

[23d August 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 36.) EDWARD HOGGAN, Writer to the Signet, Appellant.¹
[*Pemberton—Sandford.*]

ELIZABETH CRAIGIE, Daughter of George Craigie, some-
time residing at Clan-Gregor Castle, Respondent.

[*Attorney General (Campbell)—James Anderson.*]

Marriage. — Circumstances held sufficient to constitute a marriage (affirming the judgment of the Court of Session). Per L. C. It is not necessary to prove the contract itself; it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle, the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage.

Marriage (promise cum copula). — Question as to the application of the rule of law in reference to promise subsequente copula, in cases in which cohabitation has also preceded the promise. (See p. 971.)

Question as to the effect of a release of a promise of marriage intervening between the promise and a subsequent copula. (See p. 974.)

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AN intimacy had subsisted between the appellant and respondent, which resulted in the birth of a child in September 1832. The appellant, subsequent to this event, granted the respondent a letter settling 10*l.* per annum on her during life. In January 1834 the respondent discovered symptoms of pregnancy. On the 8th March 1834 the appellant delivered to the respondent the following document:—“Dear Elizabeth,

¹ 15 D., B., & M., 379. ; S. C. 16 D., B., & M., 584.

“ Under existing circumstances I feel anxious to pro-
 “ vide for you after my decease, as far as in my power,
 “ and with that view I shall, at my decease, leave a
 “ declaration acknowledging you as my lawful wife,
 “ which will secure to you the annuity payable from the
 “ Widows Fund of Writers to the Signet. It is of the
 “ utmost importance that this intention should not be
 “ made known, as utter ruin, in that event, must fall
 “ on me, and were I to show or give you possession of
 “ the declaration, I would then be compelled to an-
 “ nounce the fact to the Collector of the Widows Fund
 “ within three months, under forfeiture of the annuity.
 “ The declaration, therefore, shall only be delivered at
 “ my decease, in the event of the most strict secrecy
 “ being adhered to regarding this communication; and
 “ I hereby declare, that in the event of the contents of
 “ this letter being made known to any other person or
 “ persons, except your father and mother, the letter shall
 “ be of no avail, and shall in no manner, of way be
 “ held as binding, or used as a document against me.
 “ I am,” &c. This document was antedated 25th Ja-
 nuary 1824. On receipt of this document the respon-
 dent wrote and presented to the appellant the following:—
 “ 1834, March 8th. Dear Edward, I do hereby declare
 “ to take you for my lawful husband, in terms of the
 “ document which you have made out, and that I will
 “ not make it known to any but my father, mother, and
 “ those friends which I wish to be on terms of intimacy
 “ with. But should the fact become known, and I have
 “ no hand in it, I will not hold responsible, nor forfeit
 “ my claim. I will do all to conceal it. Yours,” &c.
 In reference to this latter document it was averred on
 record by the appellant “ that on perusing it, as it ap-
 “ peared to him to have been written for a sinister pur-

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“ pose, he instantly, and in the pursuer’s (respondent’s)
“ own presence, threw it into the fire and burnt it.”

On the 29th March 1834, the appellant delivered to
the respondent the following additional document:—

“ 29th March 1834. Dear Elizabeth, It is most assu-
“ redly my intention to provide for you to the utmost
“ extent my means will permit, during the remainder
“ of your life, while we are separate from each other.
“ If I made any statement last night to your sister to
“ the contrary, it was not my intention. Whatever
“ allowance is made is gratuitous on my part, and any
“ abuse or attempt to compel me to increase these pay-
“ ments will be attended with a contrary effect. I pro-
“ pose giving you 50*l.* this year, in full of all expenses
“ of maintenance, payable at two terms, and the re-
“ maining years to be regulated by circumstances.
“ The doctor and nurse’s expenses to be paid. Yours
“ truly.” In the first paragraph of this document after
the words “ remainder of your life ” there was originally
written “ while unmarried,” but the appellant, at the
request of the respondent, substituted the words which
conclude the paragraph as above. The above docu-
ments were the result of repeated applications by the
respondent and her parents to the appellant to acknow-
ledge the respondent as his wife. The respondent having
obtained an opinion of counsel, advising her to obtain a
publication of her marriage, the appellant on 1st April
1834 delivered to her the following additional docu-
ment: “ I hereby declare most solemnly before Almighty
“ God, that I never granted a letter to any one, such
“ as I have given to you, and cannot now grant any
“ letter with such an obligation to any other person, as
“ I consider myself bound by my letter.” The appel-
lant averred on record in reference to this document

that it “ was written in order to satisfy the respondent
“ about her annuity.”

On the 2d of April the respondent applied to Mr. Robert White, W. S., as her law agent, and, in consequence, after consulting counsel, a summons of declarator of marriage was prepared. An arrangement then took place, the nature of which was very differently described by the contending parties: by the respondent it was stated that the appellant had agreed, in writing, to acknowledge her status in the most unequivocal manner; the appellant, on the other hand, averred that the only obligation on his part was, that he should make an adequate provision for the respondent by means of annuity. In terms of said arrangement, (whatever might have been the true nature of it,) the parties proceeded to the house of Mr. White together, on the 22d April 1834. The respondent went into Mr. White’s house, and the appellant waited for her in the street. The respondent afterwards rejoined the appellant, when she informed him that she had obtained from Mr. White the summons and the letters above mentioned. The parties afterwards went to South Queensferry in a street coach, and lunched there. While there, the respondent showed the appellant the papers she had received from Mr. White; upon which the appellant observed, that Mr. White must be in possession of other documents. The respondent then transcribed and delivered to the appellant the following letter, addressed to Mr. White :
“ As Mr. Hoggan and I have now arranged the matter,
“ I withdraw all proceedings, and request you to deliver
“ the whole papers, originals, copies, and drafts, still in
“ your possession, connected with this business, to the
“ bearer, who will settle your account. I am,” &c.
The parties then agreed to cross the ferry, and before

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going, the appellant addressed the following letter to the respondent's mother: "To prevent the unnecessary
 " and very unpleasant exposure which must have taken
 " place had the intended action gone on, Elizabeth
 " and I have arranged and agreed to put a stop to all
 " proceedings; and I hope, from the arrangements
 " which I have made, there will be no cause to regret.
 " We shall return to Edinburgh to-morrow or next
 " day." The parties having spent the night together
 at the North Queensferry, they proceeded on the following day in a post-chaise to Burntisland, and the following is the respondent's statement of what took place there: "Having left Edinburgh unexpectedly, she
 " had no trunk or secure place in which she might put
 " the papers she had received from Mr. White, and
 " the letter dated 22d April 1834, which had been
 " written and delivered to her at Queensferry. The
 " whole consequently remained in her reticule. In the
 " course of the evening, having gone out of the parlour
 " for a few minutes, she left the defender there, and
 " the reticule with the papers in it lying on a chair.
 " On her return she observed that the defender had
 " gone out, and that the reticule was not in the room.
 " She became alarmed, and searched the apartments
 " carefully for the reticule and papers, but could not
 " find them. During her search the defender returned
 " to the room, and on being asked if he knew where
 " the reticule was, he presented it to the pursuer, who
 " instantly observed to him that none of her papers
 " were there. Upon this he admitted that he had
 " destroyed all her letters and papers, not, as he alleged,
 " for the purpose of defrauding her, but merely in
 " order to obtain the delay of some months in the
 " publication of their marriage, for which he had so

“ anxiously besought her parents. He warned her, at the same time, that if she mentioned the destruction of the documents, he would cast her off entirely.” The appellant denied this version of the transaction; he admitted that the letters, &c. were destroyed, but he averred that this was done with the respondent’s express consent and approbation.

After moving about for some time to different parts of the country, and for a short time separately, the appellant took a house for the respondent in Edinburgh; but, on the morning after the respondent had entered the house, the appellant having peremptorily refused to acknowledge her as his wife, or to permit her to be addressed as such, she removed to the house of her parents. The present action of declarator of marriage was then instituted.

Upon closing the record a proof before the commissaries was ordered in support of the averments therein respectively, and the same having thereafter proceeded before the commissaries, the respondent, in the course of it, called Mr. Robert White, writer to the signet, as a witness, to whose admissibility the appellant objected; and she likewise called as witnesses George Craigie, her father, and Ann Craigie, her sister, to whose admissibility the appellant also objected. The commissary-examinator made avizandum with these objections to the Lord Ordinary, and his Lordship repelled in hoc statu the objection to the admissibility of the said Robert White as a witness, reserving the effect of what might be brought out in his examination in initialibus, and made avizandum with the debate on the objection to the admissibility of the said George Craigie and Ann Craigie, the father and sister of the pursuer, as witnesses. Mr. White having thereafter

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been examined in initialibus, the appellant repeated his objection to his admissibility; whereupon the commissary allowed the examination of the witness in causâ to proceed, and appointed the same to be taken apart, to be sealed up to lie in retentis, subject to the future orders of the Lord Ordinary. His Lordship repelled the objection taken to the examination of Mr. White in initialibus, and appointed his examination, as sealed up, to be opened and produced in process.

In the course of Mr. White's deposition as a witness in causâ, he was interrogated, on the part of the respondent, on what ground, and for what purpose, she had requested him to give her up the documents before referred to, but the appellant objected to the interrogatory as incompetent, and the commissary-examinator allowed the question to be put and answered, but to be taken on a paper apart, and sealed up to lie in retentis, subject to the future orders of the Lord Ordinary.

On considering the objections taken by the appellant to the examination of the said George Craigie and Ann Craigie, the Lord Ordinary remitted to the commissaries to allow their examination to proceed, and in hoc statu, to seal up their depositions, that they might lie in retentis, subject to the future orders of the court.

The proof for both parties having been concluded, the Lord Ordinary appointed the parties to prepare and lodge mutual minutes of debate upon the competency of opening up the sealed depositions, and minutes of debate having been given in, the Lord Ordinary pronounced the following interlocutor:—
 “ 26th Nov. 1836. The Lord Ordinary having con-
 “ sidered the minutes of debate, in respect of the special
 “ circumstances of this case, as established by the
 “ documents in process, and the proof already taken,

“ repels the objections offered by the defender to the
 “ admissibility of the pursuer’s father and sister, as wit-
 “ nesses: and also repels the objection to the question
 “ put to the witness, Robert White, and appoints the
 “ sealed packets referred to in the minutes to be
 “ opened, and to form part of the process.”¹

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¹ “ *Note.*—The Lord Ordinary, upon again considering the objection to
 “ the examination of the pursuer’s father and sister, is rather confirmed
 “ than otherwise in his former opinion. The general rule unquestion-
 “ ably is that witnesses so circumstanced must be rejected, and the Lord
 “ Ordinary fully concurs in the opinion that actions like the present
 “ do not necessarily demand any relaxation of that rule. When a pursuer
 “ founds upon an alleged private and irregular marriage, it would be most
 “ dangerous to permit her to urge as a matter of right the secrecy of the
 “ transaction, as in itself a sufficient ground for obtaining the testimony
 “ of her near relations, the very persons who have the strongest motives
 “ for colouring or perverting the truth, and who, on the supposition of
 “ her averments being unfounded, are presumably the very persons with
 “ whose assistance the measures of the pursuer have been contrived.
 “ But the rule is not without exception. Even in the latest case, mainly
 “ founded on by the defender, that of *Stewart v. Menzies*, (post, p. 957,)
 “ the Court, in expressing their opinions, took for granted that circum-
 “ stances might emerge in the course of the proof warranting the exami-
 “ nation of the witnesses objected to on the ground of relationship, and
 “ accordingly, on the strength of such circumstances, a brother of the
 “ pursuer was afterwards examined.

“ Now, it does appear to the Lord Ordinary that the present case falls
 “ within the exception.

“ It is established by the documents in process, at least by copies, of
 “ which the accuracy is admitted, that the defender did address several
 “ letters to the pursuer, which, to say the least of them, are of a very
 “ equivocal character. Independently of the sense attached to them by
 “ the defender, by profession a man of business, the construction put
 “ upon them by the pursuer, the comparatively inexperienced individual
 “ to whom they were addressed, especially if that construction was known
 “ to the defender, is a point which may be of very great importance. In
 “ this view it is essential to ascertain the whole circumstances relative to
 “ the acceptance by the defender of the pursuer’s letter of the 8th of
 “ March, the terms of which are, for the first time, admitted in the
 “ minute. The defender, in his deposition as a haver, admits that he
 “ received that letter and burnt it, but the addition to that testimony that
 “ it was so burned in the presence of and with the consent of the pursuer,
 “ is clearly not conclusive evidence. The only information attainable
 “ upon all those matters is to be sought for in the examination of the
 “ pursuer’s near relations, to whom, by the most positive injunctions of

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Against the above-quoted interlocutor the appellant presented a reclaiming note to the First Division of the Court, and upon advising the same, their Lordships of this date pronounced the following interlocutor :—“ The
“ Lords having advised this reclaiming note, and heard
“ counsel for the parties, refuse the desire of the re-
“ claiming note, and adhere to the interlocutor reclaimed
“ against; find the pursuer entitled to the expense of

“ the defender himself, the pursuer’s confidence was to be confined. In
“ these circumstances it does appear to the Lord Ordinary that their
“ testimony cannot be rejected without the greatest injury to the pursuer,
“ while on the other hand the defender has by his own acts placed him-
“ self in a situation most justly barring all attempts on his part to shut
“ out the only light which can be obtained on the subject. In canvassing
“ the weight due to the testimony of those witnesses, regard will of course
“ be had to the peculiarity of their situation, but in the meantime the
“ Lord Ordinary cannot refuse their testimony.

“ The second point relates to the question put to Mr. White as to the
“ pursuer’s reasons for asking from him the letters and documents, or, as
“ the question is put in another form, his reasons for redelivering them.
“ In general a statement made by a party would be inadmissible; but
“ this is not exactly a fair mode of stating the point. It is admitted that
“ those papers and documents were got up from Mr. White by the pur-
“ suer, for the purpose of being delivered to the defender, who was
“ waiting in the neighbourhood of Mr. White’s office. It is admitted
“ by the defender that the delivery of those documents to him was not
“ gratuitous or unconditional. He avers that the condition was the con-
“ veyance to her of a provision for life, while the pursuer avers it to have
“ been the granting of a letter explicitly declaring her to be his wife, and
“ thus superseding the necessity of the first action of declarator, and of
“ the various documents on which it was founded.

“ Both parties aver that a letter was written binding the defender to
“ the condition, such as it was. That letter is not forthcoming. The
“ defender has not examined the pursuer as a haver, and on the other
“ hand she states that it was burnt along with the other documents,
“ which the defender admits he put into the fire at Burntisland, and, in
“ the absence of any proof of its existence, there does seem to be some
“ probability in this statement. The parties then being at issue in regard
“ to the condition on which these papers and documents were to be
“ delivered up, it rather appears to the Lord Ordinary that the expressions
“ used by the pursuer to her agent, on asking for the papers, while the
“ defender was waiting in the street to receive them, fall to be considered
“ as part of the *res gesta*, as a circumstance taking place in the course of
“ the transaction, which may be competently received.”

“ opposing the reclaiming note, and remit the account
 “ thereof to the auditor to tax the same and report, and
 “ remit to the Lord Ordinary to proceed farther, as
 “ shall be just.”

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The cause was then debated on the merits, and avizandum having been made with the debate and whole process, the following interlocutor was pronounced by the Lord Ordinary:—“ 7th March 1837. The Lord
 “ Ordinary having heard parties procurators at great
 “ length, and thereafter considered the proof adduced,
 “ productions and whole process, finds facts, circum-
 “ stances, and qualifications proved relevant to infer
 “ marriage between the pursuer and defender: Finds
 “ them married persons, husband and wife of each
 “ other, accordingly: Therefore, ordains the defender
 “ to adhere to the pursuer, and to cohabit with, treat,
 “ cherish, and entertain her as his wife, in terms of the
 “ conclusions of the libel, and decerns: Finds the
 “ defender liable in expenses; and allows an account
 “ thereof to be given in, and to be taxed by the auditor:
 “ Farther, and in regard to the conclusion for aliment
 “ in case of non-adherence on the part of the defender,
 “ appoints the cause to be enrolled, that parties may be
 “ heard thereupon.”¹

¹ “ *Note.*—The question will be found to depend in a great measure, if
 “ not entirely, upon the import of the writings which passed between the
 “ parties in March 1834. The Lord Ordinary has felt it to be one of
 “ considerable difficulty;—a difficulty arising from the very equivocal
 “ mode of expression used, and, as he cannot help thinking, intentionally
 “ used by the defender in these letters. They are certainly not the letters
 “ of a person intending to declare, without subterfuge or ambiguity, a
 “ present intention to contract marriage, merely qualified with the con-
 “ dition that it should be kept secret. They have as little the appearance
 “ of letters unequivocally intimating to the party to whom they are
 “ addressed that the connexion had been, and was to continue illicit,
 “ and undertaking merely an obligation for a pecuniary provision. There

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The appellant: having reclaimed to the First Division, their Lordships ordered cases, and thereafter

“ is, however, yet another object which the writer might have had in
“ view, viz., to create an impression on the mind of the party receiving
“ them, that they amounted to a declaration of marriage, while the mode
“ of expression left the means of escape, if he found it convenient to deny
“ their effect. The Lord Ordinary has found himself compelled to adopt
“ the last supposition as the true one. But the mere circumstance of
“ the defender’s intention in this particular, is not conclusive. The ques-
“ tions will still remain,—1st, Whether the letters did admit of being
“ construed as present declarations; 2dly, Whether the pursuer did re-
“ ceive and construe them as such; and lastly, Whether the defender
“ knew that that construction was put upon them by the pursuer. For
“ if these questions are answered in the affirmative, the defender will be
“ bound, and cannot be allowed to plead the concealed and fraudulent
“ intention with which the writings were framed, in defeat of the
“ meaning put upon them, and known by him to be so put upon them, by
“ the other party.

“ The first letter, bearing date the 25th January 1834, but of which
“ the true date is admitted to be the 8th of March, is strongly indicative
“ of some such intention as that already alluded to. In fact, it is impos-
“ sible for the defender to give to it, according to his own view, any
“ reasonable or consistent meaning. It sets out, no doubt, with stating
“ his anxiety to provide for the pursuer, and promises to leave, at his
“ decease, a declaration acknowledging her as his lawful wife. It then
“ assigns, as a reason for not giving her instant possession of the declara-
“ tion, that he would be compelled to announce the fact to the Collector
“ of the Widows Fund. Looking at the terms of the existing Statute
“ on the subject of that Widows Fund, it may well be questioned how
“ far this last representation was correct. But what is of more import-
“ ance, it is nearly certain that the defender must have been satisfied at
“ the very time, that the obligation, according to his construction of it,
“ was absolutely worthless. The defender is a writer to the Signet, and
“ could not be ignorant on a point which, even amongst the compara-
“ tively uninitiated, may be now considered as a matter of notoriety, that
“ unless marriage is contracted during lifetime, the mere declaration left
“ at death will not confer the character of widow. If the defender then
“ had a private object in this letter, different from that of an admission of
“ marriage *de presenti*, it was not so much the object of defrauding the
“ Widows Fund, as that of defrauding the young woman he was address-
“ ing, not only of her belief of marriage, but of her hopes of a provision;
“ but while this letter does not present any very clear or consistent mean-
“ ing, if strictly construed, it might, when read more loosely, very easily
“ create the impression that it admitted the existence of the marriage at
“ the time, while it merely postponed the granting of a document in
“ evidence of that existing marriage, in consideration of the defender’s
“ motives for keeping the marriage secret. Though far from being

pronounced the following interlocutor: — “ 17th Feb.
“ 1838. The Lords, having resumed consideration of

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“ explicit, it is a letter which might have been written by a party, who,
“ knowing and admitting that he was married, stipulated only for the
“ delay of the delivery of a document, which would at once enable the
“ other party to declare it. And with reference to this last construction,
“ the circumstance of the antedating of the letter is not immaterial. It
“ is admitted that this was done to please the pursuer; and as she was
“ then pregnant, there was an intelligible object in the antedating of the
“ letter, if it referred to an existing marriage; while, according to the
“ view of the letter taken by the defender, the antedating is utterly inex-
“ plicable and unmeaning.

“ But that letter must not be taken singly,—it must be combined with
“ the rest of the correspondence. It was followed by the letter from the
“ pursuer of the same day, commencing, ‘ Dear Edward, I do hereby
“ ‘ declare to take you for my lawful husband, in terms of the document
“ ‘ which you have made out,’ &c. One fact regarding this letter is
“ admitted, viz., that it was delivered to the defender, although he denies
“ that he retained it, but avers that he objected to it, and threw it into
“ the fire in the presence of the pursuer. Upon these last points there is
“ no evidence on either side,—certainly no conclusive evidence. For the
“ Lord Ordinary cannot view in that light, the inferences drawn respec-
“ tively by the parties, from the statements made to counsel, and the
“ correspondence which took place relative to the opinions of those
“ counsel. The admitted fact, however, of such a letter being written
“ and delivered to the defender, is evidence of the meaning attached by
“ the pursuer to the preceding letter of the defender, and is also evidence
“ of the communication by her to the defender of the meaning so put
“ upon it; and it would rather appear to the Lord Ordinary that the
“ defender was bound to produce something more conclusive than his
“ own mere averment of his rejection of that letter. As the correspon-
“ dence did not stop there, the continuance of it clearly allowed the
“ opportunity of placing this matter beyond the reach of doubt. But it
“ so happens that the remaining part of the correspondence fortifies the
“ presumption that the pursuer’s letter had not been repudiated by the
“ defender, and is, according to every probability, nearly irreconcilable
“ with his statement upon this subject.

“ The next letter, that of 29th March 1834, begins, ‘ Dear Eliza-
“ ‘ beth, It is most assuredly my intention to provide for you to the
“ ‘ utmost extent my means will permit during the remainder of your
“ ‘ life, while we are separate from each other,’ and it is admitted that
“ the last member of this sentence stood originally ‘ while unmarried;’
“ and was altered to the present form of expression, on the application
“ of the pursuer, and that the alteration ‘ was made to please her.’

“ Now, it appears to the Lord Ordinary that this was just the occasion
“ on which the defender, if he truly had rejected the pursuer’s letter of
“ 8th March, must have adhered to the expressions originally used. It

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“ this reclaiming note, with the revised cases and whole
“ procedure, and having heard counsel for the parties,

“ was the very opportunity for taking off, by a written qualification or
“ denial, the effect of any erroneous construction put upon his former
“ letter by the pursuer. Yet, instead of taking that opportunity, he
“ agrees to the substitution of a certain form of expression, which, con-
“ trasted with that struck out, amounts very nearly to complete evidence
“ of acquiescence in the view taken by the pursuer in her letter of the
“ 8th March, of their relative situations. As it is admitted, then, that
“ the pursuer’s letter of the 8th March was written and delivered to the
“ defender, as there is no evidence of his rejection of it, but, on the con-
“ trary, the adoption by him of a phrase in the letter of the 29th, nearly
“ irreconcilable with such rejection, there is a preponderance of evidence
“ in support of the presumption that her letter of the 8th had been re-
“ ceived and retained without objection.

“ Next comes the letter of the 1st April:—‘ I hereby declare most
“ ‘ solemnly before Almighty God, that I never granted a letter to any
“ ‘ one such as I have given to you, and cannot now grant any letter with
“ ‘ such an obligation to any other person, as I consider myself bound by
“ ‘ my letter.’

“ The defender seems to think that this letter may be easily disposed
“ of. According to his view, it merely stated that he considered himself
“ bound to abide by, and fulfil the obligation which he had granted by
“ the letter dated in January; which again, according to him, meant
“ nothing more than to enable her to go against the fund of the Society
“ of Writers to the Signet for the annuity, the question being here, not
“ whether this was a proper or improper purpose, but whether it was not
“ plainly the meaning of the letter. The Lord Ordinary must demur to
“ this reasoning. In the first place, the words are not merely that he
“ will not grant, but that he cannot grant such an obligation to any other
“ person, words which clearly imply an indissoluble or irrevocable engage-
“ ment. Secondly, the previous correspondence admitting, at least by
“ possibility, of this last construction, it being proved that such a con-
“ struction had been put upon it by the pursuer, and there being a strong
“ presumption that he had acquiesced in that construction, the solemnity
“ of the adjuration in the letter of the 1st of April enters deeply into the
“ question as a question of evidence of intention. That the defender
“ should call God to witness a legitimate but secret engagement, and
“ which for this last reason might require and justify such an appeal, was
“ perfectly natural and proper. But is any man to be allowed to state in
“ a court of justice that his meaning was only to call Almighty God to
“ witness his engagement to provide for his associate in an illicit inter-
“ course, through the medium of what he himself admits to be a gross
“ fraud? Can it be supposed that the pursuer could have viewed it in
“ that light? Is it not, on the contrary, quite clear that the pursuer was
“ entitled to consider an obligation so solemnly attested, as importing in
“ the first place a legitimate engagement, and at all events an irrevocable

“ adhere to the Lord Ordinary’s interlocutor of
 “ 7th March 1837, and refuse the desire of this note;

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“ engagement, neither of which conditions it will be observed can be
 “ possibly applicable to it, as explained by the defender.

“ Such, then, being the letters, it only remains for the Lord Ordinary
 “ to consider the evidence of the pursuer’s father and sister, whose exami-
 “ nation has been authorized by the Court in the special circumstances of
 “ this case. It is needless to state that witnesses so circumstanced must
 “ be presumed to have a strong bias, and that their testimony, if unsup-
 “ ported, à fortiori contradicted, must be received with great hesitation.
 “ The testimony of these witnesses, however, seems to stand clear of any
 “ imputation on the score of appearance of partiality, and is in all its
 “ essential particulars consistent with the inferences which the Lord
 “ Ordinary has thought himself entitled to draw from the letters them-
 “ selves. By the testimony of both these witnesses, it is clear that they
 “ conceived and expressed that belief to the defender, that it was the
 “ secrecy of the marriage and not the postponement of it, which they
 “ understood to be his object in the letters. And it is equally clear,
 “ according to their evidence, that that view was admitted or at least
 “ acquiesced in by the defender. Upon the whole, then, the Lordordi-
 “ nary has formed the opinion that the letters, combined with the parole
 “ proof by the pursuer’s father and sister, afford sufficient evidence of a
 “ de presenti declaration of marriage.

“ As to the remaining part of the parole proof, and the whole pro-
 “ ceedings of the parties after the raising and abandonment of the decla-
 “ rator of marriage, there seems to be a great difficulty in connecting
 “ them with the correspondence hitherto considered. This arises from
 “ the defect of the evidence of the conditions on which the action was
 “ abandoned. The defender alleges that it was in consideration of his
 “ becoming bound to grant the pursuer a pecuniary provision, while it is
 “ averred by her on the other hand that she agreed to abandon the action
 “ and give up the documents on which it was founded, solely in consid-
 “ eration of his engaging to give her an absolute and unequivocal acknow-
 “ ledgment of her status as his wife.

“ As a mere question of probabilities, the Lord Ordinary has no hesi-
 “ tation in avowing his belief of the latter statement. Even in the most
 “ trivial question of pecuniary obligation, a party, a professional person,
 “ who contrived to transact with his adversary, an inexperienced young
 “ woman, under the cautious seclusion of her parents and legal advisers,
 “ could not well complain of any unfavourable construction being put
 “ on his conduct. But these unfavourable presumptions are incalcu-
 “ lably stronger in the present case, where the defender must, from the
 “ nature of his connexion with the pursuer, have had a great influence
 “ over her, and where, having got her into his power, and having ob-
 “ tained, through her means, possession of all the documents considered
 “ to be of importance, he induced her to abandon, by her own unad-
 “ vised act, that legal proceeding which she had commenced under the

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“ of new find expenses due, and remit to the auditor to
“ tax the account, when given in, and to report.”

“ sanction and counsel of her natural guardians and legal advisers.
“ But whatever may be the probabilities, the Lord Ordinary is of
“ opinion that there is no sufficient proof of the terms on which the
“ pursuer agreed to give up the action of declarator.

“ And it may be observed that this circumstance goes far to exclude
“ the second or alternative view of the case maintained by the pursuer,
“ viz., that the continued connexion between the parties after they left
“ Edinburgh on the 22d of April 1834, when combined with the letters
“ of the defender, must at any rate constitute a marriage, by the force
“ of the promise followed by copula.

“ These letters, viewed as a declaration de presenti, were beyond the
“ reach of any recal or surrender by the parties; but if viewed as consti-
“ tuting merely a promise, that promise admitted of being retracted on the
“ one hand, or abandoned on the other; and no copula, following on such
“ retraction or abandonment, would be of any relevancy in a question of
“ marriage. Now, here it is admitted that the letters were given up, and
“ as there is no sufficient proof of the terms on which according to the
“ pursuer, they were so given up, viz., in consideration of an absolute
“ acknowledgment, it does appear to the Lord Ordinary, that there is
“ here a defect in one indispensable link of the pursuer’s chain of
“ evidence.

“ A remark of the same kind is applicable to the whole of those sub-
“ sequent proceedings, in so far as they are founded upon substantively,
“ as affording a proof of marriage by cohabitation, and habit and repute.
“ The doubtful nature of the terms on which the pursuer agreed to
“ abandon the action of declarator, throws a corresponding obscurity
“ over the true nature of the connexion which afterwards subsisted
“ between them. That connexion did not continue under circumstances
“ to make it in itself conclusive. It is proved, no doubt, that they lived
“ together as man and wife, and were so considered in the lodging-houses
“ where they resided. But it is also proved that this took place under
“ assumed names, a circumstance which goes far to neutralize the infer-
“ ence of marriage. As the assumption of the appearance of marriage
“ may be easily accounted for, from a consideration of decorum and con-
“ venience, and may be ascribed to such considerations when the true
“ names are concealed; on the other hand, the assumption of feigned
“ names is not absolutely conclusive the other way, as it is quite con-
“ sistent with the notion of a really existing marriage, which the parties
“ wish to keep secret. It certainly does not appear to the Lordordi-
“ nary, that there is here any such inconsistency as to raise doubts of the
“ true meaning of the letters forming the main ground of the pursuer’s
“ action. Even the expressions which she is said to have used at Dum-
“ fries admit of an easy explanation, when it is considered that her object
“ was to obtain an unequivocal acknowledgment of her marriage; and
“ that, after the abandonment of the action, and the delivery of the docu-

Appellant.—The father and sister of the respondent were not, according to the law and practice of Scotland, admissible as witnesses in her behalf. The principle of the law of Scotland in regard to relations in the degree of father or mother is, that in respect of their presumed partiality they are not to be credited in questions of contract. There is plainly no case to which this principle can apply more strongly than a case of status. *Penuria testium* is not held to render the evidence of such witnesses admissible in questions of irregular marriage, more than in any other sorts of contract; this exception is recognized only in questions of age and propinquity, or in the trial of crimes.¹ It was incompetent to admit as evidence the statement made by the respondent to her agent, Mr. White, respecting her motives for demanding re-delivery of her documents from him. To render hearsay admissible at all to this

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“ments she had every reason to believe that she was at the defender’s
“mercy. Neither is it to be thrown out of view, that there are some
“other circumstances in these subsequent proceedings, which the defender
“will find it difficult to explain. The taking of the house in Warriston
“Crescent, and the intimation of it to the pursuer’s mother, are not
“very easily reconcilable with the notion of a mere continuance of an
“illicit connexion. Inferences still more strong may be drawn from the
“letter addressed to the pursuer’s mother from South Queensferry, on
“22d April, on their way from Edinburgh, and also from the letter of
“1st May 1834, addressed by the defender to the pursuer in Glasgow.

“These letters are written with the defender’s habitual caution; but
“no person, on the mere reading of these letters, and in the ignorance
“of any private views on his part, could for a moment suppose that
“they implied anything but a legitimate connexion between him and
“the party to whom the first of these letters related, and to whom the
“second was actually addressed. But the Lord Ordinary finds it unne-
“cessary to remark farther on the evidence of the proceedings of the
“parties after they left Edinburgh. His opinion is formed on the
“letters of the month of March, corroborated as they are by the tes-
“timony of the two Craigies; and, for the reasons already given, that
“opinion is in favour of the pursuer.”

¹ Dalziel v. Richmond, 10th June 1790; Ball v. King, 21st January 1797; Stewart v. Menzies, 5th Feb. 1835; all in Fac. Coll.

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effect, it must be quite clear that the statement to be proved is made in circumstances in which there is no reason to suspect its truth, where no intelligible motives for deception can be supposed, and where consequently the statement made may, with reasonable certainty, be taken as throwing the light of truth upon the act to which it immediately relates. The declaration of a party, as explanatory of his acts, is therefore admitted to be proved, when it is adverse to his interest in the cause, and the statement of a third party, explanatory of an act, may in like manner be taken where it was made without interest in or anticipation of the cause in which it is offered to be proved, and without any motive to misrepresent the truth. But the declaration of a party himself in his own favour never can be so proved, for it is impossible in any such case to have a reasonable certainty that the declaration is not false, and contrived with a view to the very case, in support of which it is afterwards offered to be proved. In the present instance it will be observed, too, that the declaration was not made till after the controversy had arisen, upon the merits of which it is brought to bear.

The respondent has not proved any *de præsenti* acknowledgment or declaration of marriage on the part of the appellant.¹ The respondent has not shewn that either of the parties had marriage in view throughout their intercourse, yet in such circumstances even a

¹ Kennedy, 19th June 1747, Mor. 10457, Brown's Supplement, vol. v. p. 789; M'Innes v. More, House of Lords, 25th June 1782, Mor. 12683; Taylor v. Kello, 16th Feb. 1787, Mor. 12687; Anderson v. Fullerton, 13th Nov. 1795, Mor. 12690; M'Lachlan v. Dobson, 6th Dec. 1796, Mor. 12633; Stewart v. Menzies, 6th Dec. 1832, 12 S., D., & B., 179; Ferguson on Consistorial Law, and authorities there referred to.

regular and formal celebration in facie ecclesiæ has been disregarded.¹

A promise of marriage has not been proved. This point must depend exclusively upon the construction of the appellant's letters, or rather of the antedated letter of the 25th January 1834, containing the alleged promise of which the subsequent letters are founded on as merely confirmatory. The promise contained in the letter of 25th January is, that "I shall, at my decease, leave a declaration acknowledging you as my lawful wife;" and is accompanied by an explicit intimation, that "the declaration shall only be delivered at my decease, in the event of the most strict secrecy being adhered to regarding this communication." Lord Stair defines marriage "to be the conjunction of man and woman, to be consorts for all their life, with a communication of rights, divine and human; so the essence thereof consists in the conjugal society, the special nature of which society appeareth by the state, interest, and terms that the married persons have thereby." The promise given by the appellant was of something exclusive of this essence of marriage, viz., a declaration not to be delivered till after his decease, by which the conjugal society could not be constituted.²

Supposing there was a promise of marriage, it was effectually recalled by the appellant before any subsequent copula took place between the parties.³ The

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¹ Jolly v. M'Neill, 20th June 1828, 3 Wilson and Shaw, 85.

² Stair, b. 1. tit. 4. s. 6.; Cockburn v. Logan, 19th July 1670, Mor. 12386, Smith, 26th Nov. 1755, Mor. 12393; Harvey v. Crawford, 19th Feb. 1732, Mor. 12388; Anderson v. Fullerton, 13th Nov. 1795, Mor. 12690.

³ Stair, b. 1. tit. 4. s. 3.; Ersk. b. 1. tit. 4. s. 3.

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promise was renounced by the respondent herself, by the transaction by which she agreed to redeliver his letters to the appellant.

The legal presumption of matrimonial consent having passed at the time of a copula subsequent to the promise, is excluded by the fact of such intercourse having also preceded the promise.¹

The promise was so qualified as to be incapable, by any fiction, of being converted into the *de præsenti* consent essential to marriage, at any period during the lifetime of the parties.

The appellant and respondent never cohabited together as man and wife.

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Respondent.—Under the circumstances of the case, the respondent's father and sister were admissible as witnesses. To maintain this proposition, there is no occasion to impugn the doctrine of the law of Scotland, that persons occupying so near a relationship are inadmissible as witnesses. The question presently under discussion does not turn upon that general rule. It falls under one of its best established, and most favourably received exceptions, namely, that the facts which these relations were called to prove, are of an occult nature, in *re domestica*, and as to which there exists an unavoidable *penuria testium*. Consistorial causes stand in no other situation than ordinary causes, farther than this, that they are of that nature, that the transactions to be spoken to are most likely to be occult, and a

¹ *White v. Hepburn*, 18th Nov. 1785, Mor. 12686; *M'Dowall*, Feb. 1796, reported in *Ferguson's Consistorial Law*, 163–178; *Summary of Cases*, Ersk. b. 1. tit. 6. s. 4., p. 120. note 139. Ivory's edition.

penuria testium is most likely to exist in regard to them.¹ That the penury of testimony is the result of the tortuous act of the appellant is a circumstance of itself sufficient to authorize the testimony in question. But although the witnesses had been inadmissible the appellant waived the objection by himself cross examining them.² The conversation between the respondent and Mr. White formed part of the *res gestæ*, was explanatory of the conduct of the parties, and was therefore competent to be given in evidence.³

The letters amount to a *de præsenti* declaration of marriage, more especially when explained by the relative parole proof. The letters in March and April taken by themselves, amount to a *de præsenti* declaration. However cautiously they may be conceived, they were undoubtedly written and delivered by the defender to the pursuer as such. It is of no consequence what the characters were which the parties chose to employ in expressing their consent. If it be once made out what they intended to mean by the characters employed, effect will be given to the meaning and intention, rather than to the literal reading of the words. The respondent is quite ready to concede, in the

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¹ Stair, b. 4. tit. 43. s. 8. ; Bankton, b. 4. tit. 30. s. 15. ; Ersk. b. 4. tit. 2. s. 26. ; Barber v. Stewart, July 1732, Mor. 16742 ; Young v. Arrot, 8th Dec. 1738, Mor. 16743 ; Stirling v. Hamilton, 11th July 1704, Mor. 16708, and 13th July 1706 ; Cumming v. Cumming, 5th March 1748, Mor. 16756 ; Boyd v. Gibb, 20th Jan. 1770, Mor. 3989 and 9583 ; Nicolson v. Nicolson, 6th Dec. 1770, Mor. 16770, and Hailes, Dec. 371-418 ; Martin v. Mackissan, 8th Feb. 1816 ; Bell v. Bell, 14th April 1819, 2 Murray 130 ; Spence v. Howden, 12th July 1819, 2 Murray, 167 ; Stewart v. Menzies, ut supra.

² Corporation of Sutton Coldfield, 1 Vern. 254 ; Bland, 3 Bro. P. C. 620.

³ Starkie's Law of Evidence, 2d edit. vol. i. p. 36.

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fullest extent, a proposition which the appellant labours to establish, viz. that however clearly expressive the words might be of marriage, where it can be shewn that neither of the parties had marriage in view, the Court would not give effect to the words. But the proposition overthrows the argument which it is sought to support; because on the same principle, the respondent would say *multo magis*, if it appear that the parties understood each other as meaning to declare a marriage, it would be valid and effectual whatever ambiguity or equivocation might lurk about the mode of declaring it. The appellant was not entitled to assume that his intercourse with the respondent previous to the date of the letters was illicit. On the contrary, the presumption is, that it was in consequence of a lawful connexion.¹ The letters explain the previous footing on which the parties lived, and also give a character and a consistency to their subsequent intercourse. This much is clear, that when the letters of March and April were interchanged, the parties were not conspiring together to effect any sinister purpose. In what they did and wrote they were unquestionably serious. The respondent was serious in acknowledging the appellant to be her husband, and the appellant was serious in acknowledging the respondent to be his wife, or what is the same thing, in leading her to believe that he so acknowledged her. Every statement made and every act done by the defender was a confirmation or iteration of the declaration made by the letters. To what other source than to the declaration in the letters, or rather to the

¹ Per Lords Chancellor (Eldon) and Redesdale, in *Cunninghams v. Cunninghams*, 2 Dow, 502, 506, and 511.

marriage which the letters declare, can the repeated admissions or acknowledgments of the appellant, that the respondent was his "wife," be ascribed? In what other capacity can their cohabitation be viewed than that of marriage? Were there any doubt about the terms of the letters, or about the meaning which the parties conveyed to each other by the letters, it would be removed by what followed on them. Every word the appellant spoke, or deed the appellant did, carried to the respondent a confirmation of the acknowledgment contained, or which she believed, and which the appellant knew she believed, to be contained, in the letters. It was the evincing to her, as well as to others, the consent of marriage, which made the contract.¹

There was no discharge or renunciation of the promise. The appellant possessed himself of the letters surreptitiously, and against the will or consent of the respondent, and it is impossible to hold that that amounted to a discharge or renunciation of the previous promise or obligation of marriage. But the parties slept together on the night of the 22d, and it was not till the 23d that the appellant got possession of the documents in the manner described. A marriage by promise and copula had therefore been effectually constituted before the appellant possessed himself of the letters; and it was beyond the power of either of the parties to recall it. It was indissoluble, except by death or divorce; and even although the respondent had voluntarily renounced the promise, her renunciation

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¹ M'Adam v. M'Adam, 21st May 1813, 1 Dow, 189; Honyman v. Honyman, 3d March 1831, 5 W. & S. 133, 139, 144; Stewart v. Menzies, 6th Dec. 1833, 12 S. & D. 183.

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would have been nugatory and unavailing. By that time she was the appellant's wife for better for worse.

The position, that the promise copula subsequente did not amount to marriage, because the parties had had intercourse before the letters were granted, is maintained on a mistaken notion of the true principle of the law.¹ Marriage is held to be formed, not as a punishment on the seducer, or as a compensation to the injured female. The true principle is, that the copula is the actual fulfilment of the previous promise, as much as if a *de præsenti* declaration had been given, or a formal marriage solemnized, and the marriage thus contracted may be declared and enforced, as well against the woman as against the man. The previous character or conduct of the parties has no bearing on the question. If they could have contracted the matrimonial relationship in any way, it is formed if a copula succeeds the promise.² The principle on which marriage by promise subsequente copula depends is altogether independent of the consideration, whether the copula has or has not been the first to which the female has submitted. The previous promise is equivalent to the *sponsalia* of the Romans, the subsequent copula to the actual consummation of the matrimonial relationship. By the "natural commixtion," the promise "transit in *matrimonium*," from an inflexible legal presumption that the parties thereby interchange a consent *de præsenti*. And so strong is this presumption, that it obtains, even

¹ Per Lord Stowell in Dalrymple, Dodson's Report, p. 60, 62.

² Stair, b. 1. tit. 4. s. 6.; b. 3. tit. 3. s. 42.; Bankton, b. 1. tit. 5. s. 2.; Erskine, b. 1. tit. 6. s. 4.

although one of the parties should not consider himself or herself married.¹ The case of M'Dowall², was entirely different in its circumstances from the present. The promise there given was not absolute, but qualified. It was made to induce the woman to submit to the man's embraces; and the promise was, that he would marry her if she fell with child. The Court held this not a promise *subsequente copula*, but a promise *post copulam*. The woman might not have conceived, and in that case no promise had been given. It was only when pregnancy took place that the promise came into existence, and there it remained unconsummated and unfulfilled.

The parties were habit and repute husband and wife, and cohabited together as married persons.

LORD CHANCELLOR.—My Lords, in this case the Lord Ordinary, and all the judges of the Inner House, concurred in the opinion that there had been a valid marriage between the parties, although there was a difference of opinion as to whether it was to be considered as resting upon a contract *per verba de presenti*, or a promise of marriage *copula subsequenti*. It appears to me impossible for the appellant to escape from one or the other of these grounds; as to the first, it is not necessary to prove the contract itself, it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; upon this principle the acknowledgment of the

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¹ Pennycuik, 15th Dec. 1752; Shillinglaw v. M'Intosh, 6th March 1829, 7 S. & D. 533; M'Kinnon v. Sandys; and Myles v. Sim, 20th Nov. 1829, 8 S. & D. 89.

² Ante, p. 960.

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parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage, *contrahuntur nuptiæ consensu quomodocunque declarato, verbis aut factis*¹, according to the doctrine of the civil law, or according to Mr. Erskine, book 1., title 6., section 5., “ Marriage may be entered into where the “ consent is not expressed, but is discovered *rebus ipsis* “ *et factis.*” Everything, therefore, is pertinent and relevant in an inquiry like the present, which indicates the present or previous consent of the parties.

Upon examining the evidence of what took place between these parties in March and April 1834, so far as it is to be found in the written documents, (only with reference to this principle,) I think there is satisfactory proof of a previous contract binding upon the appellant; it seems, indeed, probable that he attempted so to manage his communications with the respondent as to satisfy her wishes, and put a stop to her importunities, and, at the same time, to keep open to himself the means of escaping from his contract. But this will not avail him if there be proof of a binding contract, and if the respondent understood it to be so.

In order fairly to try the import of the letters, and to ascertain whether they prove the case set up by the respondent, or are consistent with the case as represented by the appellant, it must be kept in mind that the respondent insists there had been a previous contract or promise of marriage, and that the appellant denies this, and says that the connexion had been altogether illicit.

The letters appear to me quite inconsistent with the

latter supposition. The letter dated the 25th of January but written on the 8th of March, (an ante-dating strongly corroborative of the respondent's case, but unexplained by that of the appellant,) states the writer's intention of providing for the respondent, by an annuity payable from the widows fund of the Writers to the Signet, which he could not do unless she were his wife. He wished, indeed, that the declaration, acknowledging her as such, should not be made known until after his decease, but such declaration would have been wholly inoperative, unless there had been a marriage in his lifetime; a declaration of marriage made known at that time, he says, would be his ruin, which is quite consistent with a previous secret contract, but is absurd, as addressed to a woman pressing for marriage not previously contracted. If it is to be construed to mean "I will never marry you, but after my death you shall have a declaration which may enable you by fraud to obtain an annuity as my widow," would it not have been absurd in the circumstances to permit her to shew it to her parents? but if, as between themselves, it was a recognition of the respondent as the wife of the writer, it would naturally tend to relieve their anxiety, although the announcement of the marriage was refused.

Again, if the letter was felt by the writer to be a recognition of the marriage, his prohibition to make it known to any other person or persons is intelligible; but if it was only to announce an intended fraud against the widows fund after his own death, by the publication of which the respondent alone would suffer, the concealment might safely have been left to her. The

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only rational and consistent construction of that letter appears to me to be this, "As between ourselves I acknowledge you to be my wife, and you may, to satisfy your parents, shew them this letter; but it must not be made known during my life; I will, however, furnish you with the necessary evidence to enable you to obtain the annuity after my death as my widow." That the respondent so understood this letter, or professed so to understand it, is proved by her letter of the 8th of March, if legally proved, which I think it is, and is scarcely less evident from the appellant's admission, in his answer to the eighth article of the pursuer's condescence, in which he says, that upon reading her letter it appeared to him to have been written for a sinister purpose, and that he threw it into the fire. With this knowledge of the appellant's construction, or assumed construction, of the letter dated the 25th of January 1834, he wrote the letter of the 29th of March, in which he at first expressed his intention of providing for her, "whilst unmarried," to which she objected, and he, yielding to the objection, instead of those words introduced the words "while we are separate from each other." The appellant's wish to use the word "whilst unmarried" may be consistent with his declared intention of keeping the marriage secret, but his yielding to the respondent's objection to these words proves at least that he knew that she considered herself as married to him, and that he acquiesced in such her representation of her status.

Knowing then that the respondent treated the letter of 25th January as an acknowledgment of their marriage, and that she had refused to permit any expression to be

used in the letter of 29th March calculated to throw any doubt upon it, the appellant wrote another letter, of the 1st of April, in which he says, "I hereby declare most solemnly, before Almighty God, that I never granted a letter to any one such as I have given to you, and cannot now grant any letter with such an obligation to any other person, as I consider myself bound by my letter." The appellant attempts to escape from the effect of this letter, by suggesting that it was only to satisfy the respondent about her annuity; there is not an expression in it consistent with such a construction; on the contrary, being written to a woman who he knew claimed to be his wife, and relied upon his former letter as a recognition of her marriage, that letter can receive but one construction, namely, that she might rely upon that letter for that purpose, and that he was himself bound by it.

Upon the evidence of those letters, therefore, without referring to any parts of the testimony upon which doubts have been raised, I think the case made out, of a written recognition of the respondent, by the appellant, as his wife, and admission of a previous contract of marriage having taken place between them. Whatever difficulty there may be as to the evidence of what took place when the respondent obtained the papers from Mr. White, or what took place at Queensferry on the 22d of April; the appellant's letter to the respondent's mother of that date, seems to me to make such evidence comparatively immaterial. The respondent had determined to institute a declarator of marriage against the appellant, with the concurrence of her parents. This proceeding she withdrew, and left

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Edinburgh with the appellant on the 22d of April, and on the evening of that day he wrote to the respondent's mother in these words, "To prevent the unnecessary
" and very unpleasant exposure which must have taken
" place had the intended action gone on, Elizabeth
" and I have arranged and agreed to put a stop to it.
" From the arrangements which I have made there will
" be no cause for regret. We shall return to Edin-
" burgh to-morrow or next day." On the night of that day the parties slept together, and it was not till the next day that the appellant got possession of the letters which, up to that time, had been in the respondent's possession. It is, therefore, quite immaterial by what means he so obtained possession of the letters, because cohabitation had clearly taken place whilst they were still in the respondent's possession.

If according to the opinion of the judges of the First Division the letters before referred to implied rather a promise of marriage than a contract per verba de presenti, there was a copula following such promise, and therefore all that is necessary to constitute a marriage according to the law of Scotland. In order to try the construction of those letters, as containing a promise of marriage, it must be assumed that there had been no previous contract, or at least none such as the respondent could rely upon.

The letter of the 25th of January was in terms a promise to secure for the respondent a provision which she would only become entitled to by a marriage. That which was to be postponed until after his death was the publication of the evidence of the marriage. What was the intention which was to be concealed, and which if

made known would be the utter ruin of the appellant? What was the fact which it would be necessary to make known within three months to the collector of the widows fund? What was to be made known to the respondent's parents, and in what way was the letter to be used as a document against him? Those expressions have all a natural meaning if a marriage was the subject to which they refer, but are wholly inconsistent with the appellant's construction that a plan of defrauding the widows fund was the only subject to which they referred.

The letter of the 1st of April puts this beyond all doubt. What was the obligation referred to in that letter, which after the letter of the 25th of January the appellant would not grant to any other person, and by which he considered himself bound? What but marriage? I think that those letters do recognize a previous contract of marriage, but if not, they clearly contain a promise of giving to the respondent the character of wife, which, followed by the cohabitation of the 22d of April, constitutes a marriage.

It has, however, been contended upon this latter view of the case that the above rule of law does not apply in cases in which cohabitation has also preceded the promise; some authority has been referred to in support of that proposition, particularly *White v. Hepburn*, 18th November 1785¹, Mor. 12,666, and the case of *M'Dowall*, in February 1800², *Ferguson's Consistorial Law* (1829) pages 167 to 178; but in the

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¹ *White v. Hepburn*, 18th November 1785.

² *M'Dowall*, February 1800.

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latter case the promise appears to have been conditional upon the woman proving with child; and a contrary doctrine has been recognized in *Shillinglaw v. M'Intosh*, 6th March 1829¹, 7 Shaw & Dunlop, 533; *M'Kinnon v. Sandys*²; and *Myles v. Sim*, 20th November 1829³, 8 Shaw & Dunlop, 89. In the view I take of this case it is not necessary to express any conclusive opinion upon this point. It has been further contended that if there had been any promise it was released by giving up the letter which contained it before any copula took place; the evidence proves the contrary, the copula having taken place on the 22d of April, and the possession of the letter by the appellant not having then taken place; even had this been otherwise it would have been necessary for the appellant to have proved the voluntary delivery of the letter to him by the respondent for the purpose, and with the intent of releasing the contract, which he has wholly failed in doing.

Finding sufficient in this case to support the judgment of the Court of Session without relying upon that part of the evidence which has been objected to, there is no necessity for saying much upon that point. If the ground of the rule of law in Scotland as to rejecting the evidence of near relations be the same as that upon which the rejection of the evidence of a husband and wife in this country rests, namely, the avoiding that invasion of domestic confidence which the admissibility of such evidence would occasion,—there may

¹ *Shillinglaw v. M'Intosh*, 6th March 1829.

² *M'Kinnon v. Sandys*.

³ *Myles v. Sim*, 20th Nov. 1829.

be reason in considering a penuria of other evidence as an exception to the rule; but if it be founded upon the supposed want of credit of such near relations, it seems most unreasonable to reject such testimony, when its credit may be fairly tested by other evidence to the same point, and to receive it only when, there being no other evidence, the conclusion must be drawn from such evidence only. There is, however, no doubt of the rule and of the exception, and there cannot be a case more clearly falling within the exception; for not only is this a case of domestic transaction likely to be known only to members of the family, but the evidence of the father and sister become material in a great measure from the secrecy maintained at the instance of the appellant himself, and from the spoliation by him of written documents; the admissibility of the evidence, under such circumstances, appears to be established by the authorities referred to by the respondent.

The evidence of White, as to what the respondent said to him upon applying for the paper, does not appear to me to be at all material in coming to a conclusion upon the merits of the case. For these reasons I think that the interlocutors appealed from are right, and therefore move your Lordships that they be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I had no doubt respecting this case from the beginning, as I intimated during the argument at the bar, though I pressed the counsel for the respondent on several points for the purpose of having it fully argued. My opinion has

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Question as to
the effect of a
release of a pro-
mise of marriage
intervening be-
tween the pro-
mise and a sub-
sequent copula.

been confirmed by having since read the cases. My Lords, I agree with my noble and learned friend that it is sufficient if there is a promise cum subsequenti copula; and in that view I am of opinion that there is evidence sufficient in this case to establish a marriage. Some law has been vented at the bar which I cannot agree to, but which it is wholly immaterial to decide, because the facts of the case do not raise it; it is not necessary for your Lordships to decide the question whether or not, if after a promise, and before the copula, a renunciation of that promise or a release of that promise took place, that would or not negative the marriage. If the copula took place no one has gone so far as to say that the subsequent release of the promise could have the slightest effect. Nay, it ought to be known, if there is the least doubt upon that point, that if not only one party, but both parties, were to agree after the copula had taken place, a promise having preceded it,—if the husband, who had given the promise, were to say “I will no longer abide by it,” and the wife, who had received it, were to say, “I no longer compel it,” they could not possibly divorce one another by that means. If a marriage has taken place it is a complete valid marriage, and the promise cannot be released. My Lords, it is wholly unnecessary, in the view I take of this case, to argue the point whether, if before the promise is followed by a copula, there is a release and renunciation by the promisee, that would prevent the subsequent copula from constituting a valid marriage; for in this case the copula took place previous to the alleged renunciation. I would not, however, be understood as at all giving my opinion in favour of the

doctrine that even if it had been proved that the promise had been renounced between the contract and the copula, there would not be sufficient to sustain the marriage, because I am inclined to think the sounder view is, that though the renunciation might bar an action for breach of promise of marriage,—if the copula took place after renunciation, the copula would revive the promise and repeal the renunciation. Where the copula takes place subsequently to the promise it is taken to be in execution of the previous promise.

It is unnecessary to enter into the other questions which have been discussed by my noble and learned friend, with whom I entirely agree. The letter of April, connected with the letter of the 25th of January, can bear no other construction than that which he has given them. One part of the case entirely fails, namely, that which relates to the supposition of an attempted fraud on the widows fund. I think a very slight attention to the case sufficient to shew that the facts do not bear out that allegation in the smallest degree, but that the facts are most consistent with the case made by the respondent. My Lords, without entering further into the reasons, or discussing the argument used at the bar or in the court below, I am of opinion, with my noble and learned friend, that the interlocutors must be affirmed, and of course with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the

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clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

ARCHIBALD GRAHAME — JOHNSTON and FARQUHAR,
Solicitors.