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SCOTCH MARRIAGES,

REGULAR AND IRREGULAR.

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BY

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"Greift nur hinein in's volle Menschenleben!
Ein Jeder lebt's, nicht vielen ist's bekannt,
Und wo ihr's packt, da ist's interessant."—*Faust.*

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PREFATORY NOTE.

THIS little book is not intended for the practitioner. I have thought it therefore unnecessary to give references to the reports of the cases mentioned. As I have been careful to give the date and, generally, the name of each case, anyone having access to the reports can have little difficulty in finding it. The information with regard to banns and other necessary formalities required for regular marriage is not at present readily accessible to the general public, and it is hoped may be of use to persons about to marry—a large and deserving class.

MARRIAGES,

REGULAR AND IRREGULAR.

CHAPTER I.

On Marriage in General.

IT will hardly be disputed that of all social institutions marriage is by far the most important. With few exceptions, everybody at some period of life looks forward to marriage as desirable. A young lady on announcing her engagement to a friend was told, "It is a very serious thing to get married." "Yes," she retorted, "but it is much more serious not to get married." And even the sternest celibates cannot refrain from regarding with interest and pity the fortunes of those who have been led to embark upon this turbulent sea. Probably in their hearts they feel the truth of the humorist's remark that whether a man marries or not he regrets his decision. It may then be safely assumed that in some of its aspects matrimony is a theme of universal interest. Law, no doubt, is "caviare to the general," but I hope it may be possible to

explain in a simple and intelligible form a part of the law relating to this subject.

Many of the cases concerning marriage have in their day roused great popular interest, and a free use will be made of the reports in illustrating the legal principles laid down. Nothing will be said that is not familiar knowledge to the lawyer, but it is astonishing how loose and hazy popular conceptions are on this matter. And though it may well be doubted whether it is a legitimate source of pride or not, it is certainly the fact that in very important respects the Scottish law of marriage is altogether peculiar. It was explained to Mr. Bumble that if a wife does certain acts in the presence of her husband, the law presumes she does them against her will and in obedience to him. Mr. Bumble, speaking no doubt from private knowledge of connubial life, pointedly remarked, "If the law says so, the law is a hass." The reader may, if so minded, make the same comment on some of the doctrines to be explained. And indeed many husbands would share the amazement of Mr. Bumble on learning how great was the power which the law presumed them to exert over their wives. By the law of England a woman charged with the commission of a crime less heinous than murder or treason may be acquitted if she prove that her husband was present when she committed the offence. The law presumes that she was not a free agent. In the words of Blackstone, "She is not

guilty of any crime, being considered until the presumption be rebutted as acting by compulsion, and not of her own will, which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King Ina, the West Saxon." But wives nowadays, as Mr. Bumble well knew, are less obedient than they were in the golden age of King Ina.

The law of marriage in this country, like other branches of law, cannot be understood except by reference to its history. It is derived from many sources. Part of it rests on native custom. Part of it has been handed down by the Roman Church. In part it is the work of Parliament. Every inch of it has been elucidated by the learning of successive generations of judges. Except the great changes made in recent years with regard to a married woman's rights in her own property, its growth has been very slow and gradual. Even the most radical of reformers have felt loath to shake roughly the framework of the marriage laws. Speculative writers have suggested an entire recasting of sexual relations. Plato in his "Republic," the most beautiful of all those dream castles of Utopia builders, advocated a community of wives, none belonging to one man more than another. But the general mass of mankind will be slow to be convinced by the philosopher that this would tend to greater harmony, and the modern advocates of free love, or marriage dissoluble at will, make fortunately little progress.

It would be out of place here even to glance at the many marriage systems which actually exist. Some of them are highly curious, as, *e.g.*, that of the Arab tribe which has so-called three-quarter marriages, the husband and wife being free every fourth day. Without travelling out of Europe we are confronted by two kinds of marriage radically different. The western world, with its ideas of boundless progress and restless striving after higher development, regards with horror the polygamy of Turkey. It might well startle a rich Turk with his harem to be told that he was not married at all. But it is undeniably true that the term "marriage" in our law does not include polygamy. The tendency of the law with us is to put women more and more on an equality with men, to allow them greater political and social freedom, and to make marriage more of an equal partnership, in which the parties are to be on the same footing, and the wife no longer subordinated to the husband. Since the Married Women's Property Act, the old saying is no longer true that "in law a husband and wife are one person, and the husband is that person."

Nor is it only in matters of property that the husband's rights have been greatly limited. Some old text-writers say that he formerly enjoyed the right of beating her in moderation. One of them thus expresses it:—"The husband hath, by law, power and dominion over his wife, and may keep her by

force within the bounds of duty, and may beat her, but not in a violent or cruel manner." As to the violence of a beating, the views of the two persons concerned are apt to conflict. But in the recent case of *The Queen* v. *Jackson*, the judges doubted whether this was ever lawful, and it is certain that the privilege, if it ever existed, will not again be asserted in any court of law. Nor can he now compel her to live with him against her will. It is true that a husband in Scotland may obtain what is called a decree of adherence, that is, he may complain to the Court that his wife will not live with him, and if she gives no sufficient reason for her refusal, the judge will issue an order that she shall return to cohabitation. And the same result may be obtained in England by a petition for restitution of conjugal rights. But in both countries such a decree is now a mere dead letter as regards, at least, its primary object. If the wife do not choose to obey it she cannot be either fined or imprisoned. In one old case in England where the petition was brought by the wife to compel her husband to return to her, his unwillingness to do so was so great that he preferred to spend three years in prison to taking her back. Nowadays he would not have had to face such a painful choice of evils. Mr. Jackson, as will be remembered, viewed with disapproval the laxity of the modern law. Having obtained his judgment ordering his wife to live with him, he proceeded to execute it himself

by the rough and ready method of carrying her off as she came out of church, and shutting her up in his house. It was pointed out with much force that to countenance such a summary form of procedure on the part of an irate husband would mean the re-introduction of private war, when every man was his own lawyer—

> Because the good old rule
> Sufficeth them,—the simple plan,
> That they should take who have the power,
> And they should keep who can –

for the wife's male relations would be apt to meet violence with violence, and the two families might soon be expected to be like the "Heathen Chinee," "lyin' loose on the strand."

Apart from these disadvantages, however, the judges held that Mr. Jackson had no right to imprison his wife, but must let her go free. In Scotland, if a wife or a husband obstinately refuses to live with the other for four years without having any legal excuse, the deserted spouse can get a divorce. Not so in England. A husband in the position of Mr. Jackson can apply after two years for a judicial separation. But he does not regain his freedom, and cannot marry anyone else during the lifetime of his recalcitrant wife. There is no doubt a hardship in this, and it is not unlikely that in spite of High Church opposition the law of divorce for desertion may be introduced into England.

As already observed, marriage in Turkey, as in most of the Eastern world, is a radically different institution. In polygamous societies the emancipation of woman has yet to begin. She remains as she was thousands of years ago—a mere chattel. No country in which polygamy has prevailed has ever shown the capacity for strong and vigorous development. All the best authorities on Oriental life attribute its sad immutability and want of initiative more to the deadening effects of its demoralising system of marriage than to any other cause. I refer to it here merely to point out that so different in the eye of the law is polygamy from monogamy that the former is not considered to be marriage at all. A man, in the view of our law, must take a woman to wife with the intention not to have any other wife during her lifetime, unless she be divorced from him. Otherwise he is not entering into the relation which our courts understand by marriage.

This leads us to the question: What is marriage in the legal sense? It is the life-long union of one man and one woman to the exclusion of all others, and entered into in some way recognised by the law.

Two modern cases may serve to illustrate the distinction between this kind of marriage and other kinds to which our law does not give the same privileges.

The Baralong Case.—A certain Christopher Bethell left England for the Cape of Good Hope in the year 1878, and never returned. He was killed in fighting

with the Boers in Bechuanaland in 1884. After his death it turned out that if he had left legitimate descendants they would be entitled to an estate in England worth about £600 a year. It was known that he had had a daughter in Bechuanaland, and the question to be decided therefore was whether he had been lawfully married. Montsioa, the chief of the Baralongs, one of the native tribes of South Africa, gave evidence as follows:—

"In October, 1883, Bethell came to me and said he wanted a woman to take and marry according to the Baralong custom. I said to him, 'You know that we Baralongs have a different custom from other tribes. The custom is that during courtship and after marriage the man when he kills an ox sends the head to the girl's mother, so if you do this the mother will know your intentions are honourable.' Bethell said, 'Well, I want to marry a Baralong, and I will do so according to Baralong custom'; also, 'I am a Baralong.' I said, 'Will you not marry he in church?' (There was a Wesleyan church near the place.) He said, 'No; I am a Baralong. Did you marry your wife in church? did you not also marry in the custom I am about to do?' I said, 'Very well; if that is the case you can take one'; and of a truth he did take one. He slaughtered an ox, and sent the head to Makwas, the mother of Teepoo. I then went to Makwas and said, 'Give your daughter to Bethell; you see he

really means it. See, he has sent you the head.' She did, and he married her exactly in accordance with our customs. There is no other ceremony except taking the girl. The paying of cattle is no part of the ceremony of marriage, and may be done years after the consummation of the marriage. Bethell took the girl to his house. Bethell gave a span of oxen and trekgoed (a goad for driving) and plough to Teepoo's father, saying, 'Plough Makwas's garden with this.' It is one of our customs for the son-in-law to plough the mother-in-law's garden, or have it ploughed. I know that Bethell really married Teepoo, and that she was his wife and not his paramour."

There was also evidence that "each male is allowed one great wife and several concubines, who have almost the same status in the home as the great or principal wife." And Montsioa also said, "There are those who have two, three, or four wives, but the first is the principal wife." The marriage ceremony was thus described: "When the consent of the parents has been obtained the bridegroom slaughters a sheep, a buck, an ox, or cow. The head of the animal is taken to the bride's parents, as also is the hide, which is cleaned and softened. They are then considered married, and after the birth of the first child the number of the cattle previously agreed upon is handed over to the wife's parents."

Teepoo, who was a niece of Montsioa, gave birth

to a daughter ten days after Christopher Bethell was killed. The case was tried in England before Mr. Justice Stirling in the year 1888, and eminent counsel were retained for the child. It was decided, however, that the evidence did not prove that Christopher Bethell and Teepoo agreed to take each other as husband and wife in the sense of our law. He meant to marry her in the Baralong sense. He had refused to marry her in the church, had never introduced her to any European as his wife, nor referred to her in any way in his letters to his friends at home. Teepoo also understood the marriage to be the sort of union usual in her tribe, and there was nothing to show that she would have felt aggrieved if Christopher Bethell had, according to Baralong custom, introduced a second or third wife into his household. Accordingly it was held that the little girl was not a legitimate daughter, and therefore not entitled to the estate.

A Japanese Marriage.—With the Baralong case may be contrasted the following :—

F. B., a retired captain in the Royal Artillery, and an Irishman, during a temporary residence in Japan married a Japanese woman. The marriage was performed in the forms recognised by the Japanese law. The question as to the validity of the marriage in England was tried in 1890. It was proved that Japanese rites had been duly observed, and that such a union is marriage as understood in monogamous

countries, so that the husband could not have taken another wife while the first marriage lasted. This being so, Sir James Hannen decided that it was a valid marriage all the world over, and the child born of it legitimate.

Enough has probably been said to indicate the general sense in which marriage is understood by the law of Scotland and England. I now proceed to explain what a valid marriage is.

CHAPTER II.

The Essentials of Valid Marriage.

THESE are: (1) The parties must be of lawful age and (2) physically capable of marriage. (3) There must be no legal impediment to their marrying each other, such as being within the prohibited degrees of relationship, or being already married. (4) They must consent to take each other then and there as husband and wife, and it must be proved, in some way recognised by the law of Scotland as sufficient, that they made a declaration to this effect, or satisfactorily showed this mutual consent.

If any of these conditions be wanting no ceremony will make a binding marriage. Either of the parties (subject to an exception to be afterwards referred to) may at any time raise an action of nullity of marriage. This is not a divorce, which means a breaking of the marriage tie, but a petition asking the Court to declare that the parties were never married at all. I shall deal first with these grounds for having a supposed marriage declared to have been null and void from the beginning, and afterwards go on to explain the various ways in which a legal marriage may be contracted in Scotland.

1. *Want of Age.*—The age at which marriage is lawful is fixed by our law at fourteen for males and twelve for females. It is certainly startling that any boy of fourteen and any girl of twelve may, without any ceremony whatever, contract a marriage by which they are bound to each other for life. It was once doubted whether, if there had been actual cohabitation, a boy even under fourteen could not validly marry. A case was tried where a boy of thirteen had gone through a form of marriage with a woman servant in his father's house, and had afterwards at various times cohabited with her. It was decided, however, that he was not married.

In England the lawful ages are the same, but if either the man or the woman is under twenty-one his or her parents or guardians have the right of objecting to the marriage. If they "forbid the banns," or lodge a notice of objection with the registrar (if the marriage was to be before him), the marriage cannot go on. But if they do not avail themselves in time of their right of objection the marriage will be valid, and no objection to it can be raised afterwards on the ground of want of parents' consent.

2. *Want of Physical Capacity.*—There must be no physical defect in either which prevents the consummation of the marriage. But this objection cannot be raised by anyone but the aggrieved spouse, who is entitled to say, "I was deceived into a marriage which is really no marriage at all." If

he or she prefers to go on, no one else can make any protest, and the marriage will be treated as valid. Nor would a marriage entered into by two old people be set aside on this ground, for there neither could reasonably say that there was any deception. Cases in which marriages are annulled on this ground are not very uncommon, and are always heard *in camera.*

3. *Legal Impediment.*—Under this head come several grounds which make it illegal for the two parties in question to marry each other. It is not, as in the former cases, that they could not lawfully marry anyone, but that as between themselves there is some legal objection to the marriage. This may be (*a*) too near relationship. It is not very easy to state clearly the range of these prohibitions. A man (or a woman) may not marry any direct ascendant or descendant. That is—in the case of the man—mother, grandmother, and so on; or daughter, granddaughter, and so on. Most men probably resist without difficulty the temptation to marry their grandmothers. But it may be of interest to mention one case in which the prohibition was necessary. The famous, or infamous, Marion Delorme, a brilliant beauty at the courts of Louis XIII. and Louis XIV., understood so well the art of preserving her charms that she had on one occasion to quench the ardour of a lover by proving to him that she was his grandmother. Among collateral relations, as they are called, viz., persons

who are not his ancestors nor descendants, but who are, with him, sprung from a common ancestor, he may not marry any sister, or aunt, or great-aunt, or niece, or grandniece. Even if such a thing were conceivable as a man desiring to marry a great-great-aunt or a great-grandniece, such a union would be illegal. He may, however, marry a first cousin, and any more remote collateral relation. The notion sometimes heard that first cousins may marry, but second cousins not, is a pure fiction. If a man has been already married the range of persons whom he is prohibited from marrying is greatly extended, for connections by marriage or, as they are legally styled, relations by affinity are, for this purpose, in the same class as relations by blood. His deceased wife's niece is equivalent to his own niece, and so in every case.

The much-debated question of legalising marriage with the sister of a deceased wife (or the brother of a deceased husband) deserves a passing notice. It is surely a pure question of expediency. In England, by a curious chapter of accidents, it has come to be regarded as a standard round which the opposing armies of church and dissent are to rally their forces. All such considerations humbly appear to the writer to be completely beside the mark. They introduce sectarian hatred, or, as we curiously call it sometimes, "religious animosity,"—of all things most irreligious,—into a question which ought to be dealt with merely

on its merits, for when the law of Moses was written the Jews practised polygamy, and the prohibition in Leviticus xviii. 18, "Thou shalt not take a wife to her sister," or "one wife to another," as it is translated in the margin, means one of two things. It means either "thou shalt not be a polygamist at all," or else "thou shalt not marry thy wife's sister during her life," *i.e.*, have two wives living who are sisters. All the best modern authorities are against the view that it contains any prohibition to marry the sister of a deceased wife. This practice, on the contrary, was common among the Jews, and regarded with favour. The late learned Chief Rabbi, Dr. Adler, the head of the Jewish Church in this country, was clearly of opinion that marriage with a deceased wife's sister was never forbidden by Jewish law. It is notwithstanding quite settled that such marriages are by our law void, and a good deal is to be said on grounds of policy in favour of the prohibition. The strongest argument for a change in the law is that public opinion does not strongly condemn such connections, and that they are very common.[1] It is inexpedient that society shall regard with leniency a relation between the sexes which is, like this, terminable at will, and of which the children are illegitimate.

[1] It may be remarked that the device of going to a country, *e.g.*, Denmark, where marriage with a deceased wife's sister is legal, to perform the ceremony, does not make the marriage good in Scotland.

In regard to these prohibitions it makes no difference whether the relationship is of the whole or the half-blood, legitimate or illegitimate. The marriage of a man with a daughter of his deceased wife's *half*-sister has been found null, and so has the marriage with the niece of a dead wife, although the mother of the niece was an illegitimate daughter. These prohibitions were much more numerous before the Reformation, *e.g.*, second cousins could not marry, and god-parents could not marry their god-children. The Pope could grant dispensations enabling persons within the prohibited degrees to marry, and this was a considerable source of revenue to him. It is still contrary to the law of the Roman Church for first cousins to marry, and in countries like Portugal, where the Church law is still the law of the land, this can only be done on obtaining dispensations. In countries, *e.g.*, Germany, where marriages between uncle and niece are legal, the parties, if good Catholics, will not marry without a dispensation.

(*b*) In addition to the foregoing grounds on which a marriage, though formally solemnised, may be declared null, are to be mentioned three others.

Already married.—It is impossible for a person who has a husband or wife living to validly marry anybody else unless the first marriage has been severed by divorce. But if, *e.g.*, a man deceive a woman into going through a ceremony of marriage with him, she honestly believing him to be

unmarried, then, although the marriage will be declared null, the children are legitimate. In such a case the woman acquires none of the rights of property which she would have had as a lawful wife, but she can bring an action against the man for damages. And though the first marriage may have been entered into in one of the irregular ways to be described later, and the second may have been performed by a minister, the result is still the same. As soon as it is proved that the man was already married when he went through the ceremony of marrying the second wife, this second marriage is at once shown to have been null and void.

(*c*) *Co-defender named in Decree of Divorce.*—The remaining case of what may be called legal impediment is peculiar to Scotland, and might very well be abolished. By an old Act passed in the year 1600 it was declared illegal for a person divorced for adultery to marry the co-defender. This bar only applies if the divorce was in Scotland, and is often evaded in this way. Unless the judgment says expressly that the adultery was with A. B. (naming him), the divorced wife may marry A. B. And it is often possible to procure the omission of the name.

(*d*) *Non-residence in Scotland for 21 days, in case of Irregular Marriage by Declaration.*—Gretna Green marriages are not now legal. Many distinguished persons, including a future Lord Chancellor, and

a great many undistinguished, contracted marriage in Scotland at Gretna Green. To avoid the necessity of publishing banns, or getting a licence, the young people took a chaise and set off over the border. It must be remembered that if either the bride or bridegroom was under 21, their parents or guardians could have prevented the marriage in England. At Gretna Green a blacksmith, who gained notoriety in this way, asked them if they wished to marry each other, and on their saying they did, put down their names in a book, and they went back to England validly married. To remedy this scandal a law was passed in 1856 to the effect that a marriage contracted in this way by mere declaration of consent should not be valid unless one of the parties had his home in Scotland, or at any rate had lived there for three weeks before the marriage.

4. *Force, Fraud, and Error.*—In addition to the two conditions of a valid marriage which have been discussed, viz., that the parties must be of lawful age, and that there must be no legal impediment to their marrying each other, there is a fourth essential condition. This is that the parties consent to marry each other then and there, and declare their consent in some way recognised by law. It is commonly believed in England that there is considerable risk in Scotland of being married without knowing it. Perhaps in a charade a mock ceremony is gone through, and afterwards the parties to it are horrified

to find that what they meant in jest has turned into earnest, and that they are validly married to each other. Or it may be that a man, by way of a foolish jest, or for some other reason, speaks of a lady of the company as "my wife," or as "Mrs. A.," and though neither the one nor the other of them has any intention to marry, they find themselves married by force of law.

Law of this kind is common in novels—a branch of literature in which the law of marriage and of wills has been much elaborated. But peculiar as Scotch marriage law is, the English tourist is not exposed to this risk of accidental marriage. The Court must be satisfied that the two people seriously and soberly agreed to be married. There is one exception to this rule. If a man persuade a woman to go through a sufficient form of marriage of any kind with him, and she seriously intend marriage, and believe him to be in earnest, he will not be allowed to come into Court afterwards and say, "I never meant to marry her. I was only deceiving her." For it is a general rule of law that a person shall not be permitted to take advantage of his own fraud. But let us take the other case. Suppose a woman comes into Court and says, "It is true I went through a form of marriage with this man, but I thought he was somebody else, or he persuaded me that the form I was going through was only an engagement, or he said if I didn't marry him he

would blow my brains out," then if she satisfy the judge that her statements are true, the marriage will be declared to be null and void—*e.g.*, if it had been arranged that the heir to a foreign throne should marry a princess, and his father sent his second son to personate him, such a marriage might be set aside, for the lady never really consented to marry the impostor—she consented to marry the heir.

The Case of Harford and Morris.—In this case the guardian of a girl only twelve and a-half years old had placed her at a boarding school in London. He then conceived the design of marrying her for the sake of her fortune, and began to win her confidence by sending notes and cards to her, and making appointments, and taking her about to dinners and balls, and to Ranelagh, and similar public places of amusement. Finally, under various pretexts, he induced her to go with him to France. On her saying "she wished she was at home again," Morris threatened that he would kill himself if she went home again, and that terrified her. They went through a ceremony of marriage at Ypres, but the court held it was a nullity, and that the girl had never given any real consent.

Lord Portsmouth's Case.—In this case, which was tried in 1828, it was proved that a young nobleman had been married at 32 to a lady of 47. Although he went into society, attended races and the like without appearing insane, it appeared that Lord

Portsmouth had never possessed more than a weak and childish degree of intellect. His wife let him drive a team of horses with which he carted hay or timber, and regarded as a toy or plaything. Shortly after his wife's death the confidential solicitor of the family and of the earl's trustees, who had a great ascendency over him, married the earl to one of his own daughters. This marriage was annulled.

A curious case occurred in 1886. The petitioner was a young lady of good position, and possessed of a fortune of £26,000, besides considerable "expectations." She sought to have her marriage declared null. The circumstances did not show that she was of weak mind, or had been entrapped into the marriage by fraud, but it was decided that she had been induced by terror to consent to the marriage, and that it could not be treated as valid. She was at the time of the alleged marriage 22 years of age. Five or six years before, when she was only about 17, she had made the acquaintance of the man. He belonged to the same class of society as she did, and was a few years older. Soon after the acquaintance began he made her an offer of marriage, which she refused. After some time they became engaged, and the engagement was never absolutely broken off, though at times this seemed likely to happen. A. S., the man, was impecunious, and induced the lady, after she became of age, to sign her name to a bill for £500. This was, of course, concealed from her mother

and friends. She was persuaded afterwards to sign further bills, and became indebted to the extent of £3325. The money-lenders pressed her for payment, issued writs against her, and threatened her with bankruptcy. Mr. Justice Butt said, "It is not matter of surprise that a young and inexperienced girl so situate should undergo mental suffering sufficiently acute to impair her bodily health. To such a person writs and bankruptcy summonses may well appear endued with unknown terrors. In the present instance it is alleged that the worry and distress to which the petitioner was subjected resulted in such a degree of prostration, bodily and mental, as to render her, if not incapable of exercising her reason, at all events unable to resist constraint and pressure brought to bear on her by others for their own ends." The state of mind the poor girl had been reduced to is indicated by a letter to a solicitor and friend. "Will you lend £2000? I am nearly mad. I will tell you everything when I come back to London, only for God's sake save me from disgrace. You are the only person I can trust. For heaven's sake do this for me, and charge me any per cent. you like, but pray save me. In a few days I shall be ruined, as I do not like going to anybody else for help. You are the only man I can trust. For heaven's sake do this. I shall be thankful to you all the rest of my life. I have not slept for nearly a fortnight. I am nearly wild. . .

Three months or a little more ago I signed two bills for Mr. S. (I rely on you never to tell him I have told you.) When I signed them I did so because he asked me so, and I was stupid enough to do it, and he promised me most faithfully to meet them when they came due. . . . I would not have mother know for anything, and it is hard, as I am fond of Mr. S. Only help me, and I will thank you all the rest of my life. For heaven's sake don't let him serve me with a writ, for it is bound to be known, and then I shall be ruined." The worry and anxiety of mind which was oppressing this lady was due to another cause as well as the pressure of pecuniary difficulties. She stated that A. S. had frequently threatened her that unless she would marry him he would accuse her to her mother, and in every drawing-room in London, of having been seduced by him. At the trial A. S. himself admitted that this abominable threat was based on nothing. When the young lady was in this state of distraction, A. S. told her that the only way out of her difficulties was to marry him, that the marriage would enable him to make arrangements with the money-lenders which would free her from further molestation; but if she refused to marry him he would do nothing to bring about an arrangement. On the contrary, he would ruin her. She gave the following evidence as to the ceremony:—After explaining that A. S. had written to her asking her to meet him about the bills, she said, "I met A. S. next morning

in Bond Street. I went in a cab. He stopped the cab and got in. He asked me to shake hands with him, and I would not. He had told the cabman where to go, when he got in. The cab stopped in S. Audley Street, at the registry office. He took me upstairs by the arm. He grasped my arm. I was nearly mad. I had no notion I was going into a marriage office. Count V. was there; I had seen him before. I did not like him. A. S. said he had brought me there to marry me that morning. I said I wished to go out of the room. Count V. stood at the door, and said that I should not leave. A. S. said if I did anything to show that I was not acting of my own free-will he would shoot me. He had pointed a pistol at me before, in May, 1885. Some people then came into the room. They spoke to me, but I did not know what they said. I was standing with my back to A. S., the respondent. The ring was put on my finger by him, and I threw it away. It never was over my knuckle. They asked me to take off my glove. I refused. They ordered me to, and I did. I was going out of the room. A. S. called me back, and said I was to sign my name. He said if I did not come back and behave properly he would ruin me. I think he took hold of my arm and brought me back. I would not speak to Count V. I was afraid of A. S.; he used to threaten me dreadfully. It was certainly not my wish to go through the ceremony of marriage with

A. S. I would not have done so but for what he said. I signed the book. He was knocking my arm the whole time to make me sign. I went downstairs. A. S. accompanied me. At the bottom of the stairs he told me to go, he had got all he wanted out of me. I got into a cab and went back. I don't know what state I was in. I have only seen A. S. twice since. I have never lived with him." In these circumstances the judge held that there had been no real consent, and the marriage was declared null.

It is hardly necessary to add that no marriage is valid if it be proved to the satisfaction of the Court that one of the parties to it was at its date insane, or imbecile, or so hopelessly intoxicated as not to understand what he was doing; for no insane person can give consent, and there is a point at which drunkenness deprives a man of will and reason.

Having now indicated the grounds on which alleged and apparent marriages may be set aside, I come to the question, how two persons of lawful age, and not physically incapable, can declare their consent to marry each other?

CHAPTER III.

How to Contract a Valid Marriage.

IN England and in most other countries there is substantially only one way of being married. It may be done either in a religious or civil mode, but both are equally regular and formal—*e.g.*, in England, if the parties wish to be married in a church, they must first either publish banns or obtain a licence. They then go on the appointed day to the church and are married by a clergyman with the usual ceremony. This is the religious mode. If they prefer the civil mode they must give notice to the registrar of their intention. He exposes the notice to view in a window or on a wall, where all persons interested may see it. After the expiration of a certain number of days they may go before the registrar and declare in his presence that they take each other for husband and wife. This is recorded by him in a book, he gives them a certificate, and they are married. The religious element and the interposition of a clergyman are here completely dispensed with. Hence all Roman Catholics, and many Anglicans, who regard marriage as a sacra-

ment, view this mode of marriage with great disfavour. From the standpoint of the church it is not a marriage at all; but in the eye of the law it is as valid a marriage as if performed by the Archbishop of Canterbury in Westminster Abbey. Nor does the law see in it any irregularity or want of due order. What is called the civil marriage in France, and many other European countries, is on precisely the same footing as this marriage before a registrar in England. But in France they go somewhat further. It is necessary for everybody to go through this civil form. If they choose in addition to have an ecclesiastical ceremony that is their affair. With that the law has nothing to do. The civil marriage is good by itself, but the religious marriage by itself has no effect in law. Accordingly all good Catholics, and most good Protestants, are married twice over, once before the government official, and once by a clergyman.

It is the great peculiarity of the Scotch marriage law that in addition to regular marriage, which, as explained, is the only marriage recognised in England or France, there are two distinct ways in which marriage may be contracted. These are both called irregular, and will be explained later; but it must be clearly borne in mind that, although irregular, they are quite valid when proved. It is a curious fact, though true, that there must always be in Scotland a considerable number of persons who

could not say off-hand whether they were married or not. It is only when the question has been decided in a court of law that their doubts can be removed. But although they do not know if they are married, and no one could tell them with certainty till the action was tried, it is nevertheless true that they must be either one or the other. There is no half-way house. Before taking up these irregular marriages I will explain shortly what is a regular marriage in Scotland.

CHAPTER IV.

How to Contract a Regular Marriage.

A REGULAR marriage is always performed by a clergyman or minister. He may be of any denomination. And among the Jews and Quakers, who have no fixed ministers, the marriage is regular if performed by the person selected for that purpose by the custom of these religious bodies.

In England marriage by a clergyman or minister is always performed in the church, and must be between certain fixed hours. In Scotland it is equally regular if celebrated by a clergyman in a private house, and any hour is lawful. It was formerly the custom in Scotland, even long after the Reformation, to celebrate marriages in church, and Roman Catholics and Episcopalians always continued to do so. Among Presbyterians, on the other hand, nearly all marriages have been celebrated for a long time back in private houses. The custom, however, of performing marriage in a Presbyterian church appears to be reviving, and nowadays it is not unusual. There must always be at least two witnesses, besides the minister. But before the

minister can legally perform the ceremony a certificate must be given him to the effect that certain preliminary steps have been taken. These steps consist of one of two things—(1) publication of banns; or, if preferred, (2) the issuing of notices. I shall explain these separately.

(1) *By Banns.*—If the parties desire to be married after proclamation of banns, each of them must intimate to the session-clerk of his or her parish church the names and designations of both (*i.e.*, address, occupation, and whether married, single, widower, or widow). It makes no difference to what church the parties may belong, the banns must be proclaimed in the Established church of the parish in which each resides. It is, however, sufficient residence that one has lived in the parish for fifteen clear days before proclamation. The intimation is sufficient if the session-clerk knows the parties, and that they are free to marry. But if he does not know if they have been fifteen days resident in his parish, or if they are unmarried, or if they are not within the prohibited degrees, the intimation must be accompanied by a certificate signed by two householders or by an elder certifying these facts. The intimation should be in this form (I put in names and dates for greater clearness):—

30*th March*, 1892.

THERE is a purpose of marriage between John Smith, clerk, single, residing at 19 High Street, in the Parish of St.

Cuthbert's, Edinburgh, and Mary Brown, widow, residing at 4 Walker Street, in the Parish of Roslin.

Application for proclamation is made by

(Signed) JOHN SMITH.

N.B.—It may be signed by any one authorised by him.

The certificate necessary when the session-clerk does not know the parties is in this form:—

30*th March*, 1892.

WE, Henry Mackintosh, accountant, householder, residing at 9 Royal Terrace, Edinburgh, and William Irvine, grocer, householder, residing at 25 Princes Street, Edinburgh, do hereby certify that the parties above named are personally known to us, and that the said Mary Brown, one of the said parties, has been resident in the Parish of St. Cuthbert's, Edinburgh, for the space of fifteen clear days immediately preceding the above date, and that we have good reason to believe them to be unmarried persons, and not related to each other within the forbidden degrees.

(Signed) HENRY MACKINTOSH, *Householder.*
(„) WILLIAM IRVINE, „

The intimation and certificate being in order, the banns may be proclaimed in the church on the following Sunday. This should, properly speaking, be done twice on two separate Sundays, but if the minister knows the parties, or is satisfied that there is no impediment, he may allow proclamation on one Sunday to be sufficient, and this is now commonly done. After proclamation the session-clerk gives to the parties a certificate in this form:—

AT Edinburgh, the 5th day of April, 1892, it is hereby certified that John Smith and Mary Brown have been duly proclaimed in order to marriage in the Parish Church of St. Cuthbert's, Edinburgh, and that no objections have been offered.

(Signed) DAVID GRIEVE, *Session-Clerk.*

(SCHEDULE C) 1892. MARRIAGE IN THE PAR

No.	Where, when, or how married.	Signature of the Parties.	Residence.		Age.
			Present.	Usual.	
12	On April 8th, 1892, at Edinburgh, marriage (after banns) was solemnized between, as according to the rites and ceremonies of the Established Church of Scotland.	John Smith.	19 High Street, Edinburgh.	4 High Street, Chesterfield, Derbyshire.	30
		Mary Brown.			28

When proclamation has been made only on one Sunday this certificate will not be given till forty-eight hours afterwards. Along with the certificate of proclamation the session-clerk gives the parties another certificate to be filled up at the marriage. Both must be handed to the minister before the ceremony. After he has married them according to the rites of whatever church he may belong to, he writes at the foot of the certificate of proclamation of banns the following declaration :—

AT Edinburgh, the 8th day of April, 1892, the above parties were this day married by

(Signed) JOHN KNOX, *Minister.*

The blank form which had been given to the parties is now filled up. It is in the form opposite. This schedule C is filled up at the marriage and handed by the minister to the parties. It must be delivered or sent by them to the registrar of the parish in which the marriage was solemnized within three days, under a penalty not exceeding £10. It is to be clearly understood that the banns must be proclaimed separately in the parish church of each of the parties. And if one of them resides in England time must be allowed for proclamation on three separate Sundays, this being still the practice there. But both or either of the parties may have preferred proceeding by notice, as afterwards described ; and it is immaterial that one of them has banns proclaimed and the other issues the notice.

(SCHEDULE C) 1892. MARRIAGE IN THE P[ARISH] OF ST. CUTHBERT'S, IN THE BURGH O[F]

No.	Where, when, or how married.	Signature of the Parties.	Residence.		Age	Rank or Profession and Relationship of Parties (if related).	Condition.			Birthp[lace] and wh[en]
			Present.	Usual.			If a Widower or Widow, whether Second or Third Marriage.	Children by each former Marriage.		
								Living.	Dead.	
12	On April 8th, 1892, at Edinburgh, marriage (after banns) was solemnized between, as according to the rites and ceremonies of the Established Church of Scotland.	John Smith.	19 High Street, Edinburgh.	4 High Street, Chesterfield, Derbyshire.	30	Clerk.	Bachelor.			Born at
		Mary Brown.			28	None.	Widow.	None.	One.	Bor[n] at

S, IN THE BURGH OF EDINBURGH. REGISTERED BY JOHN BROWN, REGISTRAR.

Condition.			Birthplace, and when and where registered.	Parents.		If a regular Marriage, Signatures of officiating Minister and Witnesses.	If irregular, Date of Extract Sentence of Conviction, or Decree of Declarator, and in what Court pronounced.	When and where registered, and Signature of Registrar.
	Children by each former Marriage.			Names.	Rank, Profession, or Occupation.			
	Living.	Dead.						
			Born & registered at Chesterfield.	William Smith, deceased, and Jane Smith, maiden name Robinson.	Grocer. None.	John Knox, *Minister of St. Cuthbert's, Edinburgh.* Thomas Smith, *Witness.* Maria Robinson, *Witness.*		
	None.	One.	Born & registered at Dalkeith.	Hugh Brown and Eliza Brown, maiden name Thomson, deceased.	Builder. Dressmaker.			

NOTICE OF MARRIAGE (PURSUANT TO THE MARRIAGE NOTICE (SCOTLAND) ACT, 1878.)

To the Registrar of the Parish of Dalkeith in the County of Midlothian.

I, WILLIAM WHITE, give you notice that I, and the other person herein named, are about to contract marriage; (that is to say,)

NAME AND SURNAME.	Condition.	Rank or Profession.	Age.	Dwelling Place.	Parish (or District) and County in which Parties respectively dwell.
William White, - -	Bachelor,	Joiner,	25	5 High Street, Dalkeith.	Dalkeith, Midlothian.
Margaret Fuller, - -	Spinster,	.....	23	3 Duke Street, Dublin,	St. Patrick's, City and County of Dublin.

And I solemnly declare that I believe there is no impediment of consanguinity, or affinity, or of age, or other lawful hindrance to the said marriage, and that I have had my usual place of abode and residence for the space of fifteen days immediately preceding the date of this notice within the above named Parish of Dalkeith, Midlothian. And this I declare, knowing that if the declaration is false, I expose myself to the penalties of perjury. In witness whereof I have hereunto set and subscribed my hand, this 5th day of October, 1890.

(Signed) WILLIAM WHITE.

Subscribed and declared by the above named in the presence of us the undersigned householders in the above named Parish, who declare that we believe the statements contained in this notice to be true.

(Signed) ROBERT ELSMERE, Grocer, 6 High Street, Dalkeith, *Witness.*
(„) DAVID ELGINBROD, Draper, 7 Broad Street, Dalkeith, *Witness.*

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If the marriage do not take place within three months after proclamation of banns, the minister can require them to be proclaimed again. The fee for publishing banns and issuing the certificates is 2s. 6d., and is to be paid to the session-clerk.

(2) *By Notice.*—This notice, as a substitute for banns, dates only from 1878, and was introduced by an Act which is quaintly entitled, "An Act to encourage Regular Marriages in Scotland." Any person, instead of having his or her banns proclaimed, may proceed by way of notice. He (or she) must in that case give (or send) to the registrar of the parish or district in which he (or she) has resided for not less than fifteen clear days a notice in the form presented on the previous page. If both parties have resided for fifteen days in the same parish, one notice is sufficient. "We" must be substituted for "I," and it must be signed by both.

The registrar affixes a notice of the names and designations of the parties in his window. It stays there for seven clear days. If no objection to the marriage has been lodged, he then gives a certificate to the parties in these terms:—

REGISTRAR'S CERTIFICATE.

I, HENRY SKIRVING, Registrar of Dalkeith, hereby certify that on the 5th day of October, 1890, William White, Bachelor, Joiner, 5 High Street, Dalkeith, duly gave notice to me of his intended marriage with Margaret Fuller, Spinster, 3 Duke Street, Dublin, that all the requirements of law in respect of such notice, so far as the said William White is concerned,

(Signed) ROBERT ELSMERE, Grocer, 6 High Street, Dalkeith, *Witness.*
(„) DAVID ELGINBROD, Draper, 7 Broad Street, Dalkeith, *Witness.*

have been complied with, and no objections stated (or written statement of objections lodged with me, *as the case may be.*)

Certified by me, the said Henry Skirving, this 13th day of October, 1890.

(Signed) HENRY SKIRVING.

(If the marriage do not take place within three months of the certificate, the certificate is void, and a new notice must be given.)

The registrar's certificate is given to the minister, and takes the place in all respects of the certificate that banns have been proclaimed. A copy of schedule C (printed opposite page 33) is supplied by the registrar, and filled up and sent in exactly as in the case when the proclamation has been by banns.

A minister who marries people with a religious ceremony, not having had produced to him a certificate of banns or a registrar's certificate applicable to each of the parties, is liable to a penalty of £50.

The fee for the registrar's certificate is 2s. 6d.

CHAPTER IV.

Irregular Marriages.

THERE are three ways in which a marriage may be contracted in Scotland without the presence of a minister of any kind. In England, as has been said, people may be married before a registrar instead of a minister. But this is a perfectly regular marriage, like the civil marriage in France. Scotland is the only country in Europe where it is possible to be married without the presence of either a minister or a government official such as a registrar. In some of the States of America this is law also, in others a celebration is necessary. Beyond the provision to put a stop to the Gretna Green marriages by declaring that an irregular marriage should not be valid unless either the man or the woman had lived in Scotland for 21 days, the Legislature has not attempted to make any change in the Scottish law of irregular marriage. Royal commissions have twice inquired into the subject, but no further action was ever taken. It cannot be said that there is any strong popular feeling on either side. Probably the sentiment of the majority would be in favour of making no change in the law.

In England much misconception exists on the subject. A deservedly popular novelist, Mr. Wilkie Collins, on reading the report of the last Royal Commission, was so horrified at the state of the law in Scotland that he expresses himself thus—"In deference to the arguments in favour of allowing the present disgraceful state of things to continue, I find them resting mainly on these grounds—That Scotland doesn't like being interfered with by England (!). That irregular marriages cost nothing (!!). That they are diminishing in number, and may therefore be trusted in course of time to exhaust themselves (!!!). That they act on certain occasions in the capacity of a moral trap to catch a profligate man (!!!!). Such is the elevated point of view from which the institution of marriage is regarded by some of the most pious and learned men in Scotland. A legal enactment providing for the sale of your wife, when you have done with her, or of your husband, when you 'really can't put up with him any longer,' appears to be all that is wanting to render this North British estimate of the 'Estate of Marriage' practically complete. It is only fair to add that of the witnesses giving evidence—oral and written—before the Commissioners, fully one-half regard the irregular marriages of Scotland from the Christian and the civilised point of view, and entirely agree with the authoritative conclusion already cited—that such marriages ought to be abolished."

Fired by this generous enthusiasm, Mr. Collins wrote the novel called "Man and Wife" in order to draw public attention to the monstrous condition of the marriage law. The leading characters are occupied chiefly during three volumes in the interesting inquiry which of them is married to which. Unfortunately the novelist's researches into the law of marriage, though conscientiously prosecuted no doubt, and vouched for at various places by references to the report of the Royal Commission, were not sufficiently profound to preserve him from falling into the most fatal mistakes imaginable. As even in Scotland many people are not a little hazy in their ideas on the subject, it may be worth while to point out wherein this very common error consists into which Mr. Wilkie Collins fell. It has already been glanced at, and may be expressed in a sentence. Mr. Wilkie Collins, and a great many other people, imagine that the natives of Scotland, and, still more, unprotected travellers in that country, need to exercise great circumspection to avoid being married by mere inadvertence. A few incautious expressions are used by two people neither of whom has the slightest desire to marry the other, and lo and behold they are married in spite of themselves, and not all the king's horses and all the king's men can repair the disaster. One doesn't wonder at Mr. Wilkie Collins feeling his blood boil when he thinks that in every visit he makes to Scotland he carries his life in his hand, and has only Providence

to thank if he gets safe back over the border without having been married by mistake.

The two unfortunate young people in his novel who are brought together at the Scotch inn are placed undoubtedly in a very compromising position. But it was only the reputation of the lady which was placed in jeopardy. Mr. Collins, however, with his view of the matter, may well feel seriously concerned for them. "Neither of them," he says, "had any adequate idea (few people have) of the infamous absence of all needful warning, of all decent precaution and restraint, which makes the marriage law of Scotland a trap to catch unmarried men and women to this day" ("Man and Wife," vol. i., p. 196). Now, this was the "trap" into which Mr. Arnold Brinkworth and Miss Anne Silvester had walked. It had been arranged that Anne Silvester and Geoffrey Delamayn should secretly marry each other in Scotland. For this purpose the lady repairs to a country inn and informs the landlady that she will be joined in a few days by her husband Geoffrey Delamayn, not being able to keep his appointment with her, sends Arnold Brinkworth, his friend, to explain matters. For reasons somewhat obscure, but sufficient for a novelist, it is considered necessary, in order to shield the lady's reputation, that Arnold, when he goes to the inn, shall ask for Anne as if he were her husband. Why he couldn't have explained to the landlady that he came merely as a messenger from Geoffrey is a

question which it would be unkind to press. The plot required that he should personate Geoffrey, and personate him he does. He asks at the door for "my wife." In the presence of Bishopriggs, the old waiter who speaks such wonderful Scotch, the Scotch of "Stratford atte le Bow," he again refers to her as his "wife," and persuades her to keep up the deception and speak of him as "husband." Then the last train having been duly missed, and the storm having as duly come on, it is found to be impossible that Arnold Brinkworth should leave the inn that night. As it would have appeared marvellous in the eyes of the landlady and the waiter if the young husband had asked for a room in another part of the house, it is agreed that Arnold shall spend the night in the sitting-room adjoining Anne's bedroom. Next morning he goes away. The great problem which agitates the breasts of so many wise men, including "Sir Patrick," the eminent advocate, is, have Arnold and Anne stepped unwittingly into this snare which Scotch law has spread for the unwary tourist? Are they married willy nilly?

Now, if Mr. Wilkie Collins, who has made a special study of the report of the Royal Commission on the Marriage Law, and quotes the opinions of learned judges, and has written a novel to elucidate the subject, is after all this so hopelessly befogged, is it surprising that his countrymen, who are mere inexperienced laymen in the matter, and know nothing

of Royal Commissions, should feel when they pass Carlisle or Berwick-on-Tweed that they may be married at any minute? If this calamity overtakes them, they can only say "kismet."

But things are not really so bad with us as Mr. Wilkie Collins was led to suppose, and though his novel brought about no change in the law, there are still unmarried men and women in Scotland who have never been caught in this "trap," and whose minds are not greatly disturbed by apprehensions of that fate. If they are prudent they will avoid placing themselves in positions so compromising as that of Arnold and Anne. But if such a thing should happen—and is not truth said to be stranger than fiction?—let them rest assured they are not married. The law of Scotland is not going about like a raging lion seeking to marry people unawares. For let it be observed neither Arnold nor Anne had any matrimonial intentions. Arnold was engaged to Anne's friend, and with Anne's knowledge. Anne was very much entangled with Geoffrey Delamayn, and, as it turned out, was at this very time, in Mr. Collins' view of the law, really married to him. True, she did not know she could then claim to be Geoffrey's wife, and it is very doubtful whether a Scottish judge would confirm Mr. Wilkie Collins in giving her that rank, but assuredly she had not the slightest idea of marrying Arnold Brinkworth. Now, the law in such a case as this is, *pace* Mr. Wilkie Collins, as clear as the

noonday sun. If two people agree to pretend to be husband and wife for some ulterior purpose, the fact that a waiter and a landlady took them to be such will have no more effect in marrying them than the belief in witchcraft will enable an old woman to ride through the air on a broomstick. Why should it? It is to be feared that many people stay together at hotels and lodging-houses who are neither married nor have the least intention of marrying. To avoid scandal and to obtain quarters they call each other husband and wife, and there the matter ends. Anyone who has seen landladies in the box knows that it is with them a point of honour to say they thought the two people were married. A landlady of experience and judgment will, no doubt, sometimes have her suspicions about the two people in the drawing-room. But as a prudent woman she smothers these doubts in her breast, or confides them only to a few of her dearest friends. The rent is paid; she cannot say for certain whether her guests may not be married after all; the respectability of her house is not impaired; and if she should ever be called into the witness-box, nothing will shake her in her assertion that she "always took them to be man and wife." But the view is fundamentally erroneous that in such a case the law of Scotland will hold them married. Its error may be stated in three words—*marriage requires consent.*

The question has often been debated by lawyers

if it is correct to describe marriage as a contract. Some writers prefer to call it a status or an institution. The difficulty in calling it a mere contract is this—Two people may agree to marry each other, but they cannot agree what sort of marriage it shall be. If they take each other it is "for better, for worse." They must accept all the consequences and incidents of marriage as it is fixed and determined by law. They could not, for example, agree to be married for ten years, or that the wife should be head of the house, or that the children should not have any rights of succession. All that they can do is to agree to marry. It is the law which lays down what are the rights of the husband, the rights of the wife, the rights of the children; whereas as a general rule in the making of contracts the parties may come to any terms they like. The discussion is not a particularly fruitful one, and I only mention it to introduce the elementary proposition so often lost sight of—that there must be matrimonial consent. Whether marriage is a contract or something more, there is no doubt at all that it is entered into by a contract—an agreement to marry. And the great difficulty and peculiarity of the law of Scotland lies in this, that when it is proved that the two people agreed to marry (*i.e.*, to marry then and there, not at some future time, which would only be promise of marriage), then they are married, provided, of course, there was no legal impediment.

There are no doubt certain cases in which the Court will not listen to one of the parties who comes forward and says, "I never intended marriage." But this is the same in all contracts. If one party ostensibly consents, and the other party relies on this apparent consent and is thus led into the contract, it is too late for the fraudulent party to plead, "I never meant what I said." But even in this case the non-consenting party may withdraw if there has been no cohabitation. Lord Brougham says in one case, "For it is perfectly clear, I hold it to be past all doubt, in Scotland at least, that if a man says to a woman 'I take you for my wife,' and she assents and says 'I take you for my husband,' she really intending to take him for her husband, though he may all the while only intend to deceive her, or to deceive the world, or to practise a fraud for any purpose, it is past all doubt, that she receiving the proposition and really assenting to it, he shall not be heard to say that he did not mean it. He has contracted a marriage with her as completely as if he had really intended to contract it, and not merely attempted to compass a fraud." But leaving out of view cases like this, which are not really exceptions, the first great rule of the law of marriage is that the two parties shall consent to marry each other. By the liberal use of illustrative cases I hope to make the law of these irregular marriages pretty clear.

Marriage by Declaration of Present Consent.

The simplest form of irregular marriage which can occur is that which consists in the mere expression of mutual consent to marry.

By the law of Scotland, if a boy of fourteen says to a girl of twelve, "I hereby declare that you are my wife," or "I hereby take you for my wife," or uses any words to the same effect, and she signify in any way her assent, they are validly and irrevocably married. The Court must be satisfied that they meant it at the time, and there must be no impediment, but nothing more is required. In strict theory the presence of witnesses is immaterial. But without them it would not be easy to prove that the declaration had been made. If, however, such a case ever arose, and the Court were satisfied in any way—as, *e.g.*, by the admissions of both parties, by their subsequent conduct, by expressions in letters, or otherwise—the fact that no witnesses were present when the declarations were interchanged would in no degree affect the validity of the marriage; and indeed it has often happened that the Court has inferred from a correspondence that the parties had at some time mutually declared their consent to present marriage.

The M'Adam Case.—This was the case, decided in 1813, in which it was finally settled by the House of Lords that mere declarations of mutual consent,

without being followed by cohabitation, are sufficient to make a valid marriage.

Mr. Quintin M'Adam, of Craigengillan, was the proprietor of large estates in Ayrshire. He was said to be a man of very violent and excitable character, subject to extraordinary outbursts of anger, but, notwithstanding, of a remarkably clear and vigorous mind. In the year 1800, he "took into keeping," as the report expresses it, Elizabeth Walker, a country girl, who lived with her brother, a farmer, in the neighbourhood of Mr. M'Adam's house. The girl left her brother's house secretly, and on the day after Mr. M'Adam writes to her brother in these terms:—

"Berbeth, 21st February, 1800.

"Dear James,—You will perhaps be surprised when I tell you your sister is come to live with me, but I hope you will not be angry, when I assure you that I mean to behave to her in the most honourable manner. I have already settled sixty guineas on her yearly during her life. *I have made her no promise of marriage, but it is very probable it will end in that.* She and I would be very happy. You will come over to-day, and if there is any further explanation you wish, I shall be glad to make it you.—I am, James, yours, &c., "QUINTIN M'ADAM."

Mr. M'Adam's views of honour were, it will be observed, very much those of a grand seigneur under the *ancien régime*, but in the end he was better than

his word. He wrote to his lawyer also in a way clearly implying that he contemplated the possibility of marrying Miss Walker, though he had not made up his mind. He writes:—

"Dear Sir,—I am going to take a girl into keeping; her name is Elizabeth Walker, daughter of the late John Walker, in Knockdon, parish of Straiton. Get two bonds wrote instantly, and be sure to send them by the very first post to Ayr, binding me and my heirs to pay her sixty guineas yearly so long as she lives. *Write them, so that if I at any time marry her, that she gets no more jointure, unless provided by a subseqvent deed.* I mean by that to prevent any claim to a third of the moveables. I suppose it can be done; if not, write them as you see best. Be sure that they arrive at Ayr on Wednesday or Thursday at farthest. *I shall be in Edinburgh the first week of March, and will bring in the will; but is it not better to allow it to remain as it is, until we see what this produces?*—I remain, &c., "QUINTIN M'ADAM."

Probably Mr. M'Adam intended to marry Miss Walker in the event of her having children. Five years afterwards, on the 21st March, 1805, he determined to carry out this resolution. He wrote to Mr. Smith, his man of business in Edinburgh:—

"Berbeth, 21st March, 1805.

"Dear Sir,—As I intend to marry Miss Walker immediately, come out as soon as you receive this,

and bring stamped paper to write the contract, and everything requisite to draw up a deed to have the whole of my landed property that I now have, or may afterwards acquire, strictly entailed.—I am, Dear Sir, sincerely yours, "Q. M'ADAM.

"Mention this to no person, not even to your son.
"Q. M."

This letter was sent to the post late on the morning of Friday, the 22nd March. Mr. M'Adam, after walking out before breakfast, came in and told Elizabeth Walker that he wished to declare their marriage immediately, without waiting for Mr. Smith's arrival. She expressed her willingness, and accordingly, between 10 and 11 in the morning, Mr. M'Adam summoned three of his men-servants into the dining-room. He then asked Elizabeth Walker to stand up, and, holding her hand, said, "I take you three to witness that this is my lawful married wife, and the children by her are my lawful children." Elizabeth said nothing, but curtsied in sign of assent. Mr. M'Adam afterwards walked out and called on his factor. He told him of his marriage and asked him to dine with him that day. The same afternoon Mr. M'Adam shot himself. The question then arose whether his estates went to his children by Elizabeth Walker. This depended on the validity of the marriage. It was naturally enough strenuously contended that Mr. M'Adam was insane at the time of the cere-

mony, but the House of Lords held this not proved. But, even admitting his sanity, it was maintained that mere mutual consent not followed by cohabitation is not of itself marriage. The Court, however, decided otherwise. This case must no doubt have scandalised Mr. Wilkie Collins, but it will be observed that the evidence was quite enough to show that Mr. M'Adam seriously meant to marry Elizabeth Walker and that she consented. They did not meet the fate he so much dreaded for his heroines, viz., being married accidentally by the insatiable law of Scotland.

A Gretna Green Marriage.—As another illustration of marriage by simple declaration I give a case which occurred so lately as 1859. To avoid causing pain to persons who may be living I have altered the names. John Black, a lawyer residing in Kendal, had formed an intimacy with Helen Smith, which had lasted for about six years and resulted in the birth of two children. Black was 43 years of age when the connection began, and Helen Smith only 19.

In 1847 they arranged to go to Gretna Green to be married. They went by train to Gretna station, which is on the English side of the Border, and walked across to the toll-house on the Scotch side. The toll-keeper, a certain John Murray, gave evidence at the trial as to the mode of marrying people adopted by him. He seems to have had a large practice, for he says that on this particular day, which was Carlisle hiring-day, he married 40 persons, and that in a year

he generally married upwards of 400 couples. The ceremony he employed was this—He made the parties stand up before two witnesses and take each other's hands. He then said to the man, "Do you take this woman to be your lawful wife, to live together for better or for worse so long as you shall be spared, before God and these two witnesses?" The man said, "I do," and a similar question was put to the woman. The toll-keeper celebrant then said, "You have acknowledged yourselves to be man and wife, joined together as one. Whom God joins together let no man put asunder. You have this day declared yourselves, in the presence of God and of these two witnesses, to be man and wife according to the laws of Scotland." The man then put a ring on the woman's finger, and they signed a register and received the usual certificate, known as the "marriage lines." The register and certificate were in these terms:—

ANNAN, Parish of Annan, 18*th Nov.*, 1843.—We, John Black, residing in the parish of Kendal, in the county of Westmoreland, and Helen Smith, residing in the same parish, do hereby acknowledge ourselves to be married persons from the 1st of November, 1843; in testimony whereof we have requested Mary Murray and David Murray to sign this as witnesses to the genuineness of our signatures.

Witnesses— JOHN BLACK,
Mary Murray. HELEN BLACK.
David Murray.

Certificate.

Kingdom of Scotland, County of Dumfries, Parish of Annan.

These are to certify to all to whom these presents shall come that John Black, from the parish of Kendal, in the county

of Westmoreland, and Helen Smith, from the same parish, being here present and having declared themselves married persons, were this day married after the manner of the laws of the Church of England and agreeably to the laws of Scotland as witness our hands. Annan, this the 1st day of November 1843.

Witnesses— JOHN BLACK.
John Murray. HELEN BLACK.
Mary Murray.
David Murray.

This done on the 13th November, 1847.

If the Gretna Green toll-keeper's business had not been ruined by the Act which requires 21 days' prior residence in Scotland, it is probable that by this time he would have taken to celebrating marriages with a "full choral" service.

In 1859 Mr. Black endeavoured to have this marriage declared null. He said that the ceremony was in 1847, and the certificate had been antedated 1843. The object of this seems to have been to make it appear that the first child had been born after marriage. But it was decided that the evidence showed they meant to be married, and married they must be held to be.

Use of Terms "Husband and Wife" in letters.— The mere fact that in a correspondence between a man and a woman they address each other as husband and wife will not be sufficient evidence that they have married each other, for such words are not infrequently used by lovers as terms of endearment. But if the whole tenor of the correspondence leads to

the conclusion that they must have agreed to hold themselves as married this will be enough. It is not necessary that the particular time and place be shown at which they consented so to take each other for spouses. And it is immaterial whether they ever cohabited or not.

A very curious case of this kind came before the Court in 1860. After the death of a Mr. L., a minister of the Church of Scotland, a lady came forward and claimed that she was entitled to an annuity from the Ministers' Widows' Fund as having been his wife. She produced a voluminous correspondence between herself and Mr. L., extending over more than thirty years. In these letters, during the first few years, they subscribed themselves "Your betrothed husband," "Your betrothed wife;" but afterwards they changed this mode of subscription into "Your affectionate husband," "Your loving wife," or similar phrases. It was proved that they had been secretly engaged when Mr. L. was a divinity student. No one had ever heard that they were married. The relations and friends of the lady always regarded her as unmarried, and Mr. L. was reputed a bachelor in the society in which he lived, and contributed in that character to the Widows' Fund. The letters were full of hopes of living together, but Mr. L. represented that his circumstances were so embarrassed as to make it necessary to keep on deferring the event. In the end he

committed suicide, and was found to be in debt to the extent of more than £7000. It was not proved that they had ever cohabited as married persons. The letters, moreover, nowhere contained any specific statement that they had at some particular time interchanged consent to marriage. But the Court held that the tone and the scope of the correspondence showed that they must have thus consented, and the marriage was found proved.

A Written Acknowledgment delivered.—An excellent illustration is afforded by a famous case which occurred in 1842. A certain Dr. Archibald Hamilton, who was connected with a Scottish noble family, had been a surgeon in the army. He retired in 1814, and went to reside in Edinburgh. His means were small, and for a considerable time he lived with his sisters. During that period he formed a connection with a woman in an inferior condition to himself, named Mary Clark, who resided in the Canongate. By her he had two children, whose illegitimacy at birth was admitted. Dr. Hamilton was obliged to give security to the parish for their support. About the year 1817 he left his sisters' house, and took a house or apartments of three rooms in Brown Street, in the Pleasance. Mary Clark and the children removed from the Canongate, and lived with Dr. Hamilton until his death. His friends regarded the connection as an illicit one, but the people in the neighbourhood appear to have believed that

Mary Clark was a lawful wife. In 1817 Dr. Hamilton applied to a lawyer for the purpose of obtaining a writing by which Mary Clark should be secured a pension as the widow of an army surgeon, if she survived him. The lawyer explained that she could not be his widow unless she were first his wife. Dr. Hamilton at first said he would never marry her, but afterwards changed his mind, and said to the lawyer, "I wish you would draw me out the form of an acknowledgment of marriage between me and Mary Clark. It will please and satisfy her." He took a form away with him, and returned in about a week with the following acknowledgment in his own hand:—"To Mary Clark, Edinburgh. September 26, 1817. My dearest Mary,—I hereby solemnly declare that you are my lawful wife, though, for particular reasons, I wish our marriage to be kept private for the present. I am, your affectionate husband, Archibald Hamilton." It was addressed on the back "To Mrs. A. Hamilton, Brown Street, Pleasance." On its being proved that this letter had been delivered, or at anyrate that its contents had been communicated to Mary Clark, and that she had impliedly consented to be Dr. Hamilton's wife, it was decided that the marriage had been established.

The Dalrymple Case.—The most famous case on the Scotch law of marriage was decided by an English judge. It arose in the following way:—Mr. John William Henry Dalrymple (who afterwards succeeded

to the title of Earl of Stair) was at the age of nineteen a cornet in the Dragoon Guards. He was quartered with his regiment in Edinburgh in the spring of 1804. He there made the acquaintance of Miss Johanna Gordon, a young lady of good position. An attachment grew up between them. Mr. Dalrymple being aware that the marriage would be displeasing to his father, induced Miss Gordon to consent to a secret engagement, which was not disclosed even to her own father. During the winter of 1804-5 they frequently met clandestinely, both at the house of the lady's father in St. Andrew's Square and at his country house of Braid. In 1805 the young officer sailed for Malta. On the eve of his departure he wrote to Miss Gordon enjoining her to the strictest secrecy, and begging her to disbelieve any reports she might hear as to his having transferred his affections to another. She continued to write to him, but he appears soon to have formed the design of breaking with her. He neither answered her letters nor saw her again, and in 1808 he returned to England, and was married according to the rites of the church to Miss Laura M——.

Miss Gordon now came forward and raised a suit for restitution of conjugal rights. As Mr. Dalrymple was domiciled in England, it was necessary that she should bring her action there, and the case was heard before Lord Stowell, a judge of the highest eminence Miss Gordon maintained that she had been validly married to Mr. Dalrymple, and that his pretended

marriage with Miss Laura M—— was therefore a nullity. In support of her assertion she produced certain documents kept in an envelope inscribed "Sacreed promises and engagements, J. D., J. G." They were couched in these terms:—

No. 1.

(Endorsed) "A sacreed promise."

"I do hereby promise to marry you as soon as it is in my power, and never marry another.

J. DALRYMPLE.

"And I promise the same. J. GORDON."

No. 2.

"I hereby declare that Johanna Gordon is my lawful wife. J. DALRYMPLE.

"*May 28th, 1804.*

"And I hereby acknowledge John Dalrymple as my lawful husband. J. GORDON."

No. 10.

"I hereby declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power. J. W. DALRYMPLE.

"*July 11th, 1804.*

"I hereby promise that nothing but the greatest necessity (necessity which . . . situation alone can justify) shall ever force me to declare this marriage.

"J. GORDON (now) J. DALRYMPLE.

"*July 11th, 1804.*

"*Witness*—CHARLOTTE GORDON."

It was also said that there had been cohabitation, and Lord Stowell obtained the opinions of many eminent Scotch lawyers on the question whether these papers in themselves were a sufficient evidence of marriage, and if not, whether cohabitation would make up the deficiency. In the end he decided that, quite apart from cohabitation, the documents sufficiently proved marriage. The regular marriage with Miss Laura M—— was thus set aside. The evidence, both of the witnesses and of the letters, left little doubt that there had been cohabitation.

Grizell Lyall, a maid who attended to the young ladies, deponed—"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, when she rang 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) rang 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 Captain 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 in this way she showed him upstairs to the dressing-room off the

young ladies' bedroom, where Miss Gordon then was, but that afterwards, upon her opening the door, he went straight upstairs without speaking or being shown up, but how long he continued upstairs she does not know, as she never saw him go out of the house." Captain Dalrymple had also been seen by others of the servants leaving the house in a furtive manner in the mornings.

In spite of the sympathy one feels for the innocent Miss Laura M—— who had gone through a solemn form of marriage with him and was now declared to have never been his wife, there is pleasure in thinking that this young scapegrace was not allowed to shake himself free of his "sacreed promises and engagements."

It must not be forgotten that, in judging of the question whether two persons have married each other, the Court will narrowly scrutinise all the circumstances. It is not enough to throw down on a table a document bearing "I take you for my husband," and "I take you for my wife," and to say, "There you have sufficient evidence of marriage." It might very well be that such a document had been written in jest, or in order to impose on some third party, or, in short, for any other purpose than to make the parties husband and wife. The position of the parties, their relations with each other before and after the signing of such a declaration, and their respective explanations of what they meant by

it, will all be jealously considered before a decision is arrived at.

In a case tried in 1891 an attempt was made to show that a declaration of marriage was made for an ulterior purpose. The facts were these:—A young woman of 28, a nurse in a hospital, was staying on a visit with the family of an aunt in Glasgow. A violent attachment sprang up between her and a cousin, who was only 19 years of age. An illicit intercourse was carried on for some time, and after it had begun, declarations in these terms were exchanged by the parties (I give only initials)—

"I acknowledge Caroline Jane W—— as my lawful wife. JAMES WILLIAM I——.

"*Witness*—J. S. S.; *Witness*—H. M.
"*8th May, 1889.*

"I acknowledge James William I—— as my lawful husband. CAROLINE JANE W——.

"*Witness*—J. S. S.; *Witness*—H. M."

A correspondence took place between the parties in which they subscribed themselves "Your loving husband," "Your loving wife."

The young man was a journeyman tailor in the employment of his father. He was in delicate health, and had no adequate means of supporting a wife. In addition to the evidence of the declarations and the letters, it was proved that he had presented her with a wedding-ring, which she occasionally wore. It is true

that he borrowed from her part of the money to pay for it. On one or two occasions she introduced him to a friend as her husband, and he did not disclaim that position; but as a rule they both passed as unmarried parties. She subsequently brought an action to have it declared that a marriage had been constituted between her and her cousin. He defended it, and said they had never meant present marriage. The woman in this case had to face a great difficulty. The written declarations had disappeared. She said they had been stolen out of her box by the defender's mother or sister. The persons who had signed as witnesses had simply put their names to the paper at a later date. They had not seen the parties write their names, nor heard them acknowledge their signatures, or declare themselves husband and wife; but the young man himself, on being put into the box, did not deny that the declarations had been exchanged, and that they were in the terms stated above. He attempted, however, to explain them away. His account of the matter was that once when he was suffering from an attack of pleurisy, and it being doubtful if he would recover, his cousin asked him to sign a document which, in the event of his death, would enable her to claim an insurance which existed on his life. Knowing he had wronged her, he signed the document for this purpose. According to him, they neither of them intended that the mere interchange of these documents should make a marriage. They

never regarded each other as husband and wife, but always as engaged persons. No doubt in their letters they employed these terms "husband" and "wife," but merely as words of endearment, and not even invariably. He said the pursuer had herself destroyed the document. "We quarrelled very bitterly at that time, and there had been a good deal of nagging on both sides. The feeling got worse and worse, and ultimately the pursuer flew out of my room into her own, and came back flourishing the document in my face. She then tore it in two, and said that that finished it for good and all." Now, if he had satisfied the Court that the writings were exchanged, not to make marriage, but to secure the payment of the insurance to the woman, his defence would have been successful. But if, on the other hand, they meant marriage at the time, the mere destruction of the documents would not set them free. Sophocles says,

> To make undone that which hath once been done,
> Even the gods avail not;

and though marriage in Scotland may be entered into by very rough and ready methods, it cannot be dissolved merely because the parties have changed their minds and would now prefer to be free. And the story about the insurance did not seem a very probable one when it was proved that in fact there was no insurance on his life, except one for £15 or £20 taken out by his parents when he was a child. This was not his, and he could not therefore have

given his cousin any right to it. Further, he admitted in the box that at the time of the exchange of the declarations he was matrimonially inclined. He said, "When pursuer made the proposal that I should do something to keep the insurance money for her, I suggested that it might be just as well to get married before the registrar, and I was quite willing to do so," an instance of popular haziness about modes of marriage. And when further questioned by the judge as to this, he said, "I asked the pursuer twice to go with me and be married before the registrar. I said that we should do so rather than sign these documents. I was perfectly willing on the 8th of May, 1889, to marry the pursuer outright if she would go before the registrar, but not unless she did so." So that, on his own showing, he was quite ready to marry his cousin, and only differed from her as to how they were to do this. But when you find a man who is proved to have been willing to marry a woman, giving her a declaration saying, "I acknowledge A. B. as my lawful wife," some more substantial reasons must be produced why he shall not be taken to have meant what he said. It might be done, but in this case the Court held that a marriage had been proved.

Marriage by Promise subsequente copula.

I now pass to the second mode of contracting an irregular marriage. It is now peculiar to Scotland, but

was at one time the law of nearly all Europe. It originated in an answer given by Pope Gregory IX. to a French bishop. During the Middle Ages, and up to the Reformation, the law of marriage was administered not by civil but by ecclesiastical judges. As a sacrament, marriage was too holy a thing to be dealt with by mere lawyers. Strictly speaking, every bishop was the judge in his own diocese in all cases relating to marriage or wills and other matters over which the church claimed authority. He did not, however, perform this duty in person, but by a deputy, who was called the "official." This "official" was always a priest. From him there was an appeal to the Pope and his court at Rome. In Scotland many such appeals are on record. Moreover, the Popes, who were always advised by learned ecclesiastics, were in the habit of solving knotty problems of ecclesiastical law which were submitted to them by church dignitaries. So much explanation is perhaps necessary to make clear how an opinion of Gregory IX., delivered about the year 1234, should have given the law of Scotland a principle which it still retains and practises. The question which the bishop put to the Pope was this—"If a man promise to marry a woman, and subsequently have intercourse with her, what is the legal position of the parties?" The Pope replied, "He who has pledged his faith to marry a woman, and afterwards has intercourse with her, although he marry another in face of the church and cohabit

with her, is bound to return to the former woman. For although the first marriage appear merely presumable, yet against a presumption of this kind no evidence can be admitted. From which it follows that the marriage, which in fact came after, is not regarded as a genuine one, or indeed as any marriage at all." And this is still the law of Scotland, subject to certain qualifications. It may be shortly stated thus—If a man promise to marry a woman, and she, relying on his promise, allow him to have intercourse with her, this is a marriage. But the promise must be in writing, unless the man admits in the box that he made it.

It has indeed been very much disputed among lawyers whether this is actually a marriage, or only a ground for demanding a marriage. Some maintain that the right of the woman was limited to this—She could go to the ecclesiastical Court and prove the promise and her surrender. The judge would then order the man to solemnize a marriage with her under pain of imprisonment and excommunication.

At a later date, in this view, the Courts came to regard a judgment ordaining the man to marry as equivalent to marriage. Others say the promise is converted into marriage by the woman allowing intercourse on the faith of it. They are married *ipso facto*, and the Court simply finds that this has been proved, as in the case of marriage by declaration. The argument is too technical to be of general interest, but it has an

important practical bearing. If the theory be sound that there is no marriage till the aid of the Court is invoked, the woman loses her remedy if the man dies before the action, for a Court of law cannot compel a dead man to solemnize the bond of matrimony. If the other view be sound, then, if the woman can prove her two facts, there is nothing to prevent the Court from finding that she was married though the man be since dead. This question has never been decided. The rule of evidence in such cases greatly limits the number of actions raised. Unless the man himself admits the promise in the witness-box, it must be proved by writing under his hand. But by this it is not meant that the woman must be able to produce a document saying in so many words, "I hereby unconditionally promise to marry you." It is enough if she bring letters written by the man which leave no doubt in the mind of the judge that the man must have made such a promise and she must have accepted it. In arriving at this conclusion the Court will look carefully into all the circumstances, the position of the parties, and their conduct to each other. Expressions of passionate attachment might well enough occur in a correspondence between a man and a woman who had not honourable matrimony in view. But if the character of the woman and her conduct satisfy the Court that she believed the man was an honest lover, and the expressions used by

him in his letters bear out that construction, it does not matter though no express promise can be found in them. A short account of one or two cases will make this clearer.

The Case of Honyman v. *Campbell.*—This case was not tried until 1831, but is based on facts which took place many years earlier.

In the year 1811 Miss Campbell was a governess in the family of a Scottish baronet, who was also a Lord of Session. His son and heir, Mr. Richard Honyman, was then about 24 years of age, and Miss Campbell about 26. An attachment grew up between them which was concealed from the young man's family. In 1812 Mr. Richard Honyman was elected member of Parliament for Orkney. He continued to see Miss Campbell frequently both in London and Scotland, and to profess the warmest affection for her. He wrote her many letters, none of which contained a definite promise of marriage. Their language was, however, that of honourable love. I give one as a specimen. It was written in February, 1813 :—

"30 Duke Street, St. James'.

"You will probably have conceived by the time which I have suffered to elapse since the permission which you so kindly granted me, that I did not intend availing myself of it ; but so bewildered and agonised have I been since our separation that I have been unable to give utterance to my feelings

or form one rational sentiment, even to her who is the tenderest object of my regards. O my dearest darling Eliza, much as I thought I loved when we were together, still does it fall far short of that affection I now feel and so fondly cherish towards you. If the sentiments which I so ardently feel and have so repeatedly avowed be reciprocal, hesitate not to say so. I am unable to doubt, after the innocent endearments with which you have favoured me, that it should be otherwise; yet still, as a solace to my woes, refuse not this solicitation. Write me. Tell me that I am dear to you, thou lovely girl. Would that we were once again together, and nothing shall separate us. I look forward with rapture to our again meeting, and then we must form plans for putting our feelings out of the reach of Fate. I intend being with you much sooner than I intended. From the embarrassed state of my father's affairs, my residing in London is both improper and disagreeable, and it was only to please him that I ever went. God knows how bad a politician I shall make, and I would resign such a situation with great happiness. I went yesterday and paid a visit to the outside of No. 8 Millman Street. The blinds were up and the windows open. Ah! thought I, they have a different inmate in the house now to what they had when I knew it; and the conclusion sunk deeply in my heart. Believe me, I feel a fondness for the house, for it was once the abode of Eliza. I took a most accurate survey of it.

The windows were new painted, and there was the little Chambers, who took such an insurmountable antipathy to me, looking out at one of them. Farewell for the present, my dearest Betsy, thou best beloved. Love me as I love you, and put my heart at rest by assuring me of it. You will receive this on Monday, and write me soon. God bless you, thou dearest girl. Again, farewell; and believe me, with an attachment strong as it is pure, yours most affectionately, "R. B. J. HONYMAN."

There were other letters conceived in the same spirit, and mentioning with satisfaction the young lady's answers to them. They appeared to the Court to indicate with sufficient clearness that promises to marry had been exchanged. It was proved that subsequently the lady had surrendered her virtue, and an illicit intercourse went on in various places till 1823. There were two children born. Miss Campbell had left her situation in the end of 1814, and having saved £400, she supported herself and her children in Edinburgh. In 1824 her funds became exhausted, she was unable to pay her rent, and was thrown into prison for debt. From Calton Hill jail she writes in the most piteous terms to her deserter: "Your children are starving and almost naked, going about without a shoe on their poor feet. Is it possible you can know this and not do something for them? The smallest supply would be thankfully received on their account;

and unless it be quickly, God only knows what is to become of them. They are at present a burden on the meagre bounty of those who can ill afford a morsel for their own children, and who cannot be expected, were they ever so willing, to be able to do it any longer. Oh, think but for a moment of their situation, and surely your heart cannot but pity and your hand assist them. There is no matter how small the sum; little will supply their present wants. Do send them something by the coach of Monday."

To this he replied—"It is your fault. Why do you not see the gentleman who has undertaken, on my part, to make arrangements for the children? Tell the woman in James' Square that you will meet him, and he will fix a time. This must be done immediately. I send five pounds for them, and shall not send anything more until a settlement takes place. Indiscreet woman, to send your letter wafered with a dry wafer." The gentleman referred to was a law agent to whom the defender had entrusted the affair. No doubt, under the proposed settlement the lady would have had to abandon all claim to the rank of wife. Happily she had courage not to do this. She wrote again saying she was determined to assert her rights, but appealing first to his honour. After an affecting account of his courtship and her fall, she upbraids him for leaving her and her children to starve. "You know how much I have suffered for you, and how silent and unrepining I have been;

and I am sure you think I would have continued to do so could I have seen a possibility of keeping your dear children from literal starvation. . . . In September, 1822, I went to within a short distance of Smyllum Park [the home of the defender's father]. I wandered about the whole afternoon and a part of the night until my wearied limbs could no longer support me, and I lay down at the foot of one of your father's haystacks. Early in the morning I again resumed my wanderings, and was, as I thought, fortunate enough to meet you. I then told you I could no longer support your children, and that you must do something for them. You then proposed boarding them somewhere, but where that was to be, or who was to pay their board, you would give no information ; and, I believe, merely to get quit of my importunities, you promised to see me in Edinburgh in twelve or thirteen days after. This period was lengthened out to twenty-seven days. You then came, but what was the result of that meeting? You went away without giving anything to your children, and without promising to give anything towards their future support. Many interviews have taken place since that time, but still nothing was given or promised for their support, unless you meant to constitute two pound-notes you gave them on the 4th December, 1822, and two sovereigns on your return from Hartlepool, a sufficient reimbursement for years that had passed and have since passed. If that was your idea you

will find that you have been mistaken. You have thought fit, through the medium of Mr. Hamilton, to assert that I had received from you, for the benefit of your children, much above £100. You know how incorrect this statement is. You know how and in what manner Elizabeth was brought into this world, and that in seventeen hours afterwards I left Smyllum for Edinburgh with her, naked as she was born. You know that I was fortunate enough to find a nurse for her, at which nurse's I, at my own expense, kept her for eighteen months, and found her in every article of clothing and every incidental expense that was incurred. I shall have no hesitation in affirming most solemnly at any time that from the day of Elizabeth's birth, on the 27th of May, 1814, and that of her sister Alexa, on the 27th of May, 1816 I never received one sixpence for ten years for their support. You cannot have forgot what passed relative to them last January, when I made you fully acquainted with my own situation, and that it was impossible for me to find them in food, clothing, and a home any longer; and that, had it not been for the late Mrs. Gilchrist, who lent me from time to time considerable sums of money, they must long ere that time have been begging from door to door. You seemed to feel, sincerely feel, the misery of our situation, but still nothing was done to mitigate that misery. Since that time I have been at Smyllum—I have written, others have written, but all applications until a short

time back have been neglected. I have been forced to be thus circumstantial, as a copy of what is now submitted to your eye must be given into other hands, and thankful I am my painful task is so near an end. You may depend upon it the preceding contents of this letter have not been written with a view of interesting your feelings. I know my own rights, and will never attempt to ask as a favour what I can command. Was it not refined cruelty to force me to an interview with a stranger—to make me the gazing-stock of one who could not be interested in my fate? and you may depend upon it, I never shall consent to another meeting. Mr. Hamilton cannot arrange the business that is between us; and whatever may be your determination after a perusal of this letter must be addressed to Mrs. Wilson, or to myself to her care. She, deeply as she is already involved, will be my friend, and, being both able and willing, I cannot be too thankful that such a friend is still left me. I shall have no hesitation in permitting a copy of this letter to be sent to your father, which will be done in a very short time, but I wished it first to be addressed to yourself. In the meantime, believe me, &c., "ELIZABETH HONYMAN."

The gentleman sent on this appeal to his agent, accompanied by a note in these terms:—

"My dear Hamilton,—The accompanying letter abounds with lies from beginning to end—not one

word of truth in it. I send it for your edification and perusal. . . . I wish you would write me and do something. Suppose I wished to be married to-morrow, what could I do? Here is a brute of a woman [he uses a still rougher word] who says what she cannot prove; but still it places me, with the anxious feelings I have, in a very uncomfortable situation. Would you have me come in?

"R. B. J. HONYMAN."

In the result his "anxious feelings" suffered yet ruder shocks.

The last letter written to him by this unhappy lady did not move him. She writes on Christmas Day, 1824:—

"Sir,—I did not think anything could have induced me to write to you again; but, alas! the wants of two poor little creatures compel me to it; far less did I think that the business now pending would have been so long of being decided. I ask for nothing for myself. I merely ask for a small sum to supply their present great want. They have passed this day without food, and are likely to do the same to-morrow. The only means I have now in my power to avert starvation is to beg from door to door for them; and the most likely consequence is that I shall be sent to the police, when I must give an account of what has reduced myself and them to such want. I cannot possibly think you would like to have your neglect of

them made so public. I would not have made this application, but I have wearied out the few friends I have, begging for them. I lay myself out of the question, for I have worked more in the last few months than would have been sufficient to keep me comfortable. How can you be so unfeeling to them, however much you may wish to punish me? Surely they are innocent. My mind is often in a state of madness. I wander the street without knowing whither I am going. And, O, what dreadful thoughts often possess it. When I look from my window and see the broad sea before me, I think how soon might all our miseries be at an end. But, O, blessed be God, my soul has yet been kept from the dreadful crime of murder. May His power preserve my soul from such a crime. I now humble myself to beg from you for them; and if you do not send something by Monday's coach, do not blame me for what may be the consequences, for I am sorely distracted. You may address your parcel, as you did the last, to A. George, Murray Street, Crosscauseway. It must be carriage-paid, for I have nothing."

The gentleman of the "anxious feelings" took no notice of this, but wrote to his solicitor:—

"My dear Hamilton,—I intend mentioning the whole affair to my father. No arrangement shall I come to until the claims which Miss Campbell asserts she possesses are substantiated in a court of justice,

or given up. I cannot charge my memory with having at any time given her the slightest ground, in words or writing, for taking the name she has done. I write this in haste in order that you may be able to communicate my intentions to Mr. C. before he leaves Scotland.—Ever yours, &c.,

"R. B. J. HONYMAN."

Mr. Honyman's father died shortly after this, and the defender became a baronet. The lady then raised her action to find that there had been a marriage. The case affords an excellent illustration of this part of the Scotch law. There was no express promise in the letters, and nothing stronger than such expressions of affection as are found in those I have given, except that in one letter he calls an aunt of the lady's "*our* aunt," and in another passage he styles Miss Campbell "beloved wife." But there was much dispute whether the word "wife" was genuine, and it certainly had been written on an erasure, though possibly it was Mr. Honyman himself who had scratched out some other word and substituted "wife." Such an isolated word, however, only goes a very little way. Among the multitude of phrases of endearment which it has been the immemorial custom of lovers to invent and apply to each other, the terms "husband" and "wife" are not uncommon. Many a lover calls his sweetheart "dear wife" without meaning to imply that he really regards her as married to him. It is not surprising,

therefore, that the House of Lords did not attach any great importance to the use of this word. More stress was laid upon expressions like this—"Nothing, I trust, will thwart the happiness I look forward to; nothing shall, nothing can, for it is felicity sanctioned by virtue herself, and everything that is tender and amiable." It was laid down that courtship *per se* is not enough evidence of promise. But it was admitted that when two persons are known to be lovers, or are shown by their letters to have been on this footing, there is a strong presumption they had promised to marry each other. And when all the circumstances indicate honourable love and the intention to marry, very precise words of promise will not be required. It must, however, not be forgotten that such evidence as there is of the promise must be in writing unless the defender admits it in the box.

It is interesting to see how Lord Brougham, the Chancellor, waxes warm in his defence of this unfortunate lady. He says, "Looking at all these letters, taking them all together, I can read them in no other way than as letters passing from one man to one woman who had avowedly been in courtship —who had plainly been in courtship with a good view —who had promised each other marriage, which there was an obvious and a satisfactory reason for deferring until a future period,—I mean till the death of his father, who was then an old man, and who, very

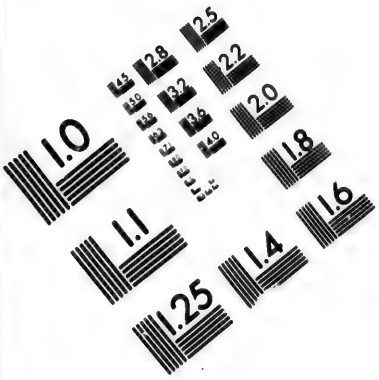
possibly, might view this as an unseemly, if not as an inferior or degrading, connection. My Lords, I beg to say that I would differ with him if he so regarded it. I desire to be understood as saying that this lady's conduct stands as pure and unimpeached as that of any party who ever came to this bar. I desire to have it understood as no part of my opinion that my Lord Armadale's son, or Sir William Honyman's son, even if he had been a wealthy baronet instead of one in moderate circumstances, would have been at all degraded by forming a virtuous connection in marriage with a lady who had been governess to his sisters—of whose accomplishments I have his own admission—whose charms he is the loudest to speak forth—and whose virtue, whose purity of character, is entirely unimpeached by the evidence, the result of the scrutiny to which it has been subjected."

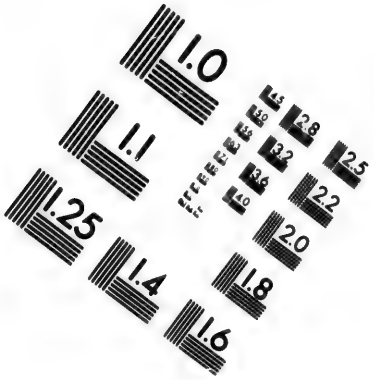
But although Lord Brougham's sympathies were evidently strongly roused by the recital of Miss Campbell's wrongs, and he was glad to be able to conscientiously decide that by the law of Scotland she had proved a marriage, he animadverted in very strong terms on the policy of the law which he was bound to administer. He puts the argument with all his accustomed point and vigour when he asks if it is expedient "that it shall still be the law that so perilous an experiment is to be tried on society and upon the most impetuous passions of mankind as to enable two young persons, at twelve and fourteen

years of age respectively, who could not by the law of Scotland, the one for nine years more and the other for seven years more, competently, by the most solemn and deliberate act, affect in any one way a single half-quarter of an acre of their landed property, to do an act which shall unite them in holy matrimony and create an indissoluble union for life?"

There is no doubt much to be said for this view. Still, it is surprising how few cases arise in actual practice which shock the public sense of either justice or expediency. If it frequently happened that designing women availed themselves of this law in order to entrap into marriage impetuous and inexperienced youths, there would soon be so much dissatisfaction with this part of our law of marriage that Parliament would be called upon to modify or abolish it. On the other hand, there are many cases in which it works beneficially. If a man is old enough to do a woman the greatest wrong possible by gaining her affections in the character of an honourable lover pledged to marry her, and availing himself of his opportunity to induce her to surrender her virtue, there seems no hardship in compelling him, if she demand it, to make the only reparation in his power. It may not be likely to be a happy marriage, and it will not entirely restore to the woman her good name, but it will at anyrate compel the man to support the woman he has so grievously injured, and it may







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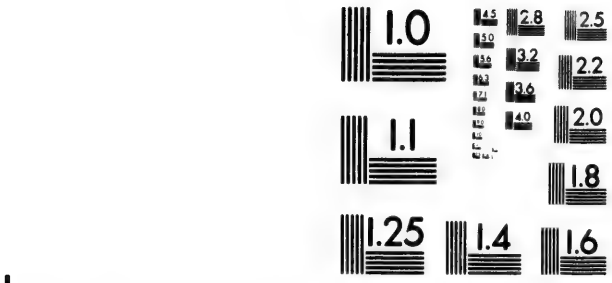

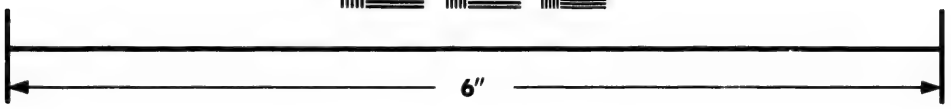

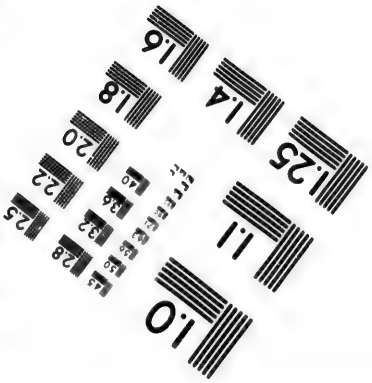

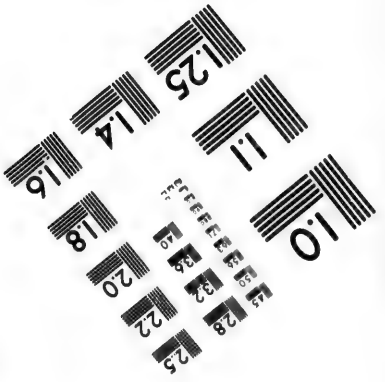

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possibly preserve her from the stigma of being the mother of an illegitimate child.

But the reader must not infer from the case of *Campbell* v. *Honyman* that mere courtship and writing of love letters will be sufficient grounds for declaring a marriage if in the course of the acquaintance the woman surrenders her virtue. It is quite possible —and, indeed, in some ranks of life quite common— for two persons to profess mutual affection and conduct themselves as lovers without there being any distinct understanding that they are to be married. And it would indeed be trying a "perilous experiment on society," as Lord Brougham expresses it, if the woman could at any time make sure of the man by the simple method of encouraging him to treat her as a wife. There are few cases in which there was so little distinct written evidence of promise as the case of *Campbell* v. *Honyman,* and the Court would not have been justified in coming to their decision in the lady's favour if they had not thought that the letters left no doubt that there had been a promise when the position of the parties and their conduct were taken into consideration. And the tendency in recent cases is rather to be more stringent in the proof required of a distinct promise having been made and accepted.

Probably one case in which a marriage was found proved would, if it now arose, be decided the other way. This was a case in which the defender was an excise officer. He had lodged for some years with the pursuer's

mother and had courted the pursuer. There was no written evidence of the promise, nor did the defender expressly admit that he had made one. But he admitted that in attempting to overcome the scruples of the woman he had shown her the 7th chapter of Corinthians, which treats of the duties of husbands and wives to each other. He had also, on his own statement, shown the pursuer and her mother a book which contained a statement of the pension-funds and annuities open to excisemen, had pointed out his own name as one of the subscribers, and said to her, "she would see what she would have if she was a gauger's widow;" and the Court, finding that she had strenuously refused to yield until these things were done, thought they were entitled to hold that the man had virtually admitted the promise, and found for the marriage. Probably this was an example of the proverb that "hard cases make bad law," *i.e.*, that judges, being human, are exposed to the temptation to strain the law now and then in order to remedy what seems to them to have been an injury.

It has been decided that, as this mode of making marriage is peculiar to Scotland, both the essential acts must be performed in that country—that is, that both the promise and the cohabitation must be in Scotland. It is not necessary that the parties should be Scotch. The Scottish Court would find a marriage proved if an Englishman were shown by his writings or admissions in the box to have promised

marriage to an Englishwoman in Scotland, and to have induced her, on the faith of the promise, to cohabit with him there; and it is probable, though not certain, that if, after promise of marriage, two Scotch people eloped to England, and after cohabiting there for some time, returned to live in Scotland, their cohabitation after their return would be held to be a completion of the promise, and they would be held to be married persons. The theory of the law is that when two persons have promised marriage to each other, and afterwards cohabit as man and wife, they intend in this way to indicate that they have fulfilled or executed the promise; and as it is presumed that the woman would not have consented to the cohabitation except in reliance on the promise, the man will not be permitted to plead that, in commencing cohabitation, he did not intend marriage to be the result, for, as already pointed out, it is a general principle of the law that a man who has induced another to contract with him, or to do something on the faith of an agreement, cannot afterwards come into Court and say, "I was acting fraudulently, and never meant to be bound." Such a man is in law held bound if the innocent person whom he has deceived so desire. If the latter would rather the contract were at an end, it is in his option to let it drop.

But it must not be thought that this doctrine implies that, in consenting to cohabitation, the woman must be aware that this will make a marriage. Unless it

be shown that the cohabitation was not begun in reliance on the promise at all, it will be a marriage, whatever may be the woman's knowledge as to the legal effect. In legal phraseology, there is a presumption that she only surrendered on the faith of the promise; and if this be so, it is a marriage. In the words of a well-known judge, "The Scottish law supposes, and experience proves, that a girl previously pure and virtuous may, on the faith of a promise, surrender her virtue. She has much to surrender, and only in the exuberance of trust, and on faith of promise, can she be supposed to render up the jewel of her honour." But although this is the presumption, there may be circumstances which show clearly that the woman in surrendering herself was not relying on the man's promise to marry her; and if the promise and the cohabitation be proved to be thus disconnected, the one not having been permitted in consequence of the other, there will be no marriage.

In a singular case which arose in 1869, the facts were shortly these:—An excise officer, whom I call Thomas D——, a widower of about 55 years of age, and a Miss Isabella M——, whose age was about 35, were both members of a Wesleyan Methodist Church in Leith. They became intimate, and the man pressed the woman to marry him, but she declined to do so. It was proved that on one occasion in 1864 there had been cohabitation. After this Thomas D—— wrote frequently to the lady in terms of extravagant affection

He spoke of the house in which they once met as the "house of the betrothal," signed himself "your devoted husband," and lavished terms of endearment and protestations of affection on her. Her responses, however, are in a very different style. She begins "My dear Mr. D——," and signs herself "yours truly, Isabella M——." In repiy to another passionate epistle she writes, "Sir, your last insulting note I received this morning. I merely write to say you may save yourself the trouble of sending me any more, as I'll either burn or return them unopened.—I. M." Even this did not quench the exciseman's ardour, and he wrote saying he would call. She answers curtly, "Mr. D—— may save himself the trouble of calling to-morrow afternoon." For two years they continued on these terms, he claiming a marriage, she refusing even acquaintance. Moreover, the lady, whose previous conduct with Mr. D—— had led to a little scandal, indignantly denied to various persons that she was married to him, or intended to marry him. But as the old French rhyme says,

> Souvent femme varie
> Bien fol qui s'y fie.

In 1869 she came to the Court and asked it to declare that she was Mr. D——'s lawful wife. Nor was it that her heart had been melted by his long fidelity, or that she repented of her coldness to his advances. It was merely a question of money. Some months before the meeting in the "house of the

betrothal" he had lent her a sum of £300. He said he had given it to her to buy clothes and furniture with a view to their marriage. She said it "had been given to her as a daughter." But whatever may have been the understanding when the money was handed over, she had not felt it incumbent on her to return it. After years of supplication to induce her to marry him, to which she responded, as was said, "in a spirit colder than indifference, and more hostile than repugnance," the poor man gave up the pursuit. But he thought, not unnaturally, if he could not have the bride, he ought at least to get back his money. No sooner, however, did he press for its repayment than the lady brought her action to have it declared they were man and wife. Few will sympathise with her disappointment in this suit. The Court held that, whatever was her motive in yielding on the one occasion to the solicitations of her very ardent admirer, she did not do so in reliance on his promise to marry her. She had herself indicated so distinctly that she was quite unwilling to be his wife that it was too late for her to come forward and say, "I was deceived by him, and thought he would marry me."

No doubt, other circumstances might equally well show that the promise and the cohabitation were not connected. For example, a man promises to marry a woman, and subsequently gives it up and goes abroad. On his return he finds the woman leading an immoral

life. She then lives for a time under his protection. Could it be maintained in such a case that her consent was only in reliance on the promise? Or a man might write offering marriage, and the lady might reply she was willing to live with him but would not be married as she was a convert to the doctrine of Free Love. Another case of greater difficulty is that of a man making a promise to a woman who is already his mistress. Here it can hardly be said that she would not have consented to live with him but for the promise, for, as she had consented to do so already before he had given any promise, why should she not continue to consent apart from any thought of marriage? Still, cases might occur in which it sufficiently appeared that her consent was consequent on the promise. Unlike the position of a virtuous woman, the presumption is here the other way, and she would have to show circumstances to lead the Court to the conviction that, but for the promise, she would not have consented to renew the intercourse. But there might well enough be a case like this:—A woman surrenders her virtue to a man. Struck by remorse, she afterwards declines to have anything to do with him. He writes distinctly offering marriage if she will renew the intimacy. On this understanding she consents. No doubt, if these facts were proved, the Court would find for a marriage in spite of the intimacy before the promise. There is one curious bar to the action. If the

man can show that since the promise the woman has been guilty of unchastity with another man, this will prevent the Court finding a marriage established.

A somewhat ingenious attempt was made in one case by a lawyer to write letters to a woman so ambiguously expressed as to satisfy her scruples, and yet not bind the writer. He was carrying on an illicit intercourse with the daughter of his landlady, and on her becoming pregnant, he gave her the following document:—

"Dear Elizabeth,—Under existing circumstances, I feel anxious to provide for you after my decease, as far as in my power, and with that view I shall at my decease leave a declaration acknowledging you as my lawful wife, which will secure to you the annuity payable from the Widows' Fund of Writers to the Signet. It is of the utmost importance that this intention should not be made known, as utter ruin, in that event, must fall on me; and were I to show or give you possession of the declaration, I would then be compelled to announce the fact to the collector of the Widows' Fund within three months, under forfeiture of the annuity. The declaration, therefore, shall only be delivered at my decease in the event of the most strict secrecy being adhered to regarding this communication; and I hereby declare that, in the event of the contents of this letter being made known to any person or persons, except your father and mother, the letter shall

be of no avail, and shall in no manner of way be held as binding, or used as a document against me."

The writer of this was probably not uninfluenced by the fact that it had been decided that a man could not, by a declaration found after his death, confer on a woman the status of his widow. He must first make her his wife. This preliminary stage to the privileges of widowhood cannot be omitted. The lady appears to have been on the alert to protect her rights. She wrote and presented to him the following:—

"8th March, 1834.

"Dear Edward,—I do hereby declare to take you for my lawful husband in terms of the document which you have made out, and that I will not make it known to any but my father, mother, and those friends which I wish to be on terms of intimacy with. But should the fact become known, and I have no hand in it, I will not hold responsible, nor forfeit my claim. I will do all to conceal it.—Yours," &c.

The gentleman was not pleased with this, and averred that "on perusing it, as it appeared to him to have been written for a sinister purpose, he instantly, and in the pursuer's own presence, threw it into the fire and burnt it." The lady and her parents continued to press the lawyer to acknowledge the marriage, and he delivered the following additional document:—

"Dear Elizabeth,—It is most assuredly my intention to provide for you to the utmost extent my

means will permit during the remainder of your life while we are separate from each other. If I made any statement last night to your sister to the contrary, it was not my intention. Whatever allowance is made is gratuitous on my part, and any abuse or attempt to compel me to increase these payments will be attended with a contrary effect. I propose giving you £50 this year in full of all expenses of maintenance, payable at two terms, and the remaining years to be regulated by circumstances. The doctor and nurse's expenses to be paid.—Yours truly," &c.

The woman then consulted counsel, and was advised to obtain a declaration of her marriage. She induced the lawyer to give her this paper in addition. It will be observed how he attempts to evade directly acknowledging a marriage:—

"I hereby declare most solemnly before Almighty God that I never granted a letter to anyone such as I have given to you, and cannot now grant any letter with such an obligation to any other person, as I consider myself bound by my letter."

Subsequent to these writings they cohabited together at various hotels and lodgings, and at a later date she went to live with him at a house in Edinburgh. As, however, he peremptorily refused to acknowledge her as his wife or allow her to be addressed as such, she left him and brought an action of declarator. Both the Court of Session and the House of Lords held that if the documents were not

a sufficient acknowledgment that marriage had been contracted by consent—which was by no means free from doubt—they at least were evidence of promise, and the subsequent cohabitation had constituted marriage.

An attempt was made in this case to argue that the woman had released the man from his promise, in support of which there was some evidence. But several judges held that, where there has been promise and cohabitation consequent thereon, it is no longer in the power of the woman to release the man. They are validly married persons, and can no more free each other by mutual consent than they could divorce each other without legal ground if they had been married in a regular way. And Lord Brougham thought that, if a woman released a man from his promise and there was cohabitation at a later period, the cohabitation must be presumed to have been preceded by a renewal of the promise. If this be sound law, and a man and woman who have promised to marry each other and afterwards cohabit are married although they both desire to be free the next day, there must be a considerable number of persons in Scotland whose status is very dubious. For, suppose in such a case the two people separate, and the man goes through a regular ceremony of marriage with another woman, ten years afterwards it may occur to the first woman that she had better claim the rights of a wife, and she brings her action. On proof of her two facts she is

declared married, and the regular ceremony which the man went through afterwards is found a nullity. Or it may be that an old woman becomes chargeable to a parish as a pauper. There may be a rumour that in her youth a neighbouring proprietor had promised to marry her, and she had had a child of which he was the father. She had never dreamt of claiming the rank of wife, and he had paid her a sum of money in satisfaction of all claims. Notwithstanding this, if Lord Brougham's view be sound, the parochial authorities may raise an action of declarator, and if the promise and the intercourse are proved, the old woman will be declared the lawful wife of the laird, and her son the heir to his estate.

The Yelverton Case.—I will conclude my account of this most singular rule of the law of Scotland by a narrative of one of the most romantic cases which have arisen under it. All Scotland, and England also, rang at one time with the thrilling story of Miss Longworth and Major Yelverton. The position of the parties, and the striking personality of the lady—admirably suited to be the heroine of a romance—made the case one of extraordinary interest. The correspondence brings out very distinctly the characters of the gentleman and the lady, and I shall let them tell their own story as much as possible.

The action was tried in 1860. Miss Longworth described herself as the daughter of "Thomas Longworth, Esq., of Smedley Park, Lancashire, now

deceased, a gentleman of ancient family and of large property." This, like many of her statements, is a somewhat glorified and poetical version of the fact. She was undoubtedly of respectable parentage. Her father was a well-to-do silk spinner in Manchester, and left her a private income of £300 or £400 a year. She had been sent at four years of age with two sisters to a convent at Boulogne to be educated. She became a good musician, and acquired a fluent knowledge of two or three languages. Like Ouida's heroines, she uses them with more courage than correctness, unless the mistakes are those of the printer, not the writer. She possessed remarkable beauty, and her letters disclose much ability. Her age at the time of her first acquaintance with Major Yelverton was about 27.

The defender, the Honourable William Charles Yelverton, was the younger son of an Irish peer and a captain in the Royal Artillery. Subsequent to the date of the action he succeeded to the title of Viscount Avonmore. He was about the same age as Miss Longworth, and appears at the time of their intimacy to have been in somewhat embarrassed circumstances.

The reader will form his own impression of the letters. In my view the Major had never the faintest intention of marrying Miss Longworth. He was, no doubt, captivated by her many charms, and quite willing to engage in a flirtation with her, more or

less serious as it might turn out. The lady, on the other hand, uses much art to draw him into marriage, and does not abandon hope until the Major gives the most emphatic proof of his view of the situation by marrying the widow of an Edinburgh professor.

It is probable that Major Yelverton, astute man of the world as he was, had not realised till the trial how narrowly he had escaped finding himself married to the pursuer. She availed herself of the services of counsel of great eminence, and sought to establish her claim to be his wife in the Courts of each of the three countries. It is only with the Scotch case that I am here concerned, but it is worth while pointing out that a friend of hers brought an action in Ireland against Major Yelverton for sums of money advanced to Miss Longworth as his wife. This raised the question whether by the law of Ireland she was married to him, and this was decided in the negative. In England she brought a suit for restitution of conjugal rights, but the Court held that it had no jurisdiction as Major Yelverton was a domiciled Irishman. She had therefore to stand or fall by the judgment of the Scottish Court. Lord Curriehill and Lord Deas, who formed the majority in the First Division of the Court of Session (there being only three judges sitting), decided in her favour. This view was supported in the House of Lords by the Lord Chancellor (Westbury) and Lord Brougham. The three other judges in the House of

Lords—Lords Wensleydale, Chelmsford, and Kingsdown—decided the case against the lady. As the Lord Ordinary (Ardmillan) and the Lord President (M'Neill) had held there was no marriage, it will be seen that of nine judges who expressed opinions in the case five were against and four in favour of Miss Longworth. This sufficiently indicates the delicacy of the question submitted.

The first scene of this tragi-comedy was played on the deck of a steamer from Boulogne to London in the summer of 1852. Major Yelverton and Miss Longworth were both travelling alone. It happened that the lady's shawl fell off when the gentleman was standing near, and he picked it up for her and helped to replace it on her shoulders. This little act of courtesy served as an introduction, and led to a conversation which kept them on deck for the greater part of the night. On arriving in London the defender said that the lady invited him to go with her to her lodgings, and that he did so, and remained several hours. This she denied, and it was not proved. But several references in the correspondence which took place later indicate that, during this first interview on the steamer, their acquaintance had ripened with unusual rapidity.

The lady writes, "I am sorry Alcide is no longer at Monastir, or you might have paid him a visit for the shooting when you go into Albania; *perhaps* I might have been so kind as to offer myself as your *escort!!*

been very polite, watched the sunrise for you, and given you a part of my *plaidie*, if you had been very good, *as I was.* How could Mr. R—— say I was a prude? *au contraire*, I am not sufficiently so as times go, but *trop au naturel*, and people misunderstand me. You don't think me a prude, do you?" And he says, long afterwards, "You recollect that plaid that I went down into the cabin of the steamer to get; well, it is here, hanging over my bed as a sort of canopy (for, as I stated before, the old tent leaks), and I cannot help thinking that plaid still retains some reminiscences of the night—the only night I remember on board a steamer. Then you see I believe more completely than you in . . . and magnetic influences." And, referring to the loss of some letters, the lady writes afterwards, "Thank God, the *Plaid* did not go too; blessed Plaid, to retain the magnetic fluid all this long time; we will have it embalmed in otto of roses when we do not require him to do duty any more." From all which it clearly appears that their acquaintance from the first contained the germ of great possibilities. But although they were so sympathetic at their first meeting, they did not see each other again for more than three years.

About a year after the steamboat incident, the correspondence opens with a letter from Miss Longworth, then at Naples, to Captain Yelverton, at Malta, asking him to do a small commission for her there. I propose now to give as much of the letters as will

explain the course of events, and the character of the writers.

"Naples, 22nd June, 1853.

"My dear Captain Yelverton,—I am half afraid that I shall just miss you when you come to Naples, at which contretemps I should be provoked—*je ne saurais dire pourquoi;* but I wanted to see you, perhaps to renew my *first* impression, for I do firmly believe in first instinctive feelings; and altho' sometimes obliged to change my opinion, still nearly invariably *je retourne toujours à mes premiers amours.* My movements are extremely uncertain at the present moment. I am going in the "Sapphire" to Tunis, and heaven knows where else, finally to be landed at Malta or Corfu, where my brother is to fetch me, and conduct me to Bosnia. Have you heard anything of Mr. R—— *depuis?* I was installed in the main cabin (not in person, emblematically—I never set foot upon the 'Endora'), and honourably mentioned in the log-book. All is well that ends well, but it didn't, for he went off in a tremendous gale of wind, cursing me, *sans doute,* in his heart for the total neglect of certain polite notes and proffered service. Nevertheless, after I had finished laughing at his stormy exit from the scene, I felt very sorry he was gone. . . . I have made up my mind to turn savage; I am weary of civilization, with no one to care a fig about me. Addio. I am getting dismal. *Au revoir, mais toujours sincère,* "THERESA A. LONGWORTH."

It is a trifling circumstance, but characteristic of the lady, that she does not write her name accurately. It was in fact Maria Theresa Longworth.

"Belle Isle, 20th August, '53.

"My dear Theresa,—I don't know if this will ever reach you, so I will not waste much of my eloquence on what may eventuate on the desert air or the dead letter office. Yours of June 22nd went through many vicissitudes, as was evident by its external appearance when it reached me here, in the land of my fathers. I took fright at the appearance of affairs eastward, and thought the growling of the Russian bear might have an evil influence on my hoped-for leave of absence, so I asked for and obtained it three weeks sooner than I had intended, and stopped nowhere till I reached Paris. My intended future is, until the 20th October, Morehampton, Dublin, and after the 7th November, Malta. When you answer, if you ever do, let me know where heaven and the 'Sapphire' have moved you. If your letter had been ten days earlier at Malta, I would have made Naples my route homewards. Poor R——, I heard from him twice. He complains bitterly of your behaviour. Says you took an ultra prudish line of conduct with him, and 'nothing of his stormy exit,' of which your account made me laugh long. Good-bye. Return good for evil, and write soon.—Ever yours sincerely,

"W. YELVERTON."

"Naples, 20th August, '53.

"My dear Mr. Yelverton,—After writing to you two or three times and receiving no answers, I intended to be very sulky, but it does not suit my constitution in the least, and recollecting your confession of inconsistence under change of feeling and circumstance, what could I expect? So, after vainly speculating upon probabilities and impossibilities, and the hidden cause of your abrupt silence still bidding defiance to my witchcraft, I set you down as one of my three standing mysteries, which time alone can fathom, and laid you carefully by on the shelf as something precious in which I might still be interested—some ten or fifteen years hence; when suddenly, a day or two ago, a bright thought struck me. How I came to have a bright thought I can't tell, except that I had been very wide awake for forty hours, in consequence of ascending Mount St. Nicholas, and indulging more freely than usual in cafè nera; a light 'broke in upon my brain, (not) the carol of a bird,' but a clear distinct vision of the motive of your inconsistency. I am a firm believer in instinctive impressions. I put more faith in these untangible perceptions than in many things that I see and hear, and am satisfied that I am right, and that you have been pitying yourself, until you have persuaded some one to do it for you, and also to call in the aid of her twin sister. It is no use your denying the charge, because I am certain of it, and the mystery is solved at once. I quite

understand and sympathise with you under these circumstances, and if there is any excuse for neglecting ladies' epistles, it is certainly the being so devoted to one as to forget all the rest; so I shan't scold you as I intended, and in consideration of this forbearance, you must tell me all about it, won't you? (Sept. 18th). Your future intended you say is at Morehampton, but I am not so curious as to her whereabouts, as what she is like, &c. You ought to tell me all about it, you know, especially when I've been clever enough to make such a good guess. Adieu, adieu.

"THERESA."

This very feminine attempt to draw Mr. Yelverton into explanations evoked the following :—

"Ireland, Oct. 1853.

"My dear Theresa,—I really must strongly recommend you to avoid caffè nera, ascending mountains, and becoming so terribly wide awake. If you don't take my advice, I warn you your lucidity will become frightful, and your brain illuminated past the hope of recovery. With regard to this, your first symptom—this bright thought, this light in the brain—since you tell me it is useless to deny it, I will employ my pen otherwise. . . . My future intended is like this O, and her whereabouts is likewise expressed and defined."

"Naples, 22nd December, '53.

"My dear Mr. Yelverton,—'Oh, my prophetic soul,' when people become *fiancé*, it is all over; one might as well give them plenty of rope, for they are bent on

destruction. . . . I was sorry you did not come to Naples. I wanted to see how you looked under such interesting circumstances. To tell the truth, I can't imagine you looking love-sick, or, in fine, being in love at all."

"Valetta, 1st Jan., 1854.

"My dear Miss Longworth,—I'll tell you a little truth that you will not believe. I am *fiancé* to 'an arm-chair at the United Service Club.' You were deceived in your clairvoyante vision probably by the influence exercised by some magnetiser near you. You are right in your *candidly* expressed opinion. *L'amore*, as you understand the *word* (sentiment?), is not, never was, and never can be, my insanity, temporary or otherwise. I have hardly confessed this to myself; but I feel that it is true and confess it without hope of absolution, though with some regret and penitence. . . . If you care to correspond with such an outcast, pray send me your address in Rome and avoid lucidity, especially produced by the method you last adopted. . . . How disappointed you must be at my confession. Not a word of her, in fact, 'no her.' Yours (excepting the arm-chair's right)."

"Rome, 27th Jan., 1854.

"My dear Mr. Yelverton,—By the way, by what mischance or misdeed have I become Miss Longworth again? I never grumbled at being addressed by my own name, and only thought that, having known me for one year, you had exalted me from a mere acquaintance to a certain degree of friendship.

I do not know what I have done to be turned out again—to be treated *en grande cérémonie.* Pray tell me why; and if you have not thought about the motive which induced the proceeding, do analyse a little for my satisfaction, as I feel particularly curious about that small bit of inconsistency *de votre part.* I solemnly promise never to interfere with your *fiancée*, whatever form she may assume, be it of an arm-chair, an eagle, or a bride. Things are sadly changed since the olden time, for now it would appear that it is the lady who metamorphoses to woo instead of the gentleman."

"Malta, 2nd March, 1854.

"My dear Theresa,—I have told you repeatedly that I don't like being called Mr. Yelverton by you, and I am not going to analyse that or anything else, but give you your choice between either of my other godfather and godmother's bestowed appellations or any other cognomen in any language you please, except German (which jargon I positively prohibit in this case). I called you Miss Longworth to see if you liked it. Now you may do unto others as you would they should unto you."

"Rome, 10th March, 1854.

"Carissimo Carlo mio! Does that suit you? or will you have an S to it and make it Spanish or a K to make it German; *pour dire la verité* I cannot settle down to your baptismals—William is out of the question. I abound with brother Williams, and could

never recognise you under that title; Charles is *un peu mieux;* nevertheless it does not recall your image. Image, do I say? I can't recollect your appearance in the least; you are to me quite a myth; I almost doubt I ever did see you. I believe you a fiction, a bright creation of my coffee, a sort of sublunary spiritual creation; you are a *feu follet.* I am always just on the point of catching hold of something tangible about you, but you always slip away and leave me disappointed. I know nothing about you, not even what you are like; you might be *(pardonnez-moi)*, in disguise, that well-known gentleman in black whose memorable walk round the world is so celebrated! to visit his snug little farm, the earth, and see how his stock goes on! It is just probable that Alcide [a cousin of the writer's] may throw up his civil and take a military position. In that case I want to go with him. I had some thought of devoting myself to humanity in the shape of a *sœur de charité;* I think it is a sort of vagabond life would just suit me, but a *vivandière*, I think, might be a little more exciting. Wouldn't you be glad to see me, with all my plasters and bandages, and charming little barrel, when you were half-choked with smoke and powder? What an *ange de miséricorde* I should appear to you under these circumstances! Adieu. Thank me for such a fine long letter which you never favour me with *de votre part.* Sincerely yours,

"THERESA."

"Malta, 11th Sept., 1854.

"Cara Theresa mia,—Your last form of address is better; don't be selfish enough to change it; if you don't see why, never mind; if we all stopped to see our way clearly we should all obviously take root. I expect to pass next winter in Turkey, probably in the neighbourhood of Skutari, as I presume our artillery must be wintered thereabouts, and I have prospects of and in joining the army."

"Abergavenny, 2nd Oct.

"Caro Carlo mio,—Always under protest that so to address you is not *comme il faut*, or rather what English people would call 'highly improper,' but as you like it and will have it so, I will e'en give you the chance of preaching me a sermon and feeling yourself shocked at my want of *savoir faire* and imperfect knowledge of etiquette! . . . If you are perfectly satisfied with my indefinite pity I will do my best not to allow it to verge into any other feeling—set it entirely apart from all its numerous kinsfolk—keep it vague, undefined, and if you should have a friendly tap from a cannon ball I will be indefinitely sorry for you, always supposing that indefinite pity is the sort of feeling you like to inspire. . . . I have been analysing your thoughts for you, and will give you the result, whether having once met we should resume a distant correspondence? I should say decidedly not. Did you ever watch the course of a stream

running smoothly along for yards together, and notice when impediment or interruption occurred, as the bough of a tree or a few rough stones, it blustered over and round them but never resumed its former steady course? So I think it is with life—a certain train of events bears us on to a certain climax, when we are met by another convoy of circumstances—but the past never comes over again. If we ever met, farewell to indefinite feeling of any kind—the dream would be over—they would become either definite or extinct. There is no stopping in this world—we are either going backwards or forwards—sometimes we do not know precisely which. Do you think I am right? With regard to our not knowing each other, that I hold, upon an hypothesis of mine (which I will treat you to), to be impossible. I consider that the fact of my writing you this day does not originate, as might be supposed, from the accidental cause of your once having been on board a steamer with me, but from the natural cause and effect of influence of one person upon another. I have been on steamers scores of times before and since—so have you—in my own case I can positively say without similar results. Now, to make my idea more comprehensible and material—suppose influence to surround each of us as Jupiter's transparent belts—this belt is composed of our various feelings and sentiments. When two belts come in contact, each composed of similar ingredients, a sort of fusion takes place—this is

sympathy; when most of the ingredients correspond and the fusion becomes complete it is friendship—am I intelligible? We might have walked the ship all night and have remained strangers, but accidentally putting my shawl on for me, your belt must have had a touch, and such cause was sufficient to produce this long effect. Now, I deduce from this theory that should we ever be shipped together again the same natural result would take place as on board the steamer, even supposing that I had turned negress and you into an Arab; so that if remembrance of personal appearance would be at fault, should we not recognise each other by the recollection of feeling? We can distinguish the tones of an instrument from another by sound only—and I am certain if we met again on board on a dark night I should know you. . . . Will you write me soon, as I do not yet feel indefinitely whether you come off safe in this coming affair—but very positively anxious that those *diables* have not done you any harm. Yours truly,

"THERESA.

"We have just received news that the battle has been fought, of course won—it has turned me rather sick. I don't believe I am really brave after all."

"20th Dec., British Army, Crimea.

"Now, you are not to set me down in your mind as one of the class of lovers of the indefinite—if there be such a class—and if I asked you to be satisfied with

anything, definite or indefinite, or with any feeling expressed or felt, whether pity or akin to it, I beg leave most abjectly to apologise for the expression. I did not mean it. I always want more myself, and have no Rubicon beyond which I do not mean to pass (if I can), and am quite sufficiently a disciple of the Christian maxim to do as I would be done by, to recognise the same want of limit in all and to all. Are you fairly ready for the land of dreams? Have you got your passport? Yes. Very well, then. I hope you will accept me as a travelling companion. May our impressions sympathise."

This candid little note, one might think, should have put the lady on her guard.

"Boulogne, 12th Jan., 1855.

"Caro mio Carlo,— . . . I really do set you down as a lover of the indefinite. I am sure it is natural to you to be mythical and dreaming. You are very like Alcide in that respect—and that feeling *chèz vous et chèz moi* is really the secret of our original correspondence. If, for example, you had met me night after night in society, dancing with me half-a-dozen times, and we had talked the usual amount of nonsense, we should never have been the friends we have become in a more indefinite way. Is it not so? I may be utterly deluded; you may, like other men who go much into the world, be constantly having your head turned by some too bright vision you

have been introduced to; but it is my decided impression you *do not*—that an angel crossing your path *en grande tenue de société* you would fail to appreciate, for the only reason that she would be *too definite*. There she is, an *angelo sicuro*, and you would have nothing to find out—nothing more left to hope or fear, no shadowy vagueness—nothing but pure unalloyed bliss!! You would not be satisfied! . . . Your not having any Rubicon is also a proof of the indefiniteness of your wishes and sentiments; in that you are right also. I accept your *amende honorable*, and your invitation to a dreamland expedition anywhere. I do not fear we shall not sympathise in every particular. I have tested you in the capacity of *compagnon de voyage*, and am quite satisfied with you. . . . God bless you, Carlo mio, a thousand times.

"THERESA."

"Boulogne, 4th April, '55.

"I do want to *approfondir le fond de votre nature*. . . . There is no monotony in nature—ever varied, ever new. It is only when shut in between four walls, looking out on the dull street, where the cold heartless world walk every day, indifferent to you, and you have no sympathy for them, then the soul recoils on itself—one becomes melancholy and selfish. Oh, for one congenial spirit and a ramble through the wild woods. Let me into your soul; it is only now and then I get a sly peep. You ought to know me better

than I know you; but I fancy women have more intuitive perception than men, and are quicker to take advantage of any unprotected nook or corner to slip in and take a survey. You will not turn me out, will you, Carlo, if I am clever enough to creep in, *bon gré, mal gré,* all your precautions?"

It seems certain that in joining a French nursing sisterhood, and going out to the Crimea, the lady contemplated the probability of meeting again her correspondent.

"St. Bénoit, Galata, 15th August, 1855.

"Dear Carlo mio,—Your letter threw me into a state of consternation! After keeping my own secret so long, that you should just come and catch me in the act is very dreadful—and I must make a full confession—if you are dreadfully wild, you shall impose your own penance—*c'est bien,* I have turned *vivandière*!!! Now, I mean to protest that it is all your fault (if fault it is); in the first place, you said once that you wished that I were one; in the second, an almost irresistible hand drew me forward, and for five months you refused to hold up one finger to draw me back. Well, I told you the vessel no longer answered to her helm, that I was going adrift—no help still. Who do you think came to my assistance? Those good folk in white bonnets termed *sœurs de charité.* And so they have got me safe enough—if you could only see the prison bars of my window—and, moreover, intend to keep me; but there are two

to that bargain, three I hope. So I am a kind of aquatic *vivandière*, for my mission is upon the boats that bring down the sick and wounded; but I have fallen on the dark side of the affair—no short petticoats, but a frightful costume—no music, but the groans and sighs of the poor wretches—and, finally, no Carlo to bring me my *eau de vie* as he promised. What is to be done? The loss of the letters, too, is a startling fact—thank God, the *Plaid* did not go too; blessed Plaid to retain the magnetic fluid all this long time; we will have it embalmed in otto of roses when we do not require him to do duty any more. I cannot stand another disappointment, so you must try to let me go for this time; but I warn you you will have as much to go through as had Orpheus in search of Eurydice; and having no lyre, you must 'whistle and I'll'—but you know the rest of the ditty.

. . . How little I expected that the next act was to be played in a convent hospital!!!!"

"Galata, Oct. or Nov., 1855.

"Dear Carlo,—I know it is not your fault, but I am in the most frightful dilemma. That note, care of Major C., has been opened and read—scandalous tongues have coupled our names together, and made the very worst of it—so far, that some one wrote to the superior to warn her. I am nearly crazy, it takes so little to dash one's fair fame, and yet what harm have I done? Now, I must either give you up or

explain to the *Superieure* our relative position. In the first place, I should become a sister directly; in the latter, I fear she will not keep me; and where on earth to go to I don't know until Alcide comes, and he will get such a version of the affair from *Madame* that he will think I have been dreadfully imprudent; and yet if we are ever to be all to each other, and fate keeps us apart, we must have some means of knowing each other?"

This was surely a pretty direct "lead," but it did not draw a proposal from the gentleman.

"Crimea, Oct. or Nov., 1855.

"Carissima Theresa mia,—I'm so sorry you are in a dilemma, if you dislike it, but I've been in one ever since I can recollect. . . . As I conceive it would be quite an impossibility to define our indefinable relative position, I see nothing you can do better than ask who wrote to the Supérieure, and demand explanation from that individual; if anonymous, it can safely be treated with contempt. . . . Still, if there be that in your position that causes these lies to give you more pain than a cessation of our correspondence, I say with pain, 'Let it cease.' . . . I think I must end on the Rocky Mountains. I never shall get respectable enough for this very old state of society. I am really very sorry for it, but amendment on that point won't come; so don't trust me more than is the due of I hope, a chivalrous savage. Addio.

"CARLO."

He manages in some way to obtain access to the convent hospital, and has an interview with the lady. It will be remembered that this was only the second time they had met. What took place can be but faintly gathered from the letters.

While occupied in nursing the wounded soldiers and sailors at Galata—and she seems to have been a zealous and devoted nurse—Miss Longworth made the acquaintance of Lady S., the wife of a general in the British army. Lady S. asked her to visit the camp in March, 1856. She did so, and stayed with the general and his wife. She told Lady S. that there was a sort of engagement between her and Major Yelverton. In consequence, Major Yelverton was asked to dinner several times, went out riding with the ladies, and was treated by the general and his wife as a suitor for Miss Longworth. He does not, however, appear to have said anything to them on the subject. Miss Longworth's beauty and conversational charm won her much admiration among the officers. It would seem from the following that Major Yelverton had shown that his affection was not Platonic:—

"On the Bosphorus, April, 1856.

"I cannot at all imagine by what strange transition you have arrived at your present state of feeling towards me. It is the very last that I should ever have contemplated inspiring, and so opposite to my idealisation of you. The glimpse you had of me

four years ago could not have produced such an effect, or supposing it to be so, it must have long since died a natural death. Our correspondence ought to have generated in you, as in me, esteem, admiration, affectionate trust, and confidence, *idealised ethereal love;* a love to live or to die for—a little Platonic at first, but finally becoming the elixir, *par excellence*, of life. You might be in love with a *Turkess*, instead of an over-spiritualised Englishwoman. I could easily comprehend that great external attractions might have operated on your sense of the beautiful, &c., and being of an inflammable temperament (which, in spite of apparent coldness and stoicism, I think you must be), you might take fire. But nature has not endowed me with a single physical beauty calculated to excite such sentiment. I have not a feature that will bear inspection—no eyes—but when the soul speaks through them—and no one would ever look at me a second time, were it not for the contents, not the casket itself. On this I rely not only to gain (if I have a chance) but to keep your affections. However, by this time you have no doubt come to your more sober senses, and I must forgive you your madness and folly this time, aye, a thousand times if necessary, but you must, *you will* everlastingly become all my heart's desire."

The gentleman had told her that his pecuniary position made it impossible for him then to marry,

and that he had promised an uncle to remain unmarried for the present. She writes thus :—

"All these reflections lead me to surmise that there is something more than the money difficulty which you have not had the courage to tell me, mio Carlo. I cannot doubt your feelings towards me, but there may be family feelings and considerations, pride of birth, &c., &c. If so, I have only three words to say, *for God's sake let this be the end.* I am of an old and good family, that is all, and will never be a firebrand in any family. If it is so, we must not meet again. It would be too painful; and as I know your former weakness, let me know that I may get out of your way in time. I told you nothing in the shape of money obstacles could appal me, and I cannot think that your uncle can entertain the absurd notion that you will not marry—you are certain to do sooner or later. In your position it is the simplest thing in the world to find a woman ready to pay your debts if you choose to set about it. I could introduce you to one to-morrow, very eligible (except in point of family); but money covers a multitude of sins. If it is not permitted to me to make you happy myself in my own way, at least let me put you on the road to leading a good life without me. I much fear that although you will not feel this disappointment as I shall, yet the after effects upon you will be most baneful, and act as a poisonous drop distilled through

the rest of your life unless you at once turn your mind to something else. Marry at once and think of me as a dear lost friend, who had your real interest too nearly at heart to be selfish. The girl is very young, and you might make all you wanted of her—her father ambitious of marrying into a noble family, you could not fail of success. Several officers have tried for her, but the father *holds to family.* As my life will be a succession of sacrifices, to begin by making the first for my own Carlo would be the most grateful thing you could let me do, and I should feel far more happy about you if I knew you were settled. Tell me, caro mio, will you see the lady? She is in Greece (but English). I must arrange before I leave here. "THERESA."

We have not his answer, but he seems to have declined this chance of retrieving his fortunes. She writes again:—

"Sybilla Yacht, May, 1856.

"I have just read yours, and now only know what has been the mainspring of my existence. I feel utterly incapable of doing anything—of taking a decision. I ought to go straight off to that place. I feel that is the thing to do, but have not the strength to do it. I can only feel one overpowering, agonising yearning to see you. . . . You must come, and that quickly, or write and say when you'll be good and reasonable. You are the only one in the world who has any influence over me; perhaps you can bring me back my scattered senses."

He writes now from Sebastopol :—

"25th May, 1856.

"My dear child, you must have mistaken the terms of my promise. I will go to Constantinople, but I do not expect to be my own master for some days yet. I still cannot counsel you to wait for me, if any opportunity shall offer which you may wish to embrace, for I fear my self-command when we do meet will almost annoy you as much as my want of it when we last met did then. *Sempre a te, Carlo.*"

Major Yelverton at this time was returning to England. If he had gone by the most natural route he would have passed Constantinople, and it had been partly arranged that he should meet Miss Longworth there. The letters suggest that his conscience was now uneasy about the matter. He admired Miss Longworth, but was resolved not to marry her. She, on her part, had conceived for him a strong and violent passion. He took the honourable course of going home by the Danube and Vienna in order to avoid an interview, the consequences of which might be so serious. He writes from Vienna :—

"Cara Theresa mia,—The paternal scheme was a physical impossibility. I dreamt it ; and, waking, found that the chivalry was not departed, but superseded ; therefore, as I could not be what you wished, I determined not to persist or continue in a course

which must end either in converting me into a modern Tantalus (reading woman for water, and thereby making the necessary step from the sublime), or—but I need not repeat the alternative. So much for the cause; the effect is that I am here, having come *via* Odessa and the Danube. Pray write if I can be of any use to you at a distance, or if it afford you any satisfaction to express your thoughts."

Her letter, written about the same day, is not an answer, for she had not received his. But she had heard of his change of route. I cannot help quoting it—it is so admirably expressed—though it hardly advances the story:—

"Bebek, 2nd July.

"Caro mio Carlo,—One night all nature was looking sad and warning—the wind, the waves, the birds, all seemed going—none coming, none coming to meet me, all going—gone, they said, 'gone by the Danube.' Then the stillness fell over all, and I have lived in a grey, dim twilight ever since. This is not imagination, but a real truth. Exterior objects are reflected from the tone of our minds. Have you not felt this? Did the Danube look bright and glorious to you? and will it have in your memory one of those silver, glittering lines like a shining river seen from a distant mountain? Did you see the sun rise as beautiful as you have seen it? If we turn away with a sad, sick, solitary feeling from that which is beautiful in nature—if this is true, Carlo, are

we not a couple of fools? Are we not sacrificing to a Moloch of false necessity? If we have found out the secret which constitutes to us the ideal of happiness—Moloch is unpropitious, and refuses us the boon as a whole—can we not submit to circumstances, and take it as a half? '*Quand on n'a pas ce qu'on aime, il faut aimer ce qu'on a*'—which seems to signify what we can get. We cannot do as other people do; but are we like other people that we should follow to the *letter* the same rule? You certainly are not; you have an individuality which is characterised as extraordinary by all who know you; you have but now given a too painful proof of it, and I have always had a feeling that your fate and mine in connection with you must be out of the beaten track. It has been so far, and as we cannot get it straight, would it not be wisdom to enjoy it crooked? Tell me is this philosophy or sophism? I do not believe in solitary or unreciprocated happiness; and as the enigmatical word conveys to each mind a different meaning, each individual seeks for a similar idea to his own as a counterpart. Considering happiness as a material object for the sake of simile, I think it is like a circle which has been roughly broken, each person taking one half, seeking through the whole of their lives until they find the other half which fits in. Until we have found it, we go on hoping; but when once found, then comes the crisis, and it is either all right or all wrong. I think you have got

the other half of my circle, but Moloch, that heathen god, won't let us fit it in all the way round, therefore we can't get the thing to a state of perfection; but with you, I think we might bear with a few nicks and cracks. I almost regret I did not take you at (*one*) of your words at Balaclava. I am pestered on all sides with half-circles; they will not fit; it is of no use. I shall seek no farther apart from you. I have but one intention; you know it. Now, I turn to common sense. What am I to do? I tell you solemnly earnest that I am irresistibly impelled to do what you wish; and if you did not recklessly contradict yourself in alternate letters (leading to the supposition that you labour under some aberration of mind, *de temps en temps*), I should much sooner submit; save me a great deal of misery, of fever, *nuits blanches*, all terminating in a cough, all because you will persist in subjecting me from violent transitions of heat to cold—anything better, as you say, than lukewarmness; but I shall never get rid of my cough until you send me a little warmth, Carlo mio —warmth is essential to my existence—moral as physical."

It is evident that Major Yelverton during this time was going through a moral struggle. He saw well enough that Miss Longworth would consent to anything he proposed. Her romantic and emotional nature had been so profoundly stirred that she was willing to fling convictions to the winds, and to be his

mistress if she could not be his wife. At present he shrinks from exercising the power he possessed over her. He had been appointed, after his return home, to the command of the fort at Leith. He writes in December, 1856:—

"You want to know how I make myself at times indifferent. I'll tell you. You mistake an effort of the will for indifference; it is that, knowing I cannot gain on your terms, I will not try on mine (necessity-made). *Addio, Carissima, sempre a te.*"

We now reach the next epoch in the history. Miss Longworth, after her return from the East, takes with her a young lady friend of eighteen, and goes into lodgings at 1 St. Vincent Street, Edinburgh. She tells the landlady that Major Yelverton is engaged to her, and he calls at the house nearly every day. Miss Longworth occupied herself with music and singing, and also painted a good deal. Miss M., the young lady who was with her, had some introductions to Edinburgh people, and the two ladies go out a good deal, being particularly frequent guests at the house of a well-known judge. What the precise relations between the gentleman and the lady were at this stage is very difficult to determine. In a letter by her, about April, 1857, she encloses two cards bearing the names Mr. and Mrs. Shears. He affects in his reply to believe that she had meant to intimate to him her own marriage:—

"Cara Theresa,—Excuse me for continuing (for

this one time more) the old style of address in part. I congratulate you on the step you have taken most sincerely, as the most likely course to render your future life a contented one; and if ever a remembrance of me crosses your mind in your new sphere of duties and pleasures, spare me a place in your prayers, and believe in me as one always ready to act towards you as a sincere and respectful friend; and permit me to add, as perhaps you will be pleased to hear that such is really the case, that by your marriage you have earned my lasting gratitude, as on reflection I found that I had placed myself in a false position with regard to you, and one of all others the most painful to me, viz., that I had promised to you to do more than I could have performed when the time came.[1] You may think this declaration a new example of the truth of the old faith, but it is not. I have passed that weakness. Forgive me that I still retain that of addressing you on the outside of this by your maiden name, and believe me ever yours to command,—Carlo."

She replies in words of burning passion:—

"Caro mio,—Are you mad, or am I? The first reading of your letter brought me to a stop, mental and physical; my present weakness could not stand such a shock, my heart went still; now on recovery I begin to see how it is. Those cards, I was going to

[1] In these words Lord Deas found sufficient proof of promise of marriage.

tell you all I knew about it—but got so faint my friend made me give it up—so I slipped the cards in. Oh, Carlo, to suspect me of such a thing, I whose very life is ebbing away for you—I who have sacrificed all but God to you—I who have lain at your heart and in sight of heaven been called yours—I whose very soul is yours to be so mistaken! Oh, Carlo, what could she be to do such a thing—the vilest hypocrite, the most sensual wanton—Carlo, I must go mad. . . . That you should judge me guilty of such an infamous thing—God help me. I do not know how to bear this last blow. Oh, that he would take me, and you seem to be glad of it. Oh, no, no, don't say that, don't say it is a comfort for you to be rid of me. If it is, you know you are, you have always been, free. You know there is a refuge for the wretched broken spirit —you know where—but you told me I might save you, that you would go headlong to perdition if I ceased to love you. Oh, Carlo, we have been too dear to part now—we must try and make the best of our lot; all I have borne, all I still must bear. God knows best how much I can, but be you a very devil, I feel I am fast to you; for some good end, no doubt, in the far-off future. Write me directly, or I must certainly come and find you; it is too late to take you at your cruel word."

He is now quartered near Dublin, and she is staying with her sister in South Wales. Carried away by her tumultuous passion, she is now ready to yield anything.

She crosses to Ireland. He fails to meet her, and she writes [end of July, 1857]:—

"Caro mio Carlo,—So disappointed not to meet you here—all day I have waited in a fever of listening—every step or sound approaching making me breathless with hope—all to melt in despair as night comes on. You are quietly philosophising elsewhere—if you knew the trials and miseries this journey has cost me you might have some compunction. But the greater the sacrifice the less it is appreciated is a fact in metaphysical annals. Witness the gods to whom human sacrifices were offered—they were most difficult to appease. You are the will-o'-the-wisp and I the deluded victim. What am I to do next? If you cannot come will you send me a telegraphic message where I am to go? I shall never return home—it is all over there. Your system of terrorism is a bad one—it may make me love you more for the time, but it breaks my heart; such policy might answer with an unsensitive person, but never with a highly nervous one. It is like those cold hard climates—it is too bracing—it kills the weak, but makes the strong doubly strong. You ought to study the constitution of your patient.

"Commin's Hotel, on the Quay,
"Waterford."

I have given these letters at so great length because they seem to me full of human interest. No doubt the lady rushed headlong to her own ruin.

She sinned against light. Blinded as she was by this great passion, she can hardly have supposed that Major Yelverton would marry her. His whole conduct from the beginning pointed to a different conclusion. For about six weeks they travelled in Ireland, staying at various hotels together. It was undoubted that they lived as husband and wife.

In August, 1857, Miss Longworth, who was a Roman Catholic, waited on the Bishop of Dromore, accompanied by the parish priest of Kilbroney. She explained to the bishop that she had been irregularly married to Major Yelverton in Scotland, but that her conscience was not clear on the matter, and she wished some church ceremony to be performed.

Accordingly the bishop authorised Father Mooney to perform a renewal of marriage-consent between the parties. They went together to the church, and knelt before the altar while the priest repeated part of the marriage service. The gentleman said after him the words, "I, William Charles, take you, Maria Theresa, to be my lawful wedded wife, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, till death do us part, if Holy Church will it permit, and thereto I plight thee my troth." After this they returned to Edinburgh, and took rooms at 31 Albany Street, passing as husband and wife. Mr. and Mrs. T., friends of the lady, visited her there, and regarded her as married, and Miss Macfarlane lived with her as a

sort of companion. They made a tour in the Highlands together, and Major Yelverton in the hotels spoke of the lady as his wife. In December, 1857, the lady went for three months to the house of some friends at Hull. The major visited her there, and stayed ten days. By their request the lady passed in the house as Miss Longworth, and an attempt was made to conceal from the servants that she and the major were living as married persons. They went from thence to France together, and travelled till the end of April. Major Yelverton's leave expired then, and he was obliged to return to Leith. The lady was not well enough to stand the journey, and he left her at Bordeaux, where she shortly after had a most serious illness, through which she lost for a time the power of one side and became almost blind. The woman in whose house she had been living at Bordeaux had treated her with great cruelty. Here is an extract from her last letter to the defender :—

"Boulogne, May or June, 1858.

"Dear Carlo,—You asked my forgiveness and received it without a word of reproach. I shall not *die*, as you say. My sister has saved me; but it is somewhat hard to lose health, eyesight, and every beauty in the prime of life. *Du reste*, if these, my sufferings for your sake, *have* not endeared me more, do not think there is any more obligation imposed upon you; let it be forgotten—*requiescat in pace.* (It

will be remembered in both our days of reckoning, and that is enough.)

"That vile thing wanted to make a claim on the plea that you had deceived her, and introduced an improper person into her house in order to abandon her—imagine, if you can, the misery I have gone through, think of your own sister in such a position—you say you never *think*, that is a fib—in our present position it is positive you think a great deal—but you fear to disclose your thoughts. May I guess? You think, perhaps, that it would be better for us to keep apart for a long, long time until circumstances remedy themselves? This may be wise, but so very hard; even now time hangs like an incubus upon me. 'Tempus fugit' seems a fallacy. I should be tempting you to come over, only I am so very ugly that you could not love to look at me. It is strange you do not miss me more—we have never lived together long sufficiently—if we could remain for six months, then you would. You are a very good Carlo to write to me so often—it is the only pleasure left me—I cannot see to read or write—my days are so long and dreary—my nights restless and feverish—your letters the only point I have to look forward to, so pray think of me—I often lie awake from daylight waiting for the postman. I will seal my letter; but I had already taken the precaution about signing, it had struck me that such letters as I write to you could only be written by a wife or——

. . . Caro mio, think at least of the happiness we have known together so entire, so unbounded—is there any other joy in the world to be compared to reciprocated love? How everything on earth became indifferent but our two selves. You said I was the dearest small Tooi Tooi that ever lived, and I thought there was not in the wide, wide world another Carlo like mine.

"THERESA YELVERTON."

Who would not be touched by the greatness of this woman's love? She wrote in June, 1858, to the priest who had performed the ceremony in Ireland, asking him to send a marriage certificate. He forwards to her the usual certificate in Latin.

In this same month of June, Major Yelverton called at 31 Albany Street, and took a present to the landlady. She said, "Is it from Mrs. Yelverton?" He replied, "Pray, don't say that," and went on to tell her that he was not married to the lady who had been there with him. The landlady asked him if he knew that he had broken the laws of God and man. He said he did not know about the laws of God, but he knew the laws of man, and laughed. Some days after Miss Longworth also called at the house, and when the landlady told her that Major Yelverton had denied that he was married to her, she became violently hysterical. On the 25th or 26th June, 1858, he wrote:—

"Poor little Tooi-tooi,—I cannot go and see you

any more just now. You must go to Glasgow as I asked you. Do not forget the man's name—Gilligan's Livery Stables. My brother has come; I will send him to see you this afternoon about four o'clock. Addio."

The same or the following day he was married at Trinity to Mrs. Forbes. On information lodged with the Procurator-Fiscal of Edinburgh, Major Yelverton was arrested on a charge of bigamy; but the Crown decided to take no proceedings, and he was released.

Miss Longworth's action was then brought. She claimed that she was married—

1. By declaration of consent in Scotland.
2. By promise *subsequente copula.*
3. By the ceremony in Ireland.
4. By living together, and being known as husband and wife in Scotland.

This last ground was not insisted in, it being felt by Miss Longworth's counsel that the evidence for it was insufficient. Her counsel were Lord Advocate Moncreiff, Solicitor-General Maitland, Mr. Patrick Fraser, and Mr. D. B. Hope. Major Yelverton was represented by Mr. Gordon, Mr. Young, and Mr. Millar, all of whom subsequently rose to the bench.

I have given the narrative of the case at such great length that I do not propose to dwell upon the law of it. It was proved by the evidence of Irish barristers that a marriage performed between a Roman Catholic and Protestant by a priest of the Romish Church was not valid. The defender's account of the Irish

ceremony was that both he and the lady were aware of this law, and that he consented to the ceremony to please her, she representing that it would ease her conscience and leave him free. As to promise, none could fairly be found in Major Yelverton's letters. And even if it could be inferred from them, the cohabitation, on her own statement, began in Ireland. Lord Ardmillan decided against the lady. In concluding an elaborate and able opinion, he says, "This judgment has been reached after much anxiety, and not without sympathy for the sad fate of the pursuer, but with a clear conviction that it is according to the truth of the case. For the conduct of the defender there can be no excuse. But he was not the seeker, the seducer, or the betrayer of the pursuer. The story of the pursuer—her charms, her talent, her misfortune, even the intense and persevering devotedness of the passion by which she was impelled—must excite interest, pity, and sympathy. But she was no mere girl—no simpleton, no stranger to the ways of the world, no victim to insidious arts. She was not deceived; she fell with her own consent."

But if anyone doubts that there is much to be said on the other side, let him read the judgment of Lord Deas. He expresses with all the force and incisiveness of a most virile and sagacious intellect the view that the letters pointed to marriage and that the history of the case makes it incredible that the cohabitation was on any other footing. He finds sufficient

proof of promise in the correspondence, and thinks the ceremony in Ireland would in itself have been enough as an acknowledgment of previous marriage in Scotland. For the reader must remember that if two people have agreed in Scotland to take each other then and there for husband and wife, an acknowledgment that they had done so will be sufficient proof of marriage, though the acknowledgment be made in England or elsewhere out of Scotland. Lord Deas thus disposes of the defender's argument about the Irish ceremony, that both he and Miss Longworth knew it was a farce, and it was meant only to ease her mind. "The defender affirmed *three* things. 1st. That there was no necessity for the proposed ceremony, and he added the reason—because of what had been previously settled or arranged. 2nd. That something had been settled or arranged which the defender either assumed the priest to know, or was prepared to explain. 3rd. That the whole use and object of what was to be done was to satisfy the lady's conscience.

"Now, as regards each of these three things, I must ask a question. 1st. What could supersede the necessity of a marriage between these two parties, who were to live and cohabit together, except a previous marriage? I can suggest no answer to that question. 2nd. What did the defender mean to represent as having been already settled and arranged between him and the pursuer? Did he mean to convey to

the priest at the altar that they had agreed to live together in habitual illicit intercourse, and that what was about to be enacted was a religious mockery to inaugurate that intercourse? I am not able to persuade myself that this could be the defender's meaning, and yet it was the meaning, and the only one which the defender's counsel suggested in answer to my question on the subject in the course of the discussion. 3rd. What was it that the defender meant to say was to satisfy the lady's conscience? She was a Roman Catholic, and, of course, looked upon the ceremony of marriage at the altar as a sacrament. Could it satisfy, or be supposed to satisfy, her conscience to add desecration of a sacrament to the sin and shame of fornication deliberately resolved to be persevered in? I am unable to comprehend what kind of conscience she could be supposed to have had to be so satisfied. The pursuer and defender were not obtuse, ignorant, uneducated individuals. They were persons of education, of knowledge of the world, and of great intelligence, and to suppose that an absurdity of this kind could pass muster with either of them is not, I think, consistent with common sense."

Lords Westbury and Brougham thought the marriage was proved. But the majority in the House of Lords was of a different opinion. Every one will feel pity and sympathy for the pursuer, however great her indiscretion may have been. Had she been successful, the fate of the other lady would have been

scarcely less hard. She would not, indeed, have lost honour and reputation, for she had been formally married, and had no reason to suspect any invalidity. But she would have been turned upon the world a wife without a husband, and her son, who succeeded to a peerage, would have had no more than a kind of fictional legitimacy.

Marriage proved by Persons cohabiting and being reputed Married.

This is not, properly speaking, a separate mode of marriage, but it is convenient to treat of it by itself. It is more correct to describe it as another way in which it may be proved that two persons had interchanged matrimonial consent. As I have explained already, all that is necessary to prove a marriage in Scotland is to show that two people, who are free to marry each other, have agreed then and there to do so. When a man and woman live together as man and wife, "cohabit at bed and board" in legal phrase, the man according to the woman the respect due to a wife and not a mistress, and they are regarded in the society in which they move as married persons, it is a reasonable and right presumption that they meant marriage and not concubinage. Such a course of life is a continual declaration that they take each other as husband and wife. A marriage established in this

way is said to be proved by "cohabitation and habit and repute." By "habit and repute" is meant that they were held and reputed to be married. Even in England, where a ceremony, ecclesiastical or civil, is essential, this presumption is recognised. *E.g.*, a man and woman are regarded as man and wife. Nothing in their conduct leads their family or relatives to suppose that they have never been married. After their death a son claims a share of the father's estate. The certificate of the marriage of his parents is not forthcoming, and no one is in a position to say when the ceremony was performed. It is surely more just that the son shall take his share unless it be proved that his parents were never married than that he should have to take upon him the burden of first proving their marriage before his claim is recognised. In other words, the law regards it as more likely that the parents were married, though the record of the ceremony may have perished or been lost, than that they deliberately chose to deceive the world into this belief. It is of course quite possible that a man may be willing that a mistress should enjoy the status and consideration of a wife, unlikely as such a supposition is. But the presumption is the other way, and no hardship is done in making the person who doubts the fact of marriage bring forward the grounds of his disbelief.

And if this is law in England where a ceremony is required, it is still more natural that weight should be

given to the same presumption in Scotland. Here the Court has not to suppose that a marriage register has perished, but only that at some moment during their cohabitation the man and woman agreed to hold themselves married. But it must not be imagined that the Court will come lightly to that conclusion. In this, as in every way in which marriage may be proved, the fundamental question is, what was the intention of the parties? If, on a careful examination of the evidence, it appears that the woman was treated as a mistress she will not be declared by the Court to be a wife. In such an inquiry it is clear that the length of time during which the cohabitation has subsisted will be an important element for consideration. It may well enough happen that a man may for a short period allow a woman to bear his name, and to enjoy some of the privileges of a lawful wife, though he has no intention of marrying her. But if she continue to live with him for years in this way the relation may wear a different complexion. The Court has never fixed any length of limit as a minimum by saying that until the parties have cohabited for so long they should not be presumed to be married notwithstanding the fact that they were reputed husband and wife. But it appears to be the fact that in no case has cohabitation coupled with repute been regarded a sufficient proof of marriage where the parties had not lived together for a very considerable time.

I am not sure whether any case is recorded where there had been less than ten years' cohabitation. But every case would depend on its own circumstances, and a much shorter cohabitation than this might avail where the evidence as to reputation was very distinct and uncontradicted, and the intention clearly manifested by conduct. I have already mentioned incidentally that much misunderstanding prevails with regard to this mode of proving marriage. A shrewd observer would generally be able to detect in the demeanour of the parties indications that they were not married where this was the case, and a judge who brings to the consideration of the evidence a reasonable amount of knowledge of the world will not often go wrong. As a rule it is the easiest thing in the world to see when a woman is "no casual mistress, but a wife." The mere fact that a man and woman travel about together and that the man writes "Mr. and Mrs. Smith" in the visitors' books of hotels, and does not correct a waiter or hotel-keeper who speaks of the lady as "your wife," affords a very slight presumption of marriage. It would, indeed, not be possible for them to obtain access to respectable hotels or lodgings unless they were assumed to be husband and wife. Similarly, if the lady makes purchases, and the accounts are sent in to the gentleman, it would be very impolitic of the shopkeeper if he allowed any suspicion he might have to prevent his putting "Mrs. Smith" at the head of the bill. It

is immaterial to him whether they are married or not, and very natural that he should not insult his customers by obtruding doubts which may be quite unfounded. This is the type of cohabitation which is consistent with no marriage, and of reputation which carries no weight. The persons whose opinion is alone worth having are the friends and relatives of the parties, in proportion to their nearness and intimacy. And if one or two of these people who have had the best means of judging say that they entertained doubts as to whether the parties were married or not, this evidence, if the Court believes it, will go a long way in preventing the proof of marriage being held sufficient. In such a case negative testimony is of much more weight than positive. For a hundred reasons might induce a man to treat a mistress as a wife, and to allow people to believe that he was married to her. But if he is married it is very unlikely that he will so conduct himself towards his wife as to lead some people to think that she is merely a mistress. There are few husbands who will not be sufficiently jealous of the honour of their wives as not to avoid any risk of such a mistake being made. I hope by giving shortly the substance of one or two cases to make the general rules of law on the subject abundantly clear. I should not omit to remark that secrecy is fatal to the proving of marriage in this way. For if a man cohabit with a woman, and endeavour to conceal the fact, the presumption is rather that she

is not his wife. She may be married to him, but if so it is right she should have some other proof of marriage. She is not in a position to say, "We lived together as husband and wife, and everybody knew we were married." "Habit and repute," says Lord Chancellor Chelmsford, "arises from parties cohabiting together openly and constantly as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighbourhood of which they are members as to produce a general belief that they are really married persons." And further, it must be distinctly understood that reputation will not marry people if it be shown that they could not or would not be married. They may be too near akin or be already married, or they may finally agree with each other that they will not marry, but live together and retain their freedom. Such facts as these, if proved, will prevent marriage being established though all the world regarded them as married persons.

The whole law on this subject was very fully discussed in the famous case in 1867 which decided the right to the marquisate of Breadalbane.

The Breadalbane Case.—On the death of John, second Marquis of Breadalbane and fifth Earl of Breadalbane, Holland, &c., which took place in 1862, there were two claimants to the title and estates. These were John Alexander Gavin Campbell of Glenfalloch and Lieutenant Charles William Campbell.

Both were great-grandsons of a certain William Campbell of Glenfalloch. The former was descended from his second and the lieutenant from his sixth son. But the lieutenant contended that William Campbell's second son James had never been married, and that his opponent's father was therefore illegitimate. There was the great difficulty in starting this question that so much time had been allowed to elapse. Moreover, Mr. W. J. Lambe Campbell, whose legitimacy was now for the first time disputed, had, during his lifetime, been regarded by his family and by all the world as legitimate, and had succeeded without dispute to the estate of Glenfalloch. But these difficulties, although very formidable in a question of this kind, in which so great weight is justly attached to family tradition, were still not such as could not have been surmounted. The question for the Court to decide was whether the lady, who had undoubtedly lived for many years with Captain James Campbell and been regarded by many people as his wife, was in reality his mistress. The strength of this contention lay in the fact that in the beginning of their cohabitation they were not married. James Campbell was born in 1754. In 1775, when he was twenty-one, he got a commission as ensign in the 40th Regiment of Foot, and joined his regiment in America. He came home in 1779 as a lieutenant on recruiting service. In 1781 we find him at Bristol, where the Secretary at War writes to him accepting an offer which he had

made to raise an independent company of foot without expense to Government. In the same year the lieutenant eloped with the handsome wife of Christopher Ludlow, a medical practitioner, apothecary, and grocer, at Chipping Sodbury in Gloucestershire. Chipping Sodbury, where Mr. Ludlow carried on his multifarious occupations, is about twelve miles from Bristol. It is even now a quiet little market town, and just then its head seems to have been completely turned by the dashing young officers engaged ostensibly in beating up men for good King George's army. Even the judicial gravity of the Lord President is disturbed by the evidence as to the inroads of the military at this place. "There appears," he says, "to have been a kind of epidemic there—a sort of scarlet fever that carried off several of the married ladies of Chipping Sodbury." We are, however, only concerned with the fortunes of one of these, viz., Mrs. Christopher Ludlow. She had been married to the doctor—apothecary—grocer in 1776, and had one son, who was three or four years old when one night in January, 1781, she eloped with Lieutenant James Campbell. The recruiting party was just leaving for Glasgow. With Lieutenant James she embarked at Gravesend for America on 8th May, 1782. The next that we hear of her is a few words in a letter from Colin Campbell, James' eldest brother, who was in Glasgow, to Duncan, another brother in Jamaica. He writes, "I had a long letter from James lately

from Halifax (*i.e.*, Nova Scotia). He and Mrs. Campbell were both well. He does not mention having any increase in his family, and, for anything I know, they consist of no more than himself and his wife, who I never saw, but she is exceedingly well spoken of." In those days news did not travel with the certainty and rapidity that it does now, and Captain Campbell seems to have managed to conceal the story of his elopement from his family, so that the lady continues to be exceeding "well spoke of" to the end of the chapter.

It may be convenient at this point to dispose of her lawful husband, Mr. Ludlow. Apparently broken-hearted at his wife's desertion, he determined to give up all his professions at Chipping Sodbury and to leave the country. He passed an examination as hospital mate on 21st June, 1781, and sailed for New York in the month following. There he remained on hospital duty, and in 1783 he made his will, "being weak and indisposed." He sailed for this country, but died just before his ship reached Portsmouth, in January, 1784. A notice of his death appeared in Farley's *Bristol Journal* and in the *Bath Chronicle*. As Lieutenant James Campbell, with a detachment of his regiment and accompanied by Mrs. Ludlow, bearing the name of Mrs. Eliza Campbell, arrived from Halifax at Portsmouth in February, 1784—*i.e.*, only a few weeks after Ludlow's death there—it seems no extravagant assumption that they should have heard

of that event. It may be supposed that the runaway wife had the curiosity to inquire what had become of the husband and child whom she had left. From the muster-roll of the 40th it appears that Lieutenant James Campbell was at Taunton and afterwards at Plymouth until March, 1785. In April, 1785, he sold out. In his private account with Messrs. Cox & Co., the army agents, he is credited with £550 as the price of his commission. Almost the whole of this sum was needed to balance his account with them. An extract from the register of baptisms of Stoke Damerel, near Plymouth, shows that on 30th May, 1785, a month after James Campbell had sold out, a child was baptised in that parish as "Eliza Marlborough, daughter of James and Eliza Maria Campbell, lieutenant in 40th Regiment." The clerk's entry suggests his acceptance of the legal principle, that husband and wife are one person. There was some evidence that in July of this year James Campbell was at his father's house of Glenfalloch in Perthshire. At that time there was a great flood which swept away two farm-houses on the estate; and there was local tradition as to Lieutenant James having been particularly active in rescuing sheep, and rendering assistance in general. But there was no evidence that Mrs. Ludlow was with him, or, indeed, that she was ever at Glenfalloch during the lifetime of William Campbell, James' father. In fact, James seems not to have satisfied his father's inquiries as to his wife, for we

find the following memorandum in the writing of Archibald, another brother of James', in reference to certain changes which their father was proposing to make in the family settlements. It is dated December, 1786, and addressed to his law agents, but was never sent to them. After stating that he intended to exclude the issue of his eldest son from succeeding to his estate, it goes on:—"Glenfalloch is equally determined to exclude the issue of James, his second son, by his present wife, on account of the uncertainty of her family or connections, which cannot be supposed respectable, or in any degree proper, as he has all along declined giving any further account of her than that she is his wife." Old Glenfalloch, however, never carried out this change in the entail. In 1786 a summons in an action for a London tailor's account for £9 9s. was served on James Campbell as residing at Glenfalloch. His subsequent history is, unhappily, chiefly recorded in documents of this or a kindred nature.

In 1793 the Breadalbane Fencibles were raised by Lord Breadalbane, who became colonel of the regiment. The nomination of the officers was left to the earl, and James Campbell got first a lieutenant's and afterwards a captain's commission, and was made quartermaster of a battalion of the regiment. He appears to have been with the Fencibles at different towns in Scotland till the regiment was disbanded in 1799. This was proved by the muster-rolls, and by

actions for debt raised against him at various places where the Fencibles were quartered. All this time Mrs. Ludlow went about with him, and in the words of an old sergeant, "They lived together like man and wife, and went in and out the same as the other officers and their wives."

But there is even clearer testimony that they were regarded as married. In 1791 old William Campbell of Glenfalloch had died. His eldest son, Colin, had succeeded to the estate. Colin was also a captain in the Breadalbane Fencibles, and must therefore have known whether his brother James was looked upon in the regiment as a married man. It was proved that about the year 1799, James and his reputed wife and their children paid a visit to the family house of Glenfalloch. As Colin was himself married, it would have been very unlikely that he should ask them unless he had believed them to be married. The Fencibles were some time in camp at Musselburgh, and the course of the unfortunate captain is, as usual, marked by the record of legal executions against him. On 4th July, 1799, we find him charged on letters of horning; and again on 8th August he is charged "at his dwelling-house, Fisherrow." The same year the Fencibles were disbanded, and Captain Campbell got a commission in the Cambrian Rangers and went out with them to Gibraltar. He executed in favour of his reputed wife a general power of attorney to act for him in his absence. He describes her "as my

wife, Eliza M. Campbell, residing at Musselburgh." The Rangers came home, and were disbanded in 1802. From that time till his death James Campbell was on half-pay as quartermaster of the Breadalbane Fencibles. We know he was in Scotland to 1812, for he took protection as a debtor in the sanctuary of Holyrood; and it is also on record that the same year his eldest daughter was married "to Mr. Butler, student of medicine." In 1803 he went into a house in College Street. Here he lived in a state of chronic pecuniary embarrassment, as is proved by the frequent service of actions against him. It appears that they tried to eke out their income by letting lodgings, for the entry in the Directory of 1804—James Campbell, 15 College Street, becomes in the following year "Campbell's furnished lodgings." We also find him taking out letters of inhibition against his "wife, Eliza Maria Blanchard, otherwise Campbell." This is the legal way by which a husband warns the public not to give credit to his wife. To do her justice, Mrs. Ludlow does not seem to have been the one to blame for the family distress. In 1806 they have to remove to James' Court, Lawnmarket, and there, in the same year, James Campbell died. At the time of his death, his eldest son, W. J. Lambe Campbell, who had been apprenticed to a surgeon in Edinburgh, and attended some of the medical classes, was lying in prison for a trifling debt, and remained there for fourteen months.

On 23rd June, 1807, James Campbell's reputed widow writes the following letter to Francis Moor, Esq., War Office. We see that her orthography is a little loose :—

"Sir,—I hope you will pardon the liberty I have taken in writing to you, but as my situation is a distressing one, I trust it will plead my excuse. I am the widow of Captain James Campbell, late Qr.-master in the 1st Batn. of the Breadalbane Fencibles, at the reduction of which he got a company in the Cambrian Rangers, and when that regiment was reduced, from ill health he was rendered unfit to enter again into His Majesty's service, and on the 24th October, 1806, my husband died insolvent, and left me with three children without the smallest means of support. I apply'd to the half-pay agent respecting the widow's pension, and have made oath before a magistrate, but as I unfortunately lost my marriage-lines in America, I am enform'd it cannot be procured. My husband was Insign & Lieut. in the 40th Regt. of Foot during the war with that country. At the end of the year 1780 he came to England to recruit, and in Sept., 1782, I was married to Mr. Campbell in Edinburgh by Mr. MacGregor, the Gaelic minister (who is also dead), as is Insign Wm. Wilcox, of the 40th, who was the witness to our marriage; and the June following we went to America, in the fleet that took out the preliminarys of peace twenty-five years agoe. The present Galic minister have been wrote to, and

he says that he got no register from any of his predecessors. I have administer'd at Doctor's Commons for four months' pay due to my husband at his death, and I have a power of attorney which he sent me from Gibraltar at the time he was in the Cambrian Rangers. I beg, sir, you will excuse my being thus particular, as my motive is to obviate any doubts of my being Mr. Campbell's lawful wife. Lord and Lady Breadalbane know me, and I have frequently had the honor of dineing with them while my husband was in his lordship's regt. His lordship at present is not in town, or I would have asked him the favor of writing to you. My case is hard. May I entreat you, sir, to compassionate my situation, and would be doing an act of the greatest charity. I am not able to work for my support. Should you, sir, have the goodness to take this into consideration, the widow and orphans' prayers will ever attend you.—I am, sir, with due respect, your obed. servant,

"ELIZA CAMPBELL."

On the same day she wrote to Lord Breadalbane:—

"My Lord,—I hope you will excuse me taking this liberty; but as your Lordship had the goodness to say that you would think of my situation, enduces me again to solicit your Lordship to consider my distress. Mr. Holland, the half-pay agent, and who pays the widows' pensions, enforms me that if your Lordship would have the goodness to write a few

lines to the Secretary of War, to say I was the wife of Captn. James Campbell, that it would be the means of procureing me the pension. Your Lordship granting this request will confer an act of the greatest charity, and will ever be greatfully acknowledged. Mr. MacGregor, the Galic minister who married us, has been dead some years, and have left no register to his predecessor, and I unfortunately lost my marriage lines in America; 'tis, my Lord, 25 years since I was married to Mr. Campbell, 'tis a distressing situation to be left without any support at my time of life, and my son's long confinement in the Tolbooth (which, I suppose, your Lordship has heard of) adds greatly to my distress. Should you, my Lord, think proper to grant me this favour, I can deliver your letter myself if your Lordship approves. With most respectfull compts. to Lady Breadalbane, I have the honor to be your Lordship obliged servt.,

"ELIZA M. CAMPBELL."

The chief of the clan "compassionated" the unhappy lady, and gave her the following certificate:—

"This is to certify that I have reason to believe that the bearer, Mrs. Campbell, is wife of the late Captn. James Campbell, Quartermaster to the 1st Battn. of the Breadalbane Fencibles.

"BREADALBANE,
"Col. late 4th Fencible Regt."

Furnished with this she obtained her pension.

Lord Breadalbane also came to the rescue of her son, and through his agent paid £60 to get him out of the Tolbooth, and had him placed as midshipman on a man-of-war. He paid him an allowance of about £20, and altogether showed that he regarded him as a poor relation.

W. J. Lambe Campbell did not stay long in the navy. In 1810 he was married in London, and his wife's friends bought him a practice as a surgeon, which he carried on with success. Much greater fortune was, however, in store for him. His uncle, Colin Campbell of Glenfalloch, died in 1806, survived by an only son. This son died abroad the same year, also leaving a son only four years old. On the death of this boy, in 1812, William J. Lambe Campbell, the surgeon, became entitled to the estate of Glenfalloch unless his legitimacy was disputed. Strange to say no question was raised about it, and he possessed the estate of Glenfalloch until his death, thirty-eight years later. The Earl of Breadalbane, who had commanded the Fencibles, had one son. This son, afterwards the second Marquess, was married, but had no children. Failing his issue, the nearest heir to the peerage was his distant cousin, William Lambe Campbell of Glenfalloch. As his legitimacy had not been doubted, he was recognised during his life as the next heir of entail to the Breadalbane estates. William Lambe Campbell died in 1850, survived by his son John Alexander Gavin. On the death of the Marquess in 1862, John Campbell of

Glenfalloch would have succeeded without question if his second cousin, Charles William Campbell of Boreland, had not come forward and challenged the marriage of Captain James. I have given the story of Captain James and Mrs. Ludlow at sufficient length to enable the reader to appreciate the point which the Court had to decide. Had James Campbell and Mrs. Ludlow consented to marry each other and proved their consent by their mode of life and by their reputation among their friends? If Mrs. Ludlow had not unfortunately been another man's wife when her cohabitation with James Campbell began the case would have presented little difficulty. For undoubtedly the Captain and she had wished everybody to regard them as married, and had been quite successful in gaining this reputation. But people had believed it just as much when Christopher Ludlow was still alive—when it was clearly impossible for his wife to marry anybody else—as after the forsaken husband had died. For some years Mrs. Ludlow had unquestionably been a mistress. Yet during this time she enjoyed the reputation of a wife. What evidence was there that her position was changed after Christopher Ludlow's death? What had James Campbell done then when he might have married her to show that he intended to raise her to the rank of lawful wife? As to the ceremony by the "Galic minister," if it ever took place, it only made matters worse. For at that time Ludlow was alive. It is well enough

to say that if you live with a woman in such a way as to make everybody believe you are married you shall take the consequences. But if at the beginning you could not possibly be married to her, must you not give some proof of change of intention, *i.e.*, that you intend that henceforth she shall be wife and not mistress, when that becomes legally possible? It was said that in the rare case where a man marries his mistress he marks the change by publicly celebrating his marriage or openly acknowledging the step he had taken. Lord Curriehill put the argument pointedly. "Is there," he says, "any precedent or any authority in the practice of Scotland for holding that the mere continuance of such cohabitation, by men and women who have entered into such illicit connections, is sufficient to prove, or to create a presumption, that they have changed these connections from concubinage to matrimony, although there is no other evidence of their having done so? No such precedent or authority has been brought forward by the respondent (Campbell of Glenfalloch), and, so far as I can discover, none exists. Such a change must be proved by other evidence. And what must be proved by such other evidence is, that the parties contracted marriage. A woman cannot grow insensibly from a concubine into a married wife by any natural process of accretion or of accession. Such a metamorphosis cannot be legally effected by such means. Marriage is a consensual contract; and although there are

different ways of proving that such a contract is entered into, yet the thing to be proved, whatever be the nature of the evidence, is, that the parties entered into a mutual contract accepting of each other as spouses. And cohabitation by them, with habit and repute as husband and wife, for any length of time, does not in law afford either proof or presumption of their having contracted marriage, when such cohabitation is ascertained to have been resorted to by them for the very opposite purpose of counterfeiting marriage, and concealing the want of it."

And Lord Ardmillan, who took the same view, says, in a rather bold figure—

"This intention to deceive by a pretence of marriage taints the spring and the stream of their cohabitation, and, unless discharged by proof of conduct indicating a change, must be held as qualifying its entire course." And the same judge, in emphasising the necessity for some outward sign that the relation had changed and became marriage, says—

"The fact of Ludlow's death is not such a change. They could not lie down in adultery and awake in marriage because Ludlow had died during the night." But the majority of the judges in the Court of Session and, on appeal, the House of Lords held that this was a case when it must be presumed that the parties intended to be married persons. The length of time of cohabitation was great, the belief in the marriage universal. All the members of the family had

accepted the son of the connection as legitimate, and he had been allowed to succeed without question to a valuable estate.

With this may be contrasted one or two cases in which the evidence was not regarded as sufficient to establish marriage.

The Strathmore Case.—No final judgment was ever pronounced in this case, as the lady decided it would be as well to marry the pursuer. In 1745 George Forbes was a footman at Castle Lyon in the service of the countess-dowager of Strathmore. He became the paramour of the countess, and she, finding herself *enceinte*, took him with her to Rotterdam where they lived as husband and wife. There the countess gave birth to a daughter. Forbes afterwards brought an action against her for declarator that she was married to him. He set forth that after the birth of the child "it was concerted betwixt them that the defender should return to Scotland to try the mind of her relations, and to send for him, or to return herself to Holland, as she should find her relations affected; neither of which she did; but, on the contrary, had secreted her daughter, by which the pursuer was deprived of the opportunity of discharging the duty of a Christian parent to her." No doubt touched by this very laudable desire on the part of the *ci-devant* footman, the countess relented and married him. The authenticity of peerages is amusingly illustrated by the fact that in Douglas' peerage of Scotland this countess

is said to have "married, secondly, at Castle Lyon, on 2nd April, 1745, Mr. Forbes, her factor and master of the horse to the Chevalier de St. George," and to have had a daughter, Susan Janet Emilia Forbes, born in Holland, 17th May, 1746. In this case, if it had gone on, Forbes would have had no chance of success, for there had been no open cohabitation and repute of marriage except in Holland, and Dutch law requires a ceremony.

The Balbougie Case.—This was one of the most famous litigations of the end of the last century. It was carried on before the different courts for twenty-four years, and the young ladies, whose legitimacy was in question, themselves grew up, and became wives and mothers before its final determination in the House of Lords. It contrasts strikingly with the Breadalbane case. In both the cohabitation was at first illicit, but whereas Mrs. Campbell was for many years treated with the respect and consideration accorded to a lawful wife, and uniformly received in that character in the society of her husband's friends, Agnes Hutcheson was treated with scant courtesy, and though some people may have thought her married, many regarded her as occupying a less honourable position. In turning over the pages of the old reports of the last century, an attentive reader can hardly fail to be struck by the laxity of morals there depicted in the upper class. The smaller country gentry were, many of them, heavily burdened with

debt. After paying the interest on their bonds, their entailed estates yielded them a bare subsistence. The younger sons who were fortunate enough to get commissions in the services, or, still better, to go out to India in the palmy days of the East India Company, were a class of men who, on the whole, did honour to the country which produced them. How unenviable by comparison was the life of the "heir" who stayed at home! The self-sacrificing efforts which were made to give the younger sons an education such as should fit them to make a career, were too often deemed unnecessary in the case of the eldest son whose career, such as it was, was already made for him. Continually pressed by the want of ready-money the "laird" knew little of the world outside his own neighbourhood. There he was sure of being regarded with consideration however crass his ignorance, however flagrant his disregard for the decencies, to say nothing of the refinements, of life. The state of manners displayed in the case of Balbougie is not therefore to be looked upon as singular. In Morrison's dictionary of decisions (the great storehouse of last century cases) we get many a glimpse of country lairds of the same type. Full of pride of birth they would not marry outside their class. To marry a lady of position, and give her a place in the society of the county and the capital, they were too poor. It was therefore a common thing for them to do like Balbougie and take a housekeeper who was their mistress and the mother of their

children. The uncertainty of the law, and the state of public opinion made the position of such a woman more tolerable than it would have been in a country house in England. It was always possible that the laird might marry her. The neighbours might incline to think that he had already done so. The tenants' wives and the people of the neighbouring town treated her with civility, and the laird's friends of the same class as himself were not shocked by her presence as head of the household. Moreover, she had always the hope which was denied to the mistress of an English squire, that if she could persuade the laird to marry her, her children would be freed from the stigma of illegitimacy. It is by no means uncommon in the history of the eighteenth century to find women of a much better rank than Agnes Hutcheson occupying the same ambiguous position in the "mansion-house." The facts of the Balbougie case were shortly these:—John Cunningham, advocate, eldest son of John Cunningham of Balbougie, was provost of the burgh of Inverkeithing. In 1758, he hired as a servant a girl named Agnes Hutcheson. In 1759, she gave birth to a child of which he was the father. The provost was rebuked privately by order of the kirk session, and the servant had to sit on two successive Sundays on the stool of repentance in the parish church, and was publicly admonished, and had to leave the neighbourhood. In 1760, the provost's affairs having become involved, he took refuge within

the precincts of the Abbey of Holyrood to escape his creditors. Here Agnes Hutcheson joined him again. John Cunningham, availing himself of his legal knowledge as an advocate, found a way of eluding, if not satisfying, his creditors. He left the sanctuary, and went for a time into the Tolbooth prison.[1] In this retreat he was also accompanied by Agnes Hutcheson. The gaoler, it is said, made some objection to receiving her on the ground that only wives were admitted, and Cunningham said she was his wife. After leaving the gaol they lived together at one time in the Canongate, at another in the Cowgate till 1768 In that year, by the death of his father, John Cunningham, the younger, became entitled to the estate of Balbougie. He removed there accordingly with his companion, and they lived there till 1770. The question was whether their cohabitation was that of married persons. The commissaries of Edinburgh, then the court of first instance in such matters, found for the marriage, and this judgment was upheld in the Court of Session by a bare majority. But the House of Lords, following Lord Eldon, found the connection was not matrimonial.

Balbougie had written in 1769 to a brother, Dr. Henry Cunningham, that he had "two fine little daughters of natural children; if Jammy (another brother) has no sons, little George (Dr. Henry's son)

[1] By so doing, and making a surrender of his property to his creditors, Balbougie, by the law then in force, obtained a discharge, and was enabled to leave the prison disburdened of his debts.

will in all probability heir the estate, for I scarce think I shall now marry." And in various documents he had described Agnes Hutcheson as his "housekeeper." "Little George" died, and there being no issue male of any of the brothers, John Cunningham wished his estate to go if possible to his own daughters in preference to a niece. Accordingly the action was brought nominally by the two daughters (though really by their father) to have it declared that they were legitimate. The daughters pleaded "that, like the children of many very respectable families in this country, they were not born in lawful wedlock, but they have this comfort, that from their infancy they and their mother lived with their father and sat at his table; and when they came the length of going about they were taken notice of by all the respectable people in the neighbourhood; and for several years past, since they came to greater length, they were visited and received visits at their father's house from all these people, and never heard the smallest surmise of their not being the legitimate children of their father, till they had information to the contrary from the defender." I should have mentioned that in 1770 Agnes, being "in a decay"—*i.e.*, consumptive—was sent to Edinburgh either for advice or to be near her relations. There she died in that year, and was buried with slight ceremony in the Canongate Churchyard, the laird sending his "cowfeeder" to see to the funeral. At the time of the action he was, however, very anxious

to prove she had been his wife, and in addition to the evidence of repute an attempt was made to prove that a marriage had actually been celebrated in the Abbey by an English clergyman who was there seeking asylum from his creditors. But this broke down, and the case really turned on the two years' residence at Balbougie. Had Agnes Hutcheson been there regarded as wife? She managed the household, sometimes sat at table when there were guests, and always when there were none; went to church with him and their children, attended by a servant who carried her cloak, and was visited by the wives of some of the respectable people in the vicinity. At a dance at Balbougie in 1770 the daughters of the neighbourhood were allowed to be present. Balbougie and Agnes visited and stayed for days together with a Mr. and Mrs. Taylor of Fodd, "who were very respectable persons, and saw genteel company." On the other hand, if Balbougie had wanted to marry Agnes, why had he not done so openly? In the Breadalbane case this was not to be expected, because it would have been proclaiming, what nobody knew, that their intercourse had at first been illicit. Not so here. Agnes would not have fallen but would have risen greatly in public estimation if the laird had openly married her. For everybody knew her story. Moreover, though some of the neighbours declared they believed her married, others were very clearly of the opposite opinion, and the respectable people who

visited her continued to visit at Balbougie after her death, when another housekeeper of equally dubious status reigned in her stead. The balance of evidence seemed against the theory of marriage, and the judgment of Lord Eldon carried with it the assent of the profession.

I have now endeavoured to make clear to a non-professional reader in what various ways it is possible to sufficiently declare matrimonial consent—*i.e.*, to contract marriage. As I have already remarked, irregular marriages are uncommon in Scotland, and reprobated by public opinion. A respectable woman, whatever her rank in life, feels herself humiliated by a marriage not performed openly and by a minister. This is not the place to discuss the question whether it would not be expedient to follow the law of the sister country in abolishing irregular marriage altogether. The uncertainty which at present attends the enquiry whether two people are married or not is itself a danger to public morals. In most countries a woman can neither busy herself with vain hopes nor distract herself with groundless fears on the subject. If she has been regularly married by a clergyman, or a civil official having the requisite authority, her marriage is secure from all attacks. If she has not gone through this ceremony she knows too well that she has no right to the name of wife.

DIVORCE.

By divorce is now meant that the marriage tie is broken by the decree of a competent Court. Both the guilty and the innocent spouse are completely liberated and made free to marry again. The guilty spouse is liable to certain pecuniary losses which it is not necessary here to specify. And in Scotland, if a decree of divorce for adultery gives the name of the paramour, the guilty spouse is barred from contracting a marriage with the person so named. There is no such disability in England, and the provision of our law seems highly injurious. It is surely better that, if a woman has been unfaithful, she should not be debarred from marrying the only man who is likely to be willing to afford her the protection of a home, and to make her such poor reparation as is possible for the ruin which he has brought upon her. In practice it is often possible to arrange that the judgment shall not contain the name of the paramour. But this is entirely matter of favour and not of right. Before the Reformation by the word "divorce" was

meant that which we now call "judicial separation." The doctrine of the Roman Catholic Church does not admit of divorce in the modern sense. The Fathers of the Church, and their successors the Schoolmen, taught that marriage, being a sacrament, was indissoluble; and this view was laid down dogmatically by the Council of Trent, which provided, "If any one say that marriage is not truly and properly one of the seven sacraments of the gospel, but say that it was invented by men in the Church, and confers no grace, let him be anathema." The other six sacraments, I may remark in passing, are baptism, confirmation, the eucharist, penance, extreme unction, and ordination. This sacramental theory of marriage was a subject of great controversy for centuries, and much curious discussion of it may be found in the works of such writers as the learned Schoolman, Thomas Aquinas. But very few nowadays have the courage to take down the huge tomes of those worthies, or are attracted by the extraordinary ingenuity which they display in deducing conclusions from premisses which they assume with a facility no less extraordinary. No great acumen, however, is required to see that marriage, if it is to be classed with the other sacraments of the Roman Church, is remarkably different from the rest. They are all symbolical. Marriage, it is true, is said to symbolise the mystical union between the Church and its divine Head. But its primary purpose can hardly be said

to be to help mankind to realise this idea. Moreover, the others cannot be validly dispensed but by a priest or bishop. There is one exception, which proves the rule. A dying person may be baptised by a layman. Otherwise an infant dying suddenly unbaptised would, in the view of the Church, be eternally lost. But though the sacrament is in that extreme case validly administered by a layman, if the person recovers he should be "received" into the Church by a priest. The Roman Church has always regarded the priesthood as a caste whose primary function and prerogative it is to administer sacraments. This is the very fountain of the priest's authority. But marriage by the practice of Catholic Europe, up to the Council of Trent in the middle of the sixteenth century, could be entered into by the mere consent of the parties without the intervention of a priest, as it still can by the law of Protestant Scotland. If it was a sacrament, it had then this great peculiarity, that the recipients administered it to themselves. So much may be said without presuming to express an opinion on such a thorny theme. The sacramental theory is so firmly rooted in many countries that no divorce is permitted. In Italy and Spain, for example, separation is the highest remedy open to the injured spouse. Even in England until 1857 a private Act of Parliament was necessary to dissolve a marriage. Many Anglican clergymen still refuse to celebrate the marriage of a divorced person.

And it is well known that Mr. Gladstone regards the English Divorce Act with aversion. It is curious to notice that the southern state of South Carolina does not allow divorce on any ground. In Ireland it can only be obtained by private Act of Parliament.

But although theoretically it was impossible to get a divorce before the Reformation, the same end was frequently gained by another means. This was to raise a suit in the ecclesiastical Court to find the marriage was originally null. So numerous were the grounds upon which a decree of nullity could be obtained that, if the parties were in a position to pay the heavy expenses of litigation in the Church Courts, the canon lawyers might generally be relied on to prove there was some flaw in the marriage. If, for example, a husband wished to release himself from his marriage, it was enough if he proved that before its date he had entered into a pre-contract with another woman. By this is meant that he and this woman had agreed to marry each other then and there, *per verba de præsenti tempore.* It was unnecessary to prove cohabitation. And as the Church Courts required no evidence but the confession of the parties, it was easy enough to find some woman who for a consideration was willing to admit that she had entered into such a pre-contract. Or the husband might prove that his wife was related to him within the eighth degree. If he could show that she was his seventh cousin the marriage was set aside.

Or, stranger still, if he could prove that he had before the marriage cohabited with any woman related to his wife within the eighth degree, this was also a ground of nullity. The Church derived great profit from these suits, and still more from the sums paid for dispensations—*i.e.*, for leave to marry in spite of some impediment. The position of a wife was intolerably insecure. As an instance of such suits may be mentioned the historical case of Henry VIII. and Anne Boleyn. The grounds upon which the royal theologian sought to have his marriage set aside were two—(1) her pre-contract with Northumberland, and (2) his pre-intercourse with Mary Boleyn, Anne's sister.

By an Act passed in Henry's own reign in the year 1540, one of these canonical impediments was removed. The Act is entitled, "For Marriages to stand, notwithstanding Pre-contracts." The preamble expresses so quaintly the evil system then prevailing that I make no apology for quoting it: "Whereas heretofore the usurped Power of the Bishop of Rome hath always intangled and troubled the meer Jurisdiction and regal Power of this Realm of England, and also unquieted much the subjects of the same, by his usurped Power in them, as by making that unlawful which by God's word is lawful, both in marriages and other Things, as hereafter shall appear more at length, and till now of late in our Sovereign Lord's Time, which is otherwise by Learning taught than his

Predecessors in Times past of long Time have been [a modern statute does not thus digress to pay personal compliments to the Queen], hath so continued the same, whereof yet some Sparks be left, which hereafter might kindle a greater Fire, and so remaining, his Power not to seem utterly extinct. Therefore it is thought most convenient to the King's Highness, his Lords Spiritual and Temporal, with the Commons of this Realm, assembled in this present Parliament, That two Things specially for this Time be with diligence provided for whereby many Inconveniences have ensued and many mo else mought come and follow; as where heretofore divers and many Persons, after long Continuance together 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 lawful, and after the same matrimony solemnized and consummate, and also sometime Fruit of Children ensued of the same marriage, have nevertheless, by an unjust Law of the Bishop of Rome, which is That upon Pretence of a former Contract made, and not consummate (for Proof whereof two Witnesses by that Law were only required), been divorced and separate, contrary to God's law and so the true matrimony, both solemnized in the Face of the Church, and consummate and confirmed also with the Fruit of Children had between them, clearly frustrate and dissolved: Further also, by reason of other Prohibitions than

God's law admitteth, for their Lucre by that Court invented, the Dispensations whereof they always reserved to themselves, as in Kindred or Affinity between Cousin-Germanes and so to fourth and fourth Degree carnal knowledge of any of the same Kin or Affinity before in such outward Degrees, which else were lawful, and be not prohibited by God's law, and *all because they would get money by it, and heepe Reputation to their usurped Jurisdiction*, whereby not only much Discord between lawful married Persons hath (contrary to God's ordinance) arisen, much Debate and Suit at the Law, with wrongful vexation, and great damage of the innocent Party hath been procured, and many just marriages brought in doubt and Danger of undoing, and also many Times undone, and lawful Heirs disinherited, whereof there had never else, but for his vainglorious Usurpation, been moved any such Question, since Freedom in them was given us by God's law, which ought to be most sure and certain; but that notwithstanding, marriages have been brought into such an Incertainty thereby *that no marriage could be so surely knit and bounden, but it should be in either of the Parties Power and Arbiter, casting away the Fear of God, by Means and Compasses to prove a Pre-contract, a Kindred and Alliance or a carnal Knowledge, to defeat the same*, and so under the Pretence of these Allegations, afore rehearsed, to live all the days of their Lives in detestable Adultery, to the utter Destruction of their own Souls, and the

Provocation of the terrible Wrath of God upon the Places where such Abominations were used and suffered." After this vigorous preamble the Act declares that a regular marriage shall not for the future be annulled on proof of a pre-contract not followed by cohabitation. Although, of course, the statute of Henry VIII. was applicable only to England, the picture which it gives of the evils attendant on the administration of matrimonial suits by the Church Courts is almost equally true of Scotland before the Reformation.

When in the sixteenth century the sun of common sense and sound reason began to break through the mists of mediævalism, a different conception of marriage gradually shaped itself. The Reformers began to ask whether, after all, it was the duty of society to refuse to sever the bond which chained the innocent spouse to the guilty. If a husband is guilty of infidelity, or during a long period obstinately refuses to live with his wife, does he not show in the clearest manner that for him marriage has no sanctity? Is it not a mockery of justice to say to the wife, "You may obtain a separation relieving you from the obligation to live with your husband. We shall order him to make you an annual allowance—an order which he will probably find it possible to disobey. But as long as he lives you are his wife?" In the ferment of new ideas every institution under the sway of the ecclesiastical power was being subjected to a keen criticism to

see if it merited preservation or modification or destruction. It was inevitable that the marriage laws, which the Church had for ages jealously administered, should occupy the minds of many. In a treatise written in 1530 Luther declared his opinion that marriage was "a thing of this world, like food and raiment, house and yard, and subject to the civil power." Most of the countries which embraced Protestantism—*e.g.*, Sweden, Denmark, Holland, and Prussia—adopted within the next thirty or forty years Luther's view, that it was expedient for the ordinary Courts of law to have power of granting divorces, which should leave the parties free to marry again. About 1560 the kirk sessions of the Scottish Reformed Church began to grant divorces. These were pronounced at first in the name of "the superintendents, elders, and deacons." But in 1563 a separate Court was established at Edinburgh, called the Commissary Court, which had jurisdiction over all Scotland in questions of marriage, divorce, and legitimacy. From the Commissaries, as the judges of this Court were called, there was an appeal to the Court of Session. This Court lasted for nearly three centuries, until in 1830 its powers were transferred to the Court of Session. Since that date matrimonial cases have followed substantially the same course as ordinary lawsuits. The witnesses are examined and cross-examined in open Court before a Lord Ordinary. From him there is an appeal to either of the

Divisions, whose judgment is in turn open to review by the House of Lords. Contrary to English practice, divorce cases are in Scotland tried without a jury. Ten years after the institution of the Commissary Court, in 1573, an Act was passed declaring that if either the husband or the wife deserted the other for four years without reasonable cause, and obstinately refused to return to cohabitation, this should be a ground of divorce. Since then divorce has been granted in Scotland on proof of adultery or desertion by either spouse.

Judicial Separation.—The minor remedy of judicial separation, corresponding exactly to the old "divorce from bed and board" of the Church Courts, may be obtained on two grounds. These are adultery or cruelty on the part of either spouse. It is competent for a husband to obtain a separation on account of his wife's cruelty, though such an action is naturally not of frequent occurrence. The effect of a decree of judicial separation is to give the innocent spouse the right to refuse cohabitation. It does not dissolve the marriage, so that the parties are not, like divorced persons, free to marry again. For the same reason the husband is still bound to support the wife, although the separation may have been granted on account of her cruelty or adultery. The separation endures until the marriage is dissolved by the death of one of the spouses. But if the innocent spouse, who has obtained the decree, chooses to return to

cohabitation, this at once puts an end to the judicial separation, and no further application to the Court is necessary.

Although lying somewhat beyond the scope of this little book, I have thought it might be not without interest to Scottish readers to contrast the state of the divorce law there, and its simple and inexpensive machinery, with that of some of the other principal European countries.

The history of divorces in Europe is intimately bound up with that of the Roman Catholic Church. In the later Roman Republic and during the first five centuries of the Empire, the spouses might dissolve their marriage by mutual consent. In the more corrupt period an almost inconceivable laxity prevailed. It was regarded as not unnatural for a woman to have had ten husbands, or for a husband to put away his wife on the most frivolous pretext. The most astonishing picture is afforded by the satirists, and although in reading Juvenal and Martial allowance must be made for great exaggeration in the straining after effect, it is undoubted that the Roman society of their day was in these matters rotten to the core.

Martial charges one lady with having been ten times married in one month, and says this is mere legalised promiscuity—

> "Aut minus, aut certa non plus, tricesima lux est;
> Et nubit decimo jam Thelesina viro.
> Quæ nubit toties, non nubit adultera lege est
> Offendor moecha simpliciore minus."—*Lib. 6, Epig. 7.*

It was the Church which first taught the doctrine of the indissolubility of marriage. From this position she has never swerved, and no question has more sharply divided society on the Continent.

To the orthodox Catholic it appears blasphemous for the State to claim any authority to dissolve a marriage which the Church has pronounced to be a sacrament. At the three great moments of human life, at birth (or at least at baptism, which is spiritual birth) at marriage, at death, the soul of man is united with the divine by the sacraments of the Church. Accordingly civil marriage, entered into without priestly intervention, is declared to be mere concubinage. In a letter to the King of Sardinia, who had consulted him on the question, Pius IX. wrote (29th September, 1852), "Conjugal union between Christians is only legitimate in the marriage sacrament, outside which there is only mere concubinage." *Papa locutus est, res finita est.* But marriage in the Catholic view is still indissoluble though entered into without the rites of the Church. Pius VII., writing to the Archbishop of Mainz in 1803, declared that the Church would treat as null the marriage of a Catholic with a *divorced Protestant*, *i.e.*, of course if the other spouse of the dissolved marriage were still living. The fulminations of the Vatican are now harmless in most of the European states, except in so far as they may disturb the minds of the faithful. But in Italy, Spain, and Portugal the law of the Church remains unmodified, and divorce is unknown.

In the Protestant states of Germany there has been considerable laxity as to divorce, and the tendency is in the direction of increasing the difficulty of severing the marriage tie.

In Prussia a marriage may be dissolved on proof of adultery or desertion by either spouse, and in addition, amongst other grounds, for the following :—

1. Attempts by one spouse on the life of the other, or violence endangering life or health.

2. Madness which has lasted at least a year, there being no reasonable hope of recovery.

3. Condemnation to a long term of imprisonment.

4. Becoming subject to a loathsome disease.

5. Where there have been no children of the marriage, or none survive, the marriage may be dissolved by mutual consent, if certain conditions are fulfilled.

It is amusingly characteristic of Germany that in some of the small states the ruling sovereign has in certain cases the power to dissolve the marriages of his subjects. This is termed "Ehescheidung durch landesherrliche Dispensation." The princelets of tiny countries like Anhalt-Dessau or Reuss have succeeded in arrogating to themselves a prerogative which for many centuries was claimed by the Pope alone. Even the Popes, to their credit be it said, exercised this power exceedingly seldom.

In Holland, Sweden, Norway, and Denmark divorces are also granted.

In Belgium divorces may be obtained on the ground

of the adultery of either, or of excessive debauchery, cruelty, or gross injuries *(excès, sévices, injures graves).* Moreover, marriages which have endured not less than two years may on certain conditions be dissolved by mutual consent.

In France, before the Revolution, there was no divorce. It was introduced in 1792, and for a time marriage was dissoluble on very trifling grounds. The Code Civil of Napoleon considerably curtailed this liberty, and divorce was again abolished when the Bourbon dynasty was restored in 1816. In 1884 a new Act was passed legalising it on the following grounds:—1. Adultery of either. 2. *Excès, sévices, injures graves,* as in Belgium. 3. A sentence of degrading punishment where there has been previous conviction of a serious crime.

In the provinces in which the Church has maintained the strongest hold, *e.g.*, Brittany, divorce is regarded with great disfavour, and very little resorted to. In the large towns, and especially Paris, it is becoming very common.

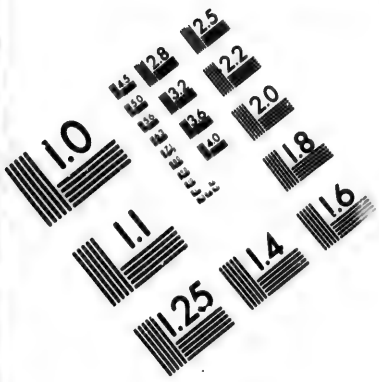
In Russia the Greek Church has always allowed divorce, and it may be obtained on the mere ground of incompatibility of temper.

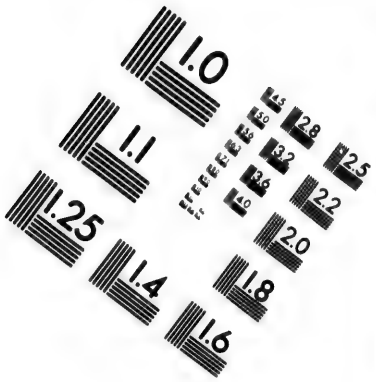
The history of divorce in England is entirely peculiar. As in most things ecclesiastical, so in regard to the marriage law, England at the Reformation took a middle course. At every stage the history discloses "latent Catholicism," to use the happy phrase of Mr.

G. H. Lewes. The Courts did not begin to grant divorces, as was the case in Scotland and elsewhere. But Parliament, being omnipotent, was appealed to for the relief which the judges were powerless to grant. It is somewhat hard to see how even the Legislature should have the power to put the two spouses asunder if the indissolubility of marriage is based on the fact that it is a sacrament of the Church. But this is only one of many instances in the history of our institutions in which abstract principle has been driven to the wall. Parliament has rarely hesitated to introduce a reform merely because the change would be difficult to reconcile with previous theories.

During the reign of Elizabeth the chief English churchmen held that adultery itself dissolved the marriage, and that if the innocent husband obtained a sentence of divorce from the ecclesiastical Court he was free to marry again. A commission was appointed as early as 1548 to inquire into this question, which arose on the case of Parr, Marquis of Northampton, who was a brother of Catherine Parr, Henry the Eighth's widow. Parr had obtained a divorce in the ecclesiastical Court from his wife, Anne Bouchier, on account of her adultery. Being desirous of contracting a second marriage, he got a commission appointed consisting of Cranmer, the Archbishop of Canterbury, Dr. Ridley, and eight other divines, "to try whether the Lady Anne was not by the Word of God so lawfully divorced that she was no more his wife, and







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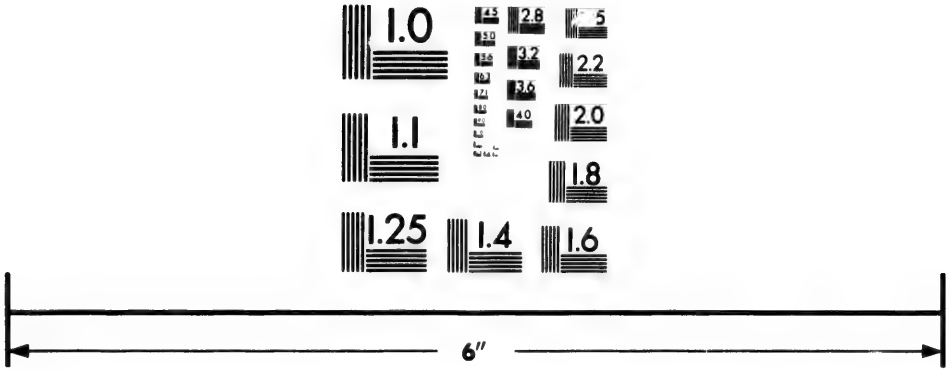



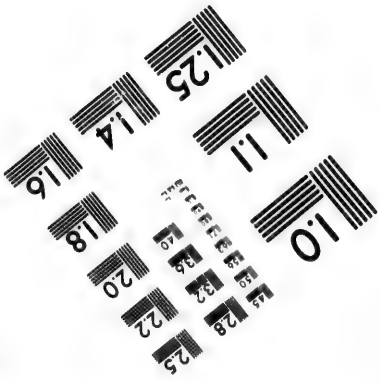

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whether thereupon he might not marry another wife." Bishop Burnet says—"This being a new case of great importance, Cranmer resolved to examine it with his ordinary diligence; and searched into the opinions of the Fathers and Doctors so copiously, that his collection about it grew into a large book (the original whereof I have perused, the greatest part of it being either written or marked and interlined with his own hand). This required a longer time than the Marquis of Northampton would stay; and therefore, presuming on his great power, without waiting for judgment, he solemnly married Elizabeth, daughter to Brooke, Lord Cobham." For this Parr had to answer to the Council, and it was ordered that he and his new wife should be parted till the question might be decided. In the end opinions were returned by the learned divines to the effect that the second marriage was valid, and Parr was allowed to take back his wife.

But during the next half century the Church began to revert to the Catholic position as to the marriage of divorced persons. While not declaring such re-marriage a nullity, the ecclesiastical authorities attempted to prevent its occurrence by attaching to it a pecuniary penalty. In 1597 Convocation passed a canon in the following terms, which received the assent of Elizabeth:—"In all sentences pronounced only for divorce and separation *a thoro et mensa*, there shall be a caution and restraint inserted in the said sentence, that the parties so separated shall live

chastely, and neither shall they during each other's life contract matrimony with other person." It thus appears clear that the view of the English Church was that a re-marriage would not be a nullity, otherwise it would have been needless to require security against it.

In 1669 Lord De Roos, the heir to the earldom of Rutland, having obtained a decree of divorce from the ecclesiastical Court, desired to marry again. He was advised that the only obstacle was the bond and security which he had given in accordance with the canon above quoted. A Bill was accordingly brought in to the House of Lords, entitled "An Act for Lord Roos to marry again." In 1697 Lord Macclesfield successfully carried an Act dissolving his marriage, and in 1700 the same remedy was extended to the Duke of Norfolk. In the following year the practice may be said to have been settled by the case of Mr. Box, who first obtained a decree of divorce in the ecclesiastical Court, and afterwards introduced a Bill in the House of Lords. The style of the title, "An Act to dissolve the marriage of Ralph Box with Elizabeth Eyre, and to enable him to marry again," was followed until 1857.

No wife appears to have applied to Parliament for a divorce until the year 1801, when a certain Mrs. Addison successfully asserted the equal right of her sex to this remedy. But as the ecclesiastical Court had never regarded the adultery of the husband as in itself a sufficient ground of divorce, it was only in

cases such as Mrs. Addison's, where the adultery was incestuous or bigamous, that Parliament could intervene.

Parliamentary divorces were always the luxury of the rich. Their number was at no time more than inconsiderable, having regard to the extent of the population. Before the accession of the House of Hanover there were only five such Acts passed. Between 1715 and 1775 there were sixty; from that date to 1800, seventy-four; from 1800 to 1830 they amounted to about ninety. In addition to a decree of divorce in the ecclesiastical Court, the House of Lords generally required that the husband should have brought an action of damages against the paramour, called an action for criminal conversation.

From 1701 to 1857 the law of England as to divorce was so anomalous that it cannot be passed over in silence, especially as, in the main, it is to this day the law of Ireland. Most Anglicans regarded marriage as in its nature indissoluble; yet if one had wealth and influence enough he could, on proof of certain facts, obtain the dissolution of his marriage by the direct act of the Legislature. Mr. Justice Maule's witty remarks in 1845, in passing sentence upon an unfortunate man for bigamy, admirably brought out the flagrant inequality of the law, and helped in no small degree to create the public opinion which led to the passing of the Divorce Act. The prisoner's wife had robbed him and run away with

another man. "You should," said the learned judge, "have brought an action, and obtained damages, which the other side would probably not have been able to pay, and you would have had to pay your own costs—perhaps a hundred or a hundred and fifty pounds. You should then have gone to the ecclesiastical Court, and obtained a divorce *a mensa et thoro*, and then to the House of Lords, where, having proved that these preliminaries had been complied with, you would have been enabled to marry again. The expense might amount to five or six hundred, or perhaps a thousand, pounds. You say you are a poor man. *But I must tell you that there is not one law for the rich and another for the poor.*" The expense here mentioned, though quite enough to place divorce entirely beyond the reach of all but the comparatively rich, is really much under the mark. £2000 seems not to have been at all uncommon, and the famous divorce of Lord Ellenborough, for his wife's adultery with the Prince of Schwartzenberg, cost his lordship £5000. And, apart from the question of expense, nothing could be more unsatisfactory than the manner in which divorce proceedings were conducted. What could be more revolting to a man of honour than to have to come to the Court and put a money value on the suffering caused him by his wife's misconduct? Yet in almost every case the action of damages for criminal conversation was a necessary preliminary. This was to satisfy the House that the

petitioner had done all in his power. It by no means followed that the Lords agreed with the verdict of the jury—*e.g.*, in the case of Colonel Powlett in 1805 the Lords rejected the Bill, though the jury had given £3000 damages. And, on the other hand, in Mr. Loveden's case (1811), the House passed the Bill, though the jury had found for the defendant.

It is very obvious what a terrible engine of oppression the same action might become in the hands of an unscrupulous husband. For the Court held that the wife was no party to this action, and had no title to defend herself in it. The husband had only to find some scoundrel willing for a consideration to admit that he had committed adultery with the wife. The husband brings his action. The alleged paramour does not appear. He is thereby taken as admitting the adultery. The jury gives damages, and all the time the wife is not allowed to prove her complete innocence. A woman's reputation is proverbially soon tarnished, and many a wife placed in this cruel position, without money and without friends, would have been entirely unable to take any steps for the vindication of her character. It is true that if the husband proceeded afterwards to raise an action of divorce *a mensa et thoro*, equivalent, as I have already said, to the modern act of separation, the wife was entitled to defend herself. But the rules of evidence and method of procedure adopted in the ecclesiastical Court might have been expressly devised to prevent

the discovery of the truth. The learned advocates and proctors who practised at Doctors' Commons, and flitted about the sombre little courts and alleys in the precincts of St. Paul's Churchyard, invested all matrimonial proceedings in a shroud of mystery. The Consistory Court and the Delegates' Court were as redolent of the Middle Ages as are the dungeons and thumbscrews of the Tower. The only thing made clear to the laic mind of the suitor was that he must be prepared to pay a very great deal. It was not for mortals to foretell the issue. In an ordinary lawsuit, conducted in open court, a witness who is brought to support a false or trumped-up case, has to go through a pretty severe ordeal. The judge narrowly observes his demeanour, the counsel on the opposite side may tear his story to rags in cross-examination. Only a very experienced or a remarkably adroit witness can reckon on escaping detection. In the ecclesiastical Court perjury was made easy. Neither the parties nor the witnesses were seen by the judge who had to decide the cause. The first step was for the witness to go to the chambers of the proctor. He there narrated the evidence which he was prepared to give. The proctor carefully "coached" him, and if disposed to be dishonest, considerably improved his evidence. This was taken down in writing, and the name of the witness and the points he was to prove were then communicated to the proctor on the opposite side. The witness was next conducted to the private room

of an official of the court called the Examiner. At this interview nobody else was present. The proctors on both sides and, of course, the public were excluded. The Examiner then read over to the witness the articles the latter was to prove, and took down his deposition almost in the very words which the proctor had drilled into him. Now would have been the time to break down his evidence by skilful cross-examination. But all that the opposite proctor knew was that this particular witness was to speak to certain facts. With this scanty information he has had to draw up a list of cross-interrogatories, which are now put to the witness by the Examiner. It is by the merest chance if they pierce the weak points in the armour of the witness. The Examiner may see that the witness is lying, he may notice that his story is full of obscurity, but as an official of Court he has no power to put any questions but those supplied to him by the proctors. His duty is limited to recording the answers in writing. When all the evidence has been taken in this way, each party is entitled to know what has been sworn to. In the technical phrase, "Publication passes." The written evidence was transmitted to the judge of the Consistory Court, and he heard counsel upon it, and decided the cause. Answers, which may have been given with manifest shrinking, with every mark of perjury, appear in black and white, with nothing to excite the suspicion of the judge. Is it wonderful that the darkest

perjury often prevailed? The system has been not inaptly described as "a duel with hatchets in a dark cellar." When all this has been done, and decree of divorce *a mensa et thoro* pronounced, the husband, let us say, who desires to complete dissolution of his marriage, must go through a tedious and expensive procedure in getting a Bill passed by the House of Lords. It is unnecessary to detail the procedure in the House. The invariable style of the preamble suggests that the Act was regarded as declaratory. It always ended in those terms, "That the said C. D. hath by her adulterous and criminal conduct dissolved the bond of matrimony on her part, and your said subject stands deprived of the comforts of matrimony, and is liable to have a spurious issue imposed upon him, unless the said marriage be declared void and annulled by the authority of Parliament." The Bill followed the ordinary course, and on the motion for second reading counsel were called in and the case was opened, and the witnesses on both sides examined. If the Bill passed it was sent down to the Commons, and by them referred to a Select Committee on Divorce Bills. In the general case they did not require the attendance of counsel or witnesses, though this was entirely in the discretion of the Committee. If the Bill again passed it was sent back to the Lords and received the Royal Assent. A system more urgently crying for reform is hardly to be conceived. Ruinously expensive, barbarously antiquated, it gave every

chance to collusion and fraud, and deprived innocence of every weapon of defence. Yet there were not wanting men of the highest eminence, and the most undoubted sincerity, to oppose tooth and nail the Divorce Bill of 1857. The general scope of this measure was to establish a new Court which should hear evidence in public, and have power to dissolve marriages on the grounds for which the House of Lords had been accustomed to pass their private Divorce Bills.

In the House of Lords, the Bishop of Oxford, and in the House of Commons, Mr. Gladstone, exhausted every resource of learning, eloquence, and zeal in the attempt to prove that the Act would endanger the foundations of society. Mr. Gladstone said, "I must confess there is no legend, there is no fiction, there is no speculation, however wild, that I should not deem it rational to admit it into my mind, rather than allow what I conceive to be one of the most degraded doctrines that can be propounded to civilised man—namely, that the Legislature has the power to absolve a man from spiritual vows taken before God." Despite all opposition, however, the Bill was carried. So strong a feeling animated the English clergy that a clause was introduced, and is still law, giving them the right to refuse to marry a divorced person, but permitting the parties to be married in the parish church if they can find a clergyman willing to perform the ceremony.

Ireland.—The Divorce Bill of 1857 did not extend to Ireland. The state of matters described above continued to exist there until 1870, when the disestablishment of the Irish Church brought about the creation of a new "Court for Matrimonial Causes." But the new Court did not, as in England, receive greater powers than had been possessed by its predecessor, the old ecclesiastical Court. It cannot dissolve the marriage, but is limited to pronouncing a decree of separation. The husband in Ireland who desires the complete dissolution of his marriage is still compelled to go through the old threefold ordeal. He must first raise an action of damages against the seducer. Next he must obtain a decree of separation from the Matrimonial Court. Finally he must get the Legislature to pass a private Bill. It is settled in Ireland that a wife cannot obtain a divorce on any ground whatever.

It is generally admitted that the Divorce Act of 1857 effected a most important reform, and that the Court then instituted has done its work satisfactorily. The fears of those who anticipated the loosening of all social ties have not been justified. Those who regard marriage as essentially indissoluble have, it is to be presumed, refrained from petitioning for its dissolution. Those who have shown by their conduct their complete disbelief in the sanctity of marriage have been allowed to go their several ways. Any change that may hereafter be made is likely to be

in the direction of increasing the number of grounds of divorce.

In the case of incurable insanity, for example, it may well be questioned whether the sane spouse should not have the right of obtaining divorce. And the doctrine of recrimination, as it is called, has nothing but its antiquity to recommend it. In England, but not in Scotland, a husband who asks for divorce on the ground of his wife's adultery may be met by the answer, "You have yourself been guilty of the same offence." Unless his adultery was in ignorance—as, *e.g.*, if he believed his wife to be dead—this will prevent the divorce being granted. This view of divorce as a prize or reward to be given to the virtuous spouse is little short of ludicrous. If both spouses have shown their contempt for the obligations of marriage, that is the stronger reason why society should not hold them chained together.

Nor, spite of Dr. Johnson, is much to be said in favour of retaining the English law that the adultery of the husband is not *per se* a ground of divorce. There is something irresistibly funny in the thought of the long line of statesmen and judges, all *men*, who have solemnly declared, after the ripest reflection, that the sin most serious in a woman is in a man most venial. The praise which the bench always bestows on a wife who has forgiven the faults of her husband is only equalled by the contempt which it showers on a husband who has condoned the mis-

conduct of his wife. An eminent judge, Lord Cranworth, speaking with kindness of an erring husband, said, "No doubt the husband had been *a little profligate*, but still," &c. But what judge ever said to a husband, "Your view of your wife's character is too harsh. No doubt she has been a little profligate, but still she has many most estimable qualities?"

Sex has its prejudices as well as class. The old ecclesiastical Court in Italy had such a firm belief in cardinals that before it would believe in the adultery of one of these dignitaries it required the evidence of *seven eye-witnesses.* We can all smile at this, but is not the rule that a wife cannot get a divorce for her husband's adultery tainted with the same vice? Both illustrate the maxim, "No one is a good judge in his own cause."

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