

1759. February 10.

JANET MACCULLOCH *against* EDWARD MACCULLOCH of Auchenguill.

JANET MACCULLOCH commenced a process of declarator of marriage, before the Commissaries of Edinburgh, against Edward Macculloch; in which a proof was allowed. The general import of the evidence was, That she was a person of good character, and nearly related to the defender himself: That in the year 1749, and beginning of the year 1750, she resided in the family of Lady Ardwall, the defender's sister, as an assistant in the education of her daughters: That the defender resided in the same house, and was younger than her by some years: That it was discovered in the family, that the pursuer had, upon several occasions, in the night-time, gone from her own apartment, where she slept with the children, to the apartment where the defender slept: That, in summer 1750, she discovered herself to be with child, and went from the house of Ardwall to her mother's house; where, after staying a short time, she accompanied the defender to the Isle of Man, and there resided for about six months, and was delivered of a child; That the defender was very attentive to her at this time, and was understood by the people of the house to be her husband; and that upon several occasions, in conversing with the people of the house, he called her his wife, and was understood by his own brother to be married to her, who came to the Isle of Man to make enquiry; That he procured the child to be baptized by the parish-minister, and its name was entered in the register as a lawful child: That during this period, the defender went several times from the Isle of Man to Scotland about his private affairs, and returned again; upon the whole, had resided with her in the Isle of Man above three months: That upon their return from the Isle of Man, the pursuer returned to her mother's house, and the defender to the house of Ardwall: That during the space of a year thereafter, he made four visits to the pursuer, and upon some of these occasions slept with her, with the knowledge of her sisters, who were persons of good character: That there was a report in the country, after his return, that he was married, and he never expressly contradicted that report during the first year after their return.

The Commissaries 'found the facts, circumstances, and qualifications proved, not relevant to infer marriage; and therefore assoilzied the defender.'

In a bill of advocacy for the pursuer it was *contended*, That the judgment of the Commissaries in this case proceeded from an opinion, that no cohabitation as husband and wife, however strongly supported by the acknowledgment of the parties that they were married, was sufficient to constitute a marriage by the law of Scotland, if that cohabitation happened in a foreign country, by the laws of which, cohabitation alone was not sufficient to constitute a marriage: That this point of law had, however, been overruled in a late noted case between George Forbes and the Countess of Strathmore, (*See APPENDIX*); where

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Cohabitation in a foreign country, will not constitute a marriage in Scotland.

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the marriage was chiefly supported by the proof of a cohabitation and acknowledgment during the residence of the parties in Holland.

That by the law of Scotland, the serious and deliberate acknowledgment, that a child is lawfully begotten, and the mother a lawful wife, is a sufficient proof of a private marriage between the parties; whether that acknowledgment be emitted in this country, or any where else. And this is not peculiar to the proof concerning a private marriage; for the evidence, that any other private deed or transaction had happened in Scotland, may arise, in a great measure, or altogether, from facts and circumstances occurring in a different country. If it should be proved against a person accused of any crime, that, in a foreign country, before witnesses, he fully confessed the matter laid to his charge, or committed, in this country, this would be good evidence of the fact, without enquiring what would be the consequence of such confession by the laws of the country where it was made.

That in this case, from the character and rank of the pursuer, there was the strongest reason to presume, that there had been a promise of marriage, and that she had trusted to the faith and honour of the defender: That this was further confirmed by his open acknowledgment of her as his wife in the Isle of Man, and his solemn and deliberate acknowledgment that the child was lawfully begotten, at the sacrament of baptism: And though he made use of several pretences to delay avowing the marriage in Scotland, yet his visits to the defender at her mother's house, were evidently upon the footing of an acknowledged husband; and his never contradicting the report which prevailed after their return from the Isle of Man, even to his own particular relations, must be held as the strongest acknowledgment of the fact.

*Answered,* Cohabitation as man and wife does, by the law of Scotland, establish a marriage; but 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. The writers on the civil law require that it should subsist for ten years; and Craig, as well as Lord Stair, requires that it should subsist a considerable time; but none of these requisites occur in the present case.

It appears by Sir George Mackenzie's observations upon the act 77th Parl. 1503, that the proof arising from cohabitation, is capable of being redargued by a contrary proof; and here there is not only no proof of an actual marriage, but the strongest presumptions of the contrary.

It is an essential requisite of cohabitation, that it should be open and public. This appears from the civil law, *l. 9. et 22. Cod. De nuptiis*. But here the cohabitation was clandestine, and concealed in a solitary place; and occasioned merely by the necessity of assuming that appearance, that the pursuer might be treated in a proper manner during her delivery and inlying.

The cohabitation in the Isle of Man cannot establish the marriage, for another reason: The legal import and effect of a man's actions must be judged of

according to the law of the country where he is residing at the time. Thus, intromission by a Scotsman with goods in England belonging to a Scotsman who died in Scotland, without confirmation here, was found no passive title; but only to subject the intromitter *in valorem*, agreeable to the law of England, where the intromission happened; Archbishop of Glasgow *contra* Bruntsfield, No 16. p. 4449. If a different law were to prevail with respect to marriage, this absurdity would follow, that parties might be held as married in one part of the united kingdom, and not in the other.

In the case of Forbes *contra* the Countess of Strathmore, the cohabitation in Holland was not held sufficient to establish the marriage; for not only was the acknowledgment of the parties in that case much stronger and more explicit than in this, and their cohabitation of a longer continuance; but there was also strong presumptive evidence, that an actual marriage had been celebrated in Scotland.

There is here no proof of an actual marriage, but strong presumptions to the contrary. There is no proof of any acknowledgment or cohabitation, except what happened in the Isle of Man; and the whole of the defender's behaviour, both before he went to that island, and after his return, was contradictory to the supposition of a real or an acknowledged marriage. It was not necessary for him to contradict every idle report, or to set every one right who had conceived a false opinion.

'THE LORDS remitted the cause to the Commissaries, with instructions to find the marriage proved.'

Act. Garden, Lockhart.

Alt. Alex. Murray, Hamilton-Gordon, Miller.

This judgment was reversed by the House of Lords, and the marriage found not proved.

W. J.

Fol. Dic. v. 3. p. 231. Fac. Col. No 168. p. 298.

1776. August 6. JACOB and JOHN RHONE *against* PARISH and SCHREIBER.

TURNER having become bankrupt in Bremen, the Senate, according to the custom of that place, took the management of the bankrupt's effects. The creditors appearing before the Senate, chose certain of the Senators trustees for the behoof of all. Certain of these creditors having arrested in the hands of the bankrupt's debtors in Scotland, *contended*, that this foreign act, though acceded to by them, could not be effectual *extra territorium*, and urged a claim of preference on their arrestments. The trustees comparing, THE LORDS, on a hearing in presence, found the arresters were precluded from all preference on their diligence by their accession to the foreign deed of trust. See APPENDIX. See Note under p. 757. See No 89. p. 4561. Fol. Dic. v. 3. p. 229.