

Counsel for the Petitioners—Chree, K.C.—C. H. Brown. Agents—Russell & Dunlop W.S.

Counsel for the Respondent—The Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Saturday, March 8.

SECOND DIVISION.

[Lord Blackburn, Ordinary.]

GREIG v. THE TRUSTEES OF THE WIDOWS' FUND OF THE COMPANY OF MERCHANTS OF THE CITY OF EDINBURGH.

Insurance—Presumption of Life at Common Law—Proof of Death.

The wife of an insured person who had not been heard of for eighteen years, and who would have been sixty-one years of age at the date of the action, brought an action against the trustees of a certain widows' fund for declarator that her husband must be held to have died at the date he was last heard of, and for payment of an annuity which was contingent on his death. *Held (rev. judgment of Lord Blackburn, Ordinary)* that the pursuer had made sufficient averments on record to warrant an inquiry into the facts, and proof before answer allowed.

Mrs Agnes Douglas or Greig, *pursuer*, brought an action against the trustees of the Widows' Fund of the Company of Merchants of the City of Edinburgh, *defenders*, (1) for declarator that her husband David Greig junior, a contributor to the defenders' Widows' Fund, "must be presumed to have died prior to 31st December 1900, that he must be held to have died on that date, and that the pursuer, his widow, is entitled to an annuity out of the said fund of £40 sterling;" and (2) for decree ordaining the defenders to make payment to the pursuer of the annuity of £40 as from Whitsunday 1901.

The pursuer averred, *inter alia*—" (Cond. 2) The pursuer's husband was the son of the late David Greig, builder, Edinburgh, and was born on 28th January 1857. . . . (Cond. 3) The pursuer was married to her husband upon 18th September 1879, but the marriage proved unhappy. (Cond. 4) In October 1896 the pursuer obtained decree of judicial separation from him with a decree for payment of aliment on account of his cruelty. They never lived together again. On two or three occasions after the decree he applied to her for money but she was unable to give him any. On these occasions he appeared to be very necessitous and to be living at no fixed abode. (Cond. 5) From 1890 onwards the pursuer's husband became of dissolute habits, and he neglected his business, with the result that he found himself in penury by 1896. He was never able to make any payment to the pursuer under the said decree either for aliment or for expenses. Shortly after decree was granted he left Edinburgh

and lived a vagrant life. For some years prior to 1896 he had been drinking to excess, and for at least three years prior to the said decree he had shown signs of moral and physical deterioration. In 1896 he was convicted in the Edinburgh Police Court on charges of assault. On two occasions at least he suffered from *delirium tremens*, with one keeper on the first occasion and two keepers on the second occasion in attendance upon him. (Cond. 6) Since in or about the year 1900 the pursuer's husband has never been heard of. The pursuer believes and avers that he is dead, and that he has been probably buried about the year 1900 as a pauper without his identity having been made known or discovered. In the circumstances stated the death of the pursuer's husband must be presumed to have taken place prior to or at 31st December 1900. . . . (Cond. 8) The Register of Deaths in Scotland has been searched for the years from 1896 to 1914, and in England and Wales for the years from 1896 to 1917, but no entries have been found relating to the pursuer's husband. (Cond. 9) In these circumstances the pursuer has submitted to the defenders the statements of relatives and friends of her husband legally and reasonably sufficient to satisfy them of his death in or about 1900. . . ."

The pursuer pleaded, *inter alia*—"1. Upon the facts averred, the death of the pursuer's husband ought to be judicially presumed as having taken place in 1900, and the pursuer is accordingly entitled to decree of declarator as craved for under the first conclusion of the summons. 2. The pursuer, upon the death of her husband being so presumed, having right to the annuity as his widow, payable by the defenders from the Widows' Fund under their administration, is entitled to decree against the defenders for payment thereof as craved under the second conclusion of the summons."

The defenders pleaded, *inter alia*—"1. The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, which should be dismissed. 4. The defenders are entitled to be assoilzied in respect that (a) no sufficient evidence of death has been submitted to them; (b) the presumption of life at common law has not been displaced."

On 8th November 1918 the Lord Ordinary (BLACKBURN) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"The pursuer in this case seeks to have it declared that her husband died prior to 31st December 1900, and that he must be presumed to have died before that date. She accordingly claims that as his widow she is entitled to an annuity of £40 a year out of the funds administered by the defenders, and she further sues them for payment of the arrears of the annuity from Whitsunday 1901 with interest at 5 per cent. on each termly payment. The defenders admit that prior to the date in question the pursuer's husband had completed his contributions to the fund so as to entitle his widow to an annuity of £40 from the date of his death, but they deny that he is dead, and maintain that the pursuer has not

averred facts relevant to raise any presumption of his death or to entitle her to a proof on that question. They also maintain in their third plea-in-law that under rule 20 of the rules passed in terms of the Edinburgh Merchant Company Act 1898 the only evidence of a contributor's death which they are bound to accept is an extract of the registration certificate of death in this country, and that as the pursuer is admittedly unable to produce such an extract the action should be dismissed.

"As I am of opinion that the pursuer has not averred facts relevant to presume the death of her husband it is unnecessary for me to dispose of their third plea-in-law, but I may say that I could not have seen my way to sustain it. Rule 20 appears to me to be merely a direction to the defender's chamberlain as to the evidence of a contributor's death which he may accept as conclusive, and cannot in my opinion be read as over-riding the unrestricted right to an annuity which is conferred by sections 74 and 75 of the Act on anyone who can qualify as the widow of a contributor. As the defenders state on record that they have only rejected the pursuer's claim because they are not satisfied after a careful consideration of the evidence submitted to them by her that her husband is dead it would appear that they themselves do not consider the matter foreclosed by the terms of rule 20.

"It is admitted that the pursuer's husband was born in 1857, and if alive at the present date would only be 61 years of age; that he was married to the pursuer in 1879, and that after an unhappy married life she obtained a judicial separation from him in 1896 on account of his cruelty. It is also admitted that at the latter date he had become of dissolute habits and was in penury, and the pursuer adds but little to this by averring that for at least three years prior to the separation 'he had shown signs of moral and physical deterioration,' and had twice at least suffered from delirium tremens. Of his history between 1896 and 1900 we are told nothing except that on two or three occasions he unsuccessfully applied to the pursuer for money, and in the latter year he disappeared at the age of 43, and has not since been heard of. The Registers of Deaths for Scotland, England, and Wales have been searched by the pursuer without any evidence of his death having been discovered.

"Had this been an application under the Presumption of Life Act 1891 the mere disappearance of the pursuer's husband for eighteen years would have entitled the Court to presume that he had died at least as far back as the year 1907. But this case appears to be one of those which are expressly excluded from the provisions of the Act by the terms of section 11 thereof, which provides that anyone claiming under a policy of assurance on the life of a person who has disappeared must in a question with the insurers prove the death of the person who is insured in the same manner as if the Act had not been passed. Be that as it may the question in this case is raised in a

common law action, and the presumption at common law is that a person who has disappeared is presumed to continue in life until he would have reached the ordinary limit of human age, unless sufficient evidence is adduced to raise a presumption that he has died within that period. It is not sufficient to prove that the person disappeared at a certain date, and that there is a 'general probability' that he is dead (see Lord President Inglis in *Williamson*, 14 R. at 229, 24 S.L.R. 170), but his disappearance must be associated with some particular incident which might involve a more than ordinary risk to life, and which, coupled with an unaccountable silence on his part since the date of the incident, raises a presumption that he died on or about that date.

"It was argued for the pursuer that the common law presumption in favour of life is more easily elided since the passing of the Presumption of Life Acts than it was prior thereto, and that more weight is now attached to the mere disappearance of a person for a number of years than was formerly the case. But no authority was quoted for this proposition, and it is difficult to reconcile it with the opinion of Lord President Inglis referred to above or with the terms of section 11 of the Act of 1891.

"The pursuer's averments amount to nothing more than a statement that her husband has disappeared, coupled with a 'general probability' that he is dead. I do not think they are strengthened by the somewhat vague averment in condescendence 9 that her husband's friends and relations are satisfied that he is dead. It appears to me that her averments fall far short of what is requisite to elide the common law presumption, and that something more specific is required to enable the Court to presume that he is dead. The pursuer's inference that her husband had probably died as an unidentified pauper appears to me to be less plausible than the suggestion of the defenders that he had good reasons for concealing himself from his wife when he found that he could get nothing more out of her. It is not impossible that he may have married again, which would provide the best of reasons for concealing himself from her and his former friends and associates. Under these circumstances it appears to me useless to allow the pursuer a proof on the record as it stands, and as the pursuer's counsel have intimated that they do not ask leave to amend, I propose to sustain the first plea-in-law for the defenders."

The pursuer reclaimed, and argued—The pursuer had disclosed a *prima facie* case on record. She had averred that she believed her husband to have died, and the various circumstances which had led her to that belief, and she was entitled to a proof of these averments—*Bruce v. Smith*, 1871, 10 Macph. 130, 9 S.L.R. 102; *Rhind's Trustee v. Bell, &c.*, 1878, 5 R. 527, 15 S.L.R. 271; *Williamson v. Williamsons*, 1886, 14 R. 226, 24 S.L.R. 170.

Argued for the defenders—The pursuer had failed to aver facts relevant to presume the death of her husband. She asked the

Court to make an assumption from a few facts which were of an entirely negative nature. A mere averment of silence, which was equally consistent with life or death, was not in itself sufficient to render a case such as the present one relevant. In all the other cases in addition to silence some circumstances were averred to show that the alleged deceased ran some particular risk. The record here disclosed no such fact or circumstance. The present action was at common law and claims such as this were expressly excluded under the Presumption of Life Limitation (Scotland) Act 1891 (54 and 55 Vict. cap. 29), sec. 11. The following cases were cited:—*Fairholme v. Fairholme's Trustees*, 1858, 20 D. 813, and *Garland v. Stewart*, 1841, 4 D. 1.

LORD JUSTICE-CLERK—I do not propose to indicate any opinion whatever as to what the result of a proof in this action may be. It may quite well be that, on the evidence submitted, the Lord Ordinary or the Court may come to be of opinion that it is not sufficient to overcome what at one time was a very strong presumption, namely, the presumption of life, and apart from the suggestions that have been made as to the effect of the Presumption of Life Act, and the changes in social circumstances in later years, I think it still remains a strong presumption.

But in all the cases of this sort—and cases raising disputes of this kind have been brought before the courts of law for a period of between two and three hundred years at least—it is agreed by both parties that so far as the recorded decisions show there has never been one which has been disposed of without inquiry. Mr Robertson pointed out some respects in which the averments here are less specific and less precise than what they have been in other cases, but I cannot say that it is impossible that the evidence which the pursuer may bring forward may not be sufficient to justify the Court in coming to the conclusion that the presumption of life—which, after all, is only a presumption—has been overcome and that the man is now dead.

The date at which the man must be presumed to have died must also depend on the evidence. I do not think that the Court would be shut up either to finding that the pursuer's husband died on 31st December 1900 or to assailing the defenders, because the cases appear to show quite clearly that the Court may well say—we cannot accept the date which the pursuer puts forward as the proper or probable date of death, but will substitute a later date as that is disclosed by the evidence. On the whole matter I think we cannot on this record come to the conclusion that the pursuer could not adduce evidence sufficient to justify a decree in her favour to the effect that her husband had died at some date prior to the raising of the action. I do not in the least say that that will necessarily be the result, because the question will be entirely open, but I think it is necessary that before the Court decides the question the evidence, and not merely the averments, of parties should be before us. I am therefore for

recalling the Lord Ordinary's interlocutor and remitting to him to allow a proof.

LORD DUNDAS—I agree. My first impression was in favour of the Lord Ordinary's view, but upon consideration I do not think we ought to throw the action out at this stage. It appears that there is no reported case of this kind which has been decided without inquiry into the facts; and I confess that some of the decisions to which we have been referred have gone rather further than I had recollected that they did. How this particular inquiry may end one cannot say, but I agree that the pursuer is entitled to have a proof before answer.

LORD SALVESEN—I am of the same opinion. I think the pursuer discloses a *prima facie* case on record. The main facts that she founds upon are the habits of dissipation into which her husband fell, his consequent poverty, and the circumstance that on two occasions he had suffered from delirium tremens. His state of health, therefore, and his circumstances were such as to indicate that his prospects of life were not good. If he remained in this country, as he appears to have done when he was last known to exist, it is difficult to suppose that, with communications so excellent as they are nowadays, all trace of him should be lost if he had continued in life.

There are other circumstances which were mentioned in the course of the debate, which may very much strengthen the pursuer's case if they are made matter of evidence, as, for instance, the fact that he had children for whom he may or may not have felt affection, for his failure to communicate with them or to make any inquiry regarding them may raise the inference that he was unable to make such inquiry. I should be very slow in circumstances like the present to foreclose the pursuer from having the fullest inquiry into the facts, but, of course, it will be open to the Lord Ordinary to consider the whole proof led before him and to draw such inferences as the circumstances justify.

LORD GUTHRIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and allowed a proof before answer.

Counsel for the Pursuer—Wilton, K.C.—Scott. Agents—Armstrong & Hay, S.S.C.

Counsel for the Defenders—W. J. Robertson. Agent—A. C. Drummond, Solicitor.

Tuesday, March 18.

SECOND DIVISION.

HARRIS'S TRUSTEES, PETITIONERS.

Trust — Nobile Officium — Jurisdiction — English Trust with Scotch Heritage — Petition to Sell Lands in Scotland — Order of English Court.

Trustees under an English trust holding Scotch heritage, having obtained an order of the High Court of Justice in England setting forth that it was