

ion, lead to any conclusion that should raise a doubt as to the propriety of examining the persons proposed by the appellant in her exculpation. If such a proof were offered at your Lordships' bar on a divorce bill, an act certainly could not be obtained in consequence of it. Nor do I think that a case so slightly supported was ever sent to the consideration of a jury in an action of damages.

“ I have little difficulty, therefore, though against the judgment given by the Court of Session, which I conceive to be contrary to the general principles of law and of reason, to move that your Lordships should reverse the judgment appealed from, and declare that the Earl of Elgin and Mr. Harrison are admissible witnesses on the part of the appellant.”

Accordingly, it was

Ordered and adjudged that the several interlocutors of the Commissaries of Edinburgh, and of the Lords of Session, complained of in the amended appeal, be, and the same are hereby reversed;—and it is further ordered, That the cause be remitted back to the said Commissaries, with instructions to repel the objection to the admissibility of the Earl of Elgin and Dr. Harrison, as witnesses on the part of the defender in the said cause.

For Appellant, *T. Erskine, W. Grant, Henry Erskine.*

For Respondent, *Sir John Scott, Wm. Adam.*

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GEORGE HERIOT, calling himself the lawful  
Son of GEORGE HERIOT, deceased, who  
was the second Son of ROBERT HERIOT  
of Ramornie, Esq., . . . . . } *Appellant;*

HON. MARGARET MAITLAND MARGILL, Wi-  
dow, and JAMES MAITLAND MARGILL her  
second Son, otherwise JAMES HERIOT of  
Ramornie, Esq., . . . . . } *Respondents.*

House of Lords, 29th April 1799.

REDUCTION OF SERVICE ON THE HEAD OF ILLEGITIMACY—MARRIAGE—CONSTITUTION.—A party alleging himself to be the lawful son of George Heriot, second son of Robert Heriot of Ramornie, served himself heir to his deceased father before the bailies of Canongate. In the reduction of this service on the head of illegitimacy: Held, that the appellant had failed to adduce sufficient proof that his mother was lawfully married to his reputed father,

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either by celebration by a clergyman, or by cohabitation as man and wife, or by general repute.

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The present question of legitimacy and constitution of marriage, arose incidentally in the course of the appellant taking out brieves to serve himself the lawful son and heir of George Heriot, second son of the deceased Robert Heriot of Ramornie, and as such, entitled to succeed to the estates of Ramornie.

Robert Heriot, Esq. of Ramornie, died in 1751, leaving four sons, William, George, Robert, and James, and four daughters, Jane, Elizabeth, Janet, and Margaret.

William entered the military service of Holland, and, after attaining the rank of Captain, died in 1782, without issue.

George, the alleged father of the appellant, was an ensign in the army, and died in Ireland, but at what time the appellant could not specify. Robert was a doctor in the East India Company's Service, and, after succeeding to the estates of Ramornie, upon the death of his brother William, died in 1789, without ever being married.

James died young; and Jane succeeded to the estates of Ramornie after the death of her brother Robert, and died in 1791. None of the daughters were ever married except Janet, and she left no issue. The respondents succeeded to Ramornie after the death of Jane, Mrs. Maitland Makgill, as one of the heirs portioners of Dr. Robert Heriot, as well as heir of tailzie and provision under the entail 1665; while James Heriot was heir of entail of the deceased William Heriot, under the deed 1771.

This latter deed conveyed the estate, 1. To his brother Robert; and, failing him, 2. To his sisters *seriatim*, whom failing, to the respondent James Maitland Makgill, otherwise Heriot.

After a proof was led in the service for both parties, and the terms circumduced, the inquest signified a desire to have further proof. A second proof was taken, and the term again circumduced on 9th March 1792, whereupon the jury found a verdict in favour of the claimant by the casting  
July 8, 1792. voice of the chancellor or foreman.

The respondents then brought the present action of reduction to set aside the service. A proof was ordered, and the Court, after fully hearing counsel thereon, pronounced an  
July 5, 1793. interlocutor, sustaining the reasons of reduction, and reducing the verdict.

The appellant having reclaimed, and, besides insisting on the evidence formerly adduced, made sundry new allega-

tions in fact which he offered to prove. The Court, though it was objected to, allowed the proof, upon which many additional witnesses were examined, and, in particular, William Turner, a relative of the appellant's mother, Margaret Turner, they altered their former interlocutor, and repelled the reasons of reduction, and assoilzied the defender.

The respondents, on their part, reclaimed; and having obtained time from the Court, they, at this period, discovered that John Lumsdaine of Blancern, Esq., was in the knowledge of some particulars extremely material to the question at issue, of which they had not before received information, and they therefore presented an additional petition to the Court, praying that Mr. Lumsdaine might be examined, which the Court granted; and, upon a petition from the appellant, the Court also allowed Mrs. Swan to be examined.

The point to which the whole evidence was made to direct itself was, whether Ensign George Heriot, the appellant's reputed father, and Margaret Turner, his mother, were married in the year 1747, or about that period, in Edinburgh?

It appeared that he had formed a connection with Margaret Turner in 1748, the result of which was, the birth of the appellant. The appellant, in the outset of his case, represented his mother as a woman of family, of great beauty, of elegant accomplishments, and a pattern of virtue. It afterwards came out, however, that she was the daughter of William Turner, a publican at Irvine. He also alleged, that the marriage of his mother to Ensign Heriot was celebrated by a clergyman in Edinburgh, but adduced no certificate, and no parole evidence of persons who witnessed the ceremony. He also alleged marriage by cohabitation. In the additional evidence adduced, Mr. Lumsdaine deponed, " That about the year 1746, he knew a woman whose maiden name was said to be Peggy Turner, but she was commonly known by the name of Peggy Bar; and the deponent understood that she came originally from Glasgow, or its neighbourhood, and that she had been married there to a man of the name of Bar, but whether he was dead at the time the deponent knew her, or if she had left him, the deponent does not recollect having heard; and when the deponent first knew her, she was reported to be in keeping by Peter Brown, writer in Edinburgh; and the deponent saw the said Peggy Turner for the most part at the house of Mrs. Menzies, who lived in a close leading from the Cowgate to the Society; and the deponent has

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“ seen the said Peter Brown along with Peggy Turner at  
 “ Mrs. Menzies’. That the deponent knew Ensign Heriot,  
 “ whose name the deponent believes was George, and he  
 “ became acquainted with him about eight or nine months  
 “ after he first knew Peggy Turner; and has seen said  
 “ Ensign Heriot at Mrs. Menzies’ in company with the said  
 “ Peggy Turner and other women; and Mrs. Menzies’ house  
 “ was not a house of bad fame, but she herself was in keep-  
 “ ing at the time by a Mr. David Wright. And being in-  
 “ terrogated, If he considered Peggy Turner to be a virtu-  
 “ ous woman? Depones, That he considers this as already  
 “ answered by that part of the deposition, which states that  
 “ she was kept by Peter Brown. And being interrogated,  
 “ If, when the deponent saw the said Peggy Turner in  
 “ Mrs. Menzies’, along with Mr. Brown or Ensign Heriot,  
 “ she behaved as a married woman would do in the pre-  
 “ sence of her husband? depones, That he never, on any  
 “ occasion, saw her behave indecently or improperly; that,  
 “ upon none of these occasions, when he saw the said Peggy  
 “ Turner or Bar, did he ever hear her called or addressed  
 “ by the name of Mrs. Heriot, either by Ensign Heriot or  
 “ by any other person.”

Ensign Heriot, in December 1748, left Edinburgh to join his regiment in Ireland; and some months afterwards Margaret Turner was delivered of the appellant; and about a year after he left she followed him to Ireland (Cork.) Mr. Lumsdaine further depones, “ That about the time Ensign  
 “ Heriot left Edinburgh to go to Ireland, or rather a little  
 “ after he was gone, the said Mrs. Menzies told the depon-  
 “ ent that the said Peggy Turner or Bar had been married  
 “ to Ensign Heriot; that Mrs. Menzies was the only person  
 “ who mentioned this to the deponent; and she mentioned,  
 “ at same time, that Mrs. Elliot, sister to Jenny Christie,  
 “ who was afterwards well known about Edinburgh, had  
 “ been present at the marriage ceremony; and both Mrs.  
 “ Elliot and Jenny Christie were in use to visit at Mrs.  
 “ Menzies’: That Peggy Turner or Bar remained in Edin-  
 “ burgh about a twelvemonth, or rather more, after Ensign  
 “ Heriot went to Ireland, and the deponent saw her during  
 “ that time occasionally at Mrs. Menzies’: That the day be-  
 “ fore she set off for Ireland, she sent a message to the depon-  
 “ ent, desiring to see him: That he accordingly went to her  
 “ lodgings or room: That she told the deponent she was  
 “ going to Ireland to Ensign Heriot, and she gave the de-

“ deponent to understand she was in want of money, and the  
 “ deponent gave her 20s. or a guinea, to assist in defraying  
 “ her expenses; and the deponent understood she was to  
 “ travel with the Glasgow carrier to Glasgow; and the said  
 “ Peggy Turner or Bar, neither at that time or any other,  
 “ ever said to the deponent that she was married to Ensign  
 “ Heriot; and the deponent did not ask whether she was  
 “ married or not. And being interrogated, If he ever  
 “ had any carnal connection with the said Peggy Turner  
 “ or Bar? The deponent declines to give any answer  
 “ to this question, being of opinion that he is not bound  
 “ to do so: Depones, that he never heard that the said  
 “ Peggy Turner or Bar, was possessed of any money or pro-  
 “ perty of any kind: And being interrogated, What sort of  
 “ woman she was in point of looks or behaviour? Depones,  
 “ That she was well looking, but her behaviour was not al-  
 “ together that of a well-bred gentlewoman: Depones, That  
 “ some months after Ensign Heriot left Edinburgh to go to  
 “ Ireland, he heard that Margaret Turner or Bar, had been  
 “ delivered of a child to him: Depones, That Jenny Chris-  
 “ tie, above mentioned, kept a house of bad fame at Edin-  
 “ burgh, a good many years after the period when the de-  
 “ ponent saw her at Mrs. Menzies’ as above mentioned, but  
 “ she had not then begun to do so; and there was no other  
 “ person present when Mrs. Menzies mentioned the mar-  
 “ riage to the deponent as above deponed to; and the depo-  
 “ nent never asked Mrs. Elliot about it; and he did not often  
 “ see Mrs. Elliot. Mrs. Elliot was a woman of bad fame.”

When the appellant’s mother, Margaret, came to Ireland  
 to join Ensign Heriot at Cork, General Watson, who was  
 then captain of the regiment, deponed, “ That upon occa-  
 “ sion of a woman coming over to Cork after Ensign Heriot,  
 “ and a report prevailing that he was married, he took  
 “ occasion to ask him whether it was so or not, and he an-  
 “ swered that he was not. Believes she stayed there a  
 “ very short time. The deponent never saw her; and be-  
 “ lieves the Ensign made the same declaration of his  
 “ not being married, to the other officers of the regi-  
 “ ment.” The other officers spoke to the same effect.

There were also letters produced, in answer to inquiries  
 made to Ensign Heriot by his brothers, proving that he had  
 uniformly denied that there was any marriage; but confess-  
 ing that the boy was his son.

There was no proof of cohabitation in Ireland, at least of  
 a nature to constitute the relation of husband and wife. But  
 witnesses were adduced to prove that the Ensign and Mar-

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garet Turner had cohabited as husband and wife in Scotland. In particular, Mrs. Swan deponed, “ That she recollects of “ three persons, who lodged in her father’s house in Edin-  
 “ burgh, Captain Frazer, Captain Sutherland, and a Captain  
 “ Heriot : That Heriot had a wife, and he and his wife both  
 “ ate and slept in her father’s house : That she has heard  
 “ the Captain and Mrs. Heriot call the child George :  
 “ That the lady was called Mrs. Heriot by the family, and  
 “ the Captain generally addressed her by the appellation of  
 “ my dear ; but the witness once heard him call her Peggy :  
 “ That they remained some time in the deponent’s father’s.  
 “ house, and were *visited by ladies and gentlemen*, who  
 “ called the wife Mrs. Heriot : That she heard they after-  
 “ wards went to Ireland.”

This evidence was given at the distance of fifty years, and referred to a time when the witness must have been about ten or eleven years of age ; and there was no proof that the parties of whom she spoke were Ensign George Heriot and Margaret Turner. The only other proof of marriage by cohabitation in Scotland consisted of hearsay evidence, and a rumour that they had been married by a clergyman. Also, Mr. Boucher, an attorney in Ireland, gave evidence to his being employed for Mrs. Heriot, when in Ireland, to prosecute a certain individual who had ravished her there. He deponed that the proceedings were instituted in her name, designed as the “ wife of George Heriot, late ensign of the “ 25th Regiment of Foot.” “ Depones, That no person  
 “ gave in objections, or moved arrest of judgment, on ac-  
 “ count of her being designed the wife of George Heriot.” It also appeared from this witness’s evidence, that she had gone under the name of Margaret Taylor : That she told him that her maiden name was Turner, and that she was of the Turners of Turner Hall in Aberdeenshire, and was related to a clergyman of the name of Turner in the west of Scotland. There was no evidence that these statements were correct. But what made the evidence more complex was, the deposition of this witness, that he had known them both in Edinburgh when living there, serving his time in an office, and that they then co-habited together. And that in Ireland he had been employed to procure a certificate from the register of the clergyman, in Edinburgh, who was said to have performed the ceremony. This certificate was not adduced, nor was there any evidence of the existence of such a register. But the witness swore to his showing the certificate to Mr. Heriot when he returned to Ireland, and upon his doing so, that he (Heriot) stated,

that she was very foolish for procuring it, as he had never denied his marriage to her. And a Mr. Seton swore to Mr. George Heriot having introduced the appellant's mother to him as his wife.

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The Ramornie family seem, at the solicitation of the Ensign, to have taken and brought up the boy at Ramornie, and from their kindness in this, an inference was drawn in support of his claims. But, on proof, this turned out to be of a nature such as marked their belief of his illegitimacy. He was boarded in a poor man's house at 13s. 4d. the quarter, and only sent to the village school, and afterwards he was sent to the sea. At Ramornie, he was not admitted beyond the kitchen or parlour.

There was still further evidence to a great extent on both sides, for and against the marriage, but, on a final balancing of the whole, both original and that which was afterwards adduced, the Court pronounced this interlocutor: "The Mar. 9, 1798.  
 " Lords having advised the petition for the Honourable Mrs.  
 " Margaret Maitland Makgill, and James Maitland Mak-  
 " gill, now James Heriot pursuers (respondents), with the ad-  
 " ditional petition for them, answers for George Heriot,  
 " defender, to both petitions, additional proof led, and writs  
 " exhibited for both parties, they alter the interlocutor re-  
 " claimed against, and, in terms of the former interlocutor of  
 " the 5th of July 1793, sustain the reasons of reduction, and  
 " reduce, decern, and declare, in terms of the conclusions  
 " of the libel." On reclaiming petition the Court adhered. May 23, 1798.

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—1. Because it is established by the evidence in this cause, that the appellant's father and mother were married persons. 2. Because it is admitted, that if the testimony of John Boucher is to be believed, there is no doubt of the marriage in question. But no ground has been stated which impeaches the character of this witness, and no objection has been urged against his deposition, which makes him unworthy of credit. To put the matter beyond question, the appellant has offered to establish the integrity of his character by persons of respectability, whose names are condescended upon; and if there could be room for doubt, it is against justice to deny to the appellant the means of establishing, by the evidence of respectable persons, that this witness is worthy of being believed.

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*Pleaded for the Respondents.*—1. The appellant has contended that the verdict obtained in his favour by a mere casting vote of the Court, changed the case, and threw the onus of proving on the respondents; but this cannot be regarded by any one acquainted with law and the course of procedure in such cases. The jurisdiction of the Court of Session to admit additional evidence, as they may see cause, is unquestionable, and, accordingly, they did so repeatedly in the present case. A reduction of a service or verdict brought instantly, as it was here, leaves parties precisely where they were before the verdict, and is analogous to a new trial. Of the actual celebration of the marriage between the appellant's reputed parents there is no evidence, unless Boucher's swearing that he obtained a copy of the entry made in the register of the clergyman who is said to have performed the ceremony, be reckoned such. But Boucher is plainly a tutored witness, and unworthy of credit. The story he tells is extremely improbable. There is the greatest reason to believe that no such register ever existed, and if it did, there is no probability that the clergyman would sign a copy of the entry, and give it to Boucher. The testimony he gives is inconsistent with that of others, and even with itself. The character for piety and virtue he bestowed on the appellant's mother he *must* have known to be false, if he knew her at Edinburgh, as he swears he did. His conduct too, in framing and carrying into effect Highly's deed in favour of the appellant's mother as a *feme sole*, gives the lie to what he now swears, of his all along believing her to be the wife of Heriot then alive, and his aiding and countenancing a scandalous forgery, meant to do away with the force of that genuine deed, completely blasts his credibility. But even if his evidence were pure, and not liable to such objections, it would be dangerous to allow a marriage to be established by the single testimony of such a fact. The clergyman is dead,—the record is not to be found, and the alleged copy not produced, how is it possible to confute such a witness?

2. Cohabitation as husband and wife for a length of time may establish marriage, but here the proof of cohabitation in Scotland rests entirely on the testimony of *Boucher*; and the want of other testimony is alone sufficient to destroy his. If the parties had lived together openly, and so long, as married persons at Edinburgh, there would not have been such a penury of witnesses to prove that fact; while the alleged

cohabitation in Ireland rests upon testimony equally objectionable and unworthy of credit. And it is positively contradicted by the evidence of the officers of the regiment while in Ireland, and of Ensign Heriot's most intimate acquaintances, Mrs. Kelly, M'Gregor, and Weston. It is clear therefore that there was no such cohabitation as is necessary to establish marriage.

So, 3. Although a repute of marriage between the parents, and of the legitimacy of the issue, may also go to establish marriage and legitimacy, yet the evidence in that case must be of general repute. Not only general, but uniform and long continued, and unshaken for a length of time. There is no such general and uniform repute proved in this case ; but the contrary. And the evidence against the marriage far outweighs that brought to establish it.

In a case like this, it is of great consequence to attend to the conduct of the parties, as from thence inferences of a nature the best possible may be drawn. In a few months after the alleged marriage, Ensign Heriot left this woman with child, and destitute, though he was in affluence. When she joined him a year after, he denied she was his wife, and she immediately disappeared, without persisting. From that time to the period of his death,—a space of twenty-seven years, there is not the least credible proof of his having acknowledged her as his wife, or the appellant as his lawful child. On the contrary, it is proved that he repeatedly, solemnly, and uniformly disowned the connection ; and, particularly, he did so in a letter to his brother, Dr. Heriot, when adjured to disclose the truth.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *R. Dundas, Wm. Macleod Bannatyne, Henry Erskine, John Burnet, M. Nolan.*

For the Respondents, *Sir J. Scott, R. Blair, Wm. Grant, Wm. Adam.*

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ADAM STEWART, Writer in Edinburgh,	<i>Appellant ;</i>
LIEUT. JAMES M'DUFF, - - -	<i>Respondent. ;</i>

House of Lords, 21st May 1799.

AGENT AND CLIENT—NEGLECT.—Circumstances in which an agent raised a reduction of a bond, omitting to observe, from the know-

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