

in question do not sufficiently astrict the onerous causes of the said bonds, be, and is hereby affirmed, with this addition, *videlicet*, “without some further proof thereof, “by circumstances or otherwise.” And it is also ordered and adjudged, That the said interlocutor of 21st February 1733, whereby the Lords of Session adhered to their interlocutor of 15th November 1732, finding the bonds in question sufficiently prove their onerous causes, without the necessity of further astriction; and the said interlocutor of 6th July last, adhering to the said interlocutor of 21st February 1733, be, and are hereby, reversed.

1734.  
MURRAY, &C.  
v.  
CHARTERIS,  
&C.

For the Appellants, *Rob. Dundas, J. Strange, A. Hume Campbell.*

For the Respondents, *Dun. Forbes, W. Murray.*

[Fraser's Domestic Relations, Vol: i., p. 208.]

MARY DALRYMPLE (formerly GAINER),  
wife of Captain James Dalrymple,  
HELEN, ELIZABETH, MARY, and JEAN,  
their lawful Children, . . . } *Appellants;*

CAPTAIN JAMES DALRYMPLE, . . . *Respondent.*

1741.  
DALRYMPLE,  
&C.  
v.  
DALRYMPLE.

House of Lords, 22d March 1741.

MARRIAGE—CONSTITUTION.—A declarator of marriage was raised by the appellant, on the ground that the appellant had been legally married to the respondent, at least, that by cohabitation as man and wife, and acknowledgment as such, she was entitled to that status, and his children to the status of lawful born children. Held, that she had not proved a lawful marriage, and that the cohabitation in this case was not relevant to infer marriage.

This was an action of declarator of marriage and legitimacy, raised by the appellant, Mary Dalrymple, against the respondent, on the ground that she was lawfully married to him at Kilkenny, Ireland, at least, on the ground of cohabitation as man and wife, and also, that the respondent had owned and acknowledged her as his lawful wife.

Her statement was, that the respondent, a Captain in the

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Earl of Rothes' regiment, then in Ireland, intermarried with her when she was scarce fifteen years of age, and from that time, 1724, they lived and cohabited together as husband and wife, in the most affectionate manner, and the appellant bore the respondent seven children, who were all baptized as his lawful children, and entered as such in the parish register of baptisms; four of them were held up by the respondent himself as sponsor, at the time of baptism, according to the custom of the Church of Scotland, and two of them, that died at Gibraltar, were buried in the church there, and entered in the register of burials, as the lawful children of the respondent, and the appellant, Mary, his wife:

The regiment to which the respondent belonged, being ordered to Gibraltar, the respondent went thither, and soon after his arrival wrote for the appellant to come to him, with her daughter, the appellant, Helen, their only child. She went accordingly to Gibraltar, and was received by the respondent with great affection, and carried by him to his house, where they openly lived and cohabited together as husband and wife, till 1736, being ten years. During all this time the appellant had the sole management and direction of the family, and he behaved to her, and she was treated on all occasions as his wife.

In 1736, the respondent obtained leave to go to Scotland, and having, together with the appellant (then pregnant), and their four children, embarked for England, they arrived in London. There they lived and cohabited together for some time, and were visited, and owned as such by the respondent's relations and acquaintances.

Some time afterwards, the respondent removed to Scotland, and during his absence there, she gave birth to another child, who was baptized as the lawful child of the respondent, his nephew standing as sponsor.

In April 1737, the respondent wrote for the appellant to come, with her children, to Scotland. She came to Scotland accordingly; but soon after their arrival in Leith, the respondent entirely withdrew from her all that support which he had formerly given, and withdrew also from her society, and attempted to entrap her into a disclaimer of her marriage.

The respondent's statement was, that having gone to Ireland to attend his duty with his regiment, he met Mary Gainer at a tavern in Dublin. She went with him to the barracks at Kingsale, where the regiment then was; and the

regiment afterwards removing to Kilkenny, she went there also, and there she was delivered of the appellant, Helen. She then went with him to Gibraltar in 1727, and from that time to 1736, the appellant only lived with him as his house-keeper, and had to him several children.

The appellant returned with him to England. He left her in London, and she followed him to Scotland. He then was obliged, upon seeing her taking upon her his name, and the character of lawful wife, to separate himself, offering, at sametime, to provide for her and her children, as his natural children.

The respondent married a lady of fortune, whereupon the appellant came to Scotland, and brought the present action of declarator.

After various procedure, in which a proof was allowed, and the appellant failed to obtemper, in some respects, the commission for proving allowed to her, which was renewed, the commissaries at last refused to renew it, and this having been brought before the Court of Session, their Lordships adhered. The commission issued was to prove the marriage or cohabitation in Ireland, and elsewhere, and the facts of acknowledgment. The Commissaries finally pronounced this interlocutor: March 6, 1740.

“ Having considered the proofs on both sides, find that the  
 “ facts and circumstances proved in behalf of the appellants,  
 “ were not relevant to infer marriage; and, therefore, absolved  
 “ the respondent simpliciter from their process, and ordered the  
 “ appellant, Mary, the mother, for the future to desist from  
 “ using the respondent’s name, and giving herself out to be  
 “ his wife, reserving to the respondent to insist upon the  
 “ conclusion of his libelled summons at any time thereafter,  
 “ as accords.”\*

Against the interlocutors of the commissaries, as well as the interlocutors of the Court of Session, approving of the interlocutors of the commissaries, the present appeal was brought.

*Pleaded for the Appellants.*—1st, After twelve years open cohabitation, and the birth of seven children during that time, who were all offered in baptism by the respondent himself, or some of his nearest and most creditable relations, and all acknowledged by the respondent as his legitimate children, no Court ought to set aside such a marriage, and thereby bastardize the issue procreated between the parties, without giving each all the opportunities of making good their several

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\* This had reference to an action for defamation, raised by the respondent, at sametime, against the appellant.

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claims; the wife, of the lawfulness of her marriage, and the children of the legitimacy of their birth.

2d, That the commission for examining witnesses to prove the marriage, which was awarded on the 30th of May, was made returnable from the several places within England and Ireland, by the 17th September, and from Gibraltar and Portmahon by the 1st November following, within which time it was impossible, in common reason, to complete the proof, and it was therefore unreasonable to circumscribe the appellants in that respect, because many of their most material witnesses were then dispersed in several parts of the world. And, under such circumstances, it is the most cruel thing imaginable to declare a marriage null, after seventeen years, and to bastardize all the children born of it, because they are not able to finish, from foreign parts, the proof of the actual marriage of their parents, within the space of three months.

3d, Although there was an application made to the commissaries, for an interim aliment to the appellant, Mary, and a constant aliment to the other appellants, which both are by law entitled to, especially children, whom the respondent allows to be his, yet they never thought fit to take the least notice of so just a request.

*Pleaded for the Respondent.*—The appellant, though she pretended she was actually married to the respondent before they had any intercourse together, yet forgot the time or day of her marriage, for in her libel she did not fix the day of her marriage, nor the month, nor the year; nay, when she was directed by the Court to fix the day, she delayed several months doing it, and when she named a day, she named first March 1724, then August 1724, and at last the 27th of that month. But even this is not only not proved, but is contradicted by express facts; for, as the appellant insists she had no communication with the respondent till after her marriage, it is expressly proved she lived with him in the barracks at Kingsale, from whence the regiment went to Kilkenny in June 1724 (before the time of the pretended marriage), so that the appellant and respondent's cohabitation was, at least, twelve months before the time fixed for the pretended marriage.

Besides, the appellant pretends the first intimacy the respondent and she had together, was subsequent to her marriage, and that the appellant, Helen, her eldest daughter, was born in July after the marriage, that must be July 1725; now, it is proved the appellant, Helen, was born within six

weeks after the regiment removed from Kingsale, which was in June 1724, and thereupon in July *Helen* must have been born.

The appellant, in her libel, says, that she was married by Mr Martin Archer, afterwards by a doctor of the surname of Martin. If the appellant could have proved her marriage, she might have done so under the commission allowed for that purpose.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby, affirmed.

For the Appellants, *Alex. Lockhart, Al. Forrester.*

For the Respondent, *Wm. Hamilton, Wm. Murray.*

1741.  
DALRYMPLE,  
&C.  
v.  
DALRYMPLE.

[Fraser's Domestic Relations, Vol. i., p. 666.]

JANET STEDMAN, wife of James Stedman  
of Kinross, . . . . . *Appellant* ;  
JAMES STEDMAN of Kinross, . . . . . *Respondent.*

1742.  
STEDMAN  
v.  
STEDMAN.

House of Lords, 6th May 1742.

DIVORCE—REMISSIO INJURIÆ.—Though a husband, who raises an action of divorce against his wife, on the ground of adultery, does not withdraw himself from his house, where his wife chooses to remain, after the summons is served on her, but eats and sleeps separately, under the same roof, he is not held to cohabit with, or to be reconciled to her, so as to raise the plea of *remissio injuriæ* as a bar to the action; and, therefore, that plea was, in this case, repelled.

An action of divorce on the ground of adultery, was raised by the respondent against the appellant, his wife, setting forth that he had been recently informed, and had the greatest reason to believe, that his wife had for several years been guilty of, and had committed acts of adultery with Charles Coupar, sheriff-clerk of Kinross, who had regularly every Sunday morning, after he had gone to church, come to his house and had connection with his wife. It was also mentioned, that criminal familiarities with Mr Coupar were said to have taken place in the most public places.

Upon hearing this, the respondent stated that he thought