No 590.

Observed from the Bench, The case of More and Macinnes, 20th December 1781, No 584. p. 12683. carried the doctrine of acknowledgment too far, in as much as there it was extorted by fraud, on the part of the woman, as she said it was intended merely to protect her from the rage of her relations; but here, the repeated acknowledgments, which were so solemn, that they induced those to whom they were made, to visit the woman as a married person, seem sufficient to constitute a marriage, and ought not to be got the better of by circumstances which could not annul a marriage actually celebrated.

The majority of the COURT, however, were of opinion, that the circumstances arising from the pursuer's own conduct afforded a sufficient indication of the intention of the parties.

THE LORDS refused the bill of advocation.

Lord Ordinary, *Polkemmet.* For Pursuers, *Maconochie.* Agent, *J. Brunton.*
For Defender, *Williamson.* Agent, *Ja. Dundas*, W. S. Clerk, *Home.*

F. *Fac. Col. No* 8. *p.* 16.

1802. *January* 20. CRAWFURD'S TRUSTEES *against* HART'S RELICT.

No 591.
A declaration of marriage, made within year and day of his death by a man, to a woman, who had borne children to him, gives her right to the legal provisions of a widow.

JANET HART had cohabited with William Crawfurd for about thirty years, and borne several children to him. These he legitimated, by declaring, along with their mother, before a Justice of Peace, 26th January 1799, that "they both publicly acknowledged themselves to be married persons, and to have been irregularly and clandestinely married, but refuse to declare the celebration thereof, or the witnesses present thereat." On the 22d October, he disponed his whole estate to trustees, making a variety of provisions upon his wife and their two children, Peter Crawfurd, and Marjory, the wife of George Reid, as well as leaving legacies to his five sisters. He died on 22d November, within ten months of the acknowledgment of marriage.

The Trustees accepted; and finding that the widow and children were dissatisfied with the provisions left them by the trust-deed, raised a process of multiplepoinding, to determine their respective claims. It was *objected*, That as the marriage had not been declared a year and day before Crawfurd's death, and as there had been no child born since, the widow could be entitled to nothing, except what the trust-deed had given to her.

After a variety of procedure, Lord Stonefield, upon advising memorials, 17th February 1801, "Found Mrs Crawfurd, the widow, entitled to her terce and *jus relictæ*; and the Trustees of Peter Crawfurd and Mrs Reid entitled to their legitim; and prefers them, for their respective rights and interests, to the funds in the hands of the raisers of the multiplepoinding, and decerns."

The cause was remitted to Lord Armadale, who adhered.

The Trustees reclaimed, so far as concerned the claim of the widow, and

Pleaded, This seems to be altogether a new case. By the Roman law, as well as by ours, the subsequent marriage of the parents, if there be no *medium impedimentum*, has the effect of legitimating the children; and, with regard to them, the marriage is held, in every question of succession, to have preceded the connection to which they owe their birth. Novell. 79. c. 8. Coll. 7. Tit. 1.; Craig, Lib. 2, Dieg. 18. § 12. & 13. No 591.

But the admission of the same fiction, in favour of the parents, seems unauthorised, 25th March 1682. Fount. p. 181. of vol. 1.*; and it would lead to this consequence, that while women of unexceptionable character, who marry upon equal terms, generally accept of a comparatively small conventional provision, in the place of their legal claims, those living as concubines, on obtaining an acknowledgment of marriage, would succeed to the entire rights of a widow; and a prudent man would find many reasons against legitimating his children, if, by the same act, he gave to the woman who had lived with him, in the degraded situation of mistress, a right, during her survivance, to the income of the third part of his landed estate, and to the unlimited property of the third of his moveables; and rather than thus deprive the children of so much of their fortune, he would not give them the privilege attached to legal birth. This other inconvenience would follow, that if the consequences of the marriage are to be drawn back to the birth of the child, so far as it regards the rights of the mother, any deed preparatory to the acknowledgment, which has paved the way to it, by the acceptance of a conventional instead of the legal provisions, would be held to be a *donatio ab uxore*, and therefore revocable; for it must be considered as postnuptial, and therefore granted *sub potestate mariti*, although, had she refused to grant it, she never would have been entitled to the rights of a widow. But the marriage has neither subsisted a year and day, nor

* This was mentioned in the pleading at the Bar, at advising the cause.—The words of Lord Fountainhall are as follow:—It was argued amongst the Lawyers, Whereas, by our custom, when a marriage dissolves within year and day, we re-integrate all things, and give back the tocher; and the wife gets no jointure, unless there is a child born: It was thought more just and reasonable, to give the woman (who is devirginated) her election, whether she will take back the tocher, or will betake herself to the jointure and liferent.

2*do*, It was argued; Where a marriage dissolves within year and day, and no bairn is procreated within that time; but before the marriage there was a child procreated, and which was legitimated by the marriage; *Quæritur*, If he will gain the tocher or courtesy by this? Some think he will; because such a child, fictione juris, is held, in all respects, as born in legitimo matrimonio; and though this seems to encourage and bestow privileges upon uncleanness, yet it does gratify it no farther than the subsequent marriage does. Yet that of the return of tochers being ex jure consuetudinario with us, it ought not to be extended ultra proprium suum casum; and the words of the custom seem to run against his gaining of the tocher; seeing the child is not truly, but only præsumptione juris, born after the marriage.

3*tio*, It was doubted among the Advocates, Where, by a contract matrimonial, a tocher is appointed to return to a wife's heirs and executors, why a husband may not crave, though the marriage be dissolved, and his wife was not an heretrix of lands, to liferent the said tocher, by the courtesy of Scotland, as he would liferent her lands? Though it has not yet been done, yet, nevertheless, some thought it might be so extended by the Lords, a paritate rationis.

No 591. has there been a child born of it; and no authority has yet given a woman in such a situation, right to the legal provisions of a widow.

Answered, The presumption certainly is, that the marriage subsisted for more than a year and day: the parties, ten months before Crawfurd's death, acknowledged themselves to have been married, of a prior date; and the petition of the Procurator-fiscal, in consequence of which they appeared, sets forth, that this took place some considerable time ago. This was presented in concurrence with Crawfurd; but, at all events, the wife must be entitled to her legal provisions, as the marriage was not dissolved without lawful children. The fiction of law is, that the marriage was contracted when the child legitimated was begotten, Erskine, B. 1. Tit. 6. § 52. This must operate as much in favour of the mother as of the children; indeed the legitimacy of the children depends upon this very presumption, that she was a lawful wife at the time of their birth, which limits the case of legitimation, by a subsequent marriage, to those where the parties might have been married at the time. Were it otherwise, where there is confessedly a widow and children, the goods in communion would suffer a bipartite instead of a tripartite division; Anderson against Wishart, 23d February 1714, No 579. p. 12676. is a narrower case than the present: There were there no children, and the proof of prior marriage was extremely weak, yet she was found entitled to the terce.

Upon the principle, that she was the mother of lawful children at the time of her husband's death, the Lords "adhered."

Lord Ordinary, *Armadale*. For the Trustees, *Fergusson*. Agent, *A. Blane, W. S.*
For the Widow, *H. Erskine. H. D. Inglis*. Agent, *W. Inglis. W. S.* Clerk, *Home*.

F. *Fac. Col. No 17. p. 34.*

*** Promise of marriage how relevant to be proved.—*See* Div. I. Sect. 9. *h. t.*

SECT. VI.

Minority.

No 592. 1626. *March* 3. Wilson *against* Aitken.

In an an action of reduction of a bond betwixt Wilson and Aitken, upon a reason of minority and lesion, the pursuer produced a testimonial, bearing the time of his baptism, subscribed by Mr Patrick Henderson, keeper of the session books of the kirk of Edinburgh, to prove his minority. The Lords found it could not prove, because neither was that register of that authority that the extract thereof alone ought to make faith *per se*, much less could it prove minority, for the time of the baptism ought not to be reputed as if the child had been born at that time, seeing he might have been one or more years of age before he was baptised, and so the minority could not be proved thereby, to count from his baptism; but such testimonials may have greater respect and