

Mrs. MAGDALEN COCHRANE, *alias* } *Appellant*;
 KENNEDY, - - - }
 Mrs. JEAN CAMPBELL, and JEAN } *Respondents*.
 her Daughter, - - - }

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31 January 1753.

HUSBAND AND WIFE.—A man having been married privately to A, and lived with her as his wife in public for twenty years, and procreated several children; B after his death alleged a previous clandestine marriage with him. Mutual declarators were raised, and strong circumstances adduced by B to establish the first marriage; yet as she had entirely concealed her pretended marriage during her husband's lifetime, and had several times been in company with him and A together, and owned her as his wife, it was found that she had not proved her prior marriage.

PERSONAL OBJECTION.—PROOF.—In the circumstances of the case, the Court of Session found that B was barred *personali exceptione* from proving the prior marriage.—Reversed of consent.*

[*Elchies, Proof, No. 7. Sup. V. 789. Falc. Mor. 10456.*]

CAMPBELL of Carrick having been married clandestinely to Jean Campbell, (the respondent,) did for many years live publicly with her as his wife, and four children were born of the marriage. Being killed at the battle of Fontenoy, a competition arose for the status of his wife. The appellant, Mrs. Kennedy, being in London at the time of his death, obtained letters of administration as his wi-

* This branch of the case was the subject of a separate appeal, the report of which is embodied in the present case, and the judgment given in a note on page 523. Falconer's Report extends only to this branch.

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dow, and in that character applied at the war office for the pension. With the view of contesting this claim, the respondent brought a declarator of her marriage, libelling that she had been married to Carrick on the 9 Dec. 1725; and she called the appellant as a party. On the other hand, the appellant likewise raised a declarator of marriage, (to which she made the respondent a party,) setting forth that she had been privately married to Carrick on 3d July 1724.

In support of the former action, the respondent produced, 1. A certificate signed by Mr. George Bennet, a clergyman of the Church of England, who married her, and by two witnesses who had been present at the marriage. 2. An extract from the minutes of the kirk-session of Roseneath, instructing that on the 24 March following, Mrs. Carrick and the respondent had appeared before the kirk-session, owned their irregular marriage, produced the above certificate, and having been rebuked by the minister, had solemnly renewed their marriage vows. 3. Extract from the parish registers of the births and burials of their children. 4. Extract deed of conveyance by Carrick in favour of trustees for his creditors, to which the respondent was a consenting party. 5. Copy assignment of his pay in part for behoof of his creditors, the residue to be accounted for to himself or to the respondent his wife, for the use of his family. 6. Numerous letters from Carrick,* and various members of his family, address-

* The following letter was cited as a specimen. " My ever dearest Jeanie,—This, if it comes safe to hand, is the eleventh letter I have wrote to you, without knowing whether you are dead or alive, but by second hand. This, if I really love you, must give me the utmost pain, which, as I hope to see God in mercy, I do sincerely

ed to her as his wife. She further proved by witnesses that her marriage had never been objected to or questioned, although she and Carrick had cohabited publicly as man and wife, from the time of its celebration in 1725 until her husband's death ; during all which time she had been received and treated as his wife, not only by all their common friends, relations, and acquaintance, but even by the appellant herself.*

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“ from the bottom of my soul, as much as ever husband loved a wife.
 “ This I am determined to do to the last moment of my life, in spite
 “ of all who think otherwise. If you have heard villainous stories of
 “ me, don't give ear to them, for they must be owing to a certain
 “ wretch, who deserves all the mischief in my power, and whose face
 “ I'll never see : you may guess who I mean. As I am told, by Mr.
 “ Archibald Campbell, that my estate is sold, and there will be some
 “ reversion, I hereby give a right all the days of your life to reversion,
 “ and all my household furniture and moveables ; and I desire you'll
 “ immediately cause Archibald Campbell draw up a right in form in
 “ your favour, and send it here to me to sign, and I shall return it as
 “ soon as possible. I send my blessing to my child,” &c.

* Clara Macaulay deponed, “ That in the year 1728, (her husband
 “ being then provost of Edinburgh,) the said Captain Campbell hav-
 “ ing been invited to dinner at their house, he came up in the fore-
 “ noon to the deponent, and desired, as a favour of her, that she
 “ would invite the respondent his wife, and the appellant Mrs. Ken-
 “ nedy, to dine with her that day, because he wanted to have his
 “ wife made acquainted with Mrs. Kennedy ; that the deponent did
 “ invite the appellant and respondent accordingly, who both came ;
 “ and while they were together, Captain Campbell came into the
 “ room, and in the presence of Mrs. Kennedy, did treat the respon-
 “ dent as his wife, and the appellant as Mrs. Kennedy ; that the de-
 “ ponent treated them so likewise, and that the two ladies conversed
 “ with each other, and under the characters of Lady Carrick and
 “ Mrs. Kennedy.” Mary Campbell deponed, “ That soon after the
 “ respondent's and Captain Campbell's marriage broke out, they
 “ came to the deponent's mother's house at Stirling, as husband and
 “ wife, where they staid some days and nights ; that during their
 “ stay, there was one room and bed prepared for them in the said
 “ house, where she believes they lay ; that Mrs. Kennedy was all the
 “ time of this visit in the deponent's mother's house, and had a sepa-
 “ rate room and bed prepared for her ; that at the time of the said

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In the appellant's action, the following interlocutor was pronounced : (23 June 1747.) "The commissaries having considered the libelled summons with the writs therewith produced, defences for the respondents, answers, replies, and duplies, have before answer, allowed Mrs. Magdalen Cochrane (appellant) a proof of her libel, and of all facts and circumstances tending to infer the marriage libelled ; and grant diligence accordingly."

Against this interlocutor, the respondent presented a bill of advocation, which being refused

" visit, the appellant assumed the name of Mrs. Kennedy, and was treated by Captain Campbell and the family under that character ; and that the deponent, her mother, and the whole family, behaved to the respondent as Lady Carrick." Lady Schaw deponed, " that being at Glasgow, and hearing Mrs. Kennedy was there, the deponent sent for her, - and told her, that she was sorry to hear of her keeping a criminal correspondence with Carrick. To which the appellant answered, that as she should answer to God, she had no correspondence with Carrick further than a kiss of civility when he came to Edinburgh or left it ; that in her widowhood Carrick had proposed marriage to her, which she had agreed to ; but he proposed first to go home and put his house in order, after which he was to return and marry her ; and in the meantime, when he was at Roseneath, he married Mrs. Jean Campbell ; and concluded with promising the deponent, that she would never see or entertain Carrick again." As to Carrick's sentiments on the subject, it was deponed by Mr. M'Millan, (a witness afterwards adduced by the appellant in the course of the action at her instance,) " That Provost Campbell and Carrick talking together concerning Carrick's keeping company with the appellant, Carrick promised the Provost that he would see the appellant no more, and have no further correspondence with her." Mrs Sussanna Campbell deponed, " That a little before Carrick left Scotland, when he was at Camsail, (his own house,) the deponent came into his room, where she saw several letters lying, which he threw into the fire, and the deponent being asked what he was then burning, he answered that they were that damned w—— Mrs. Kennedy's letters ; and the deponent owning that she had abstracted two of them, he begged of her not to show them to the respondent, his wife, for that she had got but too much grief by letters of that kind already."

by the Lord Ordinary, (Arniston,) she reclaimed, and founding on the above evidence of marriage, and public cohabitation as married persons for twenty years, and especially on the fact of their having repeatedly been acknowledged and addressed as such by the appellant, she maintained that under these circumstances, and after the death of the husband, the appellant could not be admitted to dispute her status as his wife; that she was barred from the proof of her libel *personali exceptione*, being by her own showing *particeps fraudis*, and concurring in the criminal silence by which the respondent had been induced to believe herself a lawful married wife.

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The Court (28 July 1747) remitted “to the commissaries with this instruction, to find that Mrs. Kennedy is barred *personali exceptione* from being admitted to prove that she was married to Mr. Campbell of Carrick before he was married to the petitioner, Mrs. Jean Campbell.” The commissaries, in terms of this remit, dismissed the process at the instance of the appellant; and in the respondent’s action they decerned in terms of the libel.

These interlocutors were (of consent) reversed upon appeal to the House of Lords, and the interlocutor of the commissaries allowing a proof was affirmed.*

* Appeal entered, 26 Nov. 1747. Judgment, 6th Feb. 1749. “The appellant’s counsel was heard shortly to state the case, and prayed, &c. and the counsel for the respondents being likewise heard, and consenting thereto, it was ordered and adjudged, &c. (upon the consent of the said respondents) that the said interlocutor of the Lords of Session of the 28 July 1747, except such part thereof as remits the bill of advocacy and cause back to the commissaries, and the interlocutor of the Lord Ordinary in respect

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The appellant then stated, that Carrick had paid his addresses to her when they were both very young, but his estate being encumbered, he was sent to sea, and during his absence she married and became a widow: That at his return she was living in the Abbey of Paisley with her relative the Earl of Dundonald, when he renewed his addresses, and they were privately married in the Abbey, on the 3d July 1724, by Mr. William Cockburne, an episcopal clergyman, in the presence of William and Archibald M'Intyre, servants of Carrick: That Mr. Cockburne, lest he should be punished for the irregularity, refused to grant a certificate, but Carrick gave her a holograph writing (produced) in these terms: "At Paisley, the 3d of July 1724; this day, I John Campbell of Carrick, do hereby certify and declare that I was solemnly and lawfully married to Mrs. Magdalen Cochran, lawful daughter of Alexander Cochran of Bonshaw, Esq. now my dear wife, as witness my hand, place and date aforesaid, John Campbell:" That Carrick's affairs being still embarrassed, he was apprehensive that his marriage to the appellant (who had a family, and only L.600 of her own) might displease his relatives, especially his uncle Ardkinglass, on whom he was extremely dependant; and they therefore resolved to keep it

" thereof of the 29 July 1747, and also the two interlocutors or sentences of the commissaries in consequence thereof, dated the 5 and 6 August 1747, be and the same are hereby reversed; and it is further ordered and adjudged, that the interlocutor of the commissaries of the 23 June 1747 be and the same is hereby affirmed."

Elchies remarks, that the judgment of the Court of Session was even given up by Mr. Erskine, Lady Carrick's counsel, as untenable; (as Mr. Al. Ross her solicitor wrote.) How different are the opinions of men in this mortal state!"

secret: That they behaved and treated each other as husband and wife, in so far as was consistent with the plan of secrecy; and she having taken a house in Edinburgh, he lived with her there as often as the duties of his regiment permitted him: That notwithstanding all their caution, the secret transpired, and a rumour of the marriage was circulated in Paisley and the neighbourhood: That to allay her uneasiness at the continued concealment of the marriage, he wrote to her this letter: “ My dear
 “ Maudie, I am just now in a very great hurry, and I
 “ beg you’ll not be uneasy, and in a few days I de-
 “ sign myself the pleasure of seeing you, in order to
 “ declare publicly our marriage. I hope it will be
 “ to the satisfaction of us both. Sure I am it will
 “ be to my dear Maudie’s most affectionate hus-
 “ band and slave, John Campbell. Camsail, 4th
 “ Nov. 1725. To Mrs. Kennedy, at her house in
 “ the Canongate, Edinburgh:” That they conti-
 nued to correspond as husband and wife in the
 most affectionate manner; in proof of which she
 produced 128 letters from him, addressed to her
 as his wife: That when he had unfortunately
 formed the connection with the respondent, he in-
 formed the appellant of it in a letter deeply deplor-
 ing his guilt, pleading in his excuse the arts by
 which he had been ensnared, acknowledging the
 injury he had done to her, and solemnly declaring
 that she alone was his lawful wife:* That, in consi-

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* “ My dearest dear, allow me still to call you so; the contents of
 “ this letter will certainly astonish and confound you. Unable as I
 “ am either to write or act as I ought to do with regard to any
 “ thing, I must acquaint you with the most melancholy and terrible
 “ misfortune that ever happened to man, who had nothing in view
 “ but to be happy, in doing all the duties of a regardful and most

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deration of his excuses, and being over persuaded that her claim, if then urged, might ruin him, (and consequently his family,) and even endanger his life, she consented to delay until such time as she

“ affectionate husband, to the best and most dearly beloved of women ;
 “ but alas, how have I deprived myself of that happiness ! How justly
 “ have I forfeited that honest and sincere love I might have expected
 “ from you, my wife, my friend, and only joy in life, and to which,
 “ from our mutual engagements and marriage, I had a real title. Mi-
 “ serable soul that I am ! I have lost all hopes of comfort, by the
 “ snares of a silly, worthless, and self-designing woman, whose re-
 “ peated advances I have always shunned as I would have done the
 “ devil, and to whom I never gave the least encouragement, and far
 “ less promises ; yea, never thought of her ; yet alas, how shall I be
 “ able to express it ? Notwithstanding of the undoubted just and only
 “ title you have had, and always must have to me, as your husband,
 “ and whatever else can be called mine, which you can, when you
 “ please, make appear, and at times claim me as such, I have, with-
 “ out giving myself time to think seriously, through fear of disoblig-
 “ ing the Duke of Argyle and his friends, plunged myself into the
 “ utmost misery. You’ll by this time guess what I mean. Alas,
 “ what shall I say to my dearest Maudie ? Though my hands are
 “ guilty, my heart is free. Oh ! how shall I mention that fatal
 “ night, which has been the cause of all my woe, when having drank
 “ to a very great pitch, and sitting alone in the fields, that deceitful
 “ woman, or rather devil, whom the world now calls my w—e, and
 “ who, on every occasion, laid traps to ensnare me, designedly threw
 “ herself in my way. How shall I tell you what followed ? My spi-
 “ rits fail me ; I sink, I can no more.—Ruin and destruction to me,
 “ by her ensnaring insinuations and cursed lewd behaviour, and my
 “ not being master of myself, I did——Oh, how shall I name it ?
 “ She fell with child, which was all the devil wanted, joined with her
 “ vicious inclinations, to bring about her own ends ; and in horror
 “ and confusion of mind, for the reasons above, and to prevent my
 “ flying the country, (reasons too slight, nay, not to be named when
 “ seriously thought on,) have put myself in the damnable situation I
 “ am now in. Alas, why did I yield to the fears of disobliging the
 “ Duke of Argyle, or any bad treatment I might have met with from
 “ my uncle, by declaring our marriage to the world at the time it
 “ happened ? Why did my dearest wife join with me in being silent
 “ in an affair upon which our sole happiness in life depended ? Why,
 “ nothing but her tender regard for her husband, and which, though
 “ I have no reason to expect it, must be the only cause I don’t meet
 “ with her just vengeance, which I not only deserve, but the curse of

might make it with less danger to him : That, in the meantime, in their letters, they repeatedly renewed their professions of love and honour, as married persons, and from time to time communicated their marriage to several of their friends :* That, in consequence of Carrick's apprehensions from the respondent's relations, and the increasing difficulty of his own affairs, the publication of their marriage was delayed until the time of his death.

The commissaries (25 Jan. 1751) found, " that Mrs. Magdalen Cochrane; (appellant) has not proved her prior marriage libelled, and therefore dismissed her process, and assoilzied the defenders ; and found facts, circumstances and qualifications, as proven in behalf of Mrs. Jean Campbell, relevant to infer marriage, &c. and decern." And a bill of advocation was (19

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" God, unless, by sincere repentance, he forgive me. Alas, what shall I do? May I, who, from my distressed soul, on my knees beg forgiveness, expect it from injured innocence, in imitation of his goodness. Though you have a soul noble and generous, I on no other account deserve it ; but alas, pity me who am ruined by the snares of a damnable deceitful little wretch, and who has brought me under the guilt of the most inexpressible piece of injustice to the best and most deserving wife ; yet I must unalterably be yours ; I was so, I am so to the last moment of my life. Therefore, O dearest and most injured of women, let me, from a broken heart, and sincere repentance, beg and conjure you to give peace to my troubled soul, by allowing me to see you, that I may more fully explain the miserable state I am in. Grant me this favour, that on my knees, and with a heart full of sorrow and contrition, I may ask forgiveness. O forgive, if possible, your greatly distressed and most unhappy husband, JOHN CAMPBELL. March 1, 1726.

" To Mrs. Campbell of Carrick, at her house at Edinburgh."

* Upon this particular, the respondent alleged that where the evidence was not from the lips of infamous persons, the communications spoken of had not been made until many years after the alleged marriage, and under oaths of the most inviolable secrecy.

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June) refused by the Lord Ordinary, after advising with the Lords.

The appeal was brought from the interlocutors of the 25 Jan. and 19 June 1751.

Pleaded for the Appellant:—Marriage is a contract indissoluble by the consent of parties. If properly proved, no court of law can withhold its legal effects; and during its subsistence, neither party can contract a second marriage; any attempt to do so must be an absolute nullity. No such second marriage, in whatever manner contracted, and attended with whatever circumstances, can be a bar to establishing the fact of the prior marriage. This is the law of England as well as Scotland.

If the appellant's marriage be proved, no subsequent conduct on her part can annihilate it, or have the effect to make the respondent the lawful wife of Carrick, who was the lawful husband of the appellant. And the appellant has proved in the clearest manner her marriage.

It is said that the respondent's marriage is completely established; but by the previous marriage to the appellant, any other marriage was rendered absolutely impossible in law. The evidence may prove polygamy against Carrick, but it cannot prove that the appellant ceased to be, or that the respondent became, his lawful wife.

The respondent has brought no proof of a marriage; she does not even say where it was solemnized, for in her libel it is only said, "that she was married near by the house of her parents, in the parish of Roseneath," which is in the highlands; and yet the witnesses, who are the same as those present at the appellant's marriage, assume their lowland name of Wright, instead of their ordinary

name of M'Intyre. These individuals lived at Rose-neath, where the Highland language was spoken, and where they always went by that name; so that if they had been witnesses to the respondent's marriage, and had subscribed her pretended certificate, they must have done it in the name of Archibald and William M'Intyre, and not in their lowland name of Wright. And as to the farce of the rebuke before the kirk-session, it is hard to understand how it could constitute a marriage, or be a renewal of a marriage vow, so as to be equivalent to marriage. There can be no instance found in Scotland where a gentleman and his lady were rebuked by a kirk-session for a clandestine or irregular marriage. And the real object of this rebuke was what had passed in the fields, when the parties had sexual intercourse together. The proof the appellant has led is sufficient to constitute that marriage; and this effect ought equally to hold where a competition of one marriage with another takes place, although the result may be to disannul that marriage; because law makes no difference in a proof of marriage in a case where there is a competition and where there is none. And no exception can possibly take place on the ground of *exceptio doli*, because she was not the author of that dole, nor of that silence, on the subject of her marriage, of which the respondent is pleased to take advantage. She was forced into this against her inclinations and will. And had she heard of the proclamation of banns of the respondent's marriage with Campbell of Carrick, she would have opposed them, as an outrage done to her preferable claims.

Pleaded for the Respondent:—The respondent's marriage stands authentically proved by the certifi-

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cate of the minister who married her to Captain Campbell, the declaration of the witnesses present, the renewal of the marriage vows, and promise of adherence, before the minister and the kirk-session of Roseneath, their long and public cohabitation, and procreation of children, as husband and wife, their being acknowledged and treated as such, by all the captain's family, and people of fashion in the country where they dwelt, and by numerous letters and acknowledgments. The marriage thus constituted must prevail over one defectively constituted. In regard to the appellant's marriage, the paper of 3d July 1724, signed by Captain Campbell, is not signed by any minister or witnesses. Of the two surviving witnesses who were present on that occasion, the one knows nothing of the matter, and the other swears that he never heard of it but from the appellant. And those witnesses that are adduced to prove Campbell's acknowledgment, one is contradicted by five others in a most material part, and the other is certified to be infamous. But whatever be the force and effect of this evidence, this is clear, that whatever proof attended with consummation and cohabitation might be deemed sufficient, where both parties are free, yet where there is a competition, nothing less than the most pregnant proof is sufficient to annul a subsequent marriage duly proved, completed by cohabitation, and every other necessary act. This rule is undoubted; and it holds with double force where the appellant has not only lain by with her claim for twenty years together, but has also acknowledged the other lady to be the real wife.

After hearing counsel it was

Ordered and adjudged, that the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors and final decreet or sentence of the Commissaries therein complained of, be, and the same are hereby affirmed.

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For Appellants, *W. Murray, G. Hay.*

For the Respondent, *Al. Forrester, C. Yorke.*

Note. Professor Bell states, that the Court of Session affirmed the sentence of the Commissaries on questionable grounds; and that the judgment, when taken to the House of Lords, was affirmed only on an arrangement between the parties.—Bell's *Illust.* vol. ii. p. 248. The journals of the House of Lords do not bear any evidence of this arrangement; but state, that counsel on both sides were heard for three days, and that the judgment proceeded on due consideration had of what was said on either side. Perhaps the arrangement had reference to the previous part of the case appealed, on the point, whether there should be a proof before answer; in which the judgment of the Court of Session was reversed of *consent*: But in the appeal of the final decision of the cause, the proceedings of the House of Lords were as follow: (*Journals*, vol. xxviii. p. 9.)

19th^{*} January 1753. “A petition of Magdalen Campbell was presented to the House and read, setting forth, ‘That the petitioner’s agent being out of town, she did not know till last Wednesday afternoon that her appeal, in which Jean Campbell is respondent, stood appointed for this day;’ and praying, ‘in regard the petitioner’s counsel are not prepared to attend this day, that the hearing of the said cause may be put off for a week.’

“And thereupon the agents on both sides were called on and heard at the bar. And being withdrawn:—Ordered that the hearing of the said cause be put off to this day seven-night; and the other cause removed, to come on in course.” At p. 12.

26th January 1753. “After hearing counsel in part upon the amended petition and appeal of Magdalen Cochran *alias* Campbell, widow and administratrix of Captain John Campbell of Carrick deceased, and Alexander and Archibald Stevenson, conjunct procurators fiscal of Court, to which Jean Campbell and

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her daughter are respondents :—It is ordered, That the further hearing of the said cause be adjourned to Monday next ; and that the counsel be called in precisely at one o'clock ; and that the other cause be removed of course."

31st Jannary 1753. " After hearing counsel, as well on Friday and Monday last as this day, upon the amended petition and appeal of Magdalen Cochran otherwise Campbell, widow and administratrix of Captain John Campbell of Carrick deceased, and Alexander and Archibald Stevensons, conjunct procurators fiscal of Court ; complaining of an interlocutor of the Commissaries of Edinburgh of the 25th January 1751, and of an interlocutor of the Lords of Session in Scotland of the 19th June 1751, and of the final decret or sentence of the said Commissaries, in consequence and conformable to the said interlocutor of the said 25th January 1751, made on behalf of Mrs Jean Campbell, praying, ' That the same might be reversed and set aside; and that the said Lords of Session might be directed to resume the appellant's bill of advocacy, and remit the cause to the said Commissaries ; and that such relief might be granted to the appellant as to this House, in their great justice and wisdom, should seem meet.' As also upon answer of the said Jean Campbell, relict of Captain John Campbell of Carrick, and Jean Campbell, only child now in life procreated of the marriage between the said Captain John Campbell and the said Jean Campbell his spouse, put in to the said appeal; and due consideration had of what was offered on either side in this cause : It is ordered and adjudged that the said petition and appeal be dismissed, and the interlocutors be *affirmed*."

" Ordered, That the Judges do prepare and bring in a bill, for the better preventing of clandestine marriages."

See Wilson and Shaw's Appeal Cases, vol. iii. p. 135 (note) ; this last paragraph is made erroneously to apply to the proceedings in the *first* appeal.