waiting upon her, in order to save his Jeannie's blush, in trusting her Ladyship with the secret of their marriage; and also a testament writ by him, wherein he leaves and bequeaths to Mrs Jean Anderson his spouse the sum of L. 200 Sterling; the LORDS found it relevant to entitle the pursuer to a terce, that the letter and testament are holograph, and that she was held and reputed lawful wife to the defunct, albeit neither the letter nor testament bore either place or date or witnesses. No 579.

Fol. Dic. v. 2. p. 267. Forbes, MS. p. 30.

1752. *December* 15.

PENNYCOOK and GRINTON *against* GRINTON and GRAITE.

No 580.
A promise of marriage, followed by a *copula*, makes a lawful marriage *de præsenti*, and the after marriage of either of the parties is void.

JOHN GRINTON, a tenant, made proposals of marriage to Alison Pennycook, and obtained her consent. Upon receiving repeated promises of marriage, she permitted him to have knowledge of her body oftener than once; by consequence of which, in July 1747, she bare a son, whom he acknowledged to be his, and presented to the minister of the place to be baptized. After this, John Grinton declined to adhere; upon which, in 1748, Alison Pennycook commenced a suit against him before the Commissaries of Edinburgh, setting forth the facts above mentioned, but concluding only for expenses of child-bed, aliment to the child, and damages. In this process, the courtship, the promises of marriage, the copulation, and the procreation of the child, were referred to John Grinton's oath; and he in effect acknowledged them all, although, at the same time, he alleged his being in liquor when he made the proposals and promises.

A year and a half having elapsed, and no further motion made in this process, John Grinton, in January 1750, made his proposals to Anne Graite, and married her. But this marriage was private, and without proclamation of banns; however, he brought her immediately home to his house, and lived publicly with her as his wife. Another year elapsed, and a child was also born of this marriage. During all this while, Alison Pennycook, although she had opportunity to know of John Grinton's second marriage, yet took no step in her process; but, in January 1751, she raised against him a new summons, in her own and her son's name. This summons, setting forth the very same facts as the former had done, and referring for proof thereof to the oath above mentioned, contained the proper conclusions, declaratory of her marriage, and of the legitimacy of the child; at the same time, it contained a conclusion of divorce, on account of the defender's open adultery with Anne Graite. Upon this, Anne Graite raised a counter-process, declaratory of her marriage. The Commissaries found "the marriage between John Grinton and Alison Pennycook proven, and declared them husband and wife, and James Grinton their lawful child; and

No 580. found it proved, that John Grinton and Anne Graite had celebrated a marriage in January 1750, but that the same was unlawful, void, and null; and found, that in respect of John Grinton's cohabitation with Anne Graite, he had been guilty of adultery; and therefore, they divorced and separated Alison Pennycook from him, and found her entitled to bygone aliment from the time of her marriage, and until the date of the decreet; and found James Grinton entitled to aliment from the time of his birth, until he should attain the age of 14 years; and, in order to the modification of these aliments, allowed Alison Pennycook to give in a condescendence of John Grinton's circumstances; and lastly, they found John Grinton liable in expenses of process, and dues for extracting the decreet."

In an advocation at the instance of John Grinton and Anne Graite, it was *pleaded* for them, That Alison Pennycook did not understand that any obligation to marry had been contracted between John Grinton and her, far less that an actual marriage had intervened; and that this her sense of the matter was evident, first from this, that her first suit concluded for damages only; for her making mention of the promise of marriage could mean nothing more than an apology for the surrender of her virtue. Her sense of the matter was further evident from her silence during more than a year and a half before, and a year after, the marriage with Anne Graite.

But, 2*do*, *et separatim*, it was *pleaded*, as a general point of law, That John Grinton's promises to marry, although followed by a *copula*, cannot, in the strongest sense, infer more than an obligation upon him afterwards to solemnize and complete a marriage. This obligation might, by the intervention of a mid impediment, become unperformable. Supposing John Grinton had died, his obligation to marry must have died with him. In this case, the second marriage became a mid impediment no less effectual than death; and therefore, the obligation could no otherwise issue than in damages to the party. Upon this point, important as it is, our lawyers have not wrote with entire precision; yet by their making mention, that, in a like case, there would be an action to compel the party refractory to complete the marriage, it is very plain, they did not hold the marriage to be actually completed. It must have been upon these principles that my Lord Stair, lib. 1. tit. 4. par. 6. mentions, that, in the case of Barclay against Napier, the man was obliged to solemnize the marriage, seeing he had procreated children with the woman. Sir Thomas Craig, lib. 2. dieg. 18. par. 19. relating the case of Edward Younger, says, " Et Commissarii, viri acuti, successionem bonorum mobilium concesserunt liberis Edwardi Younger, licet matrimonium nunquam fuit contractum, neque banna proclamata, ea ratione, quod cum Edwardus, sub fide futuri matrimonii, eos liberos suscepisset, materque apud Commissarios causam obtinuisset, ut Edwardus matrimonium promissum implere cogeretur; eo recusante, perinde habuerunt, ac si eam in uxorem duxisset, liberisque bonorum mobilium executio sive hæreditas adjudi-

cata est. Constat ergo, ubi nunquam matrimonium de facto intervenit, posse aliquando legitimos, saltem legitimatos esse." No 580.

This doctrine is well founded in reason; for dreadful were the consequences, if promises, made for the most part *in æstu libidinis*, and kept private, or at least not properly put in suit, should have the effect to make void a subsequent and formal marriage, and to bastardise the issue of it.

Answered for Alison Pennycook; That her not having concluded properly in her first summons, was the oversight of her procurator, and, at any right, might be amended; for in that summons she had fully set forth the facts which inferred the marriage. Anne Graite did not pretend to be ignorant of her claim; and it was evident, that the fear of objections upon that account was the reason why the celebration of the second marriage was private, and without proclamation of banns; therefore Anne could not complain she was deceived: But, at any rate, in the *second* place, The general point of law was absolutely clear, that a promise of marriage followed by conjugal intercourse made an actual and legal marriage, although not a formal one. Such was the rule of the canon law itself, notwithstanding the great stress it laid upon sacerdotal benediction. This appears from lib. 4. tit. 1. cap. 30. Decretalium de sponsalibus et matrimonio; Is qui fidem dedit mulieri super matrimonio contrahendo, carnali copula subsecuta, si in facie ecclesiæ ducant aliam et cognoscat, ad primam redire tenetur, &c. Although our law followed not the canon law so far as to give action upon *sponsalia de futuro*, or bare promise of marriage, yet *si copula subsecuta*, it makes a legal marriage *de præsenti*. This is expressly laid down by Lord Stair, lib. 1. tit. 4. par. 6. where speaking of present consent, which makes the essence of marriage, he says, "That may be by natural commixtion, where there hath been a promise or espousal preceding; for therein is presumed a conjugal consent *de præsenti*." And again, lib. 3. tit. 3. par. 42. he says, "After contract or promise of marriage, or *sponsalia*, if copulation follow, there is thence presumed a matrimonial consent *de præsenti*, which therefore cannot be passed from by either or both parties, as having the essential requisites of marriage." And in the tit. first mentioned, he relates, that in the case of Barclay against Napier, the man was obliged to solemnize the marriage, although the woman, in a contract posterior to the contract of marriage, had renounced the same. This is also agreeable to our ancient practice, as appears from Sir Thomas Craig, where he relates, that in the case of Edward Younger (above mentioned), the Commissaries first decerned him to solemnize the marriage, and upon his refusal, declared the marriage, and the legitimacy of the children. These learned authors are clear as to what made the essence of marriage; and as to the solemnization mentioned by them, that was only required for the sake of public order and decency. The principles here laid down are supported by the uniform practice of our courts, where, upon evidence of the promise and *copula*, the constant style of their judgment is, "declaring the parties to be married, decerning them to adhere, and declaring the legitimacy of the children."

No 580. This case was taken up by the Lords entirely upon the general point, and it was held for law, that a promise of marriage, followed by a *copula*, made from that moment an actual marriage.

"The Lords remitted the cause to the Commissaries *simpliciter*."

Reporter, *Drummore*. Act. *Fergusson*. Alt. *Lockhart*.

S. *Fol. Dic. v.* 4. *p.* 169. *Fac. Col. No* 46. *p.* 68.

1756. *June* 29. Cameron *against* Miss Malcolm.

No 581.

Effect of celebration without a *copula*.

Cameron of Kinnaird, living in the neighbouring of Mrs Malcolm, widow of James Malcolm merchant, cast his eyes upon her daughter Miss Malcolm, a considerable fortune, as an advantageous marriage for his son. The two families set out together from Fife, in order to pass the winter at Edinburgh. Upon their landing at Leith, Mrs Malcolm and her daughter were invited to the house of Mrs Cousnen, Kinnaird's mother-in law. They suped there, and after supper, without any previous concert, a minister was brought in by Mr Cameron, in order to marry his son to the said Miss Malcolm, at that time just turned of twelve years of age. The mother, for what reason was not made clear by the witnesses, left the room. The ceremony went on, and was completed, and the marriage-lines were subscribed by Miss Malcolm as well as by young Cameron. After this the mother returned, and a bedding being proposed, she struck out, whether dissatisfied with what had been done, or thinking her daughter too young, is uncertain. This occasioned a sort of squabble among them. The mother and daughter went home in a sort of pet, and from that time refused to stand to the marriage.

The Commissaries, upon a declarator of marriage brought before them, found the marriage proved. This occasioned an advocation on the part of Miss Malcolm, in which the Court of Session were of a different opinion. They remitted to the Commissaries to assoilzie from the declarator of marriage, and even to find Cameron the pursuer liable in expenses.

This was an extreme nice case. That the ceremony of marriage was performed is certain; nor was any force proved, or even alleged, sufficient to render the ceremony ineffectual. And if there was a marriage, however irregular or improper, it was not in the power of any court to give redress. The Court, however, moved with indignation at so gross a wrong, gave the above mentioned judgment upon sentiment rather than upon principle. The only legal footing it can stand upon, seems to be what follows: A girl of 12 years of age is no doubt capable of marriage; but then, as a girl of that age is extremely susceptible of undue influence, and to be unjustly trepanned, a marriage in this circumstance requires more accurate evidence of consent than is necessary betwixt adult persons. The present case is similar to that of a testament on death-bed. A bare subscription *in liege poustie*, is sufficient; but, *in extremis*, a proof is re-