

to all such as consented to this change; but, as to the rest who have not transacted, they still continue the Queen's vassals. And the declaring their feu-duties irredeemable, neither alters nor transfers the superiority; but it remains with the Crown *in statu quo prius*.

And therefore, in the present case of the Marquis of Lothian's, the Lords ordained him to give in a condescendence who had agreed and who had not; and then they would consider if he might not insist against the rest, in his exhibition, to produce their charters, that he might see their reddendo, feu-farms, and other services; but not to infer the severe certification annexed to improbation.

Vol. II. Page 646.

1711. *June 20.* LYDIA FORBES and DANIEL AUCHMOUTY *against* JEAN FORBES and JOHN MONRO.

JEAN Forbes, sister-german to Captain Charles Forbes, confirms herself executrix as nearest of kin to her brother, and by that title intromits with his arrears and other debts owing to him. Lydia Forbes, conceiving herself to be lawful daughter to the said Captain, raises a process, with concurrence of Daniel Auchmouty her husband, against the said Jean and John Monro her husband, to denude of the said office of executry in her favours, as lawful daughter to the said Captain, and to count for her intromissions, and repay them back to her, as truly the nearest of kin.

Against which it being excepted that she was not his *lawful*, but only his *natural* daughter, a conjunct probation was allowed to Lydia, the pursuer, to prove that Captain Forbes and Jean Price, her mother, were married and cohabited together as man and wife, and holden and reputed such; and to Jean, the sister, to prove that the pursuer is a bastard, and so holden and reputed. And so the point resolving in her legitimacy or illegitimacy, a probation was led on both sides; and a commission being directed to London, for examining witnesses there, it was directed, in the first place, to Lord Chief Justice Holt; and, failing of him, to my Lord Blairhall, then at London. Application was made to Holt's secretary, who told them he believed his Lord would not have leisure to accept and execute it; whereupon they presented it to my Lord Blairhall, who examined sundry persons on the points of the act.

But, in regard that a declaration under Holt's hand was produced, bearing, the commission was never shown to him, the Lords found it was not formally and legally executed; seeing the substitute-commissioner cannot be validly employed till the first nominated be required and refused, which was neglected in this case.

That probation being thus laid aside, the Lords proceeded to advise that which was warrantably taken on both sides. The substance whereof was,—*1mo*, Testificates produced for Lydia, the daughter, out of the baptism-registers, at London, one in 1684, and the other in 1685, bearing, one Charles Forbes and Jean, his wife, had two children baptized in these parishes. But none of them related to her; for she was born in 1678: and there was no testificate as to her baptism. Then she adduced the depositions of four witnesses, viz. Jackson, his landlord at London; Buxton, a tailor there; Skeen and Haliburton, two soldiers; who all depone, that they saw the said Captain Forbes and Jean Price

converse together as man and wife from 1687 to 1690, for three or four years; that they were reputed by the neighbourhood as such; and that he owned the said Lydia for his daughter; and never heard her called a bastard; and that one of them had dined with them, and saw Jean sit at the head of the table, and the child with her; and heard him say, he behoved to go to Jean to get a recruit of money; which shows he allowed her the management of his purse.

The sum of the probation led for the sister, defender, to prove the bastardy, were ten or twelve gentlemen; such as, Forbes of Culloden, and others well known to the Captain, either by kindred or comradeship, who depone, that Jean Price, the pursuer's mother, was in the repute of a miss and whore to the Captain, and had been formerly kept by one Smith, and then taken on by the said Captain, conform to the licentious principles of some folk; and that, after the 1690, to his death in 1700, he would never suffer her to come near him: and, being informed that she designed to come to him while he lay in garrison at Innerlochy, he sent her word he would dismiss her thence by tuck of drum; on which she forbore. And after his death she never put in her claim for a terce or any share of his moveables, as a married woman would certainly have done; neither could she afford her daughter any evidences to support both their reputations. And farther, that he was looked on by all his friends as a bachelor, and courted several women in order to marriage. And, in his testament, before he went to Darien, in 1699, he leaves 1000 merks, in legacy to the said Lydia, wherein he designs her his *natural* daughter; which she so far accepted as to assign it to Sir Robert Forbes. And they farther produced a certificate, that Jean Price, her mother, was confined in the correction house of Bridewell, as a bad woman. And if the London probation (which the Lords have laid aside because of its informality,) were looked into, the case of her bastardy would be farther cleared.

This being the summary import of probation on both sides; at advising, it was ALLEGED for the pursuer,—That though the ceremony of proclamation of bans and sacerdotal benediction in marriage be very fit and decent, yet it is not absolutely necessary; seeing the laws of European Christendom make cohabitation as man and wife sufficient to infer a marriage, as to the legitimating the children, and making them capable of succession. The being holden and reputed such, presumes an antecedent solemnization of the marriage, without necessity of farther proof. And, as to the continuance and duration of that cohabiting, some lawyers think five years sufficient; because the Roman law says *post quinquennium de statu defunctorum inquiri non debet*: and the most nice and scrupulous require but ten years; which our practice seems to have followed in two decisions, *July 7, 1626, Somervell*, and *15th January 1676, Swinton*. And *Stair, tit. Confiscation*, confirms this: and the Roman law very honestly presumes *pro matrimonio, ad evitandum delictum, l. 24 D. de Ritu Nupt.*—*In liberæ mulieris consuetudine non concubinatus sed nuptiæ potius intelligendæ sunt, si non corpore quæstum fecerit*. And so does our 77th Act 1503, giving the widow a terce. The learned Mascardus, *de Probat. voce Filiatio et Matrimonium*, shows many ways of inferring marriage, by the confession of the parties designing themselves so. And she has clearly proven that the Captain, when he came in, called for her mother, under the name of his *wife*. And whereas he afterwards seemed to disown her, that can never dissolve the matrimonial bond; for parties wearying of one another, sets them not at liberty; for *ementita professio nudaque asseveratio*, though both would consent, will not

untie the knot. And the calling her whore shows some bad impressions he had taken; and the designing her daughter a *bastard* might be out of malice, and can never take away her birthright, if she was lawfully begotten; for Craig, page 270, tells us, the parents' assertions will not prejudice the children; and gives two instances, one of a Queen and the other of a lady of his acquaintance. And as to her assigning the legacy, she was a simple woman, ignorant of its legal import; and in her assignation she designs herself, not as her father does, but by the name of daughter. And her father and mother's cohabitation was most pregnantly proven; which does more sensibly appear by deeds, than the transient act of the kirk-ceremony: the essence of marriage consisting in the conjugal consent, most conspicuous in a frequent cohabitation and procreation of children. And though her witnesses do not concur to the same years and facts, yet it is a cumulative proof of circumstances, in a successive period and duration of three or four years' uninterrupted converse as man and wife; which testimonies, in the opinion of all lawyers, used to be conjoined to make a plenary probation. And *esto* that it were proven that he disowned her afterwards, yet *in dubio semper respondendum est pro matrimonio, et plus credendum duobus testibus affirmantibus* that they cohabited and were reputed man and wife, *quam decem negantibus*. And whereas it may be thought of dangerous consequence to sustain a few deeds of cohabitation to infer a marriage, for that might encourage whores to palm spurious issues on honourable families; these are but flourishings and embellishments of pleading, and can never preponder the favour of matrimony, and the honour of children. And therefore her right to her father's estate ought to be declared.

ANSWERED,—That it were most unjust to presume marriage from a mere consuetude and converse together in a foreign country, remote from their friends and relations, where no qualifications are given to distinguish it from the ancient *concupinatus*, or the modern mercenary way of keeping a miss: And therefore, Papinian, *l. 31 D. de Donat.* requires frequent evidences of an *affectio maritalis*, and the being *consors mensæ et thori*; for a little time will not confirm it, but it must be a constant, public, and universal cohabitation in the eyes of all the world, and not in a corner; and three or four obscure persons deponing that they looked upon them as married persons can never amount to a proof; and all they say jumps as well with the character of the keeper and a miss as to a married couple. And, as to the testificates, they prove nothing of Lydia's birth; neither is cohabitation proven at that time, but in 1687, nine years after: Whereas Craig, page 270, expressly says, *filialis tantum præsumitur ex cohabitatione, si eo tempore cohabitaverint quo filius est conceptus*. Now, this is not so much as pretended here. But can any thing be retorted to her accepting her father's legacy, designing her a *bastard*? The law of Marcellus, *l. 10, sect. 1,* and *l. 32 D. de Inoffici. Testam.* rivets this argument to the head,—*Notissimum est cum qui legatum perceperit non recte de inofficioso testamento dicturum*: even as a son exheredated accepting a legacy left to him in the same writ, can never quarrel or impugn the exheredation so homologated. This cuts off all subterfuges of simplicity, inadvertency, and ignorance; and the leaving her a legacy purges him both of malice and resentment. Next, though subsequent marriage, both by the common law and ours, retrotracts and legitimates the children procreated before, yet by the law of England (where she was born, and her father and mother then lived,) it has no such effect; but the prior children continue in the

state of bastardy : and it is fit the law of the place should regulate this affair, especially he having denied there was ever any marriage betwixt them ; and what else could drive him to this confession, so prejudicial to his own honour, but merely the force of truth ? *Magna est vis veritatis quæ inter tam obstantia erumpit* ; which is fortified by the mother's silence, never craving adherence nor a share of his estate. What motive could this proceed from, but her consciousness of the want of a legal claim ?

The Lords were loth to stain any gentlewoman's birth or reputation ; yet, having balanced both probations, they, by plurality, found the cohabitation, as proven, did not amount to prove a lawful marriage, and therefore assoilyied the sister, and preferred her to the estate. *Vol. II. Page 647.*

On the 7th July 1711, an appeal was given in against this interlocutor.

1711. *June 22.* MAXWELL of BARNCLEUGH *against* FRAZER and LAUHLISON.

THE six-merk land of Kerse, belonging to one John Kilpatrick, being kirklands, they paid £120 Scots of yearly feu-duty to the lord of erection. Kilpatrick gives off a part of thir lands to Frazer and Lauchlison, extending to the half ; and, by their charters, obliged them to pay a small blench duty *pro omni alio onere*, with absolute warrandice. Maxwell of Barncleugh adjudges thir lands from Kilpatrick in 1680 ; and, being forced to pay the £120 of feu-duty to the lord of erection, he raises a process against thir two sub-vassals, who had a part of the six-merk land subset to them in feu, and craves they may relieve him of a proportion of this £120 of feu-duty he has paid to the lord of erection, effeiring to the share they possess of the whole feu liable in that sum.

ALLEGED,—That Kilpatrick's authors, above 90 years ago, feued out these parcels to their authors, whereon they are infest ; and, past prescription, have never paid more than the blench-duty contained in the reddendo of their charters ; neither could he exact any more from them, seeing he got a full adequate price, and disponded the feu, with absolute warrandice, against all further burdens. It is true the Crown or lord of erection might distress any part of the six-merk lands for the whole, unless they had confirmed the sub-feu ; but then he behoved to give them an assignation for their relief against the rest of the lands : And you, Barncleugh, being only an adjudger, you have no better right than Kilpatrick your debtor had, from whom you have adjudged it *talis qualis* as it stood in his person. Now, if he were pursuing us, his vassals, to burden us with a part of his feu-duty, we should exclude him *exceptione doli*, and as contravening his warrandice : we being obliged to pay him no more but the duty contained in our reddendo, and noways bound to relieve him of any part of the feu-duty he owes to his superior or the lord of erection. For, we being infest long before Barncleugh's adjudication, that makes it real against him, and he must warrant the feus, just as his author was bound to do ; and, when he pays the whole feu-duty, he disburdens his own lands, and can lay no part of it on the defenders, who can be burdened with no more than the reddendo of their charters.

ANSWERED,—Thir sub-vassals having a part of the six-merk land, there can be nothing more just than they should bear a proportion of the feu-duty payable