

Friday, December 19.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MALOY v. MACADAM AND OTHERS.

*Husband and Wife—Constitution of Marriage—
Evidence of Irregular Marriage.*

In an action for declarator of the constitution of an irregular marriage, the evidence of the alleged constitution of marriage is to be considered with reference to the whole conduct of the parties at the time of and subsequent to the alleged marriage as tending to show what was their real intention and understanding.

Constitution of Marriage by Promise subsequente copula—Declarator after Death of Party.

A man gave to his female servant this writing:—"I, Andrew Macadam, at present residing at Clawfin, have made a promise of marriage to Miss Elizabeth Maloy, at present residing with me in Clawfin; I also bind and pledge myself to take her for my wife, and no other. ANDREW MACADAM, Clafin, 26 February 1858." *Copula* followed, and children were born, which were registered as illegitimate. The parties cohabited for nearly 25 years till the death of the man, occupying during that period the ostensible relation of master and servant. In an action of declarator of marriage raised after the death of the man—held on a proof that the whole conduct of the parties was inconsistent with their having intended to constitute marriage or having believed themselves to have constituted that relation, and decree of declarator refused.

Opinions reserved on the question whether decree of declarator of a marriage alleged to have been constituted by promise *subsequente copula* is competent after the death of the alleged promissor.

Held by Lord M'Laren (Ordinary) that it is not.

Constitution of Marriage per verba de presenti.

Evidence held insufficient to establish the constitution of a marriage *per verba de presenti*.

This was an action of declarator of marriage and legitimacy at the instance of Elizabeth Maloy, daughter of Michael Maloy, pitheadman, Kilmarnock, and her children Andrew James Maloy and Margaret Elizabeth Maloy, against the executors of the deceased Andrew Macadam, farmer, Clawfin, Ayrshire.

By the conclusions of the summons Maloy (hereafter called the pursuer) sought to have it found and declared (1) that upon 26th February 1858 the late Andrew Macadam and she were lawfully married at Clawfin, and that they continued so till the date of his death, (2) and alternatively, in event of the marriage at the prior date not being declared, then that it should be found and declared that upon 7th August 1879 the parties were lawfully married to each other. Then followed a conclusion for declarator that the two children of the pursuer were the lawful children of the pursuer and the deceased, either being legitimately born or legitimated *per subsequens matrimonium*. There was also a conclusion that the pursuer was

in the event of failure to prove the alleged marriage, entitled to £2000 in name of damages and *solatium* for seduction.

The pursuer averred, with reference to her alleged marriage in February 1858, that when she first went to reside at the farm of Clawfin with Macadam as his housekeeper, she was about 18 years of age, and had previously been a servant in his father's house at Dalmorton, where they had become attached to each other and he had promised her marriage, and that on her coming to Clawfin as housekeeper he had renewed his courtship and endeavoured to persuade her to yield to his embraces; that upon the 26th February 1858 Macadam strongly pressed his suit, and urged her to surrender her person to him, and when she refused to give consent, and pleaded that were she to do so he might afterwards get married to some-one else and cast her off, he stated that he would make her safe in this respect, and thereupon took a sheet of note-paper and wrote upon it as follows—'I, Andrew Macadam, at present residing at Clawfin, have made a promise of marriage to Miss Elizabeth Maloy, at present residing with me in Clawfin. I also bind and pledge myself to take her for my wife, and no other. ANDREW MACADAM, Clafin, 26 February 1858;" that this letter was written in one of the apartments at Clawfin, and that after writing it Macadam handed it to the pursuer, who had since retained it: that on the faith of this promise she allowed Macadam to have carnal connection with her, and they had such connection accordingly that same night for the first time; that after the said promise and *copula* she lived with Andrew Macadam as his wife, though, owing to his desire to keep the matter secret from his parents, and from the proprietrix of his farm, there was no public or general acknowledgment made of the marriage; that the intimacy was not for a considerable time disclosed, even to the servants in the house, though they came gradually to know of it, but she took her meals along with Macadam, except occasionally when some of his relatives came to see him; they slept together more or less constantly; that the pursuer also exercised general control over the household, and the servants regarded her as their mistress.

She also alleged that no children were born until 1870, in which year she was delivered of a still-born child; that in the spring of 1871 she again found herself pregnant, and about the month of May, by arrangement with Macadam she left Clawfin, and went first to reside with her sister, Mrs Ann M'Millan, Kilmarnock, and thereafter, in the month of August, with an aunt at Ballsmill, Dundalk, Ireland, to await the birth of the expected child; that on 3rd December 1871 a male child was born at Ballsmill, and was on the following day christened Andrew James Maloy, the first Christian name being that of its father, and the second that of its uncle, James Macadam of Dalmorton; that the child's birth was afterwards registered by the pursuer in the Register of Births for the parish of Dungevry, Ireland, under the name of Andrew James Maloy, and was entered as illegitimate, which registration was made in this way because of the request of Macadam that the birth should be kept secret, and also because the pursuer was under the impression that a marriage

constituted in the irregular way hers had been would not be recognised in Ireland, and that she might render herself liable to punishment if she were to register the child as legitimate there; that about the new year of 1872 the pursuer returned to Clawfin, leaving the child with her aunt at Balls-mill; that she again became pregnant in 1874 in consequence of intercourse between Macadam and her as husband and wife, and was delivered of a child—a daughter—on 17th December, at Balls-mill, which was, like the previous one, registered as illegitimate; that about the beginning of 1875 she returned to Clawfin, leaving the children at Balls-mill, and continued to cohabit with Macadam as before, except that Macadam having about that time obtained a new lease of his farm, was upon that account less anxious than formerly about their marriage being kept secret; that the children were thereafter brought to Clawfin, and she was addressed by Macadam as his wife, and that she exercised all the domestic powers of a wife.

With reference to the alleged marriage *per verba de presenti* upon 7th August 1879, the pursuer averred that upon that day Macadam told her that he would formally acknowledge her as his wife; that he was then in the parlour at Clawfin, and had been complaining of not feeling very well; that on this day there happened to be at Clawfin Mr John M'Keand and his wife, both of them being engaged working about the farm; and about noon, or shortly after noon, these persons were asked to come into the parlour, and there, after some conversation, Macadam, stretching out his hand to the pursuer, formally acknowledged her in their presence to be his wife, the words used by him being, "This is my lawful wife," or words to that effect; that he also at the time acknowledged to the said Mr and Mrs M'Keand that the two children were his children; that in addition to the M'Keands, Sarah M'Millan, niece of the pursuer, was present during the whole or part of the above conversation, and heard the acknowledgment.

The defenders admitted that for a number of years prior to Macadam's death the pursuer had acted as his housekeeper at Clawfin. They denied that Macadam had ever cohabited with or treated Maloy as his wife, and averred that during the years 1865, 1866, and 1867 she was keeping the company of Robert Kennedy, a ploughman at Clawfin, and that they were engaged to be married. They denied that Macadam was the father of Maloy's children, and averred that she was during the time she was in Macadam's service carrying on an illicit intercourse with Alexander Wilson, a ploughman, and William Guffie, a shepherd, both in Macadam's employment. They denied that she considered herself as married to Macadam, and averred that her conduct was inconsistent with the belief on her part that she was a married woman. The averments as to what took place at the alleged marriage by *de presenti* acknowledgment on 7th August 1879 were denied, and it was explained that at that time Macadam had fallen into dissipated habits and was seldom sober. They stated that in his will Macadam left Maloy £1000, but designed her as his "housekeeper."

The pursuer pleaded, *inter alia*—“(1) Marriage between the pursuer, the said Elizabeth Maloy, and the said Andrew Macadam having been duly constituted by promise *cum subsequente copula*,

decree of declarator to that effect ought to be pronounced. (2) Marriage between the pursuer, the said Elizabeth Maloy, and the said Andrew Macadam having been duly constituted *per verba de presenti* and by acknowledgment, decree of declarator to that effect ought to be pronounced.”

The defenders pleaded, *inter alia*—“(3) The pursuers having taken no action during the said Andrew Macadam's lifetime, the declaratory conclusions founded on the alleged promise *subsequente copula* are incompetent. (4) Though the pursuer Elizabeth Maloy be held entitled to prove and prove a promise *cum subsequente copula*, yet, having had subsequent carnal connection with others than the said deceased Andrew Macadam, she is not entitled to decree of declarator of marriage. (5) No acknowledgment having been given with the intention of forming a marriage, the pursuer is not entitled to decree of declarator on the ground that marriage was constituted *per verba de presenti*.”

After a discussion in the Procedure Roll on the defenders' third plea-in-law, the Lord Ordinary by interlocutor of 20th July 1883 allowed the parties a proof of their averments. His Lordship added this note:—“I have carefully considered the authorities cited, and I am of opinion that it is not expedient at this stage of the cause to express any opinion on the question whether a declarator of marriage constituted by promise *subsequente copula* can be maintained after the death of one of the parties. In this case no inconvenience can result from allowing a proof before answer. In the course I now take I am following the same course that was taken by the House of Lords in the *Dysart Peerage* case (L. R., App. Ca. 1881).”

The First Division adhered to this interlocutor, with the variation that the proof was to be “before answer,” which words had *per incuriam* been omitted in the interlocutor of the Lord Ordinary.

A proof was then led.

The following is a summary of the proof, the most important passages of which are fully quoted *infra* in Lord Mure's opinion.

The pursuer deponed that she went to be a servant at Macadam's father's farm of Dalmorton when she was about fifteen years old and Macadam was about twenty, and had not yet become tenant of Clawfin; that he had when she was living there shown her attentions and given her presents, and she had consented to be his wife; that he had got her taught sewing at his expense before she went to Clawfin; and that she had gone there in 1856 “as his housekeeper, and to be his wife after a time.”

With regard to this period of pursuer's life at Dalmorton, the defenders, without notice on record, led proof to show that an improper familiarity rather than honourable courtship had begun there, the pursuer and Macadam having been frequently together in the straw-shed, and having secretly gone out together, and, once at least, remained till a late hour, the pursuer pretending that the person in her company was not Macadam.

It was proved, as related in the opinion of Lord Mure, *infra*, that the pursuer received payment of wages during the whole of the time she was with Macadam at Clawfin from 1856 onwards.

The pursuer deponed that from her first going

to Clawfin, Macadam renewed his addresses to her, but she had refused to permit him to have intercourse with her as he might marry someone else and cast her off; that at last on 25th February 1858, the date of the writ produced, he gave her the writ (above quoted), and they that night had connection for the first time, and thenceforward occasionally slept together in his bedroom and in the kitchen, where she slept; that she gave the writ to her father to keep for her, and he had it till near the time of Macadam's death; that their relations were, at Macadam's request, kept secret, because he wished it to be concealed from the proprietrix of the farm that he had made an irregular marriage, and also to have it concealed from his mother.

In cross-examination with regard to the writ, she stated that Macadam offered it to her, saying it would make her all right; that she was not indifferent whether she got it, "but when I got it I knew that he could marry no other person so long as I lived. He told me that."

The pursuer deposed that she sometimes took her meals with Macadam, but did not do so if any of his relatives were there. She deposed that after several miscarriages she had a still-born child in 1870, and that in 1871 she became pregnant again, and it was arranged she should go to a relative's in Ireland. She went there, and her child was born on 3d December 1871. It was a son, and was registered as illegitimate, by the name of Andrew James Maloy.

During this absence Macadam wrote her several letters, which were produced. None of them were so expressed as to lead to the conclusion that he regarded her as his wife though they were in affectionate terms. They all began "Dear Lizzy" and were signed "Yours truly" or "Yours sincerely." They were in great part occupied with information as to how farm and dairy work was progressing at Clawfin, and how the writer was spending his time.

She left the child in Ireland and returned to Clawfin, and resumed cohabitation with Macadam as before, and becoming again pregnant in 1874, went to Ireland again to be delivered. After the birth of the child—a girl—in December 1874, she returned again to Clawfin, leaving this child also in Ireland. Letters from Macadam during this absence were also produced. The same may be said of them as has been said of the others.

She deposed that during a visit she paid to these children in September 1875, Macadam also came to see them, and spoke of her as his wife, and of them as his children.

The children were brought to Clawfin to live—the boy about 1876, and the girl about 1879.

It appeared from the evidence of other witnesses than the pursuer that Macadam frequently spoke of the boy as his child, but that he doubted the paternity of the girl. When he was on his deathbed he spoke of one of them as not his child.

With regard to the allegation of verbal acknowledgment, the pursuer and a farm-servant who had been long at Clawfin, named Guffie, deposed that Macadam had acknowledged her to him as his wife on several occasions, and that he sometimes addressed her as his wife. The defenders led evidence to show that pursuer and Guffie had been on very friendly terms, and that marriage had been spoken of between them, and that Macadam spoke to various persons so as to lead them

to believe that he would be willing that such a marriage should take place, and that he would give her a dowry. The pursuer explained such evidence as to Guffie and others by the desire Macadam had to lead people not to suspect his own secret marriage to her.

The pursuer sought to show a marriage *per verba de presenti* in presence of two persons called M'Keand. The evidence of these persons is fully quoted *infra* in the opinion of Lord Mure.

It appeared that on an occasion when a band had come up from Dalmellington to Clawfin, Macadam had, when entertaining some of the members of it, called the pursuer his wife; also, that he had told a witness that he had been longer acquainted with married life than he had. In opposition to evidence of this class, the defenders led evidence to show that, speaking quite seriously, and to persons with whom he was intimate, Macadam had spoken of himself as unmarried, and of the pursuer as his housekeeper, and that, according to certain witnesses, he had said when urged to marry that the pursuer had a hold on him and he could not marry. The evidence of this class of witnesses is fully quoted in Lord Mure's opinion.

Macadam's will was made by a banker at Dalmellington in 1876. In it he gave pursuer a legacy of £1000 as "my housekeeper." On his deathbed he spoke of her as such, and regretted he had not left her more. The will had been in her keeping and she handed it to the agent for Macadam's family after Macadam's death.

The defenders led evidence (which is fully quoted by Lord Mure) to show that in the years 1872-4 the pursuer was on very intimate terms with a farm-servant at Clawfin named Wilson, and had been engaged to be married to him. Wilson's mother (among others) deposed to this, and to her having expressed disapproval of her as a wife for her son in consequence of indelicate conduct she had observed on the part of her son and the pursuer. Wilson himself deposed that they were engaged to be married; that she proposed that they should live at a neighbouring farm, and that Macadam had hinted at what he would do for them if it came off; that the pursuer had professed to be pregnant to him. He was asked if he had had carnal connection with her, but the Lord Ordinary refused to allow the question to be put, on the ground that alleged acts of infidelity to Macadam could not throw light on the question whether a marriage had been contracted with him. The pursuer admitted that Wilson and she had talked of marriage, and that she had visited his relatives as his sweetheart, but explained this as being intended, as in the case of Guffie, to aid in concealing her irregular marriage with Macadam. Similar proof was led as to a man named Kennedy, who deposed that while a farm servant at Clawfin in 1865 and 1866 (seven years after the date of the writ founded on) he had become engaged to the pursuer. She gave the same explanation of her relations with him as she had done of her relations with Guffie and Wilson. Kennedy was only about nineteen years of age at the period in question.

Macadam got his new lease in 1874. The pursuer explained his continued concealment of his marriage to be on his mother's account, but stated that their relations were not so much concealed after the lease was renewed.

It was proved that Macadam had all along been somewhat dissipated in his habits, but that in his later years had become much more given to drink, and that the pursuer was also at times somewhat given to drink, and sometimes quarrelled with Macadam.

On 20th February 1884 the Lord Ordinary (M'LAREN) pronounced this interlocutor:—“Finds it not proved that the pursuer Elizabeth Maloy or Macadam, and the deceased Andrew Macadam, were lawfully married as alleged: Finds that in consequence of the death of the said Andrew Macadam, it is no longer competent to constitute or establish a marriage between the said pursuer and him in respect of *sponsalia de futuro copula subsequente*, performance of the alleged promise of marriage being now impossible: Therefore assolizies the defenders from the declaratory conclusions of the action, and decerns, &c.

“*Opinion.*—This action of declarator of marriage and legitimacy is instituted by Elizabeth Maloy or Macadam, and her children Andrew and Margaret, against the next-of-kin and representatives of the deceased Andrew Macadam, farmer, Clawfin, Ayrshire. It is alleged on behalf of the pursuers that the deceased gentleman promised marriage to Miss Maloy *per verba de futuro copula subsequente*, and that thereby a marriage was constituted which she is entitled to have declared. It is also alleged that the marriage was acknowledged by Mr Macadam in the presence of the pursuer and witnesses, and that the acknowledgment in the circumstances deponed to amounts to an interchange of consent *de presenti* on the part of the pursuer Miss Maloy and Mr Macadam. On the subject of the marriage constituted by *de presenti* engagement, I will only say that in my opinion the evidence in support of a marriage so constituted is entirely inconclusive, and is undeserving of serious examination. I shall therefore confine my observations to the case which arises with reference to the alleged engagement *de futuro* and relative cohabitation. This case presents questions of importance and difficulty which I have considered with care, and with the assistance derived from an able argument.

“The alleged engagement to marry is in writing, and is in these terms—‘I, Andrew Macadam, at present residing at Clawfin, have made a promise of marriage to Miss Elizabeth Maloy, at present residing with me in Clawfin. I also bind and pledge myself to take her for my wife and no other. — Clawfin, 26th Feb. 1858. (Signed) ANDREW MACADAM.’ It is not disputed that this document is in the handwriting of the deceased Mr Macadam, and apparently it imports a promise of marriage in favour of the pursuer. It is also admitted or clearly proved that for a period of more than twenty years subsequent to the date which this paper bears, Miss Maloy cohabited with Mr Macadam at his residence, where she passed as his housekeeper. It will thus be seen that the scope of the inquiry is very much narrowed, and although evidence was adduced at great length regarding the habits and mode of life of the alleged spouses, much of it has little or no bearing on the two questions on which I propose to offer an opinion. These are—

“1. Whether the cohabitation had such a relation to the promise of marriage as is necessary to

support a declarator of marriage. (Two points arise under this head).

“2. Whether the right of action founded on promise or *sponsalia de futuro copula subsequente* subsists after the death of the party whose marriage is in question.

I (a) My opinion on the first of these questions may be given very shortly. Miss Maloy became acquainted with Macadam when he was a young man assisting his father on his farm, the pursuer being in domestic service in the father's house. A courtship ensued, whether honourable on Macadam's part I do not for the present inquire. But while there is some evidence of indiscretion on the part of the pursuer at this time, particularly in remaining out with Macadam to a late hour on an occasion when Macadam's parents were from home, I certainly cannot hold it proved that her relations with him at this time were other than innocent. The acquaintance began in 1853, and at Martinmas 1856 Miss Maloy went to reside with Macadam as his housekeeper at Clawfin, where she remained until February 1858 without a promise of marriage, and in such circumstances it is for consideration whether the cohabitation is referable to the promise of marriage, or whether there is such probability of intercourse having taken place prior to the promise as would disentitle the pursuer to the declaratory decree which she is seeking. This question I have felt to be one of great difficulty. The direct evidence consists of the testimony of the pursuer herself, and that of William Guffie, a person who for many years was shepherd at the farm of Clawfin, and who, according to his own statement, was admitted to a certain degree of confidence and intimacy by his master.

“According to the evidence of the pursuer, she was in the equivocal position of Macadam's ‘sweetheart and housekeeper’ from the very commencement of her residence at Clawfin. This was in cross-examination, and in her evidence-in-chief the pursuer admits without reserve that Macadam had solicited her person from the time she took up house with him, and continued to do so until she yielded. See the passage beginning ‘He spoke to me about that whenever I went.’ No doubt she affirms that the connection did not take place until after her receipt of the written promise, and I do not find either in the very elaborate cross-examination to which the pursuer was subjected, or in the evidence of other witnesses, anything injurious to her general credibility. Guffie, a friendly witness, depones that on his returning to Clawfin at Whitsunday 1857—that is, six months after the pursuer's arrival—he noticed an intimacy between Macadam and Elizabeth Maloy, and that he had heard her going up to Macadam's room at night. He then in a manner corrects himself, and explains that this would be some six months after his return. Six months after Guffie's return to Clawfin would be within three months of the date of the promise in writing, and as Guffie does not profess to fix the time with any degree of certainty, I must hold that his evidence is consistent with the pursuer's statement that the promise of marriage preceded the cohabitation. Such being the direct evidence, the presumptions arising in the admitted circumstances appear to be as follows—(1) It is improbable that the pursuer continued virtuous until the promise was given in February 1858. There

would be no presumption against the pursuer's chastity if the relation of master and housekeeper had been maintained, or if while housekeeper the pursuer had been offered honourable marriage. But the pursuer's case is, that during the fifteen months which preceded the promise she remained in Macadam's service virtuous, he all the time soliciting her to become his mistress. (2) I think it is even more improbable that the promise in writing would have been given except with the view of overcoming the pursuer's objections to an irregular connection. No other explanation has been suggested; no other presents itself to me which can be reconciled with the real evidence in the case. It never has been laid down in an unqualified sense that previous intercourse is a bar to the constitution of marriage by promise *subsequente copula*. I think, therefore, that while it is permissible to doubt as to the pursuer's absolute chastity until February 1858, it must be held that at the time of granting of the document she was in the position of refusing *concupitus* with Macadam until she should receive his engagement in writing. Such is her statement, not shaken in any way, and it is consistent with probability and the common sense of the case.

"1 (b). Notwithstanding what I have just stated, I am of opinion that if it were competent to decree a marriage after the death of the promissor, the pursuer would not be entitled to such a decree, because she did not accept the document as a promise of marriage, and had not in fact any expectation of marriage when she agreed to cohabit with Macadam. For, let it be supposed that instead of a promise of marriage, the pursuer had received from Macadam a document importing consent *de presenti*, and that cohabitation had followed, yet if a marriage were not really intended, and if the document were a mere cover or excuse for concubinage, or, as in a well-known case, something 'to satisfy the conscience' or scruples of the lady, the subsequent cohabitation upon such an agreement would not be marriage. This, I think, is a necessary deduction if we accept the doctrine of the civil law — *consensus, non concubitus, matrimonium facit*. Now, it appears to me that in the largest extension that can be given to the legal effect of promise *cum copula*, such a promise can have no higher effect than an engagement *per verba de presenti*. In either case the marriage of the parties must be a thing in contemplation, either as being or to be contracted. It is not necessary that the lady should know the law, but it is essential to her case that she shall have entered into the irregular relation in the expectation of marriage.

"In the present case I am satisfied that the pursuer never expected marriage, never was deceived by a promise of marriage, and never claimed any other position in relation to Mr Macadam than that of a mistress to whom he engaged to be faithful. The language of the document is peculiar. I do not doubt that it would amount to *sponsalia de futuro*, provided the parties intended it to have that meaning. It begins by stating that, 'I, Andrew Macadam, have made a promise of marriage to Miss Elizabeth Maloy,'—words which seem to refer rather to an engagement in the past than to a present undertaking. It proceeds—'I also bind and pledge myself to take her for my wife, and no other.' Now, it is my opinion that the concluding words were the significant words in

the intention of the parties—that Mr Macadam undertook to marry no other person. Such is the pursuer's voluntary statement in the passage where she gives her first account of the matter. 'He pressed upon me to have connection with him, but I told him I would not—that he might marry some other person when he was tired of me, and cast me off. He said he would make me all right as to that. . . . Ultimately we had connection together, but he gave me the promise of marriage before that. He gave me the promise because I would have nothing to do with him until he gave me this security that he should take no other person as his wife. . . . I put the paper in my chest and kept it; and Andrew Macadam and I slept together that night for the first time.'

"I cannot gather from this account that the pursuer consented to cohabitation in the expectation of marriage. What she feared was that Macadam might cast her off and marry some other woman. If she were secured against that contingency, apparently she was willing to live with him as his mistress, and she wanted a document which would give her a hold on him, and prevent him from contracting marriage. It is easy to see that the document in question might, if made public, have that effect. Apparently the pursuer was satisfied that it would have such effect, and we know that Macadam so regarded it, because when spoken to by more than one person on the subject of marriage, he answered that Elizabeth Maloy had a hold on him, and that he could not marry. It does not appear from her own evidence that Miss Maloy at the time when she began to cohabit with Macadam, or at any time in the course of their joint lives, ever claimed fulfilment of the promise. It is reasonable to suppose that if marriage ever was in view, she would, on the occasion of her pregnancy, or, at all events, after the birth of her first child, have desired that the promise should be fulfilled. But I cannot gather from her evidence that the pursuer ever claimed to be married to Macadam, although she may have desired the status of marriage; and her whole conduct and life is inconsistent with the supposition that she considered herself married to Macadam, or under an engagement to intermarry with him. She is asked the question by her counsel, 'Did you ever ask him to enter into a public marriage with you?' She gives contradictory answers, but she cannot say that she did so on any particular occasion. The letters addressed to her by Macadam are entirely inconsistent with the notion of any purpose of marriage on his part, and considering that the claim was not made until after his death, these letters are an important feature in the case. There is no reason to suppose that they were written with a purpose. If they express his understanding of the relation between the pursuer and himself, they confirm the impression which I have formed on her evidence, that the writing of February 1858 was not intended as an equivalent to *sponsalia de futuro*, but only, as she herself says, as a security that he should take no other person to be his wife.

"(2) I proceed to consider the remaining question in this case, viz., whether a marriage can be declared after the death of the promissor, where the ground of action is promise *cum copula*?

The subject has been treated by my colleague Lord Fraser with the learning and fulness of illustration which characterise his researches in the consistorial law of Scotland. I think counsel were agreed that the question is an open one—I mean that it has not been the subject of express and specific decision. This is also my own opinion. Now, if the question is to be resolved by argument, it appears to me that many considerations, historical and logical, lead to the conclusion that a marriage such as is in question is not complete until constituted by decree.

“I do not propose to go over the various topics referred to by Lord Fraser, though I have, for my own satisfaction, verified his references where they exist in a printed form. It is well known that this method of constituting marriage had its origin in the canon law. It is no part of the civil law of the Roman empire, but is an excrescence engrafted on it by Papal authority. I will go further, and say that the doctrine is entirely opposed to the spirit of the Roman law, and incapable of receiving illustration or limitation from that source of authority. According to the Roman law, the real, as well as the formal, assent of both parties was necessary to the constitution of marriage. This principle was so far adopted into the canon law that under it an action would lie to compel the celebration of a sacramental marriage where a civil marriage (or *sponsalia de presenti*) had been entered into, in conformity with the requirements of the older jurisprudence. But where marriage was constituted by *sponsalia de futuro copula subsequente*, the element of mutual consent was either entirely absent, or was sustained only by a legal fiction. It was not necessary to inquire into the intention or good faith of the promissor; it was enough that the woman to whom the promise was given relied on it, and that the cohabitation was referable to the promise. It appears to me that this mode of constituting marriage is a mere creation of positive law, and that it ought to be regarded rather as a remedy offered to the injured woman, than as a declaratory proceeding. It is a circumstance confirmatory of this view that there are no authentic precedents for such an action at the instance of the man, while in the case of an action to declare a marriage already constituted the right of action is available to both spouses, and to their representatives. Lord Fraser [2d ed. i. 363] makes a reference to a solitary case in the *Liber Officialis Sancti Andree*, where decree was given at the instance of the man—*March v. Stevenson*, No. 106 of the printed collection. I have examined all the marriage cases in the *Liber*, and in the case referred to I find that the decree is consistent with the supposition that the marriage was constituted *per verba de presenti*, and is therefore not an exception to the rule that actions founded on promise *cum copula* are only competent at the instance of the woman. In this case, Margaret Stevenson, the defender, is decreed to solemnise the marriage with the said March, described as ‘*suo sponso affidato*,’ and then the words are added, ‘*carnali copula subsecuta*.’ But in the cases (constituting the majority of those transcribed) where the ground of action is *sponsalia de futuro*, we find such expressions as ‘*quod idem A. contraxit sponsalia, per verba de futuro, carnali copula subsecuta cum B.*,’ and I am inclined to think that in all cases where

‘*sponsalia de futuro*’ are not expressly mentioned, and especially where the defender is described as *affidata sponsa* the ground of action is consensual marriage. I think, therefore, that the solitary case referred to by Lord Fraser is not a real exception. There is, as I conceive, no reason to believe that the action to compel fulfilment of a promise of marriage was ever competent to the man under the canon law, as administered in Scotland, nor is there, so far as I know, any precedent for such an action in the records of the Court of Session. This is quite intelligible on the theory that *concupitus* does not make marriage, but is only a ground for compelling solemnisation at the instance of the woman, which I think was the true nature of the right of action given by the canon law.

“Lord Fraser has shown from an examination of the records of the Commissary Courts of Scotland that, until about the beginning of the last century, the form of the action continued to accord with what we conceive to be the nature of the remedy. Since then, in cases founded on promise *cum copula*, the form of an action of declarator has been substituted for the form of an action of implement. The most probable cause that can be assigned for the change is this, that the Presbyterian Church did not undertake to enforce the decrees of the Commissary Courts by pronouncing sentence of excommunication against defaulting respondents, and that a decree of implement followed by a charge to celebrate the marriage was understood to be equivalent in actual solemnisation. In the altered relations of the temporal and spiritual Courts, the form of a decree ordaining solemnisation had no longer a real significance. This consideration will account for the supersession of the old form of decree of implement by that of a declaratory decree, and for the corresponding alteration which took place in the form of a summons, without the necessity of supposing a change in the law administered under such actions, a change which indeed could not have been made except by legislation.

“If I am well-founded in my opinion that this was in its origin a remedial and not a declaratory action, and if the substitution of declaratory forms was a change dictated merely by considerations of convenience, it follows by necessary implication that the right of action is extinguished by death. Plainly there can be no action to compel solemnisation after the death of one of the parties. But is there any reason for supposing that the substitution of declaratory forms would alter the nature of the right, so as to make it competent, after the death of a party, to complete a marriage which in his lifetime was not complete, although the elements of a marriage may have existed in the shape of an enforceable obligation? If such a radical change in the law were sanctioned by decisions, or by clear and preponderating expressions of legal opinion, nothing more need be said. But with the doubtful exception of Lord Stair, who was not really considering the question at all in the passages cited, no native authority can be cited for the proposition that *sponsalia de futuro* followed by *copula* is marriage. Erskine merely quoted Stair, without, as I conceive, giving a personal opinion on the subject. The judgment of Lord Stowell in *Dalrymple v. Dalrymple* was referred to on

behalf of the pursuer. I have carefully read that case with reference to the present question, but I must observe that, valuable as Lord Stowell's judgment undoubtedly is on the general subject of the constitution of marriage, this particular question was not judicially before him, and I am not sure that he meant to give an opinion upon it. On the other side there are the opinions of the consulted Judges in the *Queen v. Mills*, which on the historical question are not affected by the division of votes in the House of Lords. There is also a very important statement by the first Lord Moncreiff, expressing the understanding of the profession in his time, and there is the opinion of Lord Fraser, given without reference to any individual case, as the result of his examination of all the authorities. Lord Wensleydale's reservation of his opinion is very significant with reference to the circumstances of the case in which the observation was made—4 Macq. 871.

“In a question of this kind, where the authorities are either neutral or conflicting, I should be unwilling to extend the operation of a law which I conceive to be out of harmony with modern jurisprudence, especially where such extension would have the effect of introducing elements of injustice as yet unsuspected. According to our settled law the right of declaring such a marriage is conditional on the fact that *copula* has followed upon the promise. Such a rule is intelligible with reference to actions instituted in the lifetime of the two parties. I find great difficulty in applying it to a case where the evidence of the proper defender is not available, and where his next-of-kin, who are the parties interested in defending the case, are necessarily without knowledge of the circumstances. Again, if it be competent to institute such an action after the death of the alleged husband, it must be equally competent to institute a similar action after the defender has entered into a subsequent regular marriage, and to refer the fact of a promise having been made (on which the validity of the regular marriage would most probably depend) to the defender's oath. Other consequences not less startling may be figured. I cannot find that the right of instituting such an action after the death of the other party is supported by any reason of equity or convenience. If it were proposed to legalise such a proceeding for the first time, it may be questioned whether any member of the Legislature would undertake the responsibility of presenting a bill. I should very much regret if I were obliged, in deference to principle or authority, further to relax the marriage law of Scotland, which is at present entirely untechnical, and is in the opinion of most people as liberal in the admission of evidence of true marriage as can possibly be desired.

“The summons contains an alternative claim of damages as for breach of promise of marriage; but as I understand it is desired to bring my judgment under review, I shall not, unless moved to that effect, make any finding under this conclusion.”

The pursuer reclaimed, and argued—First, as to the intention of the parties. The evidence as to the promise and subsequent *copula* was of importance as showing the intention of the parties. The affectionate terms upon which they stood to one another prior to the pursuer going to Clawfin

was also of value as throwing light upon the latter. In a case like the present two things were necessary—(1) a written promise, and (2) *copula* following thereon; the effect of the evidence in the case was to shift the *onus* on to the defender to show that these acts were for some other purpose than marriage—*Leslie*, 22 D. 990. The written promise was not given to satisfy the pursuer's scruples, but as an expression of intention. The presumption of law was that in a case of promise *subsequente copula*, the *copula* had followed on the faith of the promise—*Morison v. Dobson*, Dec. 17, 1879, 8 Macph. 347, and authorities there cited. No doubt such a presumption might be rebutted, and that was attempted here by averments of the pursuer's unchastity with other men. If there was *copula* following upon the promise, it was no matter how Macadam entered the pursuer's name in the wages-book or described her in his will. The question was—Did promise *cum copula* constitute *verum matrimonium*, or merely a pre-contract requiring a declarator to make it effectual? Erskine, having the opinion of Stair before him, laid it down (i. 6, 4) that promise *cum copula* constitutes marriage—*Pennycook v. Grinton*, M. 12,677. The statement in Fraser, i. 323, that Stair in iii. 3, 42, had corrected what he had laid down in i. 4, 6, was not justified by a reference to these passages. All the recent cases started with the assumption that promise *cum copula* constituted marriage—*Monteith v. Robb*, Mar. 5, 1844, 6 D. 934; *Honeyman v. Wilson*, 5 W. & S. 92; *Dalrymple*, 2 Hag. 54; *Leslie v. Leslie*, Mar. 16, 1860, 22 D. 993; *Longworth v. Yelverton*, Dec. 19, 1862, 1 Macph. 761. The *copula* was the best evidence of the *de presenti* consent. If marriage was constituted by promise *cum copula*, there was no reason why it might not be declared after the death of one of the parties. Bankton said it might so be declared if the promise was in writing—vol. i. p. 106 to 112; *Aitchison v. Solicitors-at-Law*, Nov. 20, 1838, 1 D. 42; *Hoggan v. Hoggan*, Feb. 17, 1838, 16 S. 584; *Brown v. Burns*, June 30, 1843, 5 D. 1288; *Ross v. M'Leod*, June 7, 1861, 23 D. 978; *The Queen v. Mills*, 10 Clark & Finnelly, 534; *Beamish*, 9 Clark, 332; *Catteral*, 1 Robertson, 580; *Ritchie v. Ritchie*, Mar. 11, 1874, 1 R. 826; *Auld v. Shairp*, July 14, 1875, 2 R. 940.

Argued for defenders—In such cases the interchange of consent must be serious and formal. That not so here. The evidence led showed conduct inconsistent with marriage or the belief it had taken place. As to the letter, it really meant, when read by the light of the evidence, a promise that if Macadam ever married he would marry the pursuer. It did not compel him to marry at all. As to the effect of such a writing, and as to how it may be controlled by the subsequent acts of the parties, see *Fleming v. Corbet*, June 24, 1859, 21 D. 1034. In the present case the pursuer's whole actings were unlike those of a married woman. She had intimacy with parties other than her alleged husband, and such actings would raise a mid-impediment to a declarator of marriage. The question as to whether promise *subsequente copula* was marriage or only a pre-contract requiring judicial confirmation is still open. *Sponsalia*, with or without *copula*, was always distinguishable from *matrimonium*. If subsequent to the promise the wife were unfaithful she lost

her remedy—*Barton v. Mowbray*, Jan. 9, 1675, M.S., see *Fraser* 345; *Barclay v. Baptie*, 1665, M. 8413; *Lindsay*, 1548, Book of Official of St Andrews, No. 154, p. 100; *Malcolm v. Duncan*, May 5, 1563, 3 Maitland's Miscel., p. 335; *Angus Case*, 1 Riddell, 470; *Tulloch Case*, 1 Riddell, 500; *Dunbar Case*, 1 Riddell, 456. In cases of this kind written documents were incidents which fell to be interpreted by surrounding circumstances and the actings of parties—*M'Innes*, M. 12,683, *rev.* 2 Pat. App. 598; *Taylor*, M. 12,687, *rev.* Pat. App. 56; *Jolly v. M'Gregor*, June 20, 1828, 3 Wil. & Shaw; *Murthly Succession Case*, June 7, 1875, 2 R. (H. of L.) 83. The two passages in *Stair* (i. 4, 6, and iii. 3, 42) which had been quoted were not antagonistic but supplemental of each other.

Other authorities—*Bell's Putative Marriage*, 174, 176; *Fraser's Husband and Wife*, i. 323; *Craig*, ii. 18; *Dirleton, Sponsalia*, p. 181; *Stewart's Answers*, i. 278; *Kames' Illustrations*, p. 33. The authorities in which the defender maintained that a declarator of marriage *cum copula* cannot be brought after the death of one party—*Fraser*, i. 334, *et seq.*, cases there collected.

At advising—

LORD MURE—This action of declarator of marriage and legitimacy is laid on two separate grounds—(1) That of promise *subsequente copula*, alleged to have taken place in February 1858; and (2) that of *de presenti* declaration and acknowledgment, said to have been made in August 1879; and under the interlocutor and note of the Lord Ordinary three separate questions have been brought under consideration. The first two are the leading questions of fact raised upon the evidence, viz., Whether it is proved that at either of the dates mentioned on the record a marriage was duly constituted between the pursuer and the late Mr Macadam in the manner there alleged? and the third is the important question of law, Whether, assuming a marriage by promise *subsequente copula* to have been proved, that marriage can now be insisted on in respect that no steps were taken during the lifetime of Macadam to enforce it?

The Lord Ordinary held that it is not proved that on either of those occasions the pursuer and the deceased Andrew Macadam were lawfully married as alleged, and he has further held that even assuming a marriage by promise *subsequente copula* to have been proved to have taken place, it is no longer competent to constitute or establish that marriage in consequence of the death of the said Andrew Macadam before any action was raised, and he has assuozied the defender from the declaratory conclusions of the action.

It is against this judgment that the reclaiming note has been presented, and the first question for consideration is, whether upon the evidence a marriage at either of the above dates is proved to have been established?

In dealing with these questions of fact I adopt substantially the views which I understand the Lord Ordinary to have expressed in his opinion relative to the rules of the law of evidence applicable to such questions, where he explains that it is not by the mere words of promise or declaration in the document founded on that courts of law are to be guided in forming

their opinions, but that the document in all such cases is to be read and considered—more especially if the words are in any respect equivocal or ambiguous—with reference to the conduct of the parties at the time the document was granted, and subsequent thereto, in order to ascertain what their true understanding and intention was as to the nature of the relationship into which they were professing to enter—in order, in short, to ascertain whether there was, at the time this document was granted or the declaration made, that serious and deliberate interchange of mutual consent between the parties to contract marriage which is essential by the law of Scotland to give validity to an irregular marriage.

Since the decision of the House of Lords in the case of *Jolly v. M'Gregor* (3 W. & S. 85), to which we were referred in the discussion, there cannot, I apprehend, be any doubt as to what the law of Scotland is in all such questions. It was conceded in argument in that case by Dr Lushington, the counsel for the respondent in the appeal, that the rule applied in the three ordinary cases of irregular marriage, viz., those founded on promise *subsequente copula*, on declaration *de presenti*, and on cohabitation as man and wife; but it was contended that the rule went no further, and could not be properly applied in the case of a marriage ceremony performed by a clergyman, which the case of *Jolly* was. The House of Lords, however, took a different view, and held that it applied even in such a case as that with which they were then dealing. In delivering judgment Lord Lauderdale, who moved the reversal of the judgment of this Court, said with reference to this question—"I venture to say—and I may state this without fear of contradiction—that in the case of an irregular marriage in Scotland, it is the practice, and it is the law of the country, to take evidence of all the facts and circumstances antecedent to the alleged ceremony, of all the facts and circumstances pending the ceremony, and all the facts and circumstances of the conduct of the parties subsequently to the ceremony, and that from a complete view of all these circumstances you are to infer whether that real and deliberate consent was given which constitutes marriage, and in doing this you do not resort to the conduct of the parties subsequent to the ceremony for the purpose of undoing a marriage contracted, but for the purpose of hearing whether the parties did or did not by their conduct exhibit a conscious feeling that no such ceremony had taken place between them as was sufficient to lead them in their own minds to the conclusion that they were married persons."

The law thus laid down was concurred in substantially in the opinions of Lord Eldon and of Lyndhurst, who was Lord Chancellor at the time, and was applied and given effect to by Lord Cairns when Lord Chancellor, in the case of *Stuart v. Robertson* in 1875, 2 R. (H.L.) 80.

(1) In this view of the law and practice I now proceed to consider the evidence relative to each of the grounds of action, and first as to the promise *subsequente copula*. The letter founded on, as the Lord Ordinary has remarked, is rather peculiarly worded, and so open to controversy; and as was to be expected in such a case, parties are at issue as to its exact meaning—the one party maintaining that it was an absolute and unqualified promise to marry, and which when

followed by *copula* was sufficient to constitute marriage; the other that it was a mere undertaking or promise on the part of the deceased not to marry any other person, and that if he ever did marry he would marry the pursuer.

Having regard to the terms of the letter, taken by itself, I should be disposed to hold that the construction contended for by the pursuer is the more correct one. But looking, on the other hand, to the antecedents of the parties, and to the circumstances under which the letter was granted, as spoken to by the pursuer in her evidence and commented on in the opinion of the Lord Ordinary, it appears to me that the words are open to the construction contended for by the defenders, and may be held, as the Lord Ordinary has pointed out, to have been accepted by the pursuer simply as an obligation or undertaking on the part of the grantor, that if she lived with him as his mistress, which he wished her to do, he would not cast her off and marry another woman, which she says she apprehended he might do, and had consequently up to that time refused to live with him. If that is an admissible construction when taken in connection with the pursuer's account of what occurred at the time the letter was written, there is, of course, an end of the pursuer's case in so far as laid on promise *subsequente copula*. But even assuming that construction to be inadmissible, and dealing with the letter as being substantially a written promise to marry *de futuro*, I have been obliged to come to the conclusion that when the whole circumstances of the case, and the life and conduct of the parties during the twenty-five years which elapsed between the date of the letter and the death of Mr Macadam, are taken into consideration, the pursuer has failed to prove that in respect of that letter and what followed upon it there was any serious and deliberate interchange of consent between the parties to contract marriage, and that they believed themselves to be really married.

This is the conclusion I have arrived at after a very anxious consideration of the whole evidence, oral and documentary, in the case. And as I concur in this respect in the opinion of the Lord Ordinary, I do not think it necessary to go much into the evidence in detail, but shall endeavour to state shortly and distinctly the leading grounds, as deduced from that evidence, upon which I have formed my opinion.

And first as to Macadam himself. (1) What was his intention as to marriage? He wanted a mistress—not a wife. (2) His whole conduct towards the pursuer and treatment of her was that of the head servant in his house, and she treated him ostensibly as her master during all this period; and such was the relationship in which they were believed to stand towards each other by the other servants. She appears to have slept in the kitchen at one period, which was open to all the other servants, male and female, at the time she was in bed, and she was allowed to associate and go about the country visiting with the men-servants in a manner in which no man in his position would, I conclude, have allowed his wife to do. His books also show that he entered her wages regularly along with those of the other servants. (3) Again, when she went to Ireland to be confined in 1871 and in 1874, he corresponded with her, and a number of his letters are pro-

duced. But in none of those letters is there any expression used to lead to the inference that he was writing to his wife. The Lord Ordinary in his opinion attaches great weight to the tone and terms of these letters, and I am disposed to do the same. They are for the most part business letters about the house and farm, with an occasional bit of the gossip of the locality, in particular as to Wilson. (4) The children are both registered in Ireland as illegitimate, and this, the pursuer says, was done by Macadam's directions. (5) In 1876—a year and a-half after he had got a new lease of his farm, and when, according to the pursuer, there was no necessity for concealing their alleged relative position—he makes a will in which he leaves the pursuer a legacy of £1000, describing her as his "housekeeper." This deed was carefully prepared by a man of business, who was examined as to the instructions he received relative to its preparation. We have also the evidence of his intimate friend, the witness Hamilton. Hamilton deponed—"I am a farmer at Monnivae, Dalmellington. I went there twenty-five years ago, and have been there ever since. I was intimate with the late Andrew Macadam for above twenty years, and continued to be so down to the time of his death. I was in the habit of seeing him very often. I was often at Clawfin. We were a great deal together. I believe I was one of the most intimate friends he had. I have often had my meals at Clawfin with Mr Macadam. I was acquainted with Elizabeth Maloy who was living there. When I was having my meals with Mr Macadam Elizabeth Maloy waited at the table. She only sat down at the table with Mr Macadam and me on one occasion as far as I remember. When I was there she appeared to act as housekeeper. She brought the tea in to us, and we filled it out ourselves and partook of it. Tea was the meal at which I was most frequently there. I continued to see Mr Macadam frequently down till his death. He never indicated to me at any time that Elizabeth Maloy was his wife. He never said anything to lead me to suppose that she was his wife. I have heard rumours sometimes as to the footing upon which they were with each other. I have spoken to him about marrying Elizabeth Maloy. He said she was a good housekeeper, and I said he should marry her; but he said he never would. When I first knew him he was quite a temperate man. I saw a change upon him with regard to that latterly. His habits latterly became dissipated. He became dissipated, I should say, a few years before his death. (Q) Did you frequently see that he was the worse of drink?—(A) Yes. I have seen Elizabeth Maloy the worse of drink when I was at Clawfin more than once. I have seen it frequently, more especially at the latter end. I knew there was a boy called Agnew living at Clawfin, and that there was a girl also for a time. Mr Macadam spoke to me about the girl and the boy. He said he would acknowledge the boy, but the girl he never would. He said he believed William Guffie was the father of the girl. He told me that himself without me asking him. He frequently told me that he would not own the girl—that she belonged to William Guffie. He was quite sober when he told me that. The occasion when Elizabeth Maloy sat down with us was one night when we were having some toddy

together in the room. After she brought in the toddy she sat down and said she could not get rest for Wilson as he was always for marrying her. She sat in the room for a short time, but she took no refreshments with us. That is the occasion that I refer to when she sat down with us. When Elizabeth Maloy told us that Wilson was for marrying her, Mr Macadam said it was the best thing she could do. There never was anything more said upon that subject that I recollect of. I had heard Mr Macadam's name in connection with Elizabeth Maloy's before that. Mr Macadam had spoken to me about it before. He told me she had been away with Wilson seeing his friends. A good number of years ago Mr Macadam spoke to me about his will. He told me Mr Dickson had made his will. He just mentioned that in the course of conversation. I was seeing him very frequently during the few weeks before his death. He told me that he was going to add a codicil to his will, or something to that effect. That would be about a couple of years I think before he died. I don't think he said anything about making any change on his will during the six months before he died. He was confined to his room for a good while, and I was in habit frequently of going and seeing him. During his death illness he said to me he was going to put me into his will, but he did not say to what extent. He never spoke to me about Elizabeth Maloy during his last illness, nor about making any provision for the children. So far as I know, there was no-one whom he spoke more confidentially to than to me. I know a man M'Keand, a drainer. He sometimes went about Clawfin. He was there often when Mr Macadam was drinking pretty heavily. M'Keand was getting wages from Mr Macadam when he was there—nothing else. I never saw him drunk with Mr Macadam. I have seen M'Keand when he has been there a little touched with drink. . . . Mr Macadam never at any time said anything to me to lead me to think that he had married Elizabeth Maloy."

Now, assuming that evidence to be true, I cannot conceive it possible that at any period during these twenty-five years there was any belief on Mr Macadam's part that he was married to the pursuer. And that evidence of Hamilton is substantially confirmed as to the habits of Mr Macadam, and also as to the will, by the evidence of Mr Quintin Macadam, one of the defenders and a brother of the deceased. He says—"My farm is in the neighbouring parish, and about 13 miles from Clawfin. I was in the habit of seeing my brother Andrew from time to time. During the last few years I thought he was taking more drink than was good for him. I began to observe that perhaps about three years or so before his death. Before he died I saw a marked change in his appearance. He was getting thinner, and falling out of his clothes. Before that he was a stout strong man. I was at Clawfin on one occasion when Elizabeth Maloy began to speak about my brother's will. As far as I remember, that was about the beginning of November before he died. My brother was very poorly at the time. Elizabeth Maloy was in the parlour at the time. She told me there was a will. I did not know definitely previous to that whether there was one or not. It was she who began the subject. She said she had the will in her possession, and she told me the terms of it—that

Guffie was left £100, and that she was left £1000. She also told me who were the trustees and executors. I had never heard before what was in the will. She did not show the document to me at that time. She seemed highly pleased at what was in the will. She did not suggest in the course of that interview that she was my brother's wife. I had no reason to suppose that she was his wife. On the Monday before my brother died there was some allusion to his will. I was sent for early in the morning in consequence of my brother's state, and I went over to Clawfin. My brother was very poorly at the time, but he was still sensible. Elizabeth Maloy said that I had been sent for to witness a codicil to the will, giving her the napery, and she said some of the knitted things in the house were hers, and turned round and appealed to my brother, and he said yes. She said the doctors were coming out in the afternoon to see the codicil added. There was nothing said about any other property of my brother's beyond the napery and the knitted things. I remained at Clawfin continuously after that until my brother's death. He got worse that day, and died on the Wednesday. . . . My brother spoke to me on one occasion about the children, as far as I recollect. It was on the day he was so very bad that he spoke to me. He told me that he had not tasted food for three days. This was the time in November before he died I think. I was paying him a visit at the time. The children were in the room, but it was not my brother who brought them in. When I went to the house I found my brother in the room, and he and I were alone. Elizabeth Maloy was in bed. It was in the afternoon. Her bed was above the scullery, and my brother sent me to rouse her out of bed. He told me where she was. I went to the bedroom above the scullery and found her there. She was not in a very nice state. My brother had complained to me before this that she had been drinking. (Q) What state was she in when you found her?—(A) She was lying in bed in a not very nice state. (Q) Did she seem to be tipsy?—(A) She seemed as if she had been drinking. My brother complained to me that she had had a turn of drinking. He said several times that he could not get her out of bed to prepare his food, and then he asked me to go and see if I could get her down to make some tea. That is what led to me going to her room."

Now, that is the brother's account of his interview with the deceased three days before his death. He spoke to him about his will, and also about certain things that were to be left to the pursuer, and on that solemn occasion the deceased does not allude to the pursuer as holding any such relation to him as that of wife. Dr M'Lachlan, the doctor who was in attendance at the time, gives evidence to the same effect—that he never supposed there was any relation of the kind between pursuer and Mr Macadam, and that he never heard Mr Macadam speak about such a thing. He says that when he first went to attend Mr Macadam some years before his death he did not know the pursuer at all, but he afterwards ascertained that she acted in the capacity of housekeeper. Then he says,—“I have heard her speak of Mr Macadam. She spoke of him as ‘Maister.’ (Q) Did you see anything in his treatment of her different from the ordinary

treatment by a master of his servant?—(A) No, I cannot say that I ever did. (Q) Did you ever see or hear anything when you were at Clawfin pass between Maloy and Macadam which would have suggested to you that they were married persons?—(A) I never did. I was on very intimate terms with Mr Macadam. I think I was on as friendly terms with him as anybody thereabouts. I continued to be so till his death. (Q) Did he ever at anytime say anything to you which would imply that he had married Maloy?—(A) Never. Then he speaks about her being latterly occasionally given to dissipated habits, and he describes a scene which took place in the passage between her and Guffie as to his having proposed marriage to her, which she said she never would have consented to. Then he says—“Two days I think before Mr Macadam’s death he spoke to me about making an alteration on his will. (Q) On that occasion did he refer to Maloy?—(A) He did. (Q) How did he describe her?—(A) As his housekeeper. This was the first time I fairly got him to believe that he was dying; formerly he had passed it off as a joke.” In his cross-examination he substantially adheres to the statement he has made, and I see no reason to doubt the accuracy or truth of it. He says the last words Mr Macadam spoke with reference to this particular matter were that he wished to make an addition to the allowance that he had made to his housekeeper in his will. These appear to have been almost the last articulate words that he uttered before he became unconscious. Now, such words would be of considerable importance when addressed to intimate friends and relations at any time, but more particularly so when uttered by him during his last illness. With reference to the circumstances I have alluded to, namely, as to the directions regarding the registration of the children, as to the terms of the letters he writes to pursuer, and indeed as to his whole conduct in regard to her, all these appear to me to be utterly inconsistent with the notion that he considered himself a married man.

As regards the pursuer also there are a variety of circumstances equally inconsistent with the belief that she considered herself to be a married woman. In the first place, she accepts the wages he allowed her, and acquiesced without any objection in remaining housekeeper, even after the time had come when it was no longer necessary to conceal her alleged marriage. Then again, she registers the children on both occasions as illegitimate without making any objection. On this matter Mrs Agnew says—“I registered the birth of the two children at the request of Elizabeth Maloy. She told me how to register them. She told me to register them on herself as the children of Elizabeth Maloy. (Q) Without mentioning any father?—(A) Yes, to keep it silent.” There is also the conduct of the pursuer with the two men Wilson and Kennedy. The evidence as to Kennedy applies to the period between 1865 and 1867, and we have his own account of it, that he proposed to her, and that she neither accepted him nor refused him. Ultimately she appears to have gone with Kennedy to visit some of his relations; she also went with him to fairs and different places—to Maybole, near which he lived; and he took her there because he was carrying on a flirtation with her at the time. Now this was certainly not a course of conduct

consistent with a belief on the part of the pursuer that she had been married in 1858, nine years before. But Kennedy’s evidence does not stand alone, because Mrs Goode speaks to the pursuer having spoken to her on that very subject, both as regards Kennedy and as regards Guffie:—“She told me that she and Kennedy were on terms of being married, but that he had lent his father some money, and for that she would have no more to say to him;” and the short cross-examination throws no doubt on her statement. She also says—“Some time after I had been going about the house, Elizabeth Maloy told me that she and William Guffie were on terms of marriage.” Guffie is examined, and does not admit that, but the statement which the pursuer made to Mrs Goode appears to have been, that both as regards Guffie and Kennedy, they were on terms of marriage. The witness Murdoch confirms this as regards Kennedy, and the evidence of Wilson is quite distinct about it. He says that he went to fairs with Elizabeth Maloy—to Cumnock and Ayr, and other places. He says—“My relations lived at Greenan, near Ayr, about eighteen miles from Clawfin. Elizabeth Maloy went with me to the house of my relations on more than one occasion. The first time she went was on the day we were at Cumnock Fair. My father and mother were living at Greenan. From Cumnock Fair we went to Greenan, and saw my mother there. I introduced Elizabeth Maloy to her, and we came back to Clawfin the same day. We went by train from Dalmellington to Cumnock, and left Cumnock at midday for Ayr, and then travelled out to Greenan. On the occasion that we drove from Dalmellington to Greenan on a Sabbath day, we merely spent the day there, and came back again at night. My father died in 1873. I went to see him when he was lying ill, and Elizabeth Maloy went with me. That is the occasion I have just spoken to, when we drove over on the Sunday. On another occasion she accompanied me to my brother’s marriage. We went to Greenan on a Friday, and she stayed there until the Monday. After that one time I went with her to my mother’s and left her there, and she stayed for some time. That was some time, I think, about the beginning of 1874. I did not go for her from Clawfin; she came back alone. Elizabeth Maloy went with me on these visits to my relations as my sweetheart—as my intended; and I introduced her to my friends as such. We expected at that time to be married; we were intending to be married. . . . It was my understanding that I was to be married to her, and I am aware that she was of the same mind. She knew that I was introducing her to my friends as my intended, and she never objected to occupy that position. A brother and sister of mine came up to see me, about the Fast Day, at Clawfin. I went with them to the station, and Elizabeth Maloy accompanied me. On one occasion she was anxious that we should live in Clawfin after we were married, as we were, as man and wife—I to remain as ploughman and she as housekeeper. She told me she had £500 by her, and she offered me £100 to start in any business I wished, if I could not get a farm. She spoke to me of a boy of the name of Agnew. I could not say whether the people about the place knew of such a boy. She told me he was an orphan, and that there was £100 left for his education. She said she would like very well if we

would take him, as we would get the £100, and it would help us, and his education would not be much missed. She said he was about Dundalk, in Ireland. (Q.) Had you any suspicions that that boy might be a child of hers?—(A) I mentioned that to her, I think; I asked her about it. I said I thought, when she was so anxious about the child, it was very likely it would be hers, and she gave me her oath that she never had a child in her life. She went to Ireland while I was at Clawfin. When she left Clawfin first she went to Pennyvenie, where she had a sister staying. I took her chest to the station. When she was at Pennyvenie I went to see her frequently. She told me she was going to Ireland. She told me why she was going; she said she was in the family-way to me. When she went away my mother came to keep the house at Clawfin. She came a few weeks before Elizabeth Maloy left, in order to be shown how to do things. I had an illegitimate child living at Greenan. Elizabeth Maloy knew that quite well, and when she was at Greenan with me she and I went to see the child. She was very anxious in the event of our being married that we should keep the child. I had a conversation with Macadam one night, when Elizabeth Maloy was away, about the possibility of our being married. I was in the house, and Mr Macadam spoke to me about it. He said he thought that she and Guffie would be married, and I said I was most sure they would not. He said if she married a young man, or a man to his pleasing, he would give her £300. I thought it was a hint for me to accept it if I wished. My mother had opportunities of seeing Elizabeth Maloy at Greenan, and also at Clawfin before she went away. She spoke to me on the subject of my being married to Maloy before Maloy went to Ireland. Latterly my mother was not in favour of the marriage, and when Maloy was away I gave up the idea of having anything to do with her. I did so particularly because of my conversation with my mother, and partly from what I thought I saw myself." Now, this witness's mother is examined and confirms all that. She says she was in the belief that they were going to be married, but that from certain things she saw in the conduct of the pursuer she came to view the marriage with dislike, that she advised her son to have nothing more to do with pursuer, and that her son acted upon that advice. I need not read the evidence in detail. She describes a scene which she saw in the kitchen early one morning between her son and the pursuer, and which is substantially corroborated by other people, which led her to think that the pursuer would not be a desirable wife for her son. On this advice Wilson acted, and at the time when the pursuer came back from Ireland after her second confinement he had left the place and afterwards married another woman. Now, that account given by Wilson and his mother, confirmed as it is by various other witnesses, is utterly inconsistent with the notion that the pursuer believed in 1874 that she was a married woman. Then we have her conduct as to the will. She agrees to take charge of the will after it is executed, and she keeps it and gives it up after Mr Macadam's death, and she shows it before his death to the doctor and one of the witnesses. She is to all appearances at that time perfectly satisfied with the provision made for her in it, as explained by Mr Quintin

Macadam and Dr M'Lachlan, and she never makes any statement to the effect that she was married, or that they stood in the relationship of married persons for years before, until after the death of Mr Macadam. She seems to have made some statement in the room shortly before his death, when he was unconscious. She makes no request throughout these twenty-five years for any public declaration on his part as to their alleged relationship; and as to the statement about not disclosing their position from apprehension that he would not get a new lease of the farm if the relationship in which they stood to each other was made known, that difficulty was removed in 1874. The result is, that I have come to the conclusion, applying the ordinary principles and rules of law and practice in this country, that we have sufficient to negative the notion that there was any serious purpose of marriage contemplated by the pursuer or by Mr Macadam in 1858.

There remains the alleged marriage in 1879 by *de presenti* declaration; and dealing with that upon the footing of shutting one's eyes to what had been going on for twenty years before, and looking at it as a distinct case of alleged *de presenti* declaration, I am unable to put such a construction on the evidence of the witnesses. It is a very strange story in itself, and rests exclusively upon the evidence of two persons named M'Keand—the husband an occasional drainer on the farm, and his wife, who seems to have had some hay somewhere about Clawfin, which she got leave from the contractor on the public roads to cut. M'Keand was at his work on the farm on 7th August 1879, and was sent for to go to the house. His wife had gone to the house to speak about the hay, and they happened to meet there. It was an accidental meeting, and each of them says that but for the matter about the hay they never would have met there at all. But they describe an interview which they had with Mr Macadam and Maloy when in these accidental circumstances they both went to Clawfin. Now, I cannot throw out of view the fact that it is distinctly proved in evidence in this case that by 1879 the habits of Mr Macadam, and also I think the habits of the pursuer, had materially changed for the worse, and that, as both Mr Hamilton and Dr M'Lachlan say, they occasionally indulged in drink. That being so, the scene described by M'Keand is this—he says he had got leave from the road surfacemen to cut some grass growing on the sides of the road, "and I remember one day of my son Robert being sent for me by my wife when I was working at the drains, to go down and see about getting the grass turned over or something done to it. This was on Thursday 7th August 1879. He told me to go down to his mother, who was at Clawfin farm-house. I left my work and went down to the farm. I knocked at the kitchen door, and it was opened by the servant girl, Sarah M'Millan, who is now in America. She went and knocked at the parlour door, and said who it was that had called, and I was told to go into the parlour. When I went in, Mr Macadam, Elizabeth Maloy, and my wife were there. Mr Macadam told Elizabeth Maloy to get me a glass of whisky as I was very warm. Elizabeth Maloy asked if she would fetch Mr Macadam one, and he said no; he did

not feel very well. She then brought me a glass of whisky. No one else had any drink at that time. Mr Macadam and the others were chatting on various subjects, and he told Elizabeth Maloy to bring some of her knitting and crotchet-work and let my wife see it. My wife looked at Mr Macadam and said it would say far more for him to marry her decently than do as they were doing; that it was well known to the public how they were living; and he turned in his chair and said, 'This is my lawful wife,' addressing Elizabeth Maloy. Elizabeth thanked him for saying the words before strangers, and put her hand across the table, and said she would take me and my wife for witnesses. Mr Macadam was quite sober. My wife and I knew the rumour of the country as to how Mr Macadam and Elizabeth Maloy were living together. Mr Macadam told us that he had had three children. He said the first was a premature birth, but the other two were alive and could speak for themselves. I went to the house between three and four in the afternoon, and remained there until about eight o'clock at night. My wife left between five and six to go home and look after her household affairs. I remained talking with Mr Macadam about various things. He talked a great deal about Elizabeth Maloy. He said he could never get another wife that would look after his interests so well. . . . The reason he assigned to me for keeping it to himself was to keep it from his mother's ears. He told me he would make inquiries to see if I kept it secret, and I know that he made inquiries at a brother-in-law of my own." At another place it appears that he wished it kept secret, which was a curious thing with reference to a public declaration of marriage. On cross-examination he says:—"Mr Macadam did not tell me when I entered what purpose I had been sent for. I was not sent for on purpose to hear the statement made that I am aware of. I took it that the acknowledgment was made just because the conversation led up to the subject. I could not say whether Mr Macadam meant to acknowledge her or not, but the conversation turned up, and it was done. (Q) Did it appear to you that you had been sent for in order that the statement might be made to you? —(A) By the way he made his statement I think there was something in it. (Q) Do you put it that the conversation gradually led up to this and he said it, or that he had intended beforehand to say it?—(A) I could not answer that question on oath; I do not know what was in his mind. My wife and I had not arranged beforehand to meet at Clawfin farm-house. My wife went to Clawfin to ask liberty to put some hay into one of Mr Macadam's grass parks, and I think she wanted me to help her with that. If she had not gone to the house to ask about the hay I have no reason to suppose that either she or I would have been there at all that day. (Q) So that all this was the outcome of her going to ask about the hay?—(A) Yes, as far as I know." Then farther on he says—"When Elizabeth Maloy said she would take me and my wife as witnesses, Macadam gave his foot a wee stamp on the floor and said, 'Damn it.' Elizabeth Maloy told him not to curse, and he said, 'It was your curly hair, Lizzie.' (Q) When he said that he stamped on the floor and said 'Damn it'?—(A) Yes, but I passed it as a joke; he was laughing when he said it."

Mrs M'Keand gives exactly the same account of this scene. She appears to have been scarcely acquainted with the parties before, but she went to the house to ask about the hay, and she seems to have gone deliberately about the matter of the marriage in the way her husband says she introduced it. The conversation led up to it, and she thus addresses the person who was in one respect her master—the employer of her husband at all events; she herself being a person in that position in life, immediately begins to speak to this man, who was in the position of a large farmer in the district, about his married or not married life, in the way she describes. I say that is an incredible story. If Mr Macadam did say these things—and according to the description they give about his stamping his foot and swearing—I think he must have been joking (and they say he sometimes joked in that way), or he must have been in the state of mind which men who are in the habit of occasionally indulging to excess in drink sometimes get into. But that is not a serious declaration *de presenti* of marriage, in such a way as to constitute marriage; and what I have stated as to the terms on which they lived from 1858 to 1879 applies with equal force to the period subsequent to August 1879 as in the construction which is to be put on the letter of promise which is the subject of the first conclusion on which the action is laid.

I come to the same conclusion as the Lord Ordinary, so I also agree with him in thinking that this is not a serious deliberate *de presenti* declaration of marriage in the sense in which it must necessarily be held to be before it can be held to constitute marriage by the law of this country. That being the conclusion which I come to on the evidence as to the failure of the proof of both marriages, I think the defenders should be assoilzied from the conclusions of the action.

I have not entered into the very important question of law which is dealt with at length by the Lord Ordinary in his note, because it is not necessary to do so. The pursuer having failed in her proof, there is no necessity for saying what one's opinion would have been 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 right to say, as this important 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 upon that subject. I say no more upon that point. As the Lord Ordinary has made an express finding on that point of law, it will be necessary to recal or vary the interlocutor as to that; but I think he has come to a right conclusion on the question of fact raised in the first conclusion of the action.

LORD SHAND—I entirely concur, not only in the result at which my brother Lord Mure has arrived in this case, but also in the grounds of judgment which have been so fully stated by his Lordship; and if I do add a few words in reference to the general view that I take of the case, it is only because the argument at the bar on behalf of the reclaimers was of so anxious a nature that perhaps it may be desirable to say something as to our general views of the case. It is quite true that the document upon which the

pursuer founds is one in very clear and explicit terms—to this effect, that in quite distinct language the deceased Andrew Macadam bound and pledged himself to take the pursuer for his wife, although no doubt there is added the expression “and no other,” an expression to which I observe the Lord Ordinary attaches some weight. But upon the other hand, it is, I think, a remarkable feature of this case—and a feature which distinguishes it from all others that have previously occurred—that while that document was granted so long ago as 1858, Mr Macadam and the pursuer lived together until 1882, when Mr Macadam died—roughly speaking, a period of about 25 years—and from the day the document was granted till the day of his death the pursuer is unable to point to anything which can be considered satisfactory evidence that he regarded her as his wife, or declared or acknowledged her as such. If marriage was the purpose of the document, it is surely only reasonable to expect that within a much shorter period than five and twenty years, the parties living together throughout that time, the marriage would have been celebrated, or would at least have been announced or declared in some solemn way long before his death. Indeed, to my mind it is scarcely possible that marriage could have been intended without anything of that kind having followed, unless indeed it could be shown that there was some remarkable circumstance that made it extremely desirable that there should be concealment all that time, and that at the end of that time or upon the death of Mr Macadam there was no occasion for any further concealment. That there was no declaration or announcement of marriage is, I think, quite clear. Lord Mure has gone fully into the evidence bearing upon the interview with the M’Keands, and I can only say that that evidence entirely fails to make out any marriage *de presenti*. They were persons who happened to be in Mr Macadam’s house by mere accident—a drainer working at drains on the farm, and his wife—and expressions used on such an occasion could certainly not in a case of this kind be held to be proof of marriage. There was another instance of the same kind with another man, which I do not think is even mentioned on record, but which was founded on in argument, where something of the same kind occurred with one of Mr Macadam’s friends with whom he was in the habit of taking a glass. But laying all that out of view, the next question that occurs is, Can the pursuer account for no marriage having taken place? I have looked anxiously to see if I could find any explanation of that. The only motive that is seriously suggested is that it was desirable to have concealment until Mr Macadam got the new lease of his farm. Well, that difficulty, if it existed—which is a matter that stands entirely upon the pursuer’s own evidence—was got rid of in 1874, and eight years elapsed after that. Now what does the pursuer say upon that subject? She is asked about it in cross-examination, and having previously stated that secrecy was desired till the lease was renewed, she says—“Mr Macadam’s desire for secrecy disappeared when he got his lease renewed. It did not disappear entirely. He did not wish his friends to know; he did not wish to annoy his mother. By his friends I mean his relatives. The servants and

people about mostly all knew about our relations after 1874, except a very few. He was not so anxious then to keep the thing secret. There was no concealment on Mr Macadam’s part towards the servants at Clawfin or visitors not relatives after 1874 that I know of. He spoke publicly to me and of me as his wife after that date. He often did so before the servants. He did not do it before many of the visitors, but he did it before a few. To some he did not talk about it at all. Most of those who were coming about the house after 1874 knew that I was his wife.” Now, if it had been proved that there was a motive for secrecy down to 1874, which could explain why the marriage was not carried out or acknowledged, but that after 1874 that motive having been removed, for the eight succeeding years Mr Macadam did publicly acknowledge the pursuer as his wife, I think she would have succeeded in her case. But there is no evidence to support that; on the contrary, matters continued just the same after 1874 in this respect as before. In that state of the case, the Counsel for the pursuer suggested, as the pursuer herself seems to have suggested in the witness-box, that there was another reason why this was kept concealed. But the very suggestion that there was another reason for concealment is inconsistent with the evidence I have just read. The pursuer says there was no concealment after 1874, and the suggestion that there was another motive or that there was concealment after that period is inconsistent with her own testimony. But what is the suggestion when we examine it? It is this, that Mr Macadam’s mother would have been displeased if the marriage had taken place. That, again, is unsupported by evidence; and all I can say on the general aspect of the case is that it would rather have occurred to me that old Mrs Macadam would have thought her son was living a more respectable life if he had married this woman than if he lived with her as his mistress, as many of his acquaintances undoubtedly thought he did. While the document therefore is no doubt very strong in its terms, the circumstances in which we come to consider the question of marriage or no marriage are so peculiar and so striking in the respects I have mentioned, that the weight to be given to the terms of the document fails very much. And looking at the case in that aspect—the conduct of the parties otherwise—the various features of the case to which Lord Mure has referred come to be of very great importance as against the pursuer’s claim. There has been a controversy between the parties as to the relations which subsisted between the pursuer and Mr Macadam before the letter was granted at all; and I see the Lord Ordinary indicates an opinion that it is at least more than probable that intercourse had taken place between them before the letter was granted. It must be observed that the defenders on this question are really put to great disadvantage in reference to their inquiry into facts and proof of facts on a question of this kind raised so long after the date of the letter and after Mr Macadam’s death. The relations between the parties began so long ago as 1856—twenty-eight years ago; and the pursuer says that no familiarity or intercourse had taken place before the date of the letter; but even at the disadvantage I have mentioned, the defenders have adduced a good deal of evid-

ence which I think justifies the observation which his Lordship has made on that subject. But however that may be, it appears to me that the various matters to which Lord Mure has referred, and which I do not mean to go into in detail again, as to the conduct of both parties, go very far indeed to demonstrate—I might almost say—that they did not intend to create, and did not in fact create, marriage by that letter and the intercourse that followed upon it. It is quite clear, as it appears to me, from the evidence, that Mr Macadam did know of her conduct with the other men who are referred to on the record and in the proof; and I confess the general impression left on my mind by his letters and by the statements made by the pursuer herself and sworn to by various witnesses, that Mr Macadam was quite willing that she should marry if she chose, and was also willing to make some provision for her in order that she should be married—living in his neighbourhood, as the pursuer explains it was intended she should do. That conduct on the part of both of them seems to me to be very strikingly inconsistent with the idea that they were at that time husband and wife, and had intended marriage by that letter. Then, as Lord Mure has observed, their letters are quite different in expression from letters passing between husband and wife. They are such as would be addressed to a housekeeper living with him on such terms as she admits she was doing during the whole period of that correspondence. They are letters rather that a man would write to a housekeeper who was his mistress than to a housekeeper who was his wife. That is corroborated very strongly not only by the fact that she is entered in his books from time to time as receiving wages, but that in point of fact she does receive wages like other servants in the house. And further, there is the circumstance that Mr Macadam signed a will in which he designed her as housekeeper and gave her £1000, which was quite an inadequate provision for her if she had been his wife, and she took that document into her own custody and kept it for a considerable time. And following upon that we have perhaps as important a piece of evidence as any other—I mean the solemn conversation on the deathbed, when Mr Macadam again spoke of the pursuer as his housekeeper, no doubt regretting that he had not made a larger provision for her; and I am not surprised at that, considering that she had lived so long with him and was the mother of his two children. In these circumstances one would have expected a better provision, but still there is no suggestion that he regretted not having put his wife in her proper place. On the whole, I agree with Lord Mure in thinking that we are not bound by the terms of the letter, but are called on to look to the whole surrounding circumstances which can throw light on what was intended by it, and all that has occurred since in the conduct of the parties, and having done so, the conclusion I arrive at without doubt or difficulty is that this is a case in which the pursuer has failed to make out that there was a marriage between her and the late Mr Macadam. It is therefore, as your Lordship has observed, unnecessary to express any opinion upon the question of law upon which the Lord Ordinary has given an opinion, as to whether an action of this kind can be maintained after the death of the person who is alleged to

have made the promise. On that subject I shall only say that we have had a very anxious and careful argument, that I think it a very important and delicate and difficult question, and that I am not at this moment prepared to say that I could concur in the view of the Lord Ordinary, while on the other hand I desire to reserve my opinion in case the question should occur in any future case.

LORD PRESIDENT—The view which I take of the evidence in this case has been so fully, and at the same time so clearly expressed by Lord Mure that I find it quite unnecessary to add anything. I may also say that I concur in the additional observations of my brother Lord Shand. With regard to the question of law which the Lord Ordinary has decided, it is quite plain that the decision of that question is not at all necessary for this case, and I am not prepared to concur in his judgment in that respect. I must not be misunderstood as saying that I entertain an opposite opinion upon that question, but I do go the length of saying that 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.

The judgment will be to recal the interlocutor of the Lord Ordinary, find that the pursuer has failed to establish that marriage was constituted between her and the deceased Andrew Macadam, either by promise of marriage *subsequente copula* or by declaration *per verba de presenti*: Therefore assoilzie the defenders from the conclusions of declarator of marriage and legitimacy, and decern.

LORD DEAS WAS ABSENT.

The Court recalled the interlocutor of the Lord Ordinary, found that the pursuer had failed to establish that marriage had been constituted between her and the deceased Andrew Macadam, either by promise of marriage *subsequente copula* or by declaration *per verba de presenti*; therefore assoilzied the defenders from the conclusions of declarator of marriage and legitimacy, and decerned.

Counsel for Pursuer—Trayner—J. P. B. Robertson—Goudy. Agent—J. Young Guthrie, S.S.C.

Counsel for Defenders—Sol.-Gen. Asher, Q.C.—Mackintosh—Young. Agent—John Macmillan, S.S.C.

Friday, December 19.

SECOND DIVISION.

[Lord Lee, Ordinary.]

WELSH AND OTHERS (WELSH'S TRUSTEES)

v. FORBES.

Loan—Proof of Resting-Owing—Unstamped Receipt—Stamp-Duties Act 1870 (33 and 34 Vict. c. 97), secs. 17, 120, 122.

Forbes granted to Welsh a document which was unstamped, in the following terms:—
“Hydropathic Establishment, Moffat.—Re-