

[Heard, — Judgment, Oct. 6, 1841.]

MRS CHRISTIAN STEWART or MENZIES, and CATHERINE MENZIES, and JOHN MENZIES, Appellants. (No. 22.)

JOHN MENZIES, Esquire of Chesthill, Respondent.

Marriage. — Promise of marriage, on condition of a future event, excludes application of the fiction, that consent de presenti was given at the moment of copula.

Id. — A declaration in the event of a child being born of an existing connection, cannot receive effect to constitute marriage, though the condition should be purified.

Seduction. — What held not to amount to proof of.

Proof — Marriage. — It is competent to prove by parole the circumstances under which, and the intention with which, a letter was written and delivered, to the effect of negating its having been intended to form a contract of marriage, which its terms, without such evidence, might have imported.

Id. — Marriage. — Circumstances in which the evidence of relations was held to have been properly excluded.

Process — Jury Trial. — Where a record has been made up and evidence taken before the Commissaries, with a view to declarator of marriage, an alternative conclusion for damages for seduction ought not to be remitted for trial by jury.

Costs should always follow the judgment in affirmance.

THE appellants brought action against the respondent, for declarator of marriage between the first appellant and the respondent, and for adherence, and alternatively for damages, by reason of seduction, in case it should be found, that the first appellant and he were not married persons. The narrative of the summons was in these terms: — “ That, in the month of April 1825, or about
“ that period, the pursuer entered as housekeeper into
“ the family or domestic establishment of the defender,

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“ at his residence of Duneaves, and continued to live
 “ therein, down to the term of Whitsunday 1827 :
 “ That soon thereafter, and while living at the said
 “ residence of Duneaves, the said John Menzies pro-
 “ fessed the greatest love and affection for the pursuer :
 “ That, in consequence of the said John Menzies,
 “ defender, his repeated addresses and solicitations, and
 “ of his promise to marry the pursuer, the said Chris-
 “ tian Stewart or Menzies, she agreed to accept of him
 “ as her husband, and accordingly, the pursuer, admitted
 “ him to all the privileges of a husband, and he co-
 “ habited with her as his wife: That in consequence
 “ of the said promise, and subsequent cohabitation
 “ on the faith thereof, the pursuer and the defender
 “ became married persons: That the defender, upon
 “ the 25th March 1826, acknowledged and declared
 “ the said marriage, by the following document, holo-
 “ graph of himself: ‘Duneaves, 25th March, 1826. —
 “ ‘CHRISTY, — You and I having lived together as
 “ ‘man and wife for some time, I hereby declare you
 “ ‘to be my lawful wife, in the event of a child being
 “ ‘born, in consequence of the present connection be-
 “ ‘twixt us. — And, I am, yours truly.’ (Signed)
 “ ‘JOHN MENZIES of Chesthill:’ That, both previous
 “ and subsequent to the date of the said document, the
 “ defender owned and acknowledged to various and
 “ sundry persons, and on various and sundry occasions,
 “ and in various and sundry ways, that he was married
 “ to the pursuer: That the other pursuer, the said
 “ Catherine Menzies, was procreated of the said mar-
 “ riage, and was born upon the 10th day of June, 1827 :
 “ That the other pursuer, the said John Menzies,
 “ junior, was also procreated of the said marriage, and
 “ was born on or about the 18th day of November,
 “ 1829: That after the foresaid promise of marriage,

“ and consummation thereof, and down to a recent
 “ period, the defender owned and acknowledged, treated
 “ and entertained, behaved to, and cohabited with, the
 “ pursuer, as his wife : That ever since the birth of the
 “ pursuers, the said Catherine Menzies, and John
 “ Menzies, junior, the defender acknowledged them as
 “ his lawful children, and treated them as such : That
 “ from the foresaid document above quoted, and the
 “ facts and circumstances above set forth, and other
 “ facts and circumstances to be proved, it will be made
 “ to appear, that the pursuer and the defender are mar-
 “ ried persons, husband and wife of each other, and that
 “ the other pursuers, the said Catherine Menzies, and
 “ John Menzies, junior, are their lawful children.”

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The respondent denied the statements in the summons, so far as they implied marriage or seduction; and alleged that the letter founded on, had been given by him to the appellant, to enable him thereby to impose on the relations of a young lady to whom he had made proposals of marriage, a belief, that it was beyond his power to enter into that state, and pleaded, —

“ I. That as the promise of marriage contained in
 “ the letter libelled on, was qualified by the condition,
 “ that a child should be born in consequence of the
 “ illicit connection, the presumption that an agreement
 “ to marry was interchanged at the time of the subse-
 “ quent copula, was necessarily excluded. z

“ II. That an express declaration that the appellant was
 “ his wife would not constitute a marriage, if it could be
 “ proved, that, at the time when it was made, neither of
 “ the parties intended that it should have that effect.

“ III. That as he did not seduce the pursuer, he was
 “ not liable to her in the damages, which she alleged that
 “ she had sustained in consequence of her seduction.”

In the course of making up the record, the appellant

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averred, that the letter of 25th March, 1826, had been delivered to her by the respondent in the latter end of 1827, or beginning of 1828, to satisfy her anxiety as to the nature of their connection — that she had lived with him, and been treated by his household as his wife, both prior and subsequent to the date of the letter — and that their connection as married persons, had been concealed at the request of the respondent, with a view to the feelings of his relations.

The Lord Ordinary, after closing the record upon condescendence and answers for the parties, remitted to the commissaries to take the proof of the parties. The appellants reclaimed against this interlocutor, and prayed the Court to find among other things, — 1st, That the letter of the 25th March, 1826, which was holograph of the respondent, together with the admitted cohabitation of the parties subsequent to the letter, constituted a legal marriage. 2d, That the allegations made by the respondent, in order to evade the consequences of his own legal admissions, that the said letter was false and prepared by himself or his agents, under instructions from him for purposes of fraud, could not be admitted to probation.

On 6th June, 1833, the Court “having heard counsel “on the points of law, in the second prayer of the re- “claiming note,” appointed parties to prepare cases thereon, and on advising these cases, adhered to the interlocutor of the Lord Ordinary, “it being under- “stood and hereby declared, that the proof shall be “held as before answer.”

The case went to proof, and witnesses were examined by the appellant, to prove marriage by cohabitation, and habit and repute, both prior and subsequent to the date and the delivery of the letter of 25th March, 1826, with the view of establishing a marriage independent of that letter, and also of establishing a marriage either at the

date of the delivery of the letter, or of the birth of her first child. On the other hand, the respondent led proof, to shew the circumstances under, and the reasons for, which that letter had been written, and delivered to the appellant.

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The evidence led by the appellant consisted principally of the household and other servants of the respondent, to the exclusion of the brothers and sisters and sisters-in-law of the appellant, who likewise were in the service of the respondent, during the period of his intercourse with the appellant; and so far as it went to establish marriage independent of the letter of 25th March, 1826, it was held to have altogether failed. The import of the proof formed no part of the argument in the printed case, nor, as is believed, at the bar of the House of Lords; and therefore, the appellant apparently acquiesced in the opinion of the Court below, on the supposition that the evidence of the relatives was rightly excluded. This exclusion, however, formed the subject of argument on the appeal.

With regard to the circumstances in which the letter had been written and delivered to the appellant.

Allan Macdougall, examined by the appellant, swore, — “ That he understood that the defender was
“ with his regiment at York in 1827, but the deponent
“ had no occasion to see him there. Depones, That
“ there was some of the deponent’s own family residing
“ at York then with his the deponent’s mother : That
“ two or three of his sisters were then there with her.
“ Depones, That he has occasion to know that the de-
“ fender paid particular attention to the deponent’s
“ youngest sister, named Colina, and this he learned
“ from the defender himself. And the deponent was
“ informed by the defender that he had proposed mar-
“ riage to her. Depones, That the deponent went to

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“ his brother’s place of residence of Dunolly, for the
 “ purpose of being present at the ceremony of the mar-
 “ riage, which was to have taken place there. Depones,
 “ That this marriage did not take place, but was broken
 “ off on account of a letter which was shewn to the de-
 “ ponent by his brother, and said to be written by the
 “ defender to a woman of the name of Christy or Chris-
 “ tian Stewart: And a copy of the letter libelled on
 “ being shewn to the deponent, depones, That it was a
 “ copy of that letter, in the defender’s handwriting,
 “ which was shewn to him. Interrogated, In what
 “ manner the deponent first came to learn that the mar-
 “ riage had been broken off? Depones, That upon his
 “ arrival at Dunolly, in July or August, 1828, when he
 “ went out for the purpose before specified, he met his
 “ brother, Captain Macdougall on the highway, near
 “ his own gate, who told him that he had just returned
 “ from Tynedrum, having gone there in consequence
 “ of a letter from the defender, which he shewed the
 “ deponent, desiring him, the Captain, to meet the de-
 “ fender at Tynedrum on business of importance: That
 “ his brother then shewed him a copy of the said letter
 “ libelled on, which he had got from the defender, and
 “ asked the deponent’s opinion about it, when the de-
 “ ponent having perused it, said, he must believe that
 “ it was delivered, and if so, that he was decidedly of
 “ opinion the marriage should go no farther. Interro-
 “ gated, depones, That the deponent, in a day or two
 “ afterwards, went to Duneaves, and saw the defender;
 “ and he carried the copy of the letter with him, and
 “ shewed it to the defender, when the defender acknow-
 “ ledged that it had been written by him; and he is
 “ positively certain, that he then stated that the princi-
 “ pal letter was delivered to the woman to whom it was
 “ addressed of the date it bore. Interrogated, Whether,

“ upon that occasion, the defender repeated solemnly
 “ to the deponent that he was a married man? De-
 “ pones, That he certainly did not repeat solemnly this,
 “ as the deponent did not put such a question to him
 “ — he deeming himself, as a professional man, a better
 “ judge of the consequences of granting such a letter
 “ than the defender himself. Depones, That when the
 “ deponent left the defender on this occasion, he inti-
 “ mated to him that he considered the marriage finally
 “ broken off. Depones, That the defender never inti-
 “ mated after to the deponent, or to his sister, or any
 “ of his family, so far as the deponent knows, that he was
 “ a free man, and still at liberty to marry. Depones,
 “ That when he was at Duneaves, upon the occasion
 “ last deponed to, he saw the pursuer, and conversed
 “ with her on the subject of the letter: That the de-
 “ ponent himself may have suggested this to the defender,
 “ who approved of it, and said it was highly proper.
 “ And being asked to mention what occurred at the
 “ interview between the pursuer and him, depones,
 “ That when he first went in, he thinks that the pur-
 “ suer said to him, that she was aware who he was :
 “ That the deponent then asked her if she had a letter
 “ in her possession from the defender, — leading her to
 “ understand the import of it, — to which she replied,
 “ that she had: That the deponent then asked her if
 “ she would shew it, to which she answered that she
 “ would not. She said she had it and would keep it ;
 “ and that she had been told by persons as well qualified
 “ to advise her as the deponent was, that it was a good
 “ letter: That the deponent then told her, that he was
 “ authorized by the defender to come to her, and to get
 “ a sight of the letter, and also to offer her a sum of
 “ money for possession of it, but she said that she would

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“ not give it up for any sum of money that the defender
 “ could offer. Depones, That the deponent remained
 “ about ten or fifteen minutes with the pursuer, and
 “ came away without seeing the letter; and he does not
 “ recollect any other thing that passed. Depones, That
 “ the defender afterwards paid damages to the amount
 “ of betwixt three and four thousand pounds, on the
 “ footing of his being unable to fulfil his marriage
 “ engagement with the deponent’s sister. The de-
 “ ponent, of his own accord, added, that perhaps it
 “ should be stated that the damages were paid on ac-
 “ count of the defender’s apparent inability to fulfil his
 “ engagement, for at that time the deponent had a sus-
 “ picion that there were circumstances connected with
 “ that letter, not explained to the deponent by the de-
 “ fender. Interrogated for the defender, Whether,
 “ during the interview which he had with the defender
 “ at Duneaves, as above deponed to, the defender gave
 “ any account of the time when, and of the circumstances
 “ under which he had delivered the letter to the pur-
 “ suer? Depones and answers, That the defender
 “ mentioned that, on one occasion, he had entered the
 “ kitchen, where he expected to find the pursuer and
 “ some of her friends, along with some of his own
 “ tenants, at a ploy of some kind: That he found these
 “ persons so assembled: That the defender said, before
 “ the people present there, that Christy was, or to be
 “ his wife; and some male relative of the pursuer’s
 “ drew out the letter, and that the defender had then
 “ subscribed it: That, on making this statement, the
 “ deponent reminded the defender, that he previously
 “ stated that the letter was in his own handwriting.
 “ The defender then stated, that he supposed that he
 “ had copied it over on the following morning, and

“ subscribed it, having, as the deponent understood,
 “ adhibited his subscription to the first draft the night
 “ before: That the deponent asked the defender if he
 “ had been drinking before he did this, and he answered
 “ that he had: That the deponent put the question to
 “ him, Whether he was so drunk as not to know what
 “ he was about, and the defender answered that he could
 “ not say so: That the defender gave the deponent to
 “ understand, that the transaction above referred to,
 “ took place at the date which the letter bears: That
 “ the defender distinctly stated to the deponent at the
 “ time, that the letter was written and delivered at the
 “ date which it bears: That his interview with the pur-
 “ suer took place at the house in which he understood
 “ she then resided: That he thinks she was sewing when
 “ he went in, and being interrogated, Whether the pur-
 “ suer seemed to expect him? depones, That he can-
 “ not say that she expected him, but she seemed to
 “ know who he was, and that the deponent had never
 “ seen her previously, to his knowledge: Interrogated,
 “ Whether, during his interview with the defender,
 “ any thing was said about writing to Mr Sharpe, his
 “ agent in Edinburgh, requesting him to take steps to
 “ recover the letter from the pursuer? depones, That
 “ there was. And on being shewn the letter produced
 “ in process, No. 19, and addressed by the defender to
 “ Mr Sharpe, and being interrogated, Whether it was
 “ written on that occasion, in presence of the deponent?
 “ depones and answers, ‘ I think it was, or a letter of
 “ ‘ similar import.’ And said letter, No. 19, is marked
 “ by the deponent and Commissary-Examinator of this
 “ date, as relative hereto. Interrogated, Whether he
 “ considered the letter libelled on, addressed to the pur-
 “ suer, as the principal obstacle to the defender’s marry-

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“ ing the deponent’s sister? depones, That he did:
 “ But that he stated to the defender at the time, that
 “ he was so dissatisfied with his conduct, that even if
 “ the letter were destroyed, he would not consent to the
 “ marriage going on. Interrogated, Whether the de-
 “ fender stated that he had given the letter to the pur-
 “ suer with the intention of making her his wife? De-
 “ pones and answers, ‘ I never put that question to
 “ ‘ him, but I asked him if he understood the import of
 “ ‘ that letter, and he said he did.’ Depones, That the
 “ deponent’s first interview with the defender, before
 “ he had seen the pursuer, lasted for about half an
 “ hour. Depones, That he now recollects that he saw
 “ the defender, as he thinks, on the day before the con-
 “ versations already deponed to took place, but that the
 “ defender was then confined to bed in consequence of
 “ bruises from a fall, and begged the deponent to delay
 “ talking upon the subject about which he came till the
 “ following day, as he was in bodily pain, and it was
 “ difficult for him to speak: That the deponent had
 “ been in the neighbourhood for about two days endea-
 “ vouring to procure an interview with the defender,
 “ but had failed: That he had called twice at the house,
 “ and was told he was from home, and the deponent
 “ followed him to places where it was said he had
 “ gone, but did not find him. Interrogated, Whether,
 “ after the interview with the defender at Duneaves,
 “ there was any impression left upon his mind that the
 “ whole truth had not been told him with regard to the
 “ letter? Depones and answers, ‘ I had an impression
 “ ‘ then that I had not been told the whole facts; and
 “ ‘ one circumstance that excited my suspicion was, that
 “ ‘ I had not seen the letter in the possession of the
 “ ‘ pursuer; and that and other circumstances which I

“ ‘ talked over with the late General Stewart of Garth,
 “ ‘ satisfied me at the time that there was a mystery
 “ ‘ about the letter which I could not explain.’ De-
 “ pones, That the deponent had not seen, at least had
 “ had no conversation with the defender for nearly a
 “ year before he met him at Duneaves, and had never
 “ till then spoken with him on the subject of his mar-
 “ riage with his sister. And being farther interrogated,
 “ depones, that he has no doubt that the letter
 “ addressed to Mr Sharpe, already shewn to him, or
 “ one of similar import, was either written in his pre-
 “ sence, or shewn to him by the defender, as a letter
 “ which he intended to despatch to Mr Sharpe, on the
 “ occasion above deponed to : That, to the best of his
 “ recollection, the letter shewn to him is certainly the
 “ same. Depones, That, on farther recollection, he
 “ thinks he left Dunolly to proceed to Duneaves on the
 “ 14th or 15th of August, 1828.”

John M'Dougall, examined by the appellant, swore,
 — “ That he is acquainted with the defender : That the
 “ knew him some time previous to the year 1828, but
 “ saw him very seldom during that year. Depones,
 “ That he made proposals of marriage to one of the
 “ deponent's family, and some steps were taken after-
 “ wards with a view to a marriage. Depones, That the
 “ first intimation which the deponent received that the
 “ marriage was not to go on, was his receiving a letter
 “ from the defender. Depones, That he cannot say
 “ what became of the letter : That it is not in his pos-
 “ session now : That he cannot say whether it is in
 “ existence or not : That the defender's letter to the
 “ deponent merely requested an interview : That the
 “ deponent, in consequence, had an interview with the
 “ defender at Tynedrum : That the defender produced

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“ to the deponent at the interview a copy of a letter
 “ which bore to be addressed by him to a female.
 “ Depones, That to the best of his recollection, the
 “ copy of the letter shewn him by the defender, was of
 “ the import of the letter libelled. Depones, That the
 “ deponent was completely satisfied by the production
 “ of the letter by the defender, and by his declaring to
 “ the deponent that it was an exact copy of the original
 “ which he had written and delivered to the pursuer
 “ some time before, but whether of the date which it
 “ bore, the deponent cannot say: That it was unneces-
 “ sary for him to put any questions to the defender:
 “ That nothing was said about the date on the occasion:
 “ That the deponent thinks, to the best of his recollec-
 “ tion, that the expression employed by the defender
 “ was, that the letter had been delivered a ‘length of
 “ ‘time before,’ by which the deponent understood a
 “ great many months before to be implied. Depones,
 “ That the deponent cannot recollect, at this distance
 “ of time, what passed particularly, or whether any
 “ questions were put by him on the occasion to the de-
 “ fender: That he felt perfectly satisfied upon the pro-
 “ duction of the letter, that it was unnecessary for him
 “ to put any questions to the defender at all upon the
 “ subject of marriage. Interrogated, Whether the de-
 “ ponent recollects of any thing being said to him by
 “ the defender, of his having acknowledged the pursuer
 “ as his wife? Depones and answers, ‘I recollect there
 “ ‘was a great deal of conversation passed, but I can-
 “ ‘not now recollect the exact tenor or import of it.’
 “ Depones, That the interview might have lasted, per-
 “ haps, from twenty minutes to half an hour. Inter-
 “ rogated, depones, That he had a subsequent interview
 “ with the defender: That it might have been at the

“ distance of a few weeks. Interrogated, Whether, at
 “ this second interview, the defender acknowledged to
 “ the deponent that he was a married man, or that he
 “ was married to the pursuer? Depones and answers,
 “ ‘ I certainly never put any such question to the de-
 “ ‘ fender, nor can I say that the defender made any
 “ ‘ such acknowledgment to me ; after his producing to
 “ ‘ me the letter, as I have stated, the subject of mar-
 “ ‘ riage was one which I would not have allowed him
 “ ‘ to enter upon in my presence.’ Interrogated,
 “ Whether the marriage was broken off, in consequence
 “ of what passed at the interview at Tynedrum? De-
 “ pones and answers, ‘ Certainly.’ Depones, That the
 “ defender paid damages, in consequence of his breach
 “ of promise of marriage to the member of his family.
 “ Interrogated for the defender, depones, That, to the
 “ best of the deponent’s recollection, the meeting at
 “ Tynedrum deponed to, took place in July or August
 “ 1828: That no person was present at the interview,
 “ except the defender and deponent: That the de-
 “ ponent met with the defender upon two occasions
 “ after being at Tynedrum, but whether the first was
 “ at Edinburgh or at Perth, he cannot positively say
 “ which: That no person was present, except himself
 “ and the defender.”

The letter referred to by this witness, as having been written by the respondent to Mr Sharpe, was in these terms: —

“ *Duneaves*, 24th August, 1828.

“ Dear Sir, — I some time ago was imposed upon to
 “ give a letter, a copy of which I will hereafter shew
 “ you, to a woman who has born a child to me. The
 “ letter, she informs me, she intends employing to pre-
 “ vent my forming any marriage connection. I have,

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“ therefore, to request that you will, without delay,
“ take such steps, legal or otherwise, as you may judge
“ most expedient to prevent her making any hurtful use
“ of that letter. In the meantime, I would recommend
“ your coming to me here for farther information. I
“ am, dear sir, yours truly,

“ Private. (Signed) JOHN MENZIES.”

“ WILLIAM SHARPE, Esq., W.S.

5, Frederick Street, Edinburgh.”

James Stewart, who was the uncle of the appellant, but not upon the best terms with her, when examined by the respondent, swore inter alia, — “ That neither
“ during her pregnancy, nor after the birth of the child,
“ did the pursuer ever say to the deponent that she had
“ any promise of marriage from the defender : That he
“ remembers of a letter being written by the defender
“ to the pursuer, about the middle of summer, 1828.
“ Depones, that he did not see the letter delivered to
“ the pursuer, but he got a sight of it afterwards from
“ the pursuer : That the pursuer told him when she so
“ shewed him the letter, that she had got it from the
“ defender a few days before. Depones, That the letter
“ was not dated in that year, but was put back two
“ years. Depones, that the pursuer and the deponent
“ had a conversation about the letter, when the pur-
“ suer told the deponent that it had been given to her
“ for the purpose of the defender’s getting quit of a
“ Miss Macdougall : That the pursuer seemed very
“ careless about the letter at that time, but he does not
“ recollect of her saying any thing about its being given
“ back : That his wife, nor no other person, was pre-
“ sent at this conversation : That before the letter was
“ seen by the deponent, he had not heard from the
“ pursuer any thing about it. Depones, that at that

“ time the deponent never heard from the pursuer, or
 “ any other person, that the pursuer was the defender’s
 “ wife. Being interrogated and shewed the letter
 “ libelled on in the Summons, and being No. 3 of
 “ process, Whether it is the letter shewn to the witness
 “ by the pursuer in summer 1828, as before deponed
 “ to? Depones, that he cannot exactly say, but it is
 “ very like it; and adds, that he said to her at the time
 “ that the letter was of no use.”

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Christian Stewart, the wife of James, examined by
 the respondent, swore, — “ That the pursuer never on
 “ any occasion said to the deponent that she (the pur-
 “ suer) was married to the defender, or had a promise
 “ of marriage from him. Depones, That to the best of
 “ her recollection, in the year 1828, she had a little
 “ conversation with the pursuer on the subject of a
 “ letter from the defender to the pursuer. Depones,
 “ That the pursuer said that the defender had said to
 “ her, if she would receive a letter from him, it would
 “ serve him ‘ a great deal,’ and that it would do her
 “ no harm, and that he would stand her friend.
 “ Depones, That ‘ it was on account of a young
 “ ‘ lady who had a promise of marriage, as she thinks,
 “ ‘ and that it was to get, in her opinion, the better of
 “ ‘ that promise;’ and that that was what the pursuer
 “ said. Depones, That the pursuer said she did not
 “ know whether to take the letter or not: Depones,
 “ That she knows the pursuer got the letter from the
 “ defender. Depones, That the pursuer shewed the
 “ letter to the deponent. Depones, that the letter was
 “ dated two years back, and the pursuer told her so.
 “ And being shewn the letter libelled on, No. 3 of pro-
 “ cess, depones, That she thinks it exactly the same, at
 “ least if it is not, it is very like the one shewn her, as

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“ before deponed to. Depones, that the pursuer said
 “ to the deponent that the defender had desired her, if
 “ a gentleman called upon her, not to shew the letter,
 “ but that she, the pursuer, did not say what was to be
 “ done with it. Depones, That the pursuer said to the
 “ deponent, that the defender said to the pursuer, that
 “ he was to get back the letter again. Depones, that
 “ the pursuer said to the deponent, that she, the pur-
 “ suer, was desired by the defender to keep the letter in
 “ her pocket some days, so that it might have the
 “ appearance of being old. Depones, That she re-
 “ members a gentleman calling at the house soon after
 “ the occasion above deponed to, whom she heard was
 “ Mr Allan Macdougall. Depones, That she thinks
 “ Mr Macdougall saw the pursuer : That she does not
 “ remember having any conversation with the pursuer
 “ as to what passed betwixt her and Mr Macdougall.
 “ Depones, that some time after this she had some con-
 ‘ versation with the pursuer about the letter. Depones,
 “ That she was one day in the house when the defender
 “ wanted the letter back. Depones, that the pursuer
 “ said that she had not the letter, that her brother
 “ Donald had it ; but that was a lie, for she had it in
 “ her drawer, and she would not like to be found out in
 “ a lie by the defender. Depones, that she does not
 “ remember of any conversation with the pursuer on the
 “ subject of the letter, betwixt the occasion last alluded
 “ to, and the occasion of its being delivered as aforesaid.
 “ Depones, that she remembers the birth of the boy.
 “ Depones, That her husband stood godfather. De-
 “ pones, That the deponent never thought any thing
 “ else, but that both of the pursuer’s children were bas-
 “ tards. Depones, that the defender had been there
 “ shortly before, and the pursuer had asked him to

“ marry her before the thing became public, but that
 “ the defender got up in a great rage. Depones, That
 “ the pursuer said she had given a sore heart to another,
 “ meaning Miss Macdougall, as the deponent under-
 “ stood; and that she (the pursuer) should have had
 “ nothing to do with the defender’s letter or himself;
 “ but she deserved to have a sore heart likewise.”

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Charles Stewart, examined by the respondent, swore,
 —“ That he was tutor in the family of the late Mr
 “ Stewart of Crossmount, in the years 1831 and 1832 :
 “ That Mr Stewart died in December last, 1834 : That
 “ in the end of summer, or beginning of harvest, in the
 “ year 1831, the deponent saw the pursuer, Christian
 “ Stewart, at Crossmount : That he had no conversa-
 “ tion with her himself : That the pursuer, on the
 “ occasion referred to, was in company with the late
 “ Mr Stewart of Crossmount. Depones, That after the
 “ pursuer went away from Crossmount, Mr Stewart
 “ told the deponent something of what had passed
 “ betwixt him and the pursuer on the said occasion.
 “ Interrogated, What did Mr Stewart state to have
 “ passed betwixt him and the pursuer ? The counsel
 “ for the pursuer objected to this interrogatory, upon
 “ the ground that it was an attempt to prove by hear-
 “ say a conversation, and not a fact in the case. To
 “ which it was answered by the counsel for the defender,
 “ That as Mr Stewart died before the defender had an
 “ opportunity of entering upon his proof ; and it being
 “ for the Court to judge of the weight due to the testi-
 “ mony, it was perfectly admissible, and did not fall
 “ under the objection of hearsay evidence, to the effect
 “ of excluding the testimony. The commissary-exami-
 “ nator having considered the objection and answer,
 “ repels the objection, and allows the interrogatory to

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“ be put; and the interrogatory being again put,
 “ depones, That Mr Stewart said the pursuer had
 “ called upon him to consult with him as to raising a
 “ law plea against the defender. Interrogated, Whether
 “ Crossmount stated any thing to the deponent as to a
 “ letter which the pursuer said she had from the
 “ defender? Depones, That Crossmount said the pur-
 “ suer told him that she had a letter from the defender,
 “ and that he, Crossmount, had asked her whether it
 “ had not been given her for a certain purpose; and
 “ that she acknowledged that it had been given to her
 “ to keep off a Miss Macdougall, and to free him, the
 “ defender, from some obligations he had come under to
 “ Miss Macdougall. Depones, That the conversation
 “ above deponed to, took place at dinner on the very
 “ day that the pursuer called at Crossmount. Depones,
 “ That the late Mr Stewart of Crossmount was a Cap-
 “ tain in the army, and did not belong to the profession
 “ of the law.”

Mrs Jean Stewart, widow of Mr Stewart, referred to by Charles Stewart, examined by the respondent, swore, — “ That there was found in her husband’s repo-
 “ sitories a paper, entitled, ‘ Memorandum, — Note of
 “ ‘ a conversation with Christy Stewart, 1831,’ holo-
 “ graph of Mr Stewart, which the witness now pro-
 “ duces, and being interrogated in causa, depones, That
 “ the deponent recollects of the pursuer coming to
 “ Crossmount House in August, 1831: That the
 “ deponent had no conversation with her: That the
 “ pursuer was some time in conversation with Mr
 “ Stewart, and the deponent observed her afterwards
 “ leave the house. Depones, that Mr Stewart, imme-
 “ diately after the pursuer left Crossmount, told the
 “ deponent that the pursuer had come to borrow money

“ from him, to enable her to carry on some law pro-
 “ ceedings against the defender. Depones, that Mr
 “ Stewart called upon the pursuer to give up a letter
 “ which he understood she had got from the defender,
 “ in order that the defender might get quit of a Miss
 “ Macdougall: That Mr Stewart stated to the depo-
 “ nent that the pursuer admitted that she had got that
 “ letter for the purpose referred to. Interrogated for
 “ pursuer, Whether she knows when the memorandum
 “ deponed to was written? Depones, That she did not
 “ see the memorandum until after her husband’s death,
 “ or know of its existence: That her impression is, that
 “ it was written immediately after the pursuer went
 “ away, and her reason for thinking so is, that she had
 “ occasion to be in Mr Stewart’s business room in the
 “ course of the day, after the pursuer’s going away,
 “ and she found him busy writing. Depones, That it
 “ was the deponent herself who found the memorandum
 “ in Mr Stewart’s travelling-case.”

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The memorandum referred to by this witness was in these terms:—

“ MEMORANDUM, — Note of a Conversation with
 “ CHRISTY STEWART, 1831.

“ Christy Stewart. came to Crossmount with her
 “ brother Alexander, (who had been several years in my
 “ service as a herd,) in the latter end of July or begin-
 “ ning of August. She told me she came to consult me
 “ as to what course she should follow with Chesthill, as
 “ he had deserted her and her children. Christy and
 “ me are not very well acquainted. She assigned as a
 “ reason for coming to consult me, that her family were
 “ originally from my property, and that many of her kin-
 “ dred were still upon my lands, and about my family,

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“ and that I was the only gentleman she knew whom
 “ she could consult and advise with. As I heard a variety
 “ of stories through the country about Chesthill, a Miss
 “ Macdougall, and Christy, I told Christy that she
 “ would be most welcome to the benefit of my advice,
 “ and that if it appeared proper, I would procure for her
 “ better advice than I could give her, (meaning that I
 “ would obtain legal advice and opinion for her,) but be-
 “ fore I could give her my advice or opinion, or ask that
 “ of another for her, it was necessary she should tell the
 “ whole truth fairly and candidly, as there were many
 “ stories gossiped through the country that did not
 “ agree. We then had a long conversation on the sub-
 “ ject, in course of which she complained bitterly of
 “ Chesthill’s forsaking her, and not paying aliment for
 “ the children. On referring to a letter which I often
 “ heard spoke of, Christy expressly told me the object
 “ Chesthill had in giving her the letter, that it was to
 “ shew to Captain Macdougall, in order to get quit of
 “ Miss Macdougall; that Chesthill never promised, or
 “ proposed, or even mentioned marriage to her, and
 “ admitted she was a willing partner in the crim. con.
 “ but for all that, she said, why should not she make use
 “ of it to legitimatize her children, and others advised
 “ her to do it. I told her they were her evil advisers
 “ that did so; that she should never let such an idea
 “ enter her mind; that to attempt to make such base
 “ use of the letter would not avail her; that she would
 “ be guilty of the greatest treachery and breach of
 “ confidence if she did so, and that she should give up
 “ the letter, or destroy it. I made use of many terms
 “ strongly expressive of my disapprobation of her
 “ making any other use of the letter than the purpose
 “ she got it for, viz., to shew to Captain Macdougall,

“ and as we were speaking in Gaelic, I could express
 “ myself in this instance more forcibly than in English.
 “ In course of conversation, Christy observed, Who had
 “ a better right to Chesthill’s property than his own
 “ children? To which I replied, by your argument I
 “ have no right to be here as Laird of Crossmount, for
 “ my father, before he was married, had a child laid to
 “ his charge by a gipsey like yourself, and by your rule
 “ *he* should be lord and master of this house and lands;
 “ your children may be Chesthill’s, they may not, it is
 “ easy to tell who is the mother of such children, but
 “ always doubtful as to who is the father. Christy said
 “ she did not want Chesthill to take her home and be
 “ treated as a *benausel*, (i. e. a lady or gentleman,) but
 “ to legitimatize her children, and do something for
 “ herself. I said a great deal to Christy, to persuade
 “ her not to quarrel with Chesthill, and contrasted the
 “ consequence if she failed — he would be so indignant
 “ and disgusted with her conduct, that he would class
 “ her children with those of the common fellows of the
 “ country, and do nothing for them beyond what the
 “ law provided, and allow herself to work for her bread,
 “ perhaps beg; but if she would be advised by me, that
 “ I would find gentlemen of landed property far richer
 “ than myself, that would become bound that Chesthill
 “ would give a liberal education to her children, and
 “ put them in a way of doing for themselves, and that
 “ he would provide handsomely for herself. In the
 “ course of conversation, Christy told me that Chesthill
 “ did not ask the letter from her again after it had
 “ served its purpose, (that is, shewn to Captain Mac-
 “ dougall) or he might have got it; it was after he
 “ began to neglect her that he sent for it, and she
 “ refused to give it up. Christy went away, saying, she

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“ would think of all I had said to her. I have neither
“ seen or heard from her since that day.”

As this memorandum referred to the appellant's brother, Alexander Stewart, he was allowed to be examined by her, reserving all questions as to his credibility. He swore,—“ That he recollects having accom-
“ panied his sister, the pursuer, to Mr Stewart's of
“ Crossmount, four years ago: That this was in the
“ summer, and well on in the summer: That the
“ object of the deponent and his sister going to Cross-
“ mount, was to seek a little money from Mr Stewart:
“ That this was the only time he ever went to Cross-
“ mount with his sister: That they sought the money
“ for the purpose of the pursuer keeping herself and
“ family: That they saw Mr Stewart of Crossmount:
“ That they had conversation with Mr Stewart: That
“ it was the pursuer chiefly who spoke with him; but
“ the deponent also took some part in the conversation:
“ That the pursuer asked money; but Mr Stewart said
“ he had not a penny at that time: That Mr Stewart
“ asked the pursuer about a letter that she had from
“ Chesthill, (the defender:) That Mr Stewart said that
“ it was owing to Miss Macdougall that the pursuer
“ had the letter: That the pursuer said it was not, and
“ that she had the letter before Chesthill ever saw Miss
“ Macdougall. Interrogated, Whether the pursuer
“ told Mr Stewart that she came to consult him as to
“ what course she was to follow in regard to Chesthill?
“ Depones, That he never heard of any such statement
“ made in his presence. Interrogated, Whether Mr
“ Stewart said that he had heard that she had got the
“ letter to shew to Miss Macdougall's friends? Depones,
“ That Mr Stewart said that he had heard that she had
“ got the letter to keep Miss Macdougall off Chesthill.

“ Interrogated, What did the pursuer say? Depones,
 “ That the pursuer said, it was not so; that she had
 “ the letter before Chesthill ever saw Miss Macdougall.
 “ Interrogated, Whether the pursuer said at that inter-
 “ view that Chesthill had or had not promised to
 “ marry her? Depones and answers, That ‘ he did
 “ ‘ not hear such a question either put or answered.’
 “ That the interview lasted about a quarter of an hour
 “ or twenty minutes, and that he was present during
 “ the whole time of the interview, and the deponent
 “ and the pursuer left Crossmount together. Interro-
 “ gated, Whether he recollects of any thing else passing
 “ than what he has above deponed to? Depones,
 “ That he does not recollect of any thing farther.
 “ Interrogated, Whether Crossmount said any thing
 “ about the children being bastards? Depones, That
 “ he does not recollect any thing that he said about it.
 “ Interrogated, Whether he heard the pursuer say that
 “ her children were bastards? Depones, That he did
 “ not hear her say that they were bastards. Depones,
 “ That he heard every word that passed at the inter-
 “ view. Interrogated for the defender, depones, That
 “ he was several years a herd with the late Mr Stewart;
 “ but left his service a good many years ago. Depones,
 “ That the conversation before deponed to took place
 “ in a small room used by Mr Stewart as a writing-
 “ room: That it took place in Gaelic: That he saw
 “ Mrs Stewart that day. Depones, That he does not
 “ recollect to have seen Mr Charles Stewart, the tutor
 “ at Crossmount, there that day; but he has seen him
 “ there. And the memorandum by the late Mr
 “ Stewart having been read over to him, depones,
 “ ‘ That it is not the truth altogether, nor the fifteenth
 “ ‘ part of it:’ And the deponent was here desired to

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“ look over the memorandum and point out what was
 “ not true. And the memorandum having again been
 “ read over to him sentence by sentence, and being
 “ interrogated in reference to each sentence, Whether
 “ it contains a correct account of the conversation?
 “ Depones, That no part of it is true, with the excep-
 “ tion that Mr Stewart stated, that he heard that the
 “ letter had been got to shew to Captain Macdougall,
 “ and that the conversation was conducted in the Gaelic
 “ language, and that Christy did remark, ‘ Who had a
 “ ‘ better right to Chesthill’s property than his own
 “ ‘ children?’ Interrogated, Whether what is sworn
 “ to in his examination in chief, as having taken place
 “ at the interview with Mr Stewart, is the whole of
 “ what took place? Depones, That he is sure it is;
 “ ‘ there may have been words more, but it is all he
 “ ‘ remembers of it.’ ”

The proof having been concluded, the Lord Ordinary, (Jeffrey,) on 18th December, 1835, pronounced the following interlocutor, adding the subjoined note :¹—

¹ “ *Note.*—The pursuer has evidently no case in the declarator without
 “ the letter of 25th March, 1826, the separate proof of verbal acknowledg-
 “ ments or open marital cohabitation having altogether failed. If the letter,
 “ though delivered for the purpose it expresses, (with the continued inter-
 “ course after its date,) does not constitute a marriage without the other
 “ proof, it will not materially supply the defects of such proof. If it was
 “ delivered and accepted for quite another purpose, it makes the case worse
 “ for the pursuer than if it had never existed.

“ The Lord Ordinary thinks there is, on the whole, sufficient evidence
 “ that it was delivered and accepted for such a special and improper purpose ;
 “ and he rests his judgment on this. But he is also of opinion, that in the
 “ circumstance of this case, where a declaration or acknowledgment of mar-
 “ riage is conditioned on the birth of a child, and where it is certain that
 “ there had been a great deal of personal intercourse before the letter was
 “ delivered, the mere delivery of that letter, with proof that the intercourse
 “ was afterwards continued, are not sufficient to constitute a marriage accord-
 “ ing to the law of Scotland. If any reliance, indeed, is to be placed on the
 “ report of the opinions delivered when the reclaiming note for the pursuer
 “ was refused, on 6th December, 1833, (12, Shaw, 179,) this point was then

“ The Lord Ordinary having heard parties fully on
 “ the concluded proof, and whole cause, and made
 “ avizandum, sustains the defences proponed against
 “ the declaratory conclusions of the libel for marriage
 “ and legitimacy ; assoilzies the defender from the whole
 “ of those conclusions, and decerns : And, before farther
 “ answer, appoints the cause to be enrolled, that the
 “ pursuer may state whether, and to what effect she

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“ deliberately decided by the Court ; and though the proof was, no doubt,
 “ declared to be before answer, and the relevancy may, therefore, in point of
 “ form, be still open for argument, the Lord Ordinary feels that it would be
 “ improper for any single judge, even if he had scruples as to the merits, to
 “ go against this determination in a more advanced stage of the same cause.
 “ He must say, however, that, looking at the whole course of decisions since
 “ the case of Moir and M’Innes, and with reference especially to that of
 “ M’Dowall, he cannot but concur in the principles of that determination,
 “ though he is fully aware of the qualifications it may be thought to have
 “ received from some of the opinions expressed in *Sim v. Miles*, 20th Novem-
 “ ber, 1829, (F. C. and 8 Shaw, 89.)

“ But these are truly points which never can be raised in the case, if the
 “ Lord Ordinary is right in holding it sufficiently proved that the letter in
 “ question never was delivered or accepted for the purpose of constituting or
 “ proving an actual marriage, but for a very different purpose, of imposing
 “ upon third parties by a false pretence. That this is sufficiently proved, it
 “ is supposed would scarcely be disputed, if the evidence of Mr Stewart of
 “ Crossmount was allowed to be competent. But a strong effort was made,
 “ at the debate, to have his evidence set aside, as being in substance an
 “ improper disclosure of admissions made confidentially by a party when con-
 “ sulting and seeking advice from another, with a view to an impending
 “ lawsuit. But though it is quite true that Mr Stewart was so consulted,
 “ and that his situation approaches in principle to that of a law agent, where
 “ advice is sought in similar circumstances, still the Lord Ordinary can find
 “ no authority for extending this disqualification beyond the professional
 “ limits within which he conceives it has hitherto been confined ? And this
 “ is less to be regretted, as the admission of this evidence only tends to con-
 “ firm, beyond all question, what was already legally established by the
 “ uncontradicted testimony of the two Stewarts, (uncle and aunt of the pur-
 “ suer,) and rendered morally certain by almost all that appears, and that
 “ does not appear on the face of the proof. There is, first of all, the admis-
 “ sion that the letter, though bearing date in March, 1826, was not delivered
 “ till some time in 1828. Next, there is the clear proof by the defender’s
 “ letter to the pursuer’s brother, and by the depositions of Captain Macdougall
 “ and his brother, that the letter was really prepared and delivered with a view
 “ to impose upon these gentlemen ; and, finally, there is the conclusive circum-
 “ stance, that, from beginning to the end of her proof, and during the whole

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“ means to proceed with the other or alternative con-
“ clusion of her libel.”

The appellants reclaimed to the Court against this interlocutor, and the Court, on the 4th February, 1836, pronounced this judgment:—

“ The Lords having considered this note, with the
“ other proceedings, and heard counsel thereon, adhere
“ to the interlocutor complained of; refuse the desire
“ of the note, and remit to the Lord Ordinary to pro-
“ ceed accordingly.”

“ period of her connection with the defender, there is not a vestige of evidence
“ of her ever having directly claimed the title or rights of a wife, or even
“ hinted to her confidants and relations that such was truly her condition.
“ She has brought forward two witnesses to swear that the defender some-
“ times called her by a name which, though it properly signified nothing more
“ than woman, was yet often used (they say) as equivalent to that of wife.
“ But neither these nor any other witnesses, say they ever heard her address
“ the defender, or speak of him as her husband, though of the two she was
“ evidently the most likely to indulge in such epithets, and to hazard, in
“ this way, the occasional breach of a not very intelligible scheme of conceal-
“ ment. There are many circumstances, also, independent of her acquies-
“ cence in the baptism of the children as bastards, and in their universal
“ repute as such, which afford irresistible evidence of her consciousness of her
“ true state and condition.

“ But though the case is not attended with much difficulty, when it is
“ considered that the pursuer was bound to make out her allegations by legal
“ evidence, it is impossible not to feel that there are parts of it still enveloped
“ in a painful obscurity, and which present but an awkward aspect for the
“ defender. The Lord Ordinary alludes particularly to the evidence about
“ the letter from Hamilton, — to the private letter from the defender himself
“ to his agent, of 24th August, 1828, — to the proof of his having said that
“ he durst not marry, and that there were people about him who prevented
“ him from marrying, — and to the singular tone of deep feeling and despon-
“ dency in his letter to the clergyman of 15th June, 1827, which is much
“ more like that of a man committed to an unsuitable and disreputable mar-
“ riage, than of a young Highland officer, who finds himself the father of an
“ illegitimate child. It is plainly impossible, however, to hold these as proofs
“ of an actual marriage, and the indications of kindness to her relations,
“ which were quite as likely to flow from the influence of a favourite mistress,
“ as of an humble wife, are of still less importance.

“ The Lord Ordinary scarcely supposes that the pursuer means to insist in
“ her claim of damages, as for seduction. F. J.”

On the 14th May, 1836, the Lord Ordinary pronounced the following interlocutor:—

“ The Lord Ordinary having considered the foregoing remit from the Inner House, in respect it is stated that it is not the intention of the pursuer, Mrs Christian Stewart or Menzies, to appeal against the judgment, assoilzieing the defender from the declaratory conclusions of the libel for marriage and legitimacy, appoints parties’ procurators to be ready to debate at next calling on the alternative conclusion of the summons for damages.”

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The appellant, Christian Stewart, then moved the Lord Ordinary that he should order an additional record to be made up with a view to the alternative conclusion of the summons for damages on the ground of seduction, and also that the case should be remitted to a jury, with a view to try the question.

On the 31st May, 1836, the Lord Ordinary pronounced the following interlocutor, and added the subjoined note¹:—

¹ “ *Note.* — There is more authority than the Lord Ordinary (looking at the terms of the Judicature Act) could have expected, for allowing a record regularly closed in this Court to be opened up, or added to, though it does not clearly appear whether, in all these cases, this was not done substantially of consent; at least not in spite of the opposition, or in face of a plea of incompetency seriously maintained by an adverse party. For the reasons stated in the interlocutor, however, this is conceived very clearly to be a case not fit to be added to those exceptions from the rule of the statute, independently altogether of the peremptory renitentia of the defender.

“ As to the suggestion that the case should now go to a Jury, there is no doubt that a separate and independent action of damages for seduction must have gone to that tribunal; and that it is in itself the fittest and best tribunal both for deciding whether damages are due, and especially for assessing their amount. But besides the reasons stated in the interlocutor, which seem legally conclusive, it is to be considered, that even on a view of mere equity and expediency, such a course would be liable to great practical objections. The pursuer by no means proposes to lay aside the witnesses

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“ The Lord Ordinary having heard parties’ pro-
 “ curators, on the motion of the pursuer, Christian
 “ Stewart, to have a new or additional record made up
 “ on the remaining conclusions of her summons for
 “ damages on account of seduction, and also to have
 “ the cause remitted to the jury roll, with a view to
 “ the justice and extent of her claim for such damages
 “ being determined by a verdict; and having made
 “ avizandum with the debate and whole process, in
 “ respect that the existing record was made up on the
 “ whole process, and embraces both the alternative con-
 “ clusions thereof, that there is no allegation of res
 “ noviter veniens ad notitiam, and that it is clearly
 “ competent for the pursuer to prove her alleged seduc-
 “ tion, under the record as it stands, refuses to allow
 “ any new or additional record now to be made up, or
 “ to report to the Lords of the Second Division, with a
 “ view to making up such a record; and in respect that
 “ the process libelled alternatively, as the pursuer chose
 “ to libel it, was a proper consistorial cause, and must
 “ have gone to the Commissaries while that Court sub-
 “ sisted, for decision on both alternatives; that the
 “ original interlocutor of the former Lord Ordinary,
 “ (8th March, 1833,) remitting to the Commissaries ‘ to

“ already examined, and the documents already produced under the interim
 “ report of the commissaries. But she wants to enlarge and add to the proof
 “ she has thus already obtained, to re-examine before the Jury such of the
 “ surviving witnesses as she may select, and to read at her pleasure from the
 “ depositions of those who are dead, and to produce de novo the writings
 “ already recovered, together with any other she may still be able to make
 “ forthcoming; in short, to use the proof taken by the Commissaries, under
 “ the general remit already noticed, as a precognition for a Jury trial upon
 “ one branch of the cause then generally remitted to the Commissaries for
 “ probation, and partly proved in relation to this branch as well as the other.
 “ It is needless to point out the hazards and abuses to which such a course
 “ of proceeding must be liable; and the Lord Ordinary is not aware that it
 “ as ever been sanctioned.”

“ ‘ take the proof of the parties,’ necessarily imported
 “ a remit to take their proof upon both the said alter-
 “ native conclusions, and that it appears to have been
 “ so held and understood by the pursuer herself, inas-
 “ much as the report (or interim report) of the proof
 “ by the Commissary, (3d July, 1835,) proceeds upon
 “ a minute by the pursuer, in which it is stated that she
 “ had now closed her parole proof, only ‘ in so far as
 “ ‘ the conclusions applicable to marriage were con-
 “ ‘ cerned,’ and craved that the proof, as it stood, might
 “ then be reported accordingly; and in respect also,
 “ that in her reclaiming note against the said inter-
 “ locutor of 8th March, 1833, the pursuer prayed
 “ specially, that in the event of the defender’s allega-
 “ tions being found relevant, ‘ the process should be
 “ ‘ remitted to the Jury Court instead of the Commis-
 “ ‘ saries,’ and that this reclaiming note was refused by
 “ an interlocutor long ago final: Finds, that it is not
 “ now competent to send this case to a jury, and that
 “ the pursuer can only be let into any additional proof
 “ she may be entitled to offer, on the ground of
 “ seduction, under a renewal of the remit to the
 “ Commissaries, or a commission to some other proper
 “ persons.”

Against this interlocutor the appellants reclaimed to
 the Inner House, who, on the 5th July, 1836, pro-
 nounced the following judgment:—“ The Lords having
 “ considered this note with the other proceedings, and
 “ heard counsel thereon, adhere to the interlocutor
 “ complained of, and refuse the desire of the note.”

Thereafter, on 7th July, 1836, the Lord Ordinary
 pronounced the following interlocutor:—“ The Lord
 “ Ordinary allows the pursuer, Mrs Christian Stewart,
 “ a proof of the libel, quoad the conclusion of damages

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“ for seduction, and the defender a conjunct probation,
 “ and remits to the Commissaries, or any one of them,
 “ to take the proof with the usual powers; grants
 “ warrant for letters of incident diligence, at the
 “ instance of both or either party against witnesses and
 “ havers, and that any lawful day betwixt and the third
 “ sederunt-day in November next, to be then reported
 “ to the Lord Ordinary. Ten days’ previous notice
 “ being given by the one party to the other previous to
 “ leading the proof.”

Condie, a haver, examined by the appellant, produced a letter written by the respondent to the clergyman of the parish where his family residence was, in these terms: —

“ *York Barracks, 15th June, 1827.*

“ My dear Sir, — I was never more surprised, since
 “ ever I came into this world, than I was when I got
 “ your letter yesterday morning. I am so annoyed and
 “ hurt at the business altogether, that I can scarcely
 “ say or tell you any thing. I wish the child to be
 “ baptized as soon as possible; and I have asked R.
 “ Black to be my sponsor. I will pay all the fines and
 “ things that are requisite, by your letting me know,
 “ as soon as possible, all the different things and fines,
 “ and what would be the amount expected. I beg of
 “ you not to bring her before any session, or thing of
 “ that kind, as I was myself the transgressor. I have
 “ sent my servant home, to see and settle every thing
 “ the best way he can, as it is not in my power to get
 “ away myself from here; and another thing, that I
 “ have not courage to face all my neighbours and rela-
 “ tions again; so this business has caused a separation
 “ between I and my country for ever; so don’t be at all
 “ in doubt, for I am really serious.

“ I thank God that I am not at home, and hope
 “ never to have it in my power to say that I have seen
 “ the young lady. I intend to remove them in a short
 “ time till the child is nursed, and shall then board her
 “ for her lifetime, with any person who will take any
 “ charge of her. I feel for the poor woman more than
 “ it is in my power to mention, when I think of the
 “ mischief I have done in destroying her character for
 “ ever ; for my own, it was lost long ago.

“ I wish you to write me as soon as you can, all the
 “ particulars, and let the baptism be as quiet and con-
 “ cealed as you can possibly make it. I wish you and
 “ all your’s health and happiness ; and also every per-
 “ son around you, as I have never again a chance of
 “ seeing you in the Highlands. Remember me likewise
 “ to all at Glenlyon House and Druimachary, and
 “ believe me ever to remain, my dear Sir, yours most
 “ sincerely.

“ P.S.—I wish the child to be called Katherine
 “ Stewart, not Menzies at all.”

The appellant produced another letter, written by
 the respondent to herself, but without a date, which was
 in these terms :—

“ Dear Christy, — I am sorry that I cannot be able
 “ to go to see you to-night ; but I send you a letter
 “ which I had been intending to do long ago, and
 “ before I ever expected or understood that you were
 “ again with child, a circumstance which I can assure
 “ you, gives me most distressing ideas, as I am alone the
 “ person to blame, and on whom, I trust, all the blame
 “ will be laid. I have every inclination and feeling to
 “ take you to myself ; but there are just two things to
 “ be considered, one is, that all my respectability and
 “ connection with my equals will be at an end ; and

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“ another, that I will lose all the respectability which
 “ my inferiors at this time pay to me; but that won’t
 “ be a sufficient excuse for my destroying you. I now
 “ begin to enter on the circumstances of the case more
 “ minutely. I wish you (if you possibly can) to leave
 “ this country for a time, say till you are delivered, and
 “ then to get some of your relations, say those you are
 “ staying with at present, to go to some other property
 “ away from my own, where they will be as comfortable
 “ as they are at present, and on these terms, and also
 “ your giving me Catherine to myself, I will settle on
 “ you the sum of L.60 per year during the first ten
 “ years of your life; and for the remainder of the whole
 “ of your life, I will settle the sum of L.50, and L.400
 “ to the two children at my death. This I will have
 “ drawn out on a stamped paper if you choose, with
 “ any two people you may choose to take the manage-
 “ ment of it. The annuity will be made payable at
 “ Martinmas and Whitsunday, L.30 each time. I now
 “ most sincerely hope that this will come to your
 “ wishes, as I declare that I will be most happy to act
 “ towards you the best way I am able, for no one knows
 “ what I am due to you, except your brother Donald,
 “ and your uncle James, regarding that business of
 “ Miss Macdougall’s, which is now settled.

“ Report says that I am now to be married to
 “ another, which I dare say may hurt you; but I
 “ declare not a word of it is true; and even though I
 “ were anxious, I dare not marry for four years to
 “ come, from the settlement which has been made
 “ between Captain Macdougall and myself. You will
 “ also be aware that it would hurt my father very much
 “ if I was to marry you at this moment. I will be west
 “ to see you I hope to-morrow, and then you will be

“ able to tell what you think of what I have said in
 “ this letter. I remain, yours most sincerely,

(Signed) “ JOHN MENZIES.”

“ P.S.— I forgot to mention, that whatever house
 “ you will get to live in, if you leave this country, I
 “ will furnish it to you myself, and let you have any
 “ two of my cows you may wish for, or any kind you
 “ should like. (Intd.) J. M.

“ I will see you to-morrow, and you can tell me
 “ every thing then.”

And in support of this branch of the case as to seduc-
 tion, she farther relied on the evidence of Robert
 Stewart, who swore, — “ That he has resided for a long
 “ time at Foss, and is acquainted with the family of the
 “ pursuer: That the pursuer’s father was a farmer at
 “ Rannoch, and afterwards at Foss. Interrogated,
 “ Whether he was a respectable person? Depones,
 “ That he never heard any thing against him. Inter-
 “ rogated, Whether he was a person of character, credit,
 “ and reputation in the country? Depones, That he
 “ was. Interrogated, depones, That he knew the pur-
 “ suer when at Foss. Interrogated, Whether she was
 “ much liked when there? Depones, and answers,
 “ ‘ Yes; I think she was. I never heard any thing
 “ ‘ against her.’ Depones, That at the death of the
 “ pursuer’s father the family were young. Depones,
 “ That it is common in that part of the country where
 “ the pursuer’s father lived, for the daughters of far-
 “ mers to go into service.”

Another person of the same name also swore, —
 “ That he has been the most of his days a resider on
 “ the estate of Foss, and he had occasion to be fre-
 “ quently about the house of Foss, having been em-
 “ ployed as a shoemaker by the proprietor, family and

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“ servants : That he had occasion to know the pursuer
 “ when she was there. Depones, That the deponent
 “ knows that she was very much respected, and very
 “ much thought of by the family and by the whole
 “ country. Depones, That the deponent had occasion
 “ at that time to see the defender frequently about the
 “ house, and the defender and the pursuer together :
 “ That the deponent saw the defender and the pursuer
 “ whispering together, and sometimes saw him throw
 “ his arm round the pursuer’s neck : That they seemed
 “ very fond of each other : That the deponent never
 “ saw any thing improper pass betwixt them. And
 “ being interrogated, Whether the defender seemed to
 “ treat her respectfully? Depones, That he does not
 “ know as to that. Interrogated, What he means by
 “ saying that he does not know as to that? Depones
 “ and answers, ‘ I did not hear what they were saying
 “ to one another.’ Depones, That this happened before
 “ the pursuer left Foss to go to Duneaves : That the
 “ deponent observed these things for a considerable
 “ time before he left Foss : That it was a twelvemonth
 “ at least : That it might be a year and a half. Inter-
 “ rogated for the defender, Whether he remembers any
 “ particular occasion on which he saw Mr Menzies
 “ whispering with the pursuer, or throwing his arms
 “ round her neck? Depones, That he does not. De-
 “ pones, That on the occasions on which Mr Menzies
 “ acted as above deponed to, the other servants were
 “ present.”

On the 1st of February, 1837, the Lord Ordinary pronounced the following interlocutor, adding the sub-joined note :¹—

¹ *Note.* — There is no direct evidence (for what Robert Stewart depones at pp. 24 and 25 of the pursuer’s proof, can scarcely be considered as an

“ The Lord Ordinary having heard the counsel for
 “ the parties on the concluded proof, as to the remain-
 “ ing or alternative conclusions of the summons, under
 “ which the pursuer claims damages on the ground of
 “ seduction, and made avizandum, finds that there is no

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“ exception) as to the nature of the intercourse between the parties, or their
 “ behaviour to each other, prior to the time when an illicit connection must
 “ (at the very latest) have begun, viz., about nine months previous to the
 “ birth of the first child in June, 1827 ; and all the pursuer has to found
 “ upon in relation to this most important period, is, that as she had been by
 “ this time about eighteen months in the defender’s family, it is to be pre-
 “ sumed that she had all that time resisted his solicitations. But as this
 “ assumes, without any intelligible ground, that he had begun his solicitations
 “ as soon as she entered his house, it is obvious that no regard whatever can
 “ be paid to such a vague and gratuitous surmise.

“ The whole case, in short, depends on two admitted letters of the
 “ defender, one addressed to the clergyman of the parish, on occasion of the
 “ birth of the first child, and dated 15th June, 1827 ; the other, and by far
 “ the most important, to the pursuer herself, without any date, but proved, by
 “ its contents, to have been written during her second pregnancy, and some
 “ time in spring, 1829. Both these letters, the pursuer contends, contain
 “ admissions of seduction on the part of the defender, and of his consequent
 “ obligation to make her reparation for the injury she had consequently sus-
 “ tained ; and the last of them also contains clear traces of a purpose of mar-
 “ riage, and indications that such a connection had been long contemplated
 “ by both of them, which, she says, she is entitled to draw back to the period
 “ of their first intercourse, and to assume as the cause of her yielding.

“ It is impossible to deny that the tenor of these documents gives a certain
 “ colour to those allegations, and gives the case somewhat of a painful
 “ character, in respect to the defender. But the Lord Ordinary, though he
 “ cannot but regret that this part of the cause could not be sent to the appro-
 “ priate tribunal of a Jury, has not felt that he should be justified in finding
 “ upon this evidence alone that a case of seduction had been made out.

“ The defender’s general expressions of self-condemnation, and of his deep
 “ feeling for the ruin and misery he had brought upon the pursuer, though
 “ stronger than are usual, or perhaps natural in a case of mutual transgression,
 “ do not necessarily infer that he was conscious of any thing which our law
 “ would consider as seduction ; that is, any artful practices, or false insinua-
 “ tions, held out to entrap a resolute chastity ; — any deliberate plan to cor-
 “ rupt the principles or inflame the passions of an inexperienced female ; or
 “ even any long and persevering solicitations after repeated repulse and resis-
 “ tance. In almost every case where a young woman gives way, in this sort,
 “ to temptation, the man is the aggressor, and in fact, as well as in morality,
 “ decidedly the most to blame ; while, in every case almost without exception
 “ the woman is incomparably the greatest sufferer. Yet it would be of peril-
 “ ous example to hold that every woman, upon her first lapse from virtue,

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“ sufficient proof to warrant such a conclusion, and
“ therefore sustains the defences, assoilzies the defender
“ from this conclusion also of the Summons, and
“ decerns, but finds no expenses due.”

“ should be entitled to recover damages as for seduction, from her paramour.
“ But if this could not be allowed, it would scarcely be less perilous to hold
“ the feeling expression of these undoubted truths as evidence against the
“ supposed seducer; and there is really no more in the expressions now
“ referred to.

“ In the second letter, however, there are no doubt references to a matri-
“ monial purpose, evidently not then for the first time brought into discussion
“ between the parties; and not even then finally disclaimed or abandoned
“ by the defender. It is here alone that the Lord Ordinary has had any
“ difficulty; and if this letter had been dated previous to the first connection,
“ or even very soon after it, he would have been inclined to hold that it gave
“ a character to the intercourse which might have justified the present claim
“ of the pursuer. The great inequality of rank on which the defender chiefly
“ insists, as excluding the presumption of these insinuations of intended mar-
“ riage which have formed the chief indicia of seduction in most of the
“ decided cases, would have become of no consequence whatever, if there had
“ been such proof of actual matrimonial communings, as the Lord Ordinary
“ thinks would certainly have been afforded by a letter of this strain, in the
“ beginning of the intimacy, and connected, as it then would have been with
“ the self-accusations already referred to, might have been quite sufficient to
“ infer a full liability for the consequences of the pursuer's too implicit reli-
“ ance on those insinuations. The difficulty, however, is in the dates; in
“ the long interval between the time when their matrimonial contemplations
“ may have originated, and the time when the pursuer yielded either to the
“ mere request or to the artful seduction of the defender. In that interval
“ she had become the mother of one of his children, and was about to give
“ birth to another; she had entered into a state of regular concubinage with
“ him; and had become an object of more constant and respectful attention
“ than there is any proof of her having been before she had submitted to his
“ desires. It is believed to be far more common for men of affectionate
“ natures to take up purposes of marriage with the mothers of their illegiti-
“ mate children, towards whom they had not previously entertained, or pro-
“ fessed any such purpose, than for men of any description to seduce women
“ of inferior rank, by false expectations of marriage; and therefore, when the
“ only proofs of such purposes are dated subsequent to the birth of children,
“ the Lord Ordinary thinks he is bound to conclude *ex eo quod plerumque*
“ fit, and to hold that they do not amount to evidence of antecedent induce-
“ ments held out to give effect to amorous solicitations.

“ It is upon this ground that the Lord Ordinary rejects the claim of the
“ pursuer. He is not at all moved by the reference in the second letter, to
“ the trick upon Miss Macdougall, to which she consented to be an accessory,
“ but of which the discredit is chiefly with the defender, or by his sugges-
“ tion; that the matrimonial indications in that letter may have been

The appellant reclaimed against this interlocutor, and on the 27th June, 1837, the Court pronounced the following judgment:—“The Lords having considered
“this note, with the other proceedings, and heard
“counsel thereon, adhere to the interlocutor complained
“of, and refuse the desire of the Note.”

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The opinions of the Judges at delivering this interlocutor will be found 11 F. C. 347.

The appeal was taken against these different interlocutors of the Lord Ordinary and Court.

The Appellant. — I. The letter of 26th March, 1826, is twofold; it first contains an acknowledgment of marriage, or an already existing connection as man and wife; and second, a promise to declare the connection in case of the birth of a child. But assuming it not to amount to more than a promise of marriage, coupled with sub-

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“dictated, rather by gratitude for her services in that unworthy transaction,
“than by any original attachment. The whole strain and tone of the letter
“are exclusive of such a supposition. Neither could he think of depriving
“the pursuer of her right to reparation, if there was good evidence of her
“seduction, on account of her improper conduct in suppressing the letter now
“alluded to, during the discussion of the declaratory conclusions of the libel;
“unless it was proved that she had acquiesced in the statements of that
“letter, the mere receipt and custody of it might not put her in mala fide to
“insist in that declarator. But whatever her fault might be in that parti-
“cular, it could never afford a legal set off against a just debt contracted to
“her by the defender’s delinquency, any more than against such a debt con-
“tracted by his regular deed or agreement, not to insist upon the obvious
“fact, that he was himself a party to the suppression of this letter during
“that discussion, and seems to have been willing enough to lose the benefit
“of it in the declarator, for the chance of its not being forthcoming in the
“alternative conclusion for damages.

“The Lord Ordinary has no wish to encourage farther litigation in this
“painful case, but he thinks that the defender, after writing these letters, is
“not justified in casting this young woman on the world without some pro-
“vision. There may be a defence of turpis causa, if the intercourse continued
“after the date of the last letter, but if it then terminated, he does not see
“why action should not lie for the provisions there stipulated; at all events,
“he has no idea of allowing any expenses in this process. F. J.”

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sequent cohabitation, it is sufficient to constitute a marriage. It was dated in 1826, but was not delivered till 1828. Betwixt these years there had been an intermission in the connection between the parties, during which both parties had repented. Connection was resumed on the faith of the delivery of the letter, at a time when the condition contained in it had been already purified by the birth of the first child; the promise, therefore, with subsequent cohabitation, gave all the requisites to constitute marriage, for there is no rule that prior cohabitation destroys the effect of a promise, with subsequent copula. Ersk. I. 6. 4; Mill v. Sim, 5 F. C. 84.

[*Lord Chancellor.* In 1826, the letter was a promise, coupled with a condition.]

If you take it as it stands.

[*Lord Chancellor.* Do you put your case higher than if the letter had been delivered in 1826?]

Yes. It must be held as delivered in 1828.

[*Lord Chancellor.* Suppose no child had been born after the delivery.]

The condition had been purified before the delivery, and there is neither averment nor evidence that carnal connection had been resumed before the letter was delivered. Besides, copula following, the condition is presumed to have been purified. Stair, IV. 45. 19; Shillinglaw v. M'Intosh, 7 S. 722. At all events, the condition was purified by the subsequent birth of the second child. In another view, the first part of the letter contained an acknowledgment of marriage, and the second, being intended to suspend the effect of the first for an illegal purpose, must be altogether disregarded.

II. There is no averment that the letter was obtained

by force or fraud; parole evidence, therefore, either to control its terms, in themselves perfectly unambiguous, or to disclose an intention of the party at writing different from what the terms of the writing exhibit, was inadmissible. *Watt v. M'Farlane*, 15th February, 1828, 6 S. 556; *Gibb v. Winning*, 28th May, 1829, 7 S. 677, Ersk. IV. 2. 21. In the case of *Innes v. Moir*, Mor. 12683, the terms of the letter were inconsistent with, and contradictory in some respects of, the purpose for which it was used; it was necessary to have the judicial examination of the party himself to support the document, but the examination negatived the purpose for which the letter was used, and imputed it to one totally different; and the judgment proceeded specially upon the ground, that the transaction had not been proved without the examination, and that the examination gave it another colour. But it is said there is an admission that the letter in the present case was not delivered of the date it bears, and that this is sufficient to let in parole testimony; if so, the admission must be taken with its qualifications, and these support the use which the appellant makes of the document. *Innes v. Moir*, ut supra; *Gray*, 8 S. 221; *Grierson*, 8 S. 317. But moreover, the parole testimony offered by the respondent was farther incompetent, by reason it was offered to establish his own fraud, and to his own benefit, *M'Ghie*, 7 Shaw, 797; and in contradiction of his own statement, in his letter to Mr. Sharpe, of 24th August, 1828.

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-III. Though the evidence of near relations be in the general case inadmissible, clandestine and secret marriage forms one of the exceptions to the rule, for near relatives are the natural depositaries of such a secret, and to exclude their evidence would, in most cases, be to

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exclude evidence of the truth. Barber v. Stewart, Mor. 16742; Young v. Arrot, Mor. 16743; Cameron v. Malcolm, Mor. 12680; Nicolson v. Nicolson, Mor. 16774; Martin v. M'Kisson, 8th February, 1816, 19 F. C. 76. The relationship may be an objection to the credibility, but it is not any to the admissibility of a witness in such a case.

IV. The 6 Geo. IV. cap. 120, sec. 38, shews, that it was the intention of the legislature, that actions of damages for breach of promise of marriage and seduction, should be tried by Jury, as the tribunal best fitted to inquire into the facts, and assess the damages. The conjunction of the declarator of marriage with the claim for damages was according to long established usage. But the statements on the record were necessarily limited to support the conclusion for declarator only. When the declaratory conclusions, therefore, were disposed of, the Court should have allowed a new record to be prepared as to the remaining conclusion, and remitted it for trial by Jury. The refusal of the Court to remit for trial by Jury at an early stage of the case, applied to the trial of the declaratory conclusions, which certainly were not triable in that form.

V. If the Court properly reserved to itself the decision of the claim for damages, their judgment was contrary to the evidence. The two Robert Stewarts established the respectability of the appellant, previous to entering the respondent's service; and his own pleadings, and his letter to the appellant and the clergyman of the parish, proved that the appellant had become the victim of his seduction, and that he had exhibited the strongest feelings of contrition and self-reproach for the injury he had done her.

The Respondent. — I. Present consent is necessary to marriage, and matrimony must be the object of it. Consent for the purpose of fornication can never be perfected into marriage. Thomas, 7 S. 872. In such a case the presumption of consent to marry at the moment of copula is necessarily excluded, and without such consent there cannot be marriage. Ersk. I. 6, 4; Stair, I. 1, 6; Macdowall v. M'Dowall; Ferg. 163; Cameron v. Malcolm, Mor. 12680; M'Gregor v. Jolly, 3 W. and S. 85. The letter of 25th March, 1826, has none of the expressions which, if intended to acknowledge a subsisting marriage, it would certainly have contained, and is addressed to the appellant in her own maiden name, and it is admitted that it was not delivered until the close of 1827, or beginning of 1828, plainly excluding any notion of matrimonial consent having been interchanged at the date of the letter. Viewing it, on the other hand, as a promise of marriage, its effect was dependent on a condition which might, or might not, have been purified, leaving the status of the parties uncertain until that should be ascertained; this is necessarily to exclude any presumption of present unqualified consent, which by the law of Scotland has always been considered necessary. M'Innes v. More, 10 S. and D. 590. The condition involved an agreement to live for a time at least in a state of concubinage, it was therefore illegal, and could never be purified so as to perfect the promise. Bell's Dig. 206; Ersk. III. 3, 83.

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II. But the letter was given with another intent than that of marriage, and evidence to shew this was properly admitted. Though it is no doubt incompetent to admit parole testimony to explain or derogate from the terms

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of a written contract, yet it is perfectly competent to admit such evidence to shew that the document was no contract at all. M'Innes v. More, ut supra; Taylor v. Kello, Mor. 12687; M'Lauchlan v. Dobson, Mor. 12693; Grant v. Mennons, Ferg. App. p. 110. The evidence of the two M'Dougalls, and of the memorandum by Mr Stewart, establishes that the letter was given for the purpose of imposition upon another, and with no other intention, but without any purpose of injury to the appellant; it was perfectly competent therefore, for the respondent to lead evidence of the true intention, though it were fraud, the fraud being upon another person than the appellant. M'Innes v. More, ut supra; Sassen v. Campbell, 5 W. and S. 309; M'Gregor v. Jolly, 3 W. and S. 130.

III. There was not any penuria testium, which alone could have made the evidence of the near relatives admissible. The allegations of the summons negatived such a supposition. Besides, the penuria must be unavoidable, from the nature of the case, and the situation of the parties, or be occasioned by the opposite party. But here sixteen witnesses had been examined, shewing that there was not in fact any penuria; there was no evidence that the respondent had done any thing to circumscribe the means of proof; neither were the facts of the case such as to justify the belief, that there could be any scantiness of evidence. This evidence was therefore properly rejected. Dalziel v. Richmond, Mor. 16780; Bell v. King, Mor. 16786; Laing, 16th Nov. 1814, 18 F. C. 22; Manuel v. Fraser, 1 Murray, 391; Brown v. Wintours, 2 Murr. 455; Gibsons v. Marr, 3 Murr. 263; Anderson v. Jeffrey, 4 Murr. 105; Dougall v. Dougall, 11 Shaw, 1020. In Craigie v.

Hoggan, 15 Dunlop, 379, a father and sister were admitted as witnesses, because the defender had destroyed the documentary evidence, and while he had enjoined secrecy as to all others, he had permitted disclosure to these relations alone.

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IV. By 1 W. IV. c. 69, sec. 37, consistorial causes are specially excepted from trial by Jury. It was competent for the appellant to have separated her causes of action, and to have made the claim for damages in an action which could competently have been triable before a Jury. She chose, however, to join the two together, and to prepare and close the record; and in her reclaiming note against the admissibility of the evidence tendered by the respondent, she prayed, that in the event of the respondent's averments being admitted to proof, the cause should be remitted to the Jury Court. This note was refused, and the interlocutor refusing it has not been appealed from.

V. There is evidence of illicit connection between the parties, but none of those qualities in the commencement of that connection, which would be necessary to support a claim for damages, by reason of seduction. There is no evidence whatever that the appellant's virtue yielded to the fraudulent contrivances of the respondent, and that she was not as much the tempter as the tempted, *quod volenti non fit injuriam*, and their relative situations in life were not such as to raise any presumption of this kind.

LORD COTTENHAM. — My Lords, a considerable portion of the voluminous papers in this case is occupied in the discussion of a question raised by the appellant,

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which was most properly abandoned at the bar of this House, by the eminent counsel who appeared for the appellant. The point discussed in the papers, and abandoned at the bar, was, that it was not competent for the respondent to adduce evidence to shew the circumstances under which, and the purposes for which, the letter dated 25th March, 1826, was written and delivered to the appellant. This point was attempted to be supported by reference to a principle to which it has no application, and in the face of several authorities. It is unnecessary farther to notice this point.

The main question, which is that of the status of the appellant, whether she is to be considered as the wife of the respondent, turns principally upon the effect of the letter of the 25th of March, 1826, with reference to the law of Scotland upon the subject of marriage, first taken per se, and secondly, taken with reference to the facts proved.

It is an admitted fact, that cohabitation preceded and followed the date of that letter, and the time at which it is admitted to have been delivered to the appellant. The letter is dated 25th March, 1826, and is in these words, — “Christy, You and I having lived together as
“ man and wife for some time, I hereby declare you to
“ be my lawful wife, in the event of a child being born
“ in consequence of the present connection betwixt us.
“ I am yours truly, John Menzies.” The summons puts the alleged marriage upon two grounds, — 1st, A promise of marriage previous to any cohabitation cum subsequente copula, of which no proof was given; and 2d, Upon this letter, as being an acknowledgment and declaration of the marriage; but it does not put the case upon this letter as being a promise to marry, cum subsequente copula. Consent de presenti is essential to

marriage, and marriages established upon a promise cum subsequente copula are so established upon a fiction that the consent de presenti was mutually given by the parties in consequence of the anterior promise; but if the promise be conditional upon the happening of a future event, there is no room for any such fiction, the copula cannot be the perfection or consummation of the prior contract. Neither can this letter constitute a marriage by consent. It is not an acceptance by the parties of each other for their lawful spouses. By contemplating a future status of marriage upon a certain event happening, it negatives all the essentials of a marriage by consent expressed. Neither can it be considered as a declaration constituting habit and repute, as shewing that the cohabitation was that of husband and wife. The contemplation of such a relationship arising upon the happening of a future event, negatives the habit and repute which it is referred to as proving. It did not require the cases of *Macdonald v. Macdonald*, and *M'Innes v. Moir*, to prove this.

The letter, therefore, taken per se, does not support any of the grounds upon which a Scotch marriage can be supported. The very able counsel for the appellant felt this so strongly, that he rested his client's case principally upon this, that the letter, though dated in 1826, was not delivered to the appellant till late in 1827, or early in 1828, after the birth of the child, and therefore ought to be considered as a positive declaration of present marriage, the condition having at that time been performed. This would, indeed, be doing what the appellant properly insisted cannot be done, that is, construing a written document by extraneous evidence of intention. But if the fact of the letter not having been delivered till 1828 be resorted to, so must all the other

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evidence connected with the same matter, and which proves the reason for its having been delivered at that time with the date of 1826, and the purpose for which it was so delivered ; and which evidence so resorted to, and which it is now not in dispute was legally admissible, amply proves, that the parties did not intend that the letter should constitute a present marriage, or operate as a promise of marriage, but that it was written in pursuance of a scheme of the respondent, acquiesced in by the appellant, to commit a fraud upon a third person. The cases of *Kennedy v. Campbell*, in 3 W. S. 135 ; *M'Innes v. Moir*, in *Ferguson's Reports*, App. 125, 128 ; *Taylor v. Kello*, Mor. 12687 ; *Grant v. Menons*, *Ferguson*, 110, and many other cases, prove what indeed required no such proof, that to constitute a contract of marriage, there must be contracting parties, and that the expressions used, though of themselves sufficient words of contract, are of no avail if not intended by the parties to have that effect, but are used for some collateral purpose. This in no respect infringes upon the principle of not construing a written contract by extrinsic evidence of intention, the question being, not what the written contract imports, but whether it is to be treated as a contract at all. I have already observed, that in order to construe the letter dated in 1826, according to the circumstances which existed at the time it was delivered in 1828, extrinsic evidence must be resorted to ; but that proves that the parties must have had some design in antedating the letter. To construe it, therefore, as if dated in 1828, would be to defeat the proved object of the parties, and to construe a written document distinctly expressing one purpose, as importing one totally different, upon evidence dehors the instrument itself, and that not proving such to have been

the intention of the parties, but that their intention was, that the letter should be construed according to the literal terms used, that is a promise made in 1826, subsequently consummated by the birth of a child, and therefore, as they supposed, in point of form binding. This alone would have answered the purpose of imposing upon the third party. The position, therefore, attempted to be maintained by the learned counsel for the appellant, is wholly untenable.

If, then, this letter be inoperative for the purpose of constituting or proving a marriage, the case of the pursuer fails altogether. There is no other evidence deserving of observation, and the other points in the case are of no difficulty. The rejection of the evidence of the pursuers' near relations, according to the law as it then stood, was clearly right, and there is no reason to suppose that their evidence, if given, and believed, would have benefited the pursuer, seeing what was the real history of the transaction is proved by unquestionable evidence. The course adopted with respect to the conclusion for damages upon the alleged seduction, was also I think, strictly proper; the pursuer had a choice of proceeding at once in an action for that purpose, in which case, the Jury would have been the constituted tribunal to try the question; but she chose to conjoin the claim for damages with the action of declarator of marriage, and after proofs in such suit, complains of the Court assuming jurisdiction, as to the case of seduction. The evidence does not establish a case of seduction; it proves, indeed, conduct in the defender highly discreditable, as it leaves no doubt of his having been a party at least to the ruin of the pursuer, whom, as being in his service, he was in honour bound to protect; but that by no means establishes per se a title to damages for

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seduction, and the time during which the intercourse continued without complaint, is an important feature in a question of this kind.

For these reasons, I have no hesitation in advising your Lordships to affirm the interlocutors appealed from. A question important, I fear, to the pursuer, remains to be considered, the costs of the appeal; looking at the conduct of the defender throughout the transaction in evidence, and particularly to his treatment of the woman he had ruined, and the children she had borne to him, and the probably distressed circumstances of the appellant, I should have been glad to have found grounds, upon which I could have advised your Lordships not to fix upon the appellant the costs of this appeal. Such reasons probably operated upon the Court below, in refusing to the defender the expenses of the suit; but it is, I fear, to the practice as to costs in this House, having formerly been so imperfect and uncertain, that the number of frivolous appeals, particularly from Scotland, is to be attributed. Nothing can be more important to the interests of suitors, than to discourage such expensive and useless litigation. It has, I have reason to hope, been much checked of late years, by the altered system as to costs, and I have always felt it my duty, in considering the question of costs, in each particular case to look to the effect which the course to be adopted might have upon this general question; and in this House, and in the Court of Chancery, I have thought that benefit would arise from adhering more closely than had been done by some of my predecessors, to the principle of making the question of costs follow the result of the suit upon the merits, particularly when the question depended upon matters of fact, and the conduct of parties. I have been assured, and I have

reason to believe, that this course has materially checked useless litigation. Acting upon this principle, although I think that the respondent will acquire some redeeming credit by not exacting costs from the appellant, I cannot do otherwise than propose to your lordships to affirm the interlocutors appealed from, with costs.

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LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend in this case, which I heard the greater part of with him. It is a case subject to the observations which he has made, and it is therefore with some reluctance that I have come to the conclusion I have arrived at.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed.

Judgment.

ALEX. DOBIE — RICHARDSON and CONNELL, Agents.