nary plenary power to order proof to be taken in any manner he pleases. This would certainly give a very large and extraordinary effect to words of a very general character. I think that the construction proposed is an impossible one; and if it had been intended by the Legislature to do away in this clause with the distinction between the enumerated cases and those not enumerated, there certainly would have been a direct provision on the subject. It would not have been left to implication merely from a clause couched in such general terms as these. This view receives considerable support from the fact that there is in section 62 of this Act an express repeal of a part of the Evidence Act. But the inference is that the part unrepealed is to be allowed to stand. I cannot therefore avoid the conclusion that the provisions on the subject of taking evidence by commission are unaffected by the Act of 1868.

Now, the Act of Sederunt of 1870 is liable to the same observation. It is true that the powers of the Court under the Act of 1868 to regulate procedure under the Act are very large. They are more nearly powers of legislation than have ever before been accorded. But even supposing that the Court had full legislative powers, still this Act of Sederunt, framed by them in virtue thereof, is open to the same kind of construction as the Act of Parliament itself. Now, what does this Act of Sederunt effect? In its first part it substitutes for the 27th section of the Court of Session Act several provisions of its own, the fourth of which enacts that it shall be competent for parties having a cause standing in the procedure roll, in regard to which they have come to be agreed that it should be disposed of by a proof before the Lord Ordinary, or a trial by jury or otherwise, to enroll the cause, &c. Now, it is said that there is a great deal of force in these word, "*or otherwise*," and without them the application would have no support from this Act of Sederunt. It is contended that these words sweep away all restrictions upon the taking of proof on commission. Now, this would be to assume in the Court a very violent exercise of the powers conferred upon it, not only in altering the provisions of the Act of 1868, but also those of the Acts of 1850 and 1866. I need not say that the Court in the Act of Sederunt referred to had no such intention.

The other Judges concurred.

The Lord Ordinary accordingly, having advised with the First Division of the Court, refused the motion.

Agent for Pursuer—Wm. Officer, S.S.C.
Agents for Defenders—W. &. J. Burness, W.S.

Saturday, January 20.

MRS ANNIE LAWSON OR SURTEES *v.* ROBERT WOTHERSPOON.

Process—Proof—Judicial Examination—Competency—Declarator of Marriage.

Circumstances in which the judicial examination of the defender in a declarator of marriage was refused, there being no undue concealment or suspicion attaching to him, and no necessary probability of a *penuria testium*.

Opinion by the Lord President that judicial examination is still competent after proof has been led.

This was an action of declarator of marriage founded upon promise *subsequente copulâ*, or alternatively, for damages for breach of promise of marriage.

The pursuer Mrs Lawson or Surtees averred that the defender, who was an iron merchant in Glasgow, had made her acquaintance in February 1865, had paid his addresses to her, and expressed his desire that she should become his wife. That during the following years he continued on the same footing, doing much for her two children, and executing a codicil to his will in her and their favour. That finally, in November 1867, he gave her a written promise of marriage, on which repeated acts of connection followed during the three subsequent months.

The defender, on the other hand, alleged that when he made the acquaintance of the pursuer in 1865 she was a woman of loose character. That in that and the subsequent years he frequently had connection with her, for which he always paid as to a common prostitute, and that he never stood in any other relation to her. That in consequence of her conduct he broke off even this connection towards the close of 1867. He also averred that since the present action had been threatened he had discovered that in 1863 the pursuer had brought a similar declarator of marriage against a Mr Dewar, which, though allowed to fall asleep in December 1864, was still in Court in 1870, when, on her motion, the process was wakened and the defender assoilzied. These were all the averments in the defender's own statement of facts, but it otherwise appeared that the defender admitted the written promise, while alleging that it was conditional, and that the conditions had not been purified by the pursuer, so as to be competently made the ground of an action of declarator of marriage. And denied that any copula had taken place on the faith of any such promise, or with the view of constituting marriage.

The Lord Ordinary (MACKENZIE) on 21st November 1871 pronounced the following interlocutor:—

"*Edinburgh, 21st November* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and process, before answer allows the parties a proof of their respective averments in so far as regards the conclusions for declarator of marriage and adherence, and to the pursuer a conjunct probation; grants diligence," &c.

Thereafter on 23d December 1871 he pronounced this other interlocutor:—

"*Edinburgh, 23d December* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, allows the defender to be judicially examined, first in regard to the carnal connection of the defender with the pursuer set forth in the record; and second, in regard to the defender's knowledge, during the period between the month of January 1865 and the 5th of July 1871, of and concerning the action at the pursuer's instance against Francis Dewar, and the procedure therein, and appoints the said judicial examination to take place before the Lord Ordinary on Thursday the 11th day of January, at half-past ten o'clock.

"*Note.*—The Lord Ordinary considers that the judicial examination of the defender should be

allowed on the two points set forth in the preceding interlocutor.

"1. In regard to the first of these, the pursuer desired to limit the examination of the defender to the carnal connection alleged by her to have taken place after 20th November 1867, the date of the alleged promise of marriage, and set forth in the 5th article of her condescendence. But the Lord Ordinary considers that if the defender is to be examined at all with reference to this matter, his examination should be allowed to include the acts of connection alleged by him to have taken place during a period of nearly three years prior to the date of the alleged promise. Any other course would, it is thought, be unjust to the defender, and might lead to an erroneous view of the relations which subsisted between the parties, and which may have an important bearing upon the case. The ground stated in support of the pursuer's motion was the occult nature of the acts, and that she only kept one servant in the house where the defender visited her, after granting her the alleged promise of marriage, during part of the time, so that there is a *penuria testium* in regard to these subsequent acts of connection. Although the defender in his defences admits long continued intimacy with the pursuer, and connection prior to the date of the promise, he denies the pursuer's statements in regard to the subsequent connection, and the averments in his statement of facts with reference thereto are evasive.

"2. The statement of the defender with reference to the declarator of marriage at the pursuer's instance against Francis Dewar may have a very important bearing upon the question at issue,—these averments being, that during the whole period libelled the pursuer was insisting in that action of declarator. The pursuer avers that this action was not well founded in fact, and was practically abandoned by her in the year 1864, before her acquaintance with the defender began. She also avers that the defender was fully aware, both before and after the date of the promise, of the said action and of the procedure therein, and also of the relationship upon which the pursuer had stood to Dewar. Such knowledge, if it existed, must have a very material bearing upon the defence, in so far as founded upon the subsistence of that action, and the judicial examination of the defender with reference to such knowledge appears to the Lord Ordinary to be proper."

Against this interlocutor the defender reclaimed. The pursuer, at the same time, brought up for review the previous interlocutor of 18 November.

SHAND and LANCASTER for the defender and reclaimer.

SOLICITOR-GENERAL and RHIND for the pursuer and respondent.

Authorities—*Sceales*, March 13, 1866, 4 Macph. 575; *A. B.* v. *C. D.*, Dec. 23, 1843, 6 D. 342; *Lindsay* v. *Chapman*, Feb. 23, 1826, 4 S. 490; *Mackenzie* v. *Stewart*, Feb. 5, 1848, 10 D. 611; *Kennedy* v. *Macdowal*, Feb. 12, 1800, 2 Bell's Illustrations, 243, and Fergusson's Consistorial Cases, 163; *Craigie* v. *Hoggan*, Jan. 19, 1837, 15 S. 379; *Stewart*, Hume 380; *Steuart* v. *Steuart*, June 30, 1870, 8 Macph. 821; Fraser's Per. and Dom. Rel. 700. Evidence Act, 1853.

At advising—

LORD PRESIDENT—The pursuer has reclaimed against an interlocutor of the Lord Ordinary allowing proof before answer—or rather she has brought up this interlocutor of the Lord Ordinary under the defender's reclaiming note. His Lordship allows the parties a proof of their respective averments in so far as regards the conclusions for declarator of marriage and adherence, and to the pursuer a conjunct probation. I cannot help thinking that that is the proper interlocutor under the circumstances. Under it every averment that is relevant in support of the conclusions of the summons or in defence goes to proof and nothing else. And I cannot think that it would be expedient to exclude any part of the case. I cannot think that it would be safe to fix beforehand that certain averments cannot be allowed to go to proof. They may turn out in the course of the proof to be perfectly relevant, and even as it is, they do not appear to me to want that character in a declarator of marriage such as this. It is needless therefore to say more upon the subject of the interlocutor of 21st November.

But the question raised under the defender's reclaiming note is one of more general importance. At one time judicial examination *in initio litis* was a very common and almost universal part of the procedure in consistorial causes. But it is just as certain that in modern times, and since the radical jurisdiction in consistorial causes has been transferred to the Court of Session, the practice has been just the opposite. I do not mean to infer that it is now an incompetent, but only an exceptional proceeding. I think the modern practice is stated most accurately in the opinions both of Lord Medwyn and Lord Moncreiff in the anonymous case reported at 6 D. 342. Lord Medwyn says—"It is a well-known form to allow a judicial examination of the parties, of both or either of them, on facts which are within their knowledge, where there is any undue concealment or suspicion, or where there is necessarily a *penuria testium*." Now, taking that as a very fair exposition of the ground upon which judicial examination can be allowed, the question occurs here, Is there in this case anything of the nature of grave suspicion and concealment on the part of the defender, or is there any apparent probability of *penuria testium?* I can, I confess, see no aspect of the case which suggests a *penuria testium*. It is true that the circumstances of connection are accurately described as occult facts. But still they are possible to be proved by the testimony of witnesses, either directly or indirectly, and most generally are so. Therefore, to say that in such a case there must be, or probably will be, a *penuria testium*, is to contradict all previous experience.

Next, let us consider whether there is anything in the circumstances as disclosed on record which can infer any particular concealment or suspicion against the defender. I confess I cannot see any such. If this record had been completed by revisal of the pleadings in the old fashion, I rather think we should have had a fuller disclosure of the facts. That we have not is no fault of the parties, or of the defender in particular, but of the present method of procedure. The defender has made an allegation as to another action of declarator of marriage at the pursuer's instance. The answer is, that the existence and dependence of that action was known to the defender at the time he became the husband of the pursuer. If that be so, it will no doubt appear on the proof allowed by the Lord Ordinary. But there is nothing in it which attaches undue suspicion to the defender. If he did know of these proceedings it cannot be difficult to prove the fact. On neither ground,

therefore, stated by the Lord Ordinary, does it appear to me that this exceptional mode of proof can be admitted.

I think it right to add, that though a passage has been read to us from a writer on consistorial practice, to the effect that judicial examination cannot be allowed after proof has been led, I do not subscribe to that doctrine. It is quite possible —I do not say it will be the case—but merely that it is quite possible—that the facts of the case when proved may ultimately render judicial examination necessary. But if allowed it will only be so on the grounds I have mentioned.

LORD DEAS—As to the question whether proof should be allowed in the general terms contained in the Lord Ordinary's interlocutor of 21st November, I am entirely of opinion with your Lordship. The proof is allowed before answer, and in the proper terms to try the question at issue. Besides that, the proof is allowed in a case very peculiar in its circumstances, particularly as to the alleged qualifications on the promise, the effect of which may raise very important questions. I have no hesitation, therefore, in concurring in your Lordship's view.

Then as to the motion for judicial examination, I agree that, though competent, it is only to be allowed in exceptional cases. The question here then is, whether sufficient grounds for an exception have been shown. As regards the defender's knowledge of the dependence of the previous action, I see no reason to assume that there is anything occult about that which could not be proved in the ordinary way. It may be that after a proof has been led a better case may be made out for a judicial examination; and I would reserve my opinion on the point as to whether a judicial examination can be allowed after proof. The question has not been argued to us, and I would like to have all the authorities before determining the point. But supposing we assume that a judicial examination cannot afterwards be granted, we must still have very strong *prima facie* grounds for supposing that the facts averred are of such an occult nature as to justify this exceptional mode of proof. With reference to the intercourse alleged between the parties, I do not see any ground for saying that that was of such an occult nature as to require such examination. It may be that the intercourse in such cases consists of a single act, of which no one but the parties themselves have any opportunity of knowing. But that is not the case here, the intercourse libelled is continuous. There is no room therefore for presuming anything occult about it, particularly looking to the pursuer's statements as to its circumstances. Over and above all that, I am not satisfied that the existence of either of these conditions, either that *prima facie* the facts are occult, or that there is an apparent *penuria testium*, or both of them, are sufficient and conclusive in the matter. I think that, besides this, it is necessary to show that the mode of proof demanded is essential to the justice of the case. Even if these other things were made out in a satisfactory manner, I still think we must have grounds for saying that the procedure is essential to the justice of the case. And that I think the pursuer had failed to show here.

LORDS ARDMILLAN and KINLOCH concurred, reserving their opinion as to the competency of judicial examination after proof had been led.

The Court accordingly adhered to the interlocutor of the 21st November, recalled that of the 23d December, refused the pursuer's motion for the judicial examination of the defender, and remitted to the Lord Ordinary to proceed with the cause.

Agents for the Pursuer—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for the Defender—J. & R. D. Ross, W.S.

Tuesday, January 21.

BROWNE *v.* SPIER'S TRUSTEES.

Process — Proving the Tenor — Public Records — Statute 1617, *c.* 16—*Extract.*

In an action of proving the tenor of a bond of annuity and disposition in security, which had been recorded in the General Register of Sasines, the Court expressed a doubt whether the pursuer had a sufficient interest in pursuing a proving of the tenor, seeing that by the Act 1617, c. 16, it is enacted that an extract from the register "shall make faith in all cases, except where the writs so registered are offered to be improven." After further argument, the Court, without expressing an opinion as to the effect of an extract from the Register of Sasines, *held* the pursuer had a sufficient interest, and the case being otherwise satisfactorily proved, pronounced decree as craved.

Expenses.

Circumstances in which expenses were allowed to the pursuer in an action of proving the tenor.

The Rev. Andrew Browne, minister of the parish of Beith, brought this action to prove the tenor of a bond of annuity and disposition in security, by which the late Mrs Margaret Gibson or Spier bound herself and her heirs and successors to pay to the pursuer and his successors in office, as trustees, an annuity of £25, to be laid out by the minister, with the approbation of the kirk-session, for the benefit of such poor persons in the parish as the kirk-session might select, debarring the interference of the parochial board; and in security of the obligation disponed certain lands. The deed contained a clause of absolute warrandice.

The testamentary trustees of the late Mrs Spier were called as defenders.

The history of the bond and the *casus amissionis* were thus stated by the pursuer:—"The bond of annuity and disposition in security libelled was duly executed by the said Mrs Margaret Gibson or Spier on 3d March 1860. It was afterwards, by her instructions, recorded in the General Register of Sasines at Edinburgh on 30th July 1860. It was thereafter, in or about the month of November 1860, delivered by Mrs Spier to the pursuer as an irrevocable deed. He received it as such, and made known, by intimation from the pulpit and otherwise, the benevolent intentions of the granter. The first payment of the said annuity was made by the granter to the pursuer, in terms of the deed, at or about the term of Martinmas 1860, and the annuity continued to be regularly paid to the pursuer, and was laid out and expended by him in terms of the directions contained in the bond, during the life of Mrs Spier. In or about the month of November or December 1862, Mrs Spier sent her servant to the pursuer with a verbal request that he would send her the bond for perusal. He