

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. Yooll*.

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

Craigengillan, and that her children were lawful children; it was objected by the next heir, that Macadam was in a state of insanity at the time when he made the declaration of marriage upon which the pursuer founded her action of declarator. A proof was taken before the Commissaries; in the course of which, the defender endeavoured to shew that Macadam was constitutionally liable to fits of insanity; and with a view to establish this fact, interrogated certain witnesses, with respect to the disease being hereditary in his family, and whether certain of his near relations had not been subjected to that malady. These questions being objected to on the part of the pursuer, the Commissaries refused to allow them, finding it incompetent for the defender to prove the insanity of Macadam by such facts. A bill of advocation having been presented against this interlocutor of the Commissaries, praying for a remit to allow such interrogatories to be put, was, after advising with the Lords, refused by the Lord Ordinary; and a reclaiming petition against this interlocutor was likewise refused, without answers.

NO. 3.
it is not competent to examine witnesses with regard to the insanity of the relations of the party alleged to be insane.

Lord Ordinary, *Cullen.* Act. *Thomson.* Agent, *Jo. Smith junior, W. S.*

Act. *Clerk.* Agent, *Ar. Crawford, W. S.*

J.

Fac. Coll. No 244. p. 548.

1807. *March 4.*

WALKER *against* MACADAM.

NO. 4.

IN the year 1800, Elizabeth Walker, the daughter of a farmer, came to reside with Quintin Macadam, Esq; of Craigengillan, as his mistress, receiving from him an annuity of L. 60 *per annum.* She lived with him for several years in that character, and bore two children.

Proof of marriage.

On the 22d March 1805, Mr Macadam was found lying dead at the top of a staircase in his house at Berbeth. His death was occasioned by a pistol, the discharge of which had been heard a short time before, and which remained grasped in his hand, with the muzzel inserted in his mouth.

After his death, his cousin Alexander Macadam, who, in the event of Mr Macadam's death without lawful issue, was his next heir of tailzie and provision, took the necessary steps to make up his titles in that character. At the same time, an action of declarator of marriage and legitimacy was instituted before the Commissaries, by Elizabeth Walker and her children, to have it found, that she was his wife, and that they were the lawful chil-