REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

CONSISTORY COURT OF LONDON;

CONTAINING THE

JUDGMENTS

OF

THE RIGHT HON. SIR WILLIAM SCOTT.

By JOHN HAGGARD, LL.D. Advocate.

IN TWO VOLUMES.

Vol. II.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR JOSEPH BUTTERWORTH & SON, LAW-BOOKSELLERS, 43, FLEET-STREET,

J. COOKE, 6, ORMOND-QUAY, DUBLIN,

AND T. CLARK, 8, PARLIAMENT SQUARE, EDINBURGH.

1822.

SULLIVAN *v.* SULLIVAN, FALSELY CALLED OLDACRE.

11th *June* 1818.

Nullity of marriage, by reason of publication of banns in false names, not supported *in fact*.

THIS was a suit of nullity of marriage, by reason of the publication of banns not being made in the true names of the parties. The suit was brought by the father of the husband, as his natural guardian.—The libel stated the circumstances, in which it was alleged, that the marriage was effected by artifices and misrepresentations, and in a clandestine manner, and in a parish to which neither of the parties belonged, and entirely unknown to the father of the minor; and that it was celebrated by banns under a false designation of the woman.

The cause was argued much at length by Dr. *Swabey*, Dr. *Phillimore*, and Dr. *Lushington*, on the part of Mr. *Sullivan;* by Dr. *Stoddart*, Dr. *Jenner*, and Dr. *Dodson*, *contrd.*

JUDGMENT.

Sir *William Scott.*—This proceeding is instituted by the Right Honourable *John Sullivan*, to annul the marriage of his son *John Augustus Sullivan* with *Maria Oldacre*, otherwise *Maria Holmes Oldacre*, which marriage was contracted and celebrated under the following circumstances:—The son *John Augustus Sullivan* was born on the 19th of *October* 1798, and having left *Eton* school, was resident during the latter part of 1815, and beginning of 1816, at his father's seat, called *Richings Lodge*, in *Buckinghamshire*, under the care of a private tutor preparing for the University. In the year

year 1815 he began to hunt with some hounds, (which have made no small noise in the world), called the *Berkeley* hounds, at that time under the management of a Mr. *Thomas Oldacre*, who lived at *Gerard's-cross*, seven miles distant from *Richings*. The consequence of these pursuits, on the part of young Mr. *Sullivan*, was to visit frequently at the house of that person, who appears to have lived with his family, in a style of hospitality, and reception of company, not very common in such a situation of life; and with a character free, as far as the evidence discloses, from any general reproach.

The young man here became acquainted with *Maria Oldacre*, a daughter of this person, who was just three years older than Mr. *Sullivan*, being born in *October* 1795. The young woman was illegitimate, her mother, whose maiden name was *Holmes*, not being married till four months after her birth; but she was baptized as the legitimate child of the parties, and never bore, either at baptism, or on any occasion that is shown, any other names than those of *Maria Oldacre*, by which alone she was known.

The acquaintance between these two young persons ripened into intimacy, and the visits of the young man became more and more frequent. Of all this intercourse his father, Mr. *John Sullivan*, was ignorant. With the misfortune incident to most men of business, the duties of a considerable office in *London*, left him little time personally to superintend the conduct of his son, and he had therefore transferred this care to a tutor. In the present instance, the *gaudet equis canibusque* was not *custode remoto;* for the tutor accompanied his pupil occasionally on his hunting excursions, and likewise

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likewise on several (it does not exactly appear how many) of the visits just noticed. On one occasion, the young gentleman took with him two of his sisters; but still no information, respecting the conduct of his son, was derived to Mr. *John Sullivan*, either from the tutor or from any other person.

In *June* and *July* 1816, the intimacy having ripened into attachment, Mr. *John Augustus Sullivan* caused banns of marriage to be delivered at two churches, namely *St. Andrew's Holborn*, and *St. Olave's Southwark*, in the latter of which they were regularly published, by the names of *John Augustus Sullivan* and *Maria Holmes Oldacre*. The parties were afterwards married at the church of *St. Olave's*, to which parish they were both aliens; and they were both minors, she being within three months of twenty-one, he of eighteen.

In the course of the ensuing week, he informed his father of what had taken place. Mr. *John Sullivan* received the news with great surprise, and with a degree of affliction, of which, there is no reason, either from the nature of the thing itself, or from any circumstance that occurred in his behaviour at the time, to doubt the sincerity. However, upon further reflection of his own, and advice of his friends, and under the impression that the marriage was irreversible, he and his family bent under the blow, became to a certain degree reconciled, and performed some acts of civility and kindness, which, however, were soon suspended. The present proceedings were instituted by Mr. *John Sullivan*, in the first place, against Mr. *Thomas Oldacre*, as the guardian of his supposed

posed legitimate daughter; and, after her coming of age, the proceedings were continued against herself.

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These facts are produced in evidence, upon the only two pleas, that have been taken in the cause — one alleging the facts on which Mr. *John Sullivan* asserts the invalidity, — the other, in which she maintains her marriage rights; and most of these facts are so little controverted, that they may be deemed common to both parties, as the foundations on which their adverse positions of law are constructed. The birth of the parties, the actual celebration of the marriage in a Church to which they were strangers, after a proclamation of banns therein, in which the name of *Holmes* was for the first time interposed in the description of *Maria Oldacre* — the entire want of consent on the part of Mr. *Sullivan*'s father to the marriage, any further than the law may imply a consent from this unopposed publication. — This is all clear and undisputed ground, to substantiate which it is unnecessary for me to apply evidence, for nobody denies it.

To the evidence of one fact, I shall, for another reason, not pay much particular attention — that which is brought to prove Mr. *John Sullivan*'s reconciliation to the marriage; for if this evidence were ever so strong and unimpeached, it could prove at the outside nothing more, than capricious conduct on his part. It could not affirm the validity of the marriage; for if that marriage were invalid for want of his consent at the time it was solemnized, no consent given afterwards could corroborate it. It must be a precedent or a contemporary consent,

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otherwise the marriage is radically and incurably bad.

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The fact, however, is not without an explanation. For it appears, that this apparent approbation of the marriage took place, at a time when Mr. *Sullivan* considered the marriage to be irreversible. He was afterwards otherwise advised,—and then he began the present attempt to break the connexion. It is likewise true, that an interrogatory has been rather unfortunately put, on the behalf of Mr. *John Sullivan*, which insinuates, that, at the time of his reconciliation, he believed her character and conduct unimpeachable; but that, finding he had been misled, he put an end to all intercourse with her, and instituted the present suit. Mr. *Forbes*, to whom that question is put, knows nothing at all of any such matter, but puts the change of conduct on a change of opinion respecting the legal question. Certainly, if any such discovery had been made, it might naturally have augmented the father's desire to overthrow the marriage, though it would have been perfectly impossible to do it on the mere proof of such a discovery alone; for the marriage, if originally good, had got beyond the reach of all effect of character and conduct. At the same time, I am bound to discharge a debt of justice by saying, that there is nothing in the evidence before me, which, in the slightest degree, impeaches that character.

That in a house, where many young gentlemen resorted for the pursuit of field-sports, things might occasionally pass, not much calculated to cherish habits of feminine delicacy and reserve, is not improbable;

probable; but I see nothing bordering on impropriety upon her part. Her parents are not inattentive to that matter. Her father expresses a disapprobation of her riding alone with young Mr. *Sullivan;* her mother desires him to write no more letters to her daughter: she is sought in marriage by a person of her own family connexion, which strongly proves, that no taint of known dishonour had attached to her: and though it is objected, that she permitted liberties to be taken by the young gentleman, Mr. *Sullivan*, at the playhouse, after *Ascot* races, when she was in fact contracted to another, those liberties are not of an offensive kind; they are slight; she is merely passive under them, and that at a time when the other person had determined her, by his inattention, to break off all further connexion with him.

It is quite impossible, if any thing grossly improper had occurred, but that it must have attracted the notice of the numerous persons who resorted to this house. Yet nothing of the sort is insinuated, except by *Beaman*, a discarded stable-servant, of whom I say, once for all, and without wasting a single observation on the particulars of his evidence, that he is a witness far more deserving of animadversion, than of credit. The testimony given by Mr. *John Augustus Sullivan* himself to this young woman's conduct, in his letter to his father, although it may be not a little coloured by present passion, is nevertheless a statement far more worthy of attention than this of *Beaman*'s. He says, he has been "for a long time attached to *Maria* "*Oldacre*, who is a very virtuous girl, but on whose "virtues he will not then dwell, but leave that for

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"his father to be a witness of;" and that "she, "together with her family, bears every where the "best of characters." It is quite impossible, if her conversation had been what this discarded stable-man represents, "such as would rather dis- "gust than please," that a youth, brought up in a decorous and elegant family, and in the society of gentlemen, could have approached towards such a style as this in speaking of her. I have to lament here, as well as elsewhere, that Mr. *Burder* has not been examined. He could have spoken with exact information on this point; and, in doing justice to this young woman, let That justice fall where it might, he would have relieved himself, in some degree, from the observations applied to the inattention, which is said to appear on the face of his conduct. On the whole, I see nothing to the disadvantage of her character, except what comes from the reprobated witness *Beaman*.

More has been said on the disparity of age, than I am disposed to pay much attention to; for surely no very revolting disproportion exists between a woman under twenty-one and a man nearly eighteen years of age. It might, indeed, be rather desirable, that the relative ages should be differently placed; but still they are not widely unsuitable: and as to what is said of greater maturity and experience, and knowledge of stratagem and tactics on the female side, surely a young man, who has had the experience of *Eton* school, and has a private tutor constantly at his heels, may be deemed sufficiently armed for such an encounter, without taking into the account that this

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young man appears, from his letters, to have a more sedate and reflecting mind, than is usually expected at that age.

Another disparity has been pointed out which is entitled to graver attention, — that of rank and condition: for, without adverting to extrinsic inconveniences, it is not to be denied that two persons coming together, with very different educations and systems of manners and habits, are not likely to have that correspondence and harmony of mind, without which the comfort of a married life cannot exist. At the same time it is to be remembered, that the passion, which leads to marriage, is apt to overleap these distinctions, and that marriage levels them all, both in legal and moral consideration. It is likewise to be observed, that she is of an age susceptible of better impressions; and at which objections of that kind might, in a great degree, have been removed by the plan, which Mr. *Sullivan*'s father had most wisely projected, of sending her abroad for the benefits of an improved education.

Laying such considerations aside, I proceed to consider the direct case. From the strong observations thrown out in some preliminary debate, on the admissibility of evidence, I was led to expect that it was to be argued as a case (rather of rare occurrence in these Courts) of a most foul conspiracy, directly involving four persons, the two parents, the young woman herself, and a fourth person whose name I do not repeat, because it unduly crept in at first, and has been totally omitted in all the later discussions. I confess it appeared to me rather singular, that a case so represented could be maintained, upon evidence

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taken on a plea, which only charged two persons at all — the two parents, and them in a slight and indefinite way — "that they used various means to "effect a marriage without the knowledge of his "father," and that "opportunities and facilities "were given;" and that "he was prevailed upon "by their artifices and misrepresentations to con- "sent." However, the case was described in the representations of Counsel to bear very hard, and in a most criminating way, upon the four conspirators. The Court had no right to prescribe the view which the Counsel should take of their respective cases; and therefore, rejecting some evidence which appeared foreign to the question, It waited to see how the case of conspiracy was to be maintained upon this evidence.

I will not lay it down, that in no possible case can a marriage be set aside, on the ground of having been effected by a conspiracy. Suppose three or four persons were to combine to effect such a purpose by intoxicating another, and marrying him in that perverted state of mind, this Court would not hesitate to annul a marriage, on clear proof of such a cause connected with such an effect. Not many other cases occur to me, in which the co-operation of other persons to produce a marriage can be so considered, if the party was not in a state of disability, natural or artificial, which created a want of reason or volition amounting to an incapacity to consent. I presume it does not often happen, that marriages between young persons are the sole acts of the parties themselves. It is not imputed as a crime, if fair opportunities and facilities are allowed, for improving a favourable disposition, that may appear in a respectable

spectable young man towards a female of the family, and for encouraging a prospect of what the law calls an advancement of a daughter in marriage. It would create some alarm, if the Court were to lay it down, that the good offices of a mother, an aunt, or an elder sister, so performed, were to be scrutinized with a severity, that tended to call in question the validity of marriages so promoted. The object is not illegal or illaudable, if pursued with proper delicacy; of which proper delicacy different people have different measures. To some females, indeed, the promotion of marriages in general is said to be a favourite employment, without any motive arising from family connexion, and merely from a good-liking to the occupation itself. Certainly it assumes a different complexion, if these endeavours are directed to the advancement of a very unworthy object; if they are directed against a youth of green and unripe years, and with a studied concealment from his parents; and still more, if, as charged here, by vitiating and debauching the mind. These circumstances may be so mixed up as to make it a most illaudable act; and if one course of transaction be pursued, they may make the marriage null and void; but it is not to be denied that, by the existing law of this country, the same circumstances may be combined to a very frightful amount, and yet, if the marriage be effected by another course of transaction, it may constitute as valid an union, as can be produced by the most honourable means.

Suppose a young man of sixteen, in the first bloom of youth, the representative of a noble family, and the inheritor of a splendid fortune; suppose that

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he is induced, by persons connected with a female, in all respects unworthy of such an alliance, to contract a marriage with her, after due publication of banns in a parish church to which both are strangers; I say, the strongest case you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains, which, though forged by others, he had rivetted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, *is his own act*, and he must impute all the consequences resulting from it, either to himself, or to others, whose happiness he ought to have consulted, to his own responsibility for that consent. The law looks no further back. If ten times the number of circumstances here alleged to be fraudulent, had been stated in the libel, this Court could not have admitted it, unless the *undue publication of banns* had been pleaded. That circumstance alone entitles me to entertain the cause; and if that circumstance be not proved, all the other circumstances go for nothing.

I have already observed on the slightness and obscurity of the fraud imputed, and imputed to the father and mother only, for the daughter is not at all implicated even in these. In the same article in which the charge of fraud is alleged, it is distinctly stated, that the young man *went frequently* to the house; that a great intimacy took place between them; and that he was induced by their artifices *to consent*. Therefore this is a case of

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of admitted *consent*. What the artifices and misrepresentations were, is left wholly unexplained. Be they what they might, there was a *consent*, and a consent, even in this description of it, apparently not involuntary on his part. How is it on the evidence? Not a single witness to explain, or to prove, any artifices or misrepresentations whatever. All rests on probabilities and conjectures, on arguments of Counsel, that it *must* be so; as if it were a thing unprecedented that a young man of 18 should conceive a passion for a female near his own age, or as if such an event could only be accounted for, by the intervention of something approaching to the nature of spells and magic. In order to support this argument, Counsel are compelled to have recourse to rather violent distortions of facts. The father reprehends her riding out with the young man; the mother writes to him to request him not to correspond with her daughter; the cousin informs him (as the fact was) that she is already engaged; and, it is said, all this is mere simulation, in order to inflame him by an apparent opposition to his desires.

What sort of language, or what sort of conduct, is to be held? If that of direct encouragement, what would then have been said? This is discouragement, but it is argued to be all disguise, for the purpose of stimulating him further. According to such a mode of arguing, no language and no conduct would have been practicable without incurring censure. There must have been a total silence; and that, I suppose, would have been interpreted into criminal connivance. What were the artifices, what the misrepresentations employed?

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ployed? On the part of the young woman, none whatever. He was perfectly conusant of her fortune, her condition, her age; where then was the delusion? He knew that his father was in ignorance of the whole transaction, and, with this full knowledge of his own, he determined to marry her. It is impossible for evidence to show a more spontaneous and more determined movement of a young man's mind towards a marriage. All the following, all the declarations are on *his* side, and no return on *her's*, but what may fairly be attributed to an affection gradually cherished by his attentions. I may presume, without injustice, that the affection on her part was not checked by the prospect of a considerable elevation in life. Such a prospect is not apt to have such an effect. But I see no part of her conduct that bears the appearance of a hungry, an eager, and mercenary attachment. On the other hand, every word, every act of his, points to a spontaneous passion, and that with an ardour that admits of no check. He himself writes the banns, and delivers them at both Churches. His letters after marriage speak the same language of not only passionate but confirmed attachment. There is not a particle of proof, that this was incited by any studied efforts on the other side. I see nothing that can be strained to that import; and I really must say, that the averment of artifice is left entirely bare of proof, and of course can have no weight whatever in the charge.

But it is said, the courtship was not communicated to his parents, and *there* is clandestinity! By clandestinity, in the canon law, was meant the contracting of a marriage, without the full solemnities

lemnities of the Church, as by *sponsalia per verba de præsenti*, or any other defective mode. I am not aware, that clandestinity has been subjected to any legal definition by the law of *England*,—but it is introduced into the later marriage act, and seems to be there used in the popular sense, in which it is generally received; and in which this imputation charges it, of a concealment of the intended marriage from the parents of the parties, or of one of them. But on whom does the charge of clandestinity rest? Upon the son himself certainly, who was bound to communicate—and not on the young woman, who was not so bound at all; for mere silence is not clandestinity, unless you first make out the obligation on the party to communicate: nor do I know, that the law imposed any such positive obligation on her parents. Certainly it is proper and usual so to do among people in higher situations, and the omission would be deemed a gross departure from those rules of nice and delicate honour, that belong to more elevated conditions of life; but such was not the condition of these persons: Nor are they chargeable with positive fraud, if they left the discovery to the observation of his tutor, or to the vigilance of his family, or to the casualty of general report; though they undoubtedly saw the growth of this young man's passion with great satisfaction. When he had engaged his own consent most fully to marry, (which no solicitation was necessary to procure), that they should have acquiesced perfectly in the marriage, cannot be doubted; that they should, in that advanced state of things, look rather to the *efficacy* than the *regularity* of the means employed, one cannot be surprised to observe. I do not see, however,

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however, that they directed and advised those means: the merit of such advice and direction is attributed elsewhere. What part the father took, otherwise than in advising that the proper name should be used, does not at all appear. The mother, who attended at the marriage, certainly went further, and declared the parties to be (what they were not) of *Tooley-Street*, in that parish. This was going beyond what was true at that time, but which I have no right to advert to, as the marriage act forbids any proof to be now received, to show that *St. Olave*'s was not the parish, in which they actually resided. In fact, I repeat, the whole charge of fraud goes very little, if at all, on this evidence, beyond *mere non-communication*. No solicitations were employed, no measures, as far as appears, taken, but what were taken at his own instance, and almost personally by his own act. I am not entitled to say, that he was moved otherwise than by his own impulse; and if so, it is impossible to maintain a charge of active conspiracy; and that being excluded, the whole is reduced to the simple question of the due or false publication of the banns.

In considering that question, I shall not deem it necessary to enter into the canonical history of banns, previous to the passing of the Marriage Act. It has become in some measure matter of antiquarian learning, at least in this part of the island; and is not unfamiliar to us from various decisions, in causes where it has been properly introduced. As little shall I think it necessary to enter into any minute analysis of the provisions of that Act, which are still more familiar to us. It is sufficient for me to state the following positions, as composing

posing clear and settled parts of the matrimonial law of this country, — built as that law is on two foundations, the ancient canon law, and modern statutes: — That banns, or proclamation of intended marriages, must be thrice published in the Church or Churches of the parish or parishes where the parties dwell, and in one of which the marriage is to be celebrated: That these banns, being notifications of the intended marriage, must indicate the parties by the description of their names and parish residences: That the law, derived, as I have described, from two sources, does, *in terms* or *in effect*, require those two particulars, but under different sanctions. A false description of residence is, by a particular clause of the modern Marriage Act, rendered a mere *impedimentum impeditivum*, — imposing on the clergyman, if the fact be known to him, the duty of not proceeding with the marriage, but not invalidating the ceremony if once performed. The publication of false names is different, though no such difference is marked in that statute; it forms an *impedimentum dirimens*, invalidating the marriage *in toto*; and this arising from the very nature of the thing, and the intent and use of the publication.

The Court has had occasion to observe, that it may, in some cases, be difficult to say what are the true names, particularly in the case of illegitimate children. They have no proper surname but what they acquire by repute; though it is a well known practice, which obtains in many instances, to give them the surname of the mother, whose children they certainly are, whoever be their father. However, if they are much tossed about in the world, in a great variety of obscure fortunes, as such persons

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sons frequently are, it may be difficult to say for certain what name they have permanently acquired, as was the case in *Wakefield* v. *Wakefield*.* In general it may be said, that where there is a name of baptism and a native surname, those are the true names, unless they have been over-ridden by the use of other names assumed and generally accredited.

Variations of the names of parties sometimes occur in banns. If they are *total*, the rule of law respecting them cannot be doubtful. It never can be contended, that such names can be deemed true designations; nor could one have supposed, that such names could have been used, but for the purposes of gross fraud; if the case of "*Mather* against *Neigh*†" had not occurred, in which the woman, from a mere idle and romantic frolic, insisted on having her banns put up in the name of *Wright*, to which she had no sort of pretension. Such a publication, whether fraudulently intended or not, *operates as a fraud*, and is therefore held to invalidate a marriage.

But, besides *total variations*, there may be *partial variations, of different degrees, from different causes, and with different effects*. The Court is, certainly, not to encourage a dangerous laxity; neither is it to disturb honest marriages by a pedantic strictness. Variations may consist in the alteration of one letter only, as it did in *Dobbyns* for *Dobbyn*‡; in more than one, as *Widowcroft* for *Meddowcroft*§; in the suppression of a name, where there are more than two, as *William Pouget* for *William*

* Vol. i. p. 394.
† Consist. 10th *July* 1807.
‡ Consist. 26th *January* 1813.
§ Supra, p. 207.

Peter

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Peter *Pouget* * ; in the addition of a name, where there are only two known, as in the present case ; and in those of "*Heffer against Heffer* †," "*Tree against Quin*," and "*Dobbyn against Corneck*." Such varieties may arise not only from fraud, but from negligence, accident, error from unsettled orthography, or other causes consistent with honesty of purpose. They may disguise the name, and confound the identity, nearly as much as a total variation would do, in which case the variation is for the very same reason fatal, from whatever cause it arises. Where it does not so manifestly deceive, it is open to explanation, if it can be given. If the explanation offered implies fraud, that fraud will decide any doubt concerning the sufficiency of the name to disguise the party. The Court will, certainly, hold against the party, that what he intended to be sufficient to disguise the

* Vid. supra, p. 142.

† In *Heffer* v. *Heffer*, Consist. 17th *May* 1811, an objection was taken to the admission of a libel, in a suit for the restitution of conjugal rights, brought by the wife, on the ground, that the copy of the parish register, which was exhibited, stated "that "*George Heffer* and *Anna* Sophia *Colley* were married ;" and that the true name of the woman being *Anna Colley*, there was a false publication of banns. (*a*)—In *Tree* v. *Quin*, 29th *May* 1812, one of the articles of the libel (in a suit for nullity of marriage, brought by the father of a minor,) pleaded, that the woman was baptized by the name of *Martha*, and that she was known by no other ; and that the banns were published in the name of *Martha* Caroline.—In *Dobbyn* v. *Corneck* (*supra*), the real name of the man was *William Augustus Dobbyn*, and of the woman, *Maria Corneck*, but the banns were published in the names of *W. A. Dobbyns* and *Maria* Philippa *Corneck*.—In these two cases, the Court overruled the objection to the admissibility of the libel, on the effect of the variation alleged, so far as to admit the case to proof, but not determining on the effect of the variations assigned. It does not appear, however, that any further proceedings were had in them.

(*a*) On 21st *Feb.* 1812, this marriage was pronounced valid.

names,

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names, shall be so considered at least as against him. He can have no right to complain, that too strong an effect is given to his act, when he himself intended it should produce that effect. But if the explanation refers itself to causes perfectly innocent, and if it be supported by credible testimony, overcoming all the objections that may be applied against its truth, the Court will decide for the explanation, and against the sufficiency of the variation to operate as a disguise, where no such effect was intended. If the explanation should leave the matter doubtful, then evidence of general fraud intended may be let in, to decide what is left undecided on the explanation. But the only falsehood that can be shown in the first place is the falsehood, at least the insufficiency, of the explanation itself; for, till that falsehood or insufficiency is shown, there is no admission for evidence of any matter besides.

It is only by virtue of pleading, that there was a false publication of banns, that you are admitted to bring your case at all before the Court; or that the Court is authorized to receive it. The Court could not receive a libel which stated all the other circumstances of fraud here imputed, unless upon the allegation, that there was such a false publication: and if it be shown, that there was no such false publication, no evidence, applying to the other falsehoods imputed to the transaction, can be received. You may have pleaded historically, and provisionally in your libel, that such other frauds existed in the case; but you cannot originally use that evidence in any manner to impeach the publication. It would be the most circular of all arguments to say, that the falsehood in the publication

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lets in the evidence, and then that this evidence proves the falsehood of the publication. From all the cases, therefore, I take the doctrine to be, that wherever the disguising effect of the variation does not appear on the very face of the name, it is open to explanation calculated to shew, that the party has not forfeited his right by what is neither shown to *be*, nor to *operate* as a fraud—that, if no explanation is offered, the Court may generally conclude against the *bona fides* of the variation—that, if being offered, it fully and satisfactorily protects the variation from all imputation of fraud, the publication is to be recognised as a due publication, has all the authority of such, and you can bring no evidence of any other fraud connected with the marriage, except such as you would have brought in a marriage, where the publication had passed in the most orderly and regular manner. The falsehood of the publication is the whole of the case; — prove that, and every thing is proved: — without it nothing.

Is this then a case in which it appears clearly, on the face of the publication, that the variation entirely confounds the identity? I think, clearly not. I cannot consider, that the mere appearance of the name of *Holmes* could have any such effect. Upon strangers who did not know the parties, it of course could have no effect at all. To persons who were intimate with her, it would be most probably known, that the mother's name was *Holmes*: therefore they could not be much startled or misled. To those who were not intimate, it would naturally occur that it was a dormant name, one which she did not commonly bring forward; as occurs in a thousand instances; for nothing is more familiar to us than dormant

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names. Indeed very few persons who have three names, have more than two in every-day use. If they have a third name, whether of baptism, or a surname, it seldom occurs in writing otherwise than as a mere initial flourish; in common parlance it is usually quite extinct. The case of *Pouget* was, that he was called *William* in the banns, which was really one of his three names, but that he was known only by the name of *Peter*, which was the only one by which he was generally known. In higher families, where two surnames are possessed, the christian name is often omitted, as in *Wellesley Pole* and the like. It is seldom, except on formal occasions, that the whole array of names is brought into use, or indeed any names more than two. When the singularity too of the name of *Oldacre* is considered (and the Court must advert to all the circumstances, small as well as great), I cannot think that the name of *Maria Holmes Oldacre*, used on a very formal and solemn occasion, could mislead any person with respect to the identity of *Maria Oldacre*.

Then the next question is, did this variation originate in fraud, or in what else? For I admit that the party using it is bound to explain it, and to support the explanation by proper evidence against all fair objections. The explanation here offered is, that she was born before the marriage of her parents; that her mother's maiden name was *Holmes*: that she had always borne the name of *Oldacre* only, until her own marriage was in agitation; but when she came to this solemn act — an act that was very likely to be scrutinized, and which her parents naturally thought, if it was done at all, should be

done in a valid and effectual manner — they, under a common but very erroneous impression that she was legally entitled to her mother's maiden name, advised her to prefix *Holmes* to *Oldacre*. In truth, it is this mistake of theirs which has occasioned the whole of the present question.

No man can say that this explanation is not probable enough in itself. It is a most natural solution of the fact; and the circumstances on which it is founded, are proved in a way that compels the belief of Mr. *Sullivan* himself in his answers, for I have looked into those answers, and I find that Mr. *Sullivan* admits upon his oath, that he believes them to be true. That she was the illegitimate child of *Thomas Oldacre* and *Amelia Holmes* — that she was born four months before they repaired this misfortune by marriage — that she was baptized as the legitimate child of Mr. and Mrs. *Oldacre*, and brought up under that character and name — all these admitted facts lay the most natural foundation in the world for the only other fact that follows, and which is very sufficiently proved by two witnesses — that she was advised to use the name of *Holmes* in the publication of banns, as most properly belonging to her. It is very true, that she never had used the name of *Holmes;* in all probability she did not know that it belonged in any way to her. Even if she had known it, she probably would not have used it on any ordinary occasion, as it might have led to the necessity of unpleasant explanations. She herself was a minor, and could have had no occasion before to execute any formal instrument that required precision. Therefore no improbability arises from her not

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having ordinarily used the name before: and there is the highest probability, that, in order to secure such a marriage, she should have been honestly advised by her parents to use the name, on this occasion, as legally belonging to her.

Now, what is to be opposed to the facts and probabilities which constitute this explanation? Surmises merely. That it must have deen done to conceal the marriage from Mr. *Sullivan*, the father, — that other parts of the transaction show a fraudulent intention — and that these other frauds are to be transferred over to the publication of banns. But they do not break in upon any one fact on which the explanation rests; they leave every thing in it quite untouched. It stands perfectly good, as far as any thing can apply immediately to it; and, therefore, it is to be falsified *aliunde*, by evidence which could not be admitted at all, but on the antecedent proof of the falsehood of this very explanation. If this could be admitted, hardly a case would escape in which the slightest and most immaterial variation could be found; for you have nothing to do but to scrutinize the whole of the courtship, to find out something which you can colour as fraud, and then apply that to discolour the variation. It is argued, that whatever is clandestine is fraudulent; and therefore, in every clandestine marriage, if you can but find out a flaw in the banns, be it ever so slight, it is enveloped in the general fraud, with which, in truth and in reason, it has nothing to do; and that flaw shall enable you to set aside a marriage, which the whole body of fraud by itself would not even entitle you to question.

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In the present case, the Counsel are compelled to admit the name might be honestly used; that it might be used for the intent described in the explanation; but they say, there *might* be likewise a fraudulent intent. Why adopt this double purpose gratuitously, if the first purpose is quite adequate? If there was even a hope that the name thus varied might excite less notice, that does not make it fraudulent, supposing that her father really believed, that the name belonged properly to her. There is one circumstance decisive in my mind, that the name could not be used for fraud. *Who* was to be concealed upon this occasion? Not *Maria Oldacre*, but *John Augustus Sullivan*, whose interests his father had to protect. What would the marriage of *Maria Oldacre*, or of *Maria Holmes Oldacre*, have been to Mr. *John Sullivan?* Even if proclaimed in his own parish church, it would not have troubled him, for he did not know that such a person existed. But if the undisguised name of *John Augustus Sullivan* going to marry somebody, he knew not whom, had appeared, what would have been his sensations? The fraud then, if any had been intended, would have nestled *there*, in a partial or total disguise of that name; and the more so, as the name is a marked one. That would have been the startling point. Whose name was disguised in *Pouget*'s case? The young man's. They must have been bunglers indeed if they placed the fraud, not in the name which required to be concealed, but in that which needed no concealment. The very course of the transaction, therefore, entirely repels the suspicion of fraud.

Another circumstance, though somewhat slighter, deserves notice. It is quite impossible, but that Mr.

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John Augustus Sullivan must have thoroughly known *why* this name was introduced; and if he did, it must probably have come out by some means or other, either in his letters to or personal communications with his father; but there is nothing to authorize a belief of any suggestion coming from him of improper or fraudulent conduct touching this matter. I see nothing in Mr. *Sullivan*'s answers that leads to the suspicion of any such communication from his son; and if such a communication had been so made, and been introduced into a regular plea, it would have met with the most decided contradiction from her father, whose answers upon oath utterly disclaim any such imputation.

Such is the view which I am led to take of this case, on the fullest deliberation, and with a firm conviction that it is the view which I am bound by law to take. I am not insensible of the pain which the judgment, founded upon it, may inflict on persons entitled to high respect — a respect undiminished by any thing that has occurred in this cause. It is not for me to advise those persons: their own good sense, and their own feelings, will be their best monitors. If my opinion does not mislead me, the knot of this marriage is not to be untied by the hand of the law. I have, therefore, only to pronounce that the marriage is valid, and to dismiss Mrs. *Sullivan* from the suit which has been instituted for its annulment.

Affirmed, on Appeal, Arches, 16th *June* 1819.