

stituted for the Financial Board of the United Free Church College in Glasgow.

“The reporter begs respectfully to report that this alteration appears to meet the principal point adverted to in the opinions pronounced by your Lordships when remitting back to the reporter. He has had exhibited to him certified extracts of the Acts of Assembly of the United Free Church of 31st October 1900 and of 30th May 1902; and these have satisfied him that the General Trustees of the United Free Church are ‘a constitutional’ and ‘permanent’ body in the sense in which these expressions are employed by your Lordships.

“With regard to the second point on which your Lordships desire to be certified, the agents for the petitioners have undertaken to lodge in process, before this supplementary report is submitted for your Lordships’ consideration, an extract minute of a meeting of the trustees expressing their willingness to accept of the trust and hold the trust funds.

“The reporter has accordingly adjusted the schemes in conformity with your Lordships’ remit; and the schemes as adjusted by him are appended hereto. It only remains for him respectfully to recommend to your Lordships to grant the prayer of the petition in respect that your Lordships’ requirements have all been duly complied with.”

The first articles of the schemes as adjusted were as follows—Appendix A—“1. The funds applicable to the said bequest of £1000, with increase thereof as provided by the terms of said trust-disposition and deed of settlement and deed of appointment, shall be vested in and held by the General Trustees of the United Free Church of Scotland in trust for the purpose of providing out of the income thereof two bursaries to be called ‘The M’Grouther Bursaries.’” Appendix B—“1. The funds applicable to the said bequest of £2000, with increase thereof as provided by the terms of said trust-disposition and deed of settlement and deed of appointment, shall be vested in and held by the General Trustees of the United Free Church of Scotland, who shall have charge of the administration thereof, and are hereinafter called the managers.”

On 23rd December 1910 the Court pronounced this interlocutor—

“The Lords having considered the supplementary report of Mr J. H. Millar, with the schemes appended thereto adjusted by him, and having heard counsel for the petitioners, approve of the said report: Approve also of the said schemes: Appoint them respectively the schemes for the future administration of (1) ‘The M’Grouther Bursaries’ described in the petition, and (2) the bequest of £2000 made by the late Miss Jane M’Grouther for aid to ministers of the congregations of the United Free Church of Scotland in the Highlands and Islands of Scotland: Direct the said schemes to be signed by

the Clerk of Court and to remain in process: Authorise the petitioners to take payment out of the trust estate in their hands of the expenses of and incidental to the present application and decern.”

Counsel for the Petitioners—Macmillan.  
Agents—Cowan & Dalmahey, W.S.

Friday, December 23.

FIRST DIVISION.

(Before Five Judges.)

[Lord Salvesen, Ordinary.]

PETRIE v. PETRIE (PETRIE'S  
EXECUTRIX) AND ANOTHER.

*Husband and Wife—Constitution of Marriage—Proof—Habit and Repute—Declaration per verba de presenti.*

In 1901, A, a member of the S.S.C. Society, set up house in Edinburgh with B, an English lady, whom he had known for about nineteen years, and whom he had at first met when she was in Edinburgh as companion to a lady. In 1901 A was about fifty-five years of age and in good practice as a solicitor. B was then a trained nurse, thirty-eight years of age, supporting herself in London. Prior to their cohabitation the parties had corresponded since 1882. B had visited Edinburgh again in 1893, and A had visited her when she was living with her mother near Nottingham. In point of social position there was no disparity between them, and throughout the whole period of their acquaintance there was nothing to suggest anything approaching impropriety on her part. Prior to 1901 A had lived in a room at the back of his office with a house-keeper or general servant, with whom he was on terms of immoral intimacy, and had acknowledged the paternity of one of her illegitimate children. He had also had immoral relations with another woman who had also acted as his house-keeper. Each of them he had in turn discarded on account of their intemperate habits. B knew something of his relations with these women. A died in 1909. After his death B brought a declarator of marriage, her case being that in 1894 she and he had become engaged; that in 1901 he wrote asking her to come to Edinburgh, marry and settle; that she accordingly came; that they selected a house, a villa with a garden attached; that on the afternoon of the day on which they first lived together she refused to remain in the house unless he married her; and that he and she then and there interchanged matrimonial consent. No others were present at the alleged ceremony. No writing was produced to prove it, and the pursuer's story with regard to it

wa contradicted by the evidence of A's illegitimate son, who at its alleged date was a boy of sixteen. Further, the pursuer's mother was not told of the marriage for some months after it (as the pursuer alleged) took place, nor was the alleged letter of 1901, asking her to come to Edinburgh with a view to marriage, produced. To his own relations (who were in humble circumstances, and with whom he had little in common) A expressly denied that he was married; and several of his Edinburgh friends, who were aware of his previous liaisons, deponed to their absolute disbelief in his being a married man. To his confidential clerk he spoke of the pursuer as his housekeeper, and his illegitimate son, who during the earlier part of their cohabitation lived with them, was left entirely in the dark as to the nature of their relationship. No writing was produced in which A spoke of the pursuer as his "wife," or of himself as her "husband," while in reply to a circular issued by the collector of the Widows' Fund of his Society he gave the evasive answer "Nothing to report." On the other hand, it was proved that B wore a marriage ring; that during the eight years of her cohabitation with A she was regarded by the tradesmen, charwomen, and other people who came to the house as his wife; that the household bills were paid by her in that capacity; that on various occasions A introduced her to his friends as his wife; that when asked by some of them if he was married he assented that he was; that her letters (including those she received from A) were addressed to her as "Mrs" A; and that from 1901 to the date of his death he and she went about openly together as husband and wife.

*Held (diss. Lord President and Lord Dundas)* that the pursuer's oath, corroborated by the facts and circumstances, afforded sufficient proof of the alleged ceremony, and that a marriage *per verba de presenti* had been established.

*Opinion per curiam* that the evidence was insufficient to establish marriage by habit and repute.

On 18th March 1909 Mrs Annette Cooper or Gordon Petrie, designed as widow of Alexander Gordon Petrie, S.S.C., and residing at 4 Dalrymple Crescent, Edinburgh, brought an action against Margaret Cathro Petrie, Fountainbleau, Dundee, as executrix-dative *qua* next-of-kin of the late A. G. Petrie, and also as an individual, and another, the only other next-of-kin known to the pursuer, in which she sought declarator that at and prior to the late Mr Petrie's death the pursuer and he were married persons, and that she was entitled to all the rights and privileges of a wife. Pecuniary conclusions with regard to the pursuer's terce, *jus relicte*, allowance for mournings, and interim aliment followed.

The facts are given in the opinion of the Lord Ordinary and in the opinions of the Judges of the Inner House.

The pursuer pleaded, *inter alia*—" (1) A valid marriage having been constituted between the pursuer and the deceased Alexander Gordon Petrie as condescended on, decree of declarator in terms of the first conclusion of the summons should be pronounced."

The defenders, *inter alia*, pleaded—" (3) No valid marriage ever having been constituted between the pursuer and the deceased, the defenders are entitled to absolvitor."

On 3rd November 1909 the Lord Ordinary (SALVESEN) found facts, circumstances, and qualifications proved relevant to infer marriage between the pursuer and the late Mr Petrie, and accordingly granted decree as craved.

*Opinion.*—"In this action the pursuer seeks to have it declared that at and prior to the death of the late Alexander Gordon Petrie the pursuer and he were married persons; and that she is entitled to all the rights and privileges competent to a lawful wife. The action is directed against the next-of-kin, who, as Mr Petrie left no will, are entitled to his whole estate, which consisted entirely of moveables, if the pursuer cannot make good her claim to the position of his widow. It therefore involves an important question of property as well as one of status.

"The facts relating to the life of Mr Petrie prior to his taking up house with the pursuer are not in controversy, and as they may have a bearing on his relations with the pursuer it is necessary to detail them. For many years before his death Petrie practised as a solicitor in Edinburgh, at first in partnership with a Mr Shand under the firm name of Gordon Petrie & Shand, and since January 1899, when Mr Shand died, on his own account under the same firm name. He died in February 1909. Up to 1901, when he is alleged to have married the pursuer, his relations with women were irregular. In the early eighties he commenced to cohabit with a woman called Elizabeth Robertson, who was employed as a barmaid in an Edinburgh hotel; and he lived with her at various places in Edinburgh for a considerable number of years. Elizabeth Robertson had one son during the period of Petrie's cohabitation with her, who was called Macduff Robertson, and with regard to whose paternity Petrie expressed himself differently at different times. Petrie, however, agreed to bear the burden of his maintenance, and Macduff Robertson was accordingly brought up and educated at his expense, and indeed for many years resided in the same house with him. In 1892 Petrie broke off his connection with Elizabeth Robertson, partly owing to her intemperance and partly because he suspected her of relations with other men, and he refused to admit the paternity of a second child to whom she gave birth. At that time Petrie had an office at 81 George Street, with a dwelling-house behind, consisting of a sitting-room, bedroom, and kitchen. In 1893 Petrie engaged as his housekeeper a woman called Rosina

Hughes, whose acquaintance he had made when she was employed in an Edinburgh restaurant, and with whom he cohabited for about seven years, when he broke off his connection with her also.

“Both women were witnesses in the case, and their evidence leaves no doubt that his relations with them were frankly immoral. Neither suggested that she had any claim to be regarded as Mr Petrie's wife. The ostensible relation between them was that of master and housekeeper, or more correctly master and general servant, for each of the women in turn did the whole work of the house in which she lived with Mr Petrie. The defenders maintain that Petrie's relations with the pursuer were similar to those which he had with Robertson and Hughes successively.

“The pursuer's acquaintance with Petrie began so far back as 1882. This is evidenced not merely by her statement, but by a couple of letters which she has produced from Petrie written in that year. They seem to have taken a fancy to each other, and although they did not see each other again until 1893 the pursuer says that they regularly corresponded, although she has only produced the two letters referred to.

“In June 1893 the pursuer paid a visit to Edinburgh, where she remained for nearly a fortnight. She says that during that visit she frequently met Mr Petrie and was taken about by him; and her evidence is corroborated by a letter from Petrie to her. It is quite obvious from the contents of that letter that Petrie and the pursuer were on very friendly if not affectionate terms, and that he was at that time considering the question of marriage with the pursuer. The passage that I specially refer to is as follows—‘My fellows are quite glad I am back among them. Those that are married being satisfied that it is a case, and state that it is the best thing to do, and the unmarried ones stating that I should not be such a fool. I make them no wiser. Nothing like keeping your own counsel (*sic*) like you. Wishing you every good wish, and trusting to hear from you soon, remain yours ever sincerely, Gordon.’

“In the following year (1894) Petrie visited the pursuer in Nottingham, where she was staying with her relatives. The visit lasted about eight days; and Mrs Harrison (the pursuer's mother, who has since married a second time) says that the family understanding was that Petrie was paying his addresses to the pursuer with a view to marriage.

“The pursuer and Petrie continued to correspond, she says, on the footing that they were engaged persons, and that their marriage was only postponed because Petrie represented that he had sustained financial losses. There is no evidence of this, although the excuse may have been made for all that; but it is to be noted that during all this time Petrie was cohabiting with Hughes. This woman, who was of a jealous temperament, was in the habit of opening letters which came from the pursuer to Petrie, and she deponed that he was not seriously annoyed

at her doing so. This much may be taken for granted, that whatever Petrie had led the pursuer to understand, he never seriously contemplated marriage while his relations with Hughes subsisted.

“In 1901 Petrie, having got rid of Hughes, appears to have suggested that the pursuer should come and see him in Edinburgh. At that time he had taken a new office in George Street, which had no dwelling-house attached to it, and he had accordingly to take a new house. It became necessary then that he should have some one to look after the house, and his thoughts seem to have turned to the pursuer, who made no secret of her affection for him.

“The pursuer's account is that she came to Edinburgh from West Hampstead, where she had maintained herself by nursing, on 24th April 1901; that she stayed at first with a Mrs Stewart in George Street, and afterwards in Albany Street, but that she was constantly seeing Petrie. She was asked by him to look out for a house, and ultimately No. 4 Dalrymple Crescent was fixed upon. This was a self-contained villa, with garden attached, which had three sitting rooms and ample bedroom and other accommodation. She says that she bought some of the furniture for the house, and did most of the packing up of the household effects in George Street; and that after the new house was ready for occupation an interview between them took place in the drawing-room, in the course of which she told Petrie that she could not remain in the house unless they were married. She gives a detailed account of what took place, and of Mr Petrie's various objections to entering into a formal marriage which would become publicly known. In the end she says that they agreed to hold and to be true to each other, and that he undertook to make the matter legal by recording it in the will which he proposed to make, of which he repeated the opening words, ‘I leave to my wife Annette Cooper’; that he thereupon gave her a marriage ring; that she understood that this interchange of consent constituted a legal marriage, and upon that footing alone agreed to cohabit with him.

“There is nothing improbable in this account, and in some important respects the pursuer is corroborated. It is not suggested that during the nineteen years of their previous acquaintance there had been any improper relations between the pursuer and Petrie; and during the whole of that period she appears to have supported herself in a respectable way. One of the alleged reasons why Mr Petrie did not want to have the marriage published was that he would have to make a large payment to the Widows' Fund of the S.S.C. Society on marriage. As it appears from the evidence of other witnesses, and notably that of Mr Mason, that Petrie had very strong objections to the subscription which he was obliged to pay to the S.S.C. Widows' Fund, and frequently complained bitterly about it, it is more than likely that he did not wish to subject himself to liability for

a sum of about £116 to the fund. The fact that the pursuer wore a wedding ring is spoken to by two witnesses, Mrs Rattler and Mrs Forsyth, both of whom acted as charwomen in the house, and had very frequent opportunities of seeing the pursuer. Mrs Rattler was there from about March 1902 to March 1903, three days in the week; and Mrs Forsyth succeeded her in March 1903, and regularly acted as charwoman till April 1906. Their evidence, besides affording important corroboration of the pursuer's statement, throws considerable doubt on the reliability of the testimony of Macduff Robertson, who in his evidence says 'I never saw her wearing a wedding ring . . . I remember when I was living with her and Petrie of Miss Robertson asking me about the pursuer. She asked me repeatedly whether there was a ring, and accordingly I looked to see whether there was a ring. I have always looked.' Now Macduff Robertson was living with Miss Robertson from 1902 onwards, and therefore the period that he is speaking of is mainly that which is covered by the evidence of the two witnesses already referred to. There is at least a strong suspicion that Macduff Robertson had a bias against the pursuer, whereas the two charwomen had no reason whatever that I can see to assert what was not the fact.

"The only evidence which the defenders have adduced to throw doubt on the pursuer's story is that of Macduff Robertson and Petrie's clerk, Archibald Ramage. Robertson says that Petrie, the pursuer, and himself all moved into Dalrymple Crescent on the term day, driving there in a cab at five o'clock; and that they spent the evening getting the house ready, and all stayed in the house that night—the pursuer occupying the same room with Petrie. This does not square with the pursuer's evidence, which is to the effect that she lived in the house a few days alone, while Mr Petrie was staying at the Conservative Club. It does not, however, seem to me to be necessarily inconsistent, because it is admitted that the pursuer helped to pack the things in George Street; and it is quite possible that the three may have driven to the house in a cab with some remaining effects as described by Robertson. He was only a boy of sixteen at the time; and even if his recollection is accurate the interview which the pursuer speaks to may have taken place in the drawing-room while he was not present. The witness Ramage suggests that the pursuer had been cohabiting with Petrie in George Street before they took up house in Dalrymple Crescent, but the suggestion is based upon seeing her carrying some dishes in the house before Mr Petrie removed from it, which is quite consistent with her account that she did a good deal of the packing.

"The evidence of the pursuer, however, taking it to be credible, even with the corroboration that I have already referred to of her wearing a wedding ring, would not be sufficient according to the law of Scotland to establish a marriage *per verba*

*de presenti*. It is true that such a marriage may be constituted without the presence of witnesses and without proclamation of banns, and that nothing is required except the interchange of consent. But where one of the parties to the marriage is dead the law requires very clear corroboration of the evidence of the interested party. Such evidence, I think, there is in the present case. From the time that the parties took up house together in Dalrymple Crescent they cohabited as man and wife. All the letters which the pursuer received thereafter were addressed to her as Mrs Petrie, including a number that she got from Petrie himself. The postman, who is a valuable witness on this matter, says that he never remembers any letter having come addressed to the pursuer under the name of Cooper; and that as he knew that she and Petrie were the only occupants of the house his attention would certainly have been called to such a fact, as he would have assumed that there had been some mistake. The tradesmen with whom the pursuer dealt always treated her as Mr Petrie's wife. He walked about with her openly, and she frequently called for him at his office or came to meet him at the foot of the Mound when he left business. By far the strongest evidence, however, in the case is that of Petrie's intimate friends, of whom some sixteen or eighteen testify either that he introduced the pursuer to them as his wife, or that in answer to a question whether he was married to the pursuer he asserted that he was. The trustworthiness of their testimony is not open to doubt; and the only suggestion that was made for the defenders was that Petrie did not wish to shock their sense of propriety by stating the true relation on which he was living with the pursuer. In my opinion that suggestion has very little to commend it in the present case. The friends to whom Petrie admitted that he was married to the pursuer were of old standing, many of whom had a pretty shrewd notion that his relations with women had been very irregular, and who put the question to him whether he was married just because doubts had been entertained on the subject. Petrie was not in the habit of visiting his married friends, nor did they come to his house except on very rare occasions; and, so far as I can see, his friendship would not have been impaired with any of them though he had confessed that the lady with whom he was seen walking about the streets was not his wife.

"There is, however, important evidence led by the defenders which must not be overlooked. It appears that Petrie never informed his own relations that he was married to the pursuer; and indeed allowed them to believe that he was still a bachelor. These relations were, however, resident in Dundee, and although Petrie was on affectionate terms with his sister, she was in humble circumstances and only saw him occasionally. When she visited him in his office in George Street he never offered to take her home; and she had practically no

knowledge of his private life. Two witnesses from Tomintoul, to which place Petrie's mother belonged, and where he had some friends whom he visited once a year, depone that when asked whether he was married or not he answered that he had not got that length yet. It is not easy to explain this except on the footing that Petrie did not wish to discuss his private affairs with these persons. One or two Edinburgh friends say that they never knew that he was married, and assumed that he was not; but none of them, with one exception, that I shall afterwards refer to, ever asked him the question or had anything to go upon in forming their opinion except their knowledge of his previous relations with women. That exception is Mr Cargill, whose evidence I entirely accept; but the circumstances in which the conversation spoken to by him took place sufficiently account for Petrie's denying his marriage to him, as an admission would at once have exposed him to the claim at the instance of the S.S.C. Society, which he wished to avoid. The evidence of the two clerks, Ramage and Gibbs, is not of much importance, although it suggests that Mr Petrie was very cautious in allowing it to be known to anybody connected with the legal profession that he had entered into a marriage which would expose him to a claim at the instance of the S.S.C. Society. The note which he made on the circular issued by the Society in May 1908 is characteristically non-committal. Among other information requested was 'Name of wife and date of birth,' and on this Mr Petrie wrote 'Nothing to report.' His conversation with Mr Cargill is really much to the same effect; and I think it much more likely that if Petrie regarded the pursuer simply as his mistress he would have answered the question in the circular, and that which was put to him by Mr Cargill, in a much more direct way. Lastly, the evidence of Macduff Robertson, which at first sight seems formidable, is rather discounted by the readiness with which he accepted the view that the pursuer was Petrie's wife when he received a telegram which simply intimated that she claimed to be so. If any inference could be drawn from the telegram at all, it was that the sender of it did not regard the claim as valid; yet Macduff Robertson at once wrote to Mrs Petrie an affectionate letter, which I think he has entirely failed to explain consistently with the evidence which he gave in the box.

"I have accordingly come to the conclusion that the evidence for the defenders, taken as a whole, is not sufficient to displace the cumulative effect of the evidence led for the pursuer, and which practically comes to this, that he uniformly acknowledged the pursuer to be his wife, except where he had an obvious motive to be reticent or mi-leading on the subject. The pursuer's evidence, that she and Petrie entered into an irregular marriage before they commenced to cohabit together, is thus amply corroborated in the only way which it could be in the absence of witnesses

to the ceremony by the deliberate and repeated assurances of Petrie that she was his wife, and by his treating her as such until his death.

"In this view it is unnecessary to consider whether, apart from the interchange of consent spoken to by the pursuer, a marriage between her and Petrie is sufficiently evidenced by habit and repute. I shall only say that I think the evidence is on the whole stronger here than that which was adduced in the case of *Elder*, 8 S. 56, where a cohabitation, which was admittedly commenced without any ceremony of marriage, was held to have been converted into marriage by habit and repute, although consent to marriage was denied by the alleged husband, who throughout had represented himself as a bachelor in the lists annually made up with reference to a widow's claim for the officers of Excise, and had thus induced the belief amongst many of his acquaintances that he was not married. I shall accordingly grant decree in terms of the declaratory conclusions of the action, and *quoad* the accounting it had better stand over until the question of status is finally disposed of."

The defenders reclaimed to the First Division, who on 28th May 1910, after hearing counsel for the parties, appointed the cause to be argued by one counsel on each side before three Judges of the First and two Judges of the Second Division.

Argued for reclaimers—The evidence was insufficient to prove marriage either (1) *per verba de presenti*, or (2) by habit and repute. To constitute marriage the exchange of consent founded on must be unequivocally proved whether it were based on declaration *de presenti* or on cohabitation—*Ersk. Inst. i, 6, 6; Lourie v. Mercer*, May 28, 1840, 2 D. 953. (1) Where as here there was no written evidence of the interchange of consent, no evidence short of that required to establish a habit and repute marriage would be sufficient to prove it. It was not enough to prove the declaration as a fact, the intention with which it was made must also be clearly proved. Nor was it enough that the pursuer herself intended marriage; she must prove that the deceased also intended it. This she had failed to do, for his conduct showed that he intended concubinage not marriage. His previous habits of life and his relations with other women indicated a preference for a mistress; the alleged engagement to the pursuer in 1893 had not been proved; there was no stateable ground for concealment had marriage been intended, and the excuse of financial loss which the defender gave for postponing it had no foundation in fact; the important letters founded on by the pursuer had not been produced by her, and his own letters indicated an intention not to become engaged; his statements to various persons that the pursuer was his wife, even if proved, were clearly untrue, and obviously made for the sake of respectability. As to the evidence required to prove a *de presenti* marriage, reference was made

to *Aitchison v. Incorporation of Solicitors*, November 20, 1838, 1 D. 42; *Hamilton v. Hamilton*, November 22, 1839, 2 D. 89; *Lowrie (cit. supra)*; *Lockyer v. Sinclair*, March 3, 1846, 8 D. 582; *Fleming v. Corbet*, June 24, 1859, 21 D. 1034; *Stewart v. Robertson*, June 7, 1875, 2 R. (H.L.) 80, at p. 103, 12 S.L.R. 514; *Inrie v. Inrie*, November 26, 1891, 19 R. 185, 29 S.L.R. 161; *Dysart Peerage case* (1831), L.R., 6 A.C. 489, at p. 537. (2) The evidence was equally insufficient to establish a marriage by habit and repute, for where as here the repute was divided it would not be held sufficient to instruct marriage—*Hamilton (cit. supra)*; *Lapsley v. Grierson*, November 13, 1845, 8 D. 34; *Dysart Peerage case (cit. sup.)*, per Lord Watson at 538. Further, the pursuer was proved to have cohabited with Petrie prior to the ceremony founded on, and by coming to Edinburgh to live with him without first making him marry her she voluntarily divested herself of a much stronger position. As to the evidence required to prove a habit and repute marriage, reference was also made to *Cunninghams v. Cunninghams* (1814), 2 Dow's App. 482, at p. 513-14; *Elder v. M'Lean*, November 17, 1829, 8 S. 56, at p. 61; *Lowrie (cit. sup.)*; and *Campbell v. Campbell*, June 26, 1866, 4 Macph. 867, at p. 925, 2 S.L.R. 102.

Argued for respondent—The Lord Ordinary was right. This was eminently a case in which the Court would not lightly interfere with the decision of the Judge who had seen and heard the witnesses. The evidence was amply sufficient to establish marriage either by declaration *de presenti* or by habit and repute. As to the first, it was not necessary to prove the contract itself; it was sufficient if the facts of the case afforded satisfactory evidence of its having taken place—per Lord Cottenham in *Hoggan v. Craigie* (1839), M.L. & Rob. App. 942, at p. 965. Even if it were necessary to prove it, that had been done here. Six different witnesses testified to having been introduced by the deceased to the pursuer as his wife. His letters to her were addressed Mrs Petrie. The household bills were addressed to her as Mrs Petrie, and when she paid them by cheque she signed as Mrs Petrie. These were valuable items of evidence—per Lord Redesdale in *Cunninghams (cit. sup.)* at p. 513. A *de presenti* marriage might be as effectually proved by conduct and behaviour as by words—*Aitchison (cit. sup.)*; *M'Adam v. Walker* (1813), 1 Dow's App. 148; *Inglis v. Robertson* (1786), M. 12,689; *Leslie v. Leslie*, March 16, 1860, 22 D. 993, at p. 1017. The facts were in favour of marriage, not concubinage. The pursuer's position was quite as good as his, and very different from that of the other women with whom he had lived; the class of house set up was in marked contrast to the room in the office; the parties had known each other for many years; he had stayed with her family in England before the marriage, and her mother had been invited to visit them after the marriage; she assumed his name from the date of the alleged ceremony;

his letters to her were indicative of marriage, as was also his behaviour towards her in public, and his statements to his friends. *Esto* that he was averse to making the marriage public, that was easily explained by his anxiety to avoid trouble with his former mistresses, if not by his wish to escape contributions to the Widows' Fund of his Society. The statements founded on by the reclaimers were made outwith the pursuer's presence, and were made either by people who did not know the parties intimately or by biassed persons. Where a man had induced a woman to believe that he intended marriage, and she had believed him, he was precluded from denying that he had intended it—*Dysart Peerage Case (cit. sup.)*, at pp. 514 and 543; *Elder v. M'Lean (cit. sup.)*. Alternatively the facts proved were sufficient to establish marriage by habit and repute. The presumption in such cases was in favour of marriage—*Dickson on Evidence*, sec. 114 (6); *De Thoren v. Wall*, March 16, 1876, 3 R. (H.L.) 28, at p. 30; *Piers v. Piers*, 1849, 2 H.L.C. 331; *Campbell v. Campbell*, July 16, 1867, 5 Macph. (H.L.) 115, 4 S.L.R. 214. The repute to be looked to was that among those who knew the parties, not that among outsiders—*Dysart Peerage Case (cit. sup.)*, at p. 549; *Thomas v. Gordon*, July 8, 1829, 7 S. 872. The repute here could not be said to be "divided," for the criterion was the repute *inter familiares*—*Fraser, H. & W. 406*; *Walton, H. & W. 21*. The deceased's relations were really in the position of outsiders, for he seldom saw them. It was not proved that the cohabitation was illicit in its origin. Even if it were so, that was not fatal, provided the proof was, as it was here, sufficient to show that marriage had supervened—*Aitchison (cit. sup.)*; *Elder (cit. sup.)*; *Cunninghams (cit. sup.)*; and *Campbell v. Campbell*, June 26, 1866, 4 Macph. 867, at pp. 926-7, 2 S.L.R. 102.

At advising—

LORD JOHNSTON—This case is admittedly a narrow one. But on re-perusal of the evidence I have come to the conclusion, and ultimately without hesitation, that the Lord Ordinary's judgment ought to be affirmed.

The pursuer, formerly Miss Henrietta Cooper, was born in 1863, and in 1882, when she was nineteen years of age, she made the acquaintance of the late Mr Alexander Gordon Petrie, S.S.C., while she was temporarily residing in Edinburgh as companion to an invalid lady. Mr Petrie, born in 1847, was then thirty-five. At the date of the marriage which the pursuer alleges, viz., 1901, the pursuer was thirty-eight and Mr Petrie fifty-four. Mr Petrie died in February 1909, after pursuer and he had continuously lived together for about eight years.

Admittedly no regular marriage ever took place between Miss Cooper and Mr Petrie. The pursuer in her present action relies upon an alleged interchange of matrimonial consent, proof of which rests solely on her own evidence, supported by prior

circumstances and subsequent habit and repute.

Proof of marriage may rest entirely on habit and repute. In such cases the evidence of habit and repute must be of such a nature that from it may be inferred an exchange of matrimonial consent. For it is on that inference, to be drawn from the evidence of habit and repute, that the marriage in law depends. In such cases to support the inference the habit and repute require undoubtedly to be substantially unvarying and consistent. To say the least the evidence in favour of it must be so preponderating as to leave no substantial doubt. Did the pursuer's case here depend solely on habit and repute she must fail, as the evidence of habit and repute is not consistent. But I do not think that the case is one properly of that class. It is one where the actual and definite interchange of consent which is relied upon as making marriage is spoken to by the pursuer, though by the pursuer alone, and the question at issue depends, first, upon whether what is spoken to by her admits of being interpreted as an interchange of matrimonial consent; second, upon whether the interchange was with the intent to make marriage; and third, upon whether the pursuer's evidence of what she alleges to have occurred is sufficiently corroborated. In considering these questions, and particularly the third, I think that not only prior circumstances but subsequent actings, and particularly facts bearing upon habit and repute, even though these facts do not bear consistently all one way, are important factors in arriving at a judgment.

Much, I think, if not all the difficulty in the case, lies in the late Mr Petrie's habit of duplicity. As an instance or example of what I mean, I may point to his treatment of his relatives. He was of humble origin, and such relatives as he had appear to have remained in that position, and to have lived on in a small way some couple of miles from Dundee on the Dighty Burn, in a locality where farming and bleaching are intermingled. One brother farmed and another worked as a superior employee in one of the neighbouring bleachworks. Mr Petrie seems to have remained on good terms with them, to have visited them, particularly when his mother was alive—she died in 1904—at regular intervals, and to have made them occasional presents and to have received the same from them, but at the same time to have done nothing for them at all commensurate with his means and the absence of other ostensible demands upon him. Further, he was not in the habit of having them about him in Edinburgh. If they saw him there it was only when over for the day, and they were in no way admitted to the arcana of his life and establishment. Now to one friend he would speak in kindly terms of his family and represent his relations with them as most friendly, while to another friend he would hold quite different language, inconsistent both with his actings and with his representations to others.

In each case he was, I think, posing. At Tomintoul, where they were known, it suited him to recognise his relations. In Edinburgh it suited him to ignore them and even to suppress their existence.

This habit of duplicity, or of posing differently to different people, and even to some degree of living a sort of double life, affects, I think, all Mr Petrie's own statements bearing upon his relations with Miss Cooper, and in the light of that fact all such evidence must be read.

The first question then is, Does what is spoken to by the pursuer admit of being interpreted as an exchange of matrimonial consent? It is all contained in the print, to which I refer. Now, the unexplained absence of the alleged letter of invitation to come to Edinburgh with a view to marrying and setting up house cannot be ignored, and further, the pursuer's statement undoubtedly wants point and definiteness, and there are visible signs of counsel's difficulty in extracting her tale from her. Yet I am not satisfied that the latter consideration is altogether hostile to her credibility. It certainly negatives any deliberate attempt at tutoring. But the indefiniteness is, I think, cured by the last passage—"He said to make it legal, and by way of recording it, he would record it in his will, and he repeated the opening words, just a few words, 'I leave to my wife, Annette Cooper,' and I interrupted him, because I did not understand that my maiden name should appear as a married woman, and he said that was the usual way." There is a touch of genuineness in this, which I think forbids the idea of either invention or suggestion, when one recollects that Miss Cooper was an English lady who was naturally not acquainted with the old Scottish fashion of designing a married woman in a formal document by her maiden name. And it satisfies me, that notwithstanding the general indefiniteness of pursuer's account of what actually occurred, there passed between the two, if pursuer is to be believed, an exchange of matrimonial consent. It is a fact contrary to the pursuer's case that no such contemplated will is extant. I am not satisfied that one ever existed. Certainly Mr Ramage, Mr Petrie's clerk, who, if he held the confidential relation to Mr Petrie which his position would warrant one to expect, never saw it, never heard of it, and did not know where it was kept. Whether it ever existed or not, no one can explain its absence. But even Mr Ramage does not hint at its destruction by the pursuer herself. The narrative of the search made by pursuer and Mr Ramage after Mr Petrie's death at first sight raises a grave suspicion of the pursuer, and certainly gives one a very poor opinion of Mr Ramage. But, after all, though lawyers have done strange things in the matter of their own wills, and even neglected to make them, the absent will was not likely to be found in the receptacles searched and among the mass of their miscellaneous contents. But the absence of a will, from whatever cause, does not shake

my belief in the exchange of matrimonial consent to which the pursuer speaks, though it may colour the intent of that consent on Mr Petrie's part. At the same time I recognise that I could not accept the pursuer's unsupported evidence even if I believed it without qualification—my belief in her statement depends on her statement and the corroborating circumstances both before and after the event spoken to.

In the next place, was this exchange of consent made with the intent to make marriage? I think that it is impossible to believe that it was not so on the part of the lady. Look at the history of her relations with Mr Petrie. They first met in 1882, and a sufficient attachment sprang up to lead to a certain amount of correspondence from 1882 to 1893, though they did not apparently meet. In 1893 the pursuer on Mr Petrie's solicitation visited Edinburgh for a fortnight, and in 1894 Mr Petrie visited her temporary home near Nottingham in the avowed guise of an honourable suitor, and as such was accepted by her relatives. She was again in Edinburgh in 1895, for a couple of months, and, as she says, Mr Petrie staved off marriage on an averment, false as it seems, of financial losses, the reality being entanglement with one of his several mistresses. In 1897 Miss Cooper's mother married again, and being thus deprived of her home, Miss Cooper came to Edinburgh, qualified as a nurse, and thereafter maintained herself, in England I understand, and certainly not in Edinburgh, from 1897 to 1901 by nursing. In 1901 she came back, as she says, on invitation, to assist in finding a house with a view to marriage. The house was found and taken, and the cohabitation begun. During this long courtship of nearly twenty years there is not a suggestion of any impropriety of conduct on the part of pursuer, and in Mr Petrie's letters there is not a hint of illicit relations, present or prospective. The contrary is markedly the case. The pursuer was no doubt thrown on her own resources, she was getting on in life, and I can easily credit that she was anxious for marriage as a means of establishing herself. She was not ignorant of Mr Petrie's previous relations with at least one other woman, though there is nothing to suggest that she was aware of the general tenor of his life in that respect. And having regard to her previous history, and to such knowledge as she had of his, it is in the highest degree incredible that the pursuer in May 1901, after twenty years of honourable courtship, knowingly entered into a state, not of marriage but of concubinage, with Mr Petrie—merely accepted the position of another mistress, to be cast off at will as the previous one, of whose history she was aware—and did not believe that he took her as his wife as she did him as her husband. Though there are no letters produced containing perfectly definite avowals of their relationship, and though the absence of certain items of evidence, and particularly of the letter asking pursuer to come to Edinburgh in 1901 with a view to marriage, must be viewed with

suspicion, the circumstances of the previous history of the lady, and the whole tenor of the correspondence between 1882 and 1901, so far as produced, supports the view which I entertain that not only did there pass as alleged between the pursuer and Mr Petrie an exchange of matrimonial consent, but that that consent was genuine and intended and understood to make *verum matrimonium*, if not in the mind of both parties, certainly in that of the lady. It is of course a circumstance against her case that she did not insist upon a regular marriage. I think it is clear that she wished it, and tried to induce Mr Petrie to arrange for it and failed. But this does not necessarily lead me to the conclusion that she ultimately consented, not merely to an irregular marriage, but to become his mistress.

But to make reasonably certain of Mr Petrie's attitude is much more difficult. He had lived a dissolute life for a long time, and had twice at least lived for years together with a kept mistress in the background. Such correspondence as is produced indicates that he had long hovered between continuing and giving up such a life. By 1901 I think he had awakened to the fact that advancing years and probably impaired health bade him settle down both more respectably and more comfortably. But I am persuaded that even when the circumstance of his having to quit his former office and residence seemed to determine the question for him in favour of a more reputable close to his existence, he still made the plunge with hesitation, and it may quite well be—we can never know—that he consciously or subconsciously placed himself in the position of taking the benefits of the married state while keeping a door of escape open. In fact it is quite possible that he practised a deceit upon Miss Cooper—that is, induced her to believe that she became his wife, while acting himself with a mental reservation, and purposely left her without any but her own evidence of what had passed.

But even if such be the inference from a general view of Mr Petrie's conduct and character, or from the absence of the promised will, in the first place it is not a certain inference; it is at best a rather pregnant suspicion. In the second place it does not square with the way in which the couple lived down to his death eight years after, and in particular with the terms on which they were found to be in his last illness. And in the third place, even if it were an irresistible inference, it would not avail to avoid marriage with a woman who *bona fide* believed that she was entering into marriage and had reason, as I think Miss Cooper had from Mr Petrie, for that belief. The defender is, I think, faced with the dilemma that either there was the exchange of matrimonial consent, with true matrimonial intent on both sides, or that there was that consent with that intent on the part of Miss Cooper, with no reason to doubt that it was seriously and honestly accepted and returned on the part of Mr Petrie, but that by deception



and secret reservation a fraud was practised by him upon the lady. This is, in truth, to take refuge in seduction by fraud. But fortunately it does not avail in law to avoid marriage or relegate the pursuer to a mere action of damages—Fraser, i, 436, and cases there cited.

Lastly, in conjunction with the proof of the prior relations of the pursuer and Mr Petrie, is there sufficient evidence to support the pursuer's testimony as to what occurred on the occasion of the alleged interchange of consent. I think that there is; and here there has to be kept in mind what I commenced by adverting to, viz., Mr Petrie's habit of posing in different characters as suited him for the time. I have already dealt with the prior relations of the parties. As regards their subsequent conduct, to his intimate friends, mostly a circle interested in athletics, and who were neither his relations nor members of the legal profession, he admitted his marriage without apparent hesitation, and even ultroneously as accounting for an unmistakable change in his mode of life; and no one of these friends was led by his manner or by any confidential hint to interpret his admissions as a mere blind to satisfy the pursuer. They were not always made in her presence. I do not enter in any detail upon that very marked change in his mode of life. But the very best proof of the relations in which the couple lived *inter se* is, as I have already said, to be found in Dr Milne's account of Mr Petrie's last illness and death. To his relations whom he kept at a distance and to his friends in Tomintoul, among whom he had long visited as the gay bachelor and still fancied posing as such, he continued to assert, not with reference to the lady in question but generally, that he was not married, was too old to marry, did not intend ever to marry, &c. To members of his own profession and to his clerks, and particularly to the firm of Ronald & Ritchie, who are clerks and treasurers to the S.S.C. Widows' Fund, he spoke in terms which involved the inference that he was continuing a course of illicit connection, and, in the case of Mr Cargill of Messrs Ronald & Ritchie, imported a direct denial that he was married to Miss Cooper with whom he was living. At the same time his reply to the S.S.C. Widows' Fund circular of 1908 is at best strangely ambiguous.

But it suited him to keep his relations and Tomintoul friends in the dark; and it suited him to withhold any admission to his professional brethren and to their Widows' Fund.

It is impossible to surmise with confidence his motive. The ostensible pretext which he originally made to Miss Cooper for not avowing their marriage, of avoiding necessary payments to the Widows' Fund, is almost ridiculous when the sums really at stake are considered. Yet it may have actuated a mind constituted as his. Or it may have been that he was still acting on the footing already suggested of keeping open the back door of escape, which an admission indirect to the members of the

S.S.C. Society, or direct to the manager of their Widows' Fund, would have closed absolutely.

I cannot conclude without saying that I distrust the evidence of Ramage, Mr Petrie's clerk, and of Robertson, his natural son, and that though there are points of suspicion—for instance, in the history of the search after Mr Petrie's death for his will, and the treatment of his papers—these points do not displace my view of the general deduction to be made from the evidence as a whole.

There is to my mind ample corroboration of the pursuer's account of what passed in May 1901 in the prior relations and subsequent actions of the parties. There is no single incident proved, as passing in her presence, to lead her to suspect the reality of what took place in May 1901. Mr Petrie, in my opinion, led her to believe that he made her then his wife, and to the day of his death he treated her as his wife, and at no point more markedly than on his death-bed, and in nothing that is proved gave her any reason to believe that he had practiced the deceit upon her, which I admit is possible. Whether he entered into marriage with a mental reservation or not—whether he retained that mental reservation to the end—no one can tell with any certainty. But if he did, it is in law immaterial. The result is still to leave the defender in the dilemma which I have already stated, either of an exchange of consent making marriage, or of the practice of a deceit to obtain consent, which in law precludes the denial of marriage. For these reasons I think that the interlocutor of the Lord Ordinary should be adhered to.

LORD DUNDAS—I regret that I cannot agree with the Lord Ordinary's conclusion in this case, as I understand the majority of your Lordships are prepared to do; and I have therefore thought it right to state fully the reasons which have led me to an opposite result.

The pursuer claims to have been the lawful wife of the late Mr Petrie, and to be now his widow. Her counsel put the case, as he was quite entitled to do, upon two alternative grounds, viz., (a) marriage constituted *per verba de presenti* on or about 31st May 1901, or (b) marriage by habit and repute,—a true matrimonial consent evidenced by cohabitation and the actings of the parties, and by the general repute in which they were held from 1901 down to Mr Petrie's death in February 1909.

I notice here, but only to dismiss the topic finally, that at the second hearing of the case the pursuer's counsel presented, rather half-heartedly, a third alternative argument—intermediate between the two above indicated—based upon alleged mutual acknowledgments by the parties in the presence of other persons, amounting to the constitution of a marriage there and then. This argument is, in my opinion, quite untenable. It seems to me that no one of the episodes relied upon, which I shall subsequently deal with, can be reason-

ably so regarded. Each of them is no doubt entitled to its own proper weight as an item of evidence when the proof is looked at as a whole, tending to support one or other of the pursuer's two main alternative arguments, as corroborating the theory of a marriage otherwise previously constituted; but I cannot think that any one of the episodes could by itself be held to constitute a marriage. The Court must, I apprehend, look to the whole facts and circumstances, and form its judgment upon these by way of inference from their combined effect.

The case so far as rested upon habit and repute must, I think, fail. There is certainly evidence to support it; but again there is evidence, perhaps not quite so strong but not very much weaker, to refute it. The proof is by no means uniform or undivided; and it does not, in my judgment, come up to the standard required for success in cases of this kind. The standard is, I think, correctly expressed by Lord Fullerton in *Hamilton v. Hamilton* (1839, 2 D. 89). His Lordship said (p. 120) that "there can be no room in such a case for a divided evidence of habite and repute, for a belief merely limited to some persons, while others hold an opposite belief; and still less can effect be given to the evidence of circumstances, however numerous, consistent with the existence of marriage, if other circumstances are proved which, according to the ordinary course of conduct, are inconsistent with that supposition. Every party who founds exclusively upon cohabitation and habite and repute must make out a case consistent with the supposition of marriage and with no other. The *onus probandi* clearly lies upon that party; and the failure to establish a general and consistent belief of the parties being married persons must be fatal; because it is, in other words, a failure to establish in the treatment of the parties by each other the concurrence of all those circumstances by which the conduct of married parties is usually distinguished." Lord Mackenzie in the same case observed (p. 116) that "a divided habite and repute" is not what the law requires. "I do not mean that if the great body of those witnesses who speak to habite and repute shall give concurrent testimony on one side, and merely a single witness shall be opposed to this, that this must necessarily defeat the proof of marriage. But where there is a material and a considerable amount of evidence that the parties were held and reputed not to be married, I think it is fatal to the establishment of marriage on this ground."

It will be convenient at this stage to summarise briefly what seem to me to be the most salient points disclosed by the proof arising for consideration under either aspect of the pursuer's case.

It is to be observed, in the first place, that whether the pursuer and Mr Petrie were married or not, the former is quite a different kind of person from women such as Elizabeth Robertson or Rosina Hughes, with whom Mr Petrie had successively

cohabited for periods of years. She was fitted by station and otherwise to be his wife; he evidently had a strong affection for her, and treated her with proper respect, and he went about with her quite openly in the streets and elsewhere. Moreover, there is not, I think, any reliable evidence of any impropriety whatever between the two prior to the commencement of their cohabitation in 4 Dalrymple Crescent. Then the pursuer has proved that Mr Petrie introduced her as his wife to three of his friends; but the significance of these introductions is to my mind greatly lessened when one considers the circumstances under which they were made, and the painful discourtesy Mr Petrie would have had to inflict upon the pursuer if he had introduced her otherwise than his wife. It is true that, so far as the proof shows, Mr Petrie never disowned the pursuer as his wife in her presence, but I do not think that fact by itself carries her case very far, and it appears that, in the case at least of Mr Calver afterwards referred to, Mr Petrie made no introduction at all, though a suitable occasion presented itself. Next, it is clearly established that on various occasions during the period in question Mr Petrie stated or admitted to quite a number of his friends that he was married. The observation was not always made with direct reference to the lady who was keeping his house for him (the pursuer), but there is no suggestion that there was any other woman to whom it could have applied. Of less importance are the facts that to local tradesmen and others the pursuer was always "Mrs Petrie"; that Mr Petrie after 1901 addressed letters to her (some of which are produced) in that way; that according to the postman's evidence other people did so also; that the three charwomen always thought she was Petrie's wife, and deponed (therein contradicting Macduff Robertson) to the pursuer wearing a ring, for all this might equally fit either hypothesis upon the crucial question of fact—marriage or no marriage. Still if the facts now summarised stood alone and uncontroverted they might reasonably have been held sufficient evidence of marriage by habit and repute. This, however, as already indicated, is not the case. I cannot help thinking that the Lord Ordinary has failed to realise the volume and the cogency of the counter evidence for the defenders. In the first place, it is proved that Mr Petrie expressly denied that he was married to the pursuer or anyone else,—to his own mother in presence of his sister; to Mr and Mrs Band, also in his sister's hearing; to the witness Hamilton at Tomintoul; and (at least by implication) to the other Tomintoul witness, Robertson. Then several of Mr Petrie's Edinburgh friends who were aware of his previous liaisons, and also of the fact that the pursuer was keeping house for him, deponed to their absolute disbelief in his being married to her. Thus Mr Gordon Mason, S.S.C., an intimate friend and professional colleague, says—"I am perfectly satisfied that if there had been a marriage Petrie would have

told me . . . he certainly never referred to a Mrs Petrie or his wife, and from the conversations I had with him I judged that the lady who was in the house was either his housekeeper or another lady friend, or both. . . . (Q) Did you ever ask him if he were married?—(A) I never asked him the question directly.” Mr Mason (and he is not alone in this) also speaks to Mr Petrie's frequent expressions of complaint that he had to pay an annual contribution to the Widows' Fund of the S.S.C. Society “on the ground that he was paying for a thing that never would do him any good.” It is fair, however, to the pursuer to refer to Mr Mason's candid statement in answer to the Lord Ordinary—“I certainly would not expect, from what I saw of Mr Gordon Petrie, that if I had asked if he were married and he had said that he was, he would be deliberately desirous of deceiving me.” Mr Calver, S.S.C., also speaks to Petrie's statements about the Widows' Fund; and his evidence as to an occasion when he was in the house, 4 Dalrymple Crescent, is important. “I saw a lady in the house, but I was not introduced. (Q) Was any explanation given as to who she was.—(A) I knew who she was. My belief was that he had somebody living with him who was not his wife. (*By the Court*) I thought his relations with the pursuer were the same as he had had with previous women. . . . I never asked him if he was married or was not married, and I never asked anybody else if he was married. I assumed, from what I knew of his past life, that this was a continuation on the same lines.” I do not attach very great importance to Mr Petrie's words “nothing to report” which he wrote on the schedule sent him by Mr Ritchie, the collector of the S.S.C. Widows' Fund, as an answer to the request for information whether or not he was married; but the incident should not be left out of view. In the same way one may advert to the fact that Mr Ritchie's partner Mr Cargill, S.S.C., following up this matter of the schedule, asked Mr Petrie directly whether or not he was married to the pursuer and received answer in the negative. The evidence of the boy (as he was in 1901) Macduff Robertson, so far as it goes, is hostile to the pursuer's case; but her counsel insisted (not to my mind very convincingly) that it contained some inconsistencies tending to lessen its importance. I have gone over these points in the counter-proof in some detail, because the Lord Ordinary has said little or nothing about them. But there remains a witness to whose evidence I cannot help thinking the Lord Ordinary has not given sufficient consideration, for he dismisses it with the observation that it “is not of much importance.” This witness is Archibald Ramage, who was Mr Petrie's clerk, and seems to have possessed a considerable measure (though he perhaps exaggerates its extent) of his master's confidence both in his professional and personal affairs. He knew all about Mr Petrie's relations with Elizabeth Robertson and Rosina Hughes and with other women

also, *e.g.*, he was concerned in a settlement that took place with regard to a bastard child of which Mr Petrie was said to be the father. I confess that in reading Ramage's evidence I cannot avoid a feeling that, for some reason or other, he has a bias against the pursuer; and there are portions of it, especially relating to what took place after Mr Petrie's death, which are not creditable to him and give one an uncomfortable impression. But the Lord Ordinary does not say that he regarded Ramage as in any way unworthy of belief, and I see no sufficient reason for supposing that his evidence is deliberately untrue. Now it seems to me almost incredible that if Mr Petrie had married the pursuer he should not have told Ramage of the fact, and informed him that his relations with her were of quite a different character from those which he had had with other women. Yet Ramage distinctly swears that Mr Petrie never gave him any reason to suppose that he was married to the pursuer; and indeed he goes much further than this negative position, for he deposes—“When Mr Petrie used to speak to me about the pursuer he referred to her as his housekeeper. I am quite confident of that. There was one occasion when I went to Dalrymple Crescent in, I think, 1903 in connection with some plants. Mr Petrie said that ‘Miss Cooper’ would take them in. That is the only occasion upon which I remember him using the expression ‘Miss Cooper.’ I have seen letters addressed by Mr Petrie to ‘Miss Cooper.’ I cannot say it was the pursuer, but I was always under the impression it was his housekeeper.” Again Ramage says this—“(Q) When Mr Petrie was sending out a message to Dalrymple Crescent, for instance, if he had forgotten his keys, how did he refer to the person who was to be seen?—(A) He used to tell the lad to ring until the woman came; ‘keep ringing; they may be round at the back.’” The “lad” referred to by Ramage was the office boy Gibbs, and he confirms Ramage's evidence. He states that Mr Petrie occasionally sent him out to Dalrymple Crescent when he had forgotten his keys or in regard to any message, and said, “Keep ringing at the bell, she may be round at the back;” and in cross-examination this passage occurs—“(Q) Did he not simply tell you to take that parcel out to Dalrymple Crescent?—(A) No; he always said, ‘Take it out to Dalrymple Crescent and give it to her,’ or ‘Give it to the woman.’ He once said ‘the woman.’” Again, if the parties were truly married one would have expected that Macduff Robertson, who lived in the house with them, would be informed of the fact; but he was left, to his discomfiture, entirely in the dark as to the nature of their relationship. Lastly, it may be noted that the pursuer did not tell her mother of her marriage until a considerable time after it had (as she alleges) taken place—a fact which the mother accounts for by stating that “she was a reserved girl.”

Upon a careful and repeated study of the whole of the evidence, it seems

to me, as I have already said, that it falls far short of the standard which the law requires of a pursuer who seeks to prove marriage by habit and repute; and therefore that the present pursuer's case, in this aspect of it, must fail. I have only to add that I do not think she can derive any aid from the case of *Elder* (1829, 8 S. 56), to which the Lord Ordinary refers. A cardinal feature of that case,—as appears from the report and from the opinions of all the learned Judges who decided it,—which differentiates it materially from the case now before us,—was that there was absolute proof of a “ceremony” of some sort having taken place between the parties,—viz., a “bedding,” of the kind common in our reported decisions (e.g. the *Murthly* case, 1874, 1 R. 532, *revd.* 1875, 2 R. (H.L.) 80, L.R., 2 Sc. and Div. App. 494). Lord Pitmilly put, I think, the essence of *Elder's* case very shortly and clearly when he said—“We cannot lay out of view the ceremony of bedding. This may be viewed in two lights—(1) Whether it was not a declaration of present consent; and (2) whether it was not the origin of habit and repute. I doubt if it amounts to a declaration, though it comes very near it . . . but the commissaries do not take that view, they only hold it as the date from which habit and repute commences, and from that period he cannot be allowed to say that he cohabited with her as a mistress. In that view I think the commissaries are correct.”

I turn now to the pursuer's other ground of action, viz., proof of marriage *per verba de presenti*. I think this aspect of the case presents a narrower and more doubtful issue than that with which I have dealt; but upon the best consideration that I am able to give to the matter, it seems to me that the pursuer cannot succeed. She is the sole witness to the alleged declaration of marriage between the parties. No witness is said to have been present; no writing is adduced to prove it. In these circumstances the case falls directly within Lord Watson's words in the *Dysart Peerage* case (L.R., 1881, 6 A.C. 489, at p. 538), which I therefore quote—“The parties to a declarator of marriage *per verba de presenti* having now been, by the enactments of 37 and 38 Vict. cap. 64, made competent witnesses, I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect. But it will always be necessary in a case of that kind to test very strictly the statements given in evidence by a woman interested in establishing that she held and holds the honourable position of a wife, and not the degrading position of a mistress. . . .” Lord Blackburn in the same case said (p. 515) that the pursuer “is an admissible witness, though one with a very strong bias, and whose evidence therefore must be received with proper caution”; and added that in such

cases as this “evidence may be given of what is commonly called the *res geste*.” Two observations may, I think, be fairly made—both tending in favour of the pursuer. In the first place, the law does not, I apprehend, exact in such a case as we are now considering the same uniform or undivided testimony as is necessary when it is sought to establish marriage by habit and repute; the evidence *hinc inde* may be weighed and balanced. Subject to what I have just said, there is, I take it, nothing mysterious or exceptional in the proving of an alleged consensual contract of marriage; the question must always be whether or not, *totâ re perspectâ*, the pursuer has proved her case by proper and sufficient evidence. In the second place, if the pursuer has proved that words were actually exchanged between the parties which she believed, and was reasonably entitled to believe, imported a mutual *de presenti* consent to marry, marriage was duly constituted then and there, although the man may have had mental reservations, or even an intention deliberately to deceive her. (*Dysart Peerage* case (*sup. cit.*), Lord Watson at p. 542, quoting Lord Stowell in the *Dalrymple* cause; *Robertson v. Steuart*, 1 R., *per* Lord Deas at p. 639; *Leslie*, 1860, 22 D. *per* Lord Deas at p. 1014 *et passim*.) Still it is necessary to success in such a case as this that the pursuer's “direct and uncontradicted testimony”—she being a witness “with a very strong bias, and whose evidence therefore must be received with proper caution”—be “corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case,” and be tested very strictly. Viewing the whole evidence in the light of these propositions, I am constrained to hold that this pursuer has failed to prove her case. I need not resume the substance of the proof. The Lord Ordinary seems to accept the pursuer as a witness of credit; and it is not absolutely necessary to regard her otherwise; for the question is not entirely one of credibility; but largely of the sufficiency (or the reverse) of evidence and legal proof. The *onus* on the pursuer in a case like this is a very heavy one; and rightly so, from considerations of public policy. If this pursuer's story is true, she seems to have acted with astonishing recklessness and disregard of her own interests. She must hold herself largely to blame for the absence of corroborative evidence. She came to Edinburgh in April 1901 because Mr Petrie sent for her to come to take a house “with the view to marriage,” as she states in her evidence,—though not, by the way, in her record (Cond. 5). The pursuer was at that time about thirty-eight years of age, with a considerable knowledge of life, and she had had experience for a period of about nineteen years of Mr Petrie's dilatory and somewhat elusive attitude in regard to taking a plunge into matrimony. Yet her evidence is—“(Q) In 1901, when you got an invitation from Mr Petrie to come down, what was the purpose for which he invited you to come?—(A) To take a

house and to marry and to settle. He put that in writing, but I destroyed the letter at the time when I got it. (Q) I thought you said that he never referred to anything like marriage in his letters?—(A) In that one he did. He was obliged to say something to induce me to come." It is amazing that the pursuer should have destroyed this vitally important letter, containing apparently a definite (and the only) written reference to marriage, though she preserved some of Mr Petrie's other letters which are produced, and are of little (if any) moment, unless from a negative point of view. I confess to a grave doubt in my own mind whether the alleged letter ever existed. However this may be, the pursuer, having come to Edinburgh on 24th April, took her part in the acquisition and outfitting of the house in Dalrymple Crescent, and weeks elapsed during which so far as appears there was no talk between her and Petrie as to their approaching marriage, or how, when, and where it should be celebrated. It was not, according to her own account, until 31st May, when they were actually to enter into residence together in the new house, that an "interview took place between him and me in the drawing-room. On that occasion he spoke of marriage, and I said that I could not remain in the house unless we were married." I find no explanation of the pursuer's delay in bringing matters to a point, and it seems the more strange, looking to the fact that the arrangements at that date in the house, of which she was doubtless aware, afforded only two beds, one of which was presumably to be occupied by Macduff Robertson. The pursuer's account of what passed at the "interview" is far from clear or satisfactory, and I find it very difficult to understand why she did not insist upon having some writing, however simple, in proof of her marriage; Mr Petrie would surely have trusted her not to make rash or imprudent use of it. No writing, however, was obtained, and on the night of 31st May, according to the pursuer's evidence, the cohabitation commenced which continued down to Petrie's death. Now in these circumstances I think some very distinct corroboration is obviously necessary to support the pursuer's account of her marriage *per verba de presenti*, and that appears to me to be wanting. A very large part of her case is, as already observed, really colourless, for the evidence would suit equally well either hypothesis as to the true character of the cohabitation. Even her introduction to the three friends, and Petrie's repeated statements that he was married, seemed to me to be far from conclusive corroboration. One must to some extent consider a case of this sort with regard to the ordinary facts of life. I gather from the evidence that Mr Petrie was upon the whole an easy-going (though selfish) man, and I think it might not unfairly be inferred that he shrank from introducing the pursuer as a mere mistress, and was willing (at the expense of truth) that the lady for whom he had so much affection,

after his fashion, should not needlessly be regarded in that light among his friends in Edinburgh. Besides, one has to remember the mass of counter evidence and counter considerations already adverted to. It is necessary to "test very strictly" the pursuer's statements about the crucial conversation with Mr Petrie on 31st May 1901. I do not think they will stand such a test. Her evidence is not, in my judgment, "supported by the facts and circumstances of the case," nor sufficiently corroborated by such "indirect testimony of others" as can be found in the proof. The case may be a hard one for the pursuer, but it must not be decided on grounds of sympathy or pity, nor upon any basis of conjecture or mere probability, but in accordance with law and with the rules of evidence. I cannot help thinking that the judgment your Lordships are to pronounce will establish a marriage upon evidence weaker in kind as well as in degree than has ever previously been accepted as sufficient. On the whole matter I am of opinion that the Lord Ordinary's interlocutor ought to be recalled, and decree of absolutor pronounced.

LORD MACKENZIE—The question here is whether there is proof of marriage by *de presenti* consent. I do not think the facts raise any other case.

The proof consists of the oath of the pursuer, corroborated by facts and circumstances. That such evidence is sufficient, if believed, cannot be doubted after the opinion of Lord Watson in the *Dysart Peerage* case (1881, 6 A.C., at p. 538)—"I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect." It is no doubt necessary to test very strictly the statements given in evidence by the woman. Marriage is, however, a consensual contract, and may be proved as such. "It is only if a view of the whole circumstances, taken in connection with each other, fails to prove the exchange of matrimonial consent, that it is possible to hold the proof incomplete." These are the words of Lord Corehouse in the case of *Aitchison* (1 D. 54), taken from a passage where it is also pointed out—"Besides the inference which may be justly deducible from each fact taken by itself, there is the inference, of incomparably greater weight, which may be justly deducible and inevitable from the combination of the circumstances viewed in connection with each other."

The salient features of the case are these: Mr Petrie, who from small beginnings had established himself in a good business as an S.S.C. in Edinburgh, and had saved some £7000, was in the year 1901 fifty-one years of age. The pursuer, an Englishwoman, had been on terms of friendship with Mr Petrie for about nineteen years. She was a trained nurse, thirty-eight years of age, supporting herself in London. She

had been in Edinburgh as companion to a lady in the year 1882, when Petrie first made her acquaintance. From that time on they had corresponded with each other. She visited Edinburgh again in 1893, and in 1894 he visited her when she was living with her mother near Nottingham. She says they were engaged to be married so far back as the year 1894. She was the daughter of a millowner at Nottingham, and in point of social position there was no disparity between herself and Mr Petrie. Throughout the whole period of their acquaintance there is nothing to suggest anything approaching impropriety on the part of the pursuer. The letters from Mr Petrie to her, which are produced, support the view that his feelings towards her were of an affectionate character. He speaks of being very lonely, says he should have married years ago, and laments his dull bachelor home. In another letter, after speaking of her coming to Edinburgh being "like a ray of sunshine on our prosaic kind of life," he says that his married friends are satisfied that it is a case. I interpret this as meaning that they thought he and the pursuer were an engaged couple.

The frame of mind disclosed in these letters is one not difficult to understand. Petrie was a man liked by his friends, of whom he seems to have had a number of old standing, made in days when he was a well-known football player. It was in their society that he sought his relaxation in the club of which he was a member, and, especially on the occasion of football matches, in hotels at the railway stations. Of ladies' society there is not much trace throughout his history. This may be accounted for by the fact that his way of life for many years was calculated to make him disinclined for this. He lived in rooms at the back of his office in George Street, looked after by a servant, with whom he was on terms of immoral intimacy for a number of years. He had done the same with her predecessor, and acknowledged the paternity of one of her illegitimate children. He had broken first with the one, then with the other, on account of their habits.

His own relations—mother, brother, and sister—lived in Dundee, and though the correspondence with his sister is in affectionate terms, it is evident that latterly they have had little in common. She and the brother were living in a small cottage in Dundee, where he was earning a daily wage in a bleachwork.

In the spring of 1901, the pursuer says, Petrie asked her to come to Edinburgh, take a house, marry and settle. Looking to the whole circumstances I do not think there is any antecedent improbability in his evincing a desire at his time of life to settle down. So far as one can judge from the evidence there is nothing to indicate a likelihood that the pursuer was a woman who would consent to live with him as his mistress. She says, no doubt, she was cast pretty much on her own resources owing to the second marriage of her mother and the re-marriage of an uncle with whom

she lived. But both these events took place about the year 1895. Since then she had qualified herself as a nurse, and was earning her own living.

The pursuer came to Edinburgh in April 1901, took up her quarters with a lady there, and the house 4 Dalrymple Crescent was taken, with entry at Whitsunday. This house with its garden was a very different place to live in from the rooms at the back of the office in George Street. As to the precise date when the pursuer first occupied the house, the evidence as recorded is not clear. I accept the account given by the pursuer that the interchange of consent, the details of which are given in the note of the Lord Ordinary, and which was sufficient, in my opinion, to constitute marriage, took place before they lived together as man and wife. Their relations in this view were never illicit. No witnesses were present, and no will has been discovered. There is no writing to prove that consent to marriage was given. A point is made here against the pursuer's case which must be taken into account in weighing the evidence, which is, that the letter she says she got from Petrie asking her to come to Edinburgh, and mentioning marriage, is not produced. The letter which is produced shows that there was previous correspondence. In it he mentions Macduff Robertson, the illegitimate son already referred to, who was then sixteen years of age.

One matter has to be considered in judging of the pursuer's conduct at this period, and that is the extent of her knowledge of Petrie's relations with other women. I think she did know to a certain extent, as far back as 1895, and the then existing entanglement was probably a reason why Petrie was not in a position to marry earlier. This knowledge should perhaps have made the pursuer more cautious in committing herself to Mr Petrie without incontestable evidence of marriage. On the other hand, she had a man not altogether easy to deal with. She was no girl, but a woman of experience, and probably had sufficient confidence in her power, if she got his consent, to retain his affection to such an extent that he would not go back upon his word.

I do not think that, when in earnest, he ever did. They lived together as man and wife for close on eight years, until his death in February 1909. It is his relatives who have put the pursuer to prove her marriage.

The corroboration of the pursuer's evidence is, to my mind, sufficient. When he told his friends, as he did on repeated occasions throughout the period between 1901 and 1909, that he was married, I think he was speaking the truth. It would have been unlike his previous character had he professed to be better than he really was. His relations with women in his bachelor days were matter of common notoriety—a subject upon which he spoke quite freely. It may be suggested that he represented the pursuer to be his wife in order to save the woman. But his statements were not

confined to occasions when she was present. In her absence, when he was discussing matters with old friends, his avowals were quite explicit and deliberate. On occasions when it was not necessary to do anything he took the occasion to introduce the pursuer as his wife. It is this class of evidence which impresses me most. Had Petrie not been speaking the truth on these occasions I should have expected him to have said to one or more of his intimates that, although he had to pass the pursuer off as his wife, she was really in the same position as the other women he had lived with. There is a total absence of any evidence of this description. The statements made by him to the postman—the fact that they lived together as Mr and Mrs Petrie—and that, according to the clear evidence of the charwomen, she was in the habit of wearing a wedding ring—are consistent with the pursuer's case.

Petrie did not inform his own relations that he was married. He even denied to them and to friends in Dundee that he was. I confess I do not feel this an insuperable difficulty in the pursuer's way. The key to his conduct in this respect is, I think, to be found in the fact that he was very cautious about committing himself when this involved any consequent obligation upon himself. To his relations, as well as to his mother's relatives and connections at Tomintoul, he was a bachelor, and a bachelor he wished to remain. I can quite understand that in his view the maintenance of this position may have been conducive to his own comfort. As regards the pursuer's relatives, her mother says the pursuer told her in 1901 of her marriage, and the mother also speaks to an invitation she received to visit her daughter and her husband in Edinburgh. It is difficult to believe this would have been sent if she was living as Petrie's mistress. There seems to have been a coolness between the pursuer and her sister, who, however, knew the pursuer was married.

As regards the staff in the office, it is unfortunate that the chief assistant Mr Moffat was unable, owing to his state of health, to be examined. The evidence of the clerk Ramage and of Macduff Robertson, though no doubt raising difficulties, does not in my opinion outweigh the other evidence in the case. There is general evidence of acquaintances that they considered the Petries married.

As regards the evidence about the Widows' Fund of the S.S.C. Society, the answer of Mr Petrie on the schedule produced, "Nothing to report," is of a curiously non-committal nature. If he was unmarried one would have expected him to say so. There is evidence that he had an aversion to this fund, though one would have thought this would have diminished as the prospect of getting some benefit increased. He gave it as a reason to the pursuer for not making their marriage public that if he did there would be a payment of £400 or £500 to make to this Widows' Fund. The sum he mentioned was so much in excess of the actual marriage tax that this must have

been merely an excuse. Nor is there evidence of financial loss, which he alleged as a reason at an earlier stage for not marrying. What probably weighed much more with him was the fear that trouble might be made at the house by the women he had previously been living with, if they came to know he was married. This also may account for the attitude he took up when Mr Cargill spoke to him on the subject. The pursuer seems to have made Mr Petrie an exemplary wife, and for a time at least to have been successful in inducing him to take less drink, to which he had previously been addicted. She appears to have met him and taken him home after business, and also to have brought him away from the station, where he went on the conclusion of football matches. The life she led must have been a dull one, as few visitors came to the house and they do not seem to have gone out much. It must, however, be remembered that she was a stranger in Scotland, and her husband continued to see his friends as in his bachelor days.

A good deal was made against the pursuer of the fact that the clerk Ramage allowed her to search the deceased's repositories in an irregular way. Whatever view may be taken of what the pursuer then did, I do not think sufficient is proved to affect the main issue.

I am of opinion that the pursuer has proved the marriage, and am confirmed in this view by the fact that in a case largely depending on credibility it is the same as that taken by the Lord Ordinary who saw and heard the witnesses. There is not in my opinion enough to constitute marriage by habit and repute, nor were the subsequent acknowledgments *per se* such as to constitute marriage.

I am accordingly of opinion that the judgment of the Lord Ordinary should be affirmed.

The LORD PRESIDENT intimated that LORD KINNEAR concurred in Lord Mackenzie's opinion.

LORD PRESIDENT—I concur in the judgment which has been delivered by Lord Dundas which I had an opportunity of perusing, and he has gone so fully through the particulars of the evidence that I would say no more were it not for the fact that I think the case is a very important one as regards the law, and I think it therefore necessary to make a few observations. Undoubtedly it is the first case in which a marriage has been held to be established there being no record in writing of any sort, no witnesses to the interchange of consent, and the evidence by the common consent of all the judges who have considered the question not being sufficient to establish a marriage by habit and repute. Of course when I say that, I am not keeping out of view that the case in one sense could not have arisen in this precise form until after the passing of the Act of 37 and 38 Vict. cap. 64, but even that is a good long time ago, and I doubt whether it was the intention under that Act to make

the marriage law of Scotland even more loose, and as some people would say, more unsatisfactory than it was before.

As to the competency of holding that a marriage is proved, I entertain no doubt. I entirely accept the law as laid down by Lord Watson in the *Dysart* case, and as stated in the passage quoted by my brother Lord Dundas, and I wish to make two observations upon it. In the first place, when the talk is of uncontradicted testimony, I note that if, as here, the alleged ceremony is entered into before no witnesses at all, and there is no evidence bearing directly on the ceremony, and the person who raises the action waits till the other party is dead, the testimony never can be anything but uncontradicted, and therefore the word "uncontradicted," which in the ordinary case carries with it a certain measure of approval, is in this case no more than a mere unmeaning epithet. The next observation I would like to make is that Lord Watson, in the sentence quoted by my brother Lord Dundas, says—"I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect." Now I think he is perfectly right there discriminating between two different things. You may have corroboration in some way directly of the alleged ceremony itself; you may, on the other hand, have facts and circumstances brought out—of course, as all facts and circumstances must be, by testimony—which are not directly corroborative of the ceremony itself, but corroborative of the state which was the legal results of the ceremony. Now here there is absolutely nothing of the first sort. There is not a scrap of corroborative testimony that upon that 31st day of May 1901 there did take place in that drawing-room in 4 Dalrymple Crescent the ceremony of marriage between these two parties. Of course I quite agree that where there are no witnesses there would be few cases in which there could be such corroborative testimony, but there might be, and one illustration was put forward by, I think, Lord Blackburn, in one of the cases where the matter was discussed. The illustration he put forward was, that if there was a Gretna Green marriage it was something to show that the parties had been seen taking post-horses and going to Gretna Green. But there is nothing of that sort here. But I do not say that ends it, for there are facts and circumstances, and I quite agree that it may be sought, and successfully sought, to find in these, not corroboration of the ceremony having taken place, but of a state of life which is only consistent with the ceremony having taken place. I therefore pass, without supplementing the comments of Lord Dundas, to what I think are the crucial matters.

Some reference was made, and I think Lord Mackenzie referred to it, to the question of the wearing of a ring, regarding

which there is a certain discrepancy between the evidence of Macduff Robertson and the charwomen. The charwomen were witnesses of what I call the later period of the marriage; Macduff Robertson was necessarily a witness of the earlier period. It may therefore be perfectly consistent testimony that as a matter of fact the pursuer did not wear a ring in the earlier period, but did wear it in the later. But so far as the mere wearing of the ring is concerned I confess I attach nothing to that at all, because I think it is common knowledge that persons who are mistresses and yet do not wish to label themselves as mistresses before all the world, are often in the habit of wearing marriage rings to which they are not entitled. There, again, if you could show that a day before the marriage there was no ring, and a day afterwards there was a ring, that would be corroborative evidence of the ceremony, but we have nothing of that sort here, and that would not affect my judgment one way or another, because I think a mistress would be just as likely to wear a ring as a wife.

Then there is the question of the address, and there some reliance was put on the evidence of the postman, but there again as matter of fact we all know that mistresses are, I may almost say quite commonly, called by the name of the man who is keeping them, and accordingly I think it was more than natural and consistent with either idea that she should have her letters addressed by tradesmen and others to her as Mrs Gordon Petrie. And the postman, I think, attempted a feat of memory which was beyond the memory of even a postman when he said that he had never delivered any letter with any other address. Now that is inconceivable, for I do not think he could possibly charge his memory for such a long period as eight years; and in the second place, I think it is untrue and contrary to the fact, for this very simple reason that Mrs Petrie's mother declares that for some months after the marriage she never knew that her daughter was married. Now it is certain that during these months she had communications with her daughter, and the only style by which, on her own confession, she knew to address her daughter was the style of Miss Annette Cooper, and not Mrs Gordon Petrie; and therefore that at the commencement there must have been letters addressed to Miss Cooper is perfectly plain, but that that should soon change, especially with the butcher and baker, I think is a matter of no moment, because 50 per cent. of mistresses would be addressed in the same way. But when I am on the matter of the mother, I confess that it is a part of the evidence that has enormously weighed with me, but which does not seem to have impressed your Lordships in the same way as it does me. She is described by my brother Lord Johnston as having been engaged in an honourable courtship for twenty years. Is it conceivable that a woman who had been engaged in an honourable courtship for twenty years which



was certainly known to her mother, and who had then attained to the object of all courtship, to be married to the man, should not write her mother and say—"Now I am married." And yet, according to the mother's evidence, it is a period of at least three months—her evidence is vague as to the exact date; it is not less than three months and may be as much as six—before her daughter writes back to her—"I am living with this man; I am not living in any suspected class of circumstances for I am his wife; he made me his wife on the night of the 31st of May." A sister she never tells at all. She only knows she is married because a communication she makes to the mother is handed on to the sister. That to my mind is very destructive of the idea that this woman knew she was married. I take along with that two other facts—one mentioned by your Lordships, the other not. There is first the fact that there is not a scrap of writing in which Mr Petrie ever addresses the pursuer as wife or signs himself as husband, or uses any of these expressions in the body of the letter from which you could infer that married persons were writing to each other. There is also the fact of her having destroyed, as she says, the crucial letter which would have thrown such a flood of light on the matter, in which he asked her to come to Edinburgh. But the other circumstance which I do not think was alluded to by any of your Lordships, and which has great weight with me, is this, that if she was a married woman why did not she, like every other married woman, have some friends? We have had this proof, and there is not a single woman examined except the charwomen. I do not think it is conceivable that a woman should live for eight years, if she had nothing of which she was ashamed and was a man's lawful wife, and should not make some friends who would come to the house. On the other hand, it is perfectly conceivable that she, being a woman of respectable origin, would not like the society of kept women and worse and eschewed that society, and was conscious of the weak point in her own position and could not make friends among the class to which her marriage had naturally called her. But there it is, and the consequence is that we do not find in this proof a single woman who ever entered that house except the three charwomen, and they are merely people who come to order, like the butcher and the baker's boy.

The other question that affects me—where of course I easily see the point of divergence between myself and my learned brethren who do not agree with me is upon the weight of evidence—is the weight that is to be given to these two witnesses, Macduff Robertson and Ramage. I take Macduff Robertson first. He is Petrie's own son, and was an acknowledged natural son, because I really brush away that evidence of Mr Hunter, who seems to have said that Petrie was doubtful as to whether he was his son or not. Mr Hunter, I think, puts himself out of Court as an

observant witness, or as a witness who ought to have particular attention paid to him in this case, because he knows nothing about Rosina Hughes and the other woman, and yet he said he was continually in the house in George Street. It may be a great testimony to his innocence that he cannot recognise a mistress when he sees one, and therefore I do not place much reliance on his saying this woman was not a mistress. Macduff Robertson had lived with Mr Petrie behind the office in George Street. He was well aware of what a mistress was, and not only does he say that he never was given to understand that Miss Cooper was anything else than a mistress, but if Macduff Robertson's story is true as to the fitting it really displaces this question of the ceremony altogether. The story as given by the pursuer herself in chief was that she said to Mr Petrie, "Now, look here! I cannot stay in this house unless you make me your wife." and then the ceremony took place. She says he had not stayed there already, and she had not said it at first, but perhaps she had not seen the weight of it. She says—"I went to the house several days before, and it was only afterwards when it was a question of Petrie coming. He up to that time had stayed at his club." Now Macduff Robertson says the fitting took place on the term day. A cab started from George Street, carrying with it Petrie, himself, and the pursuer. They spent the evening getting the furniture arranged, and slept in two beds in Dalrymple Crescent—in two beds of which he occupied one and Mr Petrie and the pursuer occupied the other. If that is a true story it practically displaces the story of the ceremony, because it shows that she was content to occupy Petrie's bed when she went to the house, and there was no such scene as she deposed there was, of saying "You have been living at the club; you cannot come here and put me in this position unless you are prepared to marry me." The only two things that are put against Robertson—because there was nothing in his demeanour to suggest untruthfulness—and it is unfortunately not given to any Lord Ordinary (I wish it was) to simply tell by looking at a man whether he is telling the truth or not—but the two things said against him are, first of all, that he would have an animus against this woman. Now I cannot see why. Poor Robertson had had a neglected childhood, and there is a pathetic piece of evidence that when he was quite a boy it gradually became borne in upon him that the woman he had called his mother was not his father's wife, and he had lived to see his mother give herself up to drink, to be discarded, and her place taken by Rosina Hughes, who again was given up, not through any inconstancy in Petrie, but because she herself had made herself impossible by habits of drinking, and therefore I confess that to suppose his evidence would be prejudiced because this woman had filled the place his mother might have filled had things been different is really more than the facts will bear. When his

father's death came he was in New Zealand, and was telegraphed to by Ramage in terms that Cooper was claiming to be widow, and on receiving that telegram he wrote her a letter of condolence upon his father's death, and called her Mrs Petrie. And it is said that that shows he knew in his heart of hearts that she was Mrs Petrie. To my mind that inference is not at all necessarily drawn. He was in New Zealand; he did not know what had happened; he knew that his father had been living with this woman for many years, and for aught he knew there might have been a definite marriage. More than that, I do not know what his views are, but I am quite certain that the views of many people would have been that if Petrie had asked them on his deathbed what he ought to do, they would have said—"If you have never married her, marry her now, for she has lived with you and been very kind to you, and the only thing you can do is to leave her your lawful widow." Accordingly I do not think that that letter really means anything except that he knew by this time she claimed to be the wife, and did not say "I do not know what you mean by claiming to be his wife; you certainly were not his wife when I left, and I have heard nothing of that since"—a very poor letter of condolence to a woman who had lost a daily companion to whom she was much attached.

We pass now to Ramage. He was not head clerk, but had been there a long time, and was on terms of intimacy with Petrie and knew a great deal about his private affairs, and was actually used as an emissary and agent in arranging a very unpleasant business, namely, a claim made against him as being the father of an illegitimate child by somebody who was not the pursuer, nor Hughes, nor Robertson's mother. To use a person as your agent in a matter of that sort is to let him into a great deal of confidential information as to your method of living. He lived all through the Hughes period in George Street, and he says he never had any doubt about it. There may be a certain amount of animus against the pursuer, but I cannot see that he had any interest to defeat the pursuer's claim if it was a just one. He is not the next-of-kin nor is Robertson; this question from a technical point of view is a question between the pursuer and the deceased's relatives in Dundee whom Robertson and Ramage scarcely knew, if indeed they knew them at all, and therefore I cannot see that any consideration of interest would make them tell what is not the truth in absolutely chapter and verse. But I think generally Ramage affirms Robertson on the statement of the flitting. He certainly indicates that Petrie meant to take Robertson with him, and it is common ground that Robertson was there as soon as the pursuer—that is to say, Robertson was in Dalrymple Crescent as soon as the pursuer was, and if Petrie was with him, then Petrie was there at the beginning too. But on the whole matter I can

scarcely believe that Ramage did not know from Petrie by Petrie's whole demeanour and attitude what was the true state of the case.

Now the only other matter is the question of the speaking to his friends. Lord Mackenzie put the matter on this that when he made these statements to his football cronies he was speaking the truth, and that there was no reason why he should do other than speak the truth. If the only statements that Petrie had ever made had been to the football people, I think that would have been a very weighty observation, but inasmuch as Petrie had made observations to other people to another effect, you cannot take Petrie as always telling the truth. He either told a lie to the football people or to the Tomintoul people, and therefore we must convict Petrie of falsehood by statements he made at one time or another, and when we come to the reasons for speaking falsely at one time or another, I do not think they are more conclusive on one side than another, and I think it leaves the matter, so to speak, a drawn battle. I do not think there is any really cogent reason why he should have told his mother an untruth. I do not think there is really any cogent reason why he should have told the football people an untruth.

Then when you come to the undoubted considered statement to Mr Cargill, and also to his general testimony to Mr Mason, the theory is that when he got anywhere in the neighbourhood of an S.S.C. he at once drew in his horns because of the Widows' Fund. That does not seem to me an adequate reason; on the contrary, if I judge the case from the evidence that is given of his earlier expressions on this subject, what he objected to was not the expense of the S.S.C. Widows' Fund, but it was the old objection that bachelors had always to pay for married men, and therefore, from a Scotch economy point of view, the best thing he could do was to marry, and so far from being anxious to be regarded as a bachelor for the time he would really be glad to be able to be square with the S.S.C. Widows' Fund.

On the whole matter, I have ventured to make these observations not because I was not content with what Lord Dundas has said, but because I do think that this is a most important case—important no doubt to the pursuer herself, but also important for the law of Scotland—for I think here a marriage has been held to be established on an amount of evidence that has never been allowed to establish a marriage before. I think the law of Scotland on that matter is loose enough, and I think this judgment will leave it still looser.

The Court pronounced this interlocutor—

"The Lords having, along with two Judges of the Second Division, considered the reclaiming note for the defender against Lord Salvesen's interlocutor of 3rd November 1909, and heard counsel for the parties, Adhere to said interlocutor: Remit to the Lord Ordi-

nary to proceed: and decern: Find the pursuer entitled to expenses against the defender Margaret Cathro Petrie as executrix-dative of the late Alexander Gordon Petrie, and remit, &c.

Counsel for the Pursuer (Respondent)—  
C. H. Brown—Garson. Agents—Webster,  
Will, & Co., S.S.C.

Counsel for the Defenders (Reclaimers)—  
Constable, K.C.—D. Anderson. Agents—  
Ronald & Ritchie, S.S.C.

Tuesday, November 8.

## FIRST DIVISION.

[Sheriff Court at Falkirk.

### COOK v. BONNYBRIDGE SILICA AND FIRECLAY COMPANY LIMITED.

*Sheriff—Process—Master and Servant—  
Jury Trial—Action by Father of a  
Deceased Employee—Sheriff Courts (Scot-  
land) Act 1907 (7 Edw. VII, cap. 51).*

The Sheriff Courts (Scotland) Act 1907 enacts, section 30—"In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880), where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof . . . it shall, within six days thereafter, be competent to either of the parties, who may conceive that the case ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends." Section 31—"In any action raised in the Sheriff Court by an employee against his employer concluding for damages under the Employers' Liability Act 1880, or alternatively under that Act or at common law in respect of injury caused by accident arising out of and in course of his employment, where the claim exceeds fifty pounds, either party may as soon as proof has been allowed, or within six days thereafter, require that the cause shall be tried before a jury, in which case the Sheriff shall appoint the action to be tried before a jury of seven persons. . . ."

The father of a deceased employee brought an action against the employers of his deceased son at common law and under the Employers' Liability

Act 1880 for damages for his son's death.

*Held* that, the action not being one "by an employee against his employer," section 31 had no application.

*Opinion* by the Lord President—"If the pursuer had chosen, there is I suppose no question whatsoever but that he could have made a motion under section 30 of the Sheriff Courts Act 1907 for the removal of the case to this Court for jury trial, that motion under section 30 coming in place of the well-known appeal for jury trial which began under the 40th section of the Judicature Act, and was slightly modified by a section of the Court of Session Act of 1868."

Alexander Cook, labourer, 83 Dundas Street, Grangemouth, raised an action in the Sheriff Court at Falkirk against the Bonnybridge Silica and Fireclay Company, Limited, concluding "(1) For damages at common law, laid at £500, for the death of his son, Alexander Cook, who was in the service of the defenders at their Drum Mine at Bonnybridge aforesaid, and was on 24th December 1909 killed in consequence of the negligence of the defenders by being crushed by a large stone of about two tons weight falling on him in the said defenders' Drum Mine at the place where he was working therein; or otherwise (2) for £200 in name of compensation under the Employers' Liability Act 1880, in respect that the deceased was killed as aforesaid in consequence of the said stone falling upon him owing to the fault of John Wilson, mine manager, and William Hoggan, fireman and inspector, both in the defenders' employment, persons for whom, under the Employers' Liability Act 1880, the defenders are liable."

On 1st July 1910 the Sheriff-Substitute (MOFFAT) pronounced this interlocutor—"The Sheriff-Substitute, in respect the defenders have abandoned their defence that the pursuer has not stated a relevant case under the Employers' Liability Act 1880, repels the second plea-in-law stated for defenders: *Quoad ultra* having advised the closed record, repels *hoc statu* the pleas stated for defenders so far as preliminary, reserving their effect on the merits: Before further answer allows to parties a proof of their averments."

On 6th July the pursuer lodged this minute—"The pursuer moves the Court to have this cause tried before a jury, in virtue of section 31 of the Sheriff Courts (Scotland) Act 1907."

On 7th July the Sheriff-Substitute pronounced this interlocutor—"The Sheriff-Substitute, in respect of the minute for the pursuer, orders the cause to be tried before a jury of seven persons: Appoints the cause to be put to the roll of Monday, 11th July, for the purpose of fixing a diet for hearing parties upon the question or questions of fact to be proponed to the jury."

On 2nd August the Sheriff-Substitute appointed a certain question of fact, which was practically the ordinary general issue, to be proponed to the jury.