

1801. November 28. MACGREGOR and CAMPBELL against CAMPBELL.

LIEUTENANT DUNCAN CAMPBELL died in January 1791. In May the pursuer, Katharine Macgregor, who had lived in his house at Dundurn for some years as his housekeeper, was delivered of a child, which he had acknowledged to be his, previous to his death.

An action of declarator, of marriage and legitimacy, was brought before the Commissaries of Edinburgh, in her own name, and in the name of her child Colin, against Miss Colin Campbell, the sister and representative of Lieutenant Campbell.

A proof was allowed, and this interlocutor (28th August 1799) pronounced: "The Commissaries having considered the proof and memorials, along with the libel and process, find sufficient evidence is not brought to establish, that the pursuer, Katharine Macgregor, and the deceased Duncan Campbell of Edinchip, were married husband and wife of each other, therefore assoilzie the defenders from the conclusions of marriage and of legitimacy, reserving to the pursuers to insist against the representatives of Duncan Campbell, for a reasonable aliment to his son, the pursuer, Colin Campbell, as accords; find the defenders not entitled to any expenses, and decern."

Upon bringing this judgment under review, the pursuers

*Pleaded,* It is proved, that after the year 1790, when Campbell and Katharine Macgregor took a journey to Kinghorn, that, on their return to Dundurn, it was the belief of many in the country, that they were married, as they then openly cohabited as man and wife; were visited as such by several persons, particularly a brother officer and his wife, to whom she was introduced, and by whom she was received as Mrs Campbell; and, besides being acknowledged by him at various times, as his lawful wife, on one occasion he took God to witness that she was so.

*Answered,* In constituting marriage by cohabitation, and habit and repute, the common rules of law, in all mutual contracts, must have effect; and the consent must not only be mutual, but formal and deliberate. The behaviour and expressions of Campbell could only be meant as some sort of excuse to the world for the familiarity in which he lived with the pursuer, which would otherwise have deprived him of the society of the neighbourhood, while some of these expressions are proved to have been uttered in jest, or when he was in liquor. The pursuer's conduct proves, that she never conceived, for a single moment, during his life, that the expressions made use of entitled her to the character of his lawful life. She never required to be treated by the other servants, or her acquaintance, with a respect becoming that situation. She demanded wages and livery meal as a servant, to the period of Campbell's decease; and, when called before the Kirk-session of Comrie, she did not claim the character of widow and lawful mother of the child.

No 590.

Circumstances get the better of a formal acknowledgment of marriage.

No 590.

*Observed* from the Bench, The case of More and Macinnes, 20th December 1781, No 584. p. 12683. carried the doctrine of acknowledgment too far, in as much as there it was extorted by fraud, on the part of the woman, as she said it was intended merely to protect her from the rage of her relations; but here, the repeated acknowledgments, which were so solemn, that they induced those to whom they were made, to visit the woman as a married person, seem sufficient to constitute a marriage, and ought not to be got the better of by circumstances which could not annul a marriage actually celebrated.

The majority of the COURT, however, were of opinion, that the circumstances arising from the pursuer's own conduct afforded a sufficient indication of the intention of the parties.

THE LORDS refused the bill of advocacy.

Lord Ordinary, *Polkennet*.

For Pursuers, *Maconochie*.

Agent, *J. Brunton*.

For Defender, *Williamson*.

Agent, *Ja. Dundas, W. S.*

Clerk, *Home*.

F.

*Fac. Col. No 8. p. 16.*

1802. January 20. CRAWFURD'S TRUSTEES against HART'S RELICT.

No 591.

A declaration of marriage, made within year and day of his death by a man, to a woman, who had borne children to him, gives her right to the legal provisions of a widow.

JANET HART had cohabited with William Crawford for about thirty years, and borne several children to him. These he legitimated, by declaring, along with their mother, before a Justice of Peace, 26th January 1799, that "they both publicly acknowledged themselves to be married persons, and to have been irregularly and clandestinely married, but refuse to declare the celebration thereof, or the witnesses present thereat." On the 22d October, he disposed his whole estate to trustees, making a variety of provisions upon his wife and their two children, Peter Crawford, and Marjory, the wife of George Reid, as well as leaving legacies to his five sisters. He died on 22d November, within ten months of the acknowledgment of marriage.

The Trustees accepted; and finding that the widow and children were dissatisfied with the provisions left them by the trust-deed, raised a process of multiplepinding, to determine their respective claims. It was objected, That as the marriage had not been declared a year and day before Crawford's death, and as there had been no child born since, the widow could be entitled to nothing, except what the trust-deed had given to her.

After a variety of procedure, Lord Stonefield, upon advising memorials, 17th February 1801, "Found Mrs Crawford, the widow, entitled to her terce and *jus relictae*; and the Trustees of Peter Crawford and Mrs Reid entitled to their legitim; and prefers them, for their respective rights and interests, to the funds in the hands of the raisers of the multiplepinding, and decerns."

The cause was remitted to Lord Armadale, who adhered.

The Trustees reclaimed, so far as concerned the claim of the widow, and