[M. 4591.]

1759.

EDWARD MACCULLOCK, - - - *Appellant;*
JANET MACCULLOCK, - - - *Respondent.*

MACCULLOCK v. MACCULLOCK.

House of Lords, 16*th May* 1759.

MARRIAGE.—CONSTITUTION.—COHABITATION IN FOREIGN PARTS.—Held, where marriage was sought to be established by cohabitation, and habit and repute, that proof of cohabitation in the Isle of Man, where a different law prevails, did not constitute marriage in Scotland.

Declarator of marriage in the following circumstances:—The appellant and respondent were nearly related. Their fathers had each estates. They had been acquainted from infancy, and at the time when the connection was first formed, she was living with the appellant's brother-in-law, where he himself resided, and to whose family she acted in the capacity of governess. The respondent alleged that they then formed for each other a sincere and mutual love and affection, and, in consequence of the appellant's most serious and repeated addresses, a marriage was then privately concluded between them, in March 1750; but as the appellant's estate was inconsiderable, it was deemed prudent to keep it private, and, on this account, no solemnization took place. She remained in this house until she became pregnant, when she removed to her mother's. The appellant, on the other hand, averred, that while at his brother-in-law's, he slept in the summer-house, in the garden, detached from the dwelling house, which was crowded with children and servants; but the respondent got into a way of coming to the summer-house, where the appellant lay, after the rest of the family were asleep. Her first visit surprised him; but she repeated her visits, and taking care to come dressed suitably to her inclinations, only in a loose gown and smoke petticoat, at last gained her point. These interviews were, however, discovered; she was watched, missed one night out of her bed-room, and the matter being narrowly inquired into, she was turned out of the house. She retired to her mother's, big with child; and afterwards agreed to accompany the appellant to the Isle of Man. Here, it was further alleged by the respondent, they lived and cohabited together as

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man and wife, at bed and board for six months; she bore him a child, and it appeared from the proof, that he called in a midwife and paid her. He attended the birth and baptism of the child, bespoke the godfather and godmother; and never for an instant discovered that the child was illegitimate; and the child was registered in the parish, without being called a bastard. A proof was led, applicable to the cohabitation and habit and repute, while in the Isle of Man. The proof led on this particular, was as follows:—First, that when they arrived there, the appellant asked for separate rooms and separate beds;—that they slept in separate rooms and separate beds;—that the respondent then appeared to be with child;—that afterwards they assumed the character of man and wife,—cohabiting as such at bed and board; this, as the appellant explained, merely as a cloak or guise, to insure her that attention and civility, during her inlying, which she could not otherwise receive. The person who baptized the child did not ask them if they were married; but, believing them to be so, baptized the child as a legitimate child. There was no current or general report of habit and repute.—It was only vague and conjectural statements, confined to a few persons, and such as necessarily arose from their short stay in the Isle of Man; but, to the extent to which it went, it supported a belief that they were married individuals. After leaving the Isle of Man, she returned to her mother's house in Scotland, where, on four several occasions, he visited her, and, with the knowledge of her sisters, persons of good character, slept with her.

Aug. 18, 1758. The commissaries, of this date, unanimously "find the facts, "circumstances, and qualifications proven, not relevant to "infer marriage, and therefore assoilzie the defender, and "decern."

Feb. 27, 1759. In an advocation of this judgment, the Lords, of this date, refused the bill; "but remits the cause to the commissaries, "with this instruction, that they find the marriage proven."

Against this interlocutor, the present appeal was brought.

Pleaded for the Appellant.—That there was no vestige of proof of habit and repute, or cohabitation as man and wife, at bed and board in Scotland; and the only proof of that nature, attempted to be made out, had reference to the period when they resided at the Isle of Man. That even if that evidence were otherwise competent, it is, when examined, imperfect and inconclusive, and such as can by no means establish a marriage. The manner in which they first ar-

rive there,—taking separate rooms and beds,—and their afterwards assuming a different guise, shews at once the intention of parties; and gives only a vague and indistinct report of their being married, such as does not make out a sufficient habit and repute; but even supposing it to be sufficient, a proof of cohabitation in the Isle of Man, would not establish a marriage by the law of Scotland. Had there been cohabitation in Scotland, and also in the Isle of Man, the case might have been different, as in Forbes and Strathmore's case. But where the only cohabitation takes place in a foreign country, where the laws of marriage are different, the question is more deeply involved. In the Isle of Man, nothing less than actual celebration is, by law, sufficient to constitute marriage, and it being an established principle, in the laws of all nations, that the import and effect of person's actions, are to be judged of, according to the law of the country where they resided at the time; the law of Scotland could have no operation upon actions done in the Isle of Man, different from what the law which there prevails would have had. And even supposing that the contrary rule were to obtain, the cohabitation in the Isle of Man was too short in its duration, and too doubtful in character, to constitute marriage. A cohabitation for two months, which was not open, but disguised in its nature, and which was not continued, but merely adopted to serve a particular purpose, during her pregnancy and inlying, cannot be understood as sufficient habit and repute, and that habit and repute which in the law of Scotland constitutes marriage.

Pleaded for the Respondent:—By the law of Scotland, actual celebration is not necessary to the constitution of marriage; but marriage may be constituted by the consent of two persons agreeing to accept each other as man and wife. This consent may be either by contract in writing, or agreement by words, or by cohabitation as husband and wife, or by the acknowledgment of the parties expressed in the presence of witnesses. The marriage in the present case is established both by the cohabitation and by acknowledgment of the parties, either of which, taken separately, is sufficient. The equality of the parties' rank—the unblemished nature of the respondent's character—the near relationship—their acquaintance from infancy, preclude all ideas of their connection being other than as man and wife, and their open cohabitation, as proved for the period of six months in the Isle of Man, together with the universal pub-

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lic report of such married relation, up till he finally left her, after leaving the Isle of Man, all go to prove a marriage.

After hearing counsel, it was

Ordered and adjudged that the interlocutor complained of be *reversed*, and that the bill of advocation be absolutely refused.

For Appellant, *Ro. Dundas*, *Al. Forrester.*
For Respondent, *C. Yorke*, *Al. Wedderburn.*

Note.—Lord (Chancellor) Hardwicke, has written this note on his papers as to the grounds of the decision.—"The grounds on which the Lords went were: 1*st*. That it was admitted that there was no marriage solemnized. 2*d*, No proof of any contract *de presenti* or *de futuro*. 3*d*, That almost the only evidence of cohabitation and acknowledgment was in the Isle of Man, where the respondent went clandestinely with the appellant to lie in, and conceal her shame. 4*th*, That the cohabitation required by law to establish a marriage ought to be *inter familiares natos et vicinos*; where one of the parties has a domicile; and it would be of dangerous example and consequence—dangerous to young girls, heirs of families, &c. that such a remote cohabitation in the Isle of Man should be allowed to constitute a marriage in Scotland."

Right Honourable Lady Dowager FORBES, *Appellant;*
Right Honourable JAMES LORD FORBES, *Respondent.*

House of Lords, 18*th Feb.* 1760.

HEIR AND LIFERENTER—LIFERENTER'S RIGHT TO ENTER VASSALS—AGREEMENT—INTEREST—ALIMENT.—The liferentrix of an estate having, in the erroneous belief that certain bonds of provision, executed by her deceased husband on deathbed, in virtue of powers reserved by him in his antenuptial contract of marriage, were reducible on the head of deathbed, entered into agreements restricting her own liferent provisions: 1. Held, in an action of reduction to set aside these deeds of restriction, that the deeds did not prevent her from claiming her just rights: And, 2. That as liferentrix of both the lands of the lordship of Forbes, as well as of the superiorities thereof, and the patronages thereto belonging, she was entitled to enter vassals; reversing the judgment of the Court of Session: 3. Also that, as liferentrix, she had no claim against her daughters for alimenting them until their provisions fell due; the being alimented *aliunde;* and that she was not