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Irregular Marriage: Myth and Reality

Abstract

This article examines the historiography, the law, and the practice of irregular marriage in Britain. It argues that there has been a confusion of terms in the historiography of irregular marriage that has served to obscure its meaning, pattern, and incidence. Using evidence from Scotland where irregular marriage continued to be legally valid until 1939 (with one form remaining legally valid until 2006), the article argues that despite its legally valid status, the interpretation of what constituted irregular marriage was extremely limited and that it served as a de facto or functional equivalent to civil marriage.

In the formal legal sense Scotland had stood virtually alone amongst Western European countries in enshrining simple exchange of consent as sufficient basis for marriage. However, in practice Scotland was very similar to other countries in what was regarded as acceptable forms of contracting marriage and the same stigma was attached to informal or irregular unions that we see elsewhere. However, as elsewhere, the majority of people conformed to the legal rules and the legal paradigms of marriage, but equally there was no neat correspondence between legal codes and social practice with ordinary people adopting a more flexible definition of marriage than the official one.

The fluidity of marriage and its boundaries, as well as its fragility, have been documented since at least the early modern period. Historians have long argued that cohabitation and marriage breakdown are not recent phenomena.

Bernard Capp, Joanna Bailey, John Gillis, E.P. Thompson, and Leah Leneman and Rosalind Mitchison for Scotland have all drawn attention to the variety of partnership arrangements which characterized unions of ordinary people in the early modern period,¹ whilst Clarke, Gillies, Ross, Rose and Smout have provided convincing evidence that informal marriage arrangements, self-divorce and self-marrying were not infrequent occurrences in the nineteenth and early twentieth centuries.²

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However, there is no consensus with regard to the chronology of the pattern of irregular unions, the reason for the pattern or the incidence and popularity of this social practice. Some have suggested that the dissolution of traditional agrarian society and the decline of close and tightly regulated rural communities with their well-defined hierarchies of authority, resulted in a loosening of moral codes and a revolt against the traditional morality of church and community with a consequent increase in co-habitation, bigamy and desertion in the industrial period. Conversely, others see these phenomena as the triumph of pre-industrial customs and practices over attempts to increase regulation and control of sexual life and popular morality. Even among those who argue that cohabitation and irregular unions were associated with urbanization and industrialization, there is a divergence of opinion over its chronology. Clarke, Gillies, Rose, and Ross have characterized the first half of the nineteenth century as an age of marital non-conformity with the latter half of the century denoting more conformity and control, whilst Frost sees the pattern in the nineteenth century as non-linear with the early and late nineteenth century bookending a period of conformity in the middle of the century.³

Moreover, there is a battlefield of conflicting views on the meanings contemporaries gave to irregular unions and what motivated them to marry irregularly. Can they be interpreted as pragmatic solutions to the economic, social and legal barriers to regular marriage, as a mark of religious dissent, as evidence of popular social revolt against establishment views, as a product of the rise of individualism and the decline in the influence of community or as a consequence of secularization?

Scotland provides an interesting perspective from which to view “irregular” or “informal” unions as the country’s marriage laws differed significantly from other European countries until the middle of the twentieth century. Since the Council of Trent in 1563, European Catholic countries regarded marriages as legal only if conducted by a priest of the Roman Catholic Church. Whilst this stringent definition did not apply in non-Catholic countries, over the course of time, European states extended legal regulation of private relations and eventually adopted equally restrictive definitions of what constituted a legally valid marriage. However, in Scotland three forms of irregular marriage were recognized as legally valid until 1939 and marriage by cohabitation with habit and repute remained legally valid until 2006. How significant was this apparently more relaxed and tolerant legal attitude towards irregular unions in terms of shaping official attitudes and popular practices? Did it result in widespread social acceptance of informal unions which put them on a par with regular marriage and thus differentiated Scotland from its English and European neighbors?

Scottish Marriage Laws

Lying at the heart of Scottish marriage laws from the medieval period through to almost the middle of the twentieth century, was the canon law doctrine that exchange of consent was sufficient to constitute marriage. It might seem paradoxical that a robustly Protestant nation such as post-Reformation Scotland should cling to this tenet of canon law into the twentieth century when avowedly Catholic countries had significantly modified it. However, closer examination suggests that the explanation lies in the decision of the Council of Trent

in 1563 to privilege the priesthood in the marriage process by insisting that to be legally valid the marriage ceremony had to be presided over by a Catholic priest. As T.C. Smout has observed, this elevation of the priesthood in the marriage process was bound to rankle with those whose religion expressly favored expanding the powers of the laity over the clergy.⁴ The validity of marriage in Scotland continued to rest primarily on mutual consent with the caveats that there must be no legal impediments and that proof of consent could be established if required. In this respect, the emphasis on the exchange of consent meant that Scotland's marriage laws retained significant elements of continuity from the medieval period through to the modern period.

The most significant consequence of this was that irregular marriage continued to be a valid form of marriage until abolished by the Marriage (Scotland) Act 1939.⁵ Although England had been equally impervious to the dictates of the Council of Trent with regard to marriage laws, irregular marriage and clandestine marriage had been abolished in England almost two centuries earlier by Hardwicke's Act of 1753.⁶ Attempts to introduce similar legislation in Scotland were unsuccessful and Scotland continued to recognize three distinct forms of irregular marriage as legally valid.⁷

Although the persistence of irregular marriage was the most distinctive difference in the marriage laws of the two countries, there were also differences in how regular marriage was constituted: regular marriage in England was a religious sacrament as well as a legal contract, and a marriage was not legal unless celebrated by a minister of religion, held in the parish church and parental consent had been granted, if one or both of the parties was under twenty one. In Scotland a regular marriage did not have to take place within a church building, did not require parental consent, although it did require the proclamation of banns in the parish church and had to be presided over by an authorized celebrant from the established Church. From 1836 civil marriages in the register office in the presence of the superintendent registrar were allowed in England, whereas Scotland did not allow civil marriages until 1939. Therefore all regular marriages until 1939 involved a religious ceremony, although not necessarily in a church. Indeed many marriages, if not most, took place in private homes, even amongst the wealthiest classes.⁸

The three forms of irregular marriage recognized as legally valid in Scotland were, marriage constituted *per verba de praesenti* which required "some present interchange of consent to be thenceforth man and wife, privately or informally given," marriage *per verba de futuro subsequente copula* which was constituted "by a promise of future marriage without any present interchange of consent to be husband and wife, followed at a subsequent time by carnal intercourse" and marriage by cohabitation with habit and repute.⁹ The latter form of marriage was often popularly defined as "living together." The report of the Royal Commission on the Laws of Marriage 1868 (RCLM) dismissed this definition as legally erroneous stating that, "if it be admitted or if it be the necessary result of the proved facts of the case that consent was not interchanged, then no amount of cohabitation and habit and repute will be sufficient to make a marriage according to the law of Scotland."¹⁰ This reflected the doctrine that exchange of consent was the foundation of marriage but this consent could not be inferred merely by couples co-habiting. However, the view of the Commission was that whilst the popular definition might not be consistent with the strictly legal definition, it more

accurately reflected “the practical working of the law of habit and repute in Scotland.”¹¹

The distinctive marriage arrangements of Scotland and England had very real consequences, most notoriously, the vogue for runaway marriages to Scotland, particularly Greta Green and other border towns, by young English couples seeking to avoid the need for parental consent for their marriage and to take advantage of the more flexible and informal marriage laws. Although Lord Brougham's Act of 1856 attempted to stem the flow of young couples across the border by extending the residential qualification so that one of the parties had to be resident for 21 days, Greta marriages continued to excite the disapproval of the authorities on both sides of the border into the twentieth century. Indeed it was the resurgence of these border marriages that prompted calls for reform of the marriage laws in the 1920 and 1930s. Although Dr. James Stark, Superintendent of Statistics under Scotland's first Registrar General, William Pitt Dundas, described Scotland's marriage laws as simple in comparison with “the complicated marriage laws of England,” they were in fact characterized more by ambiguity and uncertainty than clarity.¹² For example, there were innumerable legal wrangles about whether particular situations demonstrated sufficient proof of exchange of consent as well as general misunderstanding of the nature of consent required, that is whether it needed to be expressed, written or tacit.¹³ Indeed when Scotland's marriage laws were reviewed in both 1868 and 1935, it was the legal ambiguities surrounding irregular marriage that was one of the key reasons proffered for abolishing it.

Irregular Marriage Pre-Civil Registration in 1855

There has emerged a degree of consensus about the pattern of irregular unions amongst those who have written about the phenomenon in Scotland. The prevailing view is that they were relatively rare in the seventeenth century, became increasingly popular in the course of the eighteenth century and declined in popularity in the first half of the nineteenth century.¹⁴ Smout also argues that irregular forms of marriage revived in popularity in the late nineteenth century, reaching their zenith in the first two decades of the twentieth century. There has been a reluctance to quantify exactly the incidence of irregular marriage in the eighteenth century, although it is usually attested that the proportion was “significant” with statistics from contemporary sources cited to illustrate this popularity. The Scottish picture coincides with Gillis's interpretation of English irregular marriage in that it views the eighteenth century as the heyday of irregular unions.¹⁵ However, Stark, Smout, and Leneman and Michieson differ in their explanation of the pattern for Scotland and differ from the explanation provided by Gillies for England. Gillis interprets pre-industrial irregular marriage in England as evidence partly of a robust popular culture unshackled by the strictures of the state or the Church but maintains that the primary motivation was practical and to avoid the cost of a wedding celebration. Leneman and Mitchison cite a range of reasons for couples marrying irregularly but take the view that cost was not a significant motivation in eighteenth-century Scotland. They argue that irregular unions were initially an artifact of non-conformity but as the century progressed increasingly became an expression of couples, “doing their own thing,”

in other words an expression of the triumph of popular practices over religious and legal regulation.¹⁶

James Stark unambiguously attributed the popularity of irregular marriages in eighteenth century Scotland to religious non-conformity and, what he described as, “the evil effect of restricting the power of performing the marriage ceremony to the ministers of the Established Church.”¹⁷ Although Smout acknowledges that the increasing vogue for irregular marriage might have “contained an element of genuine social revolt,” he is persuaded by Stark's interpretation that religious dissent from the established Church accounted for most irregular marriages. He suggests that the “apparent rarity of irregular marriage” after the introduction of the 1834 Marriage (Scotland) Act, which allowed ministers of churches other than the Church of Scotland to be celebrants, tends to confirm the importance of non-conformity as an explanation.¹⁸

There are, however, a number of problems with the scenarios outlined by Stark, Smout, and Leneman and Michison. Firstly, the claim that a significant proportion of marriages were irregular in the eighteenth century is purely speculative despite the fact that it has assumed a degree of authority over the years. The claim that one third of marriages in Scotland were irregular was first made by James Stark. In his evidence to the RCLM Stark stated that, “it may be safely assumed that, during the whole of the eighteenth century, a third of marriages in Scotland were contracted irregularly.”¹⁹ However, Stark's attempt to quantify the incidence of irregular marriage was almost certainly a guess. We know that record keeping of parish registers was patchy and deficient. In many parishes registration was carried out only sporadically and in some places not at all. Of the 855 Scottish parishes that returned vital statistics for the 1801 census, only 99 kept regular registers. Cameron has posited a number of reasons for the fragmentary nature of the official records which included the cost of registration, apathy amongst the general populace who did not see the point in registering and the reluctance of non-established churches to provide information.²⁰ The difficulties of collecting statistics, outlined by Cameron, were compounded in this period by economic changes, increasing geographical mobility, social fluidity and anonymity in the eighteenth century. This made it less likely that kirk session clerks, who were charged with the responsibility of collecting the statistics for vital events occurring within their parish boundaries, would be familiar with the activities of their parishioners.

Given that Stark had no hard evidence on which to base his claim, we can only speculate that it was based on hearsay that had been passed down over the years. Possibly his guesstimate was based on comments made by contemporary local clergy complaining of the immorality of their parishioners or the activities of unauthorized religious celebrants whose numbers proliferated after Presbyterianism had become the established religion in 1688. Whatever his source, it is not based on any kind of empirical evidence but rather on conjecture or hearsay and therefore cannot be regarded as an accurate reflection of eighteenth-century marriage practices in Scotland.

Smout's article is the only comprehensive survey of the history of marriage in Scotland and is unsurpassed in its careful analysis of Scotland's marriages laws and the changing pattern of regular and irregular marriage in Scotland. Yet despite his acknowledgement that the absence of any form of registration and the poor quality of Church records makes it impossible to quantify any kind of

marriage whether regular or irregular before 1855, he ascribed some authority to Stark's assertion that a third of marriages were irregular in the eighteenth century by observing that he was, "as well placed as anyone to guess."²¹ Thus an unsubstantiated assertion made by Stark in 1867 about the marriage customs of the Scottish populace one hundred years earlier has become solidified into an historical fact and assumed an authority that it does not merit.

Leneman and Mitchison's article is more narrowly focused on the period 1660–1780. They provide firmer evidence for the claim that irregular marriages increased in the eighteenth century and are more circumspect in gauging their incidence. They cite the evidence of St Cuthbert's parish in Edinburgh and Barony parish in Glasgow to illustrate that irregular marriages increased over twofold in the period between 1701 and 1750 in the Edinburgh parish and by around the same between 1741 and 1780 in the Glasgow parish.²² Since they do not provide the number of regular marriages in the parishes (which would, in any case be unreliable), there is no way of knowing what percentage of total marriages these irregular marriages constituted. Although Leneman and Mitchison do not repeat Stark's claim that one third of marriages were irregular in the eighteenth century, they do subscribe to the view that they represented a significant proportion of all marriages and describe the situation in Edinburgh as one of "disorder."²³ The use of the latter term is probably an allusion to the fact that irregular marriages were sometimes referred to as "disorderly" marriages. In their view the official figures indicated that "the kirk sessions had lost control over the situation and recorded only a sample of the cases."²⁴ However, their statement is based on the evidence from these two parishes and whilst it indicates an increase in irregular marriages, the deficient nature of the records makes it impossible to make any definitive statements about their incidence or indeed the proportion of all marriages that they represented. The picture is complicated by the fact that there were almost certainly regional variations in the pattern of irregular marriages as was the case with illegitimacy which calls into question the typicality of these parishes.

The problem of incomplete record keeping was almost certainly exacerbated by the Disruption of 1843 which saw almost half the clergy and lay membership leave the Church of Scotland to form the Free Church.²⁵ Since one of the problems of registering vital statistics was that those belonging to denominations other than the Church of Scotland usually refused to register their details on a point of principle, this explosion of non-conformity could only have magnified the problems of registration.

Smout argues that irregular marriages declined in the first half of the nineteenth century and were relatively rare after the 1834 Act that recognized the legitimacy of marriages conducted by celebrants not of the established church. However, the continued necessity of proclaiming banns in the established church almost certainly meant that many Free Church members would have been reluctant to do this, particularly after such a protracted bitter dispute with the established Church. Therefore it might be argued that in the first half of the nineteenth century, it was most likely that there was an increase in marriages which, although legally valid, did not follow procedures required to make a regular marriage, rather than the decline posited by Smout, particularly after the Disruption of 1843.

The second and more substantive problem with the received view of irregular marriage in the pre-registration period is that irregular marriage is used as a

catch-all term to describe every marriage that did not meet the full requirements of a legally valid regular marriage with no attempt to distinguish the different reasons for non-compliance with the regular procedures. Nonetheless, as Dempsey has argued, maintaining the distinction between the different forms of non-regular marriage is important for understanding the motivation to marry outside of the established regular procedures.²⁶ Despite its name implying secrecy, clandestine marriage generally referred to a marriage ceremony where the celebrant was not an authorized member of the established Church and where there was no proclamation of banns, whereas irregular marriage focused on the fact that the parties had not undergone any solemnisation or proclamation of banns and the marriage rested solely on exchange of consent.²⁷ However, an additional complication is that clandestine marriage could also refer to a secret ceremony, even if performed by a regular minister. The reasons for couples opting for this kind of ceremony were diverse but often property settlements were involved.

Stark uses the term “irregular marriage” throughout his evidence to the RCLM, although it is clear from the substance of his discussion that he is in fact referring to *clandestine* marriage since he sees the cause as “the restrictive laws” that required the marriage ceremony to be performed by ministers of the established Church. Leneman and Mitchison's article is titled, “Clandestine Marriage in the Scottish Cities” but is unequivocal in stating that the terms “irregular,” “disorderly” or “clandestine” are synonymous.²⁸ Although Smout acknowledges that the two types of marriage were in fact distinct, he too uses the terms synonymously. The confusion is compounded by the fact that even in official documentation the terms are used interchangeably. Moreover, in practice there was some overlap between the two types of marriage. There were occasions when religious dissent may not have been a factor in the decision to be married outside the established Church by an unauthorized celebrant. Couples who wanted to avoid answering awkward questions about their previous moral behavior, their marital history or whether their parents consented to the marriage might seek out an unauthorized celebrant who was more interested in obtaining the fee than following established procedures.²⁹

Despite the conflation of the terms, it is clear that by invoking the role of the restrictive marriage laws in explaining the incidence of irregular marriage, both Stark and Smout are actually referring to clandestine marriages, that is, marriages conducted by an unauthorized celebrant, rather than marriage based solely on consent. Smout's claim that irregular marriage virtually disappeared after the 1834 Act, is further confirmation that he is using the term “irregular marriage” to denote clandestine marriage. Although Leneman and Mitchison's article explicitly relates to clandestine marriage, they discuss an array of reasons for irregular marriage, other than religious dissent and, as has been indicated, they see the terms “irregular,” “disorderly” and “clandestine” as interchangeable. However, they routinely make the assumption that these marriages would have been conducted by a celebrant. Indeed one of their concerns is to explain why the “business” of clandestine marriages changed in terms of personnel, with laymen displacing clergy in the conduct of irregular marriages and in providing certificates.³⁰ In other words, all these authors, whilst acknowledging the different types of irregular marriage, are actually referring to clandestine marriage and not the irregular marriage which rested solely on simple exchange of consent, privately or informally given with no solemnization.

Table 1 Irregular Marriage in Scotland

Period	Annual average no. of irregular marriages registered	Percentage of total registered marriages
1855–1860	19	0.09
1861–70	41	0.18
1871–80	263	1.04
1881–90	650	2.51
1891–1900	1 428	4.78
1901–10	2 034	6.39
1911–20	5 312	14.90
1921–30	4 287	12.74
1931	4 097	12.55
1932	4023	12.13
1933	4011	11.73

Source: Morison Report, Evidence of Andrew Froude, Registrar General for Scotland.

So what conclusions can we draw about non-regular marriages in the pre-registration period in Scotland? Were they actually clandestine marriages or were they irregular marriages based on simple exchange of consent and did the incidence peak in the eighteenth century and decline in the first half of the nineteenth century?

If there was a sharp decline in marriages that took place outside of established procedures after the 1834 Act, as suggested by Smout and Stark, then this might provide compelling evidence that the vast majority of irregular marriages were actually clandestine marriages where the motive was religious dissent. However, in the absence of registration and the unreliability of parish records there is no way of knowing whether this was the case and, as has been suggested, the incidence of clandestine marriages was more likely to have increased after the Disruption of 1843.

It seems indisputable that there was a variety of reasons why people chose not to follow the conventions of regular marriage that were unrelated to non-conformity. Smout acknowledges the impact of urbanization and mobility on popular attitudes and customs. He refers to a strong urban subculture that was “irreligious” and casual in its attitude to marriage in the eighteenth century.³¹ Leneman and Mitchison also suggest a number of alternative reasons for the rise in irregular marriage, including the need for speed or secrecy, the loosening of church controls over its parishioners and “an expression of an enhanced sense of independence and the right to make personal decisions.”³² Despite the assertion by Leneman and Mitchison that cost was not a significant barrier to regular marriage, the session clerk extracted a fee for registering details which may have been prohibitive.

This acceptance of reasons other than non-conformity for people choosing to marry irregularly, suggests that eighteenth-century non-regular unions could be either clandestine or irregular in the sense that the latter rested solely on simple exchange of consent. The nature of the constitution of non-regular unions, the inconsistent definitions and the absence of reliable statistics make it impossible to establish which of these two types of irregular unions was predominant.

Clandestine marriages which involved a non-authorized celebrant almost certainly increased after the establishment of presbyterianism in 1688 and continued to be common throughout the eighteenth and early nineteenth century when the Church of Scotland had the monopoly over the rules and conventions governing regular marriage. However, there is no irrefutable evidence that they constituted all or indeed the majority of non-regular marriage. The scale, the motivation for and the pattern of irregular marriage, defined by simple exchange of consent without solemnization, is almost impossible to establish with any exactitude before registration. The inadequate and incomplete nature of record keeping means that we cannot determine the incidence of regular marriage in this period, let alone non-regular marriages which were less public affairs.

How does the Scottish experience of marriage in the eighteenth and early nineteenth centuries compare with its history in England? The conventional wisdom that irregular marriages were prevalent in eighteenth-century England has been challenged by Probert who convincingly argues that historians have been describing clandestine marriage when they use the term "irregular marriage." More contentiously, she contends that marriage based on simple exchange of consent was rare in England, that clandestine marriages were confined mainly to London and that most unions conformed to established legal and religious procedures.³³ As has been argued, the conflation of clandestine and irregular marriage has been replicated by historians of Scottish marriage. However, the evidence suggests that it would be ill-judged to draw the conclusion that irregular marriage based on exchange of consent was rare, that clandestine marriage was confined to certain well-defined areas or that the vast majority of marriages were regular. The requirements for contracting a regular marriage were fairly stringent and there were many ways in which a couple might not fulfill each and every legal requirement either by omission or commission. Therefore it would be likely that technically many couples' marriages did not conform to established procedures. However, this is very different from the scenario where there was social revolt against established marriage procedures and a preference for an alternative form of marriage.

Whether the legally valid status of irregular marriage in Scotland made it more common for couples to live together without the sanction of the authorized Church is impossible to establish. Legal validity does not, of course, denote widespread tolerance, social recognition or approval and it is certainly the case that kirk sessions and other authorities did everything in their power to discourage irregular marriage and censure those who did marry irregularly.³⁴ In this respect, Scotland was very similar to England in its disapproval and condemnation of irregular unions.

The Scottish case confirms the interpretation of those who see irregular marriage as a consequence of changes that accelerated in the eighteenth century: increasing social and geographical fluidity, economic and social changes that broke down traditional structures of authority, and the dilution of the moral authority of the church. However, its incidence and meanings are too locally shaped to make any other kinds of meaningful generalizations.

Irregular Marriage Post Civil Registration

With the introduction of civil registration in 1854 all regular marriages were registered and under Lord Brougham's Act of 1856, a semi-formalized system of

registering irregular marriages was introduced that enabled couples to register their marriages after conviction or payment of a fine before a justice of the peace or a magistrate. As Clive has observed, the “conviction” was purely fictitious since it was not illegal to contract an irregular marriage. The system was introduced merely as a device to record irregular marriages.³⁵ This system remained until the Marriage Act (Scotland) 1916 which abolished any criminal proceedings and introduced provision for registration on a sheriff’s warrant within three months of the marriage. Marriages arranged in this way were commonly referred to as “marriages before the Sheriff.” Therefore from 1856 there is a record of registered irregular marriage until it was abolished in 1939.

Although the 1834 Act authorized celebrants of mainstream denominations to conduct a marriage, there were still procedures associated with regular marriage that were impediments to those who did not belong to the established Church. Foremost among these was the requirement that banns be proclaimed in the local parish of the Church of Scotland irrespective of the denomination of the parties.³⁶ It is likely that many couples who did not belong to the established church circumvented this requirement and therefore whilst their marriage was legally valid, it was not classed as a regular marriage. It was certainly believed by those who drafted the Marriage Preliminaries (Scotland) Bill 1877 that publication of banns dissuaded many couples who did not belong to the established church from contracting a regular marriage and the explicit purpose of the Bill was “to encourage regular marriage in Scotland” so that a registrar’s certificate “shall be of equal authority in authorizing a minister, clergyman, or priest in Scotland to celebrate a regular marriage.”³⁷ Thus the introduction of the Marriage Notice (Scotland) Act in 1878 provided an alternative route to the publication of banns in the local parish by allowing couples to give public notice of their intention to marry to the local registrar. The removal of this particular obstacle for those not belonging to the established church makes it likely that the statistics of registered irregular marriage from this point were not a barometer of religious divergence or an artifact of religious non conformity. In his evidence to the Morison Committee, Andrew Froude, Registrar General for Scotland, presented statistics to illustrate the growth in the number of irregular marriages since the introduction of civil registration.³⁸

The pattern demonstrates that even in terms of the restricted definition of irregular marriage accepted by the authorities, its incidence peaked at almost one in six of all marriages during the war with the figure stabilizing at around one in eight marriages until its abolition in 1939.³⁹ An important point to make about these statistics is that they refer only to registered irregular marriages and do not include those couples who for a variety of reasons chose not to register their irregular marriage. We have no way of knowing what percentage of irregular marriages they represent and therefore the true scale of irregular marriages is unknown and remains a “dark figure” as was admitted by the RCLM in 1868.⁴⁰

The small number of registered irregular marriages in the two decades after the introduction of Lord Brougham’s Act does not necessarily mean that irregular marriage was rare in this period. A more likely explanation is a sluggish response to new legislation which was permissive rather than mandatory and the expense of registering a marriage when, generally, there was no practical advantage to doing so. Thereafter the increase in registered irregular marriage can be explained by many of the factors that were relevant in the long eighteenth century: cost,

speed and secrecy. Irregular marriage had obvious advantages for those for whom speed was of the essence. In contrast to regular marriage no notice was required and no solemnization. This process was most obviously attractive in war times. In fact Froude's conflation of the statistics into ten-yearly intervals in the first three decades of the twentieth masks the fact that in 1915 the incidence of irregular marriages soared to 20 percent, that in the same year the proportion of irregular marriages in St. Giles, the busiest district of Edinburgh, was greater than regular marriages and that the incidence of irregular marriage in the post-war years in the two largest cities, Glasgow and Edinburgh, years fluctuated between approximately one fifth and one quarter of all marriages.⁴¹ The large number of irregular marriages that took place in the cities does not reflect a rural/ urban divide in the preference for irregular marriages, but rather the fact that some of the facilities required: marriage agents, solicitors, etc. were not available in the rural districts.⁴²

The peak incidence in the war years can be related to the need for speed when numbers of men were leaving for the front and wanted to obviate the lengthy and time-consuming procedures required for a regular marriage ceremony. In an article headed "Khaki Weddings," *The Scotsman*, declared that "it will remain one of the outstanding feature of the war. . . that the present troubled times have witnessed something like a boom in matrimony."⁴³ The article focused on the fact that in Edinburgh "the remarkable increase" was almost entirely attributable to the rise in "marriages before the Sheriff" which accounted for 40 percent of registered marriages in the City." Confirmation of the convenience of irregular marriage in these circumstances is provided by the example of perhaps one of the last legally valid irregular marriages in Scotland. A young middle-class couple from Greenock, at the outset of the Second World War, in front of their assembled family, declared to each other that they were married and promptly rushed off to the Sheriff Court for a warrant to register the marriage before the young man enlisted for the army.⁴⁴

There were reasons other than speed which might prompt couples to opt for an irregular marriage. Before the introduction of the Marriage Notification Act (1878) the residence qualification for regular marriage was six weeks in the parish before the banns were published. As James Stark, argued, "Officers on leave from India and the colonies, officers and men in the royal and mercantile navy . . . and persons from abroad, or even persons from England, who cannot waste six weeks in Scotland previous to marriage, cannot marry regularly in Scotland."⁴⁵

Cost was another factor that motivated couples to opt for an irregular marriage. Many of the witnesses to the 1868 Royal Commission on Marriage Laws argued persuasively that one of the main reasons that couples chose to marry irregularly was the "exorbitant" cost of the publication of banns. James Stark claimed that because the Church of Scotland had the monopoly over the procedure for proclaiming bans, they exploited their position by charged ridiculously high fees. Although the fees varied from parish to parish ranging from 5s to 30s, most parishes had a sliding scale whereby the cheapest fee was for banns proclaimed on three separate Sundays in accordance with the formal requirements, with the fee doubling if they were proclaimed over two Sundays and trebled if done on one Sunday. Stark was scathing in his criticism of the Church claiming that not only was its action unlawful but that it encouraged "concubinage and illegitimacy" because the poor could not afford to pay the high fees. He concluded that the

Church should no longer have the monopoly over the proclamation of banns.⁴⁶ Stark was not alone in his criticism of the Church and representatives from Edinburgh Town Council and Leith parochial board expressed similar views to the Commissioners about the fees charged.⁴⁷

The 1878 Act which introduced a civil alternative to church banns not only made it easier for those of a different religious persuasion from the Church of Scotland to get married regularly, it also significantly reduced the cost of public notification of an intended marriage. A fee of two shillings and sixpence was charged by the registrar if the parties resided in the same parish and 5s if they resided in different parishes. It also reduced the residential requirement from six weeks to 15 days. However, the cost of a regular marriage could still be prohibitive, particularly if it involved taking time off work and included a celebration for family and friends. Irregular marriages could be contracted in a day and without notice. They were convenient, speedy and could be cheap too if there were minimal celebrations. Therefore they were particularly attractive to the working classes who constituted the vast majority of those who were married irregularly, according to the evidence given to the Morison Committee by L.S. Purves, the Registrar of the St. Giles district of Edinburgh.⁴⁸

Purves suggested that “religious difficulties,” divorce and secular beliefs became more significant factors in couples marrying irregularly from the late nineteenth century.⁴⁹ However, it is likely that those opting for this route because of principled objections to a religious ceremony or who were avowedly anti-religion or anti-church were in a minority. A more plausible explanation is that cost, convenience and religious indifference combined to provide compelling reasons to opt for irregular marriage. Secrecy or the lack of publicity was another persuasive reason to make an irregular marriage. Where parental opposition, fear of public censure or a desire to avoid answering embarrassing or awkward questions was an issue, the relative anonymity of an irregular marriage was an obvious attraction.

It is important to bear in mind that what is being observed is a rise in *registered* irregular marriage. In his evidence to the Morison Committee, Robert Ramsay, the Director of Public Assistance in Glasgow captured this important distinction. He claimed that in the early years of the twentieth century, “it was repeatedly our experience that there was no registration, just irregular unions without registration at all, but . . . today that number has practically vanished.”⁵⁰ Therefore what needs to be explained is not a rise in irregular marriage but why more people were motivated to register their irregular marriage.

Robert Ramsay, was convinced that the steep decline in the number of cases of cohabitation and unregistered irregular marriages amongst Poor Law applications was, “. . . coincident with the introduction of the Pensions Act . . . The [war] widow's pension has also provided an inducement to ensure that there shall be registration.”⁵¹ The key issue was that before paying out allowances, the authorities dealing with claims required proof that the union was “a proper one.” Ramsay's observations were echoed in an article in *The Scotsman* which reported that there had been a brisk business in marriages “before the Sheriff” since the outbreak of war as couples required proof to make a claim for separation allowance.⁵² The article cited the instance of one couple who had “in a simple fashion, with no witnesses present, made the solemn vow to take each other as husband and wife,” lived together for several years but had registered their irregular marriage when the husband joined the Army so that they could obtain the separation

allowance. As Smout succinctly observed, the extension of the state's role in the provision of welfare and the need to establish proof of marriage in order to gain access to these benefits, "increased convenience in the married state: it literally made respectability pay."⁵³

Until 1939 it was not possible to contract a marriage in a civil ceremony in Scotland. It is therefore tempting to argue that registered irregular marriage in Scotland was a functional equivalent to civil marriage in England and contracted for similar reasons. Although irregular marriage never reached the level of popularity of civil marriage in England there are plausible reasons for suggesting that the similarities between them were so strong that irregular marriage can be viewed as the functional equivalent of civil marriage. Cheapness and lack of publicity were important attractions of both types of marriage.⁵⁴ Moreover, the procedures for contracting civil marriage and a registered irregular marriage were not dissimilar.

The archetypal irregular marriage has been represented in the historiography as an informal affair where, in its *de praesenti* form the couples merely exchanged consent with or without the presence of witnesses. In the more colorful accounts of some ethnographers couples have been depicted variously as jumping over broomsticks, exchanging rings or resorting to some other folk-ceremony.⁵⁵ However, the semi-formalized system of irregular marriage introduced by Lord Brougham's Act came to be paralleled by semi-formalized celebration of these marriages. Indeed the system of registration of irregular marriages increasingly became similar to the formalities and technicalities associated with regular marriage, although shorn of the religious ceremony and the statutory twenty-one days public notice. The system of registration could be fairly cumbersome. In its simplest form, what was popularly and erroneously referred to as "marriage before the Sheriff," required two witnesses to appear before the Sheriff with the contracting parties who had previously signed a declaration that they were married persons. All were examined under oath. The witnesses would then declare that they saw the parties sign a written acknowledgement of marriage, and that they were aware that the parties or one of them had resided in Scotland for the period of twenty-one days immediately preceding the marriage, or had his or her usual residence there.

The process of registration often required the assistance of someone with some legal knowledge to complete the schedule that was required to be presented before the Sheriff's office.⁵⁶ Therefore by the end of the nineteenth century it was not uncommon for couples to celebrate their marriage either in a solicitor's office or in the offices of marriage agents in the presence of witnesses. According to the Registrar General, this function was also performed by the Registrars in the larger towns, although it was not part of their statutory duties.⁵⁷

Marriage agencies had been in existence since at least the 1880s and marriage agents for much longer and tended to be concentrated in the cities and larger towns.⁵⁸ It is difficult to establish with any precision the percentage of irregular marriage which was conducted by marriage agencies. Of the two largest Edinburgh marriage agencies the average number of marriages that had taken place in the previous five years was 477 in one office and 196 the other.⁵⁹ As there were on average 4,000 per annum registered irregular marriages throughout Scotland between 1930 and 1935, it is likely that marriage agencies only ever married a minority of those who registered an irregular marriage. As the average

fee charged by the marriage agents was £2. 2s, including a fee of 7s. 6d. to the law agent for drawing up the petition, 10s for the Court fee and 5s for the extract, the cost may have been prohibitive. However, it might have been cheaper than a more public church wedding that often involved costly celebrations with family and friends.

The details of the process involved in marriage agencies was outlined by Donald Jack, the representative of the largest of Edinburgh's marriage agencies, in his evidence to the Morison Committee. He claimed that it was common practice for the parties involved to notify the marriage agent by letter or by a visit to the office that they desired to get married on a certain date, even although no notice was legally required to contract an irregular marriage.⁶⁰ If the notification was given by a personal call, the marriage agent took all the particulars required by the registrar, and a form was produced showing the particulars taken. If the notification was by letter, one of the forms was sent to the applicant and the details usually received before the date set for the marriage. To facilitate the process, the marriage agent sent the details to the registrar so that he could prepare the necessary schedule for the parties to sign. The actual wedding involved a declaration of marriage being read out in the presence of two witnesses which was then signed by the couple. The petition for warrant to register the marriage was signed by the couple and the witnesses and taken to the registrar's office where the schedule and the register were signed. The next stage was to proceed to the Sheriff Court where the Sheriff would take all the proof of the marriage which was then forwarded by the Sheriff Clerk to the registrar.

Not everyone was convinced that the process was as scrupulous as Donald Jack maintained. A common complaint made about marriage agencies was that they could not be trusted to ensure that all the legal requirements had been met, particularly those relating to the residence qualifications. Some authorities believed that many of those who were witnesses to these marriages had often been invited off the street by the couple and had no former acquaintance or association with them. The Registrar General was particularly damning of marriage agencies which he described as engaging in a "more or less sordid system of touting and advertising" with little regard to the best interests of the parties.⁶¹ He claimed that before the introduction of the Marriage (Scotland) Act 1916, which introduced a system whereby the warrants granted by the Sheriff Court went straight to the Registrar, it had been common practice for marriage agencies to hold on to these warrants pending payment from the couples for their services. He was also concerned that the system contributed to non-registration. If, as was often the case, the proceedings took place out of Sheriff Court hours then "the parties returned to their more or less distant homes without the proceedings being completed."⁶² Froude's evidence was contradicted by Donald Jack and L.S. Purves, the St. Giles Registrar, both of whom attested to the fact that marriage agents did their best to get parties to register their marriages, even writing to them on several occasions urging them to do so.⁶³

Donald Jack's evidence to the Morison Committee perhaps exaggerated the rigor of the process involved in marriages conducted by marriage agencies in order to underscore their legitimacy and reliability. Even Purves, who exonerated the agencies of blame in the failure to register, acknowledged that non-registration was a problem. The lack of trust in marriage agencies resulted in a further step being taken to regularize and formalize the process with the

introduction of the Solicitor's Act (1933). This made it mandatory that petitions to the Court for authority to register a marriage had to be prepared by a duly qualified agent.

So whilst in theory an irregular marriage required no notice, no ceremony and no witnesses, by the early twentieth century often all three took place. Despite the persistence in the historical imagination of the informal and private nature of irregular marriage, there was very little to differentiate Scottish irregular marriage from the formal procedures of the civil marriages contracted in England and much of Europe, other than the fact that there was no legal requirement to provide official and public notice of the marriage. It is difficult to establish contemporary popular perception of marriage "before the Sheriff," although references in *The Scotsman* to the increase in *civil* (my emphasis) marriage during World War I suggest that it may have been widely interpreted in this way. There was often little distinction made between registered irregular marriages and regular marriages by those involved in the administration of public assistance. As one official commented, "We do not distinguish between them."⁶⁴ Indeed one legal commentator has suggested that the possibility of registering an irregular marriage explains the late introduction of civil marriage in Scotland in comparison with the rest of Europe.⁶⁵ The fact that irregular marriage in Scotland consisted of a semi-formalized process which closely resembled civil marriage may explain its longevity as a legally valid form of marriage.

Despite the apparent permissive nature of the marriage laws of Scotland, it is clear that the authorities' definition of what constituted a legally valid and socially acceptable irregular marriage was extremely restricted. James Moncrieff, Lord Advocate of Scotland was adamant that, "[They] cannot be legally married without making a declaration to the sheriff. Otherwise the marriage is not legal under the statute."⁶⁶ Moncrieff's views may not have been universally shared, although his interpretation must have carried some weight given his position in the legal establishment. However, there was a consensus that simple exchange of consent, whilst in theory fulfilling the basic requirements of a valid marriage, was in practice not sufficient to be accepted as marriage by religious, political or legal authorities.⁶⁷

The authorities routinely condemned unregistered irregular marriages as nothing more than concubinage. John Inglis, the Lord Justice General of Scotland was of the view that irregular marriage was relatively rare and was "already effectually condemned by public opinion."⁶⁸ However, this is merely an assertion which cannot be taken as evidence of popular marriage practices. Such evidence as exists from local authority records suggests that the barriers to divorce and to remarriage ensured that for a minority of couples the only route to personal happiness was cohabitation. The Criminal Officers' Prosecutions for Desertion and the Poor Law applications for Glasgow contain evidence that the vast majority of co-habiting couples were already married, separated or deserted and that it was only in a small minority of cases that there were no obvious impediments to marriage.⁶⁹ Whilst there may not have been a vibrant popular culture that rejected established legal procedures for marriage, it seems that people were willing to breach moral codes where they stood in the way of personal happiness. However, these were cases that came to the attention of the authorities and cannot tell us about the full extent or "dark figure" of cohabitation.

The Marriage (Scotland) Act 1939 abolished two forms of irregular marriage: marriage de praesenti and promise subsequente copula (but retained irregular marriage by cohabitation, habit and repute), introduced civil marriage before a registrar and made notice and registration compulsory. The Act is generally seen as a major reform in marriage and family legislation that brought Scotland into line with the rest of Europe. In the formal legal sense Scotland had stood virtually alone amongst Western European countries in according legal validity to irregular marriage and enshrining simple exchange of consent as sufficient basis for marriage. Whatever the formal legal position, it was how the law was interpreted that was the litmus test for contemporary attitudes. In practice Scotland was very similar to other countries in what was regarded as acceptable forms of contracting marriage. Irregular marriage was narrowly defined as registered irregular marriage and served as a functional equivalent to civil marriage in other countries and there was a censorious attitude to cohabitation or “concubinage.” It would appear that Scotland's apparently more tolerant legal stance on irregular unions was only a chimera and that the same stigma was attached to informal or irregular unions that we see elsewhere. However, as elsewhere, the majority of people conformed to the legal rules and the legal paradigms of marriage but equally there was no neat correspondence between legal codes and social practice with ordinary people adopting a more flexible definition of marriage than the official one.

Endnotes

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1. Joanna Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in Early Modern England 1660–1800*, Cambridge, 2002; Bernard Capp, “Bigamy in Early Modern England” *Historical Journal*: 52:3 (2009), 537–56; John Gillis, *For Better, For Worse: British Marriages 1600 to the Present* (Oxford, 1985); Leah Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separation, 1684–1830* (Edinburgh, 1998); Leah Leneman and Rosalind Mitchison, “Clandestine Marriage in the Scottish Cities 1660–1780,” *Journal of Social History*, 26:4 Summer, 1993: 845–61; E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (London, 1991).

2. Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class* (California, 1997); John Gillis, *For Better, For Worse*; Sonya Rose, *Limited Livelihoods: Gender and Class in Nineteenth-Century England* (Californian, 1992); Ellen Ross, *Love and Toil: Motherhood in Outcast London*, (Oxford, 1993); T. C. Smout, “Scottish Marriage, Regular and Irregular 1500–1940,” in R.B. Outhwaite, ed., *Marriage and Society: Studies in the Social History of Marriage* (London, 1981): 204–36.

3. Ginger S. Frost, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England*, (Manchester, 2008).

4. T.C. Smout, “Scottish Marriage,” 212.

5. For a discussion of the distinction between irregular marriage and clandestine marriage see Brian Dempsey, “The Marriage (Scotland) Bill 1755,” *Miscellany* vi: 77–76.

6. Rebecca Probert, *Marriage Law & Practice in the Long Eighteenth Century: A Reassessment*, (Cambridge, 2009). Probert's revision of the received wisdom includes the contention that

Hardwicke's Act was not a watershed either in terms of the legal status of irregular marriage, authorities' attitudes to it or popular practice.

7. See Brian Dempsey, "The Marriage (Scotland) Bill 1755: Lord Hardwicke's Attempt to Abolish Clandestine and Irregular Marriage in Scotland" in *Stair Society Miscellany VI*: 75–121; Anne Cameron, "The Establishment of Civil Registration in Scotland," *The Historical Journal*, Volume 50, Issue 02, June 2007: 377–95.

8. See Clive, *The Law of Husband and Wife in Scotland* 4th edition (Edinburgh, 1997); Brian Dempsey, "The Marriage (Scotland) Bill 1755," and Brian Dempsey, "Making the Gretna Blacksmith Redundant: Who Worried, Who Spoke, Who was Heard on the Abolition of Irregular Marriage in Scotland" in *Journal of Legal History* 2009: 23–54; T.C. Smout, "Scottish Marriage" for more detailed discussion of Scottish marriage laws.

9. Report of the Royal Commission on the Laws of Marriage, 1867–68 (RCLM): xviii–xxix.

10. *Ibid.*, xx.

11. *Ibid.*

12. RCLM, Appendix, Evidence of James Stark, Superintendent of Statistics and Assistant Census Commissioner for Scotland: 4.

13. For a full discussion of the legal disputes over the role of marriage by cohabitation with habit and repute see W. D. H. Seller, "Marriage by Cohabitation with Habit and Repute: Review and Requiem?" in D. L. Carey and D. W. Meyers (eds.), *Comparative and Historical Essays in Scots Law* (Edinburgh, 1992): 117–36.

14. T. C. Smout, "Scottish Marriage"; Leneman and Mitchieson, "Clandestine Marriage": RCLM, Appendix, Evidence of Dr. James Stark: 3.

15. J. Gillis, *For Better for Worse*.

16. Lea Leneman and Rosalind Mitchieson, "Clandestine Marriage," 850.

17. RCLM, Appendix, Evidence of Dr. James Stark: 3.

18. Smout, "Scottish Marriage," 219.

19. RCLM, Appendix, Evidence of Dr. James Stark: 5.

20. Anne Cameron, "The Establishment of Civil Registration in Scotland," *Historical Journal*, 2007 June 50 (2): 377–95 for a full discussion of the reasons for this deficiency.

21. Smout, "Scottish Marriage," 218.

22. Leneman and Michieson, "Clandestine Marriage," 351. The numbers they cite for St. Curhtbert rise from 62 to 164 and in Baron parish 34 to 81.

23. *Ibid.*, 851.

24. *Ibid.*

25. Cited in Cameron, "The Establishment of Civil Registration," 2.

26. Dempsey, "The Marriage (Scotland) Bill," 78.

27. See Dempsey, "The Marriage (Scotland) Bill," 80 for a full discussion of the difference between them. Rebecca Probert has argued that when historians have discussed "informal" or "irregular" marriage in England, they have actually been referring to clandestine marriage. Probert, *Marriage Law and Practice*, 100.

28. Leneman and Mitchison, "Clandestine Marriage," 845.

29. Parental consent was not a legal requirement in Scotland but in practice many ministers sought to obtain it.
30. Leneman and Mitchison, "Clandestine Marriage," 851.
31. Smout, "Scottish Marriage," 220.
32. Leneman and Micheson, "Clandestine Marriage," 850.
33. Probert has argued that clandestine marriages were largely confined to the Fleet marriages in London. These were marriages that were carried out by an unauthorized celebrant in or in the vicinity of the Fleet prison in London. Probert, *Marriage Law and Practice*.
34. Rosalind Michieon and Leah Leneman, *Sexuality and Social Control: Scotland 1660–1780* (Oxford, 1989); Callum Brown, *The Social History of Religion in Scotland since 1730* (London, 1987).
35. Clive, *The Law of Husband and Wife*, 10.fn 91.
36. RCLM, xvii. Source: Memorandum by A. Froude, Esquire, ISC, Registrar General for Scotland, 4.
37. Marriage Preliminaries (Scotland) Bill 1877.
38. The Morison Committee, set up in 1935 to review the marriage laws of Scotland was the second major review of Scotland's marriage laws in the post-registration period, the first being The Report of the Royal Commission on the Laws of Marriage 1867–68.
39. See Smout, "Scottish Marriage," for a detailed discussion of the statistics.
40. RCLM, xxii.
41. Detailed Annual Reports of the Registrar General for Scotland and the Morison Report, evidence of L.S. Purves, Registrar for the St. Giles district of Edinburgh; *The Scotsman*, December 29, 1915.
42. Morison Report, Evidence of Andrew Froude, 5.
43. *The Scotsman*, December 29, 1915.
44. Information from a personal contact of the circumstances of their parents' marriage.
45. RCLM, Appendix, Evidence of James Stark, 5.
46. *Ibid.*
47. RCLM, xvii.
48. Report of the Morison Committee, Minutes of Evidence of Mr. L.S. Purves, Registrar of Births, Deaths & Marriages, District of St. Giles, Edinburgh, 234. Purves maintained that those who married irregularly included, "only a sprinkling of the upper classes and professional people."
49. *Ibid.*, 235.
50. Morison Committee, Evidence of Robert Ramsay, Interim Director of Public Assistance for Glasgow, 267.
51. *Ibid.*, 264–65.
52. *The Scotsman*, December 30, 1914.
53. Smout, "Scottish Marriage," 228.
54. See Olive Anderson, "The Incidence of Civil Marriage in England and Wales," *Past and Present*, no.84 (August, 1979), 146–54.

55. See Rebecca Probert, "Chinese Whispers and Welsh Weddings," *Continuity and Change* 20 (2), 2005, 211–228; Leonore Davidoff, "The Family in Britain," in F. M. L. Thompson (ed.), *The Cambridge Social History of Britain 1750–1950*, Vol. 2: *People and their Environment* (Cambridge, 1990), chapter 2.
56. Morison Committee, Evidence of William Maclean, Solicitor, Glasgow, representing the Faculty of Procurators in Glasgow.
57. Morison Committee, Memorandum of Andrew Froude, Registrar General for Scotland.
58. Morison Committee, Memorandum of Miss M. E. Smnith of Gractney Hall, Gretna Green who refers to John Linton, Marriage Agest Graitrey Hall who died in 1851.
59. Morison Committee, Evidence of Mr. Donald Jack, solicitor, on behalf of Messrs. Beattie's Marriage Agency and William Shaw, Messenger-at-Arms, both of Edinburgh.
60. Ibid.
61. Morison Committee, Evidence of Andrew Froude, 6.
62. Ibid.
63. Morison Committee, Evidence of L. S. Purves, 237.
64. Morison Committee, Evidence of Robert Ramsay, Interim Director of Public Assistance for the Corporation of Glasgow, 257.
65. Clive, *The Law of Husband and Wife*.
66. Morison Committee, Appendix: Evidence of the Right Honourable J. Moncrieff, 63.
67. RCLM, Appendix: Evidence of witnesses, *passim*.
68. RCLM, Appendix, Evidence of John Inglis, The Lord Justice General of Scotland, *liv*.
69. These sources are discussed more fully in another article on official attitudes to irregular marriage.