(see APPENDIX); and surely her adopting a different line of conduct since Mr Fullerton's death cannot affect the question. No 588.

When the cause was advised, some of the Judges thought that the letter, when taken in conjunction with other circumstances, afforded sufficient evidence that a marriage had been constituted during the lifetime of Mr Fullerton. The woman's being in the knowledge of its execution, (it was said) was equivalent to its being delivered to her; at any rate, as it was merely a declaration of a fact, which had already taken place, delivery was not essential; and, even if considered as constituting a marriage *de præsenti*, her acceptance of it was to be presumed.

A great majority of the Court were of an opposite opinion. As the law of Scotland (it was observed) requires no definite form for the constitution of marriage, it becomes necessary to attend to the views of parties in each case. In the present case, Mr Fullerton meant to do what the law cannot sanction. His pride prevented him from making Jean Anderson his wife, but he wished to bequeath to her the *status* of his widow, with a view to legitimate the children. While the letter, however, remained in his possession, it was revocable, and was binding on neither party, and therefore it does not signify whether its execution was or was not communicated to Mrs Anderson.

The bill of advocation was refused.

Lord Ordinary, *Abercromby*. Act. *D. Cathcart, Inglis*. Alt. *M. Ross*.

D. D. *Fac. Col. No* 183. *p.* 435.

No 589.

A long correspondence, in which the parties stiled each other husband and wife, and a declaration of marriage, before witnesses, found insufficient to constitute a marriage, where there was no consummation, and it appeared, that, at the time of the declaration, the alleged husband had resolved never to cohabit with the person he declared to be his wife.

1796. *December* 6. HELENA MACLAUCHLAN *against* THOMAS DOBSON.

HELENA MACLAUCHLAN brought a declarator of marriage against Thomas Dobson, founded on the following circumstances.

In 1787, Thomas Dobson, a minor, was sent from Ireland to Greenock, to be bred a merchant, where he became attached to Miss Helena Maclauchlan.

Miss Maclauchlan having left Greenock, they commenced a correspondence, in which, with many expressions of mutual affection, they stiled each other husband and wife. Their attachment was disapproved of by the relations of both, particularly by the father of Dobson, on whom he depended, and who threatened to disinherit him if it was continued. Accordingly, it was agreed that the letters, *hinc inde*, should be restored, and all further thoughts of their union given up. With this view, Dobson, on the 16th August 1790, carried the letters he had received to the house of a relation, where the pursuer then resided, and delivered them to her; she, on the other hand, delivered up his letters; but a few minutes afterwards, she, without the knowledge of her relations, who were aware of the object of the meeting, asked and got them back from him, and he quitted the house, leaving her in possession of the letters on both sides.

No 589.

All the defender's letters to the pursuer were produced by her, but only four of her letters to the defender, she having destroyed the rest before the commencement of the action. In those produced, she subscribed her name "Helena Dobson."

From August 1790 to July 1791, the parties neither met nor corresponded with each other.

At last, in the beginning of July 1791, the defender received a letter from the pursuer's agent at Edinburgh, informing him, that he had got directions to raise a declarator of marriage against him. The defender, in answer, requested that no steps might be taken in it till he should have an opportunity of seeing the pursuer, and settling the matter amicably. He at the same time stated the ruinous consequences of forcing them into a marriage.

About the same time, the defender received a letter from the pursuer, requesting a meeting, at the house of Mr Gordon, a relation, where she then resided. The defender complied. The meeting took place on the 16th July; but parties were not agreed as to what passed at it, and no parole proof was taken in the cause.

The defender stated, in a judicial declaration, that, on his arrival at Mr Gordon's, he first met with the pursuer, and that, in a private conversation between them, it was agreed, that he should acknowledge her as his wife, in presence of her relations, but that she should never claim him as her husband; that afterwards he was for some time alone with Mr Gordon, to whom he communicated what had been agreed on; and upon this Mrs Gordon, the pursuer, and another lady, came into the room, and the defender, in their presence, declared the pursuer his wife.

The pursuer agreed as to what passed in presence of her friends, but denied the result of the previous conversation.

It was admitted by both, that the defender left the house a few minutes after this interview, and that neither then, nor at any other period, did any *concubitus* take place between them.

Next day the pursuer wrote to her agent not to proceed with the declarator, as the defender had acknowledged the marriage; and in a settlement executed by her father, some months after, she was designed wife of the defender.

The pursuer produced several letters from the defender, between the date of this meeting and December 1791, addressed to "Mrs Dobson;" in which, though he admitted the acknowledgment, he declared his resolution to have no farther intercourse with her.

In December 1791, the pursuer came with a friend to Greenock, and sent for the defender. Parties were again at variance as to what passed at this meeting. The defender stated, that the pursuer proposed that a clergyman should be sent for, to marry them immediately, and that he opposed this; but agreed to make a settlement on her, on condition of her renouncing her claim to him, and that a deed for that purpose should be drawn out by her agent, and sent to

the defender, for his consideration; and that he refused to sign the deed, afterwards drawn out, because, instead of renouncing her claim to him, it proceeded on the narrative of her being his wife. No 589.

The pursuer denied the proposal of sending for a clergyman, and insisted, that the sole object of the meeting was to adjust the terms of a separate maintenance. In proof of this, she produced the letter from the defender, in which he refused to subscribe the deed, where, without complaining of the terms in which it was conceived, he stated simply, "That he had changed his opinion."

The action of declarator was afterwards raised.

The Commissaries gave judgment in favour of the pursuer.

In an advocation, the points at issue were, 1*mo*, Whether the whole circumstances of the case afforded evidence of a consent, *de præsenti*, to enter into marriage? 2*do*, Whether consent, *de præsenti*, without either celebration or consummation, be sufficient to constitute a marriage?

On the *second* point, the pursuer

Pleaded, The maxim, in the civil law, *Quod nuptias non concubitus sed consensus facit*, D. Lib. 50. Tit. 17. l. 30. De Reg. Juris; Huber de Nuptiis, p. 23. Lib. 24. Tit. 2. De Divortiis; Vinnius, Lib. 1. Tit. 9. § 1.; Voet. Lib. 23. Tit. 2. § 2.; Cujac. in D. De Rit. Nup. v. 1. p. 809. in God. Lib. 5. Tit. 1. De Spons. et Arrhis, is completely recognised by the law of Scotland, in which marriage is considered as a consensual contract, which, like any other, requires nothing but consent to complete it, Mackenzie, B. 1. Tit. 6. § 1. 2. 3. 6.; Stair, B. 1. Tit. 4. § 6.; Bankton, B. 1. Tit. 5. § 22. B. 4. Tit. 45. § 46.; Erskine, B. 1. Tit. 6. § 2. The law has, indeed, enjoined certain solemnities in the celebration of marriage. These are required, however, only as evidence of the consent, *de præsenti*. The neglect of them subjects to penalties; but it does not create a nullity, if the consent be otherwise established.

It is a settled point, that a marriage regularly celebrated, is obligatory without consummation, and that a promise, *subsequente copula*, constitutes a marriage; or, what is the same thing, gives room for a declarator, with a retrospect. In both cases it is evident, that what the law requires is evidence of consent; and that being established, the mode of adhibiting it cannot essentially affect the contract.

The same law prevailed on the Continent before the Council of Trent, Dupin's Eccl. Hist. v. 3. p. 623. fol. edition; Pallavacino, Hist. Council of Trent, p. 275.; Father Paul, Hist. Council of Trent, p. 537.; and in England, before the marriage act, 26th Geo. II. c. 33. Blackstone, b. 1. c. 15. p. 439.; Burn's Eccles. Law, v. ii. p. 421. 422. 436. 437.

Answered, To constitute a marriage, solemnities of some sort have in all countries been required. According to the early Scottish councils, marriage could only be constituted by celebration *in facie ecclesiæ*; see acts, Council 1242, 1269, published by Lord Hailes. By the Reformers, celebration, after proclamation of banns, was held to be necessary; Archbishop Spottiswood's Church History, p. 172.; Directory for Worship, 1643; Assembly 1690, acts

No 589. 6. 7.; 1715, act 15. Our present law still requires that it be actually celebrated, if not by a clergyman, at least by a Magistrate, or some person assuming one of those characters. Accordingly, all the statutes against clandestine marriages proceed on the supposition, that they have been actually celebrated, 1661, c. 34.; 1698, c. 6. And it is a settled point, that a promise of marriage, however deliberately given, may be resiled from.

Even cohabitation, as man and wife, creates only a presumption that marriage has been celebrated, which may be more or less easily redargued, according to circumstances, 1503, c. 77. Mackenzie's Observations, 1551, c. 19. Mackenzie's Criminal Law, p. 125.; and a promise, *subsequente copula*, only creates an obligation to enter into marriage, upon the same principle that, in other cases, an obligation, null in itself, becomes binding, *rei interventu;* Erskine, B. 1. Tit. 6. § 3.; Bruce, 21st January 1715, Young against Irvine and Anderson, No 68. p. 8473.; Dirleton, *voce* Sponsalia; Stewart's Answers; 1690, c. 5. Confession of Faith, c. 24. § 5.; Kames's Euclid, p. 29. 31. 32. et seq.; Craig, Lib. 2. d. 18. § 19.; 16th December 1628, Craig against Sinclair, No 4. p. 10034. But in no instance has a mere declaration of consent, without celebration or consummation, been sustained; see 29th June 1756, Cameron against Malcolm, No 581. p. 12680.; 18th November 1766, Johnston against Smiths, No 582. p. 12681.; 25th June 1782, More against Macinnes, House of Lords, No 584. p. 12683.; 16th February 1787, Taylor against Kello, House of Lords, No 586. p. 12687.

Lord Glenlee, probationer, reported the cause on informations.

The Court were very much divided in opinion. On the one hand, it was thought, that the whole circumstances of the case, particularly the meeting of the parties in July 1791, afforded evidence of consent *de præsenti* to enter into marriage, and that this alone is required by the law of Scotland.

On the other hand it was

Observed, The letters, previous to the meeting in 1791, establish only an intention to marry at a future period, which would not have been binding on the defender; and it seems difficult to give a higher effect to what passed afterwards, where the nominal consent *de præsenti* to enter into marriage, was attended with an avowed resolution not to live in the relation of husband and wife.

Besides, although by the law of Scotland there are no precise forms, which are indispensable in the solemnization of marriage, yet, *rebus integris*, it can only be constituted by a consent adhibited in the presence of a clergyman, or in some other solemn mode equivalent to actual celebration.

The bill was at first (19th May 1795,) refused; but, upon advising a reclaiming petition and answers, it was passed by a narrow majority.

N. B. Before the last interlocutor was pronounced, the defender had left Scotland.

Lord Ordinary, *Glenlee*. For the pursuer, *Hon. H. Erskine, Fletcher.* Alt. *Solicitor-General Blair.*

D. D. *Fac. Col. No 4. p. 8.*