

fore not now entitled, on paying the appellant the debt due, to a conveyance of these heritable debts, or to the possession.

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Pleaded by the Respondent.—By the law of Scotland, where a preferable creditor gets possession of the estate of a common debtor the next creditor, on payment of principal, interest, and costs, has a right to come into the place of the preferable creditor, who, on receiving payment of his debt, is bound to grant an assignation thereof to such second creditor so paying to him. The Court below has proceeded on this principle. The preferable creditor has got possession here, which he has retained for 25 years, to the exclusion of the respondents, who having got the amount of his debt ascertained, and being willing to pay the same on such assignation, is entitled to have such a recourse and security granted her. And it is no answer to this to say, that she is not a creditor, because she is in every sense and view of law, a creditor, and the expiry of the legal is completely set at rest by the admission that the heir is entitled to redeem.

After hearing counsel, it was
Ordered and adjudged that the said interlocutors be affirmed, with £100 costs.

For Appellant, *C. Yorke, A. Wedderburn.*

For Respondent, *Al. Forrester.*

Not reported.

ANGUS MACALISTER	-	-	-	<i>Appellant ;</i>
JANE DUN	-	-	-	<i>Respondent.</i>

House of Lords, 2d May 1759.

MARRIAGE—CONSTITUTION OF MARRIAGE.—Circumstances in which marriage held to be constituted by cohabitation and acknowledgment.

THE respondent was the daughter of John Macdonald of Ardnacross, a gentleman of good family. She afterwards married John Dun, a writer in Edinburgh, who died about a year thereafter, leaving her a widow. Soon thereafter a connection was formed with the appellant, and declarator of marriage was raised by her in the following circumstances. The summons set forth, that after her husband's death, being invited into Argyleshire, to visit her relations the Mac-

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alisters, she went there in the summer of 1755, and was received by her cousin, the appellant, and his sisters, with marked regard and attention.

Towards the end of the summer, the appellant proposed to visit Edinburgh in the ensuing winter, and employed the respondent to look out for lodgings for them. She offered them lodgings in her own house, to which, accordingly, they came, but after being there a fortnight, the appellant, thinking himself confined for want of room, removed to a different lodging, while his sister remained with the respondent. His sister remained with her until the end of December, when, having to return to Argyleshire, she left her lodgings, whereupon the appellant removed from the lodgings which he had taken from Mr. Hunter, and took lodgings at her house, under the pretence of giving her the advantage of his board.

She was then only 21 years of age. The appellant was about the same age; and had for some time manifested a strong attachment to her. After some time he declared his love, and proposed honourable marriage. His attentions and assiduity were unremitting, such as it was impossible to suspect,—especially with her, his own cousin, a woman of equal condition in society with himself, and of unblemished character,—that he could have any dishonourable intentions at bottom. He pressed her to marriage, but begged that it might be kept secret until he had an opportunity, upon his return to the country, of reconciling his friends, and particularly Mr. Lamond his uncle, whom he said he regarded as a father, who would object to her without any fortune. Thinking him always honourable, she at length consented to his request, and upon the 27th of February 1756, they were privately married by a clergyman, introduced by the appellant under the name of Gordon, who was a stranger to the respondent. No witnesses were present at the ceremony, neither did the respondent demand any marriage lines. They cohabited together after this at bed and board. Soon after the respondent's marriage, she found herself affected in a very extraordinary manner, and having told her case to her husband, he acknowledged that he had been the cause of her disorder. He pressed her to send for a physician, and desired that she might reveal the secret of her marriage, but the respondent refused from modesty to do so. He brought her medicines from a surgeon of his acquaintance which she took, but her cure getting on slowly, it was thought advisable that he should separate himself from her, and go

into Argyleshire. On leaving, he desired her to continue the medicines he had got for her, and when done, extorted a promise that, if not cured, she would go to Douglas, his surgeon acquaintance, and procure more. She received several letters from his mansion, couched in terms of highest regard; and inquiring when she would be able to come home to his house. One of these, dated 22d April 1756, stated, "My marriage made the damnest noise in this country that ever was heard of." She wrote him that her disease still continued. He wrote her back, enclosing a note for her to take to his surgeon Douglas, in the following terms:—

"Dear Sandy,—The bearer of this and I *being married*, but wants to conceal it for some time, so therefore begs you will not speak of it to any person whatsoever. You know, Sandy, I had the c—p, and most unluckily gave it to her. I beg, for God sake, you'll get her instantly cured. I am," &c.

After this he wrote:

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"A boat goes to Glasgow with my sisters, and will be a fine opportunity for you to come home. I beg you'll not fail to come, and I shall write you when the boat goes out."

In the beginning of August, the respondent's health was so far re-established under Mr. Stratton's care, (another surgeon,) that she was in a condition to comply with the appellant's repeated requests "to come home." Accordingly she intimated her intentions of setting out for that purpose. An express was sent to stop her on her journey, but missed her, and she arrived at his house. He, however, insisted that the marriage should be kept secret; she insisted on being allowed to communicate the marriage to her own mother, to whose house she retired, and where soon he disowned the marriage, and gave out that it was a falsehood. The libel concluded for declarator of marriage and adherence; failing which, for damages for seduction.

On proof, the facts above detailed being proved, and a great deal of other correspondence which had passed between the parties having been adduced:—

The Commissaries at first found facts and circumstances proven sufficient to infer a marriage between the pursuer and defender.

On reclaiming petition, they altered this interlocutor, and found the facts and circumstances not sufficient to infer

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On a bill of advocation the Lords, of this date, unanimously found the facts and circumstances and qualifications proven, relevant to infer marriage. And on further petition the Court adhered.

Against these two last interlocutors the present appeal was brought.

Pleaded for the Appellant.—The story in the respondent's libel and judicial declaration is improbable, inconsistent, and proved in several particulars to be manifestly a fiction. She was much older than the appellant, had been married three years; and it is more likely that she was planning to seduce him, who was fresh from school, and thoughtless and inexperienced, than that he was attempting to seduce her. Looking to the whole proof, it is clear that the respondent has failed to prove a marriage. She alleges a private marriage, but for this there is no shadow of proof; there is no proof of cohabitation as husband and wife, nor of any facts inferring a presumption of marriage. Nor was the letter to Mr. Douglas the surgeon a deliberate acknowledgment of marriage, but written only with the view of saving the respondent's character. There was no current rumour or report of their marriage in Argyleshire, because the marriage, to which his letter to her refers, was a different marriage—a marriage with Miss MacTavish.

Pleaded for the Respondent.—By the law of Scotland actual celebration is not essential to the constitution of marriage; the consent of the parties, or acknowledgment of their being married persons, or cohabiting at bed and board as husband and wife, being sufficient. The cohabitation of the parties in this case is acknowledged: There is also circumstances which presume a private marriage, consented to by the appellant, from the whole letters written. But further, there is an acknowledgment of that marriage in the letter to Douglas, the surgeon, so that the whole proof shows the clearest evidence of a marriage.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 costs.

For Appellant, *Ro. Dundas, Al. Forrester.*

For Respondent, *C. Yorke, Al. Wedderburn.*

Not reported in Court of Session.