'communicate the same; and, after so reviewing the interlocu- May 13. 1828.
'tors complained of, the said Court are to do and decern in this
'cause as may be just.'

Appellants' Authorities.—Stair's Inst. 3. 1. § 1. 6.; Bankton's Inst. 3. 1. § 2. 6.; Ersk. Inst. 3. 5. § 2. 3.; Wallace, Nov. 16. 1750, (2805.); Douglas, June 6. 1794, (2802.); Yeaman, Feb. 2. 1813, (Fac. Coll.); Ersk. Inst. 2. 6. § 23.; Bell on Leases, (Edit. 1805.) p. 361.; Bell's Comm. vol. i. p. 51.; Chambers on Leases; Barnwell and Alderson's Rep. 514.; Turnbull, June 12. 1751, (868.); Bell's Comm. vol. ii. p. 614.; Arkwright, Dec. 3. 1819, (Fac. Coll.)

Respondent's Authorities.—Craig, 2. 10. 9.; Dirleton, 223. 295–6.; M'Kenzie's Observations, p. 37.; Mack. Inst. 2. 6. 5. and 8.; Stair's Inst. 2. 9. 4. and 7.; 2. 3. 2. 6.; Bank. Inst. 2. 9. 3, 4.; Ersk. Inst. 2. 6. 25.; Bell on Leases, 346. 354.; Bell's Comm. vol. i. p. 5. 51. 86. 187.; Stair's Inst. 3. 1. 8.; and 2. 3. 27.; Ross's Lectures, vol. ii. p. 386. 506.; Kilkerran, voce Competition, p. 145.; Russell's Conveyancing, p. 6. 23.; Elchies' Decisions, voce Tack, No. 17.

RICHARDSON and CONNELL—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

MARY BLACK M'NEILL, or JOLLY, Spouse of ROBERT JOLLY, Appellant.—*King's Advocate (Dr Jenner)—Brougham—T. H. Miller—Wilson.* No. 7.

MALCOLM M'GREGOR, Respondent.—*Lushington—Keay.*

Husband and Wife—Marriage—Proof—Process.—A party having raised a declarator of marriage and adherence against a woman, whom he alleged was his wife, stating in the summons an irregular marriage followed by consummation at Holytown, and the celebration of that marriage by a subsequent regular marriage in facie ecclesiæ in Edinburgh; and the wife having denied marriage and consummation at Holytown, and averred that she had not consented ad ipsum matrimonium in Edinburgh, but had been concussed by threats to submit to the ceremony there; and having immediately thereafter entered into a marriage with another party, enjoyed the status of marriage, and had a family; and the alleged first husband being perfectly aware of that status, and having expressly recognized her and husband in their character of husband and wife;—

1. Found, (reversing the judgment of the Court of Session), That there was no proof whatever of the Holytown marriage, nor of any regular marriage in facie ecclesiæ in Edinburgh; and further, taking into consideration all the facts and circumstances proved in relation to the conduct of the parties before and after the alleged Edinburgh marriage, that there was not evidence sufficient to justify the conclusion that the parties did, on the day when the Edinburgh marriage was said to have been celebrated, or at any other time, voluntarily and deliberately express that real mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to such an irregular marriage as was said to have taken place.

2. Question raised, but not decided, Whether, in a case where the alleged first husband had been aware of the second marriage in the manner proved, a court of justice, even if they felt themselves bound to decern in the declarator of marriage,

would decern in the conclusion of adherence, and the restitution of conjugal rights, either in relation to cohabitation or patrimonial interests?

3. Argued, but not determined, Whether the several interlocutors pronounced in the Courts below could have been deemed duly pronounced in proceedings to which the second husband and the children of the second marriage were not parties?

June 20. 1828.

1st Division, (Commissary Court), and Bill-Chamber.

Dr M'Neill, a Scottish clergyman, had a natural daughter, Mary Black, by a woman in a low rank of life. She was nursed by Christian Robertson, a porter's wife, in Simon-square, Edinburgh; thereafter resided with her mother, at whose death, in 1815, she took up her abode with her father, Dr M'Neill, then living in Leith-walk. At this period she was about 20 years of age.

Malcolm M'Gregor, a printer, had been married to Christian Robertson's step-daughter, but had lost his wife, and, it was said, had contracted an intimacy with Janet Nicolson, a niece of Christian Robertson, by whom, it was also alleged, he had several natural children. He was on terms of familiar acquaintance with Mary Black M'Neill,—had paid his addresses to her,—and she was in the habit of calling on him at the printing-office, (where he worked), sometimes alone, and sometimes accompanied by her father, twice or thrice a-week. M'Gregor was also on a very intimate footing with Dr M'Neill, and took an active management of the Doctor's affairs.

About the same time Mary Black M'Neill became acquainted with Robert Jolly, then studying medicine in Edinburgh; and he also became her suitor. This circumstance was known to M'Gregor. In April 1816 a friend asked him if Jolly and Mary were married? he answered, that they were not, but would shortly be so.

Dr M'Neill was proprietor of the estate of Stevenston, near Glasgow. On one occasion, in May 1816, he went with MacGregor and his daughter, in a post-chaise, to visit his property. When they arrived late at night at Holytown, the greater number of the beds happened to be taken down, as was the custom to be done once a-year. The landlady therefore informed M'Gregor and Mary, that, from the situation of her house at this time, she had only one double-bedded room to give them. M'Gregor said to Mary, that she need be under no apprehension of going into the same bed-room with him, as he would take her under his protection. In this arrangement she acquiesced, as her father, an old man, had already retired to rest in the only single-bedded room in the inn. But as there were no curtains on the bed designed for her, she insisted that sheets should be hung round it. Accordingly this was done; and M'Gregor and Mary slept in

the room. Next morning the parties left Holytown; went to Glasgow, and returned that same evening; but the apartments being now arranged, M'Gregor and Mary were accommodated with separate bed-rooms. There was no evidence attempted to be adduced of any celebration of marriage at Holytown. Very soon after reaching Edinburgh, Mary had some conversation with Margaret Kinlay about her (Mary's) marriage; but the bridegroom's name was not mentioned, although some marriage-clothes were given Margaret to make, and which were accordingly made and taken home. Margaret was invited to be bride's-maid, but was unable to attend. Sometime thereafter she asked Mary if she was married to M'Gregor, but Mary said 'No; I 'am going to marry a man I like better.' About the same time Christian Robertson asked M'Gregor, if he was going to be married to Mary, and he answered 'No: Dr M'Neill says he 'thinks I will be the man; but I think it will be Mr Jolly, for 'I know her pre-engagement to him.' June 20. 1828.

M'Gregor had introduced Mr Smyth, W. S. to Dr M'Neill, to be the Doctor's man of business; and accordingly Mr Smyth, in April 1816, drew two deeds of settlement of the Doctor's estate and effects, both in favour of Mary, and delivered them to Dr M'Neill. Soon after the journey to Stevenston, M'Gregor called on Mr Smyth, and invited him to be present at his marriage to Mary, at nine o'clock that evening. The marriage, he stated, was to take place at the Black Bull Inn, to be celebrated by a Mr Robertson, and to be private; which communication gave Mr Smyth surprise, as the fittest place for the marriage seemed to be the Doctor's own house, considering the share which M'Gregor possessed of the Doctor's confidence. Mr Smyth, being indisposed, could not accept the invitation, but offered to send his clerk. M'Gregor said he would call at nine, or half-past nine, for the clerk, and went away. But not coming at the appointed hour, the clerk proceeded to the Black Bull, and finding no person waiting there, returned, and mentioned the circumstance to Mr Smyth, who said he supposed the marriage had been put off to another day. Between a week and a month afterwards, M'Gregor called on Mr Smyth, and informed him that he had been married to Mary, in Edinburgh, by Joseph Robertson.

It appeared that on the 23d of May,* between nine and ten

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* M'Gregor alleged, that on the 21st of the same month he had obtained from the session-clerk of the city of Edinburgh a certificate of proclamation of banns, in evi-

June 20. 1828. in the evening, M'Gregor (who occasionally staid with and slept at Dr M'Neill's house) and Mary proceeded from Dr M'Neill's house, and went to the house of the Rev. Joseph Robertson, minister of the Leith-wynd chapel. What passed there could not be proved by the evidence of Robertson, as the question which arose out of the circumstances under detail did not emerge until after he and a person named Pearson had been indicted for falsehood, fraud, and forgery, and clandestinely and irregularly celebrating marriage: on which a verdict had been returned, finding Robertson guilty of celebrating the clandestine marriage as libelled, and both pannels guilty of uttering, as genuine, counterfeit certificates of proclamation of banns, knowing the same to be counterfeited; and sentence had been pronounced, adjudging Joseph Robertson to be banished forth of Scotland from and after the 19th July 1818, never to return to or be found therein after the said day under the pain of death, in terms of the statute of King Charles II. c. 34. His wife, Margaret Robertson, and his daughter, Mary Robertson, were the only other parties present.

Margaret Robertson was accordingly examined as a witness in the action which was afterwards brought before the Commissaries; and 'being solemnly sworn, kneeling, with her right hand 'on the holy evangel, purged of malice, partial counsel, and good 'deed, and interrogated, Do you know Mary M'Neill, or Mary 'Black M'Neill, the person now pointed out to you in the 'Court? depones, and answers, I do not; I do not remember 'that I ever saw her before. Interrogated, Did your husband 'keep a record or book in which he entered the marriages 'celebrated by him? depones, and answers, He kept a book, in 'which, so far as I know, he generally recorded the marriages 'celebrated by him. And being shewn a book produced by 'the pursuer, and now subscribed by the deponent and Judge-'examinator as relative hereto, which commences on the 1st of 'January 1814, and appears to end on the 26th of November '1817; and the deponent being interrogated, Whether that is 'the book so kept by her husband, and by whose hand it is 'written? depones, and answers, It is the book that was kept by

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dence whereof (the lines themselves not being forthcoming) he produced this extract from the books of the session-clerk: 'Registrate of Marriage. *Edinburgh, 21st day* '*of May* 1816.—Malcolm M'Gregor, printer, Old Church parish, and Mary M'Neill, 'St Cuthbert's parish, daughter of Dr James M'Neill, Edinburgh. *Edinburgh, 3d* '*December* 1817.—Extracted from the Register of Marriages for the city of Edin-'burgh. (Signed) ROBERT BOW, S.C.'

'my husband, and is wrote by him. And being particularly 'desired to look at the entry in that book, under the date of 'twenty-third May eighteen hundred and sixteen, "Married 'Malcolm M'Gregor, printer, Old Church parish, and Mary 'M'Neill, St Cuthbert's parish, daughter of Dr James M'Neill, 'Leith-Walk.—Town Lines;" and interrogated, If that entry is 'in the handwriting of her husband? depones, and answers, 'Yes. Interrogated, Were you present at this marriage? de- 'pones, and answers, Yes. Interrogated, Do you know Mal- 'colm M'Gregor the pursuer, now in the Court? depones, and 'answers, Perfectly. Interrogated, Did you know him before 'the marriage? depones, and answers, No; I did not. Inter- 'rogated, Have you been acquainted with him since the mar- 'riage? depones, and answers, No; I have not. Interrogated, 'How do you know him to be the person that was then married? 'depones, and answers, Indeed I know very little about it. I 'am very unable to answer questions to-day, I am so unwell.* 'Interrogated, Can you state any reason for saying he was the 'person who was then married? depones, and answers, I recol- 'lect his face, I cannot be more particular. He left a stick in 'our house that night. Interrogated, Did he come back for that 'stick? depones, and answers, I cannot recollect. Interrogated, 'Do you perfectly recollect that there was a marriage in your 'house, and celebrated in your presence by your husband, upon 'the 23d of May 1816, as specified in the book? depones, and 'answers, I recollect of it being, but I cannot recollect the pre- 'cise date. Interrogated, About what hour did the marriage to 'which you allude take place? depones, and answers, Between 'nine and ten o'clock in the evening, I think; I cannot be cer- 'tain. Interrogated, Did you see any marriage lines produced? 'depones, and answers, I know that they brought lines with 'them; I saw them in my husband's hands, either when he was 'celebrating the marriage, or before or after the celebration. 'He generally held the lines in his hand while he was celebrat- 'ing marriages. Interrogated, Did you yourself read the paper 'that you call lines? depones, and answers, I really think I did, 'I believe I did. I knew Dr M'Neill a little. Interrogated, 'How does your acquaintance with Dr M'Neill lead you to re- 'collect this circumstance? depones, and answers, I understood 'the woman married to be his daughter. Interrogated, Had

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* The witness's husband had that day been liberated from prison to prepare to go into banishment.

June 20. 1828. 'Dr M'Neill been in the deponent's house before this marriage? 'depones, and answers, He had sometimes, visiting my husband. 'Interrogated, Was any other person present at the marriage 'to which you allude? depones, and answers, Yes, Mary Robert-'son, my husband's daughter by his first marriage. Interrogated, 'Did you see your husband give a certificate of this marriage? 'depones, and answers, No, I did not; he does not give certifi-'cates unless when the lines happen to be lost. Interrogated for 'the defender, Did you hear the defender speak or say any thing 'at the time the ceremony was performed? depones, and answers, 'No; the woman married generally bows on such occasions, and 'does not speak. I suppose the woman then married did so, but I 'cannot recollect what she did. Interrogated, Did you hear the 'woman then married speak at all while she was in your house 'on that occasion? depones, and answers, No. Interrogated, 'Was it dark while she was in your house? depones, and 'answers, About the gloaming. Interrogated, Had you then 'candles lighted? depones and answers, I am not certain; I be-'lieve there was a candle lighted. Interrogated, Did you hear 'the lines then read? depones, and answers, I did not hear them 'read. Interrogated, You before said, that you think you read 'the lines yourself. Are you now certain that you did read 'them, and when did you so read them? depones, and answers, 'I am not certain that it was the lines I read; but I either read 'the lines or the entry in the book about the time of the marriage. 'Interrogated, Was it before or after the parties had left your 'house that you read the lines or entry in the book, according 'to your recollection? depones, and answers, I really don't re-'collect whether it was before or after. Re-interrogated for the 'pursuer, Did the parties, in the marriage to which you allude, 'conduct themselves in the ceremony in the same manner as 'parties usually do on similar occasions, or did you observe any 'thing particular? depones, and answers, They behaved just in 'the usual manner; I did not observe any thing particular. 'Re-interrogated for the defender, Was it your husband's prac-'tice to put questions to the parties when he performed the cere-'mony? depones, and answers, It was his practice to ask par-'ties if they were willing. Interrogated by the Court, Have you 'any doubt he did so upon the occasion to which you allude? 'depones, and answers, None whatever.

Mary Robertson, on being interrogated, 'Do you know the 'defender? deponed and answered, I have known her by sight 'for several years, but I never spoke to her. And being shewn

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'the book produced during the examination of the preceding wit-
'ness, and interrogated, depones, That for more than fourteen
'years past her father recorded the marriages he celebrated; and
'the book produced, which she has now seen and examined, is of
'her father's handwriting. Interrogated, depones, That the entry
'under date the 23d May 1816, "Married Malcolm M'Gregor,
'printer, Old Church parish, and Mary M'Neill, St Cuthbert's
'parish, daughter of Dr James M'Neill, Leith Walk.—Town
'lines," is of her father's handwriting. Interrogated, depones,
'That the deponent was present at this marriage. Interrogated,
'Do you know the pursuer, Malcolm M'Gregor, now in Court?
'depones, and answers, Yes; I recollect the face; he was one of
'the parties then married: I did not know him before the mar-
'riage, nor have I been acquainted with him since. Interrogated,
'What hour did the marriage take place? depones and answers,
'Late in the evening, before supper. Interrogated, Was there
'any candle lighted? depones, and answers, No; I think there
'was not; I cannot recollect that there was any. Interrogated,
'Did you see any marriage lines? depones, and answers, I did
'not see any lines; but I asked my father if there were lines; he
'answered me, "That the pursuer had Town lines." I put this
'question before the ceremony was performed. I had not been
'present at any marriages for several years before, and had some
'delicacy about attending as a witness, which led me to put the
'question. Interrogated, Did you hear the names of the parties
'mentioned at the time the ceremony was performed? depones,
'and answers, I did not hear any names during the ceremony:
'I understood it was not common to mention the names in per-
'forming the ceremony. It struck me that the woman I saw mar-
'ried was Dr M'Neill's daughter, as I had often seen her walking
'with Dr M'Neill. After the ceremony was over, I asked my
'father if she was Dr M'Neill's daughter, and he told me she was.
'Interrogated, If the defender, whom she now sees in Court, was
'the person then married? depones, and answers, She was; I
'have no doubt she was the person. Interrogated, depones,
'That the deponent had often before been present at the celebra-
'tion of marriages, and the marriage in question was celebrated
'in the usual manner, and solemnly and deliberately. Interrogat-
'ed, Did you hear the defender speak while she was in your
'father's house on that occasion? depones and answers, No, I
'did not. Interrogated, depones, That the ceremony was per-
'formed at her father's house in Carrubber's Close, and the
'parties only remained there while the ceremony was perform-

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'ing; that is to say, it was performed when they came, and they 'went away when it was over. Depones, That the deponent and 'her step-mother were the witnesses, and there was no other per-'son present but the parties and the deponent's father. Inter-'rogated, depones, That the deponent knew Dr M'Neill since 'she remembers any thing, and he frequently visited at her 'father's house.'

The record of marriages produced on this occasion contained above a thousand different entries of marriages, in regular order of date, with the exception of fifty-three entered separately upon five leaves at the end of the book, and were marked as omitted in their places. The whole, except one entry, and the names of the witnesses, appeared to have been written by one hand. The entry of the marriage between Malcolm M'Gregor and Mary Black M'Neill, was in its proper place.

M'Gregor and Mary returned to Dr M'Neill's house, where they slept, M'Gregor alleging he there consummated this marriage. This, however, Mary denied, averring, that they slept in different bed-rooms; and at this time it appeared that M'Gregor usually slept at Dr M'Neill's. The husband of Dr M'Neill's housekeeper, and who was also in the habit of occasionally residing in the house, deponed, that he never saw M'Gregor and Mary in a bed-room together in Dr M'Neill's house but once; on which occasion, a Sunday morning, about seven or eight o'clock, the deponent went with M'Gregor into a bed-room where Mary was, and he saw M'Gregor shake hands with Mary, and they bade each other good-morning: That it did not consist with his knowledge that M'Gregor and Mary slept together at any time in Dr M'Neill's house, nor did he ever hear any person say so except M'Gregor, who told him that he had slept with Mary. And being particularly interrogated by the Judge-examinator to consider the great oath that he had taken, he deponed, that he had never seen the parties in bed together, nor does it consist with his knowledge that they ever were so. Another witness (Craig) deponed, that being employed on the 24th May 1816, (the day after the ceremony at Joseph Robertson's), in removing to Dr M'Neill's the furniture of one of the Doctor's tenants, M'Gregor came to take the inventory, and Mary came down also. M'Gregor handed her a bunch of notes, and asked her, "Will that do?" she answered, "It would," and thanked him. They shook hands together at the tenant's that morning.—About 10 or 11 o'clock after breakfast, Mary said, "I am glad to see you this morning, Mr M'Gregor." No evidence arising from signs and appearances,

generally resorted to in cases of disputed consummation, was led, or attempted to be led, nor was the housekeeper examined on this point.

At this time Jolly's visits to Mary had not been discontinued, although it rather seems that they were, occasionally at least, private.

Jolly's residence was in the parish of Edinburgh—Mary's in the West Church—although, from being on the extreme boundary, next South-Leith parish, mistakes might have been innocently committed in that matter. On the 13th of June 1816, he went to the session-clerk's office of South-Leith, and obtained this certificate: 'Leith, 13th June 1816.—Robert Jolly, student 'of medicine, Edinburgh, and Mary M'Neill, residenter, Leith 'Walk, and daughter of Mr James M'Neill, portioner there. 'That the parties are free, unmarried, of legal age, &c. is at-'tested by John Gibson for John Foggie, sess.-clk.' But no actual proclamation of banns had taken place. Then, in company with Mary, Dr M'Neill, the housekeeper and her husband, they proceeded in a hackney-coach to the residence of the Rev. Dr James Robertson, who had been applied to in the morning to come to Dr M'Neill's house, and had been shewn the certificate of proclamation, but who, not being able to go, appointed the evening (about half past seven o'clock) for the ceremony.

Dr M'Neill was very feeble in his limbs, and much given to intoxication; but although it was attempted to be proved, that at this time he was so drunk as to be carried, or rather dragged to and from the coach, the evidence of that fact failed, and indeed was satisfactorily contradicted.

On reaching Dr James Robertson's house, Jolly handed out Dr M'Neill, and was followed by Mary and some of the domestics. The Doctor walked up the first flight of ten steps, with his arm in Jolly's, without any apparent difficulty. When Dr Robertson came into the room, Dr M'Neill rose slowly, and hoped that Dr Robertson would excuse an old man, who, by reason of some infirmities, was unable to rise so readily, and make so polite a bow as he was accustomed to do in his younger days. Dr Robertson requested him to be again seated; he answered, 'No; I have come to give away my daughter to Mr 'Jolly, and I must do so in the usual manner;' on which he stepped forward, took her by the hand, and placed her near Mr Jolly. Immediately thereafter, Dr Robertson, addressing Mr Jolly, asked him, 'Do you take this woman, (they having joined hands), whom you have by the hand, to be your lawful married

June 20. 1828. wife; and do you promise, before God and these witnesses, to be a faithful and loving husband to her, till God shall separate you by death?' Mr Jolly replied, 'I do.' 'He then said to the bride, Do you take this man,' whom you have by the hand, to be your lawful married husband, and do you promise to be a faithful, 'a loving, and a dutiful wife to him, till God shall separate you by death?' and the conclusion was, 'Before these witnesses I declare you married persons; and whom God in his good providence has thus united, let no man put asunder.' He then offered up a prayer, gave the parties a few exhortations, and concluded with thanksgiving; in all which Dr M'Neill seemed to be much interested, and requested the parties to remember the exhortation, and to act accordingly. Dr Robertson said, he hoped he, the Doctor, would be kind to the young couple; to which he replied, 'Sir, I have been kind to them, I will be kind to them still; and nothing shall be wanting on my part to make them happy.' Dr Robertson then certified the marriage on the lines of proclamation, by the words,—'The above-designed 'parties were married before witnesses, by James Robertson, 'minister;' and gave the certificate to the bride, (as was always his practice). Dr M'Neill's housekeeper and a bride-man were present. When the ceremony was over, Dr M'Neill, with great affection, wished Mr and Mrs Jolly much happiness, and the parties then went away. The marriage was entered in the Register for Marriages for South-Leith.

Mr Jolly proceeded with his wife to Dr M'Neill's house, and from that hour took up his permanent residence there, and lived with her at bed and board as her husband. M'Gregor congratulated them on their marriage; drank to their healths as married persons, by the names of Mr and Mrs Jolly; called and inquired for them as such; told of their marriage, and shewed gloves, which he said he had got from them; received them as visitors in his pew at church, and after service walked away with them; heard other people address them, and drink to their healths as Mr and Mrs Jolly; and heard her called so to himself, without objecting to the appellation.

It happened that Dr M'Neill required to be again at Stevenston; and, in October 1816, took with him Mr and Mrs Jolly, and M'Gregor. They proceeded to Holytown, and remained two nights there. Mary Hastie, the landlady's daughter, attended table, and deponed, that she heard M'Gregor recognize the defender as Mrs Jolly, and he drank to her health as such, and so behaved all the time they remained in the house.

During these two nights, there not being separate accommodation, Mr and Mrs Jolly and M'Gregor all slept in the same bed-room; and it being a double-bedded room, Mr and Mrs Jolly (as the witness understood) slept together in one of the beds, and M'Gregor in the other, the only other room being occupied by the Doctor. June 20. 1828.

In settling with the Doctor's tenants on this occasion, M'Gregor gave his assistance, and, without objecting, heard them drink to Mrs Jolly's health, and address her by that name.

On the death of Dr M'Neill, in May 1817, M'Gregor went to the Doctor's house, then occupied by Mr and Mrs Jolly, and desired to render himself useful to them; remained present at the chesting; and made an apology to them for being obliged to go away sooner than he could have wished. He also, with some other persons, accompanied Mr Jolly to the house of Mr Smyth, the Doctor's man of business. Mr Smyth requested M'Gregor to produce Dr M'Neill's deeds of settlement—saying, 'You have the deeds, I believe:' On which he pulled them out of a side-pocket in his breast or coat, and they were read to the persons present, and were left in Mr Smyth's possession; after which, Mr Jolly and M'Gregor went away arm-and-arm. At the funeral, Mr Jolly acted as chief-mourner. M'Gregor's step-mother (who had nursed Mary) went to the Doctor's house on the night of his death; and, on expressing a wish to get early home, M'Gregor requested her to stop for two or three days. She asked, 'Shall I stop with Mrs Jolly?' to which he answered, 'Yes.' At this time he was very much in the house, and seemed to take a charge in advising Mr Jolly as to the funeral arrangements; but Mr and Mrs Jolly invariably appeared as master and mistress of the family, and he was considered in the light of a visitor there merely. He accepted mournings from Mr Jolly; and on the evening of the funeral, when several people were present at the Doctor's house, he recognized Mary as Mrs Jolly, and repeatedly drank her health as such, along with the rest of the company. When he first came into the room, he congratulated Mrs Jolly as the lady of Stevenston; and on the following Sunday accompanied Mr and Mrs Jolly to the church to be kirked, and returned and dined with them.

On the other hand, one witness represented Mr Jolly's visits after his marriage as 'hidling;' that he had on one occasion come to the Doctor's house, and Mary having opened the door, he pulled off his shoes, and went on his stocking-soles to the

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garret, where he remained three days and three nights. But this witness's testimony seemed entitled to little credit. Another witness, who had been asked to take charge of the Doctor's house during the celebration of the marriage with Mr Jolly, deponed, That some time after that period, Dr M'Neill, Mary, and M'Gregor, came into the house together from Edinburgh, and went into the dining-room. While they were there, Mr Jolly called; she opened the door to him, and he walked up stairs. The witness could not positively say, but rather thought he previously took off his shoes. She went into the dining-room to tell the parties that the kettle was ready for tea, and addressed Mary by the name of 'Mrs Jolly;' who seemed much offended at the witness for doing so, and exclaimed in an angry tone, 'Mrs Devil.' On the same evening M'Gregor went up stairs, and called up the housekeeper and the witness, and asked them whether it was possible that Mary was married to Mr Jolly? The housekeeper answered, that it was not only possible that they were married, but that it was proveable; for that she herself had been present on the occasion. M'Gregor seemed very sorry after receiving this information, and repeated the words, 'Was it possible!' Patrick Neill, a printer, with whom M'Gregor worked, deponed, that in the beginning of June 1816, he was informed by M'Gregor of his marriage to Mary, and requested to call upon her with him. The witness called about the middle of July: they were cordially received by Mary, who shook his hand. Upon the Doctor coming in, he went up to M'Gregor, and took one of his hands in both of his, shaking hands with him in a fondling manner; and on his mentioning the witness's name to him, the Doctor politely came up to the witness, and shook hands and conversed kindly with him. Nothing was said about the marriage of the parties. Witness invited Dr M'Neill and the parties to come to his house and they accepted. Before coming away some spirits and water was brought into the room; witness drank Mary's health by the name of "Mrs M'Gregor." It was the only opportunity he had of shewing the object of his visit, which was to visit them as a new-married couple. She returned the salutation, and drank the witness's health. And John White, lapidary, deponed, that in June 1816, M'Gregor, with whom he had been long acquainted, came with Dr M'Neill and Mary to the witness's shop, and got three gold rings, and a brooch of Ayrshire jasper, which M'Gregor had bespoke, and for which he paid the witness. When the jasper brooch was delivered, Dr M'Neill said to M'Gregor,

" This will cost a great deal of money; but it does not signify, it will be all your's." There was a glass of rum handed on the occasion (the parties being in the witness's room); witness drank to Mary, saying, " Mrs M'Gregor, your health;" she said nothing, but also drank to witness. While the rings were making, Mary came to the shop with M'Gregor, and tried a ring upon her finger, to see if it would suit. In June witness made a gold brooch of a Brazil-stone, by M'Gregor's order, as he said, for Mary. Witness also furnished, by his order, a stone for the head of a cane, which he said he was to present to Dr M'Neill. June 20. 1828.

Mr and Mrs Jolly continued to live together as man and wife, were recognized as such, and continued to receive as such the visits of their friends, and of M'Gregor.

In March 1818, M'Gregor raised in the Commissary Court of Edinburgh a summons of declarator of marriage and adherence against Mary Black M'Neill, subsuming 'that an intimate 'acquaintance having for some time subsisted betwixt the pur-'suer and Mary M'Neill, sometimes called Mary Black M'Neill, 'the reputed natural daughter of the late Dr James M'Neill of 'Stevenston, by Euphemia Black, sometime residing in Car-'negie-street, Edinburgh, they formed an attachment, and 'agreed to become husband and wife of each other; and accord-'ingly, when they were together at Holytown, in the county of 'Lanark, in spring 1816, on a jaunt in company with the said 'Dr James M'Neill, an irregular marriage between them was 'celebrated by the said Dr James M'Neill, and their marriage 'was consummated by their spending several nights together in 'the same bed at Holytown aforesaid: That on the pursuer and 'the said Mary M'Neill, or Mary Black M'Neill, returning to 'Edinburgh from said jaunt, which they did in the month of 'May 1816, they considered it proper that no time should be 'lost in celebrating in facie ecclesiæ that marriage which had 'been irregularly contracted between them at Holytown afore-'said; and accordingly they were, in the month of May 1816, 'regularly married by the Rev. Joseph Robertson, minister of 'the Chapel in Leith-wynd, Edinburgh. Notwithstanding of 'all which, the said Mary M'Neill, or Mary Black M'Neill, 'casting off the fear of God, and forgetting her natural and 'Christian duty, and promise made at her entering into said 'marriage with the pursuer, now refuses to acknowledge her 'marriage, or to cohabit with him as her husband;' and concluding, that 'therefore the pursuer, Malcolm M'Gregor, ought 'to have our sentence and decreet, finding and declaring that

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'he and the said Mary M'Neill, sometimes called Mary Black 'M'Neill, defender, are lawful married persons, husband and 'wife of each other; and decerning and ordaining the said de- 'fender to adhere to and cohabit with the pursuer, and treat and 'entertain him in all respects as her husband; and further de- 'cerning and ordaining the said defender to make payment to 'the pursuer of the sum of L.100 sterling, as the expenses of 'this process, or of such other sum, less or more, as the ex- 'penses shall amount to, besides the expense of extracting the 'decreet to follow hereon.'

This summons was executed against Mary Black M'Neill, who lodged defences, (May 1. 1818.), entitled 'Defences for 'Mary Black M'Neill, spouse of Robert Jolly, surgeon.' 'That 'the pursuer was intimately acquainted with Dr M'Neill, and 'accompanied the defender and him to Holytown, in spring '1816; but there is no truth in the allegation, that a marriage 'was there celebrated by the Doctor; and she expressly denies, 'that she either then, or at any other period, consented to become 'the pursuer's wife. The pursuer, some time in the month of 'May 1816, made proposals of marriage to her, which she re- 'jected, informing him, at same time, that she was pre-engaged 'with Mr Jolly, her present husband. Notwithstanding, some 'short time thereafter, the pursuer called at Dr M'Neill's house 'betwixt ten and eleven o'clock at night, by which time the 'Doctor had retired to his bed-room; and by means of threats, 'particularly of personal injury to Mr Jolly, he prevailed upon 'her, or rather forced her, to accompany him to Edinburgh, 'and carried her to a house, which she afterwards understood 'was that of Joseph Robertson; and though, from the agitation 'of mind at the time, she could pay no attention to what might 'then pass, yet she is convinced that in no situation would she 'consent to marry the pursuer, or break her engagement with 'Mr Jolly, to whom she was sincerely attached, and resolved to 'marry. The pursuer made an apology for the impropriety of 'his conduct, requested that she would be under no uneasiness, 'and said that, with regard to a marriage, he would think no 'more of it; and as neither party wished the above circumstance 'to be made known to Dr M'Neill, so the pursuer's apology 'was accepted of: and the defender having a short time there- 'after been married to Mr Jolly, the pursuer was on that occa- 'sion presented with, and accepted of gloves, as one of their 'friends and well-wishers, and frequently thereafter visited them 'in the Doctor's house, where they lived both during the Doc-

'tor's lifetime and after his death, and he only discontinued his 'visits from the month of December last.' June 20. 1828.

Thereafter M'Gregor required the Commissaries to appoint the defender to be judicially examined as to what passed on the 23d May 1816, which the Commissaries allowed; but he afterwards passed from his motion.

He then condescended, and offered to prove,—

"1. That having paid his addresses in the way of marriage to the defender, who was living unmarried in the house of her reputed father Dr M'Neill, with the approbation of the said Dr M'Neill, the pursuer accompanied Dr M'Neill and the defender in an excursion to Lanarkshire, in the month of May 1816, for the purpose of visiting an estate belonging to Dr M'Neill in the parish of Bothwell. 2. That in the course of this excursion the parties slept several nights at the inn at Holytown, which is in the same parish with Dr M'Neill's estate; and while in that inn, Dr M'Neill stood up, and solemnly bestowed the hand of his daughter the defender upon the pursuer as her husband, and gave the parties his blessing. That the defender acquiesced in this by taking the pursuer's hand; and while at the inn at Holytown, the pursuer and the defender slept in the same room for two nights, when the irregular marriage, which had been previously solemnized by Dr M'Neill in the way here mentioned, was consummated. 3. That, while upon this journey, the pursuer was treated by the defender and by her father in such a way as induced the tenants on Dr M'Neill's estate, and others in whose company they happened to be, to believe that the pursuer and the defender were either actually married, or were solemnly betrothed to each other as husband and wife. That the parties returned from this excursion to Edinburgh on the 20th May 1816; and the defender, after her return to her father's house in Leith Walk, where she generally resided, admitted to various persons that an irregular marriage had been solemnized between the pursuer and the defender at Holytown, when she had accepted the pursuer as her husband; and that this irregular marriage had been afterwards consummated. 4. That, immediately upon their return to Edinburgh, the pursuer and defender thought it proper that their marriage should be regularly solemnized by a clergyman without any further delay; and with the view to this marriage the defender made the usual preparations, in the way of dress, which are customary on such occasions. 5. That, in pursuance of this resolution, the pursuer obtained a certificate of proclamation of banns in the usual form; and thereafter the

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pursuer and the defender proceeded, on the evening of Thursday the 23d of May 1816, from Dr M'Neill's house, near the bottom of Leith Walk, to the house of the Reverend Joseph Robertson, minister of the Chapel of Ease in Leith-wynd, Edinburgh, for the purpose of having their marriage regularly solemnized by that person. That upon arriving at Mr Robertson's house, they made application to him to solemnize the marriage, producing to him at the same time the certificate of the proclamation of banns; and they were accordingly that evening regularly married by Mr Robertson, according to the forms of the Church of Scotland, in the presence of Mr Robertson's wife and his daughter; and the marriage was entered in a book kept by the said Reverend Joseph Robertson, as a record of the marriages which he solemnized. 6. That, after the marriage was thus solemnized, the pursuer accompanied the defender from Mr Robertson's house to the house of Dr M'Neill, in Leith Walk, and there the marriage was consummated by the pursuer sleeping in the same bed with the defender. 7. That the defender has, upon a variety of occasions, admitted to sundry persons that she was married to the pursuer by the Reverend Mr Robertson, as above-mentioned, and that she thereafter slept with the pursuer as her husband in her father's house."

The defender in answer "called to the Commissaries' attention, that she had stated in her defences, that so far from Mr M'Gregor having had any idea that she was his wife, he, on the contrary, not only knew of the previous courtship betwixt Mr Jolly and her, and that they were to be married, but at the time of the marriage he was presented with gloves, which he accepted of; and being considered as one of their most intimate friends, he repeatedly visited them, drank to them as husband and wife by the names of Mr and Mrs Jolly, and during these visits was in the practice of partaking of their family fare, always acknowledging them to be husband and wife. When, however, the pursuer first pretended to say that the respondent was his wife, it appeared that his object was merely selfish, as he offered to renounce the claim of a husband, upon condition that she and Mr Jolly would pay him a sum of money; so that, if they had complied with his wish, no such action as the present would have appeared in Court.* The defender therefore submitted, that before the

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* The pursuer thus described (in his pleadings) his discovery of the intimacy of Mr and Mrs Jolly, and its effect upon him. "The pursuer, after consummating his marriage with the respondent at her father's house, where it was agreed she should remain

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pursuer was allowed to enter upon his proof of the condescendence, the above special facts should be discussed, and a proof thereof allowed to the defender; or, if the pursuer is to proceed with his proof in the mean time, the defender should also be allowed a proof of what she had now stated, and of the answers to the articulate condescendence; namely,—1. The defender denies this article, excepting in so far as regards the circumstance of the pursuer's having accompanied Dr M'Neill and the defender, first to Holytown, and afterwards to Glasgow. 2. and 3. These articles are denied. 4. This is denied, in so far as regards the defender's having any view of a marriage with the pursuer, making preparations on that account. 5. The defender recollects, that some time in May 1816 the pursuer made proposals of marriage to her, which she declined, informing him of her being pre-engaged with Mr Jolly, now her husband. Notwithstanding of this, some short time thereafter, the pursuer called at Dr M'Neill's house one evening about nine or ten o'clock, by which time he had retired to his bed-room, and by means of threats, particularly of personal injury to Mr Jolly, the pursuer prevailed on her to accompany him to Edinburgh, and he conducted her to a house, which she afterwards understood to be that of Joseph Robertson; and although, from the agitation of her mind at the time, she was incapable of paying attention to what then passed, she is convinced, that neither then, nor at any other time, did she consent to marry the pursuer, or break the engagement she had come under with Mr Jolly. 6. The defender admits that the pursuer accompanied her back from the house of Joseph Robertson to Dr M'Neill's house, where she retired to her own room, and the pursuer staid all night in a separate room below; but there is no truth in his allegation of there having been any marriage, or consummation of marriage,

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on account of the old gentleman's ill state of health, continued to see her there during the day, when leisure permitted his absence from his business, and sleeping with her generally, though not always, at night. But this did not continue long. Not very many days after his marriage, the pursuer having occasion to pass one forenoon by Pilrig-street, was amazed to meet his wife hanging upon the arm of Mr Jolly, and conversing with him, seemingly on the most familiar terms. Astonished at this instance of levity, the pursuer abruptly accosted them, by charging Mr Jolly with an improper intimacy with his wife. What the particulars of the conversation which then took place were, the pursuer does not now recollect; the result, however, was, an acknowledgment by them of their guilt, and a determination on the part of the pursuer, to take instant measures for obtaining a divorce against his unfaithful wife; and from that time all intercourse between them as married persons ceased."

June 20. 1828. betwixt her and the defender, either then or at any other period. 7. This article is denied.

A proof was led of these facts and circumstances, including a conversation which M'Gregor averred Mrs Jolly had held one evening in the house of her nurse, Christian Robertson; but no proof was at this time taken of the marriage at Dr James Robertson's, nor of the practice relative to the certificates on which the clergymen in Edinburgh were in the habit of marrying parties. From the proof relative to the above conversation it appeared, that Christian Robertson's daughter and her husband were present, and that Mrs Jolly sent for Janet Nicolson, the alleged mistress of M'Gregor, who came to the house, and on her arrival some conversation passed. Janet deponed, that Mrs Jolly stated that she had been married to M'Gregor at Joseph Robertson's, but she could by no means think of living with him: —That she preferred Mr Jolly, and would lay down her life for him:—That she asked her, whether she, Janet, was not married to M'Gregor? to which she answered, that Mary was married to him:—That she was urged to confess that she had been so, but she had never confessed it to Mary, to Jolly, or any other person, although she had been urged to do so:—The parties joked each other about livery, *i. e.* wedding-favours:—Mrs Jolly then said, that Malcolm (M'Gregor) had come down to Dr M'Neill's house, and told her to come up to Mr Bridges to settle some business:—When they were on Leith Walk, Malcolm advised her to go into one M'Farlane's in Carrubber's Close to get a bottle of ale:—She was against going, but he insisted upon it:—When they went there, they found the house shut up:—Malcolm then asked her to go to Joseph Robertson's, which was just opposite:—He insisted on her going up, and said he would employ one M'Donald to stab Mr Jolly, or assassinate him; and would burn the deeds of her property, of which deeds he had the custody at the time, if she did not go:—She did not know where she was when she went in:—Mr, Mrs, and Miss Robertson were at home, the two latter darning stockings:—Mr Robertson said, 'It was a very late hour to come there:'—Malcolm took out a pocket-book and gave him either one or two notes, and he made no scruples after that:—He said, 'Where had such 'an old man as the pursuer got such a young lassie?'—Mary said, in presence of the witness, that she did not consider this marriage was binding; and asked, 'what would two or three words of an outlawed man do?'—Afterwards, M'Gregor went home; and she went to Dr M'Neill's, and slept there:—Next

day, she and Dr M'Neill went up to the printing-office, and asked a word of M'Gregor, when Dr M'Neill told him, that Mr Jolly was a far better marriage for Mary:—That he (the Doctor) would not consent to her marrying M'Gregor, nor let him go home with them:—M'Gregor asked her to meet him in Murray-street, Leith, on the Sabbath, which she did; and took with her Mr Jolly, who asked M'Gregor if there was any thing betwixt Mary and him except the marriage-lines of Joseph Robertson? to which he answered, that there was not:—He desired her to take and burn them, and wished Jolly and her all happiness.* June 20. 1828.

On advising the proof and memorials, the Commissaries, on 1st June 1821, found, "that the pursuer has established, by sufficient evidence, that a marriage was celebrated betwixt the defender and him, by the Rev. Joseph Robertson, late minister of the Chapel in Leith-wynd, Edinburgh, in the month of May 1816: that the defender has failed to establish by evidence, any circumstance sufficient to elide the legal presumption thence arising, of the matrimonial consent having been duly adhibited by her on that occasion; and, therefore, found facts, circumstances, and qualifications proven, relevant to infer marriage between the parties; and declared them married persons accordingly, and decerned." And thereafter, on the 7th December 1821, on advising a reclaiming petition, the Commissaries adhered, and found "that no circumstances have been attempted to be proved, on the part of the defender, from which to infer intimidation, as averred by her: that the inference of the defender's matrimonial consent, arising from the marriage ceremony at Robertson's, is strengthened by the defender's admission, that the pursuer accompanied her back from Robertson's to her father's house on the same evening; and that a presumption thence arises of sexual intercourse having followed betwixt the parties, which is further confirmed by what passed at White's, the lapidary, some time thereafter: and that the inference of the defender's matrimonial consent is not con-

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* In the absence of these lines, M'Gregor produced, in modum probationis, a certificate of the marriage of the parties, under the hand of Joseph Robertson:—'Edinburgh, Carrubber's Close, 29th May 1816.—These are to certify, that Mr Malcolm M'Gregor, printer, and Miss Mary M'Neill, after producing regular marriage-lines from the session-clerk of the city, were married, before witnesses, by me. (Signed) JOSEPH ROBERTSON, minister.' The defender objected, that Joseph Robertson not being an admissible witness, no certificate under his hand, especially holograph, could be admitted, as the same objection that applied to his testimony applied to his certificate. Answered for pursuer,—The certificate had been given recently after the ceremony, and long before the sentence of the Court of Justiciary against Robertson. The certificate was allowed to be produced, reserving all objections.

June 20. 1828. tradicted by any part of the pursuer's conduct immediately following the marriage ceremony; and that, although his conduct at a subsequent period may import his willingness to relinquish his legal claims to the defender as his wife, such conduct cannot destroy the legal effect of the evidence adduced to establish the validity of the previous union of the parties."

A bill of advocation was then presented by Mary M'Neill, which was reported by the Lord Ordinary, on memorials, to the First Division; and on advising the case,—

* *Lord Hermand* said,—I have gone over the proof in this case, but I find that the pursuer has brought forward no legal evidence of his marriage with the defender, Mrs Jolly; and I also find plenty of evidence, arising from the conduct of parties, to convince me that a marriage was not seriously contemplated. Perhaps, from being aware of this, the pursuer has chosen to rest his case on the point of law; and I agree with him so far, that (if there had been a marriage) no such thing as a voluntary divorce could have been available,—indeed such a thing was never heard of. But, in this case, there was no marriage. What is called a marriage was nothing more than a mock celebration of that solemn ceremony by a person of the name of Joseph Robertson, who was nothing else than a manufacturer of marriages, and has, since the period in question, been banished from this country for immoral practices. There is, to be sure, a somewhat rash admission proved to have been made by the defender; but still I do not see that this amounts to complete evidence of a marriage,—for threats had been used in order to effect it. The pursuer states, that he had obtained the consent of Dr M'Neill to the marriage; but the inference which I would draw from his conduct leads me to conclude, that he neither had the Doctor's consent, nor that of Mrs Jolly. He never claimed the privileges of a husband; but this would not have been enough to dissolve the marriage, if there had been one. Here, however, as I said before, there was no marriage. It was all a pretence. Can it ever be supposed that the pursuer would have conducted himself as he did, if there had been any such thing? He knew of Mr Jolly's marriage,—he was in the custom of visiting him,—he dined and drank tea with him and Mrs Jolly; nay, he even drank the healths of Mr and Mrs Jolly; and now, at this distance of time, he comes forward and

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* These are the opinions laid before the House of Lords.

claims her as his wife. In such circumstances, the attempt even to infer that there was a marriage is both criminal and absurd. June 20. 1828.

Lord Balgray.—I think this à case of extreme nicety, and have had difficulty in forming my opinion. At same time, I am inclined to concur with Lord Hermand. I am quite clear, that consensus, non concubitus, facit matrimonium; a marriage in facie ecclesiæ, and one less regular, will make no difference in point of law, if the deliberate consent of parties has been given. The more solemn ceremony by a clergyman is merely considered as a matter of order; and where the marriage has been so performed, there is a greater chance that the parties have understood the nature of the contract, and have deliberately assented to it. In such a case the consent is held to be more certain; but as the law is laid down by Lord Stair, it is not essential,—the essence consists in the deliberate consent. To discover whether there was here a marriage or not, it is necessary to inquire into the conduct of parties at the time it is said to have happened, as well during the previous as during the subsequent period; and upon a review of the manner in which they conducted themselves during these three periods, I do not see that I am warranted in concluding that a deliberate consent was given by the defender. From Mrs Robertson's evidence, no consent has been established. She seems to have known little about it, and swears that the lady did not speak. Now, in a case like this, every minute particular is of importance. Mrs Robertson's evidence is confirmed by that of her daughter. The parties bolted in upon Mr Robertson at half-past nine, on a summer evening, and the ceremony seems to have been over in a few minutes; when one, or two, pound notes were thrust into Mr Robertson's hand. So hurriedly was this most important of all ceremonies gone about, that the pursuer went off, leaving his stick behind him. Upon such an occurrence as that of his marriage, the pursuer should have called upon some unexceptionable witnesses to be present; —it was his bounden duty to have done so, in order to shew that every thing was proper, fair, and correct. The want here is, that there was no consent: the irregularity of the ceremony might have been got over, had that requisite ingredient been obtained. As to the plea, that the proclamation of banns proves the marriage, I hold, that a regular proclamation cannot be traversed. But if the proclamation contains, on its own face, evidence of falsification, what credit can you give it? Now, in the present case, this document bears a nullity on the very face of it, and it must be kept out of view. I would do the same thing

June 20. 1828. with a charter under the Great Seal, or any other seal, in such circumstances. The certificate was taken out on the 21st of the month, and the parties were married on the 23d; therefore, what it sets forth could not by possibility be correct. Lord Bankton says, that a marriage is regularly solemnized, when the ceremony is performed by a clergyman, after proclamation of banns for three successive Sundays. If any of the parties belong to the Episcopal persuasion, the ceremony should be performed both by the clergyman of the Established Church, and by the Episcopal clergyman; and where the parties reside in different parishes, the banns must be proclaimed in both of these parishes: and marriages celebrated in this way, are considered as legal and regular marriages. But I do not say, that these forms were at all requisite, if consent had been deliberately given in a less ceremonious form, as where the parties declare before a Justice of the Peace, &c. The certificate of the session-clerk, which seems to have been obtained for a matter of 5s., is not to be held as a certificate of marriage. It is an ingredient in the circumstances of the case, that here the marriage was clandestine; and it has not been pointed out in the proof, that the woman gave her consent, and that she deliberately accepted of M'Gregor as her husband. No such thing appears in evidence; and as this is the most essential of all contracts, without such consent there can be no marriage. Even in a bargain regarding moveables, I would not hold that there is proof (arising out of what took place on the present occasion) sufficient to authorize the party to insist upon implement of the bargain. The conduct of parties, both before and after the sham ceremony, proves that they themselves did not consider that there had been a marriage in contemplation. The tea-drinking parties with Mr Jolly prove, that M'Gregor himself was particularly aware of this. I will not repeat the scene at Holytown on 16th October 1816, as your Lordships are aware of it from what is stated in the printed papers.

Lord Gillies.—I am for farther investigation:—The case is both difficult and important. It is as difficult in point of law, as it is important in its consequences to the parties. I have no great respect either for M'Gregor the pursuer, nor for Mrs Jolly; but the interests of the family procreated of the marriage with Mr Jolly must be attended to. In whatever light the conduct of the other parties may be viewed, they, at least, must be held to be innocent. On the one hand, we have a regular celebration of a marriage, although it was not regularly proclaimed.

But this I hold to be immaterial; for, if marriages were to be celebrated according to Lord Bankton's doctrine, I may venture to say, that few individuals have been regularly married during the last century. I think the regular celebration by a clergyman not of essential consequence, although, for the sake of order, it is the most preferable mode, since the presence of a clergyman may be supposed to prevent parties from being mistaken. What was the situation of parties in this case? The woman was about twenty-six years of age,—the man much more. They were both persons of full age; and it is difficult for me to think, that they did not both understand the nature of the contract into which they were entering. Therefore, whether the ceremony was regular or not, I agree with Lord Balgray, that consent was necessary. But the case has not been fully investigated. The Commissaries should have allowed Mr Jolly to prove his marriage. It is said by M'Gregor, that Dr M'Neill approved of his marriage: this I cannot believe. If the Doctor had done so, why was he present at Jolly's marriage? I should like to know M'Gregor's situation as to the custody of papers and title-deeds. Why did the Commissaries shut out the proof of this? There is no proof of concubitus. The Commissaries said it must be inferred. Why leave it to inference, when proof might have been obtained? There were more persons than one in the house. Why not examine the woman who acted as Dr M'Neill's servant? It is strange, that the husband should have been examined, while the wife was not. But there is a point which has not been hinted at by the Judges who have spoken. I mean the bar to the action, arising from the personal objection against the pursuer. No man is expected to criminate himself; but I think the pursuer has been guilty of such a delinquency, in countenancing Mr Jolly's marriage, as to bar him, personali exceptione, from insisting in the present action; which, as a man and a Christian, he should have objected to, and prevented. Instead of doing so, he allows matters to proceed with his entire acquiescence; and he afterwards comes forward, and seeks to bastardize the children, who, on all hands, must be held to be innocent. I do not know, however, that he can do so. Suppose he had, on the 16th June, married another woman, by whom he had issue,—Would he have been entitled to come forward, and insist that the second marriage should be dissolved on account of the previous one? I think not; and I can see no difference between the two cases. Or, take the case, that there shall be a report of the death of a first husband,

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June 20. 1828. and, on the belief of that report, that the woman enters into a second marriage, of which children are procreated; I do not think that the reappearance of the first husband could bastardize the children of the second marriage. If so, I should like to hear some further argument on this subject; and I think there is much room for further proof.

Lord Succoth.—I am disposed to do as Lord Gillies has suggested. Before we pronounce even our first interlocutor, we should get more light on the subject, as the case is so important and so difficult. Indeed I may say, it is the most difficult which has occurred since I sat on the Bench. The points to which his Lordship alluded should be fully investigated. The maxim is, consensus non concubitus facit matrimonium; and the question here comes to be, Was there a deliberate consent? The marriage was completed facie ecclesiæ. It is difficult for me to suppose, that a woman, twenty-six years of age, brought before a clergyman, as was the case here, did not give her consent. Being in presence of the clergyman, consent must be implied. She may, however, have had an after-thought. She may have repented; but that is of no consequence. The question is, whether her going there, and permitting the ceremony, is not legal evidence of her adhibiting her assent. She could not have gone there by mistake: it is pretended, that she thought she was going to another house. She had been at a house in Carrubber's close before; but she found it shut;—and, at present, I see nothing to induce me to believe, that there was any thing like concussion. The inquiry as to concussion is very material. There might have been circumstances (considering her situation as a natural child) which might have called imperiously for her going before a clergyman. It is said, that because Miss Robertson has sworn, that she did not speak when before the clergyman, that consent has not been proved. I do not go into this. I have been at many marriages, and I never yet, upon these occasions, heard the lady speak. Delicacy sometimes prevents this; and a bow or nod of assent is generally all that takes place. But there is great room for taking a personal exception against the pursuer in this case: he visited the parties after the marriage with Mr Jolly, and addressed the woman as Mrs Jolly. This point should be more fully argued. If obliged to give a decision at present, I would be disposed to do so on this last ground; for I hold that the status of the children must be attended to. I think that the circumstance of there being no

children of the first marriage, makes some difference on the legal argument. June 20. 1828.

Lord President.—This is a most distressing case. I shudder at the consequences of touching what may be considered a solemn marriage. The fashion is to have as little ceremony as possible at marriages. It is not now as it was in the days of Sir Charles Grandison, when coaches and six, &c. Regular celebration is a matter of order, which, by removing doubts, gives certainty to consent. No woman of twenty-six years of age can doubt the purpose for which she goes before a minister, if she is not an idiot; and idiots are not capable of consent. I have great delicacy in touching a marriage so celebrated. It is said here, that the pursuer wishes the marriage declared, for the purpose of bringing a divorce; but if M'Gregor makes her his wife, he can never get a divorce—he can on no account get quit of her, if he does so. Instantaneous repentance, after deliberate consent, will not dissolve a marriage. If such was the case, there would have been many instances in point. Look at the case of M'Adam. He was married at breakfast time. In the afternoon he blew out his brains. Here it was wished to dissolve the marriage; but the House of Lords would not hear of it. This might have been a rash marriage; but it was a regular one. The story of the defender saying, 'What signifies a few words before a priest?' puts me in mind of the story of a Scotchman, who was examined at Carlisle in 1747. He swore through thick and thin; and when asked by his companions why he had perjured himself, he replied, 'Po! po! Do you think me such 'a fool as to swear away my soul by blowing on a book?' This was precisely the after-thought of the woman here, who thought there was no harm in saying a few words before a priest. I cannot believe that there was concussion. If such existed, she would have shewn it. M'Naughton's evidence does not prove it. But, from circumstances posterior to the marriage, M'Gregor does not seem to believe he was married. It is a new case, and should be farther investigated, particularly as to Dr M'Neill's presence at Mr Jolly's marriage. It is said, that the Doctor not only consented to M'Gregor's marriage, but that he knew it had taken place. If so, he was the most criminal of all, to connive at Mr Jolly's marriage. I should wish to be of the opinion of Lords Hermand and Balgray, for the sake of the children; but, even if the first marriage should be adopted, the bona fides of Mr Jolly, in contracting the second, would perhaps protect them, although it would not do so on the other side of the water. I

June 20. 1828. recollect something similar happened in Mr Riddell's case,* but the child died before a decision. I had, however, then spoken to the late Lord Meadowbank on the subject, who concurred with me in thinking that the child must be held to be legitimate. I am for remitting to the Commissaries to take further proof upon every circumstance which can bear upon the case.

A remit was accordingly made to the Commissaries, with instructions to allow a proof of facts and circumstances of the facts alleged, which was done, and evidence adduced as to the facts which occurred at the marriage of Jolly before the Rev. Dr James Robertson, of the conduct of Dr M'Neill on that occasion, and of that of M'Gregor subsequent thereto, and his possession of the title-deeds.

Witnesses were likewise examined as to the regularity or irregularity of both the marriages of M'Gregor and of Jolly. It appeared from the proof, that the custom of the session-clerk of Edinburgh was, on a party's (generally the bridegroom) applying for a certificate of proclamation of banns, to enter in the day-book an attestation of giving out certificate of proclamation of banns. Thus, (as in M'Gregor's case),—'Edinburgh, 22d May '1816.—Malcolm M'Gregor, printer, Old Church parish, and 'Mary M'Neill, St Cuthbert's parish, daughter of Dr James 'M'Neill, Edinburgh; that the parties are free, unmarried, of 'legal age, and not within the forbidden degrees; and he has 'resided within six weeks in Edinburgh, is certified by James 'M'Donald, running stationer, Edinburgh, Patrick Neill, print-'er, Edinburgh. (Signed) MALCOLM M'GREGOR, JAMES MAC-'DONALD.' Thereon a certificate of proclamation having actually taken place, was delivered to the party, and the above attestation posted shortly into a book called Register of Marriages, thus:—'Malcolm M'Gregor, printer, Old C. P., and 'Mary M'Neill, St Cuthbert's P., d. of Dr James M'Neill, 'Edinburgh.' (In the present instance, it had through inaccuracy been posted as of the 21st instead of 22d April). These lines of proclamation M'Gregor did not produce, alleging he had given them to Jolly, who destroyed them; but the session-clerk deponed, that a certificate of proclamation must have been given, although de facto no proclamation had been made at that time, it not being once in fifty times the custom to proclaim. On the other hand, neither was Jolly proclaimed, although he

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* See Bell's Report of the proceedings in this case.

also had obtained from the South-Leith session-clerk a certificate of proclamation, according to the form adopted in the parish. On the above attestation being shewn to the Rev. Sir Henry Moncreiff of St Cuthberts, and the Rev. Dr David Ritchie, one of the ministers of Edinburgh, they deponed, that they would not have felt themselves warranted, on no better document being produced, to have married the parties;—two certificates of proclamation of banns would have been necessary, as the parties lived in different parishes: whilst the Rev. Dr M'Knight, one of the ministers of Edinburgh, deponed, that the practice was so common to do so, that he had celebrated marriages on a certificate of proclamation produced by one of the parties only; but that, disapproving of the practice, he had been instrumentary in bringing the matter before the Presbytery to have new regulations framed on the point. It appeared also to have been optional in the clergymen to keep or not to keep a record of the marriages they celebrated; and that their usual practice was to indorse on the certificate of proclamation a certificate of the marriage; and that previous to the year 1821, much irregularity prevailed, both as to double lines of proclamation, and making actual proclamation. An objection also lay to Jolly's certificate of proclamation, seeing he obtained it from the South-Leith session-clerk, while he (Jolly) lived in Edinburgh, and Mary Black M'Neill (as was alleged) lived in St Cuthbert's parish, although close on South-Leith parish, the limits of which do not seem at that time to have been very accurately defined.

On advising this additional proof the Commissaries were equally divided; but by a rule of that Court under such circumstances, they adhered to the former judgment, finding the marriage established, and decerning in terms of the libel.*

Mary M'Neill having then brought the case again under the review of the Court of Session,—

† *Lord Hermand* said,—This is a very difficult and important case. It is entirely made up of circumstances. As to these circumstances, so far as I can discover, every one is in favour of the defender, while there is not the shadow of a circumstance in favour of the other side, except the mere matter before Joseph Robertson. That is the only circumstance which the pursuer has brought forward in his support. As to the

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* Commissaries Fergusson and Gordon delivered their opinions at great length, the former for, the latter against, the judgment.

† These are the opinions laid before the House of Lords.

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ridiculous story of what passed at Holytown, that is all against the pursuer. Every body knows what kind of place Holytown is. There was no possibility of sleeping in separate rooms. The pursuer slept in the same room with Mrs Jolly, but in a separate bed: And what passed there? Why, she was in the arms of her husband. As to the attempt at a marriage at the Black Bull, that was a mere scheme. Then, there is the public marriage before a respectable clergyman, Dr James Robertson, one of the ministers of Leith, which took place in the presence of Dr M'Neill himself. Then, there is the after-consummation in the father's house, which took place with the knowledge of the pursuer himself. Then, at the distance of eighteen months, he brings this action. The pursuer says, the marriage before Joseph Robertson was merely a confirmation of the former private marriage at Holytown. Can any thing be more scandalous than this, or more clandestine? There is not even evidence of this celebration at Joseph Robertson's, except the acknowledgment of the lady herself. But I must take this acknowledgment in connexion with the fact, and must take the whole of her acknowledgment together. You will recollect she was a natural child; and, of course, independent of settlements, she had no right to succeed to her father. She says she was induced to attend at that time; as this person (the pursuer) declared, that, if she did not, he would destroy her father's settlements. It is quite true, that a legal marriage cannot be retracted. Most certainly it cannot. The defender does not say it can. But was this a legal marriage? Was there a full, a free, and a deliberate consent? The circumstances which I have stated appear so strong to my mind, as completely to satisfy me, that they would be sufficient to set aside much stronger evidence of consent than the pursuer has been able to bring forward. Indeed, I think the pursuer knew that there was no actual consensual celebration of marriage. I don't go the length of saying, that proclamation of banns is actually necessary to make a marriage. But if there was no proclamation, then it was a marriage of mere acknowledgment. In a marriage of that kind, it is settled by all our authorities, that circumstances must be looked to, which is all I contend for in this case. In the case of M'Innes, there was an express acknowledgment; and the House of Lords found, that the two letters mutually exchanged, were not intended or understood as a final agreement, or that the parties had thereby contracted the state of matrimony. I don't desire to go farther than the House of Lords did in that case; for I cannot discover that it was seriously intended, by the

parties in this case, to conclude a marriage. There is another case, the case of M'Gregor v. Campbell, where the marriage was celebrated in presence of a clergyman. I can conceive that we can go this length, that the pursuer knew there was in fact no marriage. This has been found even when there was a celebration, as was the case in that of Cameron v. Malcolm, and Allan v. Young. I look to what I call the real merits of the present case,—the marriage with Mr Jolly. It is attended and followed out by every circumstance which indicates a clear, serious, and solemn consent. See the evidence of the clergyman, Dr Robertson of Leith, by whom the ceremony was performed, and of Mrs Robertson.—(Here his Lordship read Dr Robertson's evidence.) I must also trouble your Lordships with one other evidence, for it almost satisfies me of the presence of the pursuer at this second marriage, which was carried on in the most solemn manner. (See Mrs Robertson's evidence.) I think it likely, on this occasion, that the pursuer was the bridegroom's man.* Here was a public solemn marriage, and if I am right that this bridegroom's man was the pursuer, I think it puts an end to the case. So that the evidence in favour of Mrs Jolly is superabundant. On the other hand, there is no legal evidence of the celebration at all at Joseph Robertson's. There was just the wife and daughter of Joseph Robertson,—and then you have only the defender's own acknowledgment. But I will do in this as I do in every other case, whether in the Court of Justiciary, or here. I will not cripple a declaration. I must take it out and out. I will take it as it is; and when she says she did go to Robertson's, she adds, that she did so under a threat, that he would destroy her father's settlements. In short, from the whole circumstances of the case, I don't see how the pursuer can succeed.

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Lord President.—I wish very much I could have taken the same view as my brother, considering that there are children of this marriage; and considering also, that Mr Jolly seems to be the only person against whom there can be no reproach. As to both of the other parties, their conduct is shameful. There is no objection to Mr Jolly's marriage. Every thing was regularly and solemnly conducted; and there can be no doubt it would be a good marriage, if it had not been vitiated by a former marriage. But that is the question;—and, therefore, what does the pursuer say as to Mr Jolly's marriage, which did not take place till the 14th June?—that, on the 23d of May preceding, he was

* This was a mistake, and was admitted to be so by the defenders.

June 20. 1828. married by the Reverend Joseph Robertson. Mr Robertson was, at that time, an ordained minister of the Gospel, and was entitled, by the law of the Church and State, to marry. The pursuer produced marriage-lines from the session-clerk of Edinburgh; and the witnesses to the marriage were, Mrs Robertson and her daughter. No doubt, there might have been a deficiency in the evidence; for although both the wife and daughter recollect a marriage, they might have been mistaken about the lady; but, unfortunately, that is supplied by the lady herself, for the defender acknowledges it. It is true, Mr Joseph Robertson may have turned out not so respectable a character; but as to his capability of celebrating a marriage, he was just as fit as the other. The parties were thus married in facie ecclesiæ in both the marriages, but in both of them without actual proclamation of banns: neither of them were regular; the one was just as irregular as the other. But the defender says she was forced into the first marriage; that no consent was given by her; that no consummation followed; and that the pursuer knew she was engaged to Mr Jolly. All this may be true; but has she proved either deceit, threats, or force? Is there the slightest evidence of it? She says the pursuer asked her, in the evening, to go to Mr Bridges, and that he led her to Mr Robertson's; and, under threats of burning the settlements, and murdering Mr Jolly, he frightened her to go in. There is no evidence of all this. Where did it happen? Was it on the heights of Lammermuir, where she could get no assistance? No;—this took place in a summer evening in the end of the month of May, when there was good daylight. She is led through the streets of Edinburgh, under threats of burning her father's deeds, and murdering her sweetheart. Was there no person near to protect her, and take her part? Surely, when she got into Mr Robertson's house, she was under protection: She could, at least, have told him of the threats that had been used against her, and desire him to send for a constable; but she says nothing. She does not even object to the ceremony. She is no child at the time;—she was twenty-six years of age. There is no evidence of all this alleged force and threats; and, to me, it is quite incredible, that all this could have taken place in day-light, in a summer evening, and in the streets of Edinburgh. Then, what happens afterwards? They walked home together; —they sleep, at least, in the same house together. It is true, there is no evidence of consummation; but is it not the presumption, that consummation did take place? And you will presume it the more, that this lady slept in the same room with him only

a few days before. It would have been more suitable, if, on that occasion, she had slept in the same room with her father. There might have been some indelicacy in this; but, at least, there would have been no impropriety; and where there was such a scarcity of rooms, it would have been more proper that she had slept in the room with her father, instead of that of a stranger. Therefore, I cannot take it off her hands, that there was no consummation; but, at all events, they walked home together, arm in arm. No doubt it is true, that both parties seem afterwards to have repented of the marriage; but repentance, however soon it follows consent, will not do. In one case, there was the most tremendous symptoms of repentance,—in the case of M'Adam. In that case, there was only an acknowledgment before servants, much less solemn than in the presence of a clergyman, as to which no person in their senses could doubt of the object in view—no mortal can be mistaken; but in that case it was found, both in this Court and the House of Lords, that the most instantaneous repentance could not undo the marriage. Therefore, the repentance of the first marriage, and the consent to the second, will not do. I won't say, and I have no occasion to say, that the consent before a clergyman is to be held as probatio probata. But this I will say, that there is no case, where the consent before a clergyman was found not to constitute a marriage, except these two cases of the children, where they did not come before the clergyman for the purpose of being married, but where, when the mother was out of the room, the marriage was performed, and the girl was taken away by the mother before it was published; so that there was no consummation. The only thing at all corroborative of the defender's story, is the fact that he was possessed of Dr M'Neill's settlements. But then, his answer is just as good,—that it was just in consequence of the marriage that the Doctor gave him possession of those. And then there is another incomprehensible part of the story,—that is, what took place at White's, the lapidary. Dr M'Neill was present on that occasion, and Mr White drank to his daughter's health, as Mrs M'Gregor; and no objections are stated. Then something took place about presents; upon which the Doctor said to Mr M'Gregor, 'It will all be yours;' which corroborates the story, not only of their being married, but of his knowing of, and being intrusted with, the settlements. The only thing that would have weighed, and weighed strongly, in my mind, if this first marriage had been constituted in any other way than in facie ecclesiæ; for you will observe, that all the clergymen say

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that they never saw a case where the marriage-lines were not delivered to the lady; but Joseph Robertson gave the lines, on this occasion, to M'Gregor himself. The object of giving the lines to the lady is, that she may have the proof of the marriage in her own possession; and, in that case, there can be no want of evidence of consent. But, in this case, it was of less consequence; because the lady could have recourse to the evidence of Mr and Mrs Robertson, and their daughter. In this case, the evidence is completely supplied. There can be no doubt, that the pursuer's conduct is most extraordinary, and most unjustifiable. He saw what was going on with Mr Jolly; he delivered up the title-deeds to him; he allowed Mr Jolly to act chief mourner at Dr M'Neill's funeral; he went to church with Mr and Mrs Jolly; he sat in the same pew with them. In short, he has been guilty of the most gross lenocinium that can well be imagined; and sure am I, that under such circumstances he will never be able to get a divorce. I wish I could separate this second marriage, which was every way regularly conducted, so as to give effect to it. But this I cannot do; and, considering all the circumstances, I regret I cannot do it. But the first marriage being constituted by what appears to me to be legal consent, nothing on earth can dissolve it, except a divorce, which this man, I think, will never be able to obtain.

Lord Balgray.—I am precisely of the same opinion. I confess, when the case was last before us, I was of the same opinion as has been expressed by Lord Hermand. From the circumstances which were carried on for a course of time,—Mr Jolly's marriage in June, Mr M'Gregor's knowledge of all that was going on, his conduct to the parties after that, and so forth,—I thought it was impossible that any marriage could have taken place with this pursuer on 23d May preceding. For I could not figure it in my imagination, that any human being, possessed of the slightest principles of honour, could ever let all these take place, if he had been married before to that lady. I confess, I was carried away with these considerations; but, on more cool reflection, and on a reconsideration of all the circumstances of the case, particularly with the additional proof, I perfectly concur with the opinion delivered by your Lordship.

Lord Craigie.—I was not here when the case was last before your Lordships; but I confess, I cannot find the slightest ground of difficulty in this case. The question is, whether there is evidence of these two parties having declared themselves married? This is a matter of fact; and I confess nothing can be more clear

to my mind. Independent altogether of the evidence of celebration, there is evidence as clear as sunshine, that these parties did meet, and virtually declare themselves married persons. There is no evidence of the woman's having been concussed. Indeed, several of the witnesses say, that she acknowledged the marriage which had taken place; but she added, it was nothing but words, and what signify a few words? With regard to the subsequent proceeding, that can have no effect on my mind. A marriage having been concluded thus, this comes to be a mere question of status; but when an engagement of this kind is once formed, it cannot be dissolved. Therefore, on the whole, although I certainly regret it, yet I think we would be undoing the law of Scotland, if we were to allow two individuals, after such a celebration, to get quit of their engagement, merely by their declaring that the marriage was at an end. June 20. 1828.

Lord Gillies.—I am sorry to say I am of the same opinion. From every feeling of humanity, I was inclined to have gone along with Lord Hermand. But I cannot do so. Formerly I felt very strongly what was expressed by Lord Balgray. I could not bring my mind to believe that a marriage had taken place in the face of circumstances which followed it. But, on closely going over this case, I think it is impossible to get the better of a marriage celebrated, as this was, in facie ecclesiæ. At the same time, the pursuer's conduct is, in every respect, most corrupt, and the conduct of the woman is highly criminal. The only innocent person, as your Lordship noticed, is Mr Jolly; and what is still worse is his children,—by making him the father of a family, which family is thus reduced to beggary. Whether there is any remedy for this, I do not know. They have been brought into this situation by the criminal conduct of the pursuer and his lady. To what extent the pursuer may be responsible, I cannot say. I pretend to give no opinion on this subject, and to give no advice. I merely throw it out as a matter of doubt, which arises from the peculiar circumstances of this case.

Lord President.—There was a case * somewhat similar to this in the Second Division, where we had a good deal of conversation, whether we could not enforce the old doctrine of the Roman law. However, that point is not before us: All we can decide upon just now, is the question of status.

The Court accordingly, on the 23d December 1825, adhered.

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* See previous Note, p. 109.

June 20. 1828. In the course of the discussion, M'Gregor presented a petition to the Court, praying for sequestration of the heritable and moveable estate belonging to Mary Black M'Neill, which had been taken possession of by her and Mr Jolly, and to serve the petition upon them. Mr Jolly made appearance at the Bar, by her Counsel, and answers were lodged in the name of 'Mrs Mary Black 'M'Neill, spouse of Robert Jolly, surgeon, Leith-Walk, and the 'said Robert Jolly for his interest.' The petition was refused. Afterwards this application was repeated: appearance was again made for Mr Jolly, and the Court sequestrated the heritable and moveable estate and effects of 'Mrs Mary Black M'Neill,' and appointed a judicial factor, with instructions to pay her, in name of aliment, half of the free annual rent; and out of the remaining moiety, the expenses of the litigations she was engaged in. No application had been made in the principal action to have Mr Jolly or the children heard for their interests; nor had they in that action been sisted as parties.

Mary Black M'Neill appealed.†

On the case for the appellant being opened by Dr Jenner, afterwards the King's advocate,—

The Lord Chancellor stated,—Considering the situation of Mr Jolly and his children, in relation to this cause, their Lordships wish to be informed whether you can cite any case in the Courts of Scotland, for the purpose of establishing the proposition, that Mr Jolly and the children are not entitled to be summoned in proceedings of this description.

Keay. My Lords, I can state upon the authority of one of the Judges of the Consistorial Court in Scotland, that there is no instance of a declarator of marriage, in which it was thought necessary to cite any other than the principal defendant.

Lord Chancellor. Is that opinion, to which you refer, to be found in the printed case?

Keay. No, my Lord, I speak of the opinion of a gentleman now below the Bar.

Lord Chancellor. Is that gentleman aware of any decision going the length, that a party standing in this situation need not be summoned?

Keay. He knows of no instance of parties, so situate, being summoned.

Earl of Lauderdale. The speeches of the Judges in the Con-

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† Lords Chancellor Lyndhurst, Eldon, Lauderdale, Stowell, and Rosslyn, attended the discussion of this appeal.

sistorial Court are given in these printed cases; do you allude to any passages in them as justifying that which you have stated? June 20. 1828.

Keay. No, my Lord.

Lord Chancellor. No such point was decided in the progress of the cause.

Keay. This objection was not taken, either in the Consistorial Court or the Court of Session; but it appears that on different occasions on which the evidence was taken, Mr Jolly attended personally.

Lord Chancellor. Yes, but that is avoiding the question. What does Mr Miller say upon the subject?

Miller. My Lords, The rule which Mr Keay has just stated to your Lordships is the general rule, on the supposition that, in a declarator of marriage, it is to be held prima facie that there is only one marriage; that it is in order to compel the party against whom the declarator is sought, to adhere to him or her, and to sustain the relation of husband and wife; but in any case in which the pursuer of such an action is cognizant of a second marriage, (as appears distinctly in the evidence of this case), I believe it will be impossible for my learned friends, or for the Judge of the Consistorial Court to whom he has now appealed, to refer to any case in the law of Scotland, where the party having that interest has not always been cited; and there are a number of cases, several of which would have been brought under your Lordships' notice had this argument proceeded, the very title of which brings this point under consideration, shewing that where more than one is interested, it is necessary that the declarator should embrace the case of both. I would refer to the case of Pennycook *v.* Grinton. In that case there were two marriages, and in each the pursuer concluded, not against one individual, but against both. I am not aware of any instance in which, where the pursuer was aware of a second marriage, he did not conclude against the husband and children of that marriage.

Dr Lushington. I would ask the learned gentleman on the other side to state this,—Does he ever remember an instance of a declarator of marriage, in which the party had cited any person except the individual who was alleged to be the wife or the husband? and if the practice has uniformly been one way, the onus of shewing it ought to be otherwise, must necessarily lie on those who are contending for an alteration of the practice.

Miller. My Lords, I think I can answer the question which has been put, so far as the citing the two parties goes. I do not recollect any instance where, the second husband or the second

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wife being alive, the husband or wife of the first marriage brought the declarator; but there are cases unquestionably, where, after the death of the second husband or wife, the husband or wife of the first marriage has brought a declarator, concluding, against the children of the second marriage, to have it found, that the pursuer of that declarator was entitled to all the rights and benefits arising from the status of the lawful wife as against the children of the person deceased, whose representatives they called into the field as the issue of the second marriage.

Earl of Eldon. My Lords, it is impossible for me to think that this is not a most important case in many respects. In the first place, one feels a great deal of pain that such a case should be decided between two individuals, and with an attention merely to their interests, where there are other persons most deeply interested in the decision who have no opportunity of being heard. In another point of view, it is extremely important to consider whether this principle should be acted upon. If it has been the constant course of the Consistorial Court in Scotland to proceed without attention to the interests of those other persons, your Lordships will feel a great deal of hesitation before you will introduce a new practice, that will go the length of destroying all which has been done in judgments in former cases in those Courts. There is a difficulty, therefore, in considering this case on both sides of it; and under that impression I do confess it appears to me, that it would be extremely advisable that the Counsel should first be heard upon this point, as to the practice in the Consistorial Court in Scotland, and I can see no objection to the cause standing over for a few days, with a view to their laying Cases on the table on that point; first, For the purpose of preventing our interfering with the interests of persons who are not before us, but who may have very deep interests; and, secondly, For the purpose of guarding us against the mischief we may do by destroying the effect of what has been done in other cases, in which this intervention has not been called for, but where the interests of others have been affected. Under these circumstances we ought not to interfere with the principle of former decisions, unless we are quite sure we are not doing mischief by so doing. It strikes me that it is very material the parties should be heard upon this point, before they go into the merits of the case.

Lord Chancellor. Within what time do the Counsel think they can be prepared to lay Cases as to this point on the table of

the House, and to argue the point? It is desirable it should be done as expeditiously as possible. June 20. 1828.

Dr Lushington. My Lords, we should be under the necessity, in relation to a question of this importance, of sending to Edinburgh for the purpose of having search made there, where, in all probability, there will be access to former cases much more than can possibly be obtained in London; but we would be ready to do it in any period which your Lordships may think reasonable.

Dr Jenner. In a question of this importance, as my learned friend has stated it to be, we feel the same necessity for a reference to Edinburgh. But there is one mode in which the necessity of this could be obviated, which is by giving Mr Jolly leave to present a petition to intervene in the present course of proceedings, which was done in the case of Dalrymple. There the second wife was not a party to the proceeding in the Consistorial Court of London; but she did intervene in the Court of Arches, and took the case by appeal to the High Court of Delegates, to prevent the effect of her rights being affected by the sentence; so that the case would be analogous. A petition might be presented by Mr Jolly, for leave to intervene for his interests in the present course of proceeding.

Earl of Eldon. Could that lady have been allowed to be heard before the Delegates if she had not intervened in an earlier stage of the cause?

Dr Jenner. Yes, my Lords, she might have intervened in the Court of Delegates.

Dr Lushington. She might have intervened at any period. I have not the slightest objection to the intervention of Mr Jolly and the children, and their arguing the case, if they think fit.

Earl of Eldon. They could not be ready this Session.

Lord Chancellor. There are objections to that course of proceeding, and the House are of opinion it is probable no time would be saved by such a course. Their Lordships are of opinion, that the Counsel may most probably be prepared by Monday week, and that Cases should in the mean time be laid on the table with respect to this point. It is a point of great importance, as far as relates to this cause, and of great importance as a general question. The Counsel will understand that this cause stands over till the Cases are laid before the House. It will be convenient we should have the cases on the table of the House as early as possible.

Cases having been accordingly given in,—

The King's Advocate, (*Dr Jenner*), *for the appellant*, main-

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tained,—The second husband and children ought to have been called. No doubt it may very often happen, that, in cases of the present nature, the pursuer may not be precisely aware of the existence of the second marriage, and consequently will be silent as to it in his summons of declarator; but here M'Gregor was connusant of the second marriage, and had dealt with the parties as man and wife. Even, therefore, in the numerous cases quoted, if no notice is taken of any other party than the husband or wife defendant, that would afford no precedent against us.

Earl of Eldon. There is one point, Dr Jenner, to which I wish to call your attention, and that is, whether the cases to which you are alluding, are cases where the circumstance occurs that occurs in the present case, that neither in the summons of Mr M'Gregor, nor in his condescendence, does he take notice at all of any subsequent marriage?

King's Advocate. The cases are various. In some only the husband or wife is cited; but where there has been notoriously a second marriage, that, at all events, enters the detail of the narrative. All parties having interest must be called to the suit,—"Res inter alios," &c. But neither Mr Jolly nor the children have been made parties to the present action; not a word is said of them in the summons, although they are as directly interested as if the action had been against them. Mr Jolly enjoys at this moment the status of husband, and the children the status of lawful children; and are they to be deprived of these valuable rights by the suit against the appellant, to which they were not made parties?

Earl of Eldon. The papers before us say, supposing there were originally a necessity for bringing all parties before the Court, as the husband knew this suit was going on, he is bound by his silence if there is a judgment given in favour of M'Gregor; but I want to know how that argument is to be applied against the children.

Dr Lushington. There might be very great difficulty in applying it, if your Lordship's first position were correct, that it is necessary to cite all the parties in a matrimonial suit; but at the time the suit commenced, there were no issue born.

Earl of Eldon. There may have been an infant ventre sa mère.

Brougham. That makes the case stronger for the appellant; for if a born infant is not to be bound, how can a child unborn?

King's Advocate. There was a vested interest, and a possible interest, both of which must be protected. It is not a rule, that it is not necessary, in matrimonial suits, to call all parties interested; especially if a party comes forward with undisguised mala fides.

After having concealed his pretended status, and acquiescéd in the rights of another, he could not take the advantage of the rule even if it existed. The effect of the judgment of the Court of Session is to make the second marriage void, while the parties most deeply interested in this finding have had no opportunity of contesting the sentence. The parties would not have been so concluded in questions involving mere pecuniary rights; and there is every reason of expediency and justice why they should not, in questions involving the status of marriage, where not only patrimonial interests are at stake, but the most valuable of all rights, viz. the subsistence of a relation in which the whole happiness of the parties may depend. This would hold true, where there was a mére pretension to the character of husband, on the ground of a second marriage; much more where the second husband holds, and has held, possession of that acknowledged status, and where the first husband has recognized that status. That distinction discloses a manifest error in the summons, which is here confined to the first marriage; but where once the second marriage is a matter of notoriety, then the summons, in conformity to received practice, ought to be full and circumstántial, and contain a narrative of the whole facts. But it is said, that although these parties were not called, they might have intervened, and they were, in fact, connusant of the proceedings. The very power, however, to intervene, proves the rule, that every person having interest ought to be made a party; for the reason why a party may intervene, is because he ought to have, but has not, been called a party. Besides, it might be most dangerous to intervene after the suit has advanced. The whole evil (as took place in the present instance in the appellant's rash and unskilful admission of the res gestæ at Joseph Robertson's house) might have been done; and to intervene then, would have been to have taken the case as it stood, according to the respondent's view of intervening. But a party ought not to be deprived of the advantage he might have enjoyed in the preparation and management of the suit: it was the pursuer's business to bring the proper parties into the field, and not having done so, he has himself to blame. To this it is no answer to say, that Mr Jolly knew of the proceedings, or could have sisted himself. The law has pointed out the means of calling the necessary parties, and such an equivalent, as a vague allegation of private knowledge, cannot be listened to. If the parties intervene now, matters must be begun ab initio; that is the only cure to the evil. Mr Jolly's defence might have been, and indeed was, in very important respects, different

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from what has been stated for the appellant. The interests of man and wife, when a first husband comes forward, are not identical. Neither can the wife admit away the status of her husband; nor the parents, the status of their children; and yet according to the respondent's doctrine, both are here admitted away. It is said, that Mr Jolly is entitled to no favour: But what favour does Mr M'Gregor deserve; he who sees his wife cohabit with another man, and lies bye from mercenary motives? This is a case sui generis; and if so, the general rule, whatever it be, must give way. Mr Jolly and the children are the partes principales. What consortium vitæ has the respondent lost? But, at all events, whatever may be said as to Mr Jolly's privilege, the children may be intervened, and insist on matters being restored ab initio. They, in the eye of law, had neither mind nor discretion. Nay, there is this singularity in the present case, that the suit implies that the children are bastardized. If so, how can they have tutors? This House, however, can call them, or tutors ad litem can be appointed. The respondent contends, that the judgment is universally binding and conclusive. That makes it more necessary to call the children, and that the House should act in this matter as their guardian.

Earl of Eldon. I have just now looked into the petition for sequestration. I see that there the parties enter into the merits of the case, and Mr Jolly's pecuniary interests are allowed to be affected; the management and enjoyment of his wife's property being taken out of his hands, on a proof to which he had been no party. This may be agreeable to the law of Scotland, but certainly the like proceeding I never heard of before.

King's Advocate. The proceedings have been most extraordinary from the very commencement; and we submit that your Lordships have but one course to pursue,—to reverse these judgments, and leave to the party, if he chuses, to reinstitute his suit in legal and proper form.

Dr Lushington (for the Respondent). It is contended by the appellant, that all the proceedings hitherto taken are null and void, by reason of the want of certain parties, said to be necessary, viz. the parties who contracted the second marriage, and the children born after taking out the summons. But is it maintained that all persons interested have necessarily a right to be made a party? or is the rule confined to narrower limits,—that only the husband and children must be called? or is this case, on account of its peculiar circumstances, to be allowed to be an exception to the rule? We are, however, prepared to

take it in any way. The doctrine, that all persons interested in a suit must be made parties to it, does not apply to a declarator of marriage. There is no necessity for citing the husband and children; nor is there any thing peculiar in the case to call for a different practice. An action of the present nature does not admit of the citation of any other person than the defender sought to be declared the husband and wife. This is the practice of all Courts exercising jurisdiction in marriage cases. It is borrowed from the civil law; and the principle is, that it is only the party principally interested who need be called. The only exception lies in the case of collusion. If that does not taint the proceeding, all parties interested in the second marriage, though not called, are bound by the result of the declarator. The brocard, 'Res inter alios,' &c. applies to mere pecuniary suits, but not to matrimonial cases. In these it is sufficient if the legitimus contradictor is a party; all who claim through him are bound by the sentence in the cause. I say bound by that sentence; but I need not go that length. It is enough to say, it is not necessary to call any other person. The effect afterwards is not before us. Accordingly this you find, (for the Scotch law is founded on the civil law), from the cases cited, to be the practice of the Scotch Courts. The appellant has endeavoured to prove the reverse, but has totally failed. But by what better test can a doctrine be tried than that of practice? In no instance, where there was a second husband and children, have the Court compelled their presence; and never have proceedings been held to be void because no citation had been given them. Why the rule and practice has been so, I cannot be asked. It is the custom; and custom makes the law. If you violate that practice, you assume the functions of the whole Legislature. Nor could the practice be violated without violating the principle on which it rests. This rule is founded on the soundest of all principles—on the necessity of the case with respect to marriage suits. Nothing would be productive of more danger than to entertain the idea that other parties than the partes principales must be called before judgment could be pronounced. Marriage does not admit of fluctuation or change; and yet what would be the consequence if other parties were not concluded? Suppose there is a declarator of marriage raised, the conclusion of which is, that the wife is bound to return and cohabit with the pursuer: If the sentence is pronounced to that effect, what would you say to the intervention of the second husband, demanding her to return to him? It may be that the second husband has been

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June 20. 1828. ignorant of these proceedings; but could he dispute the sentence, and take his wife back, and bastardize the children which may have been born?

Earl of Eldon. What is the last stage in which a second husband can intervene?

Dr Lushington. Up to the last moment.

Earl of Eldon. Is it the fixed rule of your Court, contradistinguished from other Courts, that the Court itself will not call parties who may be interested in the result?

Dr Lushington. I apprehend that in matrimonial causes the Court would not.

Brougham. In the Dalrymple case no party represented Laura Manners in the Consistory Court, but before the case was finally decided she was made a party.

Earl of Eldon. In that case it was stated, that although Miss Manners was not a party to the suit, yet that she might, if she pleased, have intervened. She was in substance a party; for her marriage was pleaded and proved in the course of the suit; and was therefore as much under the eye and protection of the Court as if she had been formally a party to the question of validity of Miss Gordon's marriage; which in effect would decide upon the validity of her own. I understood that the Court thought that Miss Manners would take better care of her own interests than the Court would.

Dr Lushington. That is an apt example of what I have been stating. The suit for restitution of conjugal rights may be compared to a Scotch declarator of marriage. Yet did the Judge say, 'Stop, I will not proceed farther until I see Miss Manners come 'forward and protect her interests?' The Court ordained Dalrymple to take home Miss Gordon as his wife. Then there was an appeal, and Miss Manners did what she might have done at any time.

Lord Chancellor. In any stage, and in any Court of appeal?

Dr Lushington. The rule with us is, that a party having interest may appear when he chuses; but he must take the case as he finds it. Besides, if justice or expediency required a different rule, would it not have been adopted in the Dalrymple case—a case of such importance to Scotland and England? But the learned Judge knew, that to do so would have been to spread doubt and dismay among other litigants. Look a little farther. Suppose a husband prosecutes a declarator of marriage, he being ignorant of the second marriage; there are children of this second marriage; these children may be in a foreign country,

beyond the possibility of the means of citing them. What is to be done then? Is the status to remain in doubt? A status made ad consortium vitæ to be suspended ad infinitum? Who can tell at what time you can call all persons who have a real interest? Where are you to put the limits? The ground-work of all this is, that it is only the partes principales who are to be called; and this shews how Mr Jolly is bound. He claims by and through his marriage with her. Unless she was a party to the marriage with him, neither he nor his children could claim through her. But if she was legally married to him, she had the greatest interest in the world to prevent the declarator of marriage with M'Gregor. Nor is there any thing peculiar in the circumstances of the case that requires a different rule; any thing of thàt grave and important nature demanded by justice and equity, to refuse which would be a breach of both. June 20. 1828.

Earl of Eldon. Will Mr Keay inform us, Whether, according to the law of Scotland, the second husband could intervene while the suit was in hearing before the Court of Session?

Keay. I apprehend it would have been competent for him to have done so.

Earl of Eldon. If he could have sisted himself as a party in the Court of Session, are we not sitting here as the Court of Session? and, therefore, if he might have sisted himself in the Court of Session, he may, if he pleases, sist himself here. But if he intervenes, Dr Lushington will maintain, that Mr Jolly is bound by all that has been done,—by all the proofs which have been taken below. But then Mr Jolly must be heard on the point, whether he is so bound, before the House can give any judgment.

Dr Lushington. I could not object to that. I should only contend on obvious general principles, that you cannot permit a party to hang back till you come to the last stage of a cause, and then allow him to annul all that has been done before. It would be contrary to all the principles of justice, besides incurring the infinite danger which would arise from such a mode of procedure. It is impossible to deny that it was owing to Mr Jolly's own folly that he did not intervene. He attended the examination of the witnesses, and was a party to the sequestration; so he has no peculiar claim upon your Lordships' favour. The defence of 'all parties not called' is a dilatory defence, and if not offered in due time, is understood to be waived. But he lay bye for nine years, all that time fully aware of the progress of the law proceedings, and in substance, if not in form, the

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dominus litis. Then as to the children: They, to be sure, cannot be held to have been aware of these proceedings; but still they are bound by the same rule as to the commencement of the suit. They could not have been made parties, for there were then none born. But if, according as they were born, it were necessary to cite them to save the proceedings from nullity, you never would get to an end; for when could you say there would be no more born? To listen to the appellant's doctrine would be to let in claims which have long since been understood to be concluded; to create confusion and dismay; to disturb a long established practice; and occasion consequences which my foresight and knowledge do not enable me to predict nor describe. Dr Jenner complained that the second marriage was not mentioned in the summons. We answer, that stating the second marriage is utterly superfluous; for by all laws of God and man, a valid marriage cannot be nullified but by a competent Court, where there is such, or by Parliament. Least of all is the pursuer the party who is to be expected to make that statement, for he avers his own marriage, and denies the pactum secundum. If it is ever done, that arises from the party's own choice, as being beneficial perhaps to his plea.

Earl of Eldon. I take it that M'Gregor means to say that these children are prima facie his.

King's Advocate. Yes, my Lord.

Earl of Eldon. But only prima facie. Now, with respect to them, suppose the House should think that the children ought to have an opportunity of intervening—there is a difficulty here that this House cannot appoint curators to appear for the children—and therefore it would be necessary to travel through the Court of Session again before the case could come here for decision; and I agree with Dr Lushington, that these suits ought not to be delayed.

King's Advocate. No doubt, my Lord, no farther than is absolutely necessary for the interests of justice.

Lord Chancellor. Is it meant to be admitted, that there might have been an intervention in the Court below on the part of the children?

Dr Lushington. I should say that that question is attended with a good deal of difficulty. In the present case I am inclined to think that the children could have been admitted; but their character would have been particular, for they assume legitimacy, and they claim to have a lawful father; but means might

have been found out to intervene them in the Court below in one shape or another. June 20. 1828.

Earl of Eldon. My Lords, I would humbly advise your Lordships to let this case stand over for a week for consideration. It is certainly an extremely important thing that this House should not disturb the usual course of practice in the Courts below. There ought to be very particular reasons and circumstances that should induce the House to do so; and I think that this is a case in which we ought to make a sort of covenant with ourselves, that the impression which the nature of the case must make upon every man's mind should not lead him too hastily to depart from these rules. Under these circumstances, it does appear to me to be a very salutary proceeding to take a little time to consider this case. To which I would add this, that, according to my notions of the practice of this House, it will be very difficult for this House to say that there shall be now these interventions on the part of the husband Jolly, and the children. Doubting whether the course of proceeding here would not be that which I should wish to avoid, if possible,—namely, to send the case back to the Court of Session with a direction to permit them to intervene,—I doubt whether we can originally do that; and I move, therefore, that this case should stand over until some day next week—to this day se'enight.

This was accordingly agreed to; and, when the case was next moved,

Earl of Eldon observed:—My Lords, When this cause was heard at your Lordships' Bar, in consequence of what passed in a previous Session of Parliament, your Lordships were pleased to direct that Counsel should be heard on the question, Whether the cause could be decided without bringing other parties before the House, who appeared to be interested in opposing the case of the pursuer in this action? I am extremely glad that your Lordships were pleased to permit this matter to stand over, with a view that the question, whether there were sufficient parties before the House, might be fully considered before you ventured to say that you would not hear the cause upon its merits: first, Because it is of very great consequence that the general doctrine, in cases of this sort, with respect to who should be parties to a suit, should not be disturbed by what is done in this House; in the next place, Because, if it was necessary that those persons who have been mentioned, viz. Jolly, one of the husbands, (if I may so describe him), and the children of Mrs Jolly, probably by that Mr Jolly, or who perhaps may have a claim now to say that

June 20. 1828. they are the children of M'Gregor, should be before the House as parties, it is important that they should be made parties to the suit, before you enter upon the question of the merits.

My Lords,—This is not a mere action of declarator, unless the prayer with which the summons concludes is the ordinary prayer in an action of declarator of marriage; and I mention that, because it does appear to me to be a matter of very great importance, that when the question is discussed upon its merits, some attention should be given to the prayer of this summons. It is not merely a prayer that it might be declared that Mary M'Neill, sometimes called Mary Black M'Neill, and Malcolm M'Gregor, are lawful married persons, husband and wife of each other; but it likewise prays, that the Court would decern and ordain the defender to adhere to, and cohabit with the pursuer, and treat and entertain him in all respects as her husband. And one question which may probably deserve consideration, (I speak this entirely without prejudice), is this, whether it is competent for a man, supposing him to have acted with respect to this second marriage in the manner in which the printed cases state M'Gregor to have acted, to come into Court, not merely for the purpose of having the marriage declared with respect to the civil consequences of the marriage, but to call upon that individual woman, with reference to whom he has so conducted himself, to return to him, and cohabit with him as man and wife?

What would be the case here if it were a suit for the restitution of conjugal rights, and the husband had so acted who instituted that suit, I do not pretend to say that I know; but it is a point I should wish to hear something of, at the Bar of this House, before I can bring my mind to say, that if the case is made out in point of fact, with respect to the conduct of this man, admitting that it were a suit for civil purposes, as for rents and profits and so on, that the suit might be entertained to the extent of having it determined judicially that he was the husband. I do entertain very considerable doubt indeed, whether a man who makes a present of his wife, in the manner in which this gentleman is stated to have made a present of her to Mr Jolly, has any right to come into any Court for the express purpose of calling her back again to cohabit with him, and to act towards him as a dutiful wife ought to act to an affectionate husband.

My Lords,—With respect to the question of parties, your Lordships heard from the Bar, and have heard it very properly as well as very learnedly stated, what is the general rule with

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respect to making parties to such a suit as this. If you are disposed to say, that you do agree with the doctrine that the husband Jolly and the children should be made parties, I am sure that your Lordships will feel that it is not in your power originally to determine a point of that nature, but that it would be necessary to direct the cause to be remitted, in order that the question with respect to the rights of these parties might be fully considered, and properly adjudicated.

Now, on looking through the papers, I find that it is there insisted, and has in fact been pronounced by the Court below, that Jolly is not a necessary party. That might, perhaps, fall under your Lordships' consideration as a matter of appeal. With respect to the children, their right to intervene, or rather the necessity, I should say, of having them as parties before the House, does not appear to have been considered at all in the Court below; but that would not relieve you from the necessity of sending the cause back again, if a point on their behalf is to be made, with reference to the question, whether they should be made parties or not. And really there is a most curious circumstance in this case with regard to that point. For, whatever might be the case with respect to children in other circumstances, I apprehend that prima facie you have the right of those children now before the Court, because those children being prima facie the children of the husband of this person, and M'Gregor is the husband, they are prima facie his children; and until he is divested of the prima facie character of the father of those children, he would be in truth their tutor, or the person to take care of their interests; and a singular distribution of parties it would be, if he had that onus of that duty laid upon him under such circumstances, for no one could suppose for a moment that it would be honestly discharged.

But whatever is the general doctrine with respect either to the necessity of having the parties or the rights of persons to intervene, it has on the one hand been very properly admitted by the Counsel, that the general rule is, as Dr Lushington and another gentleman has remarked it to be, that it is not necessary to have any parties but the parties principally interested; and there are many considerations of policy with respect to marriage suits in particular, that may make it expedient not to depart from that rule. On the other hand, it can hardly be denied, that this rule is a rule familiar in many other cases besides matrimonial cases; and in a Court in which I long sat, we all know that a suit may go on against an infant tenant in tail, and if that infant tenant

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in tail should happen to die, yet the proceedings had against him would be good against the remainder man when he came into existence, because he was the principal party interested when he was before the Court. It has not, on the other hand, been denied, that the husband may intervene if he pleases. It has not been denied, that in a special case the Court may call on the parties to bring before it other parties than those admitted to be interested in the suit; and if that doctrine is to be applied only to special cases, it is quite clear, that before we can say a word as to whether that applies to this case, we must be able, after hearing this case on its merits, to determine whether this is that special case in which we shall call for such an intervention as I have now alluded to.

My Lords,—Upon that ground, as well as upon the other grounds, it appears to me, that it may be extremely right to go on with hearing the case on its merits; for this appeal is brought before your Lordships under the sanction of very eminent Counsel, as an appeal fit for you to hear; and I am sure I may say, without offence to any body, that if the intent of desiring Counsel to sign appeals, and other proceedings in Courts of Justice, were fully attended to, I believe it would work as beneficial a change in the administration of the law as any whatever that can be mentioned. The suit being a proper suit to be heard upon appeal, it is quite clear that Mr M'Gregor, if your Lordships should happen to reverse the judgment, can have no reason to complain, if you reverse it on the merits. It is a case, therefore, in which, in one view, and supposing the cause to come to one end, you may decide this matter, which it is agreed on all hands at the Bar, ought to be decided without all the delay which must take place if you were to go through the operation of remitting it to the Court of Session, and then discuss in the shape of a future appeal from the Court of Session, which may not take place for some years, and the final decision of this case may not be obtained till a great lapse of time shall have taken place, and these parties be kept in the state of misery in which some of them must be at present.

My Lords,—There is another circumstance in this case, which strikes me is a very material one; and I take the liberty of mentioning it, that the Counsel may consider whether there is any thing in it, or rather, I should say, the papers before us, that may require much to be said upon it; and it is this:—I observe that in the Commissary Court it is found, that there are not proofs of circumstances sufficient to elide (I think that is the expression)

the intention of marriage. They apply that species of finding to a marriage which is said to be regular and in facie ecclesiæ. I observe, too, there are a great many cases cited on both sides, with a view to bringing under discussion the question, whether a marriage cannot be attacked upon the ground of want of consent, being made out by proof of force or fear. There is a great deal likewise to be found in the papers with reference to the question, whether evidence of circumstances may not be adduced to shew, that notwithstanding the marriage was regular in facie ecclesiæ, and though you cannot attack it on the general ground either of force or fear, (the point is a very singular one—is a very important one in its decision one way or the other); whether it is not consistent with the law of Scotland, that even where there is no force or fear, there may yet be circumstances which shall give the parties a right to deny the intention of being married persons, though they went through the ceremony regularly; and I mention this, because I do not see how this House can either affirm or disaffirm the judgment of the Court below, without taking notice of some parts of the contents of the interlocutors which have been pronounced bearing reference to that most important point.

Under these circumstances, therefore, my Lords, it does appear to me proper humbly to advise your Lordships to call upon the Counsel at the Bar, if they are now prepared so to do, to go through the case upon its merits, or, if they are not now prepared so to do, to mention some day on which it will be convenient for them to undertake to go through the merits; and I propose to your Lordships that that course should be adopted.

My Lords,—I would just mention, that this is not an action of declarator concluding for divorce; but it is an action of declarator by a person, stated to have conducted himself in the manner I mentioned, concluding for what we should call a restitution of conjugal rights; nor is it an action of declarator of any other species, where, upon the proof of the marriage, civil rights of property are to be enforced.

Lord Chancellor. It is very desirable that the cause should go on now if the Counsel are prepared. They were prepared to have argued the case last Session.

King's Advocate. My Lords,—In consequence of what has fallen from one of your Lordships this morning, it has become a case of very great importance, and calling for some consideration before we proceed to discuss the merits of the case. Quite a new view has been thrown upon the case by the observations of the noble Lord.

June 20. 1828. *Lord Chancellor.* Will the Counsel at the Bar name a day when they will be prepared?

King's Advocate. This day week, if convenient to your Lordships.

On the Merits.

Appellant. The marriage between Mr Jolly and Mary Black M'Neill is proved beyond doubt, not only to have taken place, but to have been celebrated with the entire consent and approbation of Dr M'Neill. It was as regular as Scotch practice required; for there is no particular form of celebrating marriages. This marriage was followed by open and avowed cohabitation as man and wife, and the birth of children. Bearing this in memory, look to the grounds of this action. The marriage at Holytown is not even attempted to be supported by evidence. The situation in life in which the appellant had been educated does not make the scene there remarkable, or afford any inference of consummation. What proof there is, goes to the reverse. If there had been a ceremony, some trace would have been preserved of it. Then comes the marriage at Joseph Robertson's; but here also the evidence fails. There is no proof of identity by the parties present. Robertson's certificate is utterly worthless as a matter of evidence; and if the respondent betakes himself to the appellant's admission, he must take it as she gives it, with all the qualification of deception, force, and fear, and the power which M'Gregor's having the title-deeds gave him over her. Besides, even if there were a shew of consent interposed, it was not a consent for the consortium vitæ, for a bona fide marriage; and, looking to the consequences of a real marriage, there was no consummation. If M'Gregor had, for the first time, slept at Dr M'Neill's on the night of this ceremony, there might have been some colour given to the respondent's plea; but he was a residenter there at the time. If he had slept with Mrs Jolly, the usual signs and tokens would have betrayed it. All along he had known that Jolly was paying his addresses to Mary Black M'Neill, and was the favoured suitor. Next he sees her living at bed and board, and tolerates this connexion, or rather expressly sanctions it, for a year and a half, and then for mercenary motives (which he admits) endeavours to oblige her to come to his embraces. We don't argue that the conduct of parties will set aside a marriage if legally and seriously solemnized, but we detail this conduct to shew that neither Mrs Jolly nor M'Gregor thought they were married,

which goes deeply into the point of consent, and casts the greatest doubt on the truth of the respondent's statements. Campbell *v.* Cochrane, when properly understood, supports this view. June 20. 1828.

Earl of Eldon. In that case, as reported in Morrison's Dictionary, it is stated that the judgment was reversed. I have endeavoured to find the case, in this House, upon the hearing, and why the judgment was reversed; but it is not to be found. Upon looking, however, into the Journals, it appears that the reversal was by consent.

Dr Lushington. Undoubtedly, my Lord, it was by consent; but it appears from the Dalrymple cause, that it was by consent after the respondent had been heard in support of the judgment.

Earl of Eldon. It was a suit between two ladies, after the death of the husband, contending for the character and status of widow, with respect to some pension that one or other would be entitled to, if one or the other was declared the widow. The one brought an action against the other to set aside the marriage; but both parties were brought by appeal before this House to contest that very point. It was a mere question as to the right of property.

Earl of Lauderdale. In whose opinion is that case mentioned?

King's Advocate. The case is referred to in all the depositions of the learned Advocates in the case of Dalrymple.

Earl of Eldon. Does it appear, from any account which you have, whether there were any other property, in respect of which the declarator of marriage was instituted, except the King's allowance to the officer's widow? because if there were no other property to be taken up by the widow, you can very easily account for the consent; for unless it was ascertained who was the widow, I apprehend neither of them would have got that allowance.

Lord Chancellor. We have found the printed cases in the second appeal. They are in the Library.*

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* Jean Campbell *v.* Magdalen Cochrane, 31st January 1753.—The following statement of the case alluded to is taken from the Records of the House of Lords. The decision of the Court of Session will be found reported under the title 'Personal Objection,' Campbell against Cochrane, 28th July 1747, Morr. 10,456. (which see). By that decision the Court remitted to the Commissaries, with instructions to find 'that 'Mrs Kennedy (Magdalen Cochrane) was barred personali exceptione from being 'admitted to prove that she was married to Campbell of Carrick, before he was 'married to Jean Campbell.' Mrs Kennedy appealed. The Records of the House

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Earl of Eldon. According to these cases the judgment of the Commissaries is, that the alleged prior marriage was not proved, and they dismiss the pursuer's declarator.

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of Lords, (22. Geo. II. vol. xxvii. page 259.) bear a petition, by Mrs Kennedy, (17th January 1748), stating, 'that by order of this House, of 13th December last, 'the hearing of her appeal, to which Jean Campbell and others are respondents, was 'put off till to-morrow, and that the parties are under a compromise,' and praying to adjourn hearing; which hearing was adjourned accordingly. Thereafter (6th February 1748) appears this entry:—(P. 273). 'The appellant's Counsel were heard 'shortly to state the case, and prayed that the interlocutor of the Lords of Session, of 'the 28th July 1748, and the interlocutor of the Lord Ordinary in respect thereof, of 'the next day, and also the two interlocutors and sentences of the Commissaries in consequence thereof, of the 5th and 6th of August 1747, (carrying the judgment of the 'Court into effect), complained of in the said appeal, may be reversed, except such part 'of the said interlocutor of the said 28th July as remits the bill of advocation and cause 'back to the said Commissaries; and that the interlocutor of the said Commissaries of 'the 23d June 1747 may be affirmed. And thereupon the several interlocutors complained of were read, and the Counsel for the respondents being likewise heard, and 'consenting thereto, it was ordered and adjudged by the Lords, &c. that the said interlocutor of the Lords of Session of the 28th July 1747, except such part thereof as remits the bill of advocation and cause back to the said Commissaries, and the said 'interlocutor of the Lord Ordinary in respect thereof, of the 29th July 1747, and also 'the two interlocutors or sentences of the said Commissaries in consequence thereof, 'dated the 5th and 6th August 1747, be, and the same are hereby reversed; and it is 'further ordered and adjudged, that the said interlocutor of the said Commissaries of the '23d June 1747, be, and the same is hereby affirmed.'

Then the Records bear an entry, 'that the Judges do prepare and bring in a bill for 'the better preventing of clandestine marriages.'

The effect of the judgment of the House of Lords was to send the case back to the Commissaries, to receive a proof from Mrs Kennedy. This accordingly was done.

The substance of Mrs Kennedy's averments were as follows:—She had been addressed by Carrick (Campbell) when she was very young; but his estate being encumbered, he was obliged to go to sea. Before he returned, she had married, and had become a widow. When he came back, he publicly renewed his addresses to her, she then having a house in Paisley, but chiefly living in the Abbey there, (the residence of her godfather the Earl of Dundonald), with her cousins the Countesses of Strathmore and Galloway. She and Carrick were married in the Abbey by Mr Cockburn, an Episcopal minister, on 3d July 1724, in presence of William and Archibald M'Intyre, two of Carrick's servants, and two of the Earl's who attended Mrs Kennedy. Cockburn, fearing the penalties, declined giving a certificate of the marriage; but Carrick gave her the following holograph certificate:—'At Paisley, the 3d July 1724. This day, I, John Campbell of Carrick, do 'hereby certify and declare, that I was solemnly and lawfully married to Mrs Magda'len Cochrane, lawful daughter to A. Cochrane of Bonshaw, Esq., now my dear wife; 'as witness hour, place, and date aforesaid, JOHN CAMPBELL.' Mrs Kennedy having a family, and only L. 600 of her own, and Carrick's money matters being deeply involved, and he owing largely to his uncle Ardkinlass, and depending much upon his relations, it was agreed to keep the marriage as quiet as possible. They, however, lived together as man and wife, as far as was consistent with secrecy. By degrees, however, the matter transpired, and the marriage came to be reported and believed at Paisley and the neighbourhood. She took a house in Edinburgh, and Carrick, who had raised an indepen-

King's Advocate. By the law of Scotland there are only two kinds of marriage—regular and solemn, and irregular and clandestine. The first must be attended with all the requisites demanded by the

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dent company in a Highland regiment, resided with her, as her husband, as often as his military duties permitted. Having, however, become very uneasy that her marriage was not published, she pressed him on the point. On an occasion of his absence, he therefore wrote her as follows:—'Camsail, 4th November 1725. My dear Maudie,—I 'am just now in a very great hurry, and I beg you will not be uneasy; and in a few days 'I design myself the pleasure of seeing you, in order to declare publicly our marriage. 'I hope it will be to the satisfaction of us both. Sure I am it will be to my dear 'Maudie's most affectionate husband and slave, JOHN CAMPBELL.' Directed to 'Mrs 'Kennedy, at her house in Edinburgh.'

In the mean time (1725) he had formed a connexion with a lady named Jean Campbell, daughter of Campbell of Mammore, which he thus communicated to Mrs Kennedy:—'1st March 1726. My dearest wife,—Allow me still to call you so. The con-'tents of this letter will certainly astonish and confound you. Unable as I am either 'to write or act as I ought to do with regard to any thing, I must acquaint you with 'the most melancholy and terrible misfortune that ever happened to a man, who had 'nothing in view but to be happy, in doing all the duties of a regardful and most af-'fectionate husband, to the best and most dearly beloved of women. But, alas! how 'have I deprived myself of that happiness! how justly have I forfeited that honest and 'sincere love I might have expected from you, my wife, my friend, and only joy in 'life, and to which, from our mutual engagements and marriage, I had a real title. 'Miserable soul that I am! I have lost all hopes of comfort by the snare of a silly, 'worthless, and designing woman, whose repeated advances I always shunned, as I 'have done the devil, and to whom I never gave the least encouragement, and far less 'promises;—yea never thought of her. Yet, alas! how shall I be able to express it! 'Notwithstanding of the undoubted, just, and only title you have had, and always must 'have, to me as your husband, and whatever else can be called mine, which you can, 'when you please, make appear, and at all times claim me as such, I have, without 'giving myself time to think seriously, through fear of disobliging the Duke of Argyll 'and his friends, plunged myself in the utmost misery. You will by this time guess 'what I mean. Alas! What shall I say to my dearest Maudie? Though my hands 'are guilty, my heart is free. Oh, how shall I mention that fatal night, which has 'been the cause of all my woe, when, having drunk to a very great pitch, and sitting 'alone in the fields, that deceitful woman, or rather devil, whom the world now calls 'my w—e, and who on every occasion laid traps to ensnare me, designedly threw her-'self in my way. How shall I tell you what followed? My spirits fail me—I sink— 'I can no more. Ruin and destruction to me, by her ensnaring insinuations, and 'cursed lewd behaviour, and my not being master of myself, I did——Oh how shall I 'name it? She fell with child, which was all the devil wanted, joined with her vicious 'inclinations, to bring about her own end; and in horror and confusion of mind, for 'the reason above, and to prevent my flying the country, (reasons too slight, nay, not 'to be named when seriously thought on), have put myself in the damnable situation 'I am now in. Alas! why did I yield to the fears of disobliging the Duke of Argyll, 'or any bad treatment I might have met with from my uncle, by declaring our marriage 'to the world at the time it happened? Why did my dearest wife join with me in being 'silent in an affair, upon which our sole happiness in life depended? Why, nothing but 'her tender regard to her husband, though I have no reason to expect it, must be the 'only cause I don't meet her just vengeance, which I not only deserve, but the curse of

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law of Scotland. Both are binding; but there exists between them this important distinction, that in the latter you are led into the inquiry whether consent was given, and for that purpose may

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'God, unless by sincere repentance he should forgive me. Alas! what shall I do? May I, 'who from my distressed soul on my knees beg forgiveness, expect it from injured inno-'cence in imitation of his goodness? Though you have a soul noble and generous, 'I on no other account deserve it. But, alas! pity me, who am ruined by a damnable, 'deceitful, little wretch, who has brought me under the guilt of the most inexpressible 'piece of injustice to the best and most deserving wife. Yet I must be unalterably 'yours.—I was so—I am so to the last moment of my life. Therefore, O dearest and 'most injured of women, let me from a broken heart and sincere repentance beg and 'conjure you to give peace to my troubled soul, by allowing me to see you, that I may 'more fully explain the miserable state I am in. Grant me this favour, that on my 'knees, and with a heart full of sorrow and contrition, I may ask forgiveness. Oh 'forgive, if possible, your greatly distressed and most unhappy husband, JOHN CAMP-'BELL. 1st March 1726.' Directed to Mrs Campbell of Carrick, at her house in 'Edinburgh.' When she upbraided him with his conduct in suffering Jean Campbell to live at his house in the country, he said his dependency disabled him from preventing it, and he threatened to leave the country if Mrs Kennedy actively interfered. This, and the increasing involved state of Carrick's affairs, (he being even obliged to sell his estate), and the ruin which would ensue to him if an open claim were made by her in the character of his wife, she stated, still induced her to be silent. Therefore, temporising for a while, she, notwithstanding his occasional intercourse with Jean Campbell, received him when he came to Edinburgh in May 1726; and when absent they corresponded together, like man and wife; and she had in her possession 126 more letters, all written as from a husband to a wife. She alleged, that before, as well as after, the second marriage, she had disclosed her marriage, and shewn her certificates, to several people, many of them of distinction; and he had got some of them to intercede with her not to make her claim then, and told them his life was miserable in consequence of his connexion with Jean Campbell. Mrs Kennedy also maintained, that Jean Campbell and her friends knew of the marriage with Mrs Kennedy; and that she (Mrs Kennedy) and Carrick had lived and cohabited together at bed and board as man and wife, from the time of their marriage in 1724, at Paisley, Edinburgh, and Ostend, and other places, to 1744, for three, four, and five months at a time; and that in consequence she had in 1727–28 refused an advantageous match with another person. She also alleged, that Jean was with child to Carrick before the second marriage.

Carrick was killed at Fontenoy in 1745, and Mrs Kennedy obtained letters of administration to him in the Prerogative Court of Canterbury, as his widow, and applied at the War Office to be put on the establishment; but the agent for the regiment having signed a certificate for Jean Campbell, a question arose concerning the pension; and then Jean Campbell raised an action of declarator of marriage, and called Mrs Kennedy as a party. Mrs Kennedy also raised a declarator. The first part of the proceedings under these declarators is the subject of the report already alluded to. On the remit from the House of Lords, the Commissary allowed a proof; and thereafter, having considered Mrs Kennedy's libel, with depositions of witnesses, certificate, and written documents; and Jean Campbell's deposition and documents, 'and particularly the proof of Carrick and her '(Jean Campbell's) overt cohabitation as husband and wife from the beginning of 1726 'to 1743, when he went abroad with his regiment;' found, that Mrs Kennedy has not proved her prior marriage libelled; and therefore dismissed the process, and found facts, circumstances and qualifications, as proven by Mrs Jean Campbell, relevant to infer

look to the conduct of parties before and after the ceremony: in the former, consent is inferred from the very ceremony. Now in the present instance there was no proclamation of banns. June 20. 1828.

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marriage; and found that the deceased John Campbell of Carrick and she were husband and wife. Mrs Kennedy advocated, and the Court refused the bill.

Mrs Kennedy appealed, repeated the foregoing statement of facts, with proof adduced; and argued,—1. Marriage is a contract indissoluble by the consent of parties; and if it be properly proved, no Court of law can deny such marriage its legal effects. During its subsistence, no second marriage can exist—a second marriage must be an absolute nullity and void; and such second marriage, in whatever manner contracted, and attended with whatever circumstances, can create no objection to establishing the prior marriage. 2. Subsequent conduct will not annihilate the marriage, nor make the second wife the lawful wife of Carrick, who is the lawful husband of the appellant. 3. The appellant has proved her marriage; but it is said, that the second marriage has been proved by lines and witnesses. The answers are,—1. A first marriage having been positively proved by certificate, letters, acknowledgment, declarations, writs, facts, and circumstances, previous and subsequent to the respondent's intercourse with Carrick, any other marriage is thereby rendered impossible in law. 2. Polygamy may be proved, but not that the appellant had ceased to be Carrick's wife, or that Jean Campbell could become his wife; but there is no satisfactory evidence of Jean Campbell's marriage. All she says is, That 'she was married near by the 'house of her parents, in the parish of Roseneath.' The witnesses are the same as those to the appellant's marriage, but they take their lowland names, a very suspicious circumstance, they being at the supposed time in the Highlands. As to the church censure, that would not constitute marriage, or renew vows; besides, there is no instance of church censure for a clandestine marriage. The censure before the kirk-session related to what had passed in the fields. It was also said, that if there had been no other marriage in competition, the appellant may have brought a sufficient proof of her marriage; but a proof, however available in the common case, cannot apply to the present case, where the consequence would be the annulling of another marriage. The exceptio doli bars the appellant from taking her declarator, and nothing else than a proof of an actual marriage would suffice. As Jean Campbell was silent all Carrick's lifetime, she ought not now, after his death, to be permitted to avail herself of her marriage, or any proof she holds of it. But to this it is sufficient to answer, That there is no difference between the proof of a marriage in a question with a husband and in a competition: what is good against a husband is good against all the world; and here has been given a proof of actual marriage. There is no exceptio doli. Mrs Kennedy created no damage. It is in proof, that Jean Campbell heard of Carrick's courtship with Mrs Kennedy in summer 1724, and of their marriage; so must blame herself. But Mrs Kennedy was ignorant of the second marriage; and when she did hear it, the entreaties of Carrick prevailed to keep her silent. The plea of personal exception was disposed of by the House of Lords.

Mrs Jean Campbell and daughter, respondents, stated their case as in the report before referred to, and founded on the marriage certificate, register of births and burying of her children—a conveyance of Carrick's of certain lands to creditors, to which Mrs Jean Campbell, as his wife, is a party—an assignation to certain rents and profits, where the respondent is made to hold the same character—on declaration of witnesses to the marriage—renewal of vows, and promise of adherence before the kirk-session of Roseneath, which had been scandalized at the irregular marriage—cohabitation as man and wife, and procreation of children—reception and treatment as man and wife by people of consequence

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There has not been produced even a certificate of proclamation. The story of Jolly burning the certificate is unsupported. The extract from the register of marriages kept by the Session-

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and fashion—the express and tacit acknowledgment by the appellant herself—and on fifty-one letters from Carrick to her, of which the following is one from Flanders:—'August 1744.—My ever dearest Jeanie,—This, if it comes safe to hand, is the 'eleventh letter I have wrote to you without knowing whether you are dead or alive, 'but by second hand. This, if I really love you, must give you the utmost pain, 'which, as I hope to see God in mercy, I do sincerely from the bottom of my soul, 'as much as husband loved a wife. This I am determined to do to the last moment 'of my life, in spite of all who think otherwise. If you have heard villanous stories of 'me, don't give ear to them, for they must be owing to a certain wretch who deserves all 'the mischief in my power, and whose face I'll never see. You may guess who I mean. 'As I am told by Mr A. Campbell that my estate is sold, and there will be some reversion, 'I hereby give a right all the days of your life to the reversion, and all my household fur-'niture and moveables; and I desire that you'll immediately cause A. Campbell draw 'up a right in your own favour, and send it here to me to sign, and I shall return 'it as soon as possible. I send my blessing to my children.' Mrs Jean Campbell also produced nine letters to her from Colin, brother to Carrick, and several from Carrick's uncle, and eleven from Carrick to her mother, acknowledging her (Jean) as his wife. She also proved by witnesses that her marriage had never been challenged, and that until 1745, when he was killed at Fontenoy, she and Carrick had cohabited together, and been received as man and wife, by friends, relations, and acquaintances. Even Mrs Kennedy had visited them, and treated them as man and wife. Clara M'Caulay, wife of the Provost of Edinburgh, deponed, that in 1728 'the said Carrick 'having been invited to dinner at the house, he came up in the forenoon to the de-'ponent, and desired as a favour of her, that she would invite his wife (the respondent) 'and Mrs Kennedy (the appellant) to dine with her that day, because he wanted to 'have his wife made acquainted with Mrs Kennedy. That the deponent did invite 'the appellant and respondent accordingly, who both came; and while they were toge-'gether, Carrick came into the room, and, in the presence of Mrs Kennedy, did treat 'the respondent as his wife, and the appellant as Mrs Kennedy. That the deponent 'treated them so likewise, and that the two ladies conversed with each other under the 'character of Lady Carrick and Mrs Kennedy.' Mary Campbell swears, that 'soon 'after the respondent's and Carrick's marriage broke out, they came to the deponent's 'mother's house, at Stirling, as husband and wife, where they staid some days and 'nights. That during their stay, there was one room and bed prepared for them in the 'said house, where, she believes, they lay. That Mrs Kennedy was all the time of this 'visit in the deponent's brother's house, and had a separate room and bed prepared for 'her. That at the time of the said visit, the appellant assumed the name of Mrs 'Kennedy, and was treated by Carrick and the family under that character; and that the 'deponent, her mother, and the whole family, behaved to the respondent as Lady 'Carrick.' Mrs Jean Campbell also proved express denials by the appellant of any marriage between herself (Mrs Kennedy) and Carrick, and acknowledgment that Mrs Jean was Carrick's wife. Lady Schaw deponed, 'that being at Glasgow, and hearing Mrs 'Kennedy was there, the deponent sent for her, and told her that she was sorry to hear of 'her keeping a criminal correspondence with Carrick; to which the appellant answered, 'that, as she should answer to God, she had no correspondence with Carrick farther than 'a kiss of civility when he came to Edinburgh or left it; that in her widowhood Car-'rick had proposed marriage to her, which she had agreed to; but he proposed first to

clerk of Edinburgh, is neither a certification of proclamation nor of marriage. The assistant to the session-clerk only speaks inferentially, and the certificate of Joseph Robertson, independent of the discrepancy in point of date, is utterly unworthy of credit. The best proof that this was an irregular and clandestine marriage is to be found in the conviction of Joseph Robertson for having cele- June 20. 1828.

'go home and put his house in order, after which he was to return and marry her; 'and in the mean time, when he was at Roseneath, he married Mrs Jean Campbell; 'and concluded by promising deponent that she would never see or entertain Carrick 'more.' M'Millan (one of the appellant's witnesses) deponed, that 'Provost Camp-'bell and Carrick talking together concerning Carrick's keeping company with the 'appellant, Carrick promised the Provost that he would see the appellant no more, and 'have no further correspondence with her.' And it was sworn by Mrs Susanna Campbell, 'that a little before Carrick left Scotland, when he was at Camsail (Carrick's house), 'the deponent came into his room, when she saw several letters lying, which he threw 'into the fire; and the deponent having asked what he was thus burning, he answered, 'that they were the damned whore Mrs Kennedy's letters; and the deponent owning 'that she had abstracted two of them, he begged of her not to shew them to the respon-'dent his wife, for that she had got but too much grief and trouble by letters of that 'kind already.'

The respondent further led evidence to shew that the knowledge of the first marriage was not extensive; and proved by doubtful witnesses that Jane Love, a sergeant's wife, who swore that Archibald M'Intyre, when he thought he was dying, told her that he had been witness to Mrs Kennedy's marriage with Carrick, and that she had asked him to write what he had said, but he affirmed he could not write, whereas it was proved that he had been seen to write; and John Cunnison, who swore to Carrick and the appellant revealing their marriage to him, and M'Intyre's declaration of having been a witness to the marriage, were certified to be of infamous character. Of the two surviving (out of the four) alleged witnesses to the ceremony, one, a female servant at the Abbey, only knew of the marriage three years ago, by a letter from the appellant, who afterwards told her the reason why it was kept secret from her was, lest she (the deponent) got anger from the ladies; and the other, the man servant, only had heard the marriage whispered by others. He also said, he had heard from others that Cockburn had been at Paisley at the time; but Cockburn's wife deponed, that she and her husband left Glasgow in 1714; that he never afterwards, to her recollection, was in the west country; and they, during the year 1724, resided in family in Edinburgh, Besides, the appellant by her conduct shewed that she did not regard herself as married; and the certificate on which she founds, is not signed by the minister or witnesses. And the letters which had passed cannot vary a right, nor establish a marriage, which wants the essential qualifications required by law. Whatever proof may be needed of a marriage, by consummation or cohabitation, when parties are free, nothing short of the most pregnant proof is sufficient to annul a subsequent marriage followed by consummation. That would hold even if the claim had been de recenti, but here the party delayed until the husband was dead. The appellant could not after Carrick's death set up the claim of marriage; but was barred personali exceptione and exceptione doli. If the appellant's pleas were listened to, no women or children would be safe, but any literary correspondence which parties chose to keep up, would bastardize lawful issue.

The House of Lords, 31st January 1753, ordered and adjudged, that the said appeal be and is hereby dismissed this House, and that the said interlocutors, and final decreet or interlocutor of the said Commissaries, be, and the same are hereby affirmed.

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brated irregular and clandestine marriages; therefore you can inquire from circumstances, whether there was exchanged at the ceremony at Joseph Robertson's a true real consent ad consortium vitæ. Indeed, the judgment of the Commissaries opens that inquiry, and the Court of Session, on the first advising, allowed a proof on this very point. But the whole conduct of parties is utterly inconsistent with the idea of actual marriage. It is plain that M'Gregor had been preparing his witnesses to found the present action. According to his own account, he saw the defender with Jolly not many days after the marriage at Joseph Robertson's, and resolved to take instant measures for obtaining a divorce; and from that time all intercourse between them as married persons ceased. How is it possible that after this alleged separation she still could be introduced by him as his wife? Besides, at the very time that he maintains he so introduced her, she was undeniably living publicly at bed and board with her husband, Mr Jolly, with the sanction of her father, and recognized as Mrs Jolly by all the visitors of the family. It is therefore quite impossible to hold that there had taken place at Joseph Robertson's any consent ad ipsum matrimonium; and without that there is no marriage. Even were this House to be constrained by evidence to affirm these judgments, you would see good cause to separate the matrimonial conclusion from the conclusion as to civil rights; for no Court of Justice would lend itself to the base mercenary plans and designs which the respondent entertained, and which indeed he hardly disavows. The conduct of the appellant is quite susceptible of explanation, when it is recollected that she was a natural daughter, and that the respondent (who possessed considerable influence over Dr M'Neill) had the possession of the mortis causa settlements, on which depended her whole hopes of succession, and which deeds he threatened to destroy. Even what passed at the alleged ceremony before Joseph Robertson is buried in obscurity. Women are not the best—are scarce admissible witnesses; and even Mrs Robertson has to be tutored by having the book of marriages put into her hands. The witness Nicolson, who is represented as detailing the appellant's confession of marriage, is unworthy of credit.* In every view

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* The appellant's Counsel having occasion to quote from an appendix to the appellant's case, which appendix, through accident, had not reached their Lordships' table, Earl of Eldon said, 'This paper, not having been laid on the table, cannot be alluded 'to. Your Lordships can, however, require it to be now produced. The rule is, that 'no papers can be read that are not on the table; but the House can call for them; so 'we can call for them yet, and in that way give them an entrance into the House.

Mr M'Gregor's conduct cannot be visited with too much censure. It was a conspiracy against the appellant's peace and fortune. He laid his plans so as to be free or not, according as she might or not truly succeed to her father's property. But if so, and looking to the whole res gestæ of the case, even were the Court to decern in the marriage, it would be prostituting the power of a Court of Justice to force the appellant to adhere, or cohabit with, or communicate any part of her worldly substance to the respondent. The Court sequestrated the estate while the subsisting status of marriage remained, and therefore may separate the patrimonial interests which were granted in contemplation of the consortium omnis vitæ from the abstract status; and personal exception is plainly competent to bar a patrimonial claim. June 20. 1828.

Respondent. (Dr Lushington). The case could not have been more fully argued, had the second husband and children been parties. All the facts have been stated, and terms of vituperation of no ordinary cast employed; but the decision of the case does not depend upon the usual conduct of the respondent, or on morality, at all. The sole point raised is, What is the legal *status* of the parties? The only finding that has yet been pronounced in the Courts below is, that there has been a marriage between the respondent and the appellant. There has been no decision of adherence or cohabitation. Now is, or is not, that finding well founded and supported by the evidence?

Earl of Eldon. I observe the concluding words of the interlocutor of the Commissaries are, 'and decern.' Have these words no reference to the whole conclusions of the summons?

Dr Lushington. I shall come to that afterwards; at present, I only say, that these words import a mere declaration of marriage.—I am still, however, quite willing to argue now the question of adherence.

Earl of Eldon. I am very sorry to interrupt Counsel,—there is nothing more painful to me. But if we are to understand this interlocutor of the Court of Session, as an interlocutor which has not as yet determined (but as being the foundation of some future proceeding) that the parties are to adhere,—that the words 'and decern,' in this interlocutor, have no reference to the conclusion for adherence; then we have no right to discuss here that question, whether the Court can or cannot order

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'I move, therefore, that the appendix be produced, and then the Counsel will be at 'liberty to remark upon it.'

June 20. 1828. an adherence. That not having been determined in the Court below, we cannot begin it originally here.

Dr Lushington. That is the very argument I mean to address to your Lordships when I come to that part of the case. If I fail in shewing that the judgment merely declares a marriage, then I shall proceed to the question of adherence. But, in either view, I must state the facts to be understood. I shall not go into the argument as to the probabilities of affection between the appellant and respondent: It must be admitted, that such connexions are not a matter of the greatest impossibility. Neither shall I inquire into the habits of the parties: As Mary Black M'Neill was educated in very humble life, there was less inequality in her match with M'Gregor. Also, the mortis causa settlements shall be passed over: It may be admitted, that this consideration made a strong impression on Malcolm; so it made on Jolly. As to the iniquity of marrying for money, that is a point on which inquiry may be safely abstained from. It has been complained, that the respondent alleged a marriage at Holytown, and did not prove it; but how could he, when Dr M'Neill, who celebrated it, is dead? Then, it is said, no notice was taken of the marriage with Jolly; but the summons only required to be composed of a statement of facts, sufficient to support the conclusion of declarator of marriage. The statement of the second marriage is only defensive. If nothing had been said in the defence of the second marriage, there might have been room for a charge of collusion, but it was not a necessary ingredient in the summons. It has been stated, that the second marriage (before Dr Robertson) was a valid marriage: I admit most distinctly that it was, provided that the appellant was not already married to another person. Now, had she been already validly married? To the regularity of the marriage, I shall proceed afterwards. The first marriage (I shall call the first marriage that before Joseph Robertson) is established, 1st, By the certificate of marriage-lines having been granted; 2d, By witnesses present at the ceremony; 3d, By Joseph Robertson's register; 4th, By certificate given by Joseph Robertson; and, 5th, By the appellant's admission in judicio, and before witnesses. It has, no doubt, been argued, that the conviction of Joseph Robertson taints the evidence; but this objection has been put with more strength than safety. Would his conviction taint the 1050th marriage recorded in his book? The good sense of the matter is, that if you can connect any marriage with the very act of iniquity of which Joseph Robertson was afterwards convicted, then the

evidence of that marriage would be shaken, but you cannot go farther back. It would be monstrous to visit on an innocent person the subsequent guilt of the clergyman. It has also been alleged, that women are not competent witnesses; but that doctrine has been long exploded. There is no apparent bias or motive, why the female witnesses here would not give their evidence truly; and unless they have been guilty of gross perjury, it is impossible to doubt that a valid marriage was solemnized before two of them. Slight discrepancies are not to be attended to. Indeed such discrepancies are the strongest proof of veracity. You want witnesses agreeing to the main points, not on matters which, from their very nature, are calculated to make slight impression on the mind. Besides, the very infirmity of recollection destroys the suspicion of wilfully supporting, against truth, the pursuer's case. As to the book shewn to Mrs Robertson, it was properly put into her hands to be proven as an exhibit. The want of memory as to the precise date is of no consequence, for that a marriage was solemnized is proved beyond doubt. It was admitted by the appellant, when visiting her friends; and the conversation they swear to is good evidence as forming the res gestæ of the case. The book of marriages was produced, and it is proved to have been in the handwriting of Joseph Robertson. It is said that it is not evidence; but the original of a private document is evidence. The book of marriages by a dissenter must be proved; but even a copy of a regular church marriage is sufficient. But it is said, that the book is rendered a nullity by the after conduct of Joseph Robertson, since it is not the conviction but the offence which destroys his credit. Be it so. Then we look to the time of the offence, and we find it long posterior to the entry of this marriage. Besides, are all acts of a clergyman to be impugned by the mere act of future crime? Is the evidence of parties' status to be destroyed by a future conviction? That is impossible. But where are you to fix the time of incapacity? Take a witness to a deed 25 years ago. Is his evidence to be destroyed because he is afterwards declared infamous? The interests of third parties must be protected. The rule is, that a party is not bound to know that a person has been guilty, until the sentence declares it—until the conviction, he is a good witness.

Earl of Eldon. Is there any evidence to shew when these entries were made? The appearance of the book affords some evidence on that point,—there can be traced the same pen and

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the same ink in distinct entries. How could a minister certify that a marriage took place on the 29th May, when it had been celebrated on the 23d?

Dr Lushington. The clergyman does not certify that a marriage took place on the 29th; but he, on the 29th, certifies that a marriage had been celebrated.

Earl of Eldon. Then this point remains:—Is there any evidence, other than this book affords, of the precise dates of these entries? What could the clergyman certify in consistence with the appearance of the book itself? Look at the fifty-three omitted marriages. The book is a very curious book, and well worth looking into.

Dr Lushington. I have not had that opportunity. But after all, the book is of no great importance. It is only one item in the evidence. Then see the appellant's defences, the important and decisive admission of this very marriage. It is no doubt said, that her Counsel was absent when the defences were drawn; but I am not aware of any general abruption of Counsel at that time from Scotland. But if so, it is more likely that truth would step in, and give us a statement that could be the more relied on. She then admits having received M'Gregor's addresses, and having gone to Joseph Robertson's. She says nothing about the burning of the deeds, of which we afterwards hear so much. She also admits, that she returned with M'Gregor that night to her father's house. All this is corroborated by the conversation after this action was raised. The objection to the witness Nicolson is unfounded. She was, at least, not the mistress of M'Gregor at the time of the marriage; and even if, anterior to that, she had children to him, it would not affect her evidence; or if it did, it would make it unfavourable to M'Gregor, since the supposition of a marriage to another person would destroy her hopes of being married to him herself. As to the lines, there is evidence that Jolly burnt them. No doubt a marriage can be annulled on ground of force or fear. It is true that the ceremony of a marriage is not to be taken as probatio probata (as the Scotch express it) of free consent. If force, such as would induce a party to succumb, has been practised, then certainly there is no marriage; but the person who sets up force and fear as the ground of objection, must prove it,—on him the onus probandi lies. Indeed the allegation only is, that the threats were directed against Mr Jolly. But that is not what the law requires: The fear must be personal to the party, him or herself. Besides, for two years and a half the appellant remains with

this force and fear concealed in her breast; nay, immediately after it had been excited, she walks home with the delinquent; and, instead of seeking assistance from the passengers in the street, claiming the aid of Joseph Robertson's family, or of unbosoming her wrongs to her household, she retains him as her special friend; in short, no sooner is the pretended offence committed than pardoned. It is clear, therefore, that these charges of fraud or fear are mere matters of invention. Even the alleged claim for the title-deeds had no grounds; for there is no evidence that, at that time, they were in M'Gregor's possession. But there having been a prima facie good and valid marriage, how can any verbal evidence be admissible to prove want of consent, neither force nor fear having entered as ingredients in the case? The danger that would arise from such a course of proof is so manifest and alarming, that had it not been for the observation of one of your Lordships' number, I would not have felt very justified in raising it. But I am thus necessarily led to inquire, what the marriage law of Scotland is? what species of marriage this is? if any proof of absence of consent can be admitted as to any Scotch marriage? and if as to any, then if it can be admitted as to this one—always presuming that force and fear are absent? June 20. 1828.

There are in Scotland several modes of marriage:—1st, By proclamation of banns, and a marriage celebrated by a clergyman in facie ecclesiæ; 2d, By a certificate of proclamation of banns, though no proclamation has de facto taken place, but where there has been a celebration by a clergyman; 3d, By an interchange of consent per verba de præsenti; 4th, By a promise cum copula subsequente; 5th, By cohabitation as man and wife. In the last three cases, proof may be received of no consent, and Scotch Courts do receive such evidence in these three situations ex necessitate of the case; for consent, when inferred from the verba de præsenti, may be dubious; for the verba themselves may be ambiguous, and misunderstood; so likewise there may have been misapprehension in the 4th and 5th situations. In these three, no outward ceremony has interposed to imbody consent into a formal contract; and, therefore, evidence of consent or of its absence is let in. The question, whether evidence can be let in of no consent, to rebut the force of any of these three last kinds of marriage, is fully stated in the Dalrymple case.

Earl of Eldon. Could you shew me the libel in that case; for I observe, that that case concludes with the consideration of the question, if a copula subsequent to promise had been proved,

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and whether there had been a consent verbis de præsenti; and the question reasoned upon was, whether consent verbis de præsenti, with that copula, would make a good marriage?

Dr Lushington. Both points were put in issue.

Earl of Eldon. The question turned thus: Is it necessary to consider the first point, as consent verbis de præsenti, where it is clear that there was a copula following promise? Now what I want to know is, whether the first point that was reasoned upon by the Judge was raised by the libel?

Dr Lushington. The libel merely alleged a marriage generally, and the whole cause was before the Court, first, whether there was a consent verbis de præsenti, and next a promise cum copula subsequente?

Earl of Eldon. I thought that there was an infinite deal of learning in the judgment, and also in the evidence given by the learned gentlemen in the profession in Scotland; but it did really occur to me, that after reading that judgment, (and perhaps I may be allowed to take some liberties with it), that a vast deal of learning and expense had been thrown away; because the evidence of promise cum copula was not clearly made out.

Dr Lushington. The Scotch law was at the time very much unsettled; and there was a question, whether a promise cum copula might not be rebutted? We had an argument as to the medium impedimentum. No doubt that was quickly brushed away by the Judge. But to some Counsel it seemed of weight; and indeed Lord Kames treats it gravely as well founded. No doubt it is said, that on some points his Lordship is not a very safe authority.

Earl of Eldon. In the judgment in Dalrymple's case, the Judge did not appear to have had the least doubt, that if there had been a promise cum copula, that would have been sufficient to constitute marriage; nor to have had the least doubt, (nor could any person who knew human nature have doubted), that there was a copula following the promise; therefore, there being no doubt that there was a promise and copula, it appears to me that the latter part of the judgment would have done without the former, though I think we are very happy in having it.

Dr Lushington. The authority of Erskine is to be sure against us; but he stands single against a host of writers, and opposed to the opinion of the most celebrated lawyers in Scotland.

Earl of Lauderdale. He is supported by the cases of Campbell against Cochrane, and Young and Allen.

Dr Lushington. I shall not allow these cases to pass unno-

ticed; when examined, they will prove to be no authority on the point they are brought forward to support. June 20. 1828.

Earl of Eldon. The reason one of the Lords, I think myself, took the liberty of desiring that this point might be attended to in the argument was this, That supposing you to be right in your argument which goes to support the interlocutor of the Commissaries, I doubt very much whether that interlocutor does not contain in it words that might lead to the inference that such evidence (of want of consent) would be admissible; and the rather, because the Court of Session seem to have argued a great deal on facts and circumstances which, connected with what I find in the body of the Commissaries' interlocutor, (which cannot but be taken in this House to be a judgment of the Court of Session), would lead to the inference that that evidence could be admitted, even if you had had a regular marriage. We therefore wished so very important a point, in this very important case, should not be passed over in the argument.

Dr Lushington. My intention is to advert particularly to that matter. It is an inquiry most important in its ultimate results. I do not find that it has been even treated in the works on Scotch law, as a simple question of law. Indeed I have found there nothing to bear on it. I have stated, that evidence of absence of consent is admissible in three of the modes of celebrating marriages: Now, on what reason and principle is it, that, in marriages of this description, you are permitted to shew that no consent had interposed? If I can find a reason why such evidence is admissible there, then we shall see if the same reason applies to marriages before clergymen, or if these *two* classes of cases do not depend on totally different principles. I can account for the admission of evidence in the *three* classes: It is, that in these there is nothing which ex necessitate imports full and free consent. There is no form—nothing to remove uncertainty—nothing to put beyond all doubt what the intention of parties was at the moment. Take the case of a marriage constituted verbis de præsenti: As the law has not pointed out any precise words for the occasion, or appointed witnesses,—as there is no solemn ceremony, nor precise form,—therefore there must attach to it the greater degree of uncertainty. Parties can use their own terms; and in these very expressions there may be doubt and ambiguity whether parties meant to imply consent or not; and therefore, because there might be every degree or gradation of uncertainty, it became necessary

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to let in evidence to shew what had truly been the view of parties; and thus the evidence would be more or less according as the ambiguity was greater or less, and all the particulars of the conduct of the parties came to be examined. Elucidation might have been necessary, to ascertain if the words had been seriously uttered, to create a consent de præsenti, with a view to marriage, or that they were not intended for that purpose; and this for the best of all reasons, because the law had not presented any precise form to be adopted. Still the enunciation of such a proposition, even in such a case, struck the Judge in Dalrymple's case with something little short of astonishment, that, where the words were clear, a different interpretation should be affixed by circumstances. In the same way, as to marriages by promise subsequente copula, evidence is admitted to shew, for instance, whether the words imported a promise. As to the other species of marriage, by habit and repute cohabitation, the necessity of letting in evidence seems greater; for it is utterly impossible to say what is habit and repute inferring marriage, without the aid of extrinsic circumstances. It is a mistake to say that in Scotland a marriage can be constituted by mere cohabiting as man and wife. That violates the first principles of the law of marriage. The true view is, that cohabiting shall be taken as a circumstance whence may be elicited the fact of a previous consent to marriage being given. Marriage is not constituted by the cohabiting, although the cohabiting is strong evidence of the previous consent. And here, therefore, the reason is strong for admitting extrinsic evidence; for if cohabiting were sufficient, then all who chose to live as married people, to conceal their illicit connexion, would become married, contrary to all principle, as construing a marriage where there had been no consent to marriage. Thus, sound principle has sanctioned the admissibility of evidence of circumstances to explain the acts of the parties in these three cases, and to shew that there was or was not consent. Now, do the same reasons exist as to marriages celebrated before a clergyman? Are there the same doubts to justify the introduction of the evidence of subsequent conduct? I assume that the law directs that no marriage shall be esteemed regular, unless it be before a clergyman. All others, although valid, are irregular, and the parties concerned are, by the law of Scotland, subjected to punishment. Formerly there was a prescribed ceremony for celebrating regular marriages, (see Directory for Public Worship, 1641), and joining hands appointed; but now, in point of practice, there is none. Still, though different clergymen use different forms, these are

the same in essence. The form necessarily contains, (for we must presume that all clergymen do their duty), 1. An express inquiry if the parties do consent; 2. An expression of assent by the parties to marry; 3. A declaration that they are married; 4. The nuptial benediction; which last takes place whatever be the form of ceremony used by the clergyman officiating. Now here is something greater, and more certain, and more binding, than in any of the other three modes of marriage. From a ceremony like this no doubt can arise as to the purpose of parties. Marriage is not a mere civil contract. There are ample authorities for the contrary opinion. The law of marriage is founded on the canon law; and although, in compassion to the weakness of human nature, a valid marriage may be constituted without the intervention of religious rites, yet it is not regular, unless a benediction has been given by the clergyman. Accordingly the Judges, in deciding marriage or not in the three last classes enumerated, consider whether what has been done by the parties to these irregular marriages is equivalent to the solemn consent before a clergyman. You will see that the first ingredient in a regular marriage, which does not exist in the irregular, is the presence of an individual appointed to have controul over marriages—to officiate—the only agent through whom the marriage can be had; all other marriages are punishable by law. Now if an act be done according to the forms prescribed by the State, no one can deny that the force of the obligation is greater than when the act is done in any other way. The maxim 'omne 'rite,' &c. takes place with more force when parties act in obedience to the law, than when violating the law by irregularly attempting to do the same thing. That is one reason why no extrinsic evidence is admitted where marriage is regularly celebrated in facie ecclesiæ. In these circumstances, the parties must know what they are about. They cannot be ignorant what they are doing, for it is the duty of the clergyman to make that fact known to them. This does not exist in irregular marriages. The expression of consent must be indubitably conveyed to the clergyman. It may be done in various ways. Where there is no force nor fear, a bow or curtsey, or silence, is as conclusive an answer to the question as words could be. Then comes the invocation of the blessing of the Deity upon what has been done. There is thus superinduced the solemn sanction of a religious rite. The parties thus profess in the face of Heaven that they are married persons. Now, observe how completely all these ingredients are absent from the other three classes,—

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marriage verbis de præsenti, promise cum copula, and habit and repute cohabitation. In a regular celebration there are every means of seeing that the contract is validly entered into; and I don't know what more the law could do to effect that purpose than by appointing a proper officer, a form, and the interposition of the expression of solemn consent, whereby the precise meaning of parties must be ascertained and appear. I therefore contend, that, so far from there existing any necessity for parole evidence, the act itself overpowers any result that could arise from parole evidence. The presumption overwhelms circumstantial evidence, which from its very nature must always be of doubtful character. There may be, no doubt, in a century, a case where actual consent is absent, but in ninety-nine cases out of a hundred these precautions insure solemn and deliberate consent, and prove its existence. I say consent may be absent—I mean that a party may be reluctantly consenting. But are we to try to dive into the breast of mankind? Is it not well known, that there are many marriages where the hand seems willing, but the heart would be found absent if the secret could be wrung from the party? But would that be a good reason for impeaching the validity and binding efficacy of the consent so given? The law goes farther. It says, if you willingly go through this form, you must be bound by it. You shall not turn round and put the institutions of your country to a different purpose than they were intended to protect. But observe how replete with danger would be the admission of evidence to rebut the consent given in a regular marriage,—destruction to the comforts of families, and to the foundations on which the dearest relations of life stand. Look at it, whether as relating to the parties, to their issue, or the public. Besides, to allow a woman to contradict all that has passed in facie ecclesiæ, is to permit her to prostitute a sacred rite. It is allowing her to say, 'I came of my free will,' —there was no force nor fear,—but I had a mental reservation. 'The ceremony was a solemn mockery,—a mere idle form.' But no Court could permit such language. There is no limit to the crime which such doctrine would create. It would tempt a wife, who was beginning to be estranged from her husband, to deviate into infidelity. She would only have to marry to give her the means of escaping from the first vows; for the very act of bigamy would operate as a proof of there having been no consent to the first nuptials. The appellant's doctrine is, not only that you shall be able to free yourself from the first marriage, but that you shall be encouraged to do so. But it is said, that

although it may be true that the proof of no consent is inadmissible where there has been due proclamation of banns, it is admissible where that form has been omitted. Now, letting alone for a moment whether there is any sound reason for this distinction, does it exist in the law? The objection is, that without actual proclamation of banns, there has not been a celebration in facie ecclesiæ,—that the marriage was irregular. Now look to the meaning of the terms regular and irregular marriage. A regular marriage is one celebrated in such a form that the clergyman and the parties do not render themselves punishable in celebrating and contracting it: an irregular marriage is one which no doubt is valid, but subjects the parties to penalties for violating the law. It is quite true that proclamation of banns is, in the strictness of law, required. It is equally true that here there was no actual proclamation. But in practice proclamation did not take place, and was not necessary to take place. It has long been the custom, a custom sanctioned by the lapse of time, to allow a certificate of the parish-clerk to stand in lieu of it. It is the substitute universally in use. Then comes the question, if such a practice be wholly illegal? or whether the maxim communis error, &c. does not apply? If you hold that the certificate is not a valid substitute, you would annul a very great proportion of the marriages in Scotland. The proper view to take is, that where a marriage is celebrated in pursuance of a certificate of proclamation by the clerk, who is the officer of the church, the certificate affords legal evidence, which cannot be controverted by any proof that de facto no publication had taken place. To maintain the reverse would render irregular a very large proportion of marriages in Scotland, and would open the door to impeachment by parole testimony of the consent given before the clergyman. It is impossible to see where the matter would stop. But it is said, that the contrary has been established by the High Court of Justiciary, to which we must all bow without doubting. But the conviction of Joseph Robertson has no bearing whatever on the present question. Indeed the strongest proof that a certificate is not traversible, is to be found in the criminal law of Scotland. Besides, it is perfectly manifest, that when we are talking of proclamation of banns, it has nothing to do with the question of consent at the time of the marriage. A party can resile after banns have been proclaimed. Indeed one of the parties is seldom privy to the publication. The inquiry, therefore, has no bearing on the point of consent, and consent before the clergyman is the essence of marriage. Proclamation was intro-

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duced, not in relation to consent, but to put people on their guard, and save from alliances within the forbidden degree of affinity. The cases quoted against us do not apply, or they may be reconciled with the principles just laid down; for in a marriage, besides consent, there must be an understanding to comprehend; and the want of understanding, from extreme youth, would annul a marriage as much as the want arising from idiocy and lunacy. But there was no extreme youth here; and except these cases, there is no authority for establishing so dangerous a novelty as that projected by the appellant. But if such evidence be admitted at all, to what extent is it to go? To this the observation of Lord Stowell in the case of Dalrymple affords a satisfactory answer. But even if all kinds of evidence were admissible, and such inferences could be drawn as such general evidence authorizes, there is no absence of consent proved by the facts and circumstances of this case. There is a presumption in favour of marriage, that there was a true consent interposed. Now, the fallacy of the appellant's argument is, that he treats the conduct of parties as inconsistent with the idea of consent having passed; whereas it can only be treated as inconsistent with the sense of the obligations arising from the consent. But a breach of contract does not negative that contract. If bigamy could prove that there was no first marriage, there never could be bigamy. Besides, it would rather be a dangerous doctrine, that the more husbands a wife took, the stronger would be the evidence that there had been no real consent to marry the first. As to the point of consummation, it is admitted that the respondent slept the night of the marriage in the same house with the appellant; and is there any thing in her history and conduct to render the natural termination of such alliances unlikely? But it is said, that M'Gregor was privy to the marriage with Jolly, and that of itself was a proof that no consent had been interposed to the marriage before Joseph Robertson. But there is no conclusive evidence of knowledge before the marriage; there is of knowledge after the marriage. But the question still remains, what is the operation of such posterior knowledge and intimacy? It is nothing as affecting the consent by the appellant before the clergyman; and if not, of what consequence is the inquiry or the admission? But, in truth, the respondent did not relinquish his character of husband; that is established by the proof. Every thing shews that there was a real consent, although, for reasons best known to themselves, the parties did not choose to continue to fulfil the obligations of marriage. To allow it to be

said that Dr M'Neill's conduct shews there was no consent by the appellant, would open the door to all sorts of evidence. Besides, he was in hopeless dotage. As to the last point which I have to notice, whether the Commissaries meant by their judgment that the parties were to return to their conjugal rights, or only that they were married parties, I understand the interlocutor not to have imposed on the parties the obligation of adherence and cohabiting. There is a declaratory process in Scotland for the very purpose of enforcing adherence after the declaration of marriage has been pronounced. These two declarations are very different things. A claim for adherence may be forfeited by personal crime, but not the declarator of marriage. The point raised in the present summons was merely, Was there a marriage? To decide that question the declarator was brought. There might or might not have been other conclusions. June 20. 1828.

Earl of Lauderdale. Do you mean to contend, that, under the present summons, it would be necessary, in order to enforce the adherence of the parties, to commence a new action?

Dr Lushington. No, my Lord, I would say not. The summons is so wide that the pursuer would only have to go back to the same Commissaries, and discuss the point of adherence. As to the plea of personal exception, that is given up by the appellant, and wisely. With us, even in the most distressing case of nullity of marriage, arising out of our marriage statutes, such a plea was not listened to, and yet the Court would have been glad to have availed themselves of the means of protecting the injured woman. There have been instances of a marriage of twenty years' standing, and of which eleven children have been born, being annulled. Yet although the father came into Court to seek the aid of the statute to attest his moral guilt, the plea of personal exception did not bar him. It is the interest of the public, that the true legal status of parties be declared. Whatever, therefore, has been the respondent's conduct, he must have his declarator of marriage. But it may be said, that the plea of exception will stand against a claim for adherence; and, indeed, what is adultery, cruelty, desertion, when used as a defence, but a plea of personal exception to the claim for adherence? But there is a peculiarity in the present case. We shall suppose adultery on the part of M'Gregor; and it must, in return, be conceded to us, that there has been adultery on the part of the appellant. But the law says, that where there has been a compensatio criminis, the parties must live together. This is bottomed upon the ancient canon law, which is good authority in

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a Scotch case. Where two parties commit adultery, neither is entitled to a divorce. And there is no intermediate place between adherence and divorce. If, therefore, there cannot be a divorce, there must be adherence. It has been much pressed, that the respondent cannot be justified in a Court of Justice for his behaviour in this matter. But we don't ask a favour; we only ask for what law gives him—his legal rights. And it is against all principle to investigate the moral character of the party, where he only claims the ordinary administration of the law. Any such inquiry is not merely superfluous, but is unjust. This House ought not to attempt to create a precedent for meting out, what would be contrary to all sound principle, a nice and accurately calculating equity to satisfy each individual case. You cannot apportion law to morals. If you try to do so, it will be a failure in a great majority of cases, and would sap the most valuable basis of justice—certainty in its administration.

Earl of Eldon. There is one circumstance in this case to which I wish to direct Counsel's attention. The judgment of the Commissary Court, and of the Court of Session is, that a good marriage was solemnized by the Rev. Joseph Robertson at Edinburgh; now, the respondent's summons states, that a good marriage was solemnized at Holytown. If the first marriage be good, can the second marriage be any thing more than a form of marriage? If the second be a good marriage, how is it to stand on an interlocutor, where the Judge proceeds upon a summons which declares a former valid marriage? Can both marriages be good? It is a common thing, I know, for a person who has been married in Scotland, to be married a second time in England. He may not be able to prove the Scotch marriage; and if he cannot prove the marriage in Scotland himself, nobody else can; and therefore the marriage in England will stand good. But can he prove that second marriage to be good upon a summons which declares that there was a prior valid marriage? Should he not first get a deliverance by a judgment with respect to the prior valid marriage? Can there be two valid marriages?

Keay. The statement in the summons is, that an irregular marriage was celebrated by Dr M'Neill, between the appellant and respondent, at Holytown.

Earl of Eldon. Yes; but according to your law, that irregular marriage is a good and valid marriage, although it was irregular. You have asserted in your summons, that what did pass at Holytown was not an irregular something—an irregular ceremony—

but an irregular marriage. Now, if, although irregular, it be still a valid and good marriage, how, upon this summons, can the second be a good and valid marriage? Could any subsequent ceremony between the same parties be also a marriage? You say it was to complete that marriage. June 20. 1828.

Keay. I admit certainly that the second marriage was entirely unnecessary, but it was a good marriage. It is not an uncommon practice in irregular marriages to have a second celebration.

Earl of Eldon. It may have been unnecessary; but does that make it a good marriage? To keep the pleadings right, I want to know whether the Court can declare that to be a good marriage which the party applying to the Court declares to have taken place subsequently to a prior valid marriage?

Earl of Lauderdale. Or whether the Court ought not to have found that there was no marriage at Holytown, but that there was a marriage at Edinburgh? The first marriage was said to be by Dr M'Neill, though, no doubt, there was no certificate of proclamation of banns.

Earl of Eldon. That appears to be of no consequence; for in Scotland a certificate of that kind on oath seems to have meant a certificate of twenty falsehoods.

Keay. If the pursuer had failed in an attempt to prove the first marriage at Holytown, it might have been necessary for the Commissary Court to find that such marriage had not been proved, and to declare that another marriage had been celebrated at Edinburgh. But that was not necessary in this case; for it was not requisite for the pursuer to offer any evidence of the first marriage which took place at Holytown, as the second marriage at Edinburgh was found to be valid by the Court.

Earl of Lauderdale. The first marriage at Holytown was before a clergyman, but without witnesses; and if it took place, it must be a good one.

Keay. I am not aware that Dr M'Neill was a regular clergyman entitled to celebrate marriages.

King's Advocate. It is stated in this paper that he gave the nuptial benediction.

Earl of Eldon. The summons expressly states, that there was an irregular marriage contracted; that a marriage was completed in fact, by consummation by the parties at Holytown; and in order more effectually to celebrate 'that' marriage,—that marriage, my Lords,—this second marriage was had before Joseph Robertson in Edinburgh. Well, then, we have it upon the face of the summons, that the purpose for which the second marriage

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was supposed to be had, was to give effect to the first marriage; that is the intention alleged in the summons, but no proof whatever is given of the marriage at Holytown. On the contrary, this gentleman afterwards confines himself simply to proof of the marriage before Joseph Robertson at Edinburgh. Now, is that, or is it not, according to the law of Scotland, the proper way of making the probata of the allegata in your summons? Your Lordships must observe, that Mr M'Gregor brings evidence to contradict his summons; for when he produces those marriage lines, which are, I believe, evidence of a certificate of banns, the first thing certified in these lines is, that the parties are free of each other,—' free and unmarried' are, I believe, the words used. I really ask those questions for explanation. I know it is thought a hard thing to make such objections to a Scotch summons; but in a matter of this great importance, I certainly think that the summons ought to be very accurate. Your own summons expresses your wish to get married again, for the purpose of effectually celebrating that marriage at Holytown.

Keay. Then, supposing, my Lords, the summons to be loosely drawn, can that be urged as an objection by the defender in this stage of the proceeding?

Earl of Eldon. The question is, Whether a party who comes into Court with this summons, must not prove what is alleged in his own summons?

Earl of Lauderdale. And whether, by giving up the Holytown marriage, you have not, in fact, cut yourselves out of the cause?

Keay. Supposing, my Lords, that we had gone into proofs of the Holytown marriage; that evidence had been given for and against that marriage; and that the result was, that no such marriage had been proved; and that the summons contained a substantive statement of a marriage at Edinburgh, and that the evidence of such marriage was complete; would your Lordships have dismissed the action, upon the ground that the statement in the summons was, that the second marriage was calculated for the purpose of completing the former marriage?

Earl of Eldon. I cannot venture to say what this House would do, but I should, for my part, feel a strong inclination to ask, in the first instance, the Court of Session, what they would have done if such an objection as the present had been made. This summons bears likewise evidence of the intention of the woman with respect to this second marriage, for it states, that it was the intention of both parties to give effect to the former mar-

riage by celebrating this second marriage. Now, if she did not go to the house of Joseph Robertson with that intention, she did not go with that intention which you allege in your summons to be the operative cause of her going to Robertson's house. You must observe, that neither the Commissary Court, nor the Court of Session, negatives the former marriage, nor makes any deliverance upon that part of the summons; so that, if this House should be of opinion that no valid marriage, either upon the ground of irregularity, or upon any other ground, was contracted in May 1816, this gentleman would be at liberty to go again before the Commissary Court in a new action, and insist that he was married at Holytown. June 20. 1828.

Lord Chancellor. It is uncertain, from the decree of the Court of Session, or the decree of the Commissary Court, when the marriage which has been pronounced good took place. The decrees only say, that the parties are married persons, but from what period the decrees do not state; and it will be necessary to know from what period they are to be married persons, when we come to declare the status of the parties interested.

Keay. According to the practice of the Courts of Scotland, the judgment is taken with reference to the evidence laid before the Court; and in this cause is applicable to the marriage of the 23d of May. The judgment must be considered as applicable to that marriage.

Earl of Eldon. Give me leave to ask you this question, What means have we of knowing that our judgment will put an end to this cause? Suppose this House should be of opinion that the marriage of the 23d May 1816 was, for sufficient reasons, not a good marriage, would, or would not, this gentleman be at liberty, upon this or upon some new process, to go into the Commissary Court, and desire to have a declarator stating him to have been married in the spring of 1816? I suppose that your spring in Scotland is a little before May. There is no deliverance upon the first marriage,—there are two marriages alleged,—are both good? If both are bad, we know that two bad marriages cannot make one good marriage; but ought there not to have been some deliverance upon the allegation of the first marriage? and ought there not to have been some attention paid to this circumstance, —that the pursuer states in his summons, that the leading and primary intention of the parties in going before Joseph Robertson was to make a good marriage of 'that marriage,' which he alleges to have been validly, though irregularly, contracted at Holytown?

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Keay. To the first question put by your Lordship, whether, from the judgment of the Commissary Court, it can be known what marriage has been confirmed? I say, that the judgment of the Commissary Court is full and explicit.—They 'find, that 'the pursuer has established by sufficient evidence that a mar-'riage was celebrated betwixt the defender and him, by the 'Reverend Joseph Robertson, late minister of the chapel in 'Leith-wynd, Edinburgh, in the month of May 1816;' and, upon that finding, the parties were pronounced married persons; and upon a review the Commissaries find, 'that no circum-'stances have been attempted to be proved on the part of the 'defendant from which to infer intimidation, as averred by her.' This second interlocutor clearly applies to the marriage at Joseph Robertson's, which the defender avers to have been effected by intimidation.

Earl of Eldon. Then give me leave to ask you this question. According to your notion of the law of Scotland, would that which was found to have taken place at Joseph Robertson's be a marriage, if it were true, as stated in your summons, that a valid though irregular marriage had been contracted between those parties previous to that day, the 23d of May 1816?

King's Advocate. Their summons is not founded upon the marriage at Joseph Robertson's, for they state that that marriage was to confirm the other irregular marriage at Holytown.

Earl of Eldon. We have a great deal of allegation about the marriage at Holytown, and of what preceded it; but we have no proof to support those allegations; and we have most important evidence of what followed after that marriage. The intention of the marriage at Joseph Robertson's is expressed, (foolishly, I think,—I beg pardon for using that word; but, in my opinion, it is foolishly expressed in the summons), to be to give effect to the first marriage, 'that marriage' celebrated at Holytown. Now, if the first was a bad marriage, the second may be good; but I have never yet heard how the second can be considered a good marriage, if the first were a good marriage; and yet the first marriage is alleged to be a good marriage; and it is now said, that the judgment finds the second marriage to be good. So that, taking the allegation in the summons, and the judgment of the Court of Session, we have two good marriages contracted between the same parties.

Keay. It is true that the summons sets forth both marriages; but the judgment only finds the second marriage to be valid. I apprehend, that the finding of the Court disposes of the first marriage.

Earl of Eldon. That apprehension comes late, Mr Keay; for you take credit for giving up the proof of the first marriage as not necessary. June 20. 1828.

Keay. If a pursuer makes an averment, and then declines to prove it, he necessarily must submit to have this averment negatived, and the Commissaries necessarily negatived it in finding the second marriage proved. Then the question arises, if the parties had loosely contracted marriage, having no witnesses, and afterwards, with a view to complete the marriage, had another marriage, would that marriage be of force and avail? It would; and it was the duty of the appellant, if she saw reason to object to the shape of the summons, to have said, dispose of the first alleged marriage, before you proceed to the second.

King's Advocate. But the second was not a marriage at all. It was an order or ceremony to complete or publish the first marriage. No consent was then interposed; for, ex concessis of the summons, the parties were already man and wife, and in that character had consummated. The respondent, having so libelled his case, cannot abandon the proof of the first marriage, and betake himself to a second; at all events, we are let into facts and circumstances to shew, that at Joseph Robertson's there was not a consent ad ipsum matrimonium.

Earl of Lauderdale. Was Dr M'Neill a clergyman?

The King's Advocate. I understand he was a clergyman. I find it stated in the papers that he gave the nuptial benediction.

Lord Chancellor. He does not appear to have been a clergyman from any thing in the papers, I think.

Earl of Eldon. The respondent, in his summons, avers consummation after the Holytown marriage, which he does not in the other marriage.

The King's Advocate. Just so, my Lord.

Earl of Eldon. I should wish to ask a question, which Mr Keay or Mr Miller can perhaps answer. The summons avers, that it was to carry into execution that marriage alleged to have been contracted at Holytown, that the ceremony, or whatever you call it, took place at Edinburgh. Either this gentleman, Mr M'Gregor, had sufficient proof of a marriage at Holytown, or he had not. If he had sufficient proof of the marriage at Holytown, he could have made good the averment of his summons; but if he had not sufficient proof of the marriage at Holytown, (which may be the case, and we know very often happens in matters of this sort), I want to know whether, according to the practice of the Commissary Court of Scotland,

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and the Court of Session, he might not have applied to amend his summons; that is, to have struck out the averment of the marriage at Holytown, and to have altered his summons so far as to have averred a marriage at Edinburgh?

Miller. There is no doubt that, according to the law and practice of Scotland, (not in every case, but generally speaking), there is a power in the pursuer of an action, at a certain stage of the proceedings, to amend his summons; but though that is generally allowed, it is not allowed in all cases. I am not prepared to say, that if the pursuer had applied for permission to amend his summons, he might not have been defeated by shewing that there was a distinct averment in point of fact, and that the proposed amendment would negative that averment, and do away completely any idea of a second substantive marriage. I cannot say how that question would be disposed of after argument, nor am I aware that a precisely similar case has occurred; but the general rule is, that before parties join issue, and go to proof, the pursuer may apply for leave, and he generally does on such application obtain leave, to amend his summons, to vary any fact, or supply any thing in respect of which he, on further inquiry and consideration, conceived he can bring forward proof.

Earl of Lauderdale. There is no doubt he might have abandoned his summons and proceeded afresh.

King's Advocate. There is no doubt, I apprehend, that that might have been done.

Dr Lushington. The respondent avers two marriages; afterwards he finds that he cannot prove the first; but would you require him to abandon the second, when, if the first is bad, the second must stand good?

Earl of Eldon. Still there is this great difficulty:—It has happened to me, whilst I had the honour of holding the Great Seal, to know that a great many of my female wards have thought proper to be married in Scotland rather than England; and it has also been a right mode of proceeding in that Court, to take care that the parties so married, should be married over again in England on account of the difficulty of proof. There are two ways in which that second marriage may take place—the one by license, the other by banns: and I have had reason to learn, that at Doctors Commons your license is very special, and a well considered one; but I have also had reason to know, that persons in the country, who are authorized to issue licenses, do not conform to your proper and well considered form. Now I take it, there can be no manner of doubt, and

that it would be the most dangerous thing in the world to breathe any thing like doubt, upon the validity of one or other of those marriages. If, therefore, a person has occasion to sue in our Courts, he avers generally that he is married. He does so in our Courts—I do not know how it is in your Courts, nor do I presume to say a word about that. He may set about proving the marriage in England, if he thinks proper; or, if he can prove the marriage which took place in Scotland, he may prove both; and as the marriage in Scotland is a good marriage, the question then is, whether his proof of the second marriage really establishes any fact whatever, except that he went through the ceremony. But in whatever way the cause is disposed of in our Courts, the one or the other marriage is certainly good: and the question then would be, whether, if there was a declaration stating that he had been married in Scotland, and then a declaration stating that, after he had been duly married in Scotland, he, for the purpose of making that marriage good, (for that is the averment in this case), was again married in England, whether, on a declaration so peculiarly framed, the proof of the first marriage in Scotland would not negative the assertion of the second marriage in England? It is a question of form upon the summons, and nothing else: It is not a question of substance. I have taken this opportunity of mentioning it, because I am sure it would be a most desirable thing that all persons in the country, authorized to grant licenses, should be furnished with your excellent form, and should proceed according to the Doctors Commons. June 20. 1828.

Dr Lushington. If the late Lord Mansfield had been aware of our form of license, when he advised the late Earl of Berkeley as to the form of license for his second marriage, it is not impossible that that case might have taken a different turn.

Earl of Eldon. The only question here would be, if there was an opportunity of amending your summons, or of abandoning your summons before issue joined, whether, as you have not amended your summons, and have not abandoned your summons, and raised a new summons before issue joined, there is or not proof of that first marriage at Holytown? Is it enough for us, in a case of this grave importance, that you should merely take upon yourself to say that you could make no proof of that, while you continue in your summons to aver that you could?

King's Advocate. Dr M'Neill is dead; so there is no living witness of the alleged first marriage; and yet the respondent continues to repeat the statement: He even continues to aver

June 20. 1828. consummation after the Holytown marriage, a thing the Doctor could not have proved.

Earl of Eldon. That is a sort of thing they could have proved, I should have thought; or at least given tolerable proof of it, though Dr M'Neill was in his grave. They prove that there were two beds in the room, and, I think, some sheets or curtain, or something of that kind, put up; a sort of thing which, I suppose, might have been removed.

Lord Chancellor. That would not have been an insurmountable impediment in such a case, I apprehend.

King's Advocate. When parties return from a Scotch marriage, and are here married again, that is done to remove doubts, but not to complete the Scotch marriage; and the second could be proved, should evidence of the first be deficient. In our case, the status of parties was, according to the respondent's statement, determined before they went before Joseph Robertson. There was no consent to marriage before him, but a consent to heal the irregularity of the alleged marriage at Holytown. The witnesses at Joseph Robertson's did not know what had passed at Holytown. So while they speak to an apparent consent to marry, they truly are only speaking to the completion of the first marriage. The evidence is quite defective as to the marriage lines.

Lord Chancellor. Where is the certificate of the proclamation of banns? Has it been proved that this certificate was given in legal form?

Dr Lushington. The certificates of the proclamation of the banns is proved to have been given by two witnesses, and it was exhibited to Joseph Robertson at the time of the marriage.

Lord Chancellor. Do you mean precisely in the form which is stated in the appendix to the additional proof?

Dr Lushington. I do.

Earl of Lauderdale. If I recollect the evidence, they do not prove that a certificate of proclamation of banns was given. All they state is, that upon the sight of the entry in the books, and the knowledge of their practice, there must have been one.

Dr Lushington. Yes, exactly so.

King's Advocate. There are great doubts if ever it was given at all, and still more that it was produced to Joseph Robertson at the time of the marriage. There is the evidence of Mrs Robertson, that she either saw or heard of one; but all which Miss Robertson says is, that her father said there were marriage lines.

Lord Chancellor. Have you turned to the evidence of Mason?

Dr Lushington. Mason distinctly swears he is quite certain that he gave out the certificate of proclamation of banns in the usual form to these parties. It is impossible to have a stronger or a more conclusive proof. The proclamation of banns in this country could never be proved by better evidence; for no man's memory serves him as to a particular act. June 20. 1828.

Earl of Lauderdale. It is an impression from his usual practice.

Lord Chancellor. He does not remember it, but he is sure of it, because it corresponds with his usual practice.

Dr Lushington. Just so, my Lord.

King's Advocate. The respondent cannot better his case by the appellant's admissions, for he must take them with their qualifications; and she alleges force and fear, and influence which the consideration had that he was possessed of her father's deeds. He admits these deeds were placed in his hands by Dr M'Neill after the marriage.

Earl of Lauderdale. That is a very important passage. It proves that the respondent was in possession of the deeds before the ceremony at Joseph Robertson's; for the words are, 'They were placed in his possession by Dr M'Neill after the 'marriage had taken place.' Now, Dr M'Neill knew only of the marriage at Holytown, because it is in evidence that the other marriage was concealed from him.

Earl of Eldon. My Lords, From the view I take of this case, I believe I shall have the concurrence of all the noble Lords now in the House, in the motion I am about to make,—viz. That the House shall proceed to judgment in this case, after the recess. I will take this opportunity of disposing of one point, which was raised by myself, namely, with respect to the proceeding so far as it has two objects in the prayer of the summons: the one is, that of declarator of marriage; the other is what we should call a restitution of conjugal rights, which they call a decree for adherence. I was misled by the circumstance of my not having read the petition of appeal in this case; but the petition of appeal was regularly founded on the Act of Parliament, which now lies before me; and which Act of Parliament authorizes an appeal to this House, after an interlocutor is pronounced which may have a material effect upon the ulterior proceedings in the Court below; if that interlocutor is appealed from, either with leave of the Division, or there is certified to have been a difference of opinion among the Judges. Therefore, the interlocutor having in the first instance disposed of no-

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thing more than the fact of a marriage, an appeal was interposed; and upon that appeal we can do nothing that is positive and final, except by a declaration upon the question, marriage or no marriage, regard being had to the summons, the condescendence, and the other proceedings in the case. I apprehend, however, on looking into the Act of Parliament, (and I wish to mention it now, that if there is any objection to stating it, on generally applying myself to the gentlemen who come from Scotland with respect to this cause, I may be set right), there is nothing in this Act of Parliament which will prevent this House, if it thought proper, sending back this judgment which has been pronounced, from which there is now an appeal, requiring the Court to give its judgment also upon the other prayer of the summons; namely, whether there should or should not be, in such a case as this, a restitution of conjugal rights. At the same time, as it is of infinite importance not merely to these parties, but it may be so to many other persons, (and there are a great many questions of considerable importance and difficulty that have been raised at the Bar), nobody can doubt that if the case can be disposed of upon the merits now, it should be so disposed of. With reference to the importance of the cases and questions to which I have alluded, and the importance of delivering these parties, if we can properly and justly do so, by our first determination, it has appeared to the noble Lords who have heard this case, as well as myself, that it is due to such a case as this that we should deliberate upon it before we decide. We should not, however, deliberate too long upon it, and therefore I should now propose to your Lordships that the House should proceed to judgment upon this case on the second day of hearing appeals after the Easter holidays.

This having been agreed to, the House of Lords thereafter pronounced this judgment:—

'Upon due consideration of all the proceedings in this action 'of declarator of marriage at the instance of Malcolm M'Gregor 'against Mary Black M'Neill, particularly of the summons, 'dated 25th March 1818, wherein the allegations set forth are, '—"That an irregular marriage was celebrated between the 'said Malcolm M'Gregor and the said Mary Black M'Neill, by 'Dr M'Neill, at Holytown, in spring 1816, which was consum-'mated by their spending several nights together in the same 'bed;" and "that they considered it proper, on their return to 'Edinburgh, in the month of May 1816, that no time should be 'lost in celebrating in facie ecclesiæ that marriage which had

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'been irregularly celebrated between them; and accordingly 'they were, in the month of May 1816, regularly married by 'the Rev. Joseph Robertson, minister of the chapel in Leith-'wynd, Edinburgh;" and upon examination of what has been 'established by evidence in the Courts below, with reference to 'the facts alleged in the said summons—this House is of opinion, 'that there is no proof whatever of any marriage between these 'parties having, at any time, taken place at Holytown, or of 'any regular marriage in facie ecclesiæ having been celebrated 'between them at Edinburgh, in the month of May 1816. 'And farther, this House, taking into consideration all the facts 'and circumstances proved in relation to the conduct of the 'parties, both before and after the 23d of May 1816, is of opi-'nion that there is not evidence sufficient to justify the conclu-'sion, that the said Mary Black M'Neill, and the said Malcolm 'M'Gregor, did, on the 23d of May 1816, or at any other time, 'voluntarily and deliberately express that real mutual consent 'immediately to contract marriage, which, by the law of Scot-'land, is necessary to give validity to such an irregular marriage 'as is alleged to have taken place: It is therefore ordered and 'adjudged, by the Lords Spiritual and Temporal in Parliament 'assembled, That the said several interlocutors complained of in 'the said appeal be, and the same are hereby reversed; and that 'the farther proceeding in this action be, and the same is here-'by remitted to the Court of Session, with instructions to give 'directions to the Commissary Court to dismiss the declarator 'of marriage raised at the instance of the said Malcolm 'M'Gregor, by summons of date 25th March 1818, and to as-'soilzie the defender, the said Mary Black M'Neill, from all the 'conclusions thereof: And this House having so ordered and 'adjudged, doth not think it necessary to determine upon what 'has been submitted to its consideration, viz. Whether the 'several interlocutors herein before-mentioned could have been 'deemed duly pronounced, in proceedings to which Robert 'Jolly, and the children of the defender, Mary Black M'Neill, 'were not parties?'

EARL OF LAUDERDALE.*—My Lords, This is an action of declarator of marriage brought by Malcolm M'Gregor, a man of very low birth, and of distinguished immorality of character, against Mary Black M'Neill, the natural daughter of the Rev. Dr M'Neill, a clergyman, in respect of immorality of conduct certainly worthy of sustaining the

* Revised by his Lordship.

June 20. 1828. relation of father-in-law to the pursuer, who by this declarator aims at the honour of becoming his son-in-law.

My Lords,—This action was commenced by a summons, on which I shall have a good deal to observe, raised on the 25th of March 1818; and after the usual defence and reply, a proof was allowed and taken, which having come to be advised by the Commissary Court, we find that the first interlocutor of the Commissaries, given on the 1st of June 1821, was to the following effect:—'The Commissaries having 'considered the memorials for the parties, proof adduced on both 'sides, and whole cause, find, that the pursuer had established by suffi- 'cient evidence that a marriage was celebrated betwixt the defender 'and him by the Rev. Joseph Robertson, late minister of the chapel 'in Leith-wynd, Edinburgh, in the month of May 1816; and find, that 'the defender has failed to establish by evidence any circumstances 'sufficient to elide the legal presumption thence arising, of the matri- 'monial consent having been duly adhibited by her on that occasion; 'find, therefore, facts, circumstances, and qualifications proven, rele- 'vant to infer marriage between the parties; find and declare them 'married persons accordingly, and decern.'

Now, on this interlocutor, I only wish to call your Lordships' attention at present to the circumstance, that the finding here is completely different from the allegation in the condescendence and summons; for they allege, that a regular marriage was celebrated at Edinburgh, to give form and effect to the private marriage which was alleged to have taken place at Holytown.

My Lords,—Subsequently the appellant presented a short petition against this interlocutor of the Commissaries, and on the 7th of December 1821 the Commissaries pronounced this interlocutor:—'Having considered this petition, and answers thereto, and resumed 'consideration of the whole process, find, that no circumstances have 'been attempted to be proved on the part of the defender from which 'to infer intimidation as averred by her: find, that the inference of the 'defender's matrimonial consent, arising from the marriage ceremony 'at Robertson's, is strengthened by the defender's admission that the 'pursuer accompanied her back from Robertson's to her father's house 'on the same evening, and that a presumption thence arises of sexual 'intercourse having followed betwixt the parties, which is farther con- 'firmed by what passed at White's, the lapidary, some time thereafter: 'find, that the inference of the defender's matrimonial consent is not 'contradicted by any part of the pursuer's conduct immediately follow- 'ing the marriage ceremony; and that although his conduct at a subse- 'quent period may import his willingness to relinquish his legal claims 'to the defender as his wife, such conduct cannot destroy the legal 'effect of the evidence adduced to establish the validity of the previous 'union of the parties; therefore, with these explanations, refuse the 'desire of the petition, and adhere to the interlocutor reclaimed 'against.'

This cause was then brought into the Court of Session by advocation, and the Court, after hearing parties upon mutual memorials, remitted it to the Commissaries, with instructions to take further evidence. Your Lordships have had in your hands the whole evidence, and at the Bar they have commented at large upon the proof, as well as the additional proofs that were taken upon that occasion; but notwithstanding those additional proofs, the Commissaries adhered to their former interlocutor; and the cause having been again brought before the Court of Session, the interlocutor was affirmed by that Court; and it is against all those interlocutors that this appeal is brought by Mary Black M'Neill, the appellant. June 20. 1828.

Now, before calling your attention to the particular grounds upon which I shall humbly offer to your Lordships my reasons for thinking that those interlocutors ought not to be affirmed, I wish to call your Lordships' attention shortly to the outline of this case.

My Lords,—It appears that this Mr M'Gregor was married to the step-daughter of a woman of the name of Christian Robertson, to whom Miss Mary Black M'Neill was given in charge to be nursed from that time, though she returned again to her mother's house, with whom she lived to the age of twenty-three. Miss Mary Black M'Neill seems to have frequented principally the society of Mrs Christian Robertson —her step-daughter, the wife of Mr M'Gregor—of another daughter, Margaret Robertson—a type-founder of the name of M'Naughton, and his wife, another daughter of Christian Robertson—and lastly, of a cousin named Janet Nicholson, by whom it appears that M'Gregor, after the death of his first wife, the daughter of Christian Robertson, had two natural children, if indeed there is not evidence in the case that he was married to her; because your Lordships will find, that, in the course of the examination of this Janet Nicholson, though she asserts broadly that she never had confessed it either to Mr Jolly or to Mary Black M'Neill, and though she is asked by the examiner whether she ever confessed it to any body else, the examiner has carefully abstained from putting the question direct, whether she actually was married.

My Lords,—In such society your Lordships cannot suppose that this unfortunate woman got any very distinguished education, or that she could contract habits other than those which were calculated to debase her mind; but, in the mean time, it appears that this man, Mr M'Gregor, who must be considered to have been a man of considerable art and cunning, though of low birth and station, had got such an influence over the mind of Dr M'Neill, that, in the end of the year 1815, when the mother of Miss Mary Black M'Neill died, we find him boasting that he had used his influence to get Mary Black M'Neill acknowledged by her father, and taken into his house. What his object was in so doing I think I shall convince you; for I think I will make it impossible for your Lordships to doubt, that he, at this early period, laid the project, through the influence he had gained over the

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mind of Dr M'Neill, of getting to himself Dr M'Neill's property, through the medium of getting the hand of this natural daughter.

In pursuance of this design your Lordships will find, that, by Dr M'Neill's direction, some time about the middle of April 1816, he managed to get a deed executed, which gave to Mary Black M'Neill the house which Dr M'Neill inhabited, and L.500 of money; and, on the 1st of May following, Mr M'Gregor got him to execute a deed, which conveyed to Mary Black M'Neill, by disposition mortis causa, his whole landed property lying in Lanarkshire, in the neighbourhood of Holytown.

My Lords,—It was not long before Mr M'Gregor took steps to follow out the design which he had thus early formed; for, in the middle of May, it appears that he went with Dr M'Neill and his daughter, for the purpose of giving his advice concerning the management of the property near Holytown, and it is alleged, that there the irregular marriage stated in the summons took place. How it was irregular, when compared with the marriage subsequently contracted at Edinburgh, it is very difficult to discover; because in neither was there a proclamation of banns, and that marriage was celebrated before a clergyman of the church of Scotland as well as the other, and I believe the most immoral clergyman, with the exception of Mr Joseph Robertson, that possibly could have been picked out from the members of that church.

My Lords,—Mr M'Gregor states to your Lordships, that he returned to Edinburgh with the family on the 20th of May 1816; and that the parties there formed the design of celebrating regularly the marriage which had been irregularly contracted at Holytown. Now, my Lords, whether the parties were, or were not, conscious that upon this occasion they had contracted marriage, I shall, in stating the facts of this case to your Lordships, submit to you my opinion subsequently; but in the mean time it is sufficient to say, that there is not, in the whole mass of evidence, any proof whatever, that from the moment that that alleged marriage was contracted, either of the parties acted as if they had actually thought they had been married persons. I know very well that the Commissaries have stated, that immediately after the marriage nothing was done such as was sufficient to contradict the inference of consent on the part of Miss M'Neill. They find, 'That the inference of the defender's matrimonial consent, arising 'from the marriage ceremony at Robertson's, is strengthened by the 'defender's admission that the pursuer accompanied her back from 'Robertson's to her father's house on the same evening, and that a pre-'sumption thence arises of sexual intercourse having followed betwixt 'the parties, which is farther confirmed by what passed at White's the 'lapidary some time thereafter: find, that the inference of the defen-'der's matrimonial consent is not contradicted by any part of the 'pursuer's conduct immediately following the marriage ceremony.' Now, my Lords, in point of fact, I think there is direct evidence that,

immediately following the marriage ceremony, there was such contradictory conduct; because there is an admission in the action of sequestration by this very Mr M'Gregor, that he saw Mr Jolly and Mrs Jolly together within a few days of the marriage. Within a few days of what marriage? The marriage that he charges is the marriage that he says took place at Holytown; and if you are to take it to have been within a few days of that, it becomes a doubt with me, whether it was before or after the alleged celebration of this marriage at Edinburgh that this meeting took place in Pilrig-street, when Mr M'Gregor puts it beyond all controversy that he never behaved subsequently as if he had been a married man, because he states, that from that hour he abandoned her, and formed an idea that he would get a divorce. Thus it is clear, by his own confession, that even at that early period he did not conduct himself in such a manner as to shew that he was conscious in his own mind that he was married. My Lords, on the other hand it is certain, that the lady, from the very first, conducted herself in a manner that shewed that she had not the most distant idea that she was married, as sufficiently appears from her having married within a very few days another man, with the consent of her father.

My Lords,—If you look at the general outline of this case you will see, that Mr M'Gregor, having placed himself, as he thought, in such a situation that he might assert his right if it turned out that this woman really possessed her father's fortune, and that he might abandon her if it turned out otherwise, (for that seems to have been his object), abstained from doing any thing to assert his right till he saw her married to another man—till he saw children born of that marriage; and he then comes forward, thinking that she was secured in the possession of the property, and overlooking the scandalous nature of the attempt to deprive an innocent man of his wife; overlooking also the scandalous nature of the attempt to transfer to himself as his legitimate children the children of another, or, perhaps, rather to prepare for some future proceedings to illegitimatize those very children, and deprive them of their birth-right: I think your Lordships will perceive, that a more scandalous case never was brought before any Court of Justice.

Your Lordships must recollect that last year there was a case discussed at your Lordships' Bar, I mean that of a Miss Turner and Mr Wakefield. Compare the circumstances of that case with this case. It is very true that Mr Wakefield seemed to have formed a scandalous plan to possess himself of that young lady's property, though he did not know her; but is the disgrace even of that attempt any thing like M'Gregor's plan, which had for its object to place himself in such a situation, that he might, if he found it convenient at a subsequent period, claim this woman as his wife, to the effect of annihilating the status of the children she bore by another husband, and deprive this

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man of his wife, who it does not appear had the smallest idea that she really was married to him?

My Lords,—If on that occasion your Lordships thought it necessary to interpose in your legislative capacity, I am sure that, acting consistently, it is impossible, before your Lordships could affirm this judgment, that you should not pause,—and that in your legislative capacity you should not send down a bill to the other House of Parliament to dissolve this marriage, and by that means do away the chance of this immoral man getting the fruits of the fraud that he has attempted to commit. Fortunately, however, my Lords, I think I can state to your Lordships grounds which will shew you that there is no occasion to resort to this extraordinary means of correcting the evil, because I think it is impossible, when the case is explained, not to see that you cannot affirm the decisions of the Court below.

My Lords,—No man possesses a greater admiration of the great powers, and of the great professional talents of many of the Judges who have concurred in this decision; but, when a member of the House has a duty to perform, it is his own judgment that he must consult; and all I can say is, that if I am wrong, I have the good fortune to have here my noble friend who is sitting on the woolsack, and a noble Lord who is now sitting near him, who, I am confident, will check and correct (for they have given minute attention to this case) any error in fact or argument which I may commit.

My Lords,—That you may follow me the more easily throughout the reasoning I am about to submit to you, I will state to your Lordships the order in which it is my intention to proceed.

In the first place, I mean to submit to your Lordships, that under the summons, as it is drawn, it would be impossible for your Lordships to affirm the interlocutors now appealed against. In the second place, I mean to submit to your Lordships, that if the summons had been otherwise drawn, and if, instead of charging an irregular marriage at Holytown, of which there is not an atom of proof—if, instead of charging an intention at Edinburgh of celebrating a regular marriage to give effect to that irregular marriage at Holytown, it had been otherwise worded, and there had been charged in the summons an irregular marriage at Edinburgh,—that there is not any evidence that has been produced upon this occasion, I mean any legal evidence, such as can carry conviction to a judicial mind, that there was any marriage ceremony at all took place upon that occasion. Thirdly, my Lords, I mean to submit, that, supposing the summons had been otherwise formed, so as to charge an irregular marriage; and supposing there had been evidence, such as was sufficient to convince your Lordships that a ceremony had taken place in Edinburgh; still the species of ceremony proved does not exhibit to your Lordships that free, deliberate, real consent to form the connexion of marriage, which the law of Scotland requires to give validity to an irregular marriage. Lastly, my Lords, I shall very shortly bring under your consideration

the cases that have already been decided in the Courts below and in this House, with a view to shew your Lordships that you must abandon every principle upon which you have heretofore acted, if you can possibly think of affirming the interlocutors in this case.

Now, my Lords, it will be my endeavour, certainly, to dwell upon details as shortly as possible. I know that your Lordships are well informed of the facts. I have witnessed the attention you have given, and it will be my object rather to allude to, than to enlarge upon, the different circumstances of the case. My Lords, the summons, on which I must first comment, is in the following words:—'That an intimate 'acquaintance having for some time subsisted betwixt the pursuer and 'Mary M'Neill, sometimes called Mary Black M'Neill, the reputed 'natural daughter of the late Dr James M'Neill of Stevenston, by 'Euphemia Black, sometime residing in Carnegie-street, Edinburgh; 'they formed an attachment, and agreed to become husband and wife 'of each other; and accordingly, when they were together at Holy-'town, in the county of Lanark, in Spring 1818, on a jaunt, in com-'pany with the said Dr James M'Neill, an irregular marriage between 'them was celebrated by the said Dr James M'Neill; and the mar-'riage was consummated by their spending several nights together in 'the same bed at Holytown aforesaid: That on the pursuer and the 'said Mary M'Neill, or Mary Black M'Neill, returning to Edinburgh 'from said jaunt, which they did in the month of May 1816, they con-'sidered it proper that no time should be lost in celebrating in facie 'ecclesiæ that marriage which had been irregularly contracted be-'tween them at Holytown aforesaid; and accordingly they were, in 'the month of May 1816, regularly married by the Rev. Joseph 'Robertson, minister of the chapel in Leith-wynd, Edinburgh. Not-'withstanding of all which, the said Mary M'Neill, or Mary Black 'M'Neill, casting off the fear of God, and forgetting her natural and 'Christian duty, and promise made at her entering into said marriage 'with the pursuer, now refuses to acknowledge her marriage, or to 'cohabit with him as her husband. Therefore the pursuer, Malcolm 'M'Gregor, ought to have our sentence and decreet, finding and de-'claring, That he and the said Mary M'Neill, sometimes called Mary 'Black M'Neill, defender, are lawfully married persons, husband and 'wife of each other, and decerning and ordaining the said defender to 'adhere to and cohabit with the pursuer, and treat and entertain him 'in all respects as her husband.'

I will not at present detain your Lordships upon the conclusion of this summons. Your Lordships will recollect, that when the Counsel were arguing this case at your Bar, I put to them, whether they could state any case of this sort, any declarator of marriage brought in Scotland, where there was proof of a second marriage, that had a conclusion desiring it to be ordained that the parties should adhere and cohabit. There is no such case existing. It is very true, that Dr Lushington alleged at first the case of Mrs Dalrymple; but that is not

June 20. 1828. a case of a declarator of marriage. It was a case of an action for restitution of conjugal rights in this country, under rules of law perfectly different from those applicable to the present action. It is obvious what was the design of this man in so framing his summons; because, if he had concluded for a divorce, her property being mostly heritable property in Scotland, on which she was infeft, he might have lost his right to that which it was his sole object to acquire. But, waiving that consideration, I beg your Lordships to attend to this, that the interlocutor which I have already stated to you finds, not that there was a regular marriage, but that a marriage was celebrated between the defender and him by the Rev. Joseph Robertson. Is such a thing mentioned in the summons? It alleges, that an irregular marriage was entered into at Holytown. There is no finding that such a marriage was proved. In fact, there was not an attempt to prove it; and the finding is not of an irregular marriage at Holytown, as alleged in the summons; but of an irregular marriage at Edinburgh;—a judgment which, under the words of that summons, I hold it was impossible for the Court regularly to pronounce; and it is impossible for your Lordships to affirm it; for before your Lordships can, under this summons, find these parties married, you must find, in the first place, evidence to convince you that there was an irregular marriage at Holytown, of which there is not an atom of proof; and then you must have evidence that that marriage derived further efficacy and further validity from the celebration of a regular marriage at Edinburgh, of which there is not, as I shall shew to you, any thing like a proof.

My Lords,—Having stated thus much upon the subject of this summons, on which I certainly could greatly enlarge, (for a more extraordinary summons than that which has been exhibited to your Lordships in this case, and one more irregularly framed for the purpose for which it is intended, never was drawn), I will now proceed upon the supposition that this summons had been regularly formed, and assume that this summons had charged a marriage ceremony before Mr Joseph Robertson of Edinburgh. Now let me ask your Lordships, what evidence there is upon this occasion that can justify you in judicially finding that any ceremony whatever took place? My Lords, the evidence upon this subject is, like the evidence in all cases where there is a consciousness of deficiency of proof, very various in its nature: The attempt seems to be to patch up with one species of proof the deficiencies which they are conscious of in another sort of evidence: for you have an attempt to establish it by documentary proof; you have an attempt to rest on the evidence of witnesses; and lastly, you have an attempt to establish it by insisting upon the admission of the party.

Now, my Lords, with regard to the documentary evidence, I must submit to your Lordships, that there never were documents more deficient tendered to a Court with a view to produce a conviction upon any subject. In the first place, you have produced to you a paper

entituled a Registrate of Marriage, and this paper is produced to you with a view to convince your Lordships' mind, aided and assisted by the evidence of Mr Bow and Mr ; witnesses who were afterwards produced to prove that there actually was that which it is impossible could have existed, and which there is no proof ever did exist, a certificate of proclamation of banns granted upon this occasion. It is indeed confessed not to have existed by the witnesses brought forward. But it is more material to shew your Lordships that it could not exist. Your Lordships will recollect that those parties returned from Holytown on Monday the 20th of May, and at that time it is asserted they first formed the design of celebrating this regular marriage in facie ecclesiæ. On Thursday the 23d they were said to be married. Now, though there could be no intervening Sunday between the Monday and the Thursday, your Lordships are desired to believe, upon the strength of those documents, that a proclamation of banns actually took place, the parties telling you a story which makes it perfectly impossible. June 20. 1828.

My Lords,—This registrate of marriage is in the following words: 'Registrate of Marriage.—Edinburgh, 21st day of May 1816.—'Malcolm M'Gregor, printer, Old Church parish, and Mary M'Neill, 'St Cuthbert's parish, daughter of Dr James M'Neill, Edinburgh.—'Edinburgh, 3d December 1817. Extracted from the Register of 'Marriages for the city of Edinburgh.' Now, it is very material that you should attend to the date of this registrate of marriage, which is the 21st of May; the date of the register of marriage is the 22d; so that you have two documents to prove a fact that is admitted not to be true, and which it is shewn cannot be true, these two documents having dates that would destroy their effect, even were they resorted to to prove a fact not otherwise impeached.

My Lords,—The next documentary evidence is on a par, at least, with that which I have already described; for you have produced to you a book of private memorandums of Mr Joseph Robertson, a man before whom it was proved, in a case in the Court of Session in the year 1814, (Dow *v.* Adie), that a private marriage was celebrated, one of the parties being represented by a person hired for the purpose.

My Lords,—This is a book formed by this man, who at that time was in prison for having celebrated an irregular marriage, contrary to the Act of Charles the II., and for the forging of marriage lines: and you are desired to give credit to this book, there being upon the face of it obvious marks that a great many of the entries must have been made at one and the same time, in one hand; and after all, it being only an irregular private memorandum of this man, who was convicted of bad practices with respect to certificates. But, my Lords, you have another document, which, if this had been a regular register kept by Mr Joseph Robertson, and a man of unimpeachable character, would have defeated the force of this entry; because you have a certificate in the handwriting of this very same man, of the date

June 20. 1828. of the 29th of May, purporting to be a certificate that those parties were married by Mr Joseph Robertson on the 29th. Then, what am I to believe, if I believe any thing that is to be inferred from these documents? Did this marriage take place on the 29th, or did it take place upon the 23d? It is impossible for your Lordships to discover upon which day it did take place; for though it has been attempted to decide this by the evidence of witnesses, your Lordships will see that they do not recollect the date of the marriage. I hold, therefore, that it is impossible for your Lordships to allow your minds to be in the smallest degree influenced by a registrate of marriage, which is contradicted by the register of marriage; or by a book kept in the irregular manner that I have described, which is contradicted by the certificate of the person that keeps it.

My Lords,—The parties seem to have been conscious that this documentary evidence was not worth much, and consequently they have relied upon the viva voce testimony of Mrs Robertson the wife of this man, and of Miss Robertson his daughter; and it does so happen (which is worthy of remark, because it places those witnesses in a very suspicious situation), that the very day on which they were examined was the day on which this man was liberated from prison, and on which his further punishment of banishment commenced; they were therefore persons who had an obvious interest to explain away his conduct, and to make it appear as regular as possible, looking undoubtedly for some mitigation of the remainder of the punishment which the Court had inflicted upon him.

Now, my Lords, Mrs Robertson, his wife, (and it is not alleged that there was any other person present but his wife and his daughter), is the first person examined, and to the first question,—Mary Black M'Neill being pointed out to her,—Whether she knew this woman? she distinctly says, that she does not know her, and that she does not recollect ever having seen her before. I am sure your Lordships will agree with me, that the moment that answer was given, the witness should have been sent out of Court, as it was quite obvious that no benefit could be derived from her testimony. But, my Lords, that was not the mode that was pursued. Mrs Robertson's recollection was refreshed, by producing the book to which I have alluded, and reading to her the entry of the marriage, in order that she might in some degree gain some recollection of the facts of the case; a proceeding which, I say, ought not to have taken place; for this book, not being itself evidence, never could have been regularly brought forward to prompt the recollection and memory of a witness, who they knew must be willing, from her situation, to say any thing upon that occasion. She is then asked, if she knew Mr M'Gregor?—He is pointed out to her,—and her answer is, that she knows him perfectly, but she never saw him either before or after the time on which, according to the entry, the marriage was celebrated. This seemed very extraordinary when she professed to have a perfect knowledge of his person; it therefore

naturally suggested this question,—how did she recollect a man that she had never seen before or since? to which her answer is,—Indeed I know very little about it. Now this is one of those witnesses who are brought forward to identify the parties; and I wish to know whether it is possible for your Lordships to say, that Mrs Robertson's evidence can be held in the smallest degree to contribute to your conviction, that Mary Black M'Neill and Mr M'Gregor were present on the day on which this ceremony is stated to have taken place at Mr Robertson's? June 20. 1828.

Miss Robertson certainly has a more perfect recollection. When I say a more perfect recollection, that is all I possibly can say; because, though she says she knew Mary Black M'Neill as Dr M'Neill's daughter, still it comes out in a future part of her evidence, that she applied to her father in the course of the ceremony going on, to know whether it really was Dr M'Neill's daughter. With regard to Mr M'Gregor, the evidence is pretty nearly the same with that which her mother gives. The one contradicts the other, both in the fact of there being a lighted candle, and in the fact of there being marriage lines; and the two agree in no one thing but a very important fact, on which I shall presently comment, that Mary Black M'Neill did not utter a word from the time she came into Mr Robertson's house to the time she left it.

My Lords,—Taking, then, the viva voce evidence in its utmost extent, your Lordships have only the evidence of one suspicious witness that can tend in the smallest degree to identify the parties who were alleged to be united by this marriage ceremony; and your Lordships well know, that, according to the law of Scotland, one witness is not sufficient to establish a fact. You must concur with me, therefore, in thinking, that there is no proof whatever upon which your Lordships can rest a judicial decision that there was any ceremony took place on the 23d of May 1816. My Lords, the parties seem in some degree convinced of this, and accordingly the defect in the evidence is attempted to be made up, throughout the whole proceeding, by appealing to judicial admissions, and to extrajudicial admissions, which it is proved Miss Mary Black M'Neill made.

Now, my Lords, I am at present looking at this case with a view to ascertain whether there is evidence that any ceremony took place, and therefore it is needless now to enter into the substance of those admissions; but I wish your Lordships to consider this question, whether it is possible that, in a case such as this, where you have evidence of a legal marriage subsequent to the irregular one said to have been contracted, the admission of the party should be received as evidence that the first marriage actually did take place? My Lords, if such admissions are received as sufficient evidence, there is no woman who has a fortune of her own, and who wishes to get rid of her husband to whom she is married, and to betake herself to the arms of her paramour, that might not by connivance get him to bring a declarator of marriage, and subsequently establish the fact of a previous marriage

June 20. 1828. by her own admission. There is, perhaps, a feeling of delicacy in the other sex that is not so prevalent in ours, which might prevent the frequency of such an occurrence; but if the principle applies to one sex, your Lordships must conceive that it applies also to the other; and then any married man who has married a lady that bona fide believes him to be unmarried,—any man who has contracted an alliance with a lady of distinction, by whom he has many children born,—if he takes a dislike to his wife, may get a similar proceeding instituted, on the ground of his having engaged in a previous marriage, alleging that there is evidence of that fact; and then the man has only himself to admit it, to the effect of destroying the status of his own children born in lawful wedlock, and of ruining the reputation of a woman of high rank and of great family connexion, and who never dreamt of the possibility of such an occurrence. Your Lordships must therefore be convinced, that this would be a precedent of the most dangerous nature. It has been stated, that the law of Scotland, with respect to divorce, gives too great a latitude; but establish this principle, and then I will venture to say, this House will have very little cause, in future, to comment upon the law of divorce in Scotland; because this new device for obtaining a divorce would be so much more easy, and so much more rapid, that I cannot doubt it would totally supersede that law, (upon which I have heard criticisms sometimes in this House), and do it away as effectually as if it were repealed by Act of Parliament.

My Lords,—I must contend, therefore, that as there is no viva voce evidence establishing that this ceremony took place; and as the documentary evidence is of such a nature that your Lordships cannot possibly rely upon it; and as I trust you will not admit as evidence the admissions of the party to prove such a fact—in point of fact, there is no legal evidence that any ceremony took place, such as your Lordships can say ought to bring home conviction to a judicial mind.

But, my Lords, supposing that you could rest upon the admissions of this lady, I wish your Lordships would consider how far the admissions could in the smallest degree promote the object of the respondent at your Lordships' Bar. The general tenor of her admissions amounts only to this, that 'the pursuer one evening, after Dr M'Neill 'had retired to his own room, the 23d of May 1816, it is believed, 'came to the house, and begged the memorialist to accompany him 'to Mr Bridges, who had been in the use of transacting business for 'Dr M'Neill, and to whom he said the Doctor had instructed him to 'make some communication. The memorialist, who knew that the 'pursuer was frequently employed by her father in that way, and who 'naturally enough supposed that her presence might be desirable, 'consented to go. When they reached Edinburgh it was late, and 'the pursuer then alleged that Mr Bridges would not be in his writing 'office; but, under pretence of going to a house where he might get 'some refreshment before conducting her home, and where Dr M'Neill

'was sometimes in the use of calling for the same purpose when in 'Edinburgh, the pursuer, instead of conducting the memorialist back 'to her father's house, persuaded her to accompany him to Carrubbers 'Close, and having got her to the foot of the stair where Mr Joseph 'Robertson, of the Leith-wynd Chapel, lived, he insisted that she 'should go to Robertson's house with him. Upon her expressing her 'anger at this attempt, he spoke to her like a desperate man; sai l "that Mr Jolly should forfeit his life for her obstinacy, that he would 'destroy the Doctor's deeds in her favour, and used other violent 'and threatening language, in the view of intimidating her into a 'compliance with his request. Agitated and alarmed at the purport of "this discourse, she found herself unable to resist, and was led almost 'insensible into Mr Robertson's house, who, on receiving from the "pursuer a present of one or two pounds, proceeded to hurry over a 'marriage ceremony, without asking her any questions, without any 'exhortations, without ascertaining that her appearance there was free 'and unforced, and without receiving any expression or indication of 'consent.'

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Now, my Lords, what does this admission amount to? If there was a marriage before Mr Joseph Robertson, it was undoubtedly an irregular marriage, and in law must be considered as such. Now, without troubling your Lordships with reference to the reasoning on the law, as laid down by Mr Erskine and Lord Bankton; without referring to the opinion of Mr Hume, to the opinion of Mr Craigie, to the opinion of Mr Erskine, or Mr Clerk, and all the great lawyers given in the case of Dalrymple *v.* Dalrymple; I will venture to say that I may state this without fear of contradiction, that in the case of an irregular marriage in Scotland it is the practice, and it is the law of the country, to take evidence of all the facts and circumstances antecedent to the alleged ceremony, of all the facts and circumstances pending the ceremony, and all the facts and circumstances of the conduct of the parties subsequently to the ceremony; and that, from a complete view of all these circumstances, you are to infer whether that real and deliberate consent was given which constitutes marriage;—and in doing this, you do not resort to the conduct of the parties subsequent to the ceremony, for the purpose of undoing a marriage contracted,—but for the purpose of learning whether the parties did or did not, by their conduct, exhibit a conscious feeling that no such ceremony had taken place between them, as was sufficient to lead them, in their own minds, to the conclusion that they were married persons. Now, my Lords, I will venture to say, that looking at the conduct of the parties before the ceremony,—looking at the circumstances proved to your Lordships at the time of the ceremony,—and looking at the conduct of the parties subsequent to the alleged ceremony, There is not a case in all the books where there is half the mass of evidence to shew, first, That the parties did not think a marriage was to take place; secondly, To shew that the

June 20. 1828. circumstances which attended the ceremony ought not to lead us to feel that a free consent had been given; and, lastly, To prove that neither the one nor the other ever conducted themselves, in any one instance, in such a manner as to lead any reasonable mind to conclude that they felt that a consent had been given.

My Lords,—How does the evidence stand? I will not go through it in detail—it would take up too much of your Lordships' time to read it; but I have made some short extracts, to which I will refer your Lordships, to shew that Mr M'Gregor himself, antecedent to this alleged ceremony taking place, uniformly held that there was not the smallest chance that he should marry this woman—that he knew she was pre-engaged to Mr Jolly. Upon this subject you have the evidence of a witness who cannot be suspected, Mrs Christopher Robertson, the step-mother of Mr M'Gregor's first wife, who states this:—'Mr M'Gregor told me he had been with them in the west country;' (a circumstance which shews the probable date of this communication): 'I asked him if he was going to be married to the defender? he said, 'No—Dr M'Neill says he thinks I will be the man, but I think it will 'be Mr Jolly, for I know her pre-engagement to him.' Margaret Robertson, the daughter of this Mrs Christian Robertson, and her sister Mrs M'Naughton, state that they were present when their mother had this conversation, and they prove the same thing to have taken place.

You have then the evidence of John Carr, in which he says, 'That 'he was walking down Leith Walk towards Leith in company with the 'respondent M'Gregor and John Manderson, a witness cited for the 'appellant, and upon returning back again they met, towards the head 'of Leith Walk, Mr Jolly and Mary M'Neill: That M'Gregor stopped 'and had some conversation with Mary M'Neill and Mr Jolly, and upon 'his joining the deponent and Manderson, the deponent asked him if Mr 'Jolly and Mary M'Neill were married, to which he replied that they 'were not married, but that they would shortly be so;' not therefore contemplating his own marriage, but, in conformity to the testimony of the witnesses already quoted, stating that such a marriage never would take place, because she was previously attached to Mr Jolly, and that the marriage would soon take place between Mr Jolly and her.

You have next the evidence of Mrs M'Naughton, another daughter of Mrs Robertson, who states, in confirmation of her mother and sister, that she heard Mr M'Gregor say that Mr Jolly would be the man; that she knew of his pre-engagement with Mr Jolly. And afterwards you have a witness beyond all suspicion, I might almost say one who stands in the situation of being the only witness beyond suspicion, I mean Dr Robertson, the clergyman who is supposed to have performed the ceremony of marriage betwixt Mary Black M'Neill and Mr Jolly, who says that a general report had taken place in the parish that she, Mary Black M'Neill, was to be married to Mr Jolly. How then does

the evidence stand antecedent to the marriage? My Lords, if it had been to be proved from circumstances of this sort, antecedent to the marriage, that there was a design of marriage with Mr Jolly, you would have had satisfactory proof; but with reference to Mr M'Gregor, there is not any one circumstance which does not go to shew that he himself actually believed that it never would take place. June 20. 1828.

Now, my Lords, what is the proof of what occurred at the time of the marriage taking place? You have this plain matter of fact, that both Mrs Robertson and Miss Robertson say, that Mary Black M'Neill never gave any consent whatever; that she never uttered a word during the progress of the ceremony. Now, my Lords, I admit that, in the case of a regular marriage, when the parties come before a clergyman after due proclamation of banns, where they have given their consent to the marriage as expressed in the marriage settlements antecedent to the marriage, that a nod of the lady, or a bow in the church, would be evidence of consent; but where you know that people have been hired to personate others in making that bow and that nod, (as in the case of Dow *v.* Adie), where you know that every irregularity has taken place, and has been practised, something more is necessary than that nod which might be sufficient in the case of a regular marriage—in such an irregular marriage it is indispensable that consent should be really expressed, which is not the case according to the evidence we have here received. Neither is there any proof of a consummation. M'Gregor, it is true, alleges, that he attended Mary Black M'Neill home to her father's house on that day. My Lords, upon other occasions, where parties have gone to the father's house, and passed the night in that house, that might be a circumstance the proof of which should produce some effect; but your Lordships will recollect, that Mr M'Gregor had a bed in the house, that he was in the regular habit of sleeping there: and the fact is, that there being no evidence of her being in the same bed with him that night, is rendered much stronger from the circumstance of Mr M'Gregor having a bed in the house; for your Lordships must feel that the absence of that testimony is more remarkable, as there was not a servant of the house who might not have been questioned, first, as to whether Mr M'Gregor slept in his own bed; secondly, as to whether he passed the night with Mary Black M'Neill; either of which circumstances would have led to a definite conclusion on this important point. Now, my Lords, what is the conclusion to be drawn from this state of the evidence?—First, I say you have proof that the parties in no respect contemplated a marriage, antecedent to the alleged ceremony;—secondly, there is absence of all proof of consummation, which, by the bye, is not even alleged in the summons; for there is an allegation of the consummation of the marriage at Holytown, but not of the marriage at Edinburgh. Thus far, then, I maintain, that you have no circumstances established on which a

June 20. 1828. presumption can be founded, that, at the time of this irregular ceremony, any real consent was given by the parties.

Now, my Lords, I wish to call your attention to the conduct of the parties after the marriage. I have already commented upon the interlocutor of the Commissary Court, wherein it is found that the inference of matrimonial consent is not contradicted by any part of the pursuer's conduct immediately following the marriage ceremony; and I have shewn your Lordships, that even from the time of the celebration of the marriage, the conduct of Mr M'Gregor and the conduct of Mary Black M'Neill was such as to satisfy every body that they were conscious of not being married persons. Why, my Lords, not to call your Lordships' attention at length to what each of the witnesses says upon this occasion, I find, that from the time of this marriage Mr M'Gregor was in the habits of regularly visiting Mr and Mrs Jolly: there are no less than eight witnesses who prove being present when they heard him drink their health as Mr and Mrs Jolly; there are witnesses who state to your Lordships distinctly that they recollect seeing Mr M'Gregor having a pair of new gloves, which, the witness John Carr says, according to the best of his recollection, he said he had received as a present at the marriage of Mrs Jolly. This man, who tells you that he was married upon the 23d of May—who tells you that, a few days after, he took such an aversion to this woman on account of her conduct in Pilrig-street with Mr Jolly, that he formed the resolution of divorcing her, though afterwards he brings an action for adherence;—this man, I say, is proved to have, on the 13th of June, within a few days of this, received a present of gloves upon the occasion of her marriage to another man. But is this all, my Lords? No.—You have this Mr M'Gregor sitting in the same seat at church, listening to divine service, and afterwards walking home to enjoy conviviality with Mr and Mrs Jolly for the rest of the evening. Is it possible, my Lords, to believe that there can exist such profligacy, as that this man, knowing that he was married to her, sits in church with the adulterer and adulteress, and goes home with Mr and Mrs Jolly to enjoy conviviality during the rest of the evening, drinking to their health as such? Must you not, under such circumstances, think that a man who could so conduct himself must have believed and known, that the marriage ceremony was not a ceremony that could be binding,—that in fact the parties had never given consent. On that ground his conduct may be explicable,—but on any other ground it is impossible to believe, that he could conduct himself in a manner so profligate and disgraceful.

But, my Lords, this is not all; for you have the evidence of a Mrs Margaret Miller, who tells you, 'that the day before Dr M'Neill's funeral she put the question to Mr M'Gregor, who it was that married Mr and Mrs Jolly? to which the pursuer answered, that it was Dr Robertson, minister of South Leith; and the pursuer at the same time mentioned, that he was personally present at the ceremony.' Now,

if your Lordships can believe this witness, surely there never did exist such a state of facts; but as none of the other witnesses seem to think he was present at the ceremony, the leaning of my mind is to the conclusion that he was not there: But that he very soon afterwards knew it, that he actually accepted gloves, is beyond all doubt; that he frequented the society of the parties, heard them drinking to the health of Mrs Jolly, and drank to her himself in that capacity; that he went (according to the evidence of Mr Hughes, and Mr Nicholson the tailor) with Jolly on the occasion of the death of Dr M'Neill, accepted mourning which Mr Jolly presented him with, and which Hughes and Nicholson both state him to have received, is equally undoubted.

My Lords,—Though these facts are strong enough to carry conviction to any one's mind, that it is not in human nature that a woman should have conducted herself in the manner that this woman is supposed to have done, if she was conscious that a marriage ceremony had taken place; or that a man should have conducted himself in the way that Mr M'Gregor did, if he had been conscious that the marriage ceremony took place; you have still stronger circumstances that tend to the same conclusion: for in the month of October following this marriage, Mr M'Gregor again attends Dr M'Neill to give his advice in the management of his property at Stevenston, accompanied by his daughter and Mr Jolly; and you have the evidence of Mary Hastie, the maid of the Inn, who proves, that there being only a double-bedded room, Mr and Mrs Jolly slept in the one bed, and Mr M'Gregor in the other. Can your Lordships believe that this man thought himself at that time married to Mrs Jolly on the 23d of May? Is it possible that he would not have run from the place, and sought a bed any where, and even slept on straw, rather than have disgraced himself by sleeping in a bed, and seeing the adulterer and adulteress (which they must in his estimation have been, if he had thought he was a married man) enjoying those rights which he had exclusively the privilege to enjoy, in a bed in the same room with himself? I say therefore, my Lords, that when you look at the evidence which has been produced in this case with reference to the conduct of the parties before marriage, the evidence which is adduced with reference to their conduct at the marriage, and the evidence that is produced of their subsequent conduct, it shews you that there is no reason to suspect there was any consciousness immediately before or after the supposed marriage, or at the time at which it took place, that they had really contracted marriage. If it had been otherwise, it is impossible there should not have been some evidence to shew that the parties had consummated the marriage as has been charged in the summons. And, lastly, it appears that there never were any two people who conducted themselves in a manner tending more strongly to induce your Lordships to believe that they were not married people, or to create a positive belief that they themselves never thought that ceremony was binding.

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Here then, my Lords, I think I have made out that, in the first place, it is impossible under this summons, drawn as it is, to affirm the decision of the Court of Session, which is declaratory of a fact that is not even alleged; secondly, that it is impossible for your Lordships to find that there is in this case any legal evidence whatever, such as ought to convince a judicial mind that there was any ceremony took place at Edinburgh; and, in the third place, that the ceremony, such as it is, which the evidence attempts to persuade your Lordships did take place, is not a ceremony from which your Lordships can infer that deliberate consent immediately to enter into marriage which the law of Scotland requires.

I do not wish to occupy your Lordships' time by dwelling much upon the cases, but I will only call your attention to one or two cases which have been cited, to shew your Lordships the spirit of the decisions which have heretofore been made in this House, as well as by the Court of Session. My Lords, we have in the books cases similar to this in one respect, viz. cases of declarator of marriage, where there was a second marriage that avowedly took place; such as the case of Malcolm *v.* Cameron, and Napier *v.* Napier; and it is very important that your Lordships should advert to the evidence which Mr Hume gives in the case of Dalrymple *v.* Dalrymple. You will there see, that in those two cases he states, that the principal ground of deciding against the first marriage was, because the parties lived in the same town, and had allowed a second marriage to take place, and allowed a length of time to pass, that marriage being unchallenged. Now, my Lords, how much stronger is this case, which exhibits a person living in the same house, and accepting gloves on occasion of the second marriage ceremony, daily frequenting the society, and living in habits with the parties contracting the second marriage, and actually sleeping in the same bed-room with them? To be sure this is indisputably a much stronger case than that of Napier *v.* Napier; yet in that case the circumstances were found sufficient to induce the Court to decide against the validity of the first marriage, though there were strong circumstances to prove consent in the case of the first marriage.

You have then the case of Patrick Taylor *v.* Kello, a case decided in this House. In that case the parties exchanged mutual declarations, such as, if it had not been for their conduct either before or after the time of marriage, (which the Court always takes into consideration, pronouncing upon a complex view of the whole case), would in their judgment have constituted a marriage in the law of Scotland. The writings they interchanged were to the following effect:—The lady signed this:—'Skirling Mill, February the 16th, 1779. I hereby so-'lemnly declare you, Patrick Taylor, in Birckenshaw, my just and 'lawful husband, and remain your affectionate wife.' He on his part signed a similar paper, and signed himself her affectionate husband. My Lords, an action of declarator having been brought in the Court

below, the marriage was held to be valid, and it came to your Lordships' House; but it appearing to you that at the time of the interchange of those letters there was an understanding, which was inferred from the conduct of the parties, that those letters were to be given up on demand, this House reversed the interlocutor of the Court below, and found that there was no marriage. Now, my Lords, how feeble is this case in comparison of that which your Lordships now have before you? This is not a case where the parties agreed to withdraw the written documents on demand, but a case where the one party stands by and sees the other party married, and the other absolutely contracts a marriage, and they conduct themselves to one another as if they had never dreamt of the marriage ceremony having been performed. June 20. 1828.

Your Lordships have then the case of M'Innes *v.* More in December 1781, where the House of Lords reversed the interlocutor of the Commissary Court and of the Court of Session, because it appeared, that though the letters which were produced were sufficient to constitute marriage, they were delivered and written, not with the intent of contracting marriage, but with the intent of getting the lady the privilege of lying-in in the house of her own relations. Upon this ground the House of Lords reversed the judgment, shewing that, in a case where the circumstances were infinitely slighter than that of M'Gregor's, yet they were sufficient to destroy the effect of the consent to marriage.

Then, my Lords, you have a case, a very strong one indeed, the case of M'Gregor *v.* Campbell, where it appears that Captain Campbell, an officer in the army, formed a connexion with a woman who was cohabiting with him; that he admitted his brother officers and their wives to visit her as his wife; and that she was by habit and repute received as such: but on the validity of this marriage being challenged, it appeared that this woman had actually received wages and livery meal, which is board wages according to the language of Scotland; that she displayed herself not as acting in the capacity of wife, but in that of his servant. Upon that evidence the inference from other facts was rebutted, and it was declared that the marriage was invalid, because she continued to accept the wages which she had been in the habit of receiving antecedently. How much stronger is this case, where the party is proved to have connived at a marriage with another man living in habits with his alleged wife, and never stating any claim to her?

My Lords,—There is one branch of evidence, which I recollect has escaped me, and I do not wish to omit any thing which can either in one way or another be deemed of importance. What I allude to is the attempt to establish in evidence the intention of the parties, as is inferred from the evidence of Mrs Kinlay, alias Shewan. Mrs Kinlay is first examined in the year 1819; and she tells a story that she had received from Mary Black M'Neill three pieces of stuff for the pur-

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My Lords,—There is another point which escaped my recollection in going over the evidence,—I mean the details given by Mr White, the lapidary, and Mr Neill, the printer, brought by Mr M'Gregor with a view to shew that he, in two instances at least subsequent to the marriage, did play the character of husband to Mary Black M'Neill. Now I confess to you it is impossible for me to give credit to either of those witnesses. Can I believe that Mr M'Gregor brought his friend, Mr Neill, in the beginning of July, to the house of Dr M'Neill, for the purpose of introducing him to his wife, and introducing him to a person as his wife, from whom he had accepted gloves on her marriage with another man; and that he introduced him to a person as his wife of whom he had expressed his disgust in consequence of the interview in Pilrig-street, and declared a fixed and settled intention, as early as possible, of divorcing her? The story is not credible; and it is totally inconsistent with the other facts proved, of his drinking her health, and associating with her and Mr Jolly, they living as man and wife.

Neither can I believe the evidence of White the lapidary. Indeed

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the whole force of it depends on whether, at the time of uttering the words imputed to Dr M'Neill, he was looking at M'Gregor or at Mary Black M'Neill. If Dr M'Neill was looking to Mary Black M'Neill, who was in the room at the time, he said that 'you will get it all by and bye,' the thing is quite clear; and that is much more probable, under the circumstances of the case, than that he was directing his eyes towards Mr M'Gregor, because your Lordships will recollect the whole detail of Dr M'Neill's conduct when present at the marriage of Mr Jolly.—Mr Robertson, the minister of North Leith, was clear and distinct that Dr M'Neill told him that he would take his part in giving away his daughter,—that he said to Dr Robertson, in reply to some observations of his, that he had done a great deal for the parties, and he would do more;—Can you believe that this man, within two days or three days of this having taken place, went to Mr White, the lapidary, for the purpose of declaring that M'Gregor instead of Jolly was married to his daughter, and uttering the sentence that he is said to have uttered, with a view to express that the whole of his fortune would belong to Mr M'Gregor? or is it not more reasonable to believe, that in point of fact all he meant to say upon that occasion was, fixing his eyes on his daughter, 'It will all be your's?'

On all these considerations I must submit to your Lordships, that it is impossible your Lordships should, under the circumstances of the mode in which this summons is framed, sanction and affirm the interlocutor of the Court below in this case;—that there is no evidence on which your Lordships can legally rely to prove there was any ceremony whatever took place on the 23d of May;—and that, at all events, the ceremony which is proved is such, taking into consideration all the conduct of the parties before and after, as, in conformity with your Lordships' former decisions, it is impossible you can say proceeded on that free, that deliberate, that real, and that immediate consent to enter into a marriage, which is the species of consent required in an irregular marriage under the law of Scotland. My Lords, with regard to the nature of the judgment, I will read at present the sketch of the judgment I am inclined to propose, but I should think it much better to delay this for the purpose of taking some time to consider how it should be worded. I confess, my Lords, that I should very much wish, that in this important case on the law of marriage in Scotland, your Lordships should introduce the allegations in the summons, as well as the conclusions thereof, so as to bring before the minds of the Judges in that country the precise grounds on which you determine: and I should think it very desirable, as the Court have obviously adopted the interlocutor they have pronounced, for the purpose of declaring that an irregular marriage had taken place at Edinburgh, that your Lordships should negative that conclusion, otherwise the effect of your judgment would be that of dismissing this action, but leaving the parties in such a state that they may bring a future action, charging an irregular marriage at Edinburgh, which I

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am sure your Lordships would not wish, after all the litigation which has taken place. The heads of the judgment I would suggest to your Lordships are,—'That on due consideration of all the facts and circumstances established by the evidence in the Court below, in an action of declarator of marriage at the instance of Malcolm M'Gregor against Mary Black M'Neill, by summons on the 25th of March 1818, wherein it is set forth, that an irregular marriage was celebrated between the said Mary Black M'Neill, daughter of the late Dr James M'Neill, in the spring of 1816, at Holytown, which was consummated by their sleeping several nights together in the same bed; and further, that they considered it proper, on their return to Edinburgh in the month of May 1816, that no time should be lost in celebrating in facie ecclesiæ that marriage which had been irregularly celebrated between them; and accordingly that they were, in the month of May 1816, regularly married by the Rev. Joseph Robertson, minister of the chapel in Leith-wynd: It appears to this House that there is no proof whatever of any marriage between those parties having at any time taken place at Holytown, or any regular marriage in facie ecclesiæ having been celebrated at Edinburgh in the month of May 1816; neither does it appear to this House, taking into consideration the facts established in evidence in relation to the conduct of the parties, both before and after the 23d of May 1816, and all the other facts and circumstances proved, that there is evidence sufficient to justify the conclusion, that the said Mary Black M'Neill, and the said Malcolm M'Gregor, did at that, or at any other time, voluntarily and deliberately express that mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to an irregular marriage: That, on these grounds, this House reverses all the interlocutors complained of, and remits to the Court of Session, with instructions to the Commissary Court to dismiss the action of declarator of marriage.'

My Lords,—It would be sufficient merely to state that you assoilzie the defendant, Mary Black M'Neill, from all conclusions therein; but in this case I should prefer your Lordships' adopting this form—to dismiss this declarator raised at the instance of the said Malcolm M'Gregor, by summons of the date of the 25th of March 1818, absolving the appellant, Mary Black M'Neill, from the conclusions thereof, that she should be declared married to the said Malcolm M'Gregor.

Earl of Eldon.*—My Lords, If this was not one of the most important cases that has ever occurred in the course of my experience before any Court of judicature, I should be perfectly satisfied with what has been already stated to your Lordships, that there is sufficient ground to reverse the interlocutor of the Court of Session.

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* Revised by his Lordship.

But, my Lords, I am anxious, for different reasons, at least to occupy a short portion of your Lordships' time. I am extremely desirous that it should appear that this judgment, at least as far as I am concerned in agreeing to it, does not proceed upon suppositions and notions, which, unless we protest against them, may be understood to be involved in the effect of the judgment. My Lords, when I first looked at these cases, and saw that the summons concluded with desiring that it should be found and declared, not only that these parties were married, but that it should be decerned that the appellant should return to her husband,—that he should enjoy what is called in this part of the country a restitution of conjugal rights, I could not help feeling considerable doubt, whether, supposing there ought to be a declarator of marriage, this was a case in which, at the instance of Mr M'Gregor, you would compel this woman to return to cohabitation with him. I have reason to believe that no such judgment would have been given in this part of the island, and I have further reason, from what I see of the conduct of the parties, to believe that Mr M'Gregor had no wish that any such judgment as that should be given. When I look at the process with respect to the property, I think that his principal reason for praying a declarator of marriage was, not to repossess himself of the person of this lady, but to get the enjoyment of that property, to which he would insist, as the husband of his wife, he might have some claim. I desire, therefore, that it may be understood, if we are to consider this, as I believe it to be, an appeal from an interlocutory judgment of the Court of Session, brought under the authority of an Act of Parliament, (48. Geo. III. c. 151. § 15.), in consequence of a difference of opinion amongst the Judges, that your Lordships will be pleased to allow the individual who has now the honour of addressing you to say, that he does not admit, (he does not deny, because it would be improper that he should either admit or deny), that he desires it to be understood as standing quite neutral upon the question, whether this lady ever could be decerned to return to the embraces of Mr M'Gregor. June 20. 1828.

My Lords,—There is another point upon which I am exceedingly anxious to be perfectly distinct, and that is this, that when you are once satisfied that, according to the law of Scotland, there has been actually a marriage between A and B, no subsequent conduct is to be received in evidence in order to entitle you to say that that marriage, which has been actually had and actually celebrated effectually, is to be undone: if it be a regular marriage, actually celebrated and completely contracted, it is not to be undone upon probabilities arising out of subsequent acts and circumstances. On the other hand, notwithstanding what has been said about these Scotch marriages, that they are very easily formed and very easily got rid of, I take it there is nothing that the law of Scotland more clearly, more solemnly, or more consistently insists upon than this, that where a marriage is alleged to have been had by a promise per verba de presenti, or by a promise per verba

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de futuro, or by virtue of the implied promise that arises out of habit and repute ;—there is nothing it does so solemnly require, as that the consent to marry should have been full, deliberate, and free,—that it should neither be the effect of force nor fraud.

My Lords,—I desire also to give no opinion upon the question at present, for it is not before the House, though it is a question of very great consequence in my judgment, namely, whether you can or cannot, there having been a regular marriage in facie ecclesiæ, give evidence whether the marriage intended to be had was effectually had. Upon that I desire to express no opinion whatever, upon which some cases are to be found in the prints upon the table.

My Lords,—I am therefore exceedingly anxious, in this very important case, to press upon your Lordships' attention this, as what I take to be an indisputable proposition in law, namely, that if you find there was a marriage duly celebrated, actually had, that marriage cannot be got rid of by evidence of facts and circumstances done or observed by persons afterwards thinking it proper to disentangle themselves from the connexion of marriage, actuated by caprice or dislike of each other, or the base motive of inducing other persons to think that they may form matrimonial connexions with parties ;—when once you have got clearly to the conclusion that a marriage has been had, that marriage must be sustained, let the consequences be what they may in consequence of sustaining it with respect to third persons. Therefore the question now before your Lordships is really this, Was the ceremony that did take or is alleged to have taken place, at Joseph Robertson's upon the 23d of May—was it a mere ceremony gone through, or was it, on the other hand, an actual constitution of marriage? If it was an actual constitution of marriage, I am afraid we must consider it an actual constitution of marriage. You cannot undo it by reasoning upon circumstances which may have great weight upon your minds, leading you, however deeply, to lament that any such thing had taken place.

My Lords,—I would beg to add here, that, in giving my humble opinion upon this case, I feel myself fortified by what I have been desired to state, that, upon a very anxious attention to this case, a noble relative of mine, who long held the situation of Judge in the Ecclesiastical Court of this country, gives his full assent to its being stated to your Lordships, that he could not possibly sustain this marriage.

My Lords,—Having said thus much, I am led to revert now to the consideration of the substance of this summons. I hope I may be excused, taking into consideration that I had the honour of sitting in an important judicial seat, the most important judicial seat in this House, for nearly twenty-five years, if I take the liberty to repeat, perhaps for the last time, that which I have often before stated, that I do most anxiously wish, whilst on the one hand no man has been more desirous than I have been, whatever may have been said to the contrary, that questions arising upon the law of Scotland should be decided here upon the grounds and principles of that law, and that we should not govern

ourselves by English principles, or the application of English law, where it cannot be applied consistently with the principles of the law of Scotland: I say, I trust I may be excused if I may express my anxiety, for the sake of the judicature of that country, that their pleadings may be somewhat more accurately attended to than they usually are. I have been very much struck with the extraordinary nature of the present summons from the first, both upon the intermediate consideration of this case, and upon the present consideration of this case. Taking the summons to be what we call the declaration of the party the pursuer, it is next to impossible for any man to reconcile what he is pleased to state in the summons, with what the real nature of the case is as he has since made it out by the proofs he has offered to you, in order to induce you to decern in his favour. June 20. 1828.

My Lords,—I shall not trouble your Lordships by repeating what has been very accurately stated already upon the subject of the connection, not the relationship, but the connexion, that subsisted between these different parties, before the occurrences which form the subject of your Lordships' consideration took place. I begin, therefore, by adverting to the journey to Holytown in the spring of 1816; and let it be remarked, that unless I have deceived myself upon looking at this evidence, or by looking at it too often, which is sometimes the case,—let it be remarked, that before the journey to Holytown it seems to have been pretty well known to Mr M'Gregor that Mr Jolly was a suitor to this lady, and not only a suitor of this lady, but Mr M'Gregor seems to have felt that Mr Jolly was preferred by the lady to himself. My Lords, Mr M'Gregor, and Dr James M'Neill, who, let it be observed, was a clergyman as well as a medical man, go, according to the summons, to Holytown in the spring of 1816, on a jaunt, in company with the appellant, natural daughter of Dr James M'Neill, where an irregular marriage between them is alleged to have been celebrated by Dr James M'Neill; that an irregular marriage is alleged to have been celebrated, and the marriage to have been consummated by their spending several nights together in the same bed at Holytown aforesaid. If you come to look at the condescendence, that important circumstance of sleeping in the same bed is softened down to something of this nature, —to its being stated that they slept in the same room; and the actual fact is disguised, both in the summons and in the condescendence,—that fact which has been spoken to by Mary Hastie, a servant in the house, and who represents this——But before I state what her representation is, give me leave to say, that this matter of consummation that is alleged to have happened at Holytown was capable of proof, and might have made an end of the whole matter; but instead of there being any such proof, all the proof that there is, the great weight of evidence as far as relates to it, is the testimony given by Mary Hastie, which goes directly the other way. If it had been true that Dr M'Neill, a clergyman, married these parties,—if there was mutual consent on both sides, and Dr M'Neill, the father of the lady, a clergyman, gave

June 20. 1828. the benediction, and put their hands together in the manner that is stated in the condescendence,—if that had been true, what difficulty was it likely there should be (unless Scotchmen differ from Englishmen) in their going into the same bed,—there would have been consummation quite of consequence,—it would have been the natural consequence, and nothing else could have happened.

Now, what Mary Hastie says upon that is,—and if consummation, which with respect to this marriage you observe is stated in the summons, had taken place, had followed, it was impossible that Mary Hastie's evidence can be true, but there is nothing to contradict it;—what she states is this, that it happened unfortunately in this Scotch inn that there were not beds enough, or rather not rooms enough, for three persons to have separate rooms, there being two beds in one room, and one bed in another; and the Doctor having taken care of himself by going to bed first, a difficulty arose what was to be done; it seems a difficulty existed in the actual circumstances, viz. that the bride and bridegroom, as the summons represents them, could only find out one room with two beds in it. I think they could in all probability have been satisfied with one bed, if they had been married at that time, as it has been alleged; at least I should suppose so. But an arrangement is made in a very curious way, and as far as we have any evidence, instead of there being consummation, we must hold there was no consummation, because Mary Hastie says, that the lady was disturbed at the idea of sleeping in the same room with her newly acquired husband—that he slept in one bed and she went to another bed; but she had just so much delicacy, which I am very glad to see among our neighbours in the north country, that she would not go to that bed, unless it was surrounded by sheets, so that even her husband could not set the eyes of his affection upon her. They accordingly slept in separate beds the whole night; and instead of any body being called to prove those circumstances, which would have been undoubtedly proved to establish consummation if it had taken place, the whole evidence tends directly the other way.

What is done next? The parties return to Edinburgh upon the 20th of May in the same year 1816, and this ceremony at Holytown having been thought very irregular, though Dr M'Neill was a clergyman, no consummation of the marriage having taken place, it was thought there should be some regular marriage. So the summons states it, or rather, that that marriage at Holytown should be regularly celebrated at Edinburgh. This marriage at Holytown is in the summons considered as an irregular marriage, and in the proceedings no proof is made of it. If this was an irregular marriage, the defect of proof of which was to be supplied by another ceremony of marriage at Edinburgh,—if that marriage at Holytown, as the summons states it, was to be regularly celebrated at Edinburgh,—if this celebration was to be free from all objection, M'Gregor proceeds on the most uncommon course that, in

affairs of this kind, one has ever heard of. See how it is carried on. On the 20th they get to Edinburgh. There I may as well state, that a regular marriage in Scotland is, as I understand it, a marriage after publication of banns has taken place three times. In Erskine's Institutes he gives a very good reason for that; he says, that the banns must be proclaimed three times in the church, because it gives people time to consider whether, by the third Sunday, they will or not consent; but Mr M'Gregor thinks that the right way of getting rid of the difficulties that belong to that irregular marriage, and that private marriage at Holytown, is to do what? is, that the right way upon the 23d is to have, or to procure, or to endeavour to procure, a certificate of the publication of banns as having taken place upon three Sundays, which could not possibly have taken place, because between the 20th and 23d no Sunday whatever could have intervened; and then he thinks it proper to apply himself to Mr Smyth, stating that he means to be married that night. Mr Smyth mentions it to his clerk, and some persons connected with him, and they have a direction given them where to attend upon that night. Mr Smyth himself could not go; the clerk, I think, does go, according to the direction, to the Black Bull, and he finds nobody there. But this ceremony of marriage is had in the evening late: there is a difference about the time of night, Mrs Robertson saying there was a candle, and Miss Robertson saying there was no candle; but for the purpose of having a public indisputable regular marriage celebrated before Joseph Robertson, there were Mrs and Miss Robertson present at the ceremony, which I suppose could not have been made any better by his being also a clergyman of the church of Scotland than the marriage by Dr M'Neill himself, he being also a clergyman of the church of Scotland. A ceremony passes at the time of night spoken to by Mrs Robertson and Miss Robertson, and that is the only evidence, unless it is supposed to be evidenced by the book, the contents of which are inconsistent with some other parts of the evidence,—a book with reference to which I have wished to hear, but I have not heard yet, what made such a book as that produceable in evidence. It may, however, be so. I know why a register in England is admitted in evidence, because it is kept according as the law requires it to be kept. The law requires that there should be such a register, kept in a particular manner and form; but whether a private book kept by a private clergyman, not in such manner and form, not under and according to the authority of the law, would be evidence in England, is a question which could scarcely bear to be agitated. June 20. 1828.

Now I will not follow my noble and learned friend—if I may take the liberty of calling him so—through all his statement of this case, because upon such a subject as this he is much more competent to speak than I am; and I am happy to acknowledge, at this time of my life, the benefit I have received from his communications with me upon the Scotch law;—I will not follow him in discussing the effect of the evidence of Mrs and Miss Robertson, as to its being or not being defective in the respects in which he has contended that it is defective.

June 20. 1828. After observing that I wish not to be understood to have conceded it to be clear, that a cause of this sort should go on without other parties to it; or that there is not great danger in admitting a marriage certainly unobjectionable in form and circumstances, such as the marriage with Mr Jolly, to be affected by the admission of the woman who is represented to be a party in both marriages; I proceed here to say, that notwithstanding all the difficulties that rest upon the testimony of Mrs Robertson and Miss Robertson, I must look at this case as a case in which the woman's admission has been read and used as evidence; and whatever observation may be made upon the evidence of the Robertsons, as not sufficient to prove the identity of the parties or the particulars of the ceremony, in her admission this lady herself has made an acknowledgment that some ceremony of some sort took place at the house when she and M'Gregor were present. But then you must take the whole of her admission together; and taking the whole of her admission together, the question turns round again to be this, Can you, or can you not, admit evidence of facts and circumstances antecedent to that period? Can you, or can you not, admit evidence of facts and circumstances subsequent to that period, with a view to aid and confirm her in her admission, taking it altogether, in which she represents, that what then passed was not a case in which she can be held to have given consent, much less that free, solemn, full, and deliberate consent upon which M'Gregor claims as against her the character of husband?

Now, my Lords, that you may, with respect to what are called irregular marriages in Scotland, look at prior facts and circumstances, and that you may look at the subsequent facts and circumstances, I take to be quite indisputable. The next question therefore is, Can you look at such facts and circumstances with respect to an alleged marriage such as has been had in this case? Can you look at them as evidence to enable you judicially to determine whether there has been effectually had a marriage?

With respect to the irregular marriages generally, there can be no doubt at all, looking at the text writers,—there can be no doubt, if you examine the opinions of the Scotch lawyers which are to be found annexed to the case of Dalrymple *v.* Dalrymple; and I take it that the opinions of Scotch lawyers would be evidence of what is Scotch law. We have the illustrious names which are here mentioned, to which I may generally refer your Lordships. We have the illustrious names of Erskine, Craigie, Hamilton, Hume, Hay, and a gentleman that I shall call by the name of John Clerk, for fear you should think I am mentioning myself, and Cathcart, and Gillies, and Sir Islay Campbell.

Then the next question is, Is this alleged marriage, such as it is, to be looked at by the application of the same rules of law that apply to the marriages mentioned in the books as irregular marriages? My Lords, I find in these papers that doctrine of the same nature has been applied in two or three cases, even of regular marriages. I have already desired to protect myself against it being understood that I give

any opinion, whether it can or not be applied to what is strictly called a regular marriage in facie ecclesiæ; but if there have been decisions that apply them to regular marriages in facie ecclesiæ, surely there can be no difficulty in applying them to a marriage that is not a regular marriage; and then comes the question, is this a regular marriage?

Now the authority of the text writers holds this not to be a regular marriage, because they say it must be a marriage with proclamation of banns. Here there could be no proclamation of banns. My Lords, I cannot adopt that expression without guarding myself against its being understood that I mean to intimate, that if there is an irregular marriage without proclamation of banns, but where there has been a full, actual, deliberate consent given, that any subsequent circumstances will authorize you to say that that irregular marriage can be represented in any way as invalid. I do not mean to call in question at all the validity of such marriages—God forbid I should; but if you have defective evidence with respect to the actual proof of a deliberate, clear, and solemn consent in the transaction of the ceremony, the question then is, Whether you may not admit evidence with respect to this species of marriage as an irregular marriage, that you will admit with respect to other marriages that are acknowledged to be irregular marriages; and seeing that it is constantly admitted in irregular marriages, it does appear to me, I own, in this case, admissible evidence.

The next question will be, If it is admissible evidence, what is the effect of it? Now undoubtedly, with reference to that, I must say, with those eminent men whose names I have mentioned, that though there may be with respect to a great many cases doubts whether those decisions are just applications of the evidence upon the effect of which the decisions have been made, that does not affect the principle at all of the admissibility of the evidence, and the duty of the Court to attend to the full effect of the evidence, according to the best of its judgment, when that evidence is offered to its consideration. My Lords, with respect to cases of marriage where the young man is 14 and the young lady 12, there are cases in which, perhaps, more effect has been given to the supposed operations of deceit and fraud upon such persons than perhaps can be fully justified, recollecting that the law has said, that at those ages they are perfectly capable of giving full and deliberate and sufficient consent; though some allowance must be made for the difference of discretion between 21 and 14, yet, with respect to this particular contract, the law, strictly speaking, has held them equally capable as older persons of giving their consent. With respect to all the cases to which I am now alluding, both with respect to those very young persons, and with respect to other persons, in those cases that have fallen under consideration of the Courts, it does appear to me one matter is considered worthy of great consideration, What is the effect of all that passed? With respect to the question, Was free, deliberate, full, and solemn consent given at the time the ceremony passed, or did the ceremony pass without that which con-

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Now, my Lords, if that be so, let us look and see what the case is with respect to the conduct of the parties. I think it is sufficiently proved in this case, that, before the parties went to Holytown, Mr M'Gregor was fully acquainted with the circumstance that Mr Jolly was a preferable candidate. There is, in my judgment, no proof of the truth of that assertion which is to be found in this summons, that a marriage ceremony took place at Holytown, or that a marriage there was consummated; but I go further than that, because I think myself judicially authorized to say, that the allegation with respect to that supposed marriage at Holytown is utterly unfounded, and that there was no marriage there of any kind; that none was there consummated. Well, then, my Lords, when the parties come back again to Edinburgh, what is done for the purpose alleged in this summons of having a regular marriage? For the purpose of having a public regular marriage—a public marriage, in order to cure all the evils and inconveniencies that might arise from a private irregular marriage, that is so alleged to have taken place at Holytown, they go to Mr Joseph Robertson's. My Lords, if such was the purpose, how does it happen that you can scarcely find any thing in this evidence?—I do not say there is absolutely nothing—but there is nothing that I think you can call material or substantial, when thoroughly examined with all the proofs, by which it appears that Dr M'Neill, that any friends of the family, that any persons who visited, that any persons who had any intercourse with the family, had ever heard of such a thing as that this marriage was intended,—that it was to give regularity and publicity to the former marriage.

My Lords,—We know very well what happens in England about such things. If parties have gone to Scotland and got married, and are to be married again in England, does not every man know, that, under such circumstances, the purpose of having the marriage is to satisfy all the friends and connexions, as well as the parties themselves, that the holy estate of matrimony has been effectually and properly contracted; that is one of the purposes, as well as the purpose of giving ease and happiness to the minds of the parties themselves; and I believe it would be thought a very extraordinary thing, if a marriage for that purpose was to be had, without any body in the world having previously heard of it. Joseph Robertson the priest, and his wife and daughter, are the only persons who know of this ceremony of marriage, except the individual parties to it. Can any man suppose, if Dr M'Neill had, according to the allegations of this summons, at Holytown given away his daughter in marriage, had put her hand into the hand of this gentleman as her husband, and given the priest's benediction upon that occasion; that Dr M'Neill, between the day on which that marriage happened at Holytown, and the 23d of the month of May, should have become so weak and impotent in point of understanding, or so dreadfully

addicted to drinking, that they would not let him know any thing at all of the matter? There is no proof that he knew of any thing at all of this matter. Can any body believe, that if Dr M'Neill had conducted himself at Holytown in the way stated in this summons, can any man believe that Dr M'Neill would not have been present at this marriage if such a marriage was to be had? but not only do you find that Dr M'Neill did not know of it, but, bating the evidence of the application to Smyth, and Smyth's communication to his clerk generally, and the reference of Smyth and his clerk to the Black Bull Inn, (your Lordships know what followed on that communication and reference), no human being seems to be acquainted with this intended marriage previous to the ceremony, but the very individual who ought to have known nothing of it, if it was intended to be a satisfactory celebration of marriage—I mean, the man who appears to have been a disgrace to his profession. Of Mrs and Miss Robertson I say nothing; but I am sure, no person meaning to celebrate a regular marriage in order to support an irregular marriage, would think of being married at that time of night, in the house of such a man as Joseph Robertson, with no witnesses but these ladies; and not only with no other witnesses, but without a single person, out of the room where this ceremony of marriage was performed, being acquainted with the matter that was to take place, or with the purpose for which they were supposed to go there, and having it in their power to attend. June 20. 1828.

Then what says the summons in another respect? Those who know any thing of the law of Scotland, know the immense importance of the allegation of a proof of consummation. It is not even alleged in this summons, that this marriage was consummated; but I can conceive a reason for not alleging it—for I am satisfied it was not consummated.

My Lords,—I agree in this, that the story Mrs Jolly states is improbable; but is it half so improbable as the story that Mr M'Gregor states? My Lords, Can any body doubt, that if this was meant to be a regular marriage, in order to do away the objections against an irregular marriage, can any body doubt that there would have been proofs of consummation, when Mr M'Gregor must have known there were, at least I think there were, proofs of the non-consummation at Holytown? Can any body doubt you would have had such proof by the servants in the house of Dr M'Neill? But there is not the least evidence that deserves the name of an attempt to prove consummation at Edinburgh; and allow me to say, there is evidence to the contrary. When you come to consider the conduct of Mr M'Gregor with respect to Mr Jolly; and here let me notice, that unless I misunderstand this evidence, it does not appear that Mr Jolly was ever acquainted with what passed before Joseph Robertson at this strange place,—it does not appear that Mr Jolly had ever been acquainted that Mr M'Gregor was the husband of this lady: I

June 20. 1828. do not find any evidence of that; if there is any evidence of it, I have passed it by.

Lord Chancellor.—No, there is not any.

Earl of Eldon.—When you come to consider, that after this Mr Jolly is united to this lady upon the 13th of June, I think it is in the subsequent month; and when it is proved that Dr M'Neill, who is said by this summons to have given his consent to the marriage, and performed the ceremony of marriage himself at Holytown; when you consider that he is present, goes to Dr James Robertson's, that he goes there, and conducts himself in the deliberate, solemn, serious manner in which Dr Robertson states his conduct to have been regulated, whilst he gives away his daughter to Mr Jolly; when you consider further, that here has been an attempt made to prove, (let those believe it who can, after having read the evidence of Dr Robertson, and of his lady), that this Dr M'Neill was in a state of utter imbecility, either from drunkenness, or a failure in his constitution, or some other cause, between the journey to Holytown and this marriage upon the 13th of June;—I say, that the evidence in my judgment, which goes to impute to Dr M'Neill (in order to render inefficacious the evidence on the other side as to the state of Dr M'Neill) that imbecility, from whatever cause it arose;—that evidence, I say, must have been brought for the purpose of destroying the effect, the dreaded effect, of the important inferences to be drawn from his attendance on the marriage of the 13th of June, and his non-attendance upon the other on the 23d of May. The attempt to prove that imbecility wholly fails; and I should have thought myself bound upon my judicial oath, if I had been trying this before a jury, to have told them they ought to give no credit to that testimony.

My Lords,—It does not rest there. So far from Mr M'Gregor supposing he had a right to the person of this lady, I find in the evidence, that it is usual to give the friends, upon a Scotch marriage, gloves; that is the present that is made to them; and Mr M'Gregor receives a present of gloves, as a friend and well-wisher to the parties who had just been married. He does not attend, I believe, at the wedding-dinner, but he very frequently afterwards is to be found as a guest in the house of the parties. And when we come to the month of October in the year 1816, these parties go to Holytown again, and the Doctor goes too. He was so far recovered from this imbecile state, in which it was attempted to be proved that he was at the time of the marriage in June 1816,—he had so far recovered from his malady, as to be able to go there again. Mr Jolly and Mrs Jolly, and Mr M'Gregor and the Doctor, form the party: and here let us see whether we can come exactly to the conclusion, that parties are sleeping in the same bed, because they are sleeping in the same room as in the antecedent spring. What is the conduct of Mr M'Gregor, who is now to convince us there was a real marriage, with full, free, and deliberate consent, given upon the 23d of May 1816? He is at Holytown along with the parties.

What are the beds required? Dr M'Neill is there, and has a bed to himself; another is required for Mr and Mrs Jolly, and Mr M'Gregor contents himself with a bed for himself, as I understand the evidence. Let me fairly say, that Mary Hastie does not say expressly that Mr and Mrs Jolly slept together in the same bed, but she says she gave them a bed, because a bed was asked for—for Mr and Mrs Jolly. According to the first marriage at Holytown, Mr M'Gregor and his lady, as she must be supposed to be then, according to his case, lie in different beds, when there could be no reason in the world why they should not follow the good advice of Dr M'Neill, for he must be taken so to advise, if he had married them, by getting into the same bed; and then, after it is supposed she had been deliberately married to Mr M'Gregor, having taken a fancy to be married to Mr Jolly when they meet in October 1816, Mr M'Gregor then does not sleep in one bed and she in another, but, according to all that is the probable effect of this evidence, Mr M'Gregor sleeps in one bed, and Mr and Mrs Jolly in another; and that is to be taken in Scotland, which would not in England be taken, to be proof of a deliberate consent, that Mr M'Gregor was the husband of the lady, and not Mr Jolly. June 20. 1828.

My Lords,—I will call your Lordships' attention to another circumstance:—Mr M'Gregor had been in some measure or sort employed as the man of business of Dr M'Neill. Dr M'Neill had made a provision for his daughter, this Mrs Jolly or Mrs M'Gregor, according as your Lordships shall determine her to be the one or the other. He had given her not the whole of his substance in the first instance; however, from a sense of duty to his natural child, he seems to have thought it was necessary to give her the whole of his substance, and he gives it her by deed. Those deeds were put into the possession of Mr M'Gregor, as I understand the case, and Mr M'Gregor might naturally enough think, that if he was to tell this story to Dr M'Neill about this lady having first married him with his consent at Holytown, and then married him again at Edinburgh, for the purpose of having no doubt left upon the effect of the Holytown marriage; and that she had then married Mr Jolly afterwards, and in the Doctor's own presence, and given away by him; he might perhaps think that all the Doctor's good intentions in favour of this lady might be frustrated if he told the Doctor of these most improper transactions on the part of his daughter, as they must be admitted to be, if Mr M'Gregor represents what were really the facts of the case. He is silent, as is alleged for some such reason, until Dr M'Neill died. But speaking the truth after a man is dead will not enable him to act as if he was a living man. When therefore the Doctor was dead, does M'Gregor claim his wife? No; he attends the funeral, where Mr Jolly acts as chief mourner, and not Mr M'Gregor. After the funeral, the deeds are called for; he delivers them himself; he is as a visitor to Mr and Mrs Jolly, as other friends visit Mr and Mrs Jolly for some time, and he says nothing about this marriage till about the month of December 1817. Then,

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in that December 1817, my Lords, he makes a claim of marriage,—it has escaped me if the proofs establish an earlier claim. Permit me, my Lords, to say, that when I first read this case, I thought it a case so disgusting with respect to the moral conduct of the respondent, that nothing upon earth would have induced me to give my opinion upon it whilst I was under those impressions. I therefore made a covenant with myself, that no detestation of the conduct of this gentleman should influence my judicial mind. I trust and hope that it has not. I have nothing to do with the case except merely as to the law of the case, as it applies to the established facts. My Lords, what he then does is to state, that he has a claim of marriage, and your Lordships know the nature of his claim; and he then lodges his summons for the purpose of having a declarator of marriage, according to the prayer of the summons, that this virtuous lady, as he must think her, might be restored to his arms, that she might live happily with Mr M'Gregor, as Mrs Jolly or Mrs M'Gregor. But this claim is not brought forward till after all those circumstances had taken place. Notwithstanding all that, it is your Lordships' duty, if, under these circumstances, you can believe that there really was a marriage constituted, effectually constituted, upon the 23d of May, it is your duty, notwithstanding all that, to say she must be restored to his arms. Whether you ever will restore her to his arms I do not know, but I do not think that your Lordships will readily make yourselves a party to that sort of business.

My Lords,—My judgment, with respect to this declarator, goes upon this, that regard being had to the nature of the evidence which your Lordships have, it appears to me there is no reason to believe that there was a free, deliberate, and full voluntary consent given to constitute immediately the relation in law of man and wife at the house of the priest Robertson; that there is no reason from the proof to believe that there was consummation. The circumstances go to shew there was no such consent. They are evidence that the marriage was not understood by this gentleman himself to be a binding and valid marriage. This appears clear from his conduct subsequent to it, as well as from his conduct prior to it; the whole tends to shew no such consent was given; and although her story is improbable, it is not half so improbable as his story.

Under all the circumstances, admitting as I do the extreme danger that attends all questions about the dissolution of supposed marriages; looking on the other hand to it as a most important principle, that you should see that the most sacred relation of life is formed deliberately and fairly; upon the whole, I think the decision you ought to come to, (in all these cases you cannot, perhaps, be quite safe,—all that you can do is to be satisfied, when you pronounce judgment, that you are pronouncing the real effect of the proof), the best decision, in my opinion, is, that which should lead you to reverse this interlocutor of declarator of marriage.

I will again repeat, that if this declarator of marriage should be

supported, I still should entertain very considerable doubts indeed, whether, regard being had to all the circumstances of this case, the Court of Session ought to have been permitted to proceed one step further for the purposes of the ulterior object of this summons, without considering the point, whether, under such circumstances, they would, or would not, decern a restitution of conjugal rights. As to the fact of the alleged marriage itself, my opinion goes along with that which has been expressed by the noble Lord who has addressed the House, subject, nevertheless, to some consideration of the terms in which the judgment should be expressed; because nothing can be of greater importance, than that you should take care, that by the terms of the judgment you do not prejudice any future case. I would therefore, with your Lordships' permission, submit to you, that you should take some time to consider in what terms the judgment should be expressed; but with respect to the substance, that this declarator of marriage ought not to be supported, I perfectly agree with my noble friend who has preceded me. June 20. 1828.

Upon a subsequent day Lord Eldon said,—My Lords, It has occurred to me, since I before addressed your Lordships, that I omitted to notice the evidence of the lapidary, White, and that of a witness of the name of Neill. I shall only now say, that after repeatedly considering the effect of the testimony of both those witnesses, and the effect of the observation contained in the different printed memorials and cases, in support of and against their testimony, that testimony might render inaccurate some few expressions to be found in what I had before the honour of stating to your Lordships upon this case; but that testimony does not in any degree, in my judgment, authorize any change of opinion that this reversal should take place.

Lord Chancellor.—My Lords, I rise merely for the purpose of stating, that I entirely concur in the view of this question which has been taken by my noble and learned friends; and I am of opinion most clearly, that the judgment of the Court below in this case ought to be reversed. It certainly is not my intention, and indeed it would ill become me, after the manner in which this question has already been considered, and I may say exhausted, to take up your Lordships' time by travelling over the case; and I will therefore, in a very few words, state the grounds and principles upon which I think this judgment ought to be reversed. In the first place, I beg to look at the charge which is contained in the summons; and without going into detail with respect to the evidence, I will say this, that after carefully considering that evidence, reading it over and over again, I not only am satisfied that the charge contained in the summons is not made out in point of evidence, but I am satisfied it is in all its principles entirely disproved. The next question is this, Did that which took place, that ceremony which is supposed to have taken place at Joseph Robertson's, did it

June 20. 1828. amount to a regular marriage according to the law of Scotland? I am perfectly satisfied, that, according to the law of Scotland, it did not amount to a regular marriage in any representation of the case that has been made. If that be so, in what position do your Lordships stand? You are entitled to look to the evidence as to what did take place at Joseph Robertson's, as far as you can collect it from the witnesses that have been examined: as to that point, you are entitled to look at the conduct of the parties before that meeting, and you are entitled to look at the conduct of the parties subsequently to that meeting; and without going into the detail of the evidence, I will only state shortly, that I am satisfied, not only with reference to what took place before that meeting, but as far as you can collect the facts from what took place at that meeting, and immediately previously to it; above all, from the conduct of the parties subsequently to the meeting, of M'Gregor himself, that there never was at that meeting a full, deliberate, uninfluenced consent of both parties, to enter into the situation and state of marriage,—a full, free, deliberate consent without influence. If I am satisfied that the evidence justifies me in stating this, then I must say, that the judgment of the Court below cannot be sustained; and I must concur with the opinion and judgment of the noble Lords who have preceded me, that that judgment ought to be reversed. With respect to the particular form in which your Lordships should ultimately pronounce the judgment, that will be the subject of future consideration. I agree entirely with the noble Lords who have already expressed their opinion upon this occasion.

Appellant's Authorities.—(Want of Parties.)*—Stair, App. 792.; 4. Ersk. 1. 66.; Campbell, June 19. 1747, (10,456.); Pennycuick and Grinton, Dec. 15. 1752, (12,677.); 4. Stair, 45. 20.; 1. Ersk. 6. 49.; Craig, 2. 18.; Phillip's Evidence, vol. ii. p. 239.—*(Merits.)*—1. Ersk. 6. 10.; 1. Bank. 5. 23.; Cameron, June 29.

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* A search for precedents on the above point (Want of Parties) was made in the Records of the Commissary Court, and the following detail given of the cases thence collected:—

17*th March* 1741.—MARY GAINER and Children against Captain DALRYMPLE.—Captain James Dalrymple cohabited with Mary Gainer for thirteen years, during which period she had seven children, two of whom died; the remaining five are pursuers in the action, along with their mother. It appears, from the statements of the parties, that their intimacy commenced at Dublin in Ireland, where the pursuer was at the time attending school. She was carried off by the Captain to Kilkenny, where they resided, until he was ordered to Gibraltar, and by his request she followed him thither. He returned to London after several years' absence, and brought the pursuer and her children along with him. In consequence of the pursuer's advancement in pregnancy, and the nature of the season, (it being winter), he left her and the children, and came to Scotland. Some time thereafter, the pursuer and her children arrived at Leith. They were visited by the Captain and some of his friends, when some proposals were talked of for settling the children and the pursuer at Inveresk. Mary Gainer states in the summons, that she had always been acknowledged as the wife of Captain Dalrymple, and went by his name on her arrival at Leith. But he being

1756, (12,680. and Monboddo's Decisions, 351.); Allan, Aug. 11. 1773, (not reported); M'Innes, Dec. 20. 1781, (12,683.); Taylor, Feb. 16. 1786, (12,687.); M'Lauchlan, Dec. 6. 1796, (12,693.); M'Gregor, Nov. 28. 1801, (12,697.); Napier, Nov. 1800, and June 1801, (see Dalrymple *v.* Dalrymple); Sanctius de

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on the eve of marriage with a lady of fortune, on his subsequent visits forbade the pursuer to use his name, and thenceforward no communication passed between them. The pursuer was reduced to extreme penury. In the mean time, Captain Dalrymple was married to Margaret Cunninghame; learning which, the pursuer and her five children went to London for some time; and on her return, as she still assumed the name of the Captain, he brought an action of putting to silence, which was defended by Mary Gainer, on the allegation that she was his lawful wife. During the dependence of the Captain's action, she brought an action of declarator, legitimacy, &c.; in which, after narrating the several facts from which she concluded for declarator of marriage, she adds, that at a time when she 'was utterly incapable to find out where Captain Dalrymple 'was, or to get information what he was about, so that, without her knowledge, or having 'opportunity to prevent it, he took upon him to accomplish, as she afterwards learned, 'on the 24th or 25th days of August 1737, a marriage with the said Margaret Cun-'ninghame.' The execution of citation upon the summons does not bear that Margaret Cunninghame was made a party, nor did she of her own accord appear in the cause. The interlocutors of the Commissaries assoilzied Captain Dalrymple from the conclusions declaratory of marriage, and in the action of putting to silence decerned against Mary Gainer.

23d October 1754.—ISOBELLA REIKIE against ALEXANDER WILSON.—In September 1750, Reikie and Wilson were married in Edinburgh by a minister before witnesses, and cohabited as man and wife till the month of March following, when they separated. On the 30th August 1754, Wilson subscribed an acknowledgment, professing that Anna Grahame, with whom he then lived, was his 'lawful married spouse.' Founding upon this and other acts of adulterous intercourse, Isobella Reikie brought an action of divorce before the Commissaries, who, upon the proof adduced, decerned against the defender in the divorce. Anna Grahame was not made a party, nor does she appear in any character in the process.

13th October 1756.—ANNE MORRISON against WILLIAM DUNLOP.—William Dunlop, chapman and burgess in Glasgow, was privately married to Mary Boyd in the month of September, or some time in the months of June, July, August, or October 1753. He afterwards, on the 10th or 12th November in the same year, married the pursuer, Anne Morrison, in a similar irregular manner. The procurator-fiscal for the town of Glasgow convened the several parties, viz. Boyd, Dunlop, and Morrison, before the Magistrates, on the 26th of November, in virtue of the 34. Charles II., when Dunlop, on his own confession, was convicted of being privately married to Anne Morrison, and fined and amerciated, &c.; and in respect of his denial of being married to Mary Boyd, which she affirmed he was, ordered to be imprisoned on a charge of bigamy, until liberated in due course of law. On the 24th January 1756, Anne Morrison raised her action of declarator of nullity of marriage against William Dunlop, referring to and founding in her libel on the proceedings at the instance of the procurator-fiscal, and the declarations of the parties under these proceedings, extracts of which were produced in process; and also upon marriage lines, severally given to Mary Boyd and Anne Morrison. The summons was only served on Dunlop: his wife, Mary Boyd, was not made a party defender, but was adduced as a witness for the pursuer. The Commissaries declared Anne Morrison's marriage null ab initio.

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Matrimonio; Haggard's Reports, vol. ii. p. 280.; Lord Hailes; Tait on Evidence; Forbes, July 12. 1709, (16,718.); Murray, June 1730, (16,741.)

Respondent's Authorities.—(Want of Parties.)—Aitken, June 16. 1824, (2. Shaw's

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18*th August* 1672.—CHARLOTT ARMSTRONG and Daughter against JOHN ELLIOT.—Charlott Armstrong raised an action of declarator of marriage, legitimacy, and divorce, against John Elliot, on 31st March 1760, in which she states, that a private marriage was contracted between her and John Elliot in the month of March 1758, and that they thereafter lived and cohabited together as husband and wife for several days, and of which marriage a female child was procreated. It then sets forth, that he has deserted her, and for several months past has cohabited at bed and board with a woman, known not to the pursuer Charlott Armstrong. While this action was in dependence, and upon the 17th May 1760, Janet Boston brought another declarator of marriage, adherence, and legitimacy, against the said John Elliot, alleging that a marriage, of which a male child was born, had been contracted between the parties on the 7th September 1757, and concluding for declarator of the said marriage, &c. Her summons states, 'that Charlott Armstrong, daughter of John Armstrong in Sorlie, pretends to be wife 'to the said John Elliot, as having been married posterior to the complainer's marriage, 'though she could not lawfully be so.' In the execution of citation, Janet Boston did not call Charlott Armstrong; but before Elliot had given in defences to Armstrong's action, Janet Boston presented a supplementary petition to the Commissaries, stating, 'That in the month of September 1757 she was privately married to John Elliot, 'younger of Halgreen, who was her father's clerk. For some family reasons the mar-'riage was not made public till after Mr Boston's death, but it was known to several 'persons, and in consequence of it the petitioner was delivered of a son at Edinburgh 'on the 18th July 1758; and the petitioner and the said John Elliot have lived happily 'together as man and wife; and she has raised before your Lordships a process for 'declaring her marriage with the said John Elliot, and the legitimacy of the child born 'of the marriage,—as the libelled summons, and execution thereof produced, bears: 'That the petitioner understands one Charlott Armstrong has raised a process for de-'claring her marriage with the said John Elliot, and most injuriously also concluding for 'a divorce for adultery with the petitioner. The petitioner's interest must appear ob-'vious to the said Commissaries in many lights, and therefore the petitioner takes leave 'to state some few things for your Lordships' consideration. In the first place, The 'pursuer (Armstrong) states her marriage with the defender to have been on the 7th 'March 1758, according to lines pretended to be signed by him, though the petitioner 'is informed by her husband this is a fiction; yet supposing it were true such a decla-'ration had been signed, it could have no manner of effect, because, unluckily for the 'pursuer, she has happened to make it posterior to the petitioner's marriage by several 'months; 2d, That any intercourse and promise that may have passed between them 'even prior to the defender's marriage with the petitioner, yet this marriage must be 'considered and held in law to be a medium impedimentum or bar against the defen-'der's obligation to the pursuer ever having any effect other than damages for such 'injuries as the pursuer can make appear have been done her.' The petition prays, that it may 'therefore please the said Commissaries to conjoin the processes, and either 'sist the process of Charlott Armstrong until the diets of compearance in the complai-'ner's summons has expired, which is not till 11th June next, or to dispense with the 'inducie, and ordain both processes forthwith to be insisted in, and allow the defender 'John Elliot to give in defences in both processes, and assign him a short day to that 'effect.' Charlott Armstrong gave in answers to this petition. Upon considering which, and answers, with the two processes referred to, the Commissaries, on the 26th

Appeal Cases, No. 51.); Chapman and Lindsay, Feb. 23. 1826, (4. Shaw and Dunlop, No. 320.); Dalziel, July 10. 1790, (16,780.); Hargrave's Law Tracts; case of Duchess of Queensberry; Scaccia de Sententiis; Heraldus de Rebus Judi- June 20. 1828.

May 1760, conjoined the two processes, and appointed the defender to give in his defences to both processes. Both parties went to proof, and the Commissaries found facts and circumstances proven to infer marriage between Charlott Armstrong and John Elliot previous to any pretended marriage with Janet Boston; and decerned in the action at the instance of the said Charlott Armstrong for marriage, legitimacy, &c.

13*th December* 1777.—JOHN CAIRNS against MARGARET FERGUSON.—The summons states, that after the parties were married, Margaret Ferguson left the pursuer, and contracted a marriage with a James Surrel, and went to London. The defender was summoned as forth of Scotland, and the divorce passed in absence.

24*th June* 1780.—HELEN STEWART against JOHN M'INROY.—The libel of declarator of marriage states she had been married to M'Inroy in 1763; that he has deserted her, and married another woman of the name of Jean Ralston or Mrs Gourlay, with whom he cohabited for some time in Glasgow, and afterwards in Greenock, before he sailed on his present voyage to the East Indies. That the defender lived with a woman not the pursuer; no evidence of the fact appears in the proof. The defender was abroad when cited, and the proceedings went on in his absence. Jean Ralston was not called, nor did she appear.

28*th September* 1780—JANET SPENCE against WILLIAM EDMOND or HADMOND.—The pursuer alleges in the summons, that the defender lived and cohabited with a woman named Elizabeth Moubray, who had children by him, and was sometimes passed as his wife. The proof only goes into the inquiry of adultery. The defender did not appear.

3*d July* 1780.—DONALD M'NAIR against ISOBEL FORBES.—This case is exactly similar in its circumstances to the one immediately preceding; the second marriage is a mere allegation, of which no proof was taken. The decree (of divorce) passed in absence.

2*d June* 1790.—ELEONORA HANNAY against JOHN DALZIELL.—In a summons of declarator of marriage, legitimacy, aliment, damages, &c. the pursuer alleges, that, in consequence of a reciprocal attachment between her and the defender, they contracted a marriage, of which a child was procreated, and cohabited privately as husband and wife during the months of January and February 1787; that the correspondence was discontinued by John Dalziell, who thereafter attached himself to a Miss Kelly, who came to reside in the neighbourhood of the parties; and that on being required by the relations of the pursuer to take her the pursuer home, the said John Dalziell alleged, that he had been deceived into a matrimonial engagement with Miss Kelly, and could not acknowledge the pursuer as his wife. In the defences given in for John Dalziell, he contended that the libel concluded for marriage on the ground of a promise and subsequent copula. He denied the marriage, and urged that the promise could only be proved by his writ or oath, which the Commissaries found. In this action, Miss Kelly was not called. The defender was examined judicially on the subject of the libel: in his declaration he continues to deny the libel, and 'declares, that he never expressed a love 'and regard for the pursuer, either to herself or to any other person whatever; and that 'he never concealed his attachment for the lady to whom he is now married, and that 'she was the sole object of his affections; and these professions were made and publicly

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catis; Mauritius de Jure Interventionis; Dalrymple, Dodson's Report.—*(Merits.)*—1. Ersk. 6. 10.; M'Innes, Dec. 20. 1781, (12,683.); Taylor, Feb. 16. 1786, (12,687.); M'Lauchlan, Dec. 6. 1796, (12,693.); M'Gregor, Nov. 28. 1801,

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'known in the whole town of Wigton, for two years before that event.' In the course of the litigation the pursuer gave in a minute, referring the promise of marriage to the oath of the defender; but before the Commissaries had advised this minute, the pursuer gave notice to the Commissaries, that being satisfied that the defender would defeat her claim from want of evidence, she had married Alexander Turnbull, mariner in Wigton, and restricted her libel to the alternative conclusion of damages and aliment for her child. The husband of the pursuer was, on the motion of the defender, sisted for his interest; and the Commissaries assoilzied from the conclusions declaratory of marriage, &c., and proceeded to consider the question of damages.

28*th December* 1791, 4*th January* 1792.—JAMES DALRYMPLE against SUSANNAH CUNNINGHAM.—The summons of divorce states, that these parties were married in 1772, and had three children of their marriage; that they lived separate after November 1772; that after that period the defender had associated and lived with a person named Mills, a comedian deceased, whose name she assumed, and after his death wore mourning as his widow; and that at the date of the summons she lived with Fingy, a comedian, and assumed his name. The defender was summoned at the pier and shore of Leith. No opposition was made for the defender.

8*th August* 1792.—JEAN LILLIE against JAMES HOGG.—The summons (of divorce) states, that the parties were married in December 1776, and lived together for a number of years in different parts of Scotland; that the defender had gone to England in 1784, and in the village of Adstone, Cumberland, cohabited for several years thereafter with a Mary Middlemist, in the character of husband and wife. The defender was summoned at the pier and shore of Leith, &c. No appearance was made.

24*th October* 1792.—Mrs JANET ALLISON against CAPTAIN BAILLIE.—The summons (of divorce) states, that the parties were married in 1780, and lived together as husband and wife; that in 1789 the defender had given up and totally alienated his affections from the pursuer, and on his passage to the East Indies he pretended to contract a marriage with Miss King, and lived with her at bed and board in the East Indies, &c. The defender was summoned as forth of Scotland. No appearance was made for him.

22*d February* 1793.—MARY CHISHOLM against DANIEL M'INTOSH.—The summons (declarator of nullity of marriage) proceeds on an allegation that the defender and pursuer were married on the 24th April 1789, but that he had been previously married to a Christian Nicol, who was still in life. The defender was summoned as forth of Scotland, and no appearance was made.

12*th June* 1793.—MARGARET LAW against ALEXANDER RULE.—In the summons (of divorce) the pursuer alleges, that the parties were married on the 18th July 1787; that in 1789 the defender went out to Gibraltar, carrying with him a woman named Mary Young, whom he pretended to marry, and who lived and cohabited with him at Gibraltar as his wife. The defender was summoned as forth of Scotland, and no appearance was made in the action.

27*th February* 1795.—CATHERINE JOHNSTONE against THOMAS WRIGHT.—The

(12,667.); Napier, Nov. 1800, and June 1801, (see Dalrymple *v.* Dalrymple); M'Kenzie, March 8. 1810, (Fac. Coll.); Niven, (Fountainhall, vol. i. p. 501.); Tait on Evidence; Barber, July 1732, (16,742.); Young, Dec. 8. 1738, (16,743.); June 20. 1828.

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summons (of divorce) stated, that marriage was contracted between the parties in January 1787; that the defender, for three years prior to the date of the action, February 1793, had contracted an adulterous connexion with Sarah Tatershalls, and, pretending a marriage, went with her to America, where they lived as man and wife. The defender was summoned as forth of Scotland, and no appearance made.

24th August 1796.—PIRRIE against LUNAN.—This case (of divorce) is in its circumstances similar to the above. The defender is said to be residing with another woman in England. He is summoned as forth of Scotland. No appearance was made for him in the action.

19th July 1805.—ANN JUNIOR and Children against HUGH ROSS.—The pursuer states in her libel, (declarator of marriage, adherence, and aliment), that she had raised an action for aliment against Hugh Ross, but he having denied his marriage with the pursuer, and alleged that he had since married a woman of the name of Noble, with whom he cohabited, the Court of Session had sisted that process, until the marriage of the pursuer and Hugh Ross should be established in the proper Court. She therefore had brought the present action to have the marriage declared. Noble was not called. The defender Ross was summoned, but failed to appear. The Commissaries allowed the pursuer a proof of her marriage: a commission was taken to examine witnesses at Inverness, &c., by the report of which it was established, that the pursuer and defender were married at Inverness about thirteen years previous to the date of the action, and the Commissaries decerned accordingly.

26th May, and 1st June 1810.—BARBARA LUTIT against GEORGE NEILL.—In the summons (declarator of marriage, with an alternative conclusion for damages), the pursuer narrates the particular circumstances upon which she founds her marriage. In the defences the defender admits that he had kept the pursuer as his mistress for some time, and denies any marriage ever having existed between them; and that lately he was publicly married to the daughter of Mr George Gibson, a respectable merchant in the town of Haddington; that they had been married by Dr Lorimer, one of the established clergymen of the town, after regular proclamation of banns, and their marriage was publicly announced in the newspapers. The pursuer did not deny her knowledge of this fact. The second wife was not made a party. The pursuer's proof went so far as to establish that the pursuer and defender had been addressed in presence of each other as married persons, and paid the usual compliments of newly married people, without any demur on the part of the defender. On going for the midwife he spoke to a person in the hearing of others, saying, Mrs Neill was very ill, &c. &c. The Commissaries assoilzied the defender.

12th July 1811.—ROBERT MONCREIFF against ELIZABETH KAY.—An action of declarator of nullity of marriage, founded upon the allegation that the defender was, at the time of contracting the marriage, married to a William Lyle, boot-maker, residing in London. The allegation was proved, and the Commissaries decerned.

15th and 16th August 1811.—JEAN RAMAGE against JAMES M'INTOSH.—The libel (declarator of nullity of marriage) states, that she was married to the defender by Mr Robertson in March 1811; and that after this marriage she discovered that he was

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Haggard's Reports; Hailes's Canon; Hume on Crimes, vol. i. 462.; vol. ii. 329.; Mogg, Addam's Reports, 2.; Fletcher, Coxe's Reports; Hailes's Reports, vol. i. 561.; Elchies, No. 7. voce Proof.

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married to another woman named , still alive. The fact being proved, the Commissaries decerned.

1819—1824.—Mrs JOANNA GORDON or DALRYMPLE, against JOHN WILLIAM HENRY DALRYMPLE, Esq.—After the pursuer succeeded in her action of declarator of marriage against Mr Dalrymple, she brought an action of divorce against him, on the ground of adultery with Miss Laura Manners, sister of the late Duchess of St Albans, with whom the defender had also contracted marriage, &c. &c. On the 26th November 1819 the Commissaries found generally facts and circumstances to warrant a divorce. The pursuer then petitioned the Commissaries, that the name of Miss Manners should be inserted as an adulteress. 10th December 1819, the Commissaries did so. Appearance was then made for Miss Manners, and the Commissaries allowed her petition to be answered. In her petition she contended, that as soon as she became acquainted with the finding of the Court declaring Mr Dalrymple married to the pursuer, she ceased to cohabit with him; that there was therefore not a guilty knowledge; and that she was innocent of the crime of adultery; and that the charge in the interlocutor upon her reputation would materially affect her status in society: that she ought not to be found guilty of a crime by the decision in a case to which she was no party, without being permitted to state any defence, and upon evidence taken without her knowledge, and without being allowed to bring forward such evidence as, if she had been a party, she might have done.

1*st December* 1810.—ROXBURGH against THOMSON, TEMPLETON against THOMSON.—Each of the pursuers claimed Thomson as her husband. Both actions of declarator of marriage were directed exclusively against Thomson: No other person was cited. Roxburgh voluntarily entered appearance in Templeton's action; in favour of whom ultimately decree was pronounced.

6*th July* 1827.—DEAS against HAMILTON.—Deas stated in her summons, that she was married to Hamilton in 1788, and concluded for declarator of marriage and aliment. He denied the marriage, and after noticing the pursuer's silence for thirty-seven years, he proceeds, 'He has been married to his present wife (Jean Stevenson) for upwards of thirty-three years, and has a family who have arrived at manhood, and one of them is married and has children.' Jean Stevenson was not called, nor did she make any appearance in the action. The Commissaries assoilzied, on the ground of the pursuer having failed to adduce legal evidence of her marriage.

12*th May* 1827.—LEES against HAIG.—Here Lees stated in her summons that she had been married to Haig, and that they cohabited together as man and wife from the year 1821 to 1823, when he deserted her, and concluded for declarator of marriage and aliment. Haig denied marriage, and stated that he has since been lawfully married to Miss Phillip. The pursuer replied, that 'she does not know whether the forms of the 'marriage ceremony took place between the defender and Miss Phillip, but be that as 'it may, she knows that the pursuer is the defender's lawful wife.' The second wife was not called, nor did she appear. The defender was assoilzied.

A number of other cases were referred to, but merely their dates and names given.