1787.

KELLO
v.
TAYLOR.

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 adressed 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 irreconcilcable 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, - - - - *Appellant;*
PATRICK TAYLOR, - - - - *Respondent.*

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-

ling-Miln, became acquainted with the respondent Taylor, who had been a farmer in Birkenshaw. Taylor followed up this accidental meeting, by paying his addresses to her at her mother's house; he made an impression on her. But her parents inquiring more particularly into his character, were not satisfied. Their daughter was possessed of £2000, and her suitor was on the eve of a second bankruptcy. After eighteen months unsuccessfully soliciting her in marriage, he obtained the following writing signed by her, which he represented to her at the time to be quite innocent, and to mean no more than a declaration of her love and affection for him, and a promise of marriage at some future period, after her parents were satisfied.

"Skirling Miln, Feb. 16, 1779. I hereby solemnly de-
"clare you, Patrick Taylor in Birkenshaw, to be my just and
"lawful husband; and remain your affectionate wife. Sign-
"ed Agnes Kello. To Mr. Patrick Taylor in Birkenshaw."
He took this and kept it, leaving in her possession a counter acknowledgment signed by himself. No consummation or copula followed. They separated immediately; and a few days thereafter, when the appellant reflected on the matter, she came to think it improper and a "foolish business," and immediately sought back the line. He at first evaded her request; then promised to give it her back if she would give him an obligation for £500. About three months thereafter he came, along with two persons, one a relation and the other his creditor, and endeavoured to obtain the consent of her parents to the match, and also consent to the proclamation of banns. This proved unsuccessful. In a week thereafter she wrote him for a return of the letter, begging him "to return that foolish line," and stating that he could not be received in person till that was done. No answer was returned to this letter, which was dated in May 1779, and no further correspondence took place until the beginning of the year 1780, when he paid her a few visits. He then, on the eve of bankruptcy, came and prevailed on her parents to allow proclamation of banns to proceed on the ensuing Sunday. This, after considerable reluctance, was consented to; but, in the meantime, inquiries having been made, they dispatched a messenger to stop the proclamation of banns on Sunday. He arrived too late for the first and second proclamation, but only in time to stop the third. All further correspondence then ceased. And the present action of declarator was only raised by the respond-

1787.

KELLO
v.
TAYLOR.

ent three years afterwards, when he heard that another was paying his addresses to her. In defence to the action, she stated that the acknowledgment was not a *de presenti* marriage, but only a promise of future marriage; besides, here the writing had been forced from her, and had been virtually retracted. That a private writing, supposing immediate consent intended, was not sufficient, unless consummation or cohabitation followed, which was the law laid down by the civil law, Lib. 22, Cod. de Nupt.—Lib. 13, ejusd. tit.—Cujacius observ. lib. 6, c. 20—Puffendorff, lib. 6, c. 1, § 14, and the law of Scotland, Dirleton's Doubts, tit. Sponsalia—Bankton's Inst. vol. 3, p. 60—Stair's Inst. p. 26. That the writing here was followed by no consummation, and, besides, he had agreed to return the letter to her whenever she required it. Further, as evidence that the letter was only understood as a promise or declaration of an intention to marry at some future period, she founded on his repeated solicitations thereafter to get her consent, and the consent of her friends, to the marriage, which the act with reference to the proclamation of banns itself demonstrated. The respondent, on the other hand, contended that *consensus non concubitus facit nuptias*, and in support of this doctrine, that marriage is constituted by consent alone, declared by the parties *per verba de presenti*, either by writing or in the presence of witnesses, the following authors were cited:—Stair's Inst. B. i. tit, 4, § 6—Bankton's Inst. B. 4, tit. 45, § 45, 48—Ersk. Inst. B. i. tit. 6, § 1.

The Commissaries pronounced an interlocutor of this
Mar. 23, 1785, date, after ordering the judicial declaration of both parties:

"Having resumed consideration of the cause with the de-
"clarations emitted by the parties, in respect it appears
"that the defender, when arrived at an age when, by the
"law of Scotland, she was deemed capable of consent, vo-
"luntarily and deliberately granted to the pursuer, the de-
"claration libelled on, and received from him a counter de-
"claration of the same import; find the mutual obligations
"relevant to infer marriage between the parties; find the
"pursuer and defender married persons accordingly, and
"decern." The case having been brought by advocation to the Court of Session, the Lord Ordinary refused the bill, on reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—There is no authority in law

for holding that any private writing, supposing consent *de presenti* intended, *ipso facto* makes marriage. There is no precedent for any such doctrine. Consent is by itself only a step; but, in order to constitute marriage by it, something more must follow. Subscribing two lines bearing that she takes a man for her husband, or a man declaring that he takes a certain woman for his wife, by a like writing, is not marriage by the mere act of writing, if nothing follows; because such a writing can in no view be that deliberate *de presenti* consent which the law requires; and most assuredly it is not every declaration of consent *de presenti* that will make a marriage. Such consent must be serious—must be solemn and deliberate. There is no evidence of this nature in granting this acknowledgment. Nothing but levity, foolishness, and want of consideration appear. Artful contrivance it was on his part; unreflecting foolishness on the part of the female. She repents this foolish affair in two days, burns her own copy, demands back the lines which he held—a circumstance which is decisive at once that such consent, if any existed, was not serious or solemn, but given rashly, and retracted immediately. Had such consent been solemn, and had the parties by that act been married, they would not have lived apart. The appellant would not have refused, as she did, to proceed any farther to consummate it, and he would not have acted altogether inconsistent with the notion of a marriage already existing. But even supposing any thing was meant by this foolish letter, it was no more than a promise or declaration of intention to marry at some future period. That such was the meaning of the document is demonstrated by his whole subsequent acts—his repeated solicitations to have the marriage celebrated, and his twice attempting to have celebration of banns. Holding it therefore only as a promise, on which no copula and no consummation having followed, it was not sufficient to constitute marriage by the law of Scotland.

Pleaded for the Respondent.—Marriage is a consensual contract, which is perfected by consent alone, cohabitation or consummation not being essential, but only a concomitant or consequence of the constitution of marriage. Consummation is not the primary aim and condition of marriage, it is only an accessory. And though parties, who from accident or natural causes, are incapable of consummation, may insist on setting aside the marriage, yet this is not because such consummation is essential to the constitution of

1787.

KELLO
v.
TAYLOR.

the contract, but only that one of them is not able to perform the obligations incumbent upon him; but it is no good reason for annulling complete consent and vacating the contract, where both parties are able to fulfil it, because one of them refuses to do so. Celebration therefore being unnecessary, and consent having been here given, the question is, whether the written acknowledgment is complete evidence of that consent *de presenti.* Now really the writing here is so plain and simple in meaning, as to render it impossible for any one to mistake its import. It is clearly a *de presenti* consent. Added to this, there is a strong circumstantial evidence of a *copula* having followed, because, in the general case, such acknowledgments are usually granted only to give a legal sanction and colour to such a connection. The writing therefore was given as a solemn consent to *de presenti* marriage, and every thing in the relation of man and wife would have followed, had it not been for the injudicious interference of her friends. Her affections were already his; and her own and the future happiness of the respondent rest on the decree of the Court of Session being affirmed.

After hearing counsel, it was

" Declared that the two letters insisted upon in this pro-
" cess, dated the 16th day of Feb. 1779, signed by the
" said Patrick Taylor and Agnes Kello, 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 there-
" by contracted the state of matrimony, or the relation
" of husband and wife, at and from the date thereof; on
" the contrary, it was expressly agreed, that the same
" should be delivered up, if the purpose they were cal-
" culated to serve proved unattainable, whenever such
" delivery should be demanded, which last mentioned
" agreement is further proved by the whole and uniform
" subsequent conduct of both parties. Therefore or-
" dered and adjudged that the interlocutors complain-
" ed 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."

For the Appellant, *Ar. Macdonald, Rob. Dundas.*
For the Respondent, *Jas. Boswell, C. Hay, Wm. Adam.*

NOTE.—Unreported in Court of Session.