

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.

1751.

COUNTESS OF  
STRATHMORE  
v.  
FORBES, &c.

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

1751.

MONTGOMERY-  
MOIR  
v.  
MONTGOMERY-  
MOIR.

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

1751.

House of Lords, 24th April 1751.

MONTGOMERY-  
MOIR  
v.  
MONTGOMERY-  
MOIR.

SEPARATION AND ALIMENT—CRUELTY.—The respondent raised an action of separation and aliment against her husband, the appellant, on the ground of cruelty and a calumny published by him against her honour and reputation. It was objected, that there was no relevant statement to support the action. The Commissaries allowed a proof of the libel. On advocacy the Court refused the bill, but remitted, with instructions to the Commissaries, to allow a proof only of such facts as appeared material, and of the publication alleged. Proof of the calumnies on the part of the husband was allowed. The Commissaries found facts and circumstances proved relevant to infer separation. On bill of advocacy the Court refused the bill, and remitted to the Commissaries. In the House of Lords reversed, and held the evidence not sufficient to support the conclusions for separation and aliment.

An action of separation and aliment was brought before the Commissaries by the respondent, Mrs Montgomery-Moir, against her husband, the appellant, on the ground of cruelty.

Her summons set forth various articles, but set forth the following: That the defendant, contrary to the duty of the relation betwixt them, had attacked the pursuer, his wife, most calumniously, and injuriously in her honour and reputation, and had behaved to her in such manner, that she could not live or abide with him in safety; that he wrote a letter to Sir Walter Montgomery, her uncle, in which he loaded her with the grossest calumnies, without any manner of foundation in truth, and endeavoured, all that in him lay, to wound her reputation, in a manner hitherto not to be paralleled betwixt husband and wife; and, therefore, concluding for a separation *a mensa et thoro*, and for separate aliment."

Her statements assumed, afterwards, the following four heads, 1st, That from the time of their marriage to that of their separation, the appellant had lived with the respondent in a course of discontent and passion, which broke out into several contumelies and abuses, and at last had proceeded so far as to threaten to pistol her. 2d, That he had agreed to a separation from the respondent, and with that view had taken from her the marriage ring, and some other trinkets, which he had given her before marriage. 3d, That he had grossly abused her character in a letter to her uncle, Sir Walter Montgomery; and 4th, That he had procured and

raised letters of inhibition against her, upon false and calumnious allegations.

1751.

MONTGOMERY-  
MOIR  
v.  
MONTGOMERY-  
MOIR.

The appellant's defence, after stating in full detail the facts of their marriage, and how, in a few weeks thereafter, she got uneasy and discontented in her mind, alleging to her friends doubts of his manhood—that he was defective, and that she could never have children by him, all of which, had they been true, might have warranted a divorce against him, was confined to the statements of the respondent, which he denied. 1st, As to the menace to pistol the respondent, he exhibited a letter from Sir Walter Montgomery, her uncle, by which it appeared, that both he and his niece understood *that* threat to be directed only against her informers, the authors of the scandalous calumnies against the appellant's sister. 2d, He denied that he had agreed to a separation, but that the respondent having, in a great passion, thrown away the wedding-ring, and other trinkets, the appellant took them up. 3d, That the appellant had tried every method of lenity to reclaim his wife, and, out of tenderness for her reputation, concealed the genuine source of their differences, until, by her obstinacy, he thought it became his duty to communicate the matter to her uncle, Sir Walter, hoping that by his interposition and advice, the respondent might still have been brought to a proper temper. This letter was written to one who stood in the relation of a parent to his wife; and if she or her uncle afterwards published this letter, they had themselves only to blame. 4th, The respondent refused to come home to his house. He used every effort to induce her to come, stating, that she would be affectionately received, and would have the entire and absolute control of his house. He even wrote her uncle, with whom she lived, to second his efforts to induce her to come home. And all these failing, he was obliged to resort to inhibition, but it contained nothing calumnious, but only the usual form of words.

The Commissaries pronounced this interlocutor: “ Having Aug. 15, 1748.  
“ considered the libel, missive letters in process, defences,  
“ answers, replies, and duplies, they, *before answer*, ordain  
“ the pursuer (*i.e.* respondent) to give in a special conde-  
“ sence of such facts and circumstances as she desires  
“ to lead a proof of, and to condescend upon the witnesses by  
“ whom she is to prove the same; and allow the defender  
“ (appellant) to give in a special condescence of such  
“ facts as he desires to prove, and of the witnesses by whom  
“ he is to prove the same.”

1751. In obedience to this interlocutor, a condescence was  
 MONTGOMERY- given in for the respondent, which varied very little from the  
 MOIR libel; and the appellant thereupon objected, that there were no  
 v. facts stated relevant to infer the conclusions of her libel, and,  
 MONTGOMERY- therefore, that the same ought not to be admitted to proof.  
 MOIR.

Nov: 18, 1748. But the Commissaries, of this date, pronounced this inter-  
 locutor: "Having considered the libel with the condescen-  
 " dence for the pursuer of the 2d November, and whole  
 " debate thereanent. Before answer, allow the pursuer a  
 " proof of the several facts and circumstances contained in  
 " the libel and condescence; and allow the defender a  
 " proof of all the facts and circumstances tending to his  
 " vindication; and allow each party a conjunct proof anent  
 " the premises."

The appellant brought a bill of advocation to the Court of  
 Session against this interlocutor.

Jan. 13, 1749. The Lord Ordinary, after advising with the Court, pro-  
 nounced this interlocutor: "Refuses the bill of advocation,  
 " but remits the cause to the Commissaries, with this instruc-  
 " tion, that they allow a proof of such articles of the libel,  
 " *only* as appears to them to be material: and particularly,  
 " that they allow a proof of all the facts and circumstances,  
 " that may tend to show that Boquhapple's letter was pub-  
 " lished with the defender's knowledge and consent, or by  
 " his advice and information of the facts, or any of them  
 " therein contained; or that the defender, by letters, conver-  
 " sation, or otherwise, published the facts contained in the  
 " said letter, or any of them: and further, that the pursuer  
 " sustained any injuries or maltreatments from the defender  
 " while they lived together."

Jan. 20, 1749. On the case coming back to the Commissaries, they pro-  
 nounced an interlocutor, allowing a proof in terms of the  
 above remit. On petition from the appellant they pro-

Feb. 3, 1749. nounced this interlocutor: "Having reconsidered their in-  
 " terlocutor of 20th January last they adhere to the said  
 " interlocutor, and further, allow the pursuer to prove that  
 " the calumnies contained in the defender's letter to Sir  
 " Walter Montgomery of the 1st July 1745, were uttered,  
 " spoke, or published by the defender (against the pursuer),  
 " in conversation or otherwise, or by others, by his know-  
 " ledge and consent, or by his advice, and information of the  
 " facts therein contained or any of them. And allow the  
 " defender a proof of all facts and circumstances tending to  
 " his vindication."

The proof was gone into. On that proof, the appellant contended, that the respondent had failed to prove either cruel conduct by him towards her, or maltreatment of any kind, not even that he was of a bad temper, though the witnesses were all composed of her uncle's servants and dependents, except one solitary instance. The Commissaries were pleased to find, "Facts, circumstances, and qualifications proven relevant to infer separation, and aliment to the pursuer, and the expenses of suit, but before modification of the aliment, allowed the pursuer to give a condescence of the defender's estate."

1751.  


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MONTGOMERY-  
MOIR  
v.  
MONTGOMERY-  
MOIR.

Jan. 9, 1750.

The appellant brought a bill of advocation to the Lords of Session. The Lord Ordinary pronounced this interlocutor: June 8, 1750.

"After advising with the Lords, refuses the said bill, but  
*remits the cause to the Commissaries, with this instruction, to consider the proof, and to find that there is no sufficient evidence adduced to support the conclusion of separation and aliment, in the summons at the pursuer's instance against the defender, and to proceed in the cause accordingly.*"

On reclaiming petition to the Court, the Court, by interlocutor, of this date, "refused the defender's bill of advocation simpliciter, and remitted, and hereby remit the cause to the Commissaries." Dec. 7, 1750.

This last interlocutor virtually altered the one immediately preceding.

The appellant, therefore, brought his appeal to the House of Lords against the interlocutor of 9th January and 7th December 1750.

After hearing counsel,

It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutors of the 9th January 1750 and 7th December 1750 be, and the same are, hereby reversed. And it is hereby further ordered and adjudged, that the said interlocutor of the 8th of June 1750 be, and the same is, hereby affirmed.

For the Appellant, *A. Hume Campbell, Geo. Lee, Alex. Lockhart, Geo. Hay.*

For the Respondent, *Wm. Grant, W. Murray.*

NOTE.—Lord Elchies has this note on the case: "I was against the separation; yet, in further considering the case, I altered my

1751.  


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MONTGOMERY-  
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MOIR.

opinion. I thought—that the lady having on her husband's information, been represented to the world as a monster of nature for lasciviousness, and a reproach to her sex, and which scandal has, by the husband and his counsel, in all their writings and pleadings, been maintained to be true, though they said it was impossible to prove them—I thought it impossible that thereafter they could live together as husband and wife, that he could wish to take her again to his bosom, or that she could live with the man who, in effect, declares that she is unworthy of living, and who had for ever debarred her from the society of every modest woman who would believe him. That though his justification from the imputation of impotency, wherewith she is said to have reproached him to one or two of her confidants, had made excusable in him to inform his nearest friend of her insatiable appetite, yet he must, at the same time, have resolved to separate from her, because they could not, consistently with the honour of either of them, thereafter live together; and whenever matters came to that pass, the Court could not refuse a separation, and he was to aliment her so long as she was his wife; at the same time, I saw no necessity for such vindication, nor evidence of the truth of what he reproached her with, and far less saw I necessity of propagating that scandal to so many, or maintaining it in courts of justice. Kilkerran also changed his opinion; and, upon the question, it carried to alter the last interlocutor, and to refuse the bill of advocacy *simpliciter*. *Pro*—Lords Minto, Drummore, Kilkerran, Justice-Clerk, Murkle, Shewalton, *et me*. *Contra*—Lords Dun, Haining, and President; but Leven was *non liquet*, and Milton in the Outer House.”—*Vide* Lord Elchies' Notes, vol. ii., p. 193.

1753.

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HIS MAJESTY'S  
ADVOCATE  
v.  
DRUMMOND.

[Kames, Sel. Dec., p. 18.]

HIS MAJESTY'S ADVOCATE, . . . . . *Appellant*;  
MARY DRUMMOND, only Daughter of the  
marriage between James, Lord Drum- }  
mond and Lady Jane Gordon, . . . . } *Respondent*.

House of Lords, 3d April 1753.

PROVISION TO HEIRS AND CHILDREN—ANTE-NUPTIAL CONTRACT  
—IMPLIED CONDITION.—By an ante-nuptial contract, provision was made for daughters, if one, of 40,000 merks, if two, 50,000 &c., payable at their respective ages of eighteen, or on marriage, providing that these should be in full of all they could claim as natural portion, or bairns' part of gear, which they, or either of