

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.

No 582.

of herself and upbringing the child ; and whatever more Glenriddle, Craigenputtoch, Mr William Sloan minister, and Mr William Clerk writer in Dumfries jointly, shall determine she should have, in case she have a child, in the event of my death, I ordain her to have it. As to my body cloaths, I leave it to my wife to give them as she pleases to my brother, and I desire and ordain her to keep my nephew John Smith as long as she lives, and to do for him as far as she can. And this I declare to all concerned to be truth, and to be my will : And in token whereof, I sign this paper with my hand this day ; and for the more security, I have put this paper among my papers, to testify the truth to every body. (S.S.) WILLIAM SMITH."

The Commissaries found no sufficient proof of a marriage betwixt the pursuer and the deceased William Smith, and therefore assolizied the defenders.

In a bill of advocation for the pursuer, it was *contended*, That the Commissaries had committed iniquity in not finding the marriage proved, in so far as by the law of Scotland, consent alone is all that is requisite to constitute marriage, and in all questions concerning marriage, the only thing inquired into is, whether there is sufficient evidence of such consent : That, by the depositions of all the witnesses adduced for the pursuer, it is evident, that he acknowledged her frequently as his wife, and that they did cohabit together as such upon repeated occasions ; and, when the writings granted by Forthingrush were joined to the parole-evidence, it was said, that there could not remain the least doubt that the pursuer was lawfully married to Forthingrush.

*Answered* ; That although, by the law of Scotland, cohabitation as man and wife does establish a marriage, yet such cohabitation requires the open and repeated acknowledgment of the parties, and must appear to be the result of a deliberate intention to avow each other as man and wife, and not the transient acknowledgment of marriage by one of the parties, without the other's presence before single witnesses, which is all that the witnesses for the pursuer have deposed to ; more especially, when to this is joined the depositions of sundry witnesses adduced by the defender, who have sworn, that Forthingrush, less than a year before his death, declared he would never marry. And with regard to the written evidence founded on, it was contended, that it could have no weight, as it was not holograph of Forthingrush, nor subscribed by him before witnesses ; *2dly*, That there was the greatest reason to believe, from the evidence of two unsuspected witnesses, and *ex comparatione literarum*, that Forthingrush had never subscribed these papers, and that the whole was a forgery, calculated to support what the pursuer's witnesses had sworn to. The authorities cited for the defenders were Mascardus De probationibus, vol. 3. conc. 1035. No 20. Corvinus Institutions of the Canon Law, lib. 3. tit. 26. De probationibus ; act 77, Parliament 1503 ; Dirleton, *voce* Marriage ; Lord Bankton ; Matthæus De probationibus, cap. 1. No 41 ; Gail. lib. 2. observ. 66. Par. 12.

"THE LORDS refused the bill, and remitted the cause to the Commissaries *simpliciter*." No 582.

Reporter, *Kames*. Act. —. Alt. *Alex. Murray*. Clerk, —.

*Fol. Dic. v. 4. p. 169. Fac. Col. No 46. p. 81.*

1774. February 15.

CLUDEN against CULTER.

No 583.

IN a declarator of marriage, the man in defence accused the woman of incontinency. THE LORDS adhered to an interlocutor of the Commissaries, refusing a proof of the allegation *in hoc statu*, reserving the same till the pursuer should establish her marriage. In this case, no actual celebration was libelled on, but a written declaration and subsequent *copula*. See APPENDIX.

*Fol. Dic. v. 4. p. 171.*

1781. December 20.

JANET MACINNES, Widow of Captain Fairbairn of the 62d Regiment of Foot, against ALEXANDER MORE, Son of Gilbert More, Merchant and Manufacturer in Aberdeen.

IN consequence of an intercourse which had taken place between Alexander More and Janet Macinnes, the former being only in the twenty-fourth year of his age, while the latter was in the thirty-seventh of hers, the lady fell with child. Her situation having been discovered by some of her relations, who interested themselves in her behalf, one of them, in particular, a Captain Grant, furnished her with a draught of a letter, containing an acknowledgment of marriage, which was copied over, and subscribed by More, as follows: "Mrs Fairbairn, I hereby acknowledge, that you are my lawful wife; and you may, from this date, use my name, though, for particular reasons, I wish our marriage kept private for some time; and always am, Madam, your most obedient servant, (Signed) ALEX. MORE. Aberdeen, 1st May 1780.—Addressed, To Mrs Captain Fairbairn, Aberdeen." This letter, however, was antedated, for it was not written till the month of November 1780.

AFTERWARDS the lady instituted against More, before the Commissary-court, an action of declarator of marriage. Having been judicially examined at the pursuer's request, the defender emitted a declaration, of which, in substance, the import is, That his connection with her was the result of the most forward and seducing advances on her part: That he had never entertained any idea of making her his wife; had not once spoken a word to her capable of such a meaning; nor had she herself, till of late, any expectation of that kind: That

No 584.

If a written acknowledgment of marriage may be defeated by a judicial declaration of the party who made it, certain collateral circumstances concurring?