

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-

NO. 4. dren of Quintin Macadam, having been publicly acknowledged by him as such in the presence of several witnesses, on the forenoon of that day on which he died.

The defences stated by the next heir of tailzie against this action of declarator, were, *1st*, That the pursuer could not bring competent evidence for proving the allegation on which the marriage is founded: *2dly*, That the parole evidence of this fact, though it would have been competent against Mr Macadam himself, if he had been alive, yet, as no marriage was actually celebrated, and no claim of marriage made against him during his life, the proof offered was not relevant in a question with his heir: *3dly*, That Mr Macadam was insane at the time in which he made this declaration.

A proof was allowed by the Commissaries, when circumstances were established, the import of which may be stated as follows:

In a communication which he had with the brother of Elizabeth Walker at the commencement of his connection with her, and upon one or two occasions afterwards, Mr Macadam spoke to his friends of his marriage with Miss Walker, as an event that might possibly take place at some future period, expressing himself dissatisfied with the persons on whom his entailed estate was likely to devolve. On the 21st March 1805, the day before his death, he told his factor, who lived in the neighbourhood, that he intended to marry Miss Walker immediately, and desired him to make out a marriage-contract, mentioning what occurred to him as an adequate jointure, and desiring him likewise to execute a deed, entailing his landed property. The factor excused himself, on account of his ignorance of the proper mode of extending such deeds, but advised him to apply for that purpose to his man of business in Edinburgh. Mr Macadam did accordingly write to his agent by that day's post, informing him of his intentions, and desiring him to come to Berbeth immediately, bringing with him stamped paper to write the marriage-contract, and every thing requisite to make out a deed, entailing his whole landed property. On the morning of the 22d of March, immediately after breakfast, Mr Macadam desired the men-servants to be assembled; and when they were so assembled, he bade Miss Walker to rise, which she did, and then taking her by the hand, desired them to be witnesses of his marriage to Miss Walker, and that the children were lawful children. He afterwards sent for the housekeeper, and on her arrival, he again took Miss Walker by the hand, and repeated the same declaration.

Mr Macadam walked out in the course of the forenoon, called at his factor's house, mentioning what he had done, adding, that he thought it a very proper thing, and requested his company to dinner. The marriage was publicly known in the neighbouring village, where the health of Mr and Mrs Macadam was drank by some of the servants, and Elizabeth Wal-

ker received the congratulations of several persons of the family in the NO. 4. course of the day.

Mr Macadam returned home about three o'clock, and it appeared, that he had that day written with his own hand a codicil to his will, leaving his horse and two of his pointers to a gentleman with whom he was in habits of intimacy. The report of a pistol was heard soon after his return to the house by one of the servants, without exciting any alarm, as Mr Macadam used occasionally to amuse himself by firing at a mark; and the body was found a quarter of an hour afterwards.

It further came out in evidence, that Mr Macadam, a few weeks before his death, told the gardener, when speaking of the report of his marriage, that he would blow out his brains the day he married Miss Walker, and that for some nights previous to his decease, he had complained of an inability to sleep. On the morning of that day, one of his servants observed something uncommon in his looks and manner. It appeared likewise, that Mr Macadam was periodically liable to a disorder, which one of the medical gentlemen, who had attended him, stated to be a degree of melancholic insanity; but in the opinion of several other medical gentlemen, who had likewise been in use to attend Mr Macadam, the disease originated in his stomach. This disorder had a visible effect upon his spirits, and while he was under its influence, his temper was rendered very irritable. Upon one occasion, about two years before his death, Mr Macadam shewed, for several years, symptoms of derangement; but this, in the opinion of the surgeon, proceeded entirely from intoxication upon an irritable temperament, and the disorder yielded at once to the remedies which were administered. A number of gentlemen who had been well acquainted with Mr Macadam, concurred in opinion, that he was a man of uncommonly strong understanding, and had never exhibited to them the smallest symptoms of derangement; and one gentleman, who had spent some days at his house, and left it the day before his death, declared that Mr Macadam appeared to him perfectly well, that he spoke with his usual good sense, upon the different topics of conversation, and upon his departure, requested him to send him some things which he wished from Edinburgh.

Upon advising this proof, the Commissaries pronounced the following interlocutor, (April 16. 1806): "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 Macadam had formed a resolution of making the pursuer Elizabeth Walker his wife, and legitimating the children which she had born to him, at some future period; find it clearly proven, that, on the forenoon of the 22d of March 1805, Mr Macadam

NO. 4. “ 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 chil-
 “ dren, in presence of several persons, whom he had called up to his din-
 “ ing-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 Macadam was in his perfect sound mind ; that the deportment of
 “ the pursuer clearly indicated her approbation of what Mr Macadam had
 “ done ; that on this occasion Mr Macadam and the pursuer mutually ac-
 “ cepted of each other as husband and wife ; find these facts relevant to in-
 “ fer marriage betwixt the late Mr Macadam and the pursuer ; that by this
 “ declaration the *status* of the pursuer as his wife, and her children as his
 “ lawful children, was fixed, and could not be affected by any subsequent
 “ act of Mr Macadam : 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.’

Against this judgment of the Commissaries, a bill of advocation was presented by Alexander Macadam, and the Lord Ordinary took the case to report upon memorials. The pursuer

Pleaded : By the law of Scotland, marriage is constituted by mutual consent alone ; Stair, B. 1. Tit. 4. § 6. ; Erskine, B. 1. Tit. 6. § 2. ; Bankton, vol. 3. p. 60. And if marriage may be effectually constituted by a verbal declaration, it may be proved by parole evidence ; the relevancy of which has been admitted, even in cases where marriage has not been made out ; Macinnes against More, December 20. 1781, No. 584. p. 12683. ; White against Hepburn, November 18. 1785, No. 585. p. 12686. The limitation of the proof to the writ or oath of party, applies only to the case of constructive marriage, arising from a promise *subsequente copula*, not to the case of a solemn declaration of marriage before witnesses. If a deliberate consent of the parties *de præsenti*, to take each other for man and wife, be completely made out, nothing further is necessary to complete a marriage. And though the death of one of the parties may limit the mode of proof, by excluding the possibility of a reference to oath, it does not therefore render a proof *prout de jure* incompetent, though a greater degree of strictness may be requisite in examining the import of the evidence. There is no foundation whatever for the allegation of the insanity of Mr Macadam at the time of the declaration of marriage. The intention of marrying Miss Walker is proved to have been of long standing ; and there was nothing in the deportment of Mr Macadam previous to it, that could give the smallest ground for believing that his intellects were disordered. The situation in which he was found, does by no means necessarily infer suicide, for the pistol might

have gone off by accident; but even if it did, suicide is not *per se* sufficient evidence of insanity, so as to invalidate engagements previously entered into. NO. 4.

Answered: There are only three ways in which, by the law of Scotland, a marriage can be established; by proof of actual celebration, of cohabitation as man and wife, and of a promise *subsequente copula*. The proof adduced in this case applies merely to the first of these modes, as it is not pretended that the pursuer and Mr Macadam ever lived together in the character of man and wife, so as to give a legal presumption of the celebration of a marriage. It is very true, a consent *de presenti*, followed by cohabitation as man and wife, is, by the law of Scotland, equivalent to a marriage. But, though the law of Scotland is less strict with regard to the mode of constituting marriage than that of most European nations, mere consent, without any form of celebration whatever, has never been held sufficient to constitute a marriage; and, with regard to the evidence of consent, marriage is not placed on the footing of an ordinary contract; Johnstone against Smith, 18th November 1766, No. 582. p. 12681.; Maclauchlane December 6. 1796. No. 589. p. 12693.; Kames' Elucidations, p. 33.; Judgment of House of Lords in case of Macinnes against More, No. 584. p. 12683. It is necessary, that the person who celebrates the marriage must be a clergyman or a magistrate, or at least, in celebrating the marriage, must assume one of these characters. The declaration in this case nowise resembled the celebration of a marriage; there was no consent given by the pursuer, who was at perfect liberty, notwithstanding what took place, to have contracted another marriage, if she had been so inclined; Young against Irvine, 21st January 1715, No. 68. p. 8473. Matters were left entire at Mr Macadam's death; there was no cohabitation, and no lapse of time sufficient to infer acquiescence. It is clear that Mr Macadam had no view of living as the pursuer's husband, both from what he had previously declared, and likewise from his immediately committing suicide. No man is entitled to bequeath to his mistress the *status* of his wife, and to his bastards the *status* of legitimate children; Anderson against Fullarton, 13th November 1795, No. 588. p. 12690. The defender further contended, that there was sufficient evidence of mental derangement at the time of this alleged marriage, to invalidate the contract which Mr Macadam entered into.

The Lords (13th November 1806) by a considerable majority, remitted to the Lord Ordinary to refuse the bill.

And, upon advising a reclaiming petition, with answers, they adhered.

Lord Ordinary, *Robertson.*

Agent, *J. Smith, jun. W. S.*

Agent, *A. Crawfuird, W. S.*

Act. Decanus, *Thomson, Cranstoun.*

Alt. Solicitor-General Clerk, *Cathcart, Jeffrey.*

Clerk, *Macdonald Buchanan.*