ARGUMENT

OF

WILLIAM F. HERRIN

IN THE CASE OF

SHARON

VS.

SHARON

UPON THE DEFENDANT'S APPEAL FROM THE ORDER REFUSING A NEW TRIAL.

DELIVERED IN THE

Supreme Court of California,

MAY 3, 1889.

ARGUMENT.

22 Pac Rep 26

Mr. Herrin.—May it Please the Court:

This appeal is from an order refusing the defendant a new trial. The action was commenced on November 1st, 1883, for the purpose of procuring a judgment declaring that a marriage existed between the respondent and William Sharon, for a divorce and a division of community property.

The complaint alleges that the marriage took place on August 25th, 1880; that it was a marriage by mutual agreement, followed by living and cohabiting as husband and wife, and that the marriage being unsolemnized, the parties had jointly made a declaration of marriage in writing, signed by each of them, substantially in the form required by Section 75 of the Civil Code of California.

The answer denies the fact of marriage, the making of a written declaration, and the living and cohabitation as husband and wife, and avers that the alleged written declaration is a forgery.

As grounds for divorce, the complaint alleged desertion, and also different acts of adultery. The charges of adultery were withdrawn at the trial, and there was no contest upon any issue, other than the existence of the marriage, and the making of the alleged declaration of marriage.

The Court below decided in favor of the plaintiff, finding that a marriage existed, and awarded a divorce on the ground of desertion.

The issues determined at the trial concerned two propositions: 1. Did the parties ever consent to marry? and, 2. Was such consent followed by a

mutual assumption of marital rights, duties or obligations ? The findings of the Court affirmed the consent to marry, and, as to the mutual assumption, state that after such consent the parties commenced living and cohabiting together, in the way usual with married people, although their cohabitation was kept secret, and was continued for the space of more than one year, and down to the 25th day of November, 1881, and during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties and obligations.

The defendant moved for a new trial upon a statement of the case and upon affidavits. By this statement the defendant attacks the findings as to consent and as to mutual assumption upon the ground that they are not justified by the evidence ; and as further grounds for a new trial the statement specifies that the decision of the Court is against law, and that certain errors were committed by the Court in the admission and exclusion of testimony, which errors were duly excepted to.

The Court refused a new trial, and the points relied upon for the reversal of this order are, as stated in our opening brief, as follows :

First. The evidence is wholly insufficient to sustain the Second Finding of consent to marriage, and that all the evidence establishes that the so-called marriage contract, which the Court below found constituted the consent, is a forgery.

Second. There is no evidence in the record to sustain the Third Finding that the parties lived or cohabited together, or that they ever mutually

assumed towards each other marital rights, duties or obligations.

Third. The Court committed error in admitting hearsay testimony as to the exhibition by respondent of the so-called marriage contract to different persons, in the absence of the defendant William Sharon, in or about the month of October, 1880.

Fourth. The Court erred in permitting improper and illegal cross-examination of the witness, Mrs. Samson, as to particular wrongful acts on her part, which had occurred more than thirteen years before the trial, and which were wholly incompetent, irrelevant and immaterial to prove or disprove any issue before the Court.

Fifth. The Court erred in striking out the whole of the evidence of the witness, F. A. Hornblower, as a privileged communication ; and

Sixth. The decision of the Court below is against law.

I will discuss these points in the order in which they are stated.

FIRST POINT.

The Court below found that the parties gave their consent to marry by the making of a writing, which is denominated throughout this case as the "Marriage Contract." This writing is set forth in full in the Second Finding of the Court, which finding is as follows :

"That on the 25th day of August, A. D. 1880, the plaintiff and defendant each signed a certain declaration of marriage in the words and figures following, to wit:

In the City and County of San Francisco, State of California, on

the 25th day of August, A. D. 1880, I, Sarah Althea Hill, of the City and County of San Francisco, State of California, age 27 years, do here, in the presence of Almighty God, take Senator William Sharon, of the State of Nevada, to be my lawful wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon of the State of Nevada.

SARAH ALTHEA HILL.

August 25th, 1880, San Francisco, Cal.

I agree not to make known the contents of this paper or its existence for two years, unless Mr. Sharon himself see fit to make it known.

S. A. HILL.

In the City and County of San Francisco, State of California, on the 25th day of August, A. D. 1880, I, Senator William Sharon, of the State of Nevada, age 60 years, do here, in the presence of Almighty God, take Sarah Althea Hill of the City and County of San Francisco, Cal., to be my lawful and wedded wife, do here acknowledge myself to be the husband of Sarah Althea Hill.

August 25th, 1880 WILLIAM SHARON—Nevada.

Which was the only written declaration, contract or agreement of marriage ever entered into between said parties, and at the time of signing the said declaration, plaintiff and defendant mutually agreed to take each other, as and henceforth to be to each other, husband and wife."

It is evident that this finding is wholly predicated upon the genuineness of the alleged " marriage contract," for the finding expressly states that this contract "was the *only* written declaration, contract or agreement of marriage ever entered into between said parties, and *at the time of signing* said declaration [not at any other time] plaintiff and defendant mutually agreed to take each other, as and henceforth to be to each other, husband and wife." In other words, the parties never agreed to marriage except by signing this contract, *and at the time of such signing*. This is the equivalent of saying that if the contract was not signed as found, the parties

never agreed or consented to marriage. The case thus turned in the Court below upon the issue as to the genuineness or forgery of the "marriage contract."

For the purpose of impeaching and overthrowing the Second Finding, that the "marriage contract" is genuine, and that the parties consented to marry thereby, we have introduced before this Court and filed with the Clerk a certified copy of the record of a decree of the Circuit Court of the United States, for the Ninth Circuit and District of California, in a cause in equity, in which William Sharon, the original defendant in the action at bar, was complainant, and the plaintiff in this action was defendant. Objections are made by respondent's counsel to this Court's considering the record from the Circuit Court, such objections being mainly based upon the ground that in presenting this record to this Court, we are calling upon it to exercise original and not appellant jurisdiction; that this Court is, of necessity, confined to a consideration of the record brought from the Court below. Undoubtedly the presentation of this record to this Court, for the purposes sought by the appellant, presents a new and novel question—one not heretofore presented to this Court for consideration, and one quite unusual in the other courts of this country. But we respectfully submit that in asking this Court to consider this record and give it the effect that we contend it should have, we are directly sustained by the decisions of the Supreme Court of the United States, and also by the Supreme Courts of Iowa and New Jersey.

It is perhaps the natural disposition of the minds of lawyers and judges long habituated to the ordinary modes of judicial proceeding, to object to that which on first impression, appears to be a departure from such procedure. But when a new procedure is invoked because of some anomalous case to which the ordinary rules of procedure cannot be applied without preventing the Court from administering substantial justice, the judicial and legal mind then recognizes a proposition of universal application, that there is no general rule to which there are no exceptions, and that for each exceptional or extraordinary case some new rule must be adopted—some departure must be allowed from the rules governing ordinary cases. And, accordingly, we find, in the decisions of the courts I have named, precedents for the practice we now invoke in the case at bar—a practice confessedly departing from the ordinary rules of procedure, because of the inadequacy of such rules to meet the exigencies of particular, extraordinary and exceptional cases, such as the case at bar must be admitted to be.

We seek to make a two-fold use of the decree of the Circuit Court upon this appeal; and with respect to the first of these uses, we insist that we are directly sustained by an early decision of this Court, which has never been overruled, qualified or doubted, so far as I have learned. The principle laid down by that decision is, that the comity which one Court owes to another of concurrent jurisdiction should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other.

Turning to the record of the Circuit Court produced here, we find that the decree entered by that Court in the cause of *William Sharon* vs. *Sarah Althea Hill* (the original parties to the action at bar) not only expressly adjudges that the "marriage contract" (a copy of which is set forth in the Second Finding of the Court below) is a forged and fraudulent instrument, and expressly cancels such instrument as a forgery, but that such decree contains a perpetual injunction against the respondent here, which injunction is in the following words:

> And it is further ordered, adjudged and decreed, that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent and her and their agents and attorneys, be, and they and each and all of them are hereby perpetually enjoined *from alleging the genuineness or the validity of said instrument, and from making any use of the same in evidence or otherwise* to support any right claimed under it, or making any claim, or setting up any right, interest or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property or right of any kind or nature, against said complainant, his heirs, executors, administrators or successors in interest.

It thus appears that the respondent stands specifically enjoined by the decree and injunction of a Court of competent jurisdiction from alleging the genuineness of the "marriage contract" in question, and "*from making any use of the same in evidence or otherwise.*" It cannot be questioned if the respondent relies in this Court upon the "marriage contract" to sustain the Second Finding of the Court below, that she, in so doing, *asserts its genuineness* and uses the same in *evidence*, and thus violates the decree and injunction of the United States Circuit Court. The cause is pending in this Court

for a hearing upon the evidence shown by the statement on motion for new trial. In the Court below at the trial the question upon the same evidence was, what decision shall be made? In that Court upon the motion for new trial and in this Court upon this appeal, the question was and is whether or not the decision made is justified by the evidence. To sustain the decision in her favor, the respondent must rely upon the evidence introduced in the Court below and brought here and exhibited to this Court by transcript of record.

We insist that we are entitled to have this Court regard and enforce the injunction of the Circuit Court; that it shall not permit the respondent here upon the hearing of this cause or in any proceeding before this Court, to violate such injunction; that this must be done without inquiring as to the facts upon which the Circuit Court granted that injunction, and without regard to the adjudication of fact included in the decree of the Circuit Court.

We further insist that in asking that this injunction be regarded by this Court and the parties before it, that we are not, properly speaking, introducing evidence or testimony, but that, on the contrary, we are only calling the Court's attention in a proper way and at a proper time, to the injunction of the Circuit Court, which controls the respondent in this Court and elsewhere, and that in doing this we are directly sustained, as I have said, by the authority of a former decision of this Court. That decision was made in the case of *Engels* vs. *Lubeck* (4 Cal., 32), where was considered the right of a Court to disregard an injunction from another

Court of concurrent jurisdiction directed to the party before it, and restraining such party from prosecuting his case in that Court. It was contended that because such an injunction operates upon the party, and not upon the Court, the Court had the right to disregard it, and that the remedy of the opposing party was by attachment for contempt in the Court issuing the injunction. Upon this point, the Supreme Court of California say :

"We prefer to lay down a different rule. The remedy suggested, for aught that we can see, may be fraught with difficulty, and involve the parties in needless expense. When a party obtains an injunction to restrain the prosecution of a suit, he acts upon the presumption that the process of the Court will be respected, and it may reasonably be supposed that he declines to make the necessary preparation for the trial of his case. This ought certainly to be considered a good reason even for granting a continuance. But we think that the propriety of the observance of the injunction by the Court to whose notice it is brought, may be properly placed upon higher grounds. The comity which one Court owes to another, of concurrent jurisdiction, should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other. The one should regard the party attempting to proceed in defiance of the authority of the other *as laboring under the same disability to ask for the action of the Court as if he was an alien enemy, or under the ban of a decree of outlawry at common law.* Such being the opinion we entertain upon this point, we cannot permit the judgment to stand."

The principle of this decision was expressly approved in the later case of *Uhfelder* vs. *Levy*, (9 Cal., 608.)

We also seek to make another use of the decree of the Circuit Court, which is, that this Court should receive such decree as a final and conclusive adjudication upon the issue as to the genuineness or falsity of the "marriage contract," as such issue is before this Court upon this appeal.

It is objected that this Court cannot consider the decree of the Circuit Court because it is confined in its action to a consideration of the record brought from the Court below, and must affirm the order appealed from, unless reversible error appears from such record. That this position is incorrect, we shall show by authority. But we first reply to this objection upon principle that the marriage contract is a part of the record brought from the Court below, and the issue as to its genuineness or falsity is to be tried by this Court ; that upon such issue the appellant here has the right to show that such contract has been as between himself and the respondent, conclusively and finally adjudicated to be a forgery by the decree of the United States Circuit Court, and that as the judgment below appears to be essentially based upon this "marriage contract," this Court is fully justified in reversing the order appealed from—thus vacating this judgment—upon this adjudication, whether the record from the Court below shows any reversible error or not. In one sense, this decree of the Federal Court is part of the record of this Court, because it has, in the eye of the law, written across the face of the original "marriage contract" the words, "*cancelled because a forgery,*" and this contract, when produced, in connection with the decree, exhibits the evidence of its falsity, and it is thus to be considered just as it would be if the decree had been executed by the actual cancellation of the document by the endorsement directed to be made upon it for that purpose. This original document is in legal effect a part of the record brought from the Court below. It was used

in evidence at the trial below, and the judgment appears to be predicated upon it, and if, when this document is inspected by this Court, it bears upon its face the evidence that it has been conclusively adjudicated to be a forgery, as between the parties to this record, it must be regarded by this Court as a forgery in disposing of the appeal at bar.

The rule invoked by us in favor of this Court considering and giving effect to the adjudication of the Federal Court, upon this appeal, is supported by authority. In *Poole* vs. *Seney*, (70 Iowa, 275), the judgment appealed from was based upon a decree in equity adjudging a chattel mortgage in question to be fraudulent and void. When the decree was used in evidence, no appeal from it had been taken, but subsequently an appeal was taken and the decree reversed, prior to the decision of the appeal from the judgment. The appellant insisted that although the record upon the appeal from the judgment showed no error, yet the judgment should be reversed, because the decree upon which it was based had been reversed, and that the Court, in order to properly exercise its appellate jurisdiction, should receive evidence of this reversal *outside of the record before the Court.* This view was sustained by the Court, which, in its opinion, says:

The determination of the equity case in this Court must be regarded as a final and conclusive determination that the mortgage is not invalid. This being so, what effect, if any, does such adjudication have in this action? It is certain that the judgment rendered in the District Court was right when it was rendered. It is equally certain that the plaintiffs have a judgment to which they are not now entitled. Is this Court powerless to correct the wrong, is the question to be determined. The District Court held as a matter of law, that there had been an adjudication which

estopped the defendant garnishee from showing that the mortgage was valid. This was a mistaken and erroneous conclusion. It is true, such an adjudication existed and was in force which could not be attacked collaterally, but which could be set aside or reversed on appeal. The judgment or adjudication existed in form only. *It was just as erroneous when introduced in evidence as it is now.* The decision of this Court relates back, and conclusively determines that, while there was in form an adjudication in the equity proceedings, *yet it was not valid and binding*, and that the plaintiffs had no legal right to such judgment when it was pleaded as an adjudication, and introduced in evidence in this action. We cannot think the judgment of the District Court in this case, although right when rendered, should now be enforced. To do so is contrary to the principles of justice, and no technical rule should be invoked to sanction such a palpable wrong. * * * The case at bar is anomalous, to which ordinary technical rules should not be applied for the purpose of preventing this Court from administering substantial justice. It is now clearly apparent that there has been no adjudication in the equity action which creates an estoppel in this Court, and, as the judgment in the District Court in this action has been directly attacked by this appeal, we hold that it is our power, and that it is our duty, to correct the palpable wrong which will ensue if the judgment in this action is affirmed.

So, we say in the case at bar, that it is now clearly apparent that the "marriage contract" is and was a forgery when it was used in evidence in the Court below, and as the order appealed from is directly attacked by this appeal because of such forgery, it is in the power of this Court, and is its duty, "to correct the palpable wrong which will ensue" if the order appealed from is affirmed.

Upon re-hearing in the above case, the Supreme Court of Iowa further considered its power to receive evidence outside of the record for the purpose of "*administering substantial justice,*" which could not be done if it confined its action to the record of the case before it. The Court says :

I. Counsel for the appellee insist that there is no evidence in

this record that the equity cause referred to in the foregoing opinion has been appealed or reversed, and that the Court made an unwarrantable assumption that such was the fact. Counsel, in their argument in this case, conceded that the equity cause had been appealed, and was pending in this Court, and our attention was called to that case. Our own records, of which we take notice, show that the case referred to has been reversed. In view of these admissions, we do not think that it can be justly said that the equity cause had not been appealed, and we are bound to know that it has been reversed.

II. It said that no such error is assigned or argued as will warrant the Court in reversing this case upon the ground stated in the former opinion. It is assigned as error that the Court erred in rendering judgment against the garnishee and this assignment, is argued by counsel. It is true, the same reasons adopted by the Court were not urged, and could not be because the equity cause had not then been reversed. If it be true, as stated in the foregoing opinion, that the decree in the equity cause was just as erroneous when it was introduced in evidence as now, then there was a sufficient assignment of errors.

III. We have but little to add in support of the opinion, but desire to say that the constitution gives this Court jurisdiction and the power to "exercise a supervisory control over all inferior judicial tribunals throughout the State." (Article 5 and 4, Const.) We concede that ordinarily such control must be exercised in strict accord with the forms and rules of procedure which obtain in actions at law or in equity.

In the former, this Court ordinarily has the power only to correct the errors of the inferior tribunal. But, in view of the foregoing provision of the constitution, we do not believe that in anomalous and exceptional cases we are bound hand and foot, and rendered powerless to redress palpable injustice, which has been caused by no fault of a litigant, but by the erroneous action of a Court provided by the State as a means to prevent injustice and wrong. There is no general rule, we think, to which there are no exceptions, and for each exceptional case some rule must be adopted. Especially is this so when otherwise injustice will occur. A majority of the Court adhere to the former opinion, and the case accordingly stands reversed.

Mr. Justice Thornton.—What order did the Iowa Supreme Court make in that case?

Mr. Herrin.—They made an order reversing the

judgment. Now, some criticism is made upon this case as authority by opposing counsel because the Constitution of Iowa gave its Supreme Court express power to "exercise a supervisory control over all inferior judicial tribunals throughout the State." But it is obvious that this grant of power is no more than our Supreme Court has by necessary implication from its grant of appellate jurisdiction; that the provision in question was not intended to give original jurisdiction, but only plenary appellate jurisdiction, and that this is the view held by the Supreme Court of Iowa appears from the opinions I have read, the first of which makes no reference to the constitutional provision in question, and the second opinion on rehearing, which says that a majority of the Court *adhered to the first opinion.*

In *Waldron* vs. *Ely*, (1 Pen. N. J., 79), after judgment against a constable for neglect of duty on an execution put into his hands, the judgment on which the execution was issued was reversed. The judgment against the constable was reversed, although upon its own record it should have been affirmed. The Court say :

> It is certain that the Justice could not take notice of any error in the first judgment while the same remained unreversed. But I take it to be a settled principle that, if a man recover *upon a* judgment, and that judgment be afterwards reversed, the second judgment shall be reversed also. And this seems to be a principle founded in plain common sense, and in *the laws of immutable justice*. That the judgment here is against the constable for neglect in carrying the first judgment into execution, and not against Prall, the defendant in that action, does not seem to me substantially to vary the case, for still that judgment is the very essence of the cause. That judgment having been reversed, in my opinion, let this be also.

This opinion was by Kirkpatrick, C. J. Russell, J., concurring. The third Justice, Pennington, while of the opinion that the Court should give relief because of the reversal of the first judgment, thought it should be by way of stay of proceedings instead of reversal. The rule of *Waldron* vs. *Ely* was followed in *Stillman* vs. *Ackley*, (1 Pen. N. J., 165), and *Anderson* vs. *Radley*, (3 Pen. N. J., 1034).

The Supreme Court of the United States held in *Dakota County* vs. *Glidden*, (113 U. S., 226), that that Court "is compelled, as all Courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal," and the Court accordingly received and considered record and other evidence showing that pending the writ of error before it, there had been a compromise and settlement of the demand in suit, thus making it a fruitless proceeding to examine the errors in the record and reverse or affirm the judgment therefor. The Court says :

> It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the Court must be that, not found in the transcript of the original case, *because it occurred since that record was made up.*
>
> To refuse to receive appropriate evidence of such facts for that reason is to deliver up the Court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal the means of inflicting gross injustice.

Other cases not infrequently occur where an Appellate Court will act on evidence *dehors* the record, for the purpose of administering substantial justice, though the record considered by itself may disclose no error. Take the case of an appeal from a judgment based on a statute, which statute is repealed

pending the appeal. The Court on learning that fact gives full effect to the repeal. In *U. S.* vs. *Schooner Peggy*, (1 Cranch, 103), the Supreme Court of the United States says:

> It is in the general true that the province of an Appellate Court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. If the law be constitutional, * * * I know of no Court which can contest its obligation. * * * In such a case the Court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Though the Court takes judicial notice of the repeal of the statute and acts upon it, such knowledge of the Court is but one kind of "judicial evidence," to procure which, no witnesses are required.

These authorities disprove the proposition that an Appellate Court must affirm the order or judgment appealed from if the record from the Court below shows no error; on the contrary, these authorities are to the effect that an Appellate Court will consider record evidence of any fact occurring after the judgment or order appealed from which shows that it is palpably wrong, and if affirmed, would operate gross injustice. And this doctrine is in accord with the highest reason. If the evidence upon which a judgment is obtained, though apparently valid and sufficient to support the judgment when entered, is shown by indisputable record evidence of a subsequent *paramount* adjudication between the parties, to be false and fraudulent, no sound reason can be given why the Appellate Court should not receive

and consider such evidence, and thus administer substantial justice, instead of delivering itself up "as a blind instrument for the perpetration of fraud."

It has been expressly decided by the United States Circuit Court in the cases of *Sharon* vs. *Terry* and *Newlands* vs. *Terry*, reported in 36 Fed. Rep., 337, that the judgment of the Court below being essentially based upon the "marriage contract" is controlled by and subordinate to the decree of the Circuit Court cancelling such "contract" as a forgery, because such decree was rendered in the exercise of a prior, and therefore paramount jurisdiction. If this position be correct, it necessarily follows that it would be a vain and fruitless proceeding as well as a denial of justice, for this Court to refuse to give the Federal decree its full force and effect upon the controlling issue of fact as to the genuineness or falsity of the "marriage contract." It appears that this document has been cancelled by the decree of a Court of competent jurisdiction, and if that decree is paramount and superior in force to the finding and judgment below, this Court should accept this superior adjudication, and reverse the order refusing a new trial, because the finding that the "marriage contract" was genuine, cannot be sustained.

I shall not attempt any extended oral argument on the proposition that the decree of the Federal Court is paramount and controlling in this case. That proposition is amply sustained by the opinion of the judges of the Federal Court, reported in 36 Federal Reporter, 337, pamphlet copies of which opinion we file with our briefs in this case. Besides, we have in our printed brief presented much

additional reasoning and authority to sustain the proposition in question. I will notice, however, some of the objections urged against us by the respondent upon this question.

It is strenuously insisted that the Circuit Court had no jurisdiction over the case of *Sharon* vs. *Hill*, and that its decree is a nullity. We submit that the views advanced by counsel upon this subject are fully answered in the opinion of the Circuit Court, and also in our printed briefs, which are before this Court for its consideration. It is therefore unnecessary for me to do more than to state as briefly as possible the principles which maintain the jurisdiction of the Circuit Court.

The jurisdiction of equity to compel the surrender and cancellation of a forged instrument is well established. The mere right of a defense at law when it may suit the holder of such an instrument to bring suit, cannot be considered an adequate remedy. One who would forge an instrument, would not hesitate to resort to other forgeries and fabrications to sustain its pretended validity; hence it would be impossible to know or anticipate what evidence would be necessary to meet the issue of forgery. Any attempt to perpetuate testimony would necessarily be incomplete and unsatisfactory, and would afford no adequate protection. "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose." (Story Eq. Jur., Sec. 700). And the Supreme Court of Indiana, in *Hardy* vs. *Brier*, (91 Ind., 93), has well said, that—

The enjoyment of a man's possession ought not to be poisoned

nor his credit impaired by the probability or even possibility that at some future period the payment of a forged note may, under the forms of law, be enforced against his estate. Remedial justice is active rather than passive. It may be doubtful whether the remedy is adequate in any case which cannot be used until the wrongdoer, or one claiming under him, sees proper to put the machinery of the law in motion to enforce his pretended right.

And in *Cornish* vs. *Bryan*, (2 Stock, 151), the Court of Chancery of New Jersey, upon the equitable jurisdiction of cancellation, says :

The mere fact that the grounds upon which the jurisdiction of this Court is invoked may avail the party in an action at law, and constitute a valid defence by plea, or otherwise, is not a sound objection to the Court's exercising this power. If a party holds an obligation which ought to be cancelled, and persists in holding it for the purpose of harassing the obligor with a suit, *he ought not to be permitted to select his own place, time and circumstances for such prosecution.*

This language applies with peculiar force to the case of *Sharon* vs. *Hill*. The contract there in question was not subject to the operation of the Statute of Limitations, as the respondent might have waited until the death of William Sharon and then asserted her claim as the widow of the deceased. At this time his heirs would not only be deprived of the testimony of William Sharon, but most probably of other necessary evidence to defeat such claim. No Court, other than a Court of Equity, could afford relief under the circumstances of the case.

Opposing counsel contend that the "marriage contract" could not of itself create or give any rights of property, and that its only possible value was that of being used as evidence, and that such value cannot be pecuniarily estimated. It might be said of any written contract that its only value was that of being used as evidence. Whenever a party bound

by such a contract, refuses to perform its conditions, the one aggrieved must seek his remedy in some court, and there use the contract as evidence of his rights. To deprive him, in such case, of the right to use the contract as evidence in the action to enforce it, is to take away its sole value to the plaintiff so far as property rights are concerned ; yet it does not follow from this fact that a suit, to cancel as a forgery, a promissory note or a deed, would not involve a controversy of pecuniary value.

The office and jurisdiction of Courts of Equity, unless enlarged by express statute, are limited to the protection of property rights, yet in view of this principle, the equitable jurisdiction to cancel forged writings is well established, and it must follow that suits to cancel such writings, involve property rights, which, of course, are capable of pecuniary estimation. The jurisdiction of Courts of Equity and of the Courts of the United States to entertain bills of discovery is well established, and it has never been suggested, in these cases, that they did not involve a controversy of pecuniary value, yet it is obvious that such suits solely concern the discovery and production of writings to be used as evidence.

But, it is argued by opposing counsel, that the marriage contract, in and of itself, was incapable of proving the marriage relation ; that, if genuine, it would prove only one of the *essential* elements of marriage, viz: *consent.* If this argument has any force, it results in the proposition that the equitable jurisdiction of cancellation does not extend to any forged instrument, which, if genuine, would not *in*

and of itself, and without any other evidence, prove or disprove a right of property ; but I submit that no such limitation of the equitable jurisdiction of cancellation exists ; upon the contrary, that such jurisdiction, as ordinarily exercised by Courts of Equity, extends to the cases provided for in Section 3412 of our Civil Code, as follows :

A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it was void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or cancelled.

But it is immaterial whether or not the old equity jurisdiction was as broad as that conferred upon the courts in California by the above statute, for it is well settled that an enlargement of equitable rights by the State Legislature may be administered and the appropriate relief given by the courts of the United States, within such State, as well as by the courts of that State. (*Clark* vs. *Smith*, 13 Peters, 195, 202–4. *Broderick's Will*, 21 Wall, 504, 519–520. *Holland* vs. *Challen*, 110 U. S., 16–26.) The objection that a forged instrument cannot be cancelled by a Court of Equity, unless it would constitute by itself, if genuine, *complete proof* of a property right, is obviously unsound. Suppose, for example, a contract was forged which contained an obligation to deliver property or pay money upon the happening of some contingency specified therein. In order to recover upon such a contract, the plaintiff must supplement the proof afforded by the contract, with other evidence showing that the contingency specified has occurred upon which the pecuniary obligation was to become complete and enforceable. Could it be maintained that such a

contract could not be cancelled as a forgery by a Court of Equity ? I think no respectable authority can be found in support of such a doctrine. It can not be that the circumstance that other facts must appear, in order to substantiate the claim that a forged instrument is *effective*, can destroy the jurisdiction of equity to annul the writing, *especially if those facts are insisted upon as actually existing* by the party against whom the equitable relief of cancellation is sought. To deny jurisdiction to a Court of Equity upon that ground would be to " suffer a wrong without a remedy."

Counsel criticise the opinion of Mr. Justice Field upon this point by saying that his opinion, as originally read in Court and published, proceeded upon the assumption that the "marriage contract" in question, if genuine, would establish a valid marriage from its date, and it is said that Mr. Justice Field corrected or changed his opinion by recognizing the proposition that the contract alone would not constitute marriage, but must be followed for that purpose by solemnization, or by the mutual assumption of marital rights, duties and obligations. In view of the obvious and elementary principles which I have just stated, I submit that it is a trifling criticism of Mr. Justice Field's opinion to say that it is based upon the assumption that the " marriage contract " would of itself, if genuine, establish a marriage from its date. Whether a marriage could be established by the contract alone, or whether other evidence must supplement the contract in order to make complete proof of marriage, were questions not before the Court, or con-

sidered, and were wholly immaterial to the proposition decided by Mr. Justice Field that the Circuit Court had jurisdiction to cancel the "marriage contract" as a forgery.

Counsel object to the jurisdiction of the Circuit Court that no matter of pecuniary value was involved in *Sharon* vs. *Hill*. But it is well settled by the authorities, which we have cited in our printed briefs, that in order that there shall be matter of pecuniary value in dispute, it is not necessary that the judgment or decree sought for should directly operate to take from one party property and give it to the other. It is only necessary that the judgment or decree should directly affect and determine rights of property. The decisions present many illustrations of this principle. For example; it has been repeatedly held by the Courts that where a suit or proceeding is brought to determine the right to an office to which a salary is attached, the amount of such salary during the term of office in question, fixes the value of the matter in dispute for the purpose of jurisdiction, and this is so, although it is evident that no judgment which can properly be entered in such suit or proceeding would expressly refer to or concern the salary of the office in question, but only the title to such office.

It has also been frequently held in suits to abate nuisances that the removal of the obstruction is the matter in controversy, and the value of the object or the right to maintain the object which creates the nuisance, must govern. So it is held by the Courts of the United States that suits to quiet title to real property, or to remove a cloud therefrom,

by which its use and enjoyment by the owner are impaired, is brought within the jurisdiction of the Court under the statute by the value of the property affected.

It certainly cannot be successfully contended that the marriage contract in question, if genuine, was not of far greater value to the respondent than the sum of $500. It would constitute, as a genuine paper, the most important, if not the indispensable evidence of her alleged secret, unsolemnized marriage with Mr. Sharon. Upon that paper, as it is, the respondent has in fact obtained judgments of the Court below, declaring her to be the wife of William Sharon, granting her a divorce, and awarding her one-half of the community property of such marriage, and over $5,000 as alimony *pendente lite*. If, therefore, by means of this writing, treated as genuine, the respondent has been able to establish herself to be the wife of William Sharon, and to obtain a judgment against him awarding her more than $5,000 as temporary alimony, how can it be said by her that a suit brought for the express purpose of cancelling such writing as a forgery and for a perpetual injunction against its use as evidence or the assertion of any rights of property under or by virtue of it, does not involve matter in dispute exceeding the sum or value of $500.

All the property rights which the respondent could assert, under or by virtue of this "marriage contract," were involved in the suit to annul such contract, just as directly and to the same extent as a suit to determine the right to an office is held to involve the salary attached to such office, for the purpose of determining the jurisdiction of the Court.

The question of the jurisdiction of the Circuit Court must of course be determined by reference to the record of the cause before it. An examination of the pleadings in *Sharon* vs. *Hill* clearly shows that the "marriage contract" in issue, was in fact the indispensable evidence of the alleged marriage, and that rights of property were directly involved in that suit.

The bill avers that the complainant is possessed of a large fortune in real and personal property, and is largely engaged in business enterprises and ventures, and has a large business and social connection; that the respondent falsely and fraudulently claims to be his wife, and falsely asserts the making of a joint declaration of such marriage in writing (a copy of which the bill sets forth) which is in her possession and which is charged to be a forgery; that such false claims of marriage were made by respondent for the purpose of obtaining credit by the use of complainant's name with merchants and others, *and thereby compelling complainant to maintain her;* also, for the purpose of harassing the complainant into the payment of large sums of money to quiet her said false pretensions; and for the purpose of harassing and injuring the complainant's estate and his true heirs at law and next of kin in the event of his death, and of compelling his heirs at law and legatees to pay her large sums of money to quiet her said false and fraudulent claims and pretensions.

If there could be any doubt as to the bill showing a case within the equitable jurisdiction of the Circuit Court, such doubt would be removed when we consider the allegations made by the respondent in

her plea and in her answer to that bill. In her plea in abatement she says, that on November 1, 1883, (which was subsequent to the commencement of the suit in the Circuit Court and service of process upon her), she had brought an action against the plaintiff in the Court below; that her complaint in that action "alleged in substance, that the plaintiff and defendant were husband and wife, *and that they had become such* BY VIRTUE OF A CERTAIN DECLARATION OF MARRIAGE, *dated August 25th, 1880, which said declaration of marriage was signed and executed by said plaintiff and defendant* in substantial compliance with Section 75 of the Civil Code of the State of California."

In her answer to the bill, the defendant denies that her claims are false. She does not deny that she makes them. She "denies and says it is not true that said claims were made for any other purpose *but that of obtaining the recognition and* SUPPORT *justly due to this defendant as the wife of said plaintiff.*" The answer and supplemental answer further allege that she had commenced her action for divorce, which had been tried, and a decision reached, declaring this writing to be genuine, and the parties to be husband and wife ; and that the plaintiff was entitled to a divorce, *and to a division of the common property of plaintiff and defendant.* Taking the bill in connection with the plea and answer of the respondent, it appears that she asserted the genuineness of the declaration in question ; that she claimed to be the wife of complainant *by virtue of that declaration ;* that she made such claim for the purpose of obtaining the recognition and *support* due to her as

the wife of William Sharon ; that in order to enforce her rights as such wife, she had commenced her action for divorce in the Court below, and had prosecuted that action to judgment, which granted her a divorce, and awarded her one-half of the community property of the alleged marriage.

It thus clearly appearing that rights of property were involved, it follows that this Court cannot hold the Circuit Court to be without jurisdiction of *Sharon* vs. *Hill*, for if that Court could have had jurisdiction of that cause *upon any state of facts consistent with the record*, the decree is to be held valid for all purposes until reversed or vacated upon appeal. This Court cannot go into the question of jurisdiction of the Circuit Court without inquiring into the facts before that Court, an inquiry which the Circuit Court made for itself, and which this Court, and no other Court, can review collaterally.

Where a Court has jurisdiction of cases *ejusdem generis*, its judgment in any case is not merely void, because its invalidity cannot appear *without an inquiry into the facts;* an inquiry which the court itself must be presumed to have made, and which will not therefore be permitted to be reviewed collaterally. The exercise of jurisdiction implies a previous ascertainment of the necessary jurisdictional facts, and such implied decision cannot be collaterally inquired into.

While the United States Courts are Courts of limited jurisdiction, they are not on that account " inferior Courts" in the technical sense of those words. If the facts giving such Courts jurisdiction, such as diverse citizenship or value of matter in dispute, are

not shown by the record, the judgment or decree may be reversed for that cause upon writ of error or appeal, but until so reversed, it is conclusive as *res adjudicata.*

In *Ex Parte Tobias Watkins*, (3 Peters, 206), Chief Justice Marshall, delivering the opinion of the Court, says :

> It is universally understood that the judgments of the Courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and this apparent want of jurisdiction can avail the party only on a writ of error.

And it is accordingly settled by the decisions of the Supreme Court of the United States, that, although the facts showing the jurisdiction of the United States Circuit Court may not appear upon the record, while this may be ground for reversing a judgment or decree upon direct appeal, yet the judgment or decree is binding upon all the world, and cannot be attacked collaterally for such want of apparent jurisdiction.

If there could be any doubt about the jurisdiction of the Circuit Court, which we insist there is not, it would not follow that this Court could or should hold that the Circuit Court was without jurisdiction. It certainly is plain that there is no apparent want of jurisdiction on the part of the Circuit Court. Opposing counsel have entirely failed in showing that the decree of the Circuit Court is void on its face, because of palpable want of jurisdiction. It follows, therefore, that in order to show a want of jurisdiction, this Court must re-examine the facts involved in *Sharon* vs. *Hill*, which were held by the Circuit Court to give it jurisdiction over the cause, or else this Court must reject the construction of the

United States Statutes, adopted by the Circuit Court in holding that it had jurisdiction. But it is well settled that a State Court will neither re-examine the jurisdictional facts nor review the decisions of the Federal Courts in construing the Federal Statutes giving them jurisdiction. On the contrary, it is uniformly settled by the decisions of the Supreme Court of the United States, *that where a Federal Court upon the direct question being presented to it, decides in favor of its own jurisdiction over the cause before it, a State Court cannot, in a subsequent action between the same parties, review that decision or hold to the contrary or proceed in disregard and defiance of the Federal Court, which is seeking to enforce its own judgment or decree entered in the cause over which it has thus maintained its jurisdiction.* As the Supreme Court of the United States has said, in considering this subject, it would be impossible for the Courts of the United States to maintain their authority, if the State Courts could review and set aside their judgments and decrees for alleged want of jurisdiction, for no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another.

The principle upon which we rely as giving the decree of the Circuit Court paramount and controlling force in the controversy at bar, is the familiar and well settled doctrine as announced and followed in many cases, *that where the jurisdiction of a Court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or*

taken away by proceedings inan other Court. It is obvious that where different Courts have concurrent jurisdiction to determine the same facts between the same parties, that some rule must be adopted in cases of conflicting judgments to determine which judgment shall control the parties, for it cannot be that two conflicting judgments can both be enforced. On the contrary, as Mr. Justice Field in his opinion in the Circuit Court, says :

> Where two judgments relating to the same subject are irreconcilable, both cannot be enforced. One or the other must give way; and the only reasonable test by which the superiority of one over the other is to be determined is that which is expressed in the authorities cited, that the Court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired possession of the subject, it cannot be rightly ousted by subsequent proceedings in another Court having no supervising or appellate authority. If the time of the rendition of the judgment independently of the commencement of the suit were to be the test, the superiority of judgment, as counsel well observe, would depend on mere accident, or circumstances beyond the power of the Court or parties, as one Court may have a large calendar and be blocked up with business, creating great delay in the disposition of causes, while the other Court may have few causes, and those of minor importance, and thus be enabled to speedily dispose of them. It would give the latter Court pre-eminence, because it is enabled from paucity of cases to dispose of its calendar at an earlier day, and might, as suggested, tend to an unseemly scramble of litigants to speed cases in the respective Courts of their preference.

While opposing counsel do not deny the general proposition that priority of jurisdiction controls, yet they insist that it is inapplicable to the controversy at bar, because, as they say, "The subjects matter of the two suits, and the relief sought in them respectively were not identical and were not inclusive." In other words, it is insisted that the Circuit Court had no jurisdiction to grant a divorce; that the

suit in the State Court was a suit for divorce, and involved the question of marriage or no marriage—a question relating to the personal status of the parties—a question over which counsel erroneously assume the Circuit Court has no jurisdiction; that for these reasons the principle of priority of jurisdiction is inapplicable. But I confidently submit that counsel are in error in this position; that it is established by the authorities cited in our briefs that the rule of priority of jurisdiction is applicable to all cases involving *the same material issue or issues*, although the nature of the actions, and the relief demanded may be different, and although one action may involve matter or issues not included in the other. That the exception sought to be made by counsel does not exist, is shown by the true statement of this rule, which is that: *Where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another Court.* (*Peck* vs. *Jenness*, 7 How., 625. *Orton* vs. *Smith*, 18 How., 266. *Mallet* vs. *Dexter*, 1 Curt., 179.)

Let it be conceded that the Circuit Court could not entertain an action for divorce—that the State Court had exclusive jurisdiction over that subject. This cannot affect the jurisdiction of the Circuit Court to cancel the "marriage contract" on the ground of its forgery. The jurisdiction to cancel a forged writing is one thing; the jurisdiction to grant a divorce is another and different thing.

It has been decided in many cases cited in our brief, that where an adjudication is made upon a

particular matter in issue, such adjudication will bind the parties in a second action upon a different cause of action or demand in which *the same issue* is involved.

In the controversy at bar, the issue as to the forgery of the "marriage contract" was the *controlling* issue in both Courts, and the fact that the subject matter of the two suits, and the relief sought in them respectively, were not co-extensive, cannot affect the question. In *Flannagin* vs. *Thompson*, (4 Hughes, 421), the Court says:

> It is error to suppose that, because the two suits concern different subject matters, the first cannot be conclusive of the second. On the contrary, the Supreme Court [of the United States] has repeatedly held that, notwithstanding the two suits have proceeded upon different causes of action, if in the first *the same matter of fact* was put in issue between the same parties, and was *necessary ground of recovery*, it is a final adjudication of that fact, and is an absolute estoppel in the second suit.

And it is accordingly held by other Courts, that —

> The principle of the rule as to *res adjudicata*, has no reference to the *form* or the *object* of the litigation in which the particular fact is determined, which is thenceforth to be deemed established as between the parties to the dispute. (*Matter of Roberts*, 59 How. Pr., 143; *Betts* vs. *Starr*, 5 Conn., 550; *Barker* vs. *Cleveland*, 19 Mich., 230, 235; *Castle* vs. *Noyes*, 14 N. Y., 329, 331.)

Nor does the fact that the jurisdiction of the State and of the Federal Courts are not co-extensive, furnish any reason why the judgment of the Federal Court upon a particular issue or fact before it should not bind the parties as to the same issue or fact in the State Court.

The jurisdiction of Justices' Courts and Superior Courts are exclusive of each other, and yet a Justice's judgment, rendered upon the same question of fact, is conclusive when presented in the higher Court.

This is held in the cases of *Mitchell* vs. *Hawley*, (4 Denio, 416) and *Doty* vs. *Brown*, (4 N. Y., 73–4). As was said upon this subject by the Supreme Court of Connecticut in *Bell* vs. *Raymond* (18 Conn., 100), the question is not as to the character of the Court *"but as to the effect of its proceedings."*

The jurisdiction of the County Court of San Francisco was *exclusive* over appeals from Justices' Courts in cases of forcible entry, yet the judgment of the Superior Court of that city, in a common law action of *assumpsit* for rent, was, in *Love* vs. *Waltz*, (7 Cal., 250–2), held conclusive, *as to the facts therein adjudicated*, upon the trial of such an appeal in the County Court.

It is well settled, by the cases cited in our briefs, that the judgment of *any Court of competent jurisdiction* upon any question of fact, directly involved in a suit before it, is conclusive *as to that fact in any other Court* between the same parties, *without reference to the nature of the jurisdiction of the respective Courts or the object of the second suit.**

Accordingly it is said by the Supreme Court of Pennsylvania, in *McDonald* vs. *Simcox*, (98 Pa. St., 623), that "the judgment of every Court pronounced on a subject within its jurisdiction is conclusive and binding *on all other Courts*, except those only before which it comes by appeal, *certiorari* or writ of error."

Any Court has jurisdiction to determine, and that conclusively, any fact or facts in issue in a cause over which it has jurisdiction. But one Court may

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* *Brown* vs. *Mayor*, 66 N. Y., 390; *Demarest* vs. *Darg*, 32 N. Y., 290; *White* vs. *Coatsworth*, 6 N. Y., 140, 143; *Embury* vs. *Conner*, 3 N. Y., 522–3; *Gardner* vs. *Buckbee*, 3 Cowen, 120, 125.

have exclusive jurisdiction to give particular relief upon such fact or facts, either alone or in connection with other facts. Exclusive jurisdiction is therefore exclusive *only as to relief*, and not as to the determination of facts. Exclusive jurisdiction to grant certain relief does not give exclusive jurisdiction to determine the fact or facts, constituting the grounds of such relief. Such fact or facts may come in issue in other causes over which other Courts have jurisdiction. For example, while the Circuit Courts of the United States have not assumed the jurisdiction to grant divorces, yet they may determine and have determined, in causes before them, the question as to whether or not a marriage existed.*

Can it be doubted that an adjudication by the United States Circuit Court in a cause before it that no marriage exists, made before the commencement of a divorce suit between the same parties in the State Court, would be an effectual bar to the divorce suit? The question of *res adjudicata* in such a case is not affected by the fact that the Circuit Court could not grant a divorce, or that the State Court had exclusive jurisdiction over the divorce suit. The doctrine of *res adjudicata* primarily concerns the *thing* or *matter adjudicated* as the basis of granting any particular relief, and *not the relief itself*. Accordingly an adjudication of one Court concludes the parties as to the thing adjudicated before all other Courts, whether the jurisdiction of the respective Courts be co-extensive or not; and the Court which has prior

* *Holmes* vs. *Holmes*, 1 Sawyer, 99; *Jewell* vs. *Jewell*, 1 How., 219; *Meister* vs. *Moore*, 96 U. S., 76; *Hallett* vs. *Collins*, 10 How., 349; *Patterson* vs. *Gaines*, 6 How., 550, 587; *Maryland* vs. *Baldwin* 112 U. S., 490.

jurisdiction to determine certain facts and grant certain relief upon such adjudication, *has paramount jurisdiction both over these facts and that relief*, whatever other relief that Court may be powerless to give. The fact that a Court of exclusive jurisdiction over a particular kind of relief is subsequently appealed to to determine the same facts as a ground of its exclusive relief, cannot affect the paramount authority of the adjudication of the Court of prior jurisdiction. The jurisdiction is manifestly concurrent *as to the facts.*

It is next objected by counsel that the decree of the Circuit Court granting the injunction staying proceedings in the State Court, is void because prohibited by Section 720 of the Revised Statutes. That Section reads: "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

But it is well settled that this statute does not have any application to a case where the Federal Court acquires the first jurisdiction over the cause, and issues its injunction as part of the appropriate relief in that cause and for the purpose of enforcing and protecting its prior and paramount jurisdiction. In such case the prior jurisdiction of the Federal Court takes the case without the prohibition of the statute. The Supreme Court of the United States in the case of *French* vs. *Hay*, (22 Wall., 250), says :

The prohibition in the Judiciary Act against the granting of injunctions by the Courts of the United States touching proceed-

ings in State Courts has no application here. *The prior jurisdiction of the Court below took the case out of the operation of that provision.*

It is next insisted that William Sharon by consenting to try the action at bar in the Court below, waived his right to insist upon the prior jurisdiction of the Federal Court. But which Court has the right to determine the question of waiver? The Court whose jurisdiction is said to be waived or some other Court? A moment's consideration should satisfy us that the question as to the waiver of its prior jurisdiction must be determined by the Circuit Court itself. The objection is that Sharon waived the jurisdiction of the Circuit Court, and therefore had no right to a decree in his favor inconsistent with the judgment of the State Court. If this is true—if Sharon waived or lost his right to a decree of the Circuit Court in his favor by his acts in the State Court, the respondent was bound to set up the fact of such waiver in the Circuit Court as a defense to William Sharon recovering a decree against her in the Circuit Court contrary to her judgment already obtained in the State Court. If the facts establishing such waiver existed and were presented to the Circuit Court as an objection to the decree which was entered, then it only follows that the Circuit Court committed error in overruling the objection of waiver and entering the decree it did, and the only remedy respondent had to correct such error was by her appeal to the Supreme Court of the United States, and not instead of such appeal, to ask the State Courts to review and reverse the erroneous decision, if such it be, of the Circuit Court. And the fact is that the respondent by her answer

and supplemental answer in the Circuit Court set forth as a defense the facts now relied upon as constituting a waiver, and the Circuit Court heard the evidence in support of her answer upon this point *and decided the issue of waiver against the respondent.* To say that the State Court can disregard the Federal decree, by holding that William Sharon waived his right to such decree, is simply to constitute the State Court as a Court of review over the decree of the Circuit Court.

But the objection made does not go to the extent insisted upon, for it is obvious that Mr. Sharon only waived, if he waived anything, his objection (if he had any) to the jurisdiction of the lower Court, and this did not and could not affect the prior jurisdiction of the Circuit Court; for the distinction is clear between a waiver of objection to the jurisdiction of a particular Court, as affecting its judgment considered alone, and a waiver of the prior jurisdiction of one Court, as between it and another Court of concurrent jurisdiction, as affecting the question as to which one of two conflicting judgments shall control.

The fact that two cases are being tried *pari passu*, without objection made by either party, does not affect the question of the priority or paramount force of the judgments. Naturally that remains the same, and the waiver of objections to the jurisdiction of the Court second in point of time, would be no waiver of the priority of the jurisdiction of the Court first in point of time.

In other words, the failure of the original defendant, William Sharon, to make objections to the ju-

risdiction of the Superior Court, if he could have done so, (and that he could not, I cite *Stanton* vs. *Embrey*, 93 U. S., 548, 550; and *Gordon* vs. *Gilfoil*, 99 U. S., 169, 178), would not affect the prior jurisdiction of the Circuit Court, for the mere waiver of objection in the Court of subsequent jurisdiction is not identical with a waiver of jurisdiction in the Court having prior jurisdiction of the controversy. It would not be within the power of the Court of subsequent jurisdiction to draw to itself the controversy so as to defeat the paramount authority of the Court of prior jurisdiction to determine the issue exclusively between the parties before it.

The case of the *Home Ins. Co.* vs. *Howell*, (24 N. J. Eq., 239), directly sustains our position upon this point. There the insurance company brought an action in the State Court to cancel the policies upon which it was subsequently sued in another State Court, and made application to remove the subsequent suit to the United States Circuit Court, and there in the Circuit Court entered into a stipulation that the case should abide the event of another case in the Circuit Court. It was held that the stipulation was no waiver of the jurisdiction of the State Court which had prior jurisdiction of the litigation, and that such prior jurisdiction would be effective as against further proceedings in the Federal Court. Here was a clear case of waiver in the Court of subsequent jurisdiction, so far as that Court was concerned, for there was no pretense of an objection to the jurisdiction of the subsequent suit, either in the State Court, where it was brought, or in the United States Court, to which it was removed, *and the juris-*

diction of the United States Court was expressly invoked and consented to. But that was held not to affect the jurisdiction of the State Court in the first suit, which was held to be paramount.

The case of *Boynton* vs. *Ball*, (121 U. S., 457), is also directly in point. There the question was whether a debtor had waived his right to rely upon his discharge in bankruptcy, by failing to ask a stay of proceedings in an action pending against him upon a debt provable in bankruptcy, to await the determination of the bankruptcy Court on the question of his discharge. Not procuring such stay of proceedings, as he had a right to do under the law, judgment was rendered against him upon the debt before he received his discharge. Upon receiving his discharge he petitioned the State Court, rendering the judgment, for a perpetual stay of execution, because of his discharge in bankruptcy. The State Court denied the debtor's right to such a stay, and the case was taken on writ of error, to the Supreme Court of the United States. That Court held that the failure to procure a stay of proeeedings, in the action against the debtor, was not a waiver or forfeiture of his right to plead his final discharge in bankruptcy, after he did obtain it, at any appropriate stage of the proceedings in the State Court, and accordingly reversed the decision of the Supreme Court of the State denying the debtor's petition for a perpetual stay of proceedings upon the judgment. That case, then, is directly in point to show that the original defendant, Sharon, by failure to procure a stay of proceedings in the State Court at one time, did not forfeit his right to rely upon the decree in the Cir-

cuit Court, at a later day and at any appropriate stage of the proceedings against him in the State Court. As the decree of the Circuit Court impeaches the very foundation of the judgment of the State Court, it seems to be entirely appropriate to oppose the decree against the enforcement of that judgment at any time after the decree was rendered by the Circuit Court. The decree was only available, of course, for such purposes, after its rendition.

Because we have insisted upon the decree of the Circuit Court, as a ground for the reversal of the order appealed from, counsel say in effect that we are forced to rely upon matters outside of the record brought from the Court below. It is unnecessary to answer such an argument by counter-assertion. The question of errors, presented by the record from the Court below, we are confident must be decided in our favor, and we might well have contented ourselves by presenting only those questions to this Court. But we might well deem it our duty in this case, to present this decree, and insist upon it as a ground of reversal, when the respondent and her counsel are openly insisting and declaring that the decree of the Circuit Court is null and void, and without force against them, and that they propose to proceed in the State Courts in defiance of the decision of the Circuit Court. In view of these facts, which are notorious, I submit that it was incumbent upon us to present the decree of the Circuit Court to the Courts of this State, at all times and in all places, where the respondent is directly or indirectly seeking to bring about a judicial conflict.

Mr. Baggett.—There is an appeal from that decree

of the Circuit Court, is there not, to the Supreme Court of the United States?

Mr. Herrin.—An appeal was taken from the decree, which has been dismissed because not properly or diligently prosecuted. An appeal has been taken from the order entered by Mr. Justice Field, when he was here last summer, reviving the suit in favor of Frederick W. Sharon, as executor of William Sharon, and that appeal is now submitted to the Supreme Court of the United States, upon our motion to dismiss it for want of jurisdiction, or to affirm the order appealed from, as not involving any question worthy of consideration.* That is the way the case now stands.

If it be suggested that we have not heretofore presented this decree to the Courts of the State, we reply, the circumstances of the case did not heretofore require such presentation, because the proceedings which have been taken in the State Courts since the decree of the Circuit Court, in which the decree was not presented, were all within the time allowed by law within which the respondent had the right to appeal to the Supreme Court of the United States from the decree of the Circuit Court, and we had the right to suppose that the respondent would either obey the decree of that Court, or else have it reversed and set aside by her appeal to the Supreme Court of the United States, the only

*The Supreme Court of the United States, on May 13th last, affirmed the order of revivor, holding that the Circuit Court had jurisdiction over the cause of *Sharon* vs. *Hill*, and that the order of revivor was properly made for the purpose of enforcing the decree against the respondent.

way in which such result can be accomplished. But notwithstanding that she has failed to prosecute such appeal, the respondent insists upon proceeding in defiance of the Federal authority, and is appealing to the Courts of this State to enter upon a conflict with the Courts of the United States; and we think this furnishes abundant reason and justification for our presenting to this Court this record at this time, and insisting upon its being given full force and effect; and we insist that notwithstanding this Court should find in the record of the Court below, grounds justifying a reversal of the order appealed from, it should not, for this reason, omit to declare the law as to the force and effect of the decree of the Federal Court so that in all proceedings which may be taken hereafter in this case, the Court below and the respondent shall be fully advised as to the views of this Court upon this important subject.

I shall now consider the errors relied upon for reversal as they are presented by the record from the Court below.

We first say, that the Second Finding that the "marriage contract" was signed by William Sharon cannot be held by this Court to be justified by the evidence, and we say this, in full recognition of the rule that this Court will not reverse if it finds any *substantial* conflict in the evidence.

The limitations and correct application of this rule are correctly stated in *Rice* vs. *Cunningham*, (29 Cal., 492), as follows:

> The rule in question is applied *only* where there is a *real* and *substantial* conflict upon material points, and *has no application where the conflict is more apparent than real*, or does not relate to controlling issues.

Undoubtedly, this Court in applying the rule of conflict of testimony must consider not only the whole of the testimony of a witness or witnesses, but such testimony must be considered in view of the indisputable facts of the case. For example, the direct examination of a witness may of itself fully sustain the findings of fact, but the cross-examination may elicit such facts and admissions as will completely destroy the testimony in chief, so that it could not be regarded by the Appellate Court as creating any substantial conflict in the evidence. A witness may testify to a fact asserting full knowledge thereof in one part of his testimony, when in another part it may be shown conclusively that he had no knowledge whatever of the fact in question. Circumstantial evidence in many cases completely overthrows the direct testimony of witnesses. For example, if the question before the Court be as to whether or not a deed was executed in good faith and for a valuable consideration to a *bona fide* purchaser, or whether it was not in fact executed in fraud of creditors, the parties to the deed might affirm the good faith of the transaction, and yet the circumstances of the case, or the admissions of the witnesses on cross-examination, might completely destroy the value of their affirmations of good faith as evidence, so that a finding of the Trial Court that the deed was made in good faith could not be sustained by the Appellate Court. Many other illustrations might be given showing that the direct and positive statements of a witness or witnesses may not, in view of the whole of the testimony given, create a real or substantial conflict.

Applying these obvious principles to the case at bar, we insist that there is no real or substantial conflict in the testimony on the issue as to the execution of the "marriage contract," and that in the great mass of testimony, much of which is most indirect, and has but little tendency to prove one side or the other of the issue, there are certain indisputable facts, from which the true fact in issue is demonstrable to a moral certainty, and that these indisputable facts are admitted by the respondent in her testimony, and show such improbability in such of her testimony as sustains the finding in question that it cannot be believed.

I have not the time and I shall not undertake to follow the discussion of the evidence which is contained in our printed brief upon this subject.* We have

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The following is the reference to the evidence and the comments thereon contained in appellant's brief:

The respondent testifies to the particular circumstances attending the making of the alleged "marriage contract"—that it was written by her at the dictation of Mr. Sharon in his office in San Francisco on August 25, 1880, but she seems wholly unable to give any details or circumstances of the acquaintance or courtship which led up to this remarkable contract. She thus describes the making of the contract:

He stood by me awhile, and walked around the room awhile, and I would write a little and then we would talk, and then I would write again. I did not suppose that was going to be the contract; I supposed it was a sketching and would afterwards be properly written out. As soon as it was written Mr. Sharon came over to me and put his arm around me, and said: "Will that suit you?" I said, "Senator, that is not going to be our marriage certificate, is it?" He said he wanted to talk to me awhile; that he was very busy and had to go away, and that if I would take it home and write it out nicely, he would sign it; that that would do for him, and the other I would keep. We talked awhile, and afterwards I went over to the Galindo Hotel and took this document with me. (I, 433-435.)

There is no evidence of any kind that the respondent ever made a "nice" copy of the contract, or that any duplicate was ever exe-

pointed out the evidence in our briefs, and the facts and circumstances relied upon which utterly dis-

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cuted for Mr. Sharon, or that the subject of making a more careful copy of this document was ever afterwards alluded to between them.

It appears from the respondent's testimony, that immediately after the signing of this document, she and Mr. Sharon separated without a word as to their future plans—she going to the Galindo Hotel in Oakland and he to Virginia City, Nevada. According to her testimony, they did not meet again until in September, at the Baldwin Hotel in San Francisco, where she had moved a day or two prior to the burning of the Galindo Hotel (I, 436, 770-1). She is most indefinite as to the date of their meeting (I, 438). She says he called before September 25, 1880 (I, 438), but that from the time of their separation on August 25, 1880, until they met in September at the Baldwin, she received no communication from him by letter, telegram or otherwise (I, 771), although Mr. Sharon had heard of the burning of the Galindo Hotel and was very much exercised about it (I, 773).

We ask upon what theory of human conduct can it be believed that these parties actually contracted present marriage, and instantly separated to spend their honeymoon apart; that although the hotel, in which the young bride was living, was burned down, perhaps to her serious danger or injury, no letter or message of any kind was exchanged between the loving spouses—the husband not inquiring if all was well with his young wife, nor she even deigning to send him a telegram that she was safe. And no explanation appears for this conduct. The pretense of secrecy does not explain it. We might well marvel at this story, did not events most strange and unnatural follow in the wedded (?) lives of these parties, to which we invite attention.

About the last of September or first of October, 1880, the respondent moved from the Baldwin to the Grand Hotel (I, 443-4), where she took rooms in which she lived until about December 1, 1881, when she was compelled to leave the hotel under circumstances fully detailed in her testimony at folios 548-559. She states that she was subjected to great indignity—that Mr. Sharon demanded of her that she sign a paper that he was to give her $500 a month, that she had no claims against him and representing her as a bad woman, which she refused to sign (I, 551-2), whereupon she was, by order of Mr. Sharon, driven from her rooms in the Grand Hotel, the carpets in these rooms being taken up and the

prove the testimony of the respondent and all that corroborates her upon the point that the " marriage

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doors taken off their hinges, thus making the rooms uninhabitable.

Upon the occasion of being thus turned out of her rooms, the respondent wrote the following letters (I, 831-833, 844):

DEFENDANT'S EXHIBIT No. 7.

MR. SHARON :

I received a letter from Mr. Thorn in regard to my room. Of course I understand it was written by your orders, for no human being can say aught of me except with regard to yourself. Now, Mr. Sharon, you are wronging me; so help me God, you are wronging me. I am no more guilty of what you have accused me than some one who never saw you; and would you, who asked me to come to this house, whom I have been up with nights, and waited on and cared for, and would have done anything on earth to help you, be the one to wrong and injure me, a man whom the people have placed enough confidence in his honor to put him in the United States Senate, to stoop to injure *a girl*, and one whom he has professed to love ? Is (IV, 3688-9.)

DEFENDANT'S EXHIBIT No. 3.

PALACE HOTEL, SAN FRANCISCO, 188 .

MY DEAR MR. SHARON : I cannot see how you can have any one treat me so—I, who have always been so good and kind to you—the carpet is all taken up in my Hall—the door is taken off and away—and it does seem to me terrible that it is you who would have done—I met Mr. Thorn in the Hall, as I started to come over to see you—and asked him if you had order such a thing done—& he said that I must move out; that it was your wish—I told him that I had written you a not when I received his, and told you if you wished me to go—to send me word—for it was not convenient to get the place I wanted until some time in this month—he said that you had told him to see that I went—so I said no more, but came over to see you--Ah, Senator, dear Senator, do not treat me so--whilst everyone else is so happy for Christmas don't try to make mine miserable--remember this time last year--you have always been so good, don't act so--now--let me see you and talk to you--let me come in after Ki has gone, if you wish--& be to me the same Senator again--don't be cross to me--please don't--or may I see you, if only for a few minutes--be reasonable with me, and don't be unjust--you know you are all I have in the world--& a year ago you asked me to come to the Grand—don't do things now *that will make talk*--you know you can find no fault with me--may I see you for a few minutes, & let us talk reasonably about all this--I know you will--I know it is not in your nature to be so hard to one that has been so much to you--don't be unjust—Say I may see you.--(IV, 3680-3682.)

contract" was ever executed. An examination of the respondent's testimony in the light of the indisput-

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DEFENDANT'S EXHIBIT No. 2.

GRAND HOTEL. S. F. Thorn, Business Manager.

SAN FRANCISCO, CAL.

MY DEAR MR. SHARON :

I have written you two letters and received no reply--excepting to hear that they have been read & commented upon by others than yourself--I also hear you said--you were told that I said I could and would give you trouble--Be too much of a man to listen to such talk—or allow it to give you one moment's thought--I have never said such a thing—or have I such a thought--If *no woman* ever makes you any trouble until I do you will go down to your grave without the slightest care--No, Mr. Sharon, you have been kind to me—I have said I hope my God may forsake me—when I siese *to show my gratitude*—& I repeat it—I would not harm one hair of your dear old head--or have you turn one restless night upon your pillow-- through any act of mine—If you are laboring under a mistake and not bringing the acquisition for the purpose of quarrelling with me--the time will come when you will find out how you have wronged me—& I believe you too much of a man at heart not to send for me & acknowledge it to me, but in your anger you are going to the extreme—I have no way of proving to you my innocence--but God knows I am innocent—as much as your own deaughter who is now in England--but when I say you are going to the extreme—I mean by calling Thorn or any of your relatives or outsiders--and letting them know of your anger--it simply gives them an opportunity of saying illnatured things of me --which are unnecessary.

Mr. Sharon, I have never wronged you by word or act, and were I to stay in this house for a thousand years I should never go near your door again until you felt willing to say to me you knew you had spoken unjustly to me—You once said to me, "There was no *woman* that could look you in the face & say William Sharon, you have wronged me"—If that be the case, don't let me be the first to utter the cry—I had hoped to always have your *friendship & best will* throughout life—always have your good advice to guide me—& this unexpected outburst & uncalled for actions was undeserved. If you would only look at how absurd and rediculous the whole thing is—you surely would act with more reason—Why should I do such a thing? What was I to gain by doing so? Prey give me credit for some little sense--I valued your *friendship* more than all the world—have I not given up everything and everybody for it—& one million of dollars would not have tempted me to have risked its loss—I feel humiliated to death that Thorn or any one could have it to say—I was ordered out of the house—*I have a world of pride*—& I ask you to at least show me the respect to let Thorn have nothing more to say or do in the affair—I have always been kind to you—& tried to do whatever I could to please you—& I hope at least in your unjust anger—you will let us *apparently part friends*—& don't do or say anything that could

able facts of the case shows that her statement that William Sharon signed this contract is so improbable that it cannot be believed.

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create or make any gossip—think how you would like one of your deaughters treated so—If you have any orders to give—or wish to make known—make them known in any other way than through your relatives or through Thorn—Don't fight me—I have no desire or wish to in any way be unkind to you—I have said nothing to any one about the letter I have received—nor do I wish to even speak to Thorn on the subject—you have placed me in a strange position, Senator & all the pride in me rebells against speaking upon the subject—I have been looking at some very nice places, but I cannot get them until some time during the coming month—If you still desire me to go away—make it known to me—& I will obey you. As ever, A. (IV., 3672-3679).

Mr. Sharon made no reply to these letters.

We are asked to believe that these were private letters from a wife, intended for no eye but her husband's—written concerning the grossest acts of abuse and mistreatment on his part towards her, and immediately thereupon, when the sting of a just indignation would be keenest. Can it be possible that any woman, let alone one having "a world of pride," could so write to a husband who had *publicly* subjected her to most outrageous and mortifying treatment without using a single word or sentence saying or indicating that "you are my husband and I your wife?" Instead of this she says, "I had hoped to always have your *friendship* and best will throughout life," and "I valued your *friendship* more than all the world," and "I hope at least in your unjust anger, you will let us *apparently part friends*," etc., expressions which seem wholly inconsistent with the fact that these parties were at this time married. To say that the wife had promised to keep the marriage secret is no explantion of these letters, for they were *private* letters written to him, and could in no way be deemed a violation of the promises of secrecy.

There are other occurrences which utterly repel the idea that the marriage relation existed between these parties. After the respondent had been put out of the Grand Hotel under the circumstances above mentioned, it seems that she resumed friendly relations with Mr. Sharon. On one occasion she wrote him the following letter :

DEFENDANT'S EXHIBIT No. 4.

MY DEAR SENATOR : Won't you please try and find out what springs those were you were trying to think of to-day, that you said Mr. Main went to—and let me know to-morrow

Another important fact in this case which should have great, if not controlling force with this Court

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when I see you—and don't I wish you would make up your mind and go down to them with Nellie & I—wherever they be—on Friday or Saturday—we all could have such nice times out hunting or walking or driving these lovely days in the country—the *jaunt* or little recreation would do you worlds of good—*and us girls would take the best of care of you, and mind you in everything* —I wish we were with you this evening, or you were out here—I am crazy to see Nell try & swallow an egg in champagne—I haven't told her of the feat I accomplished in that line—but I am just waiting in hopes of some day seeing her go through the performance—as I told you to-day, I am out at Nellie's mother's for a few days—824 Ellis—What a lovely this evening is—and how I wish you would surprise *us two little lone birds* by coming out here and taking us for a moonlight drive—but, gracious me—it is too nice to think of—but I really wish you would—t'would do you good to get out of that stupid old Hotel for a little while—and we'd do our best to make you forget all your business cares & go home feeling happy. A. (IV, 3683-3685.)

This letter was written while the respondent was living with Nellie Brackett's mother, in the summer or fall of 1882. (I, 901.) Comment upon this letter is unnecessary, as it appears to be anything but a letter from a wife to her husband.

Another occurrence wholly repugnant to the fact that these parties were married was the "bureau scene," described by the plaintiff's witness Nellie Brackett (I, 220-227), and corroborated by the respondent (I, 570, 575-6). The respondent placed Nellie Brackett, a young girl less than 19 years of age, in Mr. Sharon's room behind the bureau, to see and hear what occurred between the respondent and Mr. Sharon, when *he* supposed they were alone. Nellie Brackett details what she saw and heard, and testifies that she did not go out of the room until after the respondent and Mr. Sharon had gone to bed together, and he had fallen asleep. (I, 226-7). This conduct upon the part of a wife, is incredible, and is not to be explained upon the theory that the respondent was thus securing evidence of her marital relations, for, according to her own story, she had the "marriage contract," which, if genuine, needed no such corroboration.

On another occasion, the respondent secreted herself behind the bureau in Mr. Sharon's room, and there saw him and a woman undress and go to bed together, which transaction with what she overheard Mr. Sharon say, she afterwards described with mirth and laughter to the witness Sarah Millett, as described by her in her testimony (II, 1781-2), and this witness is not in

in considering this question, is that it appears from the record, that the Court below condemned the

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anywise contradicted by the respondent on this point, although she was called in rebuttal to contradict her on other matters (III, 3396-3399); on the contrary, the respondent admits having told Sarah Millett of this scene (I, 1124-5, 1178-9).

These are but examples of the numerous facts shown by the record which make the respondent's story of the execution and existence of the "marriage contract" too improbable for belief. No explanation in harmony with human experience can be given for these parties making this most extraordinary contract in the extraordinary way described by the respondent. Taking the story of respondent alone; can it be believed that she, a respectable woman, 27 years of age, with intelligence, pride of ancestry, ample worldly experience, without want of money, with desirable social connections, should, without consulting a friend or relative, not even her brother, contract in this unheard of way, a secret marriage? And no reasonable explanation is given for this secrecy, and no explanation at all for the agreement that such secrecy should continue for two years (I, 775-787.) Mr. Sharon had, according to her story, violated every obligation of a husband and subjected her to the grossest mistreatment, and placed her *publicly* in a most ignominious position. Every human motive under such circumstances must have impelled her to assert her true position; at least, in her secret letters intended for no other eye than her husband's, she would have said something unequivocally denoting that she was an outraged wife. And even if she was avoiding threats—if she was using soft words to turn away wrath, how much stronger her appeal must have been, if she had told an unvarnished tale of her wrongs as an outraged wife? And if she saw fit to regard her obligation of secrecy after her husband had repudiated every corresponding obligation, why did she not dispel the cloud of scandal that enveloped her, by declaring to her friends and acquaintances on or immediately after August 25, 1882 (when the two years' obligation for secrecy expired), the existence of her marriage? Yet without any sufficient explanation therefor, she holds her peace for more than a year afterwards, and continued to suffer, according to her story, the torture of her position and the grievous wrongs inflicted upon her. No reason appears for not making this marriage public at the expiration of the two years. According to the allegations of her complaint, and the findings of the Court, Wm. Sharon had at all times after he drove her from the Grand Hotel,

testimony of the respondent upon a most important point as false and unworthy of belief.

Mr. Maguire.—I would like to ask Mr. Herrin to state where in this record any such suggestion of the Court below is contained. We say it is not in the record.

Mr. Herrin.—I will come to that directly and will show that it is in the record.

It would seem, in a case like this, that where the testimony of the two parties was directly opposed, and where the Court was compelled to solve this conflict by references to the probabilities of the case, the fact that one of the parties was clearly shown to have given wilfully false testimony upon a material issue of fact, should alone have turned the scale in favor of the other party, and especially against the plaintiff, who was bound to support her case by preponderance of testimony. I will now show from the record, the Court's finding as to the falsity of the respondent's testimony upon a material point.

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in December, 1881, "refused to longer live with or provide for her support." (Sixth Finding.) In face of this fact, there was no excuse for her continued submission to the wrongs put upon her after the expiration of two years from the date of the "marriage contract." It was not possible that any woman, especially a resolute and high spirited woman, as the respondent appears to be, who supposed herself to be a wife, would have quietly submitted and suffered in silence, under the circumstances of humiliation and contumely, in which the respondent was placed by Mr. Sharon. We might safely submit this issue upon the testimony of the respondent. That part of her testimony, which must be accepted as true, overthrows and destroys her statement that the "marriage contract" was signed by Mr. Sharon. In order to believe such a statement, we must accept as true "a course of conduct wholly at variance with our experience of human action, and the influence and operation of human affections and human passions."

Respondent testified that after she went to the Grand Hotel in September, 1880, it was sometimes a frequent occurrence for Mr. Sharon to introduce her as his wife (Vol. I., fol. 790), and she testifies particularly to several occasions when she was introduced by Mr. Sharon as his wife. One occasion was to a gentleman, one of the neighbors living back of Mr. Sharon's house at Belmont (Vol. I., fols. 791–2); another to a gentleman, she does not remember to whom, on Sutter street in San Francisco (Vol. I., 795–6); and she also testifies that she was introduced upon another occasion by Mr. Sharon as his wife to one Mrs. Reigart (Vol. II., fols. 1202–3). But the Court below expressly finds in the Ninth Finding, "*that the defendant never introduced plaintiff as his wife nor spoke of her as such in the presence of other persons.*"

Now I am coming to what counsel object to my doing, and that is to refer to the opinion which the learned Judge of the Court below read and filed upon deciding this case. In this opinion he reviews at great length the testimony in the case, and in several instances, pointed out in our opening brief, he expressly finds that respondent testified untruthfully. In one instance, he finds that a certain paper, which was produced by respondent at the trial under compulsion, but which she afterwards failed to produce when called for, *was a fabrication.** All of this shows beyond question that the

*The following is the matter referred to in the brief:

Upon this point, [the alleged introductions as a wife], the Judge below in his opinion (which is given in the record upon the appeal from the judgment No. 9984, folios 403 to 644), says:

"*Plaintiff's testimony as to these occasions* [*introductions*] *is di-*

case was one demanding the application of the maxim *falsus in uno, falsus in omnibus.* This opinion is most instructive, and will serve as an important aid to this Court in considering the questions involved on this appeal, so far as they concern the insufficiency of the evidence to support the findings. The opposing counsel object to the references to this

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rectly contradicted, and, in my judgment, her testimony as to these matters is WILFULLY FALSE." (Folios 505-6, in Record 9984.)

The Judge below condemned as false the testimony of the respondent on other matters, not referred to in the findings. She testified that she let Mr. Sharon have $7,500 to invest for her (I, 378, 470), and she explains the fact that in November, 1881, Sharon gave her a check for $3,000 (Deft's Ex. No. 35, I, 3779); a note for $1,500, payable August 1, 1882, (Deft's Ex. No. 34, I, 3779), and a note for $3,000, payable $250 in each month of 1883 (Plff's Ex. No. 39, I, 3605) by saying that this was the mode adopted by Mr. Sharon of repaying her the $7,500 (I, 538-544). Mr. Sharon says this check and notes were given to get rid of the plaintiff (III, 2908). The Judge below in his opinion on this point, said:

"Plaintiff's explanation of this fact is that it was a repayment of $7,500 which she had placed in defendant's hands in the early part of her acquaintance with him. *This claim, in my judgment, is utterly unfounded. No such advance was ever made.*" (No. 9984, folios 542-3).

At another place in his opinion, the Judge below says:

"Plaintiff claims that defendant wrote her notes at different times after her expulsion from the Grand Hotel. If such notes were written, it seems strange that they have not been preserved and produced in evidence. *I do not believe she received any such notes.*" (No. 9984, folio 570).

With respect to a document, purporting to be signed by Mr. Sharon, which he denounced as a forgery (III, 29, 30-1), the respondent testified circumstantially that it was signed by Mr. Sharon (I, 725-729). She produced this document under compulsion of the Court (I, 725), and it was offered in evidence by the defendant to show its forgery, but, after discussion, the document was withdrawn, after which the respondent failed to produce it, when called for, saying that she had lost it (I, 800-1). As to this document the Judge below, in his opinion, says:

"Among the objections suggested to this paper as appearing on its face, was one made by counsel that the signature was evidently

opinion, which we have made in our opening brief, and cite authorities which hold that parties in this Court cannot refer to the records of other cases to show facts not contained in the record before the Court. But by referring to the opinion of the Judge below in this case, we are not seeking to introduce, or have considered, facts which are not in

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a forgery. The matters recited in the paper are, in my judgment, at a variance with the facts which it purports to recite. Considering the stubborn manner in which the production of this paper was at first resisted, and the mysterious manner of its disappearance, *I am inclined to regard it in the light of* ONE *of the fabrications constructed for the purpose of bolstering up plaintiff's case. I can view the paper in no other light than as a fabrication.*" (No. 9984, folios 579-580.)

And in another part of his opinion the Judge says:

"I am of the opinion that to some extent plaintiff has availed herself of the aid of false testimony for the purpose of giving her case a better appearance in the eyes of the Court; but sometimes parties have been known to resort to false testimony, where, in their judgment, it would assist them in prosecuting a lawful claim. As I understand the facts of this case, that was done in this instance."

To corroborate her testimony as to Mr. Sharon's introducing her as a wife, the respondent called the witness, Harry L. Wells (I, 404-426), who, upon being recalled for further cross-examination, admitted his testimony as to the introduction on Sutter street was wholly false, and states how it was fabricated by himself in connection with one H. M. True, and respondent's counsel Tyler (III, 2550-2648). Wells in his recantation is corroborated by the deposition of H. M. True. (IV, 4615-4852.)

In this case, the common law maxim, *Falsus in uno, falsus in omnibus*, should be taken *vice versa, i. e., falsus in omnibus, falsus in uno.*

It is an elementary principle, that when a party is shown to have supported his case by falsehood and fraud, he thus gives rise to the presumption that his claim is false and fraudulent, and his testimony should be received with distrust.

"*Truth does not ally itself with falsehood, but falsehood will often endeavor to make it appear that truth is on its side.*"

Egan vs. *Bowker*, 5 Allen, 451-2; *Chicago City Ry. Co.* vs. *McMahon*, 103 Ill., 485; *Deering* vs. *Metcalf*, 74 N. Y., 501, 506; Code of Civil Pro., Sec. 2061; Starkie on Evidence, p. 873.

the record before the Court. We only refer to this opinion for the purpose of enabling this Court to see how the facts of the case were considered by the Judge below in making his decision, just as we might refer to the opinion of any Judge or Court for a similar purpose. This opinion, although not contained in any volume of reported judicial decisions, yet was widely published at the time it was delivered. As an authenticated copy of this opinion appears in the record upon the former appeal in this case, we refer the Court to that record in our references to this opinion.

Mr. Terry.—You are mistaken there, Mr. Herrin. There is an affidavit of William Sharon setting out what he says is the opinion of the Court.

Mr. Herrin.—And there is no affidavit upon your side contradicting Mr. Sharon's affidavit.

Mr. Terry.—That is another record.

Mr. Maguire.—I just desire the Court to understand that the matter that Mr. Herrin is now presenting is not contained in the appeal at all, nor in the transcript which he has printed.

Mr. Herrin.—It is entirely proper for this Court to read the opinion of the Court below in considering this appeal, and it could send below and have a copy of that opinion brought up if it desired it. The Supreme Court of the United States, with no more or different powers in this matter than this Court, has made a rule which is enforced, that in all cases brought to review any judgment or decree, the Clerk of the Court below shall annex to and transmit with the record brought up, a copy of the opinion, or opinions of the Judges rendering the

judgment or decree sought to be reviewed. I refer to the second division of rule 8 of the Supreme Court of the United States.

Mr. Maguire.—It is made a part of the record by the rule.

Mr. Herrin.—And if the Court has power to make a general rule to govern all cases, it can make a special rule or order to govern any particular case.

Mr. Justice Thornton.—As far as a question of law is concerned we could certainly send for the opinion, and look at it, but does it refer to a question of fact —that same rule ?

Mr. Herrin.—I submit that it does to this extent, that this Court may be enabled to see if the Court below correctly applied the principles of law to the facts—that this Court can take the facts found to be true by the Court below, and from that basis determine if that Court correctly applied the principles of law in weighing or considering the testimony. Of course if this Court could make a rule upon the subject as the Supreme Court of the United States has, then it has the right in any case to refer to the opinion of the Court below for the purposes I have stated.

Mr. Justice Thornton.—My recollection of a case in which Judge Sawyer wrote the opinion, is that he says the opinion of the Court is no part of the record ; nevertheless, we are very glad to see it.

Mr. Herrin.—I do not suppose that where the parties had settled the statement in a case, and excluded certain evidence, as is often done, that, after they had done that, they could go to the opinion of the Court for the purpose of getting before the Appellate

Court any facts not in the statement which was settled ; but for the purpose of showing the rules of law which the Court applied in weighing and considering the testimony, I think it competent for this Court to read the opinion of the Judge below.

Mr. Baggett.—Your Honor will find that expressly decided to the contrary in the case of *Wilson* vs. *Wilson*, decided, I think, in the 64th California, where it is expressly held that the opinion of the Court is no part of the record, and cannot be referred to by the Court unless it is made part of the record by the bill of exceptions, or one of the modes pointed out.

Mr. Herrin.—I suppose they referred to the opinion there for the purpose of showing some fact not in the record.

Mr. Justice Thornton.—Opinions are frequently referred to, and on a question of law I never heard it objected to.

The Chief Justice.—We referred to the opinion in *Wilson* vs. *Wilson* for the purpose of showing that the Court who decided that case applied a wrong principle in deciding the question of fact. The Judge there held that it was necessary to prove that a deed was intended as a mortgage by proof beyond a reasonable doubt. They claimed that that was error, and they referred to his opinion for the purpose of showing this Court that it was on that principle alone that he decided that case against the plaintiff.

SECOND POINT.

Mr. Herrin.—I now proceed to our second point, which is that there is an entire want of evidence in

the record to sustain the Third Finding that the parties lived and cohabited together in the way usual with married people for any period of time, or that they mutually assumed toward each other marital rights, duties or obligations. The language of the Third Finding is as follows:

> The plaintiff and defendant commenced living and cohabiting together in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year.

And that—

> During all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties and obligations.

It must be constantly borne in mind in considering this point that the question involved is not at all identical with the question considered by this Court upon the appeal from the judgment. In the prevailing opinions upon that appeal, the fact is emphasized that the evidence was not before the Court, and that the case must on that appeal be determined upon the findings of fact taken as true. The question actually decided upon that appeal is stated in the concluding parts of the majority opinion, as follows (75 Cal., 36–7):

> The Court below found *as facts* that, during a certain period, after the consent to marry, " the plaintiff and defendant lived and cohabited in the way usual with married people, * * * and mutually assumed toward each other marital rights, duties and obligations." If, as we have said, they might mutually assume marital rights and duties, although their relation was kept secret, the insertion of the words " toward each other," does not vitiate the finding, and the finding of facts is conclusive on this appeal. * * * Our conclusion is, that the provision of the Code, requiring a mutual assumption of marital rights and duties to follow consent, does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public. * *
>
> It would be giving the words of the statute a meaning which

does not accord with just and established rules of interpretation, to hold that these parties, who, as found by the Superior Court, mutually consented to become husband and wife, thereafter cohabited in the manner usual with married people, and mutually assumed toward each other marital rights and duties, were not married.

Mr. Justice Temple in his opinion states the proposition decided as follows (75 Cal., 49–50):

"Persons capable of marriage consented to present marriage; thereafter they cohabited in the way usual with married persons for more than one year, during which time they mutually assumed towards each other marital rights, duties and obligations. Their cohabitation and supposed marriage was, however, kept a secret pursuant to an agreement in writing made at the time of the mutual consent to present marriage. But for the secrecy there would be no doubt as to the validity of the marriage. Does that render the marriage void?"

Mr. Justice Temple then proceeds in his opinion and reaches the conclusion that the fact of secrecy did not invalidate this marriage. While there are expressions in Mr. Justice McKinstry's opinion indicating that consent to marriage, followed by sexual intercourse, might be held to constitute a valid marriage under our Code, yet all that he says upon this point is by way of argument merely, for the Court below found nothing as to the fact of such intercourse, and the record did not present the question as to whether or not an unsolemnized marriage could be consummated in this State by the mere act of sexual intercourse.

The question now presented to this Court is, does *the evidence show* that the parties lived and cohabited together in the way usual with married people, and did they mutually assume towards each other marital rights, duties and obligations?

There is absolutely no evidence in the record to prove any living together or cohabitation of these parties. The evidence is all one way; that during all the times mentioned in the findings, the defendant continuously lived in the Palace Hotel, and never at any time lived in the Grand Hotel, while the plaintiff lived in the Grand Hotel, and never at any time lived in the Palace Hotel; and all of the witnesses that speak upon the subject designate the apartments in the Grand Hotel, where the plaintiff lived, as "her rooms," and the rooms in which Mr. Sharon lived in the Palace Hotel as "his rooms." In the testimony of the plaintiff, herself, as to her place of abode during the period covered by the finding of the Court, she repeatedly and continuously speaks of her rooms at the Grand Hotel, as "my rooms"; and there is not a particle of evidence tending to show that Mr. Sharon ever lived with her in those rooms, or ever lived in that hotel; yet she testifies positively that *she* lived there. She says that during the time she was living at the Grand Hotel that her grandmother came in perhaps two or three times a week to visit her. The Court might as well have found from this evidence that Miss Hill and her grandmother were living together as that she and Mr. Sharon were so living, on account of their visits to each other. But it is clear that the plaintiff knew the difference between a place of visitation and a place of living, for she says her grandmother "was living" at 611 Polk street, though the Court below, in its findings, has failed to distinguish that difference. The plaintiff again says, concerning Mr. Sharon: "He always

gave me $500 a month during the time I was living at the Grand Hotel." She speaks of "Mr. Sharon's rooms" at the Palace Hotel and repeatedly calls them "his rooms" in contradistinction from her own. She speaks of spending nights with him "in his *own* apartments at the Palace Hotel." She told the witness Sarah Millett that she "visited his private bed-room." She again says: "I did not move at any time to the Palace Hotel."

In our opening brief we have pointed out the testimony of all the witnesses where they speak of where these parties lived, and as to their intercourse with each other, and this testimony is all to the same effect—that there never was at any time any living or cohabitation in the way usual with married people. Wm. Sharon testified that from the time of his first acquaintance with the plaintiff until he went East, in January, 1881, she visited his rooms and spent the night "it might have been twenty times, or more"; that he was engaged in other pursuits and other circumstances, and she could not have visited him a great many times; that when she came to his room she would generally come "over after dark"; and that he visited her rooms in the Grand Hotel very seldom. He testifies positively that the arrangement between them was for sexual intercourse for a compensation of five hundred dollars a month during the pleasure of both parties. But clandestine sexual intercourse between persons who habitually live apart from each other, in separate edifices, no matter how frequent it may be, is not a *living* and *cohabiting together* in the *way usual with married people*, and the Court clearly erred in so finding.

The term "cohabitation" has a fixed and well-defined legal significance. It does not import the act of sexual intercourse; but as applied to husband and wife, it imports simply and only the fact that they *dwell together* as such in a *common abode*. In *Yardley's Estate* (75 Pa. St., 211), it is held that "Cohabitation is not a sojourn, nor a habit of visiting, nor even a remaining with for a time. * * To cohabit is to live or dwell together; to have the same habitation; *so that where one lives and dwells there does the other live and dwell always with him.*" So in *Ohio* vs. *Connaway*, (Tap. O., 59), the term "cohabitation" is held to mean "a living together in one house; a boarding or tabling together; it carries with it the idea of a fixed residence." In *Calef* vs. *Calef* (54 Me., 366), it is said that—"the primary meaning of the word cohabit is to dwell with some one—*not merely to visit or see them.* It includes more than that." And *Bouvier's Law Dictionary* defines "cohabit—to live together in the same house claiming to be married." In *Cannon* vs. *United States* (116 U. S., 55), cohabitation is held to mean the living together in the same house, of husband and wife, and does not necessarily include sexual intercourse. In England, in the Ecclesiastical Courts, matrimonial intercourse is distinguished from matrimonial cohabitation. The former could not be compelled by the Ecclesiastical Courts, while the latter may be. (*Calef* vs. *Calef*, 54 Me., 366-7. *Orme* vs. *Orme*, 2 Adams, 382. *Foster* vs. *Foster*, 1 Hagg., 144.) That "cohabitation" means a "living together as husband and wife," and does not denote the act of sexual intercourse further than such act

may be presumed from the dwelling together in the same house under the claim of being married, is stated in 1 Bishop on M. & D., Sec. 777, Note 2, and also in Vol. 3, Am. &. Eng. Encyc. of Law, p. 308.

There can be no question in the case at bar, that there is an entire want of evidence to sustain the finding that these parties *lived and cohabited* together " in the way usual with married people."

The question remains whether or not the finding that the parties mutually assumed towards each other marital rights, duties and obligations is sustained by the evidence. The majority of this Court held upon the appeal from the judgment that marital rights, duties and obligations might be mutually assumed without any element of publicity. We think this is erroneous on account of the nature of marriage as a social and public institution, and that the cohabitation, in order properly to involve a mutual taking on or assumption of marital rights, duties and obligations, should be begun and accompanied by declarations, acts and conduct characterizing the cohabitation ostensibly as matrimonial.

But without regard to the question of secrecy or publicity, we insist that *cohabitation*, or *living together*, is *essentially involved in the marriage agreement*, and that without *commencing* to *live together* there can be no mutual assumption, even towards each other, of marital rights, duties or obligations. The actual commencment of married life is the commencement of matrimonial cohabitation. Such cohabitation involves the mutual taking on of such rights and duties as pertain generally to the marriage relation.

Nothing short of matrimonial cohabitation *begun* in good faith, can involve or express the mutual assumption of marital rights and duties.

Unless matrimonial cohabitation constitutes a "mutual assumption of marital rights, duties or obligations," the complaint of the plaintiff does not state facts sufficient to constitute a cause of action; for it nowhere alleges such "mutual assumption" in terms, but does distinctly allege "that on the 25th day of August, 1880, the plaintiff and defendant became, by mutual agreement, husband and wife, and thereafter plaintiff and defendant commenced living and cohabiting together as husband and wife." This allegation shows that plaintiff and her counsel so clearly viewed the *commencement of matrimonial cohabitation* as the proper equivalent of the "mutual assumption" of marital rights and duties required by the Code, that they have staked the cause of action upon that as an equivalent. The plaintiff should now be considered as estopped by her complaint to question this position, and should not be allowed to "blow both hot and cold" in reference to it.

The "consent to marriage" is, and always must be, *essentially* a mutual agreement to *live together* as husband and wife. There is no definition even of marriage by nature, as manifested in savage or uncivilized life, which dispenses with an agreement for *permanent* cohabitation of the married parties.

In the early history of Texas, the conditions were such as to render it impossible for the inhabitants to celebrate the rite of matrimony in accordance with the form prescribed by the decree of the Church,

without going beyond the limits of the province where ministers of the established religion could be found. Marriages were accordingly entered into by way of civil contract, followed by matrimonial cohabitation. The Supreme Court of Texas, in passing upon such marriages, held, that such agreements were valid, "whenever the consent of the parties and the intention to enter into the state of matrimony, *and to assume its duties and obligations is clearly shown*," (*Sapp* vs. *Newsom*, 27 Tex., 541), but that it must be "a real marriage according to nature, and so intended by the parties," which is defined by the Court as a "mutual agreement of man and woman to live together in the relation and under the duties of husband and wife, sharing each other's fate or fortune for weal and for woe, until parted by death." (*Lewis* vs. *Ames*, 45 Texas, 341.) According to these decisions, matrimonial cohabitation, intended in good faith to be *permanent*, when entered upon, constitutes the "assuming of the duties and obligations" of marriage under the law of nature. We might here inquire if it could have been the intention of the Legislature of the State of California to repeal the laws of the "state of nature" by the use of language which has been judicially appropriated to express a merely natural marriage. If so, it would be wise for the State of California to return to the "state of nature."

Cohabitation has, from time immemorial, been recognized as the proper and legitimate mode of *assuming* marital relations. Before the time of Pope Innocent III (who first required solemnization of marriage as a religious rite), "after an agreement to cohabit, the man led the woman to his own habi-

tation." (*Newberry* vs. *Brunswick*, 2 Vt., 159; Jacob's Law Dictionary, Vol. IV., p. 343.) The common law definitions of marriage recognize the agreement *to live together* as of the essence of the contract. It is evident, that if the very nature of the marriage contract necessarily requires the parties to live together, the execution of that contract cannot be assumed or entered upon without their actually *commencing* to live together. Britton, who wrote about 1292, defines "matrimony" as being "no other thing than the union of a woman with a man, with the consent of both and by junction of holy church *to live together as one flesh, all their lives*, without expectation of separation." (Translation by Nichols, Vol. II, p. 325.) The various dictionaries of the common law define "marriage" as "the conjunction of man and woman in a *constant society*, and agreement of *living together*." (Jacob's Law Dictionary, Vol. IV, p. 343.) "A voluntary union for life, and for the purpose *of living together*." (Rapalje's Law Dictionary.) "A contract in due form of law, by which a man and woman reciprocally engage to *live with each other during their joint lives*," etc. (Bouvier's Law Dictionary.) The canon law defines marriage as "the conjunction of a man and a woman holding together *an indivisible habit of life*, with the common sanction of divine and human law." (Reeve's History of the Common Law, Vol. 4, Chap. XXVII.) *A mutual promise of cohabitation* is included in the definition of marriage in the ecclesiastical law. (*Lonas* vs. *State*, 3 Heisk., Tenn., 308.) Marriage must be an agreement looking to something more than the *concubitus*; it

must be an agreement looking to the *consortium vitæ* (the sharing together of life.) (*Askew* vs. *Dupree*, 30 Ga., 178.) So our Code in recognition that the agreement to live or dwell together is of the essence of the marriage contract, provides that a "refusal of either party to *dwell in the same house with the other party*, when there is no just cause for such refusal, is desertion." (Civil Code, Sec. 96.)

These authorities show clearly that an agreement for *cohabitation* is of the essence of the marriage contract. It needs no proof that marriage has everywhere and in all ages been practically regarded as involving such an agreement in its nature. Every properly married couple has executed the marriage contract by living together in matrimonial cohabitation, since the first parents of the human race so lived together in the garden of Eden.

Now, in view of the fact that the agreement to marry essentially involves a *living together*—the conjunction of the man and the woman holding together *an indivisible habit of life*—how can the marital status be *assumed* except by actual entering upon the discharge of marital duties and obligations, through matrimonial cohabitation. When the parties *begin* to dwell together in the same house and in the same rooms ostensibly as husband and wife, they do in and by that cohabitation *assume* all marital rights, duties and obligations. They thereby enter upon that constant society, which the marriage agreement contemplates, and in which every marital right and obligation is to find its fruition.

We submit that our contention that the rights, duties and obligations of matrimony can only be

mutually assumed by the actual commencement of married life is sustained by the language of Mr. Justice Temple's opinion upon the appeal from the judgment. In this opinion he says (75 Cal., 50–1):

> Perhaps we should be able to appreciate the force of the language better if we substitute for marriage some other well known contract relation. For instance, "Partnership is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute partnership : it must be followed by a mutual assumption of partnership rights, duties or obligations." Had there been a section of the Code to this effect, would any one doubt its meaning? It would mean simply that an agreement to be partners was not sufficient until it was followed by the *actual commencement* of partnership business.

In like manner, according to this illustration, the *actual commencement* of married life, or "matrimonial cohabitation" of the parties, would constitute the mutual assumption or taking on of marital rights and duties.

The view that a "mutual assumption of marital rights, duties or obligations" is properly made by the *beginning* of matrimonial cohabitation, does not involve or require a period of probation before the act of sexual intercourse will be lawful. The executed contract to marry is at once merged in the matrimonial status as soon as the parties have *begun in good faith* to dwell together as husband and wife, and it must therefore be immaterial how soon or how late thereafter sexual intercourse is had, or whether it is had at all. In like manner, as a duly solemnized marriage is complete when solemnized, though the parties never have sexual intercourse, so also an unsolemnized marriage is complete if the parties have consented to marriage and actually *begun* to live to-

gether as husband and wife, though one of them may die before any act of sexual intercourse has taken place. The *commencement* of true and open matrimonial cohabitation certainly constitutes a mutual assumption of all marital rights and duties. But a mere act of coition without matrimonial cohabitation cannot be held to assume anything beyond itself.

I have not time to enter upon a full discussion as to the construction which must be given to the phrase used in our Code—" a mutual assumption of marital rights, duties or obligations." That discussion is contained in our printed briefs and I will now only advert to the more significant features of the Statute which point to its true construction.

In the first place, the Statute squarely repudiates the common law theory that the matrimonial relation can be formed by consent alone. Our Statute declares that consent alone will not constitute marriage, but that consent must be followed by solemnization or by the mutual assumption of marital rights, duties or obligations. We can have no dispute about the nature of the marriage relation when formed, nor can there be a difference of opinion as to what constitutes the rights, duties and obligations of matrimony. We must construe the language of the Code in view of the particular relation of which it is treating. Its provisions concern the relation of husband and wife, and not any other social or sexual relation which may exist between a man and a woman; and accordingly, the Code requires of the parties entering upon marriage that they shall mutually assume *marital* rights, duties or obligations.

Now it must be that the act or acts which are sufficient to show the mutual assumption required by the Code should be such act or acts as will denote the marital relation as contradistinguished from the meretricious relation of man and mistress. For certainly if the Code had intended that marriage might be constituted by the performance of such acts as are common to the *marital* as well as the *meretricious* relation, it would not have expressly required that the rights, duties and obligations to be assumed should be *marital.* But in any case, the evidence relied upon to show the mutual assumption required by the Statute should clearly *indicate the intention* of the parties to enter upon the state of matrimony and not upon the relation of man and mistress. It certainly cannot be maintained that the mere act of sexual intercourse, which of itself in no wise distinguishes the marital from the meretricious relation, is sufficient to constitute a mutual assumption of *marital* rights, duties or obligations under the Code. In our opening brief we have carefully reviewed and compared the different provisions of the Code and have shown that the word "consummation" used in the Statute cannot be given the restricted meaning of sexual intercourse or copulation. On the contrary, that it must be given its ordinary meaning of completion, and was intended to include the act or acts required to complete the marriage, whether such acts be a solemnization or its equivalent—a "mutual assumption of marital rights, duties or obligations." It is not true that the word "consummation" as applied to marriage has ever received a judicial construction or even usage making it synonymous with

sexual intercourse merely. And this is evident from the fact that no lexicon or dictionary of law gives any such restricted import to the word. On the contrary, the use of the definition given to this word is the *completion* of a thing, and when applied to marriage its use denotes the acts required by law to complete the marriage relation.

In view of the obvious meaning and requirements of our Statute, we submit that the evidence wholly fails to show any "mutual assumption towards each other of marital rights, duties and obligations." No single act of either of the parties can be pointed to, which indicated that they were married rather than that their relations were meretricious. Support may be given or apartments may be furnished to a wife or to a mistress; personal intimacy may be with a wife or a mistress; the same bed may be shared with a wife or a mistress. No acts other than these are shown by the record, and it cannot be that such acts which in nowise distinguish the marital from the meretricious relation can be held under any allowable construction of our Statute to be a "mutual assumption of *marital* rights, duties or obligations."

As a confirmation of our contention that there is no evidence in the record to sustain the finding in question, it is but necessary to examine the references to the evidence in support of the finding, made in the points and authorities of respondent. I have not the time to now consider these references, but as they are reviewed in our reply brief, I will refer the Court to what we have there said upon this point.*

*The following is the matter in the Reply Brief above referred to: Counsel assert that there is a conflict of evidence upon the subject

THIRD POINT.

The appellant's third point is that the Court committed error in admitting the testimony of the witness, Martha Wilson, that the respondent in the month of October, 1880, exhibited to her the "mar-

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of this [third] finding, but do not point out even a scintilla of evidence sustaining the finding.

Let us examine *seriatim* the references to testimony which it is asserted sustains this finding.

1. Respondent's testimony that "defendant had apartments fitted up for her *reception* at the Grand Hotel—selected her residence—and that she went to *reside* there, conforming to his desire and submitting to his direction in the matter."

Does all this tend in any way to show a "living together," or "cohabitation," or "mutual assumption of marital rights," &c? If so, then if the defendant, immediately after the signing of the marriage contract, had had appartments fitted up for respondent's reception in Hong Kong—had selected her residence there—and she had gone there to reside, "conforming to his desire and submitting to his direction in the matter," this would equally establish "cohabitation" and "mutual assumption," etc.

2. "The Grand Hotel constituted a part of the same general building where he resided, and was under the same roof."

There is no such testimony; on the contrary, it appears without contradiction that defendant at all times resided or lived in the Palace Hotel—a distinct building—of which the Grand Hotel was not a part.

3. "She shared *his* bed with him *whenever it was mutually agreeable.*"

Suppose other women did the same thing. Would it be contended, even by opposing counsel, that this constituted, with such women, "a living together," or "cohabitation" or "mutual assumption," etc.?

Besides, the mere occasional sharing of *his* bed was not "cohabitation," nor did it constitute a "mutual assumption," etc., as we have shown in our opening brief.

4. "She had her meals with him at all times *when his business would permit.*"

So did others without contracting the marital relation.

5. "She visited his country residence at Belmont with him."

riage contract," and also in allowing the witness to state the conversation which then occurred between her and the respondent concerning such contract, all of which occurred in the absence of the defend-

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So did many other persons, male and female.

6. "She went and invited friends to his Belmont residence by his authority, to assist in the wedding festivities of his daughter, and in entertaining his guests; was there by him introduced to his son, and placed under his care; that she did not go, as did other guests, dressed for the reception, but in her traveling suit, and dressed, as did other members of his family, in the house."

None of these matters in any way justified the finding of "cohabitation" and "mutual assumption," etc., and their entire tendency to prove that the marital relation existed between these parties is overcome when we consider for a moment the true character of this transaction. The respondent was not present at the wedding to which the members of the family and immediate friends were invited, but she appears at the reception which followed the wedding, at which a large assemblage of guests were present. Invitations were sent far and wide, to the guests of the Palace and Grand Hotels, and to Mr. Sharon's numerous acquaintances throughout the city and coast, and even in the Eastern States. A special train was engaged to carry the invited guests from San Francisco to Belmont. The tongue of scandal had not yet associated the names of Mr. Sharon and the respondent, and it is easy to understand that if she had not been included in the list of invitations scattered broadcast, and all about her, that such omission would give rise to gossip, and indicate that the relations between the respondent and Mr. Sharon were not such as to make her presence at the wedding reception desirable. Under the circumstances the invitation would be extended to avoid scandal. Although the respondent hastens to describe every little fact which could in any way support her case, she does not say that she was introduced to or even met Lady Hesketh or her husband. This omission of an ordinary civility upon the part of Mr. Sharon shows that, while he consented that the respondent might be present at the reception, it was with the understanding that she should not come in contact with his daughter or her husband; that while he was willing to shield the respondent from gossip and scandal by allowing her to be at the wedding-reception with the hundreds of other guests, he would not allow her to associate

ant, William Sharon. This testimony, as to the exhibition of the contract and the accompanying conversation, was called for by the following question asked by respondent's counsel: Q. Will you state to the Court now what occurred at that time? The question was objected to by the defendant as

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with or meet his daughter. The respondent makes much of the fact that she sent her dress to Belmont before the reception, and there dressed, "as did other members of the family, in the house." She does not contradict the testimony of the housekeeper, Zelpha Fry, who says she received a message from Miss Hill to reserve a room for her, but having no room, she left orders for the respondent to be sent to her (the housekeeper's) room, "which was left open for the use of the guests, whoever chose to go in it" (II, 1559–1560). This seems most shabby treatment for one who did "as other members of the family."

7. "He paid her bills, and furnished her money for expenses and other purposes."

The testimony is all one way—that Mr. Sharon allowed the respondent a stipend of $500 a month, out of which she paid *all* her expenses, *even her board and lodging in his own hotel.* It does not appear that Mr. Sharon ever made her a present outside of the $500 a month—no wedding-ring, wearing apparel, or other article, not even a bouquet.

8. Counsel further offer as evidence supporting the finding of cohabitation and mutual assumption, the testimony of respondent, "That during one visit to his country residence he lifted the veil of secrecy for a moment, and introduced her to a neighbor as his wife."

This seems to us a most ill-advised reference on the part of counsel, for it appears from the ninth finding that the Court below condemned this testimony as false, in the following language: "*The defendant* NEVER *introduced plaintiff as his wife, nor spoke of her as such in the presence of other persons*" (1, 71).

This is all that can be adduced by counsel as justifying the third finding. We submit that the testimony referred to does not prove or tend to prove that the parties *lived and cohabited* together "in the way usual with married people," or that they ever "mutually assumed [even] towards each other marital rights, duties and obligations."

calling for irrelevant, immaterial and incompetent testimony. The Court thereupon after discussion ruled that it would allow proof of the fact that the paper was exhibited by the respondent to the witness at the date proposed—in October, 1880. The witness then stated that the respondent had exhibited to her this contract at the time mentioned, whereupon respondent's counsel asked the witness: Q. Will you state how she came to show it to you and under what circumstances? To which defendant's counsel objected, stating that if conversation was called for, it was irrelevant and immaterial. The Court thereupon ruled that it would allow the circumstances under which the paper was exhibited to be shown. The witness thereupon testified as to the declarations of the respondent concerning the contract—that it was understood that she was to keep secret the fact that she had such a contract, &c.

Mr. Justice Thornton.—Was the specific objection made to the admission of the declarations?

Mr. Herrin.—I take it so. I have correctly stated the record just as it appears. When they called for conversations we objected that it called for conversations that were irrelevant and immaterial.

Mr. Maguire.—That question did not call for conversations; it called for circumstances.

Mr. Herrin.—It called for the acts or circumstances—the acts of the respondent. It is well settled by the authorities cited in our opening brief that the acts of the parties are just as much within the rule of *res inter alios acta* as their declarations. It is no more competent for the party to introduce proof of his acts, in the absence of the opposing

party, than of his declarations. It is insisted by opposing counsel that the defendant's objections were not seasonably and clearly taken. But the record shows that the objection was clearly and properly made before the evidence was admitted; that the first question asked, called for all that occurred at that time, and the objection having been once fully taken to the testimony called for by the question, and particularly to any conversation between the witness and respondent, it was unnecessary to renew the objection in precise terms to the following more particular questions, which simply drew out the conversation called for by the first question. It is well settled that where an objection has been once taken and overruled, it need not be repeated to the same class of evidence; that the ruling of the Court once made at the trial is to be observed in the further progress of the trial without further vexing the Court with useless and repeated objections and exceptions, and that nothing is waived by conforming to this rule.

This testimony seemed to be admitted by the Court below upon the ground that the answer alleged a forgery of the "marriage contract" within 60 days before suit; but it is evident that if the answer tendered a material issue as to the date of the forgery, the fact of the possession and exhibition of the document prior to that date could only be competent as rebutting evidence to meet any proof which the defendant might adduce on his part to sustain his averment as to the date of the forgery. The testimony objected to was no part of the plaintiff's case in chief, and no evidence was

offered by the defendant upon this point, and there was in fact no trial of the issue tendered as to the date of the forgery.

But there was no material issue tendered as to the date of the forgery. The only material inquiry was, as to whether the document was genuine or false, and it could not be a material matter whether the document was forged within 60 days before the action was commenced or at an earlier day. The only issue which the plaintiff was called upon to sustain on her part was as to the genuineness of the document. It is well settled by the authorities cited in our briefs, that matter is not made material or issuable by mere averment, and that evidence upon an immaterial issue is incompetent and should be rejected.

The only question remaining is, as to whether or not the error committed was prejudicial. It is well settled by the decisions of this Court cited in our brief, that where the Court below admits irrelevant and immaterial testimony against an objection and exception, it must be presumed that that Court regarded the testimony as relevant and material to the injury of the appellant.

FOURTH POINT.

Appellant's fourth point concerns the allowance by the Court below, against the objection of the defendant, of cross-examination of witnesses to show particular wrongful and immoral acts on their part many years before the trial, and concerning matters wholly irrelevant to any issue in the case. The ruling of the Court below admitting this kind of cross-examination was made concerning the

cross-examination of the witness, Mrs. Shawhan. The question asked on cross-examination, was: Q. How many gentlemen have you gone with besides your husband, when your husband was not present, to the California House, and taken luncheon? In connection with this question, the record shows that the respondent's counsel proposed to show that the witness was in the habit of visiting houses not reputable, and a great deal worse even than that. Upon the question of law involved in this question and the objection thereto, the Court below delivered a lengthy and somewhat elaborate opinion, which appears in the record, and which we submit is wholly erroneous.

Although the record does not show that the witness, Mrs. Shawhan, made any answer to the question asked, it appears that the Court followed the rule of law laid down at this time in the cross-examination of the succeeding witness, Mrs. Samson. This witness gave material testimony in her direct examination, to the effect that she knew the respondent in 1882, and that at this time the respondent represented herself as an unmarried woman, but that she had been engaged to be married to the defendant, William Sharon, which engagement had been broken off, and that she intended to sue him for a breach of promise of marriage, and advised with the witness as to employing a lawyer for that purpose, &c.

On cross-examination, the Court allowed plaintiff's counsel to ask "whether at the time that he [her husband] made a will (he having died in 1870, fourteen years before the trial, Vol. II., fol. 2064),

he was imbecile, and that she went into the Court, and said he was of sound mind," to which ruling the defendant excepted. The witness thereupon was compelled to answer questions put by respondent's counsel, and to testify in effect that when her husband made his will, he was sick, and that she *knew*, when he made the will, that he was utterly unable to take care of himself, and was of weak mind and unable to make a will, that she was the executrix and sole devisee in the will, and that upon the hearing of the application for probate of the will, she presumed she swore that her husband was of sound mind when he made the will. In sustaining this course of cross-examination the Court adhered to its ruling made in the case of Mrs. Shawhan, to the effect that a witness may be impeached or discredited on cross-examination by his testimony as to his *particular acts* of wrongful conduct, in no way concerning or pertinent to the issue before the Court.

The questions propounded to Mrs. Shawhan and to Mrs. Samson on cross-examination, and the rulings respecting the same, were in direct violation of the Code of Civil Procedure of California. Section 2051 of that Code provides:

"A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his *general reputation* for truth, honesty, or integrity is bad, *but not by evidence of particular wrongful acts*, except that it may be shown *by the examination of the witness*, or the record of the judgment, *that he had been convicted of a felony*."

Here the *examination of the witness as to particular wrongful acts* is expressly limited to his or her *conviction of a felony*. The expression of this excep-

tion is upon a well settled principle of construction, the exclusion of every other exception.

Section 1847 of the same Code, relied upon by the Judge of the Court below, is to be construed in harmony and not in conflict with Section 2051. Section 1847 does not authorize an examination of the witness as to particular acts of immorality, and Section 2051 expressly forbids it. The express provision of Section 2065, of the Code of Civil Procedure, that a witness need not "give an answer which will have a direct tendency to degrade his character, *unless it be the very fact in issue, or to a fact from which the fact in issue would be presumed,*" is in fact a denial of any right to examine a witness as to *irrelevant* facts for the purpose of degrading or impeaching him. And Section 2066 reads :

"*It is the right of a witness to be protected from irrelevant, improper or insulting questions,* and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; *to be examined only as to matters legal and pertinent to the issue.*"

The questions here objected to were not pertinent to the matter in issue, but were wholly collateral and foreign to the examination of the witness in chief, and were asked solely for the purpose of discrediting the witness by compelling her to testify to *specific wrongful acts*, tending to impeach her credibility.

In *Ex Parte Rowe* (7 Cal., 184), this Court drew a clear distinction between cases where a witness is privileged from answering questions which might subject him to a criminal punishment, and cases where "*the answer is not to any matter pertinent to the issue and would disgrace the witness,* as when upon cross-examination he is asked a question, the answer to which would tend to destroy his credibility as a wit-

ness," and held that a difference between the two classes of cases is "shown from the fact that *when the answer would tend to disgrace a witness,* AND THE QUESTION IS NOT PERTINENT, *the Court will not even permit the question to be asked;* while in the other case, the question may be asked, and the witness must put himself upon his privilege." In the case of *Hinkle* vs. *S. F. & N. P. R. R. Co.* (55 Cal., 627, 632), questions asked of a witness on cross-examination, as to particular wrongful acts committed by him, in order to impeach his integrity, were held to have been rightly excluded.

In *People* vs. *Elster* (3 Pac. Rep., 884, 888), *People* vs. *Schenick* (65 Cal., 625), and *People* vs. *Hamblin*, (68 Cal., 101), it is distinctly held that the only specific question as to wrongful acts which may be asked of a witness on cross-examination, for purpose of impeachment, under Section 2051 of the Code of Civil Procedure, is that relating to his *conviction of a felony.* In *People* vs. *Elster*, a witness called by the defendant was compelled to answer, against the defendant's objection, the following questions: "Have you ever been arrested for a felony? Have you ever been arrested for stage robbing? Have you ever been arrested for cattle stealing?" This was held error and ground for reversal. In *People* vs. *Hamblin*, besides the ruling that the witness could not be asked as to his mere arrest on criminal charges, as contra-distinguished from conviction of a felony, it was also held to be prejudicial error to sustain a question asked of the witness on cross-examination as to whether he was employed as doorkeeper of a gambling-house with knowledge that it was an unlawful business. (68 Cal., 103–4).

But even if cross-examination as to particular wrongful acts is allowable, for the purpose of impeaching the witness, it would not follow that the cross-examination in question was proper, because the acts and transactions, called for, occurred more than 13 years before the trial, and it is well settled by the authorities, cited in our brief, that testimony to impeach a witness should go to his present character, and that where there is no other impeaching testimony, evidence of bad character of a witness years ago is inadmissible.

Mr. Terry.—Is there anything in the record to show when that occurred ?

Mr. Herrin.—Yes, sir; and we have made the references to the record in our reply brief.

Mr. Maguire.—I have not been able to find it.

Mr. Herrin.—You will find in our reply brief (p. 122), we made reference to the time when this trial occurred, and to the date when this transaction was said to have occurred.

Mr. Justice McFarland.—Have you discovered a distinction between errors as to admissibility of evidence, committed by a Judge who is trying a case without a jury, and a case where there is a jury ? I think Greenleaf lays it down that the questions of admissibility of evidence were hardly ever reviewed in England where there was no jury. And isn't it the law that a judgment would not be reversed for an error committed as to the admissibility of evidence, unless the error showed that the Court was trying the case upon a wrong theory ? Would a mere ordinary error as to a little piece of testimony, admitting it was error, be sufficient to reverse a judg-

ment, unless it could be shown very clearly that it must have affected the case ? Your idea is that the rule is that, wherever there is shown to be error at all in the admissibility of testimony, that the judgment must be reversed ?

Mr. Herrin.—I find no warrant for the distinction suggested, if it go to the extent that you cannot reverse for any testimony admitted where the trial was by the Court; on the contrary, I do not think there is any such distinction made. The fact that a Judge in trying a case, admits testimony as relevant and material, against a proper objection, shows that such testimony has weight with him. In two cases cited in our opening brief (p. 126), to the point that every error is *prima facie* an injury to the party against whom it is made, and is ground for reversal unless it affirmatively appears that no harm was done by the error, it is held that there is no distinction in the application of this rule between cases tried by a jury, and cases tried by the Court without a jury. These cases are *Spanagel* vs. *Dellinger* (38 Cal., 282–3), and *Mason* vs. *Wolff* (40 Cal., 249).

Mr. Justice McFarland.—The evidence is always under the control of the Court where there is no jury.

Mr. Herrin.—Undoubtedly, that is very true; but then we are entitled to have our case tried upon relevant and material evidence, and if the Court is allowed to depart from the rule where the case is tried without a jury, then it may depart entirely, and go to any extent, and admit hearsay, and exclude competent testimony. I do not see how we can depart from the ordinary rules, whether the cause is tried

by the Court or by a jury. I do not think this Court has ever made that distinction. On the contrary, it has denied such distinction in the two cases I have referred to.

Mr. Maguire.—There is a great difference between excluding relevant testimony and admitting irrelevant testimony.

FIFTH POINT.

Appellant's fifth point concerns the striking out of the testimony of the defendant's witness, F. A. Hornblower. Mr. Hornblower testified that he was a lawyer in March, 1883, practicing his profession in San Francisco, and that in that month, after having had two conversations with the witness, Mrs. Samson, he met Mrs. Samson and Miss Hill, the respondent, who were walking together, and speaking of the respondent he said, "I met her on the corner of Montgomery and California streets." "At that time Mrs. Samson introduced me to Miss Hill; she said 'this is the lady I have spoken to you about who desires to bring an action against Mr. Sharon for breach of promise of marriage.' Mrs. Samson said she had fifty letters. I told her three or four letters—good square promise from old Sharon was all I should want. She said she hadn't had time to look them over, but she would in a few days; and I told her when she got ready, to come into my office, and fetch the papers with her." Mr. Hornblower testified further that the interview at the time of his introduction to Miss Hill was only two or three minutes when they parted, and that he had not seen her from that time until he saw her in Court when he was a witness on the trial of this

action. He further said he was not Miss Hill's lawyer; that she did not tell him what kind of evidence she had against Mr. Sharon, but only that she had fifty letters. This was in substance the direct examination of the witness Hornblower, his testimony being given without objection. Respondent's counsel then cross-examined the witness, calling out a more particular narration of the facts stated in the direct examination, but not eliciting any other or different statement, showing, or tending to show, that the relation of attorney and client ever existed between Mr. Hornblower and the respondent. At the conclusion of the cross-examination, the respondent's counsel made a motion to strike out all of the testimony of the witness, upon the ground that it was a confidential and privileged communication made on the part of the plaintiff to him. We insist that this was error. The rule governing the subject of privileged communications, as between attorney and client, is stated in the second division of Sec. 1881, Code of Civil Procedure, as follows: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, *in the course of professional employment.*" It thus appears that in order to constitute a privileged communication under the Code, it must be made to appear: 1, that the relation of attorney and client existed at the time when the attorney became informed of the fact or matter sought to be proved by him; and 2, that the communication was made in the course of professional employment; and, according to the authorities,

it must appear that the matter or fact sought to be proved by the attorney, not only related to the business about which he was employed, but was communicated in confidence, and not in the presence of strangers. The Code of Civil Procedure is imperative in requiring that the privileged communication be made *in the course of professional employment.* It is clear that there can be no professional employment, without a corresponding right to professional compensation, unless the services of the attorney are given as a gratuity by express agreement. Upon the facts stated by Hornblower, he clearly had no right to compensation from the respondent, and it could not be said that if the respondent had afterwards commenced her breach of promise suit, he would have been disqualified from taking employment from Mr. Sharon. Yet this must have been the result of this conversation on the street, if it is to be regarded as a privileged communication. There can be no pretense that the testimony of Hornblower tended, in any way, to show that he was the attorney of the respondent, either by express or implied contract. On the contrary, it is clear that no such relation existed between them, and that the respondent sought no advice from him. It is laid down in the authorities cited in our briefs that the relation of attorney and client does not arise where the attorney is not employed, and there is no expectation to compensate him for his services ; that a conversation with an attorney, without such employment, is not privileged.

But even conceding that the relation of attorney and client existed, it seems clear that the communication in question was not communicated in confi-

dence and was not privileged. The conversation occurred in the presence of a third person who was not shown to be the agent of the respondent, and for this reason the communication could not be deemed confidential or privileged, according to the authorities. But further, the conversation was not confidential in its nature. It was to the effect that the respondent proposed to bring a breach of promise suit against William Sharon, and under the authorities, this could not be a privileged communication, for if the respondent had employed the witness Hornblower to conduct a particular kind of suit, it would be proper for him to testify as to that fact and the nature of the suit which he was employed to bring, because when the suit is brought, its nature would be disclosed by the record of the Court.

Opposing counsel seek to avoid our exception as to striking out the testimony of Hornblower, upon the ground that if the Court erred in holding that the testimony was a privileged communication, this was an error of fact and not of law. But the authorities relied upon in the respondent's points and authorities do not sustain this proposition. On the contrary, the authorities show that the decision of the Judge upon the preliminary question whether or not a communication is privileged, may, if erroneous, be reviewed as a question of law. This has been held by the Supreme Court of this State in two cases: *Estate of Toomes* (54 Cal., 516), and *Carroll* vs. *Sprague* (59 Cal., 659). In those cases it is held that the exclusion of evidence as a privileged communication which was not privileged under Section 1881, of the Code of Civil Procedure, is an error of law in the exclusion

of proper testimony, which is a ground for reversal.

But the objection made has no force here, because there is no question of *preliminary proof* in this case; on the contrary, the exception is to an order granting a *motion of plaintiff's counsel to strike out the whole evidence of the witness* AFTER *it had been given without objection.* This motion and the exception to the ruling thereon, presents the three following *pure questions of law*: 1, as to the *competency of the evidence*; 2, as to whether such a motion, after evidence given without objection, is allowable; and 3, as to whether the motion and the order granting it was too sweeping. As to the competency of the evidence there can be no doubt in view of the authorities cited in our opening brief, and we have also cited direct authority to the point that the motion to strike out the evidence after it had been given without objection, was not allowable. We concede that where it is *first developed* upon the cross-examination that evidence offered in chief was incompetent, a motion to strike out when the incompetency is first discovered would be proper. But in this case, the same evidence substantially was developed on cross-examination *which had been given in chief without objection*, and no new grounds of incompetency of that evidence were disclosed by the cross-examination. Moreover, if any incompetent evidence was developed at all, it was that which the cross-examination itself elicited. It cannot be contended with any reason that the *declarations of Mrs. Samson* in the presence of the plaintiff were privileged, and the conversation which occurred *between Hornblower and Miss Hill* was proved by the respondent herself on

her cross-examination of the witness. If that was a privileged communication, it did not lie in the mouth of the plaintiff, who elicited it by her cross-examination, to move to strike it out. A party cannot complain of an error caused by his own action, or of evidence which he has himself elicited, and in such cases the other party has the right to the benefit of the evidence. This is held in numerous cases cited in our reply brief.

Even if the conversation between Hornblower and the plaintiff were privileged (which we do not admit), and even if the plaintiff could object thereto after having elicited it by cross-examination, the order granting the motion was too sweeping, because it included the relevant and competent testimony of the witness as to what Mrs. Samson said in the presence of Miss Hill at the time of the introduction, and also that as to the object of the proposed suit, which had been properly given upon the examination-in-chief. A motion to strike out evidence must be directed with certainty to improper evidence only, as has been decided by this and other Courts in the cases cited in our reply brief.

SIXTH POINT.

Appellant's sixth point is that the decision is against law—that the conclusions of law stated in the decision of the Court are erroneously drawn from the findings of fact contained in that decision. Respondent objects that this point cannot be considered upon motion for new trial—that the only method of correcting this error, if any there be, is upon appeal from the judgment ; and it is further insisted that even if this question was open for con-

sideration on this appeal from the order refusing a new trial, that it must be decided against us on the doctrine of the law of the case; that the question was determined by this Court upon the appeal from the judgment, which decision cannot now be reviewed in this case, even if it should be conceded to be grossly erroneous.

To the objection that the former decision of this Court is to be treated as the law of the case upon this appeal, we reply that the doctrine of the law of the case has never been applied to a second appeal which was pending in the Supreme Court when the decision of the first appeal was made. That doctrine has been applied in every instance, so far as we can discover, to the case of a second appeal or writ of error *taken after* a decision of the Appellate Court upon a previous appeal or writ of error in the same case. In the vast majority of cases the doctrine is applied to a second appeal taken after the case has been *tried* a second time in the Court below, upon the principles announced in a previous judgment of reversal. The familiar principle must be borne in mind that all decisions are to be construed and limited in the light of the facts to which they are applied. Considered thus, the decisions which announce the doctrine of the "law of the case," must be limited to the effect of a decision made upon a prior appeal, *in cases where the mandate of the Appellate Court has been returned to the Court below for its guidance, and the parties have acted thereunder in that Court in building up a new record which is based upon and regulated by the principles of that decision*, which, therefore,

the parties are not permitted to question upon a second appeal. The cases do not conclude the point that a decision, however erroneous, upon one of two collateral or concurrent appeals pending at the same time, is absolutely binding upon the Court and upon the parties, as to the decision of the second distinct appeal *own, distinct from that used upon the first appeal, and which has no relation of dependence upon the first appeal decided, and which has been taken upon a record of its which record was made up without reference to any ruling made upon that appeal.* There are cases decided by this Court which seem on principle to indicate that in such case, each appeal must be determined *wholly upon its own merits*, without reference to the result of any other concurrent and independent appeal. In *Fulton* vs. *Hanna* (40 Cal., 278), it is held that the dismissal of an appeal from a judgment, though it operates as an affirmance of the judgment, does not place the appellant in any different or more unfavorable position in respect to his appeal from a new trial order, than he would have occupied had no appeal from the judgment been taken within the time prescribed by the statute. In *Walden* vs. *Murdock* (23 Cal., 540), it is held that the reversal of an order refusing a new trial vacates the judgment, though it became final and non-appealable by lapse of time before appeal from the order was taken; and in *McDonald* vs. *McConkey* (57 Cal., 325), it is also held that the reversal of an order dismissing a motion for a new trial, authorizes the Court below to hear the motion, grant a new trial, and vacate the judgment, though it has been affirmed on appeal.

It would be proper, when two concurrent appeals are pending in the same case, one from the judgment and the other from a new trial order, to have them consolidated and heard together. And it would certainly be the right of either of the parties to insist upon the appeals being heard together. But suppose they are heard separately, without objection from either party, each appeal upon a distinct record of its own, as in the case at bar ? Was this not a tacit agreement that the Court should, upon each appeal, consider and decide all the questions presented by the record, and that the losing party upon the first appeal might have a *rehearing* upon the questions of law common to both appeals? We submit that in so far as the new trial appeal involves the same questions which were considered upon the appeal from the judgment, the subsequent hearing of the new trial appeal operates as a *grant of a rehearing* upon those questions, as effectually as if a rehearing were expressly granted as to them upon the appeal from the judgment. The decision upon the appeal from the judgment can have only the suasive force of authority in considering the concurrent appeal from the new trial order, and may and should be overruled, if found to be clearly erroneous. The appeal from the new trial order should be decided as fully upon its own merits, as if there had been no concurrent appeal *from the judgment.*

To these views advanced in our opening brief, the respondent makes no argument in reply, but merely cites a number of cases decided by the Supreme Court of this State, where the doctrine of the law of

the case has been applied. But these cases are all instances of the application of the doctrine, to appeals *taken after* the mandate of the Supreme Court upon the first appeal has been returned to the lower Court for its guidance.

Mr. Justice Thornton.—I understand the reason of that rule of the law of the case is this: I think it is stated in the Supreme Court of the United States in the first case that I recollect, that the Appellate Court has no power to reverse its former ruling made in the case; it is beyond the power of the Court, so that it must constitute the law of the case in all its stages.

Mr. Herrin.—And if you examine the record of that case, I think it is the Washington Bridge Company case, in 3 Howard.——

Mr. Justice Thornton.—That is one of them.

Mr. Herrin.—You will find that the parties had returned to the Court below, and upon the mandate of the Supreme Court affirming the judgment, further proceedings had been had, and that the appellant on the first appeal took another appeal, and brought the record back, and sought to have the Supreme Court reverse its former decision upon the ground that it was made without jurisdiction, as the first appeal was taken from an interlocutory decree, and not a final decree; but the Supreme Court said it did not have power to review its former decision. So there are other cases in the Supreme Court of the United States, and in this Court, where the Appellate Court has made decisions in cases where there was no jurisdiction; and still, after the case was decided

upon the merits without objection as to jurisdiction, and the mandate had been sent down, the Appellate Court will not allow the lower Court to violate it or disregard it. It concludes the parties, and concludes the Court; and in such cases, the Supreme Court requires its decision to be obeyed by the parties and the Court below, and will not have itself stultified by parties who have taken proceedings in the Court below in accordance with its mandate and decision. These cases really proceed upon the principle that the decision and mandate of the Appellate Court, must, in all cases, be obeyed by the parties and the lower Court, but this principle can obviously have no application to the case at bar.

I will now proceed to show that the decision of the Court below is against law and that this constitutes a ground for new trial. Where the Court draws erroneous conclusions of law from the facts, it certainly is a decision against law, for the decision consists as well of the conclusions of law as of the findings of fact. This is expressly declared by Section 633 of the Code of Civil Procedure. Now, it has been held by this Court in *Condee* vs. *Barton*, (62 Cal., 5), that the Court below may after decision and before judgment correct any error it may have committed in drawing erroneous conclusions of law from the findings of fact. It follows that if the losing party can be so fortunate as to ascertain the decision *before* the entry of judgment by the clerk,he may move the Court to correct this error on the ground that it is a decision against law. But according to the theory advanced by opposing coun-

sel, if the losing party can be kept in ignorance of the decision until the clerk enters the judgment, he loses the right to have the error corrected by application to the trial Court. Undoubtedly, the trial Court can, on motion for new trial, correct all other errors committed on the trial, but this particular error, according to the argument of the opposing counsel, by the mere clerical act of the clerk in entering judgment, is taken from the power and jurisdiction of the trial Court to correct its own errors. If this be the true construction of the Code, it establishes a rule of practice not commendable for profound wisdom. But we submit that this is not the true construction of the Code. On the contrary, that the manifest theory of the Code is that the party injured by an error of law or fact, may apply to the Court of original jurisdiction, at his own home, and have a review and correction of the errors there, without being driven to the expense and delay of an appeal to another Court, usually held at a great distance from his home. Why should the Code have placed the particular error we are now considering—that is, erroneous conclusions of law applied to correct findings of fact—outside the correcting power of the Court of original jurisdiction? "Where the reason is the same, the rule should be the same." (Civil Code, 3511.) *In terms*, the Code does embrace it, for it is a "decision against law." To avoid, then, the natural meaning of these words, resort must be had by our opponents to a forced and unnatural construction of them, which will destroy the harmony and apparent scheme of the Code upon this subject, and

make an isolated case of an error committed by the trial Court, which that Court is powerless to correct. The Court on the next day after the judgment on the decision is entered, may become convinced of its error, and be anxious to give the injured party relief. If the motion for new trial embraces that error, and the relief can be granted in the Court where it was committed, this would certainly be in furtherance of justice and right. But to divest the words "decision against law," of their obvious and ordinary meaning, resort is had to Section 656, C. C. P., to show that if a new trial should be granted because the conclusions of law are erroneously drawn from correct findings of facts, then a new trial of the facts must be had. The mere result of a construction of a Statute is not always a safe test of its accuracy, but of course is a proper subject of consideration. But does the result follow? Must there be necessarily a new trial of the issues of fact in order to correct the error? If the motion be made to correct the error before judgment, we have seen that a new trial of the facts does not follow. Why may not the Court below have the same power, though *in form* a new trial be granted? The 656 Sec., C. C. P., contains a mere *definition* of a new trial. By this section a new trial is defined as being "a re-examination of an issue of fact in the same Court after a former trial and decision." It is obvious that this definition is not entirely accurate or comprehensive, because we know that upon new trial, the Court must re-examine and re-decide the questions of law involved, but, if the mere definition given by Section 656 is to control the other plain provisions

of the Code, it might as well be argued that upon a new trial, the Court must confine itself entirely to a re-examination of the facts only, and not concern itself with the questions of law involved. This, of course, would be an absurdity, and shows that the argument advanced is unsound.

It is further urged that our construction of the Statute requires that a new trial shall be granted as to the issues of fact, although the party dissatisfied with the conclusions of law may be entirely satisfied with the findings of fact. But does it necessarily follow that the Court must grant a new trial as to the facts, upon the ground only that its conclusions of law are erroneous? It is settled by this Court that the granting of a motion or application for new trial need not be an entirety, or as asked. The Court may grant it as to one or more of the issues of fact and deny it as to others, and may grant it as to some of the findings and not others. In these cases the Court only vacates part of its decision, and takes appropriate action in reference to the part vacated, and its final judgment rests upon the part not vacated, together with the new findings of fact and conclusions of law. Where a new trial is granted only as to one of several issues of fact, the conclusions of law, as originally drawn, are undoubtedly vacated, and ultimately new conclusions of law are drawn in part from the old findings not vacated, and in part from the new findings of fact. Suppose the Court, in granting a new trial as to part of the findings, had already before it evidence sufficient to find accurately upon the subject of the finding vacated, without new evi-

dence, might it not do so? A similar course was suggested in *Bosquett* vs. *Crane* (51 Cal., 507). There, the Court below failed to find upon a material issue. This Court reversed the judgment for that reason and remanded the cause to the Court below for further proceedings in accordance with the opinion of the Supreme Court. The Court says (p. 507):

> But if the Court below can determine this issue (upon which there was no finding) on the evidence taken at the trial, it may amend its findings in this particular, without the necessity of another trial, and will thereupon proceed to pronounce judgment. Otherwise, it will proceed to hear further evidence upon that point, after due notice to the parties.

Now, in *Brown* vs. *Burbank*, (59 Cal., 536–538), this Court held that a failure to find on any of the issues, is ground of motion for new trial. The decision in such cases is held to be "against law," and therefore ground of motion for new trial. (*Knight* vs. *Roche*, 56 Cal., 17). Why may not the Court, then, on granting the motion for new trial here, proceed as indicated and directed in *Bosquett* vs. *Crane*. A careful examination of the Code of Civil Procedure shows that the intention of the Code is to give an aggrieved party an opportunity to appeal to the Court which commits an error, for a correction of that error. The mere form of the proceeding is of secondary consideration, for "the law respects form less than substance." (Civ. Code, 3528.) The object was to give a motion for new trial the effect of an appeal in its broadest sense, in equity cases; that is a review of facts and law.

But Section 656, C. of C. P., cannot be read separately from its immediate neighbor, Section 657,

which mentions the vacation of a decision as something distinct from the granting of a new trial. That Section provides that the former verdict or other decision may be vacated *and* a new trial granted on the application of the party aggrieved. The vacation of the verdict or decision and the granting of a new trial are mentioned; not disjunctively but conjunctively. Now "the greater contains the less." (Civ. Code, 3536.) The power to vacate the decision *and* to grant a new trial, authorizes a vacation of the decision without granting a new trial where the error complained of can be corrected otherwise than by granting a new trial, or by granting a new trial in part, if that corrects the error. In other words, the power is plenary, but should be exercised only so far as necessary for the appropriate relief, or as may be commensurate to the error committed.

But if it be true that for such an error, there must be a new trial of all the issues, if the decision be disturbed at all, it only follows that if the Court has in its conclusions of law committed an error which cannot be corrected except at that cost, the aggrieved party is not responsible, but should be relieved from the error in the more direct and speedy mode, by way of motion for new trial, rather than by an appeal to the Supreme Court. Many a small error in admitting or rejecting evidence, causes a decision to be vacated, where weeks have been spent at the trial in the Court below. It is an important consideration, however, in this connection, that if a new trial of all the issues of fact be granted in any case, upon the ground that the

conclusions of law are erroneous, it would be to the advantage of the adverse party to have such a re-examination rather than to have the judgment, which was in his favor, turned immediately against him by a correction of the conclusions of law. It certainly does not lie in his mouth to object that the losing party asks for a *new trial* on the statutory ground therefor that the decision "is against law," instead of asking for a direct judgment against him upon the same ground.

The case of *In Re Doyle*, (73 Cal., 564,) is cited by the respondent as deciding this question against us. But it is a sufficient answer to that authority to say that the question, whether a new trial can be granted on the ground that the conclusions of law in the decision were erroneous, did not arise in that case. No such error was assigned or relied on. It was a case of contest of a will, and the question was whether, under the provisions of the Code, the failure of the petitioner for the probate of the will to deny by written answer the allegation of the written opposition, was an admission that the allegation was true. The appellant contended that the want of such denial involved an admission by the petitioner of the truth of the allegations in the written opposition, and that the decision was against law because it was against this alleged admission. Now it is clear that what is said in the opinion of the Court in that case upon the point that a new trial can not be granted *in ordinary civil cases* because the Court had drawn wrong conclusions of law from the facts is a simple *obiter dictum*. The decision was not made by the Court in bank, but only

by three Judges in department, and two only of these judges agreed to the main opinion containing this *obiter dictum*. Mr. Justice McKinstry wrote the opinion and Mr. Justice Paterson concurred therein, but Mr. Justice Temple delivered a separate opinion, and he placed his concurring opinion upon the question of the proper practice in such cases in the Probate Court and of the necessary pleadings there. Respondent's counsel further cite what is said by Mr. Hayne in his able work on New Trial and Appeal; but we respectfully submit that Judge Hayne lays too much stress, as we think we have shown, upon the mere definition of a new trial contained in Section 656, and that he did not give full force and effect to the subsequent provision contained in division 6 of Section 657, which provides that a new trial may be granted on the ground that *the decision is against law*. We venture to say that had his work been written after the decision in *San Diego, etc., Co.* vs. *Neale*, (20 Pac. Rep., 372), in which he wrote the able opinion published, he would, on further reflection, have agreed with the views I have stated.

I will not discuss this question further, but will only refer the Court to the full review of all the authorities having any bearing upon the subject, which is contained in our reply brief.

I will now discuss briefly the proposition that a strictly secret marriage cannot be held valid or lawful under the provisions of our Civil Code.

This Code itself, in Section 1667, recognizes a "policy of law" and a rule of "good morals" as a standard of determination as to what is lawful.

That Section declares—"That is not lawful which is—1. Contrary to an express provision of law. 2. *Contrary to the policy of express law, though not expressly prohibited; or,* 3. *Otherwise contrary to good morals.*" It is susceptible of demonstration that a strictly secret marriage, *the existence of which is unknown to any third person,* is contrary to the common law, "contrary to the policy of express law," and "contrary to good morals."

I respectfully submit that the majority of the Court, upon the appeal from the judgment, erroneously assumed that at common law, a strictly secret marriage was possible, and that such error resulted from failing to distinguish between relative and absolute secrecy or publicity. It is not denied or questioned that there might be a private solemnization of marriage at common law, or under our Statute ; but it should be borne in mind that even at the most private solemnization, the public is theoretically present in the person of its accredited officer. In the prevailing opinion, on the appeal from the judgment, it is argued that because a private solemnization without license or record may complete a valid marriage, the purpose of Section 55 of the Civil Code cannot be to require the existence of marriage to be made public. But the opinion seems not to consider that the public is a party to the most private solemnization of marriage in the person of its attesting officer who declares the marriage complete. (*Goshen* vs. *Stonington*, 4 Conn., 210, 218.) The question is not one as to the *extent* of publicity required in order to make a valid marriage, but whether the attestation of some representative or representatives of

the community, towards which, marriage, as a social and civil institution, must necessarily have regard, is not required by the law, its policy, and by good morals, in order to make the marriage valid. Mr. Justice Temple, in his concurring opinion, says that " under our Statute consent and consummation are in all respects the equivalent of solemnization." This concession is all that we contend for. Since in every solemnization of marriage, there must necessarily be attestation before a representative of the people, whether there is a license or record of the marriage or not, it follows that to make " mutual assumption," etc., a substantial equivalent of solemnization, there must also be in the assumption, a substantially equivalent attestation of the marriage by declarations or acts showing its existence to some one or more persons representing society, towards which marriage has by its nature an essential aspect.

In support of the principle for which we contend, we adduce the fact that there is no decided case, English or American, holding the validity of marriage unless the marriage was known to one or more persons other than the contracting parties. The truth is, that the only decisions extant which recognize the validity of secret marriages are declarative of the Scotch law, and not of the English common law; and there is *no decision* which declares the validity of an agreement for absolute secrecy of the marriage relation, where the facts of matrimonial consent and cohabitation were, by the terms of the agreement, to be kept absolutely secret from all third persons whatsoever for a period of years, as in the case at bar.

We have found no text-writer except Bishop, who says that an agreement to keep a marriage secret will not invalidate it or necessarily involve in doubt the proofs of its existence, and to sustain his text Mr. Bishop cites only the two Scotch cases of *Dalrymple* vs. *Dalrymple*, and *Hamilton* vs. *Hamilton*, and another case of *Swift* vs. *Kelly* (3 Knapp, 257). The last case involved a marriage celebrated at Rome by a priest, in the presence of witnesses, according to the Roman law, and we fail to see how the decision gives any support to the proposition stated by Mr. Bishop. The case of *Hamilton* vs. *Hamilton* (9 Cl. &. F., 327), was an action of declarator of illegitimacy of the issue of a Scotch marriage, where the parties had openly cohabited together in the city of Edinburgh, and had children during the cohabitation, but there had been no open recognition of a marriage contract. The sole question related to the existence of matrimonial consent between the cohabiting parties. The Court held that there was not sufficient repute of marriage to prove it; but that such proof appeared from a written declaration of marriage, which was signed by the husband and known and assented to by the wife, and left in the custody of the husband's solicitor, who knew of its contents. There was no positive agreement of secrecy, but only the expression of a wish by the husband that the marriage should be kept private for the present. There was no absolute secrecy of the matrimonial contract. There was no attempt at secrecy as to the fact that they were cohabiting together, and in view of the fact that the

children of the marriage were brought up at their father's home with knowledge of their paternity, public policy should, in their interest, rather sustain than defeat the marriage.

Mr. Terry.—Does not that case show that in the case of two or three children that bonds were given that the children who were illegitimate should not be a charge on the county—that same case of *Hamilton* vs. *Hamilton?*

Mr. Herrin.—Well, that might be so, and it would not affect the point that I am making now on that decision.

The Dalrymple case is the leading case relied on to sustain an agreement for an absolutely secret marriage, and the only one which seems to give countenance to such an agreement. But when carefully considered, it becomes evident that this case did not involve the question as to whether an agreement, *made part of the contract of marriage* for absolute secrecy of the marriage for a fixed period of years, would invalidate the contract. The case related to the validity of a marriage by written declaration of present consent to marriage in Scotland. The law of that country was the sole subject of inquiry and of decision. The Dalrymple case is not an authority as to what constituted marriage under the common law of England; for no such question was presented for decision by the facts of the case. We have fully reviewed this case in our opening brief, and have conclusively shown that the case is in no sense authority as to the common law of England, and that even in Scotland, the case has been criticised by high authority, as not being a

true exposition of the Scotch law. On the contrary, that the inquiry as to what the Scotch law was, was superficial and erroneous, and that the premises upon which the decision is based are false. Fraser in his learned treatise on the Law of Husband and Wife, according to the Law of Scotland, reviews the Dalrymple case at great length. No one who examines Mr. Fraser's work can doubt for a moment the profoundness and accuracy of his research; nor after reading his review of the Dalrymple case, will any one question his statement concerning that case that:

> There never was a case like *Dalrymple* vs. *Dalrymple*, having reference to a question so important, which underwent so imperfect and superficial an investigation. *Of general reasoning on false premises there was abundance; of patient inquiry into the facts but little.* (p. 174.)

As the Dalrymple case is only to be received by this Court as persuasive authority, we respectfully submit that before it is accepted as authority, it should be subjected to a more critical examination than was given it upon the appeal from the judgment; and in view of the fact that this decision has been expressly repudiated by the highest Courts of England as not being in any sense the true exposition of the common law of England, we submit that this Court might well hesitate before accepting the Dalrymple case as authority upon the subject of secret marriages at common law. And further than this, we say, that the law of Scotland declared in the Dalrymple case, that *mere consent*, without solemnization, witnesses or cohabitation, constitutes marriage, cannot have the slightest application in the State of California, where the law requires, *in*

addition to consent, a " solemnization," or " a mutual assumption " of marital rights and duties, in order to complete a marriage. The loose law of Scotland is certainly contrary to the law of marriage in England, and contrary to the common law, as settled in *Queen* vs. *Millis*. It ought to be enough to lay the case out of consideration as an authority here, that it is *contrary to the Statute law of California.*

That the common law of England did not permit a secret marriage is conclusively shown by the two elaborate cases of *Queen* vs. *Millis* and *Beamish* vs. *Beamish*, in which the whole question as to the constitution of marriage underwent a thorough sifting, and the cases were argued before the highest Court of England by the ablest advocates at the bar of the Queen's Bench in Ireland, as well as that of the House of Lords in England.

It is argued in the prevailing opinion on the appeal from the judgment that the fact of secrecy did not invalidate the marriage, because the making public of the marriage relation is not a duty or obligation annexed to the status of marriage, without which the status cannot exist. We concede that the *full degree* of publicity which ought to be given to marriage, and which the law by its directory provisions requires shall be given to it, is not essential to its validity. And we do not contend that the mutual *assumption* of marital rights and duties necessarily involves a complete and perfect *discharge* of every marital duty. But we insist that an *express repudiation* of any essential duty is inconsistent with a "mutual assumption" of marital rights and duties. We further insist that by the

nature of marriage as a public and social institution, there must be three parties to its consummation,—the man, the woman, and the public through some representative or representatives thereof. It cannot be denied that this is true of every solemnized marriage, however privately it may be guarded from public observation. The representative of the public must be present and attest the marriage, or else there can be no solemnization.

The "policy" of the law of marriage against strict secrecy is manifest from the consideration that the nature of the case requires something different in the "mutual assumption of marital rights and duties," from the mutual assumption of meretricious cohabitation or intercourse. It is evident that the " rights, duties and obligations " of marriage, that highest and holiest institution of human society, in which the community have the deepest interest, cannot be assumed by the act of coition *alone;* for that act is common both to lawful and unlawful connection, and is not a distinguishing feature between them. Nor can they be assumed by mere cohabitation not of an ostensible matrimonial character, for such cohabitation is not distinguishable from one of a merely meretricious character. The sexual relations between man and woman are naturally divided into two classes, the one being the honest and honorable and even sacred relation of matrimony, the other the meretricious, immoral and condemned relation of man and mistress. Their outward characteristics are as widely marked as their different natures, the one open, respectable, involving the sacred and endearing relations of home and

family and social ties, promoting the welfare of the community, and protected and encouraged by the law ; the other secret, hidden, disgraceful, and carrying with it the condemnation of society and the law —designed for illicit intercourse, and to evade, if possible, the procreation and rearing of children whose lives of bastardy will only prove a curse. Now it is evident that the policy of the law of marriage must require that the acts which *assume* the *marriage* relation as contradistinguished from the *meretricious* relation must essentially denote the former relation as contrasted with the latter. The mutual assumption of *marital* rights and duties must be essentially different from the mutual assumption of *the relation of man and mistress.* It cannot be the same thing. If we construe the Code as only requiring such acts and conduct as are perfectly consistent with meretricious relations, we abrogate the provision of the statute which requires the mutual assumption of MARITAL rights and duties. As we have said, support may be given to a wife or to a mistress; personal intimacy may be with a wife or a mistress ; apartments may be furnished for a wife or a mistress; the same bed may be shared with a wife or a mistress; therefore, these acts alone do not distinguish the one relation from the other ; and how can it be said that such acts are the mutual assumption of *marital* rights, any more than that they are the mutual assumption of illicit intercourse ?

Mr. Maguire.—Can you name any act that is not common to both relations?

Mr. Herrin.—Yes, sir.

Mr. Maguire.—Except the contract?

Mr Herrin.—Yes, sir. It is easy to know when a man and woman have truly *assumed* the rights, duties and obligations of marriage. The members of the community in which they move are awake to the event. They are surrounded by friends, relatives and acquaintances, who know the fact that they have taken each other as husband and wife and have begun to live together as such. They love the name of husband and wife, and seek the first opportunity to use it in the presence of others; they are introduced as such; they are spoken of and known as such in all their social relations. They "live and cohabit together in the way usual with married people" and so continue to do. They do not live in separate hotels and consort merely for sexual intercourse with a design to evade if possible the procreation and rearing of children. They delight to occupy a home together and rear their children within the sacred precincts of the family. In short, they recognize in every way the fact that they are "united in law for life, for the discharge to each other, and to the community, of the duties legally incumbent upon them." But no such course of conduct or habits of life ordinarily attend the association of man and mistress, whose relations are generally concealed from public knowledge and view, unless the persons live in a society or among associations not requiring the observance of the decent, respectable and moral habits of life.

If to openly *deny and repudiate* the marriage relation before the community is to *assume* such relation, then these parties assumed it, but not otherwise. If to *deny and repudiate* all marital rights

and duties in the presence of all third persons is to *assume* all marital rights and duties, then these parties assumed them, but not otherwise. In the prevailing opinion upon the appeal from the judgment, it is rightly said that the rights and duties of married persons are manifold, and the learned Justice writing that opinion appreciated the fact that the parties in this case had not assumed the whole body of those rights and duties. He says (75 Cal., 36–7):

> Moreover, marital rights and duties are correlative; there can be no rights without corresponding duties. The rights of the wife are to those things which she may claim of the husband, and *vice versa*. The claim to some of her rights may be waived temporarily, and when waived, there is no corresponding duty to be done while the claim is in abeyance. To make public the marriage relation, notwithstanding a mutual assent to privacy, may be conceded to be a duty, when the claim to publicity is asserted; but it is not an absolute duty to be performed while the mutual consent to privacy continues.

If this language means that the parties may at their election *waive* the assumption of *any* of the rights or duties of matrimony, then we respectfully submit that it is erroneous. We concede that after the *assumption* of *all* marital rights and duties, the parties may as between themselves waive the *performance or discharge* of particular duties for a time, for, after *assumption*, the marriage is complete, and its validity cannot depend upon the subsequent strict *performance* of every marital right and duty. The refusal of either party thereafter to perform a marital duty would only constitute ground for the dissolution of the marriage by means of divorce. But it cannot be, under our Statute, that the parties may at their election, *waive* the *assumption* of any one or more of

the rights or duties of matrimony. The agreement to marry must be an agreement to perform *all* marital rights and duties, and the "mutual assumption" of them must be an *actual entry* upon their performance in good faith by *beginning* to discharge such marital rights and duties as necessarily first present themselves. The first rights and duties which offer themselves to every newly married couple at the inception of their relation are those of *commencing to live together*, and beginning to hold themselves out to society as husband and wife. The discharge of these duties affords an earnest of the intent to discharge all marital rights and duties, as they may arise during married life, and so properly constitutes an assumption of all marital rights and duties. But a *repudiation* or *waiver* of an immediate duty cannot by any construction constitute an *assumption* of it. If the parties agree not to live together, and not to hold themselves out to any one as husband and wife, but merely to have secret sexual intercourse, they mutually *repudiate* all marital rights and duties save one, and how can this in any proper sense be called the "mutual assumption" of marital rights and duties? There is nothing in the Code to warrant the construction that a *waiver* of the assumption of marital rights and duties shall constitute an *assumption* of such marital rights and duties. If this were true—if the parties may select at will the marital rights and duties which they shall waive the assumption of, it necessarily follows that they may waive or postpone the assumption of all marital rights and duties, and still consider themselves married by reason of having assumed the marital rights and duties which they have waived. An agreement,

therefore, in these words, would constitute a perfect marriage, viz: "We, A. and B., hereby agree to present marriage, and we hereby mutually *waive* all marital rights, duties and obligations. (Signed) A. & B." It is evident that the parties have no right to select what, if any, marital rights or duties they will assume, and what rights or duties they will not assume. None can be waived or repudiated, but all must be virtually assumed, by beginning to perform such as are of immediate obligation under the law of marriage. This doctrine of waiver is, we respectfully submit, an inconsistent departure from the correct position announced by the Court that "the rights and obligations of that *status* are fixed by society in accordance with the principles of natural law, and are beyond and above the parties themselves. They cannot modify the terms on which they are to live together, nor superadd to the relation a single condition." (75 Cal., 8.)

While it is true that parties may waive a statutory privilege which is merely intended for their benefit, it is not true that they may waive the performance of any condition which is required by law in order to vest a statutory right, and that they can, upon that basis, claim the existence of such right. Suppose that persons undertaking to form a corporation should prepare articles in which they should state, "We hereby mutually waive the naming of any principal place of business of this corporation." They certainly could not become a corporation upon that basis. Suppose that persons locating a mining claim should declare in their notice of location, "We hereby mutually waive the marking of the boundaries of

this claim." They could not by such waiver obtain a title to their claim. But it is no more explicitly declared in the law that articles of incorporation must name a principal place of business in order to complete the incorporation, or that the boundaries of a mining claim should be distinctly marked upon the ground, in order to complete the claim, than it is that there must be a "mutual assumption" of marital rights and duties in order to complete an unsolemnized marriage; and a waiver of the requirement ought to be as effectual, to forbid the assertion of the right claimed, in the one case as in the others. It is well settled that parties cannot waive rights or duties which pertain to third persons, or to the public; nor can they waive the requirements of public policy. Partners cannot mutually waive the discharge of their obligations to their creditors, nor the requirements of law that they publish the names of secret partners before they can seek to recover claims which are due them. Parties to an agreement which is void as contrary to law, or as against public policy, cannot make that agreement valid by mutually waiving the requirements of the law, or of public policy. There is surely a public policy respecting the institution of marriage, not only as seen in the provisions and policy of express law, but also as seen in the nature of marriage as a domestic and social relation of fundamental importance to the public welfare. And this obvious public policy certainly presents a strong, if not an unanswerable argument, against the validity of a strictly secret marriage. It cannot be doubted that an agreement for an absolutely secret marriage

repudiates all the rights and duties which the parties owe to society, and it should not be questioned that these rights and duties cannot be waived by the parties, "but are beyond and above them." Such an agreement is contrary to law and to "public policy."

The section of the Civil Code which I have quoted declares *that* to be unlawful which is "contrary to good morals." By this standard, a strictly secret marriage cannot be sustained, for it violates every principle of "good morals." It requires the parties to act a continual lie, in the constant assertion through their acts, conduct and declarations, in the presence of all third persons, that no marriage exists. It deceives the State as to the *status* of her citizens, and prevents the ascertainment of the truth by census officers. It places constant temptations to evil and to the violation of the law before the parties, and those of the opposite sex with whom they associate, by presenting them to the public as unmarried persons who are eligible to matrimony. It utterly destroys the sanctity of home and the nature of marriage as a domestic institution, by preventing the parties from living together as husband and wife, and rearing their children within the sacred precincts of the family. It involves a denial of the legitimacy of offspring, and would leave the children of the marriage to be reared as bastards, without knowledge of their paternity and without a father's care. It would create the greatest confusion and difficulty in the descent and distribution of property. It would allow the husband and father to

escape the duty of providing for either wife or children, if the community could not be informed of the existence of the marriage relation. It would afford opportunity of escaping and repudiating all conjugal and paternal duties. It would encourage illicit intercourse under the pretended guise of matrimony. It would facilitate frauds upon young and innocent females, who might be abandoned after secret consent to marriage and secret copulation, which they could not have sufficient means of establishing to the satisfaction of a Court. It would be an incentive to adventurers and adventuresses to pretend to marriage and to sustain it by perjury. In short, it would tend to utterly demoralize society, by dispensing with the discharge of every duty which married people owe to society, and to the community, to the encouragement of all vice and immorality. What is a good marriage for one couple is good for all, and to show the effect of sustaining a strictly secret marriage, we have but to suppose that all the married people of this State were the subjects of such a marriage. If all people were to contract such a marriage in strict secrecy, without an attesting witness, or any acknowledgment of the contract; were to live separately from each other, and only meet in secret for the purpose of copulation; were in all other respects to treat each other as unmarried persons; were never to introduce each other as husband and wife, or speak of each other as such in the presence of others; should never be reputed among their mutual friends or nearest relatives to be husband and wife; and should never in any manner openly recognize the marriage relation, or openly

assume to be husband and wife, what a condition of society would exist throughout the State ! ! The family, that great institution of human society, could not exist. The whole people would be in a state of confusion and dismay, worse than that of Babel, for no man could understand or know whether another was husband or father; no child could understand or ascertain whether himself or any other child were legitimate or illegitimate, or who was the father thereof; and no woman could tell if her neighbor were maiden, wife or mistress. True, this is an extreme supposition, but it illustrates the demoralizing tendency of strictly secret marriages. If such a marriage is good between two persons, it is good as to any number; and just in proportion as such marriages exist, the demoralizing results which we have indicated are sure to follow. As is said in the dissenting opinion of Mr. Justice McFarland on the appeal from the judgment, (75 Cal., 77):

> If the relation between these parties was marriage, then all marriages may be of that character; and society might be undermined everywhere with such secret relations without there being *one recognized wife or family home in all the land.*

Since the Civil Code of California expressly declares that no contract is lawful which is " contrary to the *policy* of express law, though not expressly prohibited," or which is "otherwise contrary to good morals," a contract for an absolutely secret marriage ought certainly to be declared unlawful and void, as contrary to both. And in view of the endless evils and mischiefs which must attend the construction of our Civil Code as allowing strictly secret marriages, there is every reason why such

construction should be repudiated at the earliest moment. The provisions of our Civil Code in question have been in force over sixteen years. If the construction that these provisions permit a strictly secret marriage, is to be maintained, then all children born during that period must live under the shadow of illegitimacy and with uncertain rights of inheritance, for they cannot be secure against the claims of a secret marriage. The making of a new law by the Legislature, for future cases, cannot avail them. And if we regard the future, every reason requires that our law of marriage should be construed in furtherance of decency and good morals—to elevate the matrimonial relation, rather than to degrade it to the level of illicit intercourse. The judicial rule of *stare decisis* should not be invoked to uphold a decision fraught with evil to all the people, nor to prevent the Court from giving to our law of marriage its true and reasonable construction—a construction demanded, as we think, by the letter of the law, and one harmonious with the usages and social observances of our people.