band, the widow, to effect a particular object, represented the marriage to have taken place at a different date and in a different manner from that which really gave it efficiency. I cannot but infer, from all which occurred with respect to the mode in which these persons lived together, not only that they desired to be husband and wife, but also that they believed themselves to be so. In such circumstances, we ought to infer after their deaths that sometime during the long period during which they lived together, and in some manner, however informal, they did that which they could do without any difficulty,—namely, enter into an agreement to be or become married persons, and so to acquire for themselves and their children the status which the evidence satisfies me they wished to enjoy. His Lordship then examined the two authorities, relied on by the appellants, of *Cunningham* and *Lapsley*. As to the case of *Cunningham*, it was not a decision that a connection which in its origin was only that of man and woman, could not become the connection of husband and wife. Where the connection is in its origin illicit, more evidence or different evidence may or may not be necessary to satisfy a court that marriage has been contracted. Still, his Lordship continued, it is a matter which must always depend on the particular facts in proof, and I cannot understand Lord Eldon as deciding more than that. In the *Balbougie* case, there were not such facts as would justify the inference. For these reasons I think the interlocutor of the Court of Session ought to be affirmed.

Lord Westbury said nearly all the observations he had intended to make on this case had been anticipated by his noble and learned friend. Nevertheless, in so exceptional a case he was unwilling to dismiss it without a few remarks. His remarks were substantially in accordance with the previous judgments.

Lord Colonsay said he had had an opportunity when sitting as one of the Judges in the Court below to express his opinion fully on the facts as well as the law, and after hearing the able arguments at the bar, and materially considering the whole, he found nothing to induce him to alter his opinion, and therefore he entirely concurred in what had been already said.

Mr Anderson, Q.C., for the appellant, wished, before the question was put, to make an observation about costs, inasmuch as the appellant had scarcely any alternative but to come to their Lordship's Bar.

Lord Westbury interrupted the learned counsel, and said it was a mischievous practice to have a second argument about costs, and hoped their Lordships would not encourage it.

The Lord Chancellor—I was about to move that the interlocutor should be affirmed; and as I see no reason for departing from the usual rule, that it be affirmed with costs.

Affirmed with costs.

Agent for Appellant—Henry Buchan, S.S.C.

Agents for Respondent—Adam, Kirk, & Robertson, W.S.

Tuesday, July 30.

LONGWORTH *v.* YELVERTON.

(In Court of Session, 10th March 1865, 3 Macph., p. 645.)

Process—Declarator of Marriage—Reference to Oath. Reference to oath in declarator of marriage against a party who had, previous to the raising of the action, married another woman in *facie ecclesiæ*, and after judgment of absolvitor by the House of Lords had been applied, refused. (Aff. C. S.) Opinion, per Lord Chancellor, that since the Act 11 Geo. IV. and 1 Will. IV., c. 69, reference to oath is incompetent in a declarator of marriage. Opinions, that, supposing reference to oath to be competent in declarators of marriage, it ought not to be allowed where the interests of third parties would be prejudiced.

This was an appeal against a judgment of the First Division of the Court of Session, whereby the Court refused to sustain a reference to oath of the respondent, Major Yelverton, in an action of declarator of marriage against him at the instance of the appellant, Maria Theresa Longworth.

The appellant appeared in person at the Bar of the House to conduct her appeal.

J. Campbell Smith also for her.

Attorney-General (Rolt), Q.C., and Anderson, Q.C., for respondent.

Lord Chancellor—This is an appeal from the interlocutor of the First Division of the Court of Session refusing to sustain a reference to the oath of the respondent upon a minute of reference tendered by the appellant for the purpose, and finding the appellant liable to the respondent in the expenses incurred by him since the 12th December 1864, the date of lodging the minute of reference to oath. The proceedings which had taken place in the case, which was a conjunct action of declarator of marriage and putting to silence, before the proposed reference to oath, must be shortly recalled to your Lordships' attention. The two actions having been conjoined and debated before the Lord Ordinary, his Lordship, on the 3d of July 1862, issued an interlocutor, finding that in the action of declarator of marriage the appellant had not instructed that she was the wife of the respondent, and assoilzing the respondent from the conclusions of the action, and in the action of declarator of freedom and putting to silence declaring against the appellant. The appellant presented to the First Division of the Court of Session a reclaiming note against the above judgment of the Lord Ordinary, and on the 19th December 1862, the Lords pronounced an interlocutor recalling the interlocutor of the Lord Ordinary, and in the action of declarator of marriage finding that the appellant had instructed that she was the wife of the respondent; and in the action of declarator of freedom and putting to silence assoilzing the appellant from that conclusion of the said action; and this interlocutor was brought by appeal to this House, and after long argument at the Bar, your Lordships ordered that the interlocutor complained of be reversed, and declared that the Inner-House (First Division) of the Court of Session ought to have refused the reclaiming note of the present appellant against the interlocutor of the Lord Ordinary of the 3d July 1862, and to have adhered to the said interlocutor of the Lord Ordinary, save as to damages and expenses; and further ordered that the case be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with the declaration, direction, and judgment; which was opposed on the part of the appellant, for whom a note was lodged praying the Court to suspend consideration of the petition to apply the judgment in the meantime, and craving leave to put in a condescendence of *res noviter veniens ad notitiam*. The

unopposed condescendence alleged that since the judgment of this House the pursuer was informed that Major Yelverton, the respondent, when on a visit to his deceased brother, the Honourable Frederick Yelverton, in the presence of Sarah Mallins, who was at the time attending the brother as a sick-nurse, admitted that he had married the appellant in Scotland, and renewed his marriage vows in Ireland; that Sarah Mallins died in the Meath Hospital, and when she was in a dying state, and attended by the Rev. Edward George Campbell, informed him what had passed between the two brothers, and Mr Campbell communicated it to the appellant. The Court of Session afterwards pronounced an interlocutor, on the 10th December 1864, by which they refused the desire of the appellant's note, and applied the judgment of this House. After this interlocutor, a minute of reference to oath was tendered on behalf of the appellant, which was in the following terms:—"The pursuer in the said declarator of marriage hereby refers the whole case to the oath of the defender, the said William Charles Yelverton;" and a petition was presented praying the Court to sustain the minute of reference to oath. The First Division of the Court, on the 10th of March 1865, pronounced the interlocutor appealed from, and against this interlocutor and a subsequent one approving of the auditor's report on the account of the expenses, this appeal is brought. It must be taken as a settled rule of law in Scotland, that there may be a reference to the oath of a party at any time between the closing of the record and the extracting of the decree, although every other mode of proof has been previously tried and has failed. If the reference to oath is made originally, there can be no subsequent trial; because, as Lord Stair says, "the party to whose oath of verity a point is referred may refuse to swear till the adverse party not only renounce all other methods of proof, but depone that he knows of none, and particularly that he is possessed of no probative writing by which he may make good his plea." But however strange it may appear to those who are unaccustomed to the practice of the Scotch Courts, that a party having attempted to prove a case by testimony, and having failed, should be allowed, almost at the last moment, even after final judgment, to resort to a new method of proceeding, though he had his choice from the first—yet, such being the law, we are bound not to question but to administer it. The reason why this reference to oath is allowed at so late a stage of the proceeding seems to be, that until judgment is extracted the cause is still in Court. This being so, there can be no difference in principle between the case where a judgment is final in the Scotch Courts, because not appealed from, and a final judgment of this House, which equally requires extract before execution can issue. It was argued for the respondent that the appeal from the interlocutor having brought away the whole record, the cause is as much out of Court as it is after extract But this is not correct. Pending the appeal, the record was taken away from the Court, and all proceedings upon it were suspended, but upon judgment of the House being pronounced, it was ordered "that the cause be and is hereby remitted back to the Court of Session to do therein as shall be just and consistent with this declaration, direction, and judgment." So that, after the judgment of the House, the record was sent back to the Court of Session, and was exactly in the same position as if a final judgment had been pronounced in that Court, which was either unappealable or unappealed from, and the cause remains in the Court until extract. I think, therefore, that the appellant's reference to oath is competent in respect of the time at which the minute was tendered. But it was contended, on the part of the respondent, that a reference to oath is inadmissible in a case of declarator of marriage, and especially where, as in this case, the interests of third persons are concerned. With respect to the competency of a reference to oath in a declarator of marriage, I am strongly of opinion that, whatever may have been the practice formerly, since the statute 11 George IV. and 1 William IV., c. 69, such a proceeding is incompetent. The 33d section of these Acts enacts that all actions of declarator of marriage and other enumerated consistorial actions shall be competent to be brought and insisted upon only before the Court of Session; and by the 36th section no degree of judgment in favour of the pursuer shall be pronounced in any of the consistorial actions therein before enumerated until the grounds of action shall be substantiated by sufficient evidence. In the case of *Muirhead* v. *Muirhead*, 28th May 1866, 8 D., 786, which was an action of separation *a mensa et thoro*, brought by a wife on the ground of ill-usage, the husband admitted on the record conduct which, in the opinion of the Lord Ordinary, was sufficient to justify the conclusion of the action. Upon the case coming before the Court, upon a verbal report by the Lord Ordinary for instructions, Lord Mackenzie said, and the rest of the Court concurred,—"I read the words 'sufficient evidence' as meaning sufficient evidence independent of the admissions of the party. I think the Act meant entirely to exclude admissions and require extrinsic evidence." Now, it is quite clear that an admission upon the record can never be regarded as evidence; but the Court could not have meant to say that, if proof had been led in the case, admissions proved to have been made by the husband, that he had ill-used his wife, would not have been evidence, and might not have been sufficient evidence. But an oath upon reference is not evidence at all. As my noble and learned friend Lord Colonsay said in this case in the Court of Session—"A reference to oath is not what we are accustomed to regard as testimony proper. It is neither parole nor documentary evidence. An oath taken upon a reference is not the examination of a witness. It is what is technically called 'oath of party.'" And again, "It is not to be taken in connection with documentary or parole evidence that has been adduced. It may be hostile to all other evidence. It is to be judged by itself; and the question for the Court to determine upon an oath emitted under a reference, is not what, upon the aspect of the whole cause, appears to be the truth of the matter, but it is what has the party sworn?" As a party, by referring to the oath of his adversary, renounces all other species of proof, and as the oath emitted under a reference is not evidence, a decree pronounced in a declarator of marriage, founded upon this mode of proceeding, would be a violation of the express words of the statute, as the grounds of the action would not have been substantiated by sufficient evidence. A reference to oath, to be admissible in an action of declarator of marriage, ought not to be permitted in any case where the rights and interests of third persons would be prejudiced by a decree founded upon an oath affirmative of the reference. That would be the necessary consequence of such a decree

in the present case. It appears upon the record that after the time of the alleged marriage with the appellant the respondent was married, in June 1858, in Edinburgh to Mrs Forbes, the widow of Professor Forbes. A decree, therefore, establishing the validity of the marriage of the appellant and the respondent, must necessarily deprive Mrs Forbes of the *status* which she acquired by her marriage with the respondent; and this consequence would be the result of what is called a transaction or judicial contract between persons engaged in a litigation to which she is no party. It was said, however, by the appellant that the reference to oath could not prejudice Mrs Forbes, because the oath affects the parties in the transaction only, and that no judgment on it could be *res judicata* against her, being *res inter alios acta.* It is quite true that the oath of verity would not affect third persons, but there may be cases in which it must of necessity prejudice, if not conclude, the rights of strangers to the proceedings. In such cases the reference to oath is not admissible, for, as was said by Lord Moncreiff in *Adam* v. *Maclachlan*, 9 D., 560, "the general case of reference to the oath of the party is where the party referring and the party referred to stand with opposed interests on the matter referred, and where no other interest is involved." Upon this point I may borrow the language of Lord Stowell, in *Dalrymple* v. *Dalrymple*, where he says, "The lady of the second marriage is not here made a party to the suit. She might have been so in point of form if she had chosen to intervene; in substance she is, for her marriage is distinctly pleaded and proved, and is as much, therefore, under the eye and under the attention and under the protection of the Court as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own; for I take it to be a position beyond the reach of all argument and contradiction, that if the first marriage be legally good, the second marriage must be legally bad." If upon the oath of reference in this case a decree were made establishing the marriage of the appellant and respondent, there can be no doubt that it would be binding upon Mrs Forbes. It would be a judgment *in rem*, which has been defined to be an adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose, and the characteristic quality of a judgment *in rem* is, that it furnishes in general conclusive proof of the facts adjudicated, and is binding on all persons whomsoever. If the reference to oath were to be admitted in this case, Mrs Forbes might be deprived of her *status* as a wife by a decree made behind her back, and which she would never afterwards be able to question. But there is a further objection to the reference to oath in this case, that the answer to it in the affirmative—an answer which the appellant must be taken by her reference to expect to receive—necessarily involves an admission by the respondent of criminality. If the respondent were to admit the alleged marriage between himself and the appellant, he must confess that he has been guilty of bigamy, and this necessary effect of an affirmative answer plainly appears upon the record, where the marriage of the respondent with Mrs Forbes, at a date subsequent to the time of his alleged marriage with the appellant, is pleaded. The appellant says, in her printed case, there are cases in which a reference to oath was refused, on the ground that a party should not be compelled to swear *in suam turpitudinem.* But all these cases were prior in date to the Act 1 Will. IV., c. 37, the 9th section of which abolished infamy as a ground of incompetency in a witness. The Act 15 and 16 Vict., c. 27, further removes all impediments to the admissibility of the evidence of persons convicted of crime. In the present state of the law of evidence, it is obvious that in the cases of *Rogers*, 2 Shaw, 444; *MacEachern*, 3 Shaw, 410; and *Thomson*, 7 Shaw, 32, the parties who were not obliged to swear *in suam turpitudinem*, would now be competent and compellable witnesses in similar cases, with the option of declining to answer any question that might criminate themselves. Such is the argument upon this point, which leaves out of view one very important consideration. It is true that the party in a case of reference to oath may refuse to answer, if thereby he would criminate himself, but then the effect is, that he is taken to have confessed the facts which are referred to his oath; and exactly the same benefit results to the party making the reference as if he had obtained an affirmative answer. In the present case, therefore, the respondent, if he answered affirmatively, would have admitted himself to have been guilty of bigamy; or, if he had refused to answer, Mrs Forbes would have been conclusively deprived of all the rights she had acquired by her marriage with the respondent. All the preceding objections to the reference to oath in the present case, naturally lead to the conclusion at which I have arrived—that the Court of Session was right in refusing to sustain the reference. There can be no doubt that a reference to oath is not the absolute right of a party, but that it is in the equitable discretion of the Court to admit or to refuse. Lord Moncreiff, in the case of *Pattison* v. *Robertson*, 9 D., 226, said, "I could not, perhaps, go so far as Lord Cringletie did in the case of *Ritchie*, though in that approved of by Lord Chancellor Lyndhurst, that the reference to oath is in our law a mere appeal to the equitable discretion of the Court; but I agree so far that, though regarding it as a legal right to appeal by motion to the Court to that mode of proof as an *ultimum remedium*, it may still be in the discretion of the Court to refuse to allow it under the circumstances of any particular case." Now, assuming that there may be a reference to oath in an action of declarator of marriage, yet where, as in this case, the interests of a third person are affected and may be irrevocably bound, and where the effect of the reference may be either to compel the confession of a crime or to conclude the rights of another by a refusal to answer, I think that the Court of Session were perfectly justified in the exercise of a sound judicial discretion in refusing to sustain the reference to oath in this case, and that their interlocutor ought to be affirmed.

Lord Cranworth said that his noble and learned friend the Lord Chancellor had communicated to him the outline of the opinion which he had just read, and concurring as he did in that opinion, he would not trouble their Lordships with more than a few words. He wished it to be understood that inasmuch as the Lord Chancellor had made the statute of 11 Geo. IV., and 1 Will. IV., the main ground of his judgment, he (Lord Cranworth) confessed, that while that statute entirely confirmed the view he took, yet he would have come to the same conclusion independently of that statute. He held that though the reference to oath might be allowed as between two parties without leading to absurdity, yet the moment the reference came to involve the interests of a third party, it could not be the

law of Scotland, or indeed of any civilized country, that in that case such a reference in a declarator of marriage was to be permitted. There were no cases which clearly decided that a reference involving the interests of third parties was ever allowed, and if there were, the House should hesitate before it sanctioned them. But if such cases did exist, then, even if the reference were competent, the Court in its discretion ought not to allow it. Even if there had been no marriage of the respondent with Mrs Forbes, there must almost always in such cases be some interests of creditors or other persons involved, and these must necessarily be affected by the result of the reference. Therefore, even if this reference were in the circumstances competent, it certainly ought not to have been allowed by the Court, in the exercise of its judicial discretion, and was rightly refused. .

Lord Westbury said that he had no intention to give any opinion in this case, inasmuch as he had been compelled to be absent from the latter part of the argument, owing to severe domestic affliction, but he had had the advantage of hearing the whole of the appellant's opening address, and if he had, upon hearing and considering that address, been able to bring his mind to believe there was any probability of her success, he would have struggled to the utmost to be present throughout the rest of the case. But he felt bound to say that he could not at the outset see any ground for altering the conclusion at which the Court below had arrived. He felt it necessary to give this explanation why he did not take any part in the present judgment.

Lord Colonsay said that, after the opinions which had been delivered, the case was now decided, whatever view he himself might have taken. But in so important a case he would make a few observations. In the Court below, when this application was first made, he felt it was one of so much novelty that he advised the Court to order cases to be printed; and, after hearing two arguments, he came to the conclusion that this reference to oath could not be allowed. The question had been again argued fully at their Lordships' bar, and he had considered the case, but felt there was no ground for altering his former opinion. It was quite clear, as a general proposition, that a party in ordinary cases was entitled to make a reference of this kind to the oath of an adversary; and he thought it was as competent to do so after a judgment of the House of Lords as after a judgment of the Court of Session. If unappealed against, it was also clear that the reference was not a matter of right, but was in the discretion of the Court. It had been argued that such a reference in an action of declarator of marriage was altogether incompetent since the statute of 11 George IV. That was a point which he felt it unnecessary to consider in the Court below, and he would rather not commit himself to any opinion on that point on the present occasion. Another point was, that the reference, if allowed, might compel the party to answer *in suam turpitudinem*. He thought there was great weight in that objection; but whatever might be the law as to the competency of this reference, when the question came to be whether the Court, in the exercise of its discretion, ought to allow it, he confessed all the principles of the law were against allowing such reference; and he quite concurred with the observation of his noble and learned friend Lord Cranworth, that such a reference ought only to be allowed to settle some point between the two parties themselves, but should never be allowed where the interests of a third party were involved. That was the true line to be drawn. Therefore, he quite agreed in the conclusion to which their Lordships had come. But he might be allowed to add, that if, on reconsidering the matter, he had seen the least ground to alter his former judgment, he would not have had any hesitation in doing so.

Appeal dismissed.

Tuesday, July 30.

CARLETON AND ANOTHER *v.* THOMSON AND OTHERS.

(In Court of Session, 11th Feb. 1865, 3 Macph., 514.)

Trust—Residue—Vesting. The residue of a trust-estate was vested in trustees for behoof of the truster's daughter in liferent and her children in fee, to be kept by them until they in their discretion should see fit to settle it in the most safe and secure manner on her and her children; and, in the event of her decease without issue, the residue to go to the truster's nieces. At the truster's death the daughter was married and had two children. Five were subsequently born to her but they all predeceased her, only one of them leaving issue. Held, (aff. C. S.) that a share of the provision vested in each of the five children at its birth.

Andrew Hunter, surgeon, H.E.I.C.S., died in 1811, leaving a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to trustees for certain purposes. The residue of the trust-estate, including the fee of £10,000, set apart for answering the provisions to the spouse of the testator, was directed "to be vested in my said trustees for behoof of my said daughter, the said Mrs Isabella Sarah Hunter *alias* O'Reily, in liferent (exclusive of the *jus mariti* of her husband) and her children in fee, to be kept in trust by them till they in their discretion shall see proper to settle it in the most safe and secure manner on her and her children. And in the event of her decease without issue of her body, I hereby direct and appoint my said trustees to convey and make over the said residue" to the truster's nieces, equally among them, the share of any niece dying without issue to go equally among the survivors. The testator left no lawful issue. He was survived by Mrs O'Reily, his natural daughter. At the time of his death, in 1811, two children had been born to Mrs O'Reily, viz., Anne, Mrs Carleton, and Isabella, Mrs Hudson, and both of them were married during the lifetime of their mother, and both survived her. Five children were born to Mrs O'Reily after the death of the testator. Three of them died in infancy. Another, John, died in 1852, married, and leaving issue. Another, Andrew, died in 1859, unmarried. Mrs O'Reily died in 1861. The question at issue was, Whether or not a share of residue vested in each of these five children, who were born after the death of the testator, and predeceased the liferentrix?

The First Division of the Court, affirming the judgment of the Lord Ordinary (Jerviswoode), held that a share of the provision vested in each of the five children at its birth.

Lord Curriehill, with whom the other Judges concurred, thought that, although the provision in