

that title the Crown is in a position to resist any attempt to invade the rights which the trust title confers. A trustee vested in lands for trust purposes has a good and sufficient title to prevent any stranger from squatting thereon, or from interfering in any way with the lands to which he has no title whatever. Now, this appears to me to be the position of parties in the present case. The Crown has—and alone has—a title to the *solum* of Loch Long; the defenders have no title to it whatever. The defenders have therefore no right to use the *solum* of Loch Long, and the Crown has the right and title to prevent them using it if they try to do so. The defenders, however, maintain that the Crown cannot interfere with the proceedings complained of except it shows that these proceedings are injurious to the special public uses in trust for which the Crown holds. I think this argument cannot be sustained. It is the duty of a trustee to prevent any unwarranted invasion of the trust subjects, and he is, in my opinion, entitled to interdict any such invasion, on the ground, admitted or proved, that he is the vested holder of the subjects, and that the invader has no title to them whatever. He is under no necessity to state or to prove that the invasion of his right, threatened or actual, is or will be injurious. I agree substantially with the views expressed by the Lord Ordinary, and am of opinion that his interlocutor should be affirmed.

The Court adhered, and thereafter, upon the motion of the defenders and reclaimers, granted leave to appeal to the House of Lords.

Counsel for the Pursuer and Respondent—Lord Adv. Sir Charles Pearson, Q.C.—Sol.-Gen. Graham Murray, Q.C.—H. Johnston—C. S. Dickson. Agent—Donald Beith, W.S.

Counsel for the Defenders and Reclaimers—D. F. Balfour, Q.C.—Asher, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, November 26.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

IMRIE (POOR) v. IMRIE.

Husband and Wife—Constitution of Marriage—Proof—De presenti Acknowledgment.

A declarator of marriage was raised by a woman founded upon *de presenti* acknowledgments exchanged between her and her alleged husband.

The acquaintance began in October 1888. A courtship ensued, and the parties became engaged. On 8th May 1889 they signed and exchanged writings in which they acknowledged each other as husband and wife. No witness was present when this was done,

though the writings bore to be attested by witnesses. The parties had connection with each other both before and after 8th May, and the intercourse between them resulted in the birth of a child on March 2nd 1890. The pursuer deponed that the documents had been exchanged with the intention of constituting a marriage. The defender said that the object of the exchange was to give the pursuer, in the event of his death, a claim to an insurance on his life. He admitted, however, that at the time he was perfectly willing to marry the pursuer before the registrar, and had proposed that course to her. The correspondence showed that after 8th May 1889 the parties, with the exception of one letter written after a quarrel, always wrote to one another as husband and wife, but, on the other hand, it was proved that on New Year's Day 1889 the pursuer had from the defender a card addressed to "my dear husband." It was also proved that on an occasion in July 1889 the pursuer introduced the defender to a friend as her husband, and the defender allowed the description to pass without comment, and that in the same month the defender gave her a wedding-ring, which she sometimes wore. The writings founded on were not produced, and the defender deponed that the pursuer, in the course of a quarrel with him, had torn the one given to her, saying "that that finished it for good and all," and that he had afterwards burned his. The pursuer denied that she had destroyed the writing given her by the defender, and there was some ground for the belief that it might have fallen into the hands of the defender's mother, who was hostile to the pursuer. There were passages in some of the pursuer's letters which suggested that in the beginning of August 1889 she had attempted to procure abortion, and there was also evidence that she had about the same time carried on a flirtation with a former admirer.

The Court granted declarator of marriage, holding that the result of the whole evidence was to show that the writings in which the parties acknowledged one another as husband and wife had been signed and exchanged with the intention of constituting a marriage.

This was an action at the instance of Caroline Jane Williamson or Imrie against James William Imrie, concluding, *inter alia*, for declarator that the pursuer and defender had been lawfully married to each other in May 1889, and for decree of adherence.

The pursuer averred (Cond. 3) that in May 1889, in accordance with a proposal made by the defender, documents in the following terms, duly signed and witnessed, had been exchanged between her and the defender:—"I acknowledge Caroline Jane Williamson as my lawful wife. (Sd.) JAMES

WILLIAM IMRIE. *Witness*, Jessie Scott Stewart; *witness*, Henry Murphy. 8th May 1889." "I acknowledge James William Imrie as my lawful husband. (Sd.) CAROLINE JANE WILLIAMSON. *Witness*, Jessie Scott Stewart; *witness*, Henry Murphy;" and that on the faith of these declarations she had allowed the defender to cohabit with her, and they had acted towards each other as husband and wife.

The defender denied these averments. He admitted that documents had been exchanged by him and the pursuer, but did not admit their terms to be as averred by the pursuer, and explained that they had been exchanged not with the intention to constitute a marriage between the parties, but for a different purpose.

Proof was led. The evidence showed that the pursuer was a hospital nurse, and lived with her mother in York. She was a first cousin of the defender. In October 1888 the pursuer went on a visit to the defender's parents at 17 Florence Place, Glasgow. She was then at least twenty-five, if not twenty-eight years of age, and the defender was nineteen. The defender lived with his parents, and was employed in his father's business as a tailor. A courtship soon began between him and the pursuer, and subsequently they became engaged. As to the date of the engagement there was some doubt, the pursuer putting it in the end of November 1888, and the defender saying that they were not engaged till March 1889. Both agreed, however, that it was understood between them that the engagement was to last for several years.

The pursuer deponed that on 1st May 1889, on the strength of his promise to marry her, she allowed the defender for the first time to have connection with her. She further said—"Shortly after 1st May 1889 I was distressed about having allowed the defender to have connection with me, and he then promised that he would sign a document making me his lawful wife. On 8th May 1889 there were two documents written out and signed." She described the documents as they were set forth on record, but admitted that she had not signed in presence of the witnesses.

The defender deponed that he first had connection with the pursuer in December 1888, and that there had been repeated acts of connection between that date and May. He admitted that documents in the terms alleged by the pursuer had been exchanged between them, but denied that they had been exchanged with the intention of constituting a marriage. In his examination-in-chief he deponed—"In the month of May there were certain documents signed. (Q) What led to that being done?—(A) There was some talk of insurance between us. I was not very well, and the pursuer suggested that if I gave her a document it would keep her right in case of anything happening to me. She asked me to do something which would enable her to succeed to anything that I had. It was the pursuer's idea that documents should be written out; I would not have thought

of it. . . . The documents were written out by me in the shop on the morning of the 8th May. . . . I first showed these documents to the pursuer when I took them home with witnesses' names on them. After I wrote the documents I got the witnesses Murphy and Miss Stewart to sign them. Murphy signed the documents in the front shop. I went downstairs and told Murphy that there was a bit of a joke on about a marriage, and that he might come up and sign a paper when he had time. When he came up to the shop I laid down the paper before him, and he signed without thinking there was anything in it. He saw a part of what was on the paper, but there may have been a little bit at the top folded over. After Murphy signed the paper, I took it to Miss Stewart later on in the day. I did not tell her what I had said to Murphy. I just said that I wanted her to sign a paper, and that it was in connection with a lark, and that she need have no fear as Murphy had signed it. She then signed her name underneath Murphy's name without saying anything. Miss Stewart did not see any of the writing, because I folded it over. . . . There was no intention at that time on my part that that should constitute a marriage. The whole thing was done on 8th May. When the pursuer made the proposal that I should do something to keep the insurance money for her, I suggested that it might just be as well to get married before the registrar, and I was quite willing to do so. The pursuer, however, said that she would not hear of that on any consideration, and said that when she was to be married she would go to church."

In cross-examination the defender said—"I am quite sure that the documents were not written for the purpose of making a marriage. My intention was, that if I happened to die, the pursuer might get some money through these documents. (Q) How was she to get the money?—(A) I do not know. The pursuer mentioned to me that there was a small insurance upon my life. I did not know anything about that insurance, but I have since found out that my father had insured me when I was a child for about £15 or £20 of funeral money. . . . (Q) And you thought that if you died these documents would put the pursuer in the position of your wife, and so allow her to get the insurance money?—(A) No. I thought my people might pay her a sum of money rather than have any row."

In answer to questions by the Court the defender said—"I spoke about going before the registrar shortly before the documents were signed, and I also mentioned that matter again later on. . . . I was perfectly willing on the 8th of May 1889 to marry the pursuer outright if she would go before a registrar, but not unless she did so."

Murphy, whose name was appended to the documents as a witness, deponed that on 8th May the defender had brought the documents to him to sign; there were no signatures appended to them then so far as he saw; he gathered from the defender's

demeanour and what he said that the signing of the documents was a "mere lark." The other witness Miss Stewart was absent from the country at the time of the trial, and was not examined.

After these documents were signed and exchanged repeated acts of connection took place between the pursuer and defender. Nothing, however, was said about the relations between them or the documents they had exchanged with each other either to the defender's family or the pursuer's mother.

On 27th May the pursuer left her aunt's house and went as a nurse to Gartnavel Asylum. She remained there or in attendance on private patients until September, when she went to Port Bannatyne on a visit to another aunt. She returned to Glasgow in November. By that time the fact that she was pregnant was apparent, and the relations between her and the defender had been discussed. She was consequently refused admission to the Imrie's house, and was at once sent off to her mother at York, where she was delivered of a child on 2nd March.

From the time when the pursuer went to Gartnavel until she returned to Glasgow in November a correspondence was kept up between her and the defender, which he habitually addressed her in such terms as "My own dear wife," and subscribed himself as "Your loving husband," while she addressed him as "My dear" or "My darling husband," and signed herself "Your loving wife." As a contrast to the terms of their letters it was proved that in letters written to the pursuer in November 1888, when she had returned for a short time to York, he had always addressed her as "My dear sweetheart."

When the pursuer was at Gartnavel the defender used to visit her frequently, and it was proved that on one occasion she introduced him to a nurse at the asylum as her husband, and that he allowed this introduction to pass without remark. She also told the same nurse and another that the defender was her husband before the fact that she was pregnant became known. The pursuer deposed that on another occasion the defender in her presence spoke of her to Miss Stewart, one of the witnesses to the documents signed on 8th May, as his wife.

It was also proved that the defender in July 1889 bought the pursuer a plain gold ring out of money supplied by her for that purpose, and that she sometimes wore it.

The defender sought to weaken the influence to be drawn from the correspondence by pointing out that the pursuer on New Year's Day 1889 had given him a New Year's card addressed to "My dear husband;" that in a letter written from Gartnavel on August 7th, after a quarrel with him, she dropped the title of husband and addressed him as "Dear Jamie," signing herself "Yours, &c., Carrie Williamson," and that she had never signed herself as "Carrie Imrie" until December 1889, when the relations between them had ceased to be friendly.

The defender also maintained that the pursuer's conduct subsequent to 8th May was inconsistent with the idea that she looked upon the documents exchanged between her and the defender as having made her a married woman. In the first place, he deposed that about the end of July 1889 she had destroyed the document he had given her in the course of a quarrel with him. He said—"The quarrel took place upstairs in our house in Florence Place; it was partly on the stairhead and partly at the door of my room. . . . The feeling got worse and worse, and ultimately the pursuer flew out of my room into her own and came back flourishing the document in my face. She then tore it in two, and said that that finished it for good and all. I then went and burned my paper." In the second place, the defender pointed to some of the pursuer's letters to him as showing that early in August 1889, three months after the alleged marriage, she was carrying on a flirtation with an old admirer of hers named Hamley, and had been for a trip to Greenock in his company. In the third place, he pointed to certain passages in letters from her to him as showing that in the beginning of August she had attempted to procure abortion.

Neither of the documents interchanged by the parties was produced at the trial, but the pursuer denied that she had destroyed the document given to her by the defender in the manner described by him. She said that she had kept the document in her box, and that she first missed it on her return to York in November 1889, and she charged the defender's mother and sister, who had packed her box in Glasgow, with having taken it. She admitted, however, that she had not when she missed it written to them to demand its return. The defender's mother and sister denied having seen or taken the document, but admitted that when packing the pursuer's things they had found and taken, as belonging to the defender, some letters addressed by pursuer to him and returned by him to her.

With regard to her relations with Hamley, the pursuer denied that the meetings with him referred to in her letters had ever taken place. She said that the allusions in her letters to these meetings were untrue, and had been made with the view of rousing the defender's jealousy.

With regard to the charge of having attempted to procure abortion, she denied having made any attempts of the kind, and explained the passages in her letters which seemed to suggest that she had used drugs for that purpose by saying that they had been inserted in order to give the defender the false impression that she had done so, because he had told her on several occasions that she must get rid of what she had.

On 11th July 1891 the Lord Ordinary (STORMONTH DARLING), having considered the cause, found, decerned, and declared, and decerned and ordained conform to the conclusions of the summons for declarator of marriage and adherence.

“*Opinion.*—I have considered this case with all the anxiety which is due to a question fraught with so much importance to the parties and their infant child. I have grave doubts whether the conclusion to which I have felt compelled to come to is likely to conduce to the happiness of the pursuer and defender, but I must decide the case according to law, and for any consequences which may ensue they are themselves responsible. I am of opinion that they must be declared to be married persons. The facts are, that in October 1888 the pursuer, who was a first cousin of the defender, came from York to Glasgow on a visit to the defender’s father and mother. The pursuer, who had been an hospital nurse in London, was then not less than twenty-five years, and probably as much as twenty-eight. The defender was in his twentieth year, in delicate health, and employed in his father’s business as a tailor. Very soon a courtship sprang up between them which resulted in a promise of marriage, and during the pursuer’s visit, which lasted till the end of May 1889, they had repeated acts of connection. The first of these acts, according to the defender, took place in the month of December, and according to the pursuer, on the 1st of May. The pursuer says that they became engaged on the 25th November, and the defender says not till the middle of March. I do not think it is of much consequence to decide which of them is speaking the truth with regard to these dates, for both admit that connection took place before the 8th of May, and both admit that the engagement to marry was qualified by the stipulation that the marriage was not to take place for several years. The importance of the 8th of May is that on that day they exchanged writings acknowledging each other to be husband and wife. These acknowledgments bore to be attested by two witnesses, but it appears from the proof that these persons were not witnesses in any proper sense of the term, for they neither saw the parties sign nor heard them make any acknowledgment either of their signatures or of the fact that they were husband and wife. The writings are not now in existence. The defender says that the pursuer tore up hers in the course of a quarrel which they had towards the end of July 1889, and that he destroyed his immediately afterwards. The pursuer, on the other hand, denies that she ever destroyed her document, and alleges that it was taken out of her box by some member of defender’s family. But the defender admits the terms of the documents, and he explained the circumstances under which he prepared and got them signed.

“About the end of May the pursuer left the house of the defender’s father and took employment as a nurse at Gartnavel Asylum. She remained either there or at similar work in the country till the end of September, when she went to visit a maiden aunt at Port Bannatyne. Her pregnancy having then become apparent, and her intimacy with the defender having

been discovered, she returned to Glasgow in November, and was at once sent home by the defender’s parents to her mother at York, where she was delivered of a child on 2nd March 1890. From the time when the pursuer left the house of the defender’s father in May 1889 till she left Port Bannatyne in November of that year a correspondence was kept up between her and the defender, in which he habitually addressed her in such terms as ‘My own dear wife,’ and subscribed himself as ‘Your loving husband,’ while she addressed him as ‘My dear’ or ‘My darling husband,’ and signed herself ‘Your loving wife.’

“In the month of July he presented her with a wedding-ring, which she sometimes wore, and on one occasion, if not oftener, she introduced him to a friend as her husband, and he did not in any way repudiate the description.

“It is firmly settled in the law of Scotland that marriage may be constituted by the deliberate interchange of consent *de presenti*, that the consent may be evidenced by written acknowledgments, and that these need not be either holograph or tested. It is also settled that parole evidence is competent to show that the consent so interchanged, though in form present and deliberate, was not truly understood or intended by the parties to make marriage, and that if such evidence is forthcoming there is no marriage. But I take it that such evidence must show an intention on both sides inconsistent with the natural meaning of the words used, and that a mere mental reservation on one side will not be sufficient. (See the Lord Justice-Clerk’s opinion at p. 1045-6 in *Fleming v. Corbet*, 21 D. 1034.) I also think that where an explanation is made by one of the parties and denied by the other, of a purpose other than marriage as existing in the minds of both, it must be scanned very closely to see whether it is a rational explanation, and whether it is borne out by their conduct both before and after the granting of the documents.

“Now, the explanation made by the defender is that the pursuer suggested the granting of the documents in order to give her a claim, in the event of his death, to an insurance of £100 which was supposed to exist on his life, and that he agreed to become a party to the documents for that purpose and no other. In point of fact there was no insurance on his life except one for some £15 or £20 taken out by his parents when he was a child, and to which, I apprehend, he personally had no right. He does not even say that he wished the pursuer to have the rights of his widow, whatever these might be, but only that he thought the production of the documents, in the event of his death, might induce his parents to pay her a sum of money rather than have any disclosure.

“I cannot say that this explanation strikes me as probable or even rational.

“But I think it is displaced by the conduct of the defender himself. In the first place, he admits that both before and after the documents were granted he was willing

to marry the pursuer before the registrar, and he says that he proposed this course to her and she declined. She denies that he made any such proposition, but the important thing is that he was prepared in his own mind to go through a ceremony of marriage, and if so it is difficult to understand why, being situated as he was, he should not have been willing to accomplish the same object by an easier, more secret, and less formal method. Then, if his object was only what he now says it was, I cannot account for his constantly addressing her in his letters as his wife, his permitting her to describe him to others as her husband, and his presenting her with a plain gold ring. All these circumstances seem to me consistent with the acknowledgments having meant what they professed to mean and what she says they meant, and inconsistent with the meaning which he ascribes to them.

“Thus far I have considered the case as if the documents were still in existence. But it was strenuously and ably maintained by Mr Younger that the destruction of them left the pursuer entirely at the mercy of the defender, and that his admission of their terms could only be taken subject to the qualification that they were not intended to make marriage. I cannot assent to that proposition. The moment the defender admits their terms I think the Court is bound to inquire, not only by his own evidence and his own writ, but by other evidence as well, whether they were seriously meant. It is clear that if they were sufficient to signify consent *de presenti*, the marriage so constituted could not be undone by the mere destruction of the documents. The act of destroying them can only be important as throwing light on the intention with which they were granted. Even if they were destroyed, as the defender says they were, in the course of a sudden quarrel, it would not go far to show that they were regarded by the parties as insignificant. It would rather seem to me to indicate the contrary. But I am by no means satisfied that the defender's statement on this head ought to be accepted. His candour in admitting the terms of the documents disposed me on the whole to believe him, and I am sorry to add that the pursuer's admission of the untruthfulness of some of the statements in her letters very seriously shakes her credibility. But it is remarkable that the correspondence about the time when the alleged destruction of the documents took place, while it contains evidence of the parties having had a quarrel, does not indicate any serious change in their relations, and in particular the defender continues after that to call the pursuer his wife, exactly as he had been doing all along. On the whole, I think it is more probable that the destruction of the documents took place about the time of the rupture consequent on the discovery by the defender's parents of the pursuer's pregnancy, and that the pursuer was not herself a party to it.

“I do not forget that the defender was

much younger than the pursuer, and indeed little more than a boy when he granted his acknowledgment, and that his circumstances at the time were such as to make marriage in the highest degree imprudent. But he was undoubtedly at the time attached to the pursuer, they were in the same rank of life, and nearly related, and marriage was the best reparation for the wrong which he had done her (with, however, little resistance on her part, and it was, I fear, but little) in obtaining possession of her person. On the whole, it seems to me that the pursuer is entitled to the declarator which she asks.”

The defender reclaimed, and argued—it was not enough for the pursuer to prove that documents bearing that the parties acknowledged one another as spouses were exchanged between them. The *onus* was also laid upon her of showing that these documents had been interchanged with the deliberate intention of constituting a marriage—*Lockyer v. Sinclair*, March 3, 1846, 8 D. 582 (per Lord Justice-Clerk Hope, 595-602); *Fleming v. Corbett*, June 24, 1859, 21 D. 1034 (per Lord Justice-Clerk Inglis, 1043). The pursuer must show either that both parties had acted with such an intention, or at least that she had acted in the belief that she was concluding a marriage, and that the defender had intentionally induced this belief on her part—*Robertson v. Stewart*, February 27, 1874, 1 R. 532 (per Lord Deas). The pursuer had failed to discharge the *onus* laid upon her. Her conduct subsequent to 8th May favoured the truth of the defender's story that the documents had been exchanged, not with the intention of constituting a marriage, but to give her a claim in the event of his death for the amount of insurances upon his life. Documents exchanged for such a purpose could not be founded on, whatever their terms, as constituting a marriage between the parties—*Anderson v. Fullerton*, 1795, Hume's Dec. 365.

Argued for the pursuer—It was understood by the pursuer that defender's acknowledgment of her as his wife was *bona fide*; it was immaterial that the defender had made it under a mental reservation—*Fleming v. Corbett*, 21 D. 1034 (per Lord Justice-Clerk Inglis, 1045-1046). The pursuer had discharged any *onus* that lay on her by setting up a *prima facie* contract of marriage. It then lay on the defender to explain away the *prima facie* case made by her. He had not only failed to do so, but the evidence as a whole strongly supported the pursuer's account of the purpose with which the documents had been exchanged. The pursuer was therefore entitled to declarator of marriage—*M'Kie v. Ferguson*, 1781, Hume's Dec. 358; *Forster v. Forster*, June 11, 1872, 10 Macph. (H. of L.) 68; *Maloy v. M'Adam*, January 9, 1885, 12 R. 431; *Leslie v. Leslie*, March 16, 1860, 22 D. 993; *Fraser on Husband and Wife*, i. 317-318; *M'Alister v. Dun*, May 2, 1759, 2 Pat. App. 29.

At advising—

LORD PRESIDENT—The case has been argued to us on the assumption that the pursuer's averment in Cond. 3 is well-founded to this extent at least, that on 8th May 1889 documents were interchanged between the pursuer and defender in the terms set out on record, these terms being completely explicit—"I acknowledge Caroline Jane Williamson as my lawful wife;" "I acknowledge James William Imrie as my lawful husband." I say the case was argued on that presumption, because on record the defender gives a general denial to the averments in Cond. 3, and further says, "the terms of the documents are not admitted;" but in her evidence the pursuer swears to the terms of the documents as being those set out in Cond. 3, and there is no attempt made to impugn her evidence on that point. Accordingly we must take it that on 8th May 1889 documents in these terms were exchanged between the parties.

Mr Younger has quite rightly said that it is not sufficient for the pursuer to table these documents, and upon that to demand the judgment of the Court, but that it is for the pursuer to explain by evidence what were the circumstances in which they were exchanged, so as to show that they were given with the *animus* which the writings themselves express. I do not think that the *dicta* quoted by the reclamer's counsel go so far as to show that, however explicit the documents may be in their terms, the Court will require direct evidence of the intention of the parties in exchanging them other than evidence showing that the circumstances were consistent with or corroborative of the expression of matrimonial intention contained in the documents. We have to examine the circumstances of the case, not merely to see whether they support the pursuer's story, but also to see whether the competing theory advanced by the defender to account for the exchange of the documents can be sustained. If the pursuer can show that at the time when these documents were exchanged the parties were minded to enter into marriage, the burden of proof will, I think, to a large extent be discharged, while, on the other hand, if the counter explanations offered by the defender appear to be of too flimsy and unsubstantial a nature, that will again lead directly to the result that the opposite theory must be accepted, namely, that these documents were intended to attest a marriage between the parties.

On examining the evidence I find no difficulty in ascertaining the state of mind of the defender, whose interest is now to challenge these documents as documents evidencing a marriage. He says—"When pursuer made the proposal that I should do something to keep the insurance money for her, I suggested that it might be just as well to get married before the registrar, and I was quite willing to do so." His theory in the present controversy is that the pursuer proposed the exchange of these documents not expressly on matrimonial consent, but in order to give her a right over some insurance money, the existence of which, he says, had not been known to

him until he heard it from her. I shall have immediately to say that I consider that too flimsy and unsubstantial an explanation of what took place, but at present my desire is to point out that the way in which he met the pursuer's proposal, whatever it was, was by suggesting that they should go to the registrar and get married. Then the Lord Ordinary—this being a critical matter—put some questions to the defender upon it, and we therefore may be sure, taking his answers to the questions of the Lord Ordinary along with his previous answers, which were given to his own counsel, that this is his deliberate account of what took place. In answer to the Lord Ordinary he says—"I asked the pursuer twice to go with me and be married before a registrar. I said that we should do so rather than sign these documents;" and a little further on he says—"I was perfectly willing on the 8th of May 1889 to marry the pursuer outright if she would go before a registrar, but not unless she did so." Accordingly the difference which he represents to have existed between what the pursuer requested and he was himself willing to do, was as to the mode of constituting marriage, his counter proposal being that they should not enter into the occult and clandestine form of marriage suggested by the pursuer, but be, as he calls it, "married outright" before the registrar. It is therefore proved that when these documents were exchanged the defender was matrimonially inclined and minded to instant marriage.

The counter theory advanced by the defender I have described as flimsy and unsubstantial. It is said that the pursuer had found out that the defender was "insured" in a burial society, and communicated this fact to him, and proposed that he should give her a writing professing to be a declaration of marriage in order to enable her to secure this insurance money. The defender says that he had not known of this insurance until he heard of it from the pursuer. I am bound to say, especially when the counter proposal of the defender that they should be married outright is borne in mind, that I am quite unable to accept the view that the proposal made by the pursuer and so met by the defender was not a proposal for marriage, but for a simulation of marriage in order to achieve such an exceedingly small and shadowy result.

The facts with regard to the exchange of the writings are not matter of controversy. It is true that they were not signed in the presence of the witnesses, also that they were signed by the witnesses *ex post facto*, and on a representation that they were not to attest any solemn act. The conclusion I draw from the fact that names of witnesses were added is that the parties desired to give an appearance of importance and authenticity to the writings they were exchanging.

Again, when we look at the surrounding facts, I cannot say that I find anything which renders the exchange of documents, such as these bear to be, improbable, either

having regard to the circumstances or the apparent character of the two parties. There is no doubt that the woman had good ground for desiring marriage, having yielded her person before that date. Whether the illicit connection began early in the history of the parties' acquaintance is not a conceded point. I have not made up my mind when it began, but both parties are agreed that it began before the exchange of documents, and the position of parties makes it not unlikely that the pursuer should make, and that the defender should accept, a proposal of marriage.

The sequel seems not so important to the case of the pursuer as to that of the defender. I could understand the defender producing proof of a series of facts showing that the transaction had not been entered into for the purpose of marriage, and that the letter had not been treated seriously by the pursuer, but I have failed to discover such facts. The first pointed out for this purpose is the pursuer's relations with Hamley. These certainly put the pursuer in an unfavourable position, for either her letters or her evidence are untrue. My conjecture is that Hamley came to Scotland and carried on a flirtation with her, but I cannot say that that shakes in my mind the evidence as to the quality of the transaction of 8th May. It is said also that the pursuer's attempts to bring about abortion (of which there is some cogent though not conclusive evidence) were not the conduct of a woman who considered herself married. But we must bear in mind, that even assuming that the pursuer and defender looked upon themselves as married people, her position was an ambiguous and in some ways a precarious one, and if in certain matters her conduct was not that of an exemplary wife, I do not think that that leads to a conclusion adverse to the import of the documents exchanged between the parties. It is said that the fact that the document given to the pursuer is not extant now, and the fact, which we are asked to accept, that it was torn up by her, bear strongly against it being looked on by her as the charter of her position as a married woman. Taking the defender's own account of the circumstances in which it was destroyed, I cannot say that it proves to my mind that the document was not given to the pursuer for the purpose of constituting a marriage, but in order to secure her right to the insurance money. The defender says—"We quarrelled very bitterly at that time, and there had been a good deal of nagging on both sides. The feeling got worse and worse, and ultimately the pursuer flew out of my room into her own and came back flourishing the document in my face. She then tore it in two, and said that that finished it for good and all." What was it that was finished for good and all? Her claim for the insurance money? The other view appears to me much more likely, that (however futile such a proceeding was) she tore in pieces in anger what was the symbol and proof of her marriage. As to whether the defender's account is the true explanation

of the disappearance of the document or not is not very clear. There is, I think, much to be said for the Lord Ordinary's view that the destruction of the document probably took place much later, and that the pursuer herself was not a party to it. Although this matter is not put sharply to Mrs and Miss Imrie, I cannot say that it is unlikely that in the course of their rummaging the pursuer's box the document may have gone amissing. It is said, however, that the pursuer damaged her case by not at once demanding the letter when she found she had lost it. But I am not at all sure that in acting in the way that she did it may not have been to the advantage of the position in which she ultimately stands, because the letters written by both Mr and Mrs Imrie show keen hostility, and it may have been worldly wisdom on the pursuer's part not to mention that a document of such importance was in her belief in the hands of her enemies. Be that as it may, however, the fact does not seem to me to be of sufficient importance to affect the result of the case.

No doubt your Lordships have, like myself, scrutinised the case for the pursuer with vigilance and scepticism. It is our duty to prevent the decree of the Court going out on the words of such documents, namely, without submitting to a searching scrutiny the conduct of the parties. But having brought the keenest scrutiny I can to bear upon the case, I am unable to resist the conclusion at which the Lord Ordinary has arrived,

LORD ADAM—The pursuer's case is rested entirely on the two documents set forth in Cond. 3, and it is not disputed that if the documents were delivered with the object of constituting a marriage between the parties their terms are sufficient for that purpose. I, however, agree with what your Lordship said, and I think it is in accordance with the cases quoted to us, that it is not sufficient proof of the constitution of the marriage for the pursuer merely to present to the Court documents bearing to contain the consent *de presenti* of the parties to marriage. We are entitled to know the circumstances in which the documents were exchanged, how they were looked upon by the parties subsequently, and in fact the whole facts and circumstances bearing on the purpose for which they were exchanged.

The proof has now been led, and I do not know that we are to deal with the evidence on any other principle than is usual in other cases. We must say, taking the whole facts of the case into consideration, whether the documents in question were exchanged by the parties for the purpose of constituting a marriage.

The first question to be considered is the credibility of the witnesses, and for my own part I cannot say that I believe everything that the pursuer or defender says, but there are facts and circumstances which are of more weight than their evidence, and it is a consideration of these

that has led the Lord Ordinary to the conclusion at which he has arrived.

With regard to the intention with which these documents were exchanged, and the relations of the parties prior to the 8th of May as bearing on the question of intention, it does not seem to be improbable, whether the parties began to have connection with one another in December 1888 or May 1889, that they should have desired to regulate the manner in which they were living. They undoubtedly desired to avoid an open marriage, but still they may have desired to carry on their connection in a more moral way than previously. There is nothing improbable in this being the motive of the parties in desiring marriage.

It is important to look at the way in which parties acted towards one another after they had exchanged these documents, and what weighs most with me is their correspondence. When it is found that after 8th May 1889 the defender always wrote to the pursuer—except in the case of one letter which I shall immediately notice—as his wife, and signed himself as her husband, and continued doing so for a long period, and that the pursuer acted in a similar way, I think the inference to be drawn is, that when they exchanged the documents they acted with the intention which the documents themselves expressed. No doubt Mr Younger has tried to rebut this inference by pointing out that in January 1889 the pursuer had given the defender a Christmas or New Year card addressed to her husband, and we are asked to say that this circumstance gives the key to the use of the terms husband and wife in the later correspondence between the parties. I am not prepared to accept that suggestion as rebutting the inference to be drawn from the manner in which the parties corresponded with one another after the exchange of the documents. Then, again, Mr Younger tries to weaken the inference to be derived from the correspondence by pointing out that the parties dropped the style of correspondence which they had assumed, and reverted to the use of their own names though still writing in very affectionate terms. That is some slight indication that the parties did not look upon themselves as married people, but it is not enough in my opinion to destroy the inference to be derived from the whole correspondence, and the legal conclusion to be drawn from it is, I think, that the parties looked upon each other as husband and wife.

Another fact bearing in the same direction is that the pursuer had a marriage ring given her by the defender. No doubt the defender himself had not enough money to buy the ring, and borrowed money from the pursuer for that purpose, but that seems to me to make the fact bear rather more strongly in favour of the view that the parties looked upon each other as husband and wife, because what the pursuer wanted was not that the defender should buy her a ring, but that she should have a marriage ring, and she was willing to provide the necessary funds.

Then, again, the mere fact that the pursuer on some occasions said that the defender was her husband may not have great weight unless it is consistent with the other facts in the case, but it must be kept in mind that she made these statements in the defender's presence, and that he did not repudiate them.

All these things being taken into consideration, I think it is proved as matter of fact that after the 8th of May the parties acted towards one another upon the footing that the documents had been interchanged by them for the purpose of constituting a marriage. I do not therefore see why they should not receive their natural effect. If the conduct of the parties had been inconsistent with the idea that they had exchanged these documents for the purpose of constituting a marriage, then, on the authority of *Lockyer v. Sinclair*, and the other cases quoted to us, I would have held that they could not receive effect.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—Cosens. Agent—A. Laurie Kennaway, W.S.

Counsel for the Defender—Younger. Agent—Alex. Stewart Gray, W.S.

Saturday, November 28.

FIRST DIVISION.

THE KIRK-SESSION OF PRESTONPANS *v.* THE SCHOOL BOARD OF PRESTONPANS.

Trust—Charity—Administration—Nobile Officium.

In 1845 a sale of work was held by ladies of the Established Church in Prestonpans for the purpose of raising funds to provide an infant school in room of one which had been maintained by the kirk-session of the parish prior to 1843, but had been discontinued in that year owing to the Disruption. The proceeds of the sale were subsequently handed over to the kirk-session, and being insufficient for the intended purpose were applied by them towards payment of the school fees and the clothing of children of poor deserving persons. The fund having increased, and having been claimed by the school board, who proposed to devote it to educational purposes, a petition was presented to the Court by the kirk-session craving authority to apply it towards the erection of Sunday school premises in connection with the parish church. The Court, after a remit, *rejected* a scheme embracing the suggestions of the school board, and approved of the petitioners' proposal, as being more nearly "in accordance