

APPENDIX.

PART I.

PROOF.

1804. Jan. 24.

STEIN *against* MARSHALL.

WHEN this case, No. 271. p. 12443., was printed, there was an appeal depending. The House of Lords, (25th May 1805), Ordered and Adjudged, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed, with L. 150 costs.

NO. 1.

1804. May 15.

EDMESTONE and COCHRANE *against* COCHRANE.

IN the year 1797, Agnes Edmestone was delivered of a female child, of which Andrew Cochrane was the father.

In 1801, a declarator of marriage was brought by her before the Commissaries; and it also concluded for a declaratory of legitimacy in favour of Agnes Cochrane, her daughter. The libel founded upon a letter written by Cochrane to the pursuer, (which, however, she had been prevailed upon to give back to him), in the following terms: "My dear, As a full proof and testimony of my regard and affection for you, I hereby agree and bind myself to be your real husband in all senses of the word, and expects only the common ceremony of the outward rule of marriage; and,

NO. 2.

Marriage established by an explicit writing.

NO. 2. “ as a farther evidence of my love and affection for you, and of my sincerity in marriage, I do hereby bind and oblige myself to accept of you as my lawful wife, and is willing and ready at any time to accept of the common rite here put in execution in a public manner ; or, if that cannot be conveniently done suiting to all parties, I am agreeable to accept to any measure you think proper yourself, so as we may be united together in marriage. To this I sign my name as your real husband, agreeable to what is already said above ; and may nothing but death itself part us.”

After some procedure, a reference was made to the defender’s oath, who being interrogated, “ If he ever wrote to the pursuer the letter particularly engrossed in the libel, or a letter expressed in similar terms ? depones, upon the said letter being read to him, That there was some similarity in the substance and import of the letter which has been read to him, and that which he wrote to the pursuer. And being particularly interrogated, What was the substance and meaning of the letter which he wrote to the pursuer ? depones, That he cannot recollect the whole, but recollects, that he acknowledged to have begot the child of which the pursuer was pregnant ; and, as she had before threatened to make away with herself, if he did not give her a line, copied from one which she gave him, he advised her to leave her service at Brocksburn, and go back to the house of her father, near West Calder : That the letter was an exact copy of the one which the pursuer gave to him : That in this letter which he gave to the pursuer, he acknowledged her to be his wife : That when the pursuer brought the copy, she told the deponent that it imported an acknowledgment on his part that he was her husband ; and he is certain, that when the pursuer received from him the letter, she understood it to be an acknowledgment of marriage ; and that when the pursuer presented the copy of the letter to the deponent, she told him, that she would instantly make away with herself, if he did not give her a letter acknowledging himself to be her husband : That when the pursuer received the letter from the deponent, she said she was to deliver it back when demanded. Being interrogated by the Court, Whether he considered himself to be a free man after giving the pursuer this letter ? depones, That at this time he considered himself to be bound by this letter, by which he means, that he was in effect her husband, and that he was not at liberty to marry any other woman : That he has no doubt, but that the pursuer, on her part, when she received the letter from him, considered herself as his wife. Interrogated, Was any person present when the deponent wrote said letter ; where was it written, and when ? depones, That a brother of the deponent’s was present when he copied the letter and gave it to the

“ pursuer : That it was written at the deponent’s brother’s house, and at NO. 2.
“ the term of Martinmas preceding the birth of the child. Interrogated,
“ If the deponent slept with the pursuer the night on which he gave her
“ this letter ? depones, That he slept with her in his brother’s house the
“ night after he gave her this letter.”

Upon the import of this deposition, memorials were given in to the Commissaries ; upon advising which, (14th July 1802) they pronounced an interlocutor, finding, “ That the defender and the pursuer Margaret Edme-
“ stone are married persons, husband and wife of each other, and that the
“ pursuer Agnes Cochrane is their lawful child.”

This judgment was brought under review by advocation, when the following interlocutor was pronounced (1st December 1803) : “ The Lord
“ Ordinary having considered this bill, with the answers thereto, replies and
“ Commissary Court process produced, and being of opinion, that the oath
“ of the complainer emitted by him on the reference of the respondent,
“ (whatever may have been the previous words of the letter, the contents
“ of which, as engrossed in the libel, are only given according to the mean-
“ ing and recollection of the pursuer), sufficiently establishes, that it was at
“ the time meant and understood by both parties to constitute a marriage
“ *de præsenti*, and bind them as husband and wife to each other, and that
“ its effect in that respect is nowise taken off by any thing therein stated as
“ to the circumstances which may have led to his granting it, or the views
“ under which he alleges it was afterwards delivered up by her ; and there-
“ fore that it has been justly held as entitling the pursuer to obtain the
“ judgment, decerning in the declarator of marriage and adherence ; refuses
“ the bill.”

Cochrane presented a reclaiming petition to the Court, which was refused without answers (27th January 1804). He again reclaimed, and

Pleaded : A promise of marriage at some future time neither constitutes a marriage, nor affords action for declaring a marriage in a court of law, although it may subject the party who unreasonably resiles in damages. Now, the writing founded upon imports nothing more than a promise *de futuro* ; it binds him to accept of the pursuer as his wife ; it is an agreement to solemnize the marriage in a public manner at some subsequent period, but contains no consent *de præsenti* ; it only declares, that he is willing to do what is necessary, “ so as we may be united together in marriage.” It makes no difference, that he admits, that at the time, he conceived that such a writing did constitute a marriage : The private opinion of the parties cannot alter the legal effect of any solemn written instrument, or give it a meaning different from that established by law. The law itself will expound.

NO. 2. the legal meaning and effect of written contracts. Much stronger acknowledgments have been found insufficient to constitute marriage; *Maçinnes* against *More*, 25th June 1782, in the House of Lords; No. 584. p. 12683.; *Taylor* against *Kellow*, 17th February 1787, No. 586. p. 12687.; *Maclachlan* against *Dobson*, 6th December 1796, No. 589. p. 12693.

Answered: In judging of the constitution of marriage, the consent of parties is the leading principle by which the law is guided. Statute and practice have fixed upon certain circumstances from which consent is to be inferred, but the existence of a real consent is alone essential. Such consent is established by the regular solemnities fixed by positive law: it is also proved by the actual cohabitation as husband and wife; or by a promise to marry, if the parties, in fulfillment of it, have carnal intercourse: the promise becomes by that act a present consent. It is clearly shewn, by indisputable evidence, that the parties have deliberately acknowledged themselves married; *Stair*, B. 1. Tit. 4. § 6.; *Ersk.* B. 1. Tit. 6. § 5.; *Bankt.* B. 1. Tit. 5. § 24. No evidence of consent, or of the real intention and understanding of the party, can be so satisfactory as the testimony of the person himself swearing to the existence of such a consent. The writing is admitted in his deposition to have been delivered in presence of a witness to the other party, acknowledging her as his wife, intending and believing that he was thereby in effect her husband: that he never doubted that she conceived herself to be his wife, and in consequence of this mutual consent *de presenti* to take one another for husband and wife, they that very night slept together. The acknowledgment is truly a declaration of marriage *de presenti*: it shews, that though the parties thought they should go through the ceremony of a public marriage, they conceived themselves privately and effectually married. Written acknowledgments have been sustained to constitute marriage; *Inglis* against *Robertson*, 3d March 1786, affirmed in House of Lords; No. 587. p. 12689.; *Callender* against *Boyd*.

The Court, in general held, that a written acknowledgment *de presenti* was sufficient to constitute marriage, and (15th May 1804) on advising the reclaiming petition, with answers, adhered to their former interlocutor.

Lord Ordinary, *Bannatyne*.
Alt. *Fletcher*.

Act. *Moncrieff*.
Agent, *Geo. Ycoll*.

Agent. *Jo. Sommerville*.
Clerk, *Menzies*.

F.

Fac. Coll. App. No. 1. p. 1.

1806. *March 8.*

WALKER against MACADAM.

NO. 3.
In a proof
of insanity,

IN the declarator of marriage at the instance of *Elizabeth Walker*, to have it found that she was the lawful wife of the late *Quintin Macadam* of