

1782.

 MORE
 v.
 M'INNES.

head of adultery, it is an incontestible point of law, that if the party offended forgive the injury to her, in the full knowledge of the offence, and is in possession of the evidence sufficient to prove it, this amounts to an implied forgiveness, and such forgiveness, express or tacit, will be a sufficient bar to the action. But, in order to found this objection, it must be clearly proved that the party was in the *certain* knowledge of the adultery, and of its particular acts, and nevertheless cohabited with the guilty party, as it is only cohabitation, after a wife is possessed of this *certain* knowledge of the particular acts of adultery, which imports that *remissio injuriæ* which in law bars the action. In the present case, there is no such certain knowledge proved; and the deed granted by himself in 1778 cannot be construed into a *remissio injuriæ*, and so cannot be evidence of her knowledge of its contents; but it is needless to refer to it, because the acts of adultery proved were committed long posterior to that deed. And during the respondent's cohabitation with the appellant, she did not know of any particular acts of adultery committed by him, which could be the foundation of a process of divorce.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *G. Hardinge, T. Erskine.*

For Respondent, *Alex. Murray, Dav. Rae*

Note.—Not reported in the Court of Session.

[M. 12,683.]

ALEXANDER MORE,	-	-	-	<i>Appellant;</i>
JANET M'INNES, Widow of Captain FAIRBAIRN,	}	-	-	<i>Respondent.</i>
late of the 62d Regiment of Foot,				

House of Lords, 25th June 1782.

CONSTITUTION OF MARRIAGE.—Circumstances in which a written declaration of marriage, written after pregnancy, was not held to constitute marriage.

The appellant, while living in Aberdeen with his father, and then very young, had become acquainted with the respondent, who passed as an officer's widow. He was only

24 years of age, and she was 37. It was further stated that she visited at his father's house, and he was in consequence drawn into a connection with her, which took place entirely unforeseen and unpremeditated on his part. One night in the month of February 1780, after having supped at the same place, he happened to see her home to her lodgings, when certain unexpected advances on her part encouraged him to take liberties, and, after an almost immediate temporary surrender of her person, he was that night admitted to her bed. He afterwards, as he alleged, received numberless favours, by invitation, of the same kind, the consequence of which was pregnancy. When she communicated to him her situation, she did not then seek or solicit marriage, or any promise or acknowledgment of marriage; but proposed a scheme of going to London, in order to be delivered with more secrecy, and sought money for that purpose. She then changed her mind, and proposed in November to go to Edinburgh, and asked money to defray expense. He gave her £8, and a diamond ring to sell, being all he had. By the advice of her friends, this plan was abandoned, and a scheme laid to entrap him into a marriage. One of these friends advised her to go home to her brother's in the country; but, as he would be offended, the only thing to appease and satisfy him, was for her to obtain a letter "*acknowledging*" her to be his wife. She brought a draft of this letter previously prepared. It commenced and ended with "My dear and loving wife," but these were deleted, as the appellant would not consent to them, and the letter below so altered was signed by him.

"Mrs. Fairbairn, I hereby acknowledge that you are my lawful wife, and you may, from this date, use my name, though, for particular reasons, I wish our marriage kept private for some time; and always am, Madam, your most obedient,

ALEXANDER MORE.

"*Aberdeen, 1st May 1780.*"

The letter, though granted in November, when she was far gone in her pregnancy, was antedated in the draft, and copied exactly as it stands in the original, which was obviously devised in order to make the acknowledgment *anterior* to the pregnancy. But this was not all. Her friend, Captain Grant, to whom she was indebted for this plan, formed another plan, in conjunction with her brother, of having this followed up by actual celebration, after having been refused a second letter more to their wishes. Being then in the country, he was followed there by Captain

1782.

MORE
v.
M'INNES.

1782.

 MORE
 v.
 M'INNES.

Grant and her brother, in order to compel him to go through the ceremony of solemnizing the marriage. He was overtaken by them, and carried to a village called Udny, whence his own friends, having heard of the scheme, rescued him, and carried him off in a post chaise to Aberdeen. In these circumstances, the respondent brought the present action of declarator of marriage, founding on honourable courtship, and stating, that from professions of love she had consented to marry him, but he being then dependent on his father, thought it necessary to keep the matter secret till he could obtain his father's consent, "but in the meantime granted an explicit acknowledgment of marriage in writing; assuring the pursuer that it was equivalent, in every respect, to a marriage celebrated in the most formal manner in the face of the church, (*i. e.* the letter above quoted.) And being in the confidence that she was the married wife of the said Alexander More, and relying on his solemn promises and engagements, yielded to his earnest solicitations, and gave herself up to his embraces, and from henceforth he had free access to her person as a husband." In defence, courtship was denied, and it was also denied that any proposal or promise of marriage had ever been given by him, or passed between them; and that the letter was a plan adopted by her friends, after her pregnancy, to inveigle him into a marriage, but that it bore a false date. It is founded on as a promise or acknowledgment of marriage, but it was only granted in reality to serve a different purpose, namely, to screen her situation. The pursuer offered no evidence but the defender's letter, and his judicial declaration.

July 2, 1781. The Commissaries found the marriage proved. On advocacy the Lord Ordinary refused the bill; whereupon the July 27, — appellant reclaimed to the Court, who adhered to this Dec. 19, — judgment.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—Marriage must either be completed with the legal solemnities *ex facie ecclesiæ*, or attended with such circumstances as will authorize a court to interpose. Here it is not pretended there was any regular solemnization of marriage; and the written acknowledgment founded on to supply the place of regular marriage, cannot establish even an irregular one, because it was a written acknowledgment, extorted from the appellant after a criminal intercourse had taken place between them. It was granted to serve a particular purpose at the time, she being then

pregnant. And the *evidentia rei*, from its false date, shows that it was not a deliberate act of the will, but the effect of fraud and intimidation, as she demanded it under the threat that unless it were granted, her brother and Captain Grant would come and force him to grant it, and would, besides, disclose the whole connection to his father. By the law of Scotland, nothing less than a deliberate consent, mutually declared, and consummation following upon it, can establish the relation of husband and wife. There are no such circumstances here. The respondent's whole case rests upon the letter obtained of the appellant, bearing a false date, and under circumstances which at once show that considerable influence and terror, amounting to violence, had been used; yet he did not copy the draft as sent him; he altered it in most important particulars. Besides, such a letter is always to be viewed only as an article of evidence, the fact of the contract is a different thing. So assured was the respondent herself that it was not sufficient as very marriage, that her friends soon thereafter resorted to the plan of forcing an actual celebration. There being, therefore, no promise or acknowledgment, with subsequent copula, and no cohabitation proved, or attempted to be proved, after the granting the above exceptionable document, the marriage is not established.

Pleaded for the Respondent.—By the law of Scotland marriage is constituted by the *de presenti* consent of the parties acknowledging each other to be man and wife, without the intervention of any solemnity. The deliberate acknowledgment here establishes a marriage passed antecedently betwixt the parties. The phrase used, “I hereby acknowledge that *you are* my lawful wife,” necessarily imports this, and which simply meant that they had been long married together. The respondent never promised to return this letter, nor was it granted to serve a mere purpose. The circumstances attending the granting of this letter of acknowledgment are quite inconsistent with the smallest degree of concussion having taken place. No one was present but themselves when he wrote and delivered it: and it is pure invention to allege that it was the fear of her brother, Mr. M'Innes, that induced him to give it, for at that time the whole affair was unknown to her brother. But even supposing this letter was not the acknowledgment of a previous marriage, yet as a private declaration of a marriage *de pre-*

1782.

MORE
v.
M'INNES.

1782.

 MORE
 V.
 M'INNES.

senti, entered into and accepted of by the wife as such, it was sufficient to constitute marriage, though no copula had afterwards happened betwixt them, the maxim being, that *consensus non concubitus facit matrimonium*. And supposing the letter only a written promise of marriage *de futuro*, still this would be sufficient, taken in connection with the subsequent copula, which the appellant has not ventured to deny took place after granting the letter.

After hearing counsel,

And due consideration had of what was offered on either side in this cause, the pursuer not having alleged, in the original libel or subsequent condescendence, any marriage or matrimonial contract previous to the acknowledgment mentioned in her libel, as dated on the 1st May 1780, but written in fact in the latter end of November following; and no proof of that, or any other circumstance of the transaction having been produced in the cause, but, from the judicial examination of the defender, whereby it appears that such an acknowledgment was not given by the defender, or accepted by the pursuer, or understood by either, as a declaration of the truth, but merely as a colour to serve another and a different purpose, which had been mutually concerted between them; and other circumstances of the case concurring to prove the same thing; it is declared that the said written acknowledgment is not sufficient proof of any marriage or matrimonial contract having passed between the pursuer and the defender; and it is therefore ordered and adjudged that the said interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is further ordered, that the Court of Session do remit the cause to the Commissaries with directions to find, that the said written acknowledgment is not sufficient proof of any marriage or matrimonial contract having passed between the pursuer and defender, and to proceed accordingly.

For the Appellant, *Henry Dundas, Ilay Campbell, J. Douglas.*

For the Respondent, *A. Macdonald, Dav. Rae, G. Buchan Hepburn.*