in which the title was taken by M'Vitie in 1839, the substantial right and control of the property remained in him, and he was entitled to revoke, and did revoke, the deed of 1839 by the deed of 1866.

The pursuer reclaimed.

SCOTT for reclaimer.

ASHER for respondent.

The Court unanimously reversed.

LORD KINLOCH—I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and the deed of settlement challenged found to be invalid and inoperative as regards the interest of the pursuer, Sarah M'Vitie.

I consider the disposition by Thomas Jardine to John M'Vitie, dated 6th July 1839, to constitute a trust in the person of the latter on behalf of his children therein named. And this deed received all the delivery of which it was susceptible—viz., delivery to M'Vitie, the trust-disponee. This has not been sufficiently adverted to by the Lord Ordinary. And the point is one in which the present case differs materially from those of *Balvaird* and *Hill*, quoted to us; for in these cases the deed was not taken in favour of the father, the receiver, but of a third party, to whom no delivery, either actual or constructive, ever took place.

This trust-disposition remained in the possession of John M'Vitie from July 1839 to the time of his death in February or March 1866. A short time before that event he executed a disposition and settlement, by one of the clauses of which he disponed the subjects contained in the deed of 1839 to the defender Martin.

The pursuer, Sarah M'Vitie, cannot challenge this deed, on the ground of its being executed on deathbed; for she is not the heir of the granter, nor in any view more than a beneficiary under the deed in question. But she maintains the further plea, that the deed of 1839 constituted an irrevocable trust in her father's person for her behalf, and that on that account he could not competently or effectually convey the subjects away to her prejudice.

I do not intend to decide that a case may not occur in which a deed taken by a father to himself, as trustee for his children, will be revocable, or capable of being discharged by him, notwithstanding delivery to him in that capacity. It would be a strong thing to affirm that a father, intending a gratuitous benefit to his children, embodied in this form, was in all circumstances debarred from changing his mind, and destroying or discharging the deed. But, looking to the very peculiar terms of this deed, and to the long period for which it remained a subsisting instrument in the father's possession, without any process of declarator, or other proceeding to establish the contrary of what the deed bears, I cannot safely hold that, in a question between the father and his children, this was in the position of a mere gratuitous deed, revocable at any time. On the contrary, I think the legal character which must now be affixed to the deed is that of an irrevocable trust. The *prima facie* character which it bears to this effect cannot, I think, now be taken from it, with safety either to the law, or to the just interests of the parties.

I would only add, that I have great doubts whether a deed like this, constituting, as it did, the father's only title to the subjects, could, even if revocable, be competently revoked and discharged by merely granting a disposition to a third party, inconsistent with the terms of the trust. But it is unnecessary for me to decide this question; for, on other grounds, I come to the conclusion that the father's *mortis causa* settlement must be regarded as not an effectual revocation of the trust of 1839, but an ineffectual attempt to frustrate that trust.

Agent for Pursuer—W. S. Stuart, S.S.C.

Agents for Defender—Maconochie & Hare, W.S.

Tuesday, May 25.

FORSTER *v.* FORSTER.

Husband and Wife — Written Acknowledgment of Marriage—Proof. A marriage by interchange of consent *de præsenti held* established by mutual declarations, written in the defender's Bible, and signed by the parties, the proof establishing the genuineness and seriousness of the writing.

This was an action brought by Jessie Grigor or Forster, residing at Teindland, Elgin, against James Ogilvie Tod Forster, residing at Findrassie House, near Elgin, in which she sought to have it declared that she was the wife of the defender, or alternatively, asked damages for breach of promise of marriage. She alleged that there had been a deliberate verbal and written interchange of consent *de præsenti*. The written declaration was a writing on the fly-leaf of the defender's bible in the following terms:—"I, James Ogilvie Tod Forster, take thee, Jessie Grigor, to be my wedded wife, from this day henceforth until death us do part, and thus do I plight thee my troth. I, Jessie Grigor, take thee, James Ogilvie Tod Forster, to be my wedded husband, from this day henceforth until death us do part, and thus do I plight thee my troth. (Signed) JAMES OGILVIE TOD FORSTER, JESSIE GRIGOR. Sept. 2, 1865." This the pursuer contended, *ipso facto* constituted a marriage; or even, if only to be read as a promise of marriage, the subsequent intercourse yielded the legal inference of interchanged consent. In the course of the proof that was led it was testified that various acts of familiarity had openly taken place between the parties after the date of the writing, and that they had been seen coming out of one another's bed-rooms. The defender denied the authenticity of the handwriting in the bible, and maintained that the nature of the proof showed that the pursuer's conduct was inconsistent with the idea of marriage. The Lord Ordinary (MANOR) found that a marriage had been constituted *de præsenti*. The defender reclaimed, and moved for permission to lead proof that the writing in the Bible was not his.

CLARK and ASHER for reclaimer.

GIFFORD and KEIR for respondent.

The Court commented upon the peculiarity of the application, especially when coupled with the defender's departure from the country immediately before the proof, and refused the motion, with expenses.

At advising on the merits—

LORD ARDMILLAN—This is an action of declarator of marriage; and the foundation of the action is the alleged exchange of writings in the following terms:—"I, James Ogilvie Tod Forster, take thee Jessie Grigor to be my wedded wife from this day henceforth until death do us part; and thus do I plight thee my troth." "I, Jessie Grigor, take thee James Ogilvie Tod Forster to be my wedded husband from this day henceforth until death us do part; and thus do I plight thee my

troth." (Signed) "JAMES OGILVIE TOD FORSTER. JESSIE GRIGOR. Sept. 2, 1865."

There can be no doubt that, if this writing is authentic, its words are clear, distinct and unqualified; and that, if they mean what they express, they are sufficient to instruct that interchange of consent which constitutes marriage. I am not aware that I have ever seen a writing of the kind more clear and unequivocal and conclusive in its terms.

The first question is, whether this writing is authentic. The defender denies its authenticity, and alleges in substance that the body of the writing, and the name alleged to be his, are not genuine but forged. I have carefully considered the proof, and I have arrived at the conclusion that the authenticity of the writing and of the defender's subscription is instructed by the evidence.

I leave altogether out of view the testimony of engravers, who were not previously acquainted with the writing of the defender, and spoke only to their opinion on comparison of handwriting.

It has been for some years past the opinion and practice of the Court that evidence by comparison of writing given by persons not acquainted with the handwriting of the party is most unsatisfactory. I do not say that it is in all cases absolutely incompetent, but I am clearly of opinion that it cannot be relied on. If comparison of writing is to be considered as an element of proof, which I do not dispute, then it must either be comparison by those who know the handwriting of the party, or comparison by the Court according to the best of their judgment on personal examination. The testimony of engravers or men of skill, suggesting minute points for comparison or for distinction, is in my opinion not only an unsatisfactory but a dangerous species of evidence. Accordingly I leave it out of view.

Then we have the testimony of two witnesses, William Atkinson and Jane Bain, who certainly do swear distinctly that the writing in question is that of the defender, and that the signature of his name thereto is written by his own hand. Atkinson swears that he has "seen the defender write a great many times," and has seen his handwriting and knows his handwriting. With this means of knowledge, he depones that the body of the writing is by the defender. He also swears that he knows the defender's signature, and that the signature at the end of the writing is his. Jane Bain swears also that the writing is the defender's and that the signature is his. In addition to the testimony of these two witnesses, it was desirable to have some corroborative evidence, because, although I do not doubt of their honesty, and do not think that they were shaken on cross-examination, still they are not witnesses of the highest degree of intelligence, or of the best means of knowledge in such a matter. But assuming their honesty, as I do not hesitate to do, it will be found that there is corroboration of their opinion. The defender was asked by Atkinson about this writing. He tried to laugh at it, but he did not deny it. Jane Bain swears that the defender said to her that "he had put the writing in his bible to pacify her" (the pursuer). "He said it was his bible, and he had given it to Jessie. He also said that he never meant what he had written upon the bible." It appears to me that these acknowledgments afford important corroboration of the testimony and the opinion of Atkinson and Jane Bain; and no contrary evidence was adduced. That the writing was within the defender's own bible; that the bible has been produced by the pursuer; that it was seen in her possession before she left Findrassie; and that the defender admitted "that he gave the bible to Jessie in the servant's hall at Findrassie,"—are additional confirmations of the testimony of those who declare the writing to be authentic. I am not disposed to place much reliance on any comparison of the writings which I have been enabled to make. But I have examined them, and, so far as I can judge, I must say that I can see no reason to doubt the testimony or the opinion of Atkinson and Jane Bain, and that my examination of the writings in process would lead me to the same result.

The next question which arises, is, What is the effect of this writing, assuming its authenticity to be established? As I have already said, no words can be clearer or more unqualified. Why shall they not receive effect?

I see no reason to differ from the statement of the law by the Lord Justice-Clerk (HOPE), in the case of *Lockyer*, on 3d March 1846. I do not think that a pursuer can simply lay on the table of this Court a document, even as clear and as unequivocal as this, and at once demand decree of declarator of marriage without any ascertainment of the facts. The facts must be ascertained and considered as bearing upon the meaning and intention of the document; and in considering that matter, all the circumstances preceding, accompanying, or following, the signing and interchange of the writing must be taken into view. Consent mutually interchanged constitutes the marriage. The writing, clear in its terms and proved to be genuine, instructs the consent, unless something appears to derogate from its character. There is no presumption against the reality and the seriousness of an explicit writing proved to be genuine. Still it is quite true that the writing cannot be satisfactorily considered without taking into view the position of the parties and the circumstances of the case.

Now the important facts preceding this 2d of September 1865, which is the date of the writing, are explained by the Lord Ordinary. I need not mention them in detail. It is sufficient to refer to the abundant proof of marked attention and preference shown by the defender to the pursuer. Then the drive to Pluscarden in the carriage, in the middle or end of August, is a circumstance of some importance in a case like this. The pursuer was a domestic servant in the defender's mother's house; and the defender, after showing her much favour and marked preference, handed her one day into the family carriage, and drove her to Pluscarden and back. This was certainly an unusual step, raising her out of her ordinary position, indicating a strong inclination towards her, and calculated to produce no inconsiderable effect on her mind and feelings. Accordingly, it is in evidence that after that drive the defender's preference for her became more marked, and her acceptance of his fond and familiar attentions became more willing and unrestrained.

The circumstance attending the interchange of writing are also important. The date of the writing is the 2d September, probably about ten days or a fortnight after the drive to Pluscarden, the defender having in the interval been familiar and affectionate with the pursuer. The writing is within the defender's own bible; and the defender has admitted to Jane Bain that he gave that bible to the pursuer. I cannot view this fact otherwise than as indicating the serious and even solemn

character of the interchange of matrimonial consent which the words of this writing express.

Then the circumstances which followed the writing are—1st, the sexual intercourse which usually and naturally follows the interchange of matrimonial consent, beginning, as I think, immediately after the 2d September 1865, in the house at Findrassie, and afterwards resumed and continued in the house of the pursuer's parents at Teindland in January, February and March 1866; 2dly, the pursuer's statement to her mother and her friend Helen Chisholm that she had received this writing in the bible as a token of marriage, and the defender's conduct and language to the pursuer's mother, which cannot be reasonably reconciled with the idea that he did not intend marriage by the writing which he had given; and 3dly, the birth of a child on 30th November 1866, which the pursuer at once declared to be the defender's, and of which the defender does not appear to have denied the paternity when questioned on the subject. That birth corresponds in point of time to the intercourse proved to have existed in January, February, and March 1866.

I think it right to add, that some suggestions made during the course of the proof in regard to the pursuer's intercourse with other men appear to me to be totally unsupported. She positively and solemnly denies this; and I agree with the Lord Ordinary in believing her.

Taking all these circumstances together, I have arrived without difficulty at the conclusion, that the writing, being genuine, and being read in connection with these ascertained facts, preceding, accompanying, and following, must be held as really meaning what it expresses; and that, unless the defender can instruct as his defence the existence of some different import and meaning, the writing must receive effect. But the defender's pleading on this point is very peculiar. He has alleged on record that the writing and the signature are forged. That was a matter within his personal knowledge; and notwithstanding his denial the authenticity of the writing has been proved. The words of the writing are most clear. Shall the defender be permitted to say,—"The writing is not mine, it is forged; at any rate I wrote it with a meaning and intention different from what the words express. It reads like a declaration of marriage but I did not mean marriage when I wrote it. I meant something else." I greatly doubt if such a suggestion or insinuation of a meaning which is not defined or explained can be permitted. But, even though it were permitted, I am satisfied that it cannot be accepted without evidence of some kind. Now here I can see nothing in the circumstances of the case to support the defender's suggestion.

In the ingenious argument of Mr Asher, he did not suggest any circumstances giving even a plausible support to his argument on this head, except the fact that while the pursuer told her mother that she and the defender were married persons, the mother advised her daughter "to be married by a minister." To any one acquainted with the habits and feelings of the respectable class of peasants in Scotland, this fact, that notwithstanding the exchange of the writings in question, the mother, or even the girl, wished a marriage by a minister, must appear to be quite natural as well as becoming, and not in the least inconsistent with the legal effect of the written matrimonial consent. Those who suppose that any form of irregular marriage is considered in Scotland to be as creditable, as becoming, or as satisfactory, as marriage by a minister of the gospel, do not really know the habits or feelings of the people of Scotland on this subject. The pursuer's mother may very naturally and properly have wished that her daughter should be married by a minister; and the pursuer may have herself wished it; I do not doubt that she did; but that by no means leads to the inference that the previous interchange of written consent did not mean marriage.

I am, accordingly, of opinion that such interchange of deliberate consent *per verba de præsenti* has been instructed by the documents produced, as having regard to the whole facts and circumstances proved, is sufficient to constitute marriage. Therefore the pursuer is entitled to succeed in her action.

It is not necessary for me to enter upon the second question, viz.: Whether marriage has, or has not, been established by written promise *subsequente copula?* I think it however due to the pursuer to say, that I see no reason to doubt the truth of her statement on the record—that the first intercourse which she permitted to the defender was yielded after the date of the writing of 2d September 1865. This averment the defender meets by a general denial that he ever had sexual intercourse with the pursuer. That denial, like the denial of the signature and the writing, is a denial of a matter within his own knowledge, and it is contradicted by the proof; for the intercourse has been clearly instructed. The attempt now made to throw back the intercourse to a date prior to the date of the writing may be an ingenious suggestion in pleading but it is inconsistent with the defender's own statement, and is without any support in the evidence.

Lord Kinloch—I think it clearly proved that the declaration on the blank pages of the defender's Bible is in the handwriting of the defender, and was delivered by him to the pursuer on or about the date it bears. I think it further proved that, after receiving this declaration, and on the faith of it, the pursuer either surrendered her person to the defender, or permitted a continuance of sexual intercourse. I think the former alternative is that which the evidence supports. I do not think it sufficiently proved that the sexual intercourse had commenced previously.

I find no ground in the evidence for holding that this declaration was given and received in jest, or for any other purpose than seriously to express what its terms import. I think it plain that the defender intended it to be received by the pursuer as a serious declaration; and that the pursuer accepted it as such. If this be so, it would not matter although, in his secret purposes, the defender designed, if possible, to deceive and mislead the pursuer. But of this itself there is no sufficient evidence.

In these circumstances, I hold that the mutual declaration written in the Bible constitutes, in point of law, present marriage at its date; not legally requiring sexual intercourse to complete the contract; but having its subsistence confirmed by the fact of such intercourse taking place. The parties by this declaration, thereby take each other as husband and wife from that day forward till death should part them, and thereto plight their troth. Unless the natural force of these words was

taken off by evidence that they were not intended to constitute marriage, but were interchanged for some other purpose, they cannot, I think, according to our law, be interpreted otherwise than as constituting very matrimony.

It is an important element in the case that the defender denied on record that the declaration was in his handwriting, and that sexual intercourse took place. False statements like these warrant a construction of the facts the most unfavourable for the party; for the fair inference is, that the statements were made for the purpose of avoiding that very construction. This is only one item of the proof against the party, but it is an item of the greatest possible importance.

I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

The LORD PRESIDENT and LORD DEAS concurred.

Agents for Pursuer—Macdonald & Roger, S.S.C.
Agents for Defender—Adam, Kirk & Robertson, W.S.

Tuesday, May 25.

SECOND DIVISION.

POLLOCK *v.* H. E. CRUM EWING.

March Fence—Act 1661, *c.* 41—*Straightening of Marches — Excambion — Relevancy.* Circumstances in which the Court *held* an action for laying down a march fence between lands, brought under Act 1661, relevant, and appointed the line to be observed in making the fence.

This was an action brought by the pursuer under the Act 1661, intituled "Act for Planting and Inclosing Ground," to compel the defender to concur with him in constructing a march fence between the lands of Auchineden, situated in the parish of Killearn and county of Stirling, belonging to the pursuer, and the lands of Strathleven, in the parish of Bonhill and county of Dumbarton, belonging to the defender. The defender maintained that the jurisdiction of the Court of Session was excluded by the Act libelled on. He argued that the action was competent only in the Sheriff Court. This plea was repelled by Lord Ordinary JERVISWOODE.

His Lordship added the following note:—"The Lord Ordinary had the benefit of an ingenious and able argument on the question as to the exclusion of the jurisdiction of this Court, to which the second plea for the defender relates; but after examination of the Statute of the King Charles II. (1661), cap. 41, on which alone the summons is rested, the Lord Ordinary has been unable to see grounds on which to sustain the plea to which he has referred. The obligation thereby laid upon heritors, whose lands are adjacent, is general and absolute, and the jurisdiction conferred with a view to secure the enforcement of the provisions of the statute is most comprehensive, and certainly not altogether exclusive of that of this Court.

"The Lord Ordinary has only, in conclusion, to note that he has read with attention the elaborate and instructive opinions of the Court in the case of *Strang* v. *Stewart*, March 31, 1864, but it does not appear to him that either the judgment or the opinions there delivered are inconsistent with the views on which the Lord Ordinary is here so far proceeding.

"It is not as yet judicially determined that any march fence is to be constructed in the locality to which the conclusions of the summons relate."

The case was afterwards transferred to Lord ORMIDALE, before whom the defender maintained that the provisions of the Act were not applicable to the circumstances of the case, in respect that the march between the properties was a burn, and that it was impossible to erect a fence upon the line which was the boundary of the two properties —viz., the *medium filum* of the stream. A remit was made by Lord ORMIDALE to Mr John Dickson, Saughton Mains, to report upon the matter, who, after examining the proceedings and visiting the ground, reported—"1st, That it is possible to construct a strong iron fence in the centre of the burn, fixed to large stones to be placed there, but this could only be done at such a cost as would be injudicious, and would not be for the interest of either party; and 2d, that the best line of fence that could be adopted is that shown on a plan furnished by the pursuer's agents, and signed by the reporter as relative thereto—considering the nature of the ground, and having in view the interest of both parties."

As the line reported upon by Mr Dickson would encroach considerably on both properties, and would have the effect of an excambion or straightening of marches, the defender maintained that the pursuer should have laid his action on the Act 1669, being the Act applicable to straightening of marches. To this contention Lord ORMIDALE gave effect, and pronounced an interlocutor assoilzieing the defender from the action.

His Lordship added the following note:—"When the case was first debated before the Lord Ordinary, it was thought that an inspection by a practical man, such as Mr Dickson of Saughton Mains, of the line of march in dispute and adjacent grounds, and a report by him, might result not only in clearing up, so far as necessary, the disputed facts, but also in the parties agreeing to a line of fence, and the description of fence to be erected thereon. Accordingly, a remit was made to Mr Dickson, by interlocutor of 19th June 1868, and under that remit he has reported (Report, No. 15 of process) —'1st, That it is possible to construct a strong iron fence in the centre of the burn fixed to large stones to be placed there, but this could only be done at such a cost as would be injudicious, and would not be for the interest of either party;' and '2d, That the best line of fence that could be adopted is that shown on a plan furnished by the pursuer's agent, and signed by the reporter as relative hereto, considering the nature of the ground, and having in view the interest of both parties.'

"At the debate on Mr Dickson's report, both parties concurred in stating that a fence 'in the centre of the burn' was not to be thought of, and that the consideration of such a fence and line of march might therefore be laid aside. But the pursuer insisted that the other fence and line of march recommended by Mr Dickson should be adopted, and the fence ordained to be erected at the mutual expense of the parties, in terms of the conclusions of the summons. To this the defender objected that the proposed fence, if erected, would encroach considerably—at one place to the extent of no less than 79 yards—into his property, and would thereby have the effect of depriving him of a valuable portion of his estate, which he was neither bound nor could be expected to submit to, the more especially as it was stated by the pursuer himself,