to consider the effects of the proof, and then added)—In my opinion we ought to conjoin these two actions and find in both of them for the pursuers.

LORD COWAN—(After animadverting on the disgraceful conduct of the defender and co-defender) I can see no objection to the course proposed by your Lordship in conjoining the two cases, and deciding them both at this time; on either case, individually, I have formed a clear opinion that the adultery has been proved.

LORD BENHOLME—I look upon the proof in both cases as perfectly decisive, and concur in the course proposed to be adopted.

LORD NEAVES—Under the first action I regard it as demonstrated beyond the possibility of doubt, that a guilty attachment existed between the defender and co-defender. With regard to the second action, nothing can be more infatuated than their conduct. These acts of adultery being thus established, and it being of course competent only once to pronounce a decree of divorce, I am of opinion, with your Lordship in the chair, that such decree should be pronounced in the conjoined actions.

The counsel for the pursuer thereupon asked the Court to decern against the co-respondent for the whole expenses of process. He rested his demand on the seventh section of the Conjugal Rights Act, 1861, which is as follows:—"In every action of divorce for adultery at the instance of the husband, it shall be competent to cite, either at the commencement or during the dependence thereof, as co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the Court, in such action, to decern against the person with whom the wife is proved to have committed adultery for the payment of the whole or any part of the expenses of process, provided he has been cited as aforesaid, and the same shall be taxed as between agent and client." It was admitted that husband was formally liable for the wife's expenses, but in terms of the section quoted it was argued that decree should be given against the co-defender, not merely for the pursuer's expenses, but also for the expenses incurred by his wife in defending the action.

For the defender it was maintained that she was entitled to decree for her expenses against her husband (as being his wife until the decree was pronounced), and that she had no interest in the matter as to who might be ultimately liable therefor.

The co-defender asked in the first place for modification of the expenses, on the ground that the pursuer had failed to prove some of his averments in the first action; and, in the next place, that the section above quoted had reference only to his expenses, and those of the pursuer as against him, and therefore that decree should not be given against him for the expenses of the wife, which did not properly fall under the Act.

After considering the matter, the Court pronounced the following interlocutors—

"*7th February* 1873.—. . . In the first action recal the interlocutor reclaimed against: Find it established by the proof in that case that the defender and the co-defender committed adultery on the occasions libelled in the third and fourth sub-divisions of the 12th article of the condescendence. In the second action, Find that it is established by the proof that the defender and co-defender committed adultery, first, in the co-defender's house in Glasgow, secondly, in Mrs Wishart's house in Millport, and, thirdly, in the house No. 4 Soho Street, Glasgow, at the times libelled: therefore in the conjoined actions, Find the defender guilty of adultery accordingly: therefore devorce and separate the defender, Elizabeth Peacock or Andrews, from the pursuer, Robert Andrews, his society, fellowship, and company, in all time coming: further, Find and declare that the defender has forfeited all the rights and privileges of a lawful wife, and that the said pursuer is entitled to live single, or to marry any free woman, as if he had never been married to the defender, or as if she had been naturally dead: Find the co-defender liable to the pursuer in expenses, as well of those incurred by the pursuer himself as of those for which the pursuer may be liable in respect of the expenses of the defender: further, Find that the pursuer is liable to pay the expenses incurred by the defender; and remit to the auditor to tax the expenses now found due as between agent and client, and to report, and decern.

"*22d February* 1873.— . . . Approve of the Auditor's report upon the defender Mrs Elizabeth Peacock or Andrews' account of expenses; and decern for payment to her by the pursuer of £253, 6s. 2d., under deduction of £120, 4s. 9d. paid to account, leaving a balance now payable to her of £133, 1s. 5d; and allow this decreet to go out and be extracted in name of Messrs Campbell & Smith, S.S.C., the agents disbursers.

"*22d February* 1873.— . . . Approve of the Auditor's report upon the account of expenses; and decern for payment by the co-defender Joseph Stirling to the pursuer of the whole expenses incurred by him, amounting to £809, 17s. 9d."

Counsel for Pursuer—Scott and Rhind. Agent—A. Kelly Morrison, S.S.C.

Counsel for Defender—Trayner. Agents—Campbell & Smith, S.S.C.

Counsel for Co-Defender—Maclean. Agent—T. J. Gordon, W.S.

Friday, February 7.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

SURTEES *v.* WOTHERSPOON.

(See *ante*, vol. ix., p. 230.)

Marriage — Promise subsequente copula — *Conditional Promise.*

A man in the course of an uninterrupted illicit connection gave his mistress a writing, in which he promised to marry her when his circumstances warranted it, provided that, "in the interim she continued to lead a virtuous and exemplary life." *Held* that this did not constitute marriage.

The circumstances of this case will be found reported *ante*, p. 230.

Authorities—*Sim* v. *Miles*, Nov. 20, 1828, 8 S. 89; *Craigie* v. *Hoggan*, Feb. 17, 1838, 16 S. 584; *Ross* v. *Macleod*, June 7, 1861, 23 D. 972; *Morrison* v. *Dobson*, Dec. 17, 1869, 8 Macph. 347; *Campbell* v. *Honeyman*, March 3, 1831, 5 W. and S. 144; *Stewart* v. *Menzies*, Dec. 6, 1833, 12 S. 179, aff. Oct. 6, 1841, 2 Rob. 547 (Lord Cottenham's opinion); *Kennedy* v. *Macdowal*, Feb. 12, 1800; 2 Bell's Illustr. 243; Fergusson's Consist. Cases, 163; Stair iv. 45. 19.

Argued for Surtees—The promise was in express and deliberate terms, and intercourse followed a few days afterwards, and the written document itself and the other evidence and correspondence show that the previous intercourse had been broken off. If it be said that the promise was conditional on the pursuer leading a virtuous and exemplary life, there is no proof that she did not do so between the giving of the promise and the subsequent *copula*. When a promise is given in the course of an illicit connection, the presumption of law is in favour of marriage, and it lies on the defender to prove the contrary; if you establish against the defender a promise and subsequent intercourse, it is for him to disconnect them; and it is obvious that a future marriage was in the defender's mind. Intercourse following a promise gives a presumption of *de presenti* consent, which can only be rebutted by evidence of the parties having intended the intercourse to be illicit. The defender cannot be supposed to have granted the document in order to procure the continuance of the illicit intercourse, which he says himself was never interrupted. If sole condition—*sine qua non*—of future intercourse is the promise, the intercourse which follows makes *ipsum matrimonium*. The defender in his own document describes the pursuer as leading a virtuous and exemplary life at the time when the promise was given, and we must assume from this that the intercourse between them had ceased, and was only resumed on the faith of the promise. The same argument would have applied, though less strongly, if there had been no break in the illicit intercourse; on no other theory can the giving of the promise be explained at all.

Argued for Wotherspoon—The pursuer's contention is an attempt to carry the law a step further than has yet been done. The *onus* lies on her to prove that the consent was given in consequence of the promise. The character of the promise must be considered; its fulfilment is a future event dependent on certain conditions. In cases of this kind the woman's character must have an important bearing on the interpretation of the evidence. There is clearly an interval contemplated between the giving of the promise and its fulfilment.—an interval somewhat longer than elapsed before the next act of connection. The words "until" and "in the interim" refer to the same period. The doctrine of marriage *subsequente copula* is inapplicable to a conditional promise which involves or admits of a continuance of illicit intercourse.

At advising—

Lord President—This is an action of declarator of marriage founded on an allegation of promise *subsequente copula*. The case is very simple as presented on record. The pursuer says that she was of respectable parentage, and married to an officer in the East India Company's Service; that she was early left a widow, and became acquainted with the defender in 1865, having led up to that time a chaste and virtuous life. They cohabited together for two years, and in November 1867 he gave her a written promise of marriage; and her allegation is, that relying on this solemn promise she surrendered her person, and they had carnal connection. If this last allegation were true it would be very hard to find against her; but taken in this aspect the case is embarrassed with some difficulty. The evidence of connection following on the promise depends on the testimony of a single witness, who stands greatly in need of corroboration; and the difficulty is enhanced still further by the fact that the pursuer is obliged to admit that two years earlier she had another action against a Mr Francis Dewar, in which she alleges repeated promises of marriage, on the strength of which she surrendered her person. She says also that this action was not well founded in fact, which can only mean that it was not true that she surrendered her person to Francis Dewar. It is strange that she should have been involved in two adventures of the same kind in four years, but it is still more strange that this lady, on her own showing, has made an untrue allegation of this kind; and so I think the evidence of one witness is not sufficient. Therefore, in this aspect of the case, I should be inclined to agree with the Lord Ordinary that she has failed to establish that she submitted to the defender on the faith of his promise. But the case disclosed on the evidence is rather different, and I shall state in a few words what is its important aspect. The pursuer and defender became acquainted in 1865, and the result of their acquaintance was not an honourable courtship, but illicit intercourse, the pursuer being at the time simply a prostitute in Edinburgh, and the keeper of several brothels there. At length the intercourse changed its character a little, for she became his mistress for some time. She lived in a house for which he paid, and he visited her there. This continued down to November 1867, which is the date of the promise, and also subsequent to that—in short, it was uninterrupted down to the institution of this action. If the case had been rather different the proof of a continuance of the intercourse after the promise might be doubtful; but here I think there is no doubt that it did continue, and therefore this case is that of a man giving a promise in the course of an uninterrupted illicit intercourse, and the question is, what is its effect? The case is not a very uncommon one. Such a written promise will by no means necessarily constitute marriage, and will, in general, be insufficient. There is one great peculiarity in the terms of the promise, and this affords a ground of judgment which is sufficiently satisfactory. The defender in this writing thus expresses himself—"I, Robert Wotherspoon, iron merchant in Glasgow, do hereby promise to marry Anne Surtees or Dewar *née* Lawson, and provide for her according to my means until circumstances warrant such marriage—always providing that in the interim she continues to lead a virtuous and exemplary life." What follows is unimportant. Now, what is the meaning of the provision that the pursuer in the interim shall lead a virtuous and exemplary life. That is expressed as a condition of the promise, but whether it would be an effectual condition is another affair. But the question is, what was the parties' meaning?—look to the fact, that

down to the moment of the giving of the written promise she was living as the defender's mistress, and the writing was given in the course of an illicit connection. The meaning is, that she was to continue faithful to the defender, and go on attaching herself to him as his mistress. If there had been any proof of cessation of intercourse, or of a refusal on the part of the pursuer to continue the connection—the burden of proving which lay on the pursuer—her case would have been very different; and the proviso in the promise, I think, only means that she is to continue her present life as his mistress. If so, then it is provided by this arrangement that the promise is to be followed by continued intercourse to fill up the interval between its date and the celebration of the marriage. It is in vain to say that this converts a promise of marriage *in futuro* into consent *de presenti*. In this document the woman arranges that her person is to be at the man's command until his affairs admit of a marriage; she is to remain his mistress until that time. It is matter of contract that this *copula* is not to constitute marriage. I think the Lord Ordinary is right.

Lord Ardmillan—Notwithstanding the terms of the written promise given by the defender to the pursuer, I am clearly of opinion that marriage has not been instructed in this case. Speaking generally, there is no doubt that a promise of marriage, proved by written evidence, and followed by copula, is, according to Scottish law, sufficient to prove the mutual consent which creates the relation of marriage. It is the consent which makes the marriage. That consent may be proved in different ways; and the mode of proof of the consent here alleged amounts to this, that on the faith of the promise the woman has surrendered her person. But the surrender of her person by the woman, and the promise by the man, must be related to each other. It is not the law that the mere sequence of promise and copula uniformly and necessarily proves marriage. I retain the opinion on this point which I expressed in the case of *Morison* v. *Dobson*. If the connection was not given or permitted on the faith of the promise—if it was purchased, or given on a footing inconsistent with marriage—it cannot instruct marriage, however clear the words of promise.

The character of the woman, and the fact of illicit intercourse prior to and up to the promise, so that no promise was necessary or appropriate to obtain its concession, or to secure its continuance, is a most important fact in considering whether the copula subsequent to the promise was related to the promise, and was permitted on the faith of the promise.

I think that, where no special circumstances in the conduct and the relations of the parties are proved, but where the two facts of promise and subsequent copula are in the position of proved and unexplained sequence, the presumption must be that the copula was the response to the promise, and yielded on the faith of the promise.

But where the facts ascertained are such as to disconnect the copula from the promise, and explain it on a different footing, and to make it manifest that marriage was not within the intention of the parties, then the consensual contract of marriage cannot be held to have been formed.

I need say nothing of the character of the pursuer, nor need I add anything to what your Lordship has said in regard to the contradiction on the proof of her statements on record. The surrender of her person to man was a thing to her so easy, so frequent, so promiscuous, so purchaseable, that there was certainly no need for a promise of marriage to induce her to give it.

The Scottish law supposes, and experience proves, that a girl previously pure and virtuous may, on the faith of a promise, surrender her person. She has much to surrender; and only in the exuberance of trust and on faith of promise can she be supposed to render up the jewel of her honour and the possession of her person. We have no such case here.

But I take a case nearer the present. I suppose a promise made by a man to a woman who was his mistress. It is still possible that, in such circumstances, a promise might be given which, followed by copula, may constitute marriage. But such a case is surely different from this. The woman may have been contrite. She may, under conscientious conviction, have insisted on breaking off the illicit connection which she felt to be guilty; and the man may then have given the promise to prevent separation, to win her back, to allay her conscientious compunctions, and to overcome her scruples, or her reluctance, and induce her to permit renewed intercourse. Such a case is possible; but, in my opinion, it must be proved. It is only by proof of such facts as these that, in a case where the man and woman were living in illicit intercourse, the mere promise, in the course of that intercourse, can be brought within the true scope and meaning of the rule, that promise *subsequente copula* instructs the consent which constitutes marriage. I admit the possibility of such a case. I think it is exceptional, and that it must be proved.

But in this case there is nothing of the kind. There has been here an illicit intercourse without interruption, and certainly without disturbance by any conscientious scruple. This pursuer had nothing to yield on the faith of the promise which she had not yielded to the defender, and to many others, without any promise. Nay, more, it is proved that her life for years had been a life of prostitution, and that money had often purchased the surrender of her person.

I am of opinion that, however culpable and foolish the conduct of the defender was,—and of that there can be no doubt,—the sacred and abiding relation of marriage was not constituted. The condition here attached to the promise is not without importance; and I do not think it a condition of virtue.

I agree with the observations which your Lordships have made on that condition; but I rest my opinion more especially on the ground which I have now explained. The episode with Mr Dewar cannot be omitted. Shortly before the date of this promise the pursuer had alleged in judicial proceedings, in an action of declarator of marriage, that she was married to another man, named Dewar; and she avers that the defender, Mr Wotherspoon, knew of that action, as he certainly knew of her habits and character. That is not very consistent with her claims in this action. And then, after the date of the promise, the pursuer, who knew the Scottish law, and alleged it, solemnly declared that she was not married to any one, and had not been married to any one, according to the law of England, or of Scotland, or any other law.

I agree so entirely in what your Lordship has already said, that I really feel it unnecessary to add more.

The facts of the case are peculiarly clear, and especially unfavourable to the pursuer; and it does appear to me that to hold the sacred relation of marriage to be here constituted in this manner, and between these parties, would be to present a caricature of the Scottish law of marriage.

The other Judges concurred.

Counsel for Pursuer—Solicitor-General (Clark) and Rhind. Agents—Crawford & Guthrie, S.S.C.

Counsel for Defender—Lord Advocate (Young) and Lancaster. Agents—J. & R. D. Ross, W.S.

Saturday, February 8.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

MACBETH *v.* FRANCIS TROY AND GEORGE INNES.

Sheriff-Court—Process—Clerk of Process.

Held that where a Sheriff-clerk is pursuer of an action in his own Court, neither he nor his Depute is entitled to officiate as Sheriff-clerk in such action.

This was an appeal from the Sheriff Court of Renfrew and Bute, in a petition for sequestration for rent, presented by Daniel Macbeth, writer in Rothesay. The petitioner was Sheriff-clerk at Rothesay, and the Sheriff-clerk-depute was his partner in business.

The respondent, Innes, pleaded *inter alia*—"Where a Sheriff-clerk is pursuer of an action in his own court, neither he nor his partner is entitled to officiate as sheriff-clerk in such action, and all procedure in this action in which either of these parties have acted or may act in the capacity of sheriff-clerk, is illegal and invalid, as being against public policy."

On 5th July 1872 the Sheriff-Substitute (ORR) pronounced an interlocutor, in which he repelled the preliminary plea for the respondent.

The respondent appealed, and, on 26th August 1872, the Sheriff (FRASER) pronounced the following interlocutor—"The Sheriff having considered the reclaiming petition and answers, sustains the appeal for the respondent, recals the interlocutor appealed against; and, in respect that the petitioner Daniel Macbeth is sheriff-clerk of the county of Bute, finds that he is not entitled to institute or carry on an action in the Sheriff Court of that county: Therefore dismisses the petition, and decerns; Finds the respondent George Innes entitled to expenses against the petitioner Daniel Macbeth; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report.

"*Note.*—In a series of cases it has been decided that a principal or depute clerk of a court cannot act as agent in it; and the Act of Sederunt of 6th March 1783 has been repeatedly found to be simply a declaration of the common law. The authorities to this effect will be found cited in the case of *Manson* v. *Smith*, 8th February 1871, 9 Macph. p. 492, and in M'Glashan's Practice, 4th ed., by Barclay, p. 77. After stating that a clerk of court cannot act as agent in his own court, Dr Barclay lays down the law thus:—'The exclusion relates solely to clerks being agents for others, and does not preclude a clerk of court or his depute from conducting an action at his own instance in his own court, particularly if it cannot be competently raised before any other; but the libel when at the principal's instance should always be subscribed by his depute, and *vice versa*. Of course he is still more entitled to defend an action in his own court.'

"The Sheriff is unable to concur in this opinion, after considering the whole cases referred to by the learned author, and the other decisions mentioned by the Lord Justice-Clerk in the case of *Manson* v. *Smith*.

"The Sheriff and the Sheriff-clerk, according to these decisions, must be regarded as coming under the same rule. Neither of them can be an agent for a suitor, and it would seem to follow necessarily that neither of them ought to be allowed to sue in the Sheriff court in which he is a judge or clerk. If the Sheriff had a debtor in the county of Bute, it is quite plain that a summons in his name against the debtor would be a nullity. Sometimes it has been tried to obviate this inconvenience by making the summons run, not in the name of the Sheriff, but in that of the Sheriff-substitute, which summons would also be a nullity, but upon another ground, viz., that the writ must run in the name of the officer who holds his commission under the sign manual. Now, whether rightly or wrongly, the Sheriff-clerk has been put in the same category in this respect with the Sheriff. Lord Neaves gave this explanation in the case of *Manson* v. *Smith* of the position and duties of a Sheriff-clerk:—'In the argument for the respondent the position of a clerk of court was completely ignored. It is a most important office. He is not the servant of the court, but an independent public officer, whose duty it is to record and to assist in carrying out the judgments of the court, and in whom must be placed the greatest confidence. He must be as impartial as the judge. In inferior courts he is the keeper of the signet of the court, for by his signature summonses are authorised, and rendered valid. He authenticates writs. It is to his satisfaction that caution must be found, and in his hands consignation must be made. He is the taxing officer in many courts, and is virtually the extractor of their decrees, which are only rendered the foundation of diligence by being authenticated by him. It is clear that a person in such a position should not attempt to be *actor in rem suam*. No man can rightly use his public functions or any trust he may hold so as to benefit himself. If a clerk of court were permitted to be the instrument of summoning his adversary, there would be an opening for great irregularities. His doing so in my opinion not only creates a nullity, but amounts to a delinquency.'

"Two conflicting judgments have been pronounced upon the point, the one by the First Division, and the other by the Second Division of the Court of Session. In *Heddle* v. *Garioch*, 1st March 1827, 5 Sh., p. 503, the Court held that the sheriff-clerk of Shetland could sue his tenant for payment of a rent amounting to £8 in the Sheriff Court of Shetland. On the other hand, in the case of *Campbell* v. *M'Cowan*, 10 July 1824, 3 Sh., p. 245, 'the majority of the judges considered that it was illegal in a clerk of court to bring an action for his own debt before a court in which he him-