

The Court was of opinion that the subjects should be entered in the valuation roll at £160.

Counsel for the Appellant—Dykes. Agent—T. J. Cochrane, S.S.C.

Counsel for the Assessor—W. T. Watson. Agents—Simpson & Marwick, W.S.

COURT OF SESSION.

Friday, February 2.

SECOND DIVISION.

MACKIE v. MACKIE AND OTHERS.

Husband and Wife—Constitution of Marriage—Irregular Marriage—Marriage by Promise subsequente copula—Declarator of Marriage after Death of Man—Competency.

Promise *subsequente copula* constitutes very marriage; it is therefore competent to bring an action of declarator of such marriage after the death of one of the spouses; the only consequence of such death is that the promise can only be proved by writ.

Janet Barclay or Mackie, High Street, Pitlessie, Ladybank, Fife, and James Mackie Barclay, her infant son, *pursuers*, brought an action against William Mackie, Post Office, Pitlessie, and others, *defenders*, for declarator that on 17th September 1914 the late William Mackie, lance-corporal in the 1/7th Royal Highlanders, son of the said William Mackie, and the pursuer, the said Janet Barclay or Mackie, were lawfully married, and that the pursuer, the said James Mackie Barclay, was their legitimate son. The action was undefended.

The pursuer *pleaded*—“1. The marriage between the pursuer the said Janet Barclay and the said William Mackie having been duly constituted by promise *subsequente copula*, decree of declarator to that effect should be pronounced. 2. The said Janet Barclay and William Mackie having been lawfully married, the pursuer the said James Mackie Barclay is entitled to have his status of legitimacy declared.”

The Lord Ordinary (DEWAR) deemed that sufficient facts had been proved to establish a marriage founded on promise *subsequente copula*, but reported the case to the Second Division, as he considered the question to be too important to decide in an undefended action in the Outer House. He also ordered intimation of the action to be made to the Lord Advocate in case questions affecting the public interest might arise if the case were decided in the pursuers' favour.

His Lordship's report ran as follows:—“The material facts which were proved in evidence are briefly as follows:—The pursuer and the deceased William Mackie knew each other intimately for about nine years. The parents of both parties lived in the same village, and the families were on friendly terms. Her father was a master baker in

Pitlessie, and his father (the defender William Mackie) is a merchant and postmaster there. Mackie asked the pursuer to marry him in October 1913 and she accepted him, and he gave her an engagement ring. They were regarded by neighbours and friends as an engaged couple, and the engagement was recognised by both families. He was a plumber, and it was at first arranged that the marriage should not take place for two years, when he expected that he would have saved sufficient money to furnish a house, but in the beginning of 1914 he thought he might have sufficient to enable them to marry at the end of the year. But the war broke out in August 1914, and as he was in the Territorial Forces he was mobilised with his regiment, the 1/7th Battalion Royal Highlanders, at Kinghorn. He was afterwards transferred to Bedford, finally drafted to France in the spring of 1915, and on 6th June he was killed in action.

“The pursuer produced a number of letters she had received from him when he was stationed at Kinghorn and Bedford. In these letters he expressed his love and affection for her, and makes constant reference to their engagement, and hopes that their marriage will not be long delayed. The pursuer states that on two occasions during the period of their engagement he urged her to permit him to cohabit with her, and that she, relying on his promise to marry her, consented. The first occasion was on 17th September 1914, and the second on 24th March 1915. There is naturally not very much corroboration of her statement, but I think there is as much as one might reasonably expect, and that it is sufficiently proved. They were known to be engaged, and were seen walking alone in the locality where the occurrence is said to have taken place, and in one of his letters he makes what appears to be, and she believes is, an indirect reference to it. And in the month of June, when she first ascertained that she was pregnant, she wrote to him stating that “worse luck could not have befallen me.” She stated in evidence—and I see no reason to doubt her word—that this had reference to her pregnancy. She did not receive a reply to this letter. There was apparently no time, as he was killed on the 6th of June, and the letter was found in his pocket. The child was born on 17th December 1915. The deceased's father, the defender William Mackie, stated in evidence that when he ascertained the facts he and his family agreed that they ought to acknowledge the pursuer as his son's wife and invite her to reside with them. They did so, and she has resided with them ever since. He states—‘I have no doubt at all that my son was the father of the child, and that he regarded the pursuer as his intended, and that they were waiting till the war was over to be married.’ That is my opinion also. I think both promise and *copula* are proved, and I see no reason to doubt that she consented on the faith of the promise.

“If I am right in thinking that facts sufficient to establish a marriage founded on promise *subsequente copula* have been proved, the next question is whether it is

competent to raise the action after the death of one of the parties? That question has been much discussed by both judges and writers, but so far as I am aware it has never been definitely settled. If, as some hold, promise *cum copula* constitutes marriage, the action is competent; but if it does not constitute marriage but merely affords ground for a declarator, as others hold, then the action is incompetent. Lord Fraser discusses the question at length in Husband and Wife, and given his reasons for thinking that the latter view is correct. He states that originally promise *cum copula* gave the woman a right to compel the man to have the marriage solemnised, and that decree of declarator now stands in the place of an order to solemnise. But as the Court could not order a dead man to solemnise the marriage, neither will it declare him married after his death. Lord Fraser's opinion on a question of this kind is of course of great importance, and his view is supported by other high authorities. But there is, I think, even a greater weight of authority for the other view, viz., that the marriage is constituted not by the decree of the Court but by the consent of parties, and that it is therefore competent to grant decree of declarator even after the man's death. This is based on the view that *verba de futuro subsequente copula* are equivalent to *verba de presenti*, and that when promise is proved it must be presumed that the woman only consented to *copula* after the man had consented to instant marriage. In the *Dabrymple* case, 1811, 2 Hagg C. R., at p. 66, Lord Stowell said—'If the parties who exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection.' See also *Stair*, i, 4, 6, and *Erskine*, i, 6, 2.

'The most recent case in which the question was considered is *Maloy v. Macadam*, 1885, 12 R. 431. In that case Lord M'Laren (Ordinary), following Lord Fraser's view, pronounced an interlocutor assailing the defenders from the conclusions of the action on the grounds (1) that the marriage had not been proved, and (2) that it was no longer competent to constitute or establish such a marriage after the death of one of the parties. But on a reclaiming note presented to the First Division this interlocutor was recalled. Lord Muir, who gave the leading opinion, said—'The pursuer having failed in her proof, there is no necessity for giving any opinion upon the point of law which only arises upon the supposition that the marriage founded on promise *subsequente copula* is proved. At the same time I think it is right to say, as the question was fully argued before us, that as at present advised I am not prepared to concur in the opinion which the Lord Ordinary has formed, and as his Lordship has made an express finding on that point, it will be necessary to recal or vary the interlocutor

in that respect.' Lord Shand thought it a very important and difficult question and also reserved his opinion, and the Lord President said that he 'had not been convinced that it is incompetent to constitute or establish a marriage between two parties in respect of promise *subsequente copula* after the death of one of them.' That, I think, is the last judicial utterance on the question.

'All the authorities on the question are noted, and a full argument on both sides is reported in *Maloy's* case.

'The impression I have formed is that the weight of authority is to the effect that promise *cum copula* constitutes marriage, and that it is therefore competent to bring a declarator after the man's death. It appears to me that marriage according to the law of Scotland is constituted by the parties themselves by the mutual exchange of consent. Consent is essential and it is sufficient. When a man and a woman declare that they mutually consent to take each other for husband and wife the marriage is complete, and it is settled law that a declarator is competent even after the man's death. I think the same rule must apply in a case such as this. Unless promise *cum copula* be equivalent to declaration of present consent, I do not see how the Court could grant decree even when the man is alive, because mutual consent is essential. And if it be assumed, as I think it must be, that he has in fact consented at the time of the *copula* I do not see how declarator can be refused even when he is dead, because consent is sufficient.'

At the hearing the Lord Advocate intimated to the Court that having considered the evidence and the productions he saw no reason why he should offer any opposition to the granting of decree.

The pursuer argued—Marriage was by Scots law a civil contract perfected by consent. Marriage by promise *subsequente copula* constituted very marriage, as consent to the marriage was presumed at the time of the *copula*. Such a marriage could be declared after the death of one of the parties concerned. Marriage *de presenti* was equivalent to the sponsalia of the canonists. It had been declared in the House of Lords that marriage *de presenti* might be declared after the death of one of the parties. In the case of such subsequent death the promise preceding the *copula* could, however, only be proved by the writ of the party. Counsel cited the following authorities—Fraser on Husband and Wife, i, 323; Corpus Juris Canonici, iv, 1, 30, iv, 1, 15, iv, 1, 32; Brouwer, de Jure Connubiorum, i, 23, 2; Boehmer, Jus Ecclesiasticum Protestantium, iv, 1, 12 (11), p. 1087, iv, 1, 56; Fraser on Husband and Wife, vol. ii, p. 38, note; *Stair*, i, 4, 6, iii, 3, 42, iv, 45, 19; More's Notes on *Stair*, 13, note B; Bankton, i, 5, 2; *Ersk.* i, 6, 4; Ferguson's Consistorial Law, p. 115; Lothian's Consistorial Law, p. 53; Wallace's Principles of the Law of Scotland, i, 163, section 192; Walton on Husband and Wife, p. 31; *Pennycook v. Grinton*, 1752, M. 12,677 (commented on in *Kames' Elucidations*, p. 39); *Clowden v. Culton*, 1774, Hailes' Dec. 561;

Forbes v. Countess of Strathmore, 1750, 2 *Elchies* Dec. 365, per Lord President Dundas; *M'Lachlan v. Dobson*, per Lord Braxfield, quoted in Fraser on Husband and Wife, i, 268; *Kennedy*, 1796, Ferguson's Rep. 181, per Lord President Campbell; *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. Rep. 54, per Sir W. Scott at p. 66; *Honyman v. Campbell*, 1830, 8 S. 1030, and 5 W. & S. 92, per Lord Brougham at p. 143; *M'Adam v. Walker*, 1813, 5 Paton 675, per Lord Meadowbank at p. 685; *Aitchison v. Incorporation of Solicitors*, 1838, 1 D. 42, per Lord Gillies at p. 51; *Craigie v. Hoggan*, 1838, 16 S. 584, per Lord Gillies at p. 607, and M.L. & R. App. 942, per Lord Brougham at p. 974; *Lowrie v. Mercer*, 1840, 2 D. 953, per Lord Medwyn at p. 984; *Stewart v. Menzies*, 1841, 2 Rob. App. 547, at p. 590; *Ross v. M'Leod*, 1861, 23 D. 972, per Lord Curriehill at p. 987; *Yelverton v. Langworth*, 1864, 4 Macq. 745, per Lord Chancellor Westbury at p. 856 and Lord Chelmsford at p. 879, and further in the Court of Session, per Lord Ardmillan, 1 Macph. at p. 164; *Surtees v. Wotherspoon*, 1873, 11 Macph. 384, 10 S.L.R. 252; *Maloy v. M'Adam*, 1885, 12 R. 431, per Lord M'Laren at p. 448, 22 S.L.R. 243; *Browne v. Burns*, 1843, 5 D. 1288, per Lord Moncrieff; *Green v. Borthwick*, 1896, 24 R. 211, per Lord Young, 34 S.L.R. 164; *Darleton, voce Sponsalia*; *Barclay v. Napier*, 1611, M. 6115; *Baptie v. Barclay*, 1665, M. 8413; *Glen*, 1827, Syme 204, at p. 267; *Reid*, 1873, 2 Coup. 415, at p. 417; *May*, 1856, 2 Irv. 479, at p. 481; *Muir*, 1836, 1 Swinton 402, at p. 403.

The Lord Advocate was not called upon.

LORD JUSTICE-CLERK—This action has been brought by the pursuer in the interests of herself and her infant child to have it found and declared that she and the late William Mackie had been lawfully married to each other, that the child procreated of the marriage is their lawful offspring, and that the pursuer and her infant are entitled to all the rights and privileges of the lawful wife and child of the deceased. William Mackie was a soldier who enlisted voluntarily soon after the present war began, and after serving for some time in this country he was sent to France, where he was killed. The action was not brought until after his death. The Lord Ordinary was of opinion that the pursuer was entitled to get the decree asked for, but having regard to the peculiar circumstance that the action had not been raised until after the death of the alleged husband he considered it his duty to report the case to this Division. We had a very full and able argument by Mr Mackenzie on the competency of such an action, involving the question of the legal effect of *copula* in a case such as this—whether it constituted marriage or whether it was only the foundation on which decree could be obtained declaring that marriage had been completed.

From a consideration of the various authorities to which we were referred, it seems quite clear that the principal authority against the view contended for by the pursuer is Lord Fraser in his book on Hus-

band and Wife (2nd ed.), i, 322-358, in which he repeated and enlarged the views he had originally expressed in the first edition of that work, then termed The Law of Personal Relations. Lord Fraser very keenly maintained that Scots law, so far as marriage by promise *subsequente copula* was concerned, required something more than a promise and subsequent *copula* to constitute marriage. There is no decision in support of that view, but there are one or two expressions of opinion—for instance, one by the first Lord Moncrieff—*Broune v. Burns*, 5 D. 1288, at p. 1204—in that direction. But on the other hand there is a long series of expressions of opinion to the contrary by those who are regarded as well entitled to state what the law of Scotland is, embracing Stair, iv, 45, 19, Bankton, i, 5, 2, and Erskine, i, 6, 4, and other writers who, though not of equal authority with these, are still entitled to be treated with respect, such as Fergusson, Consistorial Law, p. 115, Lothian, Consistorial Law, p. 53, and Wallace, Principles of the Law of Scotland, section 192. We were referred also, *inter alia*, to the cases of *Pennycook v. Grinton*, M. 12,677, *M'Adam v. Walker*, 5 Paton, 675, and *Dalrymple v. Dalrymple*, 2 Hagg. 54, which seem to me to show conclusively that the law of Scotland on the subject is that if there is a promise proved in proper fashion, followed by intercourse upon the faith of it, there and then a marriage is constituted with all its consequences and that nothing further requires to be done. Sir William Scott (Lord Stowell) expressed an opinion in the case of *Dalrymple*, which was afterwards accepted by Lord Gillies as correctly expressing the law of Scotland, though he had previously expressed a contrary opinion. Sir William Scott said at p. 66—"If the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection."

It is also to be noted that while Lord M'Laren, as Lord Ordinary in the case of *Maloy*, 12 R. 431, at p. 448, adopted Lord Fraser's doctrine, the Inner House found it unnecessary to express a judicial determination on the question. Lord Mure indeed differed from Lord Fraser's doctrine, and Lord President Inglis said (at p. 467)—"I have not yet been convinced that it is incompetent to constitute or establish a marriage between two parties in respect of promise *subsequente copula* after the death of one of them." Other cases were referred to, such as *Craigie v. Hoggan*, 16 S. 584, and *Honyman v. Campbell*, 5 W. & S. 92 (for an opinion of Lord Brougham).

The result it appears to me is that we must hold that as at 17th September 1914, which is the date when the intercourse is alleged to have taken place, there was constituted a marriage between the pursuer and the deceased William Mackie; and further, that the marriage, as Sir William Scott says, produced all the consequences attributable

to that species of matrimonial connection. I do not think these words "that species of matrimonial connection" introduce any limitation at all. In my opinion the authorities show that the result of such a marriage is to produce all the consequences connected with the marriage relationship however constituted.

If that be so the legal question remains, whether there is any incompetency or difficulty in bringing an action after the death of the alleged husband to have it found and declared that such a marriage was constituted. In my opinion there is not. The only consequence is that the promise can only be proved by writ. If the marriage has been constituted it seems to me that it would be open to anyone at any time to bring an action to have that fact legally declared, whether the person bringing the action was the wife or the child of the marriage seeking to have his legitimacy declared and to enforce his legal rights. I am of opinion therefore that the action is competent.

We thought it proper and indeed necessary, having regard to the terms of the Lord Ordinary's interlocutor reporting the case to us, that we should see the proof, both oral and documentary, upon which the decision rested, and accordingly we were supplied with copies of the correspondence and of the parole testimony which was led before the Lord Ordinary. It seems to me impossible to doubt that the proof and documents establish beyond controversy that the promise was given, and that the intercourse which followed took place on the faith of that promise. Accordingly we have here in competent proceedings every proof necessary to enable us to come to the conclusion that the pursuer is entitled to the decree she asks as regards both herself and her child. It must be kept in view, as Lord Barcapple said, that in such cases "It is only a promise proved either by writing or by oath that when followed by *copula* constitutes marriage," whereas in an action of damages for seduction and breach of promise there is no such limitation of the proof—*Forbes v. Wilson*, 6 Macph. 770.

I think it right to say that in cases of this sort when an action is brought after the death of the husband it will be necessary that the Court, whether the Lord Ordinary or the Inner House, should scrutinise more particularly and carefully if possible the evidence which is adduced than may be necessary in other cases. Applying the utmost scrutiny to the evidence here I have no doubt as to the result.

LORD DUNDAS—I am entirely of the same opinion. The full and excellent citation of authority by Mr Mackenzie has removed from my mind any doubt I might have entertained of the law applicable to the case. I hold it to be the settled law of Scotland that if a woman prove by competent evidence that a man promised to marry her, and that on the faith of that promise she permitted *copula* to follow, a valid marriage is then and thus constituted. In the case of *Pennycook*, (1752) Mor. 12,677. "It was held

for law that a promise of marriage followed by a *copula* made from that moment an actual marriage," and a subsequent marriage entered into between the man and another woman was set aside as invalid. The promise must be proved by the man's writ or oath. It has sometimes been inferred by the Court from the general tenor of a correspondence. If the promise be once well established, the general presumption is that the ensuing *copula* proceeded on the promise and in reliance thereon.

Marriage being then validly constituted by the facts of promise followed by *copula* I see no reason to doubt, with all respect to the opinion of Lord Fraser, that it may be competently proved after the death of one of the parties. I agree, however, with your Lordship that in that event the evidence will require to be scrutinised carefully by the Court in order to ensure that the case is devoid of anything like fraud or collusion, and also that the promise is sufficiently proved *scripto*. And this may be all the more necessary if the case is undefended, as it is here. I think it right that these remarks should be made, because cases of this sort may, not unusually, arise as undefended actions in the Outer House. In the case before us, having carefully read the proof, both parole and documentary, I think both the promise and the *copula* following in reliance thereon are fully and well established. The case appears to be a perfectly honest one, and the promise is sufficiently proved by the writings which have been produced.

LORD SALVESEN—I concur. The authorities cited to us by Mr Mackenzie appear to me to be conclusive. I should like to say, however, that I think the passage in Sir William Scott's opinion, which your Lordship has cited, appears to me quite accurately to state the law, because a marriage such as this, although held in law to have taken place as at the moment when intercourse has followed on the faith of a promise, does not immediately give the woman the status of a legal wife. That she only acquires when she obtains decree in an action of declarator. Until she has obtained such a decree she cannot safely register her child as legitimate, nor can she claim the privileges of a wife. Accordingly there is that distinction between the position of the pursuer as contrasted with the position of a woman married *in facie ecclesie*, or by some other modes of irregular marriage. But whenever a decree of marriage is obtained, then she obtains the status of a wife as from the time that the consensual contract is assumed to have been completed, namely, at the first connection following upon and on the faith of the promise.

I am not sure either that the presumption to which your Lordship has referred is a *presumptio juris et de jure*, as I think it is capable of being rebutted, as, for instance, if a woman in cross-examination admitted that there was some stipulation or condition adjoined to the promise, or that the connection was not regarded by the parties as constituting marriage. In the absence of evidence

I agree that there is a presumption that connection has followed upon and on the faith of the promise, but I think it is a presumption of law only and not a presumption which is incapable of being rebutted by proof.

With the other observations which your Lordship has made I entirely agree, and especially with regard to the authorities. It so happens, and it is rather a curious fact, that although this kind of marriage has been recognised for centuries by the law of Scotland, this is the first case in which the Court has been called upon to decide that it may be declared after the death of one of the spouses. It has, however, been decided in the analogous case of marriage *per verba de presenti*, and I see no reason to differentiate between the two classes of irregular marriage. I can conceive of an action of declarator being successfully brought at the instance of the child of such a marriage after the death of both the parents, but it would require extremely strong and convincing evidence to show that the parties regarded themselves as married persons. The law is sufficiently safeguarded, as it seems to me, by the necessity of the pursuer establishing such a marriage by writ under the hand of the other spouse if he or she is dead, or by his oath if alive. It obviously would tend to great abuse, and might lead to a great deal of perjury if the law were not so, and it will be necessary for any Lord Ordinary who has to deal with a similar case to satisfy himself, first, that there is evidence in writing under the hand of the defender of a prior promise, and second, he must be satisfied that the connection between the pursuer and the defender took place subsequently to that promise. If he is satisfied of these two facts, then the law fills in the gap by presuming that the connection has followed on the faith of the promise. It would, I think, be contrary to public policy if irregular contracts of this description should be capable of being declared except upon evidence of that kind, because one can easily see a very strong inducement to a woman who had yielded her person without any promise of marriage at all but under sensual impulse, to fabricate a case after the death of the man with a view to establish her own character in the eyes of the world. In view of that limitation which the law of Scotland imposes on the mode of proof, I see no danger in holding that declarator may be obtained after the death of one of the parties to the contract.

LORD GUTHRIE—The law of Scotland as it appears in the authorities and the decisions has been stated with equal conciseness and precision by Lord Ardmillan in two cases—the first that of *Longworth v. Yelverton*, 1 Macph. 161, at p. 166, sitting as Lord Ordinary, and the other in that of *Surtees v. Wotherspoon*, 11 Macph. 384, at p. 388, sitting as one of the judges of the First Division. In the case of *Longworth* he said—“Legal proof of promise to marry, and proof that *copula* followed on the faith of the promise, is held to instruct mutual

consent, on a presumption that the promise passed into present mutual consent by the act of intercourse. Courtship *subsequente copula* does not of itself constitute marriage, but promise legally proved does, when followed by *copula*, constitute marriage.” In the case of *Surtees* Lord Ardmillan said—“A promise of marriage, proved by written evidence, and followed by *copula*, is, according to Scottish law, sufficient to prove the mutual consent which creates the relation of marriage.”

The Court found and declared in terms of the conclusions of the summonses.

Counsel for the Pursuer—A. O. M. Mackenzie, K.C.—R. Macgregor Mitchell. Agent—W. T. Forrester, S.S.C.

Counsel for the Crown—The Lord Advocate (Clyde, K.C.)—Morton. Agent—W. J. Dundas, W.S.

Thursday, February 8.

FIRST DIVISION.

[Sheriff Court at Lanark.]

RODGER v. WEIR AND ANOTHER.

Parent and Child—Curator—Expenses—Liability of Father Called as Defender in Action against his Minor Son.

An action of affiliation and aliment was brought against a minor. His father was called as his curator-in-law. Prior to the raising of the action the father wrote to the pursuer stating that he would provide funds for his son's defence, and repudiating the pursuer's statement that his son was the father of her child. The father took an active part in the litigation. The Sheriff-Substitute decided in favour of the pursuer, and on appeal the Sheriff adhered. On appeal the First Division adhered. *Held (diss. Lord Johnston)* that the father having taken an active part in the litigation, and not merely having concurred in the defence, he was liable jointly and severally with the defender in the whole expenses of the case. *Held (per Lord Johnston)* that the father was entitled to defend the action down to the date of the Sheriff-Substitute's interlocutor, whereby the claim was constituted against the defender, but was liable for the expenses incurred since that date. *Authorities examined per Lord Skerrington.*

Jeanie Rodger, pursuer, brought an action of affiliation and aliment against Walter Somerville Weir, minor son of William Weir, Carluke, defender, and the said William Weir as his curator-in-law.

The facts of the case were—On 2nd January 1915 the pursuer gave birth to an illegitimate child. Thereafter she wrote to the defender's father intimating that his son was the father of her child. The reply was as follows:—“Hill of Orchard, Carluke, 30th October 1914. — Miss Jane