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The Commissaries pronounced this sentence, " Finds facts, circumstances, and qualifications proved, relevant to infer a marriage between the pursuer and defender."

On a bill of advocation being presented by the defender, the Lord Ordinary took the cause to report ; when it was

Observed on the Bench, The defect in the proof of cohabitation in this case, proceeds in some measure from the witnesses ascribing the intercourse between the parties, to a cause suggested by the disparity of their rank. That defect is therefore to be supplied by other circumstances, such as the so frequent writing of letters by the defender to the pursuer, his making presents to her of valuable family articles, and his assent to the address made to her on the occasion mentioned above.

The Court considered the cause as attended with considerable difficulty; but, in general, the letters seemed to be viewed as furnishing evidence of the marriage.

THE LORDS refused the bill of advocation.

Reporter, *Lord Gardenston.*

Act. *Rolland.*

Alt. *Maconochie.*

S.

Fol. Dic. v. 4. p. 171. Fac. Col. No 262. p. 400.

* * * This case having been appealed, the HOUSE of LORDS, 14th February 1787, ORDERED and ADJUDGED, " That the appeal be dismissed, and the interlocutors complained of be affirmed."

1795. November 13.

JEAN ANDERSON, and her Children, *against* JOHN FULLERTON and Others.

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A holograph letter, discovered in a gentleman's repositories at his death, in which he declared himself the husband of his housekeeper, who had long cohabited with, and born children to him, found not to be sufficient evidence of marriage.

JEAN ANDERSON lived with Mr George Fullerton many years as his housekeeper. During that period she bore children to him, some of whom survived him. The children and their mother were treated by Mr Fullerton with much kindness and affection. The latter had the complete direction of his family; sat in the room, and at table with him, even when there were strangers present, and occasionally rode out in the carriage along with him; but she uniformly went by the name of Mrs Anderson. The children not only received the same marks of attention with their mother, but were allowed to assume their father's name, and sometimes visited along with him.

Mr Fullerton was taken suddenly ill, and became insensible on the 19th April 1791, and died on the morning of the 21st. His repositories were immediately sealed up. The keys were left with Mrs Anderson, who had had possession of them during Mr Fullerton's illness, and one of the servants observed her open his desk in the course of it.

In the interval between his being taken ill, and the opening of his repositories after the funeral, Mrs Anderson mentioned to several of her friends, that

there would be found in Mr Fullerton's desk, along with some bonds of provision to the children, a letter, in which he declared himself to be her lawful husband; she further told them, that, after writing that letter, Mr Fullerton gave it her to read; and that after doing so, and declaring herself satisfied, she had, at his desire, put it in the place described by her.

The following letter, holograph of Mr Fullerton, was accordingly found in his desk:

Custom-House, Leith, 16th April 1791.

" My dear Jean Anderson,

As you and I have cohabited together as man and wife for upwards of twenty years, (though pride and connections prevented my declaring to the world that you was my wife), yet, on account of your unspeakable attention to my health, and interest in my family affairs; and, above all, the love I bear to you, and the three children you have born to me, viz. Margaret, Jean, and Maria Fullertons, your and my daughters, I think it a duty incumbent on me to subscribe, what I truly am, My dear Jean, your affectionate husband,

GEO. FULLERTON."

This letter was wrapped round a sealed packet, marked, " Not to be opened till after the decease of George Fullerton." The packet contained two bonds, (the one of them dated in 1785, the other in 1789,) by which L. 1500 were provided to Mrs Anderson in liferent, and his children by her in fee. In these bonds she was described as his servant; and it was declared, that the provision then made for her should not supersede her claim for wages due to her at his death. The bonds likewise contained a nomination of tutors and curators to the children.

Mrs Anderson and her Children having brought a declarator of marriage and legitimacy against John Fullerton and others, the heirs at law of Mr Fullerton, a proof was led, the import of which has been already stated.

The Commissaries at first sustained the marriage, but they afterwards gave judgment in favour of the defenders; and a bill of advocation having been presented, the Lord Ordinary ordered informations, in which the pursuers

Pleaded, To constitute a marriage by the law of Scotland, all that is required is evidence of the deliberate consent of parties, to enter *de presenti* into that connection, Stair, B. 1. Tit. 4. § 6.; Erskine, B. 1. Tit. 6. § 2. 4. 5. 6. This consent may be implied from their conduct, and, with more security, it may be established by an express declaration made before witnesses, or in writing, Bankton, B. 1. Tit. 3. § 24.; 3d March 1786, Inglis against Robertson, No 587. p. 12689.

As evidence of that consent, in the present case, there is produced a declaration in writing, by Mr Fullerton, which may be considered, either as an acknowledgment of a fact which had already taken place, or as constituting the

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matrimonial consent, from its date ; a consent which the situation of the parties makes it very probable was then mutually declared. If Mr Fullerton had been alive, and made a similar declaration before witnesses, no further evidence could have been required, and it would have been irrevocably binding on him. The letter was written by Mr Fullerton, after mature deliberation, for the express purpose of affording such evidence, in case the fact should ever afterwards be disputed.

Further, the letter was not only communicated to the person to whom it was addressed, but, in effect, delivered to, and accepted of by her ; indeed, the delivery of it is, independently of other circumstances, implied, from its being found in the desk of Mr Fullerton, to whom, as her husband, the custody of all deeds in which she was interested naturally belonged.

Answered. The letter in question cannot be founded on as an acknowledgment of a marriage already constituted, because, in that view, it is contradicted by the whole circumstances of the case, from which it is evident that no marriage had previously taken place ; and indeed the terms of the letter shew the conviction of the granter, that the execution of it was necessary to establish a marriage.

Nor is that writing, *per se*, sufficient to constitute a marriage, as that can only be done by the mutual act of the parties, whereas the letter in question was binding upon neither. It was not binding on Mr Fullerton, because, while it remained in his possession, it was completely at his disposal, and afforded proof merely of an intention not carried into execution during his life, and he certainly could not bequeath Mrs to Anderson the character of his wife as a legacy. On the other hand, there is as little evidence of her consent. Her knowledge of the existence of the letter may have arisen, not from a deliberate communication on his part, but from her having had access to Mr Fullerton's repositories, during his last moments. Had she known of it sooner, or, at least, had she considered it as constituting a marriage, she would have immediately mentioned it to her friends, and assumed Mr Fullerton's name, and the character of his wife: Its ever having been in her possession, rests entirely upon her own averment, and is improbable in itself ; because, if it had been delivered to her, she would have been too sensible of its importance ever to have given it up ; and before she can found on the letter being discovered in Mr Fullerton's desk as equivalent to being in her own possession, she must establish, *aliunde*, that he was her husband.

As, therefore, she had had no opportunity of declaring her acceptance of the letter, it would not have prevented her from marrying another person during Mr Fullerton's life ; nor, had the present defenders found it for their interest to raise a declarator of marriage against her, and she thought proper to oppose them, would it have entitled them to a judgment in their favour. See 18th Nov. 1766, Johnston, No 582. p. 12681. ; 1771, Wallace against Ballantyne,

(see APPENDIX); and surely her adopting a different line of conduct since Mr Fullerton's death cannot affect the question.

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

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

The bill of advocation was refused.

Lord Ordinary, *Abercromby*.

Act. D. *Cathcart, Inglis*.

Alt. M. *Ross*.

D. D.

Fac. Col. No 183. p. 435.

1796. December 6. HELENA MACLAUHLAN against THOMAS DOBSON.

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

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

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

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