

corded, it was totally inoperative as such. Even assuming that it was not a new settlement, still it was a conveyance under which the institute enjoyed the estate. And in this view, it was equally necessary, in terms of the entail act, to have engrossed the limitations of the first entail in this title, which not having been done, and the general reference contended for not being sufficient in law, did open the estate to the diligence of his creditors.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *Ilay Campbell, Alex. Abercromby, J. Anstruther.*

For Respondent, *Alex. Wight, Wm. Adam.*

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ALEXANDER ROBERTSON, Merchant in Portsoy, *Appellant* ;
HELEN INGLIS, Daughter of JOHN INGLIS, *Respondent.*

House of Lords, 14th Feb. 1787.

MARRIAGE BY COHABITATION AND ACKNOWLEDGMENT.—Circumstances in which the marriage was held complete.

This was a declarator of marriage and adherence, brought by the respondent, Helen Inglis, against the appellant, Alexander Robertson, setting forth that he, Robertson, had in 1769, made his addresses to her,—that he had urged her to be his wife, which, after some solicitation, she agreed to, and soon thereafter he fitted up a house for her,—that she, the pursuer, thereafter became desirous of being formally married by a clergyman, but he told her that this was not necessary, and that they were really man and wife, and that the ceremony would only give publicity to a thing which he wished concealed from his father and mother. That, in order to satisfy her, he wrote out and delivered to her a contract of marriage, which he afterwards abstracted from her repositories,—that, in virtue of these solicitations, and on the faith of these assurances, they cohabited together, and lived and resided in the house above mentioned as man and wife, from the year 1769 to 1783, during which time he behaved himself to her in all respects as a husband would do to his wife,

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by providing the necessaries of life, and by owning and acknowledging her as such; and she was owned and acknowledged as his wife, by the minister of the parish where he resided, and by the whole neighbourhood. That by the ten letters produced, he acknowledges her as *his dear wife*, and subscribed himself *her affectionate and loving husband*. The action was thus founded on three grounds, 1. Promise with subsequent copula. 2. Habit and repute; and, 3. Acknowledgment of marriage. In addition to these facts, the house in which they lived had been bought on her account. She was originally a servant, but, preparatory to marriage, he sent her to board, and for her education. On that event, he had given her an annuity of £50 per annum, in case of his predecease. When latterly he fell off in 1783, and proposed marriage to another female, Miss Brown, and this marriage was to be celebrated by a clergyman, none of the clergymen about the place would perform the ceremony, so public was the repute of their being man and wife; and Miss Brown and he had to get married by acknowledging, and going to bed before two witnesses, taking protest in the hands of a notary. In defence, the marriage was denied, and on proof being allowed, and taken on the import of the proof, the appellant contended that she had failed in establishing any of the three grounds of her action.

Feb. 23, 1785. The Commissaries pronounced this interlocutor, “ Having
“ resumed consideration of this cause, with the deposition
“ of the witnesses, and letters and writs produced, find evi-
“ dence sufficient for determining the cause, without the
“ deposition taken by the Commissioner, and sealed up by
“ him, which the Commissioner refuses to open. Find the
“ facts, circumstances, and qualifications proven, relevant
“ to infer a marriage between the pursuer and defender.
“ Find them married persons accordingly, and find and de-
“ clare in terms of the libel.” On advocacy, the Lord
Ordinary remitted back to the Commissaries to open the
July 8, 1785. sealed depositions, whereupon the Commissaries found, that
the depositions, when opened, did not alter their view of
the case, and therefore adhered to their former interlocutors.
On advocacy, the Lord Ordinary reported the case to the
Court, whereupon their Lordships directed the Lord Ordina-
ry to refuse the bill of advocacy, and to remit simpliciter
Mar. 3, 1786. to the Comissaries.

Against these interlocutors the present appeal was brought.
Pleaded for the Appellant.—It is admitted that there was

no actual celebration of marriage; and a promise of marriage with copula following is not proved. The letters libelled contain no evidence of a promise *de futuro*, or of a consent *de presenti* to present marriage; and the parole evidence does not prove cohabitation or acknowledgment indicative of present matrimony; but the Court of Session have held that marriage may be constituted without either solemnization or conjugal intercourse,—a proposition quite untenable in the law of Scotland. But, on the supposition that marriage can be completed without either solemnities or conjugal intercourse, and by naked consent alone, there is no sufficient evidence of such matrimonial consent in this case, so as to constitute marriage. All the evidence consists in the letters produced by Helen Inglis; but these only prove the appointment of meetings held for a different purpose, namely, for clandestine intercourse, and they are addressed to her in her maiden name. These facts, taken in connection with those sworn to by Mr. Lawtie, the minister to whom she goes for advice in 1782, clearly show that no marriage existed. She denied to him having had carnal intercourse. What then are the specific grounds of marriage? The law of Scotland does not countenance constructive marriage, by blending together circumstances which relate to separate and distinct grounds of marriage, and inferring from these, when so massed together, the relation of marriage. Some specific and relevant ground must be taken and proved. The pursuer has changed her ground twice in the course of the action,—possibly she may change it a third time, and pretend that carnal intercourse, or clandestine cohabitation, makes marriage as effectually as open habit and repute cohabitation, which law requires, in order to create a presumption of marriage. Such a mode of constitution is without precedent in law. The letters only prove a clandestine and private intercourse, and no more. They do not prove habit and repute cohabitation; they do not prove carnal intercourse; and the whole evidence is totally destitute of proving any known form of marriage recognised in the law of Scotland.

Pleaded for the Respondent.—By the law of Scotland, if a man and woman consent to accept of each other as spouses, marriage between them is that instant created, though there be no witnesses present, and no consummation follow, the rule being *consensus non concubitus* makes marriage. The acceptance and consent by itself is marriage, and this consent,

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if denied, may be proved by the persons present, if any, or if not, by the deeds or writings of the parties, or the subsequent facts and circumstances clearly indicating such prior consent. In the present case, the letters prove this previous consent to marriage. They contain an express acknowledgment that, at sometime previous to their date, they had become man and wife. They are addressed to the respondent by "My dearest Nellie,"—"My dearest wife," and end with "your affectionate husband." They apprize her of his being obliged to leave town, &c., and state when he would be home, and when he would see her. Besides, this previous consent is proved by their public cohabitation as man and wife, and his calling her by the appellation of his wife in the presence of others, by his putting her to school, by purchasing and providing her with a house, and by giving her an annuity,—facts which are irreconcilable with anything but a clear marriage.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *affirmed*.

For Appellant, *Ar. Macdonald, T. Erskine*.

For Respondent, *Alex. Abercrombie, Wm. Adam*.

NOTE.—The letters founded on had no date, and in regard to the case, Lord Braxfield, in giving judgment in the Court of Session, stated that there were "three ways of making marriage by the law of Scotland, celebration, promise with subsequent copula, or cohabitation. This case falls under the last of these."

AGNES KELLO,	-	-	-	-	<i>Appellant;</i>
PATRICK TAYLOR,	-	-	-	-	<i>Respondent.</i>

House of Lords, 16th February 1787.

MARRIAGE—CONSTITUTION OF Do.—Circumstances in which a written acknowledgment of each other as husband and wife, not seriously gone into on the part of the female, but immediately repented of, did not constitute marriage.

At the annual market fair of Skirling, the appellant, Agnes Kello, who was the only daughter of a farmer in Skir-