

July 27, 1814.

INSURANCE.
—ABANDON-
MENT.

House of
Lords, if the
cases of Bain-
bridge v Neil-
son, and
Faulkner v.
Ritchie, had
been brought
before that
House.

The accept-
ance the
ground of de-
cision.

be the judgment of the House of Lords, and protesting against being considered as giving any opinion agreeing or not agreeing with these decisions, it was clear that the present case was out of the principle of these cases. Here it was not made out that the underwriters had any right whatever to refuse to settle as for a total loss: they could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss. It was therefore on the effect of the transactions in this particular case, without reference to others, that he thought the decision of the Court of Session right.

Lord Redesdale. I concur.

Judgment.

Judgment *affirmed.*

Agents for Appellant, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CUNNINGHAMS—*Appellants.*

CUNNINGHAMS—*Respondents.*

May 6, 9, 11,
July 20, 1814.

MARRIAGE.

A MAN and woman, after a known illicit connexion, cohabit together in such a way as to create a repute, though a divided one, of their being married persons; and the man, in order to get lodgings in the houses of persons of respectability, and to save the woman from rude treatment by one

of his companions when drunk, acknowledges that the woman is his wife. Held by the House of Lords, reversing a decision of the Court of Session, that the facts and circumstances were not sufficient to infer a marriage.

May 6, 9, 11,
July 20, 1814.

MARRIAGE.

Certificate of celebration not sufficient to prove the marriage; one of the witnesses who signed the certificate having sworn, that the woman was not present when the marriage was stated in the certificate to have been celebrated.

Sentiente Lord Eldon, that in cases of cohabitation, presumption is in favour of its legality—*secus*, if the connexion is known to have been in its origin illicit.

Sentiente Lord Redesdale, that repute, to raise presumption of marriage, must be founded on general, not singular opinion; and that a divided repute is, on such a subject, no evidence at all.

THE facts of this case, as far as it appears necessary here to notice them, were these:—

While John Cunningham, eldest son of John Cunningham, of Balbougie, was Provost of the borough of Inverkeithing, in the year 1758, he hired Agnes Hutcheson as a servant. In 1759 she bore him a child, and they were both rebuked—she publicly, and he privately—by order of the Kirk Session. This judicatory required of her to produce a testimonial of her being absolved from fornication, which she had been guilty of in Edinburgh; and she was at length compelled to quit Cunningham's service. Cunningham at this time would not confess that the child was his; stating, "that he had some doubts about that." The connexion in its commencement was therefore clearly illicit.

Facts of the
case.

In 1760, Cunningham's affairs having become embarrassed, he went to live within the precincts of the Abbey, where he was joined by Agnes Hutcheson. Some time after, with a view to take the

Parties cohabit together
from 1760 to
1770.

May 6, 9, 11,
July 20, 1814.

MARRIAGE.

benefit of the *cessio bonorum*, he went into gaol, where he was attended by Agnes Hutcheson; and then the parties lived together—at one period in the Canongate, and during another period in the Cowgate—till 1768, when Cunningham's father died; and then they went to Balbougie, where they lived till 1770; when Agnes Hutcheson, being in ill health, either for medical advice, or to be near her relations, or for both purposes, was sent to Edinburgh, where she died, and was buried in the Canongate church-yard, as an unmarried woman, with very little ceremony; Cunningham having sent his bailiff, or cowfeeder, to take charge of the funeral. The Respondents were the children of Cunningham by this Agnes Hutcheson; after whose death, Cunningham took another woman to live with him, under the name of his housekeeper,—a Mrs. Gibson,—whom he afterwards married.

The estate of Balbougie had been entailed by Cunningham's father upon his sons and their issue male, in the usual order; and failing issue male, then on their issue female, in the usual order. The issue male having failed, Cunningham, being desirous that his own daughters should succeed in preference to his brother's daughters, resolved to attempt to prove a marriage between himself and Agnes Hutcheson; and the Respondents, under his direction, in 1790, raised an action of legitimation before the Commissaries of Edinburgh. After some previous procedure, (*vide* the *Lord Chancellor's* speech in judgment, *post*,) a proof of the marriage was allowed.

Process of legitimation,
1790.

The marriage was attempted to be made out in

three ways—by actual celebration—by cohabitation as husband and wife—and by acknowledgments parole and written. To prove the celebration, a witness was produced, who stated that Cunningham came to his house some time in 1770, with an episcopal clergyman of the name of Murray, who made out a certificate of the marriage, which witness signed; but Agnes Hutcheson was not present. The certificate was then called for, but was not produced till about ten years after, when the witnesses were dead, and then it was impeached as a forgery. In a supplementary action against Cunningham himself by the daughters, raised in 1798, his declaration was taken; and he stated a celebration in the Abbey; but this was not relied upon. A great number of witnesses were examined respecting the alleged marriage by cohabitation and acknowledgment during the residence of the parties in the Abbey, the Canongate, Cowgate, and at Balbougie. The evidence of reputation, or habit and repute, as to the character in which the parties cohabited, was contradictory. Several acknowledgments by Cunningham were proved; but the question was, whether they were mutual, and whether not made for a particular purpose.

With respect to the law on the subject, both parties appeared to be agreed, that marriage was constituted only by mutual consent; and that regular celebration was conclusive evidence of that consent. But as to irregular marriages, the Defenders maintained, that the evidence in support of them might be rebutted by other evidence; and that the conduct of the parties, and the opinion of the world as

May 6, 9, 11,
July 20, 1814.

MARRIAGE.

Supplement-
ary process,
1798.

Moir v. M'In-
nas, Dom.
Proc. 1732.

May 6, 9, 11,
July 20, 1814.

MARRIAGE.

to the character in which they cohabited during the whole period in which they lived together, was to be taken into consideration. For the Pursuers it was contended, that when once cohabitation as husband and wife, or distinct acknowledgment, was proved, they were entitled to stop and say that the marriage was completely established; and that no subsequent declarations, or even the oaths of the parties themselves, or of other persons, could avail against it, any more than against a regular celebration.

Feb. 20, 1810

The Commissaries, and afterwards the Court of Session, (Second Division,) by the casting vote of the then Lord Justice Clerk, (*Hope*), found facts and circumstances proven sufficient to infer marriage; and from this judgment the appeal was brought. It appeared that some doubt had been expressed below as to the authority of the decision of the Lords in *Moir v. M'Innes*, as to the effect of an acknowledgment:

Dom. Proc.
1780.

In support of the proposition, that the most express parole or written acknowledgments were not conclusive evidence of consent, the Appellants cited *Moir v. M'Innes*, *Taylor v. Kello*, and *M'Gregor v. Campbell*. As to the effect of cohabitation and declaration, or acknowledgment, the cases of *Inglis v. Robertson*, 1786—*Edmonston v. Cochrane*, 1804—*Callender v. Boyd*, 1801—Case of *Arrot*, Ersk. 95. *Mor. Ed.*—*Pennycuick v. Grinton*, 1752—*M'Adam v. M'Adam* (*vide ante*, vol. i. p. 148)—*Fergusson v. Mackie*, 1781—*Richardson v. Irving*, 1785—*Ritchie v. Wallace*, 1792—*Atkinson v. Brown*, 1787—were referred to on the part of the Respondents.—In support of the proposition, that

Taylor v. Kello, Fac. Coll. 1786.—*M'Gregor v. Campbell*, Fac. Coll. 1801.

marriage was complete and indissoluble when the consent was once proved, whether by regular celebration or otherwise, besides a variety of writers on the canon and civil law, the cases of *Bunting*, 4 Coke, 29—*Jesson v. Collins*, Salk. 437—*Dalrymple v. Dalrymple*, 1811, were cited.—The cases of *Swinton v. Kailes*, 2 Stair, 400—*Somerville v. Halgro*, Durie, 210—*Cameron v. Malcolm*, 1756—*Young v. Allen*, 1774—*Johnston v. Smith*, 1766—*M'Culloch v. M'Culloch*, 1759—*Whyte v. Hepburn*, 1785, and *Maclachlan v. Dobson*, 1796, (*vide ante*, vol. i. p. 171,) were also mentioned.

May 6, 9, 11,
July 20, 1814.

MARRIAGE.

Mor. Dict.
vol. 30. Nos.
538. 543.

Romilly and *Horner* for Appellants; *Clerk* and *Moncrief* for Respondents.

Lord Eldon (Chancellor.) It would be recollected, that this cause originated by a summons of legitimation, raised in 1790 before the Commissaries of Edinburgh; in which it was alleged “ by Misses
“ Elizabeth and Alison Cunningham, daughters of
“ John Cunningham, Esq. Advocate, who is eldest
“ lawful son of the deceased John Cunningham,
“ Esq. of Balbougie, Writer to the Signet; that
“ whereas the complainers (viz. the said E. and A.
“ Cunningham) are lawful children of the said
“ J. Cunningham, procreated betwixt him and the
“ now deceased Agnes Hutcheson, his spouse, who
“ were lawfully married together; yet, notwith-
“ standing thereof, Misses Katharine, Alison, Mary,
“ and Jean Cunningham, children of Colonel James
“ Cunningham, of Balbougie, and Mrs. Esther
“ Cunningham, otherwise *Cauvin*, only surviving

July 20, 1814.
Observations
in Judgment.
Summons.

July 20, 1814.

MARRIAGE.

Allegation in the summons, that their parents were unmarried before their birth.

“ child of the deceased Dr. Harry Cunningham,
 “ third lawful son of the said deceased John Cun-
 “ ningham, and spouse of *Mr. Joseph Cauvin*,
 “ Clerk to the Signet, and the said Colonel James
 “ Cunningham, as administrator in law to his
 “ daughters Mary and Jean, who are under age,
 “ and the said *Joseph Cauvin*, for his interest, with
 “ a malicious intention of depriving the said com-
 “ plainers of succeeding to their said father or
 “ grandfather, or any of their other relations, have
 “ taken upon them to propagate and tell to sundry
 “ persons, that the complainers are bastards, al-
 “ though, as above mentioned, *they were begot in*
 “ *lawful marriage, and brought forth lawful chil-*
 “ *dren.*”

To this first part of the summons he called their Lordships' particular attention, as it was of great weight in the cause. This summons was the commencement of the suit in 1790, alleging that the complainers were the lawful children of John Cunningham, Advocate. Their father was then alive: he lived for a long time after, and had an opportunity, if they were his lawful children, to consult their interest, to gratify their anxiety to establish their legitimacy, and also his own anxiety which appeared in the course of the cause, by stating the nature of his connexion with the woman, who was certainly their mother. If he and the mother were married at an early period of their acquaintance, he could state the time, the place, and the witnesses. If the marriage took place at a later period, (by celebration,) he might also point out the time, place, and all the circumstances. If any of the witnesses

were living, he could point them out, and mention their names. He was himself the best witness in the world in such a case, from the knowledge which he must have of all the circumstances. When the complainers therefore had an opportunity of stating in this process all the circumstances from which a marriage was to be proved and inferred, they alleged that they were begot in lawful marriage, and brought forth lawful children; the meaning of which was, that they were begot and brought forth after the marriage of their father and mother. By the law of Scotland, their Lordships knew, though the complainers had been born before marriage, they would have become legitimate by a subsequent marriage of their father and mother. But this allegation was, that they were lawful children by a marriage between their parents before their birth.

When they must have been instructed then by their father as to what was the fact, and were not driven to the necessity of saying one thing and then alleging another thing inconsistent with the former, they went on to state in their summons—"at least, if the complainers, or either of them, were pro- created or brought forth *before* the said John Cunningham, their father, and the said Agnes Hutcheson, their mother, were actually married, the complainers were afterwards legitimated by a marriage which took place betwixt their said father and mother; and they have been always held and reputed to be lawful children."

The case then was open to the observation which he had stated,—that it had been clearly instituted by the advice, and conducted under the superin-

July 20, 1814.

MARRIAGE.

That if they were born before the marriage of the parents, they were legitimated by a subsequent marriage.

July 20, 1814.

MARRIAGE.

tendance, and at the expense, of Cunningham the father; and on this ground he was rejected as a witness, though he had been afterwards judicially examined, and made a declaration which would by and by be noticed. The allegation which he permitted them to make was, that there had been a formal marriage before their birth; by which he supposed was meant the marriage by *Don*, or *Dun*; that he was married to their mother either before their birth, or after their birth, by which they became legitimate. The allegation too was on the fact of an actual marriage; and yet he should be unwilling to hold that the summons excluded cohabitation with habit and repute, and acknowledgment. He took it as if it meant to include every thing by which a marriage could be inferred; though it was difficult to believe that this would have been the mode of expression if all these had been intended.

Defences.

Appearance having been made for the Defender, K. A. Cunningham, it was said in her defences, that the libel was too general; that there had been no celebration, no marriage; and that the Pursuers were illegitimate.

Answers.

Answers were given in for the Pursuers; and, instructed as they must have been by their father, as before stated, they said, “that like the children
“of many very respectable families in this country,
“*they were not born in lawful wedlock*; but they
“have this comfort, that from their infancy they
“and their mother lived with their father, and sat
“at his table; and when they came the length of
“going about, *they were taken notice of by all the*

“ *respectable people in the neighbourhood; and for* July 20, 1814.
 “ several years past, since they came to greater
 “ length, they were visited and received visits at }
 “ their father’s house from all these people, *and*
 “ *never heard the smallest surmise of their not*
 “ *being the legitimate children of their father, till*
 “ they had information to the contrary from the
 “ Defender. The Pursuers do not know why, in
 “ the deed executed by their grandfather,” (this
 deed, which was in the hand-writing of Cunning-
 ham the father, he would notice by and by,)
 “ leaving a legacy to the Pursuer, E. Cunningham,
 “ she was designed *a natural child*. They never
 “ saw that deed, nor do they know the date of it;
 “ but it would seem that it had been written pre-
 “ vious to the marriage; or, if after that period,
 “ *that their father had not wished to mention to*
 “ *their grandfather that he was married: but this*
 “ is of no importance in the present question; *for*
 “ *even supposing their father were to give a solemn*
 “ *declaration that they were at this moment na-*
 “ *tural children, it would have no effect whatever*
 “ *in contradiction to a positive proof of a marriage*
 “ *betwixt their father and mother.* The Defender
 “ is wrong in asserting so violently that the Pur-
 “ suers have never been considered as lawful chil-
 “ dren; because that they not only are so, but have
 “ long, if not always, been reputed to be so, can be
 “ proven in the most satisfactory manner.”

MARRIAGE.

After this, the Commissaries “ ordained the Pur-
 “ suers to give in a pointed condescendance of the } Condescend-
 “ facts which they offered to prove in support of } ance.
 “ their libel, and in particular of the facts and cir-

July 20, 1814,

MARRIAGE.

Offer to prove marriage by actual celebration—by cohabitation as husband and wife with habit and repute—by acknowledgment, &c.

“cumstances from which they inferred a marriage
 “between their parents:” by which, as he understood it, they were to have an opportunity of proving,—1st, The fact of marriage by actual celebration; or, 2d, In any other way by inference. A condescendance was then given in;—and here he might be allowed to observe, that up to this moment there had not been a word said as to the marriage at Holyrood House; nor he believed of an actual marriage in 1770, except in this condescendance: and not a word about the certificate in the hands of the father. The Pursuers then offered to prove,—“1st, That their father and mother were
 “formally married in the year 1770. 2d, That
 “they and their mother always sat and were entertained at their father’s table; and that their mother, if not always, was often called by their
 “father’s name. 3d, That they had been educated
 “and brought up as their father’s lawful children;
 “and that they had always been considered and
 “treated as such by their relations, neighbours,
 “and acquaintances; and there cannot be a stronger
 “instance given of the idea which their opponent
 “and her family had of their legitimacy, than to
 “mention, &c. that she, her mother, and two
 “sisters, a few years ago, paid their father and
 “them a visit at Balhousie, where they staid eight
 “or ten days, during which the greatest friendship
 “subsisted among them; and they and the Pursuers afterwards corresponded by letters always
 “upon the footing of cousins.”

Here then they first offered to prove a marriage actually celebrated in 1770, which turned out to

be the marriage supposed to have been celebrated by *Murray*, at the house of *Paterson*. But those who prepared this condescendance (he trusted this was an observation which he was warranted judicially to make) felt a difficulty as to the actual marriage; and, under the second and third heads, had betaken themselves to cohabitation with habit and repute.

July 20, 1814.

MARRIAGE.

After answers for the Defenders, the Commissaries “ordained the Pursuers to condescend more particularly on the circumstances attending the marriage of their father and mother, and to specify the time of the year, the place, the celebrator, and the witnesses.” This was not requiring too much, considering that the father was then alive, who could not be ignorant of time, place, or circumstances attending an actual celebration of marriage.

A more particular condescendance ordered.

Though immediately after the hearing of this cause he had desired further time for consideration, he had then no doubt, that if this had been one of those cases in England, where neither the place of the marriage nor registration could be found, but where the question was, whether *rebus ipsis et factis*, by cohabitation as man and wife, and what they called reputation, marriage might not be presumed; an English Jury could not have presumed a marriage upon such facts and evidence as appeared in this cause. But though that was his opinion then, he had desired time to consider what might be the peculiarities of the law of Scotland, with regard to such facts and evidence.

If question were in England, whether marriage might not be presumed *rebus ipsis et factis*, evidence here would not be sufficient.

In this condescendance, here properly called for,

July 20, 1814,

MARRIAGE

More particu-
lar conde-
scendance
given in as to
actual celebra-
tion.

Certificate said
to have been
mis-laid.

1798.

Declaration of
Cunningham
the father.

Alleged cele-
bration in the
Abbey.

though the particulars could only be supplied by the father,—no notice was taken of the marriage at Holyrood-House; but they stated, “that the marriage of their father and mother took place on the 5th of July, 1770; the *celebrator* being Mr. Thomas Murray; the *witnesses*, David Shiells and William Paterson; *place*, the house of William Paterson, who resided in the Canongate.”

Here nothing was said as to the certificate, nor was it necessary to say any thing. It was however called for, and the answer was, that it had been mis-laid; and in point of fact, it was not produced till about 10 years, or some long time, afterwards. But it was at length produced. There was an offer to examine Cunningham himself; but, if Cunningham was carrying on the suit, supplying the expenses, &c.—by the law of Scotland, as he understood it, Cunningham could not be a witness. Upon a supplementary summons however, by the Pursuers, against Cunningham the father, he was judicially examined as a party; and he declared, “That it was some years before the year 1760, when he became acquainted with Agnes Hutcheson; that he had several children by her, and that she was the mother of the present Pursuers: that he lived for four years in the Abbey, at Holyrood-House, from 1760 till 1764, as he thinks; and Agnes Hutcheson, during that period, lived constantly with him; that, during that time, he was privately married to the said Agnes Hutcheson; that the marriage ceremony was performed by a Dr. Don; or Dun, an English Clergyman, who had come from England to reside in the

“Abbey for some time, on account of debt.”—This was what Cunningham said in 1803, 13 years after the suit had been instituted.—And then he went on:—“The declarant recollects that there were present at the marriage, Captain Robert Campbell, of Monzie; Cowan, a watch-maker, and, as he thinks, either Judge Philp or Mr. D. Dalrymple, afterwards Lord Westhall; and he is certain that one or other of them was present, but which he does not recollect; that he is not sure if there were any other persons present; that Dr. Dun gave him a certificate of the marriage: and he now recollects that the woman of the house in which they staid was present at the marriage; that her husband’s name was Spark, who was one of the King’s trumpeters; that the above certificate the declarant gave to Agnes Hutcheson, after he left the Abbey, when he came to reside at Balbougie, after getting his affairs settled; *that his father was very much against the marriage, and the declarant did every thing in his power to conceal it from his father, who had declared that if he married that woman, he would not give him a sixpence.*”

July 20, 1814.

MARRIAGE.

Their Lordships would permit him here to observe, that the suit had not been instituted till long after the death of Cunningham the grandfather—till after the son had gone to Balbougie—till after the death of Agnes Hutcheson; and the reason alleged by Cunningham for not having brought forward this marriage before was, that if his father knew it *“he would not give him sixpence.”*

Suit not instituted till after death of Cunningham the grandfather—till after death of Agnes Hutcheson, &c.

Then they had from 1764 to 1770, in which to

July 20, 1814.

—
MARRIAGE.

Evidence of
facts, &c. am-
biguous and
inconsistent.

look at the circumstances from which marriage might be inferred, with the recollection of the fact of its having been alleged, that between 1760 and 1764 there had been an actual celebration of marriage. Why then, how happened it that the evidence of facts and circumstances was so ambiguous? It might be answered—"Ah, but secrecy was necessary." That, however, was nothing to the fact of actual celebration; and if it applied to the habit and repute during the grandfather's life, how came the evidence to be so inconsistent, so incoherent, when the grandfather died, and the cause of secrecy ceased; when the woman must have been anxious to have all possibility of doubt on the subject removed; and when he, who, from apprehension of his father, had compelled her for a time to live in so suspicious a situation, must have been anxious to proclaim her openly and unequivocally a married woman?

Cunningham then proceeded to declare, "that in order to obtain the benefit of a *cessio bonorum*, he was some time a prisoner in the Canongate tolbooth; which was some time after he had been in the Abbey; that while the declarant was in the Canongate tolbooth, A. Hutcheson lived and slept with him; that the gaoler made some objection to A. Hutcheson staying with him, saying, that no woman was admitted unless she was married; upon which declarant told him that he was married, and referred him to some people of whom he might inquire; that he recollects staying in the house of a man of the name of *Winter*, as he rather thinks after having been in Canon-

“ gate gaol; that A. Hutcheson lived with de-
 “ clarant in *Winter's* house, and she was treated
 “ by declarant, and the people of the house, *as he*
 “ *thinks*, as his wife, &c.; declares that he always
 “ allowed A. Hutcheson to manage his house as
 “ his wife.”—Interrogated, by what name did she
 go? Declares “ that she sometimes went by her
 “ own name, and sometimes by that of declarant;
 “ *and that he sometimes desired people to call her*
 “ *by her own name, by way of keeping the matter*
 “ *private:*”—(their Lordships could not forget the
 evidence, of a message coming to her as his wife,
 at Edinburgh, from Balbougie; a fact as inconsis-
 tent as any fact could be, with the idea of secrecy on
 account of the father:)—“ that the declarant thinks
 “ he lived in another house in Edinburgh, for some
 “ short time, after leaving *Winter's*, &c.; and that
 “ he lived with her there in the same manner as in
 “ *Winter's*, and did so in every house where he
 “ lived with her; that A. Hutcheson came to live
 “ with him at Balbougie, after his father's death;
 “ that A. Hutcheson was always in bad health,
 “ from the time when she came to reside at Bal-
 “ bougie, and she continued so till her death,
 “ which happened at Edinburgh; that, a consider-
 “ able time before she died, she mentioned to de-
 “ clarant that *she had either lost or burnt Dr. Dun's*
 “ *certificate of the marriage*; that declarant told
 “ the real story to William Paterson, porter in
 “ Canongate, and who kept a public-house, and who
 “ and his wife knew all the affairs of A. Hutcheson;
 “ and her connexion with declarant; and upon
 “ telling the said W. Paterson the matter, he said

July 20, 1814.

MARRIAGE.

Agnes Petrics
 their servant
 girl had so
 stated.

July 20, 1814.

MARRIAGE.

“ that he would get a Mr. Murray, an English
 “ Clergyman, who would marry them, and who
 “ often did those things; and that he Paterson was
 “ often present as a witness, at marriages performed
 “ by that man; *and accordingly William Paterson*
 “ *brought Mr. Murray to his own house, to the*
 “ *declarant*;—(their Lordships would please to ob-
 “ serve the fact, *that Paterson brought Murray*;))
 “ —and there Mr. Murray performed the cere-
 “ mony *in the same manner as had been done be-*
 “ *fore*, in order to confirm the marriage; and Mr.
 “ Murray did thereafter grant a certificate of the
 “ marriage.”

On occasion of the alleged marriage by Dun, Cunningham meant, no doubt, to represent that both parties were present; and here he said that the ceremony was performed *in the same manner as before*, and a certificate granted. That certificate, which had at last been produced, was in these words,—

Edinburgh, July 5, 1770.

Certificate of
marriage,
1770.

“ THESE are to certify all whom it may concern,
 “ that the parties following, viz. Mr. John Cun-
 “ ningham, Advocate, and Agnes Hutcheson, were
 “ this day duly married BY MUTUAL CONSENT, hav-
 “ ing first declared, (that is—both declared,) that
 “ they were both FREE AND UNMARRIED PERSONS of
 “ equal stations, without the forbidden degrees of
 “ kindred, knowing no reasonable objections against
 “ their being joined in the bands of marriage.—
 “ These presents being attested by me—

(Signed) “ THO. MURRAY, Minister.”

This certificate was signed by Cunningham, and then there was an attempt to write, *Agnes Hutcheson*, to which he requested their Lordships' particular attention. It was also signed by two persons as witnesses, David Shiells and William Paterson; and Shiells signed first, or at least it was not likely that he signed after Paterson, as his signature was above the other. For some reason or other, Shiells was not examined at all, but they examined Paterson and his wife; and Paterson said, "that above 20 years ago Mr. Cunningham told deponent, that he was to be married to Ann (Agnes) Hutcheson—that immediately thereafter *he brought to deponent's house one Murray*, who he knows to have been in the use of performing irregular marriages;"—(it would be recollected that Cunningham said, that Paterson had brought Murray;)—"that this person, in presence of deponent, wrote marriage lines betwixt Mr. Cunningham and Agnes Hutcheson, to which deponent signed witness—that upon this occasion *Ann (Agnes) Hutcheson was not present.*" The deposition having proceeded thus far, the Dean of Faculty, as Counsel for the defenders, required the agent for the Pursuers to produce the certificate on which their libel proceeds; whereupon the agent for the Pursuers informed the Court, that an express had been sent to Mr. Cunningham, in the country, for this certificate, and that the answer returned was, "that it was mislaid and could not be found."

The object then in calling Paterson was to establish the fact, that a marriage had been celebrated between the parties in 1770; but though the certi-

July 20, 1814.

MARRIAGE.

The two first letters *Ag* appeared to be written by one person, the rest by another; and hence the signature was said to be a forgery.

Examined
July 18, 1791.

Agnes Hutcheson not present at the place where the marriage was stated to have been celebrated.

July 20, 1814.

MARRIAGE.

1791.

ficate was said by Cunningham to be lost, he did not produce Murray, if he was in the world, nor Shiells, who unquestionably then was in it, to examine either of them as to this point. Paterson being required to state whether he was present when any actual marriage took place betwixt Mr. Cunningham and A. Hutcheson, deponed, that “ he knew nothing more than what he has deponed “ to as above.” Paterson’s wife said, “ that about “ 20 years ago, she saw Cunningham and one Mur- “ ray at her own house ; that she knows Murray was “ brought there for the purpose of performing a mar- “ riage between Mr. Cunningham and Ann (Agnes) “ Hutcheson ; *that A. Hutcheson was not present ;*” —(she confirmed her husband in that ;)—“ that she “ understood from what she heard from Mr. Cun- “ ningham, that A. Hutcheson was to have come “ to the house to be married, but *was prevented by “ sickness ;*” —(now really one would think, that if the wife could not come to the husband, the husband might have gone to the wife ;)—“ that she un- “ derstood, that Murray had made out marriage “ lines between Mr. Cunningham and A. Hutche- “ son, which had been subscribed by her husband, “ but deponent neither read the lines nor heard “ them read, but concluded they were marriage “ lines from Murray having been brought to the “ house ; that she knows this Murray died several “ years ago ; and being interrogated whether she “ ever heard Mr. Cunningham and A. Hutcheson “ acknowledge one another as man and wife, de- “ pones, she can say nothing about that, but that “ they lived together as such, which she infers from

“ their eating together and sleeping together; that
 “ she knew they ate and slept together before the
 “ marriage lines were made out, but did not know
 “ whether they did so after; that David Shiells
 “ was present at the meeting between Mr. Cunning-
 “ ham and Murray, above deponed to; and it was
 “ said among them, that D. Shiells had subscribed
 “ the marriage lines, but she did not see him sub-
 “ scribe them; that she did not know where A.
 “ Hutcheson lived at that time, nor where she then
 “ was.”

July 20, 1814.

MARRIAGE.

This declaration having been made as to an actual marriage before 1764, and this evidence given as to an actual marriage in 1770, the Pursuers examined besides a great variety of witnesses. The original connexion between Cunningham and A. Hutcheson, was of this nature.—She went to Cunningham’s house, at Inverkeithing, as a servant, and Mr. Clerk and Mr. Moncrief represented her as then an innocent and uncorrupted young woman. By the time she had been nine days in Cunningham’s house, this sturdy virtue gave way, and she bore her master a child. This gave great offence to the ecclesiastical judicatory, by which she was compelled to do penance, and she was publicly rebuked by Mr. Richardson the Clergyman. Another circumstance relative to her chastity was, that they ordered her to bring a testimonial from Edinburgh of her being absolved from the scandal of fornication she had been guilty of there. Such evidence was material in a case like the present, because in judging from circumstances of the nature of the connexion, whether illicit or not, the question

Evidence as to cohabitation as man and wife.

Origin of the connexion between the parties.

July 20, 1814.

MARRIAGE.

Presumption is in favour of the legality of the connexion—but where it in its origin is known to be illicit, the presumption is, that it has so continued.

Time when the connexion became lawful not pointed out.

must be, in some degree, affected by the mode in which it originated. The presumption was in favour of the legality of the connexion; but where it clearly appeared that it was at first illicit, that the man had expressed doubts whether the child was his own, such a connexion was likely to continue illicit, and therefore it was important to consider how it began. The difficulty was this—which, as far as he had heard or read, neither learned nor unlearned had grappled with—Was it during the residence in the Canongate, or Cowgate, or at Balbougie, or at what time did this become a lawful connexion between man and wife? 'This' was material; since, if their Lordships were called upon not to admit subsequent declarations against the *status* of wife and of children, if there was a previous marriage, it must be shown first that they had acquired that *status*, she of a wife, and they of lawful children; for otherwise how could it be known whether such declarations were made before or after the *status* had been acquired?

If we cannot establish a marriage by celebration, they said, we can establish one by acknowledgment, by cohabitation—as *man and wife* must be meant; for there might be a cohabitation as man and woman without its being a cohabitation as husband and wife. None of the Judges appeared to have thought that there was a marriage by cohabitation with habit and repute, &c. before the residence at Balbougie; and even from this very case it was clear that cohabitation as man and woman was not considered as forming cohabitation as man and wife. Then whatever affection Mr. Cunningham had for

this woman when alive, he showed very little regard to her memory when she died. In her last sickness she had been sent to Edinburgh, where this ceremony was said to have been performed, and there Mr. Cunningham left her; and when he heard of her death he sent his cow-feeder or bailiff, or some such person, to see her buried. She was buried as Agnes Hutcheson, as an unmarried person, and with hardly the decencies of the most ordinary funeral, and laid in the grave, not in the character of wife but of mistress.

July 20, 1814.

MARRIAGE.

A. Hutcheson buried as an unmarried person.

The Commissaries were of opinion, that there was no actual celebration of marriage, but found facts, circumstances, and qualifications proven, relevant to infer marriage. The cause was then carried before the Second Division of the Court of Session; and the judgment of the Commissaries was ultimately sustained by the casting vote of the then presiding Judge.

Judgment of the Commissaries.

He had read the whole of this evidence with all the attention in his power, with all the care which the demands of justice required, and with a just inclination to support the legitimacy of the Pursuers. He wished he could say, that he concurred with those Judges of the Court of Session, who thought that it might be supported. But it was impossible for him so to concur; though he admitted that the case was important, and attended with considerable difficulties. This was a case where the connexion was clearly illicit in its commencement. The parties were not married till she had borne him a child, till she had been publicly, and he privately rebuked, till after he had expressed a doubt whe-

July 20, 1814.

MARRIAGE.

ther the child was his, and till she had been directed to procure a testimonial from Edinburgh of her being absolved from the fornication she had been guilty of there, whether committed with him or others did not appear, except from the doubt which he expressed as to the child being his. He afterwards went to the Abbey, where he found her again, and lived with her. He did not enter at all into the question of habit and repute, and acknowledgment, and so forth, while they lived there, as he found that there was no difference of opinion as to that part of the case. If there was a single word of truth in this man's (Cunningham's) testimony, (he called it so, though not strictly such,) a marriage had there been actually celebrated. Cunningham might wish to conceal it, but he must say, that there should have been, on that account, the greater care to preserve the evidence of it against the effect of that concealment. Every act of concealment laid both the parties under the stronger obligation to preserve the evidence of the marriage. But when they were told, that this was the purpose, and were at the same time called upon to decide whether a marriage must not be presumed from habit and repute, the case appeared the most difficult that well could be.

He was perfectly aware of the distinction taken betwixt cohabitation with habit and repute, and acknowledgment, but he apprehended that the fact of mutual consent must be made out. He had examined this case with reference to all that was said on the subject in the books, and in the cases cited; and in the fair meaning of what was con-

Moir v.
M'Innes,
Dom. Proc.
1782.

tained in these books and cases, it did not appear to him that there was sufficient, in this case, to entitle him to infer that there had been such a consent as made a marriage. This case must be looked at as one originating in an illicit connexion, said to have become lawful at some period—no one knew when; and if the marriage depended on the evidence as to the cohabitation with habit and repute among the circles in which they lived, he desired to know at what precise period was the nature of the connexion changed, and when did they thereafter begin to live together as husband and wife? If their Lordships believed Cunningham, there was an actually celebrated marriage before 1764; but if so he would ask, whether all question about it would not have been removed long before the death of Agnes Hutcheson? If they had been acting before with a view to concealment, he would ask whether, after they went to Balbougie, after they found themselves in the seat of the man at whose displeasure Cunningham trembled, if they had the feelings, he of a lawful father, and she of a lawful mother, for their children, they could then have left any doubt as to whether they were man and wife? If the design before had been secrecy, why not then have clearly and unambiguously relieved her from the taint of the situation, in which that purpose of secrecy had so long held her, the moment they got into that house? And that too in a country where the children might have been legitimated so easily; their situation, in that respect, being different from what it would have been in England, where a man might rather choose to rest

July 20, 1814.

MARRIAGE.

July 20, 1814.

MARRIAGE.

Vide ante,
vol. i. p. 148.

on a doubtful marriage prior to the birth of his children. But there, where they had no more to do than to call two or three witnesses, as in the case of *M^cAdam*, and in their presence say, "We were married, but we were afraid of Balbougie; we now acknowledge our marriage, and we are married, &c."—she had nothing to do but to reiterate the words and clearly intimate her consent, and then they would have given to their connexion a character, and to their children a state quite unequivocal. Instead of showing that any thing of that kind had been done, they went on examining witness after witness, till one could not well tell what was the nature of the treatment which she received; some saying that she was treated as a servant, others, that she was treated as a wife.

The parties suffered to live together at Balbougie without interference of the Church Judiciary.

Brown was beadle of the parish.

There was one circumstance very strongly pressed, and properly so—he meant the conduct of the Clergyman. But in looking particularly at the evidence as to the conduct of the Minister, he could come to no such conclusion from it as that for which the Pursuers contended. His acts did not go the length of supporting the inference drawn from them by the Pursuers; and Brown's evidence showed, that the opinion of that gentleman was not favourable to the idea of a marriage. It was said, that in the circles of their friends and servants they were considered as man and wife; but he would ask, In what circle had there been an acknowledgment of that fact? at what time, in any circle, had such an acknowledgment been made?

When the cohabitation of man and woman was not known to have been in its origin illicit, the

July 20, 1814.

MARRIAGE.

presumption was that it was lawful. But where it was at first notoriously illicit, and where a change in the character of the connexion must be operated, and when they found the means employed for that purpose to be such as left half the world in doubt, the servants, the relations, one half thinking one way, the other half the other; at what time, in what circle, could it be said that there was such a habit and repute as raised the presumption that the parties had mutually consented to be husband and wife? He could not admit that mere cohabitation as man and woman was a cohabitation as husband and wife. Give him that, and let the law be what it might, what it was contended to be on one side or the other, he said that the weight of evidence was against the legitimacy, independent of actually celebrated marriage; and if there had been an actual celebration, the facts and circumstances must have all tallied with that fact of actual celebration; and instead of being against the fact, all the evidence must have been on one side. He found in the notes, and here he must observe that if what was stated in notes, which occasionally came before their Lordships as containing the observations of the Judges below, was not what was said by them, they were not to be implicated; and he wished it to be distinctly and particularly noticed, that in commenting upon what appeared in such notes, when he had no other means of knowing what was said by the Judges below, no offence to them was ever intended; but he found in the notes of their observations, that great weight was laid on the evidence of Mudie, who said, "that at the first visit

July 20, 1814.

MARRIAGE.

Cunningham declared to Mudie his brother-in-law, a considerable time after A. Hutcheson's death, that he had been married to her.

“ the deponent made at Balbougie, which was after
 “ the death of the Pursuer's mother, &c. the Pro-
 “ vost did not inform him that he had married her ;
 “ that about 18 months after deponent's marriage,
 “ Provost Cunningham came to visit him at Leith,
 “ when he informed the deponent that he had been
 “ married to the mother of the Pursuers before wit-
 “ nesses ;—(this was certainly a strong passage, but it
 “ must be taken altogether ;)—“ before witnesses ; and
 “ that Mr. and Mrs. Taylor, of Fodd, could attest
 “ the fact.” How could they attest it ?

Though sorry to shake the alleged marriage, he wished to have it pointed out where he could fix upon as the period of a marriage ceremony, or of private consent proved by facts and circumstances. He desired no stress to be laid on subsequent declarations, whether in writing or not ; but still he could not forget the fact, that Mr. Cunningham had written to his brother, Dr. Henry Cunningham, in 1769, that he had “ two fine little daughters of
 “ natural children, &c.—if Jammy (another bro-
 “ ther) has no sons, little George (Dr. Henry Cun-
 “ ningham's son) will in all probability heir the
 “ estate, for I scarce think I shall now marry ;” he could not forget his signing a note the same year, in which Agnes Hutcheson was described as his *housekeeper*, with all the variety of papers, about 15 or 16 in number, noticed as evidence in writing, where he called A. Hutcheson his *housekeeper*, and one of the Pursuers *a natural child*. Much had been said as to the conduct of the Minister, and it was asked, “ Would he have examined A.
 “ Hutcheson unless he had conceived that she

“was Cunningham’s wife?” He did not find that the Clergyman did examine her, though she was on the list;—and then as to politics and decorum, as to the Swintons visiting at Balbougie, they did appear to have objected to Mrs. Gibson, either before or after her marriage. The inference therefore from this circumstance went a great deal too far.

He should have been disposed to give more weight to the parole evidence, if there had been no such certificate as that of 1770. He had already adverted to the circumstances of contradiction between the evidence of Paterson, and the declaration of Cunningham; so that both could not have been true. Paterson stated that the woman was not in the house at the time. It had been argued that they might have been married before. But the effect of Cunningham’s declaration and of the certificate was, that Murray was brought there to marry them, and that they were married there. And it appeared to him that the certificate was a piece of false and fabricated evidence. It was inconsistent with the interests of mankind—inconsistent with human security, to give any credit to such an instrument. Was it consistent with an alleged previous marriage, to have a marriage celebrated in 1770, the parties professing themselves to be then, “free and unmarried persons?” When the children were called ‘bastards’ at school, and when instead of putting an end to all such imputations, by an open and unequivocal avowal of marriage, which might have been done in a minute, the parents contented themselves with sending messages to school-masters and school-mistresses, desiring them not to permit

July 20, 1814.

MARRIAGE.

Swinton had been also provost of Inverkeithing, and, as appeared from the evidence, in the politics of that Borough was, in the opposite interest to Cunningham. He was also stated to be a man of strict regard to decorum, and yet had suffered his daughters to visit at Balbougie, from which an inference was attempted to be drawn in favour of the marriage.

Certificate, 1770.

The Pursuers had been called bastards at school.

July 20, 1814.

MARRIAGE.

their children to be called 'bastards'—was it consistent with the conduct of the parties to suppose, that such a celebration of marriage took place in 1770? Or, if it had taken place, was it to be imagined that he should immediately have turned his back on her, and left her to be buried, not merely like one in the humblest situation in society, (for the poorest might be buried with the honours of fair character,) but to be tumbled into the grave as an unmarried woman, and one who had lived with him as his prostitute.

Moir v.
M'Innes.
Dom. Proc.
1782. That
case well con-
sidered.

With respect to the case of *Moir v. M'Innes*, it was unnecessary for their Lordships to enter into it; but he must say in very respectful language, to those who entertained doubts as to the soundness and authority of the ultimate Judgment in that case, that he was sure, from his knowledge of Lord Thurlow, that it never could have been decided till after infinite examination. Without saying whether the decision must be an authority in all cases that might come before that House, he knew that it must have been the fruit of most anxious and elaborate consideration. In the present case he did not think the facts and circumstances in proof relevant to infer marriage, and was therefore of opinion that the Judgment ought to be reversed.

Lord Redesdale. In every country marriage was a contract, and every contract was a fact, to be proved by positive evidence of the fact, or by other evidence from which the fact might be presumed. By the law of Scotland, cohabitation with habit and repute was presumptive evidence of marriage,

as it was, more or less, in all countries ; and so it had been declared in statute 1503, cap. 77 ; which at the same time proved that the presumption might be refuted by contrary evidence. There must be such a cohabitation, as to induce persons to form the opinion that the parties were married. The cohabitation by itself was nothing at all here, as it was known to have been in its origin illicit. Where that was not known, the presumption was in favour of marriage, as it was not to be presumed that the parties would live in such a way unless they had formed that contract ; but the evidence as to that presumption must rest on repute.

In this case they alleged an actual celebration of marriage in two different instances ; one in or before 1764, another in 1770. The noble and learned Lord who had just addressed their Lordships had clearly shown, that there was nothing to prove that the contract was formed on either of these occasions.

The question then rested on the repute, and the parties must be reputed and *holden* to be married : —it must not be an opinion of A., in contradiction to an opinion of B., and of C. in opposition to D. : it must be founded not on singular, but on general opinion. That species of repute which consisted in A. B. and C. thinking one way, D. E. F. another way, was no evidence on such a subject.

It was true, the evidence here was extremely contradictory ; but in such cases he had always understood, that they ought to look at what were the collateral circumstances in which there could be no error ; and which were not liable to that impression,

July 20, 1814.

MARRIAGE.

Cohabitation raises no presumption in favour of marriage, where the connexion is known to have been in its origin illicit.

A divided repute no evidence at all on the subject of marriage. It must be founded on general, not singular opinion.

Where evidence is contradictory, the collateral circumstances, in which there could be no error, ought to be looked at.

July 20, 1814.

MARRIAGE.

In 1768, Cunningham's father, in a settlement written by Cunningham himself, left a small sum to one of the Pursuers, described as Cunningham's *natural daughter*.

Written evidence.

one way or the other, to which witnesses were, often subject. What then were the collateral circumstances here? There was first the legacy left by the grandfather, in a settlement in the hand-writing of Cunningham the father, to one of the Pursuers, there described as a *natural daughter*. It had been said, that Cunningham, the father, was compelled so to write it, from apprehension of the grandfather's resentment. But after the grandfather's death, Cunningham, in a letter of Oct. 7, 1768, to Mr. S. Mitchelson, the factor for the trustees on the Balbougie estate, called her again *his natural daughter*, when it was impossible that a dread of the grandfather's resentment could be the reason. In April, 1769, in writing to his brother, Dr. H. Cunningham, he called the Pursuers his *natural daughters*. What could be the object in holding out to his brother that they were not legitimate, if they had really been so? All this was in the lifetime of A. Hutcheson, and the words in the letter to Dr. Cunningham, "I scarce think I shall ever marry," were very material, as they demonstrated that he did not then consider himself as married. In the same year he took a note payable to A. Hutcheson, and signed by her with her initials, in which she was called his house-keeper; so that both declared that there was nothing like a marriage, on which repute could be founded. After A. Hutcheson's death, in a letter to Mitchelson in 1771, and in writings dated 1773 and 1775, and signed by him, A. Hutcheson was still described as his house-keeper. These were instruments with respect to which there could be no error, and which

were not liable to that sort of affection of the mind which might lead witnesses into mistakes. In the surgeon's and shoemaker's bills, she was called *Mrs. Hutcheson*, which showed that they considered her merely as a house-keeper. These were the more valuable as evidence, from their not being framed with any idea of ever being brought into a Court of Justice. Such collateral circumstances operated in a great degree to decide on the character of the parole testimony, and, where they existed, were always the best means of ascertaining the truth on any subject whatever.

July 20, 1814.

MARRIAGE.

One thing decisively showed that there was a great deal of management in this business; he alluded particularly to the marriage lines (certificate) of 1770: Cunningham must have had these before him, and have known their contents, but he said he had mislaid them—and when were they produced? After the death of Shiells who had not been examined; Paterson the other witness having been examined, and having contradicted them. He could not account for Shiells not having been examined in any other way, except from a conviction that his evidence would have been in conformity to Paterson's.

Under these circumstances, judging from what had, and what had not been produced, &c.; he was of opinion, that there was not here such evidence of repute, as was necessary to establish the fact of a marriage by presumption.

Much stress had been laid on Cunningham's declaration to *Mudie*. But that was after the death of A. Hutcheson, and could form no contract; and

July 20, 1814.

MARRIAGE.

besides, considering what he had declared respecting his marriage in 1770, in which he was so materially contradicted by Paterson, a declaration of his was not much to be relied on. Then the matter rested on the cohabitation and repute at Balbougie; and it appeared that some thought they were married, and some thought they were not. But the repute of marriage, as he had already stated, must be general; the conduct of the parties must be such as to make almost every one infer that they were married. Here the connexion had been long illicit, and it did not appear when it became lawful. There was not repute sufficient to form presumptive evidence of a marriage.

Judgment of reversal.

“ That the facts and circumstances, &c. proven
“ were not relevant to infer marriage—and remit.”

Agents for Appellants, SPOTTISWOODE and ROBERTSON.
Agent for Respondents, CAMPBELL.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MEREDITHS—*Appellants.*

SAUNDERS—*Respondent.*

June 30, July 27, 1814.

CONTRACT.—
USURY.—IN-
ADEQUACY OF
PRICE.

MEREDITH, being in embarrassed circumstances, in consideration of a loan of 900*l.* makes a lease to Denny, with covenant for perpetual renewal, of lands of the yearly value of from 400*l.* to 500*l.* at a rent of 150*l.* subject to a private