

qualifications proved, relevant to infer marriage between the parties, and assoilzie the defender."

No 585.

Reporter, *Lord Brunsfield.*Act. *Honyman.*Alt. *Rolland, Mat. Ross.*Clerk, *Home.*

S.

Fol. Dic. v. 4. p. 170. Fac. Col. No 235. p. 364.

1786. February 16. PATRICK TAYLOR against AGNES KELLO.

AGNES KELLO, the daughter of a farmer, and possessed of a considerable fortune for one of her rank, received the addresses of Taylor, a person of equal condition, but who, by extravagance, had reduced himself to bankruptcy, and was unacceptable to her relations.

Having drawn up the following writing, he gave it to her, who made a copy of it, which she subscribed thus: "Skirling Mill, February 16. 1779. I hereby solemnly declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband; and remain your affectionate wife, Agnes Kello." This written declaration she delivered to him, and received from him another, *mutatis mutandis*, in the same terms.

Taylor afterwards continued, as formerly, to visit Agnes Kello at her mother's house; but there was no sufficient evidence of *concupitus*; though it has been since affirmed by the former, notwithstanding the denial of the latter. In the meanwhile, he employed the intercession of some of his relations to urge the mother's consent to a regular celebration of marriage, which was then without effect. The above writing, however, he kept secret from every one, even from those confidential persons themselves; nor was it ever heard of till the mother happened to discover the transcript of it, that was in her daughter's possession, when it was immediately destroyed. The latter then wrote to Taylor, requiring him to restore that copy which she had given to him.

He refused to comply with this demand; but his visits were still repeated: and in spring 1780, proclamation of bans between him and Agnes Kello was at length consented to, and twice made; but, before the third time, it was stopped by her or her relations. For two years after this period, their meetings had become very unfrequent; and from 1782 to 1784, these ceased altogether, inso-much that they had not seen each other during twenty-one months.

In the last-mentioned year, Agnes Kello was about to be married to another person, when Taylor instituted against her an action of declarator of marriage.

The Commissaries pronounced the following sentence: "In respect it appears that the defender, when arrived at an age when, by the law of Scotland, she was deemed capable of consent, voluntarily and deliberately granted to the pursuer the declaration libelled on, and received from him a counter-declaration, of the same import; find the mutual obligations relevant to infer marriage between the parties; and find them married persons accordingly."

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Two parties exchanged missives, declaring each other to be man and wife. There was no evidence of *concupitus*. Subsequent to the missives, steps were taken towards a public celebration, which were never carried into effect. Found there was no marriage.

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A bill of advocacy against this sentence having been refused by the Lord Ordinary, Agnes Kello, in a reclaiming petition,

Pleaded; The writing in question did not import consent *de præsenti*, but merely an intention of marrying at a future period. The parties, from their education and principles, were not likely to have in contemplation any marriage that was not regular and solemn; and their after conduct, particularly as to the proclamation of bans, evinces their sense of no actual marriage having taken place. The words themselves, of the writing, have not legally that import, being almost the same as, without any such meaning, are employed in all antenuptial contracts of marriage, Erskine, B. 1. Tit. 6. § 3.

But even consent *de præsenti*, if given *remotis arbitris*, and unaccompanied by celebration, by cohabitation, or by consummation, is insufficient to constitute marriage. Such is not the *consensus qui facit matrimonium*, Kames' Euclid, p. 29.; l. 5. D. De rit. nupt.; l. 22. C. De nupt.; Dirleton, *voce* Sponsalia; Bankton, vol. 3. p. 60. & 61.; 29th June 1756, Cameron *contra* Malcolm. No 581. p. 12680.

Answered, The authorities which have been adduced to prove that consent *de præsenti* is not of itself effectual for constituting marriage, do, in truth, all relate to *sponsalia*, where the consent is *de futuro*, while the contrary is the established doctrine, Stair, B. 1. Tit. 4. § 6.; Erskine, B. 1. Tit. 6. § 1. And as to the import of the writing, no words, surely, more expressive of consent, could have been employed by the parties, than those declaring themselves to be each other's just and lawful husband and wife.

The Court were divided. Some of the Judges (*concupitus* being held to be out of the question) considered the writing, as meant by the defender, to signify her willingness merely to enter into a regular marriage with the pursuer; a construction said to be enforced by the received notions of people of that class. Besides, the circumstances noticed by the defender, the pursuer's not having attempted, needy as he was, to avail himself, as the defender's husband, of her fortune, which that relation would have put in his power, was understood to indicate strongly his sense of there being no marriage. A majority, however, of the Court, independently likewise of consummation, thought, agreeably to the judgment of the Commissaries, that the marriage was sufficiently established by the terms of the writing. At the same time, there were suspicions concerning consummation, which did not seem to be altogether disregarded.

The Court adhered to the interlocutor of the Lord Ordinary, refusing the bill of advocacy.

Lord Ordinary, *Braxfield*.Act. *C. Hay*.Alt. *Mat Ross*.Clerk, *Sinclair*.

S.

Fol. Dic. v. 4. p. 170. Fac. Col. No 260. p. 396.

* * This case was appealed :

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THE HOUSE OF LORDS, 16th February 1787, pronounced the following judgment:—" It is DECLARED, That the two letters insisted upon in this process, signed by the parties respectively, and mutually exchanged, were not intended by either, or understood by the other, as a final agreement; nor was it so intended or understood, that they had thereby contracted the state of matrimony, or the relation of husband and wife, from the date thereof; on the contrary, it was expressly agreed that the same should be delivered up, if the purpose they were calculated to serve proving unattainable, such delivery should be demanded; which last-mentioned agreement is farther proved by the whole and uniform subsequent conduct of both parties; therefore ordered and adjudged, that the interlocutors complained of be reversed; and that the Court of Session do remit the cause to the Commissaries, with instructions to assoilzie from the declarator of marriage."

1786. March 3. HELEN INGLIS *against* ALEXANDER ROBERTSON.

MR ROBERTSON, a merchant of some consideration, was sued in an action of declarator of marriage, by Helen Inglis, a servant girl, with whom he had formed a connection. He had taken her from her service, put her to school, and maintained her during an intercourse that subsisted uninterrupted for fourteen years.

In that time he addressed many letters to her, under the appellation of his dear wife, subscribing himself her loving husband; made her presents of a gold watch, gold rings, his father's and mother's miniature pictures, and other such like articles; was frequently seen to behave towards her with the affectionate and respectful manner of a husband; and, on one occasion, when in company with him, she was drunk to as his wife, he seemed to assent to that mode of address.

On the other hand, it did not appear from the evidence, that they were considered by those around them to cohabit as husband and wife; while it was proved, that she, at different times, towards the close of their correspondence, with solemn imprecations, declared that she had never had any carnal communication with him; and, in particular, that she did so to a clergyman, previously to her being admitted to the sacrament.

In an action of declarator, which was instituted by Helen Inglis upon Robertson's entering into another marriage, and in his defence, against which he did not deny *concubitus*,

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Continued presumed cohabitation of a man and his servant, letters addressed to her under the appellation of his wife, and valuable presents given to her by him, with some other circumstances, found to constitute a marriage.