

1747. July 28. JEAN CAMPBELL *against* MAGDALEN COCHRAN.

No 32.

A woman alleging a private marriage with a person deceased, who during his life, had lived publicly with another in her sight, was repelled *personali exceptione*, from proving her marriage to the prejudice of the other and her issue. Reversed upon appeal.

JOHN CAMPBELL of Carrick, who was killed at the battle of Fontenoy, in the station of a Captain in Lord Semple's highland regiment, had married Jean, daughter to John Campbell of Mammore. As this marriage gave occasion to the question, the decision whereof is now to be observed, there was produced for proving it, a certificate signed George Bennet, attested by Archibald and William Wrights, witnesses of the said Mr Bennet's having married them, 9th December 1725; "On these articles, (as he exprest it) that they are come to the years of discretion, he and she, and that there is no pre-contract between them to any other party; *2dly*, The woman being an heiress, and both free persons."

Sufficient evidence was brought of a person of that name having about that time born the character of a clergyman of the church of England, of his having publicly officiated as such in the English chapel in Edinburgh, and of his baptizing a child to a person of distinction, and marrying several people; and the witnesses deponed they heard he was since dead; and it was *alleged*, the witnesses to the certificate were two men of the name of Macintire, since proved dead; which name was by witnesses skilled in the Irish language said to signify the same as Wright.

Carrick, 24th March 1726, appeared in the kirk-session of Roseneath, where his house and estate lay, held at his own house of Camsaill, and there profest his repentance for an irregular marriage, repeated his engagements, and was rebuked, as was his Lady afterwards by the minister, in virtue of an appointment of the session, reported 17th April 1726, and from that time to his death, they behaved as man and wife, living together publicly, treated in that character by their friends and acquaintance; and having procreated several children who were baptized, and such as died buried as theirs; and particularly Magdalen Cochran, relict of Lewis Kennedy collector of the customs at Irvine, was acquainted with their cohabitation, was occasionally with them, lodging in the same house, and behaved towards them as in that character.

On Carrick's death, Magdalen Cochran claiming the character of his widow, both the Ladies raised declarators of their several marriages before the Commissaries of Edinburgh, and Jean Campbell having concluded her evidence, pleaded that Magdalen Cochran ought to be repelled *exceptione doli et personali exceptione* from leading any proof, as she had connived at a twenty years cohabitation, during which children had been procreated *bona fide*, whose state she ought not to be allowed to contravert; nor yet to dispute with Jean Campbell the character of wife, which she had suffered her so long to enjoy, nor to prove her conversation with Carrick to have been unlawful, as it was her own fault, supposing her allegation to be true, that it was not interrupted.

Magdalen Cochran *alleged*, That she was privately married, before the other engagement, viz. 3d July 1724, at the abbay of Paisley, by Mr William Cockburn an episcopal minister, then residing at Glasgow, in the presence of Archibald and William Macintires, servants to Carrick, and James Lochhead, and Jean Erskine, servants to the Earl of Dundonald; that it was kept secret, as not agreeable to Carrick's relations, who had prevented his marrying her on a former occasion, before her marriage to Mr Kennedy; that it was not thought proper to disoblige them, as his dependence for promotion in the army was upon their interest; that upon his second engagement, the reasons for secrecy became infinitely stronger, since discovery then must have been his ruin. She affirmed this to have been the consequence of a rash amour, which, considering Mrs Campbell's rank, *belov'd* to be made up by an acknowledgment of marriage, for she denied any actual contract to have past between them, and did not stick to affirm Mrs Campbell had sought the occasion of her own misfortune. She produced very passionate letters from Carrick, owning her as his wife, apologizing for his conduct, and comforting her with the expectation of a time when it would be in his power to acknowledge her, giving an account of his being surprised into a commerce with Mrs Campbell, and his after 'putting himself in the situation he was in.' She also produced a certificate, signed by him 3d July 1724, declaring that he was solemnly and lawfully married to her, with a letter, 4th November 1725, promising a speedy publication thereof, and one, 2d March 1726, to Sir James Campbell of Ardkinglas his uncle, owning he had done her the greatest of injuries; and though she was commonly called Mrs Kennedy, yet she had the justest title to the name of Mrs Campbell, and praying him, if that letter ever came to hand, either before or after his death to assist her, at least compassionate her misfortunes. She produced some letters from a brother of Carrick's, calling her his sister; but he afterwards excused these letters, saying they were only in merriment. She offered a further proof of her marriage, and of Carrick and her having entertained a matrimonial correspondence both before and since his other marriage, to the knowledge of several persons, and that it was suspected by the Lady herself, or her relations, before her engagement with him, so that she was not *in bona fide*. She *pleaded*, that no explicate contract could give up a right of marriage, much less could it be lost by implication; and therefore she ought to be admitted to prove.

The Commissaries allowed a proof, before answer, and the Lord Ordinary on the bills, refused an advocacy, and remitted.

A reclaiming bill was presented and answered.

Urged for Jean Campbell, That Carrick was now dead, and there remained only a pecuniary interest to be contended for, to wit, as his estate was spent, the King's bounty to an officer's widow; and this was to be determined at the hazard of her state as a lawful wife, and the legitimacy of her daughter, the only surviving child of the marriage; that Magdalen Cochran could not pre-

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tend her own character was concerned, since the difference was not great betwixt her entertaining an unlawful amour, and being accessory to her husband's bigamy; that she might in law be repelled *exceptione* from prosecuting an interest where the subsistence of a marriage was not concerned, and from the proof already taken, it ought to be presumed that she was never married, but that the letters produced, and certificate, were granted to the insinuations of an artful woman, by whom Carrick was seduced, on condition not to be used till after his death, as was plainly the intent of that to Ardkinglas, which was never delivered; and as he had been weak enough to grant them, it was easy to antedate them, to serve a purpose.

For Magdalen Cochran, That she might have other interests to entitle her to a proof, to wit, to explain any commerce she might have had with Carrick, and to afford her a defence in case of a criminal prosecution for it. But to this it was *answered*, such proof would be competent to her on a trial.

Such of the LORDS as were for the interlocutor, declared, that whatever was the issue of this question, the daughter would be legitimate from the mother's *bona fides*; and they inclined to think Magdalen Cochran's conduct would be a sufficient ground for Jean Campbell's being preferred to the emolument's due to a widow, but that she could not thereupon be precluded from proving she had really been his wife.

THE LORDS remitted, with an instruction not to allow a proof.

Act. *Lockhart, & H. Home.* Alt. *R. Craigie, & Mailand.*
Fol. Dic. v. 4. p. 79. *D. Falconer, v. 1. No. 204. p. 279.*

*** This decision was reversed upon appeal.

1750. February 2. Competition CREDITORS OF KERSE.

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IN a sequestration of a debtor's estate, the debtor *alleged*, That the rents exceeded the interest of the debts; and craved, that part of the estate might be exempted from sequestration for his aliment. All the Creditors consented, and part was accordingly reserved from the sequestration. Afterwards it appearing that there was a considerable deficiency, a question arose between the preferable creditors and those postponed, on whom should fall this deficiency. *Plead-ed* for the postponed, That the reservation being made by the consent of all, should affect all. *Answered* for the preferable Creditors, That they are secured by their diligence; that they consented for themselves, because the estate was more than sufficient to pay their debts. THE LORDS found, that the deficiency fell solely on the postponed Creditors, as it was their interest alone to have opposed or consented to the reservation.

Fol. Dic. v. 4. p. 78. D. Falconer.

*** This case is No 52. p. 6984. *voce* INHIBITION.