SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

M'ADAM, Esq.—*Appellant.*
WALKER and others—*Respondents.*

May 17. 19. 21. 1813.

MARRIAGE.—A DECLARATION OF CONSENT DE PRÆSENTI CONSTITUTES A MARRIAGE PER SE.

M'ADAM keeps a woman in his house for some years as his mistress, and, as appears from several circumstances throughout the course of that connexion, contemplates the probability of its terminating in marriage. He, on a certain day, calls some of his servants to witness his marriage, and in their presence, declares that she is his wife, and that his children by her are legitimate. She rises, gives her hand, and courtsies in token of assent, but says nothing. This *per se*, without any further ceremony, constitutes a complete and valid marriage, *ipsum matrimonium*.

THE late Quintin M'Adam of Graigengillan was proprietor of very valuable estates in the county of Ayr, and stewartry of Kirkcudbright, to a part of which he had succeeded under an entail executed by his father, and the remainder of which he held in fee-simple, and had disponed to trustees for the benefit of his own lawful issue in the first instance, and of a certain series of heirs to be appointed in an additional entail to be executed by these trustees. In 1800, he took into keeping the Respondent, Elizabeth Walker, a country girl then residing with her brother, a farmer, in the neighbourhood of his mansion-house at Berbeth. In this situation she continued to live with him till the 22d of March, 1805, when in the presence of some of his servants, he declared that she was his wife, and that his children by her were legitimate. It was not pre-

Commencement of Mr. M'Adam's connexion with Elizabeth Walker, Feb. 1800.

March 22, 1805. Declaration of marriage.

tended that there was any *copula* subsequent to this declaration. In the afternoon of the same day, he was found dead in his own house, with a pistol grasped in both hands, and in short, under circumstances which left no reasonable doubt of his having committed suicide.

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Various proceedings took place upon a competition of brieves between the trustees under Mr. M'Adam's settlements, who were also the tutors of his children by Elizabeth Walker, and the Appellant, Mr. Alexander M'Adam of Grimmet, who was the next heir under the entail executed by Quintin M'Adam's father, failing lawful issue of his son. The question was, Whether the Respondent, Elizabeth Walker, had been lawfully married to the deceased, Quintin M'Adam, and of course whether the children were legitimate. The Court of Session decided that this question ought to be tried by counter-actions of declarator of bastardy, and of legitimacy, in the Consistorial Court, at the instance of the opposite parties.

An action of declarator of marriage and legitimacy was immediately instituted in the Consistorial Court by E. Walker and her children, and also by the tutors. The summons set forth, "that the "Pursuer, Elizabeth Walker, resided with the said "Quintin M'Adam for some years, during which "period he treated her with affection and respect, "and she having borne to him two children, and "having become again pregnant, he, in the month "of March last, determined immediately to put in "execution a wise and just resolution he had some "time before deliberately formed, and occasionally

Action of declarator of marriage, &c. by Elizabeth Walker.

Facts stated in the libel of the summons.

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" expressed, to render his children legitimate, and " his connexion with their mother honourable and " indissoluble. That, in pursuance of this resolu- " tion, the said Quintin M'Adam, did, in particu- " lar, on Thursday, the 21st day of March last, " ride to the house of David Woodburn, his factor, " at Bellsbank, situated about two miles from his " Mansion-house of Berbeth, when he told the said " David Woodburn, that he was resolved imme- " diately to acknowledge his marriage with the said " Pursuer, Elizabeth Walker, and wished that he " would write their contract of marriage; but which " Mr. Woodburn from his unacquaintance with the " form of such a writing, declined to do; and pro- " posed to the said Quintin M'Adam to send for " the Pursuer, Thomas Smith, his ordinary man " of business, to draw up the same. That the said " Quintin M'Adam immediately approved of this " suggestion, and said that he would do so; and " accordingly after his return to Berbeth, on the " said 21st day of March, he expressed to the said " Pursuer, Elizabeth Walker, his wish and deter- " mination, that their marriage should be declared " without delay; and mentioned that he had re- " solved to send for the said Thomas Smith to write " their marriage-contract; to all which the said " Pursuer fully assented. That on the said 21st " day of March, the said Quintin M'Adam accord- " ingly wrote, with his own hand, the following " letter, addressed to the said Pursuer, Thomas " Smith. 'Berbeth, 21st March, 1805. Dear Sir, " As I intend to marry Miss Walker immediately, " come out as soon as you receive this; and bring

" stamped paper to write the contract, and every
" thing requisite to draw up a deed, to have the
" whole of my landed property that I now have, or
" may afterwards acquire, strictly entailed.—I am,
" dear sir, sincerely yours. Q. M'ADAM. Mention
" this to no person, not even to your son. Q. M.'

" That on the evening of the said 21st day of
" March, the said Quintin M'Adam delivered this
" letter to one of his servants, with directions to
" carry it next morning to the Post-Office at Ayr;
" and the said letter was duly received in Edin-
" burgh, on the morning of the 24th day of March.
" That the said Quintin M'Adam, on the morning
" of Friday the 22d day of March last, after walk-
" ing out, returned home to breakfast, when he
" told the said Pursuer, Elizabeth Walker, that he
" wished to declare their marriage immediately,
" without waiting for Mr. Smith's arrival; and the
" said Elizabeth Walker having expressed her sa-
" tisfaction and consent, the said Quintin M'Adam,
" between the hours of ten and eleven o'clock of the
" forenoon of the said day, desired his house-ser-
" vant, George Ramsay, to call in three of his men-
" servants, to wit, Robert Galt, William M'Gill,
" and James Richardson. That the said William
" M'Gill could not then be found; but the said
" George Ramsay came soon after into the dining-
" room, along with the said Robert Galt, and James
" Richardson, when the said Quintin M'Adam told
" them, that he had called them to be witnesses
" to his marriage; and immediately thereafter asked
" the said Pursuer, Elizabeth Walker, to rise, which
" she did; and having given her hand to the said

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" Quintin M'Adam, he holding it, said, I take you " three to witness, that this is my lawful married " wife, and the children by her are my lawful chil- " dren; which acknowledgement and declaration of " marriage were solemnly and deliberately made, " and explicitly assented to, and acquiesced in by " the said Elizabeth Walker, Pursuer; and were " again on this occasion repeated a second time, " in presence of the said George Ramsay, Robert " Galt, and James Richardson, and also of Margaret " Wylie, the said Quintin M'Adam's housekeeper, " for whom, he, the said Quintin M'Adam, likewise " sent, with the express intention of being an " additional witness to the said declaration and " acknowledgment of marriage which were then " so formally and seriously passed between him and " the said Pursuer. That the foresaid acknowledg- " ment and declaration of marriage were soon very " generally known to all the people in the neigh- " bourhood, by many of whom the Pursuer, Eliza- " beth Walker, was congratulated as the wife of " the said Quintin M'Adam; and the intelligence, " which gave very general satisfaction, was in the " course of the forenoon of the said day universally " spread in the town of Dalmellington, which is " situated about two miles from the house of Bar- " beth: that after the parties had made the foresaid " mutual acknowledgment and declaration, the said " Quintin M'Adam walked out to see his workmen; " and afterwards went to the house of the said " David Woodburn, at Bellsbank, to whom he " mentioned that the said Pursuer and he had " declared their marriage; whereupon the said

"David Woodburn said, that he had been informed "so by Robert Galt, and wished him much joy; "to which the said Quintin M'Adam replied, that "he believed it was a very proper step: that the "said Quintin M'Adam then asked the said David "Woodburn to dine with him at Berbeth on that "day, of which invitation the said David Wood- "burn was prevented by another engagement from "accepting; and the said Quintin M'Adam having "left the said-David Woodburn's house, in perfect "health about three o'clock, returned home to Ber- "beth, where he died suddenly about four o'clock "of the afternoon of the said 22d day of March "last: that in consequence of the said Quintin "M'Adam's decease, the succession to all his estates, "entailed and unentailed, has, by virtue of certain "deeds of settlement, opened either to the Pursuer, "Katharine M'Adam, his eldest daughter, or to "the eldest child of which the said Elizabeth "Walker is pregnant, in case that child shall hap- "pen to be a male."

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The summons concludes, "That therefore the "said Elizabeth Walker, now widow of the said "Quintin M'Adam, and the said Katherine and "Jean M'Adams their two children, and the child "or children in *utero* of the said Pursuer, Elizabeth "Walker, ought and should have our sentence and "decreet, finding and declaring that the said Quintin "M'Adam, and Elizabeth Walker, were, at and "previous to the time of his decease, lawfully mar- "ried persons to one another, and husband and "wife; and that the other Pursuers, Katharine and "Jean M'Adams, their children, and the child or

Conclusions of the summons.

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"children in *utero* of the said Elizabeth Walker, "are their lawful children; and that the Pursuer, "Elizabeth Walker, and the said children respec- "tively, are entitled to all the rights and privileges "competent to the lawful wife or widow, and the "lawful children of the said Quintin M'Adam, "either by law or by the rights, titles, and investi- "tures of his lands and estates," &c. &c.

The Appellant's defences.

Against the conclusions of this action, Mr. Alexander M'Adam (now Appellant) stated the four following pleas in defence: First, "The allegations "made in the summons are totally *irrevalent*, and "insufficient for supporting the conclusions thereof. "Secondly, It appears from the shewing of the "summons, that the Pursuers can bring no com- "petent evidence for proving the allegation upon "which the supposed marriage depends. Thirdly, "*Esto*, the parole evidence offered would have been "competent against Mr. M'Adam himself, if he "had been alive; yet as no marriage was actually "celebrated, and no claim of marriage was made "against him in his lifetime, the proof offered is "not competent against his heirs, now that he is "dead. Fourthly, The late Mr. M'Adam, at the "time of the declarations libelled, was incapable, "from insanity, of contracting a marriage."

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The Pursuers (now Respondents) briefly stated their answers to these defences; and the commissaries, having considered these pleadings, appointed the parties to give in mutual memorials, stating more particularly the grounds of their action and

Oct. 24, 1805.

defences, and the relevancy of these grounds to support or elide the conclusions of the libel; and

on afterwards advising those memorials, and the whole process, "The Commissaries found the libel "sufficiently explicit to supersede the necessity of "a condescendence, and, before answer, allowed the "Pursuer a proof thereof; and allowed the Defender "a conjunct probation and a proof of this specific "allegation, that at the time of the declaration li- "belled the late Mr. M'Adam was then, and had "for some time before, been incapable, by insanity, "of contracting marriage."

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The Appellant brought this interlocutor under the review of the Court of Session, for the purpose of having the scope of the proof of alleged insanity further extended; and having given in a special condescendence of facts relative to this allegation, the Lord Ordinary, upon advising with the Lords, remitted to the commissaries "with instructions so "far to vary their interlocutor as to receive the said "condescendence, and, before answer, to allow the "Defender a proof thereof, and the Pursuers a con- "junct probation."

The transactions of the 21st and 22d of March were proved, as laid in the summons. The declaration of marriage by Mr. M'Adam, and the circumstances attending it, were proved solely by the parole testimony of the servants present. It also appeared, that E. Walker said nothing at the time, but that she stood up, and gave her hand to Mr. M'Adam when desired to do so, and after he had declared that they were married, that she courtsied in token of her assent. It also appeared, that Mr. M'Adam had from the commencement, and during the whole period of the continuance of the

The declaration of marriage proved only by parole testimony.

The consent of Elizabeth Walker given only by dumb show.

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Evidence that Mr. M'Adam from the commencement of the connexion contemplated the probability of its terminating in marriage.

connexion, contemplated the probability that it might end in marriage. When about to take her into his house, he wrote the following letter to his agent:—"Stenhouse, 16th February, 1800.—Dear "Sir, I am going to take a girl into keeping; her "name is Elizabeth Walker, daughter of the late "John Walker in Knockdon, parish of Straiton. "Get two bonds wrote instantly; and be sure to "send them by the very first post to Ayr, binding "me and my heirs to pay her sixty guineas yearly, "so long as she lives. *Write them so that if I at* "*any time marry her, that she gets no more join-*"*ture, unless provided by a subsequent deed.* I "mean by that, to prevent any claim to a third of "the moveables. I suppose it can be done; if not, "write them as you see best. Be sure that they "arrive at Ayr on Wednesday or Thursday at far-"thest. *I shall be in Edinburgh the first week* "*of March, and will bring in the will; but is it* "*not better to allow it to remain as it is, until we* "*see what this produces.* I remain, &c. QUINTIN "M'ADAM."

On the day after the Respondent had secretly quitted her brother's house, and gone to Berbeth, Mr. M'Adam addressed to him a letter, in these words: "Berbeth, 21st February, 1800.—Dear "James, You will, perhaps, be surprised, when I "tell you, your sister is come to live with me. But "I hope you will not be angry, when I assure you, "that I mean to behave to her in the most honour-"able manner. I have already settled sixty gui-"neas on her yearly during her life. *I have made* "*her no promise of marriage, but it is very proba-*

" *ble it will end in that.* She and I would be very " happy you will come over to-day; and if there is " any further explanation you wish, I shall be glad " to make it you. I am, James, yours, &c. QUINTIN " M'ADAM."

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In the month of January 1801, the Respondent was delivered of a daughter; and immediately prior to that event, Mr. M'Adam wrote a letter to Mr. Smith, his agent, proposing to him a question, which indicated, that it was in his contemplation to legitimate the children of this connection. Of this letter, the following is an extract: " Berbeth, 19th " January, 1801.—Miss Walker will *lie in* in a few " days; if I get the Minister of the parish to " christen the child, and pay the fine for a bastard " child, will that, in the event of my ever wishing " to declare a marriage, have any effect of illegiti- " mating that child, or will it do it? Answer this " immediately; it is the only part of the letter that " requires an answer." To this letter Mr. Smith immediately wrote the following answer, which was found in Mr. M'Adam's repositories: " Edin- " burgh, 22d January, 1801.—Dear Sir, I am this " day favoured with yours of the 19th. Upon Miss " Walker's in-lying, and your getting the Minister " to baptize the child, and your paying the fine for " a natural child, all this will not prevent your af- " terwards legitimating the child, by declaring a " marriage, in case you should afterwards choose to " do so. From the time of the declaration of mar- " riage, the legitimacy of the child draws back to " its birth, providing no other marriage has inter-

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" vened." A few days afterwards Mr. M'Adam again wrote to Mr. Smith: " Miss Walker was de-" livered of a daughter on Wednesday last. *I mean* " *to call her Katharine for my mother.*" And in the course of the year 1803, the Respondent bore another daughter to Mr. M'Adam, to whom, after one of his sisters, he gave the name of Jean.

The evidence of Mr. Campbell, of Treesbank, led to the same conclusion. " He stated that he was " out coursing with Mr. M'Adam, at Berbeth, and " they had been talking together of Mr. M'Adam's " new approach, and his bridge over the river Doon: " That Mr. M'Adam started the subject of mar-" riage, and spoke of Betsy, meaning Elizabeth " Walker, the Pursuer: That, among other things, " Mr. M'Adam said, that the great objection he had " always had to marriage was, the fear of having no " family, which would have made him the most mi-" serable man alive: That his cousins, Captain " M'Adam the Defender, and Mr. M'Adam of " Turnbery, were most excellent people, but they had " no families; and he alluded to a brother of theirs, " who had a family, but of whom he spoke in terms " of the greatest disapprobation; and said, that he " was resolved that he should never get a shilling of " his, *as marriage could always take place on death-*" *bed:* By all which, the Deponent understood Mr. " M'Adam to mean, that it was in his power to " marry Miss Walker on death-bed; and the im-" pression made on the mind of the Deponent by " this conversation was such, that although he " would, before it took place, have laid a bet, that

" Mr. M'Adam would not marry Miss Walker, he " would then, and afterwards, have betted, that such " a marriage would take place."

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The great object of the evidence in defence was to prove the insanity of Mr. M'Adam. It appeared that in March 1803 he was for a short time raving mad, but as he had been drinking to excess at that period, this was considered as rather the frenzy of intoxication. Some of the servants deponed, that he was periodically subject to pains in the stomach, accompanied with head-ach, flushing of the face, and an incapacity of sleep for several nights together, which had a strong effect on his mind: that when attacked by these complaints he was occasionally excessively depressed, and at other times excessively irritable, and broke out into " raptures of passion," as one of the witnesses expressed it, without any apparent reason. In March 1804, Mr. M'Adam himself, in speaking of his complaints to a Mr. Hugh Logan, Surgeon, in Maybole, said, " *that they were most distressing—that while un-* " *der the influence of them the world appeared to look* " *with contempt upon him; and that once or twice* " *he was so ill as to have nearly formed the resolution* " *of destroying himself*;" and Mr. Logan gave it as his opinion, " that Mr. M'Adam was under the " influence of melancholic insanity to a certain de- " gree, and that *it often happens that this species of* " *insanity leads to suicide.*" Some of the servants likewise deponed, that for a day or too previous to, and on the day of his death, he complained of these disorders in his stomach: " that he felt a burning " heat there which rose up to his throat as if it would

Evidence in defence to prove the insanity of Mr. M'Adam.

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" suffocate him; that he asked the same question " three or four times after it had been answered, and " that he himself complained on the morning of his " death; that he had got no sleep for three nights run- " ning." One of the servants stated, that he put the fire-arms out of the way when he thought Mr. M'Adam was unwell. It appeared, that about a fortnight before his death, an old gardener, who had been long in the family, advised him to marry Miss Walker, and that he then said " he would not marry " her, and *that he would blow his brains out the day* " *he married her*." On the morning of the day of his death, before breakfast, he wrote a codicil to his trust-deed of settlement in these words:—" Ber- " beth, 22d March, 1805.—*To Sir John Maxwell I* " *leave my chesnut horse and pointer Sancho, and* " *Major too if he chooses. The rest are rather* " *old*."—From all these circumstances the Appellant drew the conclusion, that Mr. M'Adam was subject to periodical derangement; that he was under the influence of this malady at the time of the alleged marriage, and when he committed the supposed suicide; that it appeared from the codicil above-mentioned, that he entertained the purpose of suicide on the morning of the day of his death; that the purpose of marrying Miss Walker and the purpose of suicide were associated in his distempered imagination, and that both were the effect of insanity.

Conclusions drawn from the evidence by the Appellant.

Evidence produced by the Pursuers, (Respondents,) to prove the sanity of Mr. M'Adam.

On the other hand, the Earl of Eglinton, the Earl of Casillis, Sir Andrew Cathcart, Sir Adam Fergusson, and a great number of other witnesses of the most respectable description, several of them of the medical profession, who had been in habits of

the closest intimacy with Mr. M'Adam, who had transacted business of a public nature with him, and had been employed by and with him in the management of his private affairs, who had been consulted by him on the subject of his complaints, and had seen him when under their influence—all concurred in declaring, that they had not only never observed in Mr. M'Adam any tendency to insanity, but that he always appeared to them a man of unusually sound and vigorous understanding. The Respondents likewise traced the conduct of Mr. M'Adam during each day for a week before his death by means of the most unexceptionable witnesses, who had the best opportunities of observation, all of whom deponed, that they never discovered in him the least vestige of mental derangement. Even the servants, who spoke particularly to the existence and effects of his bodily complaints, could not say directly that he was deranged. The only witness who went to that extent was Mr. Hugh Logan, a country practitioner, who had never seen Mr. M'Adam when labouring under his stomach disorder, whose opinion that Mr. M'Adam was under the influence of melancholic insanity to a certain degree, appeared to rest upon his theory, "that stomach complaints, in his (Mr. M'Adam's) and all cases of the kind, were the effect of a morbid state of the brain operating by sympathy on the stomach."

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It was attempted on the part of the Appellant, to aid his case of constitutional insanity in Mr. M'Adam, by going into evidence of the insanity of some of his relations by the mother's side;

The attempt to prove an hereditary tendency to insanity, overruled by the

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but this was resisted by the Commissaries, and also, upon review, by the Court of Session.

The Pursuers (Respondents) therefore contended: First, That there was no foundation whatever for the plea of insanity, but that it had been established, by the most striking and decided testimony, that Mr. M'Adam was in a state of perfect mental vigour; and that in the business of his marriage, his conduct was not the effect of any insane or even sudden impulse, but of a deliberate and long-meditated purpose.

Secondly, That the facts alleged in the libel of the summons were fully sufficient in law to sustain the conclusions of the action; and for this they gave the reasons, afterwards stated in substance on the appeal case, viz.: "That by the law of "Scotland, marriage was held to be a civil contract, "to the constitution of which, nothing more was es- "sential than the consent of the parties, expressed "by words, either spoken or written; or manifested "either by the unequivocal conduct of the parties, "or by such presumptive indications of present con- "sent as the law allows not to be questioned and tra- "versed. Of the first kind are explicit declarations, "*per verba de præsenti*, either spoken in the presence "of competent witnesses, or committed to writing, and "those writings interchanged by the parties: Of the "second kind are, on the one hand, continued coha- "bitation in the avowed characters of husband and "wife; or, on the other hand, a promise of mar- "riage, *subsequente copula*; from which last fact the "law infers, *presumptione juris et de jure*, that the "previous promise was then intentionally converted

" into present consent. From these principles flow
" the two negative propositions: First, That the
" forms of a religious celebration, although prescribed
" by the church, and approved of by the law, are not
" essential in the expression of matrimonial consent;
" and, Secondly, That when such consent has been
" given, it derives no additional force from subse-
" quent consummation.

" These leading principles of the law of Scotland,
" have been derived from the well known doctrines of
" the canon law; which, in all this class of matrimo-
" nial obligations, may be stated as the general law of
" civilized Christendom, unless, in so far as local and
" positive institutions have innovated on the ancient
" system. Of the adoption of these principles into
" the existing law of Scotland, there is the most un-
" doubted evidence, in all the writings of authority
" on that law, and in the decisions of the Consisto-
" rial and Civil Courts.

" Against these weighty authorities, the Appellant
" had been able to refer to nothing more substantial
" than a sceptical tract, by the late ingenious Lord
" Kames, contained in a work entitled, 'Elucidations
" respecting the Law of Scotland.' But a serious
" refutation of the opinion of Lord Kames on this
" subject would be very superfluous. It was ob-
" served on the Bench, when the judgment now ap-
" pealed from was pronounced, that this tract is
" throughout a tissue of error, always brought for-
" ward in Consistorial causes of the present descrip-
" tion, and always treated with contempt by the
" Court. And it has been still more lately observed
" by a very high authority, 'that his extreme inac-

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" curacy in what he ventures to state, with respect " both to the ancient canon law, and to the mo- " dern English law, tends not a little to shake the " credit of his representations of all law whatever."

The same learned person has added with great truth, " that it is easy to strike the balance upon this class " of authorities; they are all in one scale, a very " ponderous mass on one side, and totally unresisted " on the other."

Thirdly, That the allegations in the libel had been fully established by competent evidence, for in the case of a declaration of consent *de præsenti*, it appeared necessarily to follow that it might be proved by parole testimony; and Stair had accordingly said, " that marriage might be proved by witnesses, " which was a direct and immediate probation." The only way in which the defender (Appellant) could dispute this proposition, was by confounding a declaration of *present* consent to marriage, with a promise of marriage *de futuro*.

The proof on both sides having been at length concluded, the Commissaries proceeded to give their judgment in the cause, in the following terms:

Interlocutor of the Commissaries finding the marriage valid.

" The Commissaries having resumed consideration " of this cause, with the productions and proof for " both parties, and whole process, find it proven by " real evidence, that some years prior to the year " 1805, the late Quintin M'Adam had formed a re- " solution of making the Pursuer, Elizabeth Walker, " his wife, and legitimating the children which she " had borne to him, at some future period: Find it " clearly proven, that on the forenoon of the 22d " day of March, 1805, Mr. M'Adam carried this

" purpose into execution, by joining his hands with
" those of the Pursuer, and declaring her to be his
" wife, and her children his lawful children, in pre-
" sence of several persons whom he had called up to
" his dining-room to be witnesses to this declaration :
" Find, that this declaration was made in the most
" solemn, serious, and deliberate manner ; that the
" late Mr. M'Adam was in his perfect sound mind ;
" that the deportment of the Pursuer clearly indi-
" cated her approbation of what Mr. M'Adam had
" done ; that on this occasion, Mr. M'Adam and
" the Pursuer mutually accepted of each other as
" husband and wife: Find these facts relevant to
" infer marriage betwixt the late Mr. M'Adam and
" the Pursuer ; that by this declaration, the *status*
" of the Pursuer as his wife, and of her children as
" his lawful children, was fixed, and could not be
" affected by any subsequent act of Mr. M'Adam :
" Find the condescendence on which the defence
" was founded not proven, and repel the defence,
" and decern in the conclusions of marriage and
" legitimacy in terms of the libel."

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This judgment was brought under the review of the Court of Session, by a Bill of Advocation, on the part of the Appellant; and with the consent of parties, the LordRobertson, Ordinary, " appointed " the parties to prepare and print memorials, to be " put into the boxes *quam primum*, in order to be " reported to the Court." And on advising the cause, the Lords of Session directed the Lord Ordinary to pronounce the following interlocutor: " The Lord Ordinary having again considered this " bill, with procedure and writings produced, and

Affirmed by the Court of Session.

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"also memorials for the parties, and advised with "the Lords, refuses the bill, &c."

Against this interlocutor, the Appellant reclaimed by petition; and on advising that petition, with answers for the Respondent, the following interlocutor was pronounced: "The Lords having advised "this petition, with the answers thereto, they ad- "here to the interlocutor reclaimed against, and re- "fuse the desire of the petition."

Appeal.

Against these interlocutors, and also against the interlocutors over-ruling the attempt to prove mental derangement in some of Mr. M'Adam's maternal relations, the Appellant lodged his appeal. It was contended on the part of the Respondents that as the Appellant had acquiesced in these last interlocutors and suffered the cause to proceed, an appeal from them was no longer competent. But from the view of the case upon which the final decision turned, it was not found necessary to touch upon this point.

Argument for the Appellant. 1st, Question as to the alleged insanity.

Mr. Clerk (for the Appellant.) 1st, He still insisted that the insanity of Mr. M'Adam had been proved; that the declaration in question was made under the influence of the malady, from some vague imagination floating in his mind, relative to the legitimation of his children before his death, which he was at the time resolved to procure by his own hand; that the declaration was as much a prelude to his purpose of self-destruction, as his grasping the pistol; and that even though this purpose of self destruction were not the effect of insanity, it was clear from his entertaining it at the time, that

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2d, Question as to the admissibility of evidence of an hereditary tendency to insanity.

3d, Whether, independent of the plea of insanity, the marriage was proved?

he did not propose to live with the Respondent Walker as his wife, nor intend that *consortium vitæ* which was considered as entering into the definition of marriage.

2d, The Appellant ought to have been allowed the further proof of Mr. M'Adam's insanity, by showing that it was constitutional in his mother's family, because it was clearly a relevant fact; and therefore it was no good objection to such proof that the feelings of third parties might be incidentally hurt by it. A case had been prepared from the evidence, and submitted to some eminent physicians, who gave such an opinion relative to the nature of the malady indicated by the symptoms as induced the Appellant to submit another case to Dr. Alexander Monro, senior, in regard to the relevancy of proving the tendency to insanity in the maternal relations of the deceased; and Dr. Monro had given an opinion decidedly in favour of the Appellant, which, however, the Court below had ordered to be expunged from the proceedings. In regard to the relevancy of the fact in question, and also to show that the symptoms of Mr. M'Adam's complaints were such as indicate insanity, he cited a variety of the most eminent medical writers on insanity.

3d, Supposing the plea of insanity out of the question, the pretended marriage was not proved: First, because the facts were not sufficient to establish a marriage: Secondly, because if they were, they could not be proved by parole evidence, but only by writ, or oath of party. First, there were only three ways by which a marriage could be

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Argument that the facts were not sufficient to constitute a marriage.

constituted: First, by actual celebration *in facie ecclesiæ*: Secondly, cohabitation of the parties as man and wife, which affords a legal presumption of marriage: Thirdly, a previous promise, or a declaration of marriage with subsequent *copula*, and a decree of the proper Court finding that the parties are married. None of these modes were adopted in the present case. It was no regular marriage *in facie ecclesiæ;* there was no cohabitation as man and wife, no promise or declaration with subsequent *copula*, no celebrator, not even a blacksmith. He then cited various authorities to show that nothing was understood by the law of Scotland before the Reformation to constitute marriage, but celebration *in facie ecclesiæ*, and particularly the act relative to bigamy, where the crime is made to consist in marrying a second husband or wife, the first being alive, "*contrair to the aith and promise made at "the solemnization.*" The *medium peccati* here was perjury: but there could be no pretence for saying, that Miss Walker would have been guilty of bigamy, or perjury, though she had married another after this declaration. Kames's Elucidations, article 5, p. 29—Canons of the church, drawn up at Perth in the years 1242 and 1269—Act of 1503, c. 77—Sir J. Mackenzie's Observations, p. 114—Mackenzie's Criminal Law, p. 59, were authorities to the same point. Even after the Reformation there was no idea that there could be a marriage, without a celebrator of some description, and he cited Spottswoode's Church History, b. 1. p. 172.—Directory for Worship, 1643.—Act 6 and 7 of Assembly, 1690, and Act 15 of Assembly, 1715.—Act of

1551. c. 19.

Dictionnaire de Droit Canonique.

Par. 1641, c. 8, revived by 1661, c. 34, and Act of Par. 1698, c. 6.—Cohabitation as husband and wife, and promise or declaration *cum copula*, were different questions. There, matters were not entire. The question here was, whether a bare declaration, without any celebrator, constituted a marriage, or could prevent either of the parties from resiling, *rebus integris*. The Respondents relied, not on precedent or practice, but on certain passages in Stair, b. 1. tit. 4., and Erskine, b. 1. tit. 6. Both writers were vague and obscure upon this point, and when properly considered would not bear out the argument for the Respondents. Much was said about consent making the marriage, "*consensus*, "*non concubitus, facit nuptias.*" But upon the Respondents' doctrine the maxim was absurd. Would consent by parties at 600 miles distance from each other, and who never saw each other, be sufficient? The consent must be to something done, viz. to such ceremonies as by law constitute a marriage. At the execution of the antenuptial contracts, the parties solemnly declare *per verba de præsenti*, that they take each other, &c. &c. and yet, after this, either party is at liberty to resile, *rebus integris*, and is not even liable to the other in damages, unless under special circumstances. Here then was an instance of a much more solemn declaration than that of M'Adam, and by both parties; and yet this was no marriage. But then it was said, that in the contracts the parties did not intend a present marriage: suppose, however, they did intend a present marriage, still, being but a bare declaration, it would not, *per se*, constitute a marriage.

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With respect to the decided cases, there was not one in which a declaration of marriage had been found sufficient, *per se*, to constitute a marriage, *rebus integris*, and the following cases were cited and commented upon in proof of this assertion:—*M'Lauchlan v. Dobson*, Dec. 6, 1796.—*M'Kie v. Ferguson*, 1782.—*Cochrane v. Edmonstone*, 1802.—*Johnston v. Smiths*, Nov. 18, 1766, Dict. IV, *voce* Proof, p. 169.—*M'Innes v. More*, Dec. 20, 1781.—*White v. Hepburn*, Nov. 18, 1785.—*Taylor v. Kello*, Feb. 16, 1786.—*Anderson v. Fullerton*, Nov. 13, 1795.—*Ballantine v. Wallace*, 1773.—*Cameron v. Malcom*, June 20, 1756.—*Allan v. Young*, in 1773.

In the case of M'Kie and Ferguson, *bans were twice proclaimed under the authority of a line subscribed by the parties.* The lady was prevailed upon to subscribe a letter to the Session clerk, to proceed no farther. The parties afterwards met, went to bed together, where they continued an hour, with the door locked. Six persons were then introduced, in whose presence they declared, that they were married. This was held to be a marriage; but then the distinction in that case was, that matters were not entire, for consummation must have been presumed.

(*Chancellor.* They were in bed together an hour *before* the declaration, but it did not appear that they were alone a moment *after*.)

In the case of M'Lauchlan and Dobson, Mr. H. Erskine, who was in the cause, took a note of the observations of the Justice-Clerk, M'Queen, the greatest Scotch lawyer of his age, which agreed

with a note taken by another counsel at the same time. This note was as follows:

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"*Justice-Clerk.* Case *new:* but the law is *old* "and *settled.*

"Two facts admitted *hinc inde.* No celebration; "no *concubitus;* nor promise of marriage followed "by *copula.*

"Contract as to land not binding till regularly "executed, unless where *res non sunt integræ:* A "promise without *copula, locus pœnitentiæ.* Even "verbal consent *de præsenti* admits *pœnitentiæ.* "Form of contracts contains express obligation to "celebrate; till that done, either party may resile. "Private consent is not the *consensus* the law looks "to. It must be before a priest, *or something equi-* "*valent.* They must take the oath of God to take each "other. A present consent not followed with any "thing, may be mutually given up. *But if so, it* "*cannot be marriage.*"

If this, then, was not such a ceremony as constituted a marriage *per se,* it was not such as would authorise the Courts to compel marriage by process; and in proof of this, he cited Kames's Elucidations, p. 31, 32.—Balfour *(Marriage).*—Spottswoode *(Marriage).*—Craig. lib. 2. d. 18. 19.—Stair, b. 1. tit. 4. sect. 6.—Kames's Elu. p. 33. 34.—Bankton, b. 4. tit. 45. sect. 49.—Erskine, b. 1. tit. 6. sect. 3.—*Young v. Irvine,* Dict. vol. 1. p. 565.—*Haydon v. Gould,* Burn's Eccle. Law, vol. 2. p. 416.

But suppose a mere declaration of consent *de præsenti* did constitute marriage, there was no such thing in the present case. The Respondent Walker said nothing, *but was a mere passive spectator of*

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That if the facts were sufficient, they could not be proved by parole testimony.

the scene. No marriage therefore took place, for marriage is a mutual contract, and requires the consent of two parties, which consent on both sides must be *distinctly* and *unequivocally* expressed.

Secondly, *A nuda emissio verborum*, as this was, could not be proved by parole evidence to the effect of establishing a marriage *per se*. This was strongly implied in those passages of Bankton and Stair, which touched upon this point. It was no answer to say that a regularly celebrated marriage might be proved by parole testimony; as the public solemnization of a regular marriage was very unlike the naked emission of words in private. Even in the case of a promise *cum copula*, in order to lay the ground for establishing a marriage, the promise must be proved by writ, or oath of party, though the copula, *ex necessitate rei*, may be proved by parole testimony. To allow a proof by parole, of such a declaration as this, to the effect of establishing a marriage, would be still more dangerous than allowing a proof by parole of a promise *cum copula* to the same effect. But even if such proof could be admitted while the party was alive, it could not after his death.—*Cockburn contra Logan* Dict. July, 1670.—Bankton b. 1. tit. 5.—Dirleton's Doubts, *voce* Marriage and Legitimation.

Mr. Leach followed on the same side.

Argument for the Respondents. First, That the plea of insanity was not made out by the evidence, but the contrary.

Sir S. Romilly (for the Respondents.) First, After a particular statement of the evidence, in regard to the question of insanity, he remarked that the witnesses who deponed to the soundness of Mr. M'Adam's mind, were of a much superior description to those

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on whom the Appellant relied.—They had every opportunity of forming a correct estimate of the state of Mr. M'Adam's intellects, and they spoke decisively to the fact, that he was not only totally free from any appearance of mental derangement, but was a man of uncommonly vigorous understanding; yet the species of insanity attributed to Mr. M'Adam was not such as could have been concealed if it had existed. He purposely avoided saying any thing as to the medical authorities on which the Appellant relied, because, however valuable the testimony of such men might be in questions of insanity when speaking from personal knowledge and careful observation of the individual, nothing could be more fallacious than to try judicially the condition of any person by a comparison of his alleged symptoms with those which were stated by medical authorities to be usually the concomitants of insanity, or to submit the opinions of medical men, taken upon cases laid before them with a description of symptoms, as evidence to a Court of Justice. It was no uncommon thing for an ignorant person, in reading a treatise on diseases, to fancy that he had the symptoms of all the diseases about which he read.

Secondly, That reason and authority were opposed to the admissibility of the evidence to prove an hereditary tendency to insanity.

Secondly, In regard to the attempt to prove an hereditary tendency to insanity, if this were to be allowed, it might be necessary to follow out that proof through a great number of collateral relations, and to try twenty causes instead of one. Mr. Clerk with all his knowledge of Scotch law, had not been able to produce a single authority for such a proceeding. Something of the kind was

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done or attempted in Kinloch's case, and not stopped. That was all.—In a late case in the Common Pleas, the heir at law offered to prove hereditary insanity against a testator, but this proof was rejected; so that in the law of England at least there was authority against it.

Thirdly, That a declaration of consent to marriage was proved.

Thirdly, Whether a declaration of consent to marriage was proved? For that he need only refer to the evidence of the servants. It was also in evidence that Mr. M'Adam not only intended to marry the Respondent Walker, but also to live with her as his wife. But suppose he had at the time the intention to destroy himself, she still acquired the *status* of his wife, and could not be deprived of it by any subsequent act of his.

Fourthly, That a declaration of present consent was sufficient to constitute a marriage.

Fourthly, Whether a declaration *per verba de præsenti* was sufficient *per se* to constitute a marriage. The Appellant said, there were three ways of constituting a marriage. First, Regular celebration.—Secondly, Cohabitation with habit and repute.—Thirdly, Promise *cum copula*. The Respondents insisted that there was a fourth mode, viz. a declaration of consent *per verba de præsenti*, and for this they had the authority of the text writers and decisions. It was clearly stated in the writings of Sir G. Mackenzie, Stair, and Erskine, and the principle was distinctly recognized, even in the cases relied upon by the Appellant. The same doctrine was supported by the case of *Dalrymple and Dalrymple*, lately decided in the Consistory Court here, and the authorities there produced. Against the note of the opinion of the Justice-Clerk (M'Queen) in *M'Laughlan v. Dobson*, they had to set another note taken by Mr.

Dalrymple *v.* Dalrymple.

Another opinion of M'Queen of Braxfield.

Hamilton, of the opinion of the same Judge in the case of *Ritchie and Wallace* (Fac. Coll. 1792), in which he was stated to have said, "With us marriage is now a civil contract to be proved like "others. Is there here sufficient evidence? The "Defender has said there are only three ways of "marriage, (celebration, cohabitation, with habit "and repute, and promise *subsequente copula*.) "But I deny the doctrine. The principle of mar- "riage by promise, &c. is, that *res not sunt in- "tegræ*, which, by a common rule of the law of "Scotland, bars resiling: but a promise to marry, "and actual declaration or acceptance, are quite "different things. The last makes marriage *per se*." The case of *M'Kie and Fergusson* he particularly relied upon as not to be distinguished from the present. With regard to ante-nuptial contracts, the whole of such a contract was to be taken together, and then it must be evident that no declaration of present consent was intended. In the old styles the words were, that the parties took each other for their *future* husband and wife. As to the argument drawn from the bigamy act, it applied equally against a promise *cum copula* as against a present declaration; so that, as it proved too much, their Lordships would probably think that it proved nothing.

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Fifthly, To say that a marriage of this kind could not be proved by parole evidence appeared to him an absurdity; for it was as much as to say, that though there might be such a marriage yet it never could be proved at all. If a marriage could be constituted by a declaration *de præsenti*, it followed *ex*

Fifthly, That a marriage of this kind must *ex necessitate* be proveable by parole evidence.

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necessitate that it must be proveable by parole evidence.

Mr. Thomson (on the same side.) A declaration *per verba de præsenti*, before witnesses, was *equivalent* to celebration by a clergyman. A celebrator was not, therefore, necessary. The blacksmith was only a witness.

Mr. Clerk replied.

Judicial observations.

Lord Eldon (Chancellor.) In a case of such importance, it would have been proper to have taken further time for consideration, if the only source of their information upon the subject had been the argument at the bar, relevant and able as that argument was on both sides. They were, however, assisted, among other documents, by a paper drawn by Mr. Clerk; which, in point both of composition and learning, was one of the best that ever had been prepared by any lawyer; and which would do him the highest credit, as long as that paper should be remembered. In the discussions in the Courts below, in this country too, a marked distinction had always been made between the promise *de futuro* and contract *de præsenti*; as would be noticed, when he came to consider the validity of the marriage in that view.

In the English Courts, a marked distinction between the contract *de præsenti* and promise *de futuro*.

Question of insanity.

The first question here was, Whether Mr. M'Adam was of sound mind at the time when he entered into the contract? If not, that contract certainly could not be valid: his opinion, however, was, that on the 22d of March, 1805, Mr. M'Adam was of perfectly sufficient soundness of

Mr. M'Adam was of sound mind.

mind to form a valid contract; and this would dispense with the consideration of the other very delicate point, whether the evidence to show hereditary insanity in the blood ought to have been received in a case of this nature! The true question was, not, Whether he had ever been insane before, or from what cause? but, Whether he was of sufficiently sound mind to contract on the 22d of March, 1805? It was of no consequence in what state he had been at any other time. If then they should affirm the judgment of the Court below on the other ground, there could be no occasion to pronounce any opinion upon the very delicate question to which he had adverted.

Of no consequence what the state of his mind was before or after, if sound at the time of the contract.

It was impossible, however, speaking as a man and as a lawyer, to deny, that if Mr. M'Adam was insane in 1803, and the similarity between the state of his mind at that time, and on the 22d of March, 1805, had been so marked as to render it probable that it was a recurrence of the same malady; it was impossible, he said, to deny, that this circumstance ought to be attended to in judging whether Mr. M'Adam was really insane on the 22d of March, 1805. But if they had satisfactory evidence of his sanity at the time of the contract, then the antecedent state of his mind, and the causes of it, might be laid totally out of view.

But if proved to have been insane at other times, that circumstance was to be attended to as evidence, if the soundness at the time of the contract had been at all doubtful.

Now, their Lordships knew what the law of England was upon this point, and he was not aware that, in this respect, the law of Scotland was different. A man might marry, as well as form any other contract, if he was sane at the time. The legislature, with a view to prevent the marrying

Law of England in regard to the marriage of lunatics.

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of lunatics during their lucid intervals, had enacted, that a commission of lunacy would avoid such marriages. This was conclusive that other contracts might be formed during their lucid intervals; and that the law did not avoid marriages, unless contracted during the course of time that the lunacy had been found to exist. The usual way was, to direct an issue to try whether the party was of sound mind at the time of the contract; and, if he was, it was of no consequence in what state he might have been, either before or after. He was unwilling to mention names in such cases; but a case had lately occurred, where a young lady at Hampstead had been insane, and her father thought it would be of advantage to her if she were married. She was accordingly married during a lucid interval. He himself had examined her; and found that she was affected, even then, with a certain degree of morbid feeling; and it appeared in evidence, that, without any apparent foundation for the notion, she always believed that somebody had poisoned her. As she was a ward of the Court, and no commission of lunacy existed, he had directed an issue to try whether she was of sound mind at the time of the marriage, and it was found that she was of sound mind.

Case of the marriage of a lunatic during a lucid interval.

Case of a will, or testament, by one confined till his death in a mad-house.

He recollected having been concerned, many years ago, in a cause, where a gentleman, who had been some time insane, and who had been confined till the hour of his death in one of those houses (mad-houses) of the better sort, at Richmond, had made a will while so confined. The question was, Whether he was of sound mind at the time of making this testament?

It was a will of large contents, proportioning the different provisions with the most prudent and proper care, with a due regard to what he had previously done for the objects of his bounty, and in every respect pursuant to what he had declared, before his malady, he intended to have done. It was held, that he was of sound mind at the time. He mentioned this the rather, on account of its similarity to the case now under consideration, in one important particular; viz. that the act done was pursuant to a previous declaration of intention. The act of marriage, on the 22d of March, 1805, was in this way connected with the letters of 1800.

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He agreed, that it was not a proper mode of proceeding, merely to state facts, in such a case as this, to medical men, and take their opinion upon these facts, and then leave it to the Court to judge upon these facts and opinions, without any personal examination of the party by these medical men. But he admitted, that it was fair to consider whether, at the time of the marriage, Mr. M'Adam did not intend to commit the act of suicide. If it were proved, that he was at the moment under the influence of that morbid feeling, it might be a circumstance of considerable weight.

Fair to consider whether Mr. M'Adam did not intend to commit suicide at the time of the marriage.

With respect to the evidence here adduced, there was no doubt but an unsound state of mind might manifest itself by an accompanying ill state of bodily health. But if it was admitted that the mind was in a sound state before, then they were to look at the state of bodily health; not as in itself an evidence of mental derangement, but with a view to ascertain what effect it had on the state of

In the case of a mind previously sound, they were to look at the state of the bodily health; not as evidence

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the mind. Then, after looking at the evidence of Woodburn the factor, Hawthorn the surgeon, and a number of other most respectable witnesses, who had the very best opportunities of observation, who declared that he was in a perfectly sound state of mind, it would be taking a liberty which man ought not to take with man, to say, that Mr. M'Adam, at the time of the marriage, was not competent to contract. Under these circumstances, it belonged to God alone, who knew the heart, to decide, whether Mr. M'Adam, at the moment of contracting, entertained the purpose of suicide. It ought not to be decided by any declaration of theirs. He did not think, therefore, that the judgment of the Court below should be touched on that ground.

of insanity, but merely to ascertain what effect it had on the mind.

The insanity not made out.

He had said so much upon that head on account of the opinion given by one who had been President of the Court of Session, now alive (Islay Campbell); who had said, that he did not conceive that Mr. M'Adam was of sufficiently sound mind to contract at the time of this marriage; and that, at any rate, he conceived the object of Mr. M'Adam to have been, not to make Miss Walker his wife, but his widow. How it was possible for him to make her his widow, without making her his wife, could not very easily be conceived.

Question of the law of marriage.

As to the other question, it was of so much importance, that it was a great satisfaction to have heard all that they were ever likely to hear upon it: for, though they could not have the opinions of professional men at the bar of that House upon an appeal; yet such opinions were to be found in the

proceedings of the Consistory Court of this country. In the case of *Bearnish and Bearnish*, which had been not very long ago before the Consistory Court, it had been necessary to inquire particularly what was the law of Scotland upon this point; and it had been found, that there was a marked distinction made between contracts *de præsenti* and promises *de futuro*. And in the case of *Dalrymple and Dalrymple*, in the Consistory Court, the question was also considered, and each of the persons who were there examined stated his opinion on paper, gave the text in writing, and the decisions, with comments on the decisions and text. He found five names there of persons of the greatest professional knowledge, who had given it as their opinions, that a contract *de præsenti* constituted an immediate marriage; and there were three on the other side, who said, that a contract *de præsenti* was not of itself an entire immediate marriage. There had been, therefore, a difference among professional men on the point; but, after attending to all that he could learn on the subject, he did not find that there was the same difference in judicial opinions on this head. The fact was, that the canon law was the *basis* of the marriage law all over Europe; and the only question was, How far it had been receded from by the laws of any particular country? By the canon law, the distinction between the contract *de præsenti* and promise *de futuro* was well known: the former constituting a good marriage of itself; the other not unless followed by *copula*, or some other act which is held in law to amount to the carrying the promise into

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Authorities to show, that a contract *de præsenti* constitutes a very marriage.

Bearnish v. Bearnish.

Dalrymple v. Dalrymple.

The canon law the basis of the marriage law all over Europe.

Distinction between contract *de præsenti* and promise *de futuro* well known in the canon law.

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effect. This distinction is stated in the text of Stair. But if the contract *de præsenti*, as well as the promise *de futuro*, had required the subsequent *copula* to give effect to the marriage, the distinction would never have been heard of. The fact of the *copula* following the promise, is held to make that present and complete which before was future and incomplete. If, then, a verbal declaration *de præsenti* was sufficient to constitute a marriage, how it was to be proved, except by verbal testimony, he did not know.

But no such distinction would ever have been heard of, if present contract, as well as future promise, required the subsequent *copula* to make a marriage.

Contract *de præsenti* is *ipsum matrimonium.*

With respect to the decisions, it was a position again and again clearly recognized in them, that the contract *de præsenti* formed very marriage, *ipsum matrimonium*; and the judgments of the House of Lords had not trenched on the general doctrine. Since this was the evident result, their Lordships would excuse his entering into a detail of the decided cases. If such was the law of marriage in Scotland, he was relieved from entering upon the consideration of the question, Whether it was wise that it should have been the law so long? or, Whether it ought to be so in future? If it should be thought proper to make any alteration in the law on this subject, it must be done in another way.

Whether the species of consent is sufficient to bring the case within the maxim, "*Consensus*," &c.

Another point had been made; viz. That there was not here the species of consent necessary to bring the case within the maxim, "*Consensus, non concubitus, facit nuptias.*" Now, the evidence was, that, as soon as the connexion between this

As soon as his connexion with this lady

lady and Mr. M'Adam began, in 1800, he looked forward to a marriage with her; for, in his letter to

his man of business, on that occasion, he called the provision to be made for her, a jointure; and expressly directs the deed to be so prepared, as that the provision should not necessarily be increased, if he should at any time be *married to her*; and he mentioned in his notice to the brother, that the connexion might possibly end in marriage. After this, when she became pregnant, he wrote to his man of business; to ascertain whether certain acts would endanger the legitimation of the child in case he should afterwards marry the mother. Their Lordships knew the distinction between the law of Scotland and that of England on this point; the former legitimating all the children of the parties born before marriage; the latter legitimating only those who were born after the marriage. If they were arguing respecting the comparative moral effects of the two institutions, one might quote this as an instance of the encouragement given, by this doctrine of the law of Scotland, to postpone the time of marriage, from the idea that they can marry on their death-bed, and thereby render their children legitimate; whereas, accident might prevent them from ever carrying their design into effect. At the time of baptizing the child, *he gave her the name of his mother*; which, as connected with other acts, was a circumstance worthy of attention. It was clear, then, that he had the intention of marrying from the beginning; though this amounted neither to a promise nor a contract. It was in evidence, too, that he treated her with great respect. It had, however, been said, that he had declared to Richardson, the gardener, that he would

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began, he looked forward to a marriage with her.

The law of Scotland legitimating all the children born before or after the marriage; the law of England only those born after.

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not marry her; and to another witness, that he had given her no promise of marriage. But he did not think there was much in these casual observations, uttered probably merely to conceal his real intentions, when the design was decisively marked by his more deliberate acts. Then he wrote to Smith, and declared to Woodburn, that he had made up his mind to marry Miss Walker. Might not these be looked at as throwing light upon his intention to do the act of the 22d of March, 1805? He called her *his wife*, in the presence of his servants, sent for expressly for the purpose of bearing testimony to the marriage; and he likewise declared, that *these were his legitimate children*; words deserving of being particularly noticed, as evidence of his intention. The parties joined hands. There was a conversation between them afterwards, upon which Mrs. Wylie, the house-keeper, who appeared not to have been very well disposed towards this marriage, was called in, along with the other witnesses, and the same ceremony was repeated, with a slight unimportant variation in the expression. The lady gave her hand, and, when he declared her his wife, courtsied, as a sign of her assent. If this had been a promise of future marriage, it would not certainly have constituted an actual marriage. But when he declared that the lady was actually his very wife, and that these were his legitimate children, *per verba de præsenti*; this formed a present contract, and they became, *eo instanti*, as much husband and wife, as if the ceremony had been celebrated in the kirk; and the marriage was as valid as if a man, in returning from the kirk, immediately after his

The consent sufficiently expressed, and they become, *eo instanti*, husband and wife.

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It was clear that the parties intended to constitute a present marriage.

Whether the transaction proveable by parole testimony.

marriage there, had died of an apoplectic fit before he reached the house. Afterwards, Mr. M'Adam told Woodburn, that he was married. It appeared that Mrs. Wylie was nettled at this business, and was anxious that he should wait till Mr. Smith came; but he refused to wait for him, lest Smith should dissuade him from his purpose. The lady received compliments as Mr. M'Adam's wife. All this was evidence of the intention of the parties to marry; and it was clear, that, by the transaction of the 22d March, they meant to celebrate and constitute a present marriage.

Then came this question, Whether this transaction could be proved by parole testimony? He agreed, that there was great danger in admitting the constitution of a marriage to be proved by mere parole testimony. But they had only to consider, whether the existing law allowed this to be done. Sitting there as a Court of Appeal, they had nothing to do with the question, Whether it should be so in future. Now, when an actual marriage was constituted by the mere verbal declaration of the parties, how was it to be proved, but by parole testimony? Suppose a marriage celebrated before a minister; there was no regular form of words for this purpose; and there it was admitted, that the celebration might be proved by parole evidence. Then, if it was not necessary for a clergyman to be present, and if an irregular marriage was as valid as a regular one, why should it not be proved in the same way? It was answered, True: but there was the "habit and repute," and the subsequent *copula*, in that case. This, however, did not

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Such marriages may be proved by parole testimony.

grapple with the argument; for it might happen, that the death of one of the parties, by the act of God, might prevent any sexual intercourse, and yet the marriage might be proved by parole testimony. So the law already existed, in a number of cases; and, upon the whole, he had heard nothing to convince him that a marriage could not be proved by this species of evidence.

With respect to the question, Whether, if the parties had married other persons, after this contract, they could have been punished for bigamy? he agreed, that the argument founded upon this proved too much. If the statute applied only to marriages regularly celebrated, and if this was not a regularly celebrated marriage, then it appeared to follow, that the parties could not be punished for bigamy, on marrying other parties again, though the second marriage might be invalid. The legislature probably meant to make a distinction between the civil and criminal consequences in these cases.

The argument founded on the bigamy act proved too much.

He had now pointed out generally the grounds of his opinion, that this marriage was duly had. They had before them such evident demonstration of the inconvenience of loose judgments, that he intended to propose, that the present judgment should be prefaced by some finding which might distinguish it from some of the loose cases noticed at the Bar. The finding might be of this nature:—

Findings to preface the judgment.

1st, That, at the time of the declaration of marriage in question, Mr. M'Adam was of sound mind, and able to contract.

2d, That, being then of sound mind, it was unnecessary to decide upon the question of previous insanity, or any circumstances connected with it.

3d, That, by the declaration of marriage, and the facts and circumstances connected with this declaration, it appeared, that the parties did, on the 22d of March, 1805, intend, forthwith, to marry, and did accordingly contract very matrimony.

Lord Redesdale concurred in the opinion, that there was not the slightest proof of insanity at the time of the contract. Insanity was not to be inferred from the subsequent act of suicide. It was not inferred by law, but must be proved. There was no evidence here that Mr. M'Adam was insane at any period of his life, except from his irregular living at Edinburgh in 1803; and then it was immediately removed by medicine. Putting that, then, wholly out of consideration, the question was, Whether the circumstances were sufficient to constitute a legal marriage? The Acts of Parliament had been referred to, and especially that of 1551, cap. 19; from which it was inferred, that a marriage was not valid, except regularly celebrated in *facie ecclesiæ*; as a prosecution for bigamy could not be supported under that statute, unless the previous marriage had been so celebrated. It did however appear to him, that the answer given by Sir S. Romilly, to that argument, was sufficient. Besides, he thought that the expression in the act was not strong enough to support the inference, considering, that, by the prior act of 1503, cap. 77, marriage was recognized without this evidence of regular celebration for its validity. Perhaps the intention

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The marriage valid.

Insanity not inferred by the law, from the mere act of suicide.

Effect of the Acts of Parliament, relating to this question.

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Acts do not support the conclusion that a regular celebration is necessary.

was, that stronger evidence should be necessary in criminal cases. The acts of 1641, cap. 8, and of 1661, cap. 34, were so far from supporting the conclusion, that regular celebration was necessary to constitute a valid marriage, that they referred to marriages constituted in both ways, where there was, and was not, a regular celebration; and the act of 1698, cap. 6, made the same distinction.

The contract *de præsenti* and promise *de futuro*, in cases of marriage, are clearly distinguished in the text writers, and decided cases.

All the text authorities made a clear distinction between the contract *de præsenti* and the promise *de futuro*, whereas the argument on the side of the Appellant went utterly to abolish the distinction. In the text writers, and especially in Mackenzie's and Erskine's Institutes, the doctrine contended for by the Respondent was clearly recognized.

The same doctrine was also to be found pervading the whole of the cases. In the case of *M'Lauchlan and Dobson*, there was only a declaration, and no subsequent *copula*. Upon the doctrine of the Appellant, there was no ground to have induced the Commissaries to declare this to be a marriage. It was afterwards indeed found by the Court of Session, that this was no marriage, not because a declaration *de præsenti* was *per se* insufficient to constitute a marriage; but because, from all the circumstances taken together, it was evident that the parties had no intention of forming a present marriage. The declaration was considered as an engagement for the future, from which the parties, *rebus integris*, were at liberty to resile. It was not enough that there should be a reservation by one of the parties. The intention of both in that case was, that the real marriage should be future. It had been said, that in the pre-

sent case there was a secret reservation in the mind of Mr. M'Adam, who never meant to live with Miss Walker as her husband. But could it be allowed that a contract should be ineffectual, because there was a reservation in the mind of one of the parties? In the case of *M'Lauchlan and Dobson* the reservation was in the minds of both parties. But was there proof of any such reservation on the part of Mr. M'Adam? It had been inferred from the subsequent suicide, and from his language to Richardson and others. That inference however had been met by a variety of circumstances, which marked his present intention to marry. He had said at the time of the declaration, that these were his legitimate children. From his letter to Smith, stating, that he had made up his mind to marry Miss Walker; from his declarations to Woodburn before and after—it was clear that he considered himself bound by his contract, and that he had completed his marriage.

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A contract not to be defeated by a reservation in the mind of one of the parties.

It had been objected, however, that the verbal declaration could not be proved by parole testimony. But if a marriage could be constituted in this way, he did not understand how it could be proved, except by parole evidence. In *M'Lauchlan and Dobson*, and in *M'Kie and Fergusson*, the evidence was parole.

The marriage proveable by parole testimony.

He saw no reason in this case therefore to dissent from the Court below. If ever a marriage could be completed without consummation, this was a case of that description. He did not think it could be properly said, that things were entire after this: Though one of the parties died before consumma-

If a marriage could be constituted at all, without consummation, this must be a marriage.

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tion, the person living had acquired a different character—her children had acquired a different character. There was no proof that Mr. M'Adam did not intend a *consortium vitæ* at the time of the marriage; and even though he had not had that intention, still it was not to be allowed that a civil contract, (as this was by the law of Scotland,) should be avoided by a secret reservation of one of the parties.

Lord Carlton was satisfied that the law of Scotland made a distinction between a contract *de præsenti* and a promise *de futuro* in cases of marriage. Adverting to the objection, that there was no evidence of consent on the part of the lady, he noticed the facts that she had stood up—that she had given her hand—that she heard the declaration, and then courtsied, which was an usual mode of intimating consent. And from all these circumstances, he said it was fairly to be presumed that she had consented.

Marriage established.

Judgment of the Court below, establishing the marriage, affirmed.

Agent for Appellant, RICHARDSON.
Agent for Respondents, SPOTTESWOODE and ROBERTSON.

NOTE.—The Court of Session had awarded a sequestration of the entailed estates in question, in the above cause, during the proceedings in the Courts below. Upon the termination of the cause there, the sequestration, which the Appellant was desirous should be continued pending the appeal, was recalled: the Respondents proceeded to take possession, and

an interdict was applied for and refused. Against this recal of the sequestration and refusal of the interdict the Appellant appealed: but as the effect of the above decision was, that he had nothing to do with the estates, these two supplementary or secondary appeals fell to the ground of course.

ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

RUBICHON *v.* HUMBLE.

CONTRACT by the owner of a ship, that the vessel shall proceed from the Thames to Martinique, there to take in a full and complete cargo of sugars, rum, AND OTHER WEST INDIA PRODUCE. This contract illegal under the Navigation Act of 12 Car. 2, cap. 18, and 48 Geo. 3, cap. 69, and not helped by the Malta Act, 41st Geo. 3, cap. 103.

July 8, 1813.

CASE RESPECTING THE COMMERCIAL INTERCOURSE BETWEEN MALTA AND THE BRITISH PLANTATIONS.

Hilary Term, 1811.

THE Defendant in error, Michael Humble, owner of the ship Neptune, brought an action of covenant in the Court of King's Bench, upon a charter party of affreightment, against the Plaintiff in error, Maurice Rubichon, freighter of the vessel.

The ship was hired in November 1809, to proceed from the Thames in ballast, or with a cargo, to Martinique, without waiting for convoy, and there to deliver her cargo, if any, and then to take on board "*a full and complete cargo of sugar, rum, and other West India produce*," and to proceed direct to Malta, without waiting for convoy, and there to deliver the cargo to the agents or assigns of the freighter. *In consideration whereof*, the freighter covenanted to furnish a cargo or cargoes

Terms of the contract.—Ship freighted to proceed to Martinique, and from thence to Malta, with a full and complete cargo of sugar, rum, and other West India produce.