

order that your Lordships' intention in regard to these interlocutors may be carried into effect, and that there may be no mistake in the Court below; but the result will be, to reverse the interlocutors, so far as they are inconsistent with this declaration. May 23, 1826.

*Appellants' Authorities.*—2 Ersk. 9. 33.—Brown, May 14, 1823. (2 Shaw and Dunlop, No. 277. p. 298.)

SPOTTISWOODE and ROBERTSON, Solicitors.

Sir JAMES CAMPBELL of Ardkinglass, Bart. Appellant.— No. 26.  
*Lushington—Keay.*

Madame L. TALINE SASSEN and W. M'KENZIE, W. S.  
Respondents.—*Jas. Campbell—Robertson.*

*Husband and Wife—Aliment—Personal Exception.*—Held (reversing the judgment of the Court of Session), 1. That a woman having failed to establish a marriage, —which she alleged was constituted by certain written documents, in which she was recognised as the defender's wife,—was not entitled to found on them to the effect of obtaining a permanent aliment during her life, she being fully aware that they had been given not intuitu matrimonii, but for another purpose, and not alleging that she had been seduced; and, 2. That it is incompetent to award interim aliment in a declarator of marriage resting on the mere allegation of the pursuer, and while no evidence of the marriage has been produced.

IN 1817, Madame Lina Taline Sassen raised an action of ad- May 23, 1826.  
herence and aliment against Sir James Campbell, stating, that —  
' in the month of May 1804 she was married to the said Sir 1ST DIVISION.  
' James Callender, otherwise Campbell, and now designing him- Bill Chamber.  
' self Sir James Campbell of Ardkinglass, at St Germain-en- Lord M'Ken-  
' Laye, near Paris, and thereafter they lived and cohabited to- zie.  
' gether as husband and wife, and there were several children  
' born of their marriage, one of whom is still in life.' The sum-  
mons then stated, that Sir James had deserted her, and conclu-  
ded that he ought to be decerned ' to adhere to and cohabit with,  
' treat, and entertain the pursuer in all respects as his wife, and  
' to discharge all the duties incumbent on him as her husband;  
' and, in case of his non-adherence,' be decerned and ordained  
' to pay to the pursuer the sum of £300 sterling of yearly ali-  
' ment, and that in advance, at two terms in the year,' &c.

With this summons, she produced a power of attorney, granted in her favour by Sir James, dated Paris, 23d June 1808, in contemplation of her going to Scotland on business, in which

May 23, 1826. he was interested. The letter of attorney stated, 'That I, James Callender of Craigforth (his former designation), Stirlingshire, kingdom of Scotland, have nominated, made, constituted, and appointed, and by these presents do nominate, make, constitute, and appoint my beloved wife, Lina Taline Sassen, my true and lawful attorney, hereby giving and granting to her full power,' &c. She also produced a letter, dated 28th December 1809, addressed to her as Mrs Callender of Craigforth, after her arrival in Scotland, by Sir James, then in France. It was in these terms:—'I received yours, my dear Lina, on the 18th of October, and was very unhappy to find you had been so long ill, and have made so disagreeable a journey. I have this day got yours of the 22d of November. I make no doubt, as you say, things will at last go well, and I approve of all your proceedings. I have only to repeat, pay attention to my affairs as you have done hitherto, with prudence, slowness, and circumspection. The more affairs of a family are complicated, the more the above conduct is needful; and in all the information you require apply to George (Sir James's son), Dundas, Davidson, and B. Campbell, because they are all men of good sense and the highest honour. I received your letter of the 18th of October, which I answered by Mr Mountflorenc, addressed to Mr Adams, which I hope you have received, and I beg you will pay attention to the contents. Our brother and sister occupy her house here at present. I hope your present situation will go on well. Take care of yourself, and observe, from our family affairs, it is of consequence to you to lie in where you are. In my next letter I will send you an order for what money you will require for some time. If you was not so far from me, I should be angry with you, for not telling me in either of your two letters any particulars of George, James, or Randall. Give them my warmest blessing, I love them more than they can love themselves. Tell me everything about my daughters. Are George's children pretty? Who are they like? I hope like him in everything. My best wishes to my brother John Campbell. I shall conclude, because I shall write to you very soon indeed, and send you the draft I mentioned. It will take some time to recollect the points you asked me. Therefore let all family affairs rest until you receive my next. May God bless you, yours most affectionately,

'J. C.'

Subjoined to this letter, was another, from Mrs Eliza Callen-

der (the wife of Sir James's brother, and who, with her husband, May 23, 1826 was then on a visit to Sir James), in these terms:—' My dear  
 ' sister, I was sorry to find upon my arrival here you was gone,  
 ' and that your journey had been so bad. I hope you are quite  
 ' recovered. I found my brother in good health and spirits. We  
 ' see him very often, I brought the gown I wrought for you; my  
 ' brother will take great care of it till you return. When you  
 ' write give me a few lines. I suppose you have seen all our  
 ' friends in Edinburgh. Give my best love to Mrs Kenneth  
 ' Callender, and Mrs Flint, and all their children. If you will  
 ' call upon my mother she will be very happy to see you; she  
 ' lives in James's Court, in the Old Town. I wrote to her by  
 ' Mr Mountflorenc. The Colonel joins me in best love to you:  
 ' Believe me, my dear sister, yours affectionately,' &c.

In evidence of her reception in Scotland, as his wife, she referred to a letter, addressed to her as Mrs James Callender; from Sir James's brother, in these terms:—' My dear madam;  
 ' —I intended having the pleasure of writing to you, long before this, in answer to your kind favour; but hearing by Mr  
 ' Mountflorenc, that your husband was expected in London;  
 ' I delayed writing, but there is now no appearance of this  
 ' happiness. No doubt the time is hastening to this desirable  
 ' visit, and to remain in his own country. I am glad to hear  
 ' matters are better than others told you. I hope you are now  
 ' at Craigforth, and that your son-in-law is kind to you, as he,  
 ' I am certain, is a man of honour. My family were happy  
 ' to hear from you, and beg their assurances of friendship. I  
 ' have nothing more to write you, not being in the gay world,  
 ' and public matters are very bad; pardon this short letter. I  
 ' will be glad to hear from you and how you go on and succeed.  
 ' I am, dear madam, your affectionate brother.'

She also founded on a paragraph of a letter, addressed to her as Mrs Campbell, and written by a daughter of Sir James's brother-in-law:—' Saturday evening,—My dear madam, as I  
 ' did indeed sympathise with you in your distress when we met  
 ' last, I rejoice to find by your letter that you are in better  
 ' spirits, and I trust, health too, which, I am very sure, hearing  
 ' from your husband must greatly contribute to.'

She likewise referred to a letter from Sir James's son, addressed to her, and having prefixed to it, on the same sheet, a copy of a memorial relative to the estates of Craigforth and Ardkinglass, and a copy of a letter from the late Honourable Henry Erskine, the father-in-law of Colonel George Cal-

May 22, 1826. lender, addressed to 'Mrs Callender,' as acting in matters relative to those estates, under Sir James Campbell's power of attorney 'for her husband's family,' dated Prince's Street, 21st November 1808. Mr Erskine's letter was in these terms:—'Madam,—Although Colonel Callender and myself have already submitted to the consideration of Mr Clerk, the counsel chosen by yourself, everything necessary to form a full opinion on the merits of the Colonel's right to the estate of Craigforth, yet, being desirous of possessing you with the means of making your case known to any other man of business you may apply to on the subject, I enclose you, at Colonel Callender's desire, a memorial, containing a full and precise statement of all the proceedings that have taken place relative to the business. As this measure has been adopted from a sincere desire to convince you of Colonel Callender's readiness to afford you justice, and to save you from trouble and expense, permit me to hope that you will avail yourself of the opportunity given you of satisfying your mind, by resorting to legal opinions of such respectability as to avoid the risk of involving yourself in any measures tending to create unnecessary trouble and expense, either to yourself or your husband's family, which I should regret more on your own account than on theirs, feeling as I do for your situation. I remain,' &c.

She also produced an agreement entered into in August 1815, between Sir James and his son Colonel Callender, relative to his estates in Scotland, in which there was inter alia this article:—'In the third place, the said George Callender hereby becomes bound to pay to the widow of the said James Campbell, in case he shall leave a widow, the sum of £300 Sterling, of yearly life-rent annuity during her life, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first half yearly payment at the first of these terms that shall happen after the death of his said father, with one fifth part more of liquidate penalty for each term's failure in payment of the said annuity, and the legal interest of the same from the respective terms at which the same become due during the not payment; and the said George Callender binds himself and his foresaids to pay to the lawful child or children, if his father shall leave any such by such widow, the sum of £1500,' &c.

She founded, also, on a letter, addressed 'A Madame Madame Campbell, Hotel de Londres, Rue de L'Echiquier, Paris,' dated 18th May 1815, written to her by Sir James, saying that—'I have this moment, my dear, received yours, and I make haste to an-

‘ swer it, as you tell me your money is done ; I knew the people May 23, 1826.  
 ‘ where you now are long ago ; they are very worthy people ;  
 ‘ and I have, since the peace, sent many strangers to their hotel.  
 ‘ I send you a small bill for £35. I know Mr Murril has con-  
 ‘ nexions on the coast ; give it to him, and he will forward it to  
 ‘ Messrs Latham, Price, and Company, Dover, or anybody else  
 ‘ he pleases, and you will thus receive the amount in a very  
 ‘ short time. I shall bring your baggage with me, when I come  
 ‘ to town ; but business of moment will keep me here a week  
 ‘ longer. Yours in haste, ‘ JAMES CAMPBELL.’

And lastly, she produced a letter, dated 26th August 1816, written by Mr Ferrier, W.S. Sir James’s agent in Scotland, to M. Moran, avocat at Paris, in answer to one which he had written on her behalf. He there stated—‘ I hold no funds at present ; and if I did, I would not consider myself at liberty to pay one shilling thereof to Lady James Campbell, without his authority. The agreement between Sir James and his son Colonel Callender did not stipulate any sum to be paid to Lady Callender ; but a sum was stipulated to be paid to Sir James himself, to enable him to clear his debts on the continent ; and I understand the said sum was paid to him accordingly. The agreement stipulates a jointure of £300 a-year to his lady at his death, being the whole and the only interest she has therein. The child is to have a provision of £1500, and is placed under the guardianship of her uncle Major Callender.’

Sir James, in defence, denied the assertion of the pursuer, that there had been a marriage ; and he stated, that she had from her early years lived in a state of prostitution ; that they had become acquainted in a brothel in Rue Mont Blanc, in Paris ; that she was registered in the books of Police as such ; that she came to his house as a servant, and thenceforth lived with him as his mistress ; that no marriage between them was celebrated at St Germain-en-Laye (in support of which assertion he produced certificates from the curate and mayor of that place), nor elsewhere ; that she knew that she was not his wife ; and that the power of attorney was given to her merely to enable her to execute some important business in Scotland, as he could not go there at that time on account of the war ; and lastly, that having complained to the Police in Paris, of the vexations which he experienced daily from her pretending to be his wife, and extorting money from him, she was called before it ; that she there produced a piece of ragged paper, setting forth that in 1804 her marriage had been contracted at St Germain-en-Laye, and celebrated by a Protestant minister, assisted by two witnesses,

May 23, 1826. but that the Chief of the Protestant worship in France having testified that he never had a Protestant minister at St Germain-en-Laye, and that the name in the paper was totally unknown to him, she was ordered to cease taking in future the name and title of spouse of Sir James Callender Campbell; and that a promise having been made that influence would be used with Sir James, to give her assistance in money, and he having done so, she signed a receipt by her own name of Sassen.

On seeing these defences, she petitioned the Commissaries to be allowed to amend her libel, by adding to the narrative, that the parties had owned and acknowledged themselves, both verbally and in writing, to be married persons, and were habit and repute husband and wife, and as such, were owned and considered by their friends, neighbours, and acquaintances; and to conclude, that it should be declared that the parties 'are lawful married persons, husband and wife of each other; and that the child procreated of the marriage is a lawful child:' and she also prayed for interim aliment of £300 per annum and bygones for two years.

The Commissaries allowed the amendment, and decerned for £200, on account of aliment generally; but refused to modify a specific sum of interim aliment, at a fixed rate per annum: and thereafter, in respect Sir James was a native of Scotland, and proprietor of an entailed estate in Scotland, they sustained their jurisdiction, and ordered a special condescence of the grounds of the action.

The pursuer accordingly lodged a condescence, in which she averred that she was of good and honourable birth; that she had been married to Sir James by a Protestant clergyman at St Germain-en-Laye, but had lost the certificate; that Sir James had assured her, that the marriage was good according to the laws both of France and Scotland; that they had afterwards cohabited for many years as man and wife; that their children were recognised as lawful children; and, in support of these allegations, she referred to the above documents. Sir James repeated his former statements, and maintained, that the law of the residence was the rule in regard to the constitution of marriage; that by the law of France no acts of acknowledgment or declaration, without certain prescribed formalities, could constitute marriage; and that the pursuer knew well that the parties never had been married, nor ever proposed marriage.

The Commissaries having appointed the pursuer to state what she averred to have been the law of France at the date of the alleged marriage, with regard to the constitution of that con-

tract, she admitted that she was not in a condition to prove a French marriage; but now averred that she had cohabited in Holland with Sir James as his wife for above a twelvemonth, in the years 1812 and 1813; and that behaviour and cohabitation is by the law of that country as effectual as marriage formally celebrated. May 23, 1826.

She then proposed, and was allowed of new, to amend her libel thus:—‘ In the event of its being found that the pursuer is not lawfully married to the said James Callender, otherwise James Campbell, now designing himself Sir James Campbell of Ardkinglass, the pursuer ought to have our sentence and decret decerning and ordaining him, the said defender, to make payment to the pursuer of the sum of £5000 Sterling, or such other sum, less or more, as shall be ascertained in the course of the process, in name of solatium or damages, on account of the gross imposition and fraud committed by the said defender in leading her, the pursuer, to believe she was lawfully married; or at least, that the declaration, consent, and cohabitation of the pursuer and defender, as man and wife, would make a legal and sufficient marriage by the law of Scotland (where his property was situated), and continuing the same fraud and imposition, by executing formal and important deeds, one or more, wherein she, the pursuer, is expressed, designed, and declared to be, and published to all as his, the defender’s, wife; and further, by repeated declarations of the defender to many persons in France, Holland, and Scotland, that she, the pursuer, was his, the defender’s, lawful wife; lastly, and in any event, the pursuer ought to have our sentence and decret.’

The Commissaries having allowed a proof as to the new allegation of a marriage in Holland, and the law of that country; and the proof having been reported, they found that the pursuer has failed to establish the constitution of a marriage betwixt the parties, either in France or in Holland, according to the laws of those countries at the period to which her allegations relate; but ordain the parties to give in memorials on the point, whether the pursuer is nevertheless entitled to found upon the written evidence in process as proof of the constitution of a marriage betwixt the parties in Scotland, by any form known in the law of this country, or as founding a right to aliment in the event of her failure to establish her conclusion for marriage; and under this latter head, particularly to examine the authorities and precedents applicable thereto.’

Thereafter, on advising the memorials, the Commissaries found that the evidence adduced in behalf of the pursuer ‘ is not

May 23, 1826. ' relevant to infer marriage betwixt the parties, and therefore  
 ' assoilzie the defender from that conclusion of the libel; but  
 ' find that in a letter of attorney granted at Paris, by the de-  
 ' fender to the pursuer, and dated the 23d day of June 1808,  
 ' he styled her my beloved wife Lina Taline Sassen, and gave  
 ' her unlimited powers to act for him in that character: That  
 ' accordingly she came to this country, invested by him with  
 ' the apparent character of his lawful wife, and was so received  
 ' and acknowledged by his nearest relations in their correspond-  
 ' ence with her, and in the most important transactions relative  
 ' to the affairs of the defender and his family, as, inter alia, ap-  
 ' pears in particular from a letter dated London, 20th Decem-  
 ' ber 1809, which is holograph of his eldest son, Colonel George  
 ' Callender, and addressed to his father, the defender, with a  
 ' copy prefixed thereto on the same sheet, as a memorial relative  
 ' to the estates of Craigforth and Ardkinglass, and also a copy  
 ' prefixed of a letter from the Honourable Henry Erskine, fa-  
 ' ther-in-law of Colonel George Callender, addressed to "Mrs  
 ' Callender," the pursuer, as acting relative to these estates,  
 ' under the defender's power of attorney, "for her husband's  
 ' family," and dated Prince's Street, 31st December 1808;  
 ' also from a letter addressed by the defender to "Mrs Callen-  
 ' der of Craigforth, No. 1, St Andrew's Square, Edinburgh,"  
 ' bearing date 28th December, and having the post mark, "M.  
 ' R. 6, 1809, foreign letter," in which he declared that he "ap-  
 ' proved of all her proceedings;" and, among other acknow-  
 ' ledgments of her as his wife, said to her, "I answered your  
 ' letter of the 18th January, by Mrs Mountflorenc, addressed  
 ' to B. R. Adam, which I hope you have received, and I beg  
 ' you pay attention to the contents; our brother and sister  
 ' occupy her house here at present," with a letter subjoined  
 ' thereto, from the defender's sister, Eliza Callender, in which  
 ' she styled the pursuer "my dear sister," and said, inter alia,  
 ' "I brought the gown I worked for you; my brother will take  
 ' great care of it till your return. When you write, give me  
 ' a few lines. I suppose you have seen all our friends in Edin-  
 ' burgh. Give my best love to Mrs Kenneth Callender and  
 ' Mrs Flint, and all their children. If you will call on my  
 ' mother, she will be very happy to see you," &c. Also, from  
 ' another letter of the defender, who then styled himself Sir  
 ' James Campbell, to the pursuer, addressed by him on the back  
 ' —A Madame Madame Campbell, Hotel de Londres, Rue de  
 ' L'Echiquier, Paris," and dated 18th May 1815, in which he



6 wrote to her in terms of similar affection and confidence. Al- May 23, 1826.  
 6 so, from a letter from John Ferrier, Esq. writer to the signet,  
 6 dated Edinburgh, 26th August 1816, and addressed, "J. H.  
 6 Moran, Esq. No. 25, Rue de Hotel Dauphine, Paris," in  
 6 which Mr Ferrier, as the agent of the defender, said to Mr  
 6 Moran, the pursuer's agent—(Here the letter was quoted.)—  
 6 As also, from an extract of the said deed of agreement betwixt  
 6 the defender and his son, Colonel George Callender, dated the  
 6 15th day of July, and 5th August 1815, produced from the  
 6 record, which contains, inter alia, the provisions above refer-  
 6 red to, and likewise secures to the defender a free annuity  
 6 of £1000 per annum: That the allegations of the defender  
 6 are not relevant to elide the inferences arising from the writ-  
 6 ten evidence, in support of the remaining conclusions of the  
 6 pursuer's libel, nor credible in opposition to his own letters.  
 6 Therefore, in the whole circumstances of this case, and in con-  
 6 formity to the judgment pronounced by the Court of Session  
 6 in the case of Lyon against Gordon, 20th July 1699, and by  
 6 this Court in the case of Margaret Drummond against Sir  
 6 Alexander Hope, on the 2d August 1744, and other analogous  
 6 authorities, find the defender bound to aliment the pursuer,  
 6 Lina Taline Sassen, all the days of her life, from and after the  
 6 5th day of February 1819, when the pursuer lodged the amend-  
 6 ment of her libel, claiming a solatium or damages, in case of  
 6 her failing to establish a marriage with the defender; and,  
 6 with reference to the amount of the defender's annuity of  
 6 £1000, modify the pursuer's aliment to the sum of £300  
 6 Sterling per annum, payable quarterly from that date, with  
 6 the legal interest thereof, but deducting such sums as the de-  
 6 fender has already paid to account: Find the defender also  
 6 liable to her in expenses of process, of which allow an account  
 6 to be given in, and decern.'

Both parties advocated, and the Lord Ordinary having re-  
 ported the case on memorials, the Court, on advising them, ap-  
 pointed a hearing; and thereafter sisted procedure, until a sup-  
 plementary action relative to the claim of aliment should be  
 raised by the pursuer before the Commissaries.

*The Lord President* observed, in reference to the merits—I  
 can find no authority in support of the possibility of a marriage,  
 where one of the parties is in this country and the other is out of  
 it. It is true, that by the principles of our law mutual consent is  
 sufficient, but I cannot venture, where there is no precedent or  
 authority for it, to say that marriage may be constituted under

May 23, 1826. such circumstances. The principles of international law, besides, present great difficulties.

*Lord Hermand.*—This is a most important question, and it must be decided on general principles. The prevailing rule is, that contracts must be construed according to the law of the domicil. France must here be considered as the domicil of the parties. Sir James conveyed away his estates in Scotland, and he has resided in France since 1792. The pursuer has not proved a marriage in France. She now betakes herself to the letter of attorney, and to the law of Scotland. Independent of that letter and the correspondence, she has not even a pretence for alleging marriage. But it is impossible that she can say that she received that letter on the faith that she was thereby constituted the wife of the defender. It was granted for a different purpose altogether, and in France it could not make her his wife. When she left that country, therefore, she was unmarried, and she was so when she came to England; but she pretends that at the moment when she put her foot on Scottish ground she started up Lady Campbell. This, however, is absurd. The letter of attorney was a French deed; it was delivered in France; and it must be interpreted by the law of that country; but it is admitted on all hands that there it is ineffectual to make a marriage. Besides, the consent must be given *intuitu matrimonii*, whereas the designation of wife was applied to her not with that view, but to enable her the more easily to execute the business for which she was sent to this country.

With regard to the claim of damages, I rather think it rests on different principles. There has certainly been no seduction, and there is no allegation to that effect. But in the whole circumstances, I think some aliment is due. I cannot, however, agree that she should be allowed so much as has been awarded by the Commissaries. If she had been a virtuous woman, they could scarcely have given her more; and even as his widow she would not have drawn a larger allowance.

*Lord Balgray.*—I am not surprised that in the peculiar circumstances of this case the pursuer's legal advisers had some difficulty in framing the summons. It brings before us two questions; 1st, Whether Sir James is bound to adhere to the pursuer as his lawful wife; and, 2d, Whether he is bound to aliment her.

On the first of these points I shall say very little. The principles by which it is to be decided have been fixed by the cases of *M'Innes*, *Sheddan*, &c. It is no doubt true that consent constitutes marriage, but that consent must be deliberate, mutual, and

given at one and the same time. These qualities do not exist here. The deed was executed in France, and the consent expressed in it was to constitute the pursuer the attorney of the defender, and not for the purpose of marriage. Therefore the allegation of marriage may be thrown aside. May 23, 1826.

The second conclusion is for aliment or damages, and it is rested on averments that Sir James had been guilty of fraud and deception in making the pursuer believe that she was his lawful wife. This therefore depends on fact, and of which a proof must be allowed, unless we are of opinion that there is sufficient before us to decide the case. If a proof at large were allowed it would be ruinous to both parties, and I have therefore been anxious to avoid it, and I think we can do so. In this question we are untrammelled by the principles of international law. All we have to do is to look at the documents before us, and to consider their effect as giving a claim of damages by the law of Scotland. Now, I apprehend, that if Sir James had died and the pursuer had claimed terce as his widow, these documents would have warranted a jury in serving her. Or suppose a legacy had been left to her, I conceive Sir James would have been entitled to payment of it *jure mariti* on exhibiting these letters. *She* could not have denied effect to them. Therefore these documents are important in considering the present question. But farther, the parties lived together from 1804 till 1816—she behaved irreproachably during that time—had a family by Sir James—was acknowledged by all his relations as his wife—and was intrusted by him under that character with extraordinary powers. I therefore apprehend that she is entitled to demand aliment from him. Now, what is the defence? He says that all the papers were framed for the purpose of deception. But can we listen to such a statement from him? Certainly not. Perhaps there may be some objections to the summons in point of form; but I think as justice is with the pursuer, we ought to sist process till a supplementary summons is brought by her.

*Lord Succoth.*—I am much of the same opinion, on similar grounds.

To constitute marriage by the law of Scotland consent alone is necessary; but that consent must be deliberately given by both parties *eo intuitu*. If either of them have any other purpose in view than that of marriage, and this be clearly established, then the consent will not be of that nature which is required by law. If this doctrine be well founded, there is an end to the conclusion for adherence. The purpose of granting the letter

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of attorney and allowing the pursuer to assume the character of Sir James's wife, was not to constitute a marriage, but to enable her the more effectually to transact his affairs in this country. Besides, the letter of attorney is a French deed, although, no doubt, it was to be executed in Scotland. But in judging of it we must be governed by the law of France, by which it is unavailing to constitute marriage. The correspondence in like manner took place, not to create a marriage, but in reference to the purposes of the letter of attorney, and to maintain that deception which was thought necessary in the circumstances in which Sir James was placed.

On the question as to the claim of damages I agree entirely with Lord Balgray, and when it is brought before us in proper shape she will be found entitled to it. There is, however, no pretence for alleging seduction.

*Lord Gillies concurred.*

A supplementary action, ob contingentiam of the former action, was accordingly raised and brought into the Court of Session. After a recital of the facts and circumstances already detailed, it stated, ' That although the pursuer should fail in establishing a legal and valid marriage to subsist between her and the said defender, and although she should fail to prove that at the commencement of their connexion, the defender committed a gross fraud and imposition by leading her, the pursuer, to believe that she was then lawfully married, or that the declaration, consent, and cohabitation of the pursuer and defender, as man and wife, would make a legal and sufficient marriage by the law of Scotland, all as stated in her former summons and amendments thereof aforesaid, still the defender would, by his subsequent acts and conduct, be liable to the pursuer in damages : In so far as he, the defender, for many years received, treated, and acknowledged the pursuer as his lawful wife, and had the children procreated of their bodies during this intercourse publicly baptized as his lawful children, and afterwards acknowledged them in that character. In particular, the defender, in various deeds and instruments, owned and acknowledged the pursuer as his lawful married wife ; and more especially, he styled and designated the pursuer as his wife in the letter or power of attorney before-mentioned, and in the letter of the 28th December 1809, before recited, which is holograph of the said defender, and by him addressed to the pursuer ; and in the contract of agreement between him and his son Colonel George Callender, the defender made provision

‘ for the pursuer as his widow in case he should predecease her, May 23, 1826.  
 ‘ and also for the child or children procreated of their bodies  
 ‘ who might be alive at the time of his death, as his lawful chil-  
 ‘ dren. Farther, the defender introduced the pursuer to the  
 ‘ public and to his friends and relations as his lawful wife ; and  
 ‘ the pursuer was received, owned, and acknowledged as such  
 ‘ by the friends, relations, and men of business of the defender,  
 ‘ and by the public in France, in Holland, in England, and in  
 ‘ Scotland ; in particular, the pursuer was so received, owned,  
 ‘ and acknowledged by the persons, and in the letters and do-  
 ‘ cuments before specified ; to all of which writings, and to other  
 ‘ writings and documents which will be produced in the pro-  
 ‘ cess to follow hereon, reference is hereby had, and they are  
 ‘ here held as repeated *brevitatis causa*. That by the acts and  
 ‘ conduct aforesaid of the defender, and the consequent beha-  
 ‘ viour of his friends and relations, and others, the pursuer was  
 ‘ induced to believe, and did believe, that she and the defender  
 ‘ were lawful married persons, husband and wife, and that she  
 ‘ was entitled to all the rights, privileges, and benefits of a law-  
 ‘ ful married wife : That thereby, and by the defender desert-  
 ‘ ing and abandoning the pursuer as aforesaid, and denying  
 ‘ that he and the pursuer are lawful married persons, husband  
 ‘ and wife, the pursuer has suffered great loss, damage, and in-  
 ‘ jury, for all which the defender is liable ; and the defender is  
 ‘ now legally bound to support, aliment, and maintain the pur-  
 ‘ suer during all the days of her life, in a manner suitable to  
 ‘ his own station, and to the rank in which he placed the pur-  
 ‘ suer, and to which he made her believe that she had a legal  
 ‘ title.’

The Court thereupon remitted ‘ to the Lord Ordinary to re-  
 ‘ mit to the Commissaries, with instructions to them to adhere  
 ‘ to that part of their interlocutor of 9th March 1821, which  
 ‘ finds that the evidence adduced on the behalf of the pursuer  
 ‘ is not relevant to infer marriage betwixt the parties ; and also  
 ‘ so far as it finds the defender liable in aliment to the pursuer :  
 ‘ but to alter the same in so far as to find the pursuer entitled  
 ‘ to an aliment of £200 per annum only, payable to her quar-  
 ‘ terly all the days of her life, deducting such sums as have al-  
 ‘ ready been paid to account’—with expenses. And in the sup-  
 ‘ plementary action they remitted, ‘ to find the pursuer entitled  
 ‘ to an aliment of £200 yearly, payable quarterly, all the days  
 ‘ of her life, and commencing the 5th day of February 1819,  
 ‘ when the pursuer lodged the original amendment of her libel  
 ‘ in the Commissary Court, claiming a solatium or damages in

May 23, 1826. 'the event of her failing to establish a marriage with the de-  
'fender,' deducting such sums as have been paid to account  
'thereof; and to find expenses due.' And to this judgment the  
Court, on advising a petition by the defender, unanimously ad-  
hered on the 22d June 1824,\* and allowed execution pending  
appeal, as to this permanent aliment, without caution.

In the course of these proceedings, various applications had  
been made to the Commissaries, for interim aliment, and grant-  
ed; and Sir James having complained by advocacy, the Court  
of Session adhered, with expenses.

Against these interlocutors Sir James appealed. Madame  
Sassen made no appearance; but a Case was lodged, and counsel  
appeared for William M'Kenzie, who had become cautioner  
under an application for execution, pending appeal, to repay the  
interim aliment granted in the course of the process, and ex-  
penses, in case of a reversal.

*Appellant.*—The documents produced do not instruct the alle-  
gations, on which the pursuer claims aliment. The appellant's  
counter averments are relevant, and destructive of the claim;  
and there is in their nature no reason why he should not be per-  
mitted to prove them. The first summons was an action of adhe-  
rence, but the amendment converted it into a declarator of mar-  
riage. Under it, however, there could be no aliment found due  
until decree of marriage had been pronounced. Then came the  
third amendment, and claim for a solatium and damages, rest-  
ing on the alleged deceit practised by the appellant on the pur-  
suer, in making her believe either that she was married, or would  
be so by the law of Scotland. But, even if there could be alter-  
natives in the allegation of imposition, these alternatives destroy  
themselves; and, supposing either to be true, the pursuer does  
not give them relevancy by alleging seduction in consequence of  
that deceit. There is no relevancy in the charge of the supple-  
mentary action—no subsequent acts, short of celebration of  
marriage, can afford the pursuer ground for her claim. There  
can be no continuance of a deceit which has not been proved to  
exist previously. All that the pursuer can qualify, is, that she  
continued to assume the character which she knew to be false—  
which the appellant knew to be false—and which, as to third  
parties, was an imposition. Besides, all these averments must  
be proved, and the appellant has opposed to them the most pe-

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\* See 2 Shaw and Dunlop, No. 175, and Vol. 3, Nos. 114 and 115.

remptory denial. There is no bar to the appellant's defence in May 23, 1826. *personalis exceptio*. That exception only operates, where the individual complaining was ignorant of the deception, not when a party to it. The pursuer knew, when she went to Scotland, that she was not married. She has abandoned all pretence that she can establish marriage; and if she represented herself to the appellant's friends and relations as his lawful wife, she was guilty of a fraud. But it would be a singular mode of forwarding the interests of morality, to reward the offender, by shutting the mouth of the party resisting a demand founded on that fraud. According to her doctrine, a personal exception will allow a woman who has entered a house as a mistress, to go out as a wife, although no marriage has taken place. Besides, the same pretended exception ought to have proved a bar to pleading a defence to the marriage itself. But it did not. That there has been a fraud on the public, is no ground in a court of law for damages to a private party, who was a deceiver, and who was not deceived.

There was no ground for interim aliment. The instant the pursuer amended her summons, and converted her action into one of declarator of marriage, her claim for aliment ceased. No instance is on record where aliment has been given before a proof has been led in the declarator. Aliment is allowed only because, during marriage, the property of the wife passes under the dominium of the husband. Therefore, in an action where the fact of marriage is admitted, aliment is due. This is an onus that necessarily follows the status to which the husband has consented. But marriage must either be proved, or circumstances admitted sufficient to make a legal marriage, before aliment can be allotted; otherwise a woman might allege marriage, and enjoy aliment, until, after a protracted suit, the imposition was discovered. If a woman hold a written promise *de presenti*, and found on it in her summons of adherence, and the defender concedes that it is his letter, but alleges that it was given *alio intuitu*, in that case aliment ought to be given, because he admits what by the law of Scotland is a marriage, and tries to get the better of it by pleading a defence, which it is incumbent on him to establish. Again, if the woman alleges a regular Scotch marriage in kirk, which the defender admits, but says, that he is not her husband, because she has a prior husband alive; then aliment is due, because the onus of proving that allegation lies on the defender; and, in the meantime, he must pay aliment. If an opposite rule were adopted, and the mere statement of a pursuer were received, it would be in any woman's power to pursue any

May 23, 1826. person she chose, and thus obtain a temporary support. No one would be safe, married or not. But in the present case, the pursuer brought her action of declarator of marriage on the allegation that it had been regularly contracted at St Germainsen-Laye. In this she failed; and then she alleged a marriage in Holland; but in this she also failed. Now, although these allegations were denied, yet interim aliment was awarded to her. She then betook herself to the letter of attorney and correspondence, and law of Scotland, although she well knew that they were written not *intuitu matrimonii*, but for another object, which she now admits by abandoning all pretence of marriage. As interim aliment was therefore awarded only on the assumption that she was his married wife, and she well knew she had no title to that character, she had no right to demand it. In Lady Hawkes' case, where her name as a married woman was inserted in the passport, and in the Dalrymple case, no aliment, *pendente lite*, was allowed.

*Respondent (Mackenzie.)*—The parties lived together, and were received as man and wife. The appellant allowed the pursuer to take that character and status, and introduced her as such to his friends, and recognized her as such himself. The evidence afforded by the documents produced was sufficient to authorize a court to award aliment. It is no defence, that his whole conduct was a system of deception and fraud, and that he was deceiving both the pursuer and his own relations. She alleges she was seduced to continue to live with him on the faith that she was his wife; and there is no charge of misconduct after the acknowledgment. A personal exception, although incompetent in a question of status, may be competent in a question of aliment. By the law and practice of Scotland, aliment is due, though the facts proved do not ultimately turn out to amount to an effectual marriage; at least interim aliment, while maintaining a right to the status, is due; and the pursuer having, *bona fide*, received and consumed the sums paid, it would be most unjust to enforce a repetition of them from her surety.

The House of Lords, in the principal case, declared, ‘ That the  
 ‘ respondent having failed to establish her marriage, is not en-  
 ‘ titled, under either of the summonses, to recover aliment or  
 ‘ damages against the appellant, and, with this declaration, it  
 ‘ is ordered and adjudged, that the said interlocutors, so far as  
 ‘ they are complained of in the said appeal, and so far as they  
 ‘ are inconsistent with this declaration, be, and the same are here-  
 ‘ by reversed.’



In the question as to interim aliment, the House of Lords May 23, 1826. declared, ' That the respondent was not entitled to interim aliment, and therefore it is ordered and adjudged, that the interlocutors complained of in the said appeal, so far as they are inconsistent with this declaration, be, and the same are hereby reversed.'

**LORD GIFFORD.**—My Lords, there are two appeals that come before your Lordships under similar circumstances. In one of them the respondent, in favour of whom the judgment was pronounced, not appearing to support that judgment; and in the other of them, a party did appear who had an interest in the judgment pronounced, and therefore contended for the validity of the judgment below, but the principal party did not appear. This is a case which will require some details, to state it clearly to your Lordships, and it is a case of some singularity.

I always experience great anxiety when I feel myself under the painful necessity of differing from the view taken of a case in the Court of Session; and if in any case, more particularly I feel it on the present occasion, because, when I state the various proceedings that have taken place in this case, your Lordships will clearly see, that the matter has been very much considered by the Court of Session. At the same time, if, after due consideration of the circumstances of the case, and the law, as applicable to them, I feel myself under the necessity, consistently with the duty I owe to your Lordships and to the parties, of differing from that decision, I ought not to hesitate in pronouncing that opinion, although it should differ from the opinion expressed in the Court below.

The appellant in this case is a gentleman, calling himself Sir James Campbell of Ardkinglass, in the county of Argyle; and the respondent is a lady of the name of Madame Lina Taline Sassen, who styles herself Lady Campbell, as spouse of Sir James Campbell of Ardkinglass. It appears that, many years ago, Sir James Campbell, or, as he was then called, Callender, being in France, contracted an intimacy with this lady, and continued to cohabit with her in France, and other parts of the continent, till 1815. In the year 1817 this lady came to Scotland, and Sir James Campbell having contended that he never had contracted a marriage with this lady, she instituted proceedings in the Commissary Court of Scotland, for the purpose of compelling him to treat her as his wife, she stating that she was his wife.

The first action was an action of adherence, which is an action founded on the allegation that a marriage has actually taken place between the parties, to compel the husband to maintain the lady as his wife, and discharge all the duties incumbent upon him as a husband; and in case of noncompliance, to decree aliment against him for support of the lady.

In this action of adherence, she founded her marriage on circumstances that had taken place at St Germain in the month of May 1804. Her allegation was, that ' the pursuer was married to the said Sir James Cal-

May 23, 1826. ' lender, otherwise Campbell, and now designating himself Sir James  
' Campbell of Ardkinglass, at St Germain-en-Laye, near Paris, and  
' thereafter they lived and cohabited together as husband and wife, and  
' there were several children born of that marriage, one of whom is still  
' in life;' and she concludes her summons with the requisition I have men-  
tioned to your Lordships.

Defences were given in by Sir James Campbell, in which he denied positively the fact that any such marriage had taken place. I should have stated to your Lordships, that, in the summons, the lady referred to certain papers which she produced; one is a letter of attorney, dated Paris, 23d June 1808, in which the appellant describes her as his ' beloved wife.' Some letters also were lodged by her, in some of which it appeared that he addressed her by the name of Mrs Callender and Campbell, and treated her as his wife. Sir James Campbell, by his defences, denied the marriage; and he produced various documents to show, that some proceedings had taken place in Paris upon the subject, and that there had been a certificate granted by the mayor of St Germain, stating that no marriage had taken place between the parties. In consequence of this defence on the part of Sir James Campbell the marriage was put in issue, and the question was, whether it was a marriage or not? The consequence was, that this lady was obliged to alter her course. An action of adherence is founded on the notion that the marriage had actually taken place, and if it be admitted by the defender, the cause then proceeds, and the Court determines whether he shall treat her as his wife or grant her alimony; but in consequence of this direct denial of the marriage, she was obliged to alter the form of action, from an action of adherence to an action of declarator, to have it declared that there was a marriage, and then to have it tried whether there was a marriage or not. She then petitioned for leave to amend her libel; and at the same time that she applied to amend her libel, she also applied for interim alimony of £300 per annum, with by-gones for two years; she also applied, in the event of the marriage being established, that there might be a conclusion for alimony. Leave was given to her to amend her libel; and in consequence of that she amended her libel, by introducing a conclusion for a ' declarator of her marriage, which (as she stated in her petition), in the present ' state of the process, is competent, and has been rendered necessary by ' the conduct of the defender himself, who, notwithstanding his cruel ' treatment of the petitioner, was not expected to go the length of deny- ' ing her to be his lawful wife; and in order to have the amendment ' made, the petitioner humbly produces the same, and craves your Lord- ' ships to admit thereof.' The proposed amendment consisted of the following addition to the narrative—(His Lordship here read it.)

In consequence of this allegation, the Commissaries pronounced an interlocutor, decerning for £200 to account of interim aliment generally; and they adhered to this interlocutor, on advising a reclaiming petition. The first appeal in this case has been brought against this interlocutor of the Court of Commissaries, allowing interim alimony. It may be proper

to state to your Lordships, that the libel having been amended, by introducing this conclusion for a declarator of the marriage, the cause went on, and proceedings were had as to this French marriage; and afterwards finding that she was likely to fail altogether in making out any French marriage, she then turned round, and said that there was a Dutch marriage; a marriage in Holland; that failed her also: then, upon some expressions which had dropped from some of the learned Judges in the course of that discussion, she took up another view, and said, although there were neither a marriage according to the law of France nor according to the law of Holland, yet by this letter of attorney, executed at Paris, in which Sir James Campbell had designated her as his 'beloved wife,' and by subsequent acknowledgments, this was a marriage good by the law of Scotland. That certainly involved a very difficult question, how far a Scotch marriage could be contracted in France, where parties must be married by the law of France. A very learned discussion took place upon that point among the learned Judges, and it was ultimately determined by them that there was no marriage, and consequently Sir James Campbell was assoilzied from that part of the action relating to the marriage.

My Lords, an appeal was brought by Sir James Campbell against this allowance of interim alimony, and that appeal was met at your Lordships' bar, by the appearance of a gentleman who had become cautioner for this lady, for the return of this alimony in case it should be found that she was not entitled to it. It is very true, that in an action of adherence, for instance, or in an action of declarator of marriage, if the marriage be admitted by the party complained against, the Court will decree interim alimony—that is, alimony to be paid to the wife before the final decision of the question; but it was contended at your Lordships' bar, that in an action of declarator of marriage, no instance could be found in which interim alimony had ever been allowed where the marriage was denied, and where proof of that marriage had not been given. It was admitted, that if, in this case, proof had been given of the marriage in France—that if a prima facie case of marriage had been established—the Court would, before the final decision of the case, award interim alimony: So they would, in an action of adherence, as I have stated to your Lordships, where the action proceeded upon the ground of a marriage not denied or disputed. But, my Lords, the irregularity of the case here was, that although the action was an action of adherence when this interlocutor was pronounced, yet at that very moment application had been made by this lady to change the proceeding to an action of declarator, expressly stating she had been met, to her great surprise, by a denial of the marriage by Sir James Campbell; and, therefore, being met by that, she could no longer proceed upon this action of adherence, but that it must be changed to an action of declarator. Notwithstanding this, she sues for interim alimony: and although that was the state of the cause—and although the marriage was denied—and although no proof was adduced of the French marriage contracted at St Germain—and although it was only an allega-

May 23, 1826. tion—yet the Commissaries awarded interim alimony to his lady, and the decision was confirmed by the Court of Session. It seems to me, that if interim alimony could be awarded in this stage of the cause (as was most forcibly put in one of the most powerful arguments I ever heard at your Lordships' bar, by Dr Lushington), any woman might be entitled to alimony against any man; because it was only necessary for a woman to come in and say, 'I am the wife of A. B., but before I enter into any proof upon the subject, nay, after the denial of A. B. that he is my husband, the Court shall, upon my mere allegation that there has been this status of actual relation between us, award me interim alimony.' It seems to me, that if this position could be supported, it would necessarily follow, that the bare allegation of the mere circumstance of marriage would be sufficient to fix a man, an utter stranger to the party applying, with interim alimony, and to compel him to support the woman before the final decision of the question; he at the same time positively denying, and ultimately succeeding in proving, that there was no marriage—as was the case here.

My Lords, some cases were cited, but I think it was shown that these cases did not bear upon the present question. Because in those cases interim alimony might have been granted upon an action of declarator where there might be some doubt; but no instance could be adduced where it was given before proof was led, and before there was evidence before the Court sufficient to satisfy them that there was ground to believe that the marriage could be established between the parties. In this case, and at this stage of the cause, so far from there being evidence of that sort, this lady was obliged to abandon her action of adherence, and convert it into an action of declarator, upon the denial by Sir James Campbell that there was any marriage in fact, and it was not established. Upon this appeal, I must confess I have very little difficulty in advising your Lordships to reverse the interlocutors complained of. When I say reverse the interlocutors, I apprehend, considering the nature of these proceedings, and what may be necessary to be done in the Court below, that the safer course would be, to declare that this lady is not entitled to interim alimony, and to remit the case with that declaration, either to the Court of Session or to the Commissary Court, to apply that declaration.

My Lords, after this proceeding had taken place, and interim alimony had been awarded to her, the cause went on in the Commissary Court, and the Commissaries, in the month of February 1818, pronounced an interlocutor, by which they find, that the defender is a native of Scotland, and a proprietor of an entailed estate in this kingdom, repel the objection to the jurisdiction of the Court, and allow the action to proceed. Then they appoint a condescendence to be given in of the whole facts this lady offered to prove in support of the conclusions of her libel. It appears, that finding she could not establish a marriage according to the law of France, she then stated, that Sir James Campbell had cohabited with her as his wife in Holland, and that this cohabitation was sufficient by the law

of that country to constitute a marriage. Upon this new averment, the May 23, 1826. Commissaries directed the lady to deliver in a minute of the law of marriage in Holland in the years 1812 and 1813.

My Lords, after this, and while this discussion was going on, in relation to the law of marriage in Holland, she applied to amend her libel in other respects, to which I shall call your Lordships' attention. Her action was entirely confined to an action of declarator, that a marriage had taken place between her and Sir James Campbell, and she requested to amend her libel by adding a conclusion for £5000 of damages, on the ground of fraud and imposition. This amendment was allowed by the Commissaries. They had allowed her to prove her Dutch marriage; and they afterwards pronounced an interlocutor for additional interim aliment. They then pronounced an interlocutor, by which they find that she had failed to establish the constitution of a marriage betwixt the parties either in France or in Holland, according to the laws of those countries at the periods to which her allegations relate. Then they ordained the parties to give in memorials on the point, whether the pursuer is nevertheless entitled to found upon the written evidence in process in proof of the constitution of a marriage betwixt the parties according to the law of Scotland. So that this lady shifts her ground a third time, and resorts to the law of Scotland. Then the Commissaries, on advising memorials, found, that upon that part of her action the evidence adduced on behalf of the pursuer was not relevant to infer marriage betwixt the parties, and therefore assoilzied Sir James from that conclusion of the libel. That put an end to that part of her claim.— They had thus found that neither by the law of France, nor by the law of Holland, nor by the law of Scotland, had any marriage taken place between these parties; and then they went on to find, that the letter of attorney had been given by Sir James Campbell, in which he designates her as his wife, and that he introduced her by that title to several parts of his family, and that he addressed letters to her as Mrs Callender and Mrs Campbell; and therefore, in the whole circumstances of this case, and in conformity to certain cases to which they referred, they find that Sir James Campbell was bound to aliment this lady for all the days of her life, from and after the 5th day of February 1819, when the pursuer lodged the amendment of her libel, claiming a solatium, or damages, in case of her failing to establish a marriage with the defender; and with reference to the amount of the defender's annuity of £1000, modified the pursuer's aliment to the sum of £300 Sterling per annum. So that, although it is stated that she was not his wife—no legal marriage being established between them—yet, because he had represented her as his wife, and had introduced her as his wife, the Commissaries considered that Sir James Campbell (although not bound to pay the sum required by the conclusions of the libel) was bound to aliment her all the days of her life, and that it should be £300 per annum. The case was then brought before the Court of Session; and the Court of Session, after the case was stated at very great length by both parties, were, upon the finding in respect of the marriage,

May 23, 1826. and also the aliment, of opinion that the Commissary Court had decided rightly, by those interlocutors which are brought by appeal before your Lordships. The question as to the marriage was set at rest, for the Court thought that point could not be sustained. But the Court of Session, viewing, as any other person would, the conduct of Sir James Campbell as most dishonourable—for although he had not contracted marriage, (I add nothing of the attempt to throw discredit upon the character of this lady, that she was a prostitute in Paris and other places for many years,) the Court of Session say, it was most disgraceful that he should have introduced her, and more disgraceful if she were what he described her to be, to his friends in Scotland as his wife. The Court thought that he having so represented her, they could not allow him to plead his own fraud; and although they seemed to feel the difficulty of having fixed him with this alimony, under the amendment of the libel in the Commissary Court, yet they appear to have thought, and they intimated that probably some other action, in the nature of a supplementary action, might be raised, upon which the question might be more properly brought before them, and in which they might decree damages in the shape of aliment for all the days of the pursuer's life.

In consequence of that suggestion, a supplementary action was raised; and it is important to call your Lordships' attention to the terms of that supplementary action. It sets out the former action and the proceedings, and the judgments that had been given for aliment, and then it proceeds to state, that the Court had directed the supplementary action; and then the lady goes on in this way: that although she should fail in establishing a legal and valid marriage to subsist between her and the defender, and although she should fail to prove, that, at the commencement of their connexion, the defender committed a gross fraud and imposition, by leading her, the pursuer, to believe that she was then lawfully married, and so forth, still the defender would, by his subsequent acts and conduct, be liable to the pursuer in damages.

My Lords, this supplementary action having been raised, the question came before the Court of Session, and they pronounced an interlocutor, by which they remit to the Lord Ordinary to remit to the Commissaries, to adhere to the interlocutor, in so far as it finds no marriage established, and so far as it finds aliment due; but to alter the same so as to restrict the aliment to £200 per annum; to find no marriage, but to allow £200 of yearly aliment. Now, my Lords, I feel a difficulty in understanding precisely the interlocutor pronounced; and I shall tell your Lordships why.

This judgment confirms the interlocutor of the Commissaries, pronounced before the supplementary action was raised. By that interlocutor, the Commissaries determined under the second amendment of the libel, with respect to the claim for £5000; that Sir James Campbell was not liable in any gross sum in damages, but the sum of £300 to aliment her for life. The Court of Session seem to have thought that it was difficult to support that finding, and they therefore directed a supplementary

action to be brought. Now, although they allow this supplementary May 23, 1826.  
action to be brought, yet, when they pronounce the interlocutor after the  
supplementary action is brought, they do not appear to have pronounced  
it upon the terms of the conclusion in that supplementary action; but  
they only affirm the interlocutor of the Commissaries, by which yearly  
aliment was awarded to this lady. My Lords, they awarded this without  
any proof of the allegations contained in any of the summonses, except  
the production of these documents, although the allegations were posi-  
tively denied by Sir James Campbell; and they thought—but, with great  
deference to them, I do not think that it is so plain a principle as applied  
to this case—that it was not competent to Sir James Campbell to set  
up the defence which he pleaded, and allege his own turpitude in his  
defence. It is perfectly true, that if Sir James Campbell represented  
this lady as his wife to strangers, or third parties, and if, in consequence  
of that, any obligations were incurred by him, I apprehend it would  
not then have been competent to him, as against third parties, and in  
opposition to his own conduct, and his own allegation that she was his  
wife, to set up a plea that they were never married. But here is this lady  
found not to be his wife—not instituting any action of damages against  
him on the ground that she had been seduced—not stating in either of the  
summonses any claim for damages, nor showing to your Lordships, not  
only that he had represented her to be his wife, but that he had seduced  
her under a promise of marriage, and that she had gone away with him  
in consequence of this promise and belief that she was to be his wife;  
but merely resting upon the ground, that because there had been no  
marriage, and that he had represented her as his wife, thereby she was  
entitled to damages, without alleging or proving any damage which she  
had sustained. But even although a person be so immoral as to treat a  
lady as his wife, and to hold her out to the world as his wife, yet she  
knowing and he knowing that they are not married, it is not compe-  
tent for that lady to bring an action for damages against him. I admit,  
as it was admitted in the cases that have been cited, that if, upon the  
pretence of a solemnization of marriage, a man seduce the affections  
of a woman, and prevail with her to live with him upon the faith of his  
promise being fulfilled at a future period, it may be competent, and is  
competent, for her to maintain an action for damages against the person  
who had deceived her, and so immorally acted; or in the case where a  
woman is about to separate and break off an illicit connexion, and is pre-  
vailed on to remain, and live with the man as his wife, upon the faith of  
the promise that he will provide for and marry her, that would be a  
ground of action on her part. In the present case, my Lords, there is no  
such allegation in the pleadings. All that is said is, that the defender  
represented this lady as his wife. The supplementary action concludes  
in a most extraordinary manner: That although she shall not be able to  
prove her marriage, or to prove any promise of marriage, yet, notwith-  
standing, as he had represented her as his wife, and committed a flagrant

May 23, 1826.

breach of the rules of propriety—(not to say of morality)—in introducing this lady as his wife,—as a chaste character,—and as holding a high situation,—into society, that the defender shall be liable to her in damages. Whatever right the Court had to complain of that representation in a moral point of view—and which they very properly reprehended in strong terms—what right has this lady to complain of it? She cannot prove a marriage in Holland, or France, or anywhere. She does not pretend to say that he deceived her into a connexion with him, representing that he would marry her; but after she fails in proving the conclusions of her action,—that action calling not for alimony, but for damages for this supposed misconduct on the part of the husband,—the Court feel that it is difficult to support that finding, because she only asks for damages, and they had given her alimony; and although this gentleman appears to be now in a very advanced stage of life (but that is not a matter for consideration here), the Court award him to pay her £200 a-year. That supplementary action is brought without permitting him to rebut the action by proof, and they have awarded to her the sum of £200, cutting down the sum found by the Commissaries.

My Lords, the proceedings in this case are most voluminous, and I have taken rather a brief view of the whole of them, in order to bring the nature of the question succinctly before your Lordships, and the grounds upon which the Court below have proceeded in this case. I may repeat the observation I made upon the last case, as to this lady's not appearing. The cause stood over for some time, to see whether she would appeal against the finding upon the subject of the marriage, it being thought that it would be very material for her, if she could do it with any hopes of success; because, if it should be found in her favour, then there would be grounds for your Lordships to award her alimony. However, it has been represented that the state of health and mind of this lady is such that she could not be prevailed upon to institute any appeal—she being in a situation rendering it extremely difficult to make her comprehend the nature of an appeal, or the proceedings it would be necessary for her to take. The result was, that this appeal was heard before your Lordships *ex parte*—no person appearing for the respondent; and in this case, as in the last case which I had the honour of stating to your Lordships, I have felt a great deal of difficulty in wading through the variety of interlocutors pronounced, and examining the grounds on which they have proceeded. However, my Lords, the best attention which I have been able to pay to this case—and I assure your Lordships that the conclusion to which I have arrived has not been without many anxious considerations, as well to the parties as to your Lordships—and the arguments that I have heard at your Lordships' bar, have impressed me—and the facts of the case, and the private consideration I have given to it, have impressed me, with a notion that it is impossible to sustain these interlocutors, upon the grounds stated in this libel. Therefore, in this case, as in the last, however painful it may be to me, I feel myself



bound to advise your Lordships to come to that conclusion ; and it is particularly painful, after the very elaborate and able judgments pronounced by the Court of Session, but who appear to me to have been so strongly impressed, and rightly so, with the misconduct of this gentleman, that they have been anxiously desirous of affording relief to this lady ; and, in that view, they have gone further, in their interlocutors, than it appears to me they were warranted in doing by law. It is the province of a Judge, or at least I feel it to be mine, to divest myself, as far as I can, of any feelings that may be excited by the misconduct of any party. It is the duty of a Judge, however painful it may be to him, to look at the case stripped of the prejudices which would otherwise be excited in his mind, and to look at it as a question of law to be applied to the facts of the case. Whenever he suffers his judgment to be warped by any misconduct of the parties, I think that Judge is very likely to err. Far be it from me to say, that that is the case in the Court below. They have felt, and very rightly felt, a desire, if they could, to fix this gentleman with alimony, although the lady had failed in proving the marriage. But we must look at, and consider well, the grounds she states for claiming that alimony, or damages, for it is difficult to say which it is. It is incumbent on the Judge to see, whether, consistently with the law, she is entitled to relief. I have looked again and again to the first amended summons, and the second amended summons, and, upon the whole, I am bound to state to your Lordships what my opinion is, however it may differ from the Court below. My opinion is, that this lady's claim for damages is not only not supported by any case upon this subject, but I think she has not stated, in any of her summonses, a ground to call upon this gentleman for damages. Had she stated that she had been seduced by him to remain, in consequence of representations made,—being desirous of abandoning that course of life, and that he had promised her alimony,—whatever might have been your Lordships' judgment upon that case, no such allegation is made here. All she says is, that there were representations, and so forth, that she was his wife, and that she was received as such, and is therefore entitled to damages. I do not think that she is. It must be recollected that she is a *particeps criminis*. It is in vain for her to come and say to the defender, ' You shall not allege your own turpitude in defence of this action ;' because, if he be alleging his own turpitude, he is also alleging the turpitude of the very party who is seeking damages. If it be turpitude in him to insist upon that defence, it is equally turpitude in her to institute this action ; because she must admit, that she has been living in this way with this gentleman, and although knowing that she was not his wife, she holds herself out in this case as entitled to relief. It is impossible to say that this lady is either entitled to alimony or damages ; and therefore, on the whole, as it is extremely difficult to reverse these interlocutors simply without creating confusion, I think that your Lordships would be justified in coming to the conclusion, that neither under the first nor under the second summons, was the pur-

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May 23, 1826. suer entitled to damages; remitting the case to the Court below, with that declaration.

*Mackenzie's Authorities.*—Lyon v. Gordon, July 20, 1665.—Drummond v. Hope, April 2, 1774.—Purle, May 15, 1706.—Irvine v. Hamilton, July 13, 1706.—Castlelaw v. Agnew, Mar. 11, 1719.—Campbell v. Cochrane, July 27, 1747.

J. RICHARDSON, SPOTTISWOODE, and ROBERTSON, Solicitors.

No. 27. JAMES CAMPBELL, Esq. of Bedlay, Appellant.—*Adam—Wilson.*

Mrs STEELE and J. LANG, Respondents.—*Stephens.*

*Superior and Vassal.—Trust.*—A party having, by missive, feued a piece of building ground in his own name, and thereafter alleging that he had done so on behalf of a married woman, to whom he desired the feu-charter to be granted in life-rent, excluding her husband's jus mariti, and to her children in fee; and an action having been brought by her to compel the proprietor to execute the deed accordingly,—Held (reversing the judgment of the Court of Session), that there was no evidence of the trust to affect the proprietor, and that he was not bound to execute the feu-charter so demanded.

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1ST DIVISION.  
Lord Alloway.

THOMSON, a mason in Airdrie, wrote to Mr Campbell of Bedlay, in these terms:—‘ Molinsburn, 26th Sept. 1818. I have agreed to feu from you ninety feet from east to west along the Cumbernauld road, by the road which leads to Logie water, and to go north 40 yards from the said front; also the road that goes to Logie water to be twenty-four feet in breadth; for which I pay for a feu of these, for which I offer one shilling and eight pence per fall for the whole, also the rights that is to follow thereon. Entry of the feu to be at Martinmas next, and to be payable half-yearly; first term payable at Whitsunday 1819.’—Mr Campbell answered:—‘ Molinsburn, 26th Sept. 1818. I accept of the above offer. To Mr Andrew Thomson, mason, Airdrie.’

Soon thereafter Thomson began to build a house on the ground so feued; and obtained from Campbell advances to the extent of £30, upon security of the feu, to enable him to procure materials, for which he gave him this acknowledgment:—‘ 8th Sept. 1819. I hereby acknowledge to have, of this date, received from you £12 Sterling, which, with £18 paid by you to me some time ago, is £30 Sterling; and which sums I have got from you for the purpose of enabling me to finish the house which I am building upon the piece of ground feued by me