life to be named, as well as two terms of nineteen years. Then the next part of it refers to the division into the two nineteens of rent. As to one portion, the counsel for the respondent rightly said to-day, it was introduced into the missive for the purpose of regulating the rent.

Now, when we come to the missive or agreement relative to Tillyfaff, it is said that it is to commence at Whitsunday next, and to endure for the same space of time as the tack now given for the Mains of Crombie. Now, the tack of the Mains of Crombie was to endure till the termination of a life to be named in the 38th year, and this is said to endure for the same space of time. Now, if you are to say that it is the same number of years from the commencement to the termination of that, it is quite clear that the duration would not graduate with the currency of the lease; because, with respect to the lease of the Mains of Crombie, part of its duration being for a life, if this lease of Tillyfaff is to be held upon a life also, be it either the same life or a different life, it will not at its termination have endured the same length of years or space of time. If it be upon a different life, it may be shorter or it may be longer. If it be upon the same life, then it is not the same space of time, because it commenced two years earlier, and therefore it has had a longer endurance. Therefore that construction, which I think is the one which Lord Neaves puts upon it, cannot stand when it is examined. It is therefore difficult to say that the contention of the appellant is to be accepted as the only construction of this document. Then again, taking the construction of the other party, if you view it in the other light, if you limit the words "during the same space of time" to the nineteen years, then that will not make out their case, for the duration of the lease of the Mains of Crombie is not a duration for two terms of nineteen years, it is for two terms of nineteen years and a life beyond; that is part of its endurance, and this lease is to endure for the same time. Call it space of time or what you will, it is to endure for the same space of time —that is to say, it is to endure as long as that life, if a life is named, shall endure, upon which the Mains of Crombie was held.

Therefore, in that state of ambiguity of the document, admitting of more than one construction,—which is not wonderful, seeing that it was written by the local factor,—and with that sort of framing by reference, which is a very dangerous mode of framing a document at any time, seeing that it admits of that variety of construction,—I think we are brought back to the question, What is the construction that the parties themselves put upon it?

Now, if the notice of the nomination of the life of Robert Wilson had expressly stated that it comprehended and applied to Tillyfaff as well as to the Mains of Crombie, I understand that there would have been no question raised as to the fact that two years had elapsed before the nomination was made. I think the Lord Advocate was quite right in putting that so,—the parties accepted the nomination then, though the time had elapsed. But if the lands were at that time known as the lands of the Mains of Crombie, and if the parties had afterwards dealt with the matter as a nomination which comprehended the whole of the lands now known by the name of the Mains of Crombie, including Tillyfaff first of all, then I think it is to regarded as the effect of the nomination which was made, which the parties recognised as effectual, as applicable not merely to Tillyfaff, but as applicable to the lands held under both the documents. On these grounds, my Lords, I think the judgment of the Court below is right.

As to Scotsward, that is a matter which presents some little difficulty, and I see there has been a difference of opinion among the learned Judges below as to which portion of the land Scotsward belongs to. But it appears to me, upon the grounds stated by my noble and learned friend on the Woolsack, that it is enough for this party, when it is doubtful whether it belongs to the one or the other, if it is clear that it is under either the one or the other. I do not think that the doubt which appears to exist as to establishing which of them it was under, or the conflict of evidence on that matter, is a thing that the landlord can take advantage of in order to show that the tenant has no title to it. On these grounds, I think that the judgment of the Court below ought to be affirmed.

Interlocutors affirmed, and appeal dismissed, with costs.

Agents for Appellant—Alex. Morison, S.S.C., and Wm. Robertson.

Agents for Respondent—John Walls, S.S.C., and J. M. Greig.

Tuesday, June 11.

JAMES OGILVIE TOD FORSTER (PAUPER) *v.* JESSIE GRIGOR OR FORSTER (PAUPER).

Husband and Wife—Constitution of Marriage.

Circumstances in which it was *held* (affirming judgment of the Court of Session) that a mutual declaration in writing by a man and woman, accepting of each other as husband and wife, having been proved to be authentic and seriously meant, instructed marriage.

Process—Concluded Proof.

The defender in an action of declarator of marriage adduced no evidence, but applied for leave to do so after the Lord Ordinary had given judgment in the cause. *Held* (affirming judgment of the Court of Session) that, as the defender had had ample opportunity of giving evidence in the proof before the Lord Ordinary, and had not availed himself of it, he could not be allowed after that to lead further evidence.

This was an appeal from a decision of the First Division of the Court of Session. The respondent Jessie Grigor raised an action of declarator of marriage and damages against James Ogilvy Tod Forster. She stated in her condescendence that she was about twenty-three years of age, and in 1865, when of the age of twenty-one, went into the service of the defender's mother as housemaid. The defender's mother resided at Findrassie House, near Elgin. She said that soon after she entered the house the defender was attracted by her personal appearance and manners, and began to court her with a view to marriage; that they exchanged promises of marriage, and met frequently unobserved. On hearing this, Mrs Tod, the defender's grandmother, immediately dismissed the respondent (Mrs Forster, the defender's mother, being from home); but the defender would not allow her to go till his mother's return. On 2d September 1865, the pursuer and defender being alone in the

dining-room, the subject of their marriage was seriously discussed between them, and he then and there, of his own accord, went for his Bible, and with his own hand wrote on two of the fly-leaves the following declaration:—"I, James Ogilvy Tod Forster, take thee, Jessie Grigor, to be my wedded wife from this day henceforth until death us do part; and thus do I plight my troth." She made a similar declaration, and both signed the document. Within two or three days afterwards, the defender telling her they were as much married as they could be, and there was no impropriety in their intercourse, the marriage was consummated. During the same month the pursuer was dismissed from her situation, but the defender kept up his relations with her, and visited her at her father's house, and gave her a ring and a fruit-knive—her friends having full knowledge of the circumstances. In 1866, the defender having obtained a commission in the Army, and being about to go to Ceylon, at first proposed to marry her before his departure, but afterwards, owing to the opposition of his family, pressed on the pursuer the necessity of keeping their marriage secret. In November 1866 she gave birth to a son, who, she averred, was the defender's son. Previous to that event the defender had pressed for a return of his Bible and the written declaration of marriage, which she declined to give up. In conclusion, the pursuer averred, that if she failed to establish a marriage between herself and the defender, then she claimed damages for her seduction. Her pleas in law were that there had been marriage by mutual declaration *de præsenti* and by promise *subsequente copula*. The defender denied most of the above allegations, and denied that he had signed any such declaration as alleged.

A proof was led before the Lord Ordinary in November 1868. The defender adduced no witnesses, and the only documentary evidence which he put in was an extract from the parish register of the pursuer's birth, the date of which was 19th December 1842. He then declared his proof closed.

On 5th January 1869 the Lord Ordinary (MANOR) pronounced an interlocutor, in which he found that the parties were married persons, and ordained the defender to adhere to the pursuer as his lawful wife; and, in the event of his non-adherence, ordained the defender to pay to the pursuer a sum of £60 a-year for aliment. The defender reclaimed to the Inner-House, and craved to be allowed to add to the proof; which application was refused, and the First Division adhered to the Lord Ordinary's interlocutor. The defender thereupon appealed.

LORD COLONSAY—I observe it is stated in the paper that both parties are paupers. It is seldom we find both the parties paupers.

ANDERSON, Q.C., and SHIRESS WILL, for the respondent, explained that, in consequence of the judgment in the Court below, the defender had been proceeded against, and was unable to pay the claim, and had been allowed to appear as a pauper here. He had not appeared in the Court below as a pauper.

Sir R. PALMER and Mr CHISHOLM BATTEN, for the appellant, contended that this was a scandalous example of immodesty and misconduct on the part of the respondent, and so far from the evidence leading the Court to the conclusion that these parties were married persons, it ought to have led to the contrary conclusion. The Court below had refused to allow the appellant to give evidence contradicting that relied upon by the Court as proving the signature, which he could have done. He was out of the country at the time the evidence was taken, and so was not in a position to properly instruct his counsel and agent. The Court had also admitted a great deal of hearsay and incompetent evidence. The witnesses had been unworthy of credit, and their evidence loose and incredible. The whole evidence shows that, whatever the pursuer may have been before entering the service of the defender's mother, she had from an early period shown a total want of propriety and modesty in her conduct. The judgment of the Court below ought therefore to be reversed.

The respondent's counsel were not called upon.

At advising—

The LORD CHANCELLOR said that it was not necessary to hear any argument on the part of the respondent in this case. It was to be regretted that this young man, in his position in life, should have married somewhat imprudently, but the sole question for their Lordships was whether the fact of the marriage, as alleged by the appellant, had been established. The cause had been tried like any other cause; the parties had been allowed to lead evidence, were represented on both sides, and ample opportunity had been given to the defender to lead evidence contradictory of the case of the pursuer; but he chose, just at the time that his case came on, to go abroad. It was suggested at the bar that, in consequence of his absence abroad, his counsel had not had sufficient materials to defend him. But that was due to his own conduct. He had opportunity given him if he had availed himself of it, and he did not apply for leave to lead further evidence till after judgment was given against him. It would be impossible to allow parties, who had had opportunities of defending themselves, to come forward after the decision of the case and add to the evidence. It was suggested that the House might now give him a further opportunity; but there was nothing to justify that application except the point as to the handwriting of the declaration written in the Bible referred to in the case. Now, the signature of the pursuer to that document had, it was true, not been distinctly proved in evidence, but the witnesses called by her could have proved it, and the defender's counsel did not think fit to cross-examine those witnesses. There was ample evidence that the pursuer had always kept the declaration as an authentic document, and shown it to her fellow-servant, to justify her intercourse with the defender. If, then, the handwriting of the document be treated as genuine, it was clear that the document amounted to a mutual declaration of present marriage. Even if the signature of the pursuer be taken as not proved, still it was, as far as he (the Lord Chancellor) was aware, not necessary by the law of Scotland that her signature should be put to such a document. She kept the document in her possession, and acted upon it. Her friends, knowing the circumstances, recognised her as married to the defender; and all the facts proved were quite consistent with the pursuer's case. The judgment of the Court below was therefore right, and must be affirmed. As the appellant had been allowed to appear as a pauper, it was perhaps not competent for their Lordships to dismiss the appeal with costs.

LORD COLONSAY—I entirely concur. The first point was that the appellant should be allowed to

add to the evidence, but he had ample opportunity of leading evidence before the Lord Ordinary gave his judgment, and never applied for leave until after that judgment. The evidence in the case is quite conclusive in favour of the pursuer. She kept this document, which declared the marriage, in her own possession, and even though she had not herself signed it, it might well be deemed a declaration made by both of the parties. That being so, the declaration was clearly evidence of a marriage *de præsenti*, and the judgment of the Court below is right.

Lord Cairns concurred.

Lord Chancellor—With regard to the costs, the House will not draw up the order at once, so as to allow of any application by the appellant, but probably the effect of the judgment of the House will be to make the husband liable for the wife's costs in any event.

Judgment affirmed.

Friday, July 12

CHAPMAN *v.* COUSTON, THOMSON, & CO.

(*Vide ante*, vol. viii, p. 415.)

Sale—Sample—Timeous Rejection.

Circumstances in which it was *held* that timeous rejection as not conform to sample of goods sold had not been made. Judgment of Court of Session affirmed.

The circumstances of this case and the decision of the Court below will be found reported *ante*, vol. viii, p. 415 *et seq.*

Against the judgment holding them liable for want of timeous rejection of the wines, the defenders appealed. The discussion was limited to two particular lots of the wine sold, and to the question of timeous rejection.

Mr Manisty, Q.C., and Mr J. C. Smith, for the appellants.

Lord Advocate and Solicitor-General for the respondent, were not called on.

At delivering judgment—

Lord Chancellor—(After minutely reviewing the facts of the case and the correspondence which had taken place between the parties)—There can be no doubt that the Court below have come to a proper decision in this matter. The question related to two lots of wine bought by the defenders at a sale in Edinburgh, which were not conform to sample, there being four or five other lots bought as to which no question of quality has arisen. Both parties acted *bona fide*, but there appears to have been some unfortunate misapprehension between them as to the law applicable to the case. The law of Scotland is this:—It is not competent for a person receiving articles he has purchased, not conform to description of the sample, to retain the goods, and at the same time to raise any question about the payment of the price. There is only one of two courses open to him—either that of retaining them and paying the price, subject to any right or claim he may have as to any difference between the price and the actual value; or of notifying immediately, or within reasonable time, to the person from whom he purchased the articles that he rejects them, and that the contract is at an end between him and the vendor, and that the articles, if not removed, will be held at the risk of the vendor. Having regard to the nature of the article, I am disposed to think that timeous objection was made to the quality of the lots in question, but, on the other hand, I have failed to discover in the negotiations and correspondence which have taken place that any distinct intimation was given by the purchasers that the goods were rejected, and that they were held at the vendor's risk. The goods objected to were retained, not returned, and the price was refused. No distinct offer was made to return the goods even on the 15th June, the day after the action was commenced, and it was then too late. The defenders had no *locus pœnitentiæ*. The interlocutor complained of must therefore be affirmed, and the appeal dismissed, with costs.

Lords Chelmsford, Colonsay, and Cairns concurred.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defenders—Leburn, Henderson, & Wilson, S.S.C.

SMITH CUNINGHAME *v.* ANSTRUTHER'S TRUSTEES.

MERCER *v.* ANSTRUTHER'S TRUSTEES.

(*Ante*, p. 431.)

The following judgments were pronounced:—

"*9th August* 1872.—After hearing Counsel, as well on Tuesday the 12th as Thursday the 14th, Friday the 15th, and Monday the 18th days of March last, upon the original petition and appeal of Mrs Maria Anstruther or Smith Cuninghame, spouse of William Cathcart Smith Cuninghame of Caprington, with consent of the said William Cathcart Smith Cuninghame, as administrator-in-law for his said wife, and for his own right and interest, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage, dated 24th and 26th March 1828, the fee of the sum of £4000 was vested in James Anstruther, and that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs Marian Anstruther was vested in her, and in so far as the same does not find that under the said contract of marriage the children of the marriage became respectively absolutely entitled to a share of the provision of £4000 by Mr Anstruther, and to a share of the provision therein contained of the whole means and estate of Mrs Anstruther, subject only to a power of apportionment among them by Mr and Mrs Anstruther, or the survivor of them; and also of an interlocutor of the said Lords of Session there, of the First Division, and three Judges of the Second Division, of the 11th (signed 14th) of July 1870, and praying their Lordships to reverse, vary, or alter the said interlocutors to the extent complained of, or to give the petitioners such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the joint and several answer of Mrs Anabella Agnes Anderson or Anstruther, widow of the deceased James Anstruther, Writer to the Signet, sometime residing at Treesbank, in