1774. *February* 15. MARY CLOWDEN *against* JOHN CULTON of Auchnary.

PROOF.

In a declarator of marriage, the man in defence accused the woman of incontinency. The Lords adhered to an interlocutor of the Commissaries, refusing a proof of the allegation, *in hoc statu*, reserving the same till the pursuer should establish her marriage. In this case no actual celebration was libelled on, but a written declaration and subsequent *copula*.

[*Folio Dict., IV.* 171 ; *Dictionary*, 12,683.]

AUCHINLECK. Great expense attends a process of divorce. I am bound to presume for innocence. The woman brings a process of declarator of marriage. In that she can have no aid but from herself. If she once prevails, and then the husband brings a process of divorce, she is entitled to an interim aliment, and the husband must pay the expense of the process. If the declarator of marriage is not made to precede the proof of incontinency, she will have two suits to maintain instead of one. This expense will be such, that, should we follow the rule proposed by the defender, the woman must succumb from the want of the means to defend herself; and therefore the judgment of the commissary is founded on the highest expediency.

PITTOUR. There is a great difference in the nature of the proofs offered by the parties. The pursuer offers to instruct marriage by writing under the defender's hand: the defender offers to instruct incontinency by witnesses. He wants to go a-fishing for circumstances. The woman cannot afford to follow him: besides, his offer to prove incontinency, *hoc statu*, is, as the country people say, putting the plough before the oxen.

HAILES. I think that the judgment of the Commissary is perfectly right in allowing the marriage to be first of all established. This defender desires to prove himself a cuckold before he is proved a married man. If he is not married, what right has he to prove her incontinency. If she is *soluta*, she may have lain with all the men in the parish; it is no concern of his.

KAIMES. There is no actual marriage here, and therefore no occasion for an action of divorce. A covenant for marriage is not sufficient. Parties may, *impune*, resile *rebus integris*. A *copula* is required; after which parties may not resile without cause. Will an agreement to live as man and wife, joined with a *copula*, be sufficient to make a formal marriage? No; it only creates an obligation to celebrate a marriage *in facie ecclesiæ*. The commissaries' decree is tantamount to such a celebration. When there is an actual marriage *in facie ecclesiæ*, I would not allow a proof of incontinency till that marriage be once formally ascertained. The case here is different: no marriage is alleged, but evidence is offered that there was an obligation to marry. I would allow the man to prove the woman's incontinency as a good reason for not fulfilling the obligation. As to the expense, equity might perhaps interpose in behalf of the

woman. To save expense, I would allow both actions to go on *simul et semel.*

COALSTON. My doubt is, whether Lord Kaimes' argument will apply to this case. A contract to marry may be resiled from. When a *copula* follows, *res non est integra.* Here there is not an action to solemnize marriage, but a declarator of marriage. It seems to me that there is written evidence of an actual marriage; and the woman farther offers to prove acknowledgments of marriage. The judgment of the commissaries is founded not only on expediency, but justice. This will appear from considering the legal effects of a declarator of marriage, and of an action of divorce. The declarator, after sentence, draws back and entitles the pursuer, and her issue, to all the benefits of marriage from the date of the marriage. The decreet of divorce does not declare the marriage void before the date of the decreet; and therefore the wife and the children are entitled to the intermediate benefit of the marriage. Hence it follows that it would be unjust to make the action of divorce go before the declarator of marriage.

KAIMES. I admit that all this is good when there is so much as a habit and repute marriage libelled; for that presumes a regular marriage. But *here* there is no living together as man and wife. On the contrary, we see the *initium;* which is not a marriage.

MONBODDO. I always held it to be a maxim that *consensus facit matrimonium.* There must be a *rei traditio,* which we call a *copula.* If the defender will prove that a man could not marry a whore, he would say something. I never heard of an action for obliging a man to perform the ceremony of marriage.

GARDENSTON. I cannot agree with the doctrine laid down by Lord Kaimes. There are two species of marriage equally effectual by our law; the one solemn, the other clandestine. A clandestine marriage branches out into many sorts. The parties therein concerned are liable to pains and penalties, but still such clandestine marriages are valid. There are many instances of decrees finding such marriages proved. The case of *Loup* in particular was strong, and applicable to this case. One great argument in support of the commissaries' judgment is, that children have an interest to have their state declared. It makes no difference that in this case there are no children; for there must be one uniform rule.

JUSTICE-CLERK. I believe that, in the early period of our law, after the Reformation, when the sacerdotal benediction was much esteemed, the course was to decern the party to celebrate the marriage. But, for a long time past, the practice of the Commissary Court is totally altered, and the constant conclusion is that the parties be decerned to *adhere.* The argument used by Lord Kaimes may apply to the case where parties, having agreed to celebrate a marriage, an action arises *ex contractu:* the man may have a good defence, that, since the date of the agreement, the woman had been incontinent.

On the 15th February 1774, "the Lords refused the bill of advocation, and remitted to the commissaries *simpliciter.*"

Act. A. Crosbie. *Alt.* R. M'Queen.

Reporter, Gardenston.