

JULY 28, 1864.

The Hon. WILLIAM CHARLES YELVERTON (Major in the Royal Artillery),  
*Appellant, v. MARIA THERESA LONGWORTH or YELVERTON, Respondent.*

Marriage—Declarator—Contract *de presenti*—Acknowledgment—Promise *subsequente copulâ*—Evidence of Promise—Locality of Promise—*Lex loci*—Y., in course of a correspondence with Miss L., on suddenly hearing, and while under the impression that she had just married another person, wrote that he (Y.) was grateful to her, “for he found he had promised to her to do more than he could perform.” At a later period Y., after having cohabited with L. in Ireland, and gone through a secret ceremony of marriage with her there, and when she was pregnant, wrote, in reference to her proposing, in certain events, to disclose something affecting their position, “I have already done more than I promised, at great risk.” During the same correspondence L. wrote to him, after, as she alleged, their mutual exchanged matrimonial consent, but before cohabitation, “I, who have lain at your heart, and in sight of Heaven been called yours.” Again L., after, as she alleged, he had legally declared her to be his wife, but before cohabitation, and before he had gone through a ceremony in presence of a priest, which she further required to satisfy her conscience as a Roman Catholic, wrote to Y. in reference to some coolness on his part, “Do not say it is a comfort to be rid of me: if it is, you know you are, you always have been, free.” While the parties were travelling together, Y. frequently called L. by the name of Mrs. Y., in presence of hotel keepers and lodging house keepers.

HELD (by LORDS WENSLEYDALE, CHELMSFORD, and KINGSDOWN, reversing the judgment of the Court of Session), *That these writings and acknowledgments were too vague to establish a marriage de presenti in Scotland between Y. and L. (diss., LORD CHANCELLOR WESTBURY, and LORD BROUGHAM).*

HELD further (by LORDS WENSLEYDALE, CHELMSFORD, and KINGSDOWN), *That the above letters of Y. were too vague to establish a promise of marriage de futuro with L. (diss., LORD WESTBURY, L. C.).*

Assuming Y. had made in Scotland a promise to marry L., and that they, before cohabitation, then went to Ireland, and there a marriage was celebrated by a Roman Catholic priest between them, which turned out invalid, that they then cohabited in Ireland some days, and then continued the cohabitation in Scotland:

HELD (by LORDS CHELMSFORD and KINGSDOWN), *That the cohabitation in Scotland would be attributable to the Irish ceremony, and not to any previous promise in Scotland, and therefore could not be connected with such promise so as to constitute marriage (diss., LORD WESTBURY, L. C.).*

*Under the Statute 19 Geo. II. c. 13, which made it an offence for a Popish priest to celebrate a marriage in Ireland between a Protestant and Roman Catholic, if one of the parties has been born and bred a Protestant, and has not professed to be a Roman Catholic, he is a Protestant in the sense of the Statute; and even his own statement, that he was a Roman Catholic, would have no effect, if opposed to the tenor of his conduct—(Per LORDS WENSLEYDALE and CHELMSFORD).*

These were conjoined actions of declarator of freedom and putting to silence, and of declarator of marriage, brought respectively at the instance of Major Yelverton and of Maria Theresa Longworth or Yelverton. Throughout the following statement, the pursuer in the declarator of marriage is uniformly spoken of as the pursuer, and the defender in that action as the defender.

The pursuer was a daughter of the late Thomas Longworth of Smedley Park, Lancashire, at one time a merchant and silk manufacturer in Manchester. She lost her mother at an early age, and was sent for her education to a convent in Boulogne, where she was brought up as a Roman Catholic. Most of her life was spent in France and on the Continent. The defender, a younger son of Viscount Avonmore of Belle Isle and Hazle Rock, Ireland, was, at the date of his first acquaintance with the pursuer, a Captain in the Royal Artillery. They made each other's acquaintance on board a steamer, in travelling from Boulogne to London in the summer of 1852, and became mutually interested by each other's conversation during the passage. The pursuer

<sup>1</sup> See previous reports 1 Macph. 161: 35 Sc. Jur. 101.  
H. L. 49: 36 Sc. Jur. 716.

S. C. 4 Macq. Ap. 745: 2 Macph.

was at this time, according to her own statement, on her way to visit the Marchioness de Belinay, Baker Street, Portnan Square. The defender alleged, that on their arrival in London, she invited him to her lodgings, where he remained for several hours. Of this allegation, which was denied by the pursuer, no proof was offered. After this first meeting, the parties did not see each other again for three years.

In the spring of 1853, the pursuer was at Naples, and hearing that the defender was in Malta, she sent a letter under cover to him to be forwarded to a friend of hers at Monastir in Turkey. The defender replied, and requested the pursuer to write again and let him know of her movements. A correspondence ensued, which lasted for several years, and afforded the chief evidence out of which the relations and intentions of the parties towards each other were subsequently deduced.

In the autumn of 1854, the defender went on military duty to the Crimea, returned to England in the spring of 1855, and went back again to the seat of war in the autumn of that year. The pursuer returned to England in the summer or autumn of 1854, and, in the spring of 1855, went out with a party of French Sisters of Charity, to Constantinople, and acted as a nurse with them at the Galata Hospital. She averred, that the defender had returned to England before she sailed; that he wrote to her requesting an interview, which took place on his way out at Galata; that he then paid his addresses to her, and courted her for his wife; and that an engagement to intermarry, on the termination of hostilities, was then entered into between them. The defender averred, that the pursuer had invited him to call on her at Constantinople; that the interview was short, but that, "in consequence of the advances made by the pursuer, great familiarities ensued;" and that there was "no marriage engagement or promise of marriage between them, nor did he lead her to expect marriage."

In March 1856, after the termination of hostilities in the Crimea, the pursuer went there on a visit to Mrs. (afterwards Lady) Straubensee, wife of General Straubensee, commander of the British Light Division, and lived for about a month as the guest of General and Mrs. Straubensee, in a hut adjoining theirs. They invited the defender to visit them, under the belief that there was a mutual engagement between him and the pursuer, and he frequently availed himself of their invitations. On 29th March General Straubensee, accompanied by the defender, drove the pursuer down to Balacava, and put her on board the steamer there for Constantinople. The defender remained on deck with her for some time that evening; and he averred that "great familiarities again ensued" on this occasion.

The pursuer averred, that during one of their conversations in the Crimea the defender for the first time informed her that he was in great pecuniary embarrassment, and under a bond to an uncle, who would give him no further assistance if he married; that she then proposed to break off the engagement, but that the defender would not agree to this, and proposed a secret marriage; that she would not consent to this, and left the Crimea without any definite arrangement having been made as to the time of their marriage. These averments were denied by the defender, who explained, that any allusions made to pecuniary advances were not serious, and that "though the person who gave the loans may have been described as an uncle, he was not, and was not said to be, a relation."

After the pursuer's return to Constantinople, the correspondence was kept up on the same terms as before, and she averred, that, fearing the misconstruction to which her conduct might be exposed on the part of her friends by the subsistence of an engagement without any definite prospect of the obstacles to a public marriage being removed, she frequently offered to break it off, and retire to a convent in the Rue de Bac, Paris; but that the defender would not consent to that proposal, and continued to correspond with her on the same terms as before.

Some time after his return to England, in 1856, having travelled home by the Danube, for the express purpose, as he averred, of avoiding the pursuer, the defender was appointed to the command of the company of artillery at Leith Fort, and was quartered there till August 1859.

In January 1857, the pursuer came to Edinburgh, accompanied by a friend, Miss Macfarlane, and took lodgings with her in Mrs. Gemble's, No. 1, St. Vincent Street. The defender renewed his acquaintance with her immediately on her arrival, and visited her at her lodgings almost daily.

Mrs. Gemble in her evidence deponed, that the pursuer and Miss Macfarlane occupied the same bedroom, and had a sitting parlour which opened into it; that the pursuer assisted Miss Macfarlane in her studies, and occupied her time with reading, painting, and music; that Miss Macfarlane was invariably in the room when the defender called; that the pursuer and defender frequently rode and drove out together; that the pursuer's conduct and demeanour were always most exemplary, and that she would not have allowed the visits of the defender to the house if she had not believed that he was the pursuer's suitor. Miss Macfarlane deponed, that she accompanied the pursuer to Edinburgh by permission of her father, who thought highly of the pursuer's character; that she regarded the defender as the pursuer's suitor; that his manner towards her was respectful and attentive; that he visited her almost daily, generally coming about three, and remaining till six; and that she always accompanied them when they drove out together.

The pursuer averred, that on 12th April 1857, in Mrs. Gemble's house, she and the defender solemnly acknowledged and declared each other to be husband and wife; that they read through the Church of England marriage service together, and that, at the conclusion of it, the defender said, "This makes you my wife according to the law of Scotland," or words to that effect. The only proof in support of this statement was the evidence of Mrs. Gemble, who deponed, that one afternoon she heard from a closet in the lobby the defender, who was in the parlour with the pursuer, reading in an earnest and religious tone for several minutes. The defender averred, that the pursuer had come to Scotland "uninvited, unsolicited, and unexpected;" that she wrote to him on her arrival, in consequence of which he called on her at the Ship Hotel, Leith, and continued to visit her at her lodgings; that in February 1857, sexual intercourse between them was begun, and was repeated as opportunity offered during her stay at Mrs. Gemble's house. No dates were specified, and no proof was offered of this allegation.

The pursuer stated, that being a Roman Catholic, she entertained conscientious scruples about the propriety of a marriage not celebrated by a priest, and refused to cohabit with the defender without having gone through a ceremony so celebrated; and that the defender's solicitations that they should cohabit as man and wife, became so pressing, that she left Edinburgh about ten days after the acknowledgment and declaration above mentioned. She went first to Hull, and afterwards to Abergavenny Castle, Monmouthshire, the residence of her sister, Mrs. Bellamy, where she remained till about the end of July 1857.

The defender was at this time in Dublin, and it was arranged between him and the pursuer, that she should come to Ireland for the purpose of having a private marriage ceremony performed by a Roman Catholic priest. The defender averred, that she came "on her own suggestion," and that "he found her at Waterford." The pursuer averred, that she came on his invitation; and it was proved, that the defender purchased a wedding ring at Dublin some days before their meeting, which took place at Waterford, about the beginning of August. They travelled together for about a fortnight, during which time they occupied the same rooms at the hotels where they put up. The defender averred, that illicit intercourse was kept up between them during the whole of this journey, and that his consent to appear with the pursuer before a priest was only to appease her scruples. The pursuer denied the fact of intercourse previous to the marriage ceremony, and explained the delay in its celebration by the difficulty experienced in obtaining the services of a priest to perform it without previous proclamation of banns. She ultimately obtained a dispensation of the proclamation of banns from the right Rev. Dr. Leahy, Roman Catholic Bishop of Dromore, and the marriage ceremony was celebrated on 15th August 1857, within the chapel of Killownen, near Rostrevor, by the Rev. Bernard Mooney, parish priest.

Mr. Mooney deponed, that the pursuer had previously led him to understand, that an irregular marriage had taken place between them in Scotland; that the defender, on entering the chapel, said—"Mr. Mooney, there is no necessity for this; it has all been previously settled or arranged, but I will do it to satisfy the lady's conscience," or words to that effect; that he understood these words to refer to a previous marriage in Scotland, and that, in performing the ceremony, he was only receiving from the parties a renewal of the previous matrimonial consent; that he administered a short exhortation to them, after which they knelt before the altar, and repeated after him, their hands being united, such portions of the Romish marriage ritual as are required in the case of a renewal of consent, including these words, "I \* take you \* to be my lawful wedded wife, to have and to hold from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, till death us do part, if Holy Church will permit, and thereto I plight thee my troth." The defender averred, that this ceremony was only gone through for the purpose of satisfying the conscience of the pursuer, and on the understanding that he was to continue free; that there was no marriage service or marriage; and that from first to last the connexion between them was illicit. The Very Rev. Dean Ramsay, in his evidence, deponed, that the defender, on being questioned by him as to the Irish marriage, said it was all a falsehood; that "he and Miss Longworth went into a schoolroom; that the priest held up his hands, and said, 'God bless you, my children;' and that that was all that had taken place."

After the marriage ceremony, the pursuer and defender travelled together in Ireland for some time as husband and wife. The pursuer then came to Edinburgh, and took lodgings, along with her friend, Miss Macfarlane, in the house of Mrs. Stalker, Albany Street, where she was soon after joined by the defender. They cohabited together there, and were understood to be husband and wife by the people in the house, and by Mr. and Mrs. Thelwall of Hull, who visited them there. About the end of September, they went on horseback on a tour as far as Callander, passing as married persons at the various hotels where they put up. At Doune Castle the defender wrote their names in the visitors' book as Mr. and Mrs. Yelverton." On their return to Edinburgh, they again put up at Mrs. Stalker's house, and resided there till the beginning of December, cohabiting together at bed and board, and reputed by the landlady and servants as husband and wife. In the month of October, they visited Craigmillar Castle, where the defender spoke of the pursuer as his wife to the person in charge of the castle. The attendant at Seafeld Baths, Leith,

similarly deponed, that on the occasion of a visit, in the autumn of 1857, to the baths by the pursuer, and defender, he inquired, "Is my wife ready?"

About the beginning of December 1857, the pursuer sailed from Leith to Hull, on board the steamer "Brilliant." She was accompanied on board by the defender, who spoke of her as his wife to the stewardess, in inquiring for a berth. At Hull the pursuer went to reside with Mr. and Mrs. Thelwall, where she was joined by the defender on 31st December. He returned to Leith after a week or two, soon after again came to Hull, and resided in Mr. Thelwall's house. Mr. Thelwall deponed that, during the time of their residence together there, the pursuer and defender cohabited together as man and wife, and were so believed and reputed to be by him and Mrs. Thelwall; but that the relation between them was kept secret from others to prevent the fact of the marriage from coming to the knowledge of the defender's relatives. Before the defender came to Hull, the pursuer wrote to him, intimating that she believed herself to be pregnant; and that, in the event of her having a child, she could no longer keep their marriage secret. In his reply, 25th December 1857, the defender said, "If you do feel any love for me, you must change that resolution. If I depart this life, you may speak, or if you do, you may leave a legacy of the facts; but whilst we both live, you must trust me, and I must trust you—your duty lies this way, not that." In January 1858, the defender accompanied the pursuer to France, where they travelled together till April, and passed for married persons. In the passport obtained for her by him before starting, the name directed by him to be inserted was "Mrs. Theresa Yelverton." In April 1858, the defender returned to his military duties, leaving the pursuer ill at Bordeaux. The result of her illness, as averred by her, was a miscarriage, after recovering from which she was removed by her sister, Madame Lefebvre, to Boulogne. At Bordeaux the pursuer received three letters from the defender, addressed to her as "Madame Yelverton."

With reference to the comparative position of the parties in respect of fortune, the pursuer averred, that the whole costs of the journey to and in Ireland, of the Highland tour, the house-keeping in Edinburgh, the visit to England and the Continent, and the residence there, were borne by her.

The pursuer returned to Edinburgh about the end of June 1858, and at her first interview with the defender, he urged her to save him from an exposure of the connexion between them by emigrating to Australia, or New Zealand. The pursuer spurned the proposal, and on its being renewed by the defender's brother, at his request, declined to enter into any arrangement, without further information as to the defender's intentions and position, which, however, was not given, save to the effect that their connexion was now irrevocably ended.

On Saturday, 26th June 1858, the defender was married, after proclamation of banns in St. Cuthbert's parish church, to Mrs. Emily Ashworth or Forbes, widow of the late Professor Edward Forbes. The ceremony was performed in the Episcopal Chapel at Trinity, near Newhaven, by the Very Rev. E. B. Ramsay, Dean of the Scottish Episcopal Church, Edinburgh. A few days thereafter a Roman Catholic clergyman called on the Dean, and exhibited to him a document purporting to be a regular certificate in Latin, from the parish register of Kiltroney, of a marriage between the defender and the pursuer. The defender, on being informed of this by the Dean, made the statement already quoted. The pursuer was first informed of the marriage of the defender to Mrs. Forbes, on the Tuesday following. Shortly after she lodged information with the Procurator Fiscal of Edinburgh, charging the defender with bigamy, on which charge he was lodged in the Edinburgh prison, where he was detained till the close of the investigation by the authorities, which terminated in the abandonment of proceedings against him. The private Scottish marriage was not mentioned in the complaint, which was founded on the Irish ceremony.

On 7th August 1858, the pursuer raised an action of declarator of marriage against the defender, but the Scottish marriage was not averred in her condescendence, owing, as explained by her in the present process, to her advisers having considered it expedient to found exclusively on the Irish marriage, as more easy of proof. This action was not proceeded in; and on 8th June 1859, the defender raised the present action of freedom and putting to silence, which was followed on 13th January 1860, by the action of declarator of marriage at the instance of the pursuer. On 18th July 1860, of consent, both actions were conjoined, and the record was closed on the revised condescendences and defences. The pursuer's pleas in law (of which the first and third only were insisted in in the Inner House) were—

1. The defender and pursuer were lawfully married to each other according to the law of Scotland, by consent *de presenti*, to become husband and wife; or otherwise, the pursuer was married to the defender, by the declarations and acknowledgments of her as his wife above condescended on.
2. In the circumstances of the case, a valid marriage had been constituted between the parties, as proved by cohabitation as husband and wife, and habit and repute.
3. At all events, marriage had been constituted between the parties, by the promises of the defender and pursuer, to become husband and wife, followed by carnal connexion between them, on the faith of such promises.
4. In the event of

the pursuer failing to establish a marriage in Scotland, then the marriage which took place in Ireland, on 15th August 1857, being in all respects a valid and legal marriage according to the law of Ireland, the pursuer was entitled to decree in terms of the conclusions of the libel."

The defender pleaded—"The averments of the pursuer being false in fact, and her pleas being untenable in law, the defender ought to be assoilzied from the conclusions of her action, with expenses."

The Lord Ordinary having on 19th November 1859, granted commission and diligence, for the recovery of all letters which had passed between the parties between August 1852, and 26th June 1858, it was agreed by the agents, that they should produce all the letters put into their hands by their respective clients, to avoid the expense of executing the diligence, reserving the right of execution at any future time. Of 122 letters so recovered and put in process, 66 were written by the defender, and 56 by the pursuer. Both parties averred on record, that many important letters had been kept back or destroyed on the other side.

An extensive proof for both parties was taken by commission in the three kingdoms. Numerous appeals were taken, during the course of the proof, against the commissioner's decisions with regard to the competency of certain evidence.

Ultimately the Court of Session held, that the facts proved a valid marriage (1) by promise *subsequente copulâ*, (2) by interchange of present consent.

The appellant, William Charles Yelverton, appealed against the interlocutor of the First Division, dated 19th December 1862, which found in the action of declarator of marriage at the instance of Maria Theresa Longworth, that she had instructed, that she was the wife of the appellant, and which, in the action of declarator of freedom and putting to silence at the instance of the appellant, assoilzied the respondent.

The appellant in his *printed case*, set forth the following reason for reversing the interlocutor :—Because no marriage was ever contracted between the appellant and respondent.

The respondent in her *printed case*, set forth the following reasons :—1. Because the acts and acknowledgments and conduct of the appellant and respondent prove, that they had entered into the contract of marriage according to the law of Scotland, and are adequate to prove an interchanged consent to marry, and are incapable of reasonable explanation on any other hypothesis than that the parties had entered into the relation of husband and wife. 2. Because the conduct of parties was such, during their residence in Scotland, as to render them habit and repute married persons; and to give rise to a belief, that they were so married in the minds of all persons who knew of the existence of both, and of their relations to each other, while it did not induce in the mind of any one a belief that they were living in concubinage. 3. Because the parties having promised to marry each other, and *copula* having followed that promise, *ipsum matrimonium* was constituted thereby. 4. Because the celebration of marriage in the Roman Catholic chapel at Kilrone, near Rostrevor, being clearly proved, though denied by the appellant, and being *primâ facie* in law a valid marriage, the *onus* of proving its nullity is laid upon him, and he has failed to prove, as required by 19 Geo. II. c. 13, § 1, that at any time within a year before the 15th August 1857, on which day the said marriage was celebrated, he had been and had professed himself to be a Protestant; and in particular, he has failed to prove, that prior to that date he had been christened or confirmed, or had communicated, or had performed any of those acts of religion that are performed by professing Protestants alone, and are not performed by professors of other religions, or of no religion. 5. Because the appellant having professed himself to be a Catholic, at the time of the ceremony, by inducing that belief in the mind of the officiating priest, he is personally barred from pleading contrary to his profession on that occasion, that he had during the immediately preceding year been and professed to be a Protestant.

*Rolt Q.C., Anderson Q.C., Sir H. Cairns Q.C., and W. Clark*, for the appellant.—It is not disputed, that marriage may be constituted by mutual serious and deliberate consent alone, and that such consent may be proved by writings or acknowledgments subsequently made. There is here, however, admittedly no direct evidence by any witness of the mutual consent *de presenti*, for Miss Macfarlane did not hear it, nor did Mrs. Gemble at the time alleged. The only acknowledgment relied on in writing is the letters, in which these words occurred, "I had promised to do more than I could have performed when the time came." "I have already done more than I promised, at great risk." These were, if anything, evidence of a promise, not of a consent *de presenti*; but the promise was vague and ambiguous, and need not be construed as referring to marriage. Her letter, which says, "I who have lain at your heart, and in sight of Heaven been called yours," does not prove any consent, but merely some immoral connexion. A subsequent letter of hers which said he knew he was and always had been free, was inconsistent with the notion of any binding promise at that time made and *a fortiori* of any contract *de presenti*. The respondent alleges two inconsistent modes of constituting the marriage, for if there was a contract *de presenti*, that could not be a promise *de futuro* arising out of the same facts.

As to proof of marriage by proving a promise *de futuro*, and *copula* on the faith of it, it is

absolutely necessary, that the promise be proved by some writing of the party charged. The writing must also prove, that the promise was made in Scotland. If the promise be made out of Scotland, and the *copula* take place in Scotland, or *vice versâ*, that will not do. Applying that doctrine to this case, if nothing be proved by writing but a promise at Galata or in the Crimea, and a *copula* afterwards in Scotland, that will not be sufficient. In interpreting, therefore, the writings that passed between the parties, it is to be remembered, that both parties were foreigners, and had lived only three months in Scotland, and therefore, even if a writing allude to a previous promise without fixing any date, there is no reason for assuming, but rather the reverse, that the promise had been made within Scotland. It is far more reasonable to infer, that the promise had been made out of Scotland.

[LORD CHANCELLOR.—Suppose an Englishman in Vienna meets with a Scotswoman there, and he there promises in writing to marry her as soon as they get to Scotland, and on arriving in Scotland a *copula* take place on the faith of that promise, would that be a Scotch marriage?]

No, because the promise was not made in Scotland.

[LORD BROUGHAM.—Do I understand you to say, that not only must the promise *de futuro* be made in Scotland, but the writing which is the evidence of it must also be made in Scotland?]

That is not clear. The writing itself need not perhaps be made in Scotland, but the promise must be so.

[LORD CHANCELLOR.—Suppose a man in England write to a woman in England, saying, “I know I promised in Edinburgh to marry you, and that we had afterwards connexion in Glasgow, but I found out you were not a modest woman, and I will not carry out the marriage,” would that prove a Scotch marriage?]

It is difficult to say. That is not this case. Another remark as to the promise *de futuro* is, that promise *cum copulâ* does not *ipso facto* amount to marriage, but is merely a ground of action of declarator; and hence, if one of the parties die before the declarator of marriage, it will have no effect. And even if one of the parties before declarator marries another person, it is a moot point, whether that does not annul the effect of the promise *cum copulâ*—1 Fraser, Dom. Rel. 181. Stair (i. 4, 6) says the reason why promise *cum copulâ* amounts to marriage is, that present consent is supposed to precede the *copula*, and hence, if it can be shewn, that the *copula* did not follow on the faith of the promise, that will take away the legal effect. However, acknowledgments made for a collateral purpose are not sufficient to prove marriage—*Campbell v. Sassen*, 2 W. S. 309; *Kello v. Taylor*, 3 Paton, 57; *Folly v. Macgregor*, 3 W. S. 85; *Cuninghame v. Cuninghame*, Hume, 376; 2 Dow, 482. And cohabitation abroad goes for nothing—*Macculloch v. Macculloch*, 2 Paton, 35. It was said in *Honeyman's case*, 5 W. S. 92; 2 Dow & Cl. 265, that if the promise was ambiguous, the surrounding circumstances would be looked at, so as to give precision to the promise. But even if that be so, the surrounding circumstances here do not shew honourable courtship, but an immoral relation. When an immoral connexion has existed, a *copula* will not suffice to constitute marriage, without a decided change in the relations of the parties—*Lapsley v. Grierson*, 1 H. L. C. 498. And LORD CAMPBELL in *R. v. Millis* (10 Cl. & F. 781) said the *copula* must be with a view to marriage.

[LORD BROUGHAM.—I see LORD CAMPBELL is reported to have said so—that the *copula* must be with the intention of constituting marriage. I do not believe he ever said any such thing.]

Then it was said, that the contract *de presenti* was acknowledged subsequently on various occasions, such as when the parties went to hotels, on board steamers, to visit sights, and, in one case, to a travelling acquaintance he met at Boulogne. These, however, were too frivolous to be relied upon, for they were obviously made for the collateral purpose of getting access to places and to society while travelling together. As to the acknowledgment before Father Mooney, that was not reliable, owing to the prevarication and admitted falsehood of that priest's representations in other matters; and what was said by the respondent to the priest behind the appellant's back cannot be used against him as an admission. Nor are the allegations of the respondent to be relied upon, for she deliberately alleged and insisted upon asserting, that no connexion took place between the parties in Ireland until the Irish ceremony, whereas all the Judges below disbelieved this assertion, and held, that the evidence proved the contrary.

Another matter was, that the *copula* here was disconnected with the promise. Between the alleged promise and the *copula* a ceremony of marriage took place in Ireland, and therefore the *copula* was referable to such ceremony, and not to any antecedent promise in Scotland. The Irish ceremony was a *medium impedimentum*.

As to the Irish marriage, which is also an issue in this case, the question turned on the construction of the Statute 19 Geo. II. c. 13, § 1. The marriage would be null, if one of the parties was a Protestant. If he was *de facto* a Protestant, it was immaterial what he professed to be; and he was not bound to shew he had been a Protestant for a year previous. The words “professing to be a Protestant” had no application to one who was by birth and education a Protestant—*Kirwan v. Kirwan*, Batty's Rep. 712; *O'Connor v. M'Cann*, Milward's Eccl. Rep. 204; *D'Arcy's Infants*, 11 Ir. C. L. Rep. 298; *R. v. Orgill*, 9 C. & P. 80; *Thelwall v. Yelverton*, 14 Ir. C. L. Rep. 188.

*The Attorney General* (Palmer), *Lord Advocate* (Moncreiff), *The Queen's Advocate* (Phillimore), *Whiteside Q.C.*, *J. Campbell Smith*, *D. Bruce*, and *Hennessey*, for the respondent.—The practice in pleading a marriage did not require the evidence to be set out; and even if a particular mode of constituting the marriage be alleged, that is not binding, and does not restrict the proof. No particularity of circumstance is required, for otherwise it would be difficult to let in the various forms of acknowledgment which are held good evidence.

[LORD CHANCELLOR.—Would you say, for example, that an allegation of a promise of marriage at Edinburgh would let in evidence of a promise at Glasgow?]

It would.

[LORD BROUGHAM.—Would you say, that a letter like this—"I promise to marry you when we get to Scotland," would be evidence of a promise?]

Yes, and a similar case has occurred; *Brash* (11 Sc. Jur. 92). In *Hoggan v. Craigie*, M'L. & Rob. 965, marriage was alleged to have been contracted either by *verba de presenti* or by promise *cum copulâ*, one or other, not stating which, and yet the Court held a marriage was to be inferred from the conduct of the parties. That is the common case, for seldom is it possible to prove any express words of mutual consent. In *Honeyman's case* a mutual exchange of consent was alleged, but not proved, yet the marriage was proved in another way by an implied promise contained in the letters sent to the lady, followed by *copula*.

[LORD CHANCELLOR.—In short, the rule is, that if there is a plea of contract, and certain things are pleaded as evidence of it, you are not precluded from proving other things not pleaded.]

In this case, therefore, there was a sufficient allegation of the constitution of a marriage, though it was laid in two ways. Another circumstance, which was quite unimportant, was this, that one of the parties should seem not to be aware of the legal effect of what had taken place. This was not to be wondered at, seeing that the parties were foreigners. And the same thing was totally disregarded, and not allowed to detract from the cogency of the other evidence in the cases of *Honeyman* and *Dalrymple* and *Sim*. Another circumstance was immaterial, viz. that a regular marriage ceremony was performed after the irregular contract; indeed, this is no uncommon case. Moreover, the same evidence which proved a marriage *de presenti*, was available as evidence of the promise preceding *copula*—*Hoggan v. Craigie*; *Reid v. Laing*, 1 Sh. Ap. 451. As to the connexion between the promise and *copula*, it was held in *Sim v. Miles*, 8 S. 89, that though there was at first illicit connexion, and then a promise of marriage, and then no *copula* till eight months later, nevertheless the promise and *copula* were sufficiently connected. In the cases of *Cunningham* and *Lapsley*, referred to by the other side, there was nothing relied upon but habit and repute, and therefore the illicit connexion, which was the origin of all, may have been important. Assuming there was evidence here of a promise of marriage, there was nothing in the circumstances to disconnect the *copula* which followed in Scotland. The mere fact of intermediate intercourse in Ireland could not of itself disconnect the two ingredients of the marriage. If two parties promised marriage in Scotland, then went into England and cohabited, and then returned and continued the cohabitation, the latter would not the less follow on the Scotch promise. The whole were one connected series of acts, all naturally flowing from the Scotch promise. Supposing the invalid ceremony had taken place in Scotland instead of Ireland, could it be said the promise and *copula* were disconnected? The Irish ceremony was rather a confirmation than otherwise of the Scotch promise, and therefore could not take away from the legitimate connexion between the promise and *copula*.

[LORD BROUGHAM.—Suppose a woman, after receiving the promise, contracted a marriage with another man, and then had connexion with the one who gave the promise?]

In that case the regular marriage to another man would clearly be a bar.

[LORD BROUGHAM.—Suppose the second man died, and then the *copula* took place with the first man.]

That would not be an instance of an *impedimentum dirimens*. The principle on which the theory of marriage by promise *subsequente copulâ* rests, is, that at the *copula* there had been a prior exchange of consent. Stair says, that the *copula* presumes, that full conjugal consent *de presenti* has been exchanged.

[LORD CHANCELLOR.—Is the theory not this, that the *copula* is fulfilment of the promise, so that the promise is no longer executory?]

[LORD CHELMSFORD.—At what period of time is this consent presumed?]

Lord Stair avoids saying at what precise moment of time the consent is presumed, but treats the *copula* as evidence of continuing consent. None of the cases decides to what moment the consent relates back. The old practice of the Church was to ordain the parties, who had promised each other marriage, to celebrate the marriage *in facie ecclesiæ*, but latterly the practice was discontinued, because it had the appearance of compelling the parties to marry against their will. It was said a promise of marriage *subsequente copulâ* did not *per se* constitute marriage, but merely was a ground for the Court declaring a marriage. Mr. Fraser stated so, but his book was no authority, for the author was alive.

[LORD CHELMSFORD.—It is a very singular thing, is it not, to say, that an author's work on the law is no authority while he is alive, but that the moment he dies, it becomes an authority?]

[LORD CHANCELLOR.—It is often so said, but without reason. The proper way to look at it is this,—you are always entitled to read part of a work, whether the author is dead or alive, as part of your argument. It may always be useful and available as evidence of what is considered by the profession to be law; but, of course, it is no authority.]

Mr. Fraser doubts the law as laid down by Stair, because there were no decisions which supported Stair. But it appeared in *Dalrymple's case*, that Stair's doctrine was then held to be sound law. The common law adopts the doctrine, that a promise of marriage *subsequente copulâ*, is such an indissoluble pre-contract of marriage as not only was ground for enforcing performance of the public ceremony, but barred either party from contracting any subsequent marriage with a third person. The doctrine, that promise *de futuro, subsequente copulâ* was not *ipsum matrimonium* but merely a ground of action, was modern, and perhaps took its rise from Lord Moncreiff's remarks in *Lowrie v. Mercer*, 2 D. 953.

[LORD KINGSDOWN.—It was also said by the other side, that if after a promise and subsequent *copula* one of the parties dies before an action of declarator is brought, there will be no marriage: is that so?]

There is no authority whatever for that, though the consequence of such a state of things has been made matter of a standing doubt.

[LORD BROUGHAM.—Do you say, that the evidence of the promise *de futuro* must be in writing, or the promise itself must be in writing?]

It is well settled, that it is not the promise itself that requires to be in writing, but all that is required is, that there be some writing of the parties, which acknowledges or admits the promise. Indeed it might even be doubted, whether the general conduct of parties might not be equivalent to evidence of a promise; and the case of *Smith v. Grierson*, M. 12,391, countenances that view. The necessity of written evidence of the promise did not arise out of anything peculiar to the contract of marriage, but was a rule applicable to other obligations.

[LORD CHANCELLOR.—Supposing a promise is made out of Scotland, but while the parties are *in itinere* to Scotland, would that satisfy the rule of Scotch law?]

It might be well contended, that if two parties come into Scotland under a mutual promise of marriage previously made, and that promise rests upon them unfulfilled, and then intercourse takes place in Scotland on the faith of it, that would be as effectually a marriage as if the promise had been originally made in Scotland.

[LORD BROUGHAM.—And if the writing was made out of Scotland, that might be evidence of a promise made in Scotland?]

Yes, if the writing, wherever made, refers to a promise which had been made in Scotland, that is all that is necessary. Such was the case of *Honeyman*, two of the letters chiefly relied upon having been written in England. In that case it was laid down, that no positive proof of the connexion between the promise and the *copula* was necessary, but that it lay on the opponent to shew some disconnexion in consequence of a *medium impedimentum*. In *Hoggan v. Craigie*, LORD BROUGHAM said, that even if a promise of marriage had been renounced before *copula*, yet the *copula* would revive the promise.

[LORD CHANCELLOR. That was a *dictum*: have you any direct authority for it?]

There is no direct authority; but it follows from the nature of the case.

As to the Irish marriage, under the Statute 19 Geo. II., there must be positive evidence of a person being a Protestant: it was not enough to rely on the negative evidence of his being born and bred a Protestant and not being a Roman Catholic. The best evidence as to what he was, was given by himself to Father Mooney, when he said he was not much of anything.

The evidence on which the respondent relies as to the consent *de presenti* is the letters and acknowledgments subsequent to the first residence of the parties in Edinburgh. As to the promise, the same letters sufficiently proved it, and the *copula* was so connected with the promise as to satisfy the requirements of the law.

*Rolt*, in reply.—There is no satisfactory and definite evidence in the letters of a contract *de presenti* in Edinburgh, and the subsequent acknowledgments were all capable of explanation, as being made for a collateral purpose. As to the promise, it was absolutely necessary, that both the promise and the *copula* should have taken place in Scotland. The *onus* of proof lay on the respondent, for in all secret marriages it is incumbent on one of the parties to preserve evidence of it—*per* Lord Eldon in *Cuninghame v. Cuninghame*, 2 Dow, 504. The theory of the law of Scotland was, that the consent was exchanged at the time of the *copula*—*per* Lord Moncrieff in *Lowrie v. Mercer*. If it did not relate to that *punctum temporis*, there was no other resting place. If at the time of the *copula* it can be shewn, that there was no intention to consummate marriage, but merely to commit an act of fornication, then the *copula* was valueless as evidence of marriage—*per* Lord Campbell, *R. v. Mills*, 10 Cl. & F. 781.

[LORD BROUGHAM.—I do not believe Lord Campbell ever said what he is reported to have said there, that the *copula* must be with the intention of consummating marriage.]

It was sound law, whether Lord Campbell laid it down or not. Again, it seemed to be assumed by the respondent, that facts and circumstances can be resorted to, in order to prove the promise. That is not so; the utmost use that can be made of facts and circumstances is not to supply the want of writing, but to put one in a situation to construe the writing.

[LORD CHANCELLOR.—According to your theory, that the matrimonial consent is presumed to be exchanged at the time of the *copula*, it would not matter where the promise was made?]

It would not in point of morality; but in point of law every ingredient of the contract must exist in Scotland. As the *copula* was not with the view of marriage, no matrimonial consent can be extracted from it.

*Cur. adv. vult.*

LORD CHANCELLOR WESTBURY.—My Lords, in offering my opinion on this very painful case, it is my desire to make no observation that is not necessary for the decision of the legal rights of the parties.

The respondent sought to establish the fact of a marriage between herself and the appellant, first, on the ground of a present engagement to become husband and wife mutually exchanged between the parties when in Scotland; secondly, in the alternative, if the evidence be not sufficient to prove an immediate present contract, the respondent pleads, that there was a marriage by a promise to marry given in Scotland, followed by cohabitation on the faith of that promise.

The respondent also affirms on the record, that a religious ceremony took place between the parties in Ireland, which amounted to a marriage if there was none before, but she was content in the Court below to have it assumed, that this ceremony did not *per se* constitute a valid marriage, and having so submitted, it is not competent to her to maintain a different view of the case before this House as a Court of Appeal.

I shall therefore give no opinion on the question, whether what passed between the parties in Ireland was sufficient of itself to constitute a marriage, it being plain, that the point was withdrawn by the respondent from the consideration of the Courts below. In this all the Judges agree. I shall regard the acts of the parties in Ireland merely as part of the *res gestæ*, which may or may not tend to prove or disprove the case of a Scotch contract of marriage. The case of the respondent, therefore, is reduced to the two propositions already stated; the first of which is, that there was an immediate present contract of marriage by the interchange of mutual consent made at Edinburgh during the month of April 1857.

As to the nature of the consent which is to constitute marriage, I accept the observation of the Lord President, that it must be deliberate and serious, and given mutually, with the view and for the purpose of creating thenceforth the relation of husband and wife. It is not necessary, that a contract so made should be followed by cohabitation.

With respect to the evidence, that shall be sufficient to prove a marriage so constituted, great latitude is allowed by the law of Scotland. It was said in this House by LORD COTTENHAM, then LORD CHANCELLOR, in the case of *Hoggan v. Craigie*: "It is not necessary to prove the contract itself, it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage." And, again, the rule is stated more fully by LORD BROUGHAM when advising this House in the case of *Honeyman*, a case which in many respects is similar to the present.

When a marriage is alleged to be constituted by deliberate consent mutually exchanged, it is reasonable, that there should be some certainty in the allegation as to the time and place when the contract was made, and in this case such certainty is found in the pleadings of the respondent. But I cannot agree with the Lord President in what seems to have been his opinion, that, if the respondent's evidence fails to substantiate the exchange of present consent at the particular time and place which are assigned, but is sufficient to warrant the conclusion, that there was a deliberate interchange of consent in Scotland, without proving the time and place that are assigned, the Court is not warranted in declaring, that a marriage was contracted between the parties. In my judgment, when a marriage is pleaded as having been contracted by parties in Scotland by means of the interchange of deliberate present consent, it is not necessary to allege the particular place in Scotland, or the exact day, where and when such consent was exchanged; and further, if the particular time and place are alleged, such allegation will not detract from the sufficiency of evidence, that proves a marriage by the deliberate interchange of present consent made in Scotland, although it does not extend to prove the particular time and place which are pleaded. The strict rule applied by the Lord President in this respect appears to me to weaken very much the force of his judgment upon this part of the case.

The respondent has pleaded, that there was a solemn interchange of consent to become husband and wife on Sunday, 12th April 1857, at the house of Mrs. Gemble in Edinburgh. The

form adopted was, the respondent states, the reading aloud by the appellant from a printed book of the marriage service used by the Church of England.

The Lord President casts discredit on this statement, because it is neither said nor proved by the respondent, that there was any writing interchanged, or that there was any person present at this alleged interchange of consent. The Lord President insists on the fact, that persons even in a humble sphere of life, when contracting marriage in such a manner, rarely omit to preserve evidence of it by exchange of writings, or the presence of confidential witnesses; and he dwells on the omission to do so as inconsistent with the intelligence and foresight of the respondent. It is true, that this omission has very much weakened the respondent's power and means of proving her case, but the omission itself is entirely in accordance with the truth and consistency of her case. Her case is, and it is proved by various parts of the correspondence, that the marriage between herself and the appellant was to be kept secret, and not even avowed in their mutual letters for fear of accident—a caution which seems to have been observed until their visit to the Continent in 1858, when we find the appellant for the first time writing to the respondent as "Madame Yelverton." It would have been inconsistent with the case on both sides, if either had proved that, the want of which is made so great an objection by the Lord President.

But there occurs in the subsequent correspondence a remarkable confirmation of the statement, that some engagement or promise relating to marriage took place on the 12th April, and inasmuch as it arises from an undesigned coincidence, it is the more convincing. In a letter written by the respondent to the appellant on the 12th July, being exactly three months after the alleged engagement on the 12th April in Edinburgh, the respondent uses the words, "My ears ache to hear the *mia*, (that is, to hear the words 'my own,') though I am convinced you might say it with perfect truth now, and for exactly three months past;" that is to say, the respondent reminds the appellant, that his right to call her his own commenced exactly three months ago, namely, on the 12th April. I regard this letter of 12th July as full proof of the truth of the respondent's chief allegations, namely, that there had been a marriage by mutual consent, or at all events a deliberate mutual sacred promise to marry, entered into at Edinburgh on the 12th April 1857; but that there had not been cohabitation, in consequence of the refusal of the respondent to consent to cohabitation until a religious ceremony had been performed. The appellant, indeed, affirms, that there was sexual intercourse between himself and the respondent before she quitted Edinburgh in April 1857, an allegation which the Judges in the Court below refused to give credit to; and it is to me a strong proof of the truth and honour of the respondent, that she has denied that which the appellant affirms, for it was plainly her interest to have admitted that cohabitation did take place before she left Scotland in 1857, inasmuch as it appears to me, (and such, I infer, from his judgment, would have been the opinion of the Lord President,) that there would then have been no difficulty in arriving at the conclusion upon the evidence of the appellant's subsequent letters, that there had been a promise to marry given in Scotland, on the faith of which cohabitation also had taken place between the parties.

Before examining further in detail the evidence for and against the conclusion, that there was a marriage by present consent in Scotland, it is necessary to advert to the arguments so much pressed on the part of the appellant, that it is in the highest degree improbable that any matrimonial connexion would be formed between the respondent and the appellant, inasmuch as it is evident, from the correspondence which took place between himself and the respondent for three or four years anterior to the arrival of the respondent in Edinburgh, that the respondent had made the most indelicate advances to the appellant, and was willing to become his mistress without requiring any promise of marriage. Many hours were spent by the appellant's counsel in the attempt to give this colour to the correspondence. I abstain from making any other observation upon this, the more laboured part of the appellant's contention, than that it is in my deliberate judgment most unwarrantable and unjust.

An amatory character is first given to this correspondence by the letters of the appellant. In his third letter to the respondent he addressed her as "My dear Theresa." When the lady proposes, that the correspondence should terminate, the appellant insists, that it should be continued, and the character which the respondent gave to it, and her expectation and belief of the appellant's meaning and purpose, cannot be more justly or more seriously expressed than by the respondent in her letter before leaving the Bosphorus: "So when I tell you the curtain is about to fall between us, you hasten to avert its fall by inspiring me with hopes which, you must have known and felt, could only be construed in one way by me. You knew, that to secure my affections there was only one way; therefore, at that time, you could not have seen the utter impossibility of the realization of those hopes; then you lose me again, and when you begin to see, that I am really gone, which you do at the expiration of five months, you leave no stone unturned to find me; instead of once in three months, it is three times in as many weeks you write. I cannot mistake you any longer; you warn me of obstacles, but encourage me not to be daunted by them. 'Tis but a rock, and the ocean is not far distant where the two streams must meet, and we may be again fellow travellers. Again, you say, 'If your lucidity can make out the plot, I have only to say, Amen, so be it.' It is not possible, dear Carlo, you could have

coolly written this to me, knowing it to be vain and false? You could not so wantonly cheat me even on the supposition, that you were a very wicked man (which I know you are not). Such a measure would have proved quite absurd and useless, as I was entirely beyond your reach in a convent, and quite *à l'abri de tout épreuve*. You come to Galata and renew *vivâ voce* what you have written. It was no effect of impulsive feeling. You came with the intention as far as it was then possible of binding me to your fate, and had I had a brother or a father to have consulted, I think he would have considered it so."

I feel bound, in justice to the respondent in giving my opinion on this the most earnest part of the appellant's argument, to cite two short passages from subsequent letters. In a letter written at an advanced stage of the correspondence, she says: "All these reflections lead me to surmise, that there is something more than the money difficulty which you have not had the courage to tell me. Mio Carlo, I cannot doubt your feelings towards me, but there may be family feelings and considerations, pride of birth, etc. If so, I have only three words to say—for God's sake let this be the end. I am of an old and good family, that is all, and will never be a firebrand in any family. If it is so, we must not meet again. It would be too painful, and as I know your former weakness, let me know, that I may get out of your way in time. I told you nothing in the shape of money obstacles could appal me, and I cannot think, that your uncle can entertain the absurd notion, that you will not marry. You are certain to do so sooner or later. In your position it is the simplest thing in the world to find a woman ready to pay your debts, if you choose to set about it." And again in a letter of 2d July 1856 the respondent writes to the appellant: "If you wish the curtain here to fall between us for ever, you have but to say so: all my arrangements are made for entering the moment I receive your intimation, and I pledge you my sacred word, that it shall be decisive, and no murmur shall escape me."

I concur in the judgment of Lord Curriehill, that it was at the request, or on encouragement from the appellant, that the respondent came to Edinburgh in the month of February 1857; that there had not then been any formal agreement or promise to marry, but there had been pending for years an honourable courtship and treaty of marriage, and that they met to consider the mode in which this treaty could be carried into effect without injury to the prospects of the appellant.

In my judgment, therefore, there is nothing in the antecedents of these parties to render improbable, but on the contrary much to render probable, the allegation of a secret marriage having taken place, or, at all events, a final and absolute promise to marry having been mutually given during their residence in Scotland.

I return to the inquiry, whether the respondent has given sufficient legal evidence of a marriage in Scotland by the exchange of a *de præsenti* matrimonial consent.

The assertion of the appellant is, that illicit intercourse commenced between himself and the respondent shortly after her arrival in Edinburgh in February 1857, and that it continued on every opportunity during her stay there. The appellant has not even attempted to sustain this charge by any evidence. It was, as I have already stated, disbelieved by the Judges in the Court below; and it appears to me to be wholly unjustifiable.

The falsehood of this defence should not be entirely laid aside in considering the case of the respondent. During the respondent's stay in Edinburgh she resided in a very respectable house belonging to a widow lady named Gemble, and she was accompanied by a Miss Macfarlane, a lady of unquestionable character, as a companion. The respondent has examined Mrs. Gemble and Miss Macfarlane in support of her case; but they fail, in my opinion, to prove the allegation of the respondent, or any circumstances from which the fact of the interchange of present matrimonial consent can be inferred. They prove only, that the appellant was a constant visitor at the house where the respondent resided, and was regarded by the persons who were acquainted with the parties, as the respondent's avowed and accepted suitor.

The proof, therefore, of an actual marriage by the exchange of present consent must, if it exists, be found in the subsequent acts, conduct, and correspondence of the parties.

I take first the correspondence between the time of the respondent's leaving Edinburgh, about the 16th or 17th of April 1857, and her joining the appellant at Waterford at the end of July following. In considering these letters, it is most material to bear in mind the fact of which I am fully convinced, in common with all the Judges of the Court below, viz. that no sexual intercourse had taken place between the appellant and respondent during the residence of the respondent in Edinburgh. The respondent alleges, that she left Edinburgh to avoid the importunities of the appellant for the consummation of the marriage. She appears to have been resolved, that this should not take place until there had been some religious ceremony at a Roman Catholic place of worship which would be satisfactory to her conscience; and the desire to have this object accomplished, together with the fact, that there had hitherto been no consummation, appears to me to interpret and render intelligible the whole of the subsequent correspondence up to the meeting in Ireland. But in examining the subsequent correspondence with a view to collect evidence of what had passed on the subject of marriage, much difficulty arises from the fact of many of the letters having been destroyed, or at least not being produced, and also from the circumstance, that the letters being expressed, as they naturally would be, in

general terms, it is difficult to say, that particular expressions mean more than a solemn engagement or promise to marry. In the letter written about the beginning of May 1857, the respondent, after an offer to supply the appellant with money, writes thus in reference to their separation:—"I cannot bear it; you know it is not in nature, and you swore before God, and you will not perjure yourself: but I'll go if you wish it;" words which certainly point to the fact of a solemn engagement. On receiving a letter from the respondent, which contained the wedding cards of two persons, Mr. and Mrs. Shears, who had been lately married, the appellant affected to believe, that the respondent had married Mr. Shears, and in a letter of May 1857, he uses these words: "By your marriage you have earned my lasting gratitude, as, on reflection, I found, that I had placed myself in a false position with regard to you, and one of all others the most painful to me, viz. that I had promised to you to do more than I could have performed when the time came." I am unwilling to found much on these expressions, because I think it clear, that the letter was not sincere, but a piece of affectation written probably under some feeling of irritability as the respondent left Edinburgh. The words, however, appear to me to mean clearly, that a promise had been given in relation to marriage, and that it must have been either a promise of marriage *de futuro*, or else a promise to meet the wishes of the respondent by consenting to a religious ceremony in a Roman Catholic place of worship.

It is urged by the appellant's counsel, that the answer to this letter is not such as would have been written by the respondent if there had been a marriage. I cannot concur in that remark. Remembering always, that the respondent had refused cohabitation, that, in the language of one of her letters of this date, she was shrinking from the things he yearned for, it might well be that she did not know or believe, that what had passed was in law a binding final marriage. The same thing has occurred in several of the reported cases.

But whilst I consider the language of the respondent's answer as consistent with either hypothesis of an actual marriage or final promise to marry, I construe it as more in accordance with a state of things that can no longer be altered than with an engagement that might be released or abandoned by both the parties to it, or broken by either. The words are: "I whose very life is ebbing away for you. I who have sacrificed all but God to you. I who have lain at your heart, and in sight of Heaven been called yours. It is too late to take you at your cruel word." These expressions exactly agree with the respondent's present allegation. They refer to some solemn occasion when they had plighted their troth to each other in the sight of Heaven, but which in the mind of the lady still required the sanction of a religious ceremony. The respondent, therefore, might well write these words in her letters, which have been most relied on by the appellant. "Don't say it is a comfort for you to be rid of me; if it is, you know you are, you always have been, free." As the final step to cohabitation had not been taken, she supposes, and is willing, that if he repented of what had passed, he should, and with her consent would, be free. But a subsequent sentence shews clearly her sense of their relative position: "Oh, Carlo, we have been too dear to part now, we must try and make the best of our lot. All I have borne I must still bear. God knows best how much I can; but be you a very devil, I feel I am fast to you for some good end, no doubt, in the far off future." This is the language of natural emotion—unpremeditated, undesigned—no word of which could have been written with the view to the use which is now made of it; but as truth is always consistent, so these words naturally fit and square with the case now made by the writer, and are utterly irreconcilable with the case of the appellant.

This letter was much insisted on by the counsel on both sides, and was rightly made one of the cardinal points in the case. It appears to me full of confirmation of the present statements of the respondent.

It seems to have been answered in an affectionate manner by the appellant, and matters were restored to their former footing. Many of the letters that passed between the parties previously to the respondent meeting the appellant at Waterford on the 29th or 30th July 1857 are alleged by the respondent to have been destroyed at the instance of the appellant. That there were many other letters is admitted; but of this destruction there is no proof. In the letters which remain, there are some expressions which are in accordance with the present case of the respondent, and particularly the letter dated Sunday, on which I have already commented.

From the whole, with the light derived from the subsequent acts of the parties, I have drawn the conclusion, that the respondent, after a struggle, consented to cohabit with the appellant, as his wife, and to meet him in Ireland for that purpose, depending on the promise of the appellant, that a religious ceremony should be gone through in a Roman Catholic chapel in that country. In confirmation of this, I may refer to the circumstance, that the appellant purchased a wedding ring in Dublin when on his way to meet the respondent at Waterford, and this brings us to the most important part of the case, viz. what was said and done by the parties in the chapel at Rostrevor.

Before examining the evidence on this subject, I am obliged to say, that I cannot give credit to the respondent when she affirms, that no intercourse took place between them previously to this ceremony; it is, I think, the result of the evidence that immediately on their meeting at

Waterford they cohabited as man and wife, and passed and were accepted as such. In my judgment, the respondent instead of denying the fact, had a right to say, that she consented to this cohabitation on the faith of the contract or promise of marriage that took place in Edinburgh, and of the appellant's assurance, that he would no longer object to a marriage ceremony in a Roman Catholic place of worship.

In examining the evidence respecting the ceremony, the first, and a very material part of it, is the testimony of a Roman Catholic bishop. What passed between the respondent and the bishop, is not evidence against the appellant, who was not present; but on the very material inquiry, to which I shall presently come, whether the respondent, in cohabiting with the appellant, relied on the Scotch contract or promise, or on the Irish ceremony, the respondent is entitled to the benefit of this fact, that she stated to the bishop, either by herself or by Mr. Mooney, what had passed between her and the appellant in Scotland, and was told by the bishop, that it was a valid marriage in the sight of the Catholic Church, and, that he saw no use or advantage in any other marriage ceremony; but upon being pressed by the lady, the bishop consented, that a religious ceremony should be performed, considering, that it would be a renewal only of the marriage consent. This is plain from that portion of the bishop's testimony in which he says, that he told Mr. Mooney it was not necessary to grant a dispensation with the publication of banns, as there had already been a valid marriage between the parties.

The evidence of Mr. Mooney as to what took place in the chapel is in accordance with the testimony of the bishop. Mr. Mooney states very distinctly, that he believed the parties, from statements made by both, to appear before him as man and wife from a previous marriage in Scotland, and that the ceremony he performed was a renewal of the matrimonial consent, several points of the regular ceremonial of marriage being omitted.

Much observation was made, and justly, on the conduct of Mr. Mooney in sending to the respondent, in the following year, a certificate which purported to be the copy of an entry in the marriage register of the parish of Killrone, but in which register there was no such entry; and also to be a certificate of marriage, and not of renewal of consent, in the presence of two witnesses, although it would seem, that no such witnesses were present. It is said, by way of excuse, that this certificate was given, not for the purpose of being used as between the appellant and respondent, but to be exhibited abroad on the occasion of the baptism of the child which the respondent represented she would soon give birth to, and the baptism of which abroad could not be otherwise obtained. Whatever excuse may be pleaded, the giving of the certificate of marriage by Father Mooney was undoubtedly a most reprehensible thing, and if proper questions had been put to Mr. Mooney, (which was not done,) and he had failed to explain it, I certainly should have refused to attach any value to Mr. Mooney's evidence on any point on which he was not distinctly confirmed by other testimony; but the clear and positive testimony of Mr. Mooney is, that there was a religious ceremony performed, differing from the ordinary ceremonial of marriage, so as to amount to a renewal of marriage consent, and that this was done in consequence of the parties stating, that they were already, by reason of pre-contract, made in a Protestant country, in the relation of husband and wife; and thus far his evidence is confirmed by the testimony of the bishop, and in some degree by the admission made by the appellant, that there was an imperfect religious ceremony; and I find it stated, in the judgment of Lord Curriehill, that it was, as he understood, fully admitted by the appellant at the debate in the Court below, that the proceeding did actually take place as stated by Mr. Mooney.

This being so, I cannot find that any element is wanting to constitute a deliberate admission by the parties of the fact of a previously existing marriage contract, and I entirely adopt the remarks of Lord Curriehill:—"In none of the cases in which marriage has been held to be established by *post facto* has acknowledgment been so clear and so solemn as the one in question."

It appears to me to be clear, that each party knew and felt, that the ceremony was of no avail as a legal solemnization of marriage; but it was done, as the appellant truly said, to satisfy the lady's conscience, and for that purpose he acknowledged her as his wife in the church, and before a clergyman of her own religion.

On their return to Scotland, shortly after this ceremony, the appellant and the respondent lived openly as husband and wife. The various acknowledgments and declarations of the appellant, that the respondent was his wife, are carefully enumerated by Lord Curriehill in his judgment; but I think it unnecessary to detail them, and I will advert only to the argument of the appellant, that both parties knew them to be insincere pretences, intended only to conceal an illicit intercourse, and that they have therefore no effect or validity in law.

The answer to this seems to be furnished by some of the letters of Major Yelverton to the lady when, believing herself to be pregnant, she had declared her resolution to make the fact of their marriage publicly known. The nature of these communications by the respondent cannot, indeed, be collected otherwise than from the citations and statements in the letters of the appellant; for it is a significant fact, that the appellant has not produced a single letter of the respondent addressed to him since the ceremony at Rostrevor, in Ireland. In a letter written

also in November 1857, by the appellant to the respondent when at Hull are these expressions :—“ I think there will be an advantage in remaining until the time I said, as the fact is, there will be no certainty of an enemy until that time, as false alarms often do not declare their falsehood before a period which is, I calculate in your case, about that time. I cannot quite comprehend your wish to be alone. The fact of an unexpected responsibility and ‘ chance of a row ’ do not make me wish to be away from you, but more anxious to stand by you and assist you through the emergency. The cat must be kept in the bag just now, for if the fiery devil gets out now she’ll explode a precious magazine and blow us all to the d——l. In the future there is hope of being able to loosen the strings. If there is danger to you, in the natural course of things, that course must be hastened. What is the necessity for letting the mine explode? Can you not get abroad? I have every reason to believe that next June will see you through the scrape, but of that more when we meet. Till then *penso a te.*” And in another letter written by the appellant to the respondent, and dated Christmas day 1857, are these passages :—“ You say, ‘ I told you my resolution in case certain events did occur. You were very angry ; but it would be my duty, and if I live I must do it.’ Now the fact is, that it is not a question of mere anger on my part ; but your resolution is founded on false views. Where is your duty of keeping faith with me? I have never intentionally deceived you, and have done more than I promised (at great risk). I told you the event we fear could be avoided, and you certainly cannot doubt, that it is equally unwelcome to me as it can be to you ; but if the future proves, that I have been deceived by others, that will not absolve you from your faith, the which if you break with me you will never from that moment have one moment of even tolerable content during the rest of your life. If you do feel any love for me, you must change that resolution. If I depart this life you may speak, or if you do, you may leave a legacy of the facts. But while we both live, you must trust me and I must trust you. When I find my trust misplaced, if you have any affection for me, I do not envy you the future. Your duty lies this way, not that.”

My noble and learned friend, LORD BROUGHAM, who has been compelled to leave London, has desired me to state, that after a laborious examination of the case, he is satisfied, that there had been in Scotland that exchange of consent which constitutes marriage *per verba de presenti* ; and he has desired me to state to your Lordships the principal reasons of Lord Curriehill and Lord Deas as adopted by my noble and learned friend in support of this opinion. I have extracted those reasons as part of my address to your Lordships—

LORD CHELMSFORD.—My Lords, I must object to my noble and learned friend reading to your Lordships the opinion of an absent peer, which ought to have been expressed by himself. It must be recollected, that the judgment to be now given is the judgment of the House as expressed by the noble and learned Lords present ; and though in similar cases, I have heard the opinion of a noble Lord who concurred, but was accidentally absent at the judgment, referred to, yet I never knew a case, where the opinion of any noble Lord who differed from the House was allowed to be read for him.

LORD CHANCELLOR.—My Lords, in my personal experience I have often seen this done, but of course that will not sanction a practice if it is not regular. A noble Lord, who is absent, may, by another who is present, state the reason of his judgment. Of course, his vote cannot be taken and counted. However, I will make no controversy about this matter ; it is certainly a novel objection which is now taken. Every noble and learned Lord, who quits the House before judgment is actually delivered, ought certainly to have an opportunity of stating the reasons of the judgment which he has formed in the case. Though it cannot weigh with the House, it is always satisfactory to know his reasons for or against the ultimate decision. No one, indeed, can tell what the decision of the House will be, till it is pronounced. I am sure I have heard the reasons of an absent Lord given, by one of your Lordships who was present, twenty or thirty times ; but since objection has been taken to this being done, I will pass over what I have stated as the reasons of my LORD BROUGHAM,<sup>1</sup> and resume my own judgment.

I pass on to consider the remaining portion of this case, viz. that if the evidence fails to establish a marriage by the mutual interchange of present consent, there is sufficient to prove a promise to marry followed by *copula* on the faith of that promise, and both given and occurring in Scotland.

It is objected, that these alternative modes of stating the case by the respondent are inconsistent and even contradictory ; but I concur entirely with the opinion of the Lord President, that this objection is wholly unfounded, and that nothing is more common than this mode of stating a case in consistorial actions—in fact, it is not in law the statement of a different contract or cause of action, but a different mode of proving the fact of marriage ; there is but one principle of law, viz. *consensus facit connubium*. This may be proved by evidence of the actual exchange of consent, or it may be proved by the aid of a presumption of law, for where there is proof of an antecedent promise of marriage, followed by sexual intercourse which can be referred

<sup>1</sup> Though the opinion of LORD BROUGHAM was, for technical reasons, not read to the House, yet it will be given in its regular order, in conformity with the practice of other Courts of Justice.

to the promise, the Scotch law (if the thing be done in Scotland) furnishes a *presumptio juris* and *de jure*, that at the time of the *copula* there was an interchange of matrimonial consent in fulfilment, and thus, on the same ground of *consensus*, declares that which has passed to be *ipsum matrimonium*. This, therefore, is another mode of proving matrimonial consent, and the only difference is in the rule of evidence, the law requiring in the case of a promise *subsequente copula*, that there should be evidence of it either in writing under the hand of the party who is stated to have made it, or by his admission on reference to his oath. It is not necessary that the promise itself should be in writing, but there must be some acknowledgment in writing of the fact that a promise has been made or given.

The words in which the judgment of this House was given in the *case of Honeyman* are here again necessary to be referred to. "A promise, like all other acts, may be proved by two several ways—either by direct evidence or circumstantial evidence. There may be direct evidence by the testimony of witnesses who heard the promise given; there may be direct evidence in writing proved to be of the hand of the party giving it; but, like all other facts, these things may be proved without either witnesses to support it or the handwriting to remain of record against the party promising. Circumstances may be proved by evidence; circumstances may be proved by the testimony of witnesses, or by written evidence proving those circumstances, and if those circumstances are sufficient to convince the Court trying the fact as a matter of fact, that a promise did take place, the promise must be taken to have happened as much as if it had been proved by other more direct and immediate and satisfactory proof, though sometimes (indeed the law very much in its practice proceeds on that assumption) circumstantial evidence is more clear and stronger, and even less liable to doubt, than direct evidence, inasmuch as it is more difficult to make out a circumstantial case by curiously contrived perjury than it is to make out a direct case by one or two witnesses, who may easily swallow, as it were, an oath false to the fact.

Tried by this rule, the letters of the appellant, to which I have already referred on the other branch of the case, do, in my opinion, when taken in connexion with the acts and conduct of the parties, prove conclusive acknowledgments by the appellant, that he had promised to marry the respondent.

The same conclusion is to be derived from the letter of the appellant written on Christmas day of 1857. If this last letter stood alone, it would satisfy the rule of law requiring evidence in writing from which the alleged promise may be inferred. The Lord President says, that the promise referred to might be not a promise of marriage, but a promise relating to marriage; possibly not an actual promise, but a promise qualified with conditions. I confess I see nothing to warrant a judicial hypothesis of any subtle distinction, nor is there any suggestion of the kind to be found in the pleadings of the appellant.

Such a hypothesis, if it could be judicially suggested, would be entirely refuted by the appellant's letter to the respondent, wherein he combats her resolution to disclose their real situation in the event of her proving to be with child.

One difficulty remains, viz. that to establish marriage on this ground there must be not only proof of a promise, but also proof of sexual connexion in Scotland attributable to that promise. The Lord President says, that the sexual intercourse in Ireland cannot be attributable to the promise in Scotland. *De lege* it cannot, so as to give rise to that *presumptio legis* which makes *copula* in Scotland evidence of consent; but *de facto* it may, so as to exclude the supposition of the connexion having arisen from any other cause; and I think, that in this cause it clearly appears, that the respondent, in consenting to cohabitation in Ireland, relied on what had passed in Scotland, although she desired it to be hallowed by a religious ceremony.

The Lord President, if I understand his judgment, appears to be of opinion, that, even if there was a promise to marry given in Scotland, followed by cohabitation in Ireland, which is renewed and continued in Scotland, such cohabitation cannot be attributed to the promise. No direct authority is cited for this proposition; and it appears to me to lead directly to unreasonable consequences. For instance, suppose a promise of marriage given *per verba de futuro* in Scotland, and that the parties having crossed the border for a day, have sexual intercourse for the first time in England, returning immediately, and cohabiting as man and wife in Scotland, the Lord President's doctrine would of necessity involve the denial of its being in that case supposed a valid marriage, which I cannot but think is a conclusion which the law does not render necessary.

Finally, the Lord President seems to think, that the religious ceremony in Ireland interposes an insuperable barrier between the antecedent Scotch promise, (assuming that there was one,) and a subsequent cohabitation in Scotland; but I think it clear, that neither of the parties regarded what passed in the Roman Catholic chapel as a valid legal solemnization of marriage, and it would be as unreasonable to interpose it between the Scotch promise and cohabitation as it would be to refer the marriage of the parties to a Gretna Green ceremony as its date, because they had subsequently gone through the ceremony of marriage in a parish church in England. If the ceremony was a form of religious sanction not entering into or constituting a contract of

marriage, the case is reduced to the question whether the cohabitation in Scotland cannot be referred to the antecedent Scotch promise by reason of its having had its commencement there, and upon this point I concur with the majority of the Judges in the Court below.

Upon the whole, I must give it to your Lordships as the conclusion of my examination of this case, that there was and is now a relation of marriage adequately constituted by the Scotch law between the appellant and the respondent, and that they are now legally man and wife.

LORD BROUGHAM.—Putting together all the unequivocal acknowledgments of marriage in Ireland, Scotland, England, and France, I am of opinion, that they are sufficient to satisfy the rule of the law of Scotland, and that the marriage is established. That rule, as already stated, is, that the interchange of matrimonial consent, which constitutes marriage, is held to be proved by the acknowledgment of the parties; that such acknowledgments have this effect, whether made at the time or *ex post facto*, and whether made verbally or in writing, or by the subsequent cohabitation of the parties avowedly as husband and wife. The soundness of this doctrine was recognized by the House of Lords, affirming the judgment of this Court in the case of *Inglis v. Robertson*, in 1786, 3 Paton, 53, and it was recognized and acted upon in a series of other cases down to that of *Leslie* in 1860, 22 D. 293, already referred to. Nor is it necessary, that the precise time when the marriage so acknowledged shall be proved, as is well stated by your Lordships in your opinion in that case of *Leslie*. The defender says, that such acknowledgments have not such effect when they are mere disguises for illicit intercourse. That is quite true. But the *onus* of proving that they were such disguises was incumbent upon him. And where is his evidence? I can find none. The cohabitation commenced in Ireland in July 1857, and was continued there, in Scotland, in England, and in France, until the spring of 1858, but from beginning to end on the avowed footing of the parties being husband and wife. In the proof I find no evidence of any cohabitation by them on any other footing. How, then, does the defender attempt to deprive the acknowledged cohabitation as husband and wife of its legitimate effect? All he alleges in the record is, that before it commenced the pursuer had agreed with him to be his mistress. The question, then, is, where is the evidence of that allegation? After sifting the evidence with the most anxious care, I have found nothing to support that allegation, and have been compelled to the belief, that it is disingenuous, as well as groundless. On the contrary, it appears to me, that such a marriage as is established by the *ex post facto* acknowledgments we have been considering was quite in conformity with the arrangement under which the pursuer met the defender in Edinburgh in February 1857, in respect that for four years before there had been going on between them a correspondence, which, although an imprudent, was an honourable courtship, with a view to marriage, so far as the defender's meaning was therein disclosed; and that, although the marriage had been delayed for a considerable time from difficulties, according to the defender's statement, arising from complications with an uncle, yet these difficulties were obviated, or rather evaded, by the parties agreeing, that the marriage should be a secret one; and that it was for the very purpose of settling such an irregular marriage the pursuer came to Scotland in 1857. The greatest difficulty, indeed, I have felt in the case arises from the fact which, as I think, is clearly proven, that the cohabitation did not commence in Scotland at the first visit in the spring of 1857. But I have become satisfied, that this arose from the pursuer, in consequence of her religious notions as to the sacramental character of marriage, having for some time religious scruples against allowing the marriage to be consummated without a sacerdotal solemnity. When she first hinted at the concession she was willing to make, she expressly stated, that it would be one which would satisfy her conscience; and then, when the sacerdotal solemnity was about to be performed, the defender himself told the priest, that such a solemnity was quite unnecessary, and that the purpose it was to serve was only to satisfy her conscience. The only other thing which I have had any difficulty in reconciling with the conclusions to which I have come is, that in the correspondence between the parties after they left Edinburgh in April 1857, there are expressions not easily reconcilable with the consciousness of the parties, that they were there irrevocably married. But, in the first place, there are other passages, to some of which I have already referred, which indicate the reverse; and the true explanation appears to be, that the parties, although they privately interchanged matrimonial consent, may not have been aware of the legal effect of what they had done. This is often the case, even among natives of Scotland who are so imprudent as to engage in such proceedings. Still more may this be so, when, as in the present case, the parties were strangers in Scotland, and probably not informed as to its marriage law. But even if they were in such ignorance, and were led in consequence to use the expressions I have referred to, the marriage would not be the less binding. In the case of *Dalrymple* Lord Stowell stated the law on the subject thus: "Supposing, that Miss Gordon really did entertain doubts with respect to the validity of her marriage, what could be the effect of such doubts? Surely not to annul the marriage, if it were otherwise unimpeached. We are at this moment inquiring, with all the assistance of the learned professors of law in that country, among whom there is a great discordance of opinion, what is the effect of such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they

had satisfied the demands of the law, which had been rendered so doubtful, will not affect the real sufficiency of the measures they had taken." In the case of *Honeyman*, again, LORD BROUGHAM, referring to acts of the pursuer in that case, indicating her want of confidence in her being married, says: "She may have been ignorant of the law, and ignorant of her rights, as she says herself; and her ignorance of her legal rights does not impeach them, nor impede her in the course she takes to have them established." And several cases in Scotland have been decided on that principle. It only remains to be stated, as to the marriage which was so acknowledged, that if it did take place, it was in Scotland it took place. For, on the one hand, the correspondence proves very clearly, that, when the pursuer first left Scotland in February 1857, there had been no marriage, nor anything but an unsettled treaty for a marriage; and, on the other hand, after the pursuer came to Scotland in April 1857, and while she was in England, the parties never met again until they went to Ireland; and hence it was not in England the acknowledged marriage took place. And thus the marriage which was so acknowledged, as it did not take place either before the parties met in Scotland or after they left it in the spring of 1857, necessarily took place while they were both residing in Scotland. . . . On these grounds, I am of opinion, that the pursuer has made out her case. And if I am right in this view, it is not necessary to consider the other ground of action.

LORD WENSLEYDALE.—This inquiry, which has occupied your Lordships for an extraordinary, may I not add with truth an unnecessary length of time, has now concluded, and the true question to be decided lies in a very small compass.

We have heard a long narrative of the first accidental acquaintance of the parties, its progress, and its results; and it is impossible to have heard it without painful interest, and not to have formed an opinion as to the propriety of the conduct of both the parties in many particulars. We are not called upon to express that opinion, nor to decide a question of morals, and pronounce to whom and in what degree the greater share of blame is to be attributed. Our province is to decide a simple question of fact—whether you are satisfied, that the appellant was not married to the respondent at the time of the commencement of his suit for declarator of freedom and putting to silence, which was instituted on the 8th June 1859.

The summons on the part of the respondent of declarator of marriage was signeted on the 13th June 1860; but as there is no attempt to say, that a marriage took place between the first and second proceeding, the question is, whether a marriage had taken place before the first-mentioned day; and this we are to decide as a simple question of fact, bringing our minds unbiassed to the consideration of that question by any other feelings than the desire to do justice and act according to the rules of the law.

As we have to decide whether a legal marriage has taken place, we must first clearly ascertain what constitutes a legal marriage in this case. There is no doubt, that in Scotland, according to the ancient law prevalent in most of Europe from a very early period, a marriage between two parties *per verba de presenti*, serious, deliberate, and mutual, constitutes a valid and binding marriage. *Secondly*, a promise *per verba de futuro subsequente copulâ* connected with that promise, and taking place on the faith of it, constitutes a valid marriage. To prove that promise the evidence must be in writing, or it must be proved on the oath of the party against whom the proceeding takes place. The promise must be made in Scotland; but the proof of it may be in the writing of the party promising, made anywhere. *Thirdly*, in all cases, the fact of a marriage *per verba de presenti* may be proved either by a person present at the time, or any other legal evidence, that satisfactorily shews the fact, and under this head may be included that of habit and repute, by which without any other evidence, a marriage in Scotland may be established. It is admitted by all the Judges, and not denied in the argument before us, that there was not sufficient evidence of an acknowledgment amongst the members of the family and those connected with them, to constitute a proof of marriage by habit and repute. The further consideration of that part of the case may therefore be dismissed altogether. *Fourthly*, if a valid marriage had taken place anywhere, though the suit is in Scotland, that, no doubt, would constitute a sufficient answer to the suit for declarator of freedom and putting to silence; and it is made a part of the *respondent's case*, that such a marriage took place by a Roman Catholic priest at Rostrevor in Ireland on the 15th August 1857. But it appears, that there was in force in that country an Act of the Irish Parliament of the 19 Geo. II. c. 13, § 1, which provides, that every marriage, if celebrated by a Popish priest, between a Papist and any person, that hath been or hath professed himself to be a Protestant at any time within twelve months before such celebration, shall be null and void to all intents. I cannot feel any doubt, that, according to that law, this marriage was void. The appellant, having been born and bred a Protestant, of a Protestant family, and always treated as such, must be deemed to have continued so, unless he had done something to denote a change of his religious persuasion, and nothing of that sort appears. I have no doubt, that he was a Protestant within the meaning of that Act, and am fully supported in that opinion by those of the learned Judges Christian and Keogh, which I have read since the hearing of the case, and which are extremely full, able, and satisfactory. They are reported in the case of *Thelwall v. Yelverton*, 14 Ir. Ch. & Com. L. Reps. 188. He did not

say he was a Roman Catholic to the priest, but that he was a "Protestant Catholic." Had he said he was a Roman Catholic, it would have raised the question reported to have been decided by Alderson, B. in *Reg. v. Orrell*, in 1839 (9 Car. & P. 80), whether he was not estopped by his declaration, that he was a Roman Catholic. I must say, that I doubt greatly of the propriety of that decision, and agree with an opinion of Monahan, C. J., to that effect, referred to in the argument. That his statement in that case would be evidence against him is undoubted; but that it operates as an estoppel is a very different proposition; but it is not necessary now to be discussed and decided.

I think it clear, that there was no valid marriage in Ireland. The preparations for that marriage, which had been arranged and agreed upon before by the appellant purchasing a ring at Dublin on the 25th July 1857, clearly carry the case no further than the marriage itself on the 15th August. Whether what passed between the appellant and Father Bernard Mooney prior to the marriage operates as an admission of a prior marriage between the appellant and respondent is to be relied upon as proof of it is a different question, and must be fully considered.

The two important questions to be considered, upon which the case depends altogether, are these:—Whether there is sufficient proof of a marriage *per verba de præsenti*, and that in Scotland; and, secondly, is there sufficient proof of a marriage *per verba de futuro* in writing written anywhere, and of a *copula* connected with that promise in Scotland? It is admitted on the part of the appellant, that the writing need not be in Scotland, if the promise which it proves, and the *copula* which followed, were both in Scotland.

After the most careful attention to the evidence, I do not feel any doubt, that there is no proof of a marriage *per verba de præsenti* in Scotland, none of a promise to marry *in futuro*, with a subsequent *copula* connected with it anywhere. I agree with the Lord President and Lord Ardmillan entirely in the view they have taken of the case.

Upon the first question I have to say there is clearly no direct proof of the actual fact of a marriage *per verba de præsenti*. The respondent states in her condescendence in the action of declarator of marriage, that on or about the 12th April 1857 she and the appellant acknowledged and declared each other to be husband and wife at Mrs. Gemble's lodgings in Edinburgh, and read through the marriage service in an English Prayerbook; but the proof did not make out that fact, it failed altogether; and it is the less to be believed, because it was not mentioned in the defence to the first suit for declarator of freedom and putting to silence at all.

But though the direct proof of marriage in Scotland *per verba de præsenti* fails, it is said there is proof of acknowledgment by both parties, which, if sufficient, no doubt will establish such a marriage.

It is sad to think, that in the nineteenth century the law of marriage in Scotland should be left in such a state, that the proof of that most important relation in life should be sometimes left to depend upon the loose recollection of witnesses of conversations so often misunderstood and imperfectly remembered, and sometimes on the meaning of an amatory expression in impassioned letters. We must, however, take the law as we find it; but, in dealing with these questions, I think, that evidence of this character should be closely examined, and should not be acted upon unless no reasonable doubt is left as to the truth of the facts to be proved on the minds of those who are to decide such an important question, and can any one say, that there is any such evidence in this case of a prior completed contract of marriage in Scotland?

The circumstances of representing each other in their tour in Scotland at inns and lodgings where they otherwise would not have been admitted, or at villas which they were permitted to see, are of no weight. As they do not in any way establish a marriage by habit and repute, they are of no weight to prove the actual fact. The same may be said of his subsequently representing her as his wife at the Hotel of the Chapeau Rouge, at Dunkirk. The statement to Mr. Goodliffe himself, when he met him at the same inn, goes further, for he stated, that she really was his wife, but that he had been married secretly or privately, and that he wished Mr. Goodliffe not to mention it in society, that he had met him and his wife, lest it should come to the ears of his family; but it is perfectly uncertain, whether that statement refers to a marriage that had already taken place in Scotland, or to one elsewhere, and it may just as well relate to that marriage, which undoubtedly had taken place in Ireland in August 1857, and which he did no doubt wish to keep secret. To establish a marriage in Scotland, evidence pointing more clearly to that country ought to have been produced.

Let us consider the rest of the evidence by which that proposition is sought to be supported. The main evidence on which reliance is placed is the declaration to Mooney, the Roman Catholic priest; and some mention is also made, but not much relied upon, of a statement made by her in the appellant's presence, and not at once contradicted by him, that she had been "twice married."

It appears to me, that this evidence is entirely insufficient to form a serious and credible acknowledgment on the part of the appellant of a previous marriage anywhere, so that we could believe that it actually took place. There still would be defects in the proof, that the marriage so acknowledged took place in Scotland; but if the evidence amounted clearly to a statement,

that he had been married before the Irish Roman Catholic marriage took place, by a valid marriage in another country, it might be sufficient to enable us to refer it to Scotland, as he had made no promise before he came to Scotland, and had been but a short time in Ireland ; but, as neither of the parties were Scotch, such promise must, to be valid, be made in Scotland after one of the parties had been there for twenty-one days next preceding the marriage, by the Statute 19 and 20 Vict. c. 96. But the evidence of Mooney seems to me to be quite unsatisfactory, and wholly insufficient to prove, that the appellant acknowledged a previous marriage anywhere. When closely examined, all that is really proved by Mooney amounts to no more than this, that the appellant said, that there was no necessity for this ceremony ; "it had been all previously settled or arranged ; but I will do it to satisfy the lady's conscience." That statement made by the appellant is all that can be used as evidence against him. What the priest understood from his previous conversation with the respondent is of no weight ; and it is out of the question, that what the appellant said amounts to any acknowledgment of a previous marriage anywhere.

As little can any reliance be placed on the supposed acknowledgment by his not contradicting her in some conversation in the presence of Mr. Thelwall, in which she said she had been twice christened and twice married, and it was very possible that she might be twice buried, at which the appellant laughed. He said nothing of importance. It is impossible to attribute the slightest weight to such an occurrence as serious acknowledgment of a previous marriage. Indeed, little or no reliance was placed on that circumstance in the argument before us.

It seems to me, therefore, that there is no sufficient proof, or anything approaching to it, by the acknowledgment of the parties, of any previous marriage at any time anywhere, still less in Scotland, so as to prove a regular Scotch marriage *per verba de presenti*. I concur in the observations of Lord Ardmillan, that it is remarkable, that throughout the whole correspondence between the parties there is not one letter in which the appellant addresses her as his wife and the respondent addresses him as her husband, save one, which contains words written on an erasure, "petting sposa bella mia," which I doubt not were originally some "petting possibilémente." It is impossible, at all events, to say, that there is any satisfactory proof by circumstantial evidence of a complete contract *per verba de presenti*.

It was, however, principally contended, that there was a promise of marriage *per verba de futuro* in Scotland, evidenced by writing, in Scotland or out of it, followed by a *copula* connected with that promise in that country.

I am clearly of opinion, that this proposition also is not made out in the evidence.

In the argument before us I may, I think, say, that some days were consumed in stating and commenting on the first acquaintance in September 1852, their respective conditions in life, their subsequent conduct when the appellant was at Malta and the respondent at Naples ; afterwards their meeting at Galata in 1855 and in the Crimea ; his return by the Danube, and her coming to England. That she then went into Scotland, and they were both there and in Ireland, and each of the letters that passed between them was made the subject of a long comment. Whether she was the more active party in beginning and continuing the correspondence ; whether the ambiguous expressions in some of her lively and impassioned letters were always directed to a future regular marriage, or to a different relation between them, was discussed at great length ; whether he was desirous of discontinuing the correspondence at one time, and endeavoured to put an end to their intercourse by coming to England by Vienna, and abstaining from answering her letters for long periods ; whether he invited her on her return to this country to come to Scotland, where he was quartered, or she came without invitation, in order to carry her plans into effect : these different matters were made the subject of very long and elaborate discussion on both sides.

It seems to me, I confess, wholly useless to decide these various questions. Upon a careful consideration of the whole evidence, it is impossible not to come to the conclusion, that whatever had been said or thought or designed by either of the parties, the appellant and respondent had never made a complete and unconditional promise of marriage to each other before his return into Scotland and her arrival there in the beginning of 1857.

Up to this period, it is impossible to contend, that there was any promise of marriage proved by the correspondence or other direct evidence *per verba de futuro*. Indeed, it is perfectly clear that any marriage, if contemplated at any time, was put an end to, as appears by his letter of the 16th August 1856, and her letter of August 1856. Besides, if the correspondence contained evidence of a promise anywhere, it was of a promise out of Scotland. Indeed, the Lord Advocate, in his very able address to your Lordships, was obliged to admit, that upon that previous correspondence he could not rely, and must shew that promise by the evidence of that which occurred afterwards.

The great question is, Whether there is to be found in the subsequent correspondence any promise made in Scotland of a future marriage, or any written acknowledgment of any previous promise of marriage in Scotland, by him to her, or, I may say, indeed, of a promise anywhere. I must say, that I think there is no satisfactory proof of any such promise or acknowledgment—there are some ambiguous statements which must be carefully considered. I think their meaning

may be conjectured with great probability of the truth of that conjecture, without attributing to them the meaning of being a promise of marriage, or the acknowledgment of one; but, at all events, they are much too ambiguous and obscure to constitute a step to so important a relation as that of husband and wife.

In answer to a letter of hers, which was probably sent from Dublin in May 1857, containing the marriage cards of Mr. and Mrs. Shears, he congratulates her on her supposed marriage with Mr. Shears, and says, that by that marriage she had earned his lasting gratitude, as, on reflection, he had placed himself in a false and painful position with regard to her, that he had promised to do more than he could have performed when the time came.

It seems to me, that it is impossible to hold this to be satisfactory evidence of any prior unconditional promise of marriage, which he was then bound to perform. It may be reasonably supposed to refer to a promise of marriage of some sort somewhere made, because the occasion of writing the letter is her supposed marriage to Mr. Shears. He congratulated himself upon being released from a false position; but it may be a reference to a promise of marriage upon conditions which he could not have performed, as the sufficiency of his fortune, or the consent of his relatives; and her answer shews, that she had no promise that she could insist upon, for she says, that "he knew he was, and always had been, free." The precise date of that letter is not, so far as I can learn, ascertained, but it must have been soon after the receipt of that to which it was an answer, written in May 1857.

But the greatest reliance was placed by the respondent's counsel on the letter written by the appellant on Christmas day 1857, in which he says he had never intentionally deceived her, and had done more than he had promised "at great risk." It is certainly conjectural what that promise was; certainly it was not a promise of marriage *in futuro*, for the promise referred to had been already performed. It would be quite unsafe to rely upon it as an admission of a marriage already complete *per verba de præsenti*. It must, in that case, have been a marriage agreed upon and carried into effect since the dates of the letters last referred to, at which time she acknowledged that he was entirely free. It is a mere conjecture what promise is referred to. It may be something that was connected with her then present condition which he was desirous to conceal, and which she wished to disclose, an event "which could be avoided, and which would be equally unwelcome to him and to her;" and he strongly urges upon her her duty to keep it secret. He says, that the letter referred to her threat to disclose the illicit intercourse, if she had a child.

If we are to treat the statement of that letter as an acknowledgment of a previous marriage, it may possibly refer to the marriage at Rostrevor, which he had concurred in at her request, and which had caused him to incur a great risk by the danger of offending his relations, and injuring his pecuniary prospects. But as to a promise to marry *in futuro*, the letter seems to me wholly insufficient to prove it.

In the absence of any proofs of a promise of marriage evidenced by writing, it becomes unnecessary, in my mind, to consider whether any *copula* referable to it, and so connected as to make it valid, ever took place in Scotland.

There is no proof of *copula* in Scotland prior to August 1857, which can be judicially relied upon; she denies it altogether, and the proof of it by some expressions in a letter of hers as to what occurred in the fifth story of Mrs. Gemble's house, and which the appellant insists upon as proof of a *copula*—these cannot, I think, be considered as proof of that fact.

In July or the beginning of August 1857 they met at Waterford, in Ireland, and at Malahide, Newry, and Rostrevor: from that time to the 15th August, on which day the Roman Catholic marriage took place, they unquestionably cohabited together as man and wife. Any promise subsequent to the first of these days in Scotland—which it must be in order to constitute a step towards a Scotch marriage—could not be a complete marriage by a subsequent *copula* in Scotland, forming a part of a series in an illicit concubinage begun and continued for a considerable period of time out of Scotland. I do not dispute, that, according to the authorities, such a previous habit of long illicit intercourse, if laid aside and repented of, might render a promise, with a subsequent *copula* on the faith of it, a sufficient marriage according to the law of Scotland, as explained by Lord Glenlee and Lord Pitmilley in the case of *Sim v. Miles*, 8 S. 97. The same question is also discussed in the case of *Hoggan v. Craigie*, M'L. & Rob. 942-971. I do not think it necessary, however, to discuss this question, as no promise to marry in future can be proved; nor is it necessary to consider the very important question, whether, if there was a marriage by *verba de futuro* in Scotland and subsequent *copula* there, it was anything more than a binding agreement, not an actual marriage, and was put an end to by the subsequent regular marriage to Mrs. Forbes in the month of June 1858.

My opinion in this case, which I have formed after due care, and so as to entertain ultimately no doubt upon it, is founded entirely upon the dry and simple question of fact, that there was nothing like satisfactory proof of a marriage in Scotland *per verba de præsenti*, nor of any by an unconditional promise of future marriage there, or indeed anywhere, with a subsequent *copula* in that country connected with it; and, therefore, I am bound to give my advice, that your

Lordships should reverse the judgment of the Court of Session, and confirm the sentence of declarator of freedom and putting to silence.

LORD CHELMSFORD.—In these conjoint actions of declarator of freedom and putting to silence and of declarator of marriage, the question to be decided is the same, viz. whether the appellant and respondent are lawfully married persons.

The *onus* of establishing a lawful marriage rests in each case upon the respondent, and it can only be satisfied by clear and satisfactory proof of the fact.

The respondent asserts, that she became the wife of the appellant either by reason of a contract of marriage by interchange of consent *per verba de presenti*, or by a promise of marriage *subsequente copulâ*, or by a regular marriage with due religious ceremony in Ireland. It is to be observed, that the first two grounds upon which the existence of a marriage is relied upon are to a certain degree inconsistent with each other. It does not seem very probable, that there should exist at the same time an actual marriage *per verba de presenti* and a marriage resulting from a promise followed by *copula*, whichever of the two is supposed to have preceded the other; and it is not a circumstance favourable to the respondent, that at the close of the argument her counsel have not been disposed to rest her case upon any one ground, but have contended, that in this, or that, or the other way, a marriage is proved to have taken place. Even with regard to the acknowledgments supposed to be derived from the correspondence between the parties, they have been unable to adopt a decided line, and say whether they must be taken to relate to an actual marriage, or to a mere promise of marriage; and with respect to the marriage in Ireland, they have used it either as valid in itself, or as proof of the recognition of a previous marriage. The whole of the voluminous evidence is thus thrown loosely before your Lordships, in order that you may extract from it proof of a marriage in one or the other of the ways insisted upon by the respondent.

It appears to me, that there was a great deal of preliminary matter dwelt upon at considerable length in the course of the argument on both sides, which is not very material to the question to be decided. For instance, it could hardly be necessary to occupy time in ascertaining the exact condition in life of the parents of the respondent, which at best could have only a remote bearing on the probability or improbability of a marriage taking place between the parties. If the fact of the marriage is proved, the question of antecedent probability or improbability is entirely put aside, and if it is not proved, all previous speculations about it are useless. So, and for the same reason, I think it unimportant to settle the exact mode in which the parties originally became acquainted when they met on board the Boulogne steamer. Nor is it necessary to enter into any consideration of the propriety of the respondent's conduct, or the object she had in view in renewing a single day's acquaintance after an interval of ten months by means of a letter which it may be supposed could as easily have reached her cousin through the regular channel as through a private and unknown hand. There seems also to be no occasion to dwell upon the correspondence immediately after its commencement, or to ascertain with any accuracy which of the two, the appellant or the respondent, was more forward to adopt a familiar and intimate style of address to the other. The character of the early part of the correspondence is certainly unusual, and not exactly what might have been expected between persons who when it began had been only once in each other's company ten months before, and who continue to write in the same strain for more than two years without having met again. It must be admitted, whatever opinion may be entertained of their ultimate objects and intentions, that both parties were indulging in rather a hazardous interchange of sentiment and feeling. Whether from the beginning there was a preconceived design on the part of the respondent to entangle the appellant in a matrimonial engagement, and the appellant (as his counsel alleges) was not unwilling to amuse his leisure hours in this imaginative and romantic intercourse, but without any ulterior views, I will not stop to consider. The only use made of the earlier correspondence is to endeavour, from the tone and character of it, to establish the great probability, that if the parties ever met again a more intimate relation would be established between them. All that has a direct and immediate bearing upon the question of marriage will be found after the period when the parties met in Edinburgh in February 1857. I should therefore have omitted all notice of the previous conduct and correspondence of the parties, if they had not been regarded by one of the learned Judges of the Court of Session, Lord Curriehill, as serving "to indicate the purpose for which the meeting in Scotland took place." But the remarks which I shall make upon the early intercourse between the parties must be considered rather as an introduction to the case than as any substantial part of it. Whether the object of the respondent in joining the Sœurs de la Charité and going to Constantinople was in order to be nearer the appellant, and whether she availed herself of the invitation of Lady Straubenzee too forwardly and eagerly, that she might have an opportunity of meeting him, are circumstances which may be dismissed from consideration as having no bearing upon the question of a subsequent contract or promise of marriage. The occasion of their meeting at Galata seems to have been produced by the appellant himself. The respondent says he sought her out, and met with her there. The appellant alleges, that she furnished him with her address, and asked him to call. But it clearly appears that her address was communicated

to him on his arrival in the Bosphorus at his own request. It is at Galata, the respondent asserts, that the first mutual promise and engagement to marry took place. This assertion is denied by the appellant; and there is not only no proof of it, but subsequent circumstances render it highly improbable. And one can hardly avoid an observation in passing upon the way in which the respondent invariably alleges upon every occasion when she meets the appellant, that he promised her marriage. If any such promise was made at Galata, it is utterly unaccountable, that when the respondent availed herself of Lady Straubensee's invitation to the Crimea, she should have arrived there, and been near the appellant for several days, without his taking any notice of her. The fact appears from one of her own letters written after she had left the Crimea, in which she says, "It is useless to tell you what attracted me to the Crimea, at the risk of being frozen to death. It is to no purpose recapitulating what secret instinct pointed out to me your little hut; how in spirit I begged and prayed to be let in for mercy's sake—for pity's sake. No, you were invulnerable for a whole fortnight; you resisted the small plaintive voice." The respondent alleges, that during her stay in the Crimea the appellant told her he was in great pecuniary embarrassment and dependent upon an uncle, who did not wish him to marry; that she proposed to him to break off the engagement which had been entered into at Galata, to which he would not agree, and endeavoured to persuade her to a secret marriage, and, among other suggestions, proposed, that they should be privately married in the Greek chapel at Balaklava. All this is denied by the appellant, but he asserts, that in their interviews in the Crimea "great familiarities ensued between them." What actually happened there may be in some degree collected from the correspondence which afterwards passed between the parties. It appears to me to be clear from a letter written by the respondent after they parted in the Crimea, that there must have been some talk (at least) about marriage, and that the appellant had interposed a difficulty with respect to money matters and his obligations to his uncle. All these things are alluded to in this letter, and it has never been alleged by the appellant, that they were the mere imagination of the respondent. Whether the circumstances connected with the debt and the promise to the uncle were true, or were a mere pretence and excuse for putting off a marriage, is another question.

With respect to the appellant's assertion of familiarities in the Crimea, it is sufficient to say, that there is no evidence on the subject. The conclusion which I draw from the correspondence at this period is, that the interviews at Galata and in the Crimea, but more especially at the latter place, had raised an assurance in the mind of the respondent, that the appellant was willing to marry her, if the suggested obstacle which he had interposed could be removed; and that her feelings, not to say her passions, had been highly excited by the expectation which had been thus created, and that her mind dwelt strongly, and expressed itself passionately, upon the prospect of the anticipated gratification of her wishes.

The letters of the appellant, on the other hand, were of a character to elicit from the respondent frequent complaints of their coldness,—whether their tone and manner were designedly adopted by the appellant for the purpose of checking the hopes which he had previously raised, or indicated the real state of his feelings towards her. Certainly, nothing could have occasioned greater discouragement to the respondent than the non-fulfilment of the appellant's promise to visit her at Bebeck on his way home from the Crimea, and his returning by the Danube and Vienna for the avowed purpose of avoiding a meeting. Whatever engagement may have been entered into at this period is of small importance, as it was entirely at an end when the respondent left the Crimea, a fact which appears from the evidence of Lady Straubensee, and which was distinctly admitted by the Lord Advocate in his able argument for the respondent. Lord Curriehill himself says, that on the parties meeting in Scotland in February 1857, there had not been a concluded agreement or promise to marry; so little foundation does there appear to be for his conclusion, that the meeting in Scotland was for a purpose indicated by anything which had previously passed, or for supposing, that it had been arranged beforehand.

The early period of the history of the parties having been thus shewn to have a very slight influence (if any) upon the important part of the case upon which I am entering, I shall dismiss all that has been urged in argument with respect to the appellant's correspondence with Mrs. Bellamy, the respondent's sister, in which it is said he intimated to her, that no marriage could ever take place between them, with this single observation, that the purport of the letter may have been exactly what the appellant asserts, and yet that, having been written in the year 1856, it is not inconsistent with the fact of the alleged subsequent contract or promise of marriage in Edinburgh in the year 1857. To this period, then, when the material part of the case really commences, I now proceed.

I collect from the condescendence of the respondent and from the evidence, that the respondent went to Scotland, not upon any invitation of the appellant, but that having heard, that the appellant was stationed at Leith Fort, she proceeded to Edinburgh with her friend Miss Macfarlane for the sole purpose of having an opportunity of meeting the appellant again. Be this as it may, the parties are now brought together in a place where alone the Scotch marriage could have been contracted, and where the evidence therefore becomes of essential importance.

Before entering upon the case as applicable to this period, it may be useful to consider shortly

the two modes by which irregular marriages may be contracted in Scotland. The one is by a deliberate expression of mutual consent *de præsenti*, which may be proved by witnesses who were present at the time, or by the subsequent serious and intentional acknowledgment of the parties, whether verbal or otherwise. The other is by a written promise of marriage followed by a *copula* occurring in consequence of the preceding promise. This species of marriage may, like the other, be proved by subsequent acknowledgment, but only by an acknowledgment in writing.

It was argued on the part of the appellant, that a promise *subsequente copulâ* does not amount to a contract of marriage, but is only evidence of it. I collect, however, from the text writers upon the subject, that a promise of marriage followed by *copula* together constitute marriage, from a presumption or fiction, that the consent *de præsenti*, which is essential to marriage, was at the moment of the *copula* mutually given by the parties in consequence of the anterior promise. It would seem, therefore, that the contract cannot be referred back to the antecedent promise, but can be dated only from the time when the mutual interchange of present consent is supposed to be given. As this description of marriage is peculiar to Scotland, it is obvious, that everything which is essential to the contract, viz. both the promise and the *copula* must have taken place there, and must be distinctly proved, either directly or by written acknowledgment, to have each of them this local requisite. These being the two kinds of irregular marriages in Scotland, with their modes of proof, I proceed to examine the evidence by which the respondent endeavours to establish, that in one or other of these ways she became and is the lawful wife of the appellant.

The respondent went to Edinburgh in January or February 1857, and took lodgings at Mrs. Gemble's in St. Vincent Street. The appellant was in the habit of visiting her there, but Mrs. Gemble says, that "Miss Macfarlane was always present when he called, either in the room itself or in an adjoining room, from which everything that passed could be overheard." Under these circumstances, it is alleged by the respondent, in her condescendence, that on or about the 12th of April 1857, in this house in St. Vincent Street, the appellant and respondent solemnly acknowledged and declared each other to be husband and wife; that they read through the marriage service of the Church of England together, and at the conclusion of it the appellant said to the respondent—"This makes you my wife according to the law of Scotland," or used words of similar import. If clear and satisfactory evidence of this solemn acknowledgment and declaration could have been adduced, it would not be very material, that the respondent happens to have stated it to have occurred on the 12th of April, which (on turning to the Almanac for the year 1857) appears to have been Easter Sunday, Mrs. Gemble having deposed, that the appellant "visited the respondent every day, Saturdays and Sundays excepted, on which days," she adds, "he never called."

But the only evidence in support of this important allegation of the respondent is derived from this witness, Mrs. Gemble, who says, that "she recollects one afternoon of hearing Major Yelverton reading in the room where the pursuer was. She did not take notice how long the reading continued. It appeared to be earnest reading, and in a religious tone." It is unnecessary to say, that such a statement as this is wholly insufficient to establish the truth of the respondent's allegation. And, all circumstances considered, it seems highly improbable, (even if Mrs. Gemble heard the appellant reading in a solemn tone at any time,) that it could have been what the respondent describes. It has already been proved by this same witness, that, during the appellant's visits at her house, Miss Macfarlane was always in the room with them, or in another apartment which opened into it, "from which she could hear all that was said." But Miss Macfarlane, upon being rather boldly interrogated by the appellant's counsel "whether she ever, during her stay at Mrs. Gemble's, heard the defender, or the pursuer and defender, read over the Church of England marriage service," distinctly answered "No." Now, if this solemn declaration and acknowledgment had been previously arranged and was seriously intended, but was not meant to be divulged until some future occasion, it is unaccountable, that it should have been made in a place where it was certain to be overheard by Miss Macfarlane; and if it were not intended to be kept secret, and was the result of a deliberate purpose of matrimony, it is difficult to understand why she was not called in to witness it. According to Mrs. Gemble, there had been a previous distinct avowal on the part of the appellant of his matrimonial intentions towards the respondent, for he said to her on one occasion, "If I marry Miss Longworth, I will marry the cleverest girl in Edinburgh." These words she afterwards changed to, "When I marry," &c. making them amount to a declaration by the appellant, that a marriage had been agreed upon. I own, that I am always suspicious of the accuracy of a witness who undertakes, after a great lapse of time, to speak to expressions which (as appears by this instance) may be turned to a different meaning by the alteration of a single word; and I am compelled to doubt, whether the appellant made the remark to Mrs. Gemble either in the one form or the other, when I find that Miss Macfarlane, when questioned upon the subject, and having the very words put to her, has no recollection of having heard them, and when they are inconsistent with the respondent's whole case as to the secrecy of their matrimonial engagements. There appears, therefore, to be an entire want of direct evidence of this alleged mutual interchange of present consent, and the allegation itself is attended with great improbabilities; but the deficiency of

proof, and all the difficulties suggested by the circumstances, may of course be removed by subsequent distinct and unequivocal acknowledgments of its having taken place.

Before proceeding, however, to consider the letters immediately following the respondent's departure from Edinburgh, which are relied upon as furnishing evidence to this effect, it is necessary to advert to the other ground of marriage, which also belongs to this period, viz. a promise of marriage in Scotland, followed by *copula* there, because the supposed acknowledgments are indiscriminately and indifferently applied both to the actual contract of marriage in Edinburgh, which we have been considering, and to a promise of marriage alleged to have been there made. There is no distinct allegation of the exact time to which this promise is to be assigned, but I assume, that it must be referred to a period before the alleged solemn acknowledgment and declaration, as there would seem to be no reason or occasion for it afterwards. A promise of this kind must (as has been already stated) be in writing. It is not pretended, that there is any direct evidence of the requisite description, and the proof that any such promise was made in Scotland must, therefore, be found, if at all, in the letters subsequently written by the parties. It must be borne in mind, that it is a part of the respondent's case, that this supposed promise was not immediately followed by *copula*; for she alleges in her condescence, that she "entertained conscientious scruples about the propriety of a marriage not celebrated by a priest, and, accordingly, refused to cohabit with the appellant without having gone through a ceremony of marriage by a priest of her own faith, and that the appellant became so pressing in his solicitations that they should cohabit together as husband and wife, that she left Edinburgh about ten days (in fact, two days) after the acknowledgment and declaration before mentioned."

The appellant, on the other hand, asserts that secret and illicit sexual intercourse with the respondent occurred during her residence at Mrs. Gemble's; and it is one of the many strange circumstances connected with this extraordinary case, that the fact of *copula* at this period, which would be favourable to the respondent, so far as she relies upon a mere promise of marriage, and therefore prejudicial to the appellant to the same extent, should be denied by her and asserted by him. It is sufficient, upon their contradictory allegations, to say, that, although some stress has been laid upon an unexplained expression in one of the respondent's letters, reminding the appellant of the little room, five stories high, where they had been so happy, (the respondent's lodgings at Mrs. Gemble's being a flat upon the third floor,) there is nothing beyond the assertion of the appellant to prove, that there was any sexual intercourse between them at this period.

The respondent then leaves Edinburgh, having (as she alleges) not only received the appellant's promise to marry her, but having actually become his wife by a solemn and binding contract of marriage into which they had both deliberately entered. Direct evidence of either the promise or the contract is wholly wanting; but the respondent contends, that they are both unequivocally proved by the letters which afterwards passed between her and the appellant.

The most convenient mode, perhaps, of examining this part of the case will be to consider the effect of the correspondence down to this period, in which, if acknowledgments are found, they can refer only to the alleged marriage, or promise of marriage, in Scotland separately from the letters written after the religious ceremony in Ireland.

It was reasonably to be expected, that the greatest light will be thrown upon the doubtful questions of the Scotch marriage, upon which the parties are at issue, by the earliest letters which passed after they separated in Edinburgh. According to the respondent's case, the object of her long cherished hopes and aims had been attained, so far, at least, as that the appellant had become irrevocably bound to her by the sacred tie of marriage. In the very first of her letters after this event we should naturally look for some expression of satisfaction, if not of happiness, that so far her wishes had been accomplished, and such language as the following could hardly have been anticipated:—"I am like unto the woman in the Gospel, troubled about many things; troubled not to see you, with unspeakable longings for an absent loved one; doubts and fears about the durability of requitement; misgivings lest the ardency of attachment was merely the effect of proximity—lest a two months' trial will not prove its emptiness." And, again:—"What is the use of their saying, 'You must keep quiet,' when I cannot trust,—when by trusting I may lose both life and life hereafter (or, at least, the fruits of a life of patient suffering); for if you did deceive me again in that last not to be remedied point, the physical part would give way. On the other hand, my whole nature demands the risk—the trial to be made; it has wound itself too closely about you to give you up now; even writing about it I have little sharp ripping pains at my heart. If I made my hand write a farewell I should have a palpitation there and then. I shall die without you. Is it worse to die with you?"

It may be observed, once for all, that the enigmatical character of the correspondence, which might be intelligible to the parties themselves, renders it extremely difficult for a third person to be certain that he has put a correct interpretation upon it. It, however, appears to me, that the passages to which I have just referred are wholly irreconcilable with the idea of the respondent having recently become the lawful wife of the appellant, even if we adopt the suggestion, that the uneasiness of mind which it describes arose from the respondent having denied herself all

connubial intercourse with the appellant until their union had received the sanction of some religious ceremony.

It is a circumstance worthy of remark, that in all the correspondence there is no allusion by either party to the alleged ceremony at Mrs. Gemble's, nor is the name of husband and wife ever given by one to the other. Lord Deas accounts for this by saying, that "they could not write plainly as husband and wife lest their letters might be seen, and betray what the defender deemed it vital to conceal." But this supposed continual care to avoid detection is hardly consistent with his view of the unguarded expressions contained in some of the letters, which he thinks furnish evidence in themselves that this relation existed between the parties. The tone of the correspondence during this period seems to me to be strongly opposed to the probability of the existence of any marriage or any binding promise of marriage when the respondent left Edinburgh. I cannot bring my mind to look at the letters which passed upon the subject of the wedding cards of Mr. and Mrs. Shears in the same light in which they are viewed by Lord Deas. His Lordship thinks, that the appellant's letter, written upon this occasion, "must either mean simply, that the defender had promised to marry the pursuer, or, that he had promised to avow a marriage with her already made at some future time, or upon the occurrence of some future event." It may here, again, be remarked what perplexity and uncertainty are produced by this doubtful and alternative mode of applying the supposed acknowledgments contained in the letters. The passage relied upon by the learned Judge seems to me not to be susceptible of either of the interpretations which he has suggested. The words are—"By your marriage you have earned my lasting gratitude, as, on reflection, I found, that I had placed myself in a false position with regard to you, and one of all others the most painful to me, viz. that I had promised to you to do more than I could have performed when the time came." These words evidently point, not to an absolute promise of marriage, but to some unexplained promise with a condition which the appellant had previously made at some time and place which are left altogether uncertain, and which promise he then found he would have been unable to perform if the time of performance had arrived. The other interpretation of Lord Deas is much less to be accepted, for the language is wholly inapplicable to an existing marriage, and to a promise to avow it at some future time or upon some future event. But I do not consider it so important to determine the exact meaning of the appellant's words on this occasion as to observe the way in which the respondent answers him. It must always be borne in mind, that the respondent's case is, that at this time she was actually married to the man who is congratulating her upon her becoming the wife of another. It is not difficult to imagine the indignation which a wife would feel at the degrading idea thus entertained and expressed of her conduct and character. It is difficult to gather any distinct meaning from the impassioned language of the respondent; but these do not appear to me to be the natural expressions of a wife exposed to such serious and unjust imputations from her husband:—"Oh! Carlo, to suspect me of such a thing! I, whose very life is ebbing away for you! I, who have sacrificed all but God to you! I, who have lain at your heart, and in sight of Heaven been called yours! I, whose very soul is yours, to be so mistaken!" And again, "That you should judge me guilty of such an infamous thing, God help me! I do not know how to bear this last blow. Oh, that he would take me; and you seem to be glad of it. Oh no! no! don't say that; don't say it is a comfort for you to be rid of me. If it is, you know you are, you always have been, free." My noble and learned friend on the woolsack, thinks, that this letter is consistent with the respondent's case, as he considers, that there had been a promise of marriage given, which had not been followed by *copula*. But he overlooked the fact, that, according to the respondent's case, there subsisted, at this very time, an actual marriage, which had taken place in Edinburgh, which bound the appellant to her irrevocably, and how the words "you are, you always have been, free," can be reconciled with the existence of this marriage, it is difficult to understand.

It is not necessary to dwell upon other parts of this portion of the correspondence, which throughout is certainly not in the usual style of epistolary intercourse between husband and wife; but I must not omit to notice the letter relating to the cathedral at Manchester, to which great importance has been attached on both sides. I do not think, after all the consideration which has been bestowed upon it, that we have arrived at the real object which was to be accomplished by the proposed meeting at this place. But I cannot agree in the view of this letter which appears to have been taken by my noble and learned friend on the woolsack. It appears, that, so early as May 1856, the respondent had darkly hinted at some scheme which might gratify the appellant's wishes and satisfy her own conscience, but which she says she has not the courage to propose. She seems to refer to this again in a subsequent letter, in October 1856, in which she says, "If, for yourself, you have any definite wishes with regard to me, one desire might have been fulfilled which would have been a gleam of sunshine on my dismal life, and would not have interfered with your liberty, present position, or future prospects." No further allusion seems to have been made to this scheme, nor do I find any proposal or suggestion afterwards for a meeting for any purpose connected with a religious ceremony. But the parties, a month before the letter which we are about to consider, had evidently arranged a plan for proceeding

together upon some expedition, for on the 10th of June 1857, the respondent, writing from Wales, says, "If I do not get rid of my cough, shall I go to France, and you come when you feel disposed, and then can we go the Highland expedition? After which I can either settle in Edinburgh or Hull, until we can go to Germany." It appears to me that Manchester was only intended to be a place of rendezvous to carry out the proposed expedition, for in the letter in question she says, "We are going to Manchester in a week or ten days, and shall probably remain there about that time. You can fetch me from there if you choose, after the return home here." Having thus resolved to leave her friends for the society of the appellant, she seems to have imagined a mode of giving some solemnity to a step which would so seriously compromise her by suggesting, that he might prefer meeting her in the old cathedral, where her forefathers lie, to their other project. That this was not to be the occasion of any religious ceremony appears from the respondent telling the appellant, that he would have "nothing to say or do," and that "if safety was his object, what she suggested was merely the same as being present at mass making him a Catholic."

What, then, can be fairly and reasonably conjectured to have been the respondent's intentions? It appears to me to be at least probable, that what she intended was, that before proceeding upon the proposed expedition, the necessary result of which may be anticipated by what afterwards occurred in Ireland, she wished to bind the appellant closer to her by a solemn vow of fidelity pledged to her in some consecrated place, which might "satisfy her conscience," to use her own expressions in the letter of May 1856, and would not, in the words of the letter of October 1856, interfere with the appellant's "liberty, present position, or future prospects," and would clothe their intercourse with the appearance, at least, of a religious sanction. That it had nothing in view of a more binding obligation is apparent from the ease and tranquility with which the respondent, when this plan is defeated, turns almost flippantly in her next letter to another. "Manchester scheme," she says, "all over. Do not know when they will go. The steamer, I believe, calls at Belfast; would that do better for you? If so, say, and arrange everything for me to do."

The meeting in Ireland is stated by the respondent to have been the result of a proposal contained in letters of the appellant, who was in Dublin, saying, that he was now prepared to agree to her demand, that the marriage should be celebrated formally by a priest of the Roman Catholic Church, and inviting her to come to Ireland, that this might be done. Letters of this description have been produced; but that an arrangement had been made for their meeting at Waterford, I think appears clearly from a letter of the respondent, in which she says, "I will write you again directly I get off; and should you not meet me at the steamer on my arrival in Waterford, I will write you to Gayfield, letting you know where I am." I cannot, however, find the least trace of the proposed meeting in Ireland being intended to afford an opportunity for going through a religious ceremony. On the contrary, the letter which the respondent wrote upon arriving at Waterford and not finding the appellant there, leads me to the conclusion, that no such object was then in the contemplation of the parties. She there says, "If you cannot come, will you send me a telegraphic message where I am to go? I shall never return home; it is all over there." But why, it may be asked, should it be all over at home, and why should she never return there, if her visit to Ireland was for the purpose of obtaining a religious sanction to a marriage which had legally existed before? And it seems to me, that the most complete refutation of the respondent's allegation upon the subject is to be found in the fact, that upon the parties meeting in Ireland sexual intercourse immediately took place, and they began to cohabit together as man and wife.

Having brought the case to the point at which a new scene is opened, and a new ground laid for establishing the respondent's allegation, that she is the lawful wife of the appellant, it may be as well to pause for a moment, and to observe again, that hitherto there is no evidence of any marriage or promise of marriage in Scotland; and this is the more important to be noticed, because it renders it in the highest degree improbable, that any expressions contained in the letters written after the religious ceremony at Rostrevor were meant to apply to this antecedent period.

The absence of that species of evidence which might be expected to be derived from the letters written after the supposed marriage in Scotland seems to have struck Lord Curriehill, who says: "The only other thing which I have had any difficulty in reconciling with the conclusion to which I have come, is, that in the correspondence between the parties after they left Edinburgh in April 1857, there are expressions not easily reconcilable with a consciousness of the parties that they were irrevocably married." But his Lordship, after stating, that there are other passages in the letters which indicate the reverse, (which I confess my inability to discover,) suggests as an explanation "that the parties, although they privately interchanged matrimonial consent, may not have been aware of the legal effects of what they had done." But is there any reason for supposing, that the respondent would not have been perfectly aware of the effect of such an acknowledgment and declaration as that which she alleges in her condescendence to have taken place at Edinburgh, if it had really taken place?

Returning, then, to the meeting of the parties in Ireland, the respondent feels that the intercourse between her and the appellant before the ceremony at Rostrevor is almost destructive of her case. She therefore labours hard to disprove it. She alleges in her condescendence, that sexual intercourse was not begun until the 15th August, the day of the ceremony at Rostrevor, and she endeavours to baffle and perplex the persons who were likely to be called as witnesses to prove the earlier intercourse by procuring Miss Crabbe to personate her to them. But whatever denial may be made of this intercourse, or whatever contrivance may have been resorted to, to prevent the evidence of it, it is too clearly and distinctly proved by many disinterested witnesses to admit of the slightest doubt. It is impossible to deny, that the cohabitation of the parties at this period has the most important bearing upon the whole of the respondent's case. It entirely disposes of the reason alleged for the absence of intercourse after the supposed marriage in Edinburgh, and throws an additional doubt on the existence of such marriage. It tends very strongly to shew, that the object of the meeting in Ireland was not to remove an impediment to cohabitation by giving a religious sanction to a previous marriage, but that the ceremony at Rostrevor was the result of an after arrangement.

The purchase of the wedding ring on the 25th July does not at all militate against this supposition, because, as the parties were to travel together as man and wife, it was necessary to provide the respondent with this indication of the relation which they were to assume.

These observations bring me to the consideration of the last ground upon which the respondent rests her case, the effect of the religious ceremony at Rostrevor, either as a valid marriage, or as an acknowledgment of a previous marriage or promise of marriage subsisting between the parties.

In considering this question, it appears to me, that the evidence of Bishop Leahy may be altogether put aside, except as to his opinion of what is necessary to constitute marriage by the laws of the Roman Catholic Church. What passed between him and Father Mooney, or between him and the respondent in the absence of the appellant, cannot possibly be used as evidence against him.

With respect to Father Mooney, I am reluctant to dwell on the part he played in this transaction, except so far as it may be necessary to suggest caution with respect to his testimony as to the prior declarations of the appellant. It seems very strange, that, having been led by the respondent to understand that the appellant was a Protestant, Father Mooney should have thought it necessary just before the ceremony to ask him whether he was a Roman Catholic, and should have been satisfied with his answer, that he was a Protestant Catholic, and then think himself at liberty to proceed at once to celebrate a marriage which he must have known to be void if the appellant was a Protestant, and which was attended with the unusual condition of having his surname confided to him only under the seal of confession.

It is unnecessary to say much upon this marriage, which clearly has no validity. The Act, 19 Geo. II. c. 13, draws a strong line of demarcation between Papists and persons who have been or who have professed themselves to be Protestants within twelve months before the celebration of a marriage. The Act says nothing about a person professing himself to be a Roman Catholic, and therefore, if the appellant had in the strongest and most unequivocal language told Father Mooney before the ceremony, that he was of that religious persuasion, it would not have had the slightest effect upon the validity of the marriage. I think it is abundantly proved, that the appellant was a Protestant within the meaning of the Act. He was born of Protestant parents, and was brought up by them. Whenever proof is given of his attending any religious service it is always in a Protestant place of worship.

But this ceremony at Rostrevor, and the circumstances attending it, are pressed into the service of the respondent's case as proof of the existence of a previous marriage in Scotland. Even what passed in the ceremony itself has been insisted upon as amounting to an acknowledgment, that such a marriage existed; but looking to the words said to be used by the parties from the marriage ritual of the Roman Catholic Church, the position can hardly be seriously maintained. It is upon the previous declarations, alleged to have been made to Father Mooney, that the principal reliance of the respondent is placed. This renders it necessary to consider the degree of credit to which Father Mooney's testimony in this respect is entitled. If the marriage of the parties depended merely upon the ceremony which he had performed, he must have known, that it was utterly void; but if it were the religious complement of a previous marriage, it was not without its efficacy. The respondent in her letter asking for a certificate, appeals to Father Mooney by the strongest motives, that would be likely to influence him. She first appeals to his feelings upon a false statement of the expected birth of a child, as to whose baptism abroad she expects to have some difficulty. She then assures him, that he will find, when the time comes to proclaim the marriage, that he has not only saved two individual souls, but rendered an incalculable service to the Catholic Church; and she adds an additional motive by telling him, that she has "much hopes of her husband." Father Mooney yielded too readily to her solicitations, and gave a certificate, the purport of which he knew to be false, as it never was extracted from any register and no witnesses at all were present at the ceremony. He had so far, therefore,

committed himself to an act of great impropriety before he was examined as a witness. At that time he had also been informed by another letter from the respondent, that her object was to establish the existence of a previous Scotch marriage at the time of the Irish ceremony.

Under these circumstances, I cannot help looking at any statement made by Father Mooney of the appellant's declarations with some suspicion. His evidence is, that the appellant said, "Mr. Mooney, there is no necessity for this; it has all been previously settled or arranged; but I will do it to satisfy the lady's conscience," or words to that effect.

Upon this statement, it may be observed, that a very slight alteration in the words attributed to the appellant would make the whole difference in their meaning. Then, the understanding of Father Mooney, that the observation referred to a Scotch marriage is, of course, no evidence; and it appears, upon his cross-examination, that the appellant never used the words "Scotch marriage." I think, therefore, that much reliance cannot be placed upon the accuracy of Father Mooney's recollection of the appellant's expressions. But assuming his correctness to the letter, and that the appellant intended to refer to a previous Scotch marriage, the words could only have been used as an inducement to Father Mooney to perform the ceremony in order to satisfy the respondent's conscience, and being made with this object they cannot be regarded as such a deliberate and intentional acknowledgment of the previous marriage as the law requires.

Having satisfied myself, upon a careful and anxious consideration of all the evidence, that down to the time of the ceremony at Rostrevor there is neither proof nor acknowledgment of the existence of a marriage in Scotland, and that the *copula* which took place in Ireland was not connected with any supposed previous promise, I proceed to consider whether the latter correspondence can be fairly applied to any other relation between the parties, except that which arose out of the circumstances occurring in Ireland. The respondent's counsel laid considerable stress upon a letter of the appellant said to be written in the month of November 1857, in which an allusion is made to the respondent's probably being in the family way, and to the necessity of keeping "the cat in the bag just now;" and they contended, that the language of the appellant was expressive of his apprehension, that the secret marriage which had taken place might be discovered. I see no reason to doubt that their view in this respect is perfectly correct. There is nothing in the evidence to shew, that the appellant knew precisely the effect of the ceremony at Rostrevor; but, whether it constituted a binding marriage or not, he might be and probably was equally anxious at this period that it should not be disclosed. His expressions, therefore, would naturally be applicable to the apprehended consequences resulting from the intercourse in Ireland; and they do not require, even if they admit of, any further reference.

The greatest stress, however, is laid by the learned Judges of the Court of Session, whose judgment was in favour of the respondent, and by her counsel at your Lordships' bar, and also by my noble and learned friend on the woolsack, upon the letter of Christmas 1857, as amounting to a clear and distinct acknowledgment either that a marriage, or a promise of marriage, had taken place between the parties in Scotland. The passage of the letter which is considered to be decisive upon this point is the following:—"I have never intentionally deceived you, and I have done more than I promised, at great risk." Lord Deas says, "I think the natural construction of this letter is, that the defender had promised to the pursuer a secret marriage, and that he had done more than this promise implied, by submitting to the Irish ceremony, at great risk of its being known;" and Lord Curriehill speaks to the same effect.

But why should the promise to which the appellant refers be marriage? Why should it mean anything else than that he had done more than he had promised by going through the ceremony at Rostrevor? At the best, the meaning ascribed to this passage is entirely conjectural, and in my opinion is far too uncertain to form the foundation of a sufficient acknowledgment of a promise of marriage made in Scotland. I use the words here "promise of marriage," because neither Lord Curriehill nor Lord Deas considers the language of the letter as amounting to an admission of an actual marriage, but only of a promise, which, of course, would be incomplete without subsequent *copula* in Scotland.

Upon the subject of acknowledgment it is impossible to overlook the attempt of the respondent to supply their deficiency by tampering with one of the appellant's letters, and changing the word "possibilémente" into "sposa bella mia." This act not only throws suspicion on the respondent's case, but indicates her impression that it wants the support which is supplied by the fraud, and renders more striking the observation which must be repeated upon this later stage of the correspondence—that there is no interchange of the title of husband and wife to be found in it, nor any express mention of marriage, except in the concluding letter of the respondent. This Lord Deas himself will not dwell upon, "because," as he says, "it may be open to the observation that it may have been written after a breach was anticipated." And the less weight should be given to it, because the answer which the appellant returned to it, in which it may fairly be presumed, that he either admitted or denied the existence of marriage, has not been produced, but only the envelope in which it was contained.

It must be quite unnecessary to consider in detail the various recognitions by the appellant of the respondent as his wife, both before and after the ceremony at Rostrevor. It was obviously

impossible for them to travel together, either in Scotland or on the Continent, with the semblance of respectability, without his giving her nominally that character, and any number of acknowledgments made for this purpose would be quite insufficient to constitute or to prove a marriage.

The respondent has, however, one more ground upon which she rests her claim to have it declared, that she is the lawful wife of the appellant. She contends, that having, after the ceremony at Rostrevor, returned with the appellant to Edinburgh, and having there cohabited together as husband and wife, this *copula*, coupled with the preceding promise made in Scotland, is sufficient to constitute marriage. I have already observed, that the proof of any such promise in Scotland as that which is here assumed is wholly wanting; and I am unable to adopt the reasoning of the Lord Advocate, that a promise made anywhere out of Scotland, and not broken off, is a continued promise, and must be taken to have been renewed when the parties came to Edinburgh. No doubt, a promise is in general transitory, but a promise which, being followed by *copula*, constitutes a Scotch marriage, is essentially local, as all that is requisite to the marriage must take place in Scotland. Even if such a promise is proved by writing, (which is essential to its validity,) it cannot in any intelligible sense be supposed to have been made in Scotland merely by the parties afterwards coming into the jurisdiction, with the promise unfulfilled, but without any express renewal of it.

But, supposing this difficulty to be overcome, and that it should be admitted, that a sufficient promise of marriage had been in some manner proved, what *copula*, it may be asked, has there been in Scotland which can possibly be connected with this promise, so as to be considered as the fulfilment and completion of it? It cannot be disputed, that, in order to constitute a marriage by the combination of a promise with a subsequent *copula*, the *copula* must be clearly and distinctly referable to the promise. If the *copula* has taken place before the promise, and is merely continued afterwards, it is of no avail. So if, after the promise, the *copula* commences out of Scotland, and is afterwards continued without interruption when the parties come into Scotland, it is difficult to understand how the character of the *copula*, which at its commencement was only illicit connexion, the moment it occurred in a place where, if it had originally begun, it would have had a legal effect, could be at once and entirely changed. In the present case it appears to me, that to connect the *copula* in Edinburgh with any antecedent promise supposed to have been given there would be utterly opposed to the respondent's whole case. She alleges, that after the contract of marriage at Mrs. Gemble's, she refused, from conscientious scruples, to cohabit with the appellant without having gone through a ceremony of marriage by a priest of her own faith. When the connexion, therefore, began in Ireland it could not have been by reason and in consequence of what had antecedently passed, but (looking at the circumstances most favourably for the respondent's character) she must have yielded to it in anticipation of the religious ceremony which she expected would shortly take place. It seems, therefore, impossible to refer the cohabitation which continued after this ceremony back to any promise in Edinburgh, when the respondent has expressly stated, that she never would have consented to it on the footing of the promise itself.

I entirely agree in the view taken by the Lord President on this point of the respondent's case, that, "when the parties, not having had intercourse on the faith of the promise, entered upon a course of carnal intercourse clearly not attributable to the promise, the continuance of the carnal intercourse, so commenced, without any renewed promise, cannot be referred back to the antecedent promise." And I consider with him, that it is far more reasonable to refer the continued cohabitation of the parties when they arrived in Scotland to a positive celebration of marriage, accompanied by cohabitation, than to refer it to a supposed promise at some antecedent period.

At the close of this long examination of the circumstances of this case, one more observation must be made to complete the view of the body of negative evidence against the existence of a Scotch marriage in either of the modes founded upon by the respondent. It appears, that soon after she had armed herself with the false certificate of Father Mooney, the respondent commenced an action of declarator of marriage, which she afterwards abandoned. In this first declarator the respondent relied entirely upon the ceremony in Ireland, never making the slightest suggestion of any marriage or promise of marriage in Scotland. And this is the more striking, as in her condescendence in this declarator she expressly mentions proposals of marriage made to her by the appellant at Constantinople, and alleges, that the appellant subsequently continued his attentions while she was in Edinburgh, thereby shewing, that the omission to set up the contract of marriage upon which she now relies cannot be attributed to mere oversight. The absence in this first proceeding of all allusion to her right to a declarator of marriage founded upon a contract or promise in Scotland strikes me as furnishing a strong additional presumption against the case subsequently advanced, and which appears to me to be utterly destitute of proof.

I have examined the whole of the evidence of this case with the utmost anxiety, and have weighed as carefully as I was able the elaborate and able arguments which were presented to the House for several days by the counsel on both sides, knowing what serious interests are involved in the issue of the inquiry. Whatever opinion I have formed has been the result of my own impartial judgment, founded upon a consideration of the whole of the case, and without any

prejudice or even a wish in favour of either of the parties. There is much to regret and much to condemn in the conduct of both of them, but it is no part of my duty, and it is far from my desire, to endeavour to adjust the balance of culpability between them.

I have only to pronounce my opinion judicially, that the respondent has wholly failed in establishing the fact of her lawful marriage with the appellant, and that the interlocutor of the Court of the First Division ought to be reversed, and that of the Lord Ordinary affirmed.

LORD KINGSDOWN.—The question which we have to decide is one of law only; not of honour or of morals. Has the Court below rightly determined, that the respondent has proved herself to be the lawful wife of the appellant? The *onus* is upon her. The Irish marriage as a legal marriage may be laid out of the case. As a promise of future marriage it is equally out of the case. If it can operate at all, it is only as evidence of a preceding legal marriage. The respondent must rely upon a marriage in Scotland, either by agreement *per verba de præsenti*, or by promise *subsequente copulâ*. Both the promise and the *copula* must be in Scotland, and the *copula* must be connected with the promise.

As to the correspondence between the parties before the meeting at Galata, on the one hand, I can see nothing of serious courtship, with a view to matrimony, on the part of the appellant; on the other hand, though it is quite clear, that the respondent was anxious for a marriage with the appellant, there is nothing which indicates, that she contemplated any other than a lawful and honourable connexion. They met at Galata in August 1855.

Her allegation on the two records is, that at Constantinople (*i. e.* at Galata) the appellant sought out the respondent, courted her for his wife, gained her affections, and promised and engaged to marry her, and she promised to intermarry with him, and to accept him for her husband; and she says, that these promises were frequently renewed, but that she insisted, that the marriage should not take place till the termination of hostilities, and upon this footing an engagement to delay the marriage was entered into between the appellant and the respondent. This statement is not very consistent with the admitted fact, that at this time there was only one meeting between the appellant and the respondent. At this interview nothing is suggested by the respondent to have been said by the appellant as to the marriage being secret.

During the visit to Lady Straubenzee she says, that the difficulties as to the uncle were stated, and the appellant urged her to consent to a secret marriage, which she refused to do.

Now, all agreement or proposal of marriage is positively denied by the appellant, and there is no direct evidence to prove it. The question is, whether it is to be inferred from the correspondence. The letters shew very clearly, that the subject of marriage had been discussed between them, and that he had raised obstacles to it, and that she was endeavouring to remove them; but the question is, Do they shew, that he had pressed or proposed a marriage of any sort, public or private, or shew only, that he had stated reasons, true or false, why he could not marry? The latter seems to me to be the natural inference, as well from what was written as from what was done by the parties. I cannot find anywhere in this part of the correspondence any allusions to objections on his part to a public marriage, or desire for a private one. All her arguments are addressed to removing obstacles to any marriage. He had represented, (as he now asserts untruly,) that one of his difficulties was an engagement with his uncle not to contract a marriage, which might have the effect of excluding the uncle's son from the succession to the title of Avonmore. She believed this objection to be serious, for she argues against its obligation at great length. But this objection would have been just as fatal to a secret marriage as to a public one. Is it likely, that the same man who was urging this objection should at the same time be pressing her to consent to a secret marriage; and that if the question had been between a public marriage, which she required, and a private marriage, which he required, this should never once have been adverted to in plain terms? I think from the tone of her letters, that she would gladly have agreed to any marriage, and from the tone of his, that he would not have agreed to any marriage which would be legally binding upon him, either public or private. In her letter from Bebek, of the 6th May 1856, she says:—"I conclude you will not entertain my plans. I have another which might gratify your wishes and satisfy my conscience, but I have not now the courage to propose it." It is said, that this means a secret marriage. How could she want courage to propose a secret marriage, if that were, as she alleges that it was, the very thing which he was urging?

It is clear from her letters at this time, that he was writing to her in terms of coldness, with a view, as she thought, if possible, to alienate her affection from him. He had seen the danger of the course that he was pursuing, and he determined to stop before it was too late. She had pressed him again and again in the most warm and passionate language, to visit her at Bebek. In his letter, of which only a portion is produced, 25th May 1856, he clearly indicates, that he is determined not to indulge again in the dangerous familiarities which had taken place at the last interview between them. "I fear my self-command when we do meet will almost annoy you as much as my want of it when we last met."

On the 2d July she writes a letter, which can hardly have been an answer to this, but in which she refers to his having talked of fraternal affection for her, and at the same time, in very passionate language, suggests, that if they cannot enjoy happiness straight, it might be wisdom to

enjoy it crooked. This is the letter which refers to dangerous proximity, odic force, and other matter not necessary to be further alluded to. He receives this, and determines not to trust himself to another interview, and therefore goes back to England by the Danube, avoiding Constantinople.

From Vienna, on the 13th July 1856, he tells her what he had done, explaining at the same time that the fraternal scheme was a physical impossibility. This letter, coupled with that of the 25th May, distinctly informed her of the reasons for his conduct—that he could not trust himself. Before he wrote again he had received two letters from her, but what they were does not distinctly appear. On the 16th August, he wrote again from Dublin much to the same purpose.

The effect of these letters, I think, is: "I cannot marry you; if we meet again, the result may probably be your ruin. To avoid this I came round by the Danube. Knowing this you must decide for yourself whether we are to meet again or not." In answer to this she writes a most passionate letter, pressing in the most urgent terms for another meeting, and says: "If for yourself you have any definite wishes with regard to me, one desire might have been fulfilled, which would have been a gleam of sunshine on my dismal life, and would not have interfered with your liberty, present position, or future prospects." This was the 3d October 1856. She says in this letter, that she desires his exact address, that she might not waste time in hunting for him. He did not therefore either seek to see her himself, or spontaneously offer her an opportunity of seeing him. It does not appear that they met at this time, and she soon afterwards went on a yachting expedition for several weeks with a family named Close, without having learnt his address.

On her return in December she writes from Valetta, sending him her address at the Marchioness de Belenay, in London, and begging him to write to her there.

In answer to that letter he writes to her the note now torn, in which he says, "Knowing I cannot gain on your terms, I will not try on mine (necessity made)." This must have been written on the 29th December 1856, and was apparently received by her on her arrival in England. He wrote again a short Italian note on the 5th January 1857. She then went to Abergavenny, he being quartered in Scotland.

At this time it seems to me quite clear, not only that he was not urging a secret marriage, but that there was no subsisting promise of marriage, and that he had done what he could to avoid further personal intercourse with her, telling her why he did so. Yet after this she goes down to Scotland in order to be with him.

I have gone into this part of the case so fully, partly out of respect to the arguments of counsel, of which so large a portion was addressed to it, and partly because the relation in which the parties stood towards each other at this time has a strong bearing upon the probability or improbability of what is alleged to have taken place afterwards. The examination, I think, shews, that it is in a very high degree improbable, that the appellant should either actually marry the respondent in Scotland, or enter into any engagement to do so.

She alleges, that, during this visit to Scotland, he promised again to marry her, and proposed a private marriage, and also actually did marry her; but that she refused to cohabit till there was a religious celebration of the marriage. This appears to me, having regard to the feelings and opinions of the lady, as they are to be gathered from her letters, utterly incredible.

As to the Irish marriage, it is not necessary to suppose, that she, or even he, held it a mere mockery. But did either of them intend or suppose, that it was to be a marriage in law, making them legally husband and wife? I think certainly not. She was a Roman Catholic. She considered, that the marriage by a priest of her church, though not making her in point of law a wife, would in a religious point of view justify or excuse their cohabitation. She thought, that she might become his wife in the eyes of God, though not in the eyes of man. Something was to be done which might satisfy her conscience, and leave him free. As early as May 1856, she had alluded to some plan which might gratify his wishes, and satisfy her conscience, but which she had not then the courage to propose. This must have referred to some scheme of this description.

On the 10th July 1857, she wrote referring to some project which they had in view, and suggesting, that they might meet in the old Cathedral at Manchester. "You have nothing to say or do. If safety is your object, what I suggest is merely the same as being present at mass making you a Catholic." What was to be done there is, no doubt, left in great doubt; but I think it can only mean, that whatever passed there would no more make him a husband than being present at mass would make him a Roman Catholic. When this scheme was abandoned, she wrote on the 5th July, and said, "I have said the word, will do all you ask me, and name the time and place as soon as I am able."

She afterwards went over to Ireland, met him, on the 29th July, at Waterford, and they travelled together through Ireland from south to north, cohabiting as man and wife, without any ceremony having been gone through till they reached Rostrevor, in the county of Down. Her allegation is, that she refused to cohabit till the solemnization of a marriage before a priest, and that he invited her to come over to Ireland, that this might be done.

What passed at the marriage ceremony is quite consistent with his statement, that it was intended to have no legal effect; that he went through it to satisfy her conscience. It is consistent also, no doubt, with her statement, that there had been a previous legal marriage. Her allegation on the record is, that this was a legal marriage, and that the appellant then was or professed himself of the Roman Catholic religion; and that he stated this to the priest by whom the marriage was celebrated at the time of the ceremony. The statement of the witness is in direct contradiction to this allegation of the respondent.

The whole importance of Father Mooney's evidence rests on the words which he alleges the appellant to have used:—"There is no necessity for this; it has all been previously settled or arranged; but I will do it to satisfy the lady's conscience." In the first place, these expressions are in themselves ambiguous; and it is impossible to rely on the memory of the witness for the precise language used, even if there were not other serious reasons for refusing to place full reliance on his testimony.

The only evidence in support of the respondent's case of any value seems to be contained in the two letters of the appellant, so forcibly commented upon by the Lord Advocate. First, the letter of May 1857, addressed to the respondent on the supposed marriage, in which he says, "I found, on reflection, that I had promised to you to do more than I could have performed when the time came." Secondly, the letter of Christmas day 1857: "I have never intentionally deceived you, and have done more than I promised at great risk." The first, I think, must in all probability refer to marriage, but at what time or under what contingencies or conditions does not appear; or it may mean, as the Lord President suggests, that he had promised to take steps to facilitate a marriage. It may have been a promise to marry after the death of the father or uncle, or in the case of the marriage of his elder brother or any other contingency. At all events, it does not prove any promise in Scotland. It may refer to a promise at Galata or at Balaklava, or to a promise contained in some of the letters not produced.

The second refers, I think, clearly, to the ceremony at Rostrevor. Supposing that an absolute unconditional promise in Scotland to marry could be inferred, which I think it cannot, there must, in order to constitute a valid marriage, be *copula* in Scotland, founded on the promise. Here the parties cohabited for some weeks in Ireland before any *copula* in Scotland. After the cohabitation in Ireland he went to visit his relations in that country, and she went to Scotland to wait for him. But Scotland was not the domicile nor the home of either. They went afterwards on a tour to the Highlands, and then, after remaining some time in Edinburgh, they separated, she returning either to Hull or Abergavenny, and he remaining with his regiment. Can it be said, that this is a *copula* connected with the promise in Scotland, if any was made there? I think not.

Upon the whole, I am satisfied, that the respondent has failed to prove, that she is the lawful wife of the appellant, and I think, therefore, that the judgment must be reversed in both cases.

*Attorney General.*—My Lords, before the question is put to the House, I desire to submit an observation as to the form of the judgment. By the law of Scotland, after a decision, even by a jury, it is competent for the Court to refer a question of this sort to the oath of the parties. There were numerous instances where such a course had been adopted, even after your Lordships had reversed a judgment, and had remitted it to the Court below. Therefore the proper decree for your Lordships to make would be to reverse the interlocutors appealed from, and remit the case, with a declaration, that the respondent had failed to prove any valid marriage between herself and the appellant according to the law of Scotland, such declaration to be without prejudice to the question, whether the respondent should be allowed, if she should wish to do so, to refer the matter to the oath of the appellant.

LORD CHANCELLOR.—I do not think it possible for your Lordships to accede to any such request. What I have now to do is to defer to the opinion of the majority of the House, and to advise your Lordships to give a decision to the effect, that the interlocutor appealed from be reversed, and to declare, that in the action of declarator of marriage, the appellant is assoilzied from all the conclusions of the summons, and that, in the action of freedom and putting to silence, a decree ought to be made in accordance with the conclusions of the summons: in both cases, however, without expenses.

*Interlocutors reversed.*

*Appellant's Agents*, Tippetts and Son, London; Sang and Adam, W.S.—*Respondent's Agents*, Simpson, Trail, and Wakeford, Westminster; J. Somerville, S.S.C.