring, which he placed on the third finger of the pursuer's left hand. Mrs Kellett says he went down on his knee, took a ring out of his pocket, and put it on the third finger of pursuer's left hand"—so far the narratives agree, even in the detail they mention of the third finger, which might well have been overlooked or forgotten. It must, however, be borne in mind that the supper of the 13th February was not in any way connected with a marriage prearranged or expected on either side. It was intended to celebrate Major Steuart's birthday, which was really the 11th of February, but that being on Sunday the supper was postponed till the 13th. George Wilson says he did not believe a marriage was thought of till Major Steuart got up and spoke of stopping people's mouths. It is true that George Wilson had suggested that his mother had told him something about what she expected, but this is not corroborated by any other testimony, and Mrs Kellett, the confidant of the pursuer, does not suggest that the pursuer had said or hinted to her anything about a marriage. But if the marriage was not prearranged or anticipated, how could it have happened that Major Steuart should have a wedding ring ready in his pocket. No answer has been given to that question. Where did he get it? Did he buy it? He was a man perfectly well known in Edinburgh, and all his movements seem to have attracted attention. Evidence, one would suppose, could have been procured to shew how he had become possessed of the ring, if indeed the ring came out of his possession. But the matter does not rest there. The condescence of the pursuer in its present form tallies, as to the ring, with the evidence of George Wilson and Mrs Kellett, but the original condescence, we find from the judgment of Lord Shand, was in this form. "For some days previous to the marriage after mentioned Major Steuart went to various shops at which he ordered sundry articles, and in various other ways made preparations for the said marriage. About this time Mr Wilson was pressing Major Steuart to say finally when he would marry the said pursuer. Accordingly Major Steuart determined to enter into a private contract of marriage with the said pursuer in her father's house, and this resolution was carried out on the evening of Tuesday the 13th day of February 1866. On the afternoon of that day he caused the pursuer to put on a black silk dress which she had received from him in a present, to have her hair dressed by a hair dresser, and otherwise he prepared for his wedding; supper was then served up in the sitting-room, and when it was over, and in the presence of Mr and Mrs Wilson, the pursuer's brother George, and Mrs Kellett, Major Steuart filled the wine glasses all round, he then went down on his knees, and for the purpose of carrying through a marriage between him and the pursuer he said to the pursuer, 'Maggie, will you be my wife.' The said pursuer replied 'yes,' and then and there accepted the said Major Steuart as her husband, and they became married persons. He then took a plain gold marriage ring from his vest pocket, and placed it on the third finger of her left hand, after which he held up his right hand,

and, while still on his knees, said, "I swear by the Almighty God that I take you for my wife." This was a story into which the narrative of the ring fitted in without inconsistency, and this story must have been told in the first instance from the instructions of the pursuer. It seems impossible to avoid the conclusion that it was found that this story, as told in the original condescendence, could not be made to square with the story of a marriage brought about unexpectedly by the pressure of old Wilson, and that the greater part of the story was changed to meet this altered aspect of the ceremony, but that unfortunately the incident of the ring was left unaltered.

Of Mrs Kellett's evidence I need not say more than I have done already, beyond remarking that she varies from George Wilson's evidence as to Major Stewart weeping. She says, "I did not observe him weeping on the night of the ceremony. I did not notice tears in his eyes. I am not very good at seeing unless I have my glasses on." Under these circumstances it might perhaps be asked, How is she able to say the ring was placed on the third finger? There is some further evidence, not of any one present at the alleged ceremony, but closely connected with it in point of time, to which I should refer. One of the witnesses who gives evidence of this kind is Agnes Forbes. She was a servant of the Wilsons on the 13th February 1866, and at the time of the trial it appears she was living with the pursuer. I attach little importance to her evidence. She is, I think, discredited by the testimony allowed to be adduced after the case passed into the Inner House. But, in addition to this, she is contradicted on several important points. Your Lordships remember she places the visit of Caw the bailiff about ten o'clock on the morning of the 19th February, whereas Caw is positive it was at four in the afternoon, and from the nature of the visit it is not likely that he could be mistaken. She says, further, she never in her life saw Major Stewart drunk. She says also she heard the pursuer, in the case in the Police Court to which I have referred, say she was legally married to Major Stewart, the contrary being, as I think, clearly proved. But there is a portion of Agnes Forbes' evidence which suggests a further difficulty. I have already commented on the allegation of the pursuer that the marriage was to be kept secret, and Mrs Kellett says Mrs Wilson was very particular in saying it should be kept quiet lest it might hurt the Major, and the Major used to say to Mrs Kellett he liked her "because she was not a blab." Agnes Forbes, however, states that the pursuer was called Mrs Stewart quite publicly in the house, and to everybody who came out and in, and that in speaking of her outside she always spoke of her as Mrs Stewart. It is in fact extremely difficult to know not only what reason can be suggested for keeping the marriage, if it had taken place, secret, but also whether, wherever and whenever a marriage was talked about, it was talked of as a secret. In my opinion, where a marriage was talked of it was talked of openly, and in order to serve a purpose which could not be attained except by speaking of it openly.

I must notice the evidence of three other members of the family. Georgina Wilson was about fourteen years of age at the time. She was not present at the alleged ceremony. She states, as Agnes Forbes did, that the day following she was

a wedding ring on her sister's finger, but some part of her evidence is important, as showing how little reliance can be placed on the evidence of interested relatives in such a case. She is asked— "(Q.) On what footing did you understand that he came to the house? (A.) I understood that he was engaged to my sister. (Q.) From the time he was turned out of the hotel? (A.) Yes. (Q.) And before he came to the house at all? (A.) Yes. (Q.) Have you heard both your father and mother speak of that? (A.) Yes. (Q.) Did they say that there was an engagement before he came to the house at all? (A.) Yes. (Q.) Then you did not understand that he was in the house as a boarder or lodger? (A.) Yes he was, but he did not pay—I understood he was to pay. (Q.) Did your sister and the Major act all along from the time he came to the house as engaged people? (A.) Yes, they used to go out together. They frequently went out alone. I cannot say where they went—perhaps for a drive, and sometimes for a fish dinner at Newhaven." It need hardly be said that this is inconsistent, both with all the other evidence in the case, and with the condescendence. Again, after much fencing, she says it was from her mother, and not from the pursuer at all, she understood that the pursuer was married. She always "took it" she was married. "She did not say anything to me about it. She never made me her confidant." Finally, in order to establish a difference of treatment before and after marriage, she tells us this—"He gave my father presents to give her. The Major never kissed my sister in my presence; he was more of a gentleman than to do that. I don't think lovers do that until after the night of the marriage. Until after the night of the marriage he never kissed her in my presence. He gave the presents to my father to give to her. If my father was standing beside her he would perhaps give them to herself. If it was a Stewart tartan dress or a scarf, he gave it to her before my father; he came into the shop and gave it to her before my father. After the marriage he always gave the presents direct to herself." Alfred Wilson was still younger than Georgina. He is brought forward to say that he, though not ten years of age at the time, noticed the marriage ring on her finger after she came out of her bedroom the next morning, and that he saw them in bed together the next morning (the fifth person, if we are to believe the evidence, brought into the room for that purpose). There was another sister in the house, who was older than Alfred, Mary Wilson, now Mrs Wyke. She, for some reason, is not examined, although the pursuer obtained a commission under which she might have examined her in England, where she was residing.

Janet Wilson is sister-in-law of the pursuer. She also, as she says, saw the pursuer and Major Stewart in bed on the morning of the 14th February. This was between ten and eleven—a singular circumstance, when we remember that Georgina Wilson states that before she went to school, at half-past eight on that morning, she had seen the pursuer leave her bedroom. Janet Wilson, however, says that Major Stewart then told her that the pursuer was his wife. The same, or the next day, Major Stewart went with the pursuer to Leith, to Janet Wilson's house, and said to Janet Wilson of the pursuer, "This was his wife, Lady Stewart,"—again a statement

difficult to believe if he had told her that she was his wife a few hours before. The cross-examination of Janet Wilson, however, and the circumstance that neither a Mr nor Mrs Forman, who are said to have been present during the visit to Leith, are produced, make it impossible to rely on the accuracy of the statements of this witness. I pass over without any detailed observation the evidence of a number of witnesses in the case, who speak to statements of conversations with the Major or the pursuer, or both, in hotels, in places of amusement, in casual conversations, in drinking parties, in the course of which the Major called the pursuer his wife or Mrs Stewart, or spoke of her as such, and spoke of her child as his boy. These would in any case be equivocal acts, and would have to be considered with reference to the circumstances under which the statements were made, and in the present case, in a number of instances, the statements were obviously made in places and under circumstances where for the purposes of the moment it was necessary that the pursuer should appear to be Major Stewart's wife. The statements made upon these occasions are not, taken altogether, nor are any of them, for a moment to be put in comparison with the deliberate statements made on important occasions, when no object was to be gained, to Dr Dunsmure, Mr Rigg, Dr Simson, Dr Culbard, Mr Pople, and others. But there is in the present case a further peculiarity with regard to the statements relied upon by the pursuer. I have submitted to your Lordships the points on which I think the evidence of the alleged ceremony is not to be taken as trustworthy, but I am far from saying that I think there was no foundation for that evidence. I do not believe that a valid marriage *per verba de presenti* took place, or was supposed by any of the parties to have taken place. That something took place which was not a marriage, but which yet might be represented, and was meant to be represented, in a way "to stop people's mouths," to use the expression of George Wilson, is, I think, very probable. The places where this would be used, and the persons to whom it would be used, were places where the Wilsons were known, and the persons with whom they were accustomed to associate. Those were the persons whose "mouths" were "to be stopped," and if it answered the purpose of "stopping their mouths," that was all that was required. It may well be that the Wilsons hoped for and desired something more, but they may have been content to wait for the chance of getting something more at a future time, or of the cohabitation gliding, if they could make it do so, into a marriage by habit and repute. If this is a just view of what occurred on the night of the 13th February, it would account for the statements as to the pursuer being married made to Mortimer the butcher, and to other persons in or about Edinburgh with whom the Wilsons were associating, and for the statements of a very different kind made upon all serious occasions by Major Stewart.

I have now only to refer to the circumstances, so far as they are material, connected with the death of Major Stewart. He was living at Hythe, in the south of Hampshire, in 1868. He had been drinking, his servant Budd tells us, "very heavily," and had a very bad attack of *delirium tremens*. While labouring under that attack he pushed a stick through his windpipe on Thursday the 15th

October, and he died the following Sunday night, the 18th. On the 15th October, that is on the Thursday, Budd, his servant, telegraphed by his desire to Thornby Hall, near Rugby, for Captain Cooper, who had been a brother officer of Major Stewart in the 93d Regiment, and with whom he had kept up a correspondence, although they had not met since 1859. Budd also telegraphed for Mr Jameson, the law agent of Major Stewart. Captain Cooper arrived on the evening of Friday the 16th, and the arrival of Mr Jameson took place at mid-day on Saturday the 17th. It is to be observed that it does not appear that Major Stewart desired the pursuer to be sent for, or in any way to be communicated with. Mr Jameson says he informed Major Stewart of his success in the litigation relating to some personal property in the Court of Session, that he appreciated this success, that he was intelligent up to his death, and was not in delirium, but that speaking appeared to occasion difficulty to him, and there was no prolonged conversation. He says he alluded to his son, and referring to the money which would come under the decree of the Court, said, "Well, Cooper and you will take charge of the matter, and pay my debts and see to the boy." Mr Jameson says that, of his own accord and without any instructions, he prepared the draft of a settlement that might have been executed if approved of by the Major, but it cannot now be found. He says it must have been prepared on the Saturday night, or probably the Sunday forenoon, but that on the Sunday he was not in a fit state to sign it. He cannot remember that he spoke to Major Stewart of the pursuer. He cannot remember whether the Major at the time he said "the boy," may have added "and the mother." The impression of the conversation on his mind was that the boy was the individual who was favoured. This is the evidence of Mr Jameson, given by him when called as a witness for the pursuer.

To this, however, must be added a description of the state in which Major Stewart was, which was given by Mr Jameson at the time in a letter which he wrote to Mr Galletly in Edinburgh, and from which description I don't understand that Mr Jameson now desires to recede. It is dated "Bath, Monday, 19th October 1868," and is in these words—"My dear Sir, our poor friend the Major, to whose death-bed I was called by a telegram on Friday, died at Hythe this morning. With the exception of an occasional look and word of intelligence, he was not in a state to make any settlement of his affairs, and unless his father, whom I have seen here, is disposed to give effect to his verbally expressed wishes, gathered from occasional moments of isolated responses, the executry must be arranged by law. He intended that his friend Captain Cooper (a very excellent man, who was also at his death-bed) and I should be his executors, that we should get the money now due to him, pay all my advances and expenses and his debts, and then retain the remainder for behoof of the boy. I had prepared such a document, giving effect to his understood wishes, but he was not so long conscious as to be able to execute it." Captain Cooper describes the interviews which he had with Major Stewart in these words—"I went into the Major's bedroom, which was shown to me by Budd. I found the Major in bed when I went in. He mistook me for another officer who had been in the regiment, and said, 'Hillo, Goldsmith.'

The room was dark—duskyish. There was an officer of that name in the 93d. I was not in the least surprised at the Major so addressing me, for I had often been mistaken for Captain Goldsmith before. I am like him, and have been mistaken for him on several occasions. I said to the Major, 'I am not Goldsmith; I am Dick Cooper.' The Major recognised me then, and said, 'Oh! how are you?' He was very unwell. I sat up with him most of the night. I had very little conversation with him; I did not like to have any that night. On the Saturday morning I again saw the Major. He was considerably better. He had slept and taken some nourishment. When I went in he recognised me at once. I was in his room from time to time throughout the day, twenty minutes or half-an-hour at a time. I spoke to him occasionally. I remember that on that day the Major made a rather pointed observation to me. He said, 'You are married, aren't you?' I said, 'Yes I am, and so are you, aren't you?' He said, 'Yes, I am.' He also said, 'Have you got a son?' I said, 'No, not yet.' He said he had one, and he said something which led me to believe that he was very proud of his son. 'That was the whole conversation.'

It is remarkable that in this statement it is not suggested that the pursuer was referred to, or her name mentioned, and the only words which can be relied upon are the words "Yes I am," the weight to be attached to which would depend on the amount of intelligence of the dying man as to the question, and of the accuracy of the listener as to the answer. But the question put by Major Stewart to Captain Cooper: "You are married, aren't you?" is remarkable, because it appears that Major Stewart had received not long before a letter from Captain Cooper, dated the 24th February 1868, speaking to him of his wife, and sending him a message from her. I own that, even if no further light could be thrown upon these three monosyllables spoken to Captain Cooper, I should not, bearing in mind the silence of Major Stewart on the subject of the pursuer to his confidential agent Mr Jameson, have been disposed to attach to them the weight which they seem to have carried in the Court of Session.

But there is some subsequent evidence of Captain Cooper which requires to be taken in connection with that to which I have already referred. He says:—"Mr Jameson came that Saturday afternoon. I did not know him by sight, and asked Budd to point him out to me as soon as the packet arrived, which he did. (Q.) Did you speak to Mr Jameson about the marriage? (A.) I told him first of all that I knew everything connected with Major Stewart. (Q.) It was in that way you put it. (A.) Yes; I told him I was his most intimate friend. I learned from Mr Jameson that the Major had recovered a sum of money from Sir William Stewart. I think the amount was £11,000 or £13,000, or something like that. That was the first time I had ever heard of it. I saw the Major after learning that fact, but I did not make any reference to the money to him except in this way, that I said he ought to make provision for his wife and child. I did not like to allude to the money because the Major himself had not told me about it, but I suggested that he should make provision for his wife and child. (Q.) Did you use the word wife? (A.) Yes.

(Q.) What did he say? (A.) He said it would be all right. (Q.) What did you understand by that? (A.) I understood that he would do something with Mr Jameson so as to make a provision for his wife and child. I stipulated with Mr Jameson that his just debts should be paid first. I had some conversation with Mr Jameson on the subject afterwards. My conversation about the debts was not with Major Stewart, but with Mr Jameson. (Q.) Did you tell Mr Jameson anything about Scotch marriages? (A.) I said I disliked Scotch marriages. (Q.) Did you say anything about the son of a fishing-tackle maker's daughter not succeeding to Murthly Castle? (A.) Yes; I said I did not care about that. I understood that some papers were drawn out by Mr Jameson on the Saturday night. I saw him with some papers that looked like legal documents. We thought the Major was doing better on the Sunday morning. I went to church that morning and when I returned I thought he was better. He spat a good deal and passed blood from his throat. A medical man saw him, and we thought him somewhat better on the Sunday morning. I cannot tell why the paper was not signed. I expected from what had taken place that it would be signed. Nobody told me that it was signed, and I did not think it my business to ask, as Major Stewart's agent was there. Eventually I found it was not signed."

There is in this a statement of much that Captain Cooper thought or said, but little that was said by Major Stewart. Captain Cooper suggested that he should make a provision for his wife and child, although Mr Jameson thought him not in a state to execute an instrument for the purpose of making such a provision. Major Stewart said "it would be all right," a phrase which, even if he understood what he was saying, might be interpreted in many different ways. But the best insight into the impression really produced on the minds of both Captain Cooper and Mr Jameson by what occurred at Hythe is to be found in two letters which passed between them a few days subsequently, after they had had the conversation to which Captain Cooper refers as to Scotch marriages. Mr Jameson writes to Captain Cooper from Perth on the 2d November 1868 as follows:—"My dear Sir,—There is no word from Sir William Stewart in reply to mine, and I now expect none. Mr Condie sent to me to-day for the address of the medical attendant, and I gave him Mr Giles' address. It has struck me that it may be to communicate with him to ascertain if the Major during his last illness was ever able to say a word intelligibly as to his affairs, or to indicate with a serious mind his wishes in regard to them, as represented by me. I have written to Mr Giles by this post requesting a certificate as to the state of Major Stewart's mind when I was with him. I told him that I was aware that he frequently wandered when sleeping or dreaming, but that when aroused and spoken to he seemed to recognise the persons addressing and answered intelligibly on the subject of conversation; that these were of course quite casual and momentary, there being a reluctance on your and my part not to fatigue him with any continuous conversation, but that these were quite sufficient to indicate to me the intentions he had, namely, that you and I should take the charge of the money, pay his debts, and see to the boy; the money, the debts, and the boy being all severally the subject of con-

versation before between him and myself. I presume Mr Giles can have no hesitation to give such a certificate, and if he sends it to me good and well. My letter will at all events caution him, I should think, against saying anything imprudent to Sir William or his agent Mr Condie. I had your letter, and am glad you approve of mine to Sir William. Unfortunately, in the absence of any written document duly signed by our late friend, the law confers the right of administration on the father, and we cannot legally compel him to recognise any expression or wish on the part of his son. My letter was simply meant, as any other appeal can solely mean, as an appeal to his honourable feelings. The money was the Major's is not denied by the father—the father had no claim to it. He had not even paid him an allowance for a long time, and any one might suppose that under these circumstances he would at once say "I won't touch it. Let Captain Cooper and Mr Jameson, my son's only friends, do with it according to my son's wishes. I refuse to avail myself of the advantage given me, namely, by the absence of any legal will." The debts of course he must pay, and the boy will have a claim for aliment, but it would be covered, so far as law is concerned, by an annuity of £20 per annum, perhaps less, so that £400 would do for this, instead of £4000, the half of the succession which he *ought to give*, and this will be pocketing for himself £4000. The girl Miss Wilson (the mother of the boy) has *no legal claim*, and we would fail in any attempt at law in her behalf. If we get the £4000 we would be able to do something for her, if we found her deserving, by the allowance of a suitable board for the boy."

Nothing can be clearer than that Mr Jameson, the writer of this letter, knew and expected Captain Cooper to recognise that there was no question of marriage in the case. There appears to have been another letter from Jameson to Captain Cooper, and then, on the 12th November 1868, Captain Cooper replies in these words: "My dear Sir,--I am in receipt of yours of the 11th, and enclose you a letter I received in reply to one of mine from Dr Bond. I should like to know how far we can legally force Sir William, for I fear that as he has not treated you with common courtesy he might refuse to see me. I would give him one more chance, and if you think fit, might mention that I will be happy to call on him and explain matters, and that if he will see me I will go and wait on him at any hour or day he may think fit. If he won't do this I should be inclined to enter an action against him. Believe me, yours &c., Richard Cooper."—I cannot read this letter as referring to any claim of the pursuer or her boy founded on marriage. The letter appears to me in effect to concur in Mr Jameson's statement that on this head there was no legal claim, and to suggest an action against Sir William Stewart, on the only foundation on which Mr Jameson had said it could be maintained, namely, for aliment.

I do not delay your Lordships by an examination of the conflict of testimony between Budd and Captain Cooper, as to whether the former told the latter at Hythe that Major Stewart was "married right enough." Budd denies that he made any such statement, and it is due to him to say that he has been called as a witness on behalf of the pursuer as well as of the appellant, and although he lived for a considerable time in the service of Major Stewart it is not pretended that he ever

said to any person else of his master that he was married. It may well be the case that Captain Cooper believed the meaning of Budd to be that which he expressed in his evidence, but a very slight variation of expression, or a qualification of tone or gesture, would have greatly modified the effect of the answer of Budd, and it is remarkable that Captain Cooper himself admits that Budd immediately afterwards spoke to him of the pursuer, and said that "Miss Wilson" had not been telegraphed for.

I have now, my Lords, at much greater length than I could have desired, adverted to such portions of the voluminous evidence in this case as appeared to me to require notice. I could have been well content to have rested my decision upon the grounds expressed by the minority of the learned Judges, and especially Lord Deas and Lord Shand, with nearly the whole of whose very able judgments I concur, but I have deemed it necessary, owing to the respect I entertain for the learned Judges who compose the majority, to indicate the grounds upon which I am compelled to differ from their opinions. The burden which lay upon the pursuer to establish a marriage in this case I think she has not discharged. On the contrary, her opponents have been able, from circumstances, many of them singular, to present a body of evidence of unusual weight derived from documents written, acts done, and declarations made, all bearing with a strength almost irresistible against the marriage. To countervail this evidence, the biased, inconsistent, improbable, and inaccurate evidence of the alleged ceremony is, as I think, altogether inadequate, and the interlocutors affirming the marriage ought in my opinion to be reversed, and the appellant assolizied, with expenses, in the Court of Session.

LORD HATHERLEY—My Lords, much difference of opinion appears to have existed in the Courts of Scotland upon this case, and it becomes my painful duty to differ from the opinion which the majority of the learned Judges there expressed in a matter so much affecting the personal character and conduct of the pursuer. The reasons which have been stated so fully, so completely, and, as it appears to me—if I may say so—so convincingly, by my noble and learned friend on the Woolsack, for arriving at the conclusion that in fact no marriage was ever had between the pursuer and the late Major Stewart, render it unnecessary for me to enter at any great length upon this subject of investigation. The remarks that I shall make will be confined to a very few observations relating to the previous conduct of the parties, and a very few also relating to the subsequent conduct of the parties as established by evidence which is most material, and especially by the documents in the case, not omitting to notice—not at any length, but in some short retrospect of the matter—the conversations and the declarations that are said to have been made as affecting this question of a marriage celebrated between the parties.

Now, my Lords, I apprehend, with the learned Judges in the Court below, that if in truth such a transaction did really take place *modo et formâ* as is described by the witness George Wilson, and by the witness Mrs Kellett, to have taken place on the 13th of February 1866, than by the law of Scotland a marriage would have been duly—I cannot use the expression solemnised—but effected

between the parties. But, my Lords, it becomes extremely important on that account to see the exact position of the parties before that supposed marriage took place, and to consider the amount of testimony we have to support it, and the value—regard being had to the other circumstances of the case—of that testimony.

Now, in the first place, my Lords, as regards that which preceded the marriage, those who had to support the pursuer's case—I do not mean the counsel, but those who had to support the case by the evidence which has been given—felt the difficulty of reconciling the state of things which existed in Clyde Street with such a state of things as would lead to the conclusion that a marriage took place owing to a virtuous attachment formed by Major Stewart for this young girl, then undoubtedly in her very early youth, and, consequently, it is to be hoped, in early innocence. Feeling the difficulty of that case, regard being had to the singular position into which the Major had worked himself, or in which he had been allowed to be placed by the father of the pursuer, residing in this very small house, and under the very singular circumstances under which he did reside with the Wilsons, the pursuer and the supporters of the pursuer's case have thought it necessary to have some theory by which to account for this very singular state of things, which I will describe in a moment. Accordingly they have held it forth in evidence by several witnesses that the father George Wilson, who was in a small business as a fishing tackle maker in Edinburgh, was a man of strict character and habits—especially strict, some of them say, with a strictness amounting to severity, with regard to the conduct of his daughters. He is described as having watched over them with jealousy and anxiety, and in a manner in which a father ought to watch over the members of his family, and especially over girls, the eldest of whom was only between 16 and 17 years of age.

Now, what is done by such a father. It is perfectly established by most painful evidence that Major Stewart, highly distinguished as he was in his military career, of distinguished honour as well as rising to distinguished rank in the army, had become unhappily at this time so dissolute in his habits that he had, as appears by the evidence in this case, cohabited with two other young women before being acquainted with the pursuer, and had had children by those young women. That he was constantly drunk, and his drunkenness was so degraded that he cared not before whom that drunkenness was exhibited; that he was the object of contempt and derision on the part of the populace who might see him wandering about amongst them in this state of intoxication, the amount or degree of which I do not pause to discriminate nicely. No doubt a different opinion has been entertained upon that subject by different witnesses, who have given evidence upon it, but that the drunkenness did exist in some degree is clear from the evidence of Mr Rigg, from the evidence of one or two doctors, and from the evidence of other persons whose testimony cannot be controverted. But the circumstances under which the Major became an inmate of the Wilsons' house afforded a still more conclusive proof of the condition of the man, and they show at the same time Wilson's knowledge of that condition, for he had been living for some time at a respectable hotel—one of the

principal hotels I believe in Edinburgh. But his conduct there had been of such a character that the landlord could not have any more to say to him. There is evidence that when he left Rampling's Hotel he said that Rampling would not have him there any longer and that he had been turned out. Here is a Major in the army turned out of a hotel in Edinburgh, after having previously become known in the streets of Edinburgh by frequent exhibitions of his notoriously dissipated drunken conduct. What happens to this man?

This strict father, George Wilson, who was so careful of the conduct of his daughters, resides in a house in Clyde Street, but carries on his business in a shop elsewhere. George Wilson's evidence pretty well describes the rooms in Clyde Street. There appear to be two rooms at the entrance on each side of the door, the one on the right hand, and the other on the left, opening on to a sort of lobby. Then you go on a little further and you come to the room occupied by the servant girl, and the room of Mr and Mrs Wilson, the occupiers of the house. As things were at the time when the Major was admitted an inmate of that house, the only room that the Wilsons could offer him was a room which was at the entrance of the lobby on the one side, whilst Margaret Wilson, the pursuer in this case, a tender young girl of about 16 or 17, and her two younger sisters, occupied a room in the same passage opposite the room in which the Major was to be accommodated. Then, as I have said, you went further on, until you came to the maid-servant's room, and the room of the father and mother. Knowing that the Major was a person of the character I have described, such a person that he was not thought fit to continue to reside at a respectable hotel, the father, George Wilson, received him into his house, the room being situated as I have described, in August 1865, and he is found to be living at that house from August 1865 up to February 1866, when this supposed marriage took place. We can hardly conceive anything less favourable for the virtue of a young woman than this position in itself.

But the case does not quite stop there, for both the father and mother are absent the whole day at the shop. The young children who might have been some protection to this poor girl are at school. It appears that no one but the maid servant was left in the house with the pursuer, and the Major of course was there for any and every portion of the day, as long as he liked to remain. I do not comment further upon what passed when he is said to have been nursed by the pursuer. It is unnecessary to remind your Lordships of how the door was said to have been left open so that anybody passing by might see into the room. The witness who tells us this did not remain in the house all day—she went to school, and I have already remarked how few persons there were in the house, so that whether the door was open or not would not make much difference. I only mention this state of things, as shewing how utterly inconsistent it is with the slightest notion of the father having taken any care at all of the position and the reputation of his daughter when he admitted this man into his house under these circumstances, and allowed him to have a bedroom in such a position.

However the marriage is said to have been brought about in this way. There is certainly not said to have been any particular occasion for

holding a marriage festival on the 13th of February 1866. The festivity was to have been of a totally different character; it was to have been the representative day of the Major's birth-day. The birth-day really fell on the previous Sunday, but that not being a suitable day of course for keeping the event, it was to be celebrated on the Tuesday, without the slightest notion of any kind, on the Major's part certainly, that there was to be anything beyond a birth-day feast on that evening.

As far as regards his intention we have the evidence, among others, of Mr Rigg, the Roman Catholic priest whom he had consulted on several occasions, generally when he was in a state somewhat the worse for liquor, but who conversed with him and saw him from time to time. He was warned by Mr Rigg of the possibility of his being inveigled into a marriage of that kind, and he stated that he should take care of that—that he knew how to take care of himself, or something to that effect. There is no reason to suppose that on this day, the 13th of February 1866, he went about with the slightest intention of becoming on that evening a married man. Anterior to that day he had been situated in the manner I have described in the Wilsons' house. He had been allowed to drive this young woman about to distant places and to be absent for two hours with her—he had been allowed to have that degree of familiarity with her when this took place.

The marriage, however, seems to have been in some degree thought about (if we are able to trust the evidence that has been given) by the father and mother as likely to take place on that day; for this is George Wilson's evidence, and very curious evidence it is. He says he was in business himself, and in the course of the afternoon he was told by his mother to leave business early and to be at the house in good time, because she had reason to think, from something that his father had said, that there would be a marriage that night. It is a very odd statement, and I will refer your Lordships to the words of it, which you will find at page 168 of the appendix, about letter C—"I was working in the shop as usual all that day. I remember my mother calling me out of the back shop, and saying something to me that afternoon. I had been at dinner, and come back, so that it was between 3 and 4 o'clock. She cried me ben to the front shop; there was nobody there but herself—she told me that from what she had heard my father say to the Major, and the Major say to my father, she thought there would be a marriage in the house that night. My mother is now dead. When she said that I said I would be there." This is to lead up of course to the narrative which we have of what took place at the supper.

Now, what took place at the supper is said to have been this,—The Major thought that the supper was to celebrate his birthday. He had no reason to suppose anything more. The father, however, delivered something like a solemn address, as if he had come to think that the duties of a father called upon him to take some steps after the Major's being six months in his house, and after his driving about with the pursuer, and so on. The father is supposed to have delivered a solemn remonstrance and said—"I cannot bear this any longer" (or something to that effect), "it must be put an end to." This was to lead to the Major, unless he complied with the father's wishes,

having to be then and there expelled the house. George Wilson, who describes the scene which took place, says that after Mrs Kellett, a friend, who had been there, had taken the two younger children out of the room, "when they were gone to bed, my father told the Major that he would have to leave the house, because he had been too long in it, and that it would not do to stay longer, as the people were making complaints, and his daughters were not to have their names ruined by him staying in the house. He said that quite seriously. The Major sat quiet for a minute or two, and I saw tears coming into his eyes. He then said—'Wilson, I will show you what I can do. I am poor now, and I cannot marry'—he meant to the height of life he was in—'but I will marry her in the Scotch fashion,' or words to that effect. He was perfectly sober at that time, and spoke quite seriously." Then comes that extraordinary incident in which he says—"After the Major said that he would marry my sister in the Scotch fashion, he went down on one knee, put his hand into his waistcoat pocket and took out a wedding-ring, which he placed on the third finger of her left hand, and said—'Maggie, you are my wife before Heaven, so help me, oh God.'" The Major and Margaret Wilson were side by side at this time. Then Mrs Kellett came in, and she tells the same story about it. All this was going on early, as we should consider it, according to our habits. It began about 8 or 9 o'clock in the evening, and it went on until somewhere towards 10 or 11 o'clock at night. There was a certain amount of wine, champagne, and other liquors upon the table. It appears that the only persons present were Mr and Mrs Wilson, the father and mother, George Wilson, who gives this narrative, and Mrs Kellett. Those were the only persons who were in the house at that time, except Agnes Forbes, the servant, who came in and out of the room, and whose evidence contains some extraordinary statements. Now, my Lords, I only say one is entitled to question very narrowly in such a case as this, and with a certain degree of suspicion, the witnesses who come forward to tell us so extraordinary a story, and under circumstances such as those under which this story is told. This marriage is said to have taken place in 1866, but no case establishing a marriage, or anything approximating to a marriage, is raised until five or six years afterwards. This marriage is expected by the mother to take place after a solemn remonstrance on the part of the father, and to take place then and there that night; nevertheless no care is taken to have a single person present out of the family beyond Mrs Kellett, who seems to have been a friend of the family, and who, so far as I can learn, was not called in as a witness to the marriage, but was invited to participate in the hospitalities of the evening. If the father was really anxious that his daughter's reputation should be saved—if he was anxious to prevent gossip (and no person can be surprised at that with regard to the relationship between the Major and his daughter, why was it not possible for him to have a single person present outside his family except Mrs Kellett, and why should he only have had Mrs Kellett there as a person partaking in the festivities? Surely if the marriage was to be established, and was to be that which was to silence all gainsaying, nothing would have been easier than to have called in a next door neighbour, or the butcher, or somebody perhaps in a higher position than that. Among his many

customers it would have been easy to have found some one who would have borne testimony to this marriage. And why is the whole case kept back until the father and mother are dead, and the only persons left to tell the story are George Wilson and Mrs Kellet.

Then comes the extraordinary nature of the story itself. The Major takes a ring out of his waistcoat pocket. It is narrated with all the minute detail which is usually given when a story has been agreed upon, those minute details being meant to give colour to the case. He takes the ring out of his waistcoat pocket and puts it on the third finger of her left hand. That being the ordinary position, such a thing would not be very difficult to be borne in mind, if it happened at all, which I very much doubt; but with all this minuteness of detail we are told that the ceremony did take place. One of the learned counsel who appeared at your Lordships' bar for the pursuer, speaking of course from his instructions, said that that ring had caused him an immense amount of difficulty. He had thought over every possible hypothesis and he could not find a hypothesis which he could satisfactorily offer to your Lordships as to how that ring came to be found in the Major's waistcoat pocket on that occasion. Not a single jeweller could be found in Edinburgh, although the case has been talked about quite sufficiently there, to bear testimony that he remembered Major Steuart buying a wedding-ring. Not one of the persons who deal in these articles could be brought to say that any preparation had been made by this gentleman himself by purchasing a ring for this particular purpose. It could hardly be supposed and gravely asserted by anybody that Major Steuart always went about so fortified and prepared, especially having regard to his peculiar habits, and particularly if he was conscious himself, as it appears he was, that it was desirable that he should be on his guard against any sudden inveiglement of this description.

Those being the circumstances of the alleged wedding, I say all anterior circumstances are prodigiously adverse to any such wedding having taken place. Then the circumstances themselves, the whole affair being introduced by a solemn lecture of the father, six months after he had taken this man into his house—brought the wolf to the lamb, as it were, and placed him in such a position that his daughter must be in the greatest peril—that he should have been brought to make this solemn discourse, and that not with a rational end—not proposing that the Major should within a reasonable time go through the open and solemn form of marriage with his daughter, but that he should be disposed to raise the question in this solemn way so as to give rise to the sudden action of the Major, who was not in any way otherwise prepared, and that he should have been so far prepared as to have ready a ring to be used in marriage—the whole story is in the highest degree improbable.

Now, my Lords, let us see what takes place afterwards. The declarations of marriage stated in the evidence are utterly inconsistent, not only with the written documents, but also with a history which is given by the parties themselves of what was desired to be done. You have had two contrary hypotheses, which are continually leading them and perpetually confusing them in their evidence; the one hypothesis (of which the butcher

exhibits a specimen) being that the neighbourhood was to be satisfied—that was for the reputation of the girl, and the other hypothesis being that the marriage was to be kept secret, regard being had to the Major's position, especially to his position with his father, although we have it in evidence that his father had sent a message to Wilson through a third person that he should not the least object to his son marrying Miss Wilson, or any lady, provided he would marry and settle. Yet it is said that the father was to know nothing about it, notwithstanding that extraordinary nocturnal excursion or incursion which appears to have been made upon him in his private castle at Murthly, where, if any such marriage had existed, he was of course sure to have heard of it. But what is more, the pursuer's own evidence, contradicted no doubt, goes to this—the Major not only takes this lady down to Birnam, and taking her down there introduces her right and left as Mrs Steuart in the immediate neighbourhood of his father, as if his object was to make his father as early as possible acquainted with the marriage. It was necessary to have some case of concealment, in order to account for the extraordinary facts which are stated to have taken place immediately after the marriage; but the case of concealment is inconsistent with the case that is set up in other respects, and the cause assigned for the concealment does not tally with the course stated by the pursuer's own witnesses to have been pursued.

My Lords, I will only take up a moment of your Lordships' time with observations as to any of the evidence that succeeds the marriage. There is evidence of important matters immediately succeeding it, but it seems to me to be open to the strongest observation. On the day but one after the marriage, according to George Wilson, a visit was paid Mrs Alexander Wilson, who had before her marriage been a Miss Forman, and he gives this account of what happened. "On that night, 14th February, I called at the house. I knew that my wife was to be there and my two children, and I went to take them home. I took them home about half-past ten o'clock. I got supper in my father's house that night, some of the cold stuff that had been left from the night before. I got it in the Major's own room. He was there and my sister Margaret, I believe my wife had got tea with them before that. The second day after the marriage I went with my mother and the Major and Margaret to Newhaven to get a fish dinner. We went to Leith first. We went there about one or two o'clock in the after part of the day. We went in a cab. The Major had a dog that he wished to leave at Leith with my brother Alexander's wife. She was a Miss Forman. We called for her, and also for Mrs and Mr Forman, who lived in the same land. When we went into Mrs Forman's, Mrs Forman noticed the wedding ring on my sister's finger, and said, Maggie, are you married? The Major turned and said, 'Yes, this is Mrs Major Steuart.' Their healths were drunk on that occasion. That was proposed by Mr Forman and his wife. They drank long life and prosperity to them."

Then we have the evidence of Mrs Janet Forman or Wilson at page 228, and that is certainly very curious. She says, after giving evidence about the history of the family, in her evidence in chief, "I remember the Major coming to Leith to see my mother about a dog that she was keeping for him. I had

seen him several times before that. Maggie Wilson was with him on that occasion. (Q.) Did you give her some advice on that occasion? (A.) I don't remember. (Q.) Do you remember the Major coming into the room on that occasion? (A.) Yes. (Q.) Did he say anything to you about her? (A.) He said that this was his wife Lady Steuart, (which of course she could not be). That day we had a fish dinner at Mrs Main's, Newhaven. My mother in law, George Wilson, Major Steuart, Mrs Steuart and myself were at the fish dinner. (Q.) Do you remember before that, calling on the Wilsons one day in Clyde Street? (A.) Yes. On that occasion I went into Maggie's bed room. (Q.) How did you find her, when you went in? (A.) In bed with her husband. (Q.) Was that the first time you knew she was married? (A.) Yes. (Q.) Were you surprised at first when you saw them? (A.) Yes. I said Oh, dear! The Major said "This is my wife," When she says "I remember on one occasion," of course, it must have been the day after the marriage, because the 15th, which was two days after the marriage, was the day when they went to Newhaven, and she says it was the day before that that she went and found them in bed. Then she goes on, "That same day, after I had seen them in bed together, I went to the shop in Waterloo Place. I said to Mr and Mrs Wilson 'Maggie is married,' and Mrs Wilson said 'Yes,' and that it was to be kept quiet. The fish dinner at Newhaven took place the next afternoon." There appears to be some confusion about the days. This witness says that the Major introduced this lady as "Lady Steuart" to Mrs Forman the day after her daughter (Mrs Alexander Wilson), had seen the two in bed together, and heard the Major say that they had been married.

As to what took place afterwards we have this evidence: "When Major Steuart came to my mother's my mother said 'Maggie Wilson is married,' and I said" (having seen them in bed the day before, and being then for the first time aware of their marriage) "I could have told you that six months ago. (Q.) When was that? (A.) I don't know the date. (Q.) How long ago is it? (A.) It was the day we went to Newhaven for the fish dinner, the day after the marriage. They were in my house, and Major Steuart went to my mother's room. (Q.) Did he tell your mother of the marriage? (A.) Yes. And you said you could have told her that six months ago? (A.) I made the remark I could have told you that mother. (Q.) You said six months ago? (A.) Well perhaps I made a mistake there. (Q.) Did you say that you could have told her six months ago? (A.) Perhaps I was wrong, but I said to her 'I could have told you that perhaps long ago'—I think I was wrong in saying that I said six months ago. That night when I came back I told my mother they were married, but I was not going to make her sensible how long they had been married. I knew they were married privately. I did not want my mother to know anything about that." Can one read anything more entirely conclusive as to the state of confusion in which these persons found themselves involved in consequence of having to maintain a story which I think your Lordships must all feel, upon the sworn narrative of it, upon this special narrative in particular, is a most extraordinary story. This lady going and finding them in bed, and being told that they were married, and then the next day saying to her

mother "I could have told you that six months ago," and then equivocating afterwards on cross examination. The narrative of the marriage, and the circumstances which followed the marriage, is mystified in the minds of the witnesses themselves by the circumstance that they have to fall in with a certain counter theory, and consequently they incline sometimes one way and sometimes the other, as the necessity of maintaining the theory of publicity or of secrecy is imposed upon them, the publicity being set up by several members of the family, and the secrecy by others—the result being inconsistent with the true narrative of what occurred.

I agree, however, with my noble and learned friend on the Woolsack in thinking that something may have taken place at that supper to celebrate the birthday of the Major.

The Major had on that occasion been drinking certainly enough to suffuse his eyes with tears, evidently he had been drinking more wine, and it is not unlikely that something or other did pass.

Considering all the circumstances of the case and all the gossip that was going on, I think it very probable that some of the more respectable members of the family were desirous that something should be done to stop people's mouths—that something should be done so that if the intimacy was talked about they could say that a marriage had taken place. But that anything amounting to a solemn engagement by way of marriage did take place on that night I think it would be too much to call upon any Court to accept as proved upon evidence of this character, even if the case stopped there.

Now, my Lords, does it stop there; observe all the public transactions which took place after the alleged marriage. In the first place, as regards the poor child, there is its register. How is it registered? It is registered, the mother concurring, as an illegitimate child. It is baptized in the same manner as an illegitimate child. On the death of the father, that father dying worth £12,000, and the law of Scotland being very much the same I believe as the law of England as regards the succession to such property, what took place? There was no attempt whatever made to establish the claims of the widow and child to this money. But a solemn suit was afterwards instituted by the present pursuer for alimony for her child as an illegitimate child, and a narrative in detail was given by her stating how her seduction came about, namely, as it appears very natural that it should have come about, her father introducing the Major into the house, and his having the opportunities that he had there. That was the form and basis of the action. Now we come to her second marriage. It was said that she, as she was in honesty and honour bound to do, disclosed to her intended husband her exact position with reference to the Major. Now I say, consistently with that that you can only arrive at one conclusion, and that is, that she told him that she was never married to the Major, for in the register of marriage with her present husband she is described as "Margaret Wilson, spinster."

And in every other transaction that you can follow out in the shade of documentary evidence, or evidence which admits of any reasonable contradiction, what do you find? You find first of all the letter from old Wilson announcing the birth of the child to its father. Was there ever anything

more preposterous than the supposition of that being a grandfather's letter on the birth of his first legitimate grandchild, who was the heir to a baronetcy of many thousands a-year. And the answer to that letter is exactly in the same tone and spirit. We are asked to believe—and as the learned Judges in Scotland adopt this view I speak of the supposition with more respect than I otherwise should, but I confess I cannot adopt it myself,—namely, that the Major was a very cautious and careful man, and that it was because he took care not to commit himself that he put his reply in such a form. No doubt the Major was to a certain extent able to take care of himself. It may be said to a certain extent that he was not a man who was to be taken in, but that being in the state in which you find him to have been as to his intoxicated habits, he should be able to write letter after letter without a single word creeping out which could give a shadow of support to the pursuer's case, I think is simply impossible. As for the certificate of marriage—I mean the document which is supposed to have been signed by him and to have been handed over to the father of the pursuer as a declaration of the marriage, and to have been put by the father-in-law into his supposed son-in-law's portmanteau, and so to have got into the hands of the supposed son-in-law (a suggestion which was made and withdrawn)—I regard that as being a suggestion utterly unworthy of any sort of credit. When we consider the evidence with regard to this alleged letter, one cannot help asking is that the mode in which a contract of marriage or a letter supposed to be a solemn document, on which a daughter's position depended, would be treated by her father?

My Lords, I have gone through these different events as to the child, and I have referred to the Major's own letters and the other letters that we have, and now I ask myself how far the inference to be drawn from these documents is consistent with the evidence of the witnesses. In some cases, no doubt, we have evidence that the Major did call the pursuer "Mrs Stewart," but you never have a single proof of her being so called upon any occasion at all when his father was concerned or when any of his own family were concerned. You never have any instance of her being so called in a letter to Mr Jameson; on the contrary, it is quite clear that Mr Jameson was of opinion that they were not married; nor have you any instance of her being so called in a letter to Captain Cooper. You have only one single word said to have been uttered to Captain Cooper, and that was uttered, if uttered at all, when the Major's state of mind was at least doubtful.

But besides all this, we have important evidence as to what took place in the Police Court in Edinburgh, where the pursuer seems to have gone for the purpose of complaining of having been called foul names. I do not wish to lay stress upon the witness Torry; but there is nothing I know of to impugn his veracity. He is not to be regarded as a practitioner in a high-class of practice. He is not a Writer to the Signet. He is not at all in that position in society. But according to his narrative at all events, the charge brought by her of being called foul names was dismissed; and he tells you distinctly that she was compelled openly then and there to state that she was not married to the Major. With regard to the Major having on certain occasions declared the pursuer to be his

wife, it must be remembered that that declaration was made when he introduced her to a place where ladies were admitted; for instance on the occasion of the Birnam games. His calling her Mrs Stewart upon such occasions, where his conduct would have been open to just reprehension if he had called her by any other name, or introduced her into the society of ladies in any other character than that of his wife, is of no value whatever. In order to give value to such declarations there ought to be some degree of solemnity, and some degree of character about them; they ought to be made to persons to whom it was important that such representations should be made, and truly made.

My Lords, I find nothing that would justify my giving any credit to the proceedings which are stated to have taken place on the evening of the 13th February 1866 as being a legal marriage, when all the writing is adverse to the supposition, and all that we get in the way of public act of any description or form whatever is adverse to the story that is told.

My Lords, it is not necessary to go through the whole of the evidence in this case, for that has already been done. But I cannot help making a remark, and it shall be very brief, upon Captain Cooper's evidence. That evidence was very much relied upon in the Court below, and justly relied upon as regards the character of the witness. We should be thankful if all the witnesses for the pursuer had been of the character of Captain Cooper. A good many of them, for instance the medical attendants in Edinburgh, are highly respectable witnesses, but they do not bear out the pursuer's context. However, as regards Captain Cooper, he went to Hythe desirous to find out the truth of the matter. He approaches Budd and asks him whether the Major is married. I am willing to suppose that the question was exactly what he says. I trust to his memory in this respect as undoubtedly as I trust to his entire veracity. He says his recollection of the answer is that it was that "he was married right enough." Budd may have said "Yes, that is right enough;" but had that answer reference to the marriage? Now that may or may not have been so, and I say that for this reason, because he is asking who had been sent for; he says that Budd said "Miss Wilson has not been sent for." He says, "I asked has his wife been telegraphed for," and Budd's answer was "No, Miss Wilson has not been sent for." Therefore I cannot but believe that when he received the answer "Yes, that is right enough," the two persons may have been at cross purposes as between the interrogator and the answer, because certainly the subsequent answer, equally deposed to by the same witness, would have implied that Budd had not meant to convey what he (Captain Cooper) understood in answer to his former question as to the fact of the marriage. If he had not had that impression upon his mind he could not but have been strongly struck with Budd's cautious answer, "that Miss Wilson had not been sent for," as in fact she had not been sent for. If she had been the Major's wife she should have been sent for, especially as there was an additional strong reason to send for her as she was undoubtedly the mother of his child. But Captain Cooper made no remark upon that.

It has been said by my noble and learned friend that Budd having been called by the defender as well as by the pursuer, and having been a witness

on both sides, he must be taken to be a witness of truth as far as the intention of speaking truth goes; and as to Budd, the only doubt is whether Captain Cooper received a correct impression with regard to his first answer, which he certainly does not seem to have done the second time; and there is a certain analogy to this in the correspondence with Mr Jameson. Mr Jameson writes to Captain Cooper stating "this is all I know about the matter (narrating all that passed when they two met down at Hythe); and I tell you my view as a lawyer upon the position of the parties. I tell you as a lawyer that I do not think there is a chance of supporting the theory of the marriage." Captain Cooper might naturally have answered that letter by saying "I am very much astonished at all that, because Budd told me, and the Major himself told me on his death-bed, that he was married." But that does not seem to be the case. As to Budd, he appears to have given him no such answer; and as to the unhappy gentleman's answer, his physical state must be borne in mind. It appears that although Captain Cooper and Mr Jameson were of opinion that he was decidedly mending on Sunday morning, and Captain Cooper went to church in consequence, yet he died very soon afterwards, and they found they were mistaken in that. Under these circumstances I think Captain Cooper might well feel that he could not be so sure of what was said to him by a man in that condition as if he had been what he at first thought he was, that is to say, calm and cool and clear-headed. However, his statement is this—the Major said to him "You are married, aren't you?" It is not necessary to lay stress upon this, but it is the fact that he had known before that Captain Cooper was married, and that he had spoken of Captain Cooper's wife. And then, in answer to a question by Captain Cooper as to whether he was married, the Major's answer was "Yes, I am." At all events it was but a single sentence uttered by a person in the state of delirium tremens, in the state described by Mr Jameson, a state of half consciousness, in which he would be at times able to answer, and answer correctly, and at other times not capable of answering. I think it would be impossible to place much reliance upon the last words spoken by a man on his death-bed in this lamentable state, in a certain degree of cloudiness of mind, under any circumstances, and certainly it cannot be relied upon if it is found to be in opposition to his own repeated acts and declarations, and still more if it is found to be, as it is in this case, in opposition to the repeated conduct, actions, declarations, signatures, and avowals of the pursuer herself.

My Lords, for these reasons I entirely concur with my noble and learned friend.

LORD O'HAGAN—My Lords, the lucid and elaborate judgment of my noble and learned friend on the Woolsack has made further discussion almost superfluous; but the case is one of importance, and as my view is adverse to that of learned Judges for whom I have very sincere respect, I think it becoming that I should state, with as little detail as possible, the general grounds on which I have felt myself coerced to differ from them.

I was struck by an observation of Mr Scott as to the difficulty affecting comparative strangers to the peculiar circumstances and feelings of the Scottish people when they are required to consider acts performed under the influence of those circumstances

and feelings, and according to the customs which have grown out of them, upon a question of fact, and the question here is altogether so. I should defer greatly to the opinion of those possessing local knowledge of which we cannot boast, but in this case it seems to me that undisputed statements and admitted documents give us special means of supplying the want of it. The remark would have extreme force if our attention were called only to the circumstances of the alleged marriage of the 13th February 1866, but it fails to touch in the same manner the accumulated records, letters, and accounts which cast light upon those doubtful circumstances, and appear to me decisive in favour of the respondents. Had we, however, to deal merely with the proof afforded of the events of the 13th of February, I should be inclined gravely to doubt, with the minority of the learned Judges who have discussed the case with such elaborate fulness and conscientious care, whether it should be held to establish that "free, deliberate, full, and solemn consent,"—to use the words employed in *Jolly v. Macgregor*, 3 W. and S., 195—with the intention of constituting a marriage between the pursuer and Major Stewart, such as the law of Scotland requires for that purpose.

The burthen of proof is on the pursuer, and she comes to make it after the lapse of years, when some material witnesses have passed away, the memories of others have been weakened, and effectual enquiry as to important facts has become impossible. Assuming that something like the scene described by George Wilson did take place, we must remember that its value for the pursuer's object depends entirely on the precise words that were employed by the Major on that occasion; and for their ascertainment we are left to the evidence of two witnesses, George Wilson and Kellett (I do not rely on Agnes Forbes for the reasons which have been already given by the Lord Chancellor), who are to be regarded with caution, the one as the brother of the pursuer, and the other as her friend, speaking of occurrences in the absence of any person unconnected with her. The father and the mother are dead, and at least the father's after conduct seems to me, for reasons I shall suggest, flatly inconsistent with the notion that on that evening he was witness of any thing which he then deemed a real and valid marriage.

Then it is plain that the words alleged by Wilson and Kellett are mere fragments of a lengthened conversation, and we are left without any means of judging how far they were modified or affected in their meaning by those which preceded and came after them. And yet, before we pronounce that a binding contract, uniting the parties for all time, we must have sufficient reason to be satisfied that we know, if not the *ipsissima verba*, at least the precise effect of the communication that passed between them. Is it not very difficult to affirm that we have such knowledge from the report of a few sentences or portions of sentences, especially when the reporters vary from each other, and from the statement of the pursuer herself? In her original condescendence she makes the Major ask, Will she be his wife, but neither of the witnesses speaks of such a query. Wilson alleges his words to have been—"I am poor now, and I cannot marry, but I will marry you in the Scotch fashion;" whilst Kellett says that on her coming in he said, "he could not do what he would wish to do at the

present time; but, he added, I will show you, Wilson, what I will do, or what I can do." These words are different, as are others, also deposed to by the witnesses, and it is natural that they should not exactly agree, even if they be honest, after such a lapse of time; but their differences are material when the question is whether a marriage was then and there solemnly effected between the pursuer and a man who declared, if we believe them, that he could not marry or do what he wished at the present time; and when the supply of an omitted sentence might make indisputable the view presented in the Court below, that no present marriage was contemplated, whatever might have been the hope of the future on the one side, or the willingness to encourage it on the other.

The questionable incident of the ring, and the somewhat equivocal declaration that the pursuer was his wife "before Heaven," involving a possible repudiation for the time of the force of earthly law, which by-and-bye might be invoked to sustain the heavenly sanction, have been fairly assailed as rather weakening the pursuer's case. And certainly it does appear to me that it would be a serious thing, on evidence of words so meagre, so uncertain, so capable of being shifted to another sense by a misconceived phrase or a forgotten syllable, to establish the most sacred and momentous relation which can unite human beings in this world.

And the difficulty of giving such grave effect to such proof, so offered at such a distance of time, and with such circumstances of impeachment, is much increased when we remember the evidence as to the conduct and demeanour of the pursuer and her sisters, one of whom, Mary, still living, capable of speaking to very material facts, and challenged by personal allusions to appear, has not been produced. The utterly unrestrained intercourse between the Major and the pursuer in their frequent drives together, with her father's sanction—the introduction of a man so abandoned in his habits to such a dwelling, occupied by young girls, and with such domestic arrangements as have been detailed in proof—the condition of the Major on the evening in question, as described in the testimony "coming off drink,"—the absence of all independent witnesses, and the manifest want of any previous preparations for a marriage, of which the Major is said to have spoken only when violently threatened with expulsion from the house.

All these things, I say, and others, for reasons I do not pause to detail, seem to increase the difficulty of reaching any assurance that the words deposed to by Wilson and Kellett were deliberately intended to constitute a present and concluded marriage.

It does seem somewhat startling to give such an operation to such doubtful words, spoken, if at all, at a nocturnal carouse, by a habitual drunkard, even then emerging from a fit of intoxication, weak in mind and body, and weeping maudlin tears, and without a friend to counsel or a witness to protect him.

But, as I have said, if the case had stopped there I should have had much greater difficulty in acting on any impression of my own as against the judgment of the Court below.

I should have hesitated to differ from eminent Judges fully conversant not only with the law but also with the manners of Scotland, and, though certainly with doubt and misgiving, I should have possibly declined to concur in a reversal. But the

case does not so rest; and, looking to the subsequent conduct and acts of the parties, I find myself obliged to hold the appeal sustained. In all inquiries of this sort I apprehend the true rule is not to regard singly and apart the one transaction on which reliance is placed as constituting the marriage. It is necessary to exercise a "large discourse of reason looking before and after," and, from all the antecedents, and all the consequents, to ascertain the true mind and purpose of the parties whose intention determines the character of their act. And it seems to me eminently proper to apply this rule to the issue before us. No one, I think, can say that the direct proof of the alleged marriage is very strong or very clear; and this being so, we are bound to gather from all the information within our reach such aid as may enlighten obscurity and clear away doubt. Having striven to do this as carefully as possible, I am forced to conclude that the testimony furnished by the mass of letters, records, and proceedings, which have been so laboriously presented before us, is decisive against the pursuer. The parol proof is often conflicting and unsatisfactory. The documentary evidence points only to one result, and taken altogether seems to me demonstrative. I do not, as I have said, dream of again detailing it, but I touch on some salient points which have most affected my own judgment.

Old Mr Wilson is dead, but his acts make him a persuasive witness from the grave. He, if any one, knew all about the assisted marriage; and what did he think of it? I pass for the present his letter to the Major as to the birth of the child, which is in my view a powerful piece of evidence inasmuch as it is affected by the suggestion of a compact for secrecy, to which I shall allude in a few minutes. But when the Major was dead, and no reason existed for further falsehood or concealment by reason of such a compact, or anything else, when, on the contrary, there was every motive of duty and of interest alike for speaking the truth, Mr Wilson ignores the marriage in his accounts to the Major's executors, and when Mr Jameson writes to inform him of the Major's death, he replies simply by inquiring about his borrowed money. His description of the pursuer as Margaret Wilson in his deed of settlement, in which the name of another daughter was altered by reason of her marriage, is inexplicable if he then believed her to be the wife of Major Stewart. The document was framed for family purposes, and not to be blazoned to the world, and it is hard to imagine that he should have consciously put on record a false description, dishonouring his daughter if he knew her to be married, and putting on record permanent evidence against the rightful claims of her and of his grandson.

Then as to the pursuer herself, her whole correspondence with her alleged husband, so far as we have it—fifteen letters out of fifty written by him having been produced—in its address and its diction, and in its spirit, is inconsistent with the supposition that they wrote to each other as man and wife. "It is not too much to say," observes the Lord Ordinary, "that no such letters ever passed between a husband, said to be an attached husband, and his wife." After the supposed marriage her dealing with tradesmen were all in her own maiden name. So was her complaint in the Police Court eight months after it, on the hearing of which we have the evidence of four witnesses,

including the advocate by whom she was cross-examined, to prove that she swore she was not a married woman. Then we have the statutory registration of her child's birth, vouched by her own signature, and describing it as illegitimate. We find her sued and decreed, without objection, by Sir W. Steuart, in her maiden name. In her maiden name she corresponded with her supposed husband's agent during his lifetime, giving receipts for payments for her boy, which were manifestly made as for an illegitimate child. After her husband's death she distinctly stated to Mr Steuart, a cousin of the Major, that she was not married to him. She wrote as Margaret Wilson to Sir William Steuart, Mr Jameson, and others. She petitioned the magistrates of Edinburgh in that name. She sued Sir W. Steuart in that name successfully for the aliment of her son as an illegitimate child. In that name she accepted payment, and gave receipts on account of it; and finally, in that name she married her present husband.

Your Lordships have heard very ingenious explanations of these striking circumstances. The imagined compact of secrecy, to which I shall immediately advert, could only have had operation during the Major's life; and on the theory of the respondent that she was a pure woman, bound to her husband by an honourable marriage, and having the rights of her legitimate son to protect, it is difficult to credit that she could have been induced to compromise those rights, deny that marriage, and voluntarily submit to the degradation of virtually describing herself as a concubine, for any motive, even whilst the Major lived. I have heard no reason for the continuance of such a course of conduct after his death. She had nothing to hope from Sir W. Steuart. He put her at arm's length, and was utterly hostile to her. It has been said that she was poor, and could not assert herself. But her poverty did not require the voluntary sacrifice of her own good name and the fortunes of her child; and it is inconceivable, if she had a real consciousness of her position as a married woman, that without necessity or advantage she should, by gratuitous and aimless falsehood, have persisted in compromising it. I do not discuss in detail the various suggestions which were made at the bar to account for her conduct. They were ingenious, but notwithstanding them, the undoubted facts that I have summarised press on my mind with overwhelming force.

Then as to Major Steuart, we have admittedly strong *prima facie* evidence in his letters to prove that he did not regard as his wife the woman to whom he addressed them. They are clearly not such letters as any husband ever addressed to any wife, acting upon the ordinary feelings of our nature, or in the ordinary course of things. They are false on the face of them if Margaret Wilson was a wife, for they are all addressed to her in her maiden name, and they are utterly without any single indication of the confidence and affection which characterise the relationship of marriage, especially when the hope of offspring makes it doubly close and dear. The force of the argument from these letters has pressed hard on the pursuer, and it is encountered only by the theories, first, that the parties had an interest and an understanding binding them to keep the marriage secret; and next, that the letters were deliberately

framed by the Major so as to avoid the furnishing of any proof of it.

The answer seems to be, as to the first, that between the husband and the wife there was no necessity for pretending to keep a secret, whatever might be their view as to the outer world—that the suggestion seems at right angles with a great portion of the pursuer's case, which rests on the further proclamation of her marriage by the Major on the morning after its occurrence to Mortimer a butcher, who did not believe his statement, and afterwards at Birnam, and elsewhere, to a multitude of other people. And, finally, that the publicity so given is incompatible with the notion that he was anxious to conceal it from his father, for whom he cared nothing, from whom he feared nothing, who authorised and encouraged him to marry the pursuer, and to whom he took the directest means of communicating the fact that he had married her—if she be right in insisting that she was openly acknowledged as his wife amongst his father's servants and at his father's gate. No doubt the Major's statements on this point were various and contradictory. To the butcher and others he announced his marriage, whilst to the Rev. Mr Rigg and to the doctors, Dunsmure, Simson, and Culbard—persons for whom he had more respect, and to whom he seems to have spoken more seriously—he persistently denied it. His vacillating conduct and contradictory allegations give no safe ground to rest upon either way, but his letters, written deliberately in private, without any need of concealment or dissimulation, appear to me to be persuasive in the last degree.

Then as to the suggestion made by some of the Judges, and repeated here, that those letters were coolly and deliberately framed, so as to give no colour to any claim which might be made by the pursuer, I can only say that it appears to me to be inconsistent with her own case and her own evidence in material particulars. He is represented as having interchanged a mutual affection with her, and entered with full deliberation into a solemn contract to make her his wife; and if this was really so why should the affection have been concealed and the contract carefully ignored in letters the most intimate and confidential? And, again, he is said to have been, notwithstanding his loose habits, a truth-speaking and honourable man until the close of his life. Is such a character consistent with a foul design, if persistently carried out, to deprive his wife of any acknowledgment of their real relation, and with a contemplation in cold blood of the chance of having her declared a concubine, and her son a bastard, by reason of writings cunningly devised to assure every reader of them that no such relation had existence?

Surely such theories seem as unreasonable as they are degrading to the memory of the man to whom they attribute base motives and unworthy acts for the purpose of justifying a forced and unnatural construction of letters which in their plain and ordinary meaning so powerfully negative the notion of a marriage.

I do not go into arguments which have been fairly urged as to the mode of living of the parties—when the Major was in prison, at St Patrick Square, and in Birnam, after the alleged marriage, the coarse words employed with reference to the pursuer to the Rev. Mr Rigg and to Mr Gold, and

as to other matters,—in order to show that he did not act towards her or speak of her as a man might be expected to speak of and act towards his wife.

But I must add one word as to the evidence of Captain Cooper, which has been so much relied on in the very able and lucid judgment of the Lord Justice-Clerk: and which, we were told, mainly determined the majority of the Judges in favour of the marriage. With great deference to their Lordships, I am unable to attach such high value to it. No doubt such statements as that which is attributed to the dying Major by Captain Cooper are worthy of great consideration, and under certain circumstances would be of capital importance. The English law rightly regards as equivalent to an oath a declaration of a man who, retaining clear memory and full intelligence, feels his spirit solemnized under the shadow of death, and stands consciously on the brink of eternity, in the expectation of a speedy accounting with his God. Such declarations are admitted on the most momentous issues, and have founded many verdicts affecting the lives of men. But this was not the case of the unhappy Major Stewart. When Captain Cooper came to Hythe on the evening of the 16th of October he was fast approaching his end, and on the night of that day he had a fit of *delirium tremens*—that fearful avenger of intemperance, which shatters equally the body and the mind. He could not talk like a rational being. His memory had failed. He asked Captain Cooper if he had a wife, although he had before known fully of her existence, and had recently received a letter about her. He mistook his old comrade for another person. On the night of the 18th he died, and on the 19th his friend and agent Mr Jameson, who had arrived on the day after Captain Cooper, thus described his condition—"With the exception of an occasional look or word of intelligence, he was not in a state to make any settlement of his affairs."

It seems to me impossible to rely on the broken words of a person in such a condition as giving any faithworthy assurance of any fact, and especially of a fact so often solemnly denied by himself—implicitly in his letters, and expressly by his conversation on many serious occasions, when he was perfectly collected and in full possession of his mental faculties.

And this view is sustained by the letters of Mr Jameson of the 29th October and the 2nd November 1868, in which he treats the statement of Major Stewart as of no account, dealing with the child as illegitimate, and expressly saying that "the girl, Miss Wilson, the mother of the boy, has no legal claim." Mr Jameson's close relations with the Major, and thorough knowledge of him, gave peculiar significance to the expression of such an opinion at such a time, and he appears to have had no unfriendly feeling towards the pursuer, which might have led him, consciously or unconsciously, to misrepresent the truth.

Consider it as we may, this very singular and painful case is not free from many difficulties, which have not unnaturally produced diversity of judgment upon it, and which can never in this world be satisfactorily removed. But your Lordships must decide as best you can, on the balance of testimony and argument; and on the whole I am of opinion that that balance strongly inclines in favour of the appellant, and that, accordingly, the appeal should be allowed.

LORD SELBORNE—My Lords, when the evidence of the only two witnesses (the pursuer's brother George and Mrs Kellett) who speak directly to the constitution of a marriage *per verba de presenti* is examined, its effect is found to depend upon (1) certain words spoken, of which they profess to give the substance or effect, and which, as reported by them, are in themselves far from unequivocal; (2) certain accompaniments of fact, principally the wedding ring and the bedding, of which the former is difficult to reconcile with the rest of the story, and the latter rests upon the testimony of one witness (Mrs Kellett) only; and (3) the interpretation put by these witnesses on what they saw and heard, as that it was "solemn and serious," and so forth. A third witness, Agnes Forbes, adds what is material by way of corroboration, though she does not profess to have been present at the critical moment, but upon her testimony serious doubt is thrown, unless several other witnesses are to be entirely disbelieved. The rest of the pursuer's evidence relates to what happened either before or after the time when the actual marriage is said to have taken place, namely the evening of the 13th February 1866—as does also the whole evidence of the appellant.

In a case of this kind, the Scotch law being what it is, a certain amount of colour and exaggeration, and the addition, subtraction, or alteration of a few particulars in a narrative not wholly without foundation in fact, may bridge over the whole difference between what is (in law) marriage, and what is not. Before your Lordships can draw the conclusion in support of which this evidence is adduced you must be satisfied that what took place on the 13th February 1866 was intended and understood by Major Stewart and the pursuer as then and henceforth constituting between them the relation of husband and wife. If, on the other hand, you have the evidence of these witnesses, with such confirmation (be it more or less) as they receive from the subsequent talk about a marriage, which is deponed to by members of the Wilson family and others, and, on the other hand, convincing proof, documentary as well as oral, that Major Stewart and the pursuer did *not* really suppose or understand themselves to have been married to each other on the 13th February 1866 (a point on which, since it depended on the true meaning and intention of their own words and acts, they at all events could not be mistaken), and further, that George Wilson, the father (who must have understood what then passed, at least as well as his son George, or Mrs Kellett, or Agnes Forbes) did not after the 13th February really regard his daughter as the lawful wife of Major Stewart—I for one cannot hesitate for a moment which to believe. I believe the evidence of the subsequent lives, writings, acts, and declarations on serious occasions of Major Stewart, the pursuer, and George Wilson, the father, rather than the statements, for the purposes of this suit, of George Wilson the son, Mrs Kellett, and Agnes Forbes, made in 1872.

Your Lordships have already gone so fully into the particulars and the effect of the evidence that I think it sufficient without further repetition to say that I concur generally in the remarks on the details of that evidence which have been already made. The weight of the acts and declarations, inconsistent with belief in the alleged marriage, of the pursuer herself and her father, is so much

the stronger because it is clear that the Wilsons desired, if they could, to bring about a marriage between Major Stewart and the pursuer, and did whatever they could (in the way of conversation with relatives and others) to give a colour of marriage to the connection between them. The theory that Major Stewart was willing to marry the pursuer on the condition that the marriage was to be clandestine and kept secret, in order to withhold the knowledge of it from his father, is conclusively disproved in a variety of ways. First, by its absolute inconsistency with the large mass of evidence which is produced (whether entirely credible or not) to shew that Major Stewart himself and all the Wilsons, habitually, unreservedly, and to all sorts of people, talked from the 13th of February 1866 downwards about this alleged marriage; secondly, by the behaviour of Major Stewart to his father, and by his not merely parading this connection with the pursuer very publicly at Dunkeld and elsewhere in the immediate neighbourhood of his father's residence, but even intruding with her on two occasions into his father's house; and lastly, by the evidence of Joseph Gold (confirmed by George Wilson, the brother) of Sir William Stewart's conversation with him in December 1865, and by that of Dr Culbard, Mr Rigg, and Mr Jameson, as to Sir William Stewart's wishes and offers at a later date, and the communication of those wishes and offers to the Major; the result of which is that Sir William was then prepared not only to acquiesce in, but even to encourage, the marriage of his son with the pursuer, and to make a suitable provision for him in that event. I cannot, with the knowledge of all these facts, attribute any real importance to what was said by the Major to his friend Captain Cooper on his death-bed, whatever may have been the degree of the Major's capacity to speak rationally and collectedly on important matters of business. Even if he were supposed to have been willing at that moment to make the pursuer his widow by acknowledging her as his wife, he was of course unable to do so unless she already stood to him in that relation; and whether she did or not is a question which must be determined, not by this conversation, but by other evidence in the case.

It was strongly urged by the counsel for the pursuer that the difficulty of believing that the pursuer's father and mother (persons apparently in a respectable condition of life at Edinburgh) could have been capable of assenting to the cohabitation of their daughter with Major Stewart in their own house, and surrounded by their other children, on any other footing than that of marriage, was so great as to preponderate over all the difficulties on the other side. I cannot agree with that. It is indisputable, if the evidence of the pursuer's witnesses is at all to be believed, that Mr and Mrs Wilson were ambitious of having Major Stewart, the heir of Murthly, for their son-in-law; and that long before February 1866 they permitted and encouraged between him and their daughter a kind and degree of familiarity and intimacy (with opportunities of being together alone and unobserved for hours at a time) which could not have been reconciled with the most ordinary prudence or delicacy, considering more particularly the difference of birth and station, even if Major Stewart had been a man of exemplary reputation for moral propriety. He was, however,

by no means a man of that reputation. He was an officer in the army, fond (in some respects at all events) of low life, of irregular habits, coarse and indelicate in his language. No parent could have a right to suppose that if such opportunities were permitted to such a person advantage would not be taken of them. The infection of his coarseness and indelicacy had extended to the conduct of both the pursuer and her father when that extraordinary nocturnal excursion to Birnam took place in December 1865, and there is also sufficient evidence that she herself learnt to imitate, apparently without restraint or rebuke, in the house of her parents, his peculiar manners and language.

It is part of the pursuer's case that scandal had arisen before the 13th February 1866, and was felt by the Wilsons to be certain to continue from the circumstances under which the Major then was and had been for some time living in their house; and that it had become necessary for them to choose whether he should go elsewhere or remain in that house on the avowed footing of conjugal or quasi-conjugal cohabitation. Whatever actually took place on the 13th February 1866, this previous state of things was confessedly the cause of it. If the Major had then left the house, the expectation of a future marriage must in all probability have been abandoned, and all the evils of the past scandal, with the consequences, whatever they might be, of the intimacy which had already existed, must have been endured without any hope of remedy. On the other hand, the connection, if permitted to continue, and justified as far as possible to the family and their friends and acquaintances by such reputation of marriage as they might be able to create, might grow into an actual marriage afterwards, either by habit and repute, or by regular or irregular solemnization, under the operation of those influences which that state of things would naturally produce or strengthen.

Under the law of irregular marriage in Scotland it is not, I am sorry to say, by any means incredible that persons, generally reputed to be respectable, but not fastidious in morals or manners, may sometimes reconcile their moral sense to the notion of an inchoate marriage, to be matured and perfected by the progress of future events, of which they hope and expect a favourable issue. Such a notion is indeed foreign to the law, which recognises no middle state between marriage and concubinage; but it is, nevertheless, both possible and probable that in the peculiar circumstances in which the Wilsons were placed, and considering what were the alternatives open to them if the Major was not then willing to bind himself by an actual marriage, they might offer this excuse to their own consciences, and justify by it the language which they held to their family and their friends.

If even Mr Melville Jameson, a gentleman and a man of business, could be in so ambiguous a mental attitude as that described in the remarkable passages of his evidence at the bottom of page 246 and the top of page 247, it is not difficult to imagine a still greater indistinctness of ideas on this subject on the part of such people as the Wilsons. The passages to which I refer are these:—“(Q.) Did you think when he introduced her to you that he was introducing his mistress to you? (A.) I cannot say; I don't

think it is likely that he would. (Q.) I supposed you would not have cared that he should? (A.) No, I should not, certainly. (Q.) Did you take offence at the introduction? (A.) I did not. (Q.) Therefore you could not have thought her to be his mistress? (A.) No, I did not think her to be so. (Q.) Then I suppose you thought her to be his wife? (A.) It was a very peculiar alliance, I thought. I don't know that it was a recognised alliance of husband and wife, but I did not think he would introduce me to a woman who was his kept mistress. I cannot go the length of saying that I understood her to be his wife. (Q.) But you certainly did not take her to be his kept mistress? (A.) Certainly not. (Q.) Then I suppose there are just two relations? (A.) There are just two relations. (Q.) If you negative the one, don't you affirm the other? (A.) I cannot say that I actually thought at the time that she was his wife."

The whole circumstances of this case (including the facts that after Major Stewart's death the advice of counsel was obtained by Mr George Wilson, the father, on the question whether there was sufficient evidence of a marriage, and the assertion that documentary evidence of a marriage did exist, contained in the pursuer's letter to Sir W. Stewart, of the 1st November 1869) appear to me to illustrate in a very striking manner what is said at pages 20 and 21 of the Report of the Royal Commission on the Laws of Marriage in 1868, namely,—"We are led to conclude that there may be and that there is a considerable difference between this strictly logical view of the value of evidence of matrimonial reputation in the Scottish law and the popular view of the same subject, and that the popular view may perhaps indicate more truly than the theoretical doctrine the practical working of the law of habit and repute in Scotland. Evidently there is a wide practical difference between the effect of co-habitation with reputation of marriage in a country the law of which requires some definite and solemn acts or act for the constitution of the contract and its effect (though still considered merely as evidence) where no such solemnity is required, but where the relation may be constituted at any time by the private consent of the parties. In the former case the inquiry is, whether a certain external fact, independent of intention, did or did not happen; in the latter it is really an inquiry into the intention with which a series of acts were done. The most express declarations, oral or in writing, by both parties that they are husband and wife will not make them so unless the judge is satisfied that the inward intention of their minds was in accordance with those outward words or acts. This has been held, not only as to declarations concerning the past, which are mere elements in the proof of co-habitation with repute of marriage, but even as to *verba de presenti*, which, if sincerely spoken, would have themselves constituted marriage. In the case of *Jolly v. M'Gregor* (3 W. & S. 85), a marriage irregularly celebrated before a clergyman of the Established Church was set aside as a nullity because the Court was satisfied that the parties had no real matrimonial intention, and never regarded the ceremony as binding. Lord Glenlee (in the *Balbougie* case) said, and the House of Lords in the same case affirmed his doctrine:—"The co-habitation under the married character must be uniform and consistent, for a few instances in which a man behaves to a woman as his mistress will do away a thousand in which he addresses her as his wife. A man with-

out the least thought of marriage may behave to his mistress as if she was his wife, may not choose to contradict her before strangers who call her such, nor to expose at all times the nature of the connection."

Then the Commissioners proceed—"It is impossible not to perceive the copious elements of doubt and uncertainty which the application of the doctrine of habit and repute may introduce in a variety of circumstances under such a state of the law. An opinion, however, is entertained by some whose views are entitled to much consideration, that instead of producing upon the whole any evil effect, the practical tendency of this state of the law is to discourage concubinage, and to promote regular marriage. It appears to be thought that the law would sometimes imply marriage in such doubtful cases although the parties themselves may not really have made up their minds to be married, and would, if they were required to say positively and conclusively whether they were married or not, decline to give an affirmative answer to that question, and that the risk of such a construction of an equivocal course of life may tend to diminish the frequency of illicit connections. It was suggested to a witness of great authority, during his examination before us, that nobody could be the husband of a wife by habit and repute except by his own will; that it was his own conduct which induced the reputation; that if he wished not to be married he would not so act as by habit and repute to be a husband; that as it depended on his own will whether he would be married or not, there seemed to be no reason to suppose that having the will to marry he would not do whatever the law might require for that purpose. The reply of the witness, Lord Moncreiff, was—"I understand that in the metaphysical view; but as applied here it is reasoning in a circle. You may say that if the presumption raised by habit and repute be a true one, the parties will prove the fact by avowing it. But it seems to me clear that if that reasoning be logically carried out the presumption of law is useless. It is only useful where the fact is doubtful;" adding that, as according to his view of the practical effect of the presumption, connections continued in concubinage (that is, under the pretence or reputation of marriage) necessarily would become marriage unless there were a clear intention to the contrary, the parties would have no interest to continue in that state and not to be married in the face of the Church.

Whether the continuance of such a state of the law as this is, on the whole, for the benefit of society or not, it is for the Legislature, and not for this House in its judicial capacity, to consider. But that under such a state of the law some things may be thought by some persons reconcilable with morality and respectability which otherwise would not be so, I do not doubt; and this appears to me to be the true and adequate solution of whatever moral difficulty there is in the present case.

I concur in the judgment proposed by the rest of your Lordships.

Interlocutors appealed from reversed. Appellant (defender) assolizied, with expenses, in the Court of Session.

Appellant's Counsel—Mr Southgate, Q.C., and Balfour. Agents—Tods, Murray, & Jamieson, W.S.

Respondent's Counsel—Macrae Moir, Scott, and Brand. Agents—M'Caul & Armstrong, S.S.C.