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 præsenti*, 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 satified 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 summons.

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, 30*th October* 1914.—Miss Jane

Rodger, Low Braidwood — I am sorry to have to write you, but I have your letter of which you ought to be ashamed. Nevertheless I will keep it, as it may be a swift witness against you in future; beside I am told you have been using threats, and I here warn you not to come near the Hill for the purpose of giving trouble in any way. In all the names that you give I notice that you have omitted one very important name, and one that must have been before your mind when writing about being watched in Crossford, I mean the person who waylaid Walter, and tried to get him to promise to marry you, and used threats to compel him to do so. If it was not to cover his own and your guilt why did he need to act as he did, and then you also approached Walter presumably making inquiry about work, but purposely that you might get accompanying him out the road, and try and involve him in this mess. Your plans may have been well laid, but it is a most diabolical plot which will be exposed if need be. W. WEIR."

The pursuer again wrote to him, and received the following reply: — "Hill of Orchard, Carluke, 11*th January* 1915.—Miss Jane Rodger—I am exceeding reluctant to write you, and I do so because I consider myself as yet the guardian of Walter; beside you cannot consider it an undue interference on my part, as you have already written to me twice in connection with this matter, and from all that I can learn you seem to blame Walter for a thing of which he is not guilty, and I think it right to direct your attention to the following:—At one time you gave the month of November as the time that the child was to be born, but the time of the birth being 2nd January coincides with the time when you was walking out with a young man from Crossford, besides you was frequently seen in the company of the person you now stay with, and I am told that you was seen in the company of a married man also; whereas I understand Walter never was in your company at this time. Seeing that I believe these things you cannot think it wrong of me to assist him all I can to save him from this stigma of being the father of your child, and if you take it to law I am prepared to furnish him with means to enable him to take it to the highest court in the land if need be, as I believe it to be a fabricated plot.—Yours truly, W. WEIR. *N.B.*—Perhaps the powder you took has upset your calculations, at any rate it don't seem always reliable."

The first deliverance in the action was on 22nd January 1915. On 5th June 1915 the pursuer lodged the following minute: — "The pursuer respectfully moves the Court, in the event of decree being pronounced in her favour and for reasons appearing in the process and to be stated at the bar, that the defender and his curator should be found liable in expenses jointly and severally."

On 12th June 1915 the Sheriff-Substitute (SCOTT MONCRIEFF) found the pursuer had given birth to an illegitimate female child, and that the defender was the father thereof, and further found the defender and his curator William Weir jointly and severally liable in expenses.

Note.—"[*After dealing with the merits of the case*]—As to expenses I think the position which the defender's father takes up in his letter to the pursuer warrants me in finding him liable in expenses, as I have been asked to do by minute lodged by the pursuer."

The defender appealed to the Sheriff (MILLAR), who on 29th October 1915 adhered to the Sheriff-Substitute's interlocutor, and found the appellant liable in the expenses of the appeal.

Note.—"[*After dealing with the merits of the appeal*]—The question of expenses is a matter for the discretion of the Court, and I have had some difficulty in finding the father liable in expenses. The mere fact that he was called as curator and consented to the defences in that capacity is not enough to make him liable; but then there is his letter, which is produced, where he intimates his intention of supporting his son and of carrying the case to the highest court. He appeared as a witness, and I think there is evidence that he did take an active part in the proceedings for the defence. Accordingly I am not prepared to differ from the learned Sheriff-Substitute on this point."

The defender appealed, and argued, *inter alia*—The Sheriffs were wrong in finding the defender's curator-at-law liable in expenses jointly and severally with him. The mere supplying of funds to fight a litigation would not make the person supplying the funds liable in expenses if the decision went against the person so assisted — *Fraser* v. *Malloch*, 1896, 23 R. 619, *per* Lord Kyllachy (Ordinary) at p. 625, 33 S.L.R. 594. The defender's father could only be made liable on the ground that he was the *dominus litis*. To make him *dominus litis* it must be shown that he was the real defender, while his son acted merely as his agent—*Fraser* v. *Malloch* (*cit.*)—or that he had the entire interest in the defence—*M'Cuaig* v. *M'Cuaig*, 1909 S.C. 355, *per* Lord President Dunedin at p. 357, 46 S.L.R. 287. But here the true interest was in the son and not in his father. *Fraser* v. *Cameron*, 1892, 19 R. 564, 29 S.L.R. 446, was distinguished, for the only question was as to the competency of the Sheriff awarding expenses against a guardian; no question of the proper exercise of his discretion was raised. Cases relating to the liability of husbands as curators of their wives were not in point, but even if they were the husband was only liable in so far as his conduct of the case could be shown to be improper and vexatious—*Baillie* v. *Chalmers*, 1791, 3 Pat. 213. Here all the father had done was to promise to finance his son's defence. Further, the case was distinguished from cases in which the guardian was a pursuer, for in them he elected to sue. Here he was a defender brought into the litigation on the pursuer's calling. In any event he was entitled to defend the case up to the date of the decision of the Sheriff-Substitute, and should not be found liable in expenses prior to that date—*Herriot* v. *Jacobsen*, 1909 S.C. 1228, 46 S.L.R. 998.

Argued for the pursuer—The mere con-

currence of the curator in a defence would not have rendered him liable in expenses, but his conduct prior to the action as shown by his letters, and the part he had taken in it, showed that he was the real opponent of the pursuer. If so the Sheriffs could find him liable in expenses, and in the exercise of their discretion had done so. There was nothing in the case to show that that exercise of their discretion should be disturbed. In any event the defender's father should be found liable jointly and severally with him in the expenses of the appeal—*Maxwell* v. *Young*, 1901, 3 F. 638, 38 S.L.R. 443; *Wilkinson* v. *Kinneil Cannel and Coking Coal Company*, 1897, 24 R. 1001, 34 S.L.R. 533. The same principles applied here as in the cases where a husband acted as curator for his wife—*Macgown* v. *Cramb*, 1898, 25 R. 634, 35 S.L.R. 494; *Picken* v. *Caledonian Railway Company*, 1901, 4 F. 39, 39 S.L.R. 31.

At advising—

LORD PRESIDENT—[*After dealing with the merits, and holding that the pursuer had proved her case*]—On the question of expenses I agree with the learned Sheriffs, and have nothing to add to the reasons they have given for awarding expenses against the defender's father.

LORD JOHNSTON dissented on the merits of the case.

LORD MACKENZIE—[*After dealing with the merits and holding that the pursuer had proved her case*]—The Sheriffs have awarded expenses against the defender's father. This could not have been done had the father merely given his consent as curator of his son. The ground on which expenses have been given is that the father took an active part in the defence. Though I was at first inclined to take the view that the father should only be made liable for expenses subsequent to the date of the Sheriff-Substitute's interlocutor, on reconsideration, looking to the terms of the letters he wrote, I am not disposed to differ from the Sheriffs on this point.

LORD SKERRINGTON—[*After dealing with the merits and holding that the pursuer had proved her case*]—The third and last question in the case is one of general importance, and I think it proper to refer to the authorities on the subject. The question is whether the Sheriffs were right in finding the defender's father and curator liable in expenses jointly and severally along with the defender. The first thing to notice is that Mr William Weir, the defender's father, was cited as the defender's curator-in-law, and that he entered appearance and authorised the defence in that character. Accordingly he is a party to the process, and we are not embarrassed by any of the difficult questions which arise when a person who is a stranger to a process is sought to be made liable in expenses on the ground that he is the *dominus litis*. It has been said that the justification for making a stranger liable as *dominus litis* is that he was the true principal, and that the nominal litigant was really his agent *per* Lord President Dunedin in *M'Cuaig* v. *M'Cuaig*, 1909 S.C. 355, at p. 357, 46 S.L.R. 287). A guardian falls under an entirely different category, seeing that he acts for and on behalf of his ward, who is the disclosed principal in the matter.

There is something to be said for the view that a guardian who litigates on behalf of a pupil ought not to be found personally liable in expenses unless he has exceeded his duty or otherwise misconducted himself. He is in a position of difficulty because he may make himself personally liable to his ward if he refuses or neglects to institute or defend an action. This view derives support from the opinion of Lord Fraser in his work on Parent and Child (3rd ed., p. 364) and the dictum of the Judges in *Gall* v. *Thomson*, 1840, 2 D. 1234. But these authorities do not seem to me to be safe guides so far as regards modern practice. In the leading case on this subject, *White* v. *Steel*, 1894, 21 R. 649, 31 S.L.R. 542, a father who sued an action as tutor and administrator for his pupil son was found personally liable in expenses, not in respect of any specialty, but upon the simple and general ground that by instituting an action which was unsuccessful he had caused expense to the defender of which the latter was equitably entitled to be relieved. Though it so happened that the father and administrator-in-law in that case was the pursuer and not the defender in the action, the reasoning of the judges would have been equally applicable if he had been the defender and had caused expense to a pursuer who was seeking to vindicate a claim which proved to be well founded. The dictum of Lord Jeffrey, quoted with approval by the Lord President (Robertson) in *White's* case (*cit.*), referred (as its language implies) to the case of a defender who was found liable in expenses because he litigated unsuccessfully though in good faith. So far as regards the interests of the ward it may often be more necessary for the guardian to institute an action than to oppose the granting of a decree in absence. Accordingly in the case of the guardian of a pupil it does not seem to me to be of crucial importance as regards his personal liability for judicial expenses to inquire whether he was the pursuer or the defender in the action. In either case he is if unsuccessful *prima facie* liable as the person who had the control of the litigation and who caused expense to the successful litigant.

The case of a minor *pubes* who sues or is sued with the consent and concurrence of his father as administrator-in-law or of a stranger curator is different, in respect that, at least in legal theory, the minor is vested with the management of his affairs, while the guardian merely advises and concurs. In the ordinary case an administrator-in-law or curator would not be held personally liable in expenses merely because he authorised an action or a defence in name and on behalf of a ward who was a minor *pubes*. There is, however, authority for the proposition that if a guardian goes beyond this and takes an active part in the litigation he

may, even if he litigated properly, incur personal liability to his successful opponent. According to strict legal principle it may be difficult to justify the imposition of personal liability upon a curator who has been guilty of no misconduct, and who has done no more than his moral duty in promoting or even in financing an action or a defence for the benefit of a minor who was practically unable to protect his own interests. In so far as a curator in such a case exceeds the strict limits of his functions as guardian he presumably acts as the authorised agent of his ward, and ought not on that account to be treated as a principal in the litigation. Nevertheless in the case of *Fraser* v. *Cameron*, 1892, 19 R. 564, 29 S.L.R. 446, their Lordships of the Second Division approved of the judgment of a Sheriff finding a father and administrator-in-law personally liable in the expenses of an unsuccessful action at the instance of his daughter, a girl of nineteen. The Sheriff proceeded upon the ground that the pursuer's father had taken a prominent and leading part in the litigation. A similar finding was pronounced by Lord Kyllachy as Lord Ordinary in the case of *Wilkinson* v. *Kinneil Cannel and Coking Coal Company, Limited*, 1897, 24 R. 1001, 34 S.L.R. 533, but the motion was not contested. To an opposing litigant the difference between a tutor on the one hand and a curator who takes an active part in the litigation must appear somewhat unsubstantial, and there is much to be said for these decisions from the point of view of convenience and justice.

In the paucity of decisions as to the liability for expenses of the curator to a minor *pubes* one may refer to the cases where husbands have been made personally liable for the expenses of unsuccessful actions at the instance of their wives. In some cases the husband has been held liable partly on the ground of misconduct, *e.g.*, because in the opinion of the Court the action was one which he must have known to be unfounded and which he ought not to have authorised, and partly on the ground that he took an active part in the litigation — *Maxwell* v. *Young*, 1901, 3 F. 638, 38 S.L.R. 443; *Picken* v. *Caledonian Railway Company*, 1901, 4 F. 39, 39 S.L.R. 31. The case of *Macgown* v. *Cramb*, 1898, 25 R. 634, 35 S.L.R. 494, was decided primarily on the latter ground. In *Maxwell's* case (*cit.*) Lord M'Laren referred to the analogy of "a father who sues or defends in the character of tutor or curator for his child," and cited the case of *White* (*cit.*). In *Picken's* case (*cit.*) Lord Kinnear said that while the husband's concurrence in his wife's action does not of itself render him liable in expenses "the question comes to be whether in any particular case he has taken such an active part in the case as to make it proper that he should share in the expenses. That is a proper question for the judge who tries the case." Applying this test, I am of opinion that Mr Weir's letter of 11th January 1915, founded on by the Sheriff-Substitute, is in the absence of contrary proof sufficient evidence that he took an exceptionally active part in the conduct of the litigation. I am therefore of opinion that the award of expenses against Mr Weir was in accordance with the authorities which I have cited and was proper in the circumstances. The effect of Mr Weir's conduct in interfering with the witnesses after they had given evidence in the Sheriff Court will fall to be considered in disposing of the expenses of this appeal.

LORD JOHNSTON—I did not know that this case was going to be made the opportunity of deciding authoritatively this important question of expenses, and accordingly knowing that there had been some difference of opinion on the subject between us at consultation, and believing that the question of the father's liability was to be determined on the special complexion of the case occasioned by some prior letters written by the father, I did not think it proper or necessary to say anything in my judgment except upon the main question.

I desire to say that I can by no means accept the conclusions which Lord Skerrington has come to, and I cannot allow his judgment to pass, as it might otherwise be assumed to be, as the judgment of the Court on the general question of the personal liability of a father when he gives his concurrence as administrator-at-law to his child's defence.

Some distinction may be drawn between the function of the guardian-at-law where his ward is a pupil and where he is a minor. But into this, as the whole question has not been fully and considerately before the Court, I do not enter. But regarded as a general question I consider that there is a difference between the position of a guardian-at-law when he chooses to come into Court on behalf of or along with his ward as pursuer and when he is brought into Court in the same capacity as defender. All the authorities as far as I know—and I put it pointedly to the counsel in the case, who confirmed me—are cases in which the ward was in the position of pursuer, and so far as appears there is no case in which the question has hitherto been considered where the guardian found himself in the position of curator-at-law to a defender. I think, as I have said, that that makes a very decided difference in the situation; and the conclusion which I had come to — and which I understood had the support of some of my brethren—was that where a guardian-at-law is brought in this way into Court with his ward as defender he is entitled, without incurring personal liability, to enter appearance and defend the action so far as the action is required for the constitution of a claim. Once the claim is constituted against his ward, then I think if he continues the litigation beyond the court of first instance he undertakes a different responsibility.

Accordingly the judgment which I would have given here, as I did not think the letters to which I have referred were so compromising as they are represented to be, is that the father as curator should not be held personally liable for the expenses in the Sheriff Court down to the date of the Sheriff-Substitute's interlocutor, but that he should be held personally responsible for the expenses from that date onwards; and

I trust that the general question may not be held as foreclosed.

The Court dismissed the appeal, and found the defender and his father as his curator jointly and severally liable to the pursuer in the whole expenses of the case.

Counsel for the Pursuer (Respondent)—Morton—R. Macgregor Mitchell. Agent—R. J. Calver, S.S.C.

Counsel for the Defenders (Appellants)—Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

Tuesday, January 16.

FIRST DIVISION.

[Lord Cullen, Ordinary.

LORD ADVOCATE *v.* VAN WEEL.

War—Emergency Legislation—Revenue—Customs (War Powers) Act 1915 (5 *Geo. V, cap.* 31), *sec.* 5 (1)—*Declaration as to Destination of Goods—Defence Open to Exporter where Commissioners Express Dissatisfaction as to Goods having Reached Enemy.*

The Customs (War Powers) Act 1915, sec. 5 (1), enacts—"Where in pursuance of any order made by the Commissioners of Customs and Excise under section one hundred and thirty-nine of the Customs Consolidation Act 1876, a person in the course of making entry before shipment makes a declaration as to the ultimate destination of any goods, then, unless security has been given by bond, the exporter shall, if so required by the Commissioners of Customs and Excise, produce evidence to their satisfaction that those goods have not reached a destination in any territory which, under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, is or is treated as enemy country, and if he fails to do so he shall be liable to a penalty of treble the value of the goods or one hundred pounds at the election of the Commissioners, unless he proves that they reached such destination without his consent or connivance, and that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration."

Held that, where the exporter failed to satisfy the Commissioners, it was not a defence to prove that the goods had not in fact reached an enemy destination, but it must be established that the exporter had taken all reasonable steps to secure that the ultimate destination should be the destination in the declaration.

Process—Proof—Revenue—Customs and Excise—Order of the Commissioners—Production and Proof of Order in a Subpœna and Information.

Held, in a subpœna and information at the instance of the Lord Advocate on behalf of the Commissioners of Customs and Excise to recover penalties for an offence against the Customs (War Powers) Act 1915, sec. 5 (1), that it was unnecessary for him to produce and prove an Order issued by the Commissioners under the Customs Consolidation Act 1876, which made provision for a declaration as to the ultimate destination of goods about to be exported, unless it were challenged.

The Order of the Commissioners of Customs and Excise dated 26th April 1915 provides, section 3—"In the case of goods intended for exportation the entry shall contain particulars as to (1) the name and address of the consignor of the goods; (2) the name and address of the consignee of the goods; (3) the ultimate destination of the goods; and a declaration on the part of the person making entry that the particulars as aforesaid are correctly stated."

The Customs (War Powers) Act 1915 (5 Geo. V, cap. 31), sec. 5 (1), is quoted *supra in rubric*.

The Customs (War Powers) Act 1916 (5 and 6 Geo. V, cap. 102) enacts, section 2 (2)—"In the case of proceedings taken under the said sub-section" (*i.e.*, 5 (1) of the 1915 Act, *sup.*) "an averment in the information that the defendant has failed to produce evidence to the satisfaction of the Commissioners that the goods in question have not reached a person who is an enemy or treated as an enemy, or a country which is enemy or treated as enemy, under any law for the time being in force relating to trading with the enemy, shall be sufficient unless the defendant proves to the contrary."

The Lord Advocate, *pursuer*, brought an action against Johannes Jeronimus Van Weel, *defender*, by way of subpœna and information for the recovery of penalties.

The *information* set forth—"*First Count.*—That of date 26th April 1915 the Commissioners of Customs and Excise made an Order under section 139 of the Customs Consolidation Act 1876 (39 and 40 Vict. cap. 36) requiring the exporter or shipper of any goods of whatever description intended for exportation to make due entry and obtain clearance of the goods before shipment, and further requiring every such entry to contain a declaration as to the ultimate destination of the goods so entered for exportation; that Johannes Jeronimus Van Weel, residing at No. 2 Darnell Road, Trinity, Leith, being about to export on board the steamship 'Professor Buys' certain goods, namely, 743 bags of onions, consigned or purported to be consigned to Haddas Van Reek, Nieuwehaven, Rotterdam, did, in course of making entry, pursuant to the said Order, of the said goods, declare in a specification dated 10th May 1915, and delivered by the said Johannes Jeronimus Van Weel to Herbert James Calcutt, specification officer at the custom house at the port of Hull, that the said goods would be exported to Haddas Van Reek, Nieuwehaven, Rotterdam, as their ultimate destination; that the said Johannes Jeronimus Van Weel thereupon exported the said goods without any security being given by bond in respect of the same or the exportation thereof; that