

John, and Archibald Ferrier, W.S., placed to his own credit in the books of said firm certain sums belonging to the trust-estate of the late Major James Campbell of Glenfeochan. This he did during the years 1796-1802, and for some purpose now undiscoverable. The firm of James and John Ferrier having passed through several changes has now become that of Messrs Ferrier & Wilson, W.S. The trustees of the said John Ferrier did not ascertain and pay off this debt to the representatives of Major Campbell, but on the contrary handed over the residue of the estate of John Ferrier to Professor Ferrier, the residuary legatee. The claim of Major Campbell's representatives, therefore, remained unsettled, and he alleged that it had become necessary for the good of all parties concerned to raise the present action of multiplepointing.

WATSON and HUTCHISON for the pursuer and reclainer.

LORD ADVOCATE YOUNG and BLAIR for the objectors and respondents, Professor Ferrier's trustees.

At advising—

THE LORD PRESIDENT—This is a most singular summons of multiplepointing, and there are so many apparent grounds of objection that one is almost embarrassed in dealing with them. However, on the very face of the summons there seem to be no grounds whatever for the process. It is raised here with the object of distributing funds in Mr Thomas Ferrier's hands, being the balance due by him to the trust-estate of the late Professor Ferrier of St Andrews, to which trust he acted as agent. In January 1869 Mr Ferrier's agency ceased, and he was then debtor to the trust in the sum of £519 or thereby, which is stated to be the fund *in medio* in this action. Mr Thomas Ferrier, besides being agent, was himself one of the five trustees of the late Professor Ferrier. Now, he appears on his own shewing to raise this multiplepointing as trustee? If so, I think it is surely incompetent, because the money is in his hands not as a trustee, but simply as a debtor to the trust-estate. If, on the other hand, he were to acknowledge that the money was in his hands as agent, which is clearly the case, but were to say that it remained undivided, and that there was a competition of claims on the fund; then that would seem to me to be equally untenable in point of fact. The first claim, and an undoubtedly just one against him, is that of the trustees, whose agent he was. But what is the other? It is the claim of certain supposed heirs of Major Campbell of Glenfeochan, who may have an existence and who may not—we know nothing and he can tell us nothing about them—and what is their claim, supposing it to be made? It is one against Mr Ferrier, upon the ground that he is the business representative of certain legal firms. That may be the case, but it can give the supposed claimant no right against this £519. They may have a very good claim against Mr Ferrier, but they have no right against this fund in competition with the trustees of Professor Ferrier. There are no *termini habiles* whatsoever for a multiplepointing, and I am not even satisfied that there are any double claims, for I am not at all clear that there are any such persons as the representatives of Major Campbell of Glenfeochan.

LORD DEAS—There is no room for any dubiety as to the way in which Mr Ferrier brings this sum-

mons of multiplepointing. He himself says in the summons that he, the said Thomas Henry Ferrier, as one of the trustees of the late Professor Ferrier, is the real raiser. He raises this process as trustee, though he is only one of five trustees. If he can do so, it seems to follow that the other four could raise a similar process. And a multiplepointing being already a congeries of actions, we should have a congeries of congeries. But then, although he stated this at the outset, he goes on to make other statements perfectly inconsistent. He goes on to say that the sum in question is the balance in his hands as agent belonging to these trustees, of whom he himself is one. The trustees were therefore, upon the face of the summons, his creditors, and his only creditors. They are entitled and bound to give him a discharge. If this had been an action by the trustees or their quorum, a nice question might have been raised, whether or no there was double distress. It might have been a question whether the possibility of a claim being made by a possibly existing person is enough to raise double distress. But that is not the action before us. The action is not raised by any person legally entitled to hold the funds. The pursuer's duty was, as soon as required, to pay the funds over to the trustees. I do not see that the mere fact of his being also a trustee makes any difference. He was still acting as the agent of the trust. Nor do I see either danger or hardship that can result to him in being obliged to make such payment to the trustees. Would it make him any more personally liable that, having at one time a fund belonging to the trust estate in his hands as agent for the trust, he paid that sum over into the hands of the trustees on being required to do so. I cannot think so. And, over and above this, I do not see why he should not insist upon paying over the sum to-morrow, and take a discharge from the trustees, and then, if he likes, resign his trusteeship.

Lord ARDMILLAN concurred.

LORD KINLOCH—I am of the same opinion. How does the pursuer justify this action of multiplepointing? simply by telling us that some people are coming about him and saying that they have possible claims against the trust estate of Professor Ferrier, and asking him to keep this money for their behoof. This can never amount to double distress. I think that the Lord Ordinary was right in dismissing this process as incompetent.

The Court adhered.

Agents for the Pursuer and Reclainer—Ferrier & Wilson, W.S.

Agents for the Objectors, Professor Ferrier's trustees,—Hunter, Blair, & Cowan, W.S.

Saturday, October 29.

SECOND DIVISION.

SCOTT v. STEWART.

Proof—Promise of Marriage—Reparation. Circumstances in which held that a man who had been for years carrying on a courtship had made an implied promise of marriage, and was liable in damages for breach thereof.

This was an appeal from the Sheriff-court of Perthshire, in an action at the instance of Catherine Scott, Auchnahyle, Pitlochry, against

John Stewart, Moulinearn, "for the sum of £500 sterling, in name of reparation and damages for the loss and injury which she has sustained in her character and reputation through the defender's failure and refusal to implement and fulfil repeated promises of marriage, deliberately and solemnly made by him to the pursuer, and accepted by her in or about the month of March 1858, and at various times during the subsequent years down to and including 1867, the defender having during the whole of said period courted the pursuer, and engaged her affections for the purpose and with the intention of marriage: and as a *solatium* to her feelings for the breach of the said promises on the part of the defender."

After a proof, the Sheriff-Substitute (BARCLAY) pronounced this interlocutor:—

"*Pertshire, 31st December 1869.*—Having heard parties' procurators, and made avizandum with the process and proofs,—Finds, as matter of fact, that the pursuer has failed to prove such distinct mutual promise and agreement to marry between her and the defender as can found an action of damages for breach thereof: Therefore assolvies the defender from the conclusions of the summons: Finds him entitled to expenses, and remits the account thereof to the auditor to tax, and decerns.

"*Note.*—The Sheriff-Substitute is of opinion that to found an action of damages for breach of promise of marriage there ought to be as strong and direct evidence of the promise as, when followed by sexual intercourse, would according to the Scotch law (as still existing) constitute very marriage. The only distinction between the two class of cases is, that in the latter class the proof of the promise is prudently limited to the writing or the oath of the party on whom the marriage is sought to be fixed. The kind of promise in either class ought to be the same, not merely general courtship, however close and lengthy, or words of empty adulation or fancy promises, but a serious, distinct, and mutual offer and acceptance to marry. The great point is *mutuality*. An offer or promise on one side to marry on some future contingency, or which on the other side is rejected or not accepted, cannot ground an action of declarator of marriage, or for damages because of breach thereof. Both parties must be bound or neither. If mere vague and insincere promises on one side were to stand for mutual promise or agreement, there are few of the host of filiation cases where such flent of promise may not be proved.

"In these numerous cases the woman either seeks to screen her sin by the cover of such promise, or if such has any colour of truth, it is easily resolved into the base treachery of a heartless seducer, and in that case in an action for seduction he ought, even on *more slender* proof, most justly to be made liable as a seducer. Indeed, the Sheriff-Substitute has far more reliance on promises of marriage where there is no child in question. In such state of facts, there is the prominent fact of the high moral character of both parties, and therefore every presumption in favour of the promise being made with no vicious intent, but for the pure and sole purpose of holy matrimony.

"Testing the proof in the case by the rule of evidence above indicated, it cannot be said that though the defender in a declarator of marriage had, on reference to his oath, sworn to every thing in his declaration, nay, to every item of the evidence of the pursuer's witnesses, there would have been proof of such mutual promise to marry as,

followed by childbirth, could have formed a Scotch marriage between the parties. Take the converse. Suppose the defender had sued the pursuer for breach of promise, and that the same evidence was then adduced, still there would have been wanting the essential element of mutual promise and acceptance as could have rendered the pursuer liable to the defender.

"The Sheriff-Substitute, in such cases, is inclined to place much weight in the written communications between the parties. In letters written in silence and away from human eye and ear, and designed only to reach the object of affection, the swain is apt to pour out the secrets of his inmost heart, often in language of hyperbole. It is certainly matter of observation that in this case, during so long a courtship and with the averment of copious effusions, only three letters have been put in. These certainly show acquaintance, even courtship, but they are wholly wanting in the excelsior strain characteristic of such epistles. Nevertheless no general rule can be laid down as a common standard, and some temperaments are uniformly frigid even in matters which with others occasion excessive heat. One letter does appear to the Sheriff-Substitute as indicative of the truth of the axiom that 'the current of true love never runs smooth.' It would appear as if some cloud had darkened the bright prospects of the defender, and that the pursuer had on one occasion scowled on him in passing. It is strange that neither party was examined on this epoch in their amatory history. But at all events, looking at the date of that letter, the breach had been healed, and the parties had afterwards become reconciled and affectionate to a degree far beyond the limits of propriety.

"On the face of the letters, and of the parole evidence, there can be no doubt of the existence of a lengthy courtship, but that alone will not make up for a distinct promise, however much it may add weight to the proof of such promise. The danger of relying entirely on the evidence of near relations of the parties is well exemplified in this case. The relatives on one side directly swear antagonistically to those on the other. Nevertheless, relations are not to be altogether excluded—seeing that the marital secret is likely to be first divulged to them rather than to the public, to whom indeed the denial of all such treaties is unfortunately thought rather a virtue until the consummation takes every one by agreeable surprise.

"The Sheriff-Substitute is rather unfavourably impressed with the proof as to the Sabbath visit at Pitlochrie and the night visit at Moulinearn. Both these visits are somewhat suspicious, and are inconsistent with the existence of a fair and honest promise to marry.

"Preparations made on either side for marriage always form one of the strongest facts of the real evidence in this class of cases, such as taking and furnishing a house intended for the marriage pair. In the present case these preparations were all on one side. The extraordinary length of time devoted to them is inconsistent with any immediate intention to consummate marriage. As another aspirant for the pursuer's hand is brought prominently forward, there is no evidence that these preparations were the direct result of any act of the defender. Besides, the enumeration is of articles at all times found useful in any respectable household without any immediate prospect of the marriage of any of its members. No marriage gown or garments are in the catalogue.

"There is considerable effect due to the delay in enforcing the claim, and it is not satisfactorily explained why the action for breach of promise should not have been combined with that of filiation and aliment of the child. It has let in the plea that the pursuer was desirous of trying her strongest case first, and only on its success to put forth the far more important claim of damages for breach of promise.

"The parties are in age and in every social respect alike, and there is not a stain on the pursuer's character but that which the defender has inflicted, and after so long a courtship it is matter of deep regret that the defender did not see his way to make reparation to the pursuer in a manner which would receive the approbation of his conscience as well of the general public by doing justice alike to her, who at one time was doubtless the object of his affection, and still more to their child. Even yet this result is not beyond remedy if parties be left to themselves."

The pursuer having appealed, the Sheriff (TAIT) pronounced this interlocutor:—

"*Edinburgh, 28th March 1870.*—Having considered the minute of appeal, reclaiming petition, and answers, and whole process, and made avizandum,—Recalls the interlocutor appealed from: Finds, as matter of fact, that for a long period a courtship on the part of the defender, and a favourable reception thereof on the part of the pursuer, existed between the parties: Finds that the said courtship and reception thereof was with a view to and in contemplation of marriage between the defender and the pursuer: Finds it admitted by the defender that on one occasion at least the defender distinctly asked the pursuer to marry him: Finds that although the marriage was delayed on one consideration or another, the offer was not rejected or repudiated by the pursuer; but, on the contrary, the defender states that the pursuer also asked the defender to marry her: Finds that the pursuer's relations were under the belief that the pursuer and defender were engaged to be married; that the defender was received into their houses on that footing; and that preparations were made and gifts given by them with the view to such marriage: Finds that the *liaison* or intimacy between the parties continued on this footing until the defender obtained possession of the person of the pursuer, and in the circumstances it must be held that the pursuer yielded such possession of her person to the defender on the faith of the defender's offer of marriage, and the implied engagement between them: Finds, in law, that in the whole circumstances there existed an implied engagement for marriage between the defender and pursuer, and that should the defender refuse to implement the same, he is guilty of breach of promise of marriage, and is liable in damages for the same; but before answer as to the amount of damage, or pronouncing decree for the same, appoints the defender to give in a minute within one month from this date, stating explicitly whether he refuses now to marry the pursuer.

"*Note.*—The defender in his defences has maintained that there was no promise or engagement to marry between him and the pursuer, and that therefore he is not liable in damages for the breach thereof, but he has not said that if it be decided otherwise he will not now marry the pursuer.

"The Sheriff does not concur with the Sheriff-Substitute in thinking that this case must be regulated by the views applicable to a declarator of

marriage on a promise *subsequente copula*. An actual marriage, which not only determines the status of the offspring thereof, but may also affect the rights of third parties, is a very different thing from a mere action of damages for breach of promise. Accordingly, our law, which alone acknowledges the constitution of marriage in such circumstances, wisely requires the establishment of an express and distinct engagement by evidence as to which there can be no possible mistake—viz., by writ or oath. But a case of damages is a mere jury question, to be determined on the whole facts and circumstances proved *prout de jure*. If these facts and circumstances are such that an engagement or promise of marriage is to be implied therefrom, on the faith of which the pursuer is entitled to rely, then damages may be given for breach thereof, and cases of this kind constantly occur in England, where there is no marriage by promise *subsequente copula*. The previous action of filiation with regard to the child, which was necessary for the aliment of the child, is no bar to the present action, especially considering the reservation therein."

The defender appealed to the Court of Session. SHAND and MONCREIFF for him.

WATSON and STRACHAN in answer.

At advising—

LORD JUSTICE-CLERK—I have no difficulty in arriving at the conclusion that the Sheriff's judgment should not be disturbed. I think it clearly proved—1st, That there was an offer of marriage made by the defender, and that offer was accepted; and 2d, that it is not proved that that promise was rescinded with consent of the pursuer. There is no difficulty as to the law of the case. If the pursuer alleged that the intercourse between them had taken place on the faith of the promise, and had proved that promise by the defender's writ or oath, that might have been the foundation of a declarator of marriage. But the same facts and circumstances may be made the foundation of an action for breach of promise, the only distinction being that in the one case the proof is confined to writ or oath, while in the other the case may be established *prout de jure*. The question then is, has the pursuer established *prout de jure* that there was a promise to marry, and that it has been broken? The defender admits that in 1853 he did ask the pursuer to marry, but he says the offer was not accepted. Of this there is no evidence except his own statement. The whole evidence in the case is the other way. The pursuer's mother says that immediately after the defender admits having made the offer preparations for the marriage were made by the pursuer, and that these were continued for some time. This is confirmed by the evidence of the pursuer's brother, who saw the preparations going on. The mother says that the defender asked to have the marriage postponed, at the same time requesting her to keep her daughter for him; but there is no evidence that the defender ever asked to be released from his engagement, or that there was an arrangement to terminate it. The evidence as to the conduct of the parties shows that there had been no release from the engagement. All doubt on this subject is removed by the evidence of the pursuer's brother, Alexander Scott. What passed between him and the defender before the birth of the child can be read in no other way than as showing the consciousness of the defender at that time that there was a subsisting promise of marriage between him and the pursuer. I come

therefore to the conclusion that the Sheriff's judgment must be affirmed; and I am satisfied that this conclusion is not only in accordance with the evidence, but manifestly with the justice and equity of the case.

LORD COWAN—The only difficulty I have had as to this case has been caused by the conclusions of the summons. Had this been an action of damages for seduction there could be no room for question as to the result. But after considering the able argument we have had from the bar, I have come to the conclusion that there was here a continuous promise of marriage between the parties. As your Lordship has explained, this appears clearly enough from the evidence of Alexander Scott. So far as I can see there is yet no impediment to this marriage, or anything to prevent the damages to be awarded being held as the dowry of the wife.

LORD NEAVES concurred.

Appeal dismissed.

Agent for Appellant—Alex. Morison, S.S.C.

Agent for Respondent—David Milne, S.S.C.

COURT OF JUSTICIARY.

(Before a full Bench).

Monday, October 31.

M'CALLUM AND ANOTHER v. MACLULLICH.

Gunpowder Act—23 and 24 Vict. c. 139, §§ 24 and 25—Summary Procedure Act, 27 and 28 Vict. c. 53, § 16. In a suspension of a conviction under the sections 2 and 4 of the Gunpowder Act 1860—*Held* that the words "keeping or causing to be kept," in the 4th section, do not apply exclusively to the master; and that both the manufacturer and his responsible manager might be convicted under the same charge, if the evidence disclosed a competent case against the latter, in respect of the position held and the authority possessed by him; this was consequently a question on the evidence, as to the position, &c., held by the manager, which could not be opened up in a Bill of Suspension.

Farther, *held* that the explosion of the powder in question, before discovery of the breach of the statute, or at any rate before the complaint is laid, though it may accidentally defeat the forfeiture, does not obviate the penalty.

This was a bill of suspension brought before the High Court of Justiciary by John M'Callum, resident or managing partner of the business carried on for the manufacture of gunpowder at the Kames Gunpowder Mills in Argyleshire, and William Charles Sealy, manager of the said mills, of a sentence pronounced against them on the 9th day of August 1870, by Sir George Home, Bart., Sheriff-Substitute of the county of Argyll, on the complaint of Duncan MacLulich, writer in Inveraray, Procurator-Fiscal of the said county, "in respect of the complainers having, as pretended, been found guilty of an offence within the meaning of the Act 23 and 24 Vict., cap. 139, to the extent of keeping or causing to be kept in the press-house libelled on 455 pounds of gunpowder in excess of the

quantity allowed by the statute, by which sentence the said Sheriff-Substitute adjudged each of the complainers to forfeit and pay the sum of £20 of penalty, with the sum of £3, 7s. 6d. each of expenses, to be applied in terms of the statute: and in default of payment thereof within eight days from said date granted warrant for the recovery of the said sums by pointing of their goods and effects and summary sale thereof on the expiration of not less than forty-eight hours after such pointing, without further notice or warrant, and appointed a return or execution of such pointing and sale to be made within eight days from the expiration of the period therein allowed for payment, under certification of imprisonment for the period of one calendar month in default of payment or recovery of the said sums with the expenses of diligence before the time allowed for such report: further declared the said quantity of 455 pounds of gunpowder to have been forfeited in terms of the statute." This sentence, the complainers submitted, was most wrougous and unjust, and stated as the grounds of their suspension the following reasons:—

"1. By the 4th sect. of the Act 23 and 24 Vict., cap. 139, it is enacted:—'All gunpowder made in any place where under this Act it is not lawful to make gunpowder, and all gunpowder in any mill, press-house, coming-house, drying-house, dusting-house, or other place, exceeding the quantity which for the time being may lawfully be therein, shall be forfeited; and every person making or causing to be made any gunpowder contrary to this Act, or keeping or causing to be kept in any such mill or place any gunpowder contrary to the provisions hereinbefore contained, shall for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 2s. for every pound of gunpowder so forfeited.' Under this section, 'keeping or causing to be kept any gunpowder contrary to the provisions' of the Act is one and the same offence, alternatively stated according as the manufacturer keeps the gunpowder or causes it to be kept by some person in his employment and acting under his orders. It is incompetent under this section to convict the complainer John M'Callum, who is described as the managing partner of the business carried on for the manufacture of gunpowder at the Kames Gunpowder Mills, of 'keeping or causing to be kept' the gunpowder in question, and by the same judgment to convict the complainer William Charles Sealy, who is described as manager of the said mills, of the same offence.

"2. In consequence of an explosion at the Kames Gunpowder Mills on the 11th March 1870, all the gunpowder in the press-house mentioned in the judgment was destroyed, and the sentence is incompetent and inept, in so far as it declares any quantity of gunpowder in the said press-house to be forfeited.

"3. By sect. 25 of the said Act 23 and 24 Vict., cap. 139, it is enacted:—'It shall be lawful for any justice of the peace, and in Scotland for any sheriff, justice of the peace or magistrate, within the limits of whose jurisdiction gunpowder is suspected to be made, kept, or carried contrary to this Act, on demand made, and reasonable cause assigned upon oath by any person, to issue a warrant under his hand and seal, or in Scotland under his hand, for searching in the day-time any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place,