

1744.

For the Appellants, *A. Home Campbell, Al. Forrester.*

WATSON, &C.
v.
GLASS, &C.

For the Respondents, *Robt. Craigie, W. Murray.*

NOTE.—Lord Elchies has the following note in regard to this case :—“ An obligation in a tailzie in case there shall be daughters, and heirs female, procreate of the maker’s body, alive at his death, obliging his heirs male and of tailzie, to pay his daughter, and heirs female, 10,000 merks ; the question was, Whether that obligation took place where the tailzier’s own son succeeded to him—whether he was bound to his sister for this 10,000 merks, since she was not an heir female, since the son was the sole heir. By our interlocutor of 15th June last, we found her entitled to 10,000 merks. Arniston owned that, at first, he was against the interlocutor, but now he is for it ; and said, that providing the 8000 merks, the tocher, and the other moveables in the same way with the estate, that greatly moved him ; and observed, that in money provisions in marriage contracts, ‘ daughters’ and ‘ heirs female,’ are often used to signify daughters, though there were sons ; and upon the question we adhered.”—*Vide Elchies, vol. ii., p. 372.*

[Elchies. Proof No. 9. Fraser’s Domestic Relations,
Vol. I., p. 208.]

1751.

COUNTESS OF
STRATHMORE
v.
FORBES, &C.

COUNTESS OF STRATHMORE, . . . *Appellant ;*

GEORGE FORBES, sometime Factor and
Steward to the said Countess, and SUSAN-
JANET-EMILIA FORBES, an Infant, lawful
daughter of the said George Forbes, by
the said Countess, his wife, . . . } *Respondents.*

House of Lords, 20th March 1751.

MARRIAGE—COHABITATION—PROOF.—A declarator of marriage and legitimation was brought by the respondent, Forbes, founding upon marriage celebrated and performed in Scotland, by some clergyman unknown ; and founding, also, on cohabitation in Scotland, and also cohabitation as man and wife in Holland. Held him entitled to a proof of the marriage, and also of the cohabitation as man and wife in Scotland, but not of the cohabitation in Holland. On advocacy of this judgment of the Commissaries, the Court remitted to them to allow a proof of the marriage in Scotland, and of the cohabitation in Holland, as

an incident of that marriage. On appeal to the House of Lords, appeal withdrawn, of consent, and interlocutors affirmed.

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A declarator of marriage was raised by the respondent, George Forbes, against the Countess of Strathmore, setting forth that, in 1745, he was married to the said Countess, in her own bedroom, in her dwelling-house at *Castle Lyon*, by a person of her own procuring, for that purpose, whom she called a clergyman; and from that time they had cohabited together, treated and entertained each other as husband and wife; and, in the beginning of October thereafter, while she, the said Countess, still remained at *Castle Lyon*, and he having occasion to be at Edinburgh, she, finding herself pregnant, sent for him, whereupon they resolved to set out for Rotterdam, where they arrived, and continued to reside for sometime, and where she was delivered of a female child, in May 1746; and that during their residence in Holland, they cohabited together, at bed and board, owned, treated, and entertained each other as husband and wife, and were held and reputed such by all the many persons who had occasion to know and converse with them; and, in particular, that having caused a clergyman to come and baptize the child, she, the said Countess, before, and to him, and other witnesses present, declared that she and the respondent were husband and wife, and they acknowledged and declared themselves married persons, and that the said child was their lawful child.

That afterwards it was agreed, between the appellant and respondent, that the appellant should return to Scotland, to endeavour to reconcile her friends to the marriage, he remaining in Holland, where it was stated he was obliged to remain, from his accession to the rebellion. Accordingly, she went to Scotland, but never returned to her husband's company and society; and now refused to adhere.

The Commissaries pronounced this interlocutor:—“ Having Jan. 8, 1750.
 “ considered the process and letters produced by both parties,
 “ allow the pursuer to prove that the defender and he were
 “ married together, time and place libelled. And, as to the
 “ cohabitation as husband and wife, and acknowledging one
 “ another as such in Scotland, before answer, allow the pur-
 “ suer to prove all facts and circumstances tending to make out
 “ the same: And allow the defender a conjunct probation
 “ thereanent, and grant diligence accordingly. But as to
 “ cohabitation in Holland, libelled and condescended on more

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“ fully in the pursuer’s duplies, they supersede the consideration thereof until the proof allowed of what happened in Scotland, is adduced and concluded.”

Against this interlocutor both parties complained to the Court of Session by advocacy.

Feb. 27, 1750.

The Court of Session remitted to the Commissaries, with the instruction that “ they allow a proof to the pursuer of the facts that passed in Holland to be taken, and to be conjoined with the proof that shall be taken in Scotland.”

Feb. 28, 1750.

The Commissaries pronounced an interlocutor in terms of this remit, accordingly, allowing the pursuer a proof of all the facts and circumstances tending to make out the cohabitation as husband and wife, and the acknowledgment of one another as such, both in Scotland and Holland.

The Countess brought a suspension of this interlocutor, which was refused.

Against these interlocutors the present appeal was brought by the appellant.

Journals of
the House of
Lords.

But after answers were ordered to the appeal, on petition by the appellant, asking leave to withdraw the said appeal, in regard the said appeal was premature, in respect the Courts below had passed no judgment upon the sufficiency of the said George Forbes’ libel, and had only allowed him a proof before answer, and praying that the said appeal be dismissed, and the interlocutors hereby complained of be affirmed.

And after hearing Mr Henry Dagge, the petitioner’s agent, and likewise Mr Alex. Ross, the agent for the respondents at the bar,

It was ordered and adjudged, that the said petition and appeal be dismissed this House, and that the several interlocutors therein complained of be, and the same are, hereby affirmed. And it is further ordered, that the appellant do pay to the respondents, the sum of £40 for costs.

For the Appellant, *D. Ryder, W. Grant, W. Murray.*

For the Respondents, (*No Case given in*).

NOTE.—Lord Elchies has the following note in regard to this case: “ The Commissaries allowed him to prove the actual marriage, and before answer to prove all facts and circumstances tending to make out the cohabitation as husband and wife *in Scotland*, but superseded the proof of cohabitation in Holland, till the other proof be concluded. Both parties presented bills of advoca-

tion; the lady for allowing him any proof at all, because he was doubtful of bringing a direct proof of the actual celebration. Forbes, on the other hand, for superseding the proof of cohabitation in Holland. None of us made any difficulty of refusing my lady's bill; but we differed as to the other. The chief argument for the interlocutor was that cohabitation in Holland, even as man and wife, does not infer marriage without proclamation of banns, or, rather, as the President observed, without appearing before the burgomaster, and registering their names. On the other hand, the President observed, two cases in the Court, one of Hamilton of Grange, which had been brought here in several different shapes, first, by repeated advocations from the Commissaries, afterwards by suspension, and also by reduction, in which, at least, he was himself one of the counsel, where the question occurred and was fully argued, and a proof followed of cohabitation in England; and, in a later case of Lord Semple, the Court refused a proof of cohabitation at Gibraltar, only because they would not condescend on the witnesses. That though nothing could have the civil effect of marriage in Scotland, but celebration *secundum legem loci*, yet *consensus et copula* even in Scotland would make a good marriage in Scotland, and it was not an agreed point, whether cohabitation in Holland would not have the same effect; but that was not there the question, but the proving a marriage entered into in Scotland, where subsequent cohabitation in Holland would have a strong effect; that it did not signify whether the pursuer knew or did not know who was the celebrator, yea, even though it had been another footman; the *consensus de presenti* and the subsequent *copula* would make a marriage. I was of the same opinion, and observed the danger as well as expense of dividing the proof without necessity. The inconvenience insisted on, of exposing characters, did not move me after the process had gone thus far. And, as to the last, that as for the most part, the celebrator is provided by the husband, the poor woman very seldom knows, in clandestine marriages, whether he is a minister or not. The Lords remitted, with instruction to the Commissaries, to allow the pursuer to prove all facts and circumstances of the cohabitation in Holland at the sametime with the proof already allowed.—*Pro.* President Dun, Monzie, Murkie, Shewalton, Drummore, reported *et ego. contra*, Minto, Strachen, Kilkerran."—*Vide* Lord Elchies' Notes, vol. ii., p. 365.

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[Elchies, vol. ii., p. 193; Fraser's Domestic Relations, vol. I., p. 456.]

GEORGE MONTGOMERY-MOIR, Esq. of Leckie, *Appellant*;
ANNE, his wife, and Others, . . . *Respondents*.

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MONTGOMERY-
MOIR
v.
MONTGOMERY-
MOIR.