

I wish to add that I agree with the remarks which were made by Lord Dundas in the recent case of *Old Machar Parish Council v. Aberdeen Parish Council* (1912 S.C. 26, at p. 31) to the effect, as his Lordship put it, that some at least of the dicta in *Knox v. Hewat* ((1870) 8 Macph. 397) must be regarded as of doubtful accuracy. The case itself was very special, and with all respect for the eminent lawyers who took part in its decision I do not think that the judgment arrived at in it can be regarded as one having any general application.

LORD MACKENZIE—I concur. The Sheriff-Substitute in the opening sentence of his note says this—"In one sense this is a peculiarly hard case, and one in which one's sympathy is enlisted on behalf of the applicant." I entirely agree with that statement, but we are here to administer the Poor Law as it at present exists. And in my opinion we have no option but to apply the law as it was laid down by the Lord Justice-Clerk in the cases of *Petrie v. Meek* (1859), 21 D. 614 and *Jack v. Thom* (1860), 23 D. 173. In *Petrie v. Meek* the Lord Justice-Clerk said that it had been "conclusively and directly determined (1) that an able-bodied man has under no circumstances whatever a legal right to parochial relief, either for himself or his family, and (2) that by an able-bodied man is meant one who suffers under no personal inability, bodily or mental, to work." In *Jack v. Thom* his Lordship added to that definition of able-bodied the words, "so as to earn his subsistence."

Upon the facts in this case I am unable to take any other view than that the applicant is an able-bodied man. Accordingly whatever view may be taken of the case of *Knox v. Hewat* ((1870), 8 Macph. 397), which was cited and urged upon us, it is an entirely different case from the present, because there is an express finding there in the interlocutor—"Find that the father of the said Mary Johnston was not an able-bodied man." Accordingly that case is quite a different case from the present, because the Court here are unable to make any such finding.

LORD SKERRINGTON—I concur.

LORD CULLEN did not hear the case.

The Court refused the appeal.

Counsel for the Appellant—Keith. Agent—G. S. G. Strachan, W.S.

Counsel for Respondents—Macphail, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Saturday, January 22.

FIRST DIVISION.

[Lord Ormidale, Ordinary.]

DAVIDSON v. DAVIDSON.

Husband and Wife—Marriage—Constitution—Verba de presenti—Proof—Subsequent Conduct of Parties.

A declarator of marriage was brought by a woman after the death of her alleged husband against his representatives, founded upon an alleged interchange of matrimonial consent before witnesses twenty years prior to the raising of the action. Of those present at the ceremony only two were brought to corroborate the pursuer's story, three others, viz., her father, mother, and brother were dead, and a surviving brother was not called. The family Bible in which the writing and signatures were said to have been recorded was not produced and no satisfactory account was given of why it was not preserved. From the evidence it appeared that prior to the ceremony the pursuer had lived with her alleged husband as his mistress, that he had expressed his intention to marry her when she was free, that after the ceremony they did not take up house together, that she did not take his name or claim to be recognised as his wife, that from time to time he made visits to her house and made payments to her, and that during his last illness he did not send for her or admit that she had any claim upon him. Neither in his last will nor in his previous one did he make any mention of her, and the only letter which was produced was not consistent either in the mode of address or in the style of signature with her position as a wife.

The Court refused declarator, holding that although the interchange of mutual consents had been proved, the ceremony, in the absence of evidence which might have fortified it, had been so discredited by the subsequent conduct of the parties as to negative the existence of deliberate and serious matrimonial intention, and that accordingly the pursuer had failed to prove her case.

(Poor) Mrs Isabella Gauld or Davidson, residing at 101 Hilltown, Dundee, pursuer, brought an action of declarator of her marriage with the late John Davidson, wine and spirit merchant, Dundee, against George Davidson and others, the trustees, executors, and next-of-kin of the said John Davidson, defenders.

The defenders pleaded—"The pursuer's averments, so far as material, being unfounded in fact, the decree of declarator sought should be refused and the defenders assoilzied."

The facts are narrated in the opinion, *infra*, of the Lord Ordinary (ORMIDALE), who on 1st April 1920 after a proof assoilzied the defenders.

Opinion.—"In this action the pursuer, who sues *in forma pauperis*, designs herself as Mrs Isabella Gauld or Davidson, widow of the deceased John Davidson. She asks the Court for declarator that 'the pursuer and the said John Davidson were lawfully married to each other at Dundee on the 27th December 1899 and that the pursuer has since been the lawful wife of the said John Davidson and is now his lawful widow.'

"John Davidson died at 11 Craigie Street, Dundee, on 1st August 1918, about a year before the summons was signed. The defenders are his executor and his next-of-kin or some of his next-of-kin. He left a will dated 4th June 1918 and by it he bequeathed various legacies to sisters, nephews, and other relatives, amounting to about £1200, and the residue of his estate to his sister Miss Mary Davidson. The amount of his estate is £1545, 18s. 11d. No mention is made in his will of the pursuer. The pursuer is 55 years of age and Davidson was fully 20 years her senior. Davidson was a wine and spirit merchant and kept a public house in Dundee. He lived with his mother and sister at 11 Craigie Street. He retired from business in 1902. In January 1903 he went to live with his sister Mrs Smith in Arbroath, and in 1905 along with the same sister he went to Montrose. He left Montrose in November 1917, ten months before his death, and returned to Dundee and again resided until his death with his sister Mary at 11 Craigie Street. His mother had died a good many years before this.

"In 1888 the pursuer was married to Peter Bruce. Prior to the marriage the pursuer had had an illegitimate son—Stewart Gauld—to a Mr John. After the marriage Bruce and the pursuer went to Glasgow, where Bruce joined the Glasgow Police Force. The marriage was not a happy one owing to the drinking habits of the pursuer. A son and daughter, Peter and Freda, were born of the marriage. In 1893 Bruce owing to the conduct of his wife had to resign from the police force, the home was broken up, and the pursuer returned to Dundee bringing with her her two sons Stewart Gauld and Peter, the daughter remaining with her father.

"Davidson and the pursuer had known each other for some time prior to this, and in 1893 or 1894 they commenced to have intimate and illicit relations. Davidson provided the pursuer with money, and about 1896 or 1897 appears to have taken and stocked a crockery and furniture shop in Dundee for her. The life that Davidson was leading with the pursuer was not disclosed to his mother and sister.

"In 1899 Bruce raised an action of divorce against his wife on the ground of adultery, Davidson being called as co-defender. He obtained decree of divorce on 12th December 1899 and was also found entitled to the custody of the children of the marriage. He does not, however, appear to have attempted to recover the custody of his son Peter, who since 1893 had been living with his mother.

"From the beginning of his association

with the pursuer Davidson took an interest in and was a good friend to both Stewart Gauld, the illegitimate child of the pursuer, and Peter Bruce, and he continued to take an interest in them down to his death.

"In the divorce proceedings the present pursuer and Davidson maintained that the latter was not aware that the pursuer was a married woman. The pursuer now swears that that was a lie, and I have no doubt it was. Her purpose in stating that she committed perjury in the divorce proceedings is, I take it, to give colour to her present oath that Davidson during the earlier period of their illicit intimacy repeatedly said that he would marry her when she was free.

"Soon after the divorce proceedings the pursuer says that Davidson proposed that they should be married on 27th December, his birthday. On the evening of that day there was a meeting of the parties at the house in Mid Street, where the pursuer was then living with her two sons and in which Davidson had frequently spent the night with her. It was on this occasion that the pursuer swears that her marriage to Davidson was celebrated. That there was a ceremony of some sort approximating if not amounting to an interchange of *verba de presenti* must be taken to be beyond doubt.

"I have come to the conclusion, however, that the proceedings were not seriously intended by either party to constitute a marriage and did not constitute a marriage, and that there was no deliberate interchange of matrimonial consent.

"In a question of this kind the evidence must be examined with the most scrupulous care and attention, especially after the death of one of the parties. The witnesses here are speaking of an event which took place twenty years ago. Their memory is naturally not very clear as to what exactly was said or as to what actually occurred. Further, Davidson being dead and the alleged marriage not having been brought to the knowledge of his relatives or personal friends the evidence is necessarily *ex parte*.

"In addition to Davidson and the pursuer there were present the pursuer's father and mother, her two brothers William and David, her two sons Stewart Gauld and Peter, and two friends of the pursuer, Mrs Stewart and Mrs Gray. Mrs Gray speaks to other persons having been present, but their names have not been recorded. A man Langton appears also to have been about the premises, but he was not called as a witness. Of the persons named by the pursuer, her father and mother and her brother William are now dead. Her brother David is alive, but was not called as a witness. Her two boys were at the time aged 11 and 15 respectively, and do not profess to have anything but a hazy recollection of what was said. There remain only Mrs Stewart and Mrs Gray.

"The story told by the pursuer is as follows—On the afternoon of the 27th December the pursuer met these two and told them that Davidson had made up his mind to marry her that night, and she asked them if they would come along to her house in the evening. They said they would, and

the three of them then went to Davidson's public-house and got from him a bottle of whisky and a bottle of wine to take to Mid Street. In the evening the rest of the party had assembled before Davidson put in an appearance. On his arrival the company had a drink—'There was a drop of spirits going, and then he asked me in front of them all if I would bring out the family Bible, which I did, and put it on the table, and then he said, "I, John Davidson, take you Bella Gauld by the hand to be my lawful wife," and he took a ring out of his pocket and placed it on my marriage finger. When he held me by the hand and uttered those words I made a similar reply, and I said "I'm thankful it's over." (Q) By a "similar reply" what do you mean?—(A) Just something the same statement as he made. I cannot remember exactly the words I said, and then I said I was thankful it was over. (Q) Did he do anything after this? Did he write anything?—(A) Yes, he signed his name in the Bible, and I also signed mine. (Q) Was it merely his name or an entry of the marriage?—(A) He entered into the Bible the words he said himself and signed his name "John Davidson," and I signed myself "Isabella Fotheringham Gauld Davidson." There was a page in the front of this Bible for recording domestic events such as births, deaths, and marriages. All the witnesses were present when this was written into the Bible.'

"Thereafter supper was served, and there was singing and speeches. Davidson said—'Now are you all satisfied?' (Q) Satisfied with what?—(A) That he had taken me as his wife.' This jollification went on '... ' until about four o'clock in the morning.

"Mrs Stewart, who is the wife of a labourer, knew about Davidson's intimacy with the pursuer. She corroborates the pursuer as to what was said about her invitation to the marriage and the visit to Davidson's public-house. She says that Davidson mentioned that he was going to be married to the pursuer. Her account of what passed is as follows:—'After Davidson arrived he gave us a dram, and he made the pursuer stand up on her feet, and he took a ring from his pocket and he said, "I take Bella Gauld as my lawful wife," and the Bible was brought out, and he signed it and she signed it, and she said she was thankful it was over. He put the ring on her finger after he said "I take Bella Gauld as my lawful wife." She did not say anything when he said that; she just thanked him and said she was glad it was all over. After this ceremony she put the Bible before him and he signed his name with pen and ink in the family Bible, and then she did it after him. I did not see exactly what he wrote in the family Bible; I was not just close enough to see what he wrote. I saw him writing something. (Q) In addition to signing his name did he write anything?—(A) I was not so close as to see what he wrote, but I know, whatever he wrote, that it was that he was taking her as his wife. I did not see what he had written in the Bible.'

"In cross she says—'(A) He just came in and took off his hat, and said he hoped we

had been making a good night of it. The next thing he did was to take the bottle and give us all a dram out of it, those who would take it. (Q) After you had all got the dram, what was the next thing that was done?—(A) The marriage party; he put the ring on her finger. The first thing I remember about this ceremony was the taking of the ring and putting it upon the pursuer's finger, and I have told the Court what Davidson said. (Q) Do you not recollect what the pursuer said?—(A) Yes, that was all she said—that she was glad it was over and she thanked him. (Q) Was it after the ring had been put upon her finger, and after Davidson and the pursuer had said what you have told us, that the Bible was got?—(A) Yes—no, the Bible was brought forward before the ring was put on her finger. It was a big family Bible. I could not tell you what kind of binding it was in because I never took that particular attention. I never thought it would come to this to take all the particulars. I did not see what was written in the Bible at the time, and I do not know what was written in it either by Davidson or by the pursuer. After the signing of the Bible had been done there was nothing more said about what had taken place.'

"Mrs Gray, who is a sister of Mrs Stewart, speaks about the visit in the afternoon to Davidson's shop. Her account of the evening proceedings is as follows:—'John Davidson arrived last of the party. After he arrived on the scene he told Bell to bring forward the Bible and he said he was going to marry her. So she brought forward the Bible, and he took a ring out of his pocket, and he took her by the hand and he said, "I here take you, Bella Gauld, for my lawful wife," and he put the ring on her finger and they both shook hands and signed their names in the Bible, and she said, "Well, I am very glad it's all over now." (Q) After she said that, was any writing done in the Bible?—(A) Yes, they both signed their names. I saw them do so. Nothing else that I remember was done except that they signed their names. I do not remember whether anything else was written into the Bible.'

"I do not regard the pursuer herself as a credible witness for reasons which I shall state later, and while I cannot say that I saw anything in their demeanour in the witness-box which led me to doubt the credibility of Mrs Stewart or Mrs Gray, their evidence is in my opinion insufficient in the very peculiar circumstances of this case to warrant the inference that there was a serious interchange of consent by the parties. The different accounts of what took place agree generally as to some of the leading incidents or features of the ceremony—Davidson's declaration, the Bible, and the ring. But Mrs Stewart and Mrs Gray depone that the pursuer made no such declaration as Davidson made. She merely at the end of Davidson's declaration said she was thankful it was all over. There was no express interchange of matrimonial consent therefore, and I think that it is at least doubtful on the authorities (e.g.,

Fraser, H. & W. i, pp. 295-7; *M'Adam v. Walker*, 1 Dow. 148; *Aitchison*, 1 D. 42) whether the pursuer merely by her conduct can be taken to have indicated her assent to Davidson's declaration, and to have consented to take him as her husband. Looking to the existing relations of the parties something more definite than silence, or an observation which was largely irrelevant, was requisite to instruct deliberate matrimonial consent. But be that as it may, the want of an express declaration deliberately and solemnly made by the pursuer that she accepted Davidson as her husband indicates to my mind that she regarded the whole affair, as I think Davidson did, as an idle farce, furnishing an excuse for a merry-making in celebration of Davidson's birthday. It is not as if on the faith of what took place the pursuer was about for the first time to surrender her person to Davidson. The latter had nothing to gain by it. She had been his paramour for several years. There was no child to make legitimate. The pursuer was fond of Davidson, but in my opinion she was quite indifferent as to whether she had the status of a wife or not. That kind of consideration did not occur to her at all.

"It is averred on record with reference to the divorce proceedings—'At the hearing of the case Lord Low remarked on the difference in age between Davidson and the pursuer, and asked Davidson what he proposed to do for her, looking to the unfortunate position he had got her into. Davidson replied that he intended to marry her.'

"This would have been of some importance if true, but there is no proof at all that anything of the sort was said by the Judge, or that any such reply was made to the Judge by Davidson.

"The Bible in which the entries are said to have been made has disappeared. The pursuer admits that she attached no special importance to it. But this she would certainly have done if she believed that a marriage had been celebrated and that a solemn attestation of it had been recorded in the Bible.

"The ring has not been made forthcoming. It was not produced or exhibited at the proof, and there is no evidence that the pursuer was ever seen to wear a ring after the 27th December.

"The pursuer did not definitely change her name to Davidson. It is abundantly clear that she was generally known as Bella Gauld or Bruce, though sometimes spoken to as Mrs Davidson.

"As a matter of fact, to the outer world the relations between her and Davidson continued on precisely the same footing after as before the alleged marriage.

"If the pursuer seriously regarded the ceremony of 27th December as truly constituting very marriage between her and Davidson, it is difficult to understand how it came about that so small a number of people were made aware of its having taken place. She does not suggest that Davidson expressed any desire to make a secret of it or exacted a pledge of secrecy from her. Her case and her evidence is to the effect

that she did not make or attempt to make a secret of it. All that she says is that Davidson made first his mother, and after her death his sister Mary, the excuse for not taking up house with her. There is no corroboration of this, and in my opinion the evidence of the pursuer without corroboration is quite unreliable. She is obviously of a nervous and excitable temperament, and through this and her drinking habits she has got into trouble more than once. Between 1883 and 1908 she was ten times convicted in the Police Court, generally for breach of the peace, but on two occasions on somewhat graver charges. Her story of her last meeting with Davidson after he had gone to live in Montrose, but had come in to Dundee to attend the funeral of his brother Donald (October 1917), is clearly disproved by the evidence of Mrs Smith and Mr George Davidson.

"She admits that she was not introduced to any of his friends by Davidson, and no witness outside her own immediate relatives or friends was examined in support of her claim that she was recognised or treated by Davidson as his wife excepting Leitch, Gordon, and Mrs Brodie.

"Leitch, who was a police officer in Dundee, says that shortly after the divorce case he asked Davidson what he was going to do with Bella, and he replied that he had kept company with her for a long time, and he was going now to make her his wife. After stating that these were the words used by Davidson he goes back on that, and in answer to a leading question gives a totally different version of what Davidson said. Much importance cannot be given to testimony so elicited and so uncertain. Leitch had little opportunity of seeing the parties after the alleged marriage, and anything further he says about them is just as consistent with the pursuer being Davidson's mistress as with her being his wife.

"Gordon's evidence is of more importance. He was also in the Dundee Police Force (for thirty-five years), and at the time he retired he had attained the rank of inspector. He speaks to Davidson at the conclusion of the divorce proceedings having said with regard to the custody of Peter, 'I'll look after the child,' and 'I mean to make her' (*i.e.*, the pursuer) 'my wife.' He further says that not long after he met the pursuer and Davidson together in the street, and Davidson said—'You see I have been as good as my word. I have made her my wife.' But it is fairly clear that Gordon did not take Davidson seriously. He is asked—'When you were present has the pursuer when she spoke always spoken as if she were the wife of Davidson?—(A) Always. In fact I never knew whether they were or not, but they took it in good part that they were man and wife.' In cross he says—'(Q) When you met the pursuer and Davidson afterwards in the street in Dundee, and when you say Davidson told you of the marriage to the pursuer, did you not make an inquiry as to it?—(A) No, not me; I was not in the least interested in the case at all. . . . I did not ask him where and when the marriage took place and he did not tell me.

I just took the remark he made and left it at that.' He lost all trace of Davidson after 1902.

"The upshot of Mrs Brodie's opinion of the relations which existed between the parties is expressed in her cross-examination:—*Cross.*—(Q) Did you think that Mrs Bella Gauld and Davidson were married?—(A) Well, I did not like to pass what I thought, but I did not think he was altogether married like. (Q) Did you think he was making a joke?—(A) I thought he was making a joke, but she did not seem to think it was a joke.'

"Reliance was placed by the pursuer on the evidence of her son Peter Bruce. He is now 31 years of age and is a seedsman to trade. He gave his evidence with apparent frankness and candour. A year or two before the war he put it, he says, to Davidson—'Did you marry my mother?'—'Was it right,' and Davidson replied 'Yes I married your mother Peter and I mean to stick to her.' Peter says he put this question because he did not like the double game that Davidson was playing going and living sometimes with his own people. I do not quite understand how the question came to be put—if it was put—a year or two before the war, because Davidson was at that time practically living for the whole year with his sister at Montrose and in no sense living with the pursuer, and had been doing so since 1903. Davidson being dead this evidence cannot be tested, and that is a difficulty which occurs again and again in this case. The proof is one sided and lacking in the testimony of independent and impartial persons. If he said what is imputed to him, Davidson, who was fond of Peter as he was of the pursuer's illegitimate child Stewart Gauld, may have been merely trying to make things easier for Peter. It must be noted that Peter himself never addressed his mother as Mrs Davidson but always as Mrs Gauld, and he admits that very few persons called her Mrs Davidson—Davidson's habit appears to have been in speaking of her to her sons to refer to her as 'mother' and not as 'my wife.'

"The evidence with regard to the amount of money paid by Davidson is very uncertain and inexact, and it is impossible to form any definite impression as to how often or in what amounts or by whose hands she received the money that was given her, but I am satisfied that no definite allowance was made to her at any time, and further, that after Davidson's withdrawal to Montrose the payments became more than ever haphazard and intermittent.

"At no time during his life did the pursuer assert any claim to be Davidson's wife. Only one letter written by her to Davidson has been produced; it is dated 23rd June 1918. It commences 'My dear friend,' and concludes 'Your ever affectionate friend, B. G.' That is not a letter from a wife to her husband, and the reason given by the pursuer for signing herself 'B. G.' is not convincing, viz., that Davidson told her 'to address his letters that way as his sister Mary was in the habit of opening them, and Grace also.'

"Then again, when after Davidson's death she called at the office of the solicitors of the executor she did not claim to be Davidson's wife. I accept Mr Patterson's evidence as to what passed. She gave her name as Mrs Gauld, and she said that she came to ask if John Davidson had left her anything under his will and that he had promised her £1 a week after his death. She was asked why she had been promised a legacy, and she explained that she had had very intimate relations with Davidson, and that owing to that her husband Mr Bruce had divorced her in the Court of Session. Mr Patterson asked her if Davidson had married her after the divorce proceedings, and she said no; he told her he would not marry as long as his mother and sister were alive. She made no mention of the alleged irregular marriage. She swears that she replied in answer to Mr Patterson's question that she had not been married before a minister. That is denied by Mr Patterson.

"During his last illness Davidson expressed no desire to see the pursuer. He was asked on his death-bed by his nephew George Davidson and his sister Mary whether she had any claim upon him and he said 'None whatever.' He made no provision of any sort for her in his will.

"I have examined the evidence at some length. I quite assent to the view maintained by the pursuer's counsel that she does not profess to be able to establish a marriage by habit and repute. But for the reasons I have stated the evidence as to what passed on the 27th December is not in itself sufficient to establish a marriage, and it is necessary therefore to look to the whole other circumstances that have been proved to ascertain whether they corroborate and complete the oath of the pursuer so as to warrant the inference that there was a marriage between her and John Davidson.

"In my opinion they do not.

"Accordingly I shall repel the pursuer's plea-in-law and sustain that of the defenders, and assoilzie the defenders from the conclusions of the summons."

The pursuer reclaimed, and argued—Notwithstanding the lapse of time since the ceremony, the evidence of serious interchange of matrimonial consent was clear and sufficient. The subsequent conduct of the parties was explained by the husband's desire that the marriage should be kept from the knowledge of his relatives. The following authorities were referred to:—*Aitchison v. The Incorporation of Solicitors*, 1838, 1 D. 42; *Leslie v. Leslie*, March 16, 1860, 22 D. 993; *Maloy v. Macadam*, January 9, 1885, 12 R. 431, 22 S.L.R. 243; *Glass v. Glass's Trustees*, 1908, 15 S.L.T. 716.

Argued for the respondents—What took place at the alleged ceremony was not seriously intended by either party to constitute a marriage. There was no deliberate interchange of matrimonial consent. The conduct of the parties during the subsequent period of twenty years was not consistent with a real marriage. The following cases were cited:—*Jolly v. Macgregor*, 1823, 3 W. & S. 33; *Lockyer v. Sinclair*, 1846, 8 D. 582; *Beattie v. Baird*, 1863, 1 Macph. 273;

Roxburgh v. Watson, 1868, 7 Macph. 19; *Dysart Peerage Case*, 1881, L.R., 6 A.C. 489; *Petrie v. Petrie*, 1911 S.C. 360, 48 S.L.R. 225.

At advising—

LORD PRESIDENT—In this case the marriage is said to have been constituted by mutual consents *per verba de presenti* before witnesses. Even in the case of mutual consents reduced to unambiguous written terms a pursuer does not discharge the onus of proof by proving the document. He or she must explain, first, the circumstances in which the document was made, and second, how it was dealt with and acted on—*Fleming v. Corbet*, (1859) 21 D, *per* Lord President at p. 1044. This does not necessarily mean that direct evidence—extrinsic of a document in itself clear and unambiguous—must be given of matrimonial intention, but it does mean that both the circumstances preceding and surrounding the making of the document, and also the actings or conduct of the parties which followed on its execution, must be shown to support or at least to be consistent with such intention—*Imrie v. Imrie*, (1891) 19 R. 185. The position in the case of mutual consent proved by parole testimony is the same. To quote the words of the Lord Justice-Clerk in *Robertson v. Stewart*, (1874) 1 R. 596—“Even if the words used are proved, the Court must be satisfied that they expressed serious and deliberate consent. It must be seen whether the surrounding circumstances, and the character and conduct of the parties concerned, were consistent with the evidence so given.” In short, the pursuer of such an action as this does not establish his or her case merely by proving that in point of form, and to all appearances evident to the witnesses present, the mutual consents were such as might appropriately mark the entry of the parties into the married state. He or she must further show that the circumstances in which the consents were exchanged and the subsequent conduct of the parties were agreeable to the conditions of marriage and married life, or if there are circumstances which are not *prima facie* consistent with those conditions, he or she must explain them so as to remove the doubts they raise with regard to the substantial genuineness of the marriage. The unique character of marriage among other consensual contracts as the doorway to the acquisition of a legal status in which third parties, and indeed the general community, are deeply concerned requires this protection against the evasions and equivocations to which relations between the sexes so readily lend themselves. The extent of the burden thus resting on a pursuer's shoulders depends more or less on the completeness with which the exchange of consents is proved to have been unambiguous in point of form and unequivocal in the appearance it presented to the witnesses, for once a marriage is proved to have been duly constituted subsequent conduct will not avail to undo it. This latter point is emphasised in Lord Eldon's opinion in *Jolly v. Macgregor* (1828) 3 W. & S. 189, and in Lord Watson's opinion in the *Dysart*

Peerage case ((1881) 6 A.C. 537), but I do not read either of those opinions as warranting the implication that mere proof of exchange of consents—however unexceptionable in point of form and to all appearances evident to the witnesses—without any reference to the surrounding circumstances and subsequent conduct is sufficient.

In the present case the pursuer's account of the interchange of consents between her and the late John Davidson on the latter's birthday, 27th December 1899, is challenged by the defenders both in point of form and as wearing the appearance of something no better than a piquant incident in a riotous entertainment. The attack with regard to the form of the ceremony seems to me to be supported on trifling and unsubstantial grounds. To represent it as a farce in face of the evidence of the surviving witnesses, particularly that of Mrs Stewart, who is not crossed on the point, and of Mrs Gray, who is not crossed at all, is out of the question. I therefore differ materially from the Lord Ordinary on this part of the pursuer's case, and I regard the interchange of mutual consents—effectual in point of form and serious in intention to all appearances evident to the witnesses present—as established. The loss of the pursuer's family Bible, in which it is proved that something was inscribed at the conclusion of the ceremony, deprives the pursuer of what might have been a further powerful corroboration, and it has the effect of leaving her with a heavier burden of proof than might otherwise have been the case with regard to the circumstances of her alleged married life and the substantial reality of the consents which in form and appearance seemed unexceptionable. But the loss of this piece of evidence does not detract from the clear, congruous, and uncontradicted parole testimony of the pursuer's witnesses.

Moreover, there is evidence that at the conclusion—three weeks earlier—of an action of divorce in which the pursuer was respondent and the late John Davidson co-respondent, the latter had openly expressed his intention to marry the pursuer. It is not proved that this intention was expressed to or in the presence of the Judge, but it is proved that it was made in connection with the question of the custody of the pursuer's children, of whom one was the son of the pursuer of the action of divorce. The Lord Ordinary has not, I think, apprehended the weight of this piece of evidence. The pursuer and her two sons had been maintained by John Davidson for five years before the divorce, during which period she had been his mistress. Proof of a declared intention to marry the pursuer at the moment when she became a free woman goes a considerable way to support deliberate and serious matrimonial intention.

While the pursuer's case is a formidable one so far as regards the central matter, namely, the interchange of unambiguous consents in circumstances not inconsistent with genuine marriage, it labours under heavy difficulties in the department of subsequent conduct. An important feature of

the case is the long delay which has occurred before the pursuer made any attempt to assert her position as a married woman. She was, indeed, content for twenty years to continue for all practical purposes in the same mode of life with John Davidson as before the alleged marriage. She never used his name. She was never made known either to his relatives or to any of his friends (with the possible exception of a policeman) as his wife. The only letter we know of as having passed between her and John Davidson is one of hers, written when he was nearing his end, and neither in the mode of address nor in the style of signature is it consistent with any other than an illicit connection between them. She was apparently maintained by John Davidson so long as he lived, but he ignored her in his will, and is said by one of his relatives to have stated on his deathbed that she had no claim upon him. They never took up house together and never lived as husband and wife, though he often came to her house, and sometimes stayed in it with her for some weeks at a time. She was an object of dislike to John Davidson's sister, and when his visits to the pursuer became less frequent and his remittances to her less regular—after he left Dundee and took up his headquarters in Montrose—she appears to have created some disturbances at the door or on the stairs of the house in which the sister lived, but on none of these occasions did she assert herself to be John Davidson's wife. Even after his death, when she was making inquiries about his testamentary dispositions, it is not proved that she made any claim to be his widow, though it must be said that the defenders have needlessly embarrassed this part of the case by failing to clear up some doubts which the evidence of the executors' law agent leaves behind it. The embarrassment is all the greater because of their failure to put his assistant, who played a not unimportant part in the interview, into the box. The two sons were young boys at the date of the ceremony in 1899, but I do not doubt the complete honesty of the evidence they give with regard to it. Nor do I doubt that John Davidson stated in answer to their questions at a later date that he had married the pursuer. But it is remarkable that while all the guests present at the ceremony were either relatives or friends of the pursuer, the survivors who were examined at the proof (other than the two boys) lost all touch with the pursuer and John Davidson soon after the ceremony, and therefore knew nothing of their subsequent mode of life, while all the others but one are now dead and their evidence lost. The pursuer's father, mother, and one of her brothers have died; the other brother who still survives is not examined. We were told he refused to give evidence for either side. The loss of all these sources of evidence has to be added to the loss of the entry in the family Bible already alluded to. If these sources had been available the result might have been so to fortify the serious and deliberate character of the ceremony as to make it comparatively easy to explain the

striking features of the pursuer's and John Davidson's subsequent conduct, which go strongly to discredit and negative the idea of a real marriage, or the result might have been only to aggravate the burden of explanation which in any case rests on the pursuer's shoulders. As the burden of proof is primarily hers, I am afraid it is on her that the disadvantageous results of delay in raising the question must fall. The conduct of the parties—so far as this can now be elucidated by evidence—during the twenty years which have elapsed since the ceremony is not in my opinion consistent with a real marriage having taken place. It is not sufficiently accounted for by unwillingness on John Davidson's part openly to acknowledge the alleged marriage to his relatives. Moreover, the facts are capable of explanation on the view that the ceremony, following as it did on the public scandal of the divorce, was a cloak for the permanent continuance of an illicit connection and a means of stopping the mouths of the pursuer's relations. Accordingly, having in view the principles applicable to the proof of a marriage of the kind here alleged which were discussed at the beginning of this opinion, I have come to the conclusion, not without some difficulty, that the pursuer has failed to establish her case.

LORD MACKENZIE—This is an action to establish an irregular marriage by declaration *de presenti*. In such a case all the facts and circumstances require to be carefully examined—those antecedent to and pending the ceremony, and those relating to the subsequent conduct of the parties. It is only after this has been done that an inference can be drawn whether there was real and deliberate consent which constitutes marriage. Marriage is a consensual contract from which such important consequences follow that the evidence requires to be jealously scrutinised. Care must necessarily be taken to avoid resorting to the conduct of the parties subsequent to the ceremony for the purpose of undoing a marriage contracted. It is only legitimate to regard it for the purpose of learning whether the parties "did or did not by their conduct exhibit a conscious feeling that no such ceremony had taken place between them as was sufficient to lead them in their own minds to the conclusion that they were married persons"—*Jolly v. M'Gregor*, 3 W. & S. 179; *Fraser on Husband and Wife*, i, 416. In the *Dysart Peerage* case, 6 A.C., Lord Watson says, at p. 537—"If it be found that the subsequent behaviour of the parties was not consistent with their having contracted matrimonial relations, that will suffice to discredit the ceremony and negative marriage."

The issue in every case is whether at the date of the alleged ceremony there was marriage not merely in form but also in substance. In the present case the difficulty is whether the subsequent behaviour of the parties "will suffice to discredit the ceremony"—to use the language of Lord Watson. The problem being to ascertain what was the substance of the ceremony,

it becomes of great importance to take note, at the outset, of the fact that owing to the delay of twenty years in bringing the action what is presented in the evidence is not the whole but only a fragment. Of those present at the alleged ceremony on 27th December 1899 only two are brought to corroborate the story of the pursuer. Three are dead, namely, her father, mother, and brother William; one is alive, her brother David, but was not called. The evidence therefore is fragmentary, however word perfect the account may be, and it is not a representation of the whole. The family Bible in which the writing and signatures are said to have been recorded is not produced, and no satisfactory account is given of why it was not preserved.

The subsequent conduct of the parties is most significant. The pursuer is a woman who never at any time evinced any anxiety as to her status. She had lived with Davidson for several years before the alleged ceremony. She did not indicate a desire to be recognised as his wife. She does not say that she was asked by Davidson to keep the marriage secret. She says everyone knew she was his wife. Yet nobody is brought to say that they were living together as man and wife. They never took up house together. The pursuer never took the name of Davidson. She continued to be known as Mrs Gauld, her maiden name. This she had reverted to after her divorce from her husband Bruce in 1899. Some three years after the alleged ceremony Davidson left Dundee and went to live with a married sister in Montrose and Arbroath, visiting Dundee periodically. He is said by the pursuer to have given as his reason for not taking up house with her as his wife, first, that he would not do so during the lifetime of his mother—the exact date of her death is not proved—and next, after his mother's death that he would not do so until his sister Mary died. As his sister Mary was many years younger than himself this was no reason at all. During all this time the pursuer made no claim to be recognised as Davidson's wife. He certainly visited her in Dundee, and made payment to her of an allowance, though the evidence is loose as to the amount of the payments. One of the reasons for his leaving Dundee was that he could not get peace for the pursuer always annoying him. There is evidence in the case of her unfortunate habits. It is a remarkable feature of the case that even on the occasions when the pursuer came and created disturbances at the Davidsons' family house in Dundee, she never, so far as the proof discloses, ever pretended that she was Davidson's wife. The only writing produced is the letter dated 23rd June 1918, when Davidson was ill. This letter, commencing "My dear Friend," and ending "Your ever affectionate Friend, B. G.," although it may fairly be described as a good letter, is certainly not the letter of a wife. It is not a satisfactory explanation of its terms, taken along with the pursuer's other conduct, to say that Davidson's sisters were in the habit of opening his letters. Neither in his last

will nor in his previous one did Davidson make any mention of the pursuer. When asked on his deathbed if she had any claim upon him he denied that she had. The pursuer was never sent for by Davidson during his last illness. She did not attend his funeral. She went to the Sheriff-Clerk's office to see if she was in the will. When she discovered she was not she went to the office of Mr Patterson, the agent for the executor of the will. Even then, as I read the evidence, even of the pursuer herself, she did not claim to be Davidson's wife. She gave the name of Mrs Gauld, and said that Davidson had promised her £1 a-week after his death. She explained that she had had very intimate relations with him, and that owing to that her husband, Bruce, had divorced her. Mr Patterson, whose evidence the Lord Ordinary accepts, then asked her if Davidson had married her after the divorce proceedings, and she said "No," he told her that he would not marry as long as his mother and sister were alive. It is, no doubt, unfortunate that Mr Patterson's assistant Mr Dempster was not called as a witness. He certainly should have been. But this does not appear to me to be a sufficient reason for differing from the Lord Ordinary on the question of the relative credibility of Mr Patterson and the pursuer. It was not for a year after this interview with Mr Patterson, and twenty years after the date of the ceremony alleged to have constituted a marriage, that in this action for the first time the pursuer claimed to be Davidson's wife.

The difficulty of the case lies in the fact that the pursuer's account of what happened on 27th December 1899 is corroborated by Mrs Stewart and Mrs Gray. No doubt if the pursuer in a case of this kind were put to prove the exact words used with the literal accuracy required in a verbal warranty, it is possible to point out discrepancies. But for my part I regard the account given by the pursuer and her witnesses as coming up to proof of what is required in point of form to constitute marriage according to the law of Scotland. To the question, what did the parties mean if they did not mean marriage, it is difficult to find an answer, for none of the intelligible reasons given in the previous reported cases are to be found here. There is the undoubted fact that just three weeks before the ceremony decree had been pronounced in the Court of Session divorcing the pursuer from her husband Bruce on account of her conduct with Davidson. It is not proved that Davidson gave any undertaking in Court that he would marry her, but there is evidence that outside the Court immediately after he said he would do so. He certainly appears to have been good to the pursuer's two sons.

The case presents difficulties, but I have come to be clearly of opinion on a review of the whole case that the subsequent conduct of the parties was such as to constitute a body of negative evidence which could only be overcome by more satisfactory and more complete affirmative evidence of the whole circumstances attending

the alleged ceremony than has been adduced in the case. My view therefore is that the pursuer has failed to prove her case.

LORD SKERRINGTON—Upon a consideration of the evidence which the pursuer has been able to lay before the Court I do not think that it is possible to affirm with certainty that the ceremony which she and the late John Davidson went through upon the evening of 27th December 1899 was understood and believed by them at the time to create the relation of husband and wife between them. So far I agree with the Lord Ordinary. At the same time I venture to think that he has not fully appreciated the strength of the pursuer's case and the extent to which her testimony was satisfactorily corroborated. It is true that in various important particulars the conduct of the parties during the twenty years which intervened between the ceremony and the death of Davidson was not what is usual in the case of persons who look upon themselves as married to each other. The circumstances, however, were very peculiar, as also were the characters and lives of the two principal actors in the drama. When this speciality is kept in view I do not see any great improbability in the story told by the pursuer although she asks us to believe that a man married his kept mistress without having the reasons for doing so which ordinarily account for such a marriage. What primarily leads me to a decision adverse to the pursuer is the fact that she has by failing to preserve important evidence, and by her delay in bringing the action placed the Court in much the same position as if she had asked it to construe a deed portions of which had become illegible in consequence of her having left it exposed to wind and weather. Thus she did not preserve the family Bible (originally the property of her grandfather), in which she alleges that Davidson made an entry upon a leaf provided for that purpose "to the effect that pursuer and he had been married that day." Her carelessness and callousness, if one believes her own account of the matter, are not only inexcusable but also indicate that if she was married to Davidson she attached no great importance to the fact. Consistently with this view she did not try and was obviously unable to reproduce the exact terms of the entry or to state whether it was or was not preceded by similar entries undoubtedly genuine and certifying marriages made by other members of her grandfather's family. The evidence of her son Stewart Gauld suggests but does not prove that this was actually the case. If the pursuer had been able to establish by primary or even by secondary evidence that the writing which she and Davidson signed at the time of and as part of the ceremony was of the kind which I have indicated, it might have been difficult to come to the conclusion that they so acted in order to certify and record the fact that a course of concubinage had been substituted for one of adultery.

Similar considerations apply to the loss of evidence by the death of persons who were present at the ceremony, and in par-

ticular the pursuer's father, mother, and brother. Though one of her two brothers is still alive he was not examined, because as we were informed by the pursuer's counsel he objected to appear as a witness in a litigation which did not redound to the credit of his family, and accordingly he declined to give a precognition. The defenders were furnished with his address, but their counsel also preferred not to examine him. In the circumstances I do not think that any inference one way or the other can be drawn from the absence of this witness. The fact, however, remains that owing to the delay in bringing the action one aspect of the case has been left obscure. I should like to have known what the pursuer's parents and brother thought of the ceremony, and also the impression which the pursuer's father derived from Davidson's rejection of his suggestion that "the thing" should be "done over again" by a minister. Davidson's exceedingly conventional reply shows that he was not disposed to make a confidant of the old gentleman, but he may none the less have had excellent reasons from his own point of view for preferring an irregular though semi-public marriage to a regular marriage even of the quietest description. A rumour that he had contracted a "Scotch marriage" with his mistress, even if it should come to the ears of his mother and sister (which it never did), could be contradicted by him and could not be verified by them. On the other hand, if he ventured upon a regular marriage the fact would become known sooner or later and could easily be verified, in which case he foresaw that he would be exposed to the gibes of his female relatives, and would probably lose his comfortable home with them. No doubt it shocks us to learn that it was part of the treaty of this alleged marriage that the husband was not to take up house with his wife during his mother's lifetime, thus in the eyes of the public relegating his wife to her former position of a kept woman visited from time to time by her keeper. This arrangement, however, did not shock the pursuer's sense of propriety, and probably both parties considered that his proposal was in the circumstances a very handsome one.

A forcible argument in favour of the reality of the pursuer's marriage with Davidson is afforded by his attitude towards her two sons—an attitude which assumed prominence at the very moment when her divorce made a marriage between them for the first time possible. Under his kindly guidance these two boys, abandoned by their fathers, have become well-doing men. I disagree with the Lord Ordinary's opinion that the ceremony which took place three weeks after the divorce was regarded by the parties to it "as an idle farce furnishing an excuse for a merrymaking in celebration of Davidson's birthday." On the most unfavourable view for the pursuer it was, I think, an announcement by Davidson that he intended to take care of her and her children. His subsequent conduct towards her was no doubt largely determined by her unfortunate habits and behaviour.

It would not serve any good purpose to analyse the evidence in detail. My impression is that both the pursuer and Davidson intended by their ceremony to contract a real and immediate marriage. On the other hand our knowledge of the circumstances is fragmentary and incomplete, and I cannot say that the marriage has been satisfactorily proved. Accordingly I am for adhering to the Lord Ordinary's interlocutor.

LORD CULLEN did not hear the case.

The Court adhered.

Counsel for Pursuer and Reclaimer—Morton, K.C.—Lillie. Agent—W. Melvin Ross, S.S.C.

Counsel for Defenders and Respondents—Wark, K.C.—Scott. Agents—J. & J. Galletly, S.S.C.

Saturday, January 22.

FIRST DIVISION.

[Sheriff Court at Hamilton.

SMITH v. ARCHIBALD RUSSELL,
LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (2) (c)—Serious and Wilful Misconduct—Explosives in Coal Mines Order 1st September 1913, Rule 3 (a)—Breach of Rule.

The Explosives in Coal Mines Order of 1st September 1913 provides—Rule 3 (a) —“If a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means.”

Two miners, S. and M., were firing shot-holes in pairs by applying naked lights to the strums or fuses. M. lit his strum, and S., who had applied a light to his fuse, but believed it was not ignited, retired with him to a place of safety. M.'s shot having exploded, S. went back immediately to light his fuse. Before he reached it the shot exploded and he was injured. He knew that the Explosives in Coal Mines Order was in force in the colliery, but considered that in going back to light his strum he was not committing a breach of the Order.

Held that S. had been guilty of serious and wilful misconduct.

Fife Coal Company, Limited v. Colville, 1920, 58 S.L.R. 85, and George v. Glasgow Coal Company, Limited, 1909 S.C. (H.L.) 1, 46 S.L.R. 28, followed.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (2) (c) provides—“If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury

shall, unless the injury results in death or serious and permanent disablement, be disallowed.”

George Smith, miner, Hamilton, claimed compensation under the Workmen's Compensation Act 1906 from Archibald Russell, Limited, coalmasters, Hamilton, in respect of injuries sustained by him while in their employment on 31st May 1920.

The matter was referred to the arbitration of the Sheriff-Substitute of Lanarkshire at Hamilton (SHENNAN), who refused the claim for compensation, and at the request of the pursuer stated a Case.

The Case stated—“The following facts were admitted or proved:—1. On 31st May 1920 and for some time prior thereto the appellant was employed by the respondents as a miner in their Ross Colliery, Hamilton, and was engaged in producing coal. His average weekly earnings prior to the accident were £5, 14s. 2. On said 31st May 1920 the appellant and his neighbour David M'Cutcheon bored and stemmed four shots in their working-place. The shot-holes were prepared in pairs, one pair on each side of the working-place with 10 or 12 feet between them. Each pair consisted of one shot-hole near the floor and another 2 or 3 feet above it. The appellant and M'Cutcheon first lit the bottom shots of each pair and then retired to safety. These shots exploded successfully. They returned to light the upper shots. M'Cutcheon duly lit his. The appellant applied his naked light to the end of the strum of his shot, but he believed that the strum had not been ignited. As, however, M'Cutcheon had lit his he told the appellant that it was time for them to retire to a place of safety, and they did so. 3. M'Cutcheon's shot duly exploded about a minute thereafter. The appellant, believing that his shot was not lit, went back immediately to light it. M'Cutcheon asked him if he was sure he had not lit it and the appellant said that he was sure. When the appellant had reached a point about 20 feet from the shot it exploded and injured him. The delay in the explosion was due to the dampness of the strum. 4. In consequence of said injuries the appellant was totally incapacitated for work for a period of ten weeks, after which he regained his full earning capacity. His injuries were thus not serious and permanent. 5. Paragraph 3 (a) of the Explosives in Coal Mines Order of 1st September 1913 (which is in force in said colliery) provides—‘If a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means. The appellant knew that this rule was in force in the colliery. Believing that his shot had never been lit he considered that in going back to light it he was not breaking the rule. I held that in thus going back the appellant was in breach of the said Order and that this breach amounted to serious and wilful misconduct. On 29th October 1920 I issued my award, refusing the appellant's claim for