1755. *June* 27. SMITH *against* GRIERSON.

No 197.
Though a promise of marriage before the *copula* cannot be proved by witnesses, yet a regular courtship before the *copula* may be proved by witnesses.

IN a declarator of marriage at the instance of Christian Smith, daughter of John Smith, merchant in Brichen, against James Grierson, merchant there, the facts specified in the libel as relevant to infer the conclusion were, that the pursuer, a young woman, living in family with her father and mother, was addressed by the defender in the view of marriage: That, with the permission of her parents, he had free access to her in her father's house, as is usual in a courtship upon a matrimonial footing: That this intended marriage was a common subject of conversation in the town of Brichen: That the pursuer and her parents communicated to some of their friends the purpose of marriage: That the defender did the same; and when joked by his companions, made no difficulty of owning the fact: That while preparations were making for the marriage, the pursuer, put off her guard by what she judged a certain prospect of marriage, was tempted by the defender to yield to his embraces, upon the plausible pretext, that having plighted their faith, they were husband and wife in the sight of God, and that the celebration would soon follow.

The *copula*, in consequence of which a child was brought into the world, was admitted. The defender rested his defence upon this, That he had made no promise of marriage. The Commissaries pronounced an interlocutor, finding, "the previous promise of marriage by the defender relevant to be proved by writ or oath only." The cause being advocated to the Court of Session, the pursuer complained that the interlocutor did not apply to the case. It was admitted for her, that a promise of marriage, which must be followed with a *copula* in order to make a marriage, cannot be proved otherwise than by writ or oath; but that the present case must be regulated by other principles. A man who commences a courtship to his equal, in the view of marriage, never has an opportunity to make a promise of marriage. His will and inclination are understood: The only point is to obtain the woman's consent, which is to be done by solicitation, not by promises. A man in the way of regular courtship, is in reality as much engaged as he can be by the most solemn promise; and therefore such a courtship, with a subsequent *copula*, ought to bind him to celebrate the marriage no less than a promise does. The only question is is about the mean of proof. A promise of marriage is justly confined to writ or oath. A woman has it in her power to demand a promise in writing; and if she trust to a verbal promise, it is her own fault. In a regular courtship, there never can be *termini habiles* for demanding any voucher in writing; and therefore, if a regular courtship, with a *copula*, be relevant to oblige a man to make good his engagement, the courtship and various circumstances must be probable by witnesses, as the only mean of proof. Nor is oral testimony so dangerous in this case, as in a promise of marriage. A regular courtship must always be open, and attended with many circumstances that are publicly known.

No 197. The Judges were much divided, and cross interlocutors were pronounced. But the final judgment was, to remit to the Commissaries, with this instruction, that before answer to the relevancy, they should grant a proof by witnesses.

This point appears to me extremely delicate. It probably will be thought by many, that our law has already gone too far, when it makes a promise, with a subsequent *copula*, a good foundation for the interposition of the judge to make the marriage effectual; and that to extend the law to similar cases, would in all probability be attended with corruption of manners. Why should any encouragement be given to women to lay snares for men, in order, by the interposition of the judge, to hook them into marriage? A sad resource, even where the plot succeeds; because a forced marriage never can be comfortable to either party. And whether it succeed or no, is ruinous to the character, and destructive of virtue. This weighs in the one scale. But let us examine whether greater weight may not lie on the other. Judges ought to be upon their guard, while they endeavour to repress the machinations of the female sex, not to give too great encouragement to the other sex. Every one must be sensible how unguarded the virtue must be of a young creature during courtship, and what reliance she has upon a man to whom she has innocently engaged her affections. It is not in the power of law to guard her sufficiently in such ticklish circumstances, otherwise than by making it dangerous for the lover to make any attempt upon her. When such a crime is committed, the man has no other means to repair the honour of the woman he has injured, but to complete the marriage. And if he add crime to crime by leaving her in misery, the law justly interposes, and forces him to make that reparation, which, in good conscience, he is bound to make of his own accord. Taking thus a complete view of the matter, and of what presents itself to the eye on either side, the result seems to be this, That the punishment ought to rest upon the guilty person alone. If the man be the aggressor, let him be punished with marriage. If the woman be the aggressor, and the snare is laid by her, let her be entangled in her own snare, as a just punishment upon her. The man, in this case, is not bound in conscience to give her the reparation of marriage; and the law ought not to compel him. To apply this rule to the present case, the circumstances offered to be proved remove all suspicion from the woman, and afford real evidence that the man was the aggressor. In a regular courtship, where a man offers himself in marriage, the woman can have no occasion to lay any plot for ensnaring him; and for this reason, especially, I have no doubt that the interlocutor is well founded. The Judges who dissented, doubted not of the competency of a proof by witnesses, supposing the facts libelled relevant to infer marriage. But being afraid of consequences, gave their opinion, that a courtship, *cum copula* is not relevant to infer marriage, even though both should be admitted.

Fol. Dic. v. 4. *p.* 160. *Sel. Dec. No* 89. *p.* 117.

No 197.

*** This case is reported in Faculty Collection:

1755. *November* 26.—CHRISTIAN SMITH brought an action against James Grierson before the Commissaries of Edinburgh, for having it found and declared, That the pursuer, Christian Smith, was his lawful wife, and that the other pursuer, Christian Grierson, was his lawful daughter.

The facts from which she inferred these conclusions, and which she offered to prove by witnesses, were, That the defender made honourable addresses to her (who was every way his equal) for marriage; that the proposals were communicated by him to her parents; and being agreed to, he visited her very frequently, at her father's house; that the servants in the house had overheard him talking of the marriage to her father; and that the defender had communicated to some of his intimate friends his intentions of marrying the pursuer; had commissioned the pursuer's father to purchase some acres of land for him near the town of Brechin, and had purchased furniture, with the view of taking up house upon his marriage; that the pursuer and her friends had told several of their acquaintance of the intended marriage; and that the pursuer had bespoke one of her acquaintance, who was a mantua-maker, to make her marriage-gown; and that it was commonly reported, and believed in the town of Brechin, that the pursuer and defender were soon to be married together; that when matters were thus going on, the defender one day enticed the pursuer to come to his room, where he prevailed upon her to yield to his embraces; saying to her, that they were already husband and wife in the sight of God, having plighted their faith to each other, and promising he would immediately proceed to celebrate the marriage publicly; that the other pursuer, Christian Grierson, was the fruit of this intercourse; that the defender had acknowledged her to be his daughter before the kirk-session of Brechin; and when interrogated by the session, if he promised the pursuer marriage when he had her in his room? he said he did not remember; and being interrogated, if he had at any other time promised to marry her? he declined to answer the question.

The defender denied that he had ever given the pursuer any promise of marriage; and contended, That a promise of marriage, when founded on to infer a marriage by a subsequent *copula*, could only be proved *scripto vel juramento*.

The Commissaries "found the *copula* between the pursuer and the defender relevant to be proved *prout de jure*; and found the previous promise of marriage, by the defender to the pursuer, relevant to be proved by his writ or oath only, without prejudice to the pursuer, to insist for a proof *prout de jure* of the facts libelled, in order to infer damages, as accords."

After the above interlocutor was pronounced, the pursuer, Christian Smith, brought another action against the defender, setting forth, That if she should not be able to make out the facts libelled, relevant to be proved *prout de jure*, to infer an agreement or promise by the defender to marry her previous to the *copula*, yet that the facts were relevant to infer damages, &c. and, therefore, if

No 197. she failed in bringing a proof, relevant to infer the conclusions of marriage and legitimacy, that the defender, in respect of the premisses, ought to be decerned to pay to the pursuer a sum in name of damages, and for the aliment of the child. Together with this summons she gave in to the Commissaries a petition, reclaiming against their former interlocutor, and praying that they would conjoin the two processes; and, before answer, admit the facts contained in the two libels to be proved *prout de jure*, reserving to themselves to determine, after the proof should be brought, whether it was relevant to infer the conclusions of marriage and legitimacy, or only the alternate conclusion of damages. The Commissaries refused the petition, and adhered to their former interlocutor.

The pursuer applied to the Court of Session, by a bill of advocation, and *pleaded*, That the facts set forth in her libel were sufficient to shew that there was a promise or agreement of marriage betwixt the defender and her, and were much stronger than mere verbal promises, which are often made by men *in æstu libidinis*, without any design of performing them, and are not much relied on by the other sex; and yet even such promises as these, with a subsequent *copula*, would, by the law of Scotland, be sufficient to constitute a marriage; and much more ought a marriage to be constituted by the defender's promise or agreement to marry the pursuer, manifested so strongly and deliberately, *rebus ipsis et factis*, and on which the pursuer thought she had the greatest ground to rely; and that these facts were undoubtedly probable by witnesses, as falling under their observation, although a mere verbal promise, being only *nuda emissio verborum*, and which witnesses might mistake, may not be so proved.

Answered for the defender, That a proposal, or purpose of marriage, is not sufficient to constitute a marriage, though a *copula* follow; for one may propose a thing, and afterwards repent of it, in which case he will not be bound by such proposal; and, therefore, it was necessary for the pursuer to allege and prove an actual promise; and such promise could neither directly nor indirectly be proved any way but by the writ or oath of the defender; for it is an established principle, that no promises can be proved by witnesses; and if this hold with respect to promises in general, it must much more do so with respect to promises of marriage, as being of the greatest consequence; and should witnesses be admitted to prove such promises, either directly or indirectly, it would be of the most dangerous consequence, as the relations and friends of young women, who had yielded up their virtue, would be under strong temptations to swear to such proposals or promises, in order to cover the shame of their relations, and to procure advantageous marriages for them.

The Lords were of opinion, that the facts offered to be proved inferred a promise or agreement of marriage, and that a proof of them, by witnesses, was competent; and, therefore,

"They remitted the cause to the Commissaries, with an instruction to allow the pursuer a proof of the facts before answer." No 197.

Act. *Advocatus & Lockhart.* Alt. *Ferguson, Andrew Pringle, & Elliot.*
Reporter, *Prestongrange.*

B. *Fac. Col. No 164. p. 244.*

1771. *January* 29.

PHILIP MILLAR, Oculist in Edinburgh, *against* FRANCIS ANGELO TREMAMONDO, Master of the Academy, Edinburgh.

No 198.
A promise, though alleged to be made *intuitu matrimonii*, not proveable by witnesses.

MILLAR brought an action against Angelo for the performance of certain promises alleged to have been made by him in the view of his marrying his daughter, and craved to be allowed a proof of them *prout de jure*. The defender maintained, that the promises alleged being merely verbal and gratuitous, were not proveable by witnesses. The Lord Ordinary having allowed a proof before answer,

The defender, in a reclaiming petition, *pleaded*;

By the law of Scotland, and the invariable practice of the Court, verbal promises did not admit of a proof by witnesses, and could only be established by writing or oath of party. Mere expressions of intention *de futuro* could of themselves fix no obligation on the pronouncer, but were retractable at pleasure; and though verbal promises were a step higher in the scale of obligations, and were allowed to be established by proof, yet in these a distinction was very properly drawn as to the mode of proof allowed. For as it was impossible exactly to establish the express terms in which a verbal promise was uttered, it being possible that mistaking a single word, or even a variation in the accent or emphasis with which it was pronounced, might totally change the force and import of the obligation, the law had wisely confined these to that mode of proof by which the meaning of parties might explicitly, and with full certainty, be ascertained. Lord Stair, lib. 1. t. 10. § 4.; Lord Bankton, lib. 1. t. 11. § 2; Mr Erskine, b. 3. t. 3. § 8.; Deuchar *contra* Brown, No 192. p. 12386.; 3d July 1668, Donaldson *contra* Harrower, No 190. p. 12385.; June 1764, Maclintosh *contra* Tassie;* which last case was precisely in point, the Court having found, "That Tassie's obligation being founded on a verbal promise, could only be established by his own oath."

The pursuer, in his answer, admitted, That a mere gratuitous promise could not regularly be proved by parole-evidence; for that such a promise made verbally resolved into a *nuda emissio verborum*, and witnesses casually present might no doubt easily mistake the meaning of parties. The present case, however, was very different; for the pursuer did not allege or found on any gratuitous promise, but upon a solemn engagement the defender had come un-

* Not reported. See APPENDIX.