

"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

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

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the letter founded on was merely a piece of trick and deceit, devised by the pursuer and her relations, and was never understood to convey any serious declaration of marriage: That the nature of the artifice was this, The pursuer, when near the time of her delivery, pretended to the defender, that she had been convinced by her friend Captain Grant, of its being much more proper for her to lie in at the house of her brother, Neil Macinnes, than any where else; but as, in order to induce him to receive her, there was a necessity for persuading him that she was actually the pursuer's wife, so for that purpose, and that only, as she assured him, the letter, antedated as it was, had been drawn up by Grant; and that, while under this deception, and at the same time apprehensive of danger threatened to his person by her relations, the defender transcribed the letter, only altering the address at the beginning and end of it, from "Dear and loving wife," to "Mrs Fairbairn," and "Madam."

The pursuer, on the other hand, gave into Court a condescendence or declaration in writing, in which she affirmed, that the defender's protestations of love and promises of marriage alone had brought her into the above mentioned situation: That the letter was the consequence of the defender's spontaneous offer, of doing every thing in his power for her benefit, except publicly declaring his marriage, which his dependence on his father, as he affirmed, rendered at that particular time highly improper; and that the defender did not alter the address from what it was in the draught made by Captain Grant, but varied the date, from the true one in November, to that of 1st May, because, as he said, it would appear more decent to have it brought nearer to the time of the beginning of their intercourse.

The Commissaries pronounced the following sentence: "In respect the defender does not allege he was either concussed to grant the letter or acknowledgment libelled on, or was under any incapacity to grant the same, find the marriage proved; and decern and ordain in terms of the conclusions of the libel."

Of this judgment More complained to the Court by advocacy, and

Pleaded; The sum of the doctrines of our law relative to the constitution of marriage is, That for this purpose there is required either actual celebration by the usual solemnities, or else a decree of the proper court, founded on sufficient grounds, obliging the parties to solemnize it, and, upon their failure, declaring it to be complete; Lord Kames's *Elucidations*, p. 29. These grounds are three in number. One is, where parties, without sacerdotal benediction, have, *per verba de præsenti*, declared before witnesses, their mutual acceptance of each other as husband and wife, and on this declaration consummation has followed. Another is, a train of cohabitation as married persons, and being publicly held and reputed so to be, which, from the acknowledgment implied in these circumstances, establishes a presumption that an actual marriage has intervened, and founds the woman in her claim of terce by the statute of 1503; but this,

like other presumptions, is capable of being refuted by contrary evidence. The last ground for establishing a marriage, is a promise and subsequent *copula*.

In the present case, however, there occurs no proof of cohabitation, nor of a promise, antecedent to *copula*. The sole ground of action is the letter above recited. The Commissaries have indeed found the marriage thereby proved. But, it may be asked, What marriage? No actual marriage is charged even in the libel, and it is confessed, that none had preceded when the letter was written by the defender. Neither can it, on account of the acknowledgment it contains, afford evidence to establish a marriage at that time. The writer of it never meant it to convey any true or real acknowledgment of marriage, but merely to serve the very different purpose declared to him by the pursuer. If, on the other hand, she or her friends understood it to have that effect, they were practising a gross fraud and imposition on the defender; and to such an artifice the law will give no countenance. Nor has the account of this matter now referred to, and which is contained in the defender's judicial declaration, been disproved. Even the mode of address shews the letter to have been merely an ostensible one. A man addressing his wife, would not denominate her by the name of a prior husband, nor conclude with the cold formal compliment of, Madam, your most obedient servant. Besides, the letter could not, in any view, afford evidence of marriage, which is a mutual contract, as it does not shew any consent on the part of the pursuer.

Answered; By the more recent Roman law, marriage was accounted merely a civil contract, which might be completed without the intervention of any religious rite. Before the Reformation, indeed, agreeably to the Canon law, it was esteemed among us a sacrament; but after that æra, it again appeared in the light purely of a civil contract. Hence, like other consensual contracts, it may be perfected by the acknowledgment of the parties; Lord Stair, b. 1. tit. 4. § 6.; Erskine, b. 1. tit. 6. § 5. The same principle obtains in England, in France, and in Holland; Blackstone, vol. 1. p. 439.; Instit. par M. Argen. liv. 3. chap. 2. § 13.; Brower. De Jure Connub. p. 255. Now, in the letter above referred to, Mr More makes this direct acknowledgment, "I hereby acknowledge that you are my lawful wife." This must be held complete evidence of an anterior marriage. Even if it were not considered as such, it would at least amount to a declaration of consent *de presenti*, which, without any proof of subsequent *copula*, would be sufficient to constitute marriage; for it is a maxim of our law, that *consensus, non concubitus, facit matrimonium*.

The defender has said, that the letter was procured from him while under the influence of deception, and of intimidation. But the only evidence of this allegation, so improbable in itself, is his own words, which surely will never be deemed sufficient. He has likewise argued, that the letter could not afford proof of a mutual contract, because it did not establish the consent of the pursuer; but it was not founded on, except merely to prove the fact of the mar-

No 584. riage; and indeed the defender possessed sufficient evidence of the pursuer's consent, by letters which he has declined to produce.

Observed on the Bench: This question does not relate to a promise of marriage, nor to any distinction of antecedent or subsequent *copula*. The letter contains an explicit declaration or acknowledgment of marriage; and as there appears nothing to set it aside, it must be received as undoubted evidence; nor is it of any consequence, that it does not express mutual consent.

The Commissaries had found the marriage proved; the Lord Ordinary had refused a bill of advocation complaining of that judgment; and

“THE LORDS adhered to the interlocutor of the Lord Ordinary.”

Lord Ordinary, *Gardenston.* Act. *Rae, Buchan-Hepburn, B. W. Macleod, Macnochie.*
Att. *Ilay Campbell, Hay.* Clerk, *Orme.*

S. *Fol. Dic. v. 4. p. 170. Fac. Col. No. 46. p. 32.*

* * * This case was appealed :

THE HOUSE OF LORDS, 25th June 1782, pronounced the following judgment :
“It is declared, That the written acknowledgment is not sufficient proof of any marriage or matrimonial contract having passed between the pursuer and defender; and it is therefore Ordered and Adjudged, That the interlocutors complained of be reversed, and that the Court of Session do remit the cause to the Commissaries, with directions to find, that the said written acknowledgment is not sufficient proof of any marriage or matrimonial contract having passed between the pursuer and defender, and to proceed accordingly.”

1785. November 18. JEAN WHITE against WILLIAM HEPBURN.

No 585.

WILLIAM HEPBURN and Jean White, both young persons of middling rank, having contracted an intimacy with each other, the consequence was, the birth of a child. His having had that intercourse was not denied by Hepburn; and it was proved by witnesses, that while Jean White was with child, he said to different persons, “that he was married to her, or that she was his wife;” caused proclamation of banns to be made between him and her; and entered with her father on a treaty of marriage. But there was no evidence of any such treaty, or of a promise of marriage, prior to *copula*, and but a very slight proof that any courtship had then taken place.

The Commissaries “found facts, circumstances, and qualifications proved, relevant to infer marriage betwixt the pursuer and defender.” This sentence was brought under review by advocation; and,

“THE LORD ORDINARY having reported the cause, upon informations to the Lords, refused the bill, and remitted the cause to the Commissaries, with this instruction, that they alter their interlocutor, finding facts, circumstances, and