ridiculed their fears He said it was impossible she should see any thing because the key-hole was stopped: and at last he insisted on breaking open the door, for that the party of whom he was in quest was there. She resisted this a good while; **[51]** and he was after a long time persuaded to take another course, namely, to call in the assistance of some carpenters who were at work. they opened the windows of that room, and therein was found Mr. Barker endeavouring to conceal himself by standing up as close as he could to the wall. Upon that the disclosure took full effect —the door was afterwards opened and conversations passed, in which there was a full admission that he had come into the house the night before and that he had been in the house, and was so introduced by this lady. A servant was immediately sent off with a communication to Mr. Pryse at Woodstock, who communicated it afterwards to the husband · and steps have been taken since which bring this cause for a separation before this Court.

Upon the whole of this evidence the difficulty which has really occurred to me is to conceive how there can be a doubt of the fact—it appears to me hardly possible—it is evidence, so far as I see, that is hardly capable of explanation or observation; and it is in itself so direct and consistent, that no observation can apply it more closely to the conviction of any man's mind that has occasion to peruse it.

It has been said that either there has been no verdict in this case, or that if an action was brought it must be presumed that the verdict was unfavourable to Mr. Loveden; because it is not, as usual, noticed in the proceedings in this cause. Certainly it is usual to plead the verdict where damages have been obtained against the adulterer; but it will be recollected that the introduction of **[52]** verdicts was long resisted in this Court, and it is now perfectly understood that they are introduced merely as circumstances of evidence; and that a party does not stand upon a higher footing in a case here agitated between different parties and upon other evidence. Judicially I am not informed whether any verdict of any kind was obtained; but supposing the fact to be as understood, that an action was brought, and that there was a failure in that action, that is not a matter from which any thing can be drawn to the prejudice of the evidence that has been adduced here. What produced the failure there it is not for me to speculate upon—whether it arose from any negligence on the part of Mr. Loveden or of his agents—whether from any undue confidence in the sufficiency of the evidence which he there adduced—whether much of the evidence which is here adduced might be adducible there.

The letters, I presume, which are demonstration against this lady here, would not be in their present form evidence against him, for they are letters which he never received Whether, if they had been actually received by Mr. Barker, and he after the receipt of such letters as these, had continued that sort of intercourse with this lady, which is here proved to have existed, the receipt of such letters, coupled with his conduct after the receipt of them, might not have been admitted consistently with the rules by which the wisdom of those courts regulates the admission of evidence, it is not for me to say. But, however, that case failed. It is a matter, however, that is utterly out of the view of this **[53]** Court, and out of all further explanation here, and nothing that passed there can affect the sufficiency of evidence here, if the evidence adduced here is sufficient to bring one's mind fairly to the conclusion; for it is upon the evidence adduced here that the cause must here be determined.

I am most clearly of opinion that the evidence adduced here must lead to the conclusion of adultery. I am most perfectly satisfied that repeated acts of adultery have been committed between these parties, that an adulterous connection subsisted between them for a very considerable length of time, and that Mr Loveden is most unquestionably entitled to the sentence which he prays, of separation by reason of the repeated acts of adultery which have taken place.

Affirmed on appeal, 20th Feb, 1811.

[54] DALRYMPLE *v.* DALRYMPLE 16th July, 1811.—Marriage, by contract without religious celebration, according to the law of Scotland, held to be valid: distinction, as to the state of one of the parties being an English officer on service in that country not sustained.

[Discussed, *Reg.* v *Millis*, 1844, 10 Cl. & F. 534. Referred to, *Earl Nelson* v. *Lord Bridport*, 1845, 8 Beav. 537. Applied, *The Hallay*, 1867, L. R. 2 Adm. & Ec. 17; *Longworth* v. *Yelverton*, 1867, L. R. 1 Sc. App. 224; *Sottomayor* v. *De Barros*, 1877,

L. R. 2 P. D. 89. Explained, *In re Goodman's Trusts*, 1881, 17 Ch. D. 281. Referred to, *Mackonochie* v. *Lord Penzance*, 1881, 6 A. C 447. Adopted, *The Dysart Peerage case*, 1881, 6 A. C. 515. Referred to, *Collins* v. *Collins*, 1884, 9 A C 230.]

This was a case of restitution of conjugal rights brought by the wife against the husband, in which the chief point in discussion was the validity of a Scotch marriage, per verba de præsenti, and without religious celebration. one of the parties being an English gentleman not otherwise resident in Scotland than as quartered with his regiment in that country.

Judgment—Sir William Scott The facts of this case, which I shall enter upon without preface, are these: Mr. John William Henry Dalrymple is the son of a Scotch noble family, I find no direct evidence which fixes his birth in England, but he is proved to have been brought up from very early years in this country. At the age of nineteen, being a cornet in His Majesty's Dragoon Guards, he went with his regiment to Scotland in the latter end of March or beginning of April, 1804, and was quartered in and near Edinburgh during his residence in that country Shortly after his arrival, he became acquainted with Miss Johanna Gordon, the daughter of a gentleman in a respectable condition of life What her age was does not directly appear, she being described as of the age of twenty-one years and upwards: she was, however, young enough to excite a passion in his breast, and it appears that she made him a return of her affections. he visited frequently at her father's house in **[55]** Edinburgh, and at his seat in the country at a place called Braid A paper without date, marked No 1, is produced by her: it contains a mutual promise of marriage, and is superscribed "a sacreed promise." A second paper, No. 2, produced by her, dated May 28, 1804, contains a mutual declaration and acknowledgment of a marriage. A third paper, No. 10, produced by her, dated July 11, 1804, contains a renewed declaration of marriage made by him, and accompanied by a promise of acknowledging her the moment he has it in his power, and an engagement on her part that nothing but the greatest necessity shall compel her to publish this marriage These two latter papers were inclosed in an envelope, inscribed "Sacreed promises and engagements," and all the three papers are admitted or proved in the cause, to be of the handwriting of the parties, whose writing they purport to be.

It appears that Mr. Dalrymple had strong reasons for supposing that his father and family would disapprove of this connection, and to a degree that might seriously affect his fortunes; he, therefore, in his letters to Miss Gordon repeatedly enjoined this obligation of the strictest secrecy; and she observed it, even to the extent of making no communication of their mutual engagements to her father's family; though the attachment and the intercourse founded upon it did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they were either already, or soon would be married. He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them applying the **[56]** terms of husband and wife to himself and her. It appears that they were in the habit of having clandestine nocturnal interviews both at Edinburgh and Braid, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews passed on the 6th of July at Edinburgh, where she was left alone with two or three servants, having declined to accompany her father and family (much to her father's dissatisfaction) to his country-house at Braid. There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night He continued to write letters of a passionate and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in Scotland; but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears, but what existed in the surmises of the servants and of the sister. His stay in that country was shortened by his father who came down alarmed, as it should seem, by the report of what was going on, and removed him to England on or about the 21st of July.

The correspondence appears to have slackened, though the language continued equally ardent, if I judge only from the number exhibited of the letters written after his return; though it is possible, and indeed very probable, there may be many more which are not exhibited. No letters of Miss Gordon's addressed to him are produced; he has not produced them and she has not called for their production. In England he continued till 1805, when he sailed for Malta: his last letter, written to

her on the eve of his departure, reinforces his injunctions of secrecy, and conjures her to withhold all credit from reports that might reach her [57] of any transfer of his affections to another: it likewise points out a channel for their future correspondence, through the instrumentality of Sir Rupert George, the first commissioner of the Board of Transports He continued abroad till May, 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history unknown to his father, and as it appears, to this lady. It is upon this occasion that the alteration of his affection first discloses itself in conversations with a Mr. Hawkins, a friend of his family, to whom he gives some account of the connection which he had formed with Miss Gordon in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and having reason to fear she would write others to his father, he requested Mr. Hawkins to use all means of intercepting any letters which she might write either to the one or the other.

Mr. Hawkins executed this commission by intercepting many letters so addressed, though, in consequence of her extreme importunity, he forwarded two or three as he believes of those addressed to Mr. Dalrymple; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr Hawkins; and it was not till the death of Mr. Dalrymple's father (which happened in the spring of the year 1807) that she then asserted her marriage rights, and furnished him with copies of these important papers which she denominates according to the style of the law of Scotland, her "marriage lines." She took no steps to enforce [58] her rights by any process of law. Upon the unlooked-for return of Mr. Dalrymple in the latter end of May, 1808, he immediately visited Mr. Hawkins who communicated what had passed by letter between himself and Miss Gordon, and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. Dalrymple has exhibited. Mr. Hawkins however dismissed him with the most anxious advice to adhere to the connection he had formed; and by no means to attempt to involve any other female in the misery that must attend any new matrimonial connection. Within a very few days afterwards Mr. Dalrymple marries Miss Laura Manners in the most formal and regular manner. Miss Gordon, who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid to enforce the performance of what she considers as a marriage contract

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition for which the Court has to acknowledge great obligations to the gentlemen who have been examined in Scotland.* It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an English Court, it must be adjudicated according to the principles of English law [59] applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland.

I am not aware that the case so brought here is exposed to any serious disadvantage beyond that which it must unavoidably sustain in the inferior qualifications of the person, who has to decide upon it to the talents of the eminent men to whose judgment it would have been submitted in its more natural forum. The law-learning of Scotland has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries, and indeed to all systems of law. It is described as an advantage lost that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form if she had chosen to intervene; in substance she is; for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question

* It has been deemed proper that this information with the evidence should accompany the report of this case: it has therefore been printed in the Appendix.

respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction that if the Scotch marriage be legally good, the second or English marriage must be legally bad. Another advantage intimated to be lost is this, that the native forum [60] would have compelled the production of her letters to him, for the purpose of seeing whether any thing in them favoured his interpretation of the transaction. Surely, according to any mode of proceeding, there can be no need of a compulsory process to extract them from the person in whose possession they must be if they exist at all. If they contain such matter as would favour such an interpretation, he must be eager to produce them, for they would constitute his defence, not being produced the necessary conclusion is either that they do not exist, or that they contain nothing, which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say to all systems of law. They are circumstances which are not to be left entirely out of the consideration of the Court in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law which in both countries allows the minor to marry, attributes to him in a way which cannot be legally averred against upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, quoad hoc, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the general obligations of law. And with respect to any ignorance arising from foreign birth and educa-[61]-tion, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party who has engaged under a proper knowledge, and sense of the obligation which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr Dalrymple though a minor, a soldier, and a foreigner, as effectively as it would do if he had been an adult living in a civil capacity, and with an established domicil in that country

The marriage which is pleaded to be constituted by virtue of some or all of the facts of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a clandestine and irregular marriage. It is certainly a private transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction in any ignominious meaning of the word, for it may be that the law of the country in which the transaction took place may contemplate private marriages with as much countenance and favour as it does the most public It depends likewise entirely upon the law of the country whether it is justly to be stiled an irregular marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception [62] of particular indulgences to persons of certain religious persuasions; saving those exceptions all marriages not celebrated according to the prescribed form are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law on account of the non-conformity to the order that is established. What is the law of Scotland upon this point?

Marriage being a contract is of course consensual (as is much insisted on, I observe, by some of the learned advocates), for it is of the essence of all contracts to be constituted by the consent of parties. Consensus non concubitus facit matrimonium,* the maxim

* D. lib. 50, tit 17, l. 30, De Reg. Juris. D. lib. 35, tit. 1, l. 15. Huber, De Nuptiis, p. 23, lib. 24, tit. 2, De Divortiis. Voet. lib. 23, tit. 2, s. 2. Vinnius, lib. 1, tit. 9, s. 1. Cujac, in D. de Rit. Nup. v. 1, p. 800, in Cod. lib. 5, tit. 1, De Spons. et

of the Roman civil law is, in truth, the maxim of all law upon the subject; for the concubitus may take place for the mere gratification of present appetite without a view to any thing further; but a marriage must be something **[63]** more, it must be an agreement of the parties looking to the consortium vitæ: *[1] an agreement indeed of parties capable of the concubitus, for though the concubitus itself will not constitute marriage, yet it is so far one of the essential duties for which the parties stipulate that the incapacity of either party to satisfy that duty nullifies the contract †[1] Marriage in its origin is a contract of natural law, it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind; it is the parent, not the child, of civil society, "principium urbis et quasi seminarium reipublicæ" (Cic. De Off. l 17) In civil society it becomes a civil contract regulated and prescribed by law and endowed with civil consequences. In most civilized countries acting under a sense of the force of sacred obligations it has had the sanctions of religion superadded: it then becomes a religious as well as a natural and civil contract; for it is a great mistake to suppose that because it is the one therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance with respect both to its theological and its legal constitution; though it is not **[64]** unworthy of remark that amidst the manifold ritual provisions made by the divine lawgiver of the Jews for various offices and transactions of life there is no ceremony prescribed for the celebration of marriage In the Christian Church marriage was elevated in a later age to the dignity of a sacrament in consequence of its divine institution and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the Church, the canon law (a system which in spite of its absurd pretensions to a higher origin is in many of its provisions deeply enough founded in the wisdom of man), although, in conformity to the prevailing theological opinion, it reverenced marriage as a sacrament, still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed it had the full essence of matrimony without the intervention of the priest; it had even in that state the character of a sacrament; *[2] for it is a misapprehension to suppose that this intervention was required as matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law till that council passed its decree for the reformation of marriage: the consent of two parties †[2] **[65]** expressed in words of present mutual acceptance constituted an actual and legal marriage technically known by the name of sponsalia per verba de præsenti, improperly enough, because sponsalia in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore Brower justly observes jus pontificium nimis laxo significatu, imo etymologiâ invitâ ipsas nuptias sponsalia appellavit (l 1, c 1, n 6). The expression, however, was constantly used in succeeding times to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities in opposition, first, to regular marriages; secondly, to mere engagements for a future marriage, which were termed sponsalia per verba de futuro, a distinction of sponsalia not at all known to the Roman civil law (Swinburn, sect. 3, § 3) Different rules relative to their respective

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Arrhis. Taylor's Civil Law, p. 301. Puffendorf, b 6, c. 1, s. 14. Wood's Instit. book 1, chap. 1. 27, qu 2, c 1, Matrimonium. 27, qu. 2, c 2, Sufficiat. 27, qu. 2, c. 5, Cum Initiatur. 27, qu. 2, c. 6, Conjuges. C. 25, Extra. de Spons et Matrim. Huber, Eunom. Rom. ad lib. 23, Pand. Vind. s. 1. Hoppii, Commen. ad Ins lib 1, tit 10 Wood's Instit book 1, chap. 2, Ayl. Parerg. 362.

*[1] D. lib. 23, tit. 2, l 1. Instit lib. 1, tit 9, s. 1.

†[1] C. 2 et 3, Extra. de Spons. et Matrim Vinnius, lib. 1, tit. 9, s 1. Burn's Eccles. Law, v. 2, p. 500, Ayl. Par 226.

*[2] Sanchez, lib 2, disp. 6, s 2, et lib 2, disp 10, s. 2 Father Paul, p. 737. Pallavicini, lib. 23, chap 8. Pothier, tit. 3, p. 290. 27, qu 2, c. 10, omne.

†[2] C. 25 et c. 31, Extra de Spons. et Matrim C 3, Extra. de Sponsa Duorum. Swinburn, sect. 4, s. 2, 3, 4, et sect 18, s. 1. Brower, lib 1, cap. 2, s. 8, 9, et cap 22, s 12, et cap. 27, s. 21.

effects in point of legal consequence applied to these three cases—of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated both in substance and in ceremony. In the irregular marriage every thing was presumed to be complete and consummated in substance but not in ceremony; and the (Swinburn, sect. 17, § 1) ceremony was enjoined to be undergone as matter of order In the promise or sponsalia de futuro nothing was presumed to be complete or consummate either in substance or ceremony. Mutual (c. 2, Extra. de Spons. et Matrim) consent would release the parties from their engagement; and **[66]** one party without the consent of the other might contract a valid marriage, regularly or irregularly, with another person, but if the parties who had exchanged the promise had carnal * intercourse with each other the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse to convert the engagement into an irregular marriage and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text books of the canon law the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to obvious reference in Brower and Swinburn and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the canon law, though it is usual to plead consummation it is not necessary to prove it, because it is always to be presumed in parties not shewn to be disabled by original infirmity of body. In the case of a marriage per verba de præsenti, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise per verba de futuro looked to a future time, the marriage which it contemplated might perhaps never take place. It was (Swinburn, sect. 18, p. 1, et sect. 4, p. 2) defeasible in various ways; **[67]** and therefore consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted; it must be a (Swinburn, sect. 17, p. 11) promise cum copula that implied a present acceptance, and created a valid contract founded upon it.

Such was the state of the canon law, the known basis of the matrimonial law of Europe. At the Reformation this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony, but it likewise retained those rules of the canon law which had their foundation not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and amongst others that rule which held an irregular marriage, constituted per verba de præsenti, not followed by any consummation shewn, valid to the full extent of voiding a subsequent regular marriage contracted with another person (Brower, 1, 22, 12). A statute (32 Hen. 8, cap. 38, sec. 2) passed in the reign of Henry VIII. proves the fact by reciting that "Many persons after long continuance in matrimony without any allegation of either of the parties, or any other at their marriage, why the same matrimony should not be good, just, and **[68]** lawful, and after the same matrimony solemnized, and consummate by carnal knowledge, have by an unjust law of the Bishop of Rome, upon pretence of a former contract made, and not consummate by carnal copulation, been divorced and separate," and than enacts "that marriages solemnized in the face of the Church and consummate with bodily knowledge shall be deemed good, notwithstanding any pre-contract of matrimony not consummate with bodily knowledge, which either or both the parties shall have made" But this statute was afterwards repealed, as having produced horrible mischiefs which are enumerated in very declamatory language in the preamble of the statute 2 Edw. VI.; and Swinburn, speaking the prevailing opinion of his time, applauds the repeal as worthily and in good reason enacted. The same doctrine is recognized by the temporal Courts as the existing rule of the matrimonial law of this country in *Bunting's case*, 4 Coke, 29. "John Bunting,

* C 30 et 31, Extra. de Spons. et Matrim. C. 3, Extra. de Sponsa Duorum Brower, lib. 1, cap. 22. Swinburn, sect. 17, s 11

father of the plaintiff, and Agnes Adenshall, contracted marriage per verba de præsenti, and afterwards, on the 10th of Dec., 1555, the said Agnes took to husband Thomas Twede; and afterwards, on the 9th of July, Bunting libelled against her in the Court of Audience, et decret. fuit quod prædict. Agnes subiret matrimonium cum præfato Bunting, et insuper pronunciatum fuit dictum matrimonium fore nullum." Though the common law certainly had scruples in applying the civil * rights of dower, [69] and community of goods, and legitimacy in the cases of these looser species of marriage. In the later case of *Collins and Jesson*, 3 Anne, it was said by Holt, Chief Justice, and agreed to by the whole Bench, that "if a contract be per verba de præsenti, it amounts to an actual marriage which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been in facie ecclesiæ." "But a contract per verba de futuro, which do not intimate an actual marriage, but refer to a future act, is releasable." 2 Salk. 437 Mod. 155. In *Wigmore's case*, 2 Salk. 438, the same Judge said, "a contract per verba de præsenti is a marriage; so is a contract de futuro; if the contract be executed and he take her, 'tis a marriage, and they cannot punish for fornication." In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of Dr. Swabey, on account of its striking resemblance to the present case: I mean the case of *Lord Fitzmaurice, Son of the Earl of Kerry*, coram Deleg. in 1732. There were in that case, as in the present, three engagements in writing: the first was dated June 23, 1724, and contained these words, "We swear we will marry one another." The second, dated July 11, 1724, was to this effect: "I take you for my wife and swear never to marry any other woman." This last contract was repeated in December of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it But the Court, composed of a [70] full commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged, was refused by the Chancellor. Things continued upon this footing till the Marriage Act, 26 G. 2, c. 33, described by Mr. Justice Blackstone (book 1, chap. 15, s. 3), "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation. The thing is in itself highly probable, and we have the authority of Craig (Craig, lib. 2, dieg. 18, s. 17) for asserting that the canon law is its basis there, as it is every where else in Europe, "totam hanc questionem pendere a jure pontificio," though it is likely enough that in Craig's time, who wrote not long after the Reformation, the consistorial law might be very unsettled, as Mr. Cay in his deposition describes it to have been. It is, however, admitted by that learned gentleman that it settled upon its former foundations, for he expressly says that the canon law in these matters is a part of the law of the land; that the Courts and lawyers reverence the decretals, and other books of the more ancient canon law; and I observe that in the depositions of most of the learned witnesses, and indeed in all the factums that I have seen upon these subjects, they are referred to as authorities. Several regu-[71]-lations, both ecclesiastical and civil, canons and statutes, have prescribed modes of celebrating marriage. Mr. Cathcart, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment during the conflict between the episcopal and presbyterian parties, and are therefore, I presume, of transitory and questionable authority Mr. Cathcart infers that the whole of the Scotch statutes hold solemnization by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman, as necessary. It rather appears difficult to understand this consistently with the fact that other marriages have always been held legal and valid. What the form of solemnization by a clergyman is I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by the Church of Scotland for any office whatever. Whether

* Swinburn, sect. 1, s 2, and sect. 17, s. 29 Tract de Repub. Ang. p 103. Perkins, tit. Feoffments, fol 40, p. 38, ed. 3, 12. 1 Roll Abridg. 341 and 357. Moor, 169.

the clergyman merely receives the declaration as a witness, or pronounces the parties by virtue of his spiritual authority to be man and wife, as in our form, does not distinctly appear. I observe that Mr. Gillies says in his deposition "that to make marriage valid it is not necessary that it should be celebrated in facie ecclesiæ, but rebus integris it can only be constituted by a consent adhibited in the presence of a clergyman, or in some mode equivalent to an actual celebration" So Lord Braxfield in a loose note which is introduced is made to say, "Private consent is not the consent the law looks to; it must be before a priest, or something equivalent." Now what are these equivalents? and how to be provided? Are they to be carved out by the private fancy and judgment of the individuals? If so, **[72]** though equivalent, they can hardly be deemed the regular forms, and yet appear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages as nearly equal to that before a minister, though certainly not a marriage in facie ecclesiæ, in any proper sense of that expression.

Sir Ilay Campbell states in an opinion of his given to the English Chancery (Lib. Reg. A. 1780, f. 552) in a case furnished to me by Dr. Stoddart, "that marriages, irregularly performed without the intervention of a clergyman, are censurable, and formerly the parties were liable to be fined or rebuked in the face of the Church, but this for a long time has not been practised" The regulations, therefore, whatever they may be, are not penally enforced, and it does not appear that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates who describe the modes of marriage by the terms regular and irregular seem, as far as I can collect, to attribute no very distinctive preference to the one over the other, at any rate the distinction between them is not very strongly marked in the existing usage of that country. Many of the marriages which take place between persons in higher classes of society are contracted in such irregular forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it that the distinction between the regular and irregular marriages was much stronger than I am enabled by the pre-**[73]**-sent evidence to suppose, the question still remains to be examined, how far actual consummation is required by the law of Scotland in marriages which are so to be deemed irregular

The libel is drawn in a form not calculated to extract, simply and directly, a distinct statement of what the law of Scotland may be upon this point, for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges that by the law of Scotland this aggregate constitutes a marriage, without providing for a possible case in which she might establish some of these matters and fail in establishing others, e.g. if she failed in proof of a copula, but succeeded in establishing a solemn compact. If the law had been more distinctly understood here at the commencement of this suit the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of Scotland have to a great degree supplied the want of that distinctness in the libel by bringing forward the distinctions in their answers, and applying what they conceive to be the law applicable to the possible case that may result from the evidence; most of them have stated what they conceive to be the law, first, in the case of a promise de futuro, secondly, of a promise cum copula; thirdly, of a solemn declaration or acknowledgment of marriage, and, fourthly, of such a declaration accompanied by a copula. It may be convenient to consider, first, whether the present case is a case of promise or of present declaration and acknow-**[74]**-ledgment. It will be convenient to do so in two respects; the first convenience attending it is that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them or in the memory of those who attest them. The second convenience resulting from this is, that a large portion of the inquiry into the other points of the case may in a great degree be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises, as referable to cases accompanied or unaccompanied by a copula, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then the

law of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers, for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements of Scotland. The words of the stipulatio sponsalitia are present declaratory words; the parties mutually accept each other, but the engagements they enter into are always technically considered to be mere promises de futuro. Those who are conversant in [75] the books of the canon law will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts de præsenti, or only promises de futuro

The first paper is without date, and is merely a promise. Mr. Dalrymple promises to marry Miss Gordon as soon as it is in his power, and she promises the same; it is subscribed by both their names—is endorsed "A sacreed promise," and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2 and 10. The paper marked No 2 is dated on the 28th of May, 1804, and contains these words, "I hereby declare Johanna Gordon is my lawful wife, and I hereby acknowledge John William Henry Dalrymple as my lawful husband." I see no great difference between the expression declare and acknowledge; the words properly enough belong to the parties by whom they are respectively used, and are perhaps not improperly adapted to the decorums of such a transaction between the sexes. No 10 is a reiterated declaration on the part of Mr. Dalrymple, accompanied with a promise "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power." She makes no repeated declaration, but promises that "nothing but the greatest necessity (necessity which situation alone can justify) shall ever [76] force her to declare this marriage." It is signed by him, and by her, describing herself J Gordon, now J. Dalrymple, and it is dated July 11, 1804 Both the papers are inclosed in an envelope, on which is inscribed "Sacreed promises and engagements:" there are promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage. At the same time it is to be observed that the words "promises and engagements" are not improperly applied to the marriage vow itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words of our liturgy, it plights their troth, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2 is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal, if not the sole object of the latter paper, though Mr. Dalrymple has thrown in a renewed declaration of his marriage; that reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage, when no such prudential reasons can be [77] assigned for it, and where every thing arising from the very nature of marriage calls for its publication.

Such is the nature of these exhibits; first, a promise; secondly, that promise merged in the direct acknowledgment of the accomplished fact, thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy till the proper time for disclosure should arrive.

In these papers, as set up by Miss Gordon, resides the constitution, as some of the gentlemen who have been examined call it, or as others of them term it, the evidences of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are constituents, or merely evidences of marriage. It appears to be a distinction not very material in its effects; because if it is to be considered that such papers, so qualified, are only to be treated

as evidences, yet if free from all possible impeachments, on the grounds on which the law allows them, as evidences to be impeached, they make full faith of the marriage, they sustain it as effectually as if, according to other ideas, they directly constituted it; they have then become præsumptiones juris et de jure, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters which may controul or confirm them. What is the effect of the letters? In almost all of them Mr. Dalrymple addresses Miss Gordon as his wife, and describes himself as her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need of, "for it is her right," and **[78]** "in accepting of it she will prove her acknowledgment of it." Her sister he calls his sister. This letter appears by the post-mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind. But, non constat that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal declarations, similar in their imports to the contents of No. 2, might have passed, for it can hardly be conceived that such a paper could have passed, without many preliminary verbal declarations to the same effect. People do not write in that manner till after they have talked together in the same style. The post-mark on the letter, No 4, is May the 30th, and this letter refers to what passed on the night after the paper, No. 2, bears date; in it he says, "You are my wife, to retract is impossible and ever shall be; I have proved my legal right to protect you, which I have most fully established: nothing in this world shall break those ties" The letter, No. 5, has these expressions: "Remember you are mine: that God Almighty may preserve my wife is the prayer of her husband." No. 6. "It grieves me to suffer you five minutes from your husband, nothing can change my sentiments, independent even of those sacred ties which unite us. Nothing ever can or should (if 'twere possible) annul them. Put that confidence in me which your duty requires. That God may ever preserve my wife, and inspire her with the purest love for her husband, is the first wish of her adoring ." No 8. "I have **[79]** received letters from town which say that Lord Stair has heard of our marriage." No 12. "Whatever money you may want draw on me for without scruple." No 13, dated May 29, 1805. "Situated as you are, nothing could strengthen the ties which unite us, therefore wish it not to be mentioned that you are my wife till it can be done without injury to ourselves I insist upon a paper acknowledging yourself as my wife." No. 14, dated June 10, 1805. "Forward to me the paper I requested in my last, and acknowledge yourself my wife—that as we are not immortal I may leave you in trust of a friend, the small remains of what was once a tolerable fortune; you can't refuse on any legal grounds, do, my dearest wife, forward it." In No 15, dated June 28, 1805, he says, "I would not give up the title of your sister's brother for any consideration. Don't deny yourself what you require, as I should not wish my wife to appear in any thing not consistent with her rank, I will arrange before my departure money-matters, so as to give you every opportunity of gratifying your taste, or any other fancy." In the letter marked 14, he asks her permission to go abroad on account of the distress of his affairs. "Will you allow me to endeavour by a short absence to rectify these things? In asking your consent, I humbly conjure you, dearest love, to pardon me. I solemnly assure you I will not be absent from you very long" In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits, No. 2 and 10, are at all weakened by the strong **[80]** conjugal expressions contained in these letters. Taken together they, in their plain and obvious meaning, import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined. Mr. Erskine, Mr. Hamilton, Mr. Cragie, Mr. Hume, and Mr. Ramsay, are all clearly of opinion that they are "present declarations" Mr. Cay is equally clear that they "are contracts de præsenti" Sir Ilay Campbell describes them as "very explicit mutual declarations of marriage between the parties" Mr. Clerk says that No. 2 is evidence of a very high nature to prove that "a marriage had been contracted by the parties; it is a full and explicit declaration of a contract de præsenti." "No. 10," he says, "imports little more than No. 2; it is important evidence to the same effect." Mr. Cathcart and Mr. Gillies, who hold a copula in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of law that apply to promises. The main enquiry will thus be limited to two questions, whether, by the law of Scotland, a present declaration constitutes or evidences a marriage without a copula, and, secondly, whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties entrusted to my care, as well as I can, upon their preponderance where they disagree, and feeling that hesitation of judg-[81]-ment which ought to accompany any opinion of mine upon points which divide the opinions of persons so much better instructed, in all the learning which applies to them.

The authorities to which I shall have occasion to refer are of three classes, first, the opinions of learned professors given in the present or similar cases, secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and, thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority, where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court which has to weigh them, stare decisis.

Before I enter upon this examination I will premise an observation from which I deduce a rule that ought, in some degree, to conduct my judgment; the observation I mean is this, that the canon law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe And whether that law remains entire or has been varied, I take it to be a safe conclusion that, in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is that it continues the same Shew the variation, and the Court must follow it; but if none is shewn, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto un-[82]-known in the Christian world. It becomes of importance, therefore, to consider what is the ancient general law upon this subject, and, on this point, it is not necessary for me to restate that by the ancient general law of Europe, a contract per verba de præsenti, or a promise per verba de futuro cum copulâ, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which council were never received as of authority in Scotland.

It appears from the case of *Younger*, cited by Sir Thomas Craig (lib. 2, dieg. 18, s. 19), that, in his time, the practice upon a contract de præsenti was the same in Scotland as it continued to be in England till the period of the Marriage Act, viz. to compel the reluctant party to a public celebration as matter of order. This was soon discontinued in Scotland, on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this, which is stated by Mr. Hume, they might still consistently retain the principle that a present consent constituted a valid marriage. Whether it was retained is the question I have to examine, assuming first (as I have done) that, if the contrary is not shewn, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus: Mr. Erskine, Mr. Cragie, Mr. Hamilton, Mr. Hume, and Mr. Ramsay, who [83] have been examined upon the question at present before the Court, are all clear and decided in their opinions that a declaration per verba de præsenti without a copula does, by the law of Scotland, constitute a valid marriage. I will not enter into an examination of their authorities where they agree—oportet discentem credere, though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I presume to discuss their reasonings, except in a few instances where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated I must add the opinions of the learned persons examined upon the case of *Beamish and Beamish*, a case which came before this Court upon a similar question of a Scotch marriage of an Englishman with a Scotch woman in the year 1788, and in which the Court of Arches to which it was appealed, upon the informations of law obtained from the learned advocates of

Scotland, pronounced for the validity of the marriage. Mr. John Millar, professor of law at Glasgow, there said, "that, by the law of Scotland, the ceremony of being married by a clergyman was not necessary to constitute a valid marriage. The deliberate consent of parties, entering into an agreement to take one another for husband and wife, was sufficient to constitute a legal marriage, as valid in every respect as that which is celebrated in the presence of a clergyman. Consent must be expressed or understood to be given per verba de præsenti; for consent de futuro, that is, a promise of marriage, does not constitute actual marriage. By the Scotch law, the delibe-[84]-rate consent of parties constitutes marriage." Mr. John Orr, in his deposition, said, "By the laws of Scotland, a solemn acknowledgment of a marriage having happened between the parties, whether verbally or in writing, is sufficient to constitute a marriage, whether expressed in verbis de præsenti or in an acknowledgment that the marriage took place at a former period. A promise followed by a copula would constitute a valid marriage; and a written instrument containing not a consent de præsenti, but only stating that the parties were married at a certain time, or even a solemn verbal acknowledgment to this effect, although no actual marriage had taken place, is sufficient to constitute a marriage by the law of Scotland." Mr. Hume said, "Marriage is constituted by consent of parties to take or stand to each other in the relation of husband and wife. The mode or form of consent is not material, but it must be de præsenti" Mr. Erskine and Mr. Robertson agreed in saying, "that a deliberate acknowledgment of the parties that they were married, though not containing a contract per verba de præsenti, is sufficient evidence of a marriage, without the necessity of proving the actual celebration." Mr. Clerk, Mr. Gillies, and Mr. Cathcart, who are examined in the present case on the part of Mr. Dalrymple, are equally clear in their opinions on the other side of the question. Mr. Cay inclines to think a copula necessary, "although well aware that a different opinion prevails among lawyers on this point."

Sir Ilay Campbell's opinion upon this important point, which the Court was particularly eager to [85] learn, is, through some inaccuracy of the examiner, transmitted in such a manner as to leave it rather a matter of question which of the two opinions he favours; for in the former part of the deposition he is made to say that "by the general principles of the law of Scotland, marriage is perfected by the mutual consent of parties accepting each other as husband and wife." In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties as perfecting a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favour of the ancient rule that consent without a concubitus constitutes a marriage; but in a latter part of the deposition he lays it down that this acknowledgment per verba de præsenti must be attended with personal intercourse, prior or subsequent, if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without such intercourse," Sir Ilay Campbell says, "they would resolve into mere stipulatio sponsalitia, where the words are de præsenti, but the effect future." And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the stipulatio sponsalitia the words de præsenti are qualified by the future words that follow, and which imply something more is to be done—a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur—nothing pointing to future acts as the fulfilment of a [86] present engagement. I find the greater difficulty in ascertaining the decided judgment of this very eminent person, from considering an opinion of his given into the English Court of Chancery (Lib. Reg. A. 1780, F. 552), upon a requisition from that Court, and on which that Court acted in the case of the Scotch marriage. In that case, the case of the marriage of Thomas Thomasson and Catharine Grierson, the opinion dated August 18th, 1781, and remaining on record in Chancery, states a present contract to be sufficient to validate a marriage, without any mention of a copula, antecedent or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at that time a necessary ingredient in the validity I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority—the opinion of a person whose death is justly lamented as one of the greatest misfortunes that have recently visited that country. I need not mention the name of the Lord President

Blair, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound. Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities, with most of whom I [87] am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation may have conferred upon them. In such a case I am under the necessity of quitting the proper legal rule of estimating pondere, non numero; I am compelled to attend a little to the numerical majority (though I admit this to be a sort of rusticum judicium), and finding that much the greater number of learned persons recognize a rule consonant to that which, in ancient times, governed the subject universally, I think I am not qualified to say that, as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe. It appears to me that the common mode of expression used in Scotland, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed—Promise cum copulâ, the copula is in the ordinary phrase, a constant adjunct to the promise—never to the contract de præsenti, strongly marking the known distinction between the two cases that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the Scotch writers: the first to whom I shall refer is Craig (Cragii jus feudale, lib. 2, dieg. 18, § 17 & 19). It does not appear to me that he is of great authority either one way or the other: he admits generally that the question of marriage is not hujus instituti propria, sed judicis ecclesiastici, and the case [88] of *Younger*, which he cites from the Court of the Commissaries, is a case not of a declaration de præsenti, but of a promise cum copulâ, unless, therefore, it is previously established that a promise cum copulâ converts itself in all respects, and in all its bearings, into a contract de præsenti without a copula (which certainly it does in the canon law, and is so recognized in the majority of the opinions upon the law of Scotland), it is no direct authority; and the conclusion is still more weakened by observing that, in that case, a judicial sentence of the commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration, is Lord Stair, an ancestor, I presume, of one of the present parties—a person whose learned labours have at all times engaged the reverence of Scotch jurisprudence. He treats of this very question, stating it as a question, and determines it thus (Stair's Institut. lib. 1, tit. 4, § 6): "It is not every consent to the married state that makes matrimony, but consent de præsenti, not a promise de futuro matrimonio." The marriage consists not in "the promise but in the present consent, whereby they accept each other as husband and wife, whether by words expressly, or tacitly by marital cohabitation, or acknowledgment, or by natural commixtion where there hath been a promise preceding, for therein is presumed a conjugal consent de præsenti, but [89] the consent must specially relate to that conjunction of bodies as being then in the consenter's capacity, otherwise it is void" I shall decline entering into the distinctions and refinements which have attempted to convert the obviously plain meaning of this passage into one of a very different import. It does appear to me to establish the opinion of this very learned person to be that without a commixtion of bodies immediately following (though in all cases to be looked to as possible, and at some time or other to take place), a present valid marriage is constituted by a contract de præsenti.

Sir George Mackinsie (Mackinsie, Institut. book 1, tit. 6, § 3), Lord Advocate under King Charles and James the Second, whose authority carries with it a fair proportion of weight, says "Consent de præsenti is that in which marriage doth consist. Consent de futuro is a promise; this is not marriage, for either party may Resile rebus integris;" manifestly intimating that this could not be done under the consent de præsenti.

Another authority of more modern date, but entitled to the greatest respect, is Mr. Erskine, a writer of institutional law; by him it is expressly laid down (b. 1, tit. 6, § 5) that "marriage consists in the present consent, whether that be by words

expressly, or tacitly, by marital cohabitation, or by acknowledgment. Marriage may without doubt be perfected by the consent of parties declared by writing, provided the writing be so conceived as to import a present consent." Nothing upon the direct meaning of these words can be more [90] clear than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor, no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, "From the later decisions of the Court, there is reason to doubt, if it can now be held as law, that the private declarations of parties, even in writing, are per se equivalent to actual celebration of marriage," admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. Mr. Clerk says, "he considers the doctrine to be incorrect," thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr. Hutcheson's book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true, what has been asserted in the argument, that it has been sanctioned by the approbation of several of the Judges of Scotland, and particularly of Sir Ilay Campbell, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His statement of the law of Scotland is full and explicit in favour of the doctrine that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this effect has been happily retained in the law of Scotland, speaking with similar feelings of attachment to it, which are observable in our Swinburn, when he talks of the Repealing Statute of Edward VI. as being worthily [91] and for good reasons enacted, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provisions of later times. Mr. Hutcheson mentions it as a fact that in the case of *M'Adam* against *Walker* none of the Judges, who dissented from the judgment, disputed that doctrine of the law. His testimony to such a fact is equivalent to that of any person of unimpeached credit—even to that of Lord Stair or Mr. Erskine; he has asserted it in the face of his profession and the public, and at the hazard of being contradicted, if he has stated it untruly, by the united voice of the whole bench and bar of his country

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named is of very modern date, Lord Kaimes, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to authority and establishment. The very title of his book is sufficient to excite caution; "Elucidations respecting the law of Scotland" may seem to imply rather proposed improvements than expositions of the existing law. He says, in his preface, that "he brings into the work the sceptical spirit, wishing and hoping to excite it in others, and confesses that he had perhaps indulged it too much." But supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise de futuro cum copulâ, which has no application to the present case, unless it is assumed that this amounts to the same thing identically in [92] law, to all intents and purposes, as a contract de præsenti. I must add that his extreme inaccuracy, in what he ventures to state with respect both to the ancient canon law and to the modern English law, tends not a little to shake the credit of his representations of all law whatever. In this chapter (page 32) he asserts that by the present law of England, a mutual promise of marriage de futuro is a good foundation to compel a refractory party to complete the marriage, by process in the Spiritual Court. I mean no disrespect to the memory of that ingenious person, when I say that it is an extraordinary fact that it should have been a secret to any man of legal education in any part of this island that the law of England has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is produced; it is easy, therefore, to strike the balance upon this class of authorities; they are all in one scale, a very ponderous mass on one side, and totally unresisted on the other.

I come, thirdly, to the last and highest class of authorities, that of cases decided in the Scotch tribunals. Many of these have been alluded to in the learned expositions which have been quoted, but such of them (and they are not few in number) as

apply to the cases of promises de futuro cum copulâ I dismiss for the present observing only that if a promise of this kind be equivalent to a contract de præsenti nudis finibus, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

[93] With regard to decided cases, I must observe generally that very few are to be found, in any administration of law in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision: they are found in the maxims and rules of books of text-law It would be difficult, for instance, to find an English case in which it was directly decided that the heir takes the real, and the executor the personal estate; yet though nothing can be more certain, it is only incidentally, and obiter, that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the canon law, establishing the doctrine that a contract per verba de præsenti is a present marriage, though none is more deeply radicated in that law.

The case of *Cochrane* versus *Edmonston*, before the Court of Session in the year 1804, was a case of contract de præsenti, and of this I shall take the account given by Mr. Clerk. The Court there held, "that a written acknowledgment de præsenti was sufficient to constitute a marriage The interlocutor of the Lord Ordinary, which the Court adhered to, rests upon the consent of parties to constitute a marriage de præsenti without referring to the copula." Mr. Clerk says "he cannot suppose the Court overlooked the very material circumstance of the copula," which did exist in that case, and which he says "would have been sufficient with a bare promise to bind the man to marriage." I find great difficulty in acceding to this observation, particularly when it is stated that the Court adhered to the interlocutor, **[94]** which expressed the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court that they should have declared consent be præsenti sufficient, without express mention of the copula, if they had thought it a necessary ingredient in the validity of the marriage. What Mr. Clerk says of his disposition to advise an appeal, in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly that on the evidence of the report he thinks it at least highly probable that some such doctrine, as that held by Mr. Erskine, was laid down in that case by the Judges

The next case which I shall mention is that of *Taylor and Kello*, which occurred in 1786. This was an action of declarator of marriage instituted by Patrick Taylor against Agnes Kello, and was grounded on a written acknowledgment in the following words:—"I hereby declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Kello delivered this written declaration to Taylor, and received from him another mutatis mutandis in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the concubitus, but the report states that the Court, in its decision, held this to be out of the question. The commissaries "found the mutual obligations relevant to infer marriage between the parties, and found them married persons accordingly." This sentence was affirmed by the Court of Session, though that Court was **[95]** much divided upon the occasion, some of the Judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage, but a majority of the Court thought, in conformity to the judgment of the commissaries, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary, it was agreed that the writing was to be delivered up whenever it was demanded the whole subsequent conduct of the parties proving this sort of agreement.

It appears then that this was not considered by the House of Lords an irrevocable contract, such as that of marriage is in its own nature, from which the parties cannot resile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an irrevocable contract de præsenti does of itself constitute a legally valid marriage Mr. Cathcart admits, in his deposition, that this sentence of the commissaries, confirmed by the Court of Session, would have been a decision in favour of the doctrine that a contract de præsenti constitutes

a marriage, if it had not been reversed by the House of Lords. But as it was clearly reversed upon other grounds, the authority of the two Courts stands entire in favour of the doctrine. Mr. Gillies thinks the reversal hostile to the doctrine, but he has not favoured the Court with the grounds on which he entertains this opinion. Mr. Clerk contents himself with saying, that the doctrine is not recognized: most **[96]** assuredly it is not disclaimed, on the contrary, the presumption is, that if the contract had been considered irrevocable, the House of Lords would have attributed to it a very different effect.

In the case of *Inglis* against *Robertson*, which was decided in the same year, the commissaries sustained a marriage upon a contract de præsenti, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respect to the proof of concubitus in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the copula. If it had no such reference, then it is a case directly in point. but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of *Ritchie and Wallace*, which was before the Court of Session in 1792, is not reported in any of the books, but is quoted by Mr Hamilton, who was of counsel in the cause. It was the case of a written declaration of an existing marriage, but accompanied with a promise that it should be celebrated in the church at some future and convenient time. This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a matrimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of the opinion of the Judges upon the case, without resorting to any supposed difference of opinion on the general principle of law now controverted. The woman was **[97]** pregnant by the man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr Hamilton says the woman founded on the written acknowledgment as a declaration de præsenti constituting a marriage, which conclusion of law was controverted by the man; but the Court, by a majority of six Judges to three, found the acknowledgment libelled, relevant to infer the marriage.

The case of *M'Adam* against *Walker* (13th of November, 1806), which underwent very full discussion, is by all parties admitted to be a direct decision upon the point, though it was certainly attended with some difference of opinion amongst the Judges by whom it was decided. In that case Elizabeth Walker had cohabited with Mr. M'Adam, and borne him two daughters In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desired Elizabeth Walker to stand up and give him her hand; and she having done so he said, "This is my lawful wife, and these my lawful children." On the same day, without having been alone with Walker during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that in this case there had been a copula antecedent, though none could have taken place subsequent to the declaration: it could not therefore have been upon the ground of want of copula that Sir Ilay Campbell, who holds a prior copula as good as a subsequent one, joined the minority in resisting that judgment It is stated by Mr. Hutcheson, as a matter of fact, that "none of the Judges dis-**[98]**-puted the law," but there were other grounds of dissent arising out of the circumstances of the case, unconnected with the legal question. "The Judges entertained doubts of the sanity of Mr. M'Adam at the time of the marriage, they considered also that when he made the declaration he had formed the resolution of suicide, and therefore did not mean to live with the woman as his wife" It is said that this decision of the Court of Session is appealed from, and therefore cannot be held conclusive upon the point. At any rate it expresses the judgment of that Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise cum copulâ has been admitted to constitute a marriage, if the rule of the canon law, transfused into the law of Scotland, be sound, that copula converts a promise de futuro into a contract de præsenti. If it does not, if copula is required in a contract de præsenti, what

intelligible difference is there between the two—between a promise de futuro and a contract de præsenti? None whatever. They stand exactly upon the same footing. A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them, till these recent controversies respecting the state of the marriage law of Scotland.

I might also advert to the marriages at Gretna Green, where the blacksmith supplies the place of the priest or the magistrate. The validity of these marriages has been affirmed in England upon the [99] certificates of Scotch law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opinion of Sir Ilay Campbell, upon which the English Court of Chancery founded its decision in the case of *Grierson and Grierson.*

What are the cases which have been produced in contradiction to this doctrine? As far as I can judge, none—except cases similar to those which have been already stated, where the superior Court has overruled the decisions of the Court below, and pronounced against the marriage, upon grounds which leave the principle perfectly untouched. The case of *M'Lauchlan* contrà *Dobson*, in December, 1796, was a case of contract per verba de præsenti where there was no copula, in which the commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr. Hutcheson states that "the Court did not think there was sufficient evidence of a real de præsenti matrimonial consent." Mr. Hume says "the conduct of the parties had been variable and contradictory;" and Sir Ilay Campbell says "there were circumstances tending to shew that the parties did not truly mean to live together." The dicta of Lord Justice Clerk M'Queen have been quoted and much relied upon; but I must observe that they come before the Court in a way that does not entitle them to much judicial weight: they are stated by Mr. Clerk to be found in notes of the handwriting of Mr. Henry Erskine, who is not himself examined for the purpose of authenticating them, although interrogatories are addressed to other [100] persons with respect to other legal authorities, for which they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, "The case of *M'Lauchlan* against *Dobson* is new, but the law is old and settled. Two facts admitted hinc inde, no celebration, no concubitus, nor promise of marriage followed by copula; contract as to land not binding till regularly executed, unless where res non sunt integræ." This proposition that "contract as to land not binding till regularly executed," proves little, because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. "A promise without copula locus pœnitentiæ—even verbal consent de præsenti admits pœnitentia"—that is the matter to be proved. "Form of contracts contains express obligation to celebrate, till that is done either party may resile." The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. "Private consent is not the consensus the law looks to. It must be before a priest or something equivalent; they must take the oath of God to each other;" this may be done in private to each other, as it actually was done in the case of Lord Fitzmaurice: "a present consent not followed by any thing may be mutually given up, but if so, it cannot be a marriage" To be sure, if the propositions contained [101] in these dicta are correct, if it be true that a contract de præsenti may be mutually given up, then certainly it cannot constitute a marriage; but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord Braxfield, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; but I have already adverted to the loose manner in which these dicta are attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced, without context and without authentication, that Lord Braxfield, as Lord Ordinary, refused the bill of advocation in the case of *Taylor and Kello*, complaining of the sentence of the Consistorial Court, which found "mutual obligations relevant to infer a marriage."

The other case that has been mentioned is that of *M'Innes* against *More*, which came before the House of Lords upon appeal in the year 1782. The facts therein

were that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a colour to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The commissaries and the Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the status personarum was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage

[102] I am not aware of any other decided cases which have been produced against the proposition, that a contract de præsenti (be it in the way of declaration or acknowledgment) constitutes, or, if you will, evidences a marriage. It strikes me, upon viewing these cases, that such of them as are decided in the affirmative have been adjudged directly upon this principle, and that where they have been otherwise determined, it turns out that they have rested upon specialties, upon circumstances which take them out of the common principle and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts de præsenti. The effect was not attributed to them, because they were not considered as such contracts. I cannot but think that when case upon case came before the House of Lords, in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may, without impropriety, add that the Lord Chancellors of England have always, as I am credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord **[103]** Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe—to the principle which I venture to assume that such continues to be the rule of Scotch matrimonial law, where it is not shewn that that law has actually resiled from it—to the opinions of eminent professors of that law—to the authority of text writers, and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise cum copulâ) I think that being compelled to pronounce a judgment upon this point, I am bound to say that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract de præsenti does not require consummation in order to become "very matrimony;" that it does, ipso facto, et ipso jure, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which England has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that the law of Scotland should receive an alteration, of which that country itself is the **[104]** best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the manner in which these qualifications are sometimes described, to suppose at first that they were of a peculiar and characteristic nature, I really cannot, upon consideration, discover in them any thing more than the ordinary qualifications requisite in all contracts. It is said that the marriage contract must not be extorted by force or fraud. Is it not the general law of contracts that they are vitiated by proof of either? In the present case, menace

and terror are pleaded in Mr. Dalrymple's allegation as to the execution of the first contract No 2, for as to the promise No. 1, he admits that it was given merely at the entreaties and instigation of the lady (an admission not very consistent with the suggestion of the terror afterwards applied), but he asserts that he executed this contract, "being absent from his regiment, without leave, alone with her, and unknown to her father, and urged by her threats of calling him in." What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the fact, for he has not read the only evidence that could apply to it, the sworn answers of the lady to **[105]** this statement of a transaction passing secretly between themselves, and in which answers it is positively denied. This averment of menace and terror is perfectly inconsistent with every thing that follows, with the reiterated declaration contained in No. 10, and with the letters which he continued to write in the same style for a year afterwards. Could the paper No. 10 have been executed by a man smarting under the atrocious injury of having been compelled by menaces to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness, have been addressed to the person by whom he had been so treated? Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a deliberate contract. It is, I presume, implied in all contracts that the parties have taken that time for consideration which they thought necessary, be that time more or less, for no where is there assigned a particular tempus deliberandi for the marriage contract any more than for any other contract.

It is said that it must be serious, so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed a priori that a man is sporting with such dangerous play-things as marriage engagements. Again it is said that the animus contrahentium must be regarded: is that peculiar to the marriage contract? It is in the intention of the **[106]** parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least) from the words in which it is expressed; and in some systems of law, as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland a latitude is allowed which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, dehors the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr. Erskine In all other countries a solemn marriage in facie ecclesiæ facit fidem; the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man under all the sanctions of religion and of law; not so in Scotland where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to shew that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.

But be the law so, still it lies upon the party who impeaches the intention expressed by the words, to answer two demands which the law, I conceive, must be presumed to make upon him; first, he must assign and prove some other intention; and, **[107]** secondly, he must also prove that the intention so alleged by him was fully understood by the other party to the contract at the time it was entered into: for surely it cannot be represented as the law of any civilized country that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr. Craigie can have no such meaning, "that if there is reason to conclude from the expressions used that both or either of the parties did not understand that they were truly man and wife, it would

enter into the question whether married or not," because this would open a door to frauds which the justice, and humanity, and policy of all law must be anxious to keep shut. In the present case no other animus is set up and endeavoured to be substituted, but the animus of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed no other is assigned; and as to any plea that it was differently understood by Miss Gordon, the other party in this cause, no such is offered, much less is any proof to that effect produced unless it can be extracted from the letters.

Do they qualify the express contracts and shew a different intention or understanding? It has been argued that they contain some expressions which point to apprehensions entertained by Miss Gordon that Mr. Dalrymple would resile from the obligations of the contract, and others that are **[108]** intended to calm those apprehensions by promises of eternal fidelity, both which, it is said, are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations de præsenti, from which neither of them could resile.

In the first place, is there this real inconsistence? Do the records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connection, and amongst numerous objects which might divert his affections and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness · that a wife left in that country exposed to the chances of a change in his affections, to the effect of a long separation, to the disapprobation of his friends, to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural, equally natural is it that he should endeavour to remove them by these renewed professions of constancy But 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 enquiring with all the assistance of the learned professors of law in that country, amongst whom there is great discordance of **[109]** 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 a law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr. Dalrymple might himself entertain honest doubts upon this point; but if he felt no doubt of his own meaning, if it was his intention to bind himself so far as by law he could, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded. A public marriage was impracticable; he does all that he can to effect a marriage which was clandestine, not only at the time, but which was intended so to continue The language is clear and unambiguous in the expression of intent. No other intention is assigned: and it is not such expressions as these, arising naturally out of the feelings which must accompany such a transaction, that can at all affect its validity.

The same observations apply to the expressions contained in the later letters written to Mr. Hawkins. In one of them she says, "my idea is that he is not aware how binding his engagements are with me," and possibly he might not. Still if he meant at the time to contract so far by law as he could, no doubts which accompanied the transaction, and still less any which followed it, can at all alter its real nature and effect. Miss Gordon had likewise her later hours of doubt, and even of despondency; "you will never see me Mrs. Dalrymple," she says, in the spring of 1807, to her sister; and when it is considered what difficulties she had to **[110]** encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be matter of great surprize, if in the view of a prospect so remote and cloudy, some expression of dismay and even of despair should occasionally betray the discomposure of her mind. As to what she observes upon the alternative suggested by some friend, of a large sum of money in lieu of her rights (a proposition which she indignantly rejects) it seems to point rather to a corrupt purchase of her silence than to any idea existing in her mind of a claim of damages, by way of a legal solamen, for the breach of a mere promissory contract.

The declarations, therefore, not being impeached by any of those disqualifications by which, in the law of Scotland, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become, in this stage of the matter, præsumptiones juris et de jure that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr. Burnaby that it is not mutuality of possession, but mutuality of intention, that is requisite. It is much more natural that they should be left in the possession of the lady, she being the party whose safety is the more special object of protection, but there is no proof here that Mr. Dalrymple himself is not possessed of a similar document He anxiously requested to have one, and the non-production of it by him **[111]** furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence that he confided the proofs of his marriage entirely to the honour of the lady; but if he did it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong: that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to enquire what proof there is of carnal copulation having taken place between the parties; and upon this point I shall content myself with such evidence as the general law requires for establishing such a fact: for I find no reference to any authority to prove that the law of Scotland is more rigid in its demand, where the fact is to be established in support of a marriage than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr. Edwards; and I take it as an incontrovertible position that the circumstances which would be sufficient to prove intercourse in any other case would be equally sufficient in this case. I do not charge myself in so doing with going farther than the Scotch Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place, I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between these **[112]** parties. Miss Gordon therein says, "I hereby promise that nothing but the greatest necessity (necessity which situation alone can justify), shall ever force me to declare this marriage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up, than by a supposition of consequences which would speak for themselves and compel a disclosure.

I observe that Mr. Dalrymple denies in his allegation that any intercourse took place after the date of the written declarations, which leaves it still open to the possibility of intercourse before that time, though he certainly was not called upon to negative a preceding intercourse, in consequence of any assertion in the libel which he was bound to combat. It will, I think, be proper to consider the state of mind and conduct of the parties relatively to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have already observed) before the promise contained in No. 1 was written, at whatever time that paper was written. In the first letter, which bears the post-mark of the 27th of May, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continue to pass between them **[113]** daily, and sometimes more than once in a day, expressive of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was, at that time, most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it in some way or other; for to what other motive can be ascribed such a series and stile of letters from a young man, writing voluntarily, without any appearance of idle pleasantry, and with every character of a sincere pursuit, whether honourable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed from the contents of his letters that she was either indifferent or repulsive.

The imputation indeed, which has been thrown upon her, is of a very different kind, that she was an acute and active female who, with a knowledge of the law of the country, which Mr. Dalrymple did not possess, was endeavouring, quâcunque viâ datâ, to engage him in a marriage. To this marriage she has inflexibly adhered, and now stands upon it before this Court; so that whatever might be the real state of her affections towards this gentleman (which can be known only by herself) this at least must be granted, that she was most sincerely desirous of this marriage connection, which marriage connection, both of them perfectly well knew, could not be publicly and regularly obtained. Taking then into consideration these dispositions of the parties, his desire to obtain the enjoyment of her person on the one hand, and her solicitude to obtain a marriage on the other, which after the delivery of such instruments she knew might at all **[114]** events be effectually and honourably obtained by the mere surrender of her person, what is the probable consequence? In this part of the island the same circumstances would not induce the probability of a private surrender, because a public ceremony being here indispensably required, no young woman, acting with a regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would, in all probability, defeat all expectation of such an event.

In Scotland the case is very different, because, in that country, if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there are no other ideas excited than such as belong to matrimonial intercourse. It is the "bed undefiled" according to the notions of that country: it is the actual ceremony as well as the substance of the marriage: it is the conversion of the lover into the husband. transit in matrimonium, if it was not matrimonium before. A most forcible presumption therefore arises that parties so situated would, for the purpose of a secret marriage, resort to such a mode of effecting it, if opportunities offered; it must almost, I think, be presumed that Mr. Dalrymple was in that state of incapacity to enter into such a contract, which **[115]** Lord Stair alludes to, if he took no advantage of such opportunities; for nothing but the want of opportunity can repel such a presumption.

Now how does the evidence stand with respect to the opportunity of effecting such a purpose? The connection lasted during the whole of Mr. Dalrymple's stay in Scotland, and was carried on, not only by letters couched in the most passsionate terms, but as admitted (and indeed it could not be denied) by nocturnal private visits, frequently repeated, both at Edinburgh and at Braid, the country-seat of Mr. Gordon, in the neighbourhood of that city. Upon this part of the case six witnesses have been examined, who lived as servants in the family of Mr. Gordon. Grizell Lyall, whose principal business it was to attend on Miss Charlotte Gordon, one of the sisters, but who occasionally waited on Miss Gordon, says "that Captain Dalrymple used to visit in Mr. Gordon's family in the spring of 1804; that before the family left Edinburgh she admitted Captain Dalrymple into the house by the front door, by the special order of Miss Gordon, in the evenings; that Miss Gordon's directions to her were that when she rung her bell once, to come up to her in her bed-room, or the dressing-room off it, when she got orders to open the street door to let in Captain Dalrymple; or when she (Miss Gordon) rung her bell twice that she should thereupon, without coming up to her, open the street door for the same purpose; that agreeably to these directions she frequently let Capt. Dalrymple into the house about nine, ten, or eleven o'clock at night, without his ever ringing the bell, or using the knocker, that the first time he came **[116]** in this way, she shewed him up stairs to the dressing-room off the young ladies' bed-room, where Miss Gordon then was, but that afterwards, upon her opening the door, he went straight up stairs, without speaking, or being shewn up; but how long he continued up stairs she does not know, as she never saw him go out of the house; that the dressing-room above alluded to, was on the floor above the drawing-room, and adjoining to the bed-room where the three young ladies slept, and next to the ladies' bed-chamber was another room, in which there was a bedstead with a bed and blankets, but no curtains or sheets to the bed, and it was considered as a lumber room, the key of which was kept by Miss Gordon." She says that she recollects,

and it is a fact in which she is confirmed by another witness, Robertson, "that the family removed from Edinburgh to Braid that year, 1804, on the evening before a King's Fast" (the King's Fast Day for that year was on the 7th of June), "and on a Wednesday, as she thinks, as the Fast Days are generally held on a Thursday; that at this time Miss Charlotte was at North Berwick, on a visit to Lady Dalrymple; that Mr. Gordon and Miss Mary went to Braid in the evening, but Miss Gordon remained in town, as she Lyall also did, and Mr. Robertson the butler, and one or two more of the servants."

It appears from the testimony of other witnesses that Mr. Gordon her father appeared much dissatisfied that this lady did not accompany himself and her sister to Braid, but chose to stay in town upon that occasion. There are passages in Mr Dalrymple's letters which point to the necessity of her **[117]** continuance in town, as affording more convenient opportunities for their meeting. Lyall states, "that she recollects admitting Captain Dalrymple that evening, as she thinks, some time between ten and twelve o'clock, and he went up stairs to Miss Gordon without speaking; that on the next morning she went up as usual to Miss Gordon's bed-room about nine o'clock, and informed her of the hour; and having immediately gone down stairs, Miss Gordon rung her bell some time after, and on the deponent going up to her, she met her, either at the bed-room door or at the top of the stairs, and desired her to look if the street door was locked or unlocked; and the deponent having examined, informed her that it was unlocked, and immediately after went into the dressing-room, and, after being a very short time in it, she heard the street door shut with more than ordinary force, which having attracted her notice, she opened the window of the dressing room which is to the street, and on looking out she observed Capt Dalrymple walking eastwards from Mr. Gordon's house; that from this she suspected that Captain Dalrymple was the person who had gone out of the house just before; that nobody could have come in by the said door without being admitted by some person within, as the door did not open from without, and she heard of no person having been let into the house on this occasion; that having gone down stairs after this, Mr. Robertson, the butler, observed to her that there had been company up stairs last night, but she did not mention to him any thing of her having let in Capt. Dal-**[118]**-rymple the night before, or of her suspicions of his having just before gone out of the house, at least she is not certain, but she recollects that he desired her to remember the particular day on which this happened." Now from this account given by Lyall, the counsel have attempted to raise a doubt, whether it was Mr. Dalrymple who went out, for it is said that he would have cautiously avoided making a noise for fear of exciting attention. But the account Lyall gives is exactly confirmed by Robertson, who deposes "that on the 7th of June, which was the King's Fast, as he was employed about ten o'clock in the morning in laying up some china in his pantry, which is immediately off the lobby, he observed Captain Dalrymple come down stairs, and passing through the lobby to the front door, unlock it, and go out and shut the door after him." Some observations have been made with respect to Robertson's conduct, and he has been called a forward witness, because he made a memorandum of this circumstance at the time it occurred; but I think his conduct by no means unnatural. Here was a circumstance of mysterious intercourse that attracted the attention of several of the servants, and it is not at all surprising that this man, who held a superior situation amongst them in Mr. Gordon's family, and who appears to be an intelligent, well educated, and observing person, as many of the lower order of persons in that country are, should think it right, in the zeal he felt for the honour of his master's family, to make a record of such an occurrence. In so doing, I do not think that he has done any thing more than is consistent with the character of a very **[119]** honest and understanding servant who might foresee that such a record might, one day or other, have its use. The witness Lyall goes on to say "that Miss Gordon and herself went to Braid that day (being the King's Fast) before dinner, and that on that evening or a night or two after, she was desired by Miss Gordon to open the window of the breakfast parlour to let Captain Dalrymple in, and she did so accordingly, and found Captain Dalrymple at the outside of the window when she came to open it, and this she thinks might be between ten and twelve o'clock, and she shewed him up stairs, when they were met by Miss Gordon at the door of her bed-chamber, when they two went into said chamber, and she returned down stairs, that she does not know how long Captain Dalrymple remained there with Miss Gordon, or when he

went away;" she states that "Miss Charlotte returned from her visit at North Berwick a few days after Miss Gordon and the deponent went to Braid; that at Braid Miss Gordon and Miss Charlotte slept in one room and Miss Mary in another. that within Miss Gordon and Miss Charlotte's bed-chamber there was a dressing-room, the key of which Miss Gordon kept; and she recollects one day getting the key of it from Miss Gordon to bring her a muff and tippet out of it, and upon going in she was surprised to find in it a feather-bed lying upon the floor without either blankets or sheets upon it, so far as she recollects: that it struck her the more as she had frequently been in that room before without seeing any bed in it; and as Miss Gordon kept the key she imagined she must **[120]** have put it there herself; that she found this bed had been taken from the bed-chamber in which Miss Mary slept, it being a double bedded room; that when she observed the said bed in the dressing-room it was during the time that Captain Dalrymple was paying his evening visits at Braid; that upon none of the occasions that she let Captain Dalrymple into Braid House did she see him leave it, nor did she know when he departed." Three other witnesses, Robertson and the two gardeners, have been examined upon this part of the case, and they all prove that Mr. Dalrymple was seen going into the house in the night or coming out of it in the morning.

It is proved likewise that Porteous, one of the servants, was alarmed very much that the window of the room where he kept his plate was found open in the morning, and that it must have been opened by somebody on the inside: it is proved that nothing was missing, not an article of plate was touched, and that Mr. Dalrymple was seen by the two gardeners very early in the morning coming away from the house, and in the vicinity of the house, going towards Edinburgh; and as to what was suggested that he might have been in the outhouses all night, I think it is not a very natural presumption that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o'clock at night would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels belonging to the house. There is another witness of the name of Brown, Mr. Dalrymple's own servant, whose evidence is strongly corrobo-**[121]**-rative of the nature of those visits. This man is produced as a witness by Mr. Dalrymple himself, and he states that he was in the habit of privately conveying notes from his master to Miss Gordon, which were to be concealed from her father. He says to the second interrogatory, "that he often accompanied his master to Mr. Gordon's house at Edinburgh, but he cannot set forth the days upon which it was he so attended him there, except that it was between the 10th of May, and the 18th of July, 1804," subsequently therefore to the execution of the last paper. This witness further states, "that on the night of the 18th of July, which was the last time Mr Dalrymple was in or near Edinburgh in the said year 1804, he, by the orders of his master, waited with the curricle at the house of Charles Gordon, Esq., till about twelve o'clock, when Mr. Dalrymple came out of the said house and got into the curricle and rode away therein about a mile on the road towards Edinburgh, and then desired him to stop, and having told him to go and put up his horses in Edinburgh and to meet him again on the same spot at six o'clock the next morning with the curricle, Mr. Dalrymple then got out and walked back towards the said Mr. Gordon's house, and on the next morning at six o'clock he met his master at the appointed spot and brought him in his said curricle to Haddington, from whence he went in a chaise to the house of a Mr. Nisbet in the neighbourhood of that town, where Mr. Dalrymple's father was then staying, that he does believe that Mr. Dalrymple did, on the night of the said 18th of July, go back to **[122]** and remain in the said Mr. Gordon's country-house:" and I think it is impossible for any body who has seen this man's evidence and the evidence of the other witnesses, not to suppose that he did go there and did take his repose for the night in that house. Now it is said, and truly said in this case, that the witness Lyall upon her cross examination says, "she does not think that they could have been in bed together, so far as she could judge;" what means she took to form her judgment does not appear; the view taken by her might be very cursory: she is an unmarried woman and might be mistaken with respect to appearances, or the appearances might be calculated for the purposes of deception in a connection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference Lyall draws, but what inference the Court ought to draw, from the fact proved by her evidence that Mr. Dalrymple

passed the whole of the night in Miss Gordon's room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature.

Lady Johnstone, one of her sisters, has been relied upon as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark or at least in a twilight state. It rather appears from the letters that there were some quarrels and disagreements be-**[123]**-tween Mr. Dalrymple and the gentleman who afterwards married this lady, and who was then paying his addresses to her; how far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and therefore it might be proper that only half a revelation should be made to the sister. She certainly states that upon her return to Braid, in the middle of June, she slept with her sister and never missed her from her bed, and never heard any noise in the sister's dressing-room which led her to suppose that Mr. Dalrymple was there. I am far from saying that this evidence of Lady Johnstone's is without weight: in truth it is the strongest adverse evidence that is produced on this point: but she admits "that from what she had herself observed she had no doubt but that Mr Dalrymple had made his addresses to her sister in the way of marriage; that when the deponent used to ask her said sister about it, she used to laugh it off." from which it appears that Miss Gordon did not communicate freely with her upon the subject. She says "that never till after the proceedings in this cause had commenced had she heard that they had exchanged written acknowledgments of their being lawful husband and wife, and had consummated their marriage; but, on the contrary, always, till very lately, conceived that they had merely entered into a written promise with each other so as to have a tie upon each other that neither of them should marry another person without the consent of the other of them." That is the interpretation this lady gives to the paper No. 10, **[124]** though that paper purports a great deal more, and she says "that although she did suspect that Mr. Dalrymple had at some time or times been in her sister's dressing-room, yet she never did imagine that they had consummated a marriage between them." But since it is clearly proved by the other witnesses that Mr. Dalrymple was in the habit of going privately to Miss Gordon's bed-room at night, and going out clandestinely in the morning, I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentleman, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man alluding to the raptures of his honey-moon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature: "My dearest sweet wife—You are, I dare say, happy at Queen's Ferry, while your poor husband is in this most horrible place, tired to death, thinking only on what he felt last night, for the height of human happiness was his." It is said that this has reference only to the happiness which he enjoyed in her **[125]** society, for an expression immediately follows in which he extols the happiness of being in the society of the person beloved: and it may be so, but it must mean society in a qualified sense of the word, private and clandestine society; society which commenced at the hour of midnight and which he did not quit till an early hour (and then secretly) in the morning. That society is meant only in the tamest sense of the word is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6 he says, "Put off the journey to Braid if possible till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how a-propos plans come into her pretty head; there appears to me only one difficulty, which is where to meet, as there is only one room, but we must obviate that if possible." In the next letter, No. 7, he

says, "But I will be with you at eleven to-morrow night: meet me as usual. P S.—Arrange everything with L. about the other room"

There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon, with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity, I refer to the letters themselves, particularly to No. 4 and No. 6. But it is said, here are passages in these letters which shew that no such intercourse could have passed between them; one in particular in No. 4 is much **[126]** dwelt upon, in which he says, "Have you forgiven me for what I attempted last night; believe me the thought of your cutting me has made me very unhappy" From which it is inferred that he had made an attempt to consummate his marriage and had been repulsed. Now this expression is certainly very capable of other interpretations: it might allude to an attempt made by him to repeat his pleasures improperly or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as a right He says, "You will pardon it, although it was my right, yet I make a determination not too often to exert it; what a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday."

In a correspondence of this kind passing between parties of this description and alluding to very private transactions some degree of obscurity must be expected Here is a young man heated with passion writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; surely it cannot be matter of astonishment that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully to explain. What attempt was made does not appear; this I think does most distinctly appear, that he did at this time insist upon his rights and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur they must be received with such explanations as will render them consistent with the main body **[127]** and substance of the whole case. Another passage in the letter No. 5, which is dated on the 30th of May, has been relied upon as shewing that Mr. Dalrymple did not consider himself married at that time. In that letter he says, "I am truly wretched, I know not what I write, how can you use me so? but (on Sunday, on my soul (torn)) you shall, you must become my wife, it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is that on Sunday she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear from the whole course and nature of the transaction that no such ceremony was ever intended: it appears from all the facts of the case that it was to be a private marriage, that it was so to continue, and therefore no celebration could have been intended to take place on that approaching Sunday.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss Gordon swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr. Dalrymple swears as confidently that it did not so take place, but he admits that it did on some one **[128]** night of the month of May, prior to the signature of the paper marked No. 1; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference, upon possession, pleasures which they have eagerly pursued; but it is a thing quite incredible that a man, so sated and cloyed, should afterwards bind himself by voluntary engagements to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardors, are of a subsequent date, and prove that these sentiments clung to his heart as closely and as warmly as ever during the whole continuance of his residence in Scotland I ask if it is to be understood that with such feelings he would relinquish the pleasures which he had been

admitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage which she had allowed him, according to his own account, gratuitously and without any such inducement

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; it is a matter of fact examinable upon common principles; and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was fully proved. If this is proved, then is there, according to the common **[129]** consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular, can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can have no competitor in any second marriage, which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage—it is a mere nullity.

It is said that by the law of Scotland, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred personali exceptione from asserting her own marriage. Certainly no such principle ever found its way into the law of England, no connivance would affect the validity of her own marriage; even an active concurrence, on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law, which has been furnished to the Court, that such a principle was ever admitted authoritatively; for though in the gross case of *Campbell* versus *Cochrane*, in the year 1747, the Court of Session did hold this doctrine, yet it **[130]** was afterwards retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of Scotland, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a medium impedimentum to be no other than this, that on the factum of a marriage, questioned upon the ground of the want of a serious purpose and mutual understanding between the parties, or indeed on any other ground; it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case is consonant to reason and justice, and to the fair representations of Scotch law given by the learned advocates, particularly by Mr. Cay, in his answer to the third additional interrogatory, and Mr. Hamilton, in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking ab initio an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage which at the earnest request of this gentleman, and on account of his most important interests (in which interests **[131]** her own were as seriously involved) was not only to be secret at the time of contracting, but was to remain a profound secret till he should think proper to make a disclosure; it is a marriage in which she has stood firm in every way consistent with that obligation of secrecy, not only during the whole of his stay in Scotland, but ever since, even up to the present moment. She corresponded with him as her husband till he left England, not disclosing her marriage even to her own family on account of his injunctions of secrecy. Just before he quitted this country he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir Rupert George, the first commissioner of the Transport Board. In the same letter, written on the eve of his departure for the Continent, he cautions her against giving any belief "to a variety of reports which

might be circulated about him during his absence, for if she did, they would make her eternally miserable. I shall not explain," he says, "to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are only meant for the ruin of us both: once more, therefore, I entreat you, if you value your peace or happiness, believe no report about me whatever."

No doubt, I think, can be entertained that the reports to which he, in this mysterious language, adverts, must respect some matrimonial connections, which had become the subjects of public gossip, and might reach her ear. Nothing, however, less than certain knowledge was to satisfy her according to his own injunction, and nothing **[132]** could, I think, be more calculated to lull all suspicion asleep on her part. It appears, however, that it had not that complete effect, for Mr Hawkins says that upon the return of Mr. Dalrymple, in the month of August, 1806, when he came to England privately without the knowledge of his father, or of this lady, he then for the first time "communicated to him many circumstances respecting a connection he stated he had had with a Miss Johanna Gordon at Edinburgh, and expressed his fears that she would be writing and troubling his father upon that subject, as well as tormenting him the said John William Henry Dalrymple with letters, to avoid which he begged him not to forward any of her letters to him, who was then about to go to the Continent, and in order to enable him to know her handwriting and to distinguish her letters from any others, he then cut off the superscription from one of her letters to him, which he then gave to the deponent for that purpose, and at the same time swore that if he did forward any of her letters, he never would read them; and he also desired and entreated him to prevent any of Miss Gordon's letters from falling into the hands of General Dalrymple, and that he went off again to the Continent in the month of September." Mr. Hawkins further says "that he did find means to prevent several of Miss Gordon's letters addressed to General Dalrymple from being received by him, but having found considerable risque and difficulty therein, and in order to put a stop to her writing any more letters to General Dalrymple, he the deponent did himself write and address a letter to **[133]** her at Edinburgh, wherein he stated that the letters, which she had sent to General Dalrymple, had fallen into his hands to peruse or to answer, as the General was himself precluded from taking any notice of letters from the precarious state he was in, or to that effect, and urged the propriety of her desisting from sending any more letters to General Dalrymple; and the deponent having, in his said letter, mentioned that he was in the confidence of, and in correspondence with Mr. Dalrymple, she soon afterwards commenced a correspondence with him respecting Mr. Dalrymple, and also sent many letters, addressed to Mr. Dalrymple, to him, in order to get them forwarded; but the deponent having been particularly desired by Mr. Dalrymple not to forward any such letters to him, did not send all, but thinks he did send one or two, in consequence of her continued importunities;" he says "that it was some time in the latter end of the year 1806 or the beginning of the year 1807 that the correspondence between Miss Gordon and himself first commenced; and that after the death of General Dalrymple, which he believes happened in or about the spring of the year 1807, she, in her correspondence with him, expressly asserted and declared to him her marriage with Mr. Dalrymple."

It appears then that Miss Gordon knew nothing of Mr. Hawkins, except from the account he had given of himself, that he was the confidential agent of Mr. Dalrymple, and therefore she might naturally have felt some hesitation about laying the whole of her case before **[134]** him, especially as General Dalrymple was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss Gordon instantly asserted to Mr. Hawkins her marriage with Mr. Dalrymple, and he, wishing to be furnished with the particulars, wrote to her for the purpose of obtaining them, which she thereupon communicated, and at the same time sent him a copy of the original papers, which, in the language of the law of Scotland, she called her marriage lines. She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr. Dalrymple, and he says "that he has no doubt Mr. Dalrymple received the letters, because he replied thereto from Berlin or Vienna, and caused the bills to be regularly discharged." He says "that in the latter end of May in the year 1808, Mr. Dalrymple returned again to England" I ought to have mentioned that it

appears clearly that Miss Gordon had been sending letters to Mr. Hawkins, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered into by Mr Dalrymple. She says in a letter to Mr Hawkins, "I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day; the last one is that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter."

This description cannot apply to the marriage which has since taken place with Miss Manners, but **[135]** is merely some vague report which it seems had got into common discourse and circulation. On the 9th of May she writes to know whether any accounts had been received from Mr. Dalrymple, and says, "Any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement;" and she protests most strongly against his entering into a matrimonial connection with another woman. In the end of that very month of May, Mr. Dalrymple came home, having been at different places on the Continent; he went down to Mr. Hawkins's house at Findon, where having met him, they conversed together upon Mr. Dalrymple's affairs, and particularly upon his marriage with Miss Gordon, and on that occasion Mr. Hawkins having at this time no doubt left upon his mind of the marriage, and fearing from the manner and conduct of Mr Dalrymple that he had it in contemplation to marry Miss Manners, the sister of the Duchess of St. Alban's, he cautioned him in the most anxious manner against taking such a step, and in the strongest language which he was able to express, described the mischiefs which would result from such a measure, both to himself and the lady, and the difficulties in which their respective families might be involved, owing to Mr. Dalrymple's previous marriage.

Mr Hawkins thought at the time that those admonitions had had the good effect of deterring him from the intention of marrying Miss Manners, though he mentions a circumstance which bears a very different complexion, viz. that Mr. Dalrymple took from him, almost by force, some of Miss Gordon's letters, and particularly those annexed to the allegation. **[136]** He says "that Mr. Dalrymple took them under pretence of shewing them to Lord Stair, and seemed by his manner and expressions to consider that he had thereby possessed himself of the means of shewing that Johanna Dalrymple was not his wife." It was about the end of the month of May that Mr. Hawkins and Mr. Dalrymple held this conversation at Findon, and upon the 2d of the following month, Mr. Dalrymple was married to Miss Manners, before it was possible that Miss Gordon could know the fact of his arrival in England. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr. Dalrymple was all the time abroad, and the place of his residence perfectly unknown to her; no process could operate upon him from the Courts either of Scotland or England, nor was he amenable in any manner whatever to the laws of either country.

She did all she could do under the obligations of secrecy, which he had imposed upon her, by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole demands of that duty, which such circumstances imposed upon her, and I must say that if an innocent lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot, upon any evidence which has been produced, think that the conduct of Miss Gordon is chargeable, either legally or morally, with having contributed to so disastrous an event.

[137] Little now remains for me but to pronounce the formal sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one or perhaps more individuals; but the Court must discharge its public duty, however painful to the feelings of others, and possibly to its own; and I think I discharge that duty in pronouncing that Miss Gordon is the legal wife of John William Henry Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done, by the first session of the next term.*

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* From this decree an appeal was alleged and prosecuted to the Court of Arches. In the course of those proceedings an intervention was given for Laura Dalrymple—described as wife of John William Henry Dalrymple, Esq., the appellant in the cause.