

No. 8. 1748, Nov. 2. DUKE OF GORDON *against* LADY GORDON.

THE LORDS found that the proof taken in the process 1731 and the submission 1725 ought to be repeated here, "reserving, &c. to witnesses;" and find the defender liable to repeat, unless she can show that the balance might have been reduced to a smaller sum.

No. 9. 1750, Feb. 27. FORBES *against* COUNTESS OF STRATHMORE.

GEORGE FORBES, who had been my Lady's livery servant, sued a process of adherence against her and libelled actual marriage 2d August 1745,—living as man and wife till November 1745 in Scotland, when finding herself with child they took shipping together for Holland and lived there as man and wife, and she brought forth a daughter who was publicly baptized,—her coming home to sound her friends' inclinations, but leaving him who durst not come home because he had been in the late Rebellion, but gave him credit for L. 1000 to trade with,—and thereafter employing people to treat with him to pass from the marriage for a sum of money; but he owned he was doubtful of being able to prove the actual marriage, and either would not or could not name the celebrator, who he said was provided by the Lady. The Commissaries allowed him to prove the actual marriage, and before answer to prove all facts and circumstances tending to make out the cohabitation as husband and wife in Scotland, but superseding the proof of cohabitation in Holland till the other proof be concluded. Both parties presented bills of advocacy; the Lady for allowing him any proof at all, because he was doubtful of bringing a direct proof of the actual celebration; Forbes on the other hand for superseding the proof of cohabitation in Holland. None of us made any difficulty of refusing my Lady's bill; but we differed as to the other. The chief argument for the interlocutor was that cohabitation in Holland even as man and wife does not infer marriage without proclamation of banns, or rather as the President observed, without appearing before the burgomaster and registering their names. On the other hand the President observed two cases in the Court, one of Hamilton of Grange, which had been brought here in several different shapes, first by repeated advocations from the Commissaries, afterwards by suspension, and also by reduction, in which at last he was himself one of the counsel, where the question occurred and was fully argued, and a proof followed of cohabitation in England; and in a later case of Lord Semple the Court refused a proof of cohabitation at Gibraltar, only because they would not condescend on the witnesses. That though nothing could have the civil effect of marriage in Scotland, but celebration *secundum legem loci*, yet *consensus et copula* even in Scotland would make a good marriage in Scotland, and it was not an agreed point whether cohabitation in Holland would not have the same effect; but that was not here the question, but the proving a marriage entered into in Scotland, when subsequent cohabitation in Holland would have a strong effect; that it did not signify whether the pursuer knew or did not know who was the celebrator, yea even though it had been another footman; the *consensus de presenti* and the subsequent *copula* would make a marriage. I was of the same opinion, and observed the danger as well as expense of dividing the proof without necessity. The inconveniency insisted on of exposing characters did not move me after the process had gone thus far. And as to the last, that as for the most part the celebrator is provided by the husband, the poor woman very

seldom knows in clandestine marriages whether he is a Minister or not. The Lords remitted with instruction to the Commissaries to allow the pursuer to prove all facts and circumstances of the cohabitation in Holland at the same time with the proof already allowed. *Pro* were President, Dun, Monzie, Murkle, Shewalton, Drummore reporter, *et ego*. *Con.* were Minto, Strichen, Kilkerran.

No. 10. 1752, Dec. 15. PENNYCUICK *against* GRINTON.

JOHN GRINTON having got Ann Penyuick with child under promise of marriage, she after her delivery sued him before the Commissaries, and specially libelled the fact, but concluded only for damages and the expenses of her delivery and maintenance of the child, and referred the libel to his oath. He compeared and deponed, and acknowledged both his proposing marriage to her at different times and the getting her with child. After which the process lay over for some time, and John Grinton privately married Ann Graite and brought her home to his house and lived with her as his wife. Upon which Pennycuick raised a new libel before the Commissaries, setting forth the fact as in the first, but concluding a declarator of marriage and next a divorce because of his adultery with Ann Graite; and Ann Graite raised a counter-declarator of her marriage. A proof being allowed, the Commissaries found the previous promise to Pennycuick and the getting her with child proven, and therefore found the marriage proven, and found also Ann Graite's marriage proven, but found that it could not compete with Pennycuick's prior marriage, and found John Grinton's adultery proven, and therefore divorced and separated Pennycuick from him, and found him liable in the expenses of her inlying and the child's aliment and expenses of process. Of this sentence a bill of advocation was presented, which was this day reported by Drummore. The case is very well argued in the papers on both sides, and we refused the bill of advocation *simpliciter*; *sed multum renit*. Dun *et* Kames, who thought that promise of marriage and *copula* did not make a marriage but only inferred an obligation to solemnize a marriage, and that the marriage with Ann Graite was a mad impediment, with which the President seemed both surprised and angry. But Woodhall also joined them.

No. 11. 1753, Jan. 2. MARY BURN AND HUSBAND *against* OGILVIES.

A CONFIRMATION in the Commissary Court was found no sufficient evidence of the death of persons said to have died, one in the East Indies, and the other in the West Indies, because no proof is required in these Courts as there is in all services, at least of habit and repute; but any person is confirmed *periculo petentis*; and therefore we adhered to Kilkerran's interlocutor finding that the pursuer must bring further proof of their death.

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PROPERTY.

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No. 1. 1734, Feb. 16. AITKEN *against* DEWAR.

THE Lords found the pursuer could carry on his level, and that the defender could not stop him.