

No 580.

This case was taken up by the Lords entirely upon the general point, and it was held for law, that a promise of marriage, followed by a *copula*, made from that moment an actual marriage.

"THE LORDS remitted the cause to the Commissaries *simpliciter*."

Reporter, *Drummore*.Act. *Fergusson*.Alt. *Lockhart*.

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*Fol. Dic. v. 4. p. 169. Fac. Col. No 46. p. 68.*

1756. June 29.

CAMERON against MISS MALCOLM.

No 581.

Effect of celebration without a *copula*.

CAMERON of Kinnaird, living in the neighbourhood of Mrs Malcolm, widow of James Malcolm merchant, cast his eyes upon her daughter Miss Malcolm, a considerable fortune, as an advantageous marriage for his son. The two families set out together from Fife, in order to pass the winter at Edinburgh. Upon their landing at Leith, Mrs Malcolm and her daughter were invited to the house of Mrs Cousnen, Kinnaird's mother-in-law. They supped there, and after supper, without any previous concert, a minister was brought in by Mr Cameron, in order to marry his son to the said Miss Malcolm, at that time just turned of twelve years of age. The mother, for what reason was not made clear by the witnesses, left the room. The ceremony went on, and was completed, and the marriage-lines were subscribed by Miss Malcolm as well as by young Cameron. After this the mother returned, and a bedding being proposed, she struck out, whether dissatisfied with what had been done, or thinking her daughter too young, is uncertain. This occasioned a sort of squabble among them. The mother and daughter went home in a sort of pet, and from that time refused to stand to the marriage.

The Commissaries, upon a declarator of marriage brought before them, found the marriage proved. This occasioned an advocacy on the part of Miss Malcolm, in which the Court of Session were of a different opinion. They remitted to the Commissaries to assoilzie from the declarator of marriage, and even to find Cameron the pursuer liable in expenses.

This was an extreme nice case. That the ceremony of marriage was performed is certain; nor was any force proved, or even alleged, sufficient to render the ceremony ineffectual. And if there was a marriage, however irregular or improper, it was not in the power of any court to give redress. The Court, however, moved with indignation at so gross a wrong, gave the above mentioned judgment upon sentiment rather than upon principle. The only legal footing it can stand upon, seems to be what follows: A girl of 12 years of age is no doubt capable of marriage; but then, as a girl of that age is extremely susceptible of undue influence, and to be unjustly trepanned, a marriage in this circumstance requires more accurate evidence of consent than is necessary betwixt adult persons. The present case is similar to that of a testament on death-bed. A bare subscription *in liege poustie*, is sufficient; but, *in extremis*, a proof is re-

quired of orders given by the testator to write the testament, or at least, that it was read over to him before subscription. In the present case, the parties went to Cousnen's house without any design of marriage; *2do*, The mother not present at the celebration; *3tio*, A squabble the moment the ceremony was over, and some evidence of repentance on both sides; *4to*, Proved upon old Cameron, that he endeavoured to bribe one Mally Hay to swear to an antecedent courtship, which presumes he was conscious of some defect in the celebration of the marriage. These circumstances laid together may justly infer a suspicion that matters were not carried on so as to make an effectual marriage; and, therefore, in a case of this extraordinary kind, the Court, I think, took the safest side to refuse to give their sanction to this marriage.

No 581.

*Fol. Dic. v. 4. p. 171. Sel. Dec. No 109. p. 154.*

1766. November 18.

POOR AGNES JOHNSTON *against* JAMES and WILLIAM SMITHS.

AGNES JOHNSTON was servant to William Smith of Forthingrush, at the time of his death, soon after which, having bore a child, which she said was begot by Forthingrush in lawful marriage, in order to establish the same, she brought a process of declarator of marriage before the Commissaries of Edinburgh. The proof from which she endeavoured to establish her marriage was, *first*, The testimony of a single witness, who swore to his having sometimes called her his wife; and, *secondly*, The two pieces of written evidence which follow: "Forthingrush, 5th February 1753. I do acknowledge, that I was lawfully married to Agnes Johnston in the year 1752, by a minister that I brought from Edinburgh for that purpose; our marriage-lines being mislaid, I grant her, the said Agnes Johnston, this acknowledgment under my hand, testifying, that she is my true and lawful married wife; as witness my hand, day, date, and year of God above mentioned." The next piece of written evidence is of the following tenor: "Forthingrush, 2d June 1756. As I am taken badly, and know not but it may be death, and that it has not been made public to the world that I am married to Agnes Johnston my wife, who has lived with me several years; to take away all these allegeances and misreports that may be spread to the contrary, I now, a dying man, cannot but acknowledge that she is my lawful wife, and that if she be with child, as she tells me she is, I am the father of it, and ought to be my heir, whether lad or lass; and it is my will and inclination, that my wife be provided for, in case of death, and that she have and enjoy 100 merks Scots yearly of my rents for her subsistence, in case she be not with child, and in case she be with child, that she enjoy all my moveables, crop and stock, and possess what ground I presently possess during her lifetime, for the support

No 582.

What proof necessary to establish marriage.