

[Heard 11th *March* — Judgment 9th *August*, 1842.]

FRANCIS HAMILTON, Esq. *Appellant*.

MARY HAMILTON, JENNET HAMILTON, JAMES HAMILTON, and ARCHIBALD HAMILTON, and JAMES BOOG, *curator ad litem* to the said James and Archibald Hamilton, *Respondents*.

Marriage. — Circumstances adduced to prove marriage by habit and reputation, *held* not to establish a habit and reputation of that general and uniform character which is necessary to constitute marriage.

Ibid. — Circumstances *held* to prove, that a letter, purporting to be an acknowledgment of marriage, had been seen and assented to by the woman, and to constitute a marriage between the parties, notwithstanding evidence of another purpose on the part of the man previous to making the letter.

Ibid. — *Writ.* — *Trust.* — Delivery to a third party of a letter acknowledging marriage, the letter having been seen and assented to by the woman, makes the third party trustee for the woman, and is equivalent to delivery to herself.

IN December, 1835, the appellant, as the immediate younger brother-german, and heir apparent of the deceased Archibald Hamilton, who had been a surgeon in the army in the outset of life, but on his retiring from the army, had taken up the business of a pawnbroker, brought an action against the respondents, who were the children of Archibald Hamilton, setting forth, that as heir-at-law to Archibald Hamilton, he was about to make up titles to him, but was precluded from getting access and inspection into his papers and titles, and otherwise interrupted in making up his titles, as heir aforesaid, by the respondents. That the deceased, after serving in the army as surgeon, came

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to reside in Edinburgh, in or about the year 1811, and continued chiefly to reside there till his decease, which happened at Edinburgh, on or about the 23d day of February, 1823. That within that period, the respondents were born of May Clark, the servant or housekeeper of the deceased, and it was alleged by them that the deceased was their father. That the deceased was never married to May Clark, nor were he and she habit and repute husband and wife; but she, in so far as she was known to be connected with the deceased, was known only, and declared by himself to his friends and acquaintances, to be a person with whom he lived in illicit intercourse, and as the mother of the said children. That the deceased was always known and held and reputed to be an unmarried man, down to the period of his decease, and was buried as an unmarried man. That the respondents were bastards, or, at least, were not the lawful children of the deceased, and were never legitimated, and had no title to any of the civil rights which would have been competent to his lawful children; and concluding, “ that it should be declared, that the respondents were bastards, “ or, at least, not the lawful children of the deceased, — their “ mother, May Clark, never having been married to him, — and “ that, therefore, they had no title to any of the legal or civil “ rights which would have been competent to his lawful children.”

The respondents, in defence, denied the statements of the summons, and averred, “ That in 1814, Archibald Hamilton “ left the army, and from that time till his death, he and their “ mother, May Clark, resided constantly in Edinburgh. That “ they lived in lodgings till 1816, when they took a house in “ Brown Street, where they remained till 1820. That they “ then removed to a house in Crosscauseway, where they stayed “ for two years, after which they went to a house in St Leo- “ nards, where they continued to reside till Mr Hamilton’s “ death, which happened on the 23d February, 1823. That

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“ during all this period they cohabited together in all respects
 “ as man and wife, and were visited and acknowledged as such,
 “ by numerous neighbours and acquaintances. That in 1817,
 “ he granted their mother a letter, dated the 26th of September
 “ of that year, containing a solemn acknowledgment and declara-
 “ tion of his marriage, but adding a wish, that it should be kept
 “ private for the present. That the only reason of this was, an
 “ apprehension that some of his friends, and some members of
 “ his family, might be dissatisfied with the marriage, inasmuch
 “ as Mrs Hamilton was a person in an inferior condition of life ;
 “ on which account it was that he did not introduce her generally
 “ to his relations, but lived in a manner comparatively retired.
 “ That several members of his family were, however, aware of
 “ the marriage, and many other persons, not of the family, fre-
 “ quently visited in the house, and had access to know the terms
 “ on which they lived together. That their marriage was avowed
 “ to these persons ; and that they acknowledged each other as
 “ man and wife, and in all respects lived together and acted as
 “ such, and were received and treated as such by those who
 “ knew and visited them.”

Condescence and answers were ordered ; and when the respondents lodged their revised answers, they produced, at the same time, the letter referred to in their defences, which was in these terms :—

“ *Edinr. September 26, 1817.*

“ MY DEAREST MAY, — I hereby solemnly declare that you
 “ are my lawful wife, tho’, for particular reasons, I wish our
 “ marriage to be kept private for the present. I am, your affec-
 “ tionate husband. AR. HAMILTON.”

“ *To MAY CLARK.*”

(*Addressed on the back.*)

“ *Mrs A. Hamilton, Brown Street, Pleasance.*”

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After the record was closed, a proof was led by both parties. From this evidence it appeared, that the original connection between the father and mother of the respondents commenced sometime between the years 1810 and 1814 — that their mother lived in lodgings in the Canongate of Edinburgh until 1817; and while living there, gave birth to the respondents, Mary and Jennet Hamilton; but whether their father lived with their mother during this period, or only occasionally visited her, did not appear. That in 1816 the kirk-session of the Canongate presented a petition to the magistrates, alleging, that the respondents, Mary and Jennet, were illegitimate, and praying that the mother might be examined as to who was their father, with the view of preventing them from being chargeable to the parish. That the father of the respondents gave bond with Major John Lindsay to the kirk-treasurer of Canongate, that the respondents, describing them as “two natural children born by Mary Clark,” should not be chargeable to the parish. That in the year 1817 the father of the respondents took a flat of a house in Brown Street, Edinburgh, where he went to reside, and continued to reside, with their mother, until 1820, and during their residence there, the two respondents, James and Archibald, were born. That in 1820 the father took a house in the Crosscauseway of Edinburgh, and remained there until 1822, when he took another house at St Leonards, in which he continued to live until his death, which happened on the 23d February, 1823, and that during his residence in the Crosscauseway and at St Leonards, as during his residence in Brown Street, the respondents and their mother lived in family with him.

The evidence led had regard to the two grounds of defence set up by the respondents: — 1st, Marriage of their parents by cohabitation, and habit and repute, during the period subsequent to their going to reside in Brown Street. 2d, Marriage by the letter of 26th September, 1817.

I. Marriage by cohabitation and habit and repute.

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Of several witnesses examined for the pursuer, (appellant) Lieutenant General Hope deponed, that he “ was intimately acquainted with the late Archibald Hamilton, sometime surgeon in the 92d regiment of foot. That the deponent was acquainted with Mr Archibald Hamilton up to the period of his death. That it was generally reported, and understood among his friends, that Mr Hamilton kept a mistress, by whom he had a family; but that, to his knowledge, the deponent never saw her, and never knew her name. But he understood it was the same person who, subsequently to Mr Hamilton’s death, applied to the deponent for a certificate to obtain the government pension. That he never had any information on the subject from Mr Hamilton himself. That the deponent was intimately acquainted with the late Major Lindsay, who was brigade-major to the deponent: That the said Major Lindsay and Mr Archibald Hamilton were for many years on terms of great intimacy, down to the period of Mr Hamilton’s death: That said Major Lindsay died at Madras four or five years ago: That Major Lindsay attended Mr Hamilton during his last illness, which lasted only a few days. Depones, That Major Lindsay had often spoken to the deponent regarding the mother of the defenders, and as to Mr Hamilton having had children by her; but he did not speak to the deponent of her as being Mr Hamilton’s wife. Interrogated, In what character Major Lindsay spoke of the defenders’ mother? answers, ‘ Merely as ‘ a person who lived with him.’ Interrogated, Whether, ‘ by a ‘ person who lived with him, he understood Major Lindsay ‘ to mean that she was his mistress?’ answers, ‘ I understood ‘ so.’ Whether the deponent thinks, that if Mr Hamilton had made a low or disreputable marriage, Mr Hamilton would have mentioned it to him? Depones and answers. No; I do not think he would. Interrogated, Whether he thinks that Mr Hamilton would have refrained from doing so from a desire of retaining the deponent’s good opinion? Depones, That he

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“ has no doubt he had that desire. Depones, That Mr Hamilton was known to Lady Hope and the other members of the deponent’s family, and was received as a visitor at his house.”

Edward Bruce, a retired merchant, deponed, “ That he was intimately acquainted with the late Dr Archibald Hamilton, and that the intimacy commenced about 30 years ago, when the deponent was a boy about 14 years of age. Interrogated, If he understood that Dr Hamilton, after his return to Edinburgh, kept a mistress? Depones, That he did so understand: That the deponent used to joke Dr Hamilton about it, and he laughed in return and never denied it. Depones, That it was generally known and talked about among his friends. Interrogated, Depones, That he understood that it was the same person whom the Doctor all along kept up as his mistress, and that the connection continued down to the Doctor’s death. Interrogated, if he knew that the Doctor had a family by her? Depones, That he did. Depones, That he has seen a person in the street who was pointed out to him as the individual who was kept by Dr Hamilton, and that he frequently saw her afterwards, but she was not pointed out by Dr Hamilton himself. Interrogated, If he ever heard or understood that Dr Hamilton had married the foresaid person? Depones, That he never did; and farther depones, That the Doctor never expressed to him in conversation any intention of marrying the above individual, nor did he ever hear it whispered or surmised among the Doctor’s friends or acquaintances, that any such lawful connection between the parties had been formed. Interrogated, Depones, That, from the intimacy which the deponent had with Dr Hamilton and his family, he really thinks he would have informed the deponent had he entered into any such connection with the foresaid person; and the deponent adds, That he was so much in the habit of joking the Doctor about her as his mistress, that he

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“ thinks the Doctor would have taken the opportunity of check-
“ ing him, and mentioning that he was married to her, if that
“ had been the case. Interrogated, depones, That it was the
“ deponent’s firm belief that Dr Hamilton died an unmarried
“ man, for he had never heard, till after his death, that the
“ person referred to claimed to be his wife, and when he did
“ hear this, he was quite astonished. Interrogated, How long
“ it might be after Dr Hamilton’s death till he heard of the
“ claim? Depones, That it would be a good while after it, and
“ he daresay it might be about a year. Cross-interrogated for
“ the defenders, Whether, when the deponent was joking Dr
“ Hamilton about his mistress, the Doctor made any answer in
“ words? Depones, that he does not think the Doctor would
“ make any specific answer about it, but he would probably say,
“ ‘Bruce, you are a terrible fellow,’ or words to that effect.
“ Interrogated, Depones, That the Doctor never said to the
“ deponent in plain terms, either that he had a mistress or that
“ he had not. Interrogated, If the Doctor was in the habit of
“ communicating much with the deponent about his private
“ affairs? Depones, and answers, Oh no. Interrogated, De-
“ pones, That he does not remember any instance in which the
“ Doctor mentioned any thing to him of his private affairs.
“ Interrogated, Whether, from what he knew of the Doctor’s
“ character, he thinks, that if he had married a person in a
“ lower rank of life, he would have felt reluctant to communicate
“ it to his friends or the deponent? Depones, that he thinks he
“ would have mentioned it; and the deponent adds, That, as
“ respects the deponent, the Doctor had an opportunity of doing
“ so, for the deponent was once if not twice, but he is certain as
“ to once, by mere accident, in the house where the person
“ referred to lived. And being interrogated, the deponent
“ explains, with regard to the foresaid occasion, that he happened
“ to meet the Doctor in Princes’ Street, who asked him if he
“ would take a walk to the southward, which he agreed to, and

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“ when they had got the length of St Leonards, the Doctor
“ asked him if he would go into his house, which was somewhere
“ about St Leonards; that they went into it together; that the
“ deponent saw nobody in the house,—and that, after remaining
“ a little, they both came out together: That this happened
“ about a year before the Doctor’s death, and that it was from
“ the same house that the Doctor was buried. Depones, that he
“ thinks the Doctor proposed going into the house merely that
“ the Doctor might get a rest, and that they remained about half
“ an hour. Interrogated, Whether he ever saw the Doctor and
“ the woman above referred to, together upon any occasion?
“ Depones, That he never did. Interrogated, depones, That
“ he knew that the Doctor, for some years previous to his
“ death, lived at the foresaid house, and not with his sisters.
“ Re-interrogated for the pursuer, depones, That when the
“ deponent joked the Doctor about his mistress, what passed
“ made the impression upon the deponent’s mind, that the Doctor
“ did not mean to deny that the woman was his mistress, and
“ the deponent all along firmly believed that she was so, and
“ not his wife.”

William Crichton, surgeon, deponed, “ That he was acquainted
“ with the late Dr Archibald Hamilton, and he was particularly
“ intimate with him during his later years, and the Doctor had
“ been intimately acquainted with the deponent’s father and
“ family. Interrogated, If the deponent was aware that Dr
“ Hamilton kept a woman as his mistress? Depones, That he
“ heard it rumoured that he did so, but the deponent never had
“ any conversation with the Doctor upon the subject, and he
“ did not think it likely that the Doctor would mention such a
“ thing to the deponent. Interrogated, depones, That he does
“ not recollect, and does not think that, during the Doctor’s
“ lifetime, he ever heard that the Doctor had any children
“ by the person referred to, but the deponent may have heard it,
“ and the deponent’s family used to lament that such a gentle-

“ manlike person as the Doctor should keep a mistress. Inter-
“ rogated, If he ever heard or understood that the Doctor had
“ married any person, or declared a marriage? Depones,
“ Never during the Doctor’s life, and that it was the deponent’s
“ belief that the Doctor had died an unmarried man.”

Mrs Taylor, the widow of a merchant, deponed, “ That she
“ was very intimately acquainted with the late Dr Hamilton and
“ his family: and that the deponent’s intimacy continued with
“ the Doctor down to the Doctor’s death. Interrogated, If,
“ down to the Doctor’s death, the deponent ever heard that he
“ was married? Depones, That she never did; and the depo-
“ nent believed him to have died an unmarried person. Interro-
“ gated, Whether, if the Doctor had married, or declared a
“ marriage with any one, she thinks that she and her family
“ would have heard of it? Depones, That she does. Interro-
“ gated, If the deponent was aware that the Doctor had a family
“ of natural children? Depones, That she was. Interrogated,
“ If she knew that the Doctor, some years before his death, re-
“ sided with the mother of the children? Depones, That she
“ knows that at one time he did not reside with her, and she is
“ not aware that he ever did so, but she knows perfectly that he
“ kept the said person as his mistress, and she understood that
“ the connection continued down to the Doctor’s death.”

Dr Saunders deponed, “ That he was intimately acquainted
“ with the late Dr Archibald Hamilton, and that he attended him
“ in his last illness. Interrogated, If he was aware that the Doctor
“ kept a mistress? Depones, That he was so latterly. Interro-
“ gated, If he understood this from the Doctor himself? Depones,
“ That the Doctor never said so to the deponent, as far as he
“ recollects; but when the deponent was attending him, he used
“ to see a woman with him, whom the deponent judged to be
“ his mistress. Interrogated, If the deponent ever had any
“ reason to believe that the said woman was the Doctor’s wife?
“ Depones; That he never had. Interrogated, How the Doctor

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“ designated her when he spoke of her? Depones, That he has
“ heard the Doctor say, ‘that woman,’ or call her by her chris-
“ tian name, which was Mary or May, and that the impression
“ upon the deponent’s mind, from the whole conduct of the
“ Doctor towards her, and of the way in which he spoke of her,
“ was, that she was his mistress. Interrogated, depones, That
“ the deponent is now speaking generally to his intercourse with
“ the Doctor, including particularly his attendance during his
“ last illness. Interrogated, depones, That he was in the habit
“ of seeing the said woman both in and out of the Doctor’s room
“ when attending him, and that he never had at any time any
“ suspicion even that she was the Doctor’s wife; and that the
“ deponent spoke to, and gave her directions just as he would
“ have done to a sick-nurse. Depones, That he knows that the
“ Doctor had a family, and he understood the woman above re-
“ ferred to, to be the mother of the children.”

Walter Moir, Sheriff-substitute of Lanark, deponed, “ That he
“ was most intimately acquainted with the late Dr Archibald
“ Hamilton. That the Doctor was the deponent’s second cousin.
“ That after the Doctor’s return from the army, he was in the
“ habit of consulting the deponent about his private and confi-
“ dential matters as a friend. Interrogated, Whether the depo-
“ nent was aware that the Doctor, after his return to Edinburgh,
“ kept a mistress? Depones, That he was aware of this, and
“ the Doctor told him so himself. Interrogated, depones,
“ That he knew that the Doctor had children by the said woman,
“ and he heard this also from the Doctor; and the deponent
“ adds of himself, That about two or three years before the
“ deponent left Edinburgh, he recollects of Miss Hamilton, a
“ sister of the Doctor’s, calling at the deponent’s and complain-
“ ing of something in the Doctor’s conduct, which she said he
“ would explain himself, but which she declined doing, and re-
“ quested the deponent to mention to him her displeasure, and
“ to beg that he would amend his conduct: That accordingly,

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“ when the Doctor called, which he did almost every other day,
“ the deponent stated to him what had passed with his sister,
“ and the Doctor then said, ‘ Oh, it is about the girl that has the
“ children to me,’ and he told the deponent that he and his
“ sister had had some high words about the subject: That the
“ deponent does not recollect of any thing farther that passed.
“ Interrogated, Whether the deponent ever heard, during the
“ Doctor’s life, that he had married either the foresaid woman
“ or any other person? depones, That he never did; and he
“ always believed that the Doctor had died a bachelor. Inter-
“ rogated, Whether from his habits of intimacy with the Doctor,
“ he thinks that if he had married or declared a marriage, the
“ Doctor would have communicated it to him? depones, That
“ he thinks he would have given him some hint of it; indeed, he
“ is almost certain he would have mentioned it. Cross-interro-
“ gated for the defenders, depones, That he has no remembrance
“ of ever having visited the Doctor in any of his lodgings, and
“ the deponent was frequently quite ignorant of the Doctor’s
“ address, although the Doctor was constantly calling at the
“ deponent’s house. That he had no reason whatever for not
“ calling on the Doctor, and it was needless, as the Doctor was
“ constantly calling at the deponent’s; and depones, That he
“ understood that the Doctor liked to live privately, and saw no
“ company at his lodgings.”

Several other witnesses, persons who had lived in the neighbourhood of Dr Hamilton’s lodgings in Brown Street, were examined for the pursuer, and deponed to a report in the neighbourhood, that the Doctor and May Clark were not married persons, but none of them had been in the habit of visiting or meeting the Doctor or May Clark.

Several witnesses were also examined for the defenders, (respondents,) as to habit and repute — among others, John Robertson, writer, deponed, “ That he was acquainted with the
“ late Dr Hamilton, and their acquaintance commenced in 1818

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“ or 1819, at which time Dr Hamilton lived in Brown Street,
“ where the deponent also resided : That he occasionally visited
“ Dr Hamilton : That he understood the Doctor to be a married
“ man : That he knew his wife, and he also knows that that
“ person is the mother of the defenders in this action : That
“ the deponent was then a clerk to Mr Hamilton Miller, and
“ was then a married man, and the deponent’s wife visited Mrs
“ Hamilton : That her present state of mind prevents her
“ giving evidence as a witness, but she was in perfect health at
“ the time referred to, and for years afterwards. . That the de-
“ ponent and his wife were introduced to Dr and Mrs Hamilton
“ as married persons, and he always understood them to be so :
“ That the deponent and his wife came to occupy the room,
“ which had previously been possessed by Dr and Mrs Hamilton,
“ and it was in that way that they came to be introduced to each
“ other : That their acquaintance continued till Dr Hamilton’s
“ death, and the deponent being seldom at home, Mrs Robertson
“ was better acquainted with them than the deponent. That
“ certainly neither he nor his wife would have had any com-
“ munication with Mrs Hamilton, had they not believed her to
“ be the Doctor’s wife. That he and Mrs Robertson have drank
“ tea in Dr and Mrs Hamilton’s house, and they have supped in
“ the deponent’s, but not often. That they always conducted
“ themselves as man and wife, and were so treated by the de-
“ ponent, his wife and others, so far as the deponent ever saw.
“ That they lived privately. That during Dr Hamilton’s life,
“ nothing ever occurred to create any doubt in the deponent’s
“ mind that Doctor and Mrs Hamilton were married persons ;
“ but after the Doctor’s death, he heard, for the first time, that
“ the marriage was not a regular one, but by letter. That he
“ knows that Mrs Robertson’s belief and understanding upon
“ the subject was the same as the deponent’s. That when their
“ acquaintance commenced with Dr Hamilton, he had two
“ daughters, who, as far as the deponent knows, were reputed

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“ to be his lawful children : That afterwards, Mrs Hamilton
 “ had twins, who were also acknowledged as the Doctor’s lawful
 “ children. Cross interrogated for the pursuer, depones, That
 “ he thinks the Doctor must have been fully a year in Brown
 “ Street, after the deponent went there, when he went to St
 “ Leonards, where he died : That the deponent only called
 “ twice at the Doctor’s house at St Leonards, so far as he recol-
 “ lects; but he on neither occasion saw the Doctor, nor did he ever
 “ see him after he left Brown Street : That he, however, knows
 “ that Mrs Robertson’s acquaintance with the Doctor and Mrs
 “ Hamilton continued, and that they were often together :
 “ That the times when he was in company with the Doctor and
 “ Mrs Hamilton did not exceed six, as he thinks, but they might
 “ be more ; and the deponent more frequently saw Mrs Hamil-
 “ ton visiting Mrs Robertson than any other way : That the
 “ deponent never dined with Dr and Mrs Hamilton. Interro-
 “ gated, depones, That in speaking of Mrs Hamilton, the Doctor
 “ always called her Mrs Hamilton, — in speaking to her, he
 “ thinks he sometimes called her May.”

Ann Russell deponed, “ That the deponent’s mother, till
 “ within four years of her death, lived at the Crosscauseway, in
 “ a house belonging to herself, and the deponent recollects seeing
 “ the late Dr Archibald Hamilton at her mother’s, inquiring about
 “ her mother’s house, which he afterwards rented from her, and
 “ that upon that occasion he had some conversation with her
 “ mother about purchasing some fixtures that were in the house.
 “ That the deponent understood from him that he was a married
 “ man with a family. That Dr Hamilton said he could not settle
 “ about the bargain till he spoke to Mrs Hamilton, and that he
 “ would bring her to see the house. That the Doctor called
 “ again, and brought a lady with him, whom he called Mrs
 “ Hamilton, and the house was then taken, and some fixtures and
 “ other things purchased. That these things took place in the
 “ end of 1820 or beginning of 1821, and the Doctor entered

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“ at Whitsunday 1821. That the deponent and her mother
“ remained a night in the house after the Doctor, Mrs Hamilton
“ and two children, had taken possession : That before that,
“ and on occasions of the deponent’s being in Edinburgh, she
“ was twice at Dr Hamilton’s drinking tea : That the deponent
“ was not invited, but having called, was asked by Mrs Ham-
“ ilton to remain to tea : That on one of the said occasions
“ Dr Hamilton was present, and drank tea along with them,
“ and that two daughters were there also : That, as far as
“ the deponent observed, the Doctor and Mrs Hamilton con-
“ ducted themselves to each other as man and wife : That he
“ addressed her as Mrs Hamilton, and treated both her and the
“ children with great kindness. Depones, That from all she saw
“ she never had any thought but that the Doctor and Mrs
“ Hamilton were married persons, and that the children were
“ their lawful children.”

Agnes Slight, wife of James Slight, brass-founder, deponed,
“ That she at one time lived in Brown Street, and she recollects
“ that the late Dr Archibald Hamilton and Mrs Hamilton lived
“ on the same flat with the deponent and her husband, for more
“ than three years : That the deponent and her husband knew
“ Dr and Mrs Hamilton intimately, during most part of the fore-
“ said period. Interrogated, Whether she considered them
“ married persons or not? depones, That she always con-
“ sidered them married persons. That for some time there was
“ nobody in the stair but the deponent’s family, and Dr and Mrs
“ Hamilton, — the tenement being newly built, — and they
“ were in each other’s houses every day almost, although they
“ never took meals with each other. Interrogated, If that
“ house was Dr Hamilton’s home? depones, That it appeared
“ to be so, for he was there every night. Depones, That, as far
“ as the deponent saw, they always conducted themselves as
“ married persons : That they had two daughters at that time,
“ and the deponent considered them to be lawful children. In-

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“ terrogated, Whether Dr Hamilton conducted himself towards
“ them as lawful children? depones, That he was very fond of
“ his children, and he behaved to them just as she would have
“ expected a father to do to his lawful children. That the de-
“ ponent had then two children. That she once saw two ladies
“ visiting at the Doctor’s, who she understood to be his sisters,
“ and she was told so at the time by Mrs Hamilton. Inter-
“ rogated, Whether the deponent ever heard the children speak-
“ ing of their father’s relations? depones, That she has. That
“ in speaking of them, they called Dr Hamilton’s sisters their
“ aunts, and spoke as if they were acquainted with them. In-
“ terrogated, depones, That during the whole time the deponent
“ was acquainted with the Doctor and Mrs Hamilton, she saw
“ nothing that could lead her to suppose that they were not
“ married persons: That the conduct of Mrs Hamilton was also
“ strictly proper and correct, and she had no doubt of their being
“ married persons: That the Doctor and Mrs Hamilton never
“ visited together in the deponent’s house: That at one period
“ the Doctor came in two or three times to assist the deponent’s
“ brother-in-law in some chemical experiments, who was attend-
“ ing the chemistry class: That the Doctor also came in re-
“ peatedly to see the children when they were ill, and except on
“ these occasions, and the new year’s morning before deponed
“ to, he never was in the deponent’s house: That the depon-
“ ent’s intimacy was rather with Mrs Hamilton than the Doctor.
“ That she has frequently seen Dr and Mrs Hamilton together
“ when the deponent was in their house, but she never heard
“ the Doctor address Mrs Hamilton by any name. Depones,
“ That when speaking of Mrs Hamilton to the deponent, the
“ Doctor always called her ‘mother,’ and never ‘Mrs Hamilton.’
“ That in speaking to the Doctor of Mrs Hamilton, the deponent
“ always called her Mrs Hamilton, and never was checked by
“ the Doctor for doing so.”

Ann Martin deponed, “ That at one time she was in the

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“ service of Dr Hamilton, and she was then 15 years of age.
“ That she was engaged by Mrs Hamilton, and was with them
“ for six months : That when she went, they lived at the Cross-
“ causeway, and in three weeks they removed to St Leonards :
“ That this was the deponent’s first service, and when she went,
“ the deponent and her father and mother believed that she was
“ hired with married persons : That the deponent was there for
“ six months, and the Doctor slept in the house every night, and
“ made it his home. That, from first to last, she always con-
“ sidered Doctor and Mrs Hamilton to be married persons, and
“ she never saw any thing that could lead her to think otherwise :
“ That after she left them, she went to serve with Mr and Mrs
“ Grinton, clothier, Nicolson Street ; and, That the latter treated
“ each other and lived together just in the same way as Dr and
“ Mrs Hamilton did. That Mrs Hamilton was always called by
“ that name. That in speaking of her to the deponent, the
“ Doctor called her either Mrs Hamilton or ‘ your mistress.’
“ That she does not think the Doctor dined twice from home all
“ the time the deponent was with them : That Mrs Hamilton
“ always sat at the head of the table, and that they lived on
“ affectionate terms with each other, and the deponent never saw
“ any thing light or improper in either of them : That she has
“ seen them go out together, but very seldom : That at the
“ shops where they dealt, Mrs Hamilton was always spoken of
“ as Mrs Hamilton : That they had four children, and the de-
“ ponent considered them to be lawful children.”

Isabella Paterson deponed, “ That she was in his house as an
“ assistant to the servant, and to take care of the children, and
“ she believes she was there all the time they lived at St
“ Leonards, which might be about a year : That the deponent’s
“ father and mother lived in the neighbourhood : That the
“ deponent always understood Doctor and Mrs Hamilton to be
“ married persons, and she was uniformly called Mrs Hamilton :
“ That the Doctor gave her that name : That he lived in the

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“ house, taking his meals, and sleeping there : That the Doctor
 “ and Mrs Hamilton and the children all dined together, she sit-
 “ ting at the head of the table : That she has since been a servant
 “ in the houses of married people, and they conducted themselves
 “ towards each other just in the same way as Doctor and Mrs
 “ Hamilton: That she has seen Doctor Hamilton’s two sisters at
 “ the house : That this was during his last illness, and within
 “ five or six weeks of his death, and she never saw them before
 “ that; but the deponent, till the Doctor’s last illness, did not
 “ sleep in the house, and was only there occasionally : That
 “ the Doctor’s sisters saw Mrs Hamilton when they were there :
 “ That they asked for Mrs Hamilton, giving her that name :
 “ That she has seen them speaking to the children: That she
 “ has gone out and in of the room when they were with Mrs
 “ Hamilton : That they were then conversing together, and
 “ appeared to be on friendly terms : That when Doctor Ham-
 “ ilton got worse, his bed room was changed: That Mrs
 “ Hamilton was the only one of his connections who attended
 “ him. That, down to the last, he spoke of her as Mrs Hamilton,
 “ and appeared to treat her as his wife : That when the de-
 “ ponent opened the door to the Doctor’s sisters, she has heard
 “ them ask, Whether there was any other person in the room
 “ with the Doctor, but Mrs Hamilton? Depones, That never
 “ having been in company with Mrs Hamilton and the Doctor’s
 “ sisters, she never heard them address her by the name of Mrs
 “ Hamilton.”

Jacob Lisenheim deponed, “ That the deponent has been in
 “ the Doctor’s house in the Crosscauseway several times : That
 “ the Doctor introduced him to Mrs Hamilton : That the depo-
 “ nent had some French gloves to sell : That Major Lindsay
 “ bought some more than once, and the Doctor being at the
 “ Major’s, the Doctor said to the deponent, ‘ If my wife wants
 “ ‘ gloves, I will buy some from you ;’ and the Doctor appointed
 “ an hour to meet him at the Doctor’s house : That the deponent

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“ went there accordingly : That the Doctor called Mrs Hamilton
“ in, and said, ‘ If you want some of these gloves you may have
“ them ;’ and she then bought a pair of lady’s gloves, and he
“ now exhibits an entry in his books, in an account titled, Dr
“ ‘ Hamilton,’ which entry is as follows :— ‘ 1821, February 22.
“ ‘ One pair lady’s gloves, 2s.’ ”

Alexander Deuchar deponed, “ That he married the widow
“ of Thomas M’Whirter, in March 1823, and his wife died in
“ 1827 : That for a considerable time before the deponent’s mar-
“ riage, Mrs Deuchar had been acquainted with Dr Archibald
“ Hamilton, and in that way the deponent also became acquainted
“ with the Doctor before the deponent’s marriage : That his
“ acquaintance commenced in 1822 : That the deponent con-
“ sidered him a married man : That the deponent and Mrs
“ Deuchar were also acquainted with Mrs Hamilton, and visited
“ her before the deponent’s marriage, which the deponent cer-
“ tainly would not have done had he not believed that she and
“ the Doctor were married persons : That Mrs Deuchar knew
“ Mrs Hamilton intimately before her marriage with the depo-
“ nent, and frequently visited her : That the deponent knows
“ perfectly that Mrs Deuchar considered the Doctor and Mrs
“ Hamilton to be married ; and he is satisfied that, had she not
“ so, she would not have visited them, or introduced the depo-
“ nent to them : That his acquaintance with Dr and Mrs
“ Hamilton was prior to the deponent’s marriage in 1823 : That
“ the deponent never visited Mrs Hamilton after the Doctor’s
“ death ; but Mrs Deuchar and Mrs Hamilton visited each
“ other : That the deponent used to meet Mrs Deuchar before
“ their marriage, in the evening, at Mrs Hamilton’s, and the
“ deponent has also met Dr and Mrs Hamilton at Mrs
“ M’Whirter’s about the same time, at tea and visiting : That
“ when he saw Dr and Mrs Hamilton together, they appeared
“ to conduct themselves towards each other as married persons,
“ and the deponent never had a doubt upon the subject : That

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“ they seemed to live together openly as man and wife, just as
“ the deponent would expect married people to do. Depones,
“ That the Doctor has spoken to the deponent of Mrs Hamilton
“ as Mrs Hamilton, conversing in regard to her as his wife, and
“ calling her Mrs Hamilton.”

Helen Meldrum deponed, “ That she was at one time in the
“ service of the late Dr Archibald Hamilton : That the deponent
“ entered Dr Hamilton’s service at the November term previous
“ to his death, and she remained for six months : That as far as
“ she understood, Dr and Mrs Hamilton were married persons :
“ That the Doctor treated Mrs Hamilton respectfully and affec-
“ tionately as his wife, and they lived as happily together as any
“ lady and gentleman she ever served with : That they had four
“ children, and the deponent considered them to be lawful
“ children : That the Doctor always, in speaking of Mrs Hamil-
“ ton, called her Mrs Hamilton. Depones, That Dr Hamilton
“ was only confined for four weeks previous to his death : That
“ two or three weeks before it, the Miss Hamiltons, his sisters,
“ were sent for : That they came to see the Doctor, and they
“ took lodgings in the neighbourhood, there being no accommo-
“ dation for them in the Doctor’s house. Depones, That she has
“ seen Mrs Hamilton and the Miss Hamiltons together during
“ the Doctor’s illness, and she never saw any thing between
“ them but what was agreeable, nor any thing that could lead
“ her to suppose that they did not consider her to be the wife of
“ Dr Hamilton. Depones, That when the Miss Hamiltons saw
“ the children, they appeared to treat them kindly : That she
“ never saw any thing in the conduct of Dr or Mrs Hamilton
“ to make her doubt that they were married persons : That she
“ has always believed them to be so : That she never saw the
“ Miss Hamiltons at Dr Hamilton’s till they were sent for, as
“ before deponed to, and she does not think they could have
“ been there, while she was a servant, without her seeing them :
“ That during the time the Miss Hamiltons were residing in the

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“ neighbourhood, they were repeatedly going back and forward
“ in the course of the day, Depones, That she never was in the
“ room, or present with the Miss Hamiltons and Mrs Hamilton,
“ long enough to hear any conversation that passed between
“ them. Interrogated, Whether she ever heard the Miss
“ Hamiltons call Mrs Hamilton by that name? Depones, That
“ she never did, and she understood there was some difference
“ or quarrel between them before the deponent entered the
“ service.”

Robert Slater deponed, “ That the deponent was for some
“ years an apprentice with Mr M'Whirter, writer in Edinburgh:
“ That, during that period, he was daily in Mr M'Whirter's
“ house: That Mr M'Whirter was a married man: That he
“ has very frequently met the late Dr Archibald Hamilton at
“ Mr M'Whirter's: That he considered Dr Hamilton a married
“ man: That he has frequently seen his wife and family at Mr
“ M'Whirter's: That they were there visiting, and were inti-
“ mate with Mr and Mrs M'Whirter: That he has seen them
“ occasionally at Mr M'Whirter's at meals, as well as visiting:
“ That Dr and Mrs Hamilton always apparently conducted
“ themselves as married persons: That the lady always passed
“ under the name of Mrs Hamilton: That she was always
“ treated by Mr and Mrs M'Whirter as a married woman, and
“ the deponent never doubted that she was so: That both Mr
“ and Mrs M'Whirter are dead: That they had very few
“ acquaintances, and received few visitors: That the persons
“ who did come about them were all reputable; and the depon-
“ ent does not think they would have received Mrs Hamilton, if
“ they had believed her not to be the wife of Dr Hamilton; but
“ at the same time he cannot speak to what might be their
“ sentiments: He only gives his opinion from what he saw of
“ their conduct generally: That Mr M'Whirter was agent for
“ Dr Hamilton. Depones, That the deponent never had any
“ communication with Dr Hamilton about his private matters.

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“ Depones, That when the Doctor spoke to Mrs Hamilton, he
 “ called her by her christian name, and when he spoke of her he
 “ called her Mrs Hamilton: That the deponent never heard
 “ him call her his wife, or any other person do so in his
 “ presence.”

The documentary evidence produced for the pursuer, (appellant,) consisted, 1st, Of a will executed by Dr Hamilton on the 4th of October, 1820, bearing, “ for the love, favour, and affection I have and bear to Mary Hamilton and Janet Hamilton,
 “ my daughters, and May Clark, their mother, I do therefore
 “ hereby make, constitute, and appoint the said Mary and Janet
 “ Hamiltons, or any other children that may be procreated betwixt the said May Clark, their said mother, and me, to
 “ be my sole executors, but also my universal legatorys.” Throughout this will the mother of the respondents was called “ May Clark,” and they themselves were either called by their names, or spoken of as “ her family,” or “ my children;” and the Doctor’s whole estate, with the exception of his interest in the pawnbroking business, was given “ to and in favour of the
 “ said May Clark, Mary and Janet Hamiltons, and such child
 “ or children as may be procreated betwixt the said May Clark
 “ and me, their heirs, executors or assignees.” As to the pawnbroking business, so soon as it yielded L.200 per annum, May Clark and her children were to draw two-thirds of the profits, and the appellant one-third for his life, and, at his death, his third was to be drawn by the testator’s sisters.

2d, Of a codicil to the will, executed on the 19th of February, 1823, in which the respondents and their mother were spoken of in these terms, — “ May Clark, and my four children by her.”

3d, A variety of letters, dated between 1819 and 1822, written by Dr Hamilton, from London, to the mother of the respondents, addressed in the inside, “ My dear Mary,” or “ My dearest Mary,” and concluding, “ Yours affectionately.” The address on the outside of these letters, when produced in Court, was, to

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“Mrs Hamilton,” but, according to the opinion of several engravers, the letter “s” in “Mrs” was an *ex post facto* operation, not in the handwriting of Dr Hamilton. In one of these letters, written from the house of the appellant, the Doctor complained of not being comfortable, and added, “don’t say this to my sister.” In another he enclosed L.6, and said, “to save the expense of a double letter, you will, on receipt of this, give, or send down to my sisters, L.3.” In another he said, “Gilbert will give you any little money you may want till I come home, and if I don’t get down before the 25th, tell him to give some to my sisters.” And in all of them he inquired after the respondents in the most affectionate manner.

On the other hand, the documentary evidence produced for the defenders, (respondents,) was, — 1st, The letter of 26th September, 1817, founded on in the defences.

2d, An entry in the blank leaf of a Bible which had belonged to Dr Hamilton, in these terms, —

“*Edinburgh, 10th May, 1815.*”

“Mary Hamilton, born the 25th December, 1811.

“Jennet Hamilton, born the 21st November, 1813.

“James and Archibald, born 29th August, 1822.

“Registered in the parish of Canongate. An Extract obtained 22d April, 1824.

“W. L. and J. G., *witnesses.*”

3d, Various receipts for rent of the houses in Brown Street, Crosscauseway, and St Leonards, all of which, with one exception, were in the name of “Mr” Hamilton, the exception being in the name of “Mrs” Hamilton.

4th, An account made out by a tradesman in the name of “Mr Hamilton,” and a promissory note for the amount, signed “Mrs H. for Mr Hamilton.”

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5th, Various accounts for clothes to the respondents and their mother, made out in the name of “Mrs” Hamilton.

6th, Various notes of assessed taxes, and a warrant to poind the goods of “Archibald Hamilton” for non-payment of the amount.

7th, A note from Dr Hamilton, to Gilbert, his partner, in these terms: — “GILBERT — Will you give Mrs H. L.4, and will you take the trouble to call upon Polmore to-night, and give your bill for the balance at three months? This is the only way he will settle it. Yours, (Signed) AR. HAMILTON.”

II. Marriage by the letter of 26th September, 1817:

To negative this branch of the defence, John Dickie, a writer to the signet, who had been the friend and the legal adviser of Dr Hamilton, was examined by the pursuer, (appellant,) and deponed *in initialibus*, “That he never had any correspondence with the pursuer as to the present action; but that, immediately after Dr Hamilton’s death, the deponent communicated to the pursuer, by letter, the circumstance of the Doctor’s connection with the mother of the defenders, and that before this, that person had alleged herself to be the Doctor’s widow; and that, on the pursuer’s answering the deponent’s letter, stating that he meant to question the legitimacy of the defenders, the deponent intimated to him, that in that case, he could not act as his agent, or give him any advice upon the subject. That he did not keep any copies of his letters to the pursuer on this occasion, and indeed was not in the custom of keeping any of his letters to the pursuer, as they were all almost of a friendly and confidential nature, and the deponent does not believe that he preserved the foresaid letter of the pursuer to him.”

Subsequently, Mr Dickie produced several letters from the pursuer to him, and thereafter he further deponed *in initialibus*, “That when the deponent first wrote the pursuer after the Doctor’s death, he informed him that he knew that the Doctor

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“ had left a letter acknowledging the defenders’ mother as his
“ wife, and the deponent thinks that it was in consequence of the
“ information so given, that the pursuer wrote to the deponent
“ one of the letters transmitted to the Commissioner; and depones
“ farther, That the deponent then thought it his duty to write
“ the pursuer, and did write him, of all the particulars as to the
“ foresaid letter, within the deponent’s personal knowledge :
“ That the pursuer was then in France.”

Dickie was then examined in chief, and deponed, “ That he
“ acted as Dr Hamilton’s agent in one or two matters, and that
“ the first occasion on which this occurred, related to an applica-
“ tion which was served by the kirk-treasurer of the Canongate
“ against the defenders’ mother, to have her ordained to appear
“ and be examined as to two natural children. That these two
“ children are the two eldest of the defenders. Interrogated,
“ Whether, after this, the deponent had any conversation with
“ Dr Hamilton in regard to the defenders’ mother? Depones,
“ never, except on one occasion : That, in the year 1817 or 1818,
“ the Doctor waited upon the deponent, and stated, that he
“ wished to execute some writing by which the said person might
“ be enabled to receive the pension of an army surgeon’s widow :
“ That the deponent stated to the Doctor, that, in his opinion,
“ that could only be done by making her his wife; to which the
“ Doctor replied, that that he never would do; but he stated at
“ the same time, that he wished the deponent would give him the
“ form of an acknowledgment of the defenders’ mother as his
“ wife, and that he would leave it in the deponent’s hands, and
“ repeating that he would not make her his wife, and that, there-
“ fore, he would not deliver the document into her possession :
“ That the deponent then wrote out two lines of a simple ac-
“ knowledgment of the defenders’ mother as his wife, which the
“ Doctor took away with him. Depones, That in a short time,
“ which might be within a week or a fortnight, the Doctor re-
“ turned, bringing with him the acknowledgment written in his

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“ own hand, and subscribed by him, and addressed to the de-
“ fenders’ mother, and he delivered it to the deponent, requesting
“ him to be the custodier of it, and expressed an anxious desire
“ that it should be so arranged, that, in the event of the depo-
“ nent’s death, it should fall into no hands but the Doctor’s own;
“ and that the deponent then, in presence of the Doctor, put the
“ acknowledgment in an envelope, upon the back of which the
“ deponent wrote, — ‘ To be delivered into the hands of Archi-
“ ‘ bald Hamilton, Esq., unopened,’ and it was then sealed with
“ the Doctor’s seal, as the deponent thinks. Depones, That the
“ deponent does not recollect that any thing farther passed on
“ that occasion. Interrogated, Whether, on the above occasion,
“ the Doctor again said any thing to the effect of his being re-
“ solved not to make the defenders’ mother his wife during his
“ life? Depones, That he cannot charge his memory as to that,
“ but he recollects that, either on that occasion or the previous
“ one, but he thinks upon that occasion, he mentioned to the
“ Doctor his opinion, that a latent document of the above descrip-
“ tion would not avail him with reference to the object in view,
“ of obtaining the pension of a widow, on which the Doctor re-
“ marked, that it might be so, but it could do no harm, and might
“ be of use. Interrogated, Whether the deponent retained the
“ said document in his possession during Dr Hamilton’s life?
“ Depones, That he did. Interrogated, Whether the deponent
“ considered himself as the custodier of the said document for
“ Dr Hamilton alone, and bound to deliver it up to him, upon
“ his request to that effect? Depones, That he considered him-
“ self the holder of the document on the Doctor’s account only,
“ and he would have delivered it to him if required. That he
“ recollects the Doctor’s last illness. That when on his death-
“ bed, the Doctor sent for the deponent, and put into his hand
“ a deed of settlement, which he had executed some time before,
“ and gave the deponent instructions to make some alterations
“ upon it: That the deponent took a note of these at the moment,

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“ and prepared a codicil in terms of the instructions so received,
“ which he took to the Doctor’s next day, when it was executed,
“ and the deponent produces the settlement and codicil, which is
“ marked by him and the Commissioner as relative hereto.
“ Interrogated, Whether, on these occasions, the Doctor made
“ any allusions to the foresaid acknowledgment in the deponents’
“ custody? Depones, That on the first occasion when the
“ deponent called, he saw the defenders’ mother, who was with
“ the Doctor in the bed-room : That she left the room, and the
“ Doctor then said she was the person the deponent knew about,
“ and reminded the deponent of the letter of acknowledgment,
“ and requested the deponent to give it to her in the event of his
“ death, and that the Doctor afterwards, upon the defenders’
“ mother returning to the room on that day, or on the occasion
“ when the deponent got the codicil executed on the following
“ day, repeated, in her presence, his request that the deponent
“ should deliver the acknowledgment to her in the event of his
“ death. Interrogated, Whether he recollects the words the
“ Doctor used when he did so? Depones, That the precise
“ words the deponent cannot recollect; but it was to this effect,
“ that, addressing the deponent, he said, ‘ You know you have a
“ ‘ letter addressed to May,’ meaning the defenders’ mother,
“ ‘ and you will give it to her after all is over with me.’ That
“ nothing passed in the presence of the defenders’ mother, in-
“ timating the nature or contents of the said letter. That the
“ Doctor was quite aware that he was dying. Interrogated,
“ Whether, on any occasion, any thing ever passed between the
“ Doctor and the deponent, importing that the Doctor had made
“ the defenders’ mother his wife? Depones, No, never. Inter-
“ rogated, Whether, when the deponent wrote the codicil, he
“ was under the impression that the defenders’ mother was still
“ the Doctor’s mistress? Depones, That he was. And depones,
“ That he never would have written the codicil in the terms he
“ did, so far as regards the name of the defenders’ mother, had

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“ he supposed her to be the Doctor’s wife. Depones, That
“ before the codicil was executed, the deponent read it over to
“ the Doctor, who was then in full possession of his faculties.
“ That after the codicil was executed, and the deponent had left
“ the house, he was called back by the defenders’ mother, who
“ said it was by desire of the Doctor, and that, when the depo-
“ nent, on his return, entered the Doctor’s room, she followed him,
“ and the Doctor then said, that he wished to give the defen-
“ ders’ mother, in the deponent’s presence, his gold watch and
“ seals, as a mark of his sense of her great kindness and attention
“ to him during his illness, which he then did. That he thinks
“ the Doctor did not live 48 hours after the execution of the
“ codicil. Interrogated, depones, That after the funeral the
“ deponent returned to the house along with the late Mr John
“ Harvy and Mr Gilbert, the present husband of the defenders’
“ mother, and in their presence, and that of the Misses Hamilton,
“ the Doctor’s sisters, and the defenders’ mother, the deponent
“ read over the settlement and codicil, and then broke open the
“ envelope of the foresaid acknowledgment, and delivered the
“ acknowledgment itself to the defenders’ mother. Interrogated,
“ whether the acknowledgment was read out? Depones, That
“ probably it might, but he does not recollect that it was, and he
“ has no recollection of any thing being said by any one in re-
“ gard to it. That no one was present when the letter was de-
“ posited with the deponent, and the deponent was not aware
“ that any other person was cognizant of the letter except the
“ deponent and the Doctor, and, as the deponent supposed, the
“ defenders’ mother herself; and the deponent’s reason for this
“ supposition was, that when he was stating to the Doctor his
“ opinion that the acknowledgment would not avail, the Doctor
“ remarked, that it would please or satisfy her. That from the
“ date when the letter was deposited with the deponent, down to
“ the Doctor’s last illness, the deponent had no conversation with
“ the Doctor regarding the letter or the defenders’ mother.

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“ That the deponent considered the deposition of the letter,
“ and all that passed upon it, as confidential, and never mentioned
“ it to any one. That when, on the Doctor’s last illness, he, in
“ the defenders’ mother’s presence, requested the deponent,
“ when all was over with him, to deliver the acknowledgment
“ to the defenders’ mother, the Doctor said this aloud, with the
“ apparent intention that it should be heard by the defenders’
“ mother, and as the deponent understood, in order that there
“ might be an acknowledgment by the deponent, in her presence,
“ that he was possessed of the letter. That he cannot say that
“ the letter of acknowledgment in process is an exact transcript
“ of the form given by the deponent to the Doctor; but that in
“ so far as it mentions there being reasons for keeping the mar-
“ riage private, he thinks, that if that made part of the form
“ given by him to the Doctor, it must have been by the Doctor’s
“ suggestions to that effect; and that the deponent’s own atten-
“ tion would be principally directed to giving words which would
“ amount to a direct acknowledgment of marriage. That the
“ deponent’s impression certainly was, that the defenders’ mother
“ knew that a letter declaring her to be the Doctor’s wife, had
“ been placed in the deponent’s custody. That from the diffi-
“ culties which the deponent saw from Mr Campbell’s letter were
“ in the way, and the circumstances which were in the deponent’s
“ knowledge, he did not think it would be proper for him to take
“ any steps in the matter, and he did not do so. Depones, That
“ the deponent had, previous to the receipt of Mr Campbell’s
“ letter, written the letter No. 46 of process, addressed to the
“ defenders’ mother, suggesting that she should apply to the late
“ Mr John Tait, junior, W.S., upon the subject, who had been
“ a friend of the Doctor’s, and whom the deponent had previously
“ spoken to in regard to the matter. Depones, That on the
“ receipt of Mr Campbell’s letter, the deponent had a consulta-
“ tion with Mr Tait, and that both Mr Tait and he were of
“ opinion, that, in the circumstances, so far as known to them, it

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“ would not be proper that either of them should take any farther
 “ charge in reference to procuring the pension; and the depo-
 “ nent thinks that he mentioned this to Mr Gilbert, telling him
 “ at the same time that he did not believe that the pension would
 “ be got unless a decree of constitution of marriage was obtained.
 * “ Interrogated, depones, That the deponent’s foresaid resolution
 “ was, he has no doubt, in some part influenced by his impres-
 “ sion of the collision that was likely to take place between the
 “ pursuer and the defenders’ mother and her family, and his
 “ resolution was formed before he received any letters from the
 “ pursuer, and these letters, when received, must, of course, have
 “ tended to confirm it. And being referred to a passage in the
 “ deponent’s letter to the defenders’ mother, mentioning that Mr
 “ Tait would give her the Petition to the War-Office with the
 “ necessary certificate, and asked to explain what precise docu-
 “ ments are there alluded to? Depones, That he has no very
 “ exact recollection on the subject, but he thinks he got the
 “ papers referred to from Mr Gilbert, and that when speaking
 “ to Mr Tait about the pension, he had left them with him, and
 “ that all he meant was, that Mr Tait would give them up when
 “ wanted. Interrogated, Whether Mr Thomas Hamilton was
 “ present at the funeral or at the meeting after it, when the will
 “ was read? Depones, That he does not recollect whether he
 “ was present at the funeral, or at the meeting: That his atten-
 “ tion being called to a letter addressed by him to the defenders’
 “ mother, which bears that ‘ he presents compliments to Mrs
 “ ‘ Hamilton;’ and interrogated, Whether he gave her that
 “ designation in the belief that she had a right to it? Depones,
 “ That he did not, but only designed her as Mrs Hamilton,
 “ because she herself assumed the name.”

John Waudby, who had formerly been a bookseller, and lived in the same flat of the house in Brown Street with Dr Hamilton, but who at the time of his examination kept a shop for the sale of pies and spirits, was examined for the defenders, (*respondents*.)

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and deponed, “ That there was not only an intimacy between the
“ Doctor and the deponent, but also between Mrs Hamilton and
“ the deponent’s wife. Interrogated, If any thing ever passed
“ between the Doctor and the deponent on the subject of the
“ Doctor’s marriage? Depones, That the Doctor told him that his
“ marriage was a private one, but that, to satisfy any inquiries
“ that might afterwards be made, he had written a letter, which,
“ in his opinion, would prevent the marriage being called in
“ question at any future period: That the Doctor shewed the
“ letter to the deponent, and the deponent having read it, the
“ Doctor asked him if the deponent considered it sufficient to
“ secure an interest in his effects for his family, and that the de-
“ ponent answered, that he considered it sufficiently secure, and
“ perfectly satisfactory. Interrogated, depones, That, to the
“ best of the deponent’s recollection, this took place during the
“ second year of the Doctor and the deponent’s residence in the
“ foresaid house, No. 3, Brown Street; and the deponent is cer-
“ tain that it took place in a room occupied by him in that house,
“ the Doctor having come to him apparently for the purpose of
“ speaking to him upon the subject; and the deponent adds,
“ that, at this distance of time, he cannot be certain that this did
“ not take place after the Doctor left No. 3, Brown Street. De-
“ pones, That, till the above conversation, the deponent never
“ knew that the Doctor’s marriage was not a regular one, and
“ after it he still considered him a married man, although he
“ then understood the marriage to be a private one, of which the
“ letter had been written as an acknowledgment. Interrogated,
“ Whether any thing passed between the deponent and Dr
“ Hamilton, on the subject of the Doctor’s having concealed his
“ marriage from any, or some of his friends? Depones, That,
“ at the time he shewed the deponent the letter, or about it, he
“ told the deponent that his circumstances were such, that he
“ could not support Mrs Hamilton according to his rank in life,
“ and therefore he had kept his marriage private, but he did not

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“ enjoin the deponent to observe any secrecy about it. Inter-
“ rogated, depones, That he is perfectly aware that Mrs Hamil-
“ ton knew of the existence of the foresaid letter of acknowledg-
“ ment. Interrogated, How the deponent knew this? De-
“ pones, That Mrs Hamilton told him so herself, and that this
“ was shortly after the Doctor had spoken to him about it. And
“ being shewn a letter, and asked, Whether that is the letter of
“ acknowledgment referred to? Depones, That he is perfectly
“ certain that is the letter, and he observes that it is dated in
“ September, 1817, and he now thinks he must have seen it
“ about that time, as his impression is, that he saw it shortly
“ after it was written. That he recollects entering the employ-
“ ment of Messrs Oliver and Boyd, booksellers and publishers,
“ as a traveller, for the purpose of getting their class-books in-
“ troduced into public schools. Depones, That he thinks this
“ took place in June or July 1818, and from having seen the
“ date of the letter of acknowledgment, he thinks that it was the
“ autumn before this that the letter was shewn to him: That
“ on shewing the deponent the foresaid letter, the Doctor did
“ not say any thing about a pension to Mrs Hamilton, or men-
“ tion any particular description of property, which he meant to
“ secure to her or his family, but mentioned his property gene-
“ rally. Interrogated, How Mrs Hamilton came to speak to the
“ deponent about the foresaid letter, and where it took place?
“ Depones, That he does not recollect the particular occasion on
“ which it occurred, but he remembers quite well that Mrs
“ Hamilton told us that Mr Hamilton had executed a letter to
“ secure her an interest in his effects. Interrogated, What he
“ means by telling us? Depones, That he means the deponent
“ and his wife. Interrogated, Where this took place? De-
“ pones, That it was in the deponent’s room. Interrogated, If
“ any other person was present? Depones, Not that he recol-
“ lects of. Interrogated, who commenced the conversation?
“ Depones, That Mrs Hamilton gave the information herself.

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“ Interrogated, depones, That the deponent told Mrs Hamilton
“ that he had seen the letter. Interrogated, Whether she ap-
“ peared to know that the deponent was aware of the letter?
“ Depones, That he dares say she knew quite well. Interroga-
“ ted, depones, That it was not in Dr Hamilton’s presence that
“ this took place, and he cannot recollect at what time of the
“ day this happened, and whether it was a month, or more than
“ a month, after Dr Hamilton’s communication to him. That
“ he is aware that Mrs Hamilton is now Mrs Gilbert, and the
“ deponent’s intimacy with her has continued down to the pre-
“ sent day. Interrogated, depones, That he does not think that
“ Dr Hamilton ever spoke of the said letter in the deponent’s
“ presence, except at the time before deponed to, at least he does
“ not recollect that he ever did so. Interrogated by the ‘Com-
“ missioner, Whether he recollects of the foresaid letter ever
“ having been spoken of either by Dr or Mrs Hamilton, except
“ on the two occasions before deponed to? Depones, That he
“ does. That after Dr Hamilton’s death, Mrs Hamilton told the
“ deponent that some doubts had been raised as to her being en-
“ titled to the pension as the Doctor’s widow, and the deponent
“ advised her to send that letter, and any other evidence she might
“ have, to the proper quarter. Interrogated, Whether he ever
“ heard the said letter spoken of before the Doctor’s death, except
“ upon the two occasions above referred to? Depones, That he
“ does not. Interrogated, If he recollects of the Doctor mention-
“ ing or alluding to the said letter in Mrs Hamilton’s presence?
“ Depones, That the Doctor did so, when Mrs Hamilton men-
“ tioned the letter to the deponent. And the deponent’s atten-
“ tion being called to a previous part of his deposition, in which
“ he has stated, that, when Mrs Hamilton mentioned the letter
“ to the deponent, it was not in Dr Hamilton’s presence.
“ Depones, That Dr Hamilton was not present when she first
“ spoke of it, but he was present afterwards when there was a
“ conversation about the letter, which took place either the same

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“ day, or about that period, or it might be a continuation of the
“ same conversation. Interrogated, What then passed? De-
“ pones, That the letter was spoken of, and the Doctor con-
“ sidered it in itself sufficient to satisfy all farther inquiries:
“ That he thinks the deponent’s wife was present, but he cannot
“ positively say. Interrogated, depones, That he is certain the
“ deponent’s wife was present when Mrs Hamilton first spoke
“ of the letter. Interrogated, Whether, when the Doctor spoke
“ of the letter the second time, he shewed it again? Depones,
“ That he thinks he did. Interrogated, depones, That he never
“ saw any scroll or copy of the letter. Interrogated, depones,
“ That the letter was in the possession of the Doctor. Interro-
“ gated, depones, That he is quite certain that Dr Hamilton was
“ not in the room when Mrs Hamilton spoke of the letter.
“ Interrogated, depones, That Mrs Hamilton came to the de-
“ ponent and his wife to mention the letter to them as a piece of
“ intelligence, or to make them acquainted with it. Interroga-
“ ted, depones, That he does not know whether Mrs Hamilton
“ was aware of the deponent’s knowing about the letter or not.
“ Interrogated, If he cannot recollect how Dr Hamilton came to
“ be a party in the conversation between the deponent and Mrs
“ Hamilton, as to the said letter? Depones, That he came in
“ order to satisfy Mrs Hamilton that he had done all that was
“ requisite to secure his means to Mrs Hamilton, as his wife.
“ Depones, That, if his memory serves him right, Dr Hamilton
“ came in before Mrs Hamilton had left the deponent’s room,
“ when she first mentioned the letter. Depones, That, upon
“ coming in, Dr Hamilton shewed the letter which he had about
“ him, and said he had executed it for behoof of Mrs Hamilton
“ and his family. Interrogated, If the letter was read again, or
“ shewn to the deponent’s wife? Depones, That the Doctor read
“ it out himself, and the deponent’s wife heard it read, and he
“ thinks the Doctor gave it to the deponent to read over; and
“ depones, That he thinks it likely the deponent repeated the

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“ observation which he had made before, that the letter was
“ quite satisfactory: That the deponent never saw the letter
“ again, and he has no recollection of its having been afterwards
“ spoken of. Re-interrogated for the defenders, depones, That
“ in referring to the letter in the conversation which, after Dr
“ Hamilton’s death, he had with Mrs Hamilton, as above de-
“ poned to, he did so from his knowledge, acquired in manner
“ before stated, of the existence of such a letter, and in the be-
“ lief that it was in Mrs Hamilton’s possession.”

Elizabeth Waudby, the wife of the preceding witness, another witness for the respondents, deponed, “ That she never heard
“ any thing about whether Dr and Mrs Hamilton were married
“ by the forms of the church, but she knows that her husband
“ was consulted about a letter which Dr Hamilton wrote: but
“ she never saw it till after Dr Hamilton’s death. Interrogated,
“ When she first heard that her husband had been consulted
“ about the foresaid letter? Depones, That she cannot recollect
“ the exact period. Interrogated, depones, That it was before
“ Dr Hamilton’s death, and before the deponent and her husband
“ left Brown Street: Interrogated, Who told her about the
“ letter? Depones, That it was her husband. Interrogated,
“ depones, That he did not tell her at the time when he was
“ consulted about the letter, as she understood. Interrogated,
“ Whether Mrs Hamilton ever spoke to the deponent about the
“ said letter? Depones, That she did so: That she mentioned
“ that the Doctor had written a letter, acknowledging her as
“ his wife in every respect: That she knows this took place
“ previous to the Doctor’s death, and a long while before it, and
“ she thinks it was when they were all living in Brown Street,
“ and after the Doctor had left No. 3, but she cannot speak more
“ particularly as to the time. Interrogated, Whether her hus-
“ band had mentioned the aforesaid letter of acknowledgment
“ before Doctor and Mrs Hamilton left No. 3, Brown Street?
“ Depones, That he did not do so till after they had left No. 3;

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“ and depones, That it was some time after that, but how long
“ she does not know, that Mrs Hamilton spoke to the depo-
“ nent about the letter. Interrogated, Where it was she did so?
“ Depones, That, to the best of her recollection, it was one
“ Saturday afternoon, when the deponent and Mrs Hamilton
“ were going to the market: That Mrs Hamilton, on the way
“ there, said, that the Doctor had made all things right; and she
“ said no more particularly. Interrogated, Whether Mrs Hamil-
“ ton explained to the deponent, or the deponent asked Mrs Ham-
“ ilton what she meant by the Doctor’s having made all things
“ right for her? Depones, That the deponent never said a
“ single word, except that she was happy that all things were
“ right. Interrogated, What the deponent understood by all
“ things being made right? Depones, That she understood
“ that the Doctor had made his will, leaving every thing to the
“ children. Interrogated, Whether, upon this occasion, Mrs
“ Hamilton said any thing about the foresaid letter? Depones,
“ That she did not. Interrogated, Whether, upon any other
“ occasion, Mrs Hamilton ever mentioned the foresaid letter?
“ Depones, That she never did so till after Dr Hamilton’s
“ death. And the deponent’s attention being now called
“ to a prior part of her deposition, in which she depones, that
“ Mrs Hamilton mentioned to her that the Doctor had written a
“ letter acknowledging her as his wife, in every respect, and
“ that she knows this took place previous to the Doctor’s death,
“ and a long while before it: and to another part of it, where
“ she refers to the occasion of going to the market, as one on which
“ Mrs Hamilton had spoken to her of the letter? Depones,
“ That she must have been mistaken if she made the above
“ statements, for she did not intend to do so; and she is quite
“ positive that Mrs Hamilton never mentioned the letter to her,
“ and that, till after Dr Hamilton’s death, the deponent never
“ heard of it, except from the deponent’s own husband. That
“ she never had any conversation about it with the Doctor. In-

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“ terrogated by the Commissioner, Whether she recollects of
“ Dr Hamilton ever coming into the deponent’s room in No. 3,
“ Brown Street, and mentioning the foresaid letter of acknow-
“ ledgment. Depones, That she is certain he never did. In-
“ terrogated Whether she ever heard the foresaid letter read
“ in the presence of Dr Hamilton, Mrs Hamilton, and the
“ deponent’s husband, or any of them? Depones, That she
“ never did; but the deponent’s husband repeated the words of
“ the letter to the deponent when no other person was present,
“ and this took place before the Doctor’s death. Interrogated
“ depones, That she saw the letter shortly after Dr Hamilton’s
“ death, and that it was shewn to her by Mrs Hamilton, in
“ the deponent’s house.”

The documentary evidence tendered by the appellant in support of this branch of his case consisted,

I. Of excerpts from four letters from the appellant to Mr Dickie, produced by that gentleman at his examination, namely,
1. Excerpt from a letter, dated Paris, 3d April, 1823. “ My
“ affection and regard for my poor brother is known. My
“ regret for his loss is deep and sincere. I am not, then, the
“ one who would willingly permit a reflection to escape; but
“ I cannot suppress my feelings of deep regret, not unmixed
“ with other sensations, at the sad and lasting wreck he has
“ made of his name, by giving to a connection so utterly dis-
“ graceful and so unworthy of him, all the rights and privileges
“ which would have belonged to an open and honourable con-
“ nection. With all my affection for my brother, I shall ever
“ consider this act of his as a stain upon his name. I not only
“ say this, but I say also, that it is an act of injustice which I could
“ not have believed he would have done. I complain, too, that
“ I have been grossly deceived; for, while he had given this
“ letter five years ago, it appears he not only concealed it stud-
“ iously from me, but, from his own opinion of the connection,
“ and from other circumstances which I need not detail, he evi-

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“ dently shewed that he considered it only as one of those unfor-
 “ tunate connections which too often occur, and which he wished,
 “ if possible, to get quit of. After these unequivocal expres-
 “ sions of his sentiments, added to other things, you may well
 “ conceive with what feelings I learn, (and learn for the first
 “ time,) that he has given to that woman, (and that, too, for five
 “ years,) the rights and privileges of a wife. The connection
 “ before this acknowledgment was sufficiently degrading, and I
 “ can assure you that it helped to withdraw my brother from
 “ that society which he had a right to, and had been accustomed
 “ to, and it wanted only this act to complete the degradation.
 “ * * * I do most strongly complain of the sys-
 “ tem of deception which has been practised upon me. Had my
 “ brother told me his determination with regard to that connec-
 “ tion, he knew perfectly I never would have given him one
 “ single farthing.”

2. — Excerpt letter, dated Paris, 20th April, 1823. “ My
 “ other letter was of a more important, and of a most painful
 “ nature. It replied to your letter of the 16th ult., bringing me
 “ a state of my late brother’s affairs, with all the sad and discre-
 “ ditable circumstances attending it. * * * *
 “ My feelings are not those of the moment; they are feelings
 “ produced by the recollection of what passed between my bro-
 “ ther and myself, again and again, as connected with the future
 “ prospects of my family, and they become more deeply rooted
 “ every day. His having acknowledged this woman for his wife
 “ five years ago, is so completely at variance with every thing
 “ which passed between my brother and me from my arrival
 “ from India in 1818, till the time I last saw him in 1821, that I
 “ have very strong suspicions that the date of that letter is not
 “ correct. These suspicions are justified, 1st, by my brother’s
 “ own conduct, and by the manner he constantly spoke of this
 “ woman, (as well he might,) lamenting it deeply, and con-
 “ stantly desiring to get quit of it by leaving Edinburgh entirely.

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“ 2dly, By his own conduct towards me; and, *lastly*, by the
“ character of the persons with whom he was connected. These
“ are not merely my own suspicions. There happens to be at
“ Paris just now an old brother-officer of my brother’s, with his
“ family,—the most intimate friends my brother had,—they were
“ in Edinburgh during this disgraceful connection, and on more
“ occasions than one, circumstances occurred which shewed my
“ brother’s determination to be quite the reverse from the act of
“ his last moments, and leave not the least doubt on their minds
“ that the letter, which is said to exist, never was written five
“ years ago; on the contrary, that it was extorted from him when
“ his thoughts and his mind were turning towards his dissolution.
“ Every thing conspires to justify these suspicions; and did you
“ know all as well as I do, you yourself would entertain the
“ same.

“ As to her being habit and repute his wife, I am certain he
“ never acknowledged her as such to any one of his friends and
“ acquaintances. I can tell you that it was quite the reverse,
“ and I have this from good information. That she assumed his
“ name I don’t doubt,—such a woman could do any thing; for
“ I know more of her than you are aware, and I have no doubt
“ that this was her object from first to last.

3. — Excerpt Letter, dated London, 14th June, 1823. — “ I
“ have just received your letter of the 7th instant. Your letter
“ of the 7th and 9th ulto., one of so much importance, I never
“ received. It has miscarried in France, as it is not to be found
“ at the Treasury. Your present letter, giving the heads of the
“ former, is at least very satisfactory on the point which had ex-
“ cited my feelings, and most naturally, so much,—I mean the
“ pretended marriage of this woman. I had always, from the
“ first moment, communicated my suspicions upon this point. I
“ felt the character of my brother would never stoop to such a
“ degradation. Every thing confirmed these suspicions, and
“ from many sources. The very day before I received yours, I

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“ had a long letter from General Hope on this very subject, as
 “ he knew how important it was to my family. This was volun-
 “ tary from himself, as I had never once mentioned the subject
 “ to him. He stated such facts to me, that I had determined to
 “ desire you to take immediate steps for ascertaining the truth
 “ of this assumed marriage. The question, luckily, is now at
 “ rest, and the truth is out.”

4. — Excerpt Letter, dated Calais, 20th January, 1825. — “ I
 “ am not to have the benefit of your services. It is one of the
 “ many difficulties which one would think have been designedly
 “ thrown in my way. At the same time, I shall be the last to
 “ ask you to depart from the sacredness of your word or promise.
 “ I would have many excuses for all the trouble I give you, and
 “ without your friendship, I would indeed stand in need of every
 “ indulgence and excuse. Take, however, this test, which is
 “ the best and true guide for judging of others, — place yourself
 “ in my situation, and with my family, — see yourself surrounded
 “ by the same difficulties, — beset by the same obstacles, —
 “ forced into many privations, — the future hereditary interests
 “ of your children attempted to be extorted from them; — ask
 “ yourself these things, — look to the source whence all this has
 “ been heaped upon my head, — and then say, would you or
 “ would you not act as I am doing, and follow the same line of
 “ conduct, to prevent the interests of your children from being
 “ trampled upon by persons so utterly worthless?”

II. A letter from Dickie to Archibald Campbell, London, dated 11th March, 1823, in these terms:— “ Mr Bowie has pro-
 “ bably informed you that the late Mr Hamilton has left a widow
 “ and four children, and as they have little else to depend on,
 “ his friends are desirous of obtaining the usual government
 “ pension for them. It is proper to mention that Mr Hamilton
 “ was not married according to the rites of the church, but the
 “ lady holds a letter from him, written upwards of five years
 “ ago, declaring her to be his wife, since which they have chiefly

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“ resided together, two of the children have been born, and she
 “ was considered in the neighbourhood by habit and repute as
 “ his wife, which by our law constitutes a legal marriage, en-
 “ titling the widow and children to all their legal rights.

“ In these circumstances, I would be glad to be advised by you
 “ as to the mode of application to the War-office for the pension
 “ for the widow, and allowance for the children, and what certi-
 “ ficates are requisite.”

III. A letter from Dickie to John Pringle, Banff, dated 5th May, 1825, in these terms: — “ I ought long ere now to have written
 “ you regarding the affairs of our late friend Mr Archibald
 “ Hamilton. He left a settlement and codicil, of which I send
 “ you a copy, in favour of his illegitimate children, and their
 “ mother Mary Clark, and his brother Thomas, and appointed
 “ Mr Campbell of London, yourself, a person of the name of
 “ Gilbert, and me, his trustees.”

The documentary evidence tendered for the respondents consisted, 1st, Of an Extract from a memorandum book which had been kept by John Harvey, W. S. the person referred to by Mr Dickie in his deposition, as having been present at the reading of Dr Hamilton's will, which was in these terms: —

“ *February 23,*

“ 1823. — Died — St Leonards, Mr Archibald Hamilton, late
 “ surgeon, 92 regiment — buried West Church — left
 “ two daughters and two sons, twins, Archibald and
 “ James, by Mary Clark, whom he owned for his wife,
 “ by a letter dated () after the birth
 “ of the two daughters, but long before the birth of the
 “ twin sons; — Failing of the Wishaw family, Archibald
 “ will succeed to the title of Lord Belhaven and Stenton,
 “ if his mother's marriage shall be established. Wit-
 “ nesses at ^{reading} _{opening} the letter, John Dickie, Esquire,
 “ W.S., Hope Street; John Harvey, W.S., 23, Rose

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“ Street; John Gilbert, pawnbroker, 39, Tolbooth
 “ Wynd, Leith; Mrs Mary Hamilton, the widow, and
 “ the Misses Elizabeth and Nelly Hamiltons, sisters of
 “ the deceased. The letter of acknowledgment of mar-
 “ riage was read in the house at St Leonards, after the
 “ funeral, and given up to Mrs Hamilton. It had been
 “ previously left in the charge of Mr Dickie by the de-
 “ ceased. Major of brigade, J. Lindsay, 23, Dundas
 “ Street, was Dr Archibald Hamilton’s particular friend
 “ and confidant.

“ 1825. — Mrs Hamilton proved her title, — obtained the pension
 “ as a surgeon’s widow, L.50, — and within these few
 “ months married John Gilbert, May, 1825.”

On the 27th February, 1839, the Lord Ordinary, (*Cockburn*), pronounced the following interlocutor: — “ The Lord Ordinary
 “ having heard the counsel for the parties, and considered the
 “ closed record, Finds that all objections to the admissibility
 “ of evidence have been abandoned on both sides: Repels the
 “ defences, and decerns in terms of that conclusion of the libel,
 “ which concludes that the defenders are not the lawful children
 “ of the deceased Archibald Hamilton, the brother of the pur-
 “ suer: Finds the pursuer entitled to expenses; appoints an ac-
 “ count thereof to be given in, and, when lodged, remits to the
 “ auditor to tax the same and to report.”

The respondents reclaimed, and on the 22d of November, 1839, the Court (First Division) pronounced the following interlocutor: — “ The Lords having advised this reclaiming note,
 “ and heard counsel for the parties, alter the interlocutor re-
 “ claimed against; sustain the defences; assoilzie the defenders
 “ from the conclusions of the libel, and decern: Find the de-
 “ fenders entitled to expenses; appoint an account thereof to be
 “ given in, and when lodged, remit the same to the auditor to
 “ tax and report.”

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The appeal was against the interlocutor of the Court.

Mr Solicitor-General and Mr Gordon for appellant. — I. The evidence tending to shew marriage between the parties by habit and repute is so divided in character, so little calculated to support a continuous and uninterrupted reputation, that it may be entirely disregarded.

II. The case, then, must depend upon the letter of 26th September, 1817, which at the utmost amounts to an acknowledgment of marriage. Unless the acknowledgment is mutual, it is but the assertion of one of the parties, and even as to him the acknowledgment must be *de presenti*, and with a deliberate intention of the purpose for which it is used. Now, Dickie's evidence shews that marriage was not the purpose of the letter, and that by the inscription on the envelope, in which the letter was enclosed, the letter was not intended to be delivered to May Clark, or to be used in the lifetime of Dr Hamilton.

[*Lord Chancellor.* — What evidence is there of the inscription?]

None but by Dickie.

[*Lord Brougham.* — Why was not Dickie asked for the envelope? it might have had a different inscription from what he states.]

No point was made below upon this.

[*Lord Chancellor.* — Was any objection made to the admissibility of Dickie's evidence as to the envelope?]

None; no point was taken.

[*Lord Brougham.* — The document may be in existence, and yet parole evidence has been allowed as to its terms!]

The letter, coupled with Dickie's evidence in regard to it, shews that Dr Hamilton did not intend to do any thing which should impose on him during his life the consequences of being her husband; and that he merely wished the woman and

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children to benefit after his death by her having the character of having been his wife. Neither were the consequences of legitimacy in the contemplation of the parties; all they had in view was the impression to be made on the War Office.

[*Lord Brougham.* — If the man consented that the woman should be his widow, and that only, that would not make a marriage.]

Exactly so. Knowledge of the letter by the woman would not alter the matter, unless it is established that it was intended to take immediate effect as making a marriage; *Anderson v. Fullerton*, *Mor.* 12690; *M'Innes v. More*, *Mor.* 12683.

[*Lord Chancellor.* — Delivery to the woman, if she knew of the particular purpose of the letter, would not be material to make it good for any other purpose.]

In *Anderson v. Fullerton*, no stress was made on the terms of the envelope, and the letter was known to the woman at the time it was written. It was wrapped round a sealed packet, having on it “not to be opened till after the decease of George Fullerton,” and four witnesses swore that the woman knew of the letter in the life of the man.

[*Lord Campbell.* — The Court went there on the assumption that the woman had consented that the letter should not operate till after the man's death.]

There was no evidence in the case of that; they went upon this, that the letter remained in the power of the man, and was revocable so long as it did so; and in this case the letter never was delivered to the woman, but was delivered to the agent of the party who made it, and remained with the agent till the party's death.

[*Lord Campbell.* — If the letter constituted a present marriage, with consent interchanged, custody by the husband would not matter.]

That brings us to the evidence in regard to the circumstances attending the making of the letter. Dickie swears that the

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Doctor said he would not make the woman his wife, and therefore would not deliver the document into her possession. Unless Dickie's evidence is entirely to be disbelieved, marriage *de presenti* was not the object of the letter, and this is confirmed by what passed afterwards; the letters written by the Doctor to the woman, it is not now denied, were originally addressed to "Mr" Hamilton, instead of "Mrs" Hamilton, as they now purport, and this, it cannot be denied, is a usual course in Scotland where letters are addressed by a man to his mistress; and in no one of the letters but that founded on, nor in any other written document, does he call her "Mrs" Hamilton, or his wife. Again, how is it possible to reconcile the supposition that the letter was delivered to Dickie in the view of marriage, with the terms of the codicil written only a few days before death, in which the woman is called "May Clark," and the children, "my four children by her;" these expressions are perfectly consistent with Dickie's account that the pension was the object of the letter, but quite inconsistent with the notion of marriage. These circumstances, with undoubted evidence of birth in bastardy, give a strong presumption against marriage.

The Judges in the Court below went upon the notion of an attempt to cheat the woman.

[*Lord Chancellor.* — They allude to the expressions in conversation with Dickie as to "pleasing and satisfying" the woman.]

If Dickie was right, as to the letter not being likely to procure the pension, then it might nevertheless please the woman to see the Doctor's intention towards her, and in this view he might use the words as to pleasing and satisfying, but it by no means follows that he meant to please her by giving her the *status* of his wife. There is no evidence of any demand by her to be acknowledged as his wife, and Dickie, in another part of his evidence as to what took place in the Doctor's bed-room during his last illness, says, the request was to deliver the letter after his death. It is no where shewn that the woman was a party to the making of the letter, and if the evidence of the Waudbys, which is in

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many respects contradictory and incredible, be laid out of view, there is no evidence that she was at any time previous to the death acquainted with its contents. All, then, that appears is, that she knew of the existence in Dickie's possession of a letter which, from that person's evidence, was made for the purpose of obtaining the pension only.

Pemberton and Kelly for respondents. — I. We do not rely on the letter of 26th September, 1817, alone, but on the letter, coupled with the circumstances. There cannot be a doubt that up to 1817 the connection between the parties was illicit. In that year Dr Hamilton, desiring to continue the connection, and to avoid a repetition of the proceedings in regard to the maintenance of the children, wished to change its external appearance. He accordingly wrote the letter in question, and from the month of May in that year, he lived with her in the same house, and visited, and was visited, as if she were his wife. At first his sisters disapproved of the connection, but afterwards they became satisfied, as is shewn by the letters which Dr Hamilton wrote to Mrs Hamilton, desiring her to pay money to his sisters, and not to speak to them of his discomfort in his brother's house. This proves that he was aware of such a degree of communication existing between her and his sisters as might lead her to divulge this; and no one witness speaks to any fact as having occurred in the presence of Mrs Hamilton, which was inconsistent with her being a wife.

[*Lord Campbell.* — Are you contending for habit and repute as a substantive ground of marriage, independently of the letter?]

Yes; our case is, that whatever Dr Hamilton did with his own relations, he never did any thing in the woman's presence inconsistent with her being his wife.

[*Lord Brougham.* — What you say is, that to make habit and repute partial, the acts making it partial must be done in the presence of both parties.]

That is what we say, and if we are right, no part of the

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evidence shews that the woman was ever treated by the man in her presence so as to imply her consent, in any way derogatory to her character as his wife. The marriage was to be clandestine as regarded his brother, because he was not likely to approve of it, as his letter to Dickie shewed; accordingly the marriage was not acknowledged by the Doctor to his friends in the fashionable part of the town, through whom the knowledge of it would soon have reached his brother; and the letters from London were for the same reason addressed to himself, not to the woman; but throughout his other society, that in which the woman mixed with him, she was invariably treated as his wife, whatever reports to the contrary there might have been at one time among the gossips of the neighbourhood. Laying aside, therefore, the letter of September, 1817, there is sufficient in the case to establish marriage by habit and repute.

[*Lord Campbell.* — Is there any authority for a distinction between public and private habit and repute? Where there is a clear contract, its validity is not dependent on what either of the parties may do, but if it depend on habit and repute, the question may be, whether it ought not to be pure.

Lord Chancellor. — If habit and repute is broken in upon, that is, if there be a different habit and repute among different people, there is an end of marriage by reputation.]

II. The letter of 26th September, 1817, is sufficient to infer a marriage, if proved to have been communicated to the woman, and assented to by her, *Hoggan v. Craigie, M'L. and Rob*, 965. The evidence shews that it was produced by the party with whom it had been deposited, and that it was communicated to the woman in the lifetime of the maker. Coupling this with the evidence as to the manner in which they lived, it is impossible to say she did not adopt him as her husband. The burden of shewing that the purpose of the letter was other than that which it purports, lay upon the appellant, but he has in no degree proved

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that the woman was any way cognizant of, or assented to, the fraudulent purpose; and unless she did so, the mental reserve, or fraudulent purpose of the man cannot affect the question.

[*Lord Brougham.* — If the letter was communicated, and she did not assent to the fraudulent purpose, but did to the other lawful purpose, this must be proved.

Lord Chancellor. — You say she assented by her mode of acting.]

Yes; that is proved by the habit and repute; and the communication is established by Dickie's evidence. What Dickie says as to pleasing and satisfying could only have reference to marriage, for he had already told Dr Hamilton, that unless the letter made a marriage, it could not make the woman his widow, so as to get the pension he desired, and what took place on the Doctor's deathbed is conclusive upon this subject. The Doctor could have no object, then, in merely pleasing and satisfying the woman in the way suggested, by requiring from Dickie an acknowledgment that he held the letter. His only object could be to protect her against the disappearance of that letter, and the loss of her just rights, and Dickie viewed the matter in that light, for he appears by the answers of the appellant to his letters, to have represented the connection to have been a marriage, at least until the latter part of the correspondence, when for some reasons, probably the fear of embroiling himself with the appellant, he had been induced to alter his account of the matter. Moreover, what Dickie says as to pleasing and satisfying is confirmatory, that the letter was communicated, for without being seen, how could it either have pleased or satisfied.

Solicitor-General in reply. — Habit and repute must be notorious among the neighbourhood and friends of the parties. If it do not exist among the friends on both sides, then it is partial, and that is none at all for the purpose suggested, *Thomas v. Gordon*, 7 S. and D. 872.

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[*Lord Campbell.* — The declaration of the man there broke in upon the habit and repute.

Lord Chancellor. — Habit and reputation is the conduct of the parties, and the reputation among their friends.]

Whatever reputation there might be in the neighbourhood where he lived, there was none among the friends and relations of the man; and if the sisters did occasionally visit the woman at her house, there is no evidence that she ever visited them at theirs. The letter itself will not make a marriage without the circumstances in connection with it; but setting Waudby's evidence aside, there is no more than a supposition by Dickie that the woman was acquainted with the contents of the letter, and unless acquainted with them, how could she assent. It would be of most dangerous precedent to allow a marriage to be set up on such evidence as either Waudby's or Dickie's.

[*Lord Campbell.* — There is great danger, certainly, in establishing such a marriage, but there is as great danger in impeaching such a written document by parole evidence.]

I should have thought otherwise. There is hardly a case where documents have been extorted for another purpose than what they shew, in which parole evidence has not been allowed.

[*Lord Brougham.* — The parole evidence of the respondents is to prove assent in harmony with the document, yours is to overset, or against it.]

It is difficult now to refer to authorities.

[*Lord Campbell and Lord Brougham.* — No necessity certainly. You may impeach the document in the way you attempt.]

LORD CHANCELLOR. — My Lords, this was an action brought by the pursuer for the purpose of obtaining a declaration of the illegitimacy of the defenders, on the ground of their parents not having been married. The Lord Ordinary pronounced an interlocutor against the legitimacy, from which interlocutor there was an appeal to the Court of Session, and, after argument, the

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Court of Session, by an unanimous judgment, reversed the decision of the Lord Ordinary; from that judgment of the Court of Session an appeal has been brought to your Lordships' House.

My Lords, there was one ground insisted upon on the part of the defenders that has utterly failed. I mean the ground of defence resting upon habit and repute. The evidence of habit and repute was conflicting, and divided to a great extent, and it is impossible, therefore, that evidence of that description could be made the foundation of a decision establishing the *status* of marriage. That part of the case standing by itself may be left out of our consideration.

The question, therefore, rests solely upon a document amounting to an acknowledgment of marriage, and the evidence, principally of Mr Dickie, connected with that document.

The facts of the case, for the purpose of introducing the evidence, are very shortly these:—Dr Archibald Hamilton had been a surgeon in the army. About the year 1814 he retired from the service. He was in very humble circumstances, and went to reside at Edinburgh. He lived for a considerable time with his sisters in that city. During that period he formed a connection with a woman in an inferior condition of life, of the name of May Clark, who lived in the Canongate, and by whom he had two children. Those children were avowedly illegitimate. He was obliged to give security to the district or the parish for their support. But about the year 1817, in the month of May in that year, a considerable alteration took place in his position—in his mode of living. He left the residence of his sisters, and took a house, or apartments, consisting of two or three rooms, in Brown Street, in the Pleasance, and removed there. May Clark removed from the Canongate with the children, and lived with him in Brown Street. He resided there for three years, and lived afterwards, I think, in the Crosscauseway, and, subsequently to that, in St Leonards, and in the year 1823 he died.

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From the time that he removed to Brown Street he constantly lived with May Clark and with her children, and, subsequently to that removal, he had two other children, two sons, twins; and the four children are the defenders in this action.

I have mentioned, that in the month of May, 1817, he went to Brown Street, and he was accompanied, as I have stated, at this time by May Clark and the children. Very shortly after that period he applied to Mr Dickie, a writer to the signet, with whom he was in some way connected through his brother, the present pursuer, who had employed him in his profession. He applied to him for the purpose of obtaining a writing, by which May Clark should be secured a pension, as the widow of an army surgeon, in the event of his death. Mr Dickie informed him that that could not be done unless he married her. To that he replied that he never would do that. But, however, after a little time, he said to him, "I wish you would draw me out the form of an acknowledgment of marriage between me and May Clark," and he added, "It will please and satisfy her:" Mr Dickie accordingly drew out such a form of acknowledgment, and having obtained that he took his leave.

In about a week or fortnight afterwards he returned to Mr Dickie, with an acknowledgment, in his own handwriting, in these terms:— "To May Clark, Edinburgh, September 26, 1817. My dearest May, I hereby solemnly declare that you are my lawful wife, though, for particular reasons, I wish our marriage to be kept private for the present. I am your affectionate husband, Archibald Hamilton," — and it was addressed on the back, to "Mrs A. Hamilton, Brown Street, Pleasance." He delivered this to Mr Dickie, requesting Mr Dickie to take care of it, to shew it to nobody, and to take care, that in the event of his, Mr Dickie's death, it should come into no person's possession but Mr Hamilton's. Accordingly, in the presence of Mr Hamilton, he put this paper in an envelope, sealed it up, and endorsed it in these terms:— "To be delivered into the hands

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“ of Archibald Hamilton, Esq., unopened.” Mr Dickie expressed an opinion, that a secret transaction of this nature would not be sufficient to entitle the widow to the pension, to which Mr Hamilton replied, “ at all events it can do no harm.”

Now, stopping there for the present, the main question is this : Was this paper shewn to May Clark ? It was written for the purpose of pleasing and satisfying her. The inference, therefore, from that declaration, (and it must be remembered that Mr Dickie is an unwilling witness on the part of the defenders,) the inference from that declaration would be that it was shewn to her. I think, looking at the style of the paper, and the terms of it, it leads strongly to the probability that it was shewn to her. But I think the case does not rest there with respect to its having been communicated to May Clark ; because, upon the death-bed of Dr Hamilton, Mr Dickie attended to write his codicil, and, upon that occasion, May Clark, the mother of the defenders, being present, he said to Mr Dickie, “ You know you have a letter from me, addressed to May Clark ; upon my death, when all is over with me, you must deliver it to her.” Mr Dickie says, from the manner in which he expressed himself, he understood that Mr Hamilton wished, in the presence of May Clark, to obtain from him an acknowledgment that he was still in possession of that paper. May Clark made no observations as to the letter ; did not ask what it related to, or what the contents of it were. This leads, therefore, to the inference that she knew what the paper was, and that this was done to satisfy her at that period, that this gentleman, Mr Dickie, still continued in possession of that acknowledgment.

Again, there is another circumstance that is material to be adverted to. After the death of Dr Hamilton, Mr Dickie attended after the funeral, and produced a settlement and a codicil, which was read in the presence of May Clark and some of the members of the family, and also produced this paper and read it. Mr Dickie says, he does not recollect that he read it ;

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but Mr Harvey, a writer to the signet, whose diary was produced, which diary, according to the law of Scotland, would be evidence, states that it was read. It does not appear that May Clark expressed any surprise, but received it as a circumstance that she was already acquainted with.

Now these circumstances lead me to the conclusion, that the strong probability is, that this paper was communicated to May Clark. If it was communicated to her and she assented to it, and she continued to cohabit with him to the time of his death, and had by him children, there can be no doubt that, by the law of Scotland, that would be a marriage.

But then it is said, (and that was one of the main arguments in the case,) that the paper was never delivered, that it was never out of the possession of the party, Dr Hamilton; that Mr Dickie took it as his agent, and held it as his agent; that Mr Dickie's possession therefore was his possession, and that the instrument therefore was wholly inoperative. But if the paper was shewn to Mrs Hamilton, and she assented to it, and she afterwards cohabited with him upon the footing of that paper, and upon the foundation of it, then she had an interest in that paper. Had it remained in the possession of Mr Hamilton, and not been delivered to Mr Dickie, he would have held it for himself, and as trustee for her; and when it was handed over to Mr Dickie, though he stood in the first instance as agent of Mr Hamilton, he would, as far as the possession of this paper was concerned, have held it as agent for both of them; as agent for him, and as trustee for her. Therefore, I apprehend, that if we come to the conclusion that this paper was communicated to her, and she assented to it, (and if it was communicated to her, no person reading this paper can for a moment doubt that she did assent to it,) that, under these circumstances, would constitute a marriage.

It is very material to consider in what light Mr Dickie viewed the transaction immediately after the death of Dr Hamilton. He wrote a letter on the subject of it to the present pursuer, and

represented it as a legal binding marriage. That letter is not forthcoming. It is not produced among the documents, and we do not know, therefore, the precise terms of that letter. But we have the answer of the pursuer to the letter, we have two letters written after that letter was received, referring to it, and it is quite obvious, from those letters, that Mr Dickie had represented to the pursuer that the marriage was a legal binding marriage, according to the law of Scotland. At a subsequent period, he, being connected with the pursuer, seems to have altered his opinion, and has styled it a pretended marriage. But, taking all the circumstances of the case into consideration, I agree entirely with what was expressed so strongly by the Judges of the Court of Session, that his evidence, so far as it goes against the defenders, is to be received with great suspicion and caution. For he not only represented it to be a valid and binding marriage immediately afterwards to the pursuer, but he represented it to be a valid and binding marriage to Mr Campbell, for he wrote a letter to Mr Campbell, stating, in terms, that by the law of Scotland it was a legal and binding marriage, which entitled her to the widow's pension, and that letter was written for the purpose of obtaining the widow's pension. I think, taking all these circumstances into consideration, considering the relation in which Mr Dickie stood to the pursuer, and notwithstanding that relation, his having stated in his evidence that he had no doubt this letter was communicated to May Clark, that we cannot but come to the same conclusion at which the Court of Session arrived, that the letter was communicated to her, and that she assented to it.

But it is stated that he was a proud man, a high-minded man, and that he never would have degraded himself by such a connection. But at least, this is true and certain, that he intended, after his death, that she should be represented as his widow. He intended, after his death, therefore, that she should be considered as having been his wife, and therefore, his pride was sufficiently satisfied by concealing, during his lifetime, the circumstance of

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the marriage, and for that purpose, he took precautions which seem to have been sufficiently effectual.

Again, the same witnesses, who represent him as being a high-minded man, as being a proud man, and that he would not degrade himself by a connection of this kind, state that he was an honourable man; and yet, if we are to consider that this was not a marriage, that he was not married to May Clark, what is the inference? That he intended to commit a fraud by enabling her to represent herself as his widow, to represent that she had been married to him in order that she might obtain a pension. How much easier is it to reconcile the different parts of this character by assuming what is the probability, and the strong probability, of the case, that he married her — that it was his intention to keep that marriage secret, because he knew it would bring them into conflict with his relations, and make him the subject of mockery to persons with whom he was connected during his lifetime, but that he had no scruple whatever that it should be avowed, after his death, that he had married her, and that by these means, these honest means, he would secure to his widow a pension. It appears to me that that is the true view of the case. That was the view of the case taken by the Court of Session, and it is the view that I have taken after a careful consideration of these papers.

There is one observation made by the Court of Session which I think material; it is a circumstance to lead us not to view very favourably the course of conduct pursued by the present plaintiff. No proceedings were instituted for a period of twelve years after the death of Dr Hamilton. During the whole of that period the pursuer lay by, and did not question the legitimacy. It is not a very favourable circumstance in support of his claim, and it was not very just to the defenders, because the effect of it might have been to deprive them of evidence most material for the purpose of supporting their defence. I think, that under all the circumstances, I shall be justified in advising your Lordships to

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confirm the unanimous decision of the Court of Session in this case, with costs.

Lord Brougham. — My Lords, I entirely agree in the view which my noble and learned friend has taken of this case, in the arguments by which he has so clearly and satisfactorily supported that view, and in the proposition which he has made to your Lordships as the result of it, namely, to affirm the present judgment, with the costs of the appeal.

My Lords, habit and repute being, as my noble and learned friend has stated, and for the reasons he has assigned, entirely laid out of view in the case, the question really turns upon that paper which my noble and learned friend has read, the letter addressed by Dr Hamilton to May Clark, in which, by present words, by *verba de presenti*, he acknowledges her as his wife. Though he gives that paper into the hands, and into the custody, of his agent, Mr Dickie, Mr Dickie keeps it afterwards in the capacity, which I think has been most justly stated and proved by my noble and learned friend, not merely as the agent of the bailor, the party giving him the document, Dr Hamilton, but as in the nature of a trustee, if not agent, for May Clark, to whom the paper was addressed.

My Lords, it will not be safe for parties, though that is not the case here, but it will not be anywise safe for parties minded to practise a fraud upon the world, in Scotland at least, to hold themselves out as man and wife, much less to execute an instrument, in which they are represented as taking one another as man and wife, and yet to say, and to rely upon that assertion, and even to afford proof of it by acts done at the time, and declarations contemporaneously done, that they did not intend this as a real marriage, but only as a fraud upon the community, by representing themselves as married persons, for any purpose which they might have in view. I give no opinion as to what would be the law in that case, though I may have very little doubt about it; suffice it to say, that it would not be safe for parties to attempt

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any such thing, expecting thereby to release themselves from the matrimonial obligation. But that is not this case. The question here only is, Did both parties concur? Was this letter known to May Clark? And did she, (for that is no doubt essential,) in reality assent to the contract which this letter purports to make between her and Dr Hamilton? For it is perfectly clear, I hold it to be past all doubt, in Scotland at least, that if a man says to a woman, "I take you for my wife," and she assents, and says, "I take you for my husband," she really intending, (the case I have already put is that of neither party intending, but both concurring in a fraud,) but she really intending to take him for her husband, though he may all the while only intend to deceive her, or to deceive the world, or to practise a fraud for any purpose, it is past all doubt that she receiving the proposition, and really assenting to it, he shall not be heard to say that he did not mean it. He has contracted a marriage with her as completely as if he had really intended to contract it, and not merely attempted to compass a fraud.

But it is said that his only object was to obtain a pension for her by making *her* his widow, whom during his life he did not intend to make his wife. The answer to that is, that he could only make her his widow, and give her those rights after his death, by making her his wife, and then the question comes round again to this, Did she receive this paper, and receiving it, did she give her sanction to it?

Now, my Lords, I take the evidence to be quite clear that she must have received this paper. In addition to the circumstances referred to by my noble and learned friend which prove that, it is proved by what passed at the time, and is no matter of dispute, for when it was said, "If you do not mean it as a marriage, it will have no effect," his answer was, "Never mind, it will please and satisfy her." Now, could it please and satisfy her unless it were communicated to her? And whether it was communicated by actually putting the paper into her own hands that

she might peruse it, or by reading it over in her presence, or after having written it, and given it to Mr Dickie as a kind of common agent between them, by his holding it and communicating the contents to her, the declaration at the time that it would please and satisfy her, clearly shews, that it was intended, that in one way or other she should come to the knowledge of the contents. In either way the declaration of marriage was communicated to her, and the whole evidence in the case leaves it perfectly clear that she must have assented to it. Indeed, the presumption would be so strong that she would, in those circumstances, give her ready and immediate assent to it, that it would require strong proof to the contrary, strong proof of refusal and dissent, to make it possible to credit the assertion, if indeed that were made, (I doubt its ever having been made,) that if the knowledge of its contents on her part is admitted, either by delivery, or by reading it to her, or by perusal of it, she did not at once assent to take him for her husband.

My Lords, a good deal of observation was made upon the evidence of Mr Dickie. I do not approve of the conduct of that gentleman; much the reverse. I agree in much that was said respecting him in the Court below; but at least we are entitled to believe those parts of his statement which receive confirmation from the strong probabilities of the case, the circumstances of the parties, and other evidence existing in the cause; and I believe it so far as to credit what he says with respect to the knowledge intended to be conveyed to May Clark. But I also cannot lay out of mind the circumstance that he, being a man of business, a professional man, and knowing, as every person in the profession generally knows, what the Scotch marriage law is, treated it as a marriage, for a certain time at least, and that he could not so have treated it unless the paper had come to the knowledge of May Clark, and by her been assented to. It clearly proves to me that he knew that she had known of it, and that he knew she had assented to it.

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Upon the whole, therefore, my Lords, I am of opinion that the judgment of the Court below is right, and that in the terms of my noble and learned friend's proposition to your Lordships, the judgment should be affirmed, with the costs of the appeal.

Lord Campbell. — My Lords, I am entirely of the same opinion with my noble and learned friends who have preceded me. I have considered this case with very great attention. To induce one to do that, it was not at all necessary to be told that a Scotch Peerage was involved in the question. It was enough to consider that the legitimacy of the children, and the status of a respectable woman, who had appeared in the world as the legitimate children and as the wife of Dr Hamilton, for twelve years, was to be decided by a judgment of your Lordships' House.

Now, my Lords, the onus being upon the pursuer, I think that he has discharged himself of that in the first instance, by shewing, that down to the year 1816, Dr Archibald Hamilton and May Clark certainly lived together without being married, and that the two children who were then born were living with them. The onus is thus cast upon the defenders, but I think that they have effectually supported that onus.

They first relied upon habit and repute. I agree entirely that that cannot be justly relied upon. The marriage law of Scotland is so exceedingly well settled, that I need not remind your Lordships, that habit and repute, to constitute a marriage, must be uniform; the acts of the spouses must all be consistent with the notion of their being man and wife. Now, although in one part of Edinburgh, Dr and Mrs Hamilton appeared to be married, in others they appeared to be in the situation of a mistress living with her maintainer.

But then, my Lords, when we come to the letter to which my noble and learned friends have referred, it seems to me that that affords satisfactory evidence of the marriage. I think that the fair inference from the examination of the witnesses is, that the letter

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was communicated to May Clark at the time when it was written, otherwise it would not have satisfied his intention. But at all events, there is direct and positive evidence that it was communicated to her in the lifetime of Dr Hamilton, during his last illness; and she clearly assented to it by living with him as she had previously done — she clearly assented at a time the assent was necessary. Assent might be proved without actual cohabitation or consummation. It was decided in the case of M'Adam, where there was a contract by *verba in presenti*, that consummation is not necessary, by the law of Scotland, to establish a marriage. But it is necessary, in this case, to shew that there was an assent, and with that view, I apprehend, that my noble and learned friend on the woolsack, drew your Lordships' attention to the circumstance, that they had lived together and had several children.

Then that being so, the onus is now transferred to the pursuer. He must make out his case. Now, how does he undertake to do that? If he could really have shewn that this was a mere contrivance, that no use whatever was to be made of the letter till after Dr Hamilton was dead, that they were not to live as man and wife during his lifetime, and that it was only to be used after his death, for the purpose of obtaining a pension for his widow, and thereby committing a fraud upon the government, I humbly apprehend, that that would not have amounted to a marriage contract. But, my Lords, how is this proved on the part of the pursuer? It must be proved, for if this paper was communicated to May Clark, the onus lies upon the pursuer to shew that she was a party to the fraud, but of that there is not one tittle of evidence. Even supposing that Dr Hamilton's object might have been to commit a fraud upon the public, and to obtain a pension for this woman with whom he had lived, upon the footing that she was his wife, after his death, without having been his wife during his life, yet May Clark was no party to

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that; and I apprehend that it would be indispensably necessary in order to deprive her of her status of wife, and to bastardize her issue, that it should be shewn that she was cognizant of, and that she consented to that fraud.

There being no evidence whatever, my Lords, to implicate her in this alleged conspiracy, and it being satisfactorily proved to my mind that this paper was communicated to her in his lifetime, and that she assented to it, I think that this paper constitutes a matrimonial contract.

My Lords, with respect to the circumstance which has been very much relied upon, on the part of the appellant, of this being in the custody of Mr Dickie, the law agent of Dr Hamilton, that does not seem to me to be entitled to the slightest weight, because, supposing it to have been *bona fide* written to constitute a marriage between the parties, and to have been communicated to her, and that she had assented to it, and this supposed scheme of a pretended marriage had never been entertained for one moment, what would have been the natural course of things? Why, that Mr Dickie, the law agent of the husband, would have had the custody of this paper.

For these reasons, my Lords, I think that the Lord Ordinary came to an erroneous conclusion upon this subject, and I entirely concur in the interlocutor of the First Division of the Court of Session, establishing the validity of this marriage.

Ordered and Adjudged, that the petition and appeal be dismissed this house, and that the interlocutor therein complained of be affirmed with costs.

HAY and LAW — DEANS and DUNLOP, Agents.