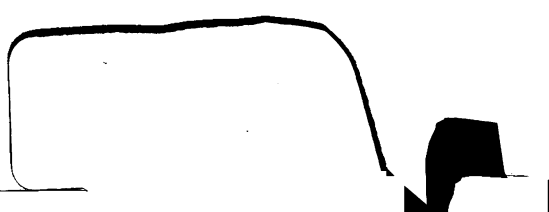

THE QUEEN *v.* MILLES, AND THE QUEEN *v.* CARROLL.

REPORT

OF TWO CASES UPON

THE MARRIAGE LAW OF IRELAND,

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

IN IRELAND.

IN EASTER AND TRINITY TERMS, 1842.

BY

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1842.

THE COURT OF QUEEN'S BENCH.

THE QUEEN *against* GEORGE MILLES.

THE prisoner was tried for bigamy at the last Spring Assizes for the County of Antrim, held at Carrickfergus, before Mr. Justice Perrin, when the jury, under the direction of his lordship, found the following special verdict:—

"We find, that about thirteen years ago, to wit, in January, 1829, the prisoner, George Milles, accompanied by Hester Graham, then spinster, and three other persons, went to the house of the Reverend John Johnston, at Banbridge, in the County of Down; the said Reverend John Johnston, then and there being the placed and regular minister of the congregation of Protestant Dissenters, commonly called Presbyterians, at Tullylish, near to Banbridge, aforesaid; and that the said prisoner, and the said Hester Graham, then and there entered into a contract of present marriage, in presence of the said Reverend John Johnston, and the said other persons; and that the said Reverend John Johnston, then and there performed a religious ceremony of marriage between the said prisoner and Hester Graham, according to the usual form of the Presbyterian Church in Ireland, and that after the said contract and ceremony, the prisoner and said Hester, for two years cohabited and lived together as man and wife, the said Hester being, after the period of said ceremony, known by the name of Milles.

"And the jurors aforesaid, on their oath aforesaid, further say, that the said George Milles was, at the time of said contract and ceremony, a member of the Established Church of England and Ireland, and that the said Hester was not a Roman Catholic, but the jurors aforesaid, do not find whether she, the said Hester, was a member of said Established Church, or a Protestant Dissenter.

"And the jurors aforesaid, upon their oath aforesaid, further find that afterwards, upon the 24th day of December, 1836, while the aforesaid Hester was still living, the said George Milles was married to one Jane Kennedy, then spinster in the parish Church of Stoke, in the County of Devon, in England, according to the forms of the said Established Church, by the then officiating minister of the said parish, he being then and there a priest in holy orders. And the jurors aforesaid, upon their oath aforesaid, further find, that the said George Milles, afterwards, on the 2nd day of September, 1841, was apprehended and in custody at Belfast, in the County of Antrim, on the charge of bigamy, because of his having so married the said Jane Kennedy, as aforesaid.

"And the jurors aforesaid, pray the advice of the Court in the premises, and say, that if the Court shall be of opinion that the said contract and ceremony between the said George Milles and Hester Graham, followed by such cohabitation as aforesaid, constituted a valid marriage in law, then the jurors aforesaid, upon their oath aforesaid, say, and find, that the said George Milles is guilty of the offence above laid to his charge, in manner and form as in the said indictment set forth. But if the Court shall be of opinion that the same do not constitute a valid marriage in law, then the jurors aforesaid, on their oath aforesaid, do say, and find, that the said George Milles is not guilty of the said offence, in manner and form, as in the said indictment set forth."

This special verdict being set down for argument in this Court, the same came on to be argued on Tuesday, the 26th of April, in Easter Term, by

Holmes for the Crown.—The question for the Court turns entirely upon the validity of the first marriage contracted under the circumstances mentioned in the special verdict, which finds that a religious ceremony of marriage was celebrated between the defendant and Hester Graham, spinster, in January, 1829, by the Rev. John Johnston, a regular Presbyterian Minister, in his house at Banbridge, in the presence of three witnesses, and that this was followed by cohabitation as man and wife for the period of two years. It also finds that the defendant was, at the time, a member of the Church of England, that Hester Graham, at that time, was not a Roman Catholic but was a member of the Church of England or a Protestant Dissenter, and that she afterwards bore the name of Milles.

The 10 Geo. IV., c. 34, is the statute upon which the defendant is indicted, the first section of which repeals former statutes, and the twenty-sixth section enacts "that "if any person being married, shall marry any other person "during the life of the former husband or wife, whether "the second marriage shall have taken place in Ireland or "elsewhere, every such offender shall be guilty of felony," &c. The generality of the words "being married," is worthy of remark. The statute does not refer to any form, ceremony, or rite of marriage. The words are the most general, perhaps, that could have been used. And they are the very same which are used in the earliest statute of Bigamy in England, the 1 Jac. I, c. 11, Eng. It will be found in the 3rd Institute 88, cap. 27, "Of "felony to marry a second husband or wife, the former "husband or wife living." The enactment is in these words, "If any person or persons within his Majesty's

"dominions of England and Wales, being married, do, at "any time after, marry any person or persons, the former "husband or wife being alive, that then every such offence "shall be felony," &c. Here are the same words, "being "married" and Lord Coke observes upon them "This "extendeth to a marriage *de facto*, or voidable by reason of "a pre-contract, or of consanguinity, or of affinity, or the "like; for it is a marriage in judgment of law until it be "avoided, and therefore, though neither marriage be *de jure*, "yet they are within this statute." In the same way it might be argued here, that the facts found by this special verdict show plainly a marriage *de facto* sufficient to satisfy the words of the statute, "being married." There is a case cited, 1 Russell on Crimes, 290, 1st. Ed.; 192, 2nd Ed., of an indictment for bigamy before Mr. Justice Dennison on the Norfolk circuit, which is likewise referred to in *Morris* v. *Miller*, 1 Sir W. Blackstone, 632, where it was ruled that a lawful canonical marriage need not be proved, and that a marriage in fact (whether regular or not,) may be shown.

It is necessary, therefore, on the prisoner's side to maintain the proposition, that the marriage between him and Hester Graham was absolutely null and void, and not merely voidable, because a mere irregular marriage would be sufficient to sustain the indictment. The other side will have to contend that the facts found by this special verdict constitute no marriage at all, that the wife was from the first moment of cohabitation a mere concubine, and that the issue, if any, are bastards.

The question raised is as important a one for the decision of the Court, as can well be conceived, not merely with regard to the particular case in which, of course, the defendant is deeply interested, but with reference to the general law of marriage in Ireland. For, if a contract under the circumstances found by the special verdict be not held a marriage,

the consequences will be most injurious to society, and, particularly in the North of Ireland, be ruinous to the peace of many families. There is here a contract *per verba de præsenti*, in the presence of three witnesses, and a clergyman of the Presbyterian Church, followed by cohabitation for two years, and this the Court is called upon to decide, is not a valid marriage according to the law of Ireland. In opposition to this, two propositions are submitted.

In the first place, putting out of consideration altogether the presence of the Presbyterian clergyman, the marriage contract *per verba de præsenti* in the presence of witnesses, followed by cohabitation as man and wife, constitutes by the law of Ireland, a legal valid marriage.

Secondly, if the Court be of opinion that the presence of a minister of the Christian religion is necessary to give validity to the contract, the presence of a Presbyterian minister is perfectly sufficient.

A recent resolution of the majority of the Judges in Ireland has gone to decide that such a marriage as the present is void(*a*). The reasons of the learned Judges which led them to that conclusion are not known(*b*), therefore, it is impossible to observe upon them. And the case will now be argued as if the question were come for the first time before the Court.

By the law of nature, and by the civil and canon law as established in England, Scotland, and Ireland, a

(*a*) The case here alluded to is *R.* v. *Smith*, reported in 2 Crawford & Dix, Circuit Cases, 318, and 1 Irish Circuit Reports, 287. Eight judges held the marriage bad. Two held it valid.

(*b*) The case of *R.* v. *Smith* came before the Judges, on a point reserved from circuit. In such cases no judgments are pronounced. Therefore, the reasons for the decisions of the Judges can only be collected from the arguments of the counsel before them, when counsel are heard, which is not always the case.

contract *per verba de præsenti* followed by cohabitation, is a valid marriage. Various opinions have existed among different nations and individuals as to the lawfulness of polygamy, some holding it to be legal, and some not; but all nations have at all times agreed in this, that the union of one man and one woman for the purpose of procreation of children and the discharge of the other duties of the marriage state for life, was a perfectly valid contract, not only legal, but meritorious, necessary for the propagation of the human species, and most conducive to the well-being of society. Parties who entered into such a contract chose for themselves—they entered into it voluntarily; and if there was no impediment from consanguinity or any like cause, the contract is indissoluble, it cannot be dissolved at the will or pleasure of the parties. Once formed it was not to be broken, but should depend upon the municipal law of the country in which the parties lived. No doubt the municipal institutions of a country might superadd any form that society thought fit, to make the contract valid, and it was competent for any state to say, that a marriage should not be valid, unless accompanied by certain prescribed forms, but that should be done by negative words; and, unless the other side were able to show by legislative enactments, or decided cases, that there was some such *sine qua non* required to validate a marriage contract, their objection would go for nothing. Every court of justice ought to be anxious and even astute to support a contract upon which the well-being and happiness of civil society so essentially depended; for what would be the consequence of the court holding the reverse, after a man and woman agreeing to live together as man and wife, and to be faithful to each other? It would be in the power of either party, in either case—it would be in the power of a profligate man, or an abandoned woman to desert each other, and to leave the innocent

offspring, if any, of the marriage, exposed to all the evils of poverty and of vice. These were consequences which every court of justice would be astute to prevent. To every contract of this kind the sanction of religion might be added, and usefully, but such a religious ceremony was not a necessary part or ingredient to make the contract valid. The agreement in contracts of this kind was entered into by one man and one woman, to live as man and wife; that vow was registered in heaven, and no interposition of any clergyman, or human being, was necessary to the validity of that contract. It might be to the more satisfactory proof of it. The contract might not be proved without witnesses, but, in its nature and its essence, it was as binding, when followed by cohabitation, as if all the clergymen of every sect that ever existed in the world were present upon the occasion. Where was the law that made their presence necessary?

It is submitted, boldly and broadly, that unless there be such a law by enactment of a negative nature, expressly enacting that such a union, without the presence of a clergyman, is not valid, the contract is valid and indissoluble. Marriage is a contract, and nothing but a contract, and when entered into *per verba de præsenti*, and followed by cohabitation, is recognised as valid and complete, by the most eminent legal writers of all countries, on natural, civil, and canon law, and the law of nations, Grotius *de Jure Belli et Pacis lib.* 2 c. 5, ss. 8 & 9. Story's Conflict of Laws, p. 100, c. 4. There is no man who reads the works of this American author but must agree that he is a learned and able writer, and he is so esteemed by the Judges in England. Throughout his works he refers to the English authorities on the different subjects of which he treats, and he has collected them fully and accurately. In the place cited he treats marriages as contracts; he says "all nations allow marriage contracts,

"they are *juris gentium*." The same doctrine is laid down in Mackenzie's Institutes of the Law of Scotland, lib. 1, tit. 6, s. 1; Stair's Institutions, tit. 4, s. 1, p. 22; Halkerstone's Digest of the Law of Scotland relative to Marriage, 3, 76.

The moral and religious obligations arising from the civil contract are as binding on the conscience as if the marriage were celebrated in the presence of every description of clergyman. Clergymen might exhort to, and enforce the duties arising from the contract, but their presence adds no force to the contract itself. The obligation flows from the contract. It is the contract which makes the breach of it a crime, and constitutes the obligation. The contract is as sacred, and as much under the superintendence of the Supreme Being whether a clergyman be present or not. It is consent which is the essence of the contract of marriage; and in the absence of express enactment on the subject, no religious ceremony is necessary to complete it. Dig. lib. 23, tit. 2; Institute, lib. 9, tit. 1, s. 1; Hubert de Nuptiis, lib. 1, tit. 9, s. 1; Vinnius, lib. 1, tit. 9, s. 58; Boethius, lib. 23, tit. 2, s. 2. In 1 Blackstone's Commentaries, c. 15, p. 433, it is laid down, that "our "law considers marriage in no other light than as a civil "contract. The holiness of the matrimonial state is left "entirely to the ecclesiastical law: the temporal courts not "having jurisdiction to consider unlawful marriage as a sin, "but merely as a civil inconvenience. The punishment, "therefore, or annulling of incestuous or other unscriptural "marriages, is the province of the Spiritual Courts; which "act *pro salute animæ*. And taking it in a civil light, the "law treats it as it does all other contracts: allowing it to "be good and valid in all cases where the parties at the time "of making it were, in the first place, willing to contract; "secondly, able to contract; and lastly, actually did contract, "in the proper forms and solemnities required by law." So

in Erskine's Institute of the Law of Scotland, title sixth, of marriage and the relation between parents and children, p. 117 of the edition by Ivory, (*a*) it is laid down, "marriage "is truly a contract, and so requires the consent of parties." "And it is constituted by consent alone, by the *conjunctio* "*animorum*, so that though the parties, after consent given, "should, by death, disagreement, or other cause whatever, "happen not to consummate the marriage *conjunctione* "*corporum*, they are, nevertheless, entitled to all the legal "rights consequent on marriage." The same writer lays it down further on (*b*) "the consent essential to marriage is "either express or tacit. Express consent in regular mar- "riages is signified by a solemn verbal vow of the parties, "accepting each other for their lawful spouses, uttered before "a clergyman, who thereupon declares them married persons. "But it is not essential to marriage, that it be celebrated by "a clergyman; the consent of parties may be expressed before "a civil magistrate, or before even witnesses; for it is the "consent of parties which constitutes marriage." In Kent's Commentaries, 2 vol. 86, (*c*) it is stated, "no peculiar "ceremonies are requisite by the common law to the valid "celebration of the marriage. The consent of the parties is "all that is required; and as marriage is said to be a contract "*jure gentium*, that consent is all that is required by natural "or public law. The Roman lawyers strongly inculcated "the doctrine, that the very foundation and essence of the "contract consisted in consent freely given by parties "competent to contract. *Nihil proderit signasse tabulas, si* "*mentem matrimonii non fuisse constabit. Nuptias non* "*concubitus, sed consensus facit.* This is the language

(*a*) I find the place cited in page 111 of the edition of 1838, by Macallan.

(*b*) Macallan's edition, 113.

(*c*) Third edition, New York, 1836.

" equally of the common and canon law, and of common " reason. If the contract be made *per verba de præsenti*, and " remains without cohabitation, or if made *per verba de* " *futuro*, and be followed by consummation, it amounts to a " valid marriage, and which the parties (being competent as " to age and consent) cannot dissolve, and it is equally " binding as if made *facie ecclesiæ*. There is no recognition " of any ecclesiastical authority in forming the connexion, " and it is considered entirely in the light of a civil contract. " This is the doctrine of the common law, and also of the " canon law, which governed marriages in England, prior to " the Marriage Act of 26 Geo. II; and the canon law is " also the general law throughout Europe, as to marriages, " except where it has been altered by the local municipal " law. The only doubt entertained by the common law was, " whether cohabitation was also necessary to give validity to " the contract. It is not necessary that a clergyman should " be present to give validity to the marriage, though it is, " doubtless, a very becoming practice, and suitable to the " solemnity of the occasion. The consent of the parties may " be declared before a magistrate, or simply before witnesses, " or subseqently confessed or acknowledged, or the marriage " may even be inferred from continual cohabitation, and " reputation as husband and wife, except in cases of civil " actions for adultery, or in public prosecutions for bigamy." Lord Brougham, in his judgment in the house of lords, in *Honyman* v. *Campbell*, (*a*) after observing on the inconveniences of the present state of the marriage law of Scotland in some particulars, observes, " it is sufficient " if the marriage be valid. A marriage may be irregular, " and the parties concerned in it may be punished by " ecclesiastical censures, and otherwise, but still it may be

(*a*) 2 Dow and Clark, 265.

" valid, and draw after it all the consequences of the most " valid measure, and affect the issue as completely as the " most solemn marriage contracted after open publication of " banns by the gravest clergyman of the Established Church. " That is the law and we are here to administer it."

His lordship is here speaking of the Scottish law, but it is confidently submitted, that it is the same in this country. His lordship then goes on to say, " consent alone makes the " marriage, and there are three ways in which that consent " may be proved. The first is consent in fact *per verba de* " *præsenti;* secondly, consent, partly by presumption of law, " and partly in fact, as when the parties live together as " married, and are, by habit and repute, husband and wife; " the third is that which more nearly concerns this case, " where there is a promise or engagement to marry *de futuro*, " with *copula* following." So in Ferguson's Reports of Decisions in the Consistorial Court of Scotland, Appendix 397, 398, and 399, Lord Robertson speaks of marriage as entirely a matter of contract; he says, " as to the " constitution of the marriage, as it is merely a personal " consensual contract, it must be valid every where, if " celebrated according to the *lex loci*." And in the same book there is another case, *Gordon* v. *Pye*, (*a*) in which the same doctrine is maintained, and where it is stated, as indeed must be admitted, that the canon law was the basis of the marriage law of all Europe. We have the authority of Craig for this: " Hujus sane juris pontificii magna " adhuc (licet jugum pontificium excusserimus), apud nos " manet auctoritas, adeo ut quoties a civili jure dissidet, (ut " sæpe fit, extentque libri scripti de differentiis juris civilis et " canonici,) jus canonicum præferamus, præcipue in iis quæ " ad Ecclesiæ administrationem pertinent, et ubi scandalum " imminet aut, (ut canonistæ loquuntur,) quoties animæ

(*a*) Ferguson's Consistorial Rep. 276.

" periculum versatur, nisi quæ sint sanæ religioni contraria. " Itaque quoties de administranda Ecclesia agitur, qui " animarum curæ præficiendi sunt, qui beneficiis, quibus " beneficia debentur, de advocationibus ecclesiarum, sive de " jure patronatus, de testamentis, de matrimonio, vel con- " trahendo vel dissolvendo, qui legitimi censeantur, in his " jus pontificium, mutatis sive antiquatis nonnullis, adhuc " sequimur. Et hæ quæstiones ad judicem ecclesiasticum, " nempe commissarios, rejici solent, quoties occurrunt, qui et " judices Christianitatis, tam in veteribus Anglorum legibus, " quam nostris vocantur. Et hæc de juris civilis et canonici " origine et incrementis." *Craig, lib.* 1, *Dicegesis*, 3, *pl.* 24.

The canon law was adopted in England to a certain extent, 1 Bl. Com. 82; Preface to Burn's Ecclesiastical Law, 25; *Middleton* v. *Crofts*, 2 Atkyns, 650; S. C. 2, Strange, 1056; S. C. Rep. temp. Hardwicke, 326. To be sure, it was only of force, so far as it was adopted by the law, and had of itself no binding power in this country, Hale Hist. Com. Law, 28; *Middleton* v. *Crofts*, *ub. sup.* Lord Hardwicke in his elaborate judgment in that case, explains how, and how far, the canon law was of force in these countries, citing *Matthews* v. *Burdett*, 2 Salk. 672, in the report of which there is the following passage: " In the primitive Church the laity were present " at all synods; when the empire became Christian, no " canon was ever attempted without the consent of the " emperor, and his concurrence included the assent of the " whole body of the people, because he had the sole " legislative power in him. But this is not the case of our " king, for he has not the whole legislative power in him, " *ergo* his consent to a canon *in re ecclesiastica* makes it a " law to bind the clergy, but not to bind the laity."

But even by the canon and ecclesiastical law of the Christian Church in Europe, before the council of Trent, although they held, as the Roman Catholics still hold,

marriage to be a sacrament, yet the presence of a clergyman was not necessary to give validity to the celebration of a marriage. The decrees of the council of Trent were never received in England; if then, previous to it, the canon law did not require the presence of a clergyman to give validity to the marriage contract, it lies upon the other side to show what positive law, of subsequent enactment in this country, has made such necessary.

The council of Trent continued its sittings for about eighteen years, commencing in 1545, and ending in 1563. After great contests in that council, among its various members representing different interests and different countries, the decree, *de Reformatione Matrimonii* was passed, that marriages should take place in the presence of the parish priest, or of a person delegated by him, or by the license of the ordinary. This decree will be found in the *Canones et Decreta Concilii Tridentini*, (*a*) Sess. 24, s 1; Halkerstone's

(*a*) It is in these words :—

"*Decretum de reformatione Matrimonii.*

Caput 1.

"*Matrimonii solemniter contrahendi forma in Conc. Lateran. præscripta innovatur: quoad proclamationes dispensare possit Episcopus. Qui aliter, quam præsentibus Parocho et duobus vel tribus testibus contrahit, nihil agit.*

"TAMETSI dubitandum non est clandestina matrimonia, libero contrahentium consensu facta rata et vera esse matrimonia, quamdiu Ecclesia ea irrita non fecit; et proindè jure damnandi sint illi ut eos sancta Synodus anathemate damnet, qui ea vera ac rata esse negant; quique falsò affirmant, matrimonia, à filiis familias sine consensu parentum contracta irrita esse, et parentes ea rata vel irrita facere posse: nihilominùs Sancta Dei Ecclesia ex justissimis causis illa semper detestata est, atque prohibuit. Verum, cum sancta Synodus animadvertat, prohibitiones illas propter hominum inobedientiam jam non prodesse, et gravia peccata perpendat, quæ ex eisdem clandestinis conjugiis ortum habent; præsertim verò eorum, qui in statu damnationis permanent, dum, priore uxore, cum qua clam contraxerant, relictâ, cum alia pàlam contrahunt, et cum ea in perpetuo adulterio vivunt: cui malo cum ab Ecclesia, quæ de occultis non judicat, succurri non possit, nisi efficacius aliquod remedium adhibeatur: idcirco sacri Lateranensis Concilii, sub

Dig. 69 n.; Pallavicini. *lib.* 23, c. 8; Father Paul's history of the Council of Trent, lib. 8. The latter writer, himself a churchman, animadverts upon the additional power thus given to the clergy by this decree. But even the council of Trent only allowed marriages not solemnized according to the directions of its decree to be avoided within a certain time. In which respect it resembles the Irish

Innocentio III. celebrati vestigiis inhærendo præcipit, ut in posterum, antequàm matrimonium contrahatur, ter à proprio contrahentium Parocho tribus continuis diebus festivis in Ecclesia inter Missarum solemnia publicè denuncietur, inter quos matrimonium sit contrahendum; quibus denuntiationibus factis, si nullum legitimum opponatur impedimentum, ad celebrationem matrimonii in facie Ecclesiæ procedatur, ubi Parochus, viro et muliere interrogatis, et eorum mutuo consensu intellecto, vel dicat: Ego vos in matrimonium conjungo, in nomine Patris et Filii et Spiritûs Sancti; vel aliis utatur verbis, juxta receptum uniuscujusque provinciæ ritum. Quòd si aliquando probabilis fuerit suspicio, matrimonium malitiose impediri posse, si tot præcesserint denuntiationes, tunc vel una tantùm denuntiatio fiat, vel saltem Parocho, et duobus vel tribus testibus præsentibus matrimonium celebretur. Deinde ante illius consummationem denuntiationes in Ecclesia fiant, ut si aliqua subsunt impedimenta, faciliús detegantur; nisi Ordinarius ipse expedire judicaverit, ut prædictæ denuntiationes remittantur: quod illius prudentiæ et judicio sancta Synodus relinquit. Qui aliter quàm præsente Parocho vel alio Sacerdote, de ipsius Parochi seu Ordinarii licentia et duobus vel tribus testibus matrimonium contrahere attentabunt; eos sancta Synodus ad sic contrahendum omninò inhabiles reddit; et hujusmodi contractus irritos et nullos esse decernit, prout eos præsenti decreto irritos facit et annullat. Insuper Parochum vel alium Sacerdotem, qui cum minore testium numero, et testes qui sine Parocho, vel Sacerdote hujusmodi contractui interfuerint, nec non ipsos contrahentes graviter arbitrio Ordinarii puniri præcipit. Præterea eadem sancta Synodus hortatur ut conjuges ante benedictionem sacerdotalem, in templo suscipiendam, in eadem domo non cohabitent: Statuitque benedictionem à proprio Parocho fieri; neque à quoquam, nisi ab ipso Parocho, vel ab Ordinario, licentiam ad prædictam benedictionem faciendam alio Sacerdoti concedi posse, quacumque consuetudine, etiam immemorabili quæ potiùs corruptela dicenda est, vel privilegio non obstante. Quòd si quis Parochus, vel alius Sacerdos, sive regularis sive sæcularis sit, etiamsi id sibi ex privilegio vel immemorabili consuetudine licere contendat, alterius Parochiæ sponsos sine illorum Parochi licentia matrimonio conjungere aut benedicere ausus fuerit, ipso jure tamdiu suspensus maneat, quamdiu ab Ordinario ejus

statute,(*a*) which enacts, that marriages of infants, possessed of a certain amount of property, without the consent of their parents, shall be void, but likewise provides, in a further clause, that, if no suit be commenced within a year to avoid the marriage, it shall be good.

It is very clear that before the council of Trent, by the canon law, which was the basis of the marriage law of Europe, marriage might be contracted without any religious ceremony, 1 Stair's Institutions, p. 25, note by Brodie. In England and in France, the decrees of the council of Trent were never received, and the law here remained as it was before that council, still regulated by the old canon law, *Dalrymple* v. *Dalrymple* 2 Haggard, 54. This is a case of the highest authority, and was never questioned until the appearance of Mr. Jacob's edition of Roper's Husband and Wife. In Poynter on Marriage and Divorce, a work of great merit, written by a proctor, it is stated: "In countries where the decrees of the council "of Trent were never received as of authority, the princi- "ples of the ancient canon law form the basis of the law "of marriage at this day; unless (as in England, subsequent

Parochi qui matrimonio interesse debebat, seu à quo benedictio suscipienda erat, absolvatur. Habeat Parochus librum, in quo conjugum et testium nomina, diemque et locum contracti matrimonii describat, quem diligenter apud se custodiat. Postremò sancta Synodus conjuges hortatur, ut ante quàm contrahant, vel saltem triduo ante matrimonii consummationem, sua peccata diligenter confiteantur, et ad sanctissimum Eucharistiæ Sacramentum piè accedant. Si quæ provinciæ aliis, ultra prædictas, laudabilibus consuetudinibus et ceremoniis hac in re utuntur, eas omninò retineri sancta Synodus vehementer optat. Ne verò hæc tam salubria præcepta quemquam lateant, Ordinariis omnibus præcipit, ut, cùm primùm potuerint, curent hoc decretum populo publicari ac explicari in singulis suarum diœcesum parochialibus Ecclesiis, idque in primo anno quàm sæpissimè fiat; deinde verò quoties expedire viderint. Decernit insuper ut hujusmodi decretum in unaquaque Parochia suum robur post triginta dies habere incipiat, à die primæ publicationis, in eadem Parochia factæ, numerandos."

(*a*) 9 Geo. 2, c. 11.

" to the passing of the Marriage Act,) variations from the " ancient law can be shown to exist by competent legislation. " Until the year 1754, (the date of the first Marriage Act,) " the ancient cannon law continued to regulate the law of " marriage in England ; the authority of the council of " Trent not having been there acknowledged ; and whilst " in virtue of domestic institutions a form was enjoined for " the more solemn celebration of matrimony, and persons " departing from those regulations were liable to ecclesias- " tical censure, still other and more private modes of con- " tracting matrimony were tolerated and acknowledged by " law ; so that a contract *per verba de præsenti*, that is to say, " between persons entering into a present agreement to " become husband wife ; or a promise *per verba de futuro* " which was an agreement to become husband and wife at " some future time, if the promise were followed by con- " summation, constituted marriage without the intervention " of a priest ; for the contract *per verba de præsenti* was held " to be a marriage complete in substance, but deficient in " ceremony ; and though the promise *per verba de futuro* of " itself was incomplete in both points, yet the cohabitation " of the parties after exchanging the mutual promise, im- " plied such a present consent at the time of the social " intercourse as to complete the marriage in substance, and " give it equal validity with the contract *de præsenti ;* that is " to say, the validity of an irregular marriage which could not " be annulled by the ecclesiastical court, though it might be " censured for its informality ; nor could the vinculum be " affected by a subsequent regular marriage." So, Sanchez de Matrimonio Disp. 1, says, " Fides catholica est, matri- " monia clandestina ante Tridentinum fuisse valida. Et " ratio est, quia quoties concurrant essentialia, contractus " validus est, licet desiderantur solemnitates extrinsicæ et " accidentales ; in matrimonio autem clandestino, concurrit " tota matrimonii essentia, deficiente sola extrinsica publi- " citatis solemnitate."

Here then it is shown by the unanimous consent of the most eminent writers of all countries, on the law of nations, and on the civil, canon, and ecclesiastical law, that marriage is a contract and nothing more, and that before the council of Trent the presence of a priest was not required by the laws of the Christian Church, or the municipal law of any country, to give validity to the celebration of a marriage. We shall now proceed to an examination of the English authorities, more immediately bearing on the question.

We come now to an examination of the English authorities applicable to the question, and the first case to be noticed is that of *Dalrymple* v. *Dalrymple*, 2 Haggard's Consistory Reports, 54. That case came before the Court for its decision on questions regarding the validity of a marriage in Scotland; and Lord Stowell in giving his judgment, goes at great length into an examination of the laws of marriage generally, and particularly of the law of marriage in England at common law, before the Marriage Act. His lordship says, p. 63, "Marriage, in its origin, is a contract of natural law; "it may exist between two individuals of different sexes, "although no third person existed in the world, as "happened in the case of the common ancestors of "mankind. It is the parent, not the child, of civil "society, *Principium urbis et quasi seminarium reipub-* "*licæ*. In civil society it becomes a civil contract, "regulated and prescribed by law, and endowed with civil "consequences. In most civilized countries, acting under "a sense of the force of sacred obligations, it has had "the sanctions of religion superadded. It then becomes "a religious, as well as a natural and civil contract; for "it is a great mistake to suppose that because it is the one, "therefore it may not likewise be the other. Heaven "itself is made a party to the contract, and the consent

" of the individuals, pledged to each other, is ratified " and consecrated by a vow to God. It was natural " enough that such a contract should, under the religious " system which prevailed in Europe, fall under ecclesias- " tical notice and cognizance, with respect both to its " theological and its legal constitution; though it is not " unworthy of remark, that amidst the manifold ritual " provisions made by the Divine Lawgiver of the Jews " for various offices and transactions of life, there is no " ceremony prescribed for the celebration of marriage."

It is remarkable indeed, that by the Mosaic law there was no priest required for the celebration of the marriage ceremony, although a breach of the marriage contract was visited with such severity that a woman guilty of adultery was punished with death. And in the New Testament there is no rite of marriage prescribed, nor any revelation of the divine will on the subject. Marriages are frequently spoken of in the New Testament but without any indication whatever of their partaking in any way of a religious character. The Jews did, as a matter of positive human institution, institute certain forms and rites of marriage among themselves, but they neither are, nor profess to be founded upon any of the divine constitutions of the Mosaic dispensation, *Selden de Uxore Ebraicâ.* Lord Stowell proceeds in his judgment, p. 64, to observe, " In the Christian Church marriage was " elevated in a later age to the dignity of a sacrament, in " consequence of its divine institution, and of some expres- " sions of high and mysterious import respecting it contained " in the Sacred Writings. The law of the church, the canon " law (a system which in spite of its absurd pretensions " to a higher origin, is in many of its provisions deeply " enough founded in the wisdom of man,) although, " in conformity with the prevailing theological opinion, " it reverenced marriage as a sacrament, still so far

" respected its natural and civil origin, as to consider, " that where the natural and civil contract was formed " it had the full essence of matrimony without the inter- " vention of the priest; it had even in that state the " character of a sacrament; for it is a misapprehension " to suppose that this intervention was required as a " matter of necessity, even for that purpose, before the " council of Trent. It appears from the histories of " that council, as well as from many other authorities, " that this was the state of the earlier law, till that council " passed its decree for the reformation of marriage. The " consent of two parties expressed in words of present " mutual acceptance constituted an actual and legal " marriage." His lordship says afterwards, p. 67, that the canon law was " the known basis of the marriage law of " Europe," and concludes a review of the different opinions and authorities by stating that according to the general matrimonial law of Europe, as well as the law of Scotland, a contract of marriage *per verba de præsenti* is " very " matrimony, that it does, *ipso facto, et ipso jure*, consti- " tute the relation of man and wife." This was likewise the law in England before the Marriage Act, and is the law of Ireland at this day. If then a man say to a woman " I marry you, will you marry me?" and she answers " yes," this is a valid marriage.

This judgment of Lord Stowell has been attacked by late writers, and he is said to be mistaken. Yet, it is obvious he took great pains with the case and displays no ordinary research in the numerous authorities which he cites in support of his positions, and he founded his judgment on the opinions of eminent professors, the authority of the best writers, and the still higher authority of decided cases. There is a remarkable case of a contract *per verba de præsenti* cited by Lord Stowell in his judgment in *Dalrymple* v. *Dalrymple*, p. 69, 100, and

also referred to in 1 Lee by Phillimore, 28 n. that of Lord Fitzmaurice, in 1732, before the Delegates in England. There were in that case three engagements in writing. The first was dated 23rd June, 1724, and contained these words, "we swear we will marry one another." The second, dated 11th July, 1724, was to this effect— "I take you for my wife, and swear never to marry any "other woman." This last contract was repeated in the December of the same year. It was argued, that the repetition of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a full Commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged, was refused by the Chancellor. [Perrin J. I have procured through the kindness of Sir John Nicholl, an account of the facts and proceedings in that case, from which it appears, that the contract of marriage was entered into in a house in Duke-street oi Dublin, between Lord Fitzmaurice and a Mrs. Leeson. The case came first before the Archbishop of Dublin, in his Consistory Court, and he pronounced against the marriage. Upon appeal to the Delegates in England, however, this decision was reversed. It was declared a valid contract, and Lord Fitzmaurice was decreed to perform the ceremony of marriage in *facie ecclesiæ* within a given time.]

Lord Stowell also observes, in his judgment in *Dalrymple* v. *Dalrymple*, that the general stream of authorities ran in favor of treating contracts *per verba de præsenti* as actual marriages "till the Marriage Act, 26 Geo. II. c. 33, "described by Mr. Justice Blackstone as an innovation "on our laws and constitution, swept away the whole "subject of irregular marriages, together with all the "learning belonging to it, by establishing the necessity

" of resorting to a public and regular form, without which " the relation of husband and wife could not be contracted." 2 Haggard 70. Blackstone questions very seriously the policy of the Marriage Act on the ground, that restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes, and thereby destroying one end of society and government, which is *concubitu prohibere vago.*

In *Bunting* v. *Lepingwell*, 4 Co. 29, a contract *per verba de præsenti* was held valid against a subsequent marriage. The case was this, J. Bunting the plaintiff's father and Agnes Addingshal contracted matrimony between them, *per verba de præsenti*, after which Agnes married one Twede, and afterwards Bunting libelled Agnes in the Spiritual Court, which decreed the marriage with Twede was void, and that Bunting and Agnes should intermarry, which they did and had issue the plaintiff, in the life time of Twede, after which John Bunting died, and it was resolved in the case, that the plaintiff was legitimate and no bastard. In *M'Adam* v. *Walker*, 1 Dow, P. C. 148, in which it was held in the House of Lords, that where a person in Scotland declared in the presence of his servants, that a woman whom he had kept for some years as his mistress, was his wife, whereupon she rose, gave her hand, and courtsied in token of assent, but said nothing, this *per se*, without any further ceremony, constituted a complete and valid marriage, Lord Eldon, in giving judgment in the cause, after citing a case of *Bearnish* v. *Bearnish*, of which there is no trace in the Reports, and observing upon the marked distinction between contracts *de præsenti* and promises *de futuro*, says " the fact was, that the canon law was the basis of the " marriage law all over Europe," p. 181. And again, p. 182,

"With respect to the decisions, it was a position again and "again clearly recognized in them, that the contract *de* "*præsenti* formed very marriage." Lord Redesdale acquiesced in this judgment.

The marriages of Jews and Quakers are excepted out of the operation of the English Marriage Act. There is no provision of an enacting or declaratory nature upon the subject of the validity of their marriages. They are just left as they were at common law. Now it is impossible to support such marriages, if the presence of a clergyman in holy orders be necessary to the celebration of a valid marriage. They can only be held good on the ground of marriage being entirely a matter of contract. How can such marriages be valid, if the argument on the other side is good, that the presence of a clergyman in holy orders is essential to the celebration of a marriage? It is, nevertheless, quite established that the marriages of Jews are good. *Lindo* v. *Belisario*, 1 Haggard, 216, was the case of a Jewish marriage before Lord Stowell, who treated the marriages of persons of that persuasion as perfectly valid. It is true that in that particular case, in which the question was, whether there was a betrothment, or an actual marriage, he decreed against the marriage, on the ground, that certain essential requisites of a Jewish marriage were wanting. The decision, however, is quite immaterial for the purposes of this argument, but the following observations of Lord Stowell, in his judgment, are very material, "the rule prevailed "in all times, as the rule of the canon law, which existed "in this country, and in Scotland, till other civil regulations "interfered in this country; and it is the rule which "prevails in many countries of the world, at this day, "that a mutual engagement, or betrothment, is a good mar- "riage without consummation, according to the law of nature, "and binds the parties accordingly, as the terms of other "contracts would do, respecting the engagements which

"they purpose to describe. If they agree and pledge "their troth to resign to each other the use of their persons, "for the purpose of raising a common offspring, by the law "of nature that is complete. It is not necessary that "actual use and possession should have intervened to "complete the *vinculum fidei*. The vinculum follows on "the contract, without consummation, if expressed in "present terms; and the canon law itself, with all its "attachments to ecclesiastical forms adopts this view of "the subject, as is well described by Swinburne in his book "on Espousals, where he says, 'that it is a present and "perfect consent, the which alone maketh matrimony, "without either public solemnization or carnal copulation, "for neither is the one nor the other the essence of matri-"mony, but consent only.'" These authorities go the length of establishing that present contract alone is sufficient, but that is not contended for here, nor is it necessary to do so, for the special verdict finds a cohabitation of the parties for two years after the marriage, and that the woman went by the name of Milles.

It will be said on the other side, that the wife, upon such a marriage as this, would not be entitled to dower by the common law, nor to a grant of letters of administration in the ecclesiastical court; and they will argue from this that the marriage is therefore invalid. The decisions and the practice in such cases, however, do not support this view, for the marriage may be good and valid although of a nature to deprive parties of certain civil and temporary rights relating merely to property. These are exceptions arising from the imperfection of the contract as to civil effects. Lord Stowell says, in *Lindo* v. *Belisario*, 1 Haggard, 231, "The contract, thus formed in the state of "nature, is adopted as a contract of the greatest importance "in civil institutions; and it is charged with a vast variety "of obligations merely civil. Rights of property are attached

" to it on very different principles, in different countries. In " some there is a *communio bonorum;* in some, each retain " their separate property. By our law it is vested in the " husband. Marriage may be good, independent of any " considerations of property, and the *vinculum fidei* may well " subsist without them." In Bacon's Abridgment, 5 vol. 295, Marriage B., it is laid down, that "*a contract in* " *præsenti*, or *per verba in præsenti:* as, *I marry you*, " you and I are *man and wife*, &c., is, by the civil law, " esteemed *ipsum matrimonium*, and amounts to an actual " marriage, which the very parties themselves cannot " dissolve by release or other mutual agreement, it being " as much a marriage in the sight of God as if it had been " *in facie ecclesiæ*, with this difference, that if they cohabit " before marriage *in facie ecclesiæ*, they are for that punish- " able by ecclesiastical censure; and, if after such contract, " either of them lies with another, such an offender shall " be punished as an adulterer."

In Co. Lit. 34 a. n., from Hale's M.SS. it is stated that after contract of affiance, followed by *copula* the parties are, as it were, husband and wife, and a gift by the man to the wife is void. " *Post affidationem et carnalem copulam* " *sunt quasi* husband and wife, and gift by him to the wife " is void, 16 H. 3, *Feoffments*, 117, 13 E. 1, ibid. 113, " Hal. M.SS." In *Jesson* v. *Collis*, 2 Salkeld, 437, S. C. nom. *Collins* v. *Jessot*, 6 Modern, 155, Holt, C. J. said, as reported in Salkeld, " A contract *per verba de præsenti*, was " a marriage, viz. *I marry you: you and I are man and* " *wife;* and this is not releaseable; *per verba de futuro; I* " *will marry you;* I promise to marry you, &c., which do " not intimate an actual marriage, but refer it to a future " act; and this is releaseable." In 6 Modern, 155, Holt, C. J., is reported thus, " If a contract be *per verba de* " *præsenti*, it amounts to an *actual marriage*, which the " very parties themselves cannot dissolve by release or other

"mutual agreement; for it is as much a marriage in the "sight of God as if it had been *in facie ecclesiæ;* with "this difference, that if they cohabit together before mar- "riage *in facie ecclesiæ,* they are for that punishable by "ecclesiastical censures; and if after such contract either "of them lies with another, they will punish such offender "as an adulterer. And if the contract be *per verba de* "*futuro,* and after, either of the parties so contracting, "without a previous release or discharge of the contract, "marry another, it will be a good cause with them of a "dissolution of a second marriage, and of decreeing the "first contract being perfected into a marriage." Here is a plain assertion of that great man, Chief Justice Holt, after a careful distinction between contracts *per verba de præsenti* and *per verba de futuro,* and a careful examination of the respective consequences of each, that a contract *per verba de præsenti* is an actual marriage. The same eminent judge expressed the same opinion in *Wigmore's* case, 2 Salk. 438; S. C., Holt, 459, which was this: "The "wife sued in the Spiritual Court for alimony; in fact, "the husband was an Anabaptist, and had a licence from "the bishop to marry, but married this woman according "to the forms of their own religion, *et per* Holt, C. J. "By the canon law a contract *per verba de præsenti* is a "marriage; as I take you to be my wife. So it is of a "contract *per verba de futuro,* viz., I will take, &c. If "the contract be executed, and he does take her, it is a "marriage, and they cannot punish for fornication."

It will be argued on the other side, that no marriage, where either of the parties is of the Established Church, is valid, unless solemnized according to the rites of the Church of England. Any other sort of marriage might perhaps be considered irregular in the Ecclesiastical Courts, but an irregular marriage is not a void marriage. A regular marriage is one complete in substance and in ceremony.

An irregular marriage is complete only in substance, but not in ceremony. The contract and consent are the substance of matrimony, all else is formality and ceremony. It is the contract which is *ipsum matrimonium*. In *Holt* v. *Clarencieux*, 2 Strange 937, in which it was held that an infant might sue a person of full age for breach of promise of marriage, it was stated in argument, and undisputed, that the only reason why the Spiritual Courts hold jurisdiction in the case of a contract *per verba de præsenti*, is because that is looked upon, amongst them, to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the church. The object of having marriage celebrated *in facie ecclesiæ*, is to give publicity to the affair, not that a priest was at all necessary to the ceremony. The term, *in facie ecclesiæ*, means, in the presence of the people, not in the presence of a priest. "*Facie ecclesiæ*, i. e., *conspectu ecclesiæ, populi sc. congregati* "*in ecclesiâ*," Lyndwood's Provinciale, 271, n. f. When a marriage *in facie ecclesiæ* is spoken of, it does not at all imply that a priest was present at it. It is probable that there generally was a priest there, but his presence was no essential part of the ceremony.

In *Reed* v. *Passer*, Peake, N. P. C., 231, where Lord Kenyon refused to receive the Fleet books in evidence; that eminent judge, after saying that a marriage in the fleet, before the Marriage Act, was legal, added, "I think, "though I do not speak meaning to be bound, that even "an agreement between the parties *per verba de præsenti*, was "*ipsum matrimonium*." In *The King* v. *Inhabitants of Brampton*, 10 East, 282, where it was held that the marriage of British subjects abroad, by a person who was not proved to be a priest, was valid. Lord Ellenborough said, p. 288, that a contract of marriage *per verba de præsenti*, would have bound the parties before the Marriage Act. It is well known that in actions of *crim. con.* it is

necessary to prove an actual marriage, yet, in *Woolston* v. *Scott*, Buller, N. P. 28, before Denison, J., at Thetford, 1753, where the plaintiff was an Anabaptist, it was held that he might recover on proof of a marriage, as used by that sect. Mr. Justice Buller rests the decision on this ground, that, "as this is an action against a wrong-doer "and not a claim of right, it seems sufficient to prove the "marriage according to any form of religion, as in the case "of Anabaptists, Quakers, or Jews." But unless such marriages be valid for all purposes, there is no pretence for supporting them on such a ground. The true principle upon which they are to be supported is, that according to the decisions in all the cases cited, and by the law of nature and the canon law, a contract of marriage *per verba de præsenti*, is a valid marriage. In the case of *Beer* v. *Ward*, not reported, but cited in the Addenda to Roper's Husband and Wife, by Jacob, p. 446, the opinion, that a matrimonial contract unattended with any religious ceremony, was, before the Marriage Act, a marriage legally solemnized, was likewise acted upon. Mr. Jacob states, that, "upon the trial of an issue out of the Court of "Chancery, on the legitimacy of a person born before the "Marriage Act, the Lord Chief Justice of the King's Bench, "is said to have ruled, that at that period a contract of "matrimony *per verba de præsenti*, constituted a legal mar-"riage. On a motion for a new trial the question was "elaborately argued before the Lord Chancellor, but did not "ultimately call for a decision."

In *Lautour* v. *Teesdale*, 2 Marshall, 243; S. C. 8 Taunt. 830, it was held that British subjects, resident in a British settlement abroad, are governed by the laws of England; and consequently, with respect to marriage, by the law which existed in England before the Marriage Act, viz., the canon law. Therefore, where two British subjects, being Protestants, were married at Madras, by a Portuguese

Roman Catholic priest, according to the Catholic form, in the Portuguese language, in a private room, and the ceremony was followed by cohabitation, it was held that this was a valid marriage, though without a licence from the governor, which it is the custom at Madras to obtain. Although a priest performed the ceremony, the Court did not rest its decision upon that, but upon the fact of there being a contract of present matrimony, followed by cohabitation, as will appear from the following passage of the judgment of Chief Justice Gibbs. His Lordship says, 2 Marshall, 249, "British subjects settled at Madras, are "governed by the laws of this country, which they carry "with them, and are not affected by the laws of the "natives. The question therefore is, whether, by the "laws of this country, to which alone they are subject, "and by which alone their actions are to be governed, this "marriage was legal. In this country we judge of the "validity of a marriage by what is called the Marriage "Act; but as that statute does not follow subjects to "foreign settlements, the question remains, whether this "would have been a valid marriage here before that Act "passed. The important point of the case, viz.: what "the law is, by which such a question is to be governed, "was most ably and fully discussed in the case of *Dalrymple* "v. *Dalrymple*, which has been alluded to, and the judgment "of Sir William Scott, has cleared the present case of all "the difficulty which might, at a former time, have "belonged to it. From the reasonings there made use of, "and from the authorities cited by that learned person, it "appears that the canon law is the general law throughout "Europe, as to marriages, except where that has been "altered by the municipal law of any particular place; "and that before the Marriage Act, marriages in this "country were always governed by the canon law, which "the defendants, therefore, must be taken to have carried

" with them to Madras. It appears also, that by that law, " a contract of marriage entered into *per verba de præsenti*, " is considered to be an actual marriage, though doubts " have been entertained whether it be so, unless followed " by cohabitation. In the present case a ceremony was " performed, the regularity of which it is unnecessary to " discuss, because it was followed by cohabitation; all that " is required, therefore, by the canon law, has been amply " satisfied." Here is an express decision of the Court of Common Pleas in England, in accordance with the judgment of Lord Stowell, that the canon law was the law of marriage in England, before the Marriage Act; and that by the law of England, before the Marriage Act, a contract of marriage *per verba de præsenti*, was an actual marriage. In *Ilderton* v. *Ilderton*, 2 H. Bl., 145, a marriage in Scotland, according to the law of that country, was held to entitle the wife to dower.

We come now to consider the state of the law as to the marriages of Quakers; they, as well as Jews, are excepted expressly from the operation of the Marriage Act; they are, however, only excepted. There is nothing in the Marriage Act to recognize them or give them validity, if void before. It is submitted that the marriages of Quakers before the Marriage Act were good and valid by the common law, as contracts of marriage *per verba de præsenti*, and that if they were not, there is no such thing as a legal marriage at all among the Quakers, and therefore, according to the argument on the other side, if it be well founded, their wives are concubines and their children bastards. Mr. Jacob observes, 2 Roper's Husband and Wife, Addenda, 476, upon the difficulty of the position of the marriages of Quakers, except upon the supposition of their being good, as contracts *per verba de præsenti* at common law. After discussing the case of the Jews, he says, " It is less " easy to ascertain what principles of law are now to be

" applied to the marriages of Quakers. The question " must in a great measure depend on the state of the law " previous to the statute 26 Geo. II, with reference to " marriages of Protestant Dissenters, celebrated in their " own congregations."

It may be said on the other side, that in Ireland the marriages of Quakers are within the operation of the Dissenters' Marriage Act, 21 & 22 Geo. III. c. 25, Ir. which after reciting s. 1, that " the removing of any " doubts that may have arisen concerning the validity of " matrimonial contracts or marriages entered into between " Protestant Dissenters, and solemnized by Protestant " Dissenting Ministers or Teachers, will tend to the peace " and tranquillity of many Protestant Dissenters and their " families," enacts " that all matrimonial contracts, or " marriages, heretofore entered into, or hereafter to be " entered into, between Protestant Dissenters and solem- " nized or celebrated by Protestant Dissenting Ministers " or Teachers," shall be valid. This cannot apply to " Quakers for it is notorious they have no ministers or " spiritual teachers among them." [Crampton J. I believe there is no doubt of that.] Yet it is held that Quakers' marriages are good and valid, *Haughton* v. *Haughton*, 1 Molloy, 611, App. In that case there was a devise to A. on condition " that if he shall marry or form any " connexion resembling, or in imitation of marriage, contrary " to the order and established rules of the people called " Quakers, that such devise should as to him and his " issue cease and be void." It was contended that this condition was bad, inasmuch as Quakers' marriages are not recognized by law. On the other side it was contended that " the statute 21 & 22 Geo. III. c. 25, is merely a " declaratory law. The Quakers have their elders, who " are *quasi* ministers and teachers, and the marriage takes " place in their presence. Independent of the act, any

"marriage in Ireland publicly solemnized, is good at "common law. This appears by the Marriage Act in "England which excepted Quakers, and, therefore, "recognizes such marriages as good at common law, "otherwise it must be argued that the English legislature "has enacted, that all Quakers must be illegitimate." The Chancellor, Lord Manners, said "as to the question "of the legality of Quaker marriages, I have no manner "of doubt." To be sure, he then goes on to say, he thinks Quakers' marriages within the 21 & 22, Geo. III. c. 25, but even if they are, that is merely an affirmative enactment, and if these marriages were not good before it, they cannot be good by virtue of it. In 1 Haggard, App. 9, n. there is a case cited of a marriage between Quakers according to their own ceremonies, which was held valid at the Assizes of Nottingham, in 1661, in a case of ejectment, and reference is made to Sewell's History of the Quakers, in which the full account of the case is as follows(*a*).—"It happened about this time in England, that "some covetous persons, to engross inheritances to "themselves, would call in question the marriages of those "called Quakers. And it was in this year that such a "cause was tried at the Assizes at Nottingham; a certain "man dying and leaving his wife with child, and an estate in "copyhold lands; when the woman was delivered, one "that was near of kin to her deceased husband, endea-"voured to prove the child illegitimate, and the plaintiff's "counsel willing to blacken the Quakers, so called, asserted "the child to be illegitimate, because the marriage of its

(*a*) 1 Sewell, p. 376, 6th Ed. London, Darton and Harvey, 1835.
The History of the Rise, Increase, and Progress of the Christian People called Quakers, intermixed with several remarkable occurrences, written originally in Low Dutch, and also translated by himself into English by William Sewell.

"parents was not according to law, and said bluntly, and "very indecently, that the Quakers went together like brute "beasts. After the counsel on both sides had pleaded, "the judge, whose name was Archer, opened the case to "the jury, and told them, that there was a marriage "in Paradise, when Adam took Eve and Eve took Adam; "and that it was the consent of the parties that made a "marriage. And as for the Quakers, said he, he did not "know their opinion; but he did not believe they went "together as brute beasts, as had been said of them, but "as Christians; and therefore, he did believe the marriage "was lawful, and the child lawful heir. And the better "to satisfy the jury, he related to them this case; 'a man "that was weak of body and kept his bed, had a desire "in that condition to marry, and did declare before "witnesses that he did take such a woman to be his wife; "and the woman declared, that she took that man to be "her husband. This marriage was afterwards called into "question: but all the bishops did, at that time, conclude "it to be a lawful marriage.' The jury having received "this instruction, gave in their verdict for the child, and "declared it legitimate." In the same note, 1 Haggard, App. 9, it is stated that in the case of *Harford* v. *Morris*, Mr. Justice Willes said, that he remembered a case many years ago, upon the circuit, where a Quaker brought an action of crim. con. in which it was necessary to prove the marriage. The objection was taken, that he was not married according to the rites of the Church of England, and the point was argued; but it was overruled; and the plaintiff recovered thereon. In *Dodgson* v. *Haswell*, Deleg. 1730, there was a suit between two Quakers, in which the libel pleaded a marriage had, in the manner usually observed by those of their religion, by the public declaration thereof at their monthly meetings, in the form pleaded, and that, notwithstanding the defendant had

refused to solemnize and consummate. The defendant admitted the contract, but alleged it was conditional. There had been two sentences against the defendant in the Consistory of Durham, and afterwards at York. It does not appear what was the result of the proceedings in the Delegates. The foregoing case in Sewell, and that cited by Willes J. are direct decisions on the validity of Quaker marriages. Is it possible to dispute their validity? If there was any doubt of their validity, would it have been suffered to continue? Would the Quakers have submitted to such a doubt? No.—Such marriages have been repeatedly held, and always recognized, as valid. Yet, no priest intervenes at the celebration, and there is no legislative exemption of Quakers from the necessity of such intervention, if it be necessary in any case. In a late case of an action of crim. con. by a Quaker, the marriage was proved according to the custom of the Quakers, and it was considered sufficient, although, in that action it is always necessary to prove an actual marriage. *Deane* v. *Thomas*, 1 Mood. & Malk. 361.

The proposition sought to be established and, as it is submitted, proved by the foregoing authorities, is, that by the common law the presence of a priest or clergyman in holy orders was not necessary to the solemnization of a marriage. There are certain Irish Statutes which will be probably relied on at the other side, but they do not impugn this doctrine. Nor is it easy to see how Irish Acts of Parliament can make the common law. It may be well, however, to notice some of them. The 9th Geo. II. c. 11, Ir. only provides against marriages of persons under age, entitled to a certain amount of property. The 11 Geo. II. c. 10 s. 3, Ir. recites that Protestant Dissenters scrupling to be married according to the form of matrimony prescribed by the Church of Ireland as by law established, frequently enter into matrimonial contracts in their own

congregation, before their ministers or teachers, and thereupon live together as husband and wife, and enacts "that "they shall not be prosecuted in any ecclesiastical court "in this kingdom *ex officio mero* or on the presentment of "any minister or churchwardens of any parish, for, or by "reason of their entering into such matrimonial contracts, "or for their living together as husband and wife by "virtue of such contract." This statute recognizes the validity of such marriages, and prohibits proceedings against parties who so marry. If the marriages were good they must have been so by the common law anterior to the Statute. The 58 Geo. III. c. 81, s. 3, enacts, "that in no "case whatsoever, shall any suit or proceeding be had "in any ecclesiastical court, of that part of the United "Kingdom called Ireland, in order to compel a celebra-"tion of any marriage in *facie Ecclesiæ*, by reason of any "contract of matrimony whatsoever, whether *per verba de* "*præsenti* or *per verba de futuro*, which shall be entered "into after the end and expiration of ten days next after "the passing of this Act; any law or usage to the "contrary notwithstanding." This only prohibits suits to enforce solemnization in *facie ecclesiæ*, but does not interfere with the contracts themselves. Nor does it assist the argument on the other side at all. The 32 Geo. III. c. 21, Ir. a Catholic Relief Act enacts, that nothing therein contained shall authorise a popish priest to marry a Protestant and Roman Catholic, unless they "shall have "been first married by a clergyman of the Protestant religion. The words "clergyman of the Protestant "religion" cannot possibly be confined to mean a clergyman of the Established Church. They must necessarily include Presbyterian clergymen, the legislature thereby recognizing the validity of marriages by such clergy.

There is, however, a Statute of the United Kingdom, which recognizes Presbyterian ministers as ordained clergy-

men. It is hardly necessary to observe first, that the Presbyterians of the North of Ireland, hold in all respects the same doctrine and discipline as the Church of Scotland, that they are in fact the same church. The 58 Geo. III. c. 84, entitled, " An Act to remove doubts as to the validity " of certain marriages, had and solemnized within the " British territories in India;" after reciting that doubts had arisen concerning the validity of marriages, which had been had and solemnized within the British territories in India, " by ordained ministers of the Church of Scotland, " as by law established," and that the law respecting such marriages, " should be declared for the future;" it proceeds in these words: " be it declared and enacted, and it is " hereby declared and enacted," that " all marriages here- " tofore, had and solemnized; or which shall be had and " solemnized within the said territories in India, before the " 31st of December now next ensuing, by ordained " ministers of the Church of Scotland, as by law established, " shall be, and shall be adjudged, esteemed, and taken to " have been, and to be of the same and of no other force and " effect, as if such marriages had been, had and solemnized " by clergymen of the Church of England, according to " the rites and ceremonies of the Church of England." The Statute then proceeds to declare and enact for future marriages. Here then, is a declaratory Act, declaring past marriages by persons not in the holy orders of the Church of England, good.

This Statute likewise, as has been seen, expressly calls ministers of the Scotch Church, " ordained ministers." This applies to, and brings us to the second head of the argument, which is: That if the Court be of opinion, that the presence of a minister of the Christian Religion is necessary, to give validity to the contract, the presence of a Prebysterian minister is perfectly sufficient.

Here in point of fact the marriage has been celebrated by

a clergyman, who, it is hoped will be admitted to be a minister of the Christian Religion. It will be said, however, that he is not in holy orders, because he is not a clergyman of the Church of England,—of the Established Church, because he has not got episcopal ordination. What is he then? Is he a clergyman at all? Has he any orders, is he ordained at all?

What right have they to claim for episcopal ordination, the exclusive title of holy orders? Let them show the origin of bishops in the Christian Church, and of ordination by them; and it will be shown that Prebysterian ordination is both more ancient, and more in accordance with Scripture truth, and practice. What magic is there in the the touch of a bishop?

Mr. Rogers in his Ecclesiastical Law 593, submits "as "clear that in places to which the Marriage Act does not "extend, it is not necessary that the celebration of marriage "should take place *in facie ecclesiæ.*" He then states that he agrees with Mr. Jacob, in opposition to Blackstone, and Lord Stowell, that marriage is not a civil contract, and that the contract without the presence of a clergyman, does not constitute matrimony; but he is of opinion that if, as was the case here, the contract is solemnly entered into in the presence, and under the sanction of a minister of religion, that is sufficient, though he be not a clergyman episcopally ordained. He says, "that, although it is "insisted that the intervention of a priest is necessary to give "validity to the marriage; yet it is not necessary that the "ceremony should be performed in strict conformity to the "rites of the Church of England. The object of the law "in calling in the aid of religion to sanctify the marriage "vow, is to give it a deeper and more solemn obligation than "belongs to ordinary contracts. The most rational way of "effecting this object, seems as in the case of oaths, to "allow all persons to assume the vow, with such religious

" ceremonies as are most binding on their own consciences ;
" nor does it appear by the foregoing cases, that any parti-
" cular rite or form, has ever been held to be indispensable.
" Finally, is it necessary that the Priest celebrating the
" marriage should be in regular orders ? It would appear
" not. The common law only seems to insist that the con-
" tract should be solemnly entered into, in the presence,
" and under the sanction of a minister of religion." Mr. Rogers then goes on to observe on the difficulty of maintaining on any other sound ground, the validity of the marriages of Jews and Quakers, and says " it is true that " the first, and subsequent Marriage Acts, have uniformly " excepted the marriages of Jews and Quakers out of their " operation, which has been said to be a recognition of them " as excepted cases ; but if those marriages were not good " at common law, the exception would appear to be useless." The observations of Sir J. Nicholl, in his luminous judgments, in *Kemp* v. *Wickes*, 3 Phill. 298 ; and the language of Lord Mansfield in the House of Lords, cited by the learned judge in that case, seems to put this question on its true grounds ; Lord Mansfield says " Nonconformity is no " offence at common law, and the pains and penalties for " nonconformity to the established rites of the Church, are " repealed by the Act of Toleration." Sir J. Nicholl, says, " The Toleration Act has allowed Protestant Dissenters, " publicly to exercise their worship in their own way, under " certain regulations—it legalised their ministers,—it pro-
" tected them against prosecutions for nonconformity. Now " their ministers and preachers being allowed by law, (and " so far as that goes they are lawful ministers for the " purposes of their own worship,) their worship being per-
" mitted by law—their nonconformity being tolerated, could " it any longer be said, that rites and ceremonies performed " by them, are not such as the law recognizes in any of " his Majesty's Courts of Justice, provided they are not

" contrary to, nor defective in that which the Christian " Church universally holds to be essential, that is, provided " they are Christians. This appears to be a necessary con- " sequence of the Toleration Act." The case of *Kemp* v. *Wickes*, in which these observations were made by Sir J. Nicholl, was a suit in the Spiritual Court, against a parson of the Church of England, who refused to allow in the church-yard the burial of an infant, because it had been baptized by a Dissenting minister.

The Court is now, in the middle of the nineteenth century, called upon to pronounce that a clergyman of the Presbyterian Church, of that church which in one part of the United Kingdom is the Established Church, is not in holy orders.

What is a priest? He is *presbyter per presbyterium sacris ordinibus institutus.* The original in Greek means elder. The proper ordination is at the hands of the elders. We read, 1 Timothy, c. 4, v. 14, " Neglect not the gift that is " in thee, which was given thee by prophecy, with the " laying on of the hands of the presbytery." There is the first trace we have of ordination, " with the laying on of " the hands of the presbytery." This presbytery is now represented by the presbytery of the Presbyterian Church, whose ordination is much more consonant with Scripture than the episcopal form, which arrogates to itself the exclusive power of conferring holy orders. It is remarkable enough, too, that even in the ordination of the Church of England, the Presbyterian ordination is admitted, as co-ordinate with the episcopal. We find in 1 Bullingbroke's Ecclesiastical Law, 125, an account of the orders in the church, and *id.* 217, a description of the form of ordination according to the Rubric, from which it appears that a priest must, along with the bishop, lay his hands on the head of the person receiving holy orders. The priest takes a part, as co-ordinate with the bishop. The following is the form of

ordination of the Presbyterian Church, according to the Presbyterian Code of Discipline, published by authority of the general Synod of Ulster, Belfast 1825, p. 39.

"The candidate then reverently kneeling in some con-
" venient place; the minister appointed to ordain, standing
" before him, shall pray to the following effect."

" Humbly adoring the God and Father of our Lord
" Jesus Christ, for sending His Son into the world to save
" sinners; for his being delivered for our offences, and raised
" for our justification; for his ascension into Heaven; his
" pouring out His Spirit; and giving gifts to men; for
" his appointment of prophets, apostles, and teachers, for
" the gathering of his people, and the edification of his
" church; for the promise of being with all who faithfully
" teach in his name, even to the end of the world."

" And in some such part of the prayer, the officiating
" minister shall lay his hands upon the head of the can-
" didate, and be joined by the rest of the ministers
" present."

It is to be recollected, that for a considerable time Presbyterian ministers in the North of Ireland, were admitted to hold livings and parishes, and were recognized by law and even by the bishops. Reid in his History of the Presbyterians(a) mentions particularly the case of two eminent Presbyterian divines who held church livings, the celebrated Robert Blair, Vol. I. p. 103, 104; and John Livingston, id. 116, 117. In p. 129 the same writer tells us, " these honoured ministers, it need
" scarcely be added, after the full detail which has been
" given of their character, principles, and conduct, were
" strictly Presbyterian. Though like the English Puri-
" tans, in the early part of the reign of Elizabeth, they
" were comprehended within the pale of the Established

(a) Waugh and Innes, Edinburgh, 1834.

"Episcopal Church, enjoying its endowments and sharing "its dignities, yet, notwithstanding this singular position "which they occupied, they introduced and maintained the "several peculiarities, both of discipline and worship, by "which the Scottish Church was distinguished." Yet, though for a length of time the Presbyterian clergy actually enjoyed livings in the church, and held parishes in the North of Ireland, it is now said, and said for the first time, in the middle of the nineteenth century, that they are not in holy orders, that they are mere laymen. It is said, that because they have not episcopal ordination they cannot celebrate a marriage ceremony. Is there any authority for this? Can they cite cases or authorities on the other side to show that this marriage, performed by a clergyman, recognized by law, receiving the *regium donum*, and using a ceremony just as solemn as that of the Established Church, is invalid as being celebrated by a mere layman.

It is not very wise for members of the Church of England to seek in these times to maintain the exclusive doctrine which may be expected to be advanced on the other side. Paradoxical as it may seem, the Presbyterians of the North are the main supporters of the Established Church in Ireland. Assailed as that Church is, by Roman Catholics from without and Puseyites from within, it would soon crumble in the dust were it not for the support of the Presbyterian Protestants. It is unwise to seek occasion to interrupt the good understanding between the Presbyterians and the Established Church. And who is it that now claims from the Court a recognition of this exclusive doctrine to shield him from the just punishment of his crime?

The defendant cohabited for two years with a wife to whom he was united by this marriage, and he now calls upon the Court to decide that this unfortunate woman is

not his wife, that she was his concubine—the woman whom he induced to enter into a contract with him, which he professed to think himself, and induced her to believe, a valid marriage. And to fill up the measure of his perfidy, he seeks to bastardise his issue, to stamp the innocent child with the brand of infamy and strip him of the legal rights of property.

In conclusion then, it is submitted that in either point of view, whether a clergyman be necessary at all or not, the marriage of the defendant with Hester Graham was a valid marriage.

Whether the Court regard the marriage as one good at common law without the presence of a clergyman, or whether it consider a clergyman necessary to the due celebration of a marriage, it is submitted, that the facts found by the special verdict show a sufficient marriage to convict the prisoner of bigamy.

It is not easy to understand what can be urged on the other side. It may be pretended, perhaps, that by the common law a priest is necessary for the celebration of matrimony. Where is this common law to be found? It is not founded on the canon law which nevertheless is the basis of the law of marriage in this country. Is it something that existed in Saxon times? The law of nature and the canon law equally pronounce marriage a civil contract for the completion of which the presence of a clergyman is not necessary. And that such is the common law has been declared by repeated decisions, and by the authority of the most eminent judges. Such was the opinion of Lord Stowell, of Sir William Blackstone, of Lord Eldon, of Lord Redesdale, of Sir Vicary Gibbs, of Lord Ellenborough, of Lord Kenyon, of Lord Tenterden, of Chief Justice Dallas, and of Sir John Nicholl. Such was the opinion of the several judges who decided on the

legality of the marriages of Quakers. These opinions the Court is now called upon to overrule, for it is, with great respect, submitted, that without overruling these opinions the Court cannot decide in favour of the defendant(*a*).

Friday, 29th and Saturday, 30th of April, 1842.

Whiteside for the defendant.—Two propositions have been laid down by the counsel for the Crown, and it is said that if either be maintained, there should be judgment against the defendant.

It is said, first, that, putting out of the case the presence of the Presbyterian clergyman, there is, without it, a contract of marriage *per verba de præsenti* followed by cohabitation, which, it is said, is a valid marriage. Secondly, it is said, that if the presence of a minister of the Christian religion is necessary to the celebration of a marriage, that of a Presbyterian minister is sufficient. There is a little inconsistency in this argument. For, if the Rev. Mr. Johnston be an ordained priest,—a clergyman in holy orders, according to the meaning of these terms recognized by our law, it was quite unnecessary to have argued the first proposition at all, and a great deal of research and labour might have been spared the

(*a*) When Holmes had concluded his argument, James Gibson called the attention of the Court to the case of *Hutchinson* v. *Brookebank*, 3 Lev. 376; to *Maston* v. *Escott*, in the Court of Arches in England, not yet reported, but noticed in the 12th and 13th Nos. of the Ecclesiastical Journal, 29th June, 1841; and to Burnet on the Thirty-Nine Articles, Observations on the Twenty-Third Article.

Peebles, L.L.D. referred the Court to Ayliffe's Parergon, 364.

On Friday before the commencement of Whiteside's argument Holmes cited the observations of Sir John Nicholl, 1 Addams, 64 in *Stedman* v. *Powell.*

learned counsel who has sought to maintain it. The most convenient course will be, to consider the last of these questions first. It is said that the Presbyterian minister is to be considered a clergyman in holy orders. This is a new proposition not advanced by the learned counsel or the eminent civilian who argued the case of the *Queen* against *Smith*. It is said now for the first time, that a Presbyterian minister has the same office and power by law, as a clergyman in the holy orders of the Established Church. This proposition involves this consequence, that, while the Presbyterian ministers are supposed to have all the power and authority which the orders of the Church confer, they are not amenable to the discipline of the Church, are not bound to obey its rules and canons, and are not subject to the penalties imposed by the church upon its ministers in case of breach of such its rules and canons. They are to have all the powers and rights of clergymen of the Church, but are altogether exempt from canonical and ecclesiastical discipline. The Presbyterian clergy themselves disclaim any submission to the church—they shun its connexion—they abhor even the idea of a union with it. In a pamphlet very lately published (*a*) by an eminent Presbyterian divine upon the very matter now in debate, there is the following passage—"The truth, however is, that on account of its "prelacy—many parts of its liturgy—its saint's days—its "lent—its consecration of things inanimate and material— "its sponsors in baptism—its unintelligible marriage "service, and the many other unscriptural forms, which, "in common with the Church of Rome, the Church of

(*a*) Presbyterian Marriages.—Review of the Rev. Dr. Miller's Judgment in *Lemon* v. *Lemon* and Mr. Whiteside's argument in *Regina* v. *Smith* by the Rev. Dr. Stewart, Broughshane, M'Comb, Belfast 16th April, 1842.

" Ireland still observes, not a single Presbyterian minister " with whom I spoke on the subject, and I conversed " with several, entertained the most distant idea of con- " senting to such an union." Thus, reprobating the constitution and the rites of the church, pronouncing its marriage service unintelligible, and disclaiming its authority, the Presbyterian ministers, nevertheless, claim the power of an ordained clergyman of the church, not only to perform the ceremony of marriage between persons not of their own religious connexion, but to do so at all times and places, in a way not authorised by the church, and without the proclamation of banns, or an observance of any of the rules imposed by the canon law upon persons in holy orders.

Let us consider who are ordained ministers according to the law of England, and of this country. The clergyman in holy orders of the English law, is a clergyman of the Church of England as by law established, necessarily a person who has received episcopal ordination. The form and requisites of ordination and the mode in which persons are promoted to holy orders are stated in Ayliffe's Parergon, 402. The person who confers orders ought to be the proper bishop or diocesan of the person to be ordained. Id. ib. The origin and progress of the settlement of the Christian Church in England is detailed by the same writer. " It is very " well known to all who consult history in these matters, " that in the first settlement of this Church of England, the " bishops of the several dioceses had the churches under " their own immediate care, and had a clergy living in " community with themselves whom they sent abroad to " several parts of their dioceses as they saw occasion to " employ them. But that by degrees they saw a necessity " of fixing presbyters within such a compass to attend on " the service of God among the people that were the " inhabitants, and thus came parishes among us."—

Ayliffe Parer. 404. Here is traced the establishment of parochial clergy in England, directly and immediately by the bishops.

It is to be borne in mind, that after the invasion of Britain by the Saxons, in the fifth century, Christianity was entirely extinct in England. The Saxon invaders were Pagans, and remained so for upwards of a century after they had taken complete possession of the country.—The person by whom the Saxons in England were first converted to Christianity was Austin, or Augustine, a Roman monk, who was sent to England for that purpose by Pope Gregory the Great, in the end of the sixth century. It is on record that Austin himself received episcopal ordination from the Primate of Arles(*a*). The bishops and clergy of England, at the present day, have received their orders in direct succession from this the founder of the English Christian Church, of which the following account is to be found in Ayliffe's Parergon, 405:—"It appears that the parochial clergy were nu-
"merous before the conquest, and within the diocese of
"Worcester, in two deaneries of it, there were to be
"found in Doomsday Book above twenty parish-churches;
"in the deanery of Warwick ten, and in the deanery
"of Kington, fifteen. Bede tells us that at first the
"Saxon Christians made use of any old British churches
"they found standing, and thus Austin at first made
"use of St. Martin's, near Canterbury, and after-
"wards repaired Christ Church, which were both British
"churches. But Ethelbert gave all encouragement both to
"repair old churches, and build new. However the work
"went on slowly; Austin consecrated but two bishops
"which were settled at London and Rochester, where Ethel-
"bert built and endowed two churches for the bishops and

(*a*) See 1 Mosheim Eccles. Hist. 261, n. e. Ed. by Maclaine, London 1838, Tegg and Son.

" their clergy to live together. Wilfred converted the South " Saxons, and settled presbyters in the Isle of Wight, but " they were but two. In the western parts, Birinus built " several churches about Dorchester, where his see was " fixed. In the kingdom of Mercia, there were five dioceses " made in Theodore's time; and Putta, Bishop of Rochester, " being driven from his see, he obtained from Saxulphus, a " Mercian bishop, a church, with a small glebe, and there " he ended his days. In the northern parts we read of two " churches built by two noblemen (Puck and Addi) on their " own manors. And the same might be done elsewhere, but " Bede would never have mentioned these if the thing had " been common. But in his letter to Egbert, Archbishop of " York, he intimates the great want of presbyters and paro- " chial settlements; and, therefore, earnestly persuades him " to provide more. In the Council of Cloveshoe, we read of " presbyters placed up and down by the bishops in the " manors of the laity, and in several parts distinct from the " episcopal see. All which accounts plainly show the " antiquity of parishes among us even before the conquest. " In the laws of Canutus, we find a four-fold distinction of " churches, viz.—1st. The head or Mother Church, other- " wise called the Bishop's See," &c. &c.

Here then, it is shown, that the introduction of Christianity into England, after its extinction there for upwards of a century, was effected by a person who had received episcopal ordination, who himself conferred episcopal ordination on others, who have transmitted it down in direct succession to the present bishops and clergy of the Church of England. Is it pretended that the Presbyterian ministers of the present day derive their orders from the first founders of the Christian Church in England. Were Austin and Gregory the Great, Presbyterians?

We find in Ayliffe, under the title, "Of a Bishop, his rise, power, and office in the church," the following

passages, showing, if authorities be required for such a purpose, that episcopal ordination is considered, and has always been essential to confer holy orders by our law :—

" A bishop, in Greek called, episcopos, is an overseer, or " superintendent of religious in the Christian Church " among men, and ought, as a good shepherd of the " people, to feed his flock, and to watch for their souls ; " and in the behalf of his flock to preserve it from the " incursions of wolves and other ravenous beasts."—Ayliffe 118.

" Though a bishop comes under the appellation of a " priest or presbyter, yet a priest or presbyter does not " come under the appellation of a bishop, because there " are many priests which are not bishops, though there is " no bishop that is not a priest in the church."—*Ibid.* 119.

" Though a person may be said to be a bishop upon " confirmation ; yet, without consecration he cannot do " some things which relate to the office of a bishop, as to " ordain and give holy orders to persons suing for the " same."—*Ibid.* 120.

" Tis the bishop's province to consider and judge what " number of clerks it is fit for him to ordain."—*Ibid.* 125.

" A bishop of another diocese ought neither to ordain or " admit a clerk without the consent of his own proper " bishop, and without letters dimissory ; and Father " Osius said, that whoever should thus ordain a stranger " without the leave and consent of his own bishop, should " have his ordination adjudged invalid, and herein says " Osius we are all agreed."—*Ibid.* 125.

Turning aside for the present from the immediate contemplation of the ecclesiastical polity of the English Church to that of the Christian Church throughout the world, we shall every where find it equally established that

holy orders could only be conferred by episcopal ordination. The testimony of the ancient church is in few points so clear and decided, as in recording the rule, that the bishop was regarded as *ex officio* the regular minister of ordination.—Riddle's Manual of Christian Antiquities, 273. At an early period, the power of ordaining was vested in the bishop or governing presbyter, or at least it was arranged that no ordination by a presbyter could be valid without episcopal concurrence and assent.—Riddle, *ub. sup.* "The canons of councils for the most part attribute the "power of ordaining to the bishop, without further remark." Conc. Nic. c. 19; Antioch. c. 9; Chalced. c. 2; Carthag. 3, c. 45; 4, c. 3. And early ecclesiastical writers often expressly assert, that ordination is valid only when performed by a bishop. Thus Chrysost. Hom. 11, in 1 Ep. ad Timoth; Hom. 1 in Ep. ad Phil.; where it is distinctly said, that a presbyter possessed no power of ordaining. (See also Hieronymi Epist. 85, ad Evagr. Epiphanius, Hæres. lxxv. n. 4.) represents it as an error of Ærius, that he desired to place bishops and presbyters on an equal footing. (see Book iii. chap. 3. sect. 5.) Ordinations by presbyters were frequently declared invalid. (Conc. Sardic. c. 19; Conc. Hispal. ii. c. 5; Athanas. Apol. c. Ar.) and the only right in the matter of ordination which belonged to presbyters, was that of assisting the bishop in ordaining their fellow-presbyters. Riddle 275.

"Presbyter cum ordinatur, episcopo eum benedicente et "manum super caput ejus tenente, etiam omnes presbyteri "qui præsentes sunt, manus suas juxta manum episcopi "super caput illius teneant." Conc. Carth. iv. c. 4.—*In notis* Riddle, 274.

"Ordination was administered in the church, in the "presence of the congregation; any more private adminis- "tration was regarded as an abuse." (Greg. Naz. Carm. de "vita sua; Socrates, Hist. Eccl. lib. iv. c. 29)."

The following passages, from a work of great learning and authority, likewise go to establish the antiquity and universality of episcopal ordination in the Christian Church. Palmer's Origines Liturgicæ, 249.—"The bishops who "rule the churches of these realms were validly ordained "by others, who by means of an unbroken spiritual "descent of ordinations, received their mission from the "apostles, and from our Lord. This continual descent is "evident to any one who chooses to investigate it. Let "him read the catalogues of our bishops ascending up to "the most remote period. Our ordinations descend in a "direct unbroken line, from Peter and Paul, the Apostles "of the Circumcision, and the Gentiles. These great "apostles successively ordained Linus, Cletus, and "Clement, bishops of Rome; and the Apostolical line of "succession was regularly continued, from them, to "Celestine, Gregory, and Vitalianus, who ordained "Patrick, Bishop for the Irish, and Augustine and "Theodore, for the English.

"And from those times the uninterrupted series of valid "ordinations has carried down the Apostolical succession in "our churches, even to the present day. There is not a "bishop, priest, or deacon, amongst us, who cannot, if "he pleases, trace his own spiritual descent from St. Peter "and St. Paul.

"Secondly; those bishops are the rightful successors of "those *who ruled the church in the beginning*. The Pastors, "who originally preached the Gospel, and converted the "inhabitants of these realms to christianity, were legi- "timately ordained, and therefore had divine mission for "their work. The ancient British bishops, who sat in "the council of Arles and Nice, in the 4th century, were "followed by a long line of successors, who governed "dioceses in Britain; so were those prelates from Ireland, "who, in the 7th century, converted a great portion of

" the Pagan invaders of Britain; and, so, also, was Au-
" gustine, Archbishop of Canterbury, who was sent by
" Gregory of Rome, about the same time; and who
" preached to another portion of the Anglo-Saxons.

" The churches, deriving their origin from those three
" sources, were governed by prelates, who all filled
" distinct dioceses; and those dioceses have been occupied
" by a regular series of bishops, canonically ordained, from
" the beginning, down to the present day. We can,
" therefore, not only prove that we are descended by valid
" ordinations from the Apostles, Peter and Paul, but can
" point out the dioceses which our predecessors have rightly
" possessed, even from the beginning.—We stand on the
" ground of prescriptive, and immemorial possession, not
" merely from the times of Patrick and Augustine, but,
" from those more remote ages, when the bishops and
" priests, that were our predecessors, attended the councils of
" *Arles* and of *Nice*; when *Tertullian* and *Origen* bore witness
" that the fame of our christianity had extended to *Africa*
" and the *East*."—Sec. vii. p. 300.

" The beginning of our office for the ordination of priests,
" which very much resembles that for deacons, has been used
" for a great length of time in the English and other western
" Churches as we find it in manuscripts written more than a
" thousand years ago."

" The next portion of this service is of still greater anti-
" quity, as it occurs not only in the Pontifical of Egbert,
" Archbishop of York, written 1000 years ago, but in the
" Sacramentary of Gelasius, A.D. 494. The office
" of the holy communion then commences, and after a
" proper collect, epistle and gospel, the bishop addresses the
" candidates for the priesthood in a discourse of some length,
" in which he reminds them of the great importance and
" responsibility of the office to which they are called, and
" explains some of the principal duties which are incumbent

"upon them. This address in the most ancient times, seems "to have been delivered to the candidates at their nomination "and before ordination, in fact it was made when the ecclesias- "tical canons were read to the candidates for orders, which ac- "cording to the 3rd council of Carthage, A.D. 397, took "place some time before their ordination; but in latter ages "we find some traces of it in the ordination service itself. "A manuscript pontifical, cited by *Martene*, and written "more than six hundred years ago, contains a short formulary "of the kind, which is placed, as ours is, in immediate con- "nexion with some questions addressed to the candidates for "ordination, and directly before the most solemn part of the "office. The questions which follow the address in our ordinal "seem to be in some degree peculiar to it. Probably no "church requires from her priests such solemn vows as our "own. They seem to have been modelled, in a great degree "after the parallel formularies used in the ordination of "bishops, and might perhaps have been introduced here, "(independently of their importance) to preserve greater "uniformity in the offices. The last question is probably "the most ancient of them all, and is found in manuscript "ordinals written eight hundred years ago, when it is placed "in exactly the position which it holds in our service, before "ordination begins, and not at the end of the communion "as in the Roman pontifical."—Palmer, p. 302.

It would be endless to enumerate the historical evidences, or to cite even the leading authorities, which abound to support the antiquity of episcopal government, and ordination; and to prove the direct succession of bishops of the Christian Church, from the Apostles, to the present day. The principal may be found in Potter on Church Government, 77, 88, 92, 94, 98, 103, 111, 113, 115, 116, 125, 128, 199, 201; and Wheatly on the Book of Common Prayer, 95, 98. In the conference with Charles I., in the Isle of Wight, the presbyterian divines, in their reply to

the king, say, " We grant that, not long after the Apostles' time, bishops, in some superiority to presbyters, are, by the writers of those times, reputed to have been in the church."—Boyd's Episcopacy and Presbytery, 121.

It is said that at one time, in the North of Ireland, the Presbyterian clergy were comprehended within the pale of the Established Church, enjoying its endowments, and sharing its dignities. And an argument is thence sought to be drawn, that Presbyterian ordination was recognized by the law and by the church, as conferring holy orders. Now it is undoubtedly true, that in the troubled times in Ireland, when neither the authority of the church, nor that of the government existed in the country, some livings were held by Presbyterian clergymen. They got into these livings in the time of the usurpation, when, as Primate Bramhall said, " there was no law," and at the period of the Restoration they were obliged either to receive episcopal ordination, or to give up their benefices. By the Irish Act of Uniformity, 2 Eliz. c. 2, it was enacted that no other form of ordination should be used in the Church of Ireland, but that contained in the Book of Common Prayer. This which was further ratified by the 17 & 18 Car. II. c. 6, was the actual law of the land, at the time of the Restoration. If then, persons were admitted within the pale of the church who were not so ordained, it was in breach, not in accordance with the law. And soon after the Restoration, when lawful authority resumed its sway, the law was enforced. Bishop Mant in his History of the Church of Ireland, vol. 1, p. 623, gives the following account from Vesey's life of Primate Bramhall, of the mode in which that prelate dealt with those Presbyterian divines who were in possession of benefices, without having duly received holy orders. " When " the benefices were called at the Visitation, several appeared, " and exhibited only such titles as they had received from the " late powers. He told them, they were no legal titles; but

" in regard he heard well of them, he was willing to make such " to them by institution and induction, which they humbly " acknowledged and intreated his lordship so to do. But, " desiring to see their *letters of orders;* some had no other " but their certificates of ordination by some Presbyterian " classes, which he told them did not qualify them for any " preferment in the church. Whereupon the question " immediately arose, 'are we not ministers of the Gospel?' " To which his Grace answered, that that was not the " question: at least he desired for peace sake, of which he " hoped they were ministers too, that that might not be " the question for that time, 'I dispute not,' said he, 'the " value of your ordination, nor those acts you have exercised " by virtue of it: what you are, or might do, here when " there was no law, or in other churches abroad. But we " are now to consider ourselves as a National Church, " limited by law, which among other things takes chief " care to prescribe about ordination: and I do not know, " how you could recover the means of the church, if any " should refuse to pay you your tithes, if you are not or- " dained, as the law of this church requireth. And I am " desirous, that she may have your labours, and you such " portions of her revenue, as shall be allotted to you in a " legal and assured way.' By this means he gained such " as were learned and sober, and for the rest it was not " much matter." Bishop Mant then proceeds to inform us that the Primate ordained these ministers as by law required. He then goes on to narrate, p. 627, the course adopted by Bishop Taylor. " With respect to the ministers whom he " found in possession of the churches, there was only one " of two courses which it was possible for him to pursue. " The course chosen by the Primate, we have seen, was that " of giving episcopal ordination to the individuals, and so " permitting them to retain the benefices; the same " course might have been adopted by Bishop Taylor, had

" it depended upon his choice. But the Presbyterian " ministers in his diocese assumed from the first, an atti- " tude of determined hostility against him. They refused " to submit themselves to his episcopal jurisdiction; and " when the day of his visitation was announced, they con- " federated together, and in a body agreed not to attend it. " The obvious consequence followed. Not having received " episcopal ordination, these persons could not be recognised " as ministers of the Church of Ireland; and the benefices " which they were thus not qualified to hold, were declared " to be, what in law they were, actually vacant, and the " vacancies were supplied by the bishop, in the exercise of " his legitimate authority. The same course was taken in " the other northern dioceses, especially in those of Raphoe " and Clogher." So much for the argument drawn from the fact of some Presbyterians, having got into possession of church livings. Such of them as would not receive episcopal ordination were deprived, at the time of the Restoration, of the benefices into which they had been admitted during the Usurpation, " when there was no law." The same facts are recorded in different language by Mr. Reid, in his History of the Presbyterians, already cited on the other side. And he concludes by complaining that " In " this violent and summary manner was the constitution of " the Irish Episcopal Church, as it now stands in doctrine " and discipline, finally settled. The Thirty-nine Articles " of the English Church, became the accredited standard of " the former; and the latter was regulated by a body of " canons, selected from those adopted in England, and " framed into a new series, for the gratification of those " prelates, who stood out for the independence of their " national establishment. These canons, the first which " were in force in Ireland, amounted to one hundred in " number. They were ordered to be subscribed by every " minister, and to be read by him publicly in his church, " once a year."—1 Reid, 173.

Let us consider now what is the law as to holy orders in this country, irrespective of theological doctrine. There are three orders of ministers in the church, bishops, priests, and deacons, Gibson's Codex, 99. Sir Edward Simpson in his judgment in *Scrimshire* v. *Scrimshire*, 2 Haggard, 399, tells us, that "The Romish Church "acknowledges several orders; though bishops, priests, "and deacons, corresponding to those orders in the Church "at Rome, are only allowed by us; and in the form of "making and consecrating bishops, 3 & 4 Ed. VI. c. 12; "5 & 6 Ed. VI. c. 1, s. 5; 13 & 14 Car. II. c. 4, it is "declared 'That no man is to be accounted or taken to "be a lawful bishop, priest, or deacon, or suffered to "execute any function, except he be admitted thereto, "according to the form following, or hath had *formerly* "episcopal ordination and consecration.' Bishop Gibson "observes that this last clause was designed to allow "Romish converted priests, who had been before ordained "by a bishop, that such priests might be received without "re-ordination; namely, that they might be received to "exercise the functions of a priest, and to do the duties "of the English clergy," 2 Haggard, 400. The 17 & 18 Car. II. c. 6, Ir. is the Statute of force in this country, corresponding to the 13 & 14 Car. II. c. 4, Eng. It is entitled "An Act for the uniformity of public prayers "and administration of sacraments, and other rites and "ceremonies; and for establishing the form of making, "ordaining, and consecrating bishops, priests, and "deacons in the Church of Ireland." The first section recites the advantages of universal agreement, among other things, in "the form and manner of making, "ordaining, and consecrating of bishops priests, and "deacons." Therefore "To the intent that the greatly "desirable work of uniformity in divine worship may be "obtained, and that every person may know the rule to

" which he is to conform in public worship, and adminis-
" tration of sacraments and other rites and ceremonies
" of the Church of Ireland, and the manner how and by
" whom bishops, priests, and deacons, are and ought to
" be made, ordained and consecrated;" it enacts " that
" all and singular ministers in any cathedral, collegiate
" or parish church or chapel, or other place of public
" worship within this realm of Ireland, shall be bound to
" say and use the morning prayer, evening prayer, cele-
" bration and administration of both the sacraments and
" all other the public and common prayer, in such order
" and form as is mentioned in the Book of Common
" Prayer." The second section requires all clergymen to declare their assent to the Book of Common Prayer " and
" the form and manner of making, ordaining, and conse-
" crating of bishops, priests and deacons," on pain of deprivation. The eighth section provides and enacts, that from the 29th of September, 1667, " no person who now
" is incumbent and in possession of any parsonage, vicarage
" or benefice, and who is not already in holy orders by
" episcopal ordination, or shall not before the said 29th
" of September, be ordained priest or deacon according to
" the form of episcopal ordination, shall have, hold, or
" enjoy the said parsonage, vicarage, benefice with cure,
" or other ecclesiastical promotion within this kingdom of
" Ireland, but shall be utterly disabled and *ipso facto*
" deprived of the same, and all his ecclesiastical promotion
" shall be void, as if he were naturally dead." The ninth section enacts that " no person whatsoever shall thenceforth
" be capable to be admitted to any parsonage, vicarage,
" benefice, or other ecclesiastical promotion or dignity
" whatsoever, nor shall presume to consecrate and administer
" the holy sacrament of the Lord's Supper before such
" times as he shall be ordained priest, according to the
" form and manner in and by the said book prescribed,

" unless he have formerly been made priest by episcopal " ordination." The eleventh section prohibits the use of any prayers, rites, or ceremonies, except those in the " Book of Common Prayer." And the eighteenth section enacts that the former Statute of Uniformity shall also be in full force and effect. Hence it is plain that after the Reformation and Statutes of Uniformity, the only orders recognized or allowed by law were bishops, priests, and deacons, ordained and consecrated in manner by the Book of Common Prayer directed. And the only religious ceremonies and rites recognized or allowed by law were those contained in that book. After some time the Toleration Acts were passed, and after that the Dissenters' Marriage Act in this country. But whatever rights those Statutes confer on dissenters it is not by virtue of them that Presbyterian clergymen now claim to be in holy orders for the purpose of celebrating marriage as now contended for by the counsel for the Crown. Do they claim to be the ministers mentioned in the Book of Common Prayer? Are they bishops, priests, or deacons? Such only are the holy orders of our law. So far from the church or the law recognizing any dissent or other form of ordination than that in the Book of Common Prayer, the Act of Uniformity punished dissent and non-conformity with temporal penalties, and the canons imposed their spiritual censures. The 5th Irish canon is thus headed—" Authors of schism, and Maintainers of " conventicles censured;" and it is in these words— " Whosoever shall separate themselves from the com- " munion of saints, as it is approved by the Apostles' " rules in the Church of Ireland; and combine them- " selves together in a new brotherhood; (accounting the " Christians who are conformable to the doctrine, govern- " ment, rites, and ceremonies of the Church of Ireland, " to be profane and unmeet for them to join with in

" Christian profession,) or shall affirm and maintain, that " there are within this realm other meetings, assemblies " or congregations, than such as by the laws of this land " are held and allowed, which may rightly challenge to " themselves the name of true and lawful churches, let " him be excommunicated, and not restored until he repent, " and publicly revoke his error." The fourth canon "Of the " form of consecrating and ordering archbishops, bishops, &c. " and of the churches established according to that order," is in these words—" That form of ordination and no other " shall be used in this church, but that which is contained " in the Book of ordering bishops, priests, and deacons, " allowed by authority and hitherto practised in the " churches of England and Ireland. And if any shall " affirm that they who are consecrated or ordered according " to those rites, are not lawfully made, nor ought to be " accounted either bishops, priests, or deacons: or shall " deny that the churches established under this govern- " ment are true churches, or refuse to join with them in " Christian profession, let him be excommunicated, and " not restored until he repent, and publicly revoke his " error." The third canon directs that " That form of " liturgy or divine service and no other, shall be used in " any church of this realm, but that which is established " by the law, and comprised in the Book of Common " Prayer and administration of Sacraments. And if any " one shall preach, or by any open words declare or " speak any thing in the derogation or despising of the " same book, or of anything therein contained, let him be " excommunicated, and not restored until he repent and " publicly revoke his error." Yet, the Presbyterian clergy of the present day, who openly denounce the prelacy of the church, which is the holy order of bishops, who ridicule its liturgy and its form of solemnization of matrimony as contained in the Book of Common Prayer,

claim to be in holy orders, under the laws which have just been stated. If they be in holy orders now, they must have been so when the Act of Uniformity was in full force, before the Toleration Act, for there is nothing, it is conceded, in that Statute conferring on them the right of claiming to be in holy orders if they had not such right before. And the state of the law which has just been described is utterly inconsistent with such an assumption. It is very remarkable too, that in numerous Statutes down to the latest times, in which there are provisions relating to clergymen in holy orders and other religious ministers, the legislature invariably preserves an express and guarded distinction between them. For instance, the English Jurors' Act, 6 Geo. IV. c. 50, s. 2, in exempting clergymen in holy orders and other ministers and teachers from serving on juries, uses these words—"All clergymen "in holy orders, all priests of the Roman Catholic faith "who shall have duly taken and subscribed the oaths "required by law, all persons who shall teach or preach in "any congregation of Protestant Dissenters, whose place "of meeting is duly registered." So the Jurors' Act in force in Ireland, the 3 & 4 Wm. IV. c. 91, s. 2, provides the same exemption in these words—"All clergymen in "holy orders, all persons who shall teach or preach in "any religious congregation." And the 21 & 22 Geo. III. c. 25, Ir. which enables Protestant Dissenting ministers to solemnize marriages between Protestant Dissenters by no means treats such ministers as in holy orders; it calls them "Protestant Dissenting ministers or "teachers."

For these reasons it is submitted, that Presbyterian ministers are not, by the law of this country, clergymen in holy orders. If the Court should hold that they are, it must hold the same of all dissenting ministers and teachers of all religious sects of whatsoever description

professing the Christian religion. Although the Presbyterian be the established religion in Scotland, the law knows no distinction in England and in Ireland between Presbyterians and other sects of Protestant Dissenters. It tolerates all equally. It recognizes the ministers of none to be in holy orders. It knows no holy orders, in England and in Ireland, but those of bishops, priests and deacons. Therefore, the ceremony of marriage found by the special verdict to have been performed between the defendant and Hester Graham, cannot be considered as in fact a marriage on the second ground relied on by the counsel for the Crown, as having been performed by a clergyman in holy orders.

We now come to the second head of the argument.

The counsel for the crown has contended that, by the law of this country a contract of marriage *per verba de præsenti*, followed by cohabitation, is an actual marriage, although not solemnized by a priest or clergyman.

It is submitted that such is not the law, and that the presence of a priest or clergyman in holy orders is necessary for the celebration of marriage by the common law of England, which is the law of this country.

The line of argument intended to be submitted to the Court on this branch of the subject is this. It will be first shown that from the earliest times of the Christian Church marriage has been a religious ceremony of that church; that it has been the universal practice of all Christian countries to treat marriage as a religious ceremony, for the due celebration of which the presence of a priest was always required. It will then be shown that not only was the practice of the Christian Church in England the same as that of the continental churches, but that the sacerdotal benediction was expressly and repeatedly declared by positive law to be necessary for the celebration of marriage in the earliest times of our history, when the common law,

which is equally of force in this country as in England, was yet in its infancy. It will be proved, that such has been ever since and always the common law, by repeated decisions of courts and judges, by the fact that the common law, as well as the ecclesiastical law of England, always denied the consequences of lawful wedlock to such contracts of matrimony as were not celebrated by a priest. This will be proved by the unanimous testimony of the most ancient authorities of both the ecclesiastical and common law, and by the express and implied opinion of the legislatures of both England and Ireland, to be collected from numerous enactments from the period of the Reformation down to modern times.

From the earliest times of the Christian Church, marriage has been a religious ceremony of that church. And it has been the universal practice of all Christian countries to treat marriage as a religious ceremony, for the due celebration of which the presence of a priest was always required. It appears that Pope Evaristus, otherwise called Anacletus Græcus, flourished about the year 110.—Ayliffe's Parergon, 404. "Pope Evaristus, writing to the African bishops, says, that, "marriages ought not to be contracted in a clandestine man- "ner, for marriage, says he, is no otherwise lawful but when "the wife is demanded of such persons as seem to have "the government and dominion over the woman's person, "and who have the care and guardianship of her; and "unless she be espoused by the consent of her parents and "nearest relations, and be endowed according to law, and "likewise at the time of her nuptials, receives the sacer- "dotal benediction according to custom, by means of "prayer and oblations, and be also given in marriage by "her paranymphi as usual, such marriage is deemed un- "lawful by the canon law. And this was the ancient way "of celebrating legal marriages in the church, for other- "wise they were styled only *conjugia præsumpta*, and not "lawful marriages; and by that law are rather termed

" *adulteria*, *stupra* and *contubernia*, than lawful marriages. " Let no believer or Christian, of what condition soever he " be, presume to celebrate wedlock in private, but let him " publicly marry in the Lord, receiving the benediction of " the priest, says the text of the law," citing the *Corpus Juris Canonici*.—Ayliffe, 364.

In Martene De Antiquis Ecclesiæ Ritibus, lib. i. cap. 9, art. 5, p. 127, there are a collection of old marriage rituals used in several churches of the continent, printed from manuscripts preserved in different towns of France of very old date, some as old as the eighth century, and from that down to the thirteenth, which show that it was the ancient practice of the Christian Church from the earliest times, to have marriages solemnized by priests, according to certain regular adopted forms of religious ceremony. The first of these is thus headed:—" Ex Gelasiano Missali et MSS. " Codicibus Remensi et Gelonensi Annorum, 900." The next is headed—" Ex MS. Missali Redonensi, ab annis " circiter 700 scripto, et in Bibliotheca S. Gatiani Turo- " nensi asservato." It begins thus—" Incipit ordo ad " sponsum et sponsam benedicendam," and proceeds in these words—" In primis veniat sacerdos ante ostium ec- " clesiæ indutus albâ atque stola cum benedicta aquâ: quâ " aspersa, interroget eos sapienter utrum legaliter copulari " velint, et quærat quomodo parentes non sint, et doceat " quomodo simul in lege Domini vivere debeant. Deinde " faciat parentes sicuti mos est, dare eam atque sponsum " dotalitium dividere, cunctisque audientibus legere. " Anulo quoque benedicto in nomine Sanctæ Trinitatis, " eam in dextrâ manu sponsare faciat, atque honorare auro " vel argento pro ut poterit sponsus. Postremo benedic- " tionem inibi faciat quæ in libris continetur. Quâ finitâ, " intrando in ecclesiam, missam incipiat. Sponsus autem et " sponsa candelas ardentes in manibus tenentes et offerto- " rium, missam audientes offerunt, et antequam *Pax Domini*

" dicatur, ante altare sub pallio vel alio quolibet opertorio, " sicuti mos est, eos benedicat: ad ultimum prædictus " sponsus pacem de presbytero accipiat, suæque sponsæ " ipse ferat." The ritual then proceeds with the benedictions and prayers. The third is headed—" Ex MS. Pon- " tificali Monasterii Lyrensis annorum 600." It also directs the parties to appear in the first instance before the doors of the church " Ante omnia veniant ad januas " ecclesiæ sub testimonio plurimorum."

In Bingham's Antiquities of the Christian Church, 22 Book, 4 chapter, 1 sect.(*a*) that learned author shows that the solemnity of marriage between Christians was usually celebrated by the ministers of the church, from the beginning. He tells us, p. 328, that on this subject " a great " dispute is raised by Mr. Selden, for he will by no means " allow that it was the general practice among Christians " when they made marriages one with another, to have the " marriage solemnized by a minister of the church. He " owns it was sometimes so done by the choice of the con- " tracting parties, or their parents inclining to it; but he " asserts they were under no obligation of law so to do, nor " did any general custom prevail to give it so much as the " title of a general practice. But Mr. Selden in this is " contradicted by eminent men of his own profession. He " himself owns that Dionysius Gothofred, and Hotoman " are against him in point of law; and Jacobus Gothofred, " the famous commentator upon the Theodosian code, is " against him in point of practice. The former Gothofred " and Hotoman are of opinion, that the words, *vota nup-* " *tiarum*, in one of Justinian's laws, means the celebration " of marriage by the clergy. The other Gothofred thinks " the passage hardly express enough to be a full proof of " the matter; but then he is clear against Mr. Selden, in

(*a*) 7 Vol. p. 327. London edition, 1840.

" point of practice. For he says ' The ancient church in " general, and the African Church in particular, were " ever wont to celebrate marriages by the solemn bene- " diction of the clergy,' and he gives very good proofs of " his assertion." Bingham then states several passages from the writings of Tertullian, who flourished in the second century of the Christian era, which are cited by Gothofred in proof of the early practice of the Christian Church in this particular. One of which is, " Among " us secret marriages, that is, such as are not publicly " professed before the church, are in danger of being " condemned as fornication and adultery." He then goes on to state that Gothofred proves further, by citing the writings of Saint Ambrose, Ignatius, and Gregory Nazianzen, and the fourth council of Carthage, his position, that it was the practice of the Christian Church in the earliest times to have their marriages celebrated by a priest. In addition to the authorities relied on by Gothofred, Bingham, p. 332-3, cites to the same effect, Saint Austin, Possidius, and Saint Chrysostom, and Siricius, bishop of Rome, who lived about the same time with Chrysostom and Saint Austin and a decree of Pope Hormisdas, who lived about the year 520. Mr. Bingham then goes on to describe how the primitive practice of having marriages celebrated by priests, came to be neglected in certain places, which made some of the more zealous emperors set themselves to renew the primitive custom, and make some more effectual provision than had hitherto been done, by more express and general laws to establish and confirm it. Charlemagne enacted a law in the west, about the year 780; wherein he ordered (*a*) that no marriage should be celebrated by any other ways but by blessing,

(*a*) Carol Capitular. lib. 7, c. 363, Aliter legitimum non sit conjugium... nisi sponsa sua suo tempore sacerdotaliter cum precibus et oblationibus a sacerdote benedicatur, ecta ap. Bingham, Book 22, Chapter 4, s. 3.

with sacerdotal prayers and oblations: and whatever marriages were performed otherwise, should not be accounted true marriages; but adultery, concubinage, or fornication. And about the year 900, Leo Sapiens, in the Eastern Empire, revived the same ancient practice. Mr. Bingham, p. 336-7, concludes his observations in these words, "Mr. "Selden and Gothofred, both agree in this, that now the "necessity of sacerdotal benediction was established by "law; but they differ in one point, that Mr. Selden sup- "poses that this was the first beginning of the general "practice of making marriages by sacerdotal benediction; "whereas Gothofred thinks it was only a reviving of a "former ancient general practice, which for some ages had "been much neglected. And that the truth lies upon "Gothofred's side,—the reader from what has been said, "will be able very easily to determine." Mr. Bingham gives both in English and in the original tongues, the passages of the different writers cited,(a) establishing beyond dispute, the early and universal practice of the Christian Church in Asia, Africa and Europe, to treat marriage as a religious ceremony, for the due celebration of which the presence of a priest was required.

The same practice was adopted, and universally followed in England from the earliest times after the introduction of Christianity among the Saxons. It may be observed in the first place, as stated by Mr. Palmer in his Origines Liturgicæ, 2 vol. p. 2, that our liturgy rather resembles the ancient Gallican, Spanish, Egyptian and Oriental liturgies than the Roman, while the expressions of our rituals are either taken from the ancient English offices which had been used in England from the sixth century and were then derived from the Roman offices of the first

(a) They will be found at length in Bingham's Antiquities of the Christian Church, Book 22, Chapter, 4, ss. 1, 2, 3.

four, or five centuries after Christ: so that, he says, "most "of the expressions of the English ritual have continued "in this church for above twelve hundred years, and in the "Christian Church, for fourteen hundred years." The same writer, Origines Liturgicæ, p. 208, c. 7, after observing that "there can be no reasonable doubt, that the "office of matrimony has from the earliest period been per- "formed by the ministers of the Christian Church;" and noticing the frequent mention made of the benediction of marriage, and of the rites which attended it by Tertullian, Ambrose, Augustine, Gregory Nazianzen, Chrysostom and other Fathers, and by early councils, proceeds thus to consider the office of matrimony according to the English ritual. "The greater portion of this office has been used for a "lengthened period in the English Church, as will appear "by the following extracts from the ancient manuals of "Salisbury and York. Statuantur vir et mulier ante "ostium ecclesiæ coram Deo et sacerdote et populo, vir "a dextris mulieris, et mulier a sinistris viri. Tunc inter- "roget sacerdos banna dicens in lingua materna sub "hac forma."

"And also speaking unto the persons that shall be "married he shall say: also I charge you both and eyther "be yourselfe, as ye wyll answer before God, at the day "of dome, that yf there be any thynge done pryvyly or "openly, betweene yourselfe; or that ye know ana lawful "lettyng why that ye may nat be wedded togyder at thys "tyme. Say it nowe, or we do any more to this matter."

"M. Wilt the have this woman to thy wedded wife?"

"N. Wilt thou have this man to thy wedded husband?"

This first part of the office was anciently termed the *espousals*, which took place some time before the actual celebration of marriage. The espousals consisted in a mutual promise of marriage, which was made by the man and woman before the bishop, or presbyter and several

witnesses; after which the articles of agreement of marriage, (called *tabulæ matrimoniales*) which are mentioned by Augustin, were signed by both persons.

After this, the man delivered to the woman the ring and other gifts, an action which was termed *subarrhation.*

In the latter ages the espousals have always been *performed* at the same time as the office of matrimony, both in the western and eastern churches; and it has long been customary for the ring to be delivered to the woman *after the contract* has been made, which has always been in the actual office of matrimony.

When marriage was to be celebrated, the man and woman, accompanied by their relatives, or a friend, who gave away the woman, (the *paranymphus* is spoken of by Augustin,) came to church, and gave their consent to the marriage; and while they performed their public contract, they gave each other their right hand, a custom which is mentioned by Tertullian and Gregory Nazianzen. These rites accompanied, or followed by the benediction of the priest, seem to have been always used in the office of matrimony.

The priest shall say, "who giveth this woman to be "married to this man," &c.

"I take thee," etc.

"With this ring I thee wed."

Mr. Palmer tells us again, p. 214, that the benediction is of ancient use in the English Church, as it appears in the manuals of Salisbury and York. These manuals are ancient English rituals used in the churches, of which they bear the name. There were many such of use in different parts of England, before the Reformation, as appears from the preface to the Book of Common Prayer, "whereas heretofore there hath "been great diversity in saying and singing in churches "within this realm; some following Salisbury use, some "Hereford use, and some the use of Bangor, some of York, "some of Lincoln; now from henceforth, all the whole

"realm shall have but one use." These rituals are of great antiquity, and are frequently referred to, particularly the manuals of York and of Salisbury. The exact period when they came into use is unknown, but such is their antiquity, that Bishop Osmond is said to have altered the Salisbury manual in the eleventh century. When they were originally framed is utterly unknown. But for the present purpose it is enough to say, that they existed many centuries before the Reformation and the council of Trent. Mr. Palmer tells us, p. 219, that the benediction which concludes the office of matrimony, is found in the Salisbury and York manuals, though not exactly in the place it now occupies.

It has now been shown that, according to the usage of the Christian Church in other parts of the world, it was likewise the practice of the church in England, to treat marriage as a religious ceremony, to be celebrated by a priest with sacerdotal benediction. To have established the mere fact of the existence of such usage, is no inconsiderable step in the proof of what is sought to be established, that the common law required the presence of a priest to celebrate the marriage. For, what is the common law but the general immemorial usage of the country? We can go, however, much farther than this, and show that the sacerdotal benediction was expressly and repeatedly declared, by positive law, to be necessary for the celebration of marriage, in the earliest times of our history, when the common law was yet in progress of formation among our Saxon ancestors. In 1 Wilkins' Concilia, 217, we find a constitution of very early date in the Saxon period, entitled, *constitutio de nuptiis*, in which one article is as follows: "Nuptiis presbyter intersit, qui de jure cum Dei "benedictione eorum conjunctionem adunare debet in "omni felicitatis plenitudine." And in the same volume of Wilkins' Concilia, p. 367, there is this constitution of

the council of Winchester, under Archbishop Lanfranc, A. D. 1076, "Præterea statutum est ut nullus filiam suam "vel cognatam det alicui absque benedictione sacerdotali; "si aliter fecerit, non ut legitimum conjugium, sed ut "fornicatorium judicabitur." In Wilkins' Laws of the Saxons we find a translation of the Saxon laws of Edmond I. who reigned from 940 to 946, under the title, "Quomodo "virgo desponsanda et quinam ritus ibi esse debent," in which there is this clause, "Dationi presbyter intersit, is "de jure cum Dei benedictione conjunctionem eorum "adunare debet in omni felicitatis plenitudine." Wilkins, 76.

The Record Commissioners have lately published a complete collection of the ancient Saxon laws, (*a*) with the original Anglo-Saxon and a literal English translation, in parallel columns, in which there is in English, among the laws of king Edmond, who, as it has been said, reigned from 940 to 946, the law of which the foregoing extract in Latin has been cited from Wilkins. The whole law is most important, as showing with what rites marriage was solemnized in those times, and as distinguishing between the various steps in the celebration of matrimony. It will be found p. 108 to 109, and is in these words:—

OF BETROTHING A WOMAN.

1. "If a man desire to betroth a maiden, or a woman, "and it so be agreeable to her and her friends, then it is "right that the bridegroom, according to the law of God, "and according to the customs of the world, first promise "and give a 'wed' to those who are her 'foresprecas,' "that he desire her in such wise that he will keep her, "according to God's law, as a husband shall his wife: and "let his friends guarantee that.

(*a*) Ancient laws and institutes of England, comprising laws enacted under the Saxon kings, from Ethelbert to Cnut, the laws of Edward the Confessor, &c.

2. " After that it is to be known to whom the 'foster-" lean' belongs: let the bridegroom again give a wed for " this; and let his friends guarantee it.

3. " Then, after that, let the bridegroom declare what " he will grant her in case she choose his will, and what " he will grant her if she live longer than he.

4. " If it be so agreed, then is it right that she be " entitled to half the property, and to all if they have " children in common, except she again choose a husband.

5. " Let him confirm all that which he has promised " with a 'wed;' and let his friends guarantee that.

6. " If they then are agreed in every thing, then let " the kinsmen take it in hand, and betroth their kinswoman " to wife, and to a righteous life, to him who desired her, " and let him take possession of the 'borh' who has " control of the 'wed.'

7. " But if a man desire to lead her out of the land, " into another thane's land, then it will be advisable for " her that her friends have an agreement, that no wrong " shall be done to her; and if she commit a fault, that " they may be nearest in the 'bot,' if she have not " whereof she can make 'bot.'

8. " At the nuptials, there shall be a mass-priest by " law; who shall, with God's blessing, bind their union " to all posterity.

9. " Well is it also to be looked to, that it be known " that they, through kinship, be not too nearly allied, " lest that be afterwards divided, which before was wrongly " joined."

The celebrated work of Stiernhook, *de jure Sueonum et Gothorum vetusto*, contains many interesting particulars of the laws and customs of the Northern nations, from whom our Anglo-Saxon ancestors spring. It is a work of great credit and authenticity, and one to which Sir William Blackstone makes frequent references when tracing the

origin of many of our laws. Stiernhook, p. 159, after having given an account of the preliminary rites of marriage, and the taking of the bride to the house of the bridegroom, says, "Conjunctio autem tunc a tutore facta est, consecratio "vero ab Ecclesiæ ministro: nihil rite fieri potuit nisi "præsente tutore aut qui ejus locum suppleret, absque eo "enim si consecrasset sacerdos pravissimâ pœnâ puniebatur "tanquam si cædem fecisset." Thus it is shown that, not only was it the usage of our Saxon ancestors, as well as of the other Northern nations of the same stock, to have the ceremony of marriage hallowed by the benediction of a priest, but that their laws expressly required the presence and benediction of a priest for the due celebration of marriage. Such was the law and usage of England from time immemorial. It is idle to say that the canon law was the basis of the marriage law of England. The canon law was never adopted in this country where it clashed with the general usages and laws of the land. And on no subject has the common law more jealously checked the innovations of the canon and civil law than on that of marriage. It was on occasion of an attempt to make an innovation in the law and usages of England on the subject of marriage, that the great council of the nation, with one voice, answered, "Nolumus leges Angliæ mutari."

An examination of the monuments and evidences of our legal customs contained in the records of the several courts of justice and the repeated decisions of courts and judges in all times of our judicial history, will likewise show, that the common law always required marriage to be solemnized by a priest, and that it has always denied the consequences of lawful wedlock to such marriage contracts, as were not completed by such solemnization.

It would appear, even, that, at one time, it was considered that our law required marriages to be solemnized not only by a priest, but in church, or as the phrase is, *in facie ecclesiæ*. This was after, and probably in consequence

of the decree of the council of Lateran, under Pope Innocent the 3rd, in 1215, against clandestine marriages, which was, however, only a canonical constitution. *Foxcroft's* case, 10 Ed. I. 1 Roll. Ab. 359; 4 Viner Ab. 218; tit. Bastard pl. 18; was this, "One R. being infirm and "in his bed, was married to one A. a woman, by the Bishop "of London privately, in no church nor chapel, nor with "the celebration of any Mass, the said A. being then big "by the said R., and within twelve weeks after the marriage, "the said A. was delivered of a son, and adjudged a bastard; "and so the land escheated to the lord by the death of R. "without heir." There the marriage though celebrated by a bishop was held bad because not solemnized in a church or chapel. The extreme strictness of this rule was relaxed, and it seems to have been settled finally by successive cases, that the ministration of a priest alone was sufficient to give to a marriage celebrated by him in private, the essentials of a marriage solemnized *in facie ecclesiæ*, and to confer upon it all the rights and consequences of lawful matrimony, as will appear from the authorities presently to be cited. But it will appear from them, as well as from *Foxcroft's* case, that the ministration of a priest was never dispensed with.

In Rolle's Abridgment, tit. Baron and Feme, 341, pl. 21, we read, "If a man and woman are married by a priest in "a place which is not a church or chapel and without any "solemnity or celebration of the Mass, still it is a good "marriage and they are baron and feme." Perkins tells us in the latter part of s. 306, in accordance with the decision in *Foxcroft's* case, that "it hath been holden in the time of "King Henry the Third, that if a wife had been married in "a chamber, that she should not have dower by the common "law," and then adds, "but the law is contrary at this day." In Fitzherbert's Natura Brevium, 352 [150] M. N. it is stated, "If a man marry a woman in a chamber, dowment "*ad ostium cameræ* is not good, dowment *ad ostium ecclesiæ* "of a moiety of the land is good. And a woman married

" in a chamber shall not have dower by the common law," and H. 16, H. 3, is cited, probably the same authority as that referred to by Perkins. Fitzherbert then adds, " quære of marriages made in chapels not consecrated, &c. " And it seemeth reasonable, that in such cases she shall " have dower."

While on the subject of dower *ad ostium ecclesiæ*, it may be excusable to digress a little from the subject immediately under examination, in order to observe in support of part of the preceding argument, how strongly the practice of endowing at the church door, corroborates what has been already urged to show the universal, immemorial usage of England, to have been, to require the celebration of marriage as a religious ceremony.

The practice of those times seems to have been to solemnize marriages at the doors of the churches. Wheatly in his work on the Book of Common Prayer, p. 408, c. 10, s. 2, on the form of solemnization of matrimony, observes, upon the direction in the rubric, that the persons to be married are to come into the body of the church, " the custom formerly was for the couple, who were to enter upon this holy state, to be placed at the church door, where the priest was used to join their hands, and perform the greatest part of the matrimonial office. It was here the husband endowed his wife with the portion or dowry before contracted for, which was therefore called *dos ad ostium ecclesiæ*, the dowry at the church door. But at the reformation, the rubric was altered, and the whole office ordered to be performed within the church, where the congregation might afford more witnesses of the fact." It was with reference to this practice of marrying at the church door, that Chaucer who flourished in the reign of Edward the Third, has the lines

" She was a worthy woman all her live,
" Husbands at the church-dore had she five."

Littleton, s. 37, tells us "that, by the common law, the "wife shall have, for her dower, but the third part of the "tenements which, were her husband's, during the "espousals." In s. 38, we read, "Also, there be two "other kinds of dower, viz., dower, which is called, dow-"ment at the church-door, and dower, called, dowment "by the father's assent." In s. 39, he describes dower at the church-door, as follows, "Dowment at the church-door "is, where a man of full age, seized in fee-simple, who "shall be married to a woman, and when he cometh to the "church-door, to be married, there, after affiance, and "troth, plighted between them, he endoweth the woman, "of his whole land, or of the half, or other legal part, "thereof, and, there, openly, doth declare, the quantity, "and the certainty, of the land which she shall have for "her dower." Then dowment by assent of the father, is described, s. 40, to be, "where the father is seized of "tenements in fee, and his son and heir apparent, when "he is married, endoweth his wife, at the monastery, or "church-door, of parcel of his father's lands, with the "assent of his father" &c. These several sections all corroborate, strongly, the proofs already adduced to show that it was the universal custom of England to treat marriage as a religious ceremony; they assume that people went to church to be married, and were married by a priest. Lord Coke, in his Commentary on Littleton, s. 39, says, Co. Lit. 34 a. "If this dower be made *ad* "*ostium castri sive messuagii*, it is not good, but ought to "be made, *ad ostium ecclesiæ sive monasterii*." And he cites Bracton, "*hæc constitutio fieri debet in facie ecclesiæ*, "*et ad ostium ecclesiæ*." Lord Coke then observes, upon the words, "there, after affiance between them" "*affidare* "*est fidem dare*, affiance or sponsalitie, and is derived of "this word, *spondeo*, because they contract themselves "together; *et ideo sponsalia dicuntur futurarum nuptiarum*

" *conventio, et repromissio.* But this dower is ever after " marriage solemnized, and, therefore, this dower is good " without deed, because he cannot make a deed to his wife. " For no assignment of dower *ad ostium ecclesiæ* can be " made before marriage, for that before marriage the woman " is not entitled to have dower." Mr. Hargrave, note 2, Co. Lit. 34 a, observes upon Coke's description of sponsalia, thus: " This explanation of affiance or sponsalia is " conformable to the strict sense of the word amongst the " civilians and canonists; but our law books, as Mr. Swin- " burne long ago observed, use affiance and marriage " promiscuously for one and the same thing, and Lord Coke " apparently supposes Littleton by affiance to mean mar- " riage; for Lord Coke says, that dower *ad ostium* ever is " after marriage, without professing to contradict Littleton." Mr. Hargrave likewise observes ib. n. 3, " But though " dower *ad ostium* cannot be till after marriage, yet it seems " that such endowment cannot be made at any time after, " but must be *immediately after*." That it was *immediately after* or rather that it was actually at the time of the marriage appears from the form of the writ of dower where the wife was endowed *ad ostium ecclesiæ*. " Command A., that " &c. he render to B. who was the wife of C., one hundred " acres of land with the appurtenances in N. of which the " aforesaid C. some time the husband of her, the said B. " endowed her at the door of the church when he espoused " her, whereof she nothing hath, &c. &c."—Fitzherbert Natura Brevium, 347 [148]. Hence it appears the practice was, for the husband to endow the wife at the door of the church, " when he espoused her." Why did they go to church, if marriage was not a religious ceremony? Why might not the endowment take place *ad ostium castri sive messuagii*, instead of at the door of the church, or of the monastery? Because it is plain, from an accumulated mass of evidence, that marriage was, by the universal and

immemorial custom of England, a religious ceremony, always performed by a priest, generally at church, or at a monastery. Such a marriage, only, was lawful matrimony; such a marriage, only, joined the parties in lawful wedlock; such a solemnization of marriage, only, drew after it the consequences of lawful wedlock.

That it has been the opinion of the Judges and Courts of common law, at all times, that solemnization by a priest was essentially necessary to constitute lawful matrimony by the common law, appears from numerous cases. On a trial before Lord Pemberton on an issue of marriage, or no marriage, it appeared that a clergyman of the Church of England in holy orders solemnized a marriage in these words—" I, A. B. take thee B. C. for " my espoused, betrothed, wedded wife, and will be thy " espoused, betrothed and wedded husband until death;" the parson speaking these words, the man repeating them after him, and the woman the like. No ring, according to the Book of Common Prayer was used; but a cohabitation as man and wife ensued for ten years. It seems to have been doubted if the marriage was good for want of the ring, &c. but Lord Pemberton did incline it a good marriage, there having been words of contract *de præsenti* repeated after a parson in holy orders, but upon importunity of counsel a case was to be made thereof. Here the validity of the marriage was put, not upon the ground of words present contract, but of words of present contract repeated after a priest in holy orders. *Weld* v. *Chamberlaine*, 2 Shower, 300. In *Holder* v. *Dickinson*, 1 Freeman 95; S. C. Carter 233; 3 Keble 148, it was held that in an action for breach of promise of marriage, it was unnecessary for a female plaintiff to allege that she offered herself to the defendant to be married in the presence of a priest. Vaughan C. J. differed from the rest of the Court, and thought the plaintiff should aver she offered herself in the presence of a priest.

But the Court held otherwise, not upon the ground, that a priest was unnecessary, but, admitting that he was necessary, on this ground, that where one is bound to do an act in which a third person must necessarily concur, he must produce the third person at his peril, that, in fact, the man was bound to have a priest to perform the ceremony. It is plain that, in this case, all the Court as well as Vaughan, C. J. thought a priest was necessary to the celebration of marriage. *Tarry* v. *Browne*, 1 Siderfin 64, shows that what the common law considered marriage lawfully solemnized was marriage solemnized by a priest in holy orders. In *Paine's* case, Id. 13, it was said by Windham Serjeant, that if a man contracts with a woman to marry her, and afterwards he marries another woman and the first woman sues in the Spiritual Court and by sentence there the first marriage is adjudged null that the man and the first woman are *baron* and *feme*. And he said that Noy Attorney-General, held that by this sentence the man and the first woman were complete *baron* and *feme*, without any other solemnity. But Twisden Justice "*negavit*, et dit que le marriage doit "estre solemnize, devant que ils seront complete baron et "feme." It is clear that Noy, who only said this at a reading or lecture was mistaken. The Ecclesiastical Court clearly would not have recognized them as complete husband and wife until after solemnization of matrimony. And Twisden J., at once repudiates the idea of their being husband and wife by the common law, until after solemnization, before which there was only a contract. Perkins, s. 194, draws the distinction very clearly between actual marriage and marriage contract. "And if a contract of "marriage be between a man and a woman, yet one of them "may enfeoff the other, for yet they are not one person in "law, in so much as, if the woman die before the "marriage is solemnized betwixt them, the man unto

" whom she was contracted shall not have the goods of the " wife as her husband, but the wife thereof may make a " will without the agreement of him, unto whom she was " contracted." [Burton J. The contract there intended might have been one *per verba de futuro* which would reconcile the authority with the argument on the other side]. The next section shows, it is conceived, that the contract meant, is one *per verba de præsenti.* It has been always considered that a contract *per verba de futuro* followed by *copula,* is equivalent to a contract *per verba de præsenti, quantum valeat.* Then Perkins goes to say, s. 195, that it had been once formerly holden, " that if a man contract " himself unto a woman *et postea cognovit eam carnaliter,* " and afterwards he doth enfeoff the same woman of a " carve of land, and puts her in seisin thereof, and " afterwards marrieth her in *facie ecclesiæ,* that this " feoffment is void, because that it is made *post fidem datam* " *et carnalem copulam et sic tanquam inter virum et uxorem,* " for that the marriage is subsequent, &c." This, Perkins says " hath been holden," but he adds " But at this day " if such a feoffment be made, it is good enough." Why is it good enough? Because a contract of marriage, no matter whether present, or future followed by *copula,* was not marriage, did not make the man and woman, man and wife—did not make them one person. For, husband and wife are one person in law, Com. Dig. D. 1. And Perkins adds further " But after the marriage is celebrated " between a man and a woman, the man cannot enfeoff " his wife, for *then* they are as one person in law." It is the celebration of marriage which makes the man and the woman one person in law, so that the one cannot enfeoff the other. The 194th section states the husband shall not have the goods of the woman as her husband after a mere contract of marriage, without solemnization. The 195th section says, that " After contract of marriage followed

" by *copula*, the one may enfeoff the other, for they are " not man and wife until celebration." And the 306th section says, that " If a man seized of land in fee, " make a contract of matrimony with J. S., and die before " the marriage is solemnized between them, she shall not " have dower, *for she never was his wife.*" So Lord Hale, in Co. Lit. 33, a. n. 10, tells us, " A. contracts *per* " *verba de præsenti* with B. and has issue by her, and " afterwards marries C. *in facie ecclesiæ*. B. recovers A. " for her husband by sentence of the Ordinary, and for " not performing the sentence he is excommunicated " and afterwards enfeoffs D. and then marries B. *in* " *facie ecclesiæ*, and dies. She brings dower against D. " and recovers, because the feoffment was *per frau-* " *dem* mediate between the sentence and the solemn " marriage, *sed reversatur coram rege et concilio quia* " *prædictus A. non fuit seisitus* during the espousals between " him and B. *Nota*, neither the contract nor the sentence " was a marriage." This establishes that a contract *per verba de præsenti*, though followed by cohabitation and birth of issue, and established by the sentence of the Ecclesiastical Court, is not a marriage. Here is a decision upon a writ of error, reported by Lord Hale, and reported with approbation, for he adds " *Nota*, neither the contract nor the sentence was a marriage." How can the loose doubts and extrajudicial dicta of modern Judges, following, without examination, the theory of a civilian, however eminent he may have been, outweigh, upon a question of the common law, such an authority as this? [Crampton, J.—Was the contract there one *per verba de præsenti?*] It was, expressly. If a contract be a marriage, this case is not law. If a contract, followed by cohabitation, be a marriage, this case is not law. If a contract followed by cohabitation, and established by the sentence of the Ecclesiastical Court, be a marriage, this case is not law. Lord Hale says, neither

the contract nor the sentence was a marriage. The sentence orders the contracting party to solemnize a marriage *in facie ecclesiæ*, but until he do solemnize it there is no marriage. In Comyn's Digest, *Baron* and *Feme*, B. 1, we read, "So "by the common law, till the marriage be solemnized the "wife cannot be endowed *ad ostium ecclesiæ*. And the "usual way of pleading a marriage is *per Presbyterum* "*sacris ordinibus constitutum;*" and again, "So by a contract "of marriage, it is no marriage if espousals do not after-"wards ensue." The word "espousals" here, has the same meaning as in the case reported by Lord Hale, *i. e.*, lawful wedlock. In *Fielding's* case, 5 State Trials, 615, (*a*) which was in 1704, before the Marriage Act, the defendant was convicted of bigamy, the first marriage having been celebrated in a private room, but in the presence of a priest who was in the train of one of the foreign ambassadors, and the validity of the marriage was put upon its being performed by a priest. The Judge in his charge dwells upon that fact; he says, speaking of the evidence of the principal witness, "If you believe her, she swears the marriage by "this priest and the consummation of it." In Bacon's Abridgment, tit. Marriage and Divorce, C., it is laid down, that in order to make the marriage complete, to entitle the wife to dower, the issue to inherit, &c., the same must be celebrated *in facie ecclesiæ*, and therefore, the private contract, without the priest's blessing, makes no marriage, though such marriage may be enforced in the Spiritual Court. In *Smith* v. *Maxwell*, 1 Ryan and Moody, 81, in which the question was of a marriage in Ireland, there would have been no room for difficulty or dispute if the contract was sufficient to constitute a marriage. The question turned entirely on the evidence offered, of the presence of a priest. *The King* v. *The Inhabitants of*

(*a*) Vol. 14, p. 1327, 8vo. ed.

Bathwick, 2 Barn. and Adol. 639, was likewise a case in which a marriage in Ireland came in question. The proof was, that a woman named Mary Byrne, a Roman Catholic, and one Cook, a Protestant, went on the 21st of May, 1826, before Mr. Wood, a clergyman residing in Dublin, who, in his private house, read to them the marriage ceremony, and in the course of it asked her whether she would be the wife of Cook, and asked him whether he would be her husband, to which question both of them answered, I will; and after the ceremony they returned to the house of Cook's father, whose servant she was, and there secretly cohabited for two months and upwards. It was proved by parol that Wood was reputed to be a clergyman of the Established Church, and there was also put in a document, purporting to be the letters of orders signed and sealed by William Archbishop of Tuam, dated in 1799, whereby the Archbishop certified that he had ordained Wood a priest, and which letters were proved to have been among Wood's papers at the time of his death, in July, 1829. It was argued on one side, first, that here there was a contract *per verba de præsenti*, which constituted a valid marriage, on which point *Dalrymple* v. *Dalrymple* was cited: and secondly, assuming that it was necessary to prove the marriage celebrated by a clergyman, that there was sufficient evidence of that fact from the letters of orders. On the other side it was admitted, as is admitted in this case, that a marriage in Ireland need not be celebrated *in facie ecclesiæ*, and that the only question, as to the validity of the marriage, was, whether or not there was any evidence of Wood being a priest, and it was contended, on several grounds, that there was no such evidence. Lord Tenterden, in giving judgment, never once notices the question of a mere contract *per verba de præsenti* without solemnization, being a valid marriage, though, if it were, the difficulty in the case of the proof of the orders

of Wood would have been got rid of, as a contract *per verba de præsenti* and cohabitation were distinctly proved. On the contrary, his lordship, all through, assumes it to be essential to the case, to prove Wood to have been a priest. And after discussing one question in the case, which does not apply to the matter now under consideration, he says, "We are also of opinion that the certificate of the ordina-"tion of Mr. Wood, by whom the first marriage was "celebrated in Ireland, was properly received in evidence." His lordship then goes at length into the reasons why the Court thought it receiveable, all which would have been quite unnecessary if the presence of a priest had not been considered essential to the celebration of the marriage. The learned reporters, in a note to this case, cite with approbation, Mr. Jacob's Addenda to Roper's Husband and Wife, where that learned writer maintains the doctrine here contended for, that, by the common law, a contract of marriage without the intervention of a priest was not a marriage; that such is the opinion of the profession generally in England, appears from the statements of Mr. Shelford, in his work on Marriage, p. 31; of Mr. Rogers, in his Ecclesiastical Law, 506; and of Mr. Starkie, in his Law of Evidence, 698, 3rd ed. n. d., where he says, "Before "the Marriage Act, 26 Geo. II. c. 33, s. 18, it was "essential to the validity of a marriage that it should have "been solemnized by a person in holy orders." There was an Irish case, cited by Torrens, J., in the argument of *The Queen* v. *Smith*, 2 Crawford and Dix, Circuit Cases, 339, and tried before Fletcher, J., which shows that the common law courts in this country, have agreed with those in England on this question. "It was the case of *Lessee* "*Verner* v. *Robinson*, and Judge Fletcher held, that a "marriage *per verba de præsenti* followed by cohabitation, "was not a valid marriage according to the law of Ireland; "and stated that he did not agree with Lord Stowell's obser-

" vations in *Dalrymple* v. *Dalrymple*, and the decision of " Judge Fletcher in that case was acquiesced in; and the " parties are still in possession of the lands under it." Then there is the case of *The Queen* v. *Smith*, itself, to the same effect, 2 Crawf. and Dix, C. C. 318.

The foregoing authorities, it is conceived, establish the proposition, that it has been the opinion of the Judges and courts of common law, at all times, that solemnization by a priest was essentially necessary to constitute lawful matrimony by the common law.

It is proposed now, to examine the authorities bearing on the subject, connected with ecclesiastical law. It has been said, that though a marriage not celebrated by a person in holy orders might not draw after it certain rights of property, might not, for instance, entitle the wife to dower or to letters of administration to her husband,—that nevertheless it was good for other purposes. There is no doubt, however, that in real actions the issue of such a marriage would be held a bastard. There is no doubt, that where in real actions the question of legitimacy came incidentally in issue it was tried by certificate of the bishop, and that if there had not been a marriage by a priest, he would certify bastardy, and the court of common law would act upon and be bound by his certificate and hold the issue to be illegitimate accordingly. According to the argument at the other side, then, as a marriage might be valid for certain purposes, so the issue might be legitimate for certain purposes and illegitimate for others, he might at once be a bastard and not a bastard, he might be entitled as heir to recover in ejectment but would be refused letters of administration and would be defeated as a bastard in a real action. The course of the common law, when a question of marriage came incidentally in issue was to send it to the bishop for trial by his certificate. Lord Coke tells us, 9 Rep. 316, in the

Abbot of Strata Marcella's case that, "general bastardy, "excommengement, loyalty of matrimony, profession, "and divers other ecclesiastical matters, shall be tried "by the certificate of the bishop." In these cases the bishop, it will not be disputed, would always certify against the marriage unless it were celebrated by a priest. The argument on the other side involves a startling anomaly. The common law courts when they find questions of legitimacy and marriage arise before them, in certain proceedings, refer them to the ecclesiastical court as matters of spiritual cognizance, and regulate their judgment by the certificate of that court. But, it is said, the same common law, when such questions arise in other forms of proceeding, in which they decide for themselves, are to act upon different principles and hold diametrically the reverse. Although, be it remembered, the common law has full controul over the ecclesiastical courts, and by the process of prohibition, can restrain them from acting or deciding contrary to the law of the land. The man then who is a bastard in one form of proceeding, is legitimate in another. Can a more startling anomaly be conceived?

Such an anomaly never existed in the law of England. The right of inheritance was never recognized in a bastard. "*Hæres*," Lord Coke tell us, Co. Lit. 7, b., "in the "legal understanding of the common law, implieth, that "he is *ex justis nuptiis procreatus;* for *hæres legitimus* "*est quem nuptiæ demonstrant.*" What then are *nuptiæ?* "*Nuptiæ sunt illi ritus quibus matrimonium perficitur*," Selden *Uxor Ebraica Lib.* 2, c. 1, 13. These are common law authorities. "A bastard, according to the civil and "canon law, is a person born of a woman out of wedlock, "or not legally married."—Ayliffe Parergon, 106. The same writer tells us, p. 107, "*Pater is est quem nuptiæ* "*demonstrant.*" When the court of common law, finding

the question of bastardy arise, sent it to be tried by the bishop, it was because, marriage being a religious ceremony to be duly performed by a priest, the bishop was more competent to decide on the sufficiency of the performance of the rite, on the validity of the orders of the priest, or on such other questions as might be expected likely to arise. It was not for the purpose of trying the question by the canon law, or by any rules different from the common law, for the bishop was to try it "*Not according to the canon law, but in pursuance of* "*the rules of the common law.*" This, it is very well known was the case. It is so stated expressly by Ayliffe who thus states the course of proceedings as to bastardy:—

"The temporal courts divide bastardy into what the "common lawyers call general and special bastardy. The "first is so called, because it comes incidently and is in "gross objected against some that sue in a matter prin- "cipal in order to disappoint his suit. As when a suit is "commenced in a temporal court for an inheritance, "and the defendant pleads in disability, that the plaintiff "is a bastard. For the issue must be joined upon it and "transmitted by the King's writ to the ordinary who is to "try it in his consistory court, not according to the canons, "*but in pursuance of the rules of the common law,* "though it be of ecclesiastical cognizance. For these "laws differ in this matter, viz: By the canon law he is "no bastard that is born before marriage if the parents "afterwards intermarry; but it is otherwise by the "common law, for such a child is a bastard. This is "sent to the bishop with certain additions for the greater "perspicuity of the inquiry thereinto, as that, whether the "person charged with bastardy was born *in lawful* "*matrimony* or not, or whether he was born before his "father and mother were lawfully contracted together in "marriage or after. Which inquiry the ordinary is to

" make by his own authority, and if he finds the truth of " the matter upon examination to be this or that, he is, " after sentence of his own court, to certify the matter " as it appears to him, under his seal unto the king's " courts accordingly, which certificate is conclusive to " them; and they are to give judgment as it is found " before the ordinary, either for or against the inheritance " in question."—Ayliffe, 109, 110.

Ayliffe likewise tells us, that " As to the matter of " bastardy, what it is, both the ecclesiastical and temporal " courts are pretty well agreed; but they differ in the " prosecution thereof." He then observes on the different ways in which the questions arise in the temporal and spiritual courts, and on general and special bastardy. And he observes how cautious the common law courts are in the way in which they submit to the spiritual court questions of bastardy which they do not go into themselves.

" *Ad curiam enim Regiam* (says Glanville) *non pertinet* " *agnoscere de bastardiâ*, against which the law of the land " does not oppose itself, but acknowledges it to be the " right of the church. And yet to avoid all subtle and " surreptitious dealing in this behalf, it has set down a " wary form of proceeding, by which the same shall be " brought to the ordinary; and such as have an interest " in the suit may have notice thereof, and in time to " object in form of law against the proofs and witnesses " of him that pretends himself to be a mulier, if they " think fit to be heard: and what shall be certified herein " by the ordinary as concerning the birth of him that is " charged with bastardy, that is to say, whether he was " born before or after his parents' marriage shall be " supplied in the king's court, either by judging for or " against the inheritance."—Ayliffe 108, 109.

Ayliffe then observes upon the case where the principal matter of the suit is concerning bastardy itself, as when

an action of slander is brought for the calling the plaintiff bastard, and the defendant justifies that he is a bastard, that this shall be tried by the country in the ordinary way, and not by the bishop. Now it is contended that in this case the common law regulates its judgment by a different rule from that followed where inheritances are in question? Does it apply a different test or principle to try the question? If so, it would be inconsistent with itself, it would cease to be a rule of reason.

But to return to the trial of bastardy by certificate of the bishop. Ayliffe quarrels with the application of the division of general and special bastardy to cases where the marriage is admitted, but the question is, whether the birth was before or after the marriage; he says that this is nothing else but general bastardy diversified in terms, "For first, "in respect of matrimony here mentioned, it is acknowledged "both by the plaintiff's pleading of it, and the defendant's "answering thereunto; and therefore, the plaintiff's plea is "thus: 'Thou art a bastard, for that thou wast born before "thy parents were contracted together in wedlock, or their "marriage solemnized in the face of the church.' To which "the defendant replies, 'I am no bastard, because I was "born in lawful wedlock, or after my parents' lawful mar-"riage.' In both which there is a marriage confessed, and "the question only is touching the priority or posteriority "of the birth of him that is charged with bastardy, "whether such nativity happened before or after the "parents' marriage." He then goes on reprobating the distinction between general and special bastardy, which latter question was taken away altogether from the spiritual courts, and seems to complain that it was not left still to them; "But in truth, if these things are well considered, "special bastardy is nothing else but the definition of the "general, and the general again is nothing else but a "definite of the special; for whoever is born out of, or

" before, *lawful marriage, is a bastard*; and again, he is " a bastard that is born before or out of lawful marriage; " so that these things, to be a bastard, *and to be born out of* " *lawful wedlock*, are convertible, the one with the other; " and 'tis hard to make a divorce between these things " that are so near in nature to each other as being convert- " ible terms, and to try them in different courts, since " they have so near an affinity to each other, being the " same in substance and nature. Wherefore, I think they " ought to be tried by the same law, *ne continentiæ causa-* " *rum dividantur*, which is as great an absurdity in law, as " it is in other learning to deny a general principle or " maxim of the profession. And thus far concerning the " reasons and arguments that may be brought against this " special bastardy. Lindwood in his catalogue of causes, " which he makes to be of ecclesiastical cognizance in his " time, reckons legitimation, or the trial of bastardy, as " one among the rest, because in those days there was no " dispute or practice to the contrary, whereby the ecclesi- " astical courts were hindered by the temporal in their " proceedings touching bastardy."—Ayliffe, 110.

The course of proceeding of the common law, as to bastardy, is thus described by Glanville, c. 13, (*a*) " Neither a bastard, nor any other person not born in " lawful wedlock, can be, in the legal sense of the term, " an heir. But if any one claims an inheritance in the " character of heir, and the other party object to him, " that he cannot be heir, because he was not born in " lawful wedlock, then indeed the plea shall cease in the " king's court, and the archbishop or bishop of the place " shall be commanded to inquire concerning such marriage, " and to make known his decision, either to the king or " his justices. For this purpose the following writ shall

(*a*) Beames' ed., 180.

" issue, c. 14, 'The King to the Archbishop, Health, *W.*, " appearing before me in my court, has demanded against " *R.*, his brother, the fourth part of one knight's fee, in " such a vill as his right, and in which the said *R.* has no " right, as *W.* says, *because he is a bastard, born before the* " *marriage of their mother.* And, since it does not belong " to my court to inquire concerning bastardy, I send them " unto you, commanding, that you do in the Court Chris- " tian, that which belongs to you. And when the suit is " brought to its proper end before you, inform me by your " letter, what has been done before you concerning it. " Witness, &c."—Glanville goes on to state, c. 15, "Upon " this subject, it has been made a question, whether if any " one was begotten or born before his father married the " mother, such son is the lawful heir, if his father after- " wards married his mother?" It is to be observed, that in the time of Pope Alexander the 3rd, A. D., 1160, this constitution was made, that children born before solemnization of matrimony, where matrimony followed, should be as legitimate to inherit unto their ancestors, as those that were born after matrimony. 2 Inst. 96; Beames Glanville, 182, n. Glanville in the same chapter proceeds thus, " Although, indeed, the canons and the Roman laws " consider such son as the lawful heir, yet, according to " the law and custom of this realm, he shall in no measure " be supported as heir, in his claim upon the inheritance; " nor can he demand the inheritance by the law of the " realm." " This decision of Glanville," observes Lord Littleton, " is very remarkable, as it shows the entire " independence of the law of England on the canon and " civil laws in his time." 3 Litt. Hist. Hen. 2 p. 125. Mr. Beames in his translation of Glanville, 183, n., adds, " When this doctrine was, in a subsequent period of our " history, attempted to be overturned, it gave rise to the " celebrated answer of the Barons recorded in our statute

" book, ' *Et omnes Comites et Barones unâ voce responde-*
" *runt, quod nolunt leges Angliæ mutare, quæ hucusque*
" *usitatæ sunt et approbatæ,*' (Stat. of Merton, c. 9; see
" also 2 Inst. 96.) The rule thus memorably defended, has
" descended untouched to the present day." So jealous, has the English common law always been of the interference of the canon law, particularly in the matter of marriages; and so far, is the canon law from being the basis of the marriage law of England, as some have fondly supposed.

In a late case it has been held that a person born in Scotland of parents domiciled there, but not married until after his birth, though legitimate by the law of Scotland, and capable of succeeding to heritable property in that country, cannot succeed to real estate in England, *Doe* d. *Birtwhistle* v. *Vardill* 5 B. and C. 438; S. C. 8 D. and R. 185; 6 Bligh, N. S. 479, n.; 6 Bing. N. C. 385; 1 Scott New Rep. 828. This case was brought on writ of error to the House of Lords, where Chief Baron Alexander, delivered the opinion of the judges, 6 Bligh N. S. 479, n; but the Lord Chancellor, Lord Brougham, having then some doubts on the subject, the case was postponed and the unanimous opinion of the judges was pronounced in the House of Lords by Chief Justice Tindal, 20th of July, 1840, 6 Bing. N. C. 385; S. C. 1 Scott New Rep. 828. His lordship gives at length in his very able judgment the reasons upon which the judges founded their opinion. He observes that the rule or maxim of the law of England that the son must be born after actual marriage between his father and mother is a rule *juris positivi*, framed for the direct purpose of excluding in the descent of land in England the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate. Observing that it was necessary to consider the earlier authorities both before and subsequently to the statute of Merton he says, 1 Scott N. R. 831 " If we

" take the definition of heir, which Lord Coke (Co. Lit. 7 b.) " adopts from the ancient text writers, and which is borrowed " originally from the Roman law, viz. that he is, *ex justis* " *nuptiis procreatus*, the very description points at marriage " celebrated according to the rules, requisites, and ritual of " the civil or Roman law, '*Operæ pretium est scire quæ sint* " *justæ nuptiæ*,' says Huber (lib. 23, tit. 2, &c. de Ritu Nup- " tiarum;) he adds *in* '*promptû est Justiniani responsa: sunt* " *eæ quæ secundum præcepta legum contrahuntur.*' But, to " refer to the Mirror of Justices, perhaps the very earliest of " our text-books: it is there laid down in p. 70 as an admitted " principle, that the common law only taketh him to be " a son whom the marriage proveth to be so." He then cites the chapters of Glanville already quoted, and observes upon the precise form of the question contained in the writ, namely a question of special bastardy; proving thereby how closely and with how much jealousy the law adhered to its rule of descent. His lordship then observes that after the statute of Merton the question of special bastardy ceased to be sent to the bishop and became the subject of inquiry in the king's courts. Thus it appears that so far was the common law from adopting the canon law as the basis of its marriage law, it, on the contrary, actually withdrew the question of special bastardy from the cognizance of the spiritual courts, because they sought to engraft doctrines of the canon law upon the settled marriage law of England.

The foregoing authorities on the subject of bastardy show that the common law always referred questions of general bastardy, and also, originally, of special bastardy, to be tried by the bishop. Why? *In promptu est responsa.* —Because, as has been shown, by our law from the earliest times, the benediction of a priest was necessary to the due celebration of marriage—because marriage was a religious rite, and the bishop was more competent, than any other authority to take cognizance of the due celebration of such

rite. Therefore, when a question of bastardy arose, when the question was, if a person was, *ex justis nuptiis procreatus*, it was left to the bishop to decide, *quæ sint justæ nuptiæ*. But when innovations were sought to be made by the ecclesiastics, and the doctrines of the canon law on the subject of marriage, and the consequences of marriage, were sought to be introduced in opposition to the law of England, the legislature protested against the adoption of the canon law, and the common law courts withdrew the question of special bastardy, from the cognizance of the Court Christian, which was supposed by its submission to the canon law, to be no longer fit for the trial of that which was at first of its proper jurisdiction. And the case of *Doe* d. *Birtwhistle*, v. *Vardill*, shows that the judges of England at this day, are as slow as their predecessors, to allow innovations on the common law, in respect of marriage, and the consequences of marriage, founded on the loose notion of the canon law being the basis of the marriage law of England, and on the so-called comity of nations.

In Swinburne on Espousals, 1, it is stated that the term, sponsalia, or spousals, "properly understood, doth only "signify promises of future marriage." Sometimes it means the love gifts; sometimes it is taken for the portion of the goods which is given for, and in consideration of the marriage to be solemnized; and sometimes it means the marriage feast. He observes, sect. 2, "Our temporal "lawyers, they do usually confound these terms of espousals "and marriage, using them *promiscuè*, or one for another, "yet, do not they confound the natures with the names; "for until the celebration of the marriage, they do not "repute the affianced couple for one person, nor deem of "their issue as lawful; nor doth he gain any property in "her goods, nor she any dower in his lands by force of the "*contract of matrimony*, only, without *solemnization*." This proposition is supported by reference to a host of legal and

other authorities. It relates to three things, legal consequences of matrimony: legitimacy of issue, right of husband to wife's goods, and wife's right to dower. None of these results follow from a contract, which ought to ensue from lawful matrimony. This is the common law. The writer then goes on to observe upon the little difference, thought by the civilians and canonists, (as contradistinguished from the temporal lawyers,) to exist between the contract and perfect matrimony.

"The civilians, though seldom they use the word spousals "for matrimony, but rather for a preamble, or preparation "thereunto; making no less difference betwixt *spousals* and "matrimony, than betwixt the promise and the performance "of the act,——; yet, both the civilians and canonists, "in favorable cases generally, in matters indifferent "often, and sometimes in strict and penal cases, deem of "espousals, like as of pure and perfect matrimony."—Swinburne Espousals, 2.

"The canonists be somewhat more diligent indeed, in "the observation of terms, for they do not only distinguish "between matrimony and spousals; but descending further, "they do also discern betwixt one kind of spousals and "another, being the first ministers of the general names of "spousals *de futuro*, and spousals *de præsenti;* and yet, "nevertheless oftentimes, they make no difference, or very "little, betwixt the natures and effects of spousals *de præ-* "*senti*, and of matrimony *solemnized and consummate*."—Swinburne, 2, 3.

Swinburne defines spousals thus, "spousals are defined "after this manner, *sponsalia sunt mutua repromissio fu-* "*turarum nuptiarum, ritè inter eos quibus jure licet facta.* "Spousals are a mutual promise of future marriage, being "duly made between those persons to whom it is lawful." Swinburne, p. 5. He says, p. 7, "There be other "words in the definition, viz. *futurarum nuptiarum*, of

" future marriage, in which words both the matter and the " end of the spousals are comprized. The matter of " spousals is nothing else but marriage. The end, that by " solemnization of the promised marriage, the parties " betrothed may become proper husband and wife." Again p. 9, " *nuptiæ*, marriages, is not evermore referred to the " substance and indissoluble knot of matrimony only; but " doth often signify the rites and ceremonies observed at " the celebration of matrimony only, which thing being " true, then is not false, that seeing a man may contract " present matrimony, and yet refer the solemnization thereof " till another time, in respect of this future solemnization, " the contract *de præsenti*, may justly be defended and " verified to be *futurarum nuptiarum repromissio*, a promise " of future marriage." Observe the distinction taken here between the contract and marriage,—the contract *de præsenti* and nuptials, which sometimes means " the substance and " indissoluble knot of matrimony;" and sometimes " the " rites and ceremonies observed at the celebration of matri- " mony only." When Swinburne speaks, p. 13, of the parties being " reputed very husband and wife, in respect " of the substance," the reference is to the ecclesiastical and civil laws. There is in p. 15, this passage, " although " by the common laws of this realm, spousals not only *de* " *futuro* but also *de præsenti*, be destitute of many legal " effects, wherewith marriage solemnized doth abound, " whether we respect legitimation of issue, alteration of " property in her goods, or right of dower in the husband's " lands."

Thus Swinburne ever affirms the principle of the common law, that there is no marriage without solemnization, that the common law ever distinguishes between a mere contract of mariage and lawful matrimony. A contract of marriage does not legitimate the issue,—lawful matrimony does; a contract of marriage does not give the

man a right to the woman's goods, nor the woman a right to dower in the man's land. If then the common law makes such distinctions in favor of lawful matrimony, does it not show, pretty plainly, what is not lawful matrimony? He tells us again c. 45, p. 108, "Finally, albeit they "which do contract spousals *de præsenti*, be very husband "and wife, in respect of the knot or bond of matrimony, "so that it is not lawful for either of them to marry else- "where, so long as they now live together; yet do not "these spousals produce all the same effects *here in England*, "which matrimony solemnized in the face of the church "doth, whether we respect the legitimation of their "children, or the property which the husband hath in the "wife's goods, or the dower which she is to have in his "lands; of which effects we shall have better opportunity "to deliver our mind hereafter."

The following passages from Swinburne show, as plainly as possible, the utter fallacy of the notion that the marriage law of England was formed upon the civil and canon laws, and that it invariably refused to recognize a contract of marriage as lawful matrimony.

OF THE EFFECTS OF SPOUSALS, p. 233.

"28. Other effects there be of spousals, whereof some "respect the issue, or children, begotten before celebration "of the marriage, betwixt those which have contracted "spousals; and some have relation to their lands and goods. "Concerning their issue, true it is, that by *the canon* "*law*, the same is lawful: But, by the laws of this realm, "their issue is not lawful, though the father and "mother should afterwards celebrate marriage, in the face "of the church. Likewise, concerning lands, by the canon "law, the foresaid issue may inherit the same; for further "declaration whereof, *the canonists* tell us, how the children "of Jacob, which he had by his handmaids, did inherit

" the land with their lawful brethren, by reason Jacob did " afterwards marry their mothers: But it is otherwise by " the laws of this realm, for as the issue is not legitimated " by subsequent marriage, no more can he inherit his father's " land; and as he cannot inherit, no more is she to have " any dower of the same lands; for whereas, by the laws " of this realm, a married wife is to have the third part of " her husband's lands, holden in fee simple or fee tail, " either general, or special, for her dower after her hus- " band's death, during her life, so that she be above the " age of nine years, at her husband's death. Yet, a woman " having contracted matrimony, if the man to whom she " was betrothed die before the celebration of the marriage, " she cannot have any dower of his lands, because, as yet, " she is not his lawful wife, at least to that effect.

" Indeed it was sometimes holden for law within this " realm of England, that if a man affianced to a woman, " did carnally know her, and then make a feoffment to the " same woman of a piece of land, and give her seisin " thereof, and after that marry her; in the face of the " church, this feoffment was void, as being made unto his " own wife, to whom he had given his faith, and whom he " had carnally known, he and she being both one person " in law, which thing also is agreeable to the civil law, and " to the canon law also; whereby the donations which are " forbidden betwixt the husband and wife, are interpreted " likewise to be forbidden betwixt them which have con- " tracted spousals *de præsenti;* or which having contracted " spousals *de futuro,* do afterwards live together, whereby " those spousals are reputed matrimony. But, afterwards, " the temporal lawyers of this realm were of another " opinion than they were in former times. And whereas, " long ago, they did seem to hold that the feoffment was " not good, as being made to his own wife; now, they do " hold that it is good, as being made, not unto his wife,

" but unto a single woman, and another person in law. " But a single woman cannot have any dower, as aforesaid, " and, therefore, a woman contracted only to a man, " cannot have any dower of his lands."

29. " Concerning goods, the like may be said of them, " as hath already been spoken of lands, that is to say, that " although, by the civil and canon laws, where the man " doth gain any of the woman's goods, or the woman gain " any of the man's goods, by reason of marriage, spousals " *de præsenti*, or *de futuro* consummated with carnal know- " ledge, have the same effect as hath matrimony solem- " nized, yet, by the laws of this realm, it is otherwise, " so that neither spousals *de præsenti*, neither spousals *de* " *futuro* consummate, do make her goods his, or his " goods her's.

" And hence it is that a woman contracted in matrimony, " dying before the celebration of the marriage, may make " her testament, and dispose of all her goods, at her own " pleasure, which, after solemnization of the marriage, she " cannot do, without his licence and consent; and, on the " other side, the man dying intestate, before celebration of " the marriage, the woman to whom he was betrothed " surviving, cannot obtain the administration of his goods, " as his widow; which otherwise, the marriage being " solemnized, she might do.

" And the like I read to be observed in divers other " countries, as in France and Saxony, where, neither he, " nor she, gain any part of the other's goods, by being " affianced, unless the marriage be solemnized, if not " consummate also." Swinburne, 235.

Swinburne is a writer himself of great authority, and he refers in the margin to authorities in support of all his positions. What do they prove? They show the difference between the common law of England, on the subject of marriage, and the civil and canon laws. They show that

where the union consisted merely of marriage contract, without solemnization, whether followed by copula or not, such was not, by the law of England, lawful matrimony. None of the consequences of lawful matrimony ensued. The children were not legitimate; the woman was not entitled to dower; the man was not entitled to the chattels of the woman, who is not his married wife. Is that a marriage where there is no dower, no acquisition of right to personal property,—where the parties may convey to each other as to third persons,—where the children are bastards, —and where the woman is not a wife.

In some of the cases cited by Mr. Holmes, the validity of the marriage was tested by a consideration of the consequences of the union. In the judgment of Lord Brougham in the House of Lords, in *Honyman* v. *Campbell*, 2 Dow and Clark, 265, that great man, speaking of a marriage in Scotland, applies this test. He says, that a marriage in Scotland may be irregular, "but still, it may be valid, "and draw after it all the consequences of the most valid "measure, and affect the issue as completely as the most "solemn marriage contracted after open publication of "banns by the gravest clergyman of the Established "Church." Now, what consequences did a contract of marriage, whether *per verba de præsenti* or not, whether followed by *copula* or not, draw after it by the common law of England? None. How were the issue affected by it? Not at all. They were illegitimate and could not inherit.

So the ecclesiastical courts never recognized a contract of marriage as an actual marriage; they recognized it as a valid contract, and enforced the performance of it by solemnization *in facie ecclesiæ*. Until such solemnization they did not allow it the consequences of lawful matrimony. They refused administration of the goods of the deceased man to the woman, because she was not his widow. Swinburne, 235. A contract of marriage did not confer

the rights of property, which actual marriage conferred by the ecclesiastical law of England. In Comyn's Digest, Baron and Feme, B. 1, it is stated: "So, if the "marriage be not conformable to the ecclesiastical law, the "husband shall have no right by the ecclesiastical law. As "if the marriage be in a separate congregation by their "preacher, who is a layman, the husband will not be "entitled to administration." Comyn refers here to 1 Salk. 120, *Haydon* v. *Gould*. So, in Comyn's Digest, Baron and Feme, B. 6, which treats of, who are husband and wife, it is laid down, "So, if a man marry a woman pre-"contracted, they are husband and wife till divorced." No authority is cited for this position, but its authority is perhaps, therefore, the greater: it is the authority of Chief Baron Comyn. This is a position of great importance in the consideration of the present question. See what it proves. It proves it to be utterly impossible to hold a contract to be a marriage, unless a man can be lawfully married to two persons at the same time. He says the parties are man and wife. How can they be man and wife if the previous contract with another be a marriage? They are man and wife till divorced. If the husband died they could never be divorced. If they had issue they would be legitimate, and after their father's death could not be bastardised. [Crampton, J.—It may be contended that the pre-contract there spoken of, was a contract *per verba de futuro*.] There is nothing to confine it to that. *Hutchinson* v. *Brookbank*, 3 Lev. 376, a case cited on the other side, may be disposed of with this observation, that if a contract made a marriage, as is now contended for, there was no occasion to try the question there in dispute; but it was not sought to be put on that ground.

Haydon v. *Gould*, 1 Salkeld, 119, the case referred to by Comyn, is an authority of great importance, for it is a decision of the delegates, a mixed tribunal of common law

judges and civilians. It is likewise of importance for this purpose:—it has been asserted that the canon law so far respected the natural and civil origin of matrimony, as to consider, that where the natural and civil contract was performed, it had the full essence of matrimony, without the intervention of a priest, no such intervention having been required before the council of Trent, as is alleged. Now this case shows that the canon law, at least so far as it is adopted in this country, does no such thing. The ecclesiastical law of England never so respected the supposed natural and civil origin of matrimony, as to consider, that where the natural and civil contract was performed it had the full essence of matrimony. The case was this, a woman died and her supposed husband took administration; the next of kin of the woman sued a repeal upon the suggestion, that he and she "were never married; and it appeared, in "fact, that they were Sabbatarians, and married by one "of their ministers, in a Sabbatarian congregation, and "that they used the form of the common prayer, except "the ring; and that they lived together as man and wife "as long as the woman lived, viz., seven years. On the "other hand it appeared, that the minister was a mere lay-"man, and not in orders." Upon this evidence the letters of administration were repealed, and new administration granted to the sister of the woman. This sentence was, upon appeal, affirmed by the delegates, "for Haydon (the "supposed husband), demanding a right due to him as "husband, by the ecclesiastical law, must prove himself "a husband according to that law, to entitle himself in this "case." This shows that the ecclesiastical law does not consider that, where the civil or natural contract is performed, it has the full essence of matrimony. The case, likewise, supports powerfully the first branch of this argument, viz., that Presbyterian ministers are not, by law, persons in holy orders. This case was decided in the ninth year of

the reign of Queen Anne, after the English Toleration Act, and before the English Marriage Act, when the law of England was, as to Dissenters and marriages, what the law of Ireland is now. The Sabbatarian minister there, was held to be "a mere layman, and not in orders." The law no more recognizes the ministers of the Presbyterians, than it does those of the Sabbatarians. The religion of both sects is equally tolerated; they are equally Dissenters; the minister of the one sect is no more in holy orders than the minister of the other. The case, as has been already seen, shows that such a marriage was not according to the ecclesiastical law. But it goes further, for it shows that the marriage was void, or rather that there was no marriage at all; for when it was urged that though the positive law required marriages to be by a priest, yet that made the marriage irregular only, and not void, the court denied that the distinction existed in the case, and referred to the Act passed at the restoration for giving validity to marriages contracted during the time of the Commonwealth, and to the form of pleading a marriage, that it was celebrated by a priest in holy orders. "In this case it was urged, that "this marriage was not a mere nullity, because by the law "of nature, the contract was sufficient; and though the "positive law ordains that the marriage shall be by the "priest, yet, that makes such a marriage as this irregular "only, but not void, unless the positive law had gone on "and ordained it expressly to be so, *vide* Mo. 169, 170; "Bract. lib. 4, c. 8, 9; 3 Jac. 1, c. 5, 13. But the "Court ruled *ut supra*. And a case was cited out of "Swinb. where such a marriage was ruled void; and an "Act of Parliament was made to confirm the marriages "contracted during the usurpation, viz. 13 Car. II. c. 35. "and the constant form of pleading marriage is, that it "was *per Presbyterum sacris ordinibus constitutum*." This case of *Haydon* v. *Gould*, is referred to with approbation,

by Sir John Nicholl, in *Elliott* v. *Gur*, 2 Phil. 21, and by Sir William Wynne, 1 Hag. App. 8 n. where that eminent Judge calls the marriage of the Sabbatarians "a marriage "of their own invention." See also 2 Burn's Ecclesiastical Law, 472.

In *Hervey* v. *Hervey*, 2 Sir W. Bl. 877, it was held that strong and repeated acknowledgments of marriage for eighteen years of uninterrupted cohabitation as man and wife, was sufficient to establish a marriage in a suit of jactitation of marriage between the parties themselves. There the wife pleaded a marriage "in the Fleet, between the 25th "of July and the 7th of August, 1745, by a person who "appeared to be a clergyman," and a very full court of delegates, reversing the decision of the Consistory Court of London, and the Court of Arches, held that the evidence against the husband, "was, in all its branches, the "most solemn and deliberate acknowledgment, and avowal "on his part of the truth of the marriage that could be "desired; and that he should not now be admitted, espe- "cially on such light and flimsy evidence, to controvert or "impeach it. And therefore, they unanimously pronounced "for establishing the marriage, and reversed the two former "sentences with costs." This case turned entirely on the weight of evidence; and there was no attempt to argue that a contract was a marriage. If it was, there was no reason for the argument adopted by the Court. In *Scrimshire* v. *Scrimshire*, 2 Hag. 395, Sir E. Simpson, after stating he doubted if a marriage in England, by a Romish priest, after the Romish ritual would be valid, in consequence of the Acts of Parliament, prohibiting Roman Catholic priests the exercise of their functions, asks this question, and gives this answer, p. 402:—"Would a contract only by the inter- "vention of a Romish priest, or any priest, be deemed a "legal marriage? The Roman ritual not being the same "with ours, such a ceremony is nothing more than a con-

"tract." The reasoning of Sir E. Simpson here is important, as pointing out the distinction between marriage solemnized, and a contract. The suit was for restitution of conjugal rites, and the celebration of a marriage in France by a priest was proved. But as such marriage was, by the French law, null and void, because the parties were of an age requiring consent of parents, it was likewise held by the ecclesiastical court in England to be void, as being subject to the regulations of the *lex loci.* This case shows that, although a contract is said to be *ipsum matrimonium* by the ecclesiastical courts, a suit for restitution of conjugal rights, cannot be maintained upon a contract of matrimony, without due solemnization, for the ceremony, which was after the Roman Catholic ritual, contained a present contract. If such drew after it the consequences of marriage, the party would have been entitled to maintain the suit for restitution of conjugal rights. In *Hawke* v. *Corri*, 2 Hag. 280, Lord Stowell, in giving judgment, says, p. 288. "It seems to be a generally accredited opinion "that if a marriage is had by the ministration of a person "in the Church, who is ostensibly in holy orders, and is "not known or suspected by the parties to be otherwise, "such marriage shall be supported. Parties who come to "be married, are not expected to ask for a sight of the "ministers letters of orders, and if they saw them, could "not be expected to inquire into their authenticity." His lordship intimates an opinion, that a marriage by a person ostensibly in holy orders, and not known by both parties not to be so, is good. This assumes that the presence of a person in holy orders, or some one representing himself to be so, and believed, by at least one of the parties, to be in holy orders is necessary. And if so, it must have been equally necessary before the Marriage Act, 26 Geo. II, c. 33, which introduced no new rule on the subject. For the direction that the solemnization should be according to the Rubric, is not enforced by the clause of nullity. In a late

case in this country before Dr. Miller, in the Consistorial Court of Armagh, that learned civilian refused to grant letters of administration, of the effects of a deceased person intestate to a woman, between whom and the deceased, a marriage ceremony had been performed by a Presbyterian minister, on the ground that such was not a lawful marriage, as both parties were not Presbyterians. *Lemon* v. *Lemon*, 1 Crawford and Dix Circuit Cases, 498. Thus, the authorities of ecclesiastical law establish that a contract of matrimony is not a marriage according to that law. The spiritual courts did certainly, before the enactment of Statutes which took away their jurisdiction in this particular, enforce the performance of such contracts, by directing and enforcing solemnization *in facie ecclesiæ*. But until such solemnization, they never allowed to such contracts the consequences of marriage. When either of the parties died, administration was refused to the survivor; and when living, neither could enforce restitution of conjugal rites. The sentence in the case of Lord Fitzmaurice, mentioned by Mr. Justice Perrin, on a former day,(*a*) shows that when the ecclesiastical courts established a contract as binding, they did not pronounce it to be a marriage; but only directed the contract to be carried into effect by solemnization, at a future time. [Perrin, J. here read from his manuscript note the sentence, which was in Latin. Crampton, J. It is part of the judgment too, that the party should be inhibited from marrying any other person in the mean time.] The sentence in *Baxtar* v. *Buckley*, 1 Lee by Phillimore, 42, in which a contract of matrimony was established at the suit of the woman, was "Mr. Buckley, to "solemnize marriage in the Church, with Susanna Baxtar "within sixty days, after he shall have been served with a "monition for that purpose."

(*a*) See *ante*, 22.

Having thus shown by the decisions of ecclesiastical courts, that a contract of matrimony was, by our ecclesiastical law, not an actual marriage, but a contract and nothing more—a contract to be enforced, but still merely a contract, it may be proper to notice the respect paid by the courts of common law to the decisions of the spiritual courts. On this subject Mr. Hargrave, an eminent authority, thus speaks "I take "it to be a general rule of our law, that where any matter "belongs to the jurisdiction of one court so peculiarly, that "other courts can only take cognizance of the same subject "indirectly and incidentally, the latter are bound by the sen- "tence of the former, and must give credit to it. This rule, "which prevails in various instances, is more especially "applicable to sentences of the spiritual courts in cases of "marriage. Amongst us the law of marriage hath been "deemed a subject merely of spiritual cognizance from very "ancient times; nor have the temporal courts, for many "centuries past, pretended to examine the legality of mar- "riage, except when the question hath occurred in the trial "and as a part of some other more general issue falling "within the sphere of temporal jurisdiction. Of the *fact* "of marriage, the temporal courts ought to undertake the "trial, and always do, when the *fact only* is in question, "as is usually the case in personal actions. See 1 Lev. 41. "2 Ro. Abr. 584. Vin. Ab. v. 21, p. 43. But, if the "lawfulness is really in issue, the temporal court cannot "proceed without calling in aid the ecclesiastical judge. "Therefore, when, in dower, or in appeal, the lawfulness "of a marriage becomes the issue, it must be remitted to "the Ordinary for trial by certificate. The law was for- "merly the same, when bigamy (not the offence sometimes "called so, but marrying a second wife after the death of "the first, or marrying a widow, either of which, before "the Statute of 1 Edward the 6th, c. 12, disqualified from "having the benefit of clergy) was denied on its being

" counterpleaded to clergy; and the bishop's certificate " still is the proper, and only mode of trial in every suit, " in which 'whether there is a lawful marriage or not' is " made the point in issue."—Hargrave's Law Tracts, 452. There is a case cited in Viner's Abridgment, vol. 21, p. 46, tit. Trial pl. 40, which shows that the common law courts would hang a man on the certificate of the ordinary. The placitum is in these words, " If *bigamy* be in question, " *upon a counterplea of the clergy*, it shall be tried by the " ordinary."—40 Ass. 17. 18 Ed. 3, cap. 2. Then is added in the margin " Br. Trials pl. 87, cites S. C.—Br. Certifi- " cate de Evesque, pl. 18, cites S. C.—S. P. And if found " *against the defendant* by certificate of the ordinary, this " is *peremptory*, and the defendant shall be hanged.—Br. " Peremptory pl. 84 cites 11 H. 4, 48." In Brooke's Abridgment tit. Trial pl. 87, we find the following, " Appel, le def. pled. non culp al robberie et trouve est " culp. et puis prie son clergy. Fitz-John, vous estes " bigam. et pur ceq. ceo sera trie p. certificat l'ordinarie." There can be no better proof of the conclusiveness, in a court of law, of the judgment of the spiritual court, than the fact that a man might be hanged by the sentence of the one, upon the certificate of the other. But authorities abound on the subject. Hargrave, Law Tracts 455, after citing *Kenne's* case in the Court of Wards, says, " It " being thus settled by *Kenne's* case, that the temporal " must give credit to, and were concluded by, sentences of " the ecclesiastical court in case of marriage, it followed " of course not to receive any evidence in contradiction to " such sentences; for to what purpose should proofs be " entered into, if, when given, they cannot be made use " of. Accordingly, in *Jones* and *Bow*, in B. R. 4 W. and " M. on a trial at bar in ejectment, the question being, " whether Sir Robert Car was married to Isabella Jones, " under whose issue the plaintiff claimed, and the defend-

" ant offering, by way of anticipation of the plaintiff's " evidence of the marriage, and to prevent his giving any " evidence, a sentence of the arches in a suit of jactitation " decreeing that there was no marriage, the whole court " upon debate held, that this sentence whilst unrepealed " was conclusive against all matters precedent, and that the " temporal courts must give credit to it, the subject being " of mere spiritual cognizance." Mr. Hargrave also cites a case of *Prudam* and *Phillips*, in which " it was resolved " on great debate, that the ecclesiastical law was part of " the law of the land." And he concludes his review of the reported cases in which sentences of the spiritual court, on the point of marriage, have been deemed conclusive, before temporal judges, with this observation, " From this " general practice of deeming such sentences conclusive " universally and without exception, it seems obvious, " that the ground, on which our temporal judges give this " credit, is the peculiar jurisdiction of the ecclesiastical " courts in cases of matrimony, independently of other " considerations; and not the effect of such sentences, " either on account of the nature of the suit in which they " are given, or in respect of any distinction of persons, " against or for whom they may be offered in the " temporal court."—Hargrave's Law Tracts, 457.

If then the ecclesiastical courts, as has been shown, hold a contract of matrimony not to be a marriage, and if the ecclesiastical law be part of the law of the land, and if, as has been shown, the judgments of the spiritual courts are acknowledged as binding in the courts of common law, does it not follow that a contract of matrimony is not a marriage by the common law? The ecclesiastical courts, it is true, recognized such contracts as valid, and upon a suit instituted, enforced the performance of them by solemnization until the passing of the Marriage Act in England, 26 Geo. II. c. 33, and in Ireland until the passing

of the 58th Geo. III. c. 81(*a*). The legislature interposed and prohibited the enforcement of the completion of such contracts by the ecclesiastical courts, and yet it is now contended that such contracts are complete already. What was the use of the enactment of the 58th Geo. III. c. 81, s. 3, prohibiting proceedings in ecclesiastical courts in Ireland in order to compel a celebration of marriage by reason of any contract of matrimony whatsoever, if such a contract is, without celebration an actual marriage?

The authorities cited on the other side may be satisfactorily disposed of. The principal one relied on was the case of *Dalrymple* v. *Dalrymple*. Of the observations of Lord Stowell in that case, it may be said, that however great his fame as a scholar and his reputation as a Judge, they cannot add the weight of law to extra-judicial dicta, inapplicable to the facts of the case in which they were thrown out. That case turned upon the validity of a marriage in Scotland between parties domiciled there. The legality of the marriage was to be tried entirely by the law of Scotland. Although the question was raised in an English court, the only question of English law which arose in the case was, whether or not the marriage was to be determined by the *lex loci* where the marriage was had. That point being determined, the validity of the marriage depended entirely upon the law of Scotland. In *Lacon* v. *Higgins*, Dowl. & Ry. N. P. Rep. 38, where the question was of the validity of a marriage had in France, Abbott C. J. says, p. 45, "I take it, according to "the general rule laid down by Lord Stowell in *Dalrymple* "v. *Dalrymple*, that a marriage celebrated out of England "is valid or invalid in England, according as it would be "valid or invalid in the country in which it is celebrated. "In that case the whole inquiry was, whether the supposed

(*a*) See *ante* 36.

"marriage between the parties was a valid marriage "according to the law of Scotland, in which country the "contract took place, and the decision of the court was, "that it was a valid marriage." The whole inquiry then in *Dalrymple* v. *Dalrymple* being, as Chief Justice Abbott says, whether the supposed marriage "was a valid marriage "according to the law of Scotland," all the observations of Lord Stowell on the marriage law of England were extra-judicial. Lord Stowell says, in *Dalrymple* v. *Dalrymple*, 2 Hag. 64, "The law of the church, the "canon law, (a system which, in spite of its absurd "pretentions to a higher origin, is in many of its provi- "sions deeply enough founded upon the wisdom of man,) "although, in conformity with the prevailing theological "opinion, it reverenced marriage as a sacrament, still so "far respected its natural and civil origin, as to consider, "that where the natural and civil contract was formed, "it had the full essence of matrimony without the "intervention of the priest. It had even in that state the "character of a sacrament; for it is a misapprehension "to suppose, that this intervention was required as a "matter of necessity, even for that purpose, before the "council of Trent. It appears from the histories of "that council as well as from many other authorities, that "this was the state of the earlier law, till that council "passed its decree for the reformation of marriage." This is generally considered, and perhaps justly, to convey Lord Stowell's opinion, that it was by the decree of the council of Trent for the reformation of marriage, that the intervention of a priest first became necessary by the law of the church for the celebration of a marriage. This, it is conceived, is altogether a misapprehension. The object of the council of Trent was to prevent clandestine marriages. At the time of the sittings of that council, and long before it, the face of Europe was covered by a

vast number of clergy in holy orders not holding ecclesiastical benefices or under the jurisdiction of the ordinary, consisting of monks and begging friars who were in the habit of celebrating clandestine marriages among young persons without the consent of their parents, to the great inconvenience of society and the scandal of the church. This was the mischief sought to be remedied by the decree of the council of Trent. And it was for this that it required marriages to be solemnized by "the parish "priest" "*Parochus*" "or some other priest by his "authority or the license of the bishop," "*vel alio* "*sacerdote de ipsius parochi seu ordinarii licentiâ.*" It requires banns to be called in the church three festival days before. It requires the celebration to be by the parish priest or by another priest by his authority or that of the bishop, and it requires the parish priest to keep a register of marriages.

It does not decree, or require marriages to be celebrated by *a* priest. It assumes all through, that they always were so celebrated. But it requires them to be celebrated by *the parish* priest, for the purposes of publicity, perpetuation of evidence, and preservation of morals and order.

That such was the object of the decree of the council of Trent, is plain, as well from the decree itself, (*a*) as from the account of it in Father Paul's History, which is this: "The decrees of the Reformation of matrimony, did con- "tain, 1, that however it be true, that '*Clandestine Mar-* "*riages,*' have been true and lawful, so long as the Church "hath not disallowed them; and that the Synod doth "anathematise him, who doth not hold them for such, as "also those who affirm, that marriages contracted without "consent of parents, in whose power the married parties

(*a*) See *ante* 15 n.

" are, is void, and that the fathers may either approve, or " disprove it; yet, the Church hath ever forbid, and detested " them. And because prohibitions do no good, the Synod " doth command, that the matrimony shall be denounced in " the church, three festival days before it is contracted, and " no impediment being found, shall be celebrated in the " face of the church, where the *parish priest* having inter- " rogated the man and woman, and heard their consent, " shall say, ' I join you in matrimony, in the name of the " Father, Son, and Holy Ghost;' and shall use other " words, accustomed in the province. Notwithstanding " the Synod doth refer it to the will of the bishop, to omit " the Banes; but doth declare those to be incapable of " marriage, who attempt to contract it without the aid of " the *parish priest*, or another priest of equal authority, and " of two or three witnesses, making void and nullifying " such contracts and punishing the transgressors. After- " wards it doth exhort the parties married, not to dwell " together, before the benediction, and commands the parish " priest to have a book, in which marriages so contracted, " shall be written. It doth exhort the parties that are to " be married, to confess and communicate before the con- " tract, or consummation of the marriage; reserveth the " customs and ceremonies of every province; and will have " this decree to be of force within thirty days after it shall " be published in every parish."—Father Paul's History of the Council of Trent, English edition. p. 731, lib. 8.

This English translation is a bad one, the words, " or " another priest of equal authority is rendered in the Latin " thus, ' *vel alio Sacerdote de ipsius parochi seu ordinarii* " *licentiâ.*" And in the French thus, " ou d'un pretre " commis par lui." It has been found impossible to pro- cure a copy in the original Italian.

This shows plainly the true object of the decree of the council of Trent, to have been to prevent clandestine

marriages, by confining the power of celebrating them to the secular clergy, who were under the control and jurisdiction of the ordinary, by providing for their publication by banns, and by preserving the evidence of them in registers kept by the parish priests. It is to be observed too, that the decree expressly purports to preserve, in addition to the solemnities it requires, the words of the celebration of the rite of marriage already in use in different countries, "words "accustomed in the province," and "reserveth the customs "and ceremonies of every province." It has been shown that both in this country and on the continent, old marriage rituals were in use long before the council of Trent; and that there were in the earliest times of Saxon Christianity customs and ceremonies of marriage in England, established by express law, as well as usage, for the due observance of which the presence of a priest was necessary. The decree of the council of Trent, expressly purports not to interfere with these customs and ceremonies, recognizes the validity of customs of any country requiring for the celebration of marriage additional ceremonies to those required by the canon law, and provides that such ceremonies shall continue to be observed.

In Van Espen's Jus Ecclesiasticum universum, published at Louvain, 1753, Pars 2, cap. 5, several matters relating to marriage are treated of. He lays down first' "Olim "coram Sacerdote nuptiæ contrahebantur, 2 Cur ecclesia "voluerit publice coram Sacerdote Matrimonium contrahi? "3 Decretum conc. Trid. contra matrimonia clandestina, 4 "Vi illius Decreti præsentia Parochi aut alterius Sacer- "dotis de ejus licentiâ requiritur ad validitatem matri- "monii." On the first head, the writer says as follows: "Jam pridem moris fuisse ut Christianorum nuptiæ non "nisi cum benedictione Sacerdotali, ac ipso Sacerdote eccle- "siæ nomine eas probante contraherentur, diserte verbis "expressit Tertullianus, libro de Pudicitia. 'Ideo penes

" nos (ait) occultæ quoque conjunctiones, id est, non prius " apud ecclesiam professæ, juxta mœchiam et fornica- " tionem judicari periclitantur. Et ante Tertullianum " Martyr Ignatius Epistolâ ad Polycarpum, Decet verò " ut ducentes uxores et nubentes cum Episcopi arbitrioconjungantur, ut nuptiæ juxta Domini præceptum sint, non " autem ad concupiscentiam." Tertullian flourished in the second century, and Ignatius Martyr before him; and these passages show, that in the earliest times of the Christian Church the solemnization of marriage was a religious ceremony of the Church. The next passage is in these words, " Legitur quoque in Capitularibus Regum Francorum, lib. " 7, cap. 179, Pius conveniendus est Sacerdos in cujus " Parochia nuptiæ fieri debent in ecclesia coram populo. ,, Et ibi inquirere una cum populo ipse Sacerdos debet, si " ejus propinqua sit an non, aut alterius uxor, vel sponsa " vel adultera. Et si licita et honesta omnia pariter " invenerit, tunc per consilium et benedictionem Sacerdotis " et consultu aliorum bonorum hominum eam sponsare et " legitime dotare debet." He then proceeds to observe on the evils arising from clandestine marriages, and the objects the council of Trent had in view in preventing them, and that it was with such view that the council required marriages to be celebrated by the parish priests. Such were the objects of the decree of the council of Trent.

But, to return to the judgment of Lord Stowell in *Dalrymple* v. *Dalrymple*, even his lordship was not a little shocked at the loose notions of the Scotch advocates, whose opinions were relied upon in that case, on the subject of marriage. He observes upon this, that the Scotch law allowed a sort of mental reservation in marriage, so that although the parties in words most seriously and deliberately contracted matrimony " in the presence of God and man, " under all the sanction of religion and of law," they were yet " at liberty to show that by virtue of a private

" understanding between themselves, all this is mere im-
" position and mockery, without being entitled to any
" effect whatever." This his lordship says Mr. Erskine, states; and Mr. Craigie states, "that if there is reason to
" conclude, from the expressions used, that both, or *either*
" of the parties did not understand that they were truly man
" and wife, it would enter into the question, whether married
" or not." Lord Stowell is a good deal shocked at all this as he might very well be. He says, " surely it cannot be
" represented as the law of any civilized country, that in
" such a transaction, a man shall use serious words, expres-
" sive of serious intentions, and shall yet be afterwards at
" liberty to aver a private intention, reserved in his own
" breast, to avoid a contract which was differently under-
" stood by the party with whom he contracted." The authorities cited by Mr. Holmes on the supposed mere civil nature of the marriage contract, were almost all Scotch writers or American writers, who copy into their works the dicta of Lord Stowell in this case. And upon such authorities it is seriously urged, if the argument be rightly understood, that the law of Scotland and the common law of England are the same on the subject of marriage. Let us try whether it is so or not, by the test of consequences. It is stated, Erskine's Instit. 111, that marriage is founded on consent. " And after consent given, should the parties
" by death, or disagreement happen not to consummate
" the marriage, they are nevertheless entitled to *all* the
" legal rights consequent on marriage." Now it has been already shown by a host of authorities, that by the common law of England, they would be entitled to *none* of the legal rights consequent on marriage. The authorities and the argument are inconsistent with each other. The argument is, that a contract *per verba de præsenti*, followed by cohabitation, is a valid marriage. Kent, the American writer cited by Mr. Holmes, says p. 86. " If the contract

" be made *per verba de præsenti*, and remains without cohabi-
" tation, it amounts to a valid marriage, as if celebrated *in*
" *facie ecclesiæ*." This proves too much. The same American writer, Kent, says " There is no recognition of " any Ecclesiastical authority in forming the connexion, " and it is considered entirely in the light of a civil contract." Is this said of that common law which tried general bastardy by certificate of the ordinary, which tried whether a *feme* was accoupled in lawful matrimony by certificate of the bishop? Such may be the law of Scotland, but it never was the common law of England. Indeed Mr. Kent in a note, 2 Kent's Commentaries, 88, qualifies a good deal what he says in his text. He admits in the note, that a contract of marriage, though followed by cohabitation, " would not entitle the wife to dower, nor " entitle the husband to administration on his wife's estate," and concludes, by observing, that " the intervention of a " person in holy orders seems to have been assumed in the " cases as a material circumstance." The state of the marriage law in Scotland is such as not only to have called for the observations of Lord Stowell cited above, but even to become a subject of animadversion by writers on the law of that country. Mr. Alison, an eminent writer on the criminal law of Scotland, tells us that a man may be married by the law of that country without his knowing it, and that many men, under the present law of Scotland, do not know whether they are married or not. " To autho-
" rize a charge of bigamy" he tells us, " it is necessary " that both marriages shall have been formal and regular," for, he goes on to argue, if the first marriage were clandestine, " still it deserves consideration, that possibly the man " did not intend to marry in the first instance, and was " entirely ignorant that he had involved himself in its " bonds; a situation by no means unlikely to occur, when " it is recollected how many men, under the present law

" of Scotland, do not know whether they are married or " not, and how long an investigation is frequently required " to enable others to determine the point."—1 Alison's Principles of the Criminal Law of Scotland, 537. In *Honyman* v. *Campbell*, 2 Dow and Clark, 265, the case cited by Mr. Holmes, Lord Brougham in his judgment in the House of Lords, thus speaks of the marriage law of Scotland which it is now sought to represent as the same as the common law of England, " I take the marriage law " of Scotland as I find it, although it makes so perilous " an experiment on human passions, when it says that a " person, of the one sex at the age of twelve, and of the " other at the age of fourteen, who would not, the one " till nine years, the other till seven years after, be com- " petent by law to affect one half quarter of an acre of an " estate, may legally perform the most solemn act of life, " may enter into a binding contract of holy matrimony, " establishing an union for life from which issue may be " procreated, and which may carry all the estates and " honours of a family to the children of (it may be) a " common prostitute; whether it is consistent or expedient " that a system should continue by which, in half a " moment, when passion is predominant and reason is " lulled asleep—in half a moment—no time allowed for " reflection, a person at such an age is made capable of " binding himself or herself in the most solemn contract " of life, involving consequences affecting the whole of " the property, and the honour, of families, is a matter " into which I do not at present stop to inquire." In such language does that great man describe the evils of the Scotch law of marriage; evils which it is now sought to introduce into this country. Even the Scotch writers themselves admit that, by the general assent of civilized nations, marriage is recognized as a religious union entered into under the force of sacred obligations. In Ferguson's

Reports in the Consistorial Court of Scotland, p. 315, Mr. Commissary Tod in his judgment in *Gordon* v. *Pye*, (the case cited by Mr. Holmes) says, "Marriage, in its "origin, is a contract of natural law, antecedent to its "becoming in civil society, a civil contract. *Superadded* "*to this, in most civilized countries, acting under the force of* "*sacred obligations, it is a religious contract*, the consent "of the individuals pledged to each other being ratified, "and consecrated by a vow to God. This, generally "speaking, is the idea of marriage as entertained in every "country where the Christian religion prevails. It is "precisely the view taken of it by the more ancient regu-"lations of the canon law, even before marriage was, by "that law elevated to the dignity of a sacrament."

M'Adam v. *Walker*, 1 Dow P. C., 148 has been cited, it decides that if, in Scotland, a man declares a woman to be his wife and his children by her, to be legitimate, and she bows in token of assent, that thereupon the woman is his wife and the children are legitimate. If this is put as an authority of English law it proves too much. *Holt* v. *Clarencieux*, 2 Strange, 937, proves nothing. It was decided there that an infant might sue for breach of promise of marriage. In *Reid* v. *Passer*, Peake N. P. C. 231, there is a loose dictum of Lord Kenyon, but he said he did not "speak meaning to be bound." In *R.* v. *Inhabitants of Brampton*, 10, East, 282, the marriage was celebrated in Saint Domingo in a chapel by a priest or a person who appeared to be a priest. Lord Ellenborough's judgment must be taken as it applied to the facts of the case, but even if all his dicta be taken into consideration they go but a little way. He says first, "Both parties "being desirous of celebrating their marriage with effect, "they went to a chapel in the town where they were, "and there the ceremony was performed by a person "appearing to be a priest, and officiating as such." His

lordship then proceeds to consider whether the marriage would be good by the common law of England anterior to the Marriage Act and then whether it were good by the laws of the country where celebrated. On the first question he says, "Now certainly a contract of "marriage *per verba de præsenti* would have bound the "parties before the Act; and this appears to have been "*per verba de præsenti* and celebrated by a priest, that "is by one who publicly assumed the office of a priest "and appeared habited as such; of what persuasion indeed, "Roman Catholic or Protestant, does not appear. But "even if it were performed by a Roman Catholic priest "that would not vary the case, for such a person would "be recognized by our church as a priest capable of "officiating as such, upon his mere renunciation of the "errors of the church of Rome, without any new ordination." Lord Ellenborough then cites *Fielding's* case where the marriage was celebrated by a Roman Catholic priest(*a*). Here Lord Ellenborough in his judgment dwells on the fact of the presence of a priest, and cites *Fielding's* case, to show that a Roman Catholic priest was sufficient. The expression that "a contract of marriage *per verba de* "*præsenti* would have bound the parties before the Act," is not inconsistent with any part of this argument. There is no doubt it would have bound the parties, and would have been enforced before the Marriage Act in the Spiritual Court, which would by its sentence have enforced solemnization by a priest. The opinions of Grose J. Le Blanc J. and Bayley J. show that the decision of the court in favour of the marriage rested upon the celebration by the priest. In *Lautour* v. *Teesdale*, 8 Taunt, 830; S. C. 2 Marshall, 243, there was likewise

(*a*) See *ante*, 82.

a celebration of marriage by a Roman Catholic priest. Neither of the decisions in these cases, therefore, at all conflict with this argument. *Bunting* v. *Lepingwell*(*a*) 4 Co. 29 ; S. C. better reported, Moore, 169, is not only reconcileable with, but strongly supports this argument. There it was held that the issue born after the contract were, after the solemnization in pursuance of the sentence of the Spiritual Court, legitimate. When marriage followed a contract, it related back to the time of the contract. But if the marriage were never solemnized the issue after the contract were bastards. In 5 Collier's Ecclesiastical History, p. 473, having given a full report of *Bunting* v. *Lepingwell*, from Moore's Reports, the writer makes these observations upon it—" This case being not " foreign to the history, learnedly argued, and more than " common instructive, may, I hope, excuse the reporting it " at length. But before I take leave, the reader may " please to observe, that Goldingham the civilian was alto- " gether mistaken in assuming that marriages were not " solemnized in the church till the time of Pope Innocent " 3rd. For the practice was quite otherwise *from the first* " *centuries*, and so remained. For when the parties were " agreed, their marriage was publicly celebrated in the " church, they received the bishop's, or the priest's, bless- " ing, and the holy Eucharist, *as part of the solemnity.*" The observations of Lord Holt in *Jesson* v. *Collis*, 2 Salk. 437, and *Wigmore's* case, Id. 438, have been cited. In neither of these cases did the question arise, and the *dicta* seem to have been added by the reporter rather irrelevantly. As it is, they are quite extrajudicial. At any rate his observations do not apply to the common law, but to the

(*a*) See *ante*, 23.

canon law. He says in the first case, "a contract *per verba* "*de præsenti* was a marriage, viz. I marry you, you and I "are man and wife." In the second case he says. "*By* "*the canon law*, a contract *per verba de præsenti*, is a mar- "riage." This shows his observations in the first case, to have reference to the canon law, and not to the common law of England. Yet, it is upon these three last cases, that Lord Stowell founds his dicta of the doctrines of the temporal courts on the matrimonial law of England, omiting when he cites, 2 Hag. 69, Lord Holt's observation in *Wigmore's* case, the words, "*By the canon law*," which shows that he is not to be taken as making that observation in reference to the common law.

In *Stedman* v. *Powell*, 1 Addams, 364, cited by Mr. Holmes, the question was, whether the evidence showed that the marriage was had before a Catholic priest. All through the judgment it is assumed, that the presence of a priest was necessary; and it is inferred that it was more likely that it was a Protestant clergyman of the Established Church, who performed the ceremony, than a Roman Catholic priest, from this and other circumstances; the great difference between the ecclesiastical censures to which a clergyman of the Established Church, was liable for celebrating a clandestine marriage, and the heavy penalties to which a Roman Catholic priest was liable for marrying Protestants.

The practice which existed in England, before the Marriage Act, of having marriages solemnized by degraded clergymen in the Fleet prison and elsewhere, is strongly corroborative of the view here presented, that, by the common law of England the presence of a priest was essential for the legal celebration of marriage. If it were not so, why should this practice have grown up? Why could not the parties have entered into contracts without having recourse to these degraded clergymen? Why, when parties wanted to contract marriage clandestinely, did they not

follow the course still adopted in Scotland in such cases; and dispense altogether with the presence of a priest? Why did Fleet marriages ever obtain their notoriety? [Burton J. Mr. Holmes, cited a passage from 3 Institute, to show that a former marriage in fact was sufficient to maintain a prosecution for bigamy.] A marriage in fact would be sufficient. But this is not a marriage in fact. A marriage in fact, is one which *primâ facie* is valid. [Crampton J. A marriage in fact means a marriage apparently good, but which, for some reason or other, is voidable by judgment of the spiritual court. Till judgment pronouncing it void, it is to be taken as a valid marriage] Just so. The supposed marriage in this case, cannot be represented to be a marriage *de facto*. It is either utterly void, or perfectly valid.

The question of the marriages of Jews, may be very shortly disposed of. They have been always considered as foreigners, and, as was decided in *Lindo* v. *Belisario*, 1 Haggard, 216, the validity of a Jewish marriage is triable by evidence of the laws of the Jews, as in cases of foreign marriages. To this day the constitution denies to Jews, though born within the realm, where their fathers have lived before them, the right of natural born subjects. It treats them for all political purposes as foreigners, and not as citizens. This appears as well from the judgment of Lord Stowell, in that case, in the consistorial court, 1 Haggard, 216, as from that of Sir W. Wynne on appeal, in the court of Arches, Id. App. 7, from which it appears, that learned Civilian would have doubted, whether the validity of a Jewish marriage was a fit subject for his jurisdiction, if the case had not been sent to him by the Lord Chancellor, and says, his judgment must be regulated by a consideration of the Jewish laws.

As to the marriages of Quakers: it appears that the ecclesiastical courts did not at one time, recognise their

validity, *Green* v. *Green*, cit. 1 Hag. App. 9, n. In that case a Quaker instituted a suit for restitution of conjugal rights, and the libel was dismissed, because they were not married according to the forms of the Church of England. The case cited from Sewell, (*a*) is of no authority. And the case, said to have been cited by Judge Archer, is utterly apocryphal. Such a decision could never have been made, least of all by "all the bishops."

But now in Ireland their marriages are valid, by virtue of the Dissenters' Marriage Act, 21 and 22, Geo. III. c. 25, Ir. *Haughton* v. *Haughton*, 1 Molloy, 611, App. Lord Manners expressly said in that case, that Quaker marriages were within that Statute. And Quakers have always been considered Protestant Dissenters. The Statute 8 Anne, c. 3. Ir. expressly calls Quakers, Protestant Dissenters. The 24th section commences in these words, "Provided "always, that whereas there are certain Protestant Dissenters called Quakers, who scruple." &c.

As to the case of *Beer* v. *Ward*, (*b*,) not reported, but cited by Mr. Jacob, in the addenda to Roper's Husband and Wife, p. 446, Mr. Jacob says, "that on a motion for a "new trial, the question was elaborately argued before the "Lord Chancellor, but did not ultimately call for a decision." Inquiry has been made to ascertain what became of this case, the result of which shows, that a new trial at the bar of the King's Bench, was directed by the Lord Chancellor, but this trial was never had, as the parties compromised the suit. The question which seems to have been raised in the case, was this. Prior to the Marriage Act, (which passed in 1752,) and, as appears, in or about 1740, there was alleged to have been a precontract of some sort between the parties; and afterwards in 1742, there was a secret, but

(*a*) See *ante*, 33. (*b*) See *ante*, 22.

admittedly a valid marriage, and the question was, whether the issue born between the contract and the marriage was legitimate. The judgment of Lord Eldon upon the new trial motion is found reported in the Morning Chronicle Newspaper, of 30th April, and 1st May, 1824. And in such report, Lord Eldon, in one place is stated to have said, "the question, then, to be put to the jury was, whether "there was a pre-contract previous to 1742, and, if so, "whether a subsequent marriage in 1742, would not render "the children born before 1742, legitimate?" It seems, that it was argued before him, that by the common law of England, before the Marriage Act, a contract of matrimony *per verba de præsenti*, or a contract *per verba de futuro*, followed by cohabitation, amounted to an actual marriage; and in one part of his judgment he says, "with respect to "the legal branch of this question, he should pause before "he gave any opinion whatever, because he was unwilling "to disturb the comfortable feelings (if he might use that "expression,) which some parties at present entertained." His lordship further observes, "that the best mode of "disposing of this case, both as to law and to fact, would be "to direct that there be a trial at bar." And concludes by saying, "the opinion of the Judges upon the point of law "might thus be obtained, and the facts of the case would "be thoroughly and entirely understood." This shows how very unwilling Lord Eldon was, to adopt the doctrine contended for on the other side.

It will now be shown by an examination of several Statutes, passed in England, as well as in Ireland, that the legislatures of both countries have frequently declared their opinion, either expressly or by implication, that by the common law, the presence of a clergyman in holy orders was required, for the due celebration of marriage. It will appear that in passing these enactments, the legislature has always taken it for granted, that the presence of a priest

was essential to the lawful solemnization of matrimony; and it will be found that these Statutes throw no little light on the question now under consideration, namely, what the common law was.

It appears very plainly, that it was the invariable practice in England, before the period of the commonwealth to have marriages solemnized by persons in holy orders. In the times of the usurpation, however, a rage sprung up for innovation of all sorts, but chiefly in things sacred. Episcopacy was abolished, and an ordinance was passed dispensing with the necessity of celebration of marriages by persons in holy orders, and enacting that they might be contracted before justices of the peace. Hume gives the following account of the passing of this ordinance, and the legislators who enacted it. "All fanatics being consecrated by "their own fond imaginations, naturally bear an antipathy "to the clergy, who claim a peculiar sanctity, derived mere- "ly from their office and priestly character. This parliament "took into consideration the abolition of the clerical func- "tion, as savoring of popery; and the taking away tythes "which they called a relic of judaism. Learning also, and "the Universities they deemed heathenish and unnecessary. "The common law they denounced a badge of the con- "quest, and of Norman slavery; and threatened the "lawyers with abrogation of their profession. Some steps "were taken even towards an abolition of the chancery, "the highest court of judicature in the kingdom, and the "Mosaic law was intended to be established as the sole "system of English jurisprudence."

"Of all the extraordinary schemes, adoped by these "legislators, they had not leisure to finish any except that "which established the *legal solemnization of marriage* by "the civil magistrates alone, without the interposition of "the clergy. They found themselves exposed to the "derision of the public. Among the fanatics of the house,

" there was a very active member, much noticed for long " prayers, sermons, and harangues. He was a leather " seller in London: his name, 'Praise God Barebone.' " This ridiculous name, which seems to have been chosen " by some poet or allegorist, to suit so ridiculous a per- " sonage, struck the fancy of the people, and they com- " monly affixed to this assembly the denomination of " 'Barebone's Parliament.' "

The enactment, if so it may be called, of this ordinance, shows that such an ordinance was thought necessary. It shows that it was thought that, by the common law, marriages could only be celebrated by a priest. In Neale's History of the Puritans, it is stated, that " the solemnizing " of matrimony had hitherto been engrossed by the clergy," but that by this ordinance it was made a civil contract, and put into the hands of justices of the peace. In Bacon's Ab. tit. Marriage and Divorce C. margin, we are told, " mar- " riages in England during the usurpation, were solemnized " before justices of the peace; but for what purpose this " novelty was introduced, except to degrade the clergy, does " not appear." What was the use of the ordinance if the presence of a person in holy orders was not necessary before its enactment, for the celebration of marriage. [Perrin J. you will find that the ordinance of 1644, assumes that before then, marriages had to be solemnized before persons in holy orders.] The ordinance of 1653, c. 6, enacted that " after the 29th Sep. 1653, all persons who " should agree to be married within the commonwealth of " England, should deliver in their names and places of " abode, with the names of their parents or guardians, to the " registrar of the parish, where each party lived, who was " to publish the banns in the church or chapel, three " several Lord's days, after the morning exercise; or else in " the market-place, three several weeks successively, be- " tween the hours of 11 and 2, on a market day."

It further enacted, that all such persons so intending to be married, should come before some justice of peace, within the county, city, or town corporate, where publication was made with their certificate, and with sufficient proof of the consent of the parents, if either party be under age, and then the marriage should proceed in this manner :—

"The man to be married, taking the woman to be "married by the hand, shall plainly and distinctly pro- "nounce these words, 'I, A. B., do here in the presence "of God, the searcher of all hearts, take thee, C. D., for "my wedded wife; and do also in the presence of God, "and before these witnesses, promise to be unto thee, a "loving and faithful husband.'"

"And then the woman taking the man by the hand, "shall plainly and distinctly pronounce these words, 'I, "C. D., do here in the presence of God, the searcher of "all hearts, take thee, A. B., for my wedded husband; "and do also in the presence of God, and before these "witnesses, promise to be to thee a loving, faithful and "obedient wife.'"

After this the justice, "may and shall declare the said "man and woman, to be from thenceforth husband and "wife; and from and after such consent, so expressed and "such declaration made, the same (as to the form of mar- "riage,) shall be good and effectual in law; and no other "marriage whatsoever within the commonwealth of England, "after the 29th of Sept. 1653, shall be held, or accounted "a marriage according to the law of England."

In the form thus prescribed, there are express words of present contract. Now if such constituted a marriage by the common law, what occasion was there for the enactment of the ordinance?

At the Restoration, Acts of parliament were passed by the legislatures of both England and Ireland, to give validity to marriages celebrated during the period of the

Usurpation. The Irish Statute is the 17 and 18 Car. 2, c. 3, it recites, "whereas by virtue, or colour of certain "ordinances, or certain pretended acts or ordinances, divers "marriages, since the beginning of the late troubles, have "been had and solemnized in some other manner, than "hath been formerly used and accustomed within this "kingdom." And enacts, "that all marriages had, or "solemnized in this kingdom of Ireland, since the first "day of May, which was in the year of our Lord God, "1642, *before any justice, or reputed justice of the peace of* "*this your Majesty's kingdom of Ireland*, and by such "justice, or reputed justice, so pronounced or declared, "and all marriages within this kingdom, since the same "first day of May, in the said year of our Lord God, "1642, had or solemnized, according to the directions, or "true intent of any act, or ordinance of one or both houses "of the parliament of England, or of any convention "sitting at Westminster, under the name, stile or title "of parliament, or assuming the same, stile or title of a "parliament, shall be and are hereby adjudged, esteemed "and declared to be and to have been of the same force "and effect in law, *as if such marriages had been had and* "*solemnized according to the rites and ceremonies established* "*or used in the church of Ireland*, any law, custom, or "usage to the contrary thereof notwithstanding." The 12 Car. 2, c. 33, is the corresponding English Statute. The enactment of these Statutes proves two things of great importance for the purposes of this argument. First, that it was thought necessary, or expedient, to enact by lawful authority, that marriages so celebrated, should be valid. If, however, a contract of matrimony, *per verba de præsenti*, was by the common law a marriage, such an enactment would have been quite unnecessary. Because, as has been seen, the form of the marriage ceremony in the presence of justices of the peace, included an express contract of matri-

mony *per verba de præsenti*. Secondly, it shows that, in the opinion of the legislatures of both countries, a marriage, to be valid, should be "had and solemnized accord-"ing to the rites and ceremonies established and used in "the Church."

A good deal of misapprehension seems to have arisen on the subject of the English Marriage Act, 26 Geo. 2, c. 33. Its real object was what its title imports "for the better "preventing of clandestine marriages." These clandestine marriages, it is a matter of history, were not marriages contracted without the presence of persons in holy orders, but were marriages solemnized by low, abandoned, and generally degraded, clergymen in holy orders, in the Fleet prison, May fair, or such like places. The existence and extent of the practice of having marriages so celebrated by such persons, is a matter of historical notoriety. It is recited in the beginning of the 13th section of the Marriage Act, and it is noticed in the debate in the House of Commons, on the introduction of the bill. As has been before observed, the existence and extent of this practice, afford powerful evidence of general opinion, that the performance of a ceremony of marriage by a person who had received holy orders, was essential to the legal celebration of marriage by the common law, and such general opinion and usage, tend to show what the common law in fact was. If a contract of matrimony was a marriage, without the intervention of a priest, why resort to these degraded clergymen? It is quite plain, from the debate on the Marriage Act, in the House of Commons, preserved in the Parliamentary History, that it was assumed all through, that at every period of our history, except that of the Usurpation, marriage was considered as a religious ceremony, to be performed by persons in holy orders, and that the mischief sought to be remedied by the enactment of that Statute, was the inveterate practice of celebrating clandestine mar-

riages by degraded clergymen. It was stated, (15 Hansard Parl. Hist. 56) that "in Holland, not only every province, "but every town is a sort of sovereignty within itself, and "their religion, especially with regard to marriage, is much "the same as it was in this country, in the days of Oliver "Cromwell, when neither the marriage contract, nor the "ceremony was supposed to have any sanctity, or religion "in its nature."

Sir W. Murray, afterwards Lord Mansfield, says, ib. 78, "Now Sir, with regard to the objections made against this "bill: it is in general objected, that we are going to do what "we have not a power to do: that we cannot declare that to "be void, which is valid both by the law of God, and the law "of nature. Sir, we are only to declare a marriage void in "law, which is not contracted according to the forms pre-"scribed by the laws of this society; and this is what every "society may do, and what we have done in a multitude of "other cases. Our statute of frauds is an instance of this, "and every Statute we have made for the limitation of actions, "is an instance of it. A verbal contract for the sale of goods "above £10, is a good contract, both by the law of God, "and the law of nature, though the buyer has received no "part of them, or received any earnest; yet, that statute has "declared it not to be good; and a man is obliged both by "the law of God, and the law of nature, to pay a debt with-"out specialty, though he has not been sued for it within "six years, yet the Statute declareth he shall not be obliged. "And even with regard to marriage, I believe it will be "allowed, that if a man and woman, seriously and sincerely "enter into a marriage contract, without the interposition of "a clergyman, or any religious ceremony whatever, it will "be a good marriage both by the law of God, and the law "of nature, yet the law of this society, and I believe of every "Christian society has declared it, not to be a good marriage; "therefore, why may not we declare those marriages to be

" void, which are solemnized by scandalous, worthless clergy-
" men in a clandestine manner; for it is really doing no more
" than what the the honorable gentleman said, we might do,
" it is only denying the assistance of the law, for enforcing
" the performance of such a contract." To prevent such contracts from being enforced, was the object of the 13th section of the Marriage Act, which is in these words: " and
" it is hereby further enacted, that in no case whatsoever
" shall any suit or proceeding be had in any ecclesiastical
" court, in order to compel a celebration of any marriage
" in *facie ecclesiæ*, by reason of any contract of matrimony
" whatsoever, whether *per verba de præsenti*, or *per verba*
" *de futuro*, which shall be entered into after the 25th day
" of March, in the year 1754: any law or usage to the con-
" trary notwithstanding." The legislature knew of the jurisdiction exercised by the ecclesistical courts, in the enforcement of the performance of contracts of matrimony. And the object of this enactment was to take away such jurisdiction. If the contract was a marriage, what occasion was there for the enactment of this section?

As has been stated, the title of the Marriage Act is, " An
" Act for the better preventing of clandestine marriages."
And the first section commences with a recital in these words, " whereas great mischiefs and inconveniences have
" arisen from clandestine marriages, for preventing whereof
" for the future,"—&c. The 8th section is in these words, " and whereas many persons do solemnize matri-
" mony in prisons and other places without publication of
" banns, or licence of marriage, first had and obtained,
" therefore, for the prevention thereof, be it enacted, that if
" any person shall, from and after the said 25th day of
" March, in the year 1754, solemnize matrimony in any
" other place than a church, or public chapel, where
" banns have been usually published, unless by special
" license from the Archbishop of Canterbury; or shall

" solemnize matrimony without publication of banns,
" unless license of marriage be first had and obtained, from
" some person or persons having authority to grant the
" same; every person knowingly, and wilfully so offending
" and being lawfully convicted thereof, shall be deemed
" and adjudged to be guilty of felony, and shall be trans-
" ported to some of his Majesty's plantations in America,
" for the space of fourteen years, according to the laws in
" force for the transportation of felons; and all marriages
" solemnized, from and after the 25th day of March, in
" the year 1754, in any other place than a church, or such
" public chapel, unless by special license as aforesaid, or
" that shall be solemnized without publication of banns,
" or license of marriage, from a person or persons having
" authority to grant the same, first had and obtained, shall
" be null and void to all intents and purposes whatsoever."

It is plain, that the enactments of the Marriage Act, were levelled at the clandestine marriages solemnized by low and worthless clergymen in the Fleet Prison, and other places. That was the evil sought to be remedied. The enactment of the 13th section, was necessary to complete the remedy, for there would have been little use in declaring clandestine marriages null and void, unless there was likewise provision made for preventing the ecclesiastical courts from continuing to exercise their jurisdiction of enforcing the performance of contracts of matrimony. Throughout the enactments of the Marriage Act it appears clearly, that the legislature assumed solemnization by persons in holy orders, necessary for the celebration of actual marriages. And when it comes to deal with contracts of matrimony, it does not enact that such shall be void, but that the ecclesiastical courts shall not entertain suits to enforce the performance of them by celebration in *facie ecclesiæ*.

The Irish Statute law throws a great deal of light on the

subject, and is utterly unintelligible if the argument on the other side be good. The Irish legislature throughout a series of enactments assumes the presence of a priest in holy orders, to be necessary for the celebration of marriage by the common law. Mr. Gabbett, 1 Dig. 410, observes, "the policy of the Irish Statutes has been, not only as the "9 Geo. II. c. 11, Ir. professes, to prevent the clandestine "marriages of persons entitled to considerable fortunes, "but also to prevent the popish interest and religion from "being increased and propagated by intermarriages be- "tween Protestants and Catholics." And to prevent this being done, severe penalties were imposed upon Roman Catholic priests celebrating such marriages. The following enactment, 8 Anne, c. 3, s. 26, Ir. will afford a specimen of the severity of these enactments. "And whereas by an "Act of Parliament, past in this kingdom in 6th year of the "reign of her present Majesty, it is enacted, that if any "popish priest, shall after the time therein expressed, *cele-* "*brate matrimony*, between any persons, knowing at the time "of such marriage they or either of them is of the Protestant "religion, that every such popish priest so offending, and "being thereof lawfully convicted, shall be deemed, judg- "ed, and reputed to be a popish regular clergyman. Now to "the end, that no popish priest may pretend that he did "not know either of the parties, at any time so married by "him, to be of the Protestant religion, be it enacted by "the authority aforesaid, that if any popish priest, shall "after the first day of September, one thousand seven "hundred and nine, be prosecuted for offending, contrary "to the said statute, and that it doth appear that the said "persons so married, or any one of them, was or were a "Protestant, or Protestants at the time of the marriage "it shall be presumed, allowed, and concluded to all "intents and purposes, that the said popish priest so accused "did celebrate matrimony between the said persons, know-

" ing at the time of such marriage, that they or one of them " were of the Protestant religion, unless the said popish " priest shall produce and prove a certificate or certificates " under the hand and seal, or hands and seals, of the minister " or ministers of the parish or parishes, where the parties " so married did at the time of the said marriage respectively " inhabit or reside, certifying that the said person or per- " sons were not of the Protestant religion at the time of " the celebration of the said marriage."

Now, if the presence of a priest was unnecessary for the celebration of a marriage, why was it necessary thus to heap penalty upon penalty, for the purpose of preventing celebration of marriages by priests. If a contract of matrimony were a marriage, there was no occasion for parties to incur these penalties, and no necessity for the legislature to enact them.

The 12 Geo. I. c. 3, Ir. is entitled, " An Act to prevent " marriages by degraded clergymen and popish priests, and " for preventing marriages consummated from being avoided " by precontracts, and for the more effectual punishing of " bigamy." The first and second sections are as follows: " Whereas clandestine marriages are for the most part " celebrated by popish priests and degraded clergymen, to " the manifest ruin of several families within this kingdom: " for remedy whereof be it enacted by the king's most " excellent majesty, by and with the advice and consent of " the lords spiritual, and temporal and commons, in this " present Parliament assembled, and by the authority of " the same, That if any popish priest, or reputed popish " priest, or person pretending to be a popish priest, or any " degraded clergyman, or any layman pretending to be a " clergyman of the Church of Ireland as by law established, " shall after the twenty-fifth day of April, in the year of " our Lord, one thousand seven hundred and twenty-six, " celebrate, or take upon him to celebrate, any marriage

" between two Protestants, or reputed Protestants, or " between a Protestant, or reputed Protestant, and a " Papist, such popish priest, or reputed popish priest, and " such degraded clergyman, and layman pretending to be a " clergyman, shall be, and is hereby declared to be, guilty " of felony, and shall suffer death as a felon without benefit " of the clergy, or of the Statute.

" II.—And for the better discovering and convicting " such offenders, be it further enacted, by the authority " aforesaid, that it shall and may be lawful to and for any " two justices of the peace, in their respective counties, " by warrant or warrants under their hands and seals, " directed to any constable or constables, to summon " any person, or persons suspected to be married by " such popish priest, or degraded clergyman, or layman " pretending to be a clergyman of the Church of Ireland, " as by law established, or to have been present at the " celebration of such marriage, to appear before such " justices at the time and place in such warrant mentioned, " not being more than ten miles distant from his, her, or " their usual place of abode, and to examine such person " or persons upon oath, where, and by what person or " persons, and with what form and ceremonies such mar- " riage was celebrated, and what religion the person or " persons so married professed, and who were present at " such marriage," &c.

Thus the legislature always assumes the celebration of marriages by persons in holy orders, or supposed to be so. It seems in several of the cases cited already, to have been taken for granted, that if the person celebrating the marriage, held himself out to be a priest, and was by at least one of the parties *bonâ fide* supposed to be so, it was the same as if in fact he had been a priest. And it was to meet this case, that the provision is made, as to the " lay- " man pretending to be a clergyman." The legislature to

prevent the mischief of clandestine marriages, directs its enactments against marriages celebrated by such persons. Now, if it were not necessary that marriages should be celebrated at all, the mischief would not have been remedied. The whole series of Irish legislation on this subject, is unintelligble, except upon the ground that the legislature thought marriages could be contracted in no other way but by celebration by persons in holy orders.

The 9 Geo. II. c. 11, Ir., corroborates this view of the opinion of the Irish legislature, and likewise draws a distinction between marriages and matrimonial contracts. It is entitled, "An Act for the more effectual preventing "clandestine marriages," and is in these words: "Where- "as the several laws made to prevent clandestine marriages "have proved ineffectual; and notwithstanding the penal- "ties laid on those who celebrate such marriages, many "persons under age who are entitled to considerable for- "tunes, are frequently married without the consent of their "parents or guardians to the great prejudice of many "families; and Protestants frequently intermarry with "Papists, whereby the popish interest and religion are "increased and propagated; for remedy thereof be it enact- "ed by the King's most excellent Majesty, by and with "the advice and consent of the lords spiritual and tempo- "ral, and commons, in this present parliament assembled, "and by the authority of the same, that from and after "the twenty-fifth day of March, which will be in the year "of our Lord, one thousand seven hundred and thirty- "seven, all marriages and matrimonial contracts, where "either of the parties are under the age of twenty-one "years, had without the consent of the father (if living) "in writing under his hand, first had and obtained, or, if "dead, of the guardian had and obtained in the same man- "ner, or of the lord chancellor or keeper of the great seal, "in case no guardian be appointed, shall be absolutely null

" and void to all intents and purposes whatsoever, and shall " not be deemed, adjudged, or construed by any spiritual " court as contracts or marriages, if either of the parties " marrying or contracting marriage without such consent, " and being under the age of twenty-one years, be entitled " to any real estate of the value of one hundred pounds per " annum, or to any personal estate to the value of five " hundred pounds, or if the father or mother of such party " so marrying under age, be in possession of any real " estate of the value of one hundred pounds per annum, or " of any personal estate, of the value of two thousand " pounds.

" II.—And be it further enacted, by the authority " aforesaid, that from and after the said twenty-fifth day of " March, in the year of our Lord one thousand seven hun- " dred and thirty-seven, it shall and may be lawful for the " father or guardian of any person, who shall marry, or be " contracted in marriage when under the age of one and " twenty years, or, if there be no father or guardian, for any " person, or persons, to be appointed by the lord chancellor, " or the lord keeper of the great seal, for that purpose, " to commence a suit in the proper ecclesiastical court in " order to disannul such marriage or matrimonial contract; " which suit, when commenced, shall be prosecuted with " effect; and if it appears in the said suit by proper proof, " that either of the parties so marrying, or contracting to " marry, was at the time of such marriage or matrimonial " contract under the age of one and twenty years, such " marriage or matrimonial contract, shall be declared and " adjudged by the ecclesiastical court, where such suit is " commenced, to be absolutely null and void to all intents " and purposes.

" III.—Provided always, that if no such suit be com- " menced within one year after the solemnization of such " marriage, or the making of such matrimonial contract, shall

" from the expiration of the said year be good and valid, to " all intents and purposes, as if this act had never been made; " anything herein before contained to the contrary thereof " in any wise notwithstanding."

The Statute 11 Geo. II. c. 10, Ir. which prohibits the prosecution in ecclesiastical courts of members of dissenting congregations who have been married by their ministers in their own congregations, and the Dissenters' Marriage Act, 21 & 22 Geo. III. c. 25, allowing Dissenting ministers to celebrate marriages between persons both of their own congregation, bear strongly upon both branches of this argument. First, they show that the legislature did not consider Dissenting ministers to be in holy orders. Secondly, they show that the legislature did not think that marriages could be celebrated otherwise than by the intervention of a person in holy orders.

The 11th Geo. II. c. 10, Ir. is entitled " An Act " for allowing further time to persons in offices to qualify " themselves pursuant to an Act, intituled An Act to " prevent the further growth of popery, and for giving " further ease to Protestant Dissenters, with respect to " matrimonial contracts." The 3rd section is as follows— " And whereas several Protestants dissenting from the " church of Ireland as by law established, *scrupling to be* " *married according to the form of matrimony prescribed* " *by the said church*, do therefore, frequently enter into " *matrimonial contracts* in their own congregation before " their ministers or teachers, and thereupon live together " as husband and wife, be it enacted by the authority " aforesaid, that for the ease of such Protestant Dissenters " who have already entered or shall hereafter enter, into " such matrimonial contracts, and thereupon live together " as husband and wife, that *they shall not be prosecuted* in " any ecclesiastical court in this kingdom *ex officio mero*, " or on the presentment of any minister or churchwardens

" of any parish, for or by reason of their entering into " such matrimonial contracts, or for their living together " as husband and wife by virtue of such contract: pro- " vided such Protestant Dissenters, and such minister or " teacher have or shall take the oaths, and subscribe the " declaration, according to a statute made in the sixth " year of the reign of King George I. intituled, ' An Act " for exempting the Protestant Dissenters of this kingdom " from certain penalties, to which they are now subject.' "

The Dissenters' Marriage Act 21 & 22 Geo. III. c. 25, Ir. is entitled " An Act for the relief of Protestant " Dissenters in certain matters therein contained." It recites, s. 1, that, " the removing any doubts that " may have arisen concerning the validity of matrimonial " contracts, or marriages entered into between Protestant " Dissenters, and solemnized by Protestant Dissenting " ministers or teachers will tend to the peace and tran- " quillity of many Protestant Dissenters and their families." And enacts, " that all matrimonial contracts or marriages " heretofore entered into, or hereafter to be entered into, " between Protestant Dissenters, and solemnized or " celebrated by Protestant Dissenting ministers or teachers, " shall be, and shall be held and taken to be good and " valid to all intents and purposes whatsoever; and that " all parties to such marriages, and all persons deriving " under them, shall in virtue of such marriages be, and " be deemed, adjudged, and taken as entitled to all rights " and benefits whatsoever, from, under, or in consequence " of such marriages in like manner as all his Majesty's " subjects of the Established Church, and as if the same " had been solemnized by a clergyman of the Church " of Ireland by law established; any law, Statute cus- " tom, matter or thing to the contrary thereof in any " wise notwithstanding."

This act was passed after great discussion and opposi-

tion(a). Its object was to relieve Protestant Dissenters. It gave them by enactment a limited relief. It enables Dissenting ministers to marry persons both of their own sect, and enacts that such marriages shall be valid as if solemnized by clergymen of the Established Church. Now what occasion was there for the passing of this Act, or for the opposition to it, if by the common law the intervention of a person in holy orders was not necessary to the celebration of a marriage, or if Protestant Dissenting ministers were by law persons in holy orders? Why should this Statute have been passed unless it were thought necessary to give validity to such marriages? And why otherwise should its enactment have been opposed? The Act only allows them to marry persons of their own sect. This would have been quite unnecessary surely, if before it they might have married persons of any religious persuasion. Neither in the Statute, nor in the protest against it, is there the slightest indication that it was ever supposed that a marriage might be had without the solemnization of a person in holy orders.

The 19 Geo. II. c. 13, Ir. "for anulling all marriages "to be celebrated by any popish priest between Protestant "and Protestant, or between Protestant and Papist," after reciting that "the laws now in being to prevent "popish priests from celebrating marriages between "Protestant and Protestant, or between Protestant and "Papist, have hitherto been found ineffectual," enacts "that every marriage that shall be celebrated after the "1st day of May which shall be in the year of our "Lord 1746, between a Papist and any person who hath "been or hath professed him or herself to be a Protestant

(a) See the protest against it signed by twenty-two Peers.—Browne's Eccles. Law, App. 34, 2 Mant's Hist. Church of Ireland, 675.

" at any time within twelve months before such celebra-
" tion of marriage, or between two Protestants, if cele-
" brated by a popish priest, shall be and is hereby
" declared absolutely null and void to all intents and
" purposes without any process, judgment, or sentence
" of law whatsoever." The 23 Geo. II. c. 10, Ir. recites the 9 Geo. II. c. 11, Ir. for the more effectual preventing of clandestine marriages, and in the 1st and 2nd sections contains enactments for a similar purpose, throughout which the legislature draws an express distinction between marriages and matrimonial contracts. The 3rd section recites a doubt, whether it was under the 12 Geo. I. c. 3, Ir. felony, " for a popish priest to
" celebrate marriage where one or both of the parties
" are Protestants; by which such popish priests are
" encouraged to deceive and impose upon his Majesty's
" Protestant subjects by taking upon them to celebrate
" marriage between them;" for remedy whereof it was enacted, " that every popish priest or reputed popish
" priest who from and after the 1st day of May, 1750,
" shall celebrate any marriage contrary to the said first
" recited Act, and be thereof convicted, such popish
" priest shall be guilty of felony without benefit of
" clergy or of the Statute, and suffer death accordingly
" although the marriage so celebrated by such popish
" priest be declared null and void by the said last recited
" Act." Now, throughout these enactments the object of the legislature appears plainly to have been to prevent the celebration of marriages of Protestants by Roman Catholic priests. That was the mischief sought to be prevented. If parties could marry by mere contract without the intervention of a priest, it would have been unnecessary for the parties to have had recourse to the Romish clergy, and it would have been unnecessary for the legislature to have passed these severe enactments on the subject.

The 32 Geo. III. c. 21, Ir. a Roman Catholic Relief Act, s. 12, enables Protestants and Roman Catholics to intermarry, and enacts that it shall be lawful to grant "licenses for marriages to be celebrated between Protes-"tants and persons professing the Roman Catholic "religion, and for clergymen of the Established Church "or Protestant Dissenting ministers to publish the "banns of marriage between such persons, and that "clergymen of the Established Church or other Pro-"testant ministers duly celebrating such marriages" shall not be liable to penalties. The 13th section provides, "that nothing herein contained shall extend or be construed "to extend to authorise Protestant Dissenting ministers or "popish priests to celebrate marriage between Protestants "of the Established Church and Roman Catholics." Here it is implied throughout, that there is to be necessarily a celebration of marriage as a religious ceremony. Clergymen, priests and ministers are alone spoken of. The Dissenting ministers are only to celebrate such marriages, too, by license of the bishop, under s. 12. They, therefore, had not the wide prerogative of marrying all persons indiscriminately. And the 13th section, carefully provides that the permission thus given to Dissenting ministers to celebrate marriages between Roman Catholics and Protestants, shall be confined to Dissenting Protestants and not Protestants of the Established Church. The 33 Geo. III. c. 21, Ir. likewise a Roman Catholic Relief Act, s. 12, enacts that nothing therein contained "shall be construed to extend to authorise any popish "priest, or reputed popish priest, to celebrate marriage "between Protestant and Protestant, or between any "person who hath been or professed himself or herself "to be a Protestant at any time within twelve months "before such celebration of marriage, and a Papist, unless "such Protestant and Papist shall have been first mar-

" ried by a clergyman of the Protestant religion." And a penalty of £500, is imposed upon Roman Catholic clergymen celebrating marriages in contravention of this enactment. Thus, throughout this continued series of legislation by the Irish Parliament, it is always assumed that the celebration of marriage was a religious ceremony for which the intervention of a priest was necessary. All its enactments are framed upon this supposition. And the objects of those enactments would not have been attained if it were otherwise. The clandestine marriages, and the mixed marriages which it sought to prevent, would not have been prevented by all this legislation if the intervention of a priest were unnecessary,—if, as is now contended, a contract of matrimony is an actual marriage.

We now come to consider the effect of a very important enactment of the United legislature, the 58 Geo. III. c. 81. It is entitled " An Act for extending to that part of the " United kingdom called Ireland, certain provisions of the " Parliament of Great Britian, in relation to executors " under the age of 21 years, and to matrimonial contracts." With one part of its enactments we have nothing to do: but that relating, as the title denotes, to " matrimonial con- " tracts," enacts for Ireland, a provision against the enforcement in the spiritual courts of matrimonial contracts, in the same words as the 13th section of the English Marriage Act. The 3rd section enacts, " that in no case " whatsoever, shall any suit or proceeding be had in any " ecclesiastical court of that part of the United kingdom " called Ireland, in order to compel a celebration of any " marriage in *facie ecclesiæ*, by reason of any contract of " matrimony whatsoever, whether *per verba de præsenti*, or " *per verba de futuro*, which shall be entered into after the " end and expiration of ten days, next after the passing of " this Act, any law or usage to the contrary notwith- " standing." Can it be contended that the legislature

which passed this Act, considered a contract of matrimony *per verba de præsenti*, an actual marriage? If so, what was the object of the Act? What did the Statute mean to do? It is conceived that the legislature, consistently with the whole of this argument, considered that such a contract of matrimony was not a marriage, and that its object was to take away the jurisdiction of the ecclesiastical courts, to enforce the performance of such a contract. The legislature has taken away that jurisdiction, but, according to the argument on the other side, it has effected nothing, for although the spiritual courts can no longer enforce a contract of matrimony, *per verba de præsenti*, as a contract, it is yet good and valid, as an actual marriage. According to the argument at the other side, this is a most absurd and useless enactment. [Crampton J.—It only forbids the enforcement of the contract by the ecclesiastical courts. It leaves the parties to their action at law.] Just so. And it frequently happens in actions for breach of promise of marriage, that actual contracts *per verba de præsenti* are proved, yet the suit is in such cases for breach of the contract of marriage. How could there be a breach of a contract of marriage, if the contract was an actual marriage? [Crampton J.—It frequently happens too in seduction cases, that there has been a contract of matrimony *per verba de præsenti.*] Yes, and if the contract be a marriage, how can a man be guilty of seduction of his own wife? No one ever heard of a defendant in an action for breach of promise of marriage or seduction, objecting that he was the husband of the injured woman, by virtue of a contract *per verba de præsenti.*

The 3 and 4 Wm. IV. c. 102, passed to repeal the penalties imposed on Roman Catholic clergymen, for celebrating marriages contrary to the provisions of the Irish Statutes, enacts s. 3, "that nothing in this Act, shall "extend or be construed to extend to the giving validity to

" any marriage ceremony in Ireland, which ceremony is not " now valid under the existing laws, or to the repeal of " any enactments now in force, for the preventing the per- " formance of the marriage ceremony by degraded clergy- " men." Thus the Imperial legislature constantly treats marriage as a religious ceremony, and carefully preserves in force the enactments by which it is a capital felony for a degraded clergyman to celebrate marriages(*a*). There would be no use in preserving these enactments in force, if marriages could be effectually had by mere contract of matrimony without the presence of a priest.

The 58 Geo. III. c. 84, which enacts, that marriages celebrated by ministers of the Church of Scotland, in the British territories in India, between persons both, or one, of whom are members of the Church of Scotland, shall be valid, has been relied on at the other side(*b*). That Statute enacts, that "all marriages between persons, both or " one of such persons being members or member, of or " holding communion with the Church of Scotland, and " making a declaration to the effect hereinafter mentioned, " which marriages shall be had and solemnized within the " British territories in India, by ordained ministers of the " Church of Scotland, as by law established, and appointed " by the United Company of merchants of England, " trading to the East Indies, to officiate as chaplains " within the said territories, shall be and shall be adjudged, " esteemed and taken to be, of the same and no other " force and effect, as if such marriages were had and solem- " nized by clergymen of the Church of England, according " to the rites and ceremonies of the Church of England."

(*a*) See R. v. Sandys, Jebb's Crown and Presentment Cases, 166: Sandys' case, 1 Irish Circuit Rep. 10. Sentence of death was recorded three several times against the defendant in those cases. He was a degraded clergyman of the Church of Ireland.

(*b*) See *ante*, 37.

It then provides for a declaration to be made by both or one of the parties, of both, or one of them, being of the Church of Scotland. Now the English Marriage Act, 26 Geo. 2, c. 33, does not extend to India, or the colonies. The marriages of British subjects in British India were regulated by the common law. If then, by the common law, mere contracts of matrimony *per verba de præsenti*, or ceremonies of marriage, celebrated by Presbyterian ministers, were valid marriages, what occasion was there for this enactment? Why should the legislature enact that such ceremonies of marriage, where both or one of the parties were or was of the Church of Scotland, should be valid marriages, if they were already such, whether the parties were of the Church of Scotland or not?

Thus the whole current of legislation, both of the Irish and the Imperial Parliament, shews that it was at all times the opinion of the legislature, that marriage, by the common law, was a religious ceremony to be celebrated by a priest in holy orders. Its enactments on the subject always treat marriage as such. They are on such a supposition reasonable and consistent throughout. The legislature never has in any one enactment contemplated the possibility of an actual marriage being had by mere contract of matrimony, *per verba de præsenti*, without the intervention of a priest, although followed by cohabitation. Its enactments are not framed to suit such a state of the law. And if such be the law, the enactments of the legislature on the subject of marriage are incomplete, inconsistent, and absurd. It is submitted that such is not the law, and that the presence of a priest or clergyman in holy orders is necessary for the celebration of marriage by the common law of England, which is the law of this country at this day.

Observations have been made at the close of the argument at the other side, the use of which is much to be regretted.

It has been said, that this has been made a question between the Established Church, and that very respectable body, the Presbyterians of Ireland, and that in raising this discussion, parties have indulged in a spirit of persecution against the Presbyterians. When this question was first raised, the Church had nothing to do with the matter. It arose on the trial of a prisoner for bigamy, when it was the duty of his counsel to see that his client was tried according to law. And if, when the question did arise, some members of the Church did feel desirous that the case should be fully argued and fairly submitted to the decision of this court, and the consideration of the judges of the land, who are the guardians of the law, what intolerant or persecuting spirit does that evince ?

It is said on the high authority of the eminent counsel who has argued this case for the crown with so much ability, that if this question be decided against the Presbyterians, that great and virtuous body might withdraw their countenance and support from the Church, which must then be overtaken with certain ruin. There is little danger to be apprehended for the Church, from the Presbyterians, even if they should withdraw the light of their countenance from it. There is little fear of any such consequences; and if there was, no lover of his country could indulge with satisfaction in such gloomy anticipations. The history of our country,—the history of those times we have been considering, bears its witness that when, at one period, the temporal fabric of the Church was overthrown, and its power fell, there fell at the same time an ancient monarchy, a free constitution, and the noble institutions which made it flourish. The fall of the Church was but a prelude to the ruin of the state. But the Church of Ireland is not supported by its temporalities; but by the spirit of that truth which it teaches. When that Church teaches falsehood, it may perish. While the spirit of truth abides therein, it rests upon a rock. Tem-

poralities constitute neither its power, nor its existence. They spring from a purer and a higher source. Were it stripped of those temporalities to-morrow, it would not, as a spiritual Church, cease to bear witness of the truth giving to mankind here below the means of consolation and instruction, and showing the way to a bright hereafter.

Monday, 2nd May, T. B. C. Smith, Q. C. on the same side.

Three questions arise in this case for the decision of the court. 1st. Whether a contract *per verba de præsenti*, without any solemnization by a person in holy orders, was considered lawful matrimony by the common law of England. 2nd. Whether, if solemnization by a person in holy orders be necessary by the common law, a Presbyterian minister is a person who either by the common law, or the statute law, can solemnize matrimony between a member of the Established Church and a Dissenter; and 3d. Whether the ceremony performed in the present case, between the prisoner and Hester Graham, although absolutely void, was such a marriage *de facto* as to make the prisoner guilty of the crime of Bigamy.

And it may be observed, that in thus arguing the question, the view most unfavorable to the prisoner has been adopted. For it is assumed that one of the parties here is a Presbyterian, which the special verdict does not clearly state; and as this was an indictment for a felony, the point might be argued as if they had both been Episcopalians.

First then, it is to be shewn, that by the common law of this realm, a contract *per verba de præsenti*, until sanctioned by a religious ceremony, performed by a person in holy orders, did not constitute lawful matrimony.

What we have to inquire into then is, what is, and, what was, the common law of this land; and in so doing it may not be improper to advert to the statements of Sir William Blackstone, and Sir Mathew Hale, upon this subject, as a guide to us in these inquiries. Sir William Blackstone, in the 1st vol. of his Commentaries, p. 63, thus speaks of the common law: "When I call these parts of our law, "*leges non scriptæ*, I would not be understood as if all these "laws were at present merely *oral*, or communicated from the "former ages to the present, solely by word of mouth. "It is true indeed, that in the profound ignorance of "letters, which formerly overspread the whole Western "World, all laws were entirely traditional, for this plain "reason, because the nations among which they prevailed, "had but little idea of writing. Then the British, as well "as the Gallic Druids, committed all their laws as well as "learning to memory; and it is said of the primitive "Saxons here as well as their brethren on the continent, "that *leges solâ memoriâ et usu retinebant*. But with us at pre-"sent the monuments and evidences of our legal customs "are contained in the records of the several courts of "justice, in books of reports and judicial decisions, and in "the treatises of learned sages of the profession, handed "down to us from the times of highest antiquity. How-"ever, I therefore style these parts of our laws *leges non* "*scriptæ*, because their original institution and authority "are not set down in writing, as Acts of Parliament are; "but they receive their binding power and the force of "laws, by long and immemorial usage, and by their uni-"versal reception throughout the kingdom." After alluding to the various sources from whence their laws and customs were drawn, Blackstone proceeds, "and indeed our anti-"quaries and early historians, do also positively assure us "that our body of laws is of this compounded nature. "For they tell us that in the time of Alfred, the local

" customs of the several provinces of the kingdom, were " grown so various, that he found it expedient to compile " his *Dome-book*, or *Liber Judicialis*, for the general use of " the whole kingdom. This book seems to have been " extant, so late as the reign of King Edward the IV, but " is now unfortunately lost."

He then proceeds to say that the irruption of the Danes having introduced new customs, caused this code of Alfred to fall into disuse, so that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts, the *Mercen-lage* or Mercian laws, the *West-Saxon-lage*, or laws of the West Saxons, and the *Dane-lage*, or Danish law. " Out of " these three laws Roger Hoveden and Ranulphus Cestrensis " inform us King Edward the Confessor extracted one " uniform law or digest of laws." " But this undertaking," he afterwards adds, " seems to have been no more than a " new edition, or fresh promulgation of Alfred's code or " Dome-book, with such additions and improvements as " the experience of a century and a half had suggested; for " Alfred is generally styled by the same historians as *legum* " *Anglicanarum Conditor;* as Edward the Confessor is the " *Restitutor*." Sir Mathew Hale in his history of the Common Law, pp. 23, 38, 58, gives the same account. Thus we perceive that the common law has acquired its binding powers and the force of law by a long and immemorial usage, by the strength of custom, and by its reception in this kingdom, and that in order to ascertain its nature we must look, according to Blackstone and Hale, to the records of the several courts of justice, to books of reports and judicial decisions, and to the treatises of learned sages of the profession.

In this point of view, therefore, it becomes an important matter, in considering the common law on the subject of marriage, to examine the provisions of the Saxon law,

from whence it was in a great measure derived. In the collection of ancient Saxon laws, published by the Record Commissioners, and which have been already cited from in this case, are the following remarkable words, p. 109· "At the nuptials there shall be a Mass-priest by law, who "shall, with God's blessing, bind their union to all posterity." This is of great authority, and shows the ancient practice. It will not be necessary to go in detail through the earlier portions of history which have already been cited in the course of this argument, to show that marriage was recognized as a religious ceremony by the several countries of Europe, upwards of 900 years ago. The point is very clearly established by the passages cited from Martene de Antiquis Ecclesiæ Ritibus, and Bingham's Antiquities of the Christian Church. And the form in which the ceremony is stated in the rituals collected by Martene to have commenced, corresponds with the custom in England, as appears from the form of endowment *ad ostium ecclesiæ* which was after affiance and troth plighted at the door, where Sir W. Blackstone, 2 vol. p. 133, tells us all marriages were formerly celebrated. And thus we have the account given by Martene of the celebration of this ceremony in foreign countries agreeing entirely with that declared by Sir Wm. Blackstone to have been the practice here. That marriage was a religious ceremony at an early period in England, appears from the York and Salisbury rituals, to be found in Palmer's Origines Liturgicæ, p. 209. The liturgy of Salisbury is stated in that work, at p. 23, to have been corrected by Osmond, Bishop of Salisbury, in the year 1080, from which we may conclude that it had been already in force for a considerable period.

And thus we find the rituals in use throughout Europe upwards of 900 years ago, agreeing with the Saxon laws which were the foundation of our common law, in the statement of the necessity of a religious ceremony in all

contracts of marriage; or if we have no direct evidence of the necessity, we have at least indisputable testimony of ancient usage to this effect, and this, according to Sir Wm. Blackstone and Sir M. Hale, gives to customs a binding power and the force of laws.

It is less difficult to trace an unbroken usage in Ireland than in England, where a marriage law having been in force for a period of 88 years, it is no longer possible to ascertain by living testimony what the usage was. In Ireland, on the contrary, we have no statute prior to the year 1818, (58 Geo. III,) which could have prevented parties from entering into a contract of marriage, *per verba de præsenti*, if it had been valid. But no instance will be found in which a marriage without a religious solemnization has taken place either between members of the Established Church, or Roman Catholics. The same may be said with regard to Dissenters; for the Presbyterians have always had a religious ceremony, the original of which is to be found in the Directory—Scobell, p. 86. And the Quakers did not introduce their method from any adoption of the principal of a contract *per verba de præsenti* constituting a valid marriage, but because their founder, George Fox, thought there was no authority from scripture for the solemnization of marriage by a priest, and considered it right on religious grounds to abandon what he called apostate usage, and to adopt a mode more conformable to his views. Such a contract as that given in *Dalrymple* v. *Dalrymple*, is unknown in this country, and the fact is notorious, that all clandestine marriages here have been performed by degraded clergymen, against whom distinct laws have been passed. In how many instances in which actions of seduction have been brought in this country, has it appeared on the evidence of the female that she was betrayed by a promise of marriage? If a marriage by contract were the law of the land, this action could

not be sustained. Also, in cases of breach of promise of marriage, when was it ever argued that the marriage was complete by the contract or promise? It may, therefore, with confidence be said, that neither by the common law of this realm, as traced from its legitimate sources, nor by the rituals of the church, nor the immemorial usage in Ireland down to the present day, has a contract *per verba de præsenti* unsanctioned by any religious ceremony been considered as valid matrimony.

Let us now proceed to consider what light can be thrown on this question by the sources from which we have to draw the principles of our common law, viz. the records of courts of justice, the books of reports and judicial decisions, and the treatises of learned men in our own country. The court has been so fully referred to these authorities already, that I shall pass quickly over them. In Roll. Ab. p. 359, and in Viner, *Bastard*, B. 18, we find an account of Foxcroft's case in the 10 Ed. I. "One "R. being infirm and in his bed, was married to A. a "woman, by the bishop of London privately in no "church nor chapel, nor with the celebration of any "Mass, the said A. being then big by the said R. and "within twelve weeks after the marriage the said A. "was delivered of a son; and adjudged a bastard, and so "the land escheated to the Lord by the death of R. "without heir."—Thus it appears that at this early period the law was considered as going the length of requiring marriage to be celebrated, not only by a clergyman but in the face of the church. *Del Heith's* case, in the 34 Ed. I. which appears in Rogers' Eccles. Law, p. 584, quoted from the Harlerian MSS. is to the same effect as Foxcroft's case. There the ceremony was performed by a clergyman, but at the private residence of *Del Heith* and without the celebration of Mass, and it was determined that the son of this marriage took

nothing in his father's lands by reason of his parents not having been married in *facie ecclesiæ*. The strictness of this practice, which had probably been adopted in pursuance of the canon of Pope Innocent the Third, was relaxed in later times, and the Saxon law was again restored, which held it sufficient that the ceremony should be performed by a priest; Roll. Ab. 341, Baron and Feme, A. 21; 4 Viner p. 21. The next authority to which I shall allude is the case of *Weld* v. *Chamberlain*, 2 Shower 300, where there was a marriage by a priest, but no ring was used according to the Book of Common Prayer, and Pemberton, C. J. says—he "*inclined* to think "that words of contract *de præsenti* repeated after a "parson constituted a good marriage, though no ring "had been used." If by common law a contract were of itself sufficient for this purpose, how could any doubt have arisen upon so insignificant an accompaniment as a ring? In *Hodder* v. *Dickenson*, Freem. 95, which was an action of assumpsit for not performing a promise to marry, three of the judges thought that judgment should be given for the plaintiff, on the ground that marriage had always been considered a good consideration on which to found a contract. But Vaughan, C. J. dissented. And one of his grounds was this.—"When one is to do an act and avers that he was ready "to do it, he ought to show that he was ready to do "it as it may be done; and here a priest is requisite "and the plaintiff does not say *quod obtulit se* in the "presence of a parson." The insufficiency of a contract to create the relation of husband and wife is laid down in Perkins, 194-306. In the case in Co. Litt., 33 a, note 10, already cited to the court, Lord Hale's note is very important. "Neither the contract," he says, "nor the sentence was a marriage."

The case of *Bunting* v. *Lepingwell*, 4 Co. 29, and Sir F.

Moore, 169, cited upon the other side is also very material here. The plaintiff's father, J. Bunting, had contracted with Agnes Adenshall, *per verba de præsenti*. She subsequently married one Twine, and cohabited with him, and Bunting sued her in the court of Audience. The court decreed that she should marry Bunting, which she did, and had issue the plaintiff who was declared to be legitimate, and the second marriage was deemed null; but the reason appears to have been, not that the contract, *per verba de præsenti*, rendered the second marriage void, but that credit should be given to the sentence which annulled it. If by the common law a contract *per verba de præsenti* was sufficient to constitute a good marriage, there could never have been any question as to the second, which must have been invalid. This case establishes clearly that the second marriage was not void, but voidable if the court should decree a marriage *in facie ecclesiæ*, in pursuance of the first contract. The same doctrine is laid down in Co. Litt. 33(a), where it is said, that "if a marriage "*de facto* be voidable by divorce, in respect of consan- "guinity, affinity, pre-contract, or such like, whereby the "marriage might have been dissolved, and the parties "freed *à vinculo matrimonii*, yet, if the husband die before "any divorce, then, for that it cannot now be avoided, "this wife *de facto* shall be endowed; for this is *legi-* "*timum matrimonium quoad dotem*. And so in a writ "of dower the bishop ought to certify that they were "*legitimo matrimonio copulati*, according to the words "of the writ." So in *Hemming* v. *Price*, 12 Mod. 432, where a woman being libelled for adultery with one now dead, by whom she had children living, pleaded that she was married to him; and it was replied she had a former husband then living, a prohibition having been moved in the King's Bench, Holt, C. J., said: "The meaning of the saying, that one shall not be

" bastardized after the death of either of the parents, " is, that the spiritual court shall not proceed to dis- " solve a marriage *de facto* after the death of either " of the parties, as in case of consanguinity, pre-con- " tract, &c.; but in this case if the replication below " be true, the marriage was *ipso facto* void." The same is said by Blackstone, 1 Vol., 434, when speaking of disabilities, and among them of pre-contract " such mar- riages not being void *ab initio*, but voidable only by " sentence of separation, they are esteemed valid to " all civil purposes." It is perfectly plain from these authorities that a contract was only ground to annul a marriage subsequently solemnized, for if the contract was binding the subsequent marriage must have been absolutely void. In the case of *Scrimshire* v. *Scrimshire*, which was a suit for restitution of conjugal rights, Sir E. Simpson, at p. 400, says, " The canon law received " here, calls an absolute contract, *ipsum matrimonium*, and " will enforce solemnization according to English rites; " but that contract or *ipsum matrimonium* does not convey " a legal right to restitution of conjugal rights, though " an English priest had intervened, if it were otherwise " than according to the English ritual." If a contract, as contended on the other side, were a perfect and binding marriage, why should it not support a suit for restitution of conjugal rights?

In continuation of the proposed plan of tracing the principles of the common law through the treatises of learned men, we will now refer to a work alluded to by Sir Launcelot Shadwell, the present Master of the Rolls in England, in arguing the case of *Beer* v. *Ward*, and sup- posed by him to have come from the pen of Mr. Justice Lawrence. It is entitled, " *The Law's Resolutions of* " *Women's Rights, or the Law's Provisions for Women*, "Lond. 1632," and is quoted by several writers, and amongst

others by Sheppard in his Abridgment. At. p. 116, Lib. 3, S. 1, it gives the following quaint statement of the necessity of the presence of a priest at the celebration of marriages. " If Titus and Sempronia, by words *de præsenti* " in a lawful contract, contract marriage, they are man " and wife before God. But they cannot do all that " married couples may, ye know my meaning, *id possumus* " *quod de jure possumus*, but they may (saith Parkins) enfeoff " one another, for they are not yet *una persona* in the eye " of the law. If it fall out that the woman chance to " die before nuptials celebrated, he which is no more but " betrothed shall not have her goods unless it be by her " last will and testament, which she might without craving " licence of any body have ordained according to her " pleasure. If a man affianced to Sempronia, know her " carnally, enfeoff her of a carve of land, and then marry " her in *facie ecclesiæ*, the old world would have judged " this feoffment void coming *post fidem datam et carnalem* " *copulam*, but at this day it is good enough." The book then goes on to say, p. 117, " Public celebration, there- " fore, according to law, is it which maketh man and wife " in plain view of law, *consensus non concubitus facit* " *matrimonium*. But one nail keepeth out another, and " a firm betrothing forbideth any new contract; yet they " which dare play man and wife only in the view of " heaven, and closet of conscience, let them be advised " how they shall take the advantages or emoluments of " marriage in conscience or in heaven, for on earth if the " priest see no celebrated marriage, the Judge saith no " legitimate issue, nor the law any reasonable or constituted " dower." This exactly corresponds with the language of Swinborne, a Judge of the Prerogative court of York, in his treatise on Spousals, pp. 2, 15 and 233, which has been already quoted, and is similar to what we have already seen, were the laws of Saxony from which Alfred drew so

much of his *liber judicialis*, the foundation of our common law. In the preface to Swinborne's treatise, which was published after his death, the legal requisites of marriage are stated by the editor, p. 2, to be the public office and the benediction of the minister, and that without these it is incapable of the legal effects of dower and legitimation of issue. Thus we perceive that the following principles are laid down by all these authorities upon this subject: that a man and woman entering into a contract of marriage are not considered *una persona* in law, and may enfeoff each other; that their issue is not considered legitimate by the common law; that the man has no property in the woman's goods, nor can she be endowed of his lands; that she may make a will without her husband's consent, and in short, that every act which may be performed by a single person, may with equal validity be performed by them after a contract of marriage, *per verba de præsenti*, and yet it is urged by the counsel on the other side, that notwithstanding all this, and although no consequence ordinarily flowing from the mutual relation of husband and wife can follow from this contract, yet it is to be considered a legal and valid marriage, recognized by the common law. This position appears most extravagant.

Let us now see how this argument can be supported by reference to modern cases. *Bruce* v. *Burke*, 2 Adams, 471, *Smith* v. *Maxwell*, 1 R. & M. 80, and *R.* v. *Inhabitants of Barthwick*, 2 B. & Ad. 80, appear to go entirely on the assumption that the presence of a clergyman is necessary. And in the last of these cases Lord Tenterden passes without notice, the argument of counsel as to the effects of a contract, relying exclusively on the orders of the priest. One passage in the case of *Steadman* v. *Powell*, 1 Adams, 58, cited on the other side is all which I shall refer to, as showing Sir John Nichols' view upon this point. "Ministers (he says, at "p. 73) in this country were liable both to ecclesiastical

" censures, and to pecuniary forfeitures, for celebrating " clandestine marriages, prior to and independent of the " marriage act." And this he says is applicable also to Ireland.

But how has this case been met on the other side, or what authorities have been cited by the counsel for the crown, in support of their position. The case of *Dalrymple* v. *Dalrymple*, has been much relied upon and it has been urged that Lord Stowell there stated the civil and canon law to be the foundation of our law concerning marriage. But with great respect to this learned Judge this *dictum* does not appear to be well founded, and as has happened to many other Judges of eminence, may have been hastily pronounced. If it be true, and if the civil and canon law, and not the Saxon law, are the foundation of the marriage law of England, then children born before wedlock should be deemed legitimate, if the ceremony of marriage be subsequently performed. But this has never been held. On the contrary, it has been expressly decided that a child thus born cannot inherit as heir to his father. In the case of *Doe dem Burtwhistle* v. *Vardell*, 6 Bing. N. C. 385, the opinion of the Judges of England was twice taken; once in 1830, when it was delivered by the Chief Baron, (Sir William Alexander,) Bligh, N. R. 479, and, again, in 1840, when it was delivered by Tindal, C. J., 6 Bing. N. C. 385. In this opinion the law upon the subject is very minutely considered and ably stated; and one of the chief reasons which influenced the learned Judges in declaring the law to be that a person born in Scotland, before the marriage of his parents, could not inherit estates in England, as heir to his father seems to have been that the common law of this country was opposed to the civil and canon law. It was upon an attempt to assimilate them in the reign of Henry the Third, that all the Earls and Barons (in the statute of

Merton) with one voice answered that they would not change the laws of the realm which hitherto had been used and approved. In accordance with the opinions of the Judges, the House of Lords, through Lord Chancellor Cottenham, decided that a person born under these circumstances, could not inherit the estates of his father in England. Upon this occasion Lord Brougham certainly expressed considerable doubts as to the soundness of this judgment, and though he did not oppose it, he intimated his opinion of the difficulties which beset the question, and the anomalies which might arise from the future application of the principle. But whilst we acknowledge the great authority of any opinion expressed by so eminent a person and so able a Judge, we should remember that Lord Brougham may not be quite free from prejudice in favor of the system of laws in Scotland, and may be disposed to view the laws and customs of England in the light derived from his study of Scotch law. However this may be, it must be acknowledged that the judgment in *Burtwhistle* v. *Vardell*, goes far to shake the authority of Lord Stowell's *dictum* in *Dalrymple* v. *Dalrymple*. The case of *Bunting* v. *Lepingwell*, (4 Co. 29,) referred to by Lord Stowell, by no means supports his view of the law. It is a silent testimony to the truth of the principle, that a contract *per verba de præsenti*, was never considered to have been a good marriage, and upon the authority of Co. Litt. 33 *a*., if the second husband had died before the marriage had been avoided by sentence of the court, his wife would have been endowed, notwithstanding the first contract. The next authority cited by Lord Stowell, is the case of *Lord Fitzmaurice coram Deleg*., in 1732. But this does not bear upon the present case, for though it is perfectly true, that by the civil law contracts may be enforced in the spiritual courts, and the parties are held bound by them, yet it is equally

clear that these are not the principles of the common law. The same may be said of the cases of *Jesson* v. *Collins*, and *Wigmore's* case, Salk. 437. They were both applications for a prohibition to stay proceedings in the spiritual court, which were refused on the ground that by the canon law, ecclesiastical courts had jurisdiction in such cases. In *Rex* v. *Inhabitants of Brampton*, 10 East 282, the expression of Lord Ellenborough which is referred to as an authority on the other side is very equivocal. He says, p. 288, "now certainly a contract *per verba de* "*præsenti* would have *bound the parties* before that Act." (the Marriage Act). But this is far from establishing the fact that such a contract was a good marriage by common law. And in this case the ceremony had been performed by a person in holy orders. In *Latour* v. *Teesdale*, 8 Taun, 830, the officiating person was also a priest in holy orders. So that the question never was directly raised. So in *Fielding's* case, (5 St. Tr. 610, fol. Ed). Thus it appears that the cases cited on the other side can not be taken as authorities in support of their position.

Before closing this part of the subject it may be well to refer to a case, which, though never reported has yet been noticed in several works. It is the case of *Beer* v. *Ward*, which was frequently before Lord Eldon, and is of importance as showing his lordship's opinion upon the question now under discussion. The case is alluded to in Jacob, p. 194, (note) and in 2 Roper's Law of Husband and Wife, p. 446. It is also referred to in several places in Phillipps on Evidence. Two isues appear to have been sent down for trial by the Lord Chancellor at different times. The first was tried before Dallas, C. J. in the C. P. at the sittings after Michaelmas Term, 1821. And the second before Lord Tenderden in the K. B. at the sittings after Trinity

Term, 1823. The chief question at issue was, whether the children of a pretended private marriage could inherit in preference to the issue of a subsequent public marriage, and the case is thus stated in a note to a book called, *The Doctrine and Law of Marriage, Adultery and Divorce, by the Rev. H. D. Morgan*—Oxford, 1826. "In this case application was made to set aside a second "verdict in the Court of King's Bench, on the ground "that the Chief Justice, in his charge to the Jury, had "mistaken the law, when he said that a marriage without "religious solemnization, or the presence of a priest, and "merely with the consent of parties admitted before sufficient witnesses, and followed by cohabitation was, before "the passing of Lord Hardwick's Act, a valid marriage "for all purposes whatsoever, according to the then known "law of the land, as was the case with the law of Scotland, "to this day." In commenting upon this part of the Chief Justice's charge, Lord Eldon is stated, in the "*Times*," of the 6th May, 1824, to have expressed himself to the following effect: "In stating that our law was the same as the law "of Scotland, he was inaccurate, for it was never so loose "as the law of Scotland. That a marriage might have "been celebrated without the presence of a clergyman, "with some qualification, it was difficult to deny—that was "when the person performing the ceremony, was supposed "really to be a clergyman. The case was different where a "fraud was intended by one of the parties. The Chief "Justice's charge went on to say, that a contract between "the parties, followed by cohabitation and accompanied by "a declaration in the presence of witnesses, constituted a "good and legal marriage at that period of our history, "as it would in Scotland at this day. There was no doubt "that that would constitute a good marriage at present in "Scotland, as was established in a case the other day in "the House of Lords, where it appeared that the husband

" said in the presence of witnesses, 'Madam, I acknow-
" ledge you to be my wife,' and she replied, 'Sir, I
" acknowledge you to be my husband.' In a few moments
" afterwards the husband went into another room and blew
" his brains out. This was held to be a valid irregular
" marriage by the law of Scotland; he said *irregular*, because
" there was a difference between a valid marriage and a
" regular marriage. It was contended in the present case,
" that the attention of the jury ought to have been called to
" the question, 'are you sure according to the evidence that
" such a contract has been so made between these parties.'
" And it was said that the principles laid down by the
" Chief Justice were bad law. Cases were cited to show
" that though a contract of marriage *de præsenti*, before the
" year 1756, was a good contract, (to use the Soliciter
" Generals expression) *quoad hoc*, yet, it was not a legal
" and valid marriage of itself, that is, that the issue of such
" marriage if the parties were not compelled afterwards to
" celebrate it *in facie ecclesiæ*, were illegitimate." Lord Eldon's final opinion as appears by the " *Times*," of 8th May, was that, " the best thing he could do was to direct " a trial at bar; and thereby have the opinion of all the " Judges upon the law." But this trial appears never to have taken place, as Mr. Morgan says, the parties retired from the suit. The opinion of Lord Eldon was directly opposed to that given by Lord Tenterden at *nisi prius*, on the authority of Lord Stowell whose *dictum* in *Dalrymple* v. *Dalrymple*, has not been followed in any of the cases I have cited. We have here, therefore, from the earliest period down to the present, a long chain of testimony to the truth of the principle, that by our common law, a contract *per verba de præsenti*, was never held to constitute *ipsum matrimonium.*

Let us now proceed to consider the Statutes affecting Ireland, which relate to the law of marriage. These, it

will be seen, recognize the principle, that by the common law a contract of marriage *per verba de præsenti*, until sanctioned by a religious ceremony performed by a person in holy orders, was incomplete, and did not constitute lawful matrimony; and not being recognized by the common law as lawful matrimony, did not confer the civil rights incident to that state, or render the issue legitimate.

It has been contended, by the counsel for the crown, that by the civil and ecclesiastical law, and also by the common law, the contract or *sponsalia de præsenti* though not consummate constituted lawful matrimony; and the authorities referred to by them draw no distinction between a contract *per verba de præsenti* being *cum copulâ* or not. I have, however, endeavoured to show that neither the contract *per verba de præsenti*, nor even the sentence of an ecclesiastical court, requiring solemnization of the contract *per verba de præsenti*, was lawful matrimony by the common law; solemnization in pursuance of the sentence being necessary to give the contract or sentence legal effect.

I shall now proceed to consider whether the Statutes of the Irish legislature recognize any such principle as that contended for on the part of the crown, namely, that a contract *per verba de præsenti*, whether consumted or not, is by the common law lawful matrimony. The earliest Statute is the 33 Henry VIII. c. 6. It recites, amongst other matters, as follows:—"As "where heretofore diverse and many persons, after long "continuance together in matrimony, without any allega- "tion of either of the parties or any other at their marriage, "why the same matrimony should not be good, just, and "lawful, and after the same matrimony solemnized and "consummated by carnal copulation, and also sometimes fruit "of children ensued by the same marriage, have, neverthe- "less, by an unjust law of the bishop of Rome, which is, "that upon pretence of a former contract not consummate

" by carnal knowledge, (for proof whereof two witnesses, " by that law were only required,) been divorced and " separated contrary to God's law; and so the true matri- " mony both solemnized in the face of the church, and " consummate with bodily knowledge, and confirmed also " with fruit of children had betwixt them, is clearly " frustrate and dissolved." After a further recital as to dispensations by the church of Rome, it then proceeds, "whereby " not only much discord betwixt lawful married persons, " hath, contrary to God's ordinance, arisen; much debate " and suit at the law, with the wrongful vexation and " great damage of the innocent party hath been procured, " and many just marriages in doubt and danger of " undoing, and also many times undone, and lawful heirs " disinherited, whereof they had never else, but for his " vainglorious usurpation, been moved any such question " sithence freedom was in them was given us by God's " law, which ought to be most sure and certain; but that " notwithstanding, marriages have been brought into " such uncertainty thereby, that no marriage could be " so sure knitte and bounden, but it should lye in " either of the parties powers and arbitre, casting away " the feare of God, to prove a pre-contract, a kindred and " alliance, or carnal knowledge, to defeat the same, and so " under the pretence of these allegations afore rehearsed, " to live all the days of their life in detestable adultery, to " the utter destruction of their swn souls, and the provo- " cation of the terrible wrath of God upon the places where " such abominations were used and suffered." The statute then enacts, " that from the 1st day of " July, 1540, all and every such marriage as within this " church of Ireland will or shall be so contracted betwixt " lawful persons, as by this Act we declare all persons to " be lawful that be not prohibited by God's law to marry,

" such marriages being contracted in the face of the church, " and consummate with bodily knowledge or fruit of children " or child, being had therein betwixt the parties so mar- " ried, shall be by the authority of this present parlia- " ment aforesaid, deemed, judged, and taken to be lawful, " good, just, and indissoluble, notwithstanding any pre- " contract or pre-contracts of matrimony, not consummate " with bodily knowledge, which either of the persons so " married, or both shall have made with any other person " or persons before the time of contracting that marriage " which is solemnized or consummate, or whereof such " fruit is ensued or may ensue as afore, and notwithstand- " ing any dispensation, prescription, law, other thing " granted or confirmed by Act or otherwise." It then provides that no proceedings shall be taken in the spiritual courts contrary to the said Act.

Now, it will be kept in mind that the position contended for by the counsel for the crown, is that, by the common law, a contract *per verba de præsenti*, was a legal marriage, whether consummated or not; the distinction taken being between a contract *per verba de præsenti*, and a contract *per verba de futuro*. In the latter case it being necessary that it should be a contract *cum copulâ*, but in the former not; and it has been contended on the part of the crown, that the religious celebration or solemnization was, in the language of Lord Stowell, " matter of order."

It is submitted that the Statute of Henry VIII. here referred to, and which was passed 300 years ago, is distinctly at variance with this position. It states that the invalidating a marriage had in *facie ecclesiæ*, by a prior pre-contract, was " by an unjust law of the bishop of Rome." It states that the divorcing and separating parties married in *facie ecclesiæ*, in consequence of such pre-contract, was " contrary to God's law." It states the marriage in *facie ecclesiæ* to be the "true matrimony;"

speaks of such marriage as contradistinguished from such pre-contract with another as the "just marriage;" and the parties married in *facie ecclesiæ* as the "lawful married persons." It speaks of the persons proving such pre-contract, so as to defeat the marriage in *facie ecclesiæ*, as "casting away the fear of God." It speaks of the parties establishing the pre-contract as living in "detestable adultery," and the proceeding as an "abomination." It enacts that the mariage in *facie ecclesiæ* shall be indissoluble, notwithstanding any pre-contract of matrimony not consummate; and yet, notwithstanding all these recitals and provisions, in a Statute passed 300 years ago, it is said, that this "unjust law of the bishop of Rome," this his "vainglorious usurpation," leading in its consequence to "detestable adultery;" this "abomination," this proceeding contrary to "God's law," was and is a part of the common law of Ireland.

The corresponding Statute in England is the 32 Hen. VIII. c. 38, which, as far as relates to pre-contracts, was repealed by the 2 & 3 Edw. VI. c. 23. This Statute restored the authority of the ecclesiasticalcourt, to entertain suits for the enforcing of the contracts mentioned in the Statute of 32 Hen. VIII. c. 38, English: "and to "give sentence for matrimony commanding solemnization, "cohabitation, consummation, and tractation as becom-"eth man and wife to have, &c."

Swinburne, in his work on Spousals, page 15, in observing on the Statute of Edward the Sixth, says "wor-"thily, I say, and upon good ground was this branch of "the Statute (established by the father) repealed and made "void by his gracious son, king Edward the Sixth, for "spousals *de præsenti* though not consummate be in truth "and substance very matrimony, and, therefore, perpetu-"ally indissoluble except for adultery; although by the "common law of this realm, (like as it is in France and other

" places) spousals not only *de futuro*, but also *de præsenti* " be destitute of many legal effects wherewith marriage " solemnized doth abound, whether we respect legitima- " tion of issue, allocation of property in her goods, or right " of dower in her husband's lands."

There is not any Statute in Ireland corresponding with the 2 & 3 Edward VI. c. 23, English. The Irish Statute of 33 Hen. VIII. c. 6, was therefore never expressly repealed; but the 3 & 4 Philip & Mary, c. 8, Irish, which repeals all Statutes passed against the supremacy of the see of Rome since 20 Henry VIII., is considered to have impliedly repealed the 33 Henry VIII. This Statute of 3 & 4 Philip & Mary was repealed by the Irish Act, 2 Elizabeth, c. 1. But the 2nd section of the latter Act raises a doubt whether the 33 Henry VIII. c. 6, was revived save as to the provisions relating to consanguinity. In order, as it is conceived, to remove this doubt, the 12 Geo. I. c. 3, s. 4, Irish, was passed, which recites that " some doubts have arisen whether marriages con- " summated by carnal knowledge can be avoided by pre- " contracts without consummation, which has been the " ground of many vexatious suits; for remedy whereof, " and to prevent all doubts concerning the same for the " future, be it enacted and declared, that no contract of " marriage only not consummated by the carnal know- " ledge of the parties, shall be of any force towards " making void a subsequent marriage consummated by " such carnal knowledge."

The doubts which are here stated to have arisen were, whether the express repeal of the 3 & 4 Philip and Mary, by the 1st section of the 2 Eliz., had had the effect of reviving the 33 Hen. VIII. c. 6, and this Statute having removed these doubts, the 33 Hen. VIII. must be considered as still in force. The 12 Geo. I. is an important Statute as distinguishing " contracts of marriage only consum-

mated," from "a marriage consummated;" and it is plain from the recital that the legislature did not consider the marriage as void by the previous contract, which it would have been, if, as contended by the counsel for the crown, a contract *per verba de præsenti* were a good common law marriage. On the contrary, the object clearly was to declare the law as to proceeding in the ecclesiastical court to enforce such contract, and thereby avoid the regular marriage. If the contract had been valid, there would have been no occasion for a suit to enforce it. (*Crampton*, J. That Statute allows the ecclesiastical courts to retain their jurisdiction when the contract has been followed by consummation.) Just so.

The next Irish Statute bearing on the point is the 58 Geo. III. c. 81, s. 3, which extends to all contracts, whether *cum copula* or not, and excludes altogether the jurisdiction of the ecclesiastical court. It enacts, "That "in no case shall any suit or proceeding be had in any "ecclesiastical court of that part of the United Kingdom "called Ireland, in order to compel a celebration of any "marriage in *facie ecclesiæ* by reason of any contract of "matrimony whatsoever, whether *per verba de præsenti*, or "*per verba de futuro*, which shall be entered into after "the end of ten days after the passing of this act."

Now although this is a modern Act, so far as Ireland is concerned, the section is transcribed from the English Marriage Act of the 26 Geo. II. c. 33, s. 13, passed nearly 90 years ago: and I am justified in looking to that Act, as showing what 90 years ago was considered to be the common law. The then Solicitor-General of England, (Murray,) afterwards Lord Mansfield, stated in the course of the debate upon that Act: "I believe it will be allowed, "that if a man and woman seriously and sincerely enter "into a marriage contract without the interposition of a "clergyman, or any religious ceremony whatever, it will

" be a good marriage both by the law of God and the law " of nature, *yet the law of this society*, and I believe of " every other Christian society, has declared it not to be a " good marriage. Therefore, why may not we declare " those marriages to be void which are solemnized by " scandalous worthless clergymen, in a clandestine manner; " for it is really doing no more than what the honorable " gentlemen said we might do; it is only denying the " assistance of the law for enforcing the performance of " such a contract." Parl. Hist. v. 15. p. 78.

This view of the common law, as laid down by the Solicitor-General of England, was, as it is submitted, recognized by the clause of the English Marriage Act of the 26 Geo. II. relating to contracts of marriage, which I have stated to the court, and which was introduced into Ireland by the 58 Geo. III. c. 81, s. 3; and it will be observed that there is no provision in the corresponding section of either Act nullifying contracts *de præsenti* or *de futuro*, but the enactment is, that there shall be no suit in the ecclesiastical court to *enforce* the celebration of any marriage *in facie ecclesiæ*, by reason of such contracts. Neither is there any provision in the Act for the solemnization of marriage by a priest, because that was always considered as a necessary form. All the Act looks to is the publication of banns, or the possession of a license, &c. Let us admit contracts *per verba de præsenti* to have been valid marriages before the passing of this Act, which of its provisions rendered them illegal? Nothing can be found in it which would prevent Presbyterians from being married in any manner they pleased, if the banns were published, and the other steps required by the Act relating to publicity had been duly taken. But it is perfectly clear that the Act goes all along upon the assumption, that solemnization by a clergyman was necessary to a legal marriage. If this had been otherwise, the evils which it

proposed to remedy would have been left untouched. Every section of this Act squares with the opinion of the Solicitor-General, (Murray,) as expressed in the debate. Therefore, I contend that by all these Acts we have a recognition of the principle, that the common law of England never acknowledged the validity of a contract; that the civil and canon law had done so, and became ancillary to it by completing the marriage by a ceremony; but that from the time of Alfred, the common law always required solemnization by a Christian clergyman, and that every Statute assumed this principle. (*Crampton*, J.—This is a very important point; for, if the position be true that marriages *in facie ecclesiæ* after contract, are voidable and not void, the means of enforcing the prior contract being taken away, the marriage must thus become unavoidable, and the prior contract consequently void.) The position may be illustrated by the present case. We have here, first, a contract, (for I put out of the question the presence of a Presbyterian minister on the occasion, who can only be considered a layman,) and next a marriage *in facie ecclesiæ*. Suppose (before the passing of the 58 Geo. III.) there had been children of the second marriage and one of the parents had died, could there have been a proceeding to avoid the second marriage? Certainly not, if the authority of Blackstone, or Hale, or of the case of *Bunting* v. *Lepingwell*, be considered. The Statute 58 Geo. III., has the same effect now as the death of one of the parents would have produced before that Act passed, and puts the parties into the very same position, making the second marriage unavoidable. If the argument of the counsel for the crown be good, the prisoner here would have two lawful wives, and two sets of children. The error has arisen from a mistake as to the extent to which the law of England has adopted the canon law, and the difficulty is all removed by attending to this distinction, viz: that a contract is not an

actual marriage; but that it was enforcible by suit in the ecclesiastical court.

I will now go through another class of Acts, referring to marriages, commencing at the time of the commonwealth. In 1644, by the 51st Ordinance, the Book of Common Prayers was abolished, and the directory which was substituted, enjoined marriages to be "solemnized by a lawfull "minister of the word,"—Scobell, p. 86. This was when the Presbyterians were the dominant party in the state.

At a later period, when the fifth monarchy men appeared, and latitudinarianism lapsed into unbelief, the religious ceremony of marriage was abolished, and a form was enacted as given in the Ordinance of 1653, C. 6, (Scobell, p. 236,) which retained a solemnization though it was no longer required to be in the presence of a priest. But at neither of these periods was a contract recognized as a valid marriage. Then came the Restoration, and with it the 17 & 18, C. II. c. 3. for the confirmation of marriages. It recites, that "by virtue, or color of certain Ordinances, "or certain pretended Acts, or Ordinances, divers mar- "riages since the begining of the late troubles, have "been solemnized in some other manner, than had been "formerly used and accustomed within this kingdom," and enacts, that "for the correcting and avoiding of all doubts "and questions which may be made touching the same, "all marriages, had and solemnized in this kingdom of "Ireland, since the 1st day of May, 1642, before any "justice, or reputed justice of the peace, of this your "Majesty's kingdom of Ireland, and by such justice so "pronounced or declared; and all marriages within this "kingdom, since the same 1st of May, 1642, had or "solemnized according to the directions or true intent of any "Act, or Ordinance, or reputed Act or Ordinance, of one "or both Houses of the Parliament of England, or of any "convocation sitting at Westminster, under the name, style

" or title of a Parliament, or assuming the name, style or " title of a Parliament, shall be and are hereby adjudged, " esteemed and declared to be, and to have been of the " same force and effect in law, as if such marriages had " been had and solemnized according to the rites and " ceremonies established or used in the Church of Ireland, " any law, custom, or usage thereof to the contrary in any " wise notwithstanding."

Now it is first to be observed, that it appears from this Statute, that the marriages during the Usurpation, were before justices of the peace, and that those marriages were not only contracts *per verba de præsenti*, but something more, for the Statute only validates marriages, had before a justice of the peace, "and by such justice or " reputed justice, so pronounced or declared;" or had or solemnized in the manner required by the Ordinances of the usurping power. Thus even in the time of the Usurpation, there was a species of *civil solemnization* of the contract.

But the Statute recites that these marriages were, "had " and solemnized in some other manner, than hath been " formerly used and accustomed within this kingdom." This plainly shows that a contract *per verba de præsenti*, *was not* the marriage used and accustomed within this kingdom prior to the Usurpation; and the latter part of the first section, shows that a religious solemnization *was* used, and accustomed in Ireland, prior to the Usurpation. The section validates the marriages *solemnized* before the justices, &c. "as if such marriages had been had, and *solemnized* " *according to the rites and ceremonies established* or used in " the Church of Ireland." The position of the counsel for the crown, appears directly at variance with the inference necessarily to be drawn from this Statute. In the address to Cromwell after the Ordinance, legalising marriage, which is alluded to in *Morgan's Law of Marriage*,

1 vol. p. 140, it is distinctly said, that before the period of the Usurpation, a marriage to be valid, as to the legitimacy of the issue must be solemnized by a priest in orders. [Perrin, J.—The ordinance of 1653, was relaxed by the Ordinance of 1656, c. 10, which repealed the clause in the first Ordinance, declaring all marriages illegal, which were not celebrated according to the provisions of that Ordinance.] Yes, and that may account for the case of *Tarry* v. *Browne*, (1 Sid. 64,) when a marriage before a "parson in sacred orders," was alleged.

Let us now examine the class of Statutes relating to clandestine marriages. The 12 Geo. I. c. 3, which was for preventing marriages by degraded clergymen, or popish priests, made the celebration of a marriage by such persons between a Protestant and a Roman Catholic, or two Protestants, a capital felony. The 19 Geo. II. c. 13, made all marriages between a Protestant and a Roman Catholic, or between two Protestants, if celebrated by a popish priest, absolutely null and void. And the 33 Geo. III. c. 21, s. 12, imposes a penalty of £500, on any priest celebrating such marriages. If a contract *per verba de præsenti*, entered into between any two persons, had been sufficient to constitute matrimony, these Acts would have been useless and inconsistent. Not one word is said of a contract throughout the whole of them. They are in fact declarations, that at those periods, solemnization was considered necessary to a marriage. Taking this chain down to the present day, the 3 and 4 Wm. IV. c. 102, which repeals so much of these Acts as makes it felony for Roman Catholic clergymen to celebrate such marriages, leaves untouched the 19 Geo. II. and expressly guards against giving validity to any marriage ceremony, not recognised as valid by the existing laws of Ireland.

The next class of Acts, is that relating to Protestant Dissenters. The 11 Geo. II. c. 10, enacts that Protes-

tant Dissenters, shall not be prosecuted in the Ecclesiastical Courts, for entering into matrimonial contracts in their congregation, and living together as husband and wife, by virtue of such contract. This Statute however, made no express provision, that the marriages of Protestant Dissenters, by their own Teachers, should be valid. Some doubts appear to have arisen, whether this was not fairly deducible from the Toleration Acts, 1 Wm. & M. s. 1. c. 18, Eng., and 6 Geo. I. c. 5, Ireland. And this question was raised in *Hutchinson* v. *Brooksbank*, 2 Lev. 376, and as to burials in *Kemp* v. *Wickes*, 3 Phill, 264; and in Ireland the doubt might well exist, as marriages of Dissenters were to a certain degree recognised by the 11 Geo. II. c. 10. It was to remove these doubts, that the Dissenters' Marriage Act was passed. This Act, (21 & 22 Geo III. c. 25,) after reciting the doubts, proceeds to enact, that all matrimonial contracts or marriages, heretofore entered into between Protestant Dissenters, and solemnized or celebrated by Protestant Dissenting ministers or teachers, shall be good and valid to all intents and purposes. Now, it is to be observed, that the doubts were not whether a contract *per verba de præsenti* was valid, the doubts were, "whether marriage solemnized by Protestant "Dissenting ministers or teachers," was such a solemnization as the common law required. If by the common law, a contract *per verba de præsenti* had been lawful matrimony, it is impossible that any such doubts could ever have arisen.

Upon the whole review of Irish legislature, it is worthy of remark, that at all times and by all persons, (including the Presbyterians themselves,) solemnization has always been considered a necessary annexation to marriage, and in no one place is it even hinted that a contract *per verba*

de præsenti has been held in itself sufficent to constitute matrimony.

With respect to Jewish marriages, they have been at all times celebrated according to the rites of the Jewish religion, and all questions arising upon them have been determined by the Jewish law, ascertained by the examination of witnesses. The case of *Andreas* v. *Andreas*, reported in the note to 1 Hagg. p. 9. App. shows this to have been the custom before the passing of the Marriage Act, as the case of *Lindo* v. *Belisario*, 1 Hagg. 216, and *Goldsmid* v. *Bromer*, 1 Hagg. 324, shows it to have been the custom after that period. If a contract *per verba de præsenti* had been sufficient to constitute very matrimony by the common law of this land, where would have been the necessity for the minute and troublesome inquiry into the laws and customs of the Jewish nation which took place in those cases?

In considering the subject of Quakers' marriages, it may be useful to inquire into the grounds of their departure from the forms of the Established Church. In Clarkson's Portraiture of Quakerism, 2 vol. p. 5, we find the following explanation.—"George Fox, as he "introduced these and other salutary regulations on the "subject of marriage, so he introduced a new manner "of the solemnization of it. He protested against the "manner of the world, that is, against the formal "prayers and exhortations as they were repeated, and "against the formal ceremonies as they were practiced "by the parish priest. He considered that it was God "who joined man and woman before the fall, and that "in Christian times, or when the man was truly reno-"vated in heart, there could be no other right or honour-"able way of union. Consistently with these views of "the subject, he observed that in the ancient Scriptural "times persons took each other in marriage in the assem-

" blies of the Elders, and that there was no record " from the book of Genesis to that of Revelations of " any marriage by a priest. Hence it became his new " Society, as a religious or renovated people to abandon " apostate usages and to adopt a manner that was more " agreeable to their new state." The Quakers, therefore, did not adopt the contract *per verba de præsenti* as the existing law, but they considered the existing law contrary to Scripture, and on Scriptural grounds they omitted the ceremony and prayers. It has never been contended that if two Quakers were to write mutual agreements to become husband and wife, that would constitute matrimony. The question has been whether marriage performed according to their ceremonies is valid. The mode of celebrating these marriages is described by Clarkson, at p. 7 of the 2nd vol. of his work, and the reason given why Quakers marrying with persons of other religious persuasions are disowned is, that " no person who " marries out of the Society can be legally married without " going through the form of the Established Church, " and those, therefore, who submit to this ceremony as " performed by a priest, acknowledge the validity of a " human appointment to the ministry," which the Quakers deny. The way in which Quakers are admitted to the ministry is explained by Clarkson, 2 Vol. p. 263.

One of the earliest cases that arose concerning Quakers' marriages was before Sir Matthew Hale. It will be recollected that he had been appointed by the Parliament of 1651, one of a Committee to consider the subject of a reformation of the law, and in 1653 he was made a judge. It is not clear whether it was upon the recommendation of this Committee that the Ordinance was passed directing marriages to be solemnized before a justice of the peace, but it may well be believed that Sir Matthew Hale, a member of the Barebones Parliament in 1654, was

inclined to the opinions of the party with whom he was acting, and would have been disposed to have considered marriage in the light of a civil contract only, if he could legally have done so. The case of Quakers' marriage which came before him is thus stated in Burnet's Life of Hale, Lond. 1826 pp. 85-86.—"He was a devout "Christian, a sincere Protestant, and a true son of "the Church of England; moderate towards Dissenters, "and just even to those from whom he differed most; "which appeared signally in the care which he took of "preserving the Quakers from that mischief which was "likely to fall on them, by declaring their marriages "void, and so bastarding their children. In a trial that "was before him, when a Quaker was sued for some debts, "owing by his wife before he married her, and the "Quaker's counsel pretended that it was no marriage "that had passed between them since it was not solemnized "according to the rules of the Church of England, he "declared that he was not willing on his own opinion to "make their children bastards; and gave directions to "the jury to find it special." This trial took place before the Historian of the common law, and if a contract *per verba de præsenti* had by that law been then considered valid matrimony would he not have availed himself of it? He says not one word of a contract, but says that in his opinion "all marriages made according to the several "persuasions of men ought to have their effects in law."

The conduct of Sir Mathew Hale, upon this occasion, is thus noticed in Roger North's Life of Lord Guilford, 1 Vol. 126, (Lond. 1819).—"Marriage of Quakers found "specially at Guildhall. This was gross in favor of these "worst of sectaries, for if the circumstances of a Quaker's "marriage were stated in evidence, there was no colour "for a special verdict; for how was a marriage by a "layman without the liturgy good within the acts

" that establish the liturgy? * * * * Here though " the right was debated, and could not be determined for " the Quakers, yet a special verdict, upon no point, " served to baffle the party that would take advantage of " the nullity."

It is hardly necessary to remark on the case cited by the counsel for the crown, and stated in Sewell's History of the Quakers, to have been decided by Judge Archer, as the reasoning by which this learned Judge supports his opinion, is of itself almost sufficient to destroy its authority. But it may be well to observe that this Judge Archer, who was raised to the bench in the time of the Commonwealth, was removed some years after the restoration. The case mentioned by Mr. Justice Willes in *Harford* v. *Morris*, (1 Hagg. App. 9, note,) when, in an action of crim. con. by a Quaker, it was held unnecessary to prove a marriage according to the rites of the Church of England, is explained by Dennison, J., in *Woolston* v. *Scott*, referred to in Buller's N. P., p. 28. He there states the distinction to be, that a case of this nature is an action against a wrong doer, and not a claim of right.

In this country the case of Quakers' marriages has been settled by the judgment in *Houghton* v. *Houghton*, 1 Molloy, 611, which explains the grounds upon which they are sustainable here. The counsel for the crown, however, inquire how Quakers' marriages in England are to be sustained, if not as contracts *per verba de præsenti*. The answer is, that the case of *Hutchinson* v. *Brooksbank*, and the observations of Sir J. Nicholl, in *Kemp* v. *Wickes*, are calculated to show that the effect of the toleration act in England had been to make valid the marriages of Dissenters solemnized according to their own ceremonies. The effect of the English Marriage Act, if no exception had been made in it, would have been to render it impera-

tive on all persons to be married in church. There were, however, two classes of persons towards whom it would have been very oppressive to have required this :—1st, Jews who could not be reasonably required to join in a Christian ceremony ; and 2ndly, Quakers who, by their religious opinions, considered the ceremony of the Church as repugnant to Scripture. Accordingly Jews and Quakers were excepted out of the Marriage Act, where both parties were Jews, or both Quakers, which exception may be considered as having recognised, as valid, the marriages celebrated according to their own ceremonies. Still, however, the question of the validity of Quakers marriages in England, was by no means free from doubt; and there has, in consequence, been an express enactment on the subject, 6 & 7 Wm. IV., c. 85, s. 2, by which the marriages of Jews and Quakers are declared and confirmed good in law, provided both parties belong to the same society, and comply with the other provisions of that act as to registration.

Having now gone through this branch of the subject, and established, it is hoped, upon the authority of immemorial usage, of the records and proceedings of courts of justice, of the treatises of learned men, and of the whole code of Irish legislation, that a contract *per verba de præsenti*, has never been held to constitute matrimony, let us proceed to argue the second question, viz: whether, if solemnization by a person in holy orders be necessary by the common law, a Presbyterian minister is capable of celebrating the ceremony between a member of the Established Church and a Dissenter. By the Dissenters' Marriage Act, 21 & 22 Geo. III. c. 25, those cases are provided for where both parties are Dissenters, but as it does not apply to marriages where one party is a member of the Established Church, it can be no authority in the present case. And, further, the Presbyterians have thrown aside this act, and now assert that their ministers are recognized

by our law as persons in holy orders. This appears to be a proposition most difficult to maintain. Without entering into the theological part of the question as to Presbyterian orders, which has been already so fully discussed, it may be sufficient to inquire whether by the common law or by the statute law Presbyterian ministers have ever been recognized as persons in holy orders. The doctrine of the canon law will be seen by reference to Ayliffe's Parergon "Ordination," p. 398, and Burn's Ecclesiastical Law, 3 vol. p. 23. With respect to the provisions of the common and statute law, we may divide the consideration of the subject into three periods. The first from the beginning of the Christian era to the time of the Reformation; the second from the Reformation to the Act of Toleration; and the third from the Act of Toleration to the present time. During the first period the Roman Catholic was considered the universal religion of this county, as during the second was the Protestant. And in neither was dissent recognized, *R.* v. *Larwood*, 1 Ld. R. 30, 4 Black. Com. 46–9. The acts 1 Eliz. c. 2, ss. 4, 7, 14, and 23 Eliz. c. 1, establish this fact. The Act of Uniformity 13 & 14 C. II. c. 4, expressly provided for the regular episcopal ordination of priests, and so far from acknowledging dissenting ministers, it prohibited, by the 13th section, all who were not episcopally ordained from holding benefices. Down to this period, therefore, we have episcopal orders solely recognized. Then came the Toleration Act, 1 W. & M. c. 18. The first section which exempts Dissenters, taking the oaths of allegiance and supremacy, from the penalties of several previous acts of parliament, does not exempt them from the penalties of the Act of Uniformity. But it is in the eighth section that the principle of distinction between episcopal and other orders is most clearly shown. And in *King* v. *Inhabitants of Gloucestershire*, 15 East. 577, it appears to be allowed that the holy orders mentioned in that section

are distinguished from the pretended holy orders also mentioned, in that the former are episcopal and recognized, and the latter irregular and unrecognized. There is nothing whatever in this act to lead to the belief that dissenting clergymen were hereby recognized as being in holy orders. And as, by the Marriage Act, Dissenters are clearly prohibited from solemnizing marriages, the argument of the counsel for the crown goes the length of saying, that under the Toleration Act they were allowed to do what, by the Marriage Act, they were prohibited from doing. In *Scrimshire* v. *Scrimshire*, 2 Hagg. 395; Sir Edward Simpson, (p. 400,) says, "as a priest popishly ordained is allowed "to be a legal Presbyter, it is generally said that a mar- "riage by a popish priest is good." And the reason of this is manifest, viz. that the same rules of ordination are observed in both churches. So in *R.* v. *Inhabitants of Brampton*, 10 East. 289, Lord Ellenborough says, treating of a Roman Catholic Priest, "such a person "would be recognized by our church as a priest capable of "officiating as such without new ordination." And in *Haydon* v. *Gould*, 1 Salk, 119, the marriage by a Sabbatarian was held invalid as not being solemnized by a person in holy orders, *per Presbyterum sacris ordinibus constitutum*. If I have already proved my first position, viz., that a ceremony by a person in holy orders is necessary to constitute matrimony, I think I have now established the second part viz., that at no period of our history could Dissenting clergymen be considered as answering this description. Not certainly during the first or second periods, because Dissent was not then recognized, nor after the Toleration Act, for Presbyterians could only rank then as amongst Dissenters, and we have authority to show that their marriages were not considered valid, because their ministers were not held to be in holy orders.

The only point now remaining for consideration is,

whether the ceremony performed between the prisoner and Hester Graham, although absolutely void, was such a marriage *de facto* as to make the prisoner guilty of the crime of bigamy. Much stress has been laid by the counsel for the crown, on a passage from 3 Inst. 88, where the words of the Statute of Bigamy, 1 Jac. 1, c. 11, are said to extend to a marrige *de facto* or voidable by reason of a pre-contract, &c., "for it is a marriage in judgment of law "until it be avoided, and, therefore, though neither mar- "riage be *de jure*, yet they are within the Statute." And this would undoubtedly be true if the first ceremony here had constituted a voidable marriage, but the principle has no application in cases where, like the present, the first ceremony was an absolute nullity. The case put in 1 Hales Pl. Cr. 693, illustrates this, and shows that bigamy must be the result of two valid marriages. We have already seen from the distinct authority of Co. Litt. 33(a), and others, that if the first ceremony is merely to be supported as a contract, the subsequent marriage is only voidable, and valid until avoided. Now it is a rule in bigamy cases that the second wife is competent as a witness, and the first wife is not. 1 East Pl. Cr. 469,—Buller, N.P. 287. And the reason as given by East is that the first marriage being proved, the second wife is not so much as a wife *defacto*. Can it be contended in the present case, that Hester Graham would have been a competent witness for the prisoner? Clearly not. Because the proof of the contract does not invalidate the second marriage which is only *voidable*. It is an extravagant proposition to say that a man can be indicted for bigamy when the second ceremony is legal and valid, and a marriage voidable for pre-contract, &c. is valid until avoided. And the passage already cited from 3 Inst. is clear upon this, for it says that a marriage *defacto* or voidable by reason of pre-contract is a marriage in judgment of law until avoided; and therefore Lord

Coke says that if a man being married, and such marriage being voidable for pre-contract, marries again, he is guilty of bigamy. That is, the marriage being only voidable and valid until avoided, he cannot *afterwards* marry. But this clearly shows that the marriage voibable for pre-contract did not constitute bigamy; but was sufficient to prevent a *further* marriage. In the case of *Bunting* v. *Lepingwell*, it is clear from these authorities, that Agnes was not guilty of bigamy in marrying Twine; and if so, the prisoner here is not guilty.

But however it may be attempted to support this indictment, whether by treating the first marriage as a contract, or as a solemnized marriage, there are several modern cases to show that to constitute bigamy, both marriages must be valid, or carry with them a strong presumption of being so. And here I submit that the first ceremony was not a valid marriage, nor such a marriage *defacto* as would warrant the court in assuming it to be a valid marriage.

In *R.* v. *Charleton*, Jebb's Cr. Ca. 268, a *valid* marriage was held necessary. In *R.* v. *Allison*, R. & Ryan, 109, such a marriage *defacto* as was allowed to carry a strong presumption of a marriage *de jure* was held sufficient. In the note to *R.* v. *Inhabitants of Brampton*, 10 East, 287, it is said that in admitting a *defacto* marriage it must be understood as containing *primâ facie* evidence of a lawful marriage. So in the case of *R.* v. *Jocob*, M. Cr. Ca. 140, the point to be determined is said to be whether the marriage was void or voidable only. And all admissions of *defacto* marriages, are in cases where valid marriages are supposed.

This I think establishes my third and last proposition, that the prisoner cannot in the present case be found guilty of bigamy, for if the arguments now brought forward, are well founded, the first ceremony is clearly void, and

cannot therefore be taken to be even such a marriage *defacto* as will support the indictment.

In conclusion, it only remains for me to express a hope that the spirit in which the question raised in this argument, has been alluded to by the counsel for the crown, at the close of his address, may not be shared by the Presbyterian party in this kingdom. If doubts have been raised as to the legal validity of marriages celebrated under circumstances like the present, it is much for the interest and repose of the Presbyterians of Ireland that the question should be solemnly argued and deliberately settled; and I entertain too much respect for the character and principles of that large and important class of Her Majesty's subjects in this kingdom to allow of my joining with the learned counsel for the crown in his apprehensions of the effect which this argument may produce upon their minds. Still less can I agree with him in his fears for the safety of the Established Church of this kingdom. It is much to be hoped that the attachment with which the Presbyterians are said to view this Church, may still continue; but if, unhappily, circumstances should arise calculated to diminish that feeling, the Church as established in this kingdom will remain unshaken, strong in the affection of its members, and supported by the spirit of truth which it enjoys.

Blackburne, Attorney General, in reply—There appear to me to be two questions arising in this case. First, whether this was not a valid marriage as being celebrated by a person in holy orders, which view concedes the necessity of a religious ceremony; and secondly, (if I do not succeed upon the first question) whether it was not a valid marriage, independently of any religious ceremony, which I contend the law of Ireland does not require. These are the two questions. But there is a third mode of arguing the case, which I shall keep by itself, and which consists in the assertion, that the court is to collect from a consideration of the statute law of the land, that marriage is a religious ceremony, and that by the common law of the land, as thus declared, it must be celebrated by a priest canonically ordained. I prefer this order to that followed by the learned counsel for the crown, who preceded me, because I shall thus argue the case on its true facts; for here there was not simply a contract *per verba de præsenti,* but a religious ceremony as solemn, as impressive, and in its nature as essentially spiritual, as any ceremony which the wisest, ablest and most religious man could devise. I hold in my hand a book, which though certainly not an authority, may with propriety be referred to as testifying facts relating to the discipline of the Presbyterian Church in Ireland, and which will be found amply to bear out my description, both as regards the person performing the religious ceremony, and as regards the essential attributes of the ceremony itself. It is entitled, "The Constitution "and Discipline of the Presbyterian Church," and has been already cited by the learned counsel who opened the case The form of ordination as given in the passages

then read to the court, may safely be said to constitute a ceremony of the most solemn and religious description, and an attentive perusal of the work will not fail to satisfy the reader that in the person of a Presbyterian clergyman, is to be found an ordained minister of the Christian religion, ordained by a Church corresponding in almost all points of doctrine with the Established Church of this kingdom. In the same book will be found the rules and regulations of the Presbyterian Church with regard to marriage, which prove beyond all doubt, that the ceremony as used in this Church, is as essentially religious and as impressive and authoritative as that of any Church, or of any religion in the world.

It need scarcely be remarked that what has been said of the discipline and rule of the Presbyterian Church in Ireland, may in like manner be predicated of the Established Church of Scotland. They are identical in doctrine, discipline, and government, and whatever the legislature has said of one, must be taken as said of the other also; and I will show by undisputed authority, that Presbyters of the Scotch Church, are in contemplation of the legislature ordained ministers of the gospel. By the 58 Geo. III. c. 84, after reciting that "doubts have arisen "concerning the validity of marriages, which have been "had and solemnized within the British Territories of India, "by ordained ministers of the Church of Scotland, as by "law established," and that it is expedient to remove such doubts, it is declared and enacted, that all marriages theretofore solemnized by ordained ministers of the Church of Scotland, shall have the same force and effect as if solemnized by clergymen of the Church of England, and that from the 31st December, 1818, all marriages so solemnized, when either both or one of the parties are members of, or holding communion with, the Church of Scotland, shall be equally valid. We have thus the

authority of the legislature for saying that the person who performed the ceremony in the present case, was an ordained minister of the Christian religion.

But I will now proceed to show that he has further been pronounced by the legislature as a person in holy orders, capable of administering the sacrements, as received in our Church. By the Toleration Act, Ireland, 6 Geo. I. c. 5, s. 8, it is enacted, that Dissenting ministers taking the oaths of allegiance, supremacy and abjuration, and making the declaration therein required, shall not be liable to the penalties of the Act of Uniformity, "for consecrating or ad- "ministering the sacrament of the Lord's Supper, or for "preaching or officiating in any congregation permitted "by that Act." The counsel for the prisoner have fallen into a mistake in treating the English and Irish Toleration Acts as identical, for the latter appears to go farther than the former, and whilst the English Act only exempts Dissenting ministers from penalties for preaching, the Irish distinctly recognizes Protestants in holy orders dissenting from the Church of Ireland, and pronounces them competent to administer one of the most important functions which attach to the office,—the sacrament of the Lord's Supper. How is it as to Baptism, the other sacrament of our Church? In *Kemp* v. *Wickes*, already cited, a clergyman refused to bury the child of Dissenting parents, upon the ground that it had not been baptised according to law. This case occurred in 1809, and Sir John Nicholl, in a very elaborate and learned judgment, decided that the ceremony of baptism by a Calvinistic Independent clergyman was perfectly valid. After remarking at large on the law upon this subject, Sir J. Nicholl thus proceeds: "it seems "to me by no means proper, however, wholly to pass over "the view which may be taken of this subject as affected "by the Toleration Act. By that Act, an important "change was worked in the situation of His Majesty's "Protestant Dissenting subjects; and the baptisms now

" administered by Dissenting ministers, stand upon " very different grounds, from those by mere laymen." The court will recollect that he had argued this point at considerable length in the previous part of his judgment. " There were many laws both of Church and State, requir- " ing conformity to the Church, creating disabilities impos- " ing penalties, and denouncing excommunication upon all " non-conformity. Now supposing that during the exis- " tence of these disabilities it could be maintained that in " point of law no Act of non-conformists could be " recognized in a court of justice, and therefore that a " baptism by such persons could not be noticed at all, " yet, could it be maintained, now, that such a baptism was " to be considered as a mere nullity?" 3 Phill. 297. Now looking at the words of the Irish Toleration Act, which allows the administration of the Lord's Supper by a Presbyterian minister, can it be doubted that baptism was permitted also? Whatever might have been the case before the Toleration Act, can it be said that after this enactment, acknowledging ministers and teachers of Dissenting congregations, the rites and ceremonies performed by them provided they are not contrary to the Christian religion are not recognized by law? At p. 299, Sir John Nicholl alluding to the case of *Evans* v. *The Chamberlain of London*, quotes the following expressions from the judgment of Mr. Justice Foster. " The defendant does not plead the " Toleration Act to excuse one offence by another, but " to show that although the rubric did require conformity in " all things, yet by the Toleration Act the rubric is taken " out of the way, and does not extend to his case. The " Act of Toleration is not to be considered merely as an " Act of connivance, it was made that the public worship " of Protestant Dissenters might be legal, and they might " be entitled to the public protection." He afterwards refers to the words of Lord Mansfield on the same occasion, when he said that non-conformity was no offence by the

common law, and that the pains and penalties for non-conformity to the established rites of the church were repealed by the Act of Toleration, and proceeds thus:—
"Protestant Dissenters then, being allowed the exercise "of their religion, being no longer liable to pains and "penalties, their ministers lawfully exercising their "functions, the rites of that body being allowed by the "law, it can no longer be considered that any acts and "rites performed by them are such as the law cannot, "in the due administration of it, take any notice whatever "of, or that a baptism performed by them, when attended "with what our own church admits to be the essentials "of baptism, is still to be looked upon as a mere nullity, "or that infants so baptized are to be rejected from "burial as persons unbaptized at all, or in other words "as not being Christians; for the court finds it difficult "not to concur with the learned counsel who spoke last, "that *unbaptized* and *not being Christians* amount to "pretty much the same thing."

There can, I think, be no possible doubt after this of the power of Presbyterian ministers to administer the sacraments of our church. [Crampton, J. Within their own congregation undoubtedly. But would you carry it further?] I would. There appears no limitation or restriction. It is a recognition of a right without limit as to person or place; and unless the language of Sir John Nicholl is to be altogether discarded as unworthy of notice, and treated as a misrepresentation of the law, the rite of marriage is one which Protestant Dissenting ministers may perform. Even if I had not the express language of Sir J. Nicholl, I should have this irresistible inference from the various legislative provisions;—viz. is it possible that the most important offices of the church may be performed by them, while they are not capable of performing

an act whereby the union of contracting parties is sanctioned?

The law of the Quakers and the Jews directly applies; and first, as to the Quakers. They are subjects of the crown, living in the king's realm, bound by the laws of the land: yet they have at all times contracted marriage according to their own rules, and the principles whereby they govern themselves. The prisoner's counsel say that the cause of this is *not* that a contract *per verba de præsenti* constitutes marriage, but that an exception is made for this class of sectarians, or rather that the law permits to them to make an exception for themselves, and that because they considered our ceremony of marriage to be unscriptural, the law allowed them to perform it in their own manner. Putting the validity of a contract out of the question for the present, can any other reason be discovered for the permission given to Quakers, than the common law right? [Burton, J.—Can they celebrate marriages out of their own order?] Perhaps not.—The argument may not go to this length, but it establishes the principle that in this realm particular rules and regulations may exist which may be as valid as the law of the land, and although the permission in this case may be confined to marriages within their own society, it establishes the possibility of legal marriages without the intervention of a priest episcopally ordained. The case of the Jews proves this also, for though their laws apply only to members of their communion, still the case establishes their power to make binding regulations on this subject and the respect with which our law treats them when made. The counsel for the prisoner, however, limit this right to celebration between members of the same communion. But suppose one of the parties be a Presbyterian, how is he to be married? By his own principles it must be by a minister of his own church. The civil contract

between the parties is complete, and they come to a minister to sanction it by a religious ceremony. Is the court prepared to say that this is a complete nullity? If so how is he ever to be married? He does not admit the sanction of an episcopalian clergyman, nor conform to the rites of his church, how then can he acknowledge the effect of a ceremony performed by him. If the ceremony is valid when performed by a Presbyterian clergyman between two of his congregation, I contend that it is equally so when only one of the parties is a member of his church. It must be remembered that we are now dealing with this case as a marriage where there has been an actual ceremony, and endeavouring to meet the proposition advanced on the other side that by the common law the presence of a priest canonically ordained is necessary to give it validity.

Before the period of the reformation there was but one church in this kingdom. A second then arose, which as far as regards episcopal ordination, then shared and still enjoys the spiritual influence derived from this source. The common law must, therefore, have at that time expanded itself to receive those who by change of doctrine had become professors of the religion of the state. But the counsel for the prisoner contend that the privileges at that period confined to these two churches, remain up to the present day so limited, episcopal ordination being the necessary qualification for enjoying them. But in what book of authority is this position laid down? We know that the common law from time to time expands so as to accommodate itself to the varying circumstances of society, and it would be difficult to find a period which more called for the exercise of this power than the present, or a class of persons more fitted to profit by it than the members of the Presbyterian Church, Christian in their doctrine, partaking of the principles of the state religion,

and whose ministers recognized by law as in holy orders, are declared entitled to perform the most solemn ceremonies of religion. If Presbyterian Ministers are not only recognized in other parts of Her Majesty's kingdom, but form the Established Church in one of the most important portions of it, it would be hard and unjust to deny to members of that church in one part of the kingdom what has been granted to them in another. This is a most important question. It is well known that the Irish and Scotch Presbyterians hold the same doctrines in every particular. That church is by the Act of Union, 5 Anne c. 8, Art. 25, established in Scotland, and it is worthy of notice to see how it is there recognized with all its order and discipline, and protected in all its rites and ceremonies. [Crampton, J.—That only applies to the Church of Scotland, but your argument applies to ministers of any congregation, Annabaptists, Sabbatarians, or any other sect]. I do not require to go so far, but if my argument carries me that length I cannot help it. All I mean now to contend for is, that by the Act of Union the privileges and rites of the Presbyterian Church are guaranteed in Scotland, and must be taken to extend beyond it. Suppose after the Union, and before the Marriage Act, a Presbyterian clergyman had performed marriage between two of his communion in England, would not that have been a good marriage? And it is well known that when Presbyterians came over to Ireland in the reign of James I. their ministers accompanied them and were allowed to hold livings.

Such are the reasons which occur to me as establishing my first proposition, and I think we may safely assert that the minister who performed the ceremony of marriage in the present case, must be treated as a person in holy orders, capable of administering the holy sacraments, and unless Sir John Nicholl is

wrong, of celebrating marriage also. [Burton, J.—Your argument is that a minister of the Presbyterian Church is *tantamount* to a clergyman of our Church in holy orders?] Precisely.

Now as to the second branch of the subject. I have to contend for the abstract proposition, so frequently found in our books, and founded, as I think, on such incontrovertible authority, that in Ireland, according to the common law, which is unrestricted by any statute on the subject, as in England before the passing of the Marriage Act, a religious ceremony is not essential to the validity of the marriage contract. I do not lessen the force of this argument by admitting, what is stated by all authorities, that at a very early period of history a religious ceremony was superadded to the civil contract. I may further admit, though not bound to do so, that this ceremony was imposed by some authority. And by this admission I feel that I get rid of the greater number of cases cited by the counsel for the prisoner. For the question here is not whether in civilized Christian countries marriage was a religious ceremony, but whether without this ceremony it was uniformly declared invalid. For the argument on behalf of the prisoner has been, throughout, that the contracts *per verba de præsenti* and *per verba de futuro*, followed by copulation, were entirely null and void as marriages, and available only as simple contracts, to be sued on for damages in common law courts; or as contracts enforcible by suits in the Ecclesiastical Courts, where alone they could become available towards marriage. The question, therefore, is whether they were contracts or matrimony; and this resolves itself into the original question, whether by common law it was *of the essence* of matrimony that it should be solemnized by a priest canonically ordained. Instead of looking to modern authorities, or the decisions of learned judges of the land, we have been

referred back to remote antiquity, and required from thence to deduce evidence as to matters of fact. The Saxon law is the first of these ancient authorities alluded to by the counsel for the prisoner; but this law of Edmund, as reported by Wilkins, can only be evidence of custom; and even supposing it to be sufficient to show the existing law of that period, what does it amount to? Simply to this, that a ceremony had been superadded to the contract. It does not and cannot prove that without this ceremony there could be no valid marriage. [Crampton, J.—It serves to show that the practice did not commence with the decrees of the Council of Trent.] Poynter, in his work on the "Practice of the Ecclesiastical Courts," thus writes upon this subject, at p. 8:—"It was usual among "the primitive Christians for newly married persons to "receive the benediction of the priesthood—a custom "which, it seems, had fallen into neglect in the time of "the Emperor Leo, who considered it necessary to publish "a constitution in order to revive a practice so conducive "to the solemnity and importance of the contract. At "length the rite of marriage was elevated to the dignity of "a sacrament, which occasioned the injunction of Pope "Innocent III. for its more regular solemnization in the "face of the Church." And subsequently he adds—"It "was not until the twenty-fourth session of the Council "of Trent that the intervention of a priest was required, "even by the Church of Rome, as of positive necessity "for the validity of marriage; for while the ancient canon "law of Europe reverenced marriage as a sacrament, it so "far respected the natural and civil origin of marriage as "to consider that when the natural and civil contract was "complete, it had the full essence of matrimony, without "the necessity of a solemnization." The same language is used by every writer of celebrity when speaking upon the subject of marriages. Sir Wm. Blackstone, in his Commentaries, 1 vol. p. 433, says:—"Our law considers

"marriage in no other light than as a civil contract." Again, at the same page—"Taking it in this civil light "the law treats it as it does all other contracts, allowing it "to be good and valid in all cases, where the parties "were at the time of making it, in the first place, *willing* to "contract; secondly, *able* to contract: and lastly, actually "*did* contract in the proper forms and solemnities required "by law." Again, at p. 439, he says:—"Any contract "made *per verba de præsenti*, or in words of the present "tense, and in case of cohabitation, *per verba de futuro*, "also between persons able to contract, was, before the "late Act, deemed a valid marriage to many purposes." Then, after stating some of the provisions of the Act, he goes on—"It is held also to be essential to a marriage that "it be performed by a person in orders; though the "intervention of a priest to solemnize this contract is "merely *juris positivi*, and not *juris naturalis aut divini*, "it being said that Pope Innocent III. was the first who "ordained the celebration of a marriage in the Church, "before which it was totally a civil contract." The edict of Pope Innocent III. took place in the year 1218, so that from that time until the Council of Trent, in 1564, it formed the rule by which Ecclesiastical Courts were governed in all their dealings respecting marriage. But it did not enact, nor, as all writers agree, was it ever held that marriage formed anything but a civil contract, or that the presence of a clergyman was anything but a superaddition. Heineccius, in his Elementa Juris Civilis, Lib. 1, Tit. 10, s. 148, says:—"Jure canonico tamen connubium "non gaudet effectibus ecclesiasticis priusquam accesserit "ἱερολογία." That is, that it could have no ecclesiastical effects till the blessing of the priest was pronounced. "Hinc distinctio inter matrimonium legitimum et ratum. "Hinc clandestinum habetur matrimonium in quâ omissa "ἱερολογία." In Ridley's Civil and Ecclesiastical Law,

p. 77, it is said to be the law—" That noble personages " marrie not without instruments of dowrie, and such other " solemnities as are usual in this behalf—that is, that they " profess the same before the bishop or minister of the " place, and three or four witnesses at the least, and that a " remembrance thereof be left in writing and kept with " the monuments of the Church; but that it shall not be " needful for meaner persons to observe the former " solemnities." In Ziletti's Matrimonialia Consilia, p. 56, the summary of a case is thus stated:—" Sponsalia " probata sunt, cum apparet quod mulier promisit viro eum " in virum et sponsum accipere, et ipse vir promisit " accipere eam in sponsam et uxorem." The question then was whether the contract *per verba de futuro* had been *cum cupulâ* or not, and the opinion then given as to the law is thus stated:—" Ex prædictis apparet esse con- " tractum matrimonium inter dictam P. et dictam S., vel " saltem compellendum esse dictum S. ad contrahendum " matrimonium cum dictâ P." This shows that in such a case the court had the power of declaring that a marriage was contracted between the parties—that is, that it had actually taken place. [Perrin, J., referred to the last portion of the section quoted from Heineccius, in these words:—" Immo Protestantes retinentes *ἱερολογίαν*, ne " effectus quidem civiles relinquunt nuptiis, sine ritu " solemni cujusque loci contractis."] [Crampton, J.—Which would appear to import that Protestants do not attach the civil effects of marriage to a contract unless with a religious ceremony.] In Sanchez De Matrimonio, lib. 2, dis. 1, par. 6, p. 119, it is said:—" Consistit ergo " essentia matrimonii, seu matrimonium ipsum in vinculo " illo, quo formaliter sunt conjuges uniti quod oritur ex mu- " tua traditione." " Item quia matrimonium idem est quod "conjugium." In Bracton, Lib. 4, De Actione Dotis, f. 302, the following case appears:—" Habet quis legitimam

" concubinam, et ex eâ prolem in concubinatu, et postmodo " contrahit cum eâdem clandestinum matrimonium et post " contractum clandestinam suscitat ab eà prolem. Ita " postmodo contrahit cum eâdem publice et in facie " ecclesiæ et dotat eam ad ostium ecclesiæ: In hoc casu " erit ille legitimus qui ex clandestino matrimonio natus " fuerit, dum tamen hoc probetur, et hereditatem " obtinebit. Et ille qui post solemnitatem progenitus " fuerit (quamvis legitimus) not erit hœres propinquior " quoad successionem, sed mulier propter solemnitatem et " dotis constitutionem in facie ecclesiæ dotem obtinebit." This is a very important position in every view of the case. It has been already shewn that marriages were considered clandestine when not sanctified by the blessing of the priest; and from this case in Bracton we find that the heir of such a marriage was deemed legitimate, and succession to an inheritance granted, when there was no previous marriage by a priest. [Crampton, J.—It does not appear from the authorities on ecclesiastical law that a clandestine marriage was one celebrated without the presence of a priest, but not in *facie ecclesiæ.*] The authority of Heineccius is opposed to this. He distinctly says that a clandestine marriage was where no priest was present. But we have further the authority of the Church of Rome to establish the validity of marriages by contract. For to avoid the inconvenience which resulted from the custom, the Council of Trent issued its decree, prefacing it with the following words:—" Tametsi dubitandum non " est, clandestina matrimonia, libero contrahentium " consensu facta, rata, et vera esse matrimonia, quamdiu " ecclesia ea irrita non fecit; et proinde jure damnandi " sint illi, ut eos sancta synodus anathemate damnat, qui " ea vera, ac rata esse negant; * * * nihilominus " sancta Dei ecclesia ex justissimis causis illa semper " detestata est, atque prohibuit." This is a most authori-

tative declaration of what the law was before the time of this Council.

In Bossius De Matrimonii Contractu, p. 225, c. 9, s. 1, it is said:—"Benedictiones nuptiales, quibus, ii qui "contrahunt matrimonium, solemniter benedicuntur, non "sunt de substantia matrimonii ut constant ex Tredentino "*cap.* 1, *sess.* 24, *de reformat. matrimon.* et tradunt omnes "Doctores; et convincit ratio ipsa, quia ante ipsas quando "adhibentur supponitur matrimonium validum. In Canone "autem, quando conjugium, cui non accedunt benedic-"tiones, dicitur non esse legitimum, tantum significatur "non esse secundum totum decorem, et secundum totam "honestatem requisitum a lege, seu a jure." In 2 Dyer, 105, note, Noy, Attorney-General, is said to have held that if a woman be divorced from her husband *causâ præcontractus* with another *per verba de præsenti*, in that case immediately, by the sentence given in court, the marriage was completed between the said woman and the first husband, without any of the rites performed *in facie ecclesiæ*. [Crampton, J.—In *Siderfin*, p. 13, it is said that Twisden, J., denied this.]

This brings us to the end of the old authorities upon this subject, which appear to me to establish beyond a doubt the truth of the position, that a contract of marriage was from the earliest times taken to constitute very matrimony. But whether this point is considered as fixed, or whether the question is taken to have been undetermined and open, the range of modern authorities, upon which I am now entering, is so strong, that, without completely subverting them, it will be impossible not to hold this contract to have been a valid marriage. Many of them having been already brought before the court, I shall confine myself to a short review of them. And, as applicable to this part of the case, let us first refer to the passage already cited from 3 Inst. 88, where Lord Coke, commenting upon the

words of the Marriage Act of James I., says, they extend to a marriage *de facto*, or voidable by reason of pre-contract—viz.: "For it is a marriage in judgment of law "until avoided; and, therefore, though neither marriage "be *de jure*, yet they are within the statute." Next, I would refer to the case of *Elliott* v. *Gurr*, 2 Phil. 19, where a passage occurs in the judgment of Sir John Nicholl which is of great value, as applicable to much of the argument employed by the counsel for the prisoner. "Civil disabilities," he says, "such as a prior marriage, "want of age, idiotcy, and the like, make the contract "void *ab initio*, not merely voidable; but these do not "dissolve a contract already made; but they render the "parties incapable of contracting at all; they do not put "asunder those who are joined together, but they pre-"viously hinder the junction; and if any persons under "these legal incapacities come together, it is a meretricious "and not a matrimonial union; and therefore no sentence "of avoidance is necessary." Here it is expressly laid down that a prior contract makes a subsequent marriage not merely voidable, as urged by the counsel for the prisoner, but void *ab initio*. To the same effect is *Bunting's* case, 4 Co. 355, already cited. [Burton, J.—The contract there was ratified by sentence and subsequent solemnization.] It seems to me that the substantial reason for the judgment, as appears from the terms of it, is, that the second marriage was declared void by the Ecclesiastical Court, and not that solemnization was enjoined. But, however the law may appear to have been laid down at these distant periods of time, or whatever we may now imagine it to have been, it appears clear that modern authorities have closed the question, and indisputably established that the civil law was the basis of the marriage law of England, and that according to that a contract *per verba de præsenti* has always been held to constitute *very*

matrimony. In support of this position there is a weight of authority not to be found upon any other question. Indeed, so strong and overpowering is it, that the only manner in which the counsel for the prisoner attempted to relieve themselves from its pressure was by declaring it to be extra-judicial. The judgment of Sir William Scott in *Dalrymple* v. *Dalrymple* has been ratified by the sanction of the highest judicial authorities of the country, and appears to have so settled the law on the subject that it is difficult to imagine how it can any longer be considered as in doubt. It is said, indeed, on the other side, that in delivering this judgment Lord Stowell travelled out of his way: that the question before him related only to Scotch marriages, and that he might have, therefore, confined himself to a consideration of the Scotch law. But it was necessary for him to examine into all the authorities, and into the law of this country; and the result of his inquiries was, that a contract of marriage had always been considered valid, and as constituting *ipsum matrimonium.* In so important a judgment it is difficult to select any one part more deserving of attention than another, and I shall therefore confine myself to one or two passages, referring to the whole judgment as containing a complete and distinct view of the law. At p. 62, Sir William Scott says:—"Marriage being a contract is, of "course, *consensual,* for it is of the essence of all contracts "to be constituted by the consent of parties. *Consensus* "*non concubitus facit matrimonium,* the maxim of the "Roman civil law, is, in truth, the maxim of all law upon "the subject." Again, at p. 63:—"Marriage, in its "origin, is a contract of natural law; it may exist between "two individuals of different sexes, although no third "person existed in the world, as happened in the case of "the common ancestors of mankind. It is the parent, "not the child, of civil society. *Principium urbis et quasi*

"*seminarium reipublicæ.*" At p. 67 :—"Such was the state "of the canon law, the known basis of the matrimonial law "of Europe." I shall give no further extracts, but proceed to cases in which Lord Stowell's judgment has been followed. [Crampton, J.—You have a perfect right to say that Lord Stowell is with you.] The first case is that of *M'Adam* v. *Walker*, 1 Dow. 148. Lord Eldon's language seems perfectly decisive. At p. 181, he says:—"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." At p. 182 :—"With respect to the decisions, "it was a position again and again clearly recognised 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 "such was the result, their lordships would excuse his "entering into a detail of the decided cases." If anything could add to the authority of Lord Stowell it would be the sanction of Lord Eldon. Lord Redesdale follows Lord Eldon, and coincides with him; and I, therefore, say that it is not now open for any person to recur to old authorities, as these modern cases have settled beyond all doubt—1, That the Canon Law is the basis of the Marriage Law of England; and 2, That a contract *per verba de præsenti* made *ipsum matrimonium*. The next authority in support of Lord Stowell's opinion is the judgment of Sir Vicary Gibbs, in *Latour* v. *Teesdale*, 2 Marsh, 243, and 8 Taun. 830. How did the counsel for the prisoner attempt to get rid of this case? By asserting that though the judgment was right, it was founded upon false grounds. It will be recollected that this was the case of a marriage at Madras between two British subjects, solemnized by a Roman Catholic priest, without any license from the Governor. At p. 836, the Chief Justice said—"The

"important point of the case—viz., what the law is by "which such a question is to be governed, was most "ably and fully discussed in the case of *Dalrymple* v. "*Dalrymple;* and the judgment of Sir William Scott has "cleared the present case of all difficulty which might at "former times have belonged to it." And this, I venture to say, is also the case here. "From the reasons," he proceeds, "there made use of, and from the authorities "cited by that learned person, it appears that the canon "law is the general law throughout Europe as to mar-"riages, except where that has been altered by the "municipal law of any particular place. From that case, "and from those authorities, it also appears that, before "the Marriage Act, marriages in this country were always "governed by the canon law, which the defendants must, "therefore, be taken to have carried with them to "Madras." Thus it appears the decision was entirely based on the common law of England:—"It appears also "that a contract *per verba de præsenti* is considered to be "an actual marriage, though doubts have been held "whether it be so, unless followed by cohabitation." Thus we see a marriage upheld within a very short period by an eminent judge, resting his decision entirely on the common law of England, and expressly validating a contract *per verba de præsenti.* The same doctrine is laid down by Lord Ellenborough in *Rex* v. *Inhabitants of Brampton,* 10 East, 282. As to the case of *Beer* v. *Ward,* cited for the prisoner, how does it stand, as far as we know anything about it? Lord Eldon directed the issue; it was a case of complicated *fact,* in which it does not appear that there was difficulty as to what the *law* was; and on both the trials, Dallas, C. J., first, and then Lord Tenterden, gave opinions in direct accordance with *Dalrymple* v. *Dalrymple.* If that was the only question, why should there have been a third trial? It is quite

obvious that the new trial was granted, not because the court was dissatisfied with the decision in point of law, but because the facts were complicated. The opinion of Best, C. J., in *Smith* v. *Maxwell*, R. & M. 81, and of Lord Kenyon, in *Reed* v. *Passer*, 1. P. N. P. C. 303, is to the same effect. And with these cases I close the chain of authority in support of Lord Stowell's opinion.

With respect to the cases of Quakers and Jews, if their marriages are not referable to the grounds before stated, they can be held good only by being viewed as contracts *per verba de præsenti*. They are excepted from the Marriage Act, and therefore they rest upon the same ground as they did before it. They, therefore, rest altogether on the common law, as laid down by Lord Eldon, and Lord Stowell. But it is said on the other side that the Quakers came within the Act, by which the marriages of Dissenters performed by their own teachers are declared valid, and that this is decided in the case of *Haughton* v. *Haughton;* but was it ever heard of, that prior to that Act the validity of Quakers' marriages was ever brought in question in a court of law? I am persuaded that such has never been the case. They form a most wealthy sect—one that has frequently been engaged in suits in the prerogative and other courts, and yet no instance can be found of such a question having been raised. The Quakers might, perhaps, be partakers of the benefit of a Declaratory Act, explaining what their rights were; but no more.

But it has been said by the counsel for the prisoner, how does it happen if your doctrine of contract is sound, that it has never been urged in cases of action for breach of promise of marriage, or in cases of seduction. Let us see how this question could arise. Suppose an action brought

for breach of promise of marriage, on the ground that there had been no marriage, and that what had taken place was *contract* only. It would be very hard for the judge to nonsuit, by saying that the parties were husband and wife. The very frame and form of the action asserts that the relation does not exist; so that it would be impossible for the question to arise. It would be contrary to the whole matter upon record. Then with respect to actions for seduction; suppose after the parent had brought his action, the defendant were to say that he was not guilty, because he was the husband of the party; I do not understand how a person could allow himself to be sued, and then defend himself by asserting that he was the husband of the woman. A case of the kind did once arise, and the defendant was advised by his counsel to plead that he was the husband of the plaintiff. But he deprecated that defence, and said it was the last thing he desired. Before closing this part of the case, I may refer the case of *Steadman* v. *Powell*, 1 Ad. 58, when Sir John Nicholl says, that in Ireland, a marriage may be had without any celebration *in facie ecclesiæ*, as in the presence of witnesses. Upon all these cases, I therefore say, that for the reasons already stated, Sir William Scott's judgment closes this case, unless the court should think that it is not law, or that it is inapplicable to the present circumstance, and that as we are dealing with a country where there is no marriage law, it is plain, that at this day a contract *per verba de præsenti*, makes at least such a marriage as will subject a party to punishment for bigamy.

I now proceed to the consideration of the several Statutes affecting this case. Assuming the common law to be as I have stated, the question is, has the Statute law repealed or altered it? It is not contended that it has done either; but a dangerous argument has been used, that authorities establishing the law, are to be allowed to be shaken by

presumption, arising from the tenor of the particular Acts of parliament. That is, that the law must be taken to be such, as it is represented by the counsel for the prisoner, otherwise the legislature would not have passed these acts. I think it is plain, first, that unless the legislature has plainly altered what is established as law, it must be considered not to have interfered with it; and secondly, that if any alteration has been made, it can only be taken to be such as will accomplish the objects in view. The argument for the prisoner is founded not on what the legislature has enacted or declared; but on the assumption, that unless the law had been what they now attempt to prove it was, the legislature could never have enacted such laws as appear on the Statute book, that is, that the common law of the land is to be altered in deference to the character of Irish representatives, and their knowledge of the laws. But I say, that if the law has been plainly established by *Dalrymple* v. *Dalrymple*, and the other similar cases, that so far from attempting to subvert them by inferences from Acts of the Irish legislature, an endeavour should be made to limit those Acts, to their proper sphere; and that it would be dangerous in the extreme to determine that the Statute law had altered the common law, except for the particular purposes for which any such Statute was framed: with this view I will now go through some of these Acts separately, and show the definite object, purpose, and reason of each, which will I think *affirm* my view of the common law.

The 17 & 18 Car. II., was passed to validate marriages, had during the commonwealth; but its object also was, to annul those clauses in the Ordinance refered to, by which all other marriages than those solemnized according to that Ordinance were annulled; and therefore, so far from enacting that all such marriages *per se* should be invalid, it restores them to their former efficacy. The 9 Wm. III. c. 3. s. 1. prohibiting marriages between Roman Catholics

and Protestants, and making the party celebrating such marriages liable to fine and imprisonment, employs these words, "in case any Protestant minister, or popish priest, "or other person whatsoever, shall join in marriage any "Protestant woman." The 12 Geo. I. c. 3, relating to marriages by popish priests and degraded clergymen, enacts that any popish priest, degraded clergyman, or layman, pretending to be a clergyman, shall celebrate a marriage between Protestants, shall be guilty of felony. It was contended for the prisoner, that because this Act was levelled at a particular mischief, it is to have the effect of annulling, or altering the law, as settled and declared. I deny that position altogether. The 9 Geo. II. c. 11, is more restricted, being confined to the marriage of minors possessed of a certain amount of property; but it shows that the object of the legislature was not to interfere with the law as it stood. [Crampton J.—I did not understand the argument to be that the effect of those Acts, was to alter the law, but that they furnished an illustration of what the common law was.] The common law of Ireland, is the same as that of England: and when we have settled upon the highest authorities, what that law is, as I think we have done satisfactorily, I say, I am liberty to construe these Statutes in the same point of view. I deny the right of the prisoner's counsel, to argue against it, by inference from loose legislation. I cannot allow that these inferences will alter the law of the land. And I argue, that so far from changing the common law by inferences, the court is bound to maintain it as it stands. If one Irish Act can be produced to contradict the law of England, as I have stated it, then I will allow it to have been altered, but unless this is clearly shown, the court must declare the law, as they find it expressly laid down. The 11 Geo. II. c. 10. s. 3, leaves the contract *per verba de præsenti*

just as it was formerly, and was passed only for the purpose of exempting Protestant Dissenters, entering into matrimonial contracts, from any ecclesiastical censures. The 21 & 22 Geo. III. c. 25, which has been so much dwelt upon by the counsel for the prisoner, appears rather to raise an argument in our favor; for every declaratory Act, is an admission of the validity of the measure it ratifies and sanctions; and this Act is therefore an admission of a legal right, about which doubts had previously existed. The language is very remarkable. The preamble states that, "whereas the removing any doubts "that may have arisen concerning the validity of matri- "monial contracts, or marriages entered into between "Protestant Dissenters, and solemnized by Protestant "Dissenting ministers or teachers, will tend to the peace "and tranquillity of many Protestant Dissenters and their "families." And if this Act be declaratory of the validity of marriages thus celebrated before the passing of that Act, how could they have been valid otherwise than as is now contended, viz: as contracts *per verba de præsenti?* The argument on the part of the prisoner, is that Dissenting ministers are mere laymen, and have no authority to solemnize matrimony,—that marriages solemnized by them, are however validated by this Act, and that consequently all other kinds of contracts are to be taken as invalid; on the contrary I say this Act is in our favor as a ratification of marriage contracts *per verba de præsenti.*

The 58 Geo. III. c. 81. s. 3, undoubtedly goes far to do away with contracts, either *de præsenti*, or *de futuro.* It takes away all remedy in the ecclesiastial courts. [Crampton, J. I believe that section is copied from the English Marriage Act.] It is, *verbatim.* It was intended by this Act to lay down a fixed rule, and therefore it was necessary, while it prescribed a new system, that it should remove the old remedies. The object was to sweep away all the old

machinery, whereby a civil contract and its relations were governed, both in the ecclesiastical court and out of it, in order that there might be for the future one system of ecclesiastical law. The only question is, has that section put an end to the old doctrine, (supposing it existed,) that a contract *per verba de præsenti*, made *ipsum matrimonium*. In arguing this question, the prisoner's counsel assume that a contract merely gave the parties a right to sue upon it in the ecclesiastical courts; and that in no case did it amount to *ipsum matrimonium*. But this assumption we deny. We say such a contract did constitute *ipsum matrimonium*, and if so, then this Statute leaves the common law as it was before, and interferes only with the *remedy*. The sections leave untouched the question of contracts being *ipsum matrimonium*. If it was intended to annul the contract why does the Act only deal with the remedy? Suppose the law were to enact that in future there should be no suit allowed in the court of chancery, for the specific performance of a contract, that provision would not annul the contract. So here, if the decisions of Lord Stowell, Lord Eldon, and the many others who have sactioned the doctrine, be well founded in law, this Act does not interfere with the law, but leaves a contract *per verba de præsenti* in the same position as ever. Upon these grounds I submit, that the first marriage here was legal and valid.

In conclusion, I must add my deep regret, that any expressions should have been allowed to fall from the counsel who have argued this case, reflecting upon any religious class or community in this kingdom. And in justice to the Presbyterians, I feel bound to add, that having carefully looked into their regulations upon the subject of marriages, I find them prepared in the most strict manner, and I believe that so far from desiring to intrude in any degree upon the province of episcopalian clergymen, the Presbyterian ministers have been always

unwilling to interfere in marriages, where either party was of the Established Church; and in the case now before the Court, an application was actually made to the clergyman of the parish, to perform the ceremony before the Presbyterian Minister consented to officiate.

The Attorney-General then referred to the following M.S.S. reports of four trials for bigamy:—

The *King* v. *H. Marshall*, tried at Enniskillen Spring Assizes, 1828, cor. M'Cleland, B., where the first marriage was by a Presbyterian clergyman, the prisoner being a member of the Established Church. Doherty, for the prisoner, objected that under the 32 Geo. III. c. 21, dissenting ministers and others therein named are allowed to marry on publication of banns only. M'Cleland, B.—Those regulations go to the ecclesiastical discipline. If the clergy err against the Statute, the Bishop or the Synod censures them; but the marriage is good; and I have great doubts whether under the law of Ireland it is at all requisite that the marriage should be celebrated by a person in holy orders. If it be contracted by words *de præsenti* in the presence of any third person it will be sufficient. The prisoner was convicted.

The *King* v. *Wilson*, tried at Armagh Summer Assizes, 1828, cor. Torrens, J. The first marriage was unquestioned. The second was celebrated by a Presbyterian clergyman, the prisoner being a member of the Established Church, and the woman a Presbyterian. Torrens, J., put it to the counsel for the Crown to shew that the second marriage was valid under the subsisting law of marriage. He referred to Lathropp's case, where, according to his recollection, Dr. Black, who proved the second marriage,

gave some evidence that the prisoner, as well as the lady, had occasionally frequented his meeting-house(*a*).

Doherty, for the prisoner, referred to the statute, as in the former case; but Torrens, J., did not consider that banns were necessary.

The officiating Presbyterian clergyman was examined. He said it was considered in his Church that if the woman was of their communion they had a right to celebrate the marriage. The prisoner was convicted.

The *Queen* v. *Halliday*, tried at Donegal Spring Assizes, 1838, cor. Pennefather, B. The prisoner was indicted for bigamy. A Presbyterian minister was produced on the part of the Crown to prove the celebration of the first marriage by himself. The prisoner was a member of the Established Church, the woman a Presbyterian.

(*a*) The following account is given of this case in Hans. Parl. Deb. 30 vol. p. 464:—

1815, April 10th.

On this day Sir S. Romilly presented a petition to the House of Commons from Captain Lathropp, (who appears at this date to have taken the name of Murray,) complaining of the illegality of his conviction, on the ground that his first marriage was void, he having been then a member of the Established Church, and married to a Presbyterian, by a person named Robert Black, a dissenting preacher, who had never been ordained; that he had been entrapped into the marriage; that the lady was twice his age; that no banns had been published or license obtained; the marriage celebrated in a private room in the house of the lady's family. Sir S. Romilly stated that Dr. Black in his evidence had stated that he had seen Mr. Lathropp Murray but once at a dissenting congregation.

The Solicitor-General (Sir S. Sheppard) said that in his opinion and that of his learned friend, the Attorney-General, after having examined every Act of Parliament in Ireland respecting the validity of the marriage ceremony, the first marriage of the petitioner (Murray) was *a legal one*. That certain very eminent civilians in Ireland had been consulted several years before respecting that marriage, all of whom declared it was a legal marriage, and that no Ecclesiastical Court in Ireland would venture to set it aside; and that he had no doubt as to the legality of the conviction.

Macklyn, on behalf of the prisoner, contended that such a marriage was invalid; but Pennefather, B., said he considered such a marriage in Ireland to be perfectly good, and directed the jury accordingly. The prisoner was *acquitted*, but the reason appears to have been that the witnesses to one marriage did not sufficiently *identify* him.

The *Queen* v. *Robinson*, tried at Cavan Spring Assizes, cor. Foster, B. The prisoner was indicted for bigamy. It was proved for the Crown that the prisoner and both wives were Protestants; that the first marriage was solemnised by a Seceding clergyman; that the prisoner cohabited with his first wife, who was then living; that the second marriage was solemnised by a person who had been duly ordained by the Synod of Ulster, and had a congregation, but was removed from it, and ceased to be a member of the Presbyterian Church before this marriage. This person swore he performed the ceremony according to the form prescribed by the Presbyterian Church, but could not say whether by the discipline of that Church the orders continue after the congregation is taken away. He proved the form of marriage used on this and similar occasions—viz., after a lecture, each party holds up his or her hand, and makes a solemn declaration of fidelity, &c., adjuring God. Cohabitation with the second wife was proved.

Doherty, for the prisoner, submitted there was not legal evidence of the second marriage, the person who performed the ceremony not being qualified, inasmuch as he had withdrawn from the Presbyterian congregation and Synod, and should therefore be considered as a layman.

Schoales, for the Crown, contended that even if the ceremony were performed by a layman that it would be valid, and cited the *King* v. *Marshall*.

At the desire of the Court an old and respectable minister of the Presbyterian Church and Synod of Ulster was examined, and proved the mode of ordination: that after

going through certain forms the candidate becomes a licentiate; that he preaches before the presbytery; then, if approved, is ordained by imposition of hands; then he may marry. The witness further swore:—"If degraded, "he is no longer under our jurisdiction. I cannot say "whether or not a marriage by a degraded clergyman is "valid, but I am of opinion the functions of such a person "cease. I think that a person who resigns his charge of "a congregation before sentence passed on him is capable "of performing the marriage ceremony, and that such a "marriage should be looked upon as good."

Foster, B., after conferring with Baron Pennefather, held that the marriage in question was good. The prisoner was found guilty.

Sir Thomas Staples refers to *R.* v. *M'Laughlin*, 1 Cr. & Dix. C.C. 170.

CUR. ADV. VULT.

The Lord Chief Justice having been absent from Court during Easter Term, and having had no opportunity of hearing the arguments in the foregoing case, it was determined that for the purpose of obtaining his Lordships' opinion upon the questions involved in it, the points should be reargued upon a similar case tried at the Armagh Spring Assizes, 1842, before Crampton J., where the jury under his Lordships direction had also found a special verdict. Accordingly the case came on for hearing in Trinity Term. The special verdict was as follows:

The Queen against *James Carroll.*

"The jurors upon their oaths say that on the 6th of May, "1841, the Rev. Joseph Kelso, performed a marriage "ceremony, according to the form of the Presbyterian "Church at his house near Lisburn, between the said James "Carroll and Sarah Robinson, and that they were seen "next morning both sitting on the bed side, and that both "the said James Carroll, and Sarah Robinson, were mem-"bers of the Church of England, and that the said Sarah "Robinson, is now alive."

"And the jurors aforesaid upon their Oaths aforesaid "further say that the Rev. Joseph Kelso, was a Presbyterian "Minister; that in the year 1809, he had been ordained "to the Maharageel Congregation, and gave it up about "ten years ago, and that for twenty years he had acted as "Minister of the said congregation; that he did not consider "himself by resigning his charge as having ceased to be a "Presbyterian Minister; that he is now a Presbyterian

"Minister but without a pastoral charge; that he married "James Carroll to Sarah Robinson, according to the rules "of the Presbyterian Church; he asked them were they "of age and if they had the consent of parents to be "married, and was satisfied with their answers on this "subject and asked no other questions. That he was "ordained by the laying on of hands of the Presbytery "of Belfast, which comprehended a number of Ministers "and congregations in and about Belfast; That it is the "usual and only form of Ordination in the Presbyterian "Church; that since his resignation he has done no duty "but to marry and baptize and preach in private houses; "that for nine years past he has not attended at Synod or "Presbytery; that a degraded clergyman ceases to be a "member of the Presbyterian body, that he has got no "*regium donum* or salary for above eight years."

"And the jurors aforesaid further say that the said James "Carroll was married to Jane Foster on the 15th October, "1841, at the Parish Church of Kilmore, in the said "county of Armagh, according to the form of the Church "of England by the Rev. Mr. Lloyd, the curate of the "said parish, and that they lived together for two days as "man and wife, and that the said Jane Foster is a member "of the Established Church. But whether upon the whole "matter aforesaid the said James Carroll was guilty of the "premises within laid to his charge the jurors last aforesaid "are wholly ignorant, and therefore they pray the advice "of the said justices of our said lady the Queen, upon the "premises, and if upon the whole matter it shall appear to "the said justices, that the said marriage performed by the "said Rev. Joseph Kelso is a valid marriage in point of "law, then the said jurors say that the said James Carroll "is guilty of the premises. But if upon the whole matter "aforesaid, &c. it shall seem to the said justices that the "said marriage ceremony performed by the Rev. Joseph

" Kelso is not a valid marriage, then the said jurors say " that the said James Carroll is not guilty."

On the 27th May, Sir Thomas Staples opened the case on behalf of the crown, and adopted the same line of argument as had been used in the *Queen* v. *Milles;* insisting, first, on the validity of a contract *per verba de præsenti* by the common law of England, and repeating the cases before cited in support of the position, and referring to two unreported cases one of *Patterson* v. *Parson*, T. T. 1835, and Weir *v.* Weir, T. T. 1837, where letters of administration were granted to a widow when the marriage was performed by a presbyterian clergyman and it was not alleged that the parties were members of that Church. Secondly, he argued the point whether supposing the law to require solemnization by a priest, a Presbyterian minister was not to be taken as sufficient to satisfy this exigency of the law. He denied that the form of pleading was *per presbyterum sacris ordinibus constitutum* and referred to Rastall, 229, 588. He further argued that the common law moulded itself to circumstances, that under it all men were allowed to choose their own religion, and had still free power to do so, unless when restrained by statute law; that there was no express enactment requiring marriage to be performed by a priest episcopally ordained; that the argument for the necessity of episcopal ordination could only be founded on a continuance of the Roman Catholic religion as the established form of this country, and that to carry this argument to its length would involve the absurdity of all Roman Catholic practices being still enforcible here, when it was not otherwise expressly declared by law; instancing the marriage of priests. Finally he argued that the prisoner was estopped from setting up the present defence, by having voluntarily adopted the Presbyterian form of marriage, and thereby solemnly

declared himself to be of that persuasion, citing *R.* v. *Orgill*, and *R.* v. *Hanly*, 9 C. & P. 80.

Whiteside and T. B. C. Smith followed, on the 28th and 30th May, using the same arguments and arrangement as on the previous occasion.

On the 3rd June, W. Brooke was heard in reply. He contended that upon the authorities the question was completely closed by the decision in *Dalrymple* v. *Dalrymple*, and the subsequent cases decided on the same principle down to the time of the *Queen* v. *Smith* in this country; that the municipal law here had not receded from the Canon Law on the subject of marriages, citing Bracton, f. 302, b. 3; that frequent attempts had been made in early times by churchmen, to alter the canon law by making the presence of a priest necessary to true matrimony, but that it was clear from the councils and monitions and books of authority that this had never been accomplished, citing Spelman's Concilia, p. 358. He then proceeded to review all the authorities brought forward in the previous part of the argument, shewing the great weight of authority in favor of the validity of a contract of marriage, *per verba de præsenti* and the inconsistency apparent in the cases denying this principle, none of them agreeing as to what was necessary to constitute *ipsum matrimonium*, some confining it to solemnization by a clergyman, others laying it down that the ceremony must take place in a church, and others that there must also be a celebration of mass upon the occasion. He then proceeded to argue the question of the necessity for episcopal ordination, and insisted that whatever might have been the law before the Toleration Act, that now, Dissenters were, beyond all doubt, recognized by law, and empowered to perform many of the most important functions of ministers; and that the Common Law must be taken to have moulded itself to the circumstances of

the time and recognized Presbyterian clergymen as ordained ministers for all other purposes. He further argued that neither by the statute law, nor by the Articles of the Church, nor even in the ordination service was episcopal ordination declared to be the only valid and binding form, citing, 2 Strype's Annals, 481, 553; Neal's History of the Puritans, 310; Bishop Burnet on the Articles, 229, (fol. 1700,) and Hooker's Eccl. Polity, Bk. 7, c. 7.

CUR. ADV. VULT.

JUDGMENTS.

On the 10th of June, Mr. Justice Perrin and Mr. Justice Crampton delivered their judgments.

Perrin, J.—These are two indictments for bigamy, upon which two special verdicts have been found. It is unnecessary for me to state them at length, as the only question is, whether the respective prisoners were in either case married, the one to Hester Graham and the other to Sarah Robinson. There is some slight difference in the findings, but in all essential matters they agree. (Here the learned judge stated the facts, as appearing on each special verdict.) It is plain that the parties intended to be married—that they entered into a marriage contract—and that a ceremony of marriage was celebrated at their desire by a minister of the Presbyterian Church, and according to its forms. This ceremony was such as is declared by the 21 & 22 Geo. III. c. 25, to constitute a valid and perfect marriage between Protestant Dissenters; and the single question now before the court is, whether it is equally binding under the present circumstances, when one or both of the parties are members of the Episcopalian Church.

The indictment is founded on the 10 Geo. IV. c. 34, which does not materially differ from the prior Act against bigamy (1 Jac. I. c. 11); and in both, those words are used upon which Lord Coke has commented in the 3 Inst. 88. For the prisoner it has been argued, that the ceremony which has taken place between these parties does

not constitute marriage—that they were not married *de jure* or *de facto*, for that, by the common law, the presence and intervention of a priest in holy orders, episcopally ordained, is essential to constitute valid marriage—that without this ceremony there can be no marriage in this country, in cases where either of the parties is a member of the Established Church, although prior to the 58 Geo. III. c. 81, s. 3, there might have been a matrimonial contract capable of being enforced, and which would have prevailed against a subsequent marriage solemnised by a priest in holy orders. On the other hand, the Attorney-General and counsel for the Crown have contended that the parties here were actually married—that there was a marriage in fact by a dissenting minister, who, though not episcopally ordained, is a clergyman in holy orders, qualified to solemnize marriages; and that even if this were otherwise, yet that the contract, advisedly entered into between these persons, constitutes marriage, and as a civil compact may be contracted without the intervention of any clergyman.

Much learning and extensive research have been shown in the course of the argument, and authorities of weight have been cited on both sides, which it is difficult, if not impossible, to reconcile. I may therefore justly doubt my own ability to digest and decide upon them, and must distrust my own judgment in coming to a conclusion differing from my Lord Chief Justice and my brethren on the Bench, for whose superior judgment and abilities and more extensive experience and attainments, I entertain profound and sincere respect. But having given the case and the authorities bearing upon it the utmost consideration in my power, and having formed a fixed opinion upon the subject, I am bound to declare it, and abide the responsibility; though I cannot refrain from expressing my distrust of the judgment which has led me to the conclusion.

I shall now proceed to state the foundation of my opinion; and in so doing, I shall discuss such of the authorities referred to on the one side or the other as appear to me to be material to the question directly before the court. Much of the antiquarian and ecclesiastical learning I shall pass by with this observation, that on the one hand it is plain that by the civil and canon law, a contract *per verba de præsenti*, followed by cohabitation, constituted valid marriage; on the other, by the ancient Saxon law, and by some of the constitutions, the presence and blessing of a priest was required to unite the couple in lawful matrimony. But neither of these laws govern the question before the court, save so far as they have been adopted by our common law, or have become part of it. What the common law is upon the subject, I shall endeavour to ascertain from the text writers of admitted authority, from the decisions and opinions of eminent judges, and from the statutes which explain and declare it.

It has been shown that the usage in England, from a very remote antiquity, has been to have marriages solemnized by a clergyman—that a form and rite for its celebration is contained in the most ancient rituals, (Ayliffe's Parergon, 404,) as well as in the Book of Common Prayer, and that it has been deemed not merely a civil but a religious engagement. It appears certain that one species of dower could be had only upon marriages so solemnized, and it is doubtful whether in ancient times any kind of dower could have been had otherwise. (Perkins, s. 306. Co. Litt. 33. a., n. 10.) This note or memorandum of Lord Hale(*a*) has been much relied on throughout the argument, as sustaining and laying down generally the proposition that solemnization was necessary to constitute marriage. But it appears to me that his words have been taken in too extended a sense, as referring generally to marriage, and

(*a*) Ante p. 81.

not, as I believe is the true meaning of the note, to the particular case abstracted, and to such a marriage as thereby was held to entitle a wife to dower. The closing part of the note, where Lord Hale expresses a doubt whether *the husband shall have trespass de tali uxore abducta* seems to show that he considered the relation of husband and wife to exist between persons so circumstanced. Solemnization appears also to have been held necessary to entitle the offspring of a marriage to inherit, *Hæres legitimus est quem nuptiæ demonstrant*, Co. Litt. 7. b. So in *Bunting* v. *Lepingwell*, of which the just result appears to be, that if the marriage under the decree of the court had not taken place, the issue by the marriage with Tweed would have been legitimate, whilst those by the contract would not. It proves that the contract was not held to be equivalent to marriage, though it was sufficient to avoid the subsequent marriage, and possibly by relation to legitimatise intermediate offspring. But it appears to me that the passage quoted from Ayliffe, 109-10, (*a*) does not bear the precise meaning claimed for it. For as I understand the passage, it would be necessary that *both* the questions sent to the bishop, viz., whether the person charged with bastardy was born in *lawful matrimony*, and whether he was born before his father and mother were lawfully contracted together in marriage, must be answered in the negative, in order that the King's Court should pronounce the person a bastard. But however this may be, it certainly does not (as has been on the other hand contended) prove a contract to have been valid marriage. Foxcroft's case (*b*) has also been referred to, and much relied upon, by the counsel for the prisoner; but it is clearly not law, and cannot be even argued for in the extent to which it goes. If then it does not maintain the position it appears to rule, I cannot consider it an authority to prove or maintain anything or any

(*a*) Ante p. 87. (*b*) Ante p. 74.

part of that position; therefore I need not consume time by observing further upon it. The same observation may be applied to and dispose of Del Heith's case.

It also appears that until marriage solemnized, the husband might enfeoff the wife, after a contract *per verba de præsenti*, though this doctrine was at one time doubted, if not denied. The position is thus laid down in Perkins, s. 194:—"And if a contract of marriage be between a man "and a woman, yet one of them may enfeoff the other, for "they are not yet one person in law, insomuch that if the "woman die before the marriage solemnized between them, "the man to whom she was contracted shall not have her "goods as her husband, but she may make a will without "his agreement," &c. But the contrary is to be found in Fitz. Abr. "Feoffment," pl. 117, citing a case in 16 H. 3, to the following effect—"A man was affianced to a "woman, and had connexion with her, and afterwards he "enfeoffed her of a carve of land, and put her into posses- "sion, and executed a deed of it to her, and then married "her *in facie ecclesiæ;* the feoffment was adjudged void, "because it was *post fidem datam et carnalem copulam*, and as "if made between husband and wife." The expression in Com. Dig. "*Baron and Feme*," B. 1, "so by a contract "of marriage, it is no marriage if espousals do not ensue" has also been cited to show that in Chief Baron Comyn's opinion a contract of marriage was no marriage if espousals did not afterwards ensue. But he does not put it as his own opinion, on the contrary he says "*semble*"—and in the passage which follows that cited we find, "So if the *mar-* "*riage* be not conformable to the ecclesiastical law, the "*husband* shall have no right by the ecclesiastical law; as "if the *marriage* be in a separate congregation by their "preacher, who is a layman, the *husband* will not be enti- "tled to administration. Yet where there is a *marriage* in "fact only, the *wife* or her children, who were not in fault,

" may be entitled to a temporal right." I will, bye and bye, observe more fully upon this passage, and the case abstracted.

Other authorities have been cited and relied upon as showing that the presence of a priest was considered necessary to constitute marriage. *Fielding's* Case; as to which I doubt whether it establishes any such position. The question was not then raised. It merely proves that long after the reformation, and the statutes of uniformity, the marriage of two Protestants by a Romish priest, after the Romish ritual, when words of present contract in English had been used, was good and valid. It would seem that the presence of a priest was relied on principally as corroborating the testimony of a doubtful witness; and if the case proves anything, it shows that a marriage may be contracted by members of the Established Church, before a clergyman of another church, and according to another ritual. And Lord Ellenborough, in *R.* v. *The Inhabitants of Brampton*, 10 East. 288, remarking upon this case says, " Mr. Justice " Powel, upon a question of felony, considered it as a " marriage contracted *per verba de præsenti*." It may also be convenient here to refer to the opinion expressed by Sir Edward Simpson, in *Scrimshire* v. *Scrimshire*, 2 Hagg. 399: " It is to be observed that this marriage was per- " formed by a Romish priest, according to the Romish " ritual. The Romish Church acknowledges several or- " ders; though Bishops, Priests and Deacons, corresponding " to those orders in the church of Rome, are only allowed " by us; and in the form of making and consecrating " bishops, 3 & 4 Edw. VI. c. 12; 5 & 6 Edw. VI. c. 1, s. 5; " 13 & 14 Car. II. c. 4, it is declared, 'that no man is to " to be accounted or taken to be a lawful Bishop, Priest or " Deacon, or suffered to execute any function, except he be " admitted thereto according to the form following, or hath " had formerly episcopal ordination and consecration.'

" Bishop Gibson observes, that this last clause was " designed to allow Romish converted priests, who had " been before ordained by a Bishop, that such priests " might be received without reordination: namely, that " they might be received to exercise the functions of a " priest, and to do the duties of the English clergy. But " not to allow them to celebrate marriage according to the " Romish ritual; for by the laws of this country, it is, " I apprehend, prohibited under severe penalties, for a " Roman Catholic priest to be in this country, and to " exercise any part of his office as a popish priest in this " kingdom. But as a priest popishly ordained is allowed " to be a legal presbyter, it is generally said that a marriage " by a popish priest is good; and it is true, where it is " celebrated after the English ritual, for he is allowed to be " a priest. But upon what foundation a marriage after " the popish ritual can be deemed a legal marriage, is " hard to say; indeed the canon law received here, calls an " absolute contract *ipsum matrimonium*, and will enforce " solemnization according to the English rites; but that " contract, or *ipsum matrimonium*, does not convey a legal " right to restitution of conjugal rights, though an English " priest had intervened, if it were otherwise than according " to the English ritual. Upon what reason or foundation " then should a contract of marriage entered into by the " intervention of a popish priest, not in the form prescribed " by law, be deemed a legal marriage in this country, " more than any other contract, that is considered, by the " canon law, as *ipsum matrimonium*?

" There may be other instances, but I have not met with " any but that of *Arthur* v. *Arthur* where a marriage by a " popish priest, by the Roman ritual, has been pronounced " for; but that was a marriage in Ireland, between parties, " both Catholics, where the laws with respect to papists are " different; which laws, as the laws of the country in

"which the contract was made, the court would respect. "And in that case there was consummation that purified "any condition in the contract. There can be no doubt "but that a marriage here by him who is in allowed "orders, according to the English ritual, would be "good by our laws. But I much doubt whether "a marriage in England by a Romish priest after the "Romish ritual, would be deemed a perfect marriage in "this country; the act of parliament having prescribed "the form of marriage in this country, and changed that "condition in the contracting part, in the Roman ritual, "'if holy church permit,' to, 'according to God's holy "ordinances;' and acts of parliament having prohibited "to Roman Catholic priests the exercise of their functions. "And I apprehend, unless persons in England are married "according to the rites of the Church of England, they "are not entitled to the privileges attending legal "marriages, as thirds, dower, &c. How can a bishop "try or certify such a marriage? can he certify that "English subjects, residing in England, were lawfully "married according to the laws of England, if they were "not married according to the rites prescribed by act of "parliament for marriages in this country. Would a "contract only by the intervention of a Romish priest, "or any priest, be deemed a legal marriage? The Roman "ritual not being the same with ours, such a ceremony "is nothing more than a contract."

The cases of *Smith* v. *Maxwell*, and *Rex* v. *The Inhabitants of Bathwick*, have also been relied on by the counsel for the accused, and it has been argued, that if a contract *de præsenti* without solemnization by a priest, had been sufficient by common law, they would have been decided upon that ground. Wherefore it is inferred that they are authorities shewing the opinions of the judges and courts, that such a contract, without such solemniz-

ation, did not constitute marriage. But though they certainly furnish grounds for that observation, yet neither of them is a decision upon the point now under discussion, which was not then raised, and which it was not necessary to rule. *Sir Robert Paine's* case, Sid. 13, is a short note; and it does not seem easy to hold that after a decree in the spiritual court pronouncing the parties to be husband and wife, anything more was necessary to complete that relation. *Tarry* and *Browne*, Sid. 64, is not upon the point in question.

The statute of the 17 & 18 Chas. II, c. 3, has been referred to as evincing its own necessity, the necessity, as it is said, for a legislative declaration of the validity of marriages by contract. But I do not think the statute is entitled to the weight and extent claimed for it, or justifies the use made of it. The frame and phraseology of the statute are remarkable. It recites that "by virtue or "colour of certain ordinances, divers marriages since the "beginning of the late troubles, have been had and so-"lemnized in some other manner than hath been formerly "used and accustomed; and for *the preventing and avoiding* "of *doubts* and *questions* which *may be* made, touching the "same, it enacts, that all marriages had or solemnized "since the first day of May, 1642, before any justice, and "all marriages had or solemnized according to the direc-"tions or true intent of any act or ordinance, shall be and "are thereby *adjudged*, *esteemed*, and *declared* to be and *to* "*have been* of the same force and effect in law, as if such "marriages had been had and solemnized according to the "rites and ceremonies established or used in the Church of "Ireland; any law, custome, or usage to the contrary "thereof notwithstanding." The Act of Uniformity prescribed a form of marriage according to the church ritual, and as many persons may have had scruples upon the subject, it might have been deemed prudent to meet

and prevent questions which, upon old authorities, might have been apprehended or raised as to the right to dower, or heirship attaching to marriages otherwise celebrated; and therefore, to avoid doubts, this act (17 & 18 C. II. c. 3) enacts "that they shall be and are thereby adjudged, "esteemed, and declared to be, and to have been valid, as "if solemnized according to the rubric." In an inquiry as to what was the rule of the common law upon this subject, one of the Ordinances referred to in this statute (1664, c. 51) is well deserving of grave consideration, as the act of learned men and lawyers of great reputation, deliberately framed and adopted. In the preface to that part of the Directory concerning the solemnization of matrimony, it is stated and declared "that marriage is no sacrament, nor "peculiar to the church of God, but common to mankind, "and of public interest to every commonwealth. Yet be- "cause such as marry are to marry in the Lord, and have "special need of instruction, direction, and exhortation "from the word of God, at their entering into such a new "condition, and of the blessing of God upon them therein, "we judge it *expedient* that marriage be solemnized by a "lawful minister of the Word," &c. This may be considered as a declaration, by its framers, that in their opinion of the law, it was not *essential* though *expedient*.

The Irish Statutes forbidding the celebration of marriages between Roman Catholics and Protestants, or between Protestants and Protestants, by Roman Catholic Priests punishing any priest who should officiate on such occasions, have also been relied upon, and it has been said, if the contract had of itself constituted marriage, where was the necessity for forbidding the presence and intervention of a priest. Perhaps one answer to this may be, that many acts have been at different times passed, upon notions not quite accurate, and views of the law not quite correct. According to Sir Edward Simpson, these marriages, if not celebrated after

the English ritual, were already void, and therefore there was no need of these statutes. But perhaps also some reason may be found for this enactment in the superstitious notion which we are told by Sir Dudley Rider prevailed extensively, that a marriage once solemnized by a clergyman could not be annulled. In accordance with this notion, a solemnization would be considered efficacious, and in certain cases more binding on the conscience than a contract, and therefore more generally resorted to and insisted on by the female, at least, in cases of clandestine marriage. If the argument derived from these acts were carried out, their subsequent repeal (so far as the matter of punishment), might warrant an inference that the legislature in later times held a contrary opinion.

The case of *Weld* v. *Chamberlain*, does not establish anything. In that case on a trial of an issue of marriage or no marriage; the evidence appeared to be, that a man having taken orders according to the forms of the Church of England, and having been ejected in 1663, contracted the parties by a form of words which they both repeated after him, but that no ring was used, and Pemberton, C. J. inclined to think it a good marriage, there having been words of contract *de præsenti* repeated after a person in orders. The ritual of the church had not been employed, nor any benediction pronounced by the parson, yet it was only on the importunity of counsel that Pemberton, C. J., agreed to make a case of it. Neither can the case of *Holder* v. *Dickinson*, be taken as an authority; for the opinion of Vaughan, J., whose judgment is the only one to the point, was not held by the other judges, whose judgments were affirmed on writ of error. The case of *Haydon* v. *Gould*, is, as I think, deserving of very serious consideration, and bears more upon the present question than any other yet cited. It has been so fully stated and dwelt upon in the course of the argument that I need not repeat it in terms. It has been

relied on as showing, not merely that a contract was not marriage, but that celebration by one not episcopally ordained was insufficient. However Chief Baron Comyn, in the passage I have already cited, abstracting this case, calls it a *marriage*; treats the man as *husband*, and adds that the *wife* and her children may be entitled to temporal rights; so in Gibson's Codex, p. 430, referring to this case we have this passage, "But though the husband demanding a right "due to him as husband, by the ecclesiastical law must "prove himself a husband according to that law, before "he can be entitled to it, and if he does not, shall not "reap benefit by his own fault; yet, the wife who is the "weaker sex, and the children who were in no fault, "may entitle themselves to a temporal right by such mar- "riage, which, (as was urged,) cannot be called a mere "nullity, because by the law of nature the contract was "sufficient, but only an irregularity in not complying with "a positive law." Here in a note of the very case, it is plainly treated as a marriage and not a nullity, though irregular as not complying with that rule of the rubric which enjoins celebration by a clergyman in holy orders; which is the meaning of the passage cited from Browne's Treatise on Ecclesiastical Law, and not that the common law required it. I have been favoured by a very learned and eminent civilian in England, with a reference to a case decided in the prerogative court of Canterbury, in 1742, which bears upon this point. The parties names were *Dawe* (calling herself *Tanner*) v. *Tanner*, and the case is abstracted in a MS. known as *Simpson's Repertorium*, the work of Sir Edward Simpson, and now in the possession of the present judge of the prerogative court. The marriage in that case was celebrated by a layman in Ilchester jail, yet the court after hearing counsel upon an application to revoke the letters of administration granted to the wife, refused to do so, and confirmed the letters condemning the

other party in costs. With the particular facts or circumstances of the case I am not yet informed, and can therefore only quote the abstract. The case of *Scrimshire* v. *Scrimshire*, has been referred to in order to shew that a marriage celebrated by a Romish priest was void, and not good even as a contract; yet, notwithstanding the high authority of Sir Edward Simpson, I do very much doubt, and cannot assent to the proposition. Indeed it appears to me directly at variance with the provisions of and necessary inference flowing from the English statute of the 3 Ja. 1, c. 5, s. 13, which has not, as I recollect, been referred to or observed on in the argument. That statute reciting that marriages, &c., were done superstitiously, enacts that every man being popish recusant convicted, who shall be thereafter married otherwise than in an open church or chapel, and otherwise than according to the orders of the church of England, and by a minister lawfully authorized, shall be *disabled* to have any estate of freehold in the lands, &c., of his wife; and that every woman, popish recusant convicted, who shall be married in other form than as aforesaid, shall be excluded from dower of her husbands lands, &c. The mischiefs which this section was intended to remedy are stated in the preamble to be, not that the parties so pretended to be married are not married, or are living in concubinage, but the mischief recited is, that the dates of their marriages, births, and burials, cannot be certainly known. The marriages thus solemnized are considered valid marriages; the parties husband and wife, and by reason thereof entitled to dower and courtesy, and of course the children legitimate. And the statute enacts, not that the marriages shall be null and void thenceforth, but that the *husband*, if a recusant convicted, shall not be entitled to courtesy of *his wife's* lands, nor she to dower of his; it disables them, thenceforward, from enjoying such consequences of their marriage, which

it therefore admits and asserts to have theretofore been, and consequently thereafter to continue to be marriage, valid marriage, though thenceforward these consequences of marriage shall no longer ensue.

For the prosecution it has been contended that these marriages of *Milles* and *Carroll* respectively are valid marriages, that they were present contracts which at common law constituted marriage (though it might not confer right to dower or inheritance, nor community of goods); that they were each celebrated before a minister of religion, and therefore constituted good and valid matrimony, and further that the ministers must each be considered to be "in holy orders," though not episcopally ordained. And they have referred to Fitz. Ab. pl. 117, Co. Litt. 34, a., Swinb. p. 75, in order to shew the inaccuracy of Perkins, and that the contract avoided the subsequent feoffment, and further that a contract makes very marriage, though it has not the same effects or consequences as solemnized matrimony. Certain ancient constitutions of the church to be found in Spelman and Gibson have been cited and relied upon, especially by Mr. Brooke to shew that the validity of the contract was always acknowledged. The principal passages referred to are found in Gib. Cod. 415, "Walterus in Const. Matrimonium." "Prohibeant etiam Presbyteri frequenter matrimonium "contrahere volentibus, sub pœnâ excommunicationis, ne "dent sibi fidem mutuo de matrimonio contrahendo, nisi "in loco celebri, coram* publicis et pluribus personis ad "hoc convocatis."

* *(Publicis)* "Utputà 'Tabellionibus;' vel dic 'Publicis,' id est, palam "in publico præsentibus, *Lyndw.* De qua re ita statutum est à Thoma "Bouchier Archiep. Cant. Ann. Dom. 1455: Injungatis insuper utriusque "sexûs viris ac mulieribus, ne mutuo fidem dent de matrimonio con-"trahendo, aut matrimonium quoque modo contrahant, nisi in præsentiâ "duorum aut trium testium idoneorum per quos matrimonium hujus "modi, si quando, inimico homine procurante, id per aliquem contra-"hentium denegari contingat, luculenter probari possit."

Whence the inference seems just—that matrimony might be contracted without the intervention of a priest, otherwise why enjoin the people not to contract it unless in the presence of witnesses who could prove it? Why forbid the parties to do so unless *in public, in loco celebri, coram publicis et pluribus personis ad hoc convocatis?* Why direct the priest to issue these injunctions instead of commanding them not to celebrate or solemnize unless in certain places, before a certain number, if without their presence and intervention there could be no marriage contracted?

The case of *Wickham* v. *Enfield*, Cro. Car. 351, has also been relied on by Mr. Brooke to show that clandestine marriages entitled the wife to dower. But the facts and circumstances of the case do not appear; so that it does not seem to me entitled to the weight as an authority upon this point which the learned counsel contended for. The entries read from Rastall by Sir Thomas Staples show that the form of pleading marriage relied on by Mr. Whiteside *per presbyterum sacris ordinibus constitutum*, was not invariable or universal.

I now come to more modern authorities. Chief Baron Comyn, in his Digest, title "Baron and Feme" B. 1, lays it down that by the common law, the contract *per verba de præsenti* was marriage: he adds—"so by the common "law, it is very matrimony, if it be a contract *per verba de* "*præsenti.*" So Blackstone, whose Commentaries were published not long after the Marriage Act, when the matter occupied much of public attention and anxious consideration, 1 Vol. p. 433—"Our law considers marriage in no other "light than as a civil contract. The *holiness* of the ma- "trimonial state is left entirely to the ecclesiastical law, "the temporal courts not having jurisdiction to consider "unlawful marriage as a sin, but merely as a civil incon- "venience. And, taking it in this civil light, the law

" treats it as it does all other contracts; allowing it to be " good in all cases, where the parties at the time of making " it were, in the first place, *willing* to contract; secondly, " *able* to contract; and lastly, actually did contract, in the " proper forms and solemnities required by law." Again, at p. 439—" Any contract made *per verba de præsenti*, or " in words of the present tense, and in cases of cohabita- " tion *per verba de futuro* also, between persons able to " contract, was before the late act deemed a valid mar- " riage to many purposes." I find in a book called Readings upon the Statutes, published in the year 1725, at p. 192 the following passage:—" Marriage, or the " conjunction of one man and one woman in a constant " society and agreement to live together (till the contract " is dissolved by death or breach of faith, or some notorious " misbehaviour destructive of the ends for which it was " intended) was evidently the institution of heaven, if we " give any credit to the Scriptures. And nothing more is " requisite to a complete marriage, even by the laws of " England, than a full, free, and mutual consent between " parties not disabled to enter into that state by their near " relation to each other, infancy, pre-contract, or impotency. " As to the solemnization of marriage, this is evidently a " civil rite, and is regulated by the laws and customs of " the nation where we reside; and every state allows " such privileges and advantages to the parties as it deems " expedient; they may and do also deny any legal advan- " tages to those who refuse to solemnize their marriage in " the manner the state requires, but they cannot dissolve " a marriage celebrated in another manner than the laws " of the country direct, for marriage, as has been observed, " is of divine institution, and nothing but a full, free and " mutual consent of the parties is necessary to complete " it and those who are so conjoined, no powers can, " without just cause, put asunder. I do not cite this

book as authority, but in a case where so many references have been made to books not of strict authority and to the usages and received opinions on the subject as indications of the common law, it may be permitted to shew what the author conceived to be the opinion of that day, 1725, as the Woman's Lawyer has been cited to shew the then popular notion on the subject.

The passage referred to by Mr. Holmes, from Story's Conflict of Laws, the work of a great lawyer, a man of profound learning and judgment, c. 5, s. 108, p. 100, is to the same effect, "Marriage is treated by all civilized nations "as a peculiar and favoured contract; it is in its "origin a contract of natural law; it may exist between "two individuals of different sexes although no third "person existed in the world, as happened in the case "of the common ancestors of mankind; it is the parent "and not the child of society; *principium urbis et quasi* "*seminarium reipublicæ*. In civil society it becomes a "civil contract, regulated and prescribed by law, and "endowed with civil consequences. In most civilized "countries, acting under a sense of the force of sacred "obligations, it has had the sanctions of religion super-"added. It then becomes a religious as well as a natural "and civil contract; for it is a great mistake to suppose, "that because it is the one, therefore it may not likewise be "the other. The common law of England (and the like "law exists in America,) considers marriage in no other "light than as a civil contract. The holiness of the "matrimonial state is left entirely to ecclesiastical and "religious scrutiny. In the Catholic, and in some of "the Protestant countries of Europe, it is treated as a "sacrament." And in Kent's Commentaries, vol. 2 p. 86, another American work of much weight and celebrity it is said—"No peculiar ceremonies are requisite by the "common law to the valid celebration of the marriage.

"The consent of the parties is all that is required, and as "marriage is said to be a contract *jure gentium* that "consent is all that is required by natural or public law. "The Roman lawyers strongly inculcated the doctrine "that the very foundation and essence of the contract "consisted in consent freely given by parties competent "to contract. *Nil proderit signasse tabulas si mentem "matrimonii non fuisse constabit. Nuptias non concubitus "sed consensus facit.* This is the language equally of "the common and canon law and of common reason. "If the contract be made *per verba de præsenti*, or if made "*per verba de futuro*, and be followed by consummation "it amounts to a valid marriage, and which the parties "(being competent as to age and consent) cannot dissolve, "and it is equally binding as if made in *facie ecclesiæ*. "There is no recognition of any ecclesiastical authority "in forming the connexion, and it is considered entirely "in the light of a civil contract. This is the doctrine of "the common law and also of the canon law which "governed marriages in England prior to the Marriage "Act of 26 Geo. II.; and the canon law is also the "general law throughout Europe as to marriages, except "where it has been altered by the local municipal law. The "only doubt entertained by the common law was, whether "cohabitation was also necessary to give validity to "the contract. It is not necessary that a clergyman "should be present to give validity to the marriage, "though it is doubtless a very becoming practice, and "suitable to the solemnity of the occasion."

The same position is laid down by Lord Holt in *Jesson* v. *Collins*. "If a contract be *per verba de præsenti*, it "amounts to an actual marriage which the very parties "themselves cannot dissolve by release or other mutual "agreement, for it is as much a marriage in the sight of "God, as if it had been in *facie ecclesiæ*, with this dif-

" ference, that if they cohabit before marriage in *facie* " *ecclesiæ*, they are for that punishable by ecclesiastical " censures, and if after such contract either of them lies " with another, they will punish such offender as an adul- " terer, and if the contract be *per verba de futuro*, and " after, either of the parties so contracting without a " previous release or discharge of the contract, marry " another, it will be a good cause with them of a dis- " solution of a second marriage, and of decreeing the first " contract's being perfected into a marriage. Quæ omnia " tota cur. concess. except the last point whereof Powell, " Justice, doubted."

Hence it appeared that the whole court considered that such contract was marriage; that the parties so living together, were not punishable for fornication, but that they would be for adultery, if either party were afterwards to cohabit with a third. So in *Wigmore's* case; though the value of the position is said to be lessened by Lord Holt's reference to the *canon* law in that case. Then we have the case of *Alleyne* v. *Grey*, reported in 2 Salk. 437, in 1 Shower, 50, and in Comb. 131. In the two first Reporters, the action is stated as being debt on bond, which must of course have been to the wife *dum sola*. The defendant pleaded *ne unques accouple in loyal matrimony*. Plaintiff demurred and had judgment, and for this reason as given in Salk, " for it alters the trial; instead of trying " *per pais*, it puts the trial on a certificate from the ordi- " nary, and secondly, it admits a marriage, but denies the " legality of it, whereas a marriage *de facto* is sufficient, " and whether legal or not legal, is no wise material." In Comb. the action is stated as being in tresspass, but the same judgment as reported in Salk, is attributed to Lord Holt. The result is the same in either form of action, viz., that the relation of husband and wife was taken to subsist between the plaintiffs, without proof of a solemnized marriage.

Lord Mansfield, a report of whose speech on the debate of the Marriage Act, has been so pressed upon the Court, as evincing his opinion in support of the position laid down by counsel for the prisoner in *Morton* v. *Fenn*, 3 Doug. 211, expressed directly the contrary opinion. It was an action for breach of promise of marriage, and tried before Lord Mansfield. The evidence was, that the defendant who was a man of fortune in Jamaica, aged seventy, promised to marry the plaintiff if she would go to bed with him that night, which she did, and afterwards lived with him a considerable time. It appeared also that the defendant several times subsequently repeated his resolution to marry her, but that he afterwards married another woman. The jury found a verdict for the plaintiff, with £2000 damages. A rule *nisi* for a new trial having been obtained, on the ground that it was *turpis contractus*, Lord *Mansfield* said, "I thought the "objection would not lie on two grounds, first, that be- "fore the Marriage Act, this would have been a good "marriage, and the children legitimate by the rules of the "common law. Secondly, I thought so because the par- "ties were not *in pari delicto*, but this was a cheat on "the part of the man." This opinion expressed many years after the Marriage Act had become law, and reported by Douglas, extinguishes the notion, that he could have used the expressions so imputed to him in the unauthenticated report of the debate in Parliament. And as *Wilmot*, C. J., says in his judgment in *Evans* v. *Harrison*, (where *R.* v. *Larwood*, and the doctrines on which it is rested, are substantially overruled.) "Parliamentary doubts, debates, or con- "ferences ought to have no weight in directing judicial "determinations."

Such then was his notion of the rule of the common law declared by this learned and able judge, Lord Mansfield, upon a subject which must have engaged much of his attention,

and with which he must have been conversant and familiar before the passing of the Marriage Act.

The next authority upon this part of the case is, the opinion of Sir William Scott, pronounced upon the subject in *Dalrymple* v. *Dalrymple*. The eminence of Sir William Scott, as a judge is too great to require any observation. His familiarity with the marriage law of England, his profound learning and great experience, entitle this opinion so expressed by him, to the utmost respect and profound attention. He distinctly lays down, that the canon law is the basis of the marriage law of England, and that its rule in this respect, viz., that an irregular marriage contracted *per verba de præsenti*, though not consummated, was valid, even to the extent of avoiding a subsequent regular marriage, was enforced by the ecclesiastical courts of England. It has been argued in answer to this, that the case in which that judgment was delivered was a Scotch case, and that as far as relates to the law of England, this *dictum* was *obiter* and extrajudicial. But what weight is this objection entitled to, against the deliberately expressed opinion of a judge of his sound judgment, and minute and thorough acquaintance with the English law of marriage, whose great experience and practice in that court, must have made the subject a matter of perfect familiarity to his mind?

In the course of his judgment he refers to the case of Lord *Fitzmaurice*, where he says, "the court composed of "a full commission, found for the marriage." I have been favoured by the courtesy of the same eminent and learned civilian, with a copy of the judgment in that case, which is said to a certain extent to fall short of Sir William Scott's view of it, as it does of the prayer of the ladies libel. The terms of the judgment are these: "Nos "judices delegati, deliberavimus præfatos G. Fitzmaurice, "&c., et Elizabetham, &c., contractum sponsaliticum et

" matrimonialem, per verba de præsenti ad id apta et idonea, " per ipsos et eorum alterutrum mutuo et ad invicem pro- " bata et pronunciata, iniisse et inter sese *celebrasse*, " eundemque per carnalem copulam, et procreationem " liberi consummasse; proque viribus, valore, et validitate " contractus matrimonialis et sponsalitici, sic inter præ- " fatos Gulielmum et Elizabetham initi contracti et con- " summati, ad omnem juris effectum pronunciamus decer- " nimus et declaramus; præfatumque Gulielmum ad so- " lemnizandum sed solemnizari procurandum verum, purum, " et legitimum matrimonium in facie ecclesiæ, inter se et " præfatam Elizabetham compellendum fore de jure debere, " pronunciamus decernimus et declaramus." They declared the matrimonial contract to have been entered into and celebrated between them, and to be valid and entitled to all legal effects, but being irregular, they added, and also decreed a solemnization in *facie ecclesiæ*. It is observable that Chief Baron Comyn was one of that court of delegates, and that the contract was made and celebrated in Ireland.

The same opinion was thrown out by Lord Kenyon in *Reed* v. *Passer*, at Nisi Prius; next we have Lord Ellenborough in *R.* v. *the Inhabitants of Brampton*, and Lord Eldon in *M'Adam* v. *Walker*, supporting and confirming Lord Stowell's position; the latter using the same language and clearly expressing his opinion to be identical. Again in the case of *Latour* v. *Teesdale*, we have the judgment of the acute, accurate, cautious and very learned chief justice Sir Vicary Gibbs, express and distinct, that a contract *per verba de præsenti* constituted actual marriage. After a full argument by the most eminent counsel of the day, Sergeant Copley, now Lord Lyndhurst, and Sergeant Best, now Lord Wynford. Lastly we have the opinion of Lord Tenderden in his charge to the jury, on the second trial of an issue sent from the Court of Chancery, in the case of *Beer* v. *Ward*. After stating that for the due consideration

of the question then at issue, it was important to understand in what way marriage might lawfully have been celebrated before the passing of the marriage act, he thus proceeded: "A marriage most undoubtedly, at that time, might lawfully "be celebrated in a way in which afterwards the proof of "it would be extremely difficult; that might be, for it "might be celebrated at any time and in any place by a "clergyman. *Nay! as I understand the law, it might be "even celebrated without a clergyman;* for a declaration "by the parties in terms of contract, that they were "man and wife accompanied by cohabitation as man "and wife; *a contract verbally made before witnesses, and a "declaration of that in the presence of witnesses, would, at "that time of our history, have made a good and lawful "marriage in England, as it does now in Scotland.*" This cause came before Lord Eldon, on a motion for a new trial and an objection was taken to the law as thus laid down, and it has been said, that he differed from Lord Tenterden upon the point. But that is a mistake, Lord Eldon said, "If it were agreed, that the only question "was a question arising on the law of the case, I should "have said undoubtedly I ought to retire from it, and "call on a court of law to give me their opinion on it. "I should go no further with respect to that question "than to say, I think, I ought to hesitate before I would "venture to say, that the law was improperly stated to the "jury; recollecting the consequences of such a statement." After some observations on the facts of the case, he adds, "I am on the whole of opinion that the best way of "disposing of this case, both with respect to the law and "fact, will be to direct that there should be a trial at bar "on this case, in which you may have the opinion of all "the judges of the court on the law, and in which these "matters so contradictory to each other, and so distressingly "contradictory to each other, may be thoroughly and entirely

" understood, and thoroughly and entirely observed on." I read from a note taken by a very great and eminent person, who was counsel in the case. Thus, it appears, that there is the authority of Lord Holt, supported by the whole court, Chief Baron Comyn, Sir William Scott, Lord Mansfield, Lord Kenyon, Lord Ellenborough, Lord Eldon, Sir Vicary Gibbs and Lord Tenterden, for the position, that a contract *per verba de præsenti*, constituted a valid marriage by the Law of England, before the marriage act. How all these eminent men came to adopt this opinion, (if it is erroneous) affords matter for serious consideration, and must make me pause and be well assured of the ground I go upon, before I venture to pronounce it error. It appears incontrovertible, that such a contract was indissoluble at common law; that it could not be released; that it bound the parties during life, that their cohabitation was not sinful, was not fornication; and that cohabitation by either with a third party was considered adultery. In all these most important respects, more important in the just estimation of many, than any title to, or matter of property, or temporal advantage, this *vinculum fidei* operated and was valid; so that even if it were clearly proved, that as to some of the legal rights attendant or consequent upon marriage, such contract had not the full force and effect of a marriage in *facie ecclesiæ*, (a position which is controverted as to community of goods by the case of *Alleyne* v. *Grey*, and as to right of administration by *Daw* v. *Tanner*,) yet we have Sir William Scott in *Lindo* v. *Belisario*, 1 Hagg. 231, saying, that " marriage may be good " independent of any considerations of property, and the " *vinculum fidei* may well subsist without them."

The constitutions to which I have previously referred from Gibson, seem strongly, nay necessarily to import, that matrimony may be contracted in the absence of the priest; and the 5th Canon, agreed upon by the clergy of Ireland

in 1711, and referred to in the course of the argument by Mr. Whiteside, shows such a marriage, though irregular and clandestine, is yet marriage. The canon is in these words: "For the more effectual prevention of clandestine marriages "we constitute and appoint, that every person who is "married clandestinely, where neither banns, according to "the rubric, have been published, or license obtained, or "where the said marriage is solemnized by a person not "qualified by law, or in any other form than that which is "prescribed by the Church of Ireland, as by law estab-"lished, and that all that are present at such marriages, "shall be obliged to do public penance. And that the "parties so clandestinely married, shall be obliged to "discover the person that married, or pretended to marry "them, under pain of excommunication, from which "they shall not be absolved before they make such "discovery." This view of irregular and clandestine marriages appears to have been held in the case in Simpson's Repertorium, and seems also to have been the opinion of Lord Avanmore in *Dowling* v. *Constable*, Ir. T. R. 263, (a case noticed in Dr. Radcliffe's learned and able opinion on this subject;) for though there is no decision, or distinct expression of opinion upon the point, on no other ground than that it was marriage, can his rule (in which the whole court seem to have concurred,) be sustained.

But it is said that the 58 Geo. III. c. 81, s. 3, annuls the contract, leaves it powerless, devoid of the means of enforcement, and therefore inoperative—that this section follows the 13th sect. of the English Marriage Act, and that that section must be taken to have annulled all contracts, and declared them not to be marriage. I do not think so. I rather incline to think that the legislature refrained from annulling these contracts, because it would not venture or consent to do such violence to the moral and religious feelings of the community. It is not a fair inference from

the words of this section, that it annuls all contracts of marriage, because it enacts that no suit shall be maintained to compel celebration *in facie ecclesiæ*, by reason of any contract *of* (not *for*) matrimony. The remedy is taken away, but the contract is not annulled—the remedy, not the right, is barred. If otherwise, why did not the legislature distinctly enact it? If they intended to dissolve the contract, why not say so? In the absence of any such provision, why should this court be called upon to put a construction on this section of the act, which would dissolve a solemn compact, a relation in which the parties chose to live, and in which the law says they may continue to live, free from and without sin, though it denies them some of the advantages derivable from a more solemn or different form of celebration of marriage? The argument, that since the Act of Uniformity any marriage but one celebrated by a clergyman, and according to the ritual prescribed by the rubric, is invalid, as said to be laid down by Sir Edward Simpson in *Scrimshire* v. *Scrimshire*, seems utterly untenable. It is inconsistent with the validity of the marriages of Jews and Quakers, which can no more be disputed or denied, than they can be reconciled to or upheld consistently with that position, or the basis on which the whole argument for the defendants rests. It is contradicted by the provisions of the 3 Jac. 1, c. 5, s. 13, to which I have had already occasion to refer, which proves that such marriages were valid—and valid for conferring title to dower and courtesy. If the marriages there spoken of were valid, by what means was it that they became so? Not by reason of the English ritual, because that was not employed, but simply as common law contracts. Sir Edward Simpson, observing on the case of *Arthur* and *Arthur*, says the Roman ritual, not being the same with ours, such a ceremony is nothing more than a contract, 2 Hag. 402. He assumed, I do not know on what authority, that the laws of

Ireland were different from those of England, as to marriages, previous to the marriage act, or permitted marriages, which the law of England did not, between Roman Catholics; and added, that in that case, *Arthur* v. *Arthur*, there was consummation (as is found in both the cases at bar) that purified any condition in the contract. If such marriages between Roman Catholics, (persons much more widely separated from the Established Church than Presbyterian Dissenters) nay, indeed, between Protestants of the Established Church (as in *Fielding's* case) were held valid, upon what principle can marriages by these dissenting ministers be rejected? Why, if marriages performed between Episcopalians by a Roman Catholic Priest, according to a condemned and prohibited ritual, be deemed valid, should not the same doctrine be applied to the ceremony as performed by Presbyterians and other Protestant Dissenters.

Two very important statutes have been cited in the course of this argument, with the view of proving the doctrine, that, by the law of England, marriages to be valid must be celebrated by a priest episcopally ordained. But to me they appear to prove the reverse. The first is the 57 Geo. III. c. 51, "An Act to regulate the celebration "of marriages in Newfoundland." It recites that "whereas "a doubt had existed whether the law of England, re- "quiring religious ceremonies in the celebration of mar- "riage to be performed by persons in holy orders for the "perfect validity of the marriage contract, was in force in "Newfoundland, and by reason of this doubt marriages "had been of late celebrated in Newfoundland by persons "not in holy orders." This has been cited as a legislative declaration of the common law. Now, in the first place I think it doubtful whether the "Law of England," there referred to, is to be taken as the common law or the existing law under the Marriage Act; but if it be the former, as

was contended by the counsel for the prisoner, the provisions both of this Act and of a subsequent one, to which I shall presently allude, appear to me to be most extraordinary and irreconcileable. This statute, after the recital just mentioned, proceeds to *enact* (not to declare) that after the 1st of January, 1818, all marriages in Newfoundland shall be celebrated by persons in holy orders, and that all marriages otherwise contracted after that date shall be void, provided that nothing therein shall be taken to extend "to marriages that may be had under circumstances of "peculiar and extreme difficulty in procuring a person in "holy orders to perform the celebration, *and in which the* "*law might on that account otherwise determine on the validity* "*of such marriages.*" I cannot but consider that this proviso plainly shows that the intervention and celebration of the ceremony by such a person was not considered essential, but expedient only. The marriages of Jews and Quakers are also excepted from the operation of this Act, which to me appears another proof of the view the legislature then took of the common law on this subject. But perhaps the subsequent Act by which this was repealed puts this in a still clearer light. It is the 5 Geo. IV. c. 68, and provides that *all* marriages which had taken place at any time before the passing of that Act, which had not been declared and adjudged void by a court of competent jurisdiction, and all marriages which should take place in Newfoundland previous to the 25th of March, 1825, should be as good and valid as if the said recited Act had not been passed or made. And then goes on to re-enact the provision as to celebration by a person in holy orders, except in cases therein after specially excepted and provided for. It then provides that the Secretary of State or Governor may grant licences to teachers or preachers of religion to celebrate marriage within the colony. This principle is recognized in *Hutchinson* v. *Brooksbank*, viz. that after the

Toleration Act, which removed the penalties for non-conformity, the forms and ceremonies of the Dissenters must be taken to be valid and sufficient in law.

Long before that, the marriages of Quakers were ruled to be valid in a case of ejectment in 1661, mentioned in the note to 1 Hagg. App. 9, at the assizes at Nottingham, and the same point was ruled, after argument, in an action of crim. con. as mentioned by Willes, J. in *Harford* v. *Morris*. Such appears to have been the opinion of Lord Hale, and to have led him to the course adopted at the trial at Guildhall, mentioned in Burnet's life. And the case of *Deane* v. *Thomas*, M. & Malkin, 361, seems to remove all question that in the case of Quakers no solemnization by a priest in orders is necessary, and to shew that a marriage contract according to the forms of their sect is valid and legal. It was an action for crim. con.; the plaintiff and his wife were both Quakers, and the marriage had been performed according to the ceremonies of the sect, by a public declaration of the parties at a monthly meeting of the society of their becoming man and wife, and a certificate to that effect entered in a register signed by the parties and by several subscribing witnesses. The register was produced and proved by one of the witnesses, and a member of the society proved the forms observed to be those usually considered as necessary to marriage amongst Quakers. The proof was received without objection, and the plaintiff obtained a verdict and damages. This proves beyond question that this was marriage—valid marriage. How valid? Not certainly by statute, but by common law.

The same observations apply with regard to the Jews. It has, indeed, been argued that *Lindo* v. *Belisario* is an authority to shew that Sir William Scott did not hold the doctrine that a mere contract *per verba de præsenti* constituted very marriage by the common law of England,

for that though a contract was proved and admitted in that case, the marriage was held void. But that was not the question he was called upon to try: it was whether by the laws and institutions of the Jewish nation the marriage as there solemnized was sufficient. He states that he was bound to consider those institutions as having the form and effect of laws; and the plain inference from his argument is, that but for the obligation thus imposed upon him of considering the question as dependant on the laws and customs of the Jewish nation, he would have pronounced the contract to have been valid marriage.

The principle thus applied to the marriages of Quakers and Jews ought, I think, to be held to extend to Protestant Dissenters; and of this opinion Lord Mansfield appears to have been, even after the passing of the Marriage Act, for in the case of *Birt* v. *Barlow*, 1 Doug. 174, he is reported to have used these words:—"An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage. In other cases cohabitation, reputation, &c., are equally sufficient, since the Marriage Act as before. But an action for criminal conversation has a mixture of penal prosecution, for which reason, and because it might be turned to bad purposes by persons giving the name and character of wife to women to whom they are not married, it struck me, in the case of *Morris* v. *Miller*, that in such an action, a marriage in fact must be proved. I say a marriage in fact, because marriages are not always registered. There are marriages among particular sorts of Dissenters where the proof by a register would be impossible; and Dennison, Justice, in a case of that kind which came before him, admitted other proof of an actual marriage." Why should the proof be *impossible*, but because the marriage was not celebrated in Church by a minister of the Establishment? And yet we have here the authority of

Lord Mansfield and Mr. Justice Dennison, that such are marriages—actual valid marriages, though marriages of nonconformists.

In Ireland Dissenters have, as far back as memory or tradition can be traced, celebrated marriages according to their own forms, and before their own ministers, and in no single case has any such marriage been adjudged to be invalid. So in the Huguenot Church, in Dublin, it has been the practice, as long as the register goes back, for ministers to celebrate marriages not only among their own congregation, but also where one of the parties was an Episcopalian. And their marriages have never been called in question because the minister who solemnized them had not been episcopally ordained. Yet the court is called upon to hold that no marriage at common law can be valid without the intervention of a priest episcopally ordained, the direct consequence of which must be to hold that the society of Quakers in England have, (contrary to the authorities already referred to in this respect,) till the last Marriage Act in England, been living in a state of concubinage, not matrimony; and that their children have been all illegitimate—for the Marriage Act of Geo. II. gave them no validity, though it protected them from its own regulations and provisions; and that in Ireland the Quakers, and other Protestant Dissenters of every description, were, previous to and until the year 1781, in the same condition and plight. These are startling propositions, in the absence of any authority, save the case of *Haydon* v. *Gould* in England, and of any case whatever in which such marriages were denied or impugned in Ireland on the ground that they were not solemnized by a minister episcopally ordained.

This court is called upon to hold them invalid, and not marriage, not merely in the absence of any such case, but in disregard of the statute declaring them to have been

valid—the Act of 21 & 22 Geo. III. c. 25. This statute appears to me to bear very decisively upon the question, and its consideration is of the utmost importance in the case. It begins—"Whereas the removing any doubts "that may have arisen concerning the validity of matri- "monial contracts or marriages entered into between Pro- "testant Dissenters, and solemnized by Protestant dissent- "ing ministers or teachers, will tend to the peace and tran- "quillity of many Protestant Dissentersand their families, "&c., be it therefore declared and enacted that all such "contracts or marriages heretofore entered into, or here- "after to be entered into, between Protestant Dissenters, "and solemnized or celebrated by any Protestant dissenting "minister, shall be and be held and taken to be good and "valid to all intents and purposes whatever." That is, in order that there may be no doubt of the validity, the effectual binding, force, and effect of matrimonial contracts or marriages entered into between Protestant Dissenters, and solemnized by Protestant dissenting ministers, the Parliament declares and enacts that all such shall be, and be held and taken to be, good and valid to all intents and purposes whatever, it declares those in future to be entered into and those theretofore entered into and solemnized, to be perfect marriages, good and valid to all intents and purposes; and it enacts that they shall be so deemed, held, and taken—that they were perfect legal marriages,—good and valid; *i. e.*, having all the qualities and obligation or binding effect of marriage; valid, *i. e.*, at law, conferring all the benefits and attaching all the obligations consequent upon marriage; whence it follows as a consequence of that declaration, that by the law so declared they were previously valid, entered into and solemnized according to law, though no priest in holy orders intervened; that by the then existing law a matrimonial contract or marriage, (they are used synonimously)

entered into and solemnized before a minister of religion, though not episcopally ordained, had been and was a perfectly good and valid marriage. And this not because the parties were Dissenters, but because such a contract constituted marriage by the law of the land. And if valid at *common law* between A. and B., both being Protestant Dissenters, of whatever sect or denomination, it must have been equally so between C. and D., one or both of whom are episcopalian. This is a declaratory act. In Co. Litt. 76, a. & 290, b. observing on the Act of Eliz. against fraudulent feoffments, Lord Coke lays down this rule as to the construction of declaratory Acts, "And it is to be "observed, that the words of the said Act are, *Be it* "*therefore declared, ordained, and enacted*, and therefore "like cases in semblable mischief shall be taken within "the remedy of this Act, by reason of this word (*declared:*) "whereby *it appeareth what the law was before the making* "*of this Act.*" So in 3 Co. 82, b. *Twyne's* case, he says, "Note well this word declare, by which *the Parliament* "*expounded that this was the common law before.*" Apply these observations of Lord Coke to the Act which I am now considering, and it follows that this statute must be taken to be declaratory of what the law was before, and at the time it was passed. A doctrine not then for the first time broached, but quite consistent with the positions already cited from writers of weight and learning, and the opinions of the eminent judges I have enumerated. Unless then we now throw aside this rule of Lord Coke, for the construction of statutes, "whereby it "appeareth what the law was before the making of the "act," it cannot be doubted after this declaratory Act, that at common law the intervention of a Priest in episcopal orders was not essential to the solemnization of marriage; certainly not, in the case of Protestant Dissenters of any denomination or denominations.

The form found in these special verdicts is a sufficient form and celebration of marriage; why then may it not be adopted by any two subjects of the realm, who from choice or convenience prefer it and submit to it? In consenting to submit to this form, they recognize and acknowledge its obligations, and cannot be permitted to cast them off at his or her will and pleasure. Such a marriage has been held sufficient to support an indictment for bigamy, where one of the parties was a Presbyterian and the other a member of the Established church, *Rex* v. *Lathropp*, Old Bailey Sess. June, 1815. So in *Rex* v. *Marshall*, at Enniskillen, 1828, the same point was ruled by Baron M'Clelland. So in *Rex* v. *Wilson*, by Torrens, J., at Omagh Summer Assizes, 1828; so in *Rex* v. *M'Laughlin*, by Moore, J., at Antrim Spring Assizes, 1831; so in *Rex* v. *Haliday*, by Baron Pennefather, at Omagh Spring Assizes, 1838. In each of these cases the man on trial was a member of the Established church, the woman a Presbyterian, the marriage celebrated by a Presbyterian clergyman. It was held good after objection and the prisoner convicted. So in the case of the *Queen* v. *Daniel M'Enery*, tried before my brother Crampton, at Downpatrick, Spring 1841, the prisoner a Roman Catholic, was married to a Presbyterian, by a Presbyterian minister, Mr. Weir. One of the witnesses, the Bridewell keeper, stated that he was present when Mr. Weir, said to the prisoner that he had imposed himself on him as a Presbyterian, and the prisoner said that he was sorry for so doing, and the marriage was held good; the prisoner was convicted and sentenced to twelve month's imprisonment and hard labour. This was so held upon the authority of the *Queen* v. *Orgill*, 9 C. & P. 80, which was an indictment for bigamy, where the second marriage was performed by a Roman Catholic Priest, to whom the prisoner represented or held himself out as one of that religion, and Baron *Alderson*

expressed his decided opinion that the prisoner could not at the trial set up as a defence that he was a Protestant. It does not appear whether M'Enery, in terms stated to Mr. Weir, that he was a Presbyterian, but I think a man may impose himself upon another, and bind himself as effectually by acts as declarations. By seeking to have the ceremony of marriage celebrated according to the rites of any particular church, by being party to its celebration, a man holds himself out as recognizing its obligation by acts as strongly as any form of words, and cannot afterwards be permitted to say, "I contracted marriage solemnly, accord-"ing to the forms of a known and venerable church; I "professed to enter into that contract; I thereby imposed "myself on the woman as her husband, she thought me "honest and sincere, and that we did contract marriage; "yet as I did not belong to that sect, nor say that I did, "but merely by act more solemn than any mere declaration, "held myself out as bound by the ceremonies I so solemnly "adopted, I may now cast away all its obligations and "disregard its duties; I may betray, abuse, and abandon "the woman whom I so professed to take as my wife, and "upon whom I so imposed myself as her husband."

The subject is one of vital importance to society, and ought not be considered as a matter of controversy among sects, nor discussed in such a spirit. If a witness, even before the late statute, after having been sworn as a seceder or covenanter, or as a Jew, were to attempt to justify or protect his perjury, by disowning the creed which he had professed when on his oath, and by the forms of which he had sworn, would the defence be admitted because he had not made the verbal declaration. In the case of *Jones* v. *Robinson*, 2 Phill. 285, where one of the parties to the marriage was a Jewess, but had been married in a Christian church, Sir William Scott said, "The marriage was "solemnized according to the Christian form; whatever

" her persuasion was she conformed in this respect to the " Christian religion, so she submits to the restrictions of " that form, and is bound to the consequences if she departs " from them." So I say here, whatever his persuasion was, the prisoner conformed in this respect to the Presbyterian church, so he submits to the restriction and obligation of that form, and is bound to the consequence if he departs from and transgresses them.

It may be deemed more convenient—it may tend more effectually to prevent clandestine marriages, if the ceremony be of necessity to take place and be repeated before the minister of the congregation to which each party belongs, and it may be considered expedient that such should be the law, but no such position, law, or rule has been promulgated in Ireland, nor has there been one constant uniform usage and practice to any such effect. There has indeed existed a general, but not universal usage, to have marriages solemnized in the presence of a minister of some religious sect or congregation, or of an assemblage of a religious character. The rites and solemnities used on these occasions have varied, and though the statutes seem generally to assume that marriage must be solemnized by a clergyman of the established church, or a minister in holy orders, yet some import the contrary, and some go far to prove the contrary; and an opinion of an opposite kind has been entertained and expressed by several of the most eminent judges that ever adorned the bench. In neither of the cases before the court does it appear to me that the disputed marriage can be considered as a mere contract. It is a marriage entered into before a clergyman, and solemnized in his presence according to the established form of his church, and in my opinion requires nothing farther to its perfection and completion as marriage; and even if the provisions of the 58 Geo. III. c. 81, s. 3, could be considered as having had the effect of annulling and

sweeping away a mere pre-contract, it cannot in my mind be held to apply to, or to have contemplated a case like the present.

On this ground, therefore, I hold this to have been a marriage in fact, a marriage within the protection of the statute, upon which the indictment is framed, as it clearly is a case within the mischief intended to be prevented, and a case where the wife and children of such an union, should receive the shelter and protection of the law, although it may not by ecclesiastical judges be held to entitle the parties to rights in that court, or to be there cognizable.

It has been further argued with great force, that ministers of the Presbyterian or Scotch Church, are ministers "in holy orders;" that they were so considered at the time of the reformation, and their ordination was for a time acknowledged, until the Act of Uniformity prescribed episcopal ordination. The Statute referred to (58 Geo. III. c. 84,) in support of this argument, appears to me to bear directly upon the point, it is entituled, "An Act to remove doubts as to the validity "of certain marriages had and solemnized within the British "territories in India." The doubts related to marriages solemnized in British India by ordained ministers of the Church of Scotland. It declares and enacts, that all marriages theretofore had and solemnized by ordained ministers of the Church of Scotland, shall be taken and esteemed to be of the same and no other force and effect, as if solemnized by clergymen of the Church of England, according to its ritual. If they were so in the East Indies, and that by the common law, the same common law declares alike of a marriage celebrated in Ireland, by the ordained ministers of the Irish Presbyterian Church. This statute is declaratory, and the law as there laid down, is consequently to be taken as having been the common law of England previously. If these marriages were by the common law legal in the East Indies, the same common law applies to marriages cele-

brated by the ordained minister of the Irish Presbyterian Church, which is similar to the Scotch in principles, doctrine, and discipline, and where ministers are ordained in the same form and manner. So that upon this ground it appears to me impossible to hold that such marriages are not valid and legal marriages, *de facto* and *de jure*. The Presbyterian clergymen are authorized to perform the most solemn offices and functions of religion, to consecrate the elements of the Sacrament of the Lord's supper, and to administer it, and I think there should be some very stringent authority produced, before this court can hold that they are not ordained ministers of the church, ministers in holy orders, and that, therefore, they cannot celebrate marriage here, when it is plain that ministers similarly circumstanced, were by the common law qualified to celebrate marriage in the East Indies.

These are the several grounds upon which I have come to the conclusion, that the marriages in the present cases, are marriages within the meaning of the statute on which the indictments are founded, and that the crown is entitled to judgment.

Crampton, J.—In the opinion I am about to give I shall confine myself to the case first argued, the *Queen* v. *Milles*, because the facts in the case of *The Queen* v. *Carroll* although not precisely the same with those found in the *Queen* v. *Milles*, do not essentially differ from them. This case comes before the court upon a special verdict found before my brother Perrin, at the Spring Assizes of the year 1842, for the county Antrim, and removed by the Crown by *certiorari* for the judgment of this court.

The subject is one of vast importance not to the parties to this record merely, but to the public at large, and I rejoice, therefore, that the questions which it involves are raised in such a shape as will enable the parties to bring them before the ultimate tribunal, the House of Lords, for a final and satisfactory determination. This course was not open in the cause of the *Queen* v. *Smith*, lately before the twelve Judges, upon a case reserved by myself from the Armagh Assizes. In that case the same question arose as now arises upon this special verdict, and the decision of the judges was in favor of the prisoner, who was accordingly discharged. But the present case is brought before us now upon special verdict for the purpose of reviewing the decision in the *Queen* v. *Smith*, and of enabling the parties to have the final determination of the House of Lords upon the momentous matters which it involves. The *Queen* v. *Smith* has not been relied upon as an authority, by the prisoner's counsel, to govern the present case, and most properly. For, how-

ever I may feel myself bound, as an individual member of the tribunal which ruled that case, when sitting as a circuit judge upon a case from which there is no appeal nor opportunity of revision save through the medium of a case reserved for the twelve judges, yet sitting in this Court of Queen's Bench to pronounce judgment upon a question which arises upon the record, and is (so to say) on its transit to the House of Lords for the purpose I have before stated, I feel myself not pressed by the authority of the *Queen* v. *Smith*.

The case we are now about to rule has been argued with great ability, zeal, and research, and the court has before it abundant materials for its judgment. If we go astray it will not be for want of information from counsel. This is an indictment for bigamy. The crime of bigamy in the language of the statute, upon which this indictment is founded (10 Geo. IV., c. 34, s. 26) is committed when "a person being married shall marry any other "person during the life of the former husband or wife." The special verdict finds that the prisoner, George Milles, was on the 24th of December, 1836, solemnly married to one Jane Kennedy, and the question for the court is whether the prisoner was, at that time, a married man, his former wife being then living, or in other words, whether upon the facts found by the jury, Hester Graham, was on the 24th of December, 1836, the wife of the prisoner, within the meaning of the statute. The few facts which raise this question are these:—the prisoner, George Milles, was in the year 1829, *a protestant of the Established Church*, Hester Graham was not a Roman Catholic, but whether a member of the Established Church or a Protestant dissenter the jury do not find. The special verdict states, that in the year 1829, the prisoner and Hester Graham entered into a contract of present marriage before the Rev. John Johnston, and other persons

in Banbridge; Mr. Johnston *being then the placed and regular minister of the congregation* of Presbyterians at that place, and that Mr. Johnston performed a *religious ceremony* of marriage between those parties according to the usual form of the Presbyterian Church in Ireland; and that after the ceremony, the parties cohabited and lived together for two years as man and wife. On the part of the crown it is contended that these facts establish a legal marriage between the prisoner and Hester Graham in 1829, and that therefore his second marriage in 1836, (Hester Graham being then alive, as found by the special verdict) was an offence against the statute. On the other hand the prisoner's counsel contend that the facts found by the special verdict do not establish a legal marriage between the prisoner and Hester Graham, within the true meaning of the statute.

The judgment of the court must turn upon the character of the ceremony of 1829. Had both the parties in 1829 been Presbyterians, this marriage by force of the statute of the 21st and 22nd Geo. III., c. 25, had been clearly a legal marriage, and we should have had no difficulty in pronouncing judgment against the prisoner. Again, had it appeared that one of the parties was a Presbyterian, the other being an Episcopalian Protestant, the question argued by the Attorney-General would have arisen, viz.: whether a Presbyterian minister is authorized by the statute of the 21st and 22nd Geo. III. ch. 25, to celebrate a mixed marriage. That question however does not arise since it is not found that Hester Graham was a Presbyterian or even a Protestant dissenter, but consistently with the special verdict she may have been a Protestant of the Established Church. This marriage therefore plainly can derive no aid from the Dissenters Act which, in terms as well as in its spirit, is applicable only to the marriages of dissenters, performed by their own

dissenting ministers. And the case must therefore be argued as if the parties to the disputed marriage were both of them Episcopalian Protestants.

Upon this argument then, three propositions were insisted upon by the crown. First, that a contract of marriage *per verba de præsenti* independently of, and without any religious ceremony, by the law of Ireland makes a valid legal marriage. Secondly, that if a religious ceremony must be superadded, yet that here was a religious ceremony of marriage celebrated by a Presbyterian minister, which is all that the law requires. And thirdly, that if wrong in both the former positions, yet there was here a marriage *de facto* which is sufficient to sustain an indictment for bigamy. All these propositions are controverted by the prisoner's counsel who contend. First, that a contract of marriage *per verba de præsenti* without the intervention of a priest is no legal marriage, whether followed by cohabitation or not. Secondly, that a Presbyterian or any dissenting minister is not a clergyman in holy orders competent to celebrate marriages, outside the pale of his own people. And thirdly, that the contract and ceremonial in question did not make such a marriage *de facto* as, within the true meaning of the statute against bigamy, will sustain this indictment. If any one of these three positions be ruled in favour of the crown, there must be judgment against the prisoner—should they be all ruled against the crown the prisoner must stand acquitted.

I shall discuss these three propositions, though not exactly in the order in which I have stated them. First, is marriage merely a civil contract which requires not the intervention of any religious ceremony to give it validity? or must the seal of religion be added to constitute the relation of husband and wife? This is a question as difficult as it is important, upon each side of which there has been arrayed a host of judicial names of the highest

authority. Were we compelled to decide according to the weight and number of these venerable names, our duty might be indeed a perplexing one, but we must decide this case, as all others, upon the authority, not of great names, but of legal principles and adjudged cases. Where then are we to look for an answer to this first question? If we look for it in the civil law the answer is clear, that marriage is no more than a civil contract. "*Consensus non concu-* "*titus facit Matrimonium,*" is a well-known maxim of the imperial code. Again, if we look for the answer of this question in the canon or pontificial law, as it stood before the Councel of Trent, the reply is the same. If this question be to be resolved by the law of Scotland, (which has taken the canon law for the basis of its code,) the answer then would alone be, that marriage is merely a civil contract, to which the sanction of religion may or may not be superadded; and that a contract of marriage *per verba de præsenti*, or *per verba de futuro*, when followed by cohabitation, is to all intents and purposes a legal and complete marriage. A distinction there certainly is in all these codes between a clandestine and irregular marriage, and a solemn and regular marriage; the latter being a marriage consecrated by a solemn religious ceremony, and the former being unattended by such a solemnity, or celebrated in secret, which latter is the meaning of "clandestine" in the law of England. But it is not in any foreign code, but in the law of Ireland, that we are to look for an answer to the inquiry we are now making; and this distinction it will be well to keep in view during the whole of this discussion, for it disposes of many of the authorities which have been pressed into the case. And when I say the question is to be decided by the law of Ireland, I say not so in contraposition to the law of England, as that law stood before the first Marriage Act; for I hold the common law of Ireland and England to be

one and the same; and the law of marriage in Ireland, to differ from the marriage law of England, only so far as the statutes of both countries have produced that difference. The appeal, therefore, which, during the argument, was made to the marriage law of England before its first Marriage Act, was a legitimate appeal. Were we indeed to assume that the canon law, as to marriage, was received into and became the law of England, (as it undoubtedly did in Scotland,) there would be no longer any difficulty in the case. But I cannot admit that position. We have derived much from the canon and the civil law. And a great deal of the wise rules of those venerable codes have been incorporated into the law of England; but, as a whole, England never submitted to the pontifical code; its ecclesiastical law is in many respects variant from, and opposed to, the canon law, and perhaps in none so much as on the subject of heirship and of marriage. This is a position of great importance, and I shall quote some authorities in support of it. In *Caudrey's* case, 5 Rep. 326, p. 65, Sir E. Coke says, "If it be demanded what "canons, constitutions, ordinances and synodals provincial are "still in force within this realm; I answer that it is resolved "and enacted by authority of parliament, that such as have "been allowed by general consent and custom within the "realm, and are not contrariant or repugnant to the laws, "statutes, and customs of the realm, nor to the damage "or hurt of the King's prerogative regal, are still in force "in this realm, as the *King's ecclesiastical laws of the same.*" This statement of Coke is adopted by Lord Hardwicke, in the case of *Middleton* v. *Crofts*, 2 Atk. 664. Lord Chief Justice Hale, in his history of the common law, p. 29-30, speaking of the English ecclesiastical courts, says, "The "rule by which they proceed is the canon law, but not in "its full latitude, and only so far as it stands uncorrected "either by contrary acts of parliament or the common law

" *and custom of England*; for there are divers canons made " in ancient times, and decretals of the pope that never " were admitted law in England." Again, Lord Coke, p. 7 of the preface to the eighth part of his Reports, says, " King Stephen, that succeeded his uncle, confirmeth in " his great charter of liberties to the barons and commons " of England, in these words, 'all the liberties and good " laws which Henry, King of England, my uncle, granted " unto them; and I grant them all the good laws and " customs which they enjoyed in the reign of King " Edward;' and was so jealous of innovation as Roger " Bacon the learned friar saith in his book *De Impedi-* " *mentis Sapientæ;* King Stephen forbad by public edict, " that no man should retain the laws of Italy," (viz., the canon law,) " formerly brought into England." And Sir John Davies, p. 190 of his report of the case of a Commenda, says, " These decrees were published in the year 1150, " which was during the reign of King Stephen," and he adds, " it is probable that Stephen's edict is to be intended " of the papal decreta, which was then newly compiled " and published." Sir John Davies, p. 190-2, adds that " these decretals were not entirely and absolutely received " and obeyed in any part of christendom but only in " the temporal territory of the Pope, which is called by " the canonists, *Patria obedientiæ*; but in the other part, " several of these canons were utterly rejected and dis- " obeyed in France and England, and other Christian " realms, which are called *Patriæ consuetudinariæ;*" and p. 198, he says, " Yet all the ecclesiastical laws " of England were not derived and borrowed from the " court of Rome, *for long before the canon law was authorized* " and published, (which was after the Norman conquest, " as is shown before,) the antient Kings of England, " Edgar, Athelston, Alfred, Edward the Confessor, and " others have, with the advice of their clergy within the

" realm, made divers ordinances for the government of the " Church of England, and after the conquest divers " provincial synods have been held, and several constitu- " tions have been made in both realms of England and " Ireland, *all which are part of the ecclesiastical laws at this* " *day.*" And in the same page he says that " in the " time of Henry the second, a synod of the clergy of " Ireland was held at the Castle of Dublin, in which it " was ordained. 'Quod omnia divina juxta quod Angli- " cana observat Ecclesia, in omnibus partibus Hiberniæ " amodo tractentur. Dignum enim et justissimum est, ut " sicut Dominum et Regem ex Angliâ divinitûs sortita est " Hibernia, sic etiam exinde vivendi formam accipiat " meliorem.'" I will cite one passage more from Sir John Davies, p. 141, "The course of trial for legitimation." " And therefore the King of England, who is, and always " of right hath been, the fountain of all justice and " jurisdiction in all causes, as well ecclesiastical as civil, " within his dominions, although he alloweth the prelates " of the church to exercise their several jurisdictions in " these (matrimonial) causes, which properly belong to " their cognizance, yet by the rules of the common law " he hath a superintendency over their proceedings, with " power of direction when and how they shall proceed, and " of restraint and correction if they do not proceed duly " in several cases, as is manifest by the writs of several " natures directed to bishops, by which the king com- " mands them to certify bastardy, excommunication, pro- " fession, accouplement in lawful matrimony, &c.; and " also by the writs of prohibition, consultation, and " attachment on prohibition." The result is, that the ecclesiastical law of England, commonly called the King's ecclesiastical law, is part of the law of England, that it is derived from various sources—partly from the canon law, partly from the statute law, partly from the ancient canons

and councils of England, and partly from the immemorial customs and usages of the country. Even Bracton, who wrote at the time when England was most remarkably under the pontificial sway, and for whom, therefore, the editor, in his preface, bespeaks the indulgence of the reader, if under the circumstances in which he wrote, too much deference is shown by him to the pontificial authority and law,—even Bracton refers to the customary law of England as controlling the canon law. His words are these, L. 2, c. 29, s. 4, p. 63. "Sciendum quod si quis naturales habuerit "filios de aliquâ, et postea cum eâdem contraxerit, filii jam "nati per matrimonium subsequens legitimantur, et ad "omnes actus legitimos idonei reputantur. Sed tamen non "nisi ad ea quæ pertinent ad sacerdotium, ad ea vero quæ "pertinent ad regnum non sunt legitimi, nec hæredes "judicantur, quod parentibus succedere possunt, propter "consuetudinem regni quae se habet in contrarium." In a civilian of authority, Heineccius, Ele. Jur. Civ. lib. 1. tit. 10. S. 148, we find a similar diversity, which is very important to this inquiry. "Jure canonico tamen con-"nubium non gaudet effectibus ecclesiasticis, priusquam "accesserit ἱερολογία. Hinc distinctio inter matrimonium "legitimum et ratum; hinc clandestinum habetur matri-"monium in quâ omissa ἱερολογία. Immo *Protestantes* "retinentes ἱερολογίαν ne effectus quidem civiles relinquunt "nuptiis sine ritu solemni cujusque loci contractis." Thus according to the canon law, the clandestine marriage, the contract without the religious ceremony, was *legitimum*, allowed by law, though not followed by ecclesiastical effects, i. e. as Bracton has it *quoad sacerdotium*. But the Protestants (the German Protestants and probably also the English) would not allow civil consequences to flow from such an irregular connexion. It will be found I think, that here the learned civilian makes an important distinction which will be seen to exist between the canon

law of Rome and the King's Ecclesiastical Law of England, the latter refusing to a mere civil contract the consequences of a solemn marriage. There is another circumstance in which the Ecclesiastical Law of England is at variance with the canon and the Scotch law. It allows not of divorce *a vinculo* on the ground of adultery but only *a mensa et thoro*. Co. Litt. 235, a.

We thus see three important circumstances bearing upon the present inquiry in which the ecclesiastical law of England differs from the law of Scotland and the canon law. 1, In its law of basterdy; 2, in its law of divorce; and 3, in its refusing the civil consequences of marriage to a mere matrimonial contract. This latter circumstance I shall have to examine more at large hereafter. I have said so much to show that although the canon law may be said generally to be the basis of the marriage law of Europe, yet it is not in that law we are to look for the Anglican law of marriage, but in the ecclesiastical law of England as administered in the ecclesiastical courts of England, and as recognized by our courts of common law, and that these two codes are not to be confounded, the one with the other. Let us see then whether we cannot find the foundation of the English law of marriage which requires the intervention of a clergyman in the ancient laws of our Saxon ancestors, and in the old provincial canons and constitutions of England. In the Anglo-Saxon laws as lately published by the Record Commissioners we have an English translation of the law of betrothment as given in Wilk. Laws of the Saxon, p. 76, which requires *inter alia*, that "at the nuptials there shall be a mass-priest by law, who "shall with God's blessing bind their union to all posterity." and in 1 Wilk. Concilia, p. 217, we find an ancient constitution of the English church under the title of *constitutio de nuptiis* which runs in these terms; "nuptiis presbyter "intersit qui de jure cum Dei benedictione eorum con-

" junctionem adunare debet in omni felicitatis plentitudine." Also p. 367, we find a constitution of the year 1076, in these terms, " Preterea statutum est ut nullus filiam suam " vel cognatam det alicui absque benedictione sacerdotali; " si aliter fecerit, non ut legitimum conjugium set ut forni- " catorium judicabitur." Thus then we have it established that so far from the canon law being the basis of the old marriage law of England, above a century before the publication of the decretals, England had a marriage law of its own; and that law required the intervention of a priest to complete the union. And although struggles were made by the clergy afterwards to force the canon law of marriage and descent upon the English people, their efforts were successfully resisted, and the ecclesiastical law of England has always insisted upon a religious ceremony to complete the relation of man and wife.

I shall not for the reasons I am about to state enter as fully into this question as otherwise I should be disposed to do. 1, Because I am about to rest my judgment in these cases upon grounds which are independent of the determination of this first question. 2, Because I am satisfied that this part of the subject will be more effectually and more fully handled by my brethren who are to succeed me, than it could be treated by myself. However, without going through the numerous authorities cited on the one side and on the other, I shall lay down some positions and make some observations applicable to this *vexato questio* which appear to me to be warranted by the authorities to which we were referred during the argument.

First then, long before the canon law was published in Europe a marriage law existed in England, and that law required a celebration of marriage by a priest, to make the marriage binding. And this was one of the old customary laws of the country, and probably the

foundation of that *consuetudo* referred to by Bracton.—Secondly, although the ecclesiastical law of England took many of its forms and modes of proceeding from the canon law, and many of its rules also, it never adopted as a whole the canon law of marriage and descent, but adhered to its old Saxon principle, that it required the seal of a religious ceremony to make complete the relation of husband and wife. The passages referred to by the prisoner's counsel in our standard works upon the ecclesiastical law of England, and other authorities lead to this conclusion and I shall not now occupy public time by particular references to Ayliffe, Swinburne, and the other books cited by the prisoner's counsel. Thirdly.—Not a single case up to the time of the *Dalrymple* case, has been adduced by the crown, which can be said to decide that a mere contract *per verba de præsenti* amounted to a complete legal marriage. The *Fitzmaurice* case in 1732, so far from being an authority for that doctrine, appears to me to tend directly the other way. My brother Perrin has supplied us with some of the proceedings in that cause and with the sentence of the court. Now that sentence seems to me to be pregnant with argument against the doctrine of the crown counsel. First.—If the contract was a complete marriage why the sentence *quod subiret matrimonium?* It is said that this is for *order* only. I apprehend that is a mistake. There is no such principle. The court Christian, acts *pro salute animæ*, it never decrees, nor can decree a second marriage, where there has already taken place a complete valid one between the parties. If the object were merely to declare the marriage good, the sentence would be to that effect; but it goes farther, it decrees a marriage to be solemnized, *quod subiret matrimonium;* there had, therefore, been no *matrimonium* before though there had been a valid matrimonial contract

between the parties. Here it may be useful to make a distinction, the not attending to which has created confusion, and the correction of which may help us to understand some of the *dicta* upon this subject. In the canon law as in the civil *matrimonium* means merely the contract; because the contract completed the marriage. In the ecclesiastical law of England matrimony means either the full relation of man and wife or the solemn religious ceremony by which they became such, just as we find *sponsalia* to be applied sometimes to signify the betrothment of the parties, and sometimes their marriage, though in our ancient law books *sponsalia* generally imports *legitimum matrimonium*. In the *Fitzmaurice* case, where Chief Baron Comyn was one of the delegates, it is remarkable that the decree was not to declare the marriage good, as sought in the libel, but *quod subiret matrimonium*, and it is also worthy of remark that to the sentence is appended an order on the parties not to marry with another person pending the suit, an absurdity, if such subsequent marriage would be a nullity according to the argument of the crown, but very significant when we come to consider the nature and effect of a pre-contract.

Bunting's case is also claimed as an authority by the crown, to show that a contract *per verba de præsenti* is sufficient to avoid a second marriage though followed by consummation; and as there cannot be two subsisting marriages of the same person, it is argued therefore, that the contract between *Agnes* and *Bunting* was a valid marriage, and her marriage with *Twede* a nullity. The opinion of Chief Justice Hale upon this subject is most valuable Co. Litt. 33, a. Note 10(*a*).—He says that neither the sentence nor the contract was a marriage. This becomes intelligible by adverting to the effect of such a contract. A marriage contract was either *per*

(*a*) *Ante*, p. 81.

verba de præsenti or *per verba de futuro*. The contract *per verba de futuro* followed by consummation was exactly of equal validity with the contract *per verba de præsenti*. All these with reference to a future marriage were denominated in our ecclesiastical law pre-contracts. They are called contracts in the English Marriage Act, and in the statute of the 58 Geo. III. c. 18, and placed on the same footing; and comparing 3 Inst. 88, with these statutes, it is clear that the word pre-contract includes both. Now this solemn contract by which parties bound themselves to undertake the relation of man and wife, was, in the canon law, a complete marriage; was regarded by the ecclesiastical law of England with great respect; the parties to it had an irreleasible right each to call upon the other for a public performance of the contract; either party could, through the ecclesiastical court, insist upon a public marriage; and the parties were held not to live in that state of fornication which the ecclesiastical court would visit with its censure. And no suit for jactitation of marriage would lie. It thus amounted to what may be called an equitable or inchoate marriage. But a solemn public marriage in contravention of this contract was never held to be a nullity. If such a marriage took place it could be avoided only through a suit in the ecclesiastical court. And that avoidance must have taken place in the life time of both parties to the solemn marriage. Thus Co. Litt. 33, a. says "so it is, "if a marriage *de facto* be voidable by divorce in respect "of consanguinity, affinity, pre-contract, or such like, "whereby the marriage might have been dissolved and "the parties freed *a vinculo matrimonii*; yet if the husband "die before any divorce then for that it cannot now "be avoided, the wife *de facto* shall be endowed, for this "is *ligitimum matrimonium quoad dotem*." And so again Co. Litt. 235, a. "Divorces *á vinculo matrimonii* are these;

"*causâ præcontractûs, causâ metûs, causâ affinitatis, &c.*" Therefore was Hale quite warranted in saying that neither the contract, (which was a contract *per verba de præsenti*,) nor the sentence make a marriage. In *Bunting's* case the matter of doubt was as to the regularity of the sentence, it being contended that the husband of the solemn marriage should have been a party to it; but however, that may be, the court of common law felt itself bound by the sentence of the ecclesiastical court and acted upon it. But it is important to consider what the sentence was. It consisted of two parts.—First, it decreed that Agnes *subiret matrimonium* with the plaintiff as in *Fitzmaurice's* case. And secondly, it decreed and declared the marriage with Twede *fore nullum* which is tantamount to a sentence of divorce, on the ground of pre-contract; and is indeed, as to the latter part of it, substantially the same sentence that was pronounced by Archbishop Cranmer in the celebrated case between King Henry VIII. and Catherine his Queen, on the ground, not of pre-contract, but of *affinity*; Henry's Hist. of Eng. v. 6, p. 174. That this view is correct will be manifest by adverting to a few statutes in which the subject of pre-contract is mentioned.

First.—The 32nd Hen. VIII. chap. 38, which validates all marriages had *in facie ecclesiæ* notwithstanding any pre-contract of matrimony, not followed by consummation. This enactment took away all remedy in the spiritual court from persons claiming under a contract *per verba de præsenti* or *de futuro* against a subsequent marriage, unless where there had been consummation; but if consummation had followed, it left the parties to the course of the ecclesiastical law. This statute was afterwards repealed; and a similar legislative provision in Ireland, 33 Hen. VIII. chap. 6, was repealed also. Now if such a contract was in the eye of the legislature in Hen. VIII's time,

ipsum matrimonium, such an act could not have been passed, for if so, the law would have allowed to a man two wives living at the same time, one by contract *per verba de præsenti*, and the other by the solemn marriage. This is the absurdity at which the argument arrives.

I next refer to the Marriage Act, passed in England in the year 1752, 26 Geo. II. c. 33. The thirteenth section of that Act prohibits the enforcing of any contract of matrimony whether *per verba de præsenti*, or *per verba de futuro*, after the 25th March, 1754. This section, to apply the words of Sir W. Blackstone, speaking of the Marriage Act, as quoted by Lord Stowell, in *Dalrymple's* case, (Dod's Ed., p. 19,) "swept away the "whole subject of irregular marriages, together with "all the learning belonging to it, by establishing the "necessity of resorting to a public and regular form with-"out which the relation of husband and wife could not be "contracted." Now how was this done? By the Marriage Act the contracts are not invalidated; an action at law is still maintainable for breach of such a contract; and, although there is by the eighth section a provision that all marriages solemnized after the 25th March, 1754, (otherwise than as the Act directs,) shall be null and void; yet there is nothing to avoid the contract which it is contended is *ipsum matrimonium*. As a marriage, however, that contract is effectually avoided by the 13th section, which disables the parties from converting the equitable into a legal title by shutting the Ecclesiastical Court against them. The 58 Geo. III. c. 81, s. 3, contains for Ireland an enactment similar to the 13th section of the English Marriage Act, and its effect must be the same. It precludes any suit in the Ecclesiastical Court to enforce a marriage contract, whether *per verba de præsenti* or *de futuro*, followed by consummation or not. The words are general, and yet it is contended now, that such contracts

are actual marriages. But this involves a palpable absurdity; for if a subsequent marriage be entered into, this marriage becomes by the law of England indissoluble; and it was before shown, that although such contracts were grounds for avoiding a marriage by sentence, yet, until avoided, the marriage was valid, (3 Inst. 88.) Suppose the case of a contract, *per verba de præsenti*, in Ireland between A. & B., and suppose two years after A. to marry C., *in facie ecclesiæ*, this second marriage is indissoluble. No suit to avoid it can be entertained. But the argument of the Crown makes the pre-contract a marriage, and this gives to A. two living wives at the same time. To avoid this consequence they are compelled to say that the marriage *in facie ecclesiæ* is a nullity; a position entirely at variance with the whole doctrine of voidable marriages. Put the case of A. after his wife's death marrying her sister; such marriage was not before the late statute, a void marriage; it was avoidable only by suit and sentence in the life-time of both the parties to it; such a sentence avoided the marriage *a vinculo* and made the issue bastards; but if either party died before such a proceeding taken, the marriage was valid, and the issue ligitimate; and exactly similar to the objection of affinity stood that of a pre-contract. Another in consequence also arises from the crown counsel's argument here, viz. that the legislature in the two Acts of Parliament last referred to, have dealt with these contracts, not as marriages, but as contracts of such a mischievous policy, that they should neither be enforced or respected by the only tribunals having jurisdiction to effectuate them, and yet it is now assumed that they are actual and complete marriages. *Cui bono* this legislation in Ireland but to sweep away these irregular marriages, as Blackstone calls them?

Mr. Brooke, in his very able argument said, that before the Dalrymple case the law of marriage in England

was doubtful upon the authorities, but that all doubts were removed, and the law settled in the Dalrymple case. I take leave to differ, and to suggest that it would be nearer the truth to say, that up to the Dalrymple case there was no conflict of authority; but the law of England was clear that a mere contract of marriage, whether *per verba de præsenti* or *de futuro*, and followed or not followed by consummation, did not make a complete lawful marriage without the addition of a religious ceremony, and that (not the Dalrymple case but) the misapplication of the Dalrymple case has caused all the doubts and difficulties which have since been cast upon the subject. Upon this point I shall make some observations hereafter, but I would wish first to lay down another position which has I think been established upon the argument, viz.: that whatever be the nature or character of the contract *per verba de præsenti*, the most important consequences of a lawful marriage did not flow from it by the law of England.

First, it did not entitle the supposed wife to dower. I refer for this position to Perkins, 306, and Lord Hale's note to Coke Litt. 33, a., and I remark, that the reason assigned for depriving the wife of dower, in the case put by Hale was, that the husband was not seized during the espousals,—establishing that after the contract *per verba de præsenti*, nay, after sentence, and until the espousals or the marriage, the relation of husband and wife did not exist by the law of England. Other authorities have been referred to,—but I pass on. The counsel for the crown would account for this refusal of dower to such a connexion, by supposing it to result from the old rule which is said to have prevailed in Bracton's time, that there was no dower but that given *ad ostium ecclesiæ;* but supposing this to be so, it will not account for the dower at common law, which subsequently became usual, and which always

followed a lawful marriage, and which was denied to the relation growing out of a mere contract. Nor can this denial of dower be ascribed to the canon law, not the canon, but the Kings ecclesiastical law it was which denied these rights of marriage to the mere civil contract. The ecclesiastical court had only jurisdiction in dower cases, to certify accouplement in loyal matrimony or not, and that it must do according to the King's ecclesiastical law. If it followed the canon law, dower would have attached as a consequence to the matrimonial contract.

Secondly, bastardy, and not legitimacy, was the character of the issue of this connexion. Not by the canon law, for by that law the issue was clearly legitimate, but by the ecclesiastical and common law of England. If an issue of bastardy was knit in the temporal court, that issue was sent to be tried by the Court Christian. The Court Christian as to the issue of a matrimonial contract not solemnized, would certify bastardy, that is beyond controversy; but why? was it that in so doing they followed the canon law? No; that law pronounced such issue to be legitimate, but because they were compelled *by the law of the land* so to do. There is a remarkable passage in Bracton upon this subject. It is in *Bracton de Leg.* Lib 5, ch. 19, p. 416. He there gives the celebrated scene in British history, of the spirited resistance made by the lay Barons of England, to the introduction of the canon law of legitimation, as proposed by the bishops. *Nolumus leges Angliæ mutare quæ haterus nsitatæ fuerunt et approbatæ*, was the unanimous cry of the barons, and Bracton adds, that it was determined by the parliament hereupon, to substitute for the general question formerly sent to the court christian, "*An bastardu fuit vel non*," the special question of "*natus fuit ante sponsalia seu matrimonium con-*"*tractum inter patrem et matrem, vel post.*" Now here by the canon law, the bishop would have certified legitimacy;

but by the ecclesiastical law of England, and the special form of the question, he is compelled to certify whether the birth was before or after marriage.

Thirdly, the rights of personal representation to a deceased person is refused to parties claiming through a contract *per verba de præsenti*. Is this by the canon law? No; the canon law makes such a contract *ipsum matrimonium*, but it is by force of the King's ecclesiastical law of England, which denies such contract to be a marriage; this is the doctrine of *Haydon* v. *Gould*, 1 Salk. 120, before the Delegates. Now, by the statute law, the ordinary is bound to give the administration to the widow, or next of kin, or both; the husband is next of kin to the wife, and, if he was lawful husband, the ordinary was bound to have granted him the administration. This was a mixed tribunal composed of common law judges and civilians; and such has been the law and practice of the ecclesiastical courts in England and in Ireland down to the present day. And will it be said, that the same judges would have decided this question of the validity of marriage differently in the common law courts? No, the doctrine of the canon law was pressed by counsel in the case of *Haydon* v. *Gould*, and was repudiated by the court.

Fourthly, it has been shown that the relation arising from such a contract does not produce that union of persons and community of goods which is the result of lawful matrimony. Now is it possible to call by the name of marriage that relation which is denuded of all the most important consequences of a lawful marriage? If we ask who is entitled to dower by the common law? the answer is the wife. Who is entitled to inherit land as heir by the common law? *Quem nuptiæ demonstrant*, is the answer. Who are entitled by the statute law to administration? The widow and next of kin is the answer. Again, if we ask who are disabled from contracting or making a will?

The law of England answers, married women. Those therefore, to whom these rights are denied, cannot fill the relations of wife, of heir, of husband, or next of kin. If a tree be known by its fruits, that cannot be a marriage which bears none of the fruits of marriage. This subject is casually and curiously adverted to by Lord Stowell in his celebrated judgment in the *Dalrymple* case, Dod. Ed. p. 17, 18. He says, "though the common law cer- "tainly *had scruples* in applying the civil rights of dower "and community of goods and legitimacy in the cases of "these looser species of marriages." The *canon law* had no such scruples, and the reason of the difference is this; by the canon law the contract was *ipsum matrimonium*, and therefore by that law all civil rights flowed from the mere contract, but the contract to become a marriage by the common law must have the ἱερολογία added to it, and until that seal was put to it, the civil rights did not arise. When, therefore, Lord Holt in *Jesson* v. *Collins*, 2 Salk. 438, says, that a contract *per verba de præsenti* was a marriage—it is manifest he said so with reference to the *canon* law. The case was one of prohibition, and the prohibition was sought on the ground that the contract was a contract *per verba de futuro*. The answer of Lord Holt is perfectly according to the course of the ecclesiastical court, and of the ecclesiastical law administered in that court. It was this in effect. The difference between the two contracts is that one is *ipsum matrimonium* by the canon law and not releasable; the other is releasable; but both equally within the jurisdiction of that court. And in the next case, *Wigmore's* case, Holt uses the same language, but adds in express terms that it is so by the canon law, which it undoubtedly was.

The Marriage Act of 1752, affords a strong proof that the intervention of a Priest was thought necessary to the validity of the marriage. The act makes no provision

that marriages shall be celebrated by clergymen; but throughout the act it supposes that clergymen alone can celebrate marriages. This is a strong testimony. The same may be said of all the Irish statutes on the subject of marriage. They all suppose that the intervention of a clergyman is necessary. If one statute had recited such to be the law of England or of Ireland, it would be irresistible evidence upon the subject; but if we find that the statute law both of England and of Ireland, always supposes the intervention of a clergyman to be essential to a valid marriage, is not the conclusion almost inevitable that such was the law of both countries? I pass by the discussion of these statutes in detail; they open too wide a field for me now to occupy, but I observe generally with reference to the acts for annulling marriages between Protestants and Roman Catholics, celebrated by Roman Catholic Priests and by degraded clergymen, and for punishing the celebration of them, *cui bono* all this cumbrous and expensive machinery which could be all defeated or evaded at once by a simple declaration of marriage *per verba de præsenti?* Are we to believe that the object of the Legislature was to prohibit such marriages only when they had the sanction of religion, but to allow and sanction them when they wanted that seal? Again, why the Fleet marriages? Why all the elopements from Ireland to Scotland, for the purpose of clandestine marriages, if the simple process of a declaration of marriage at home was equivalent to the sanction of the Blacksmith at Gretna-green? The answer is, because the universal opinion including that of the Legislature itself, down to the time of the *Dalrymple* case, was that the intervention of a clergyman was necessary to a valid marriage. That such was the law of Ireland, is stated by Dr. Browne, an eminent civilian, and a learned and accomplished lawyer. In his Treatise on Ecclesiastical

Law, p. 269,he says, " marriages are also void, if not cele- " brated by a person in holy orders." And it is well known that the late Judge Fletcher, an eminent common law lawyer, and civilian, often declared that he never could subscribe to the law laid down in the *Dalrymple* case, as applicable to Ireland.

But I have digressed perhaps too far. I close this part of the case by restating, that before the *Dalrymple* case it appears to me that the law of England and the law of Ireland required the intervention of a clergyman, and a religious ceremony, to make a complete valid marriage; and that it is impossible to account for the various enactments on the subject of marriage in both countries, without arriving at the clear conclusion, that the legislature legislated under the supposal and belief, that celebration by a clergyman was necessary to make a legal marriage.

But I cannot pass by the *Dalrymple* case without a few remarks. It is said to be an authority in point, and to have settled the controversy. I deny the position. It has not even affected to decide the question now before us. Lord Stowell himself says, that he decides the case *on the law of Scotland*—and p. 6, he expressly says that the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland. It is true that in illustration of that law, this most learned, able, and eloquent Judge entered into a consideration of the marriage law of England before the Marriage Act, and it must be admitted that the opinion thrown out by him as to the Marriage Law of England, in that case is favourable to the legality of a marriage by mere contract. But on the other hand it may truly be said, that this opinion was extra-judicial, not being called for by the case before him, and I cannot but think that if that most distinguished Judge had directed his powerful mind to the ancient fountain of the law of England, instead of resorting to the canon-

ists, the distinction which existed from the earliest period between the canon law of Rome, and the King's ecclesiastical law of England, would not have been unnoticed by him. He has I think, (and I must speak with great humility, when I presume to criticise even the *obiter dicta* of so great a man,) too much amplified the jurisdiction of the canon law in England; he omitted the consideration that England was a *Patria consuetudinaria*—and he assumed that before the Council of Trent the marriage law of England (as of Europe) was the same as the canon law; and as I before stated, he merely hints at the scruples of the common law, as to allowing civil rights to flow from a mere contract. The decision of the case itself is unquestioned and unquestionable—nothing is questioned but an extrajudicial *dictum* of this great man, the splendour of whose judicial name seems to have in this instance eclipsed the common law, and to have been the foundation for those subsequent *dicta* of other eminent Judges upon the same subject, so strongly relied upon by the crown. I pass by all those cases which are posterior to the *Dalrymple* case, merely observing, that not one of them is a case in which the very point here at issue is decided. It is true we have opinions thrown out by judges whose opinions, though *obiter dicta*, are entitled to the highest consideration; but in most, if not all of these cases, one or both of these ingredients exist. Either a priest was the celebrator of the disputed marriage,—or, the *Dalrymple* case is relied upon as an authority for the position that a civil contract is by the law of England *ipsum matrimonium*. With respect to the case of *M'Adam* v. *Walker*, Lord Eldon's observations are plainly applied to the case before him, and have reference to the law of Scotland only.

1. The case of the Jews in England is appealed to, and *Lindo* v. *Belisario* is cited. But it is remarkable that that case was decided upon the Jewish law alone—and the

disputed marriage was held by Lord Stowell to be void, because an important part of the Jewish ceremonial had been omitted. But why not apply to this Jewish marriage the principle of the contract *per verba de præsenti?* That feature existed in the case, but it was not resorted to, although Lord Stowell held the marriage to be void. The Jews, with the Quakers, were excepted from the Marriage Act. The marriages of both these sects are celebrated with much of religious solemnity, and whether upon these grounds, or upon the broader ground ascribed by Bishop Burnet(*a*) to Sir M. Hale, that marriages celebrated according to the religious rites of the several sects of Christians should be deemed good, the cases of Jews and Quakers ever since the passing of the Marriage Act, have been held to stand upon peculiar grounds, and not to be based upon the principle of a mere civil contract being a marriage. Upon this first question, therefore, my opinion is against the prisoner.

2. It is contended on the part of the crown, that here was a marriage *de facto*, and that such, independently of any religious ceremony, is sufficient to maintain the indictment. It is clear from 3 Inst. 88, and other authorities, that a marriage, to maintain an indictment for bigamy must be either a valid marriage *de jure* or a marriage *de facto*—that is, as explained by Sir Edward Coke, a voidable marriage, or a marriage not simply void, but one which stands good till avoided by sentence. Thus in commenting on the words "being married," he says:—"This extendeth to a marriage *de facto*, or voidable "by reason of a pre-contract, or of consanguinity or "affinity, or the like, for it is a marriage, in judgment "of law, until it be avoided, and therefore, though "neither marriage be *de jure*, yet they are within

(*a*) Burnet's Life of Hale, 95, 96.

" the statute." Again, in Co. Litt. 33, a. the wife of a voidable marriage is termed " a wife *de facto*." And Sir Matthew Hale, 1 P. C. 693, says the second wife, (the first being alive,) is not so much as a wife *de facto*. That ceremony, therefore, which is neither valid *de jure*, nor voidable but merely void, cannot sustain an indictment for bigamy, except in the case of the second marriage, which, though merely void, yet by the statute it " maketh the offender a " felon."—1 Hale, 693. Suppose the case of the first marriage being *de jure* a valid marriage, and the second a mere promise *per verba de futuro*, followed by consummation, would such a state of facts maintain an indictment for bigamy? And yet, reversing the order of the marriages, such is the present case, if we omit the circumstance of the presbyterian minister being present, which upon this branch of the argument we do. In 1 East. P. C. 469, it is laid down, that " to sustain an indictment for bigamy, the first " marriage must be duly established according to the rights " and ceremonies of the country in which it is celebrated." And in the next page, he refers to *R.* v. *Lyon*, tried in 1738 (before the Marriage Act) before Chief Justice Willes. In that case the ceremony was performed by a Roman Catholic priest, not according to the ritual of the Church of England, but in the Latin language, which the witnesses did not understand, and therefore could not swear that the ceremony of marriage according to the Church of Rome had been read. The prisoner was directed to be acquitted; but Lord C. J. Willes, who tried him, seemed to be of opinion, that a marriage by a priest of the Church of Rome was good, could the ceremony according to that church be proved, namely, the words of the contracting part of it,—that is, that a celebration by a priest, and a contract of the parties, made a valid marriage. But even in Scotland, the very focus and centre of irregular marriages, such a marriage as the present (supposing no

clerical celebration) would not sustain an indictment for bigamy; at least such is the opinion of Mr. Alison, in his very clear treatise on the criminal law of Scotland. His words are, "to authorise a charge of bigamy, it is necessary "that both marriages shall have been formal and regular." p. 536. And the same distinction is taken by Lord Eldon in the Scotch case of *M'Adam* and *Walker*, 1 Dow. 186, "With respect to the question, whether if the parties "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 only "applied 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 crimi-"nal consequences in these cases." The cases of *R.* v. *Lathropp*, *R.* v. *Orgill*, and *R.* v. *M'Enery*, the last tried before myself at Downpatrick, have been relied on. But these cases all rest upon a principle inapplicable to the case now before us. That principle is, that when two parties impose themselves upon a clergyman, as being members of his own religious denomination, and thus by fraud procure the clergyman to marry them, they shall not afterwards be allowed to say that they were, at the time of the marriage, of a different denomination. Upon that principle, and upon the authorities of *R.* v. *Lathropp*, and of *R.* v. *Orgill*, I decided the case of *R.* v. *M'Enery*. I thought that no man should be allowed to assert himself to be a Presbyterian, in order to procure a marriage, and afterwards to deny that he was a Presbyterian, in order to escape the consequences of his crime; he is morally estopped. But the case we have to decide is before us upon special verdict. There is no such fact stated as that of imposition, and we

can intend or imply no fact beyond those stated on the record, especially against a prisoner. Upon this second question, also, my opinion is therefore with the prisoner.

The third and last question to be discussed is, whether a Presbyterian clergyman is competent by law to celebrate a marriage in Ireland between two Protestants of the established church. That he is a minister of the Church of Christ, is not, I believe, disputed; that he is by law qualified to teach, to preach, and to administer the sacraments of the Protestant Church in his own congregation, is allowed; but that which is controverted is, that he is in the eye of the law "*presbyter sacris ordinibus institutus*, i. e. a clergyman in holy orders. A Presbyterian minister undoubtedly is not a Priest either in the sense in which the Roman Catholic Church uses that word, or in the sense in which the Anglican Church uses it. In the Roman Catholic Church, a Priest, according to the ancient acceptation of the word, is one who is ordained to offer sacrifices to God. In the Anglican Church, a priest is one who is lawfully ordained to administer the sacraments, and to perform the services of the Church; for the Anglican Church repudiates, (as much as the Presbyterians do,) the notion that there is now, or can be any proper Priest of human ordination. Hooker's Eccl. Polity, B. 5, c. 78. The word Priest therefore, as used in the Anglican Church, imports no more than a presbyter in holy orders, and substantially, therefore, the two churches of England and Scotland are agreed upon this subject. Undoubtedly, "holy orders" in the Anglican Church, generally mean episcopal orders. Now, a Presbyterian minister, though ordained to administer the sacraments, and to perform the services of his Church, is not episcopally ordained. The difference irrespectively of the statute law is, that the Anglican Minister is ordained by the hands of a Bishop, assisted by presbyters, whereas the Presbyterian Minister

is ordained by the imposition of the hands of the presbyters only, the Presbyterian Church altogether rejecting prelacy. It is quite true, that by the act of Uniformity, one only form of worship and prayer was permitted to all the King's subjects. No other ministers were allowed or contemplated but Bishops, Priests and Deacons of the Established Church, and in contemplation of law, there were after the passing of that act, neither dissenting ministers, nor Dissenters in England. All the King's subjects were bound to conform under pains and penalties. Even the Roman Catholic clergymen, though theologically admitted by the Church of England to be clergymen in holy orders, were not tolerated or admitted to officiate in that country. But then came the Toleration Act, 1 W. & M. c. 18, with this short but expressive preamble, "for as much as some "ease to scrupulous consciences in the exercise of religion "may be an effectual means to unite their Majesties Pro-"testant subjects in interest and affection;" a sentiment not inappropriate to the subject we are now discussing. That act, and the subsequent enlargements of it, placed the Protestant dissenters in a new and more favoured position. Dissenting congregations were thenceforward recognized by the law; they were relieved from the penalties of non-conformity; their meetings for worship, according to their peculiar opinions were legalized, and held to be religious meetings; their preachers, teachers, and ministers were licensed and allowed, and those who disturbed their religious assemblies, were made punishable by law; and the tide of liberality continuing to flow, has at length swept away all the barriers which ages less enlightened, had raised to separate all but conformists to the Established Church from the bosom of the constitution; still however, all Dissenters are in England and Ireland only tolerated and protected. The united Church of England and Ireland, is still in England and in Ireland the only Established

Church, and there is nothing that I can see in the Statutes to which I have thus generally referred, which could lead to the conclusion, that dissenting preachers and teachers generally, are recognized by law as clergymen, or as being persons in holy orders. But I own that after much deliberation, and perhaps I may add much of doubt, that doubt diminishing as I considered the subject, I have arrived at the conclusion, that the case of Presbyterian Ministers, or Ministers of the Church of Scotland in this country, is a peculiar one, and separated from that of all other dissenters, by as wide an interval as a recognized Church is from a congregation of Sabbatarians. When the reformation shook off from amongst its followers, the spiritual and temporal power of the pope, three classes of reformers were gradually moulded into three great divisions or Churches. 1. The Anglican, retaining episcopacy and episcopal orders in common with the Romish Church, and which, like the state to which it is annexed, assumes the form of a mixed monarchy. 2. The Genevese or Calvinistic, upon the model of which the Church of Scotland is formed, which repudiated episcopacy altogether, and upholding a perfect equality of its ministers, assumes rather the form of a republic. 3. The Lutheran Church, which, though episcopal in Denmark and Sweden, in all its other branches, departs from the episcopal form and is governed by consistories of its ecclesiastical doctors, under the presidency of the civil power, and which may be said to be aristocratical in its form of Church government. See 3 Mosheim. Ecc. Hist. 204.

Most of the great reformers were themselves clergymen; and from the earliest period of the reformation the ministers of the Protestant Church, in all its three great branches, were set apart for the ministry; and the scriptural form of ordination, by the imposition of hands, was retained in all. No doubt many of the ministers of the Anglican Church

hold the doctrine of Apostolical succession as transmitted through the bishops of the church from the time of the Apostles. Others of the same Church hold the more proveable doctrine of a continued standing ministry with a perpetual succession from the time of the Apostles to the present day; these ministers set apart for the service of the Church, and the instruction of the people; a doctrine which (as I believe is not contradicted by any of the dogmas of the Presbyterian Church. It is not for me to enter upon this question of Episcopal succession as a theological question,—a doctrine which the great John Wesley (himself a priest of the Anglican Church,) said no man ever did or ever could prove; but it is important to consider how far *episcopal* orders are necessary to constitute "*presbyterum sacris ordinibus institutum*," or whether the orders of a Presbyterian Minister, are by the law of this land, considered to be holy orders. For if the Presbyterian Minister be by law a clergyman, or Presbyter, in holy orders, then the marriage by him of two Episcopalian Protestants is valid in law. It is conceded that a priest of the Romish Church is a clergyman or presbyter in holy orders, competent at common law, to celebrate marriages between Protestants. There are statutes which make such marriages void but I speak of the common law. Now on what ground is this doctrine rested. It is this; that the Roman Catholic clergyman is held by the Anglican Church to be a person in holy orders. His orders are not the orders of the English Church, they are not the orders established by the law of England, but being episcopal orders, and supposed to flow from the same source as their own orders, they are admitted by the Prelates of the episcopal Church. This doctrine is carried so far that if a Roman Catholic priest in Ireland, had read his recantation, and conformed to the Established Church, he was admitted *ad eundem*, into the establishment, and was by law entitled to a stipend upon his conformity.

This will appear from the Irish statute of 8 Anne, c. 3, s. 18.—19 and 20 Geo. III, c. 39, and 29 Geo. III, c. 40, s. 12, 13. These statutes are now all happily expired. The argument of the prisoner's council admits that before the Marriage Act in England a marriage of two Protestants celebrated by a Roman Catholic priest was valid; it was so held in the case of *R.* v. *Fielding*, (The English Act of the 3. James, I. referred to by my brother Perrin, and the Irish acts against the marriages of Protestants by Roman Catholic priests are strong to this point.) It is also thus held by Sir Edward Simpson, in the case of *Scrimshire* v. *Scrimshire*, though he inclined to think the celebration should be according to the English ritual; but in that latter respect the prisoner's counsel justly questions the opinion of Sir Edward Simpson, for in *R.* v. *Fielding*, it does not appear that the service was according to the English ritual, and in *Latour* v. *Teesdale* 8 Tann. 830, the marriage was by a Roman Catholic priest according to the rites of the Church of Rome, and there are also the cases of the *R.* v. *Brampton*, and *R.* v. *Lyon*, tending to the same conclusion. It is important to remember this distinction, that the ceremony, is valid because celebrated by an ordained Minister, not because it is celebrated according to any particular religious rites. Indeed when it is considered that it is the solemn performance of a religious ceremony which gives binding permanency to the marriage contract, it is impossible to suppose that those rites and that ceremonial must not be the most solemn, and the most proper for a minister to use, which are the rites of the Church to which he belongs. If therefore the marriage celebrated by a Presbyterian clergyman is to be validated he ought to have celebrated the marriage according to the rites of his own Church. The question then comes to this, is a Presbyterian minister by the law of Ireland, a clergyman or presbyter in holy orders; or is he a mere layman in the

eye of the law. If the former, he stands on the same footing as the Roman Catholic priest at common law. That he is not in episcopal orders is confessed, but that he is in religious orders by a ceremony as solemn and as impressive as any ceremony can be, is certain. But it is said it is the episcopal character of his orders that exempts the Roman Catholic priest at common law from being deemed a layman. I know of no authority for this position. It is his character as a presbyter or ordained minister of the Christian church which gives him the privilege; for neither our law nor our church acknowledges his priesthood, and both of them denounce his doctrine and his ritual as being heretical and impure, the difference is only that he is a presbyter by the ordination of a Bishop, whose jurisdiction our law repudiates, and the Presbyterian minister is a presbyter by an ordination which differs formally but not substantially from our own. But it is said that by the act of Uniformity no orders are acknowledged, and no ministers are allowed but Bishops, Priests and Deacons, ordained according to the established form by the Protestant Bishops of the land, and that those so ordained must subscribe to the articles of the Protestant Established Church. I admit this to be so; none other can hold benefices or promotion, or minister in the Established Church. But how comes it that Roman Catholic orders are acknowledged? They do not come within the terms of the acts of Uniformity. They are not ordained by our Bishops, nor according to the form of the Anglican church, and they do not subscribe our articles or use our liturgy. The argument therefore from the acts of Uniformity fails. And if the Roman Catholic and the Presbyterian ministers were tried by the articles of the Protestant Established Church, it would be seen that the Presbyterians (agreeing with us in all the essentials of doctrine) differ with us in discipline and church government

only, while the Romanists agreeing with us in discipline and church government differ from us essentially in doctrine. Indeed it appears to me that leaving out the matters of episcopacy and church government, there is no Presbyterian that might not subscribe the articles of the English church, and no churchman that might not subscribe the Presbyterian confession of faith. It would seem therefore *a priori* a difficult conclusion to arrive at that the Presbyters of the Church of England should allow the Romish priests to be presbyters in sacred orders, and reject the Presbyterian ministers as mere laymen. But such is not (in my humble opinion) the view which the law of the united kingdom since the opening of the constitution to non-conformists has taken of this subject.

First by the acts of the Union between England and Scotland, it was enacted that "*the true Protestant religion* "contained in the *above* mentioned confession of faith, "with the form *and purity of worship presently* in use in "the said church, and its Presbyterian church government "and discipline, &c. &c. shall remain, and be the only "church government of the church within the kingdom of "Scotland."—3 Anne, c. 8. act 25. And by the 7th and 8th sections of the same act, a provision is made for the perpetual establishment of the doctrine, worship, and discipline of the Church of England within the kingdoms of England and Ireland and Berwick-upon-Tweed. This act did not apply to Ireland. But again by the act of Union between Great Britain and Ireland, it is enacted, that the churches of England and Ireland, as now by law established be united and that the doctrine, worship, discipline and government, shall remain in full force for ever as by law established, and that the continuance and preservation of the said united church shall be deemed and taken to be an essential and fundamental part of the

union, and that in like manner, the doctrine, worship, discipline and government of the Church of Scotland, shall remain and be preserved as by the law and the act of Union is established. Thus in fact re-enacting the former enactment, consolidating the Church of England and Ireland, and making Ireland a party to the Scotch act of Union.

We have thus by an imperial statute two established churches within this one kingdom of Great Britain and Ireland; both churches recited to be churches holding the pure Protestant religion, and the worship, doctrine, and discipline of both churches not only declared to be legal, but established; the one for England and Ireland, and the other for Scotland, and with perfect parity of right to the protection and support of the common legislature. Now what is this discipline and church government of the Church of Scotland which is there recognized by the imperial legislature? Why it is the government by Kirk sessions, by presbyters, annual synods and general assemblies. And an essential part of it is the ministration of the rites, ceremonies, and sacraments of the church by the ordained ministers of the Church of Scotland, and among them, the form of their ordination Here we have the Church of Scotland not only legislatively tolerated, allowed and protected, but established as the true church of Christ, and as the governing church within a third portion of the united kingdom. The ministers of that Christian church are the legal and appointed pastors of the people of Scotland and their orders are recognized as true, legal, and complete orders. Can it, after these enactments, be contended that these ordained ministers are not clergymen in the eye of the law, or that their orders are not holy orders? If they were such only by the law of Scotland it might be so, but these enactments are imperial and bind

all the Queen's subjects every where. Can it be said that their orders are not valid out of Scotland? The doctrine of the Church of England is that orders are personal and permanent and not merely local or official, indeed that they are indelible. Thus Hooker in his Eccl. Polity, Book 5, c. 78, says, speaking of orders, "They which have once received this power may not "think to put it off and on, like a cloak as the wea-"ther serveth to take it, reject and resume it as oft as "themselves list, &c.—But let them know which put "their hands unto this plough that, once consecrated "unto God, they are his peculiar inheritance for ever. "Suspensions may stop, and degredations utterly cut off "the use and exercise of power before given, but volun-"tarily it is not in the power of man to separate and pull "asunder what God by his authority coupleth."

The sacred character of the Presbyters of the church of Scotland, is recognized in other and later statutes also. Thus by the 58 Geo. III. c. 84, they are denominated "ordained ministers of the church of Scotland." By that statute *all* the marriages theretofore celebrated in British India, by "ordained ministers of the church of Scotland," are declared and enacted to have been valid, as if celebrated by clergymen of the church of England; though for the future their power to marry in India is limited to cases in which both or one of the parties is of their own church. It is said, indeed, that the Scotch Presbyterian clergyman is a clergyman in holy orders in Scotland only, and not elsewhere. But this statute shows that he carries that character with him to India, and if to India, why not to Ireland? And, although a British clergyman officiating in Scotland, is there but a tolerated licensed preacher, as the Scotch preacher is in England or in Ireland, will it be contended that he loses his character

as a clergyman, and is deprived of or suspended in his orders by residing in Scotland? So far from it his orders are recognized in Scotland, and accordingly although by the law of Scotland the celebration of irregular marriages is subject to severe penalties, the episcopal minister, acting regularly according to his license, is protected by law, and his orders are recognized. Alis. 544, & 545. If this be so, should not the *comitas gentium* in Ireland, where no Marriage Act exists to control us, recognize in return the orders of the Scotch clergymen here? And in this particular case, the presbyter Mr. Johnston, is the stated pastor and regular minister of the congregation.

But again it will be said that the Irish Presbyterian minister does not come within the category of the Scotch Church,—but I answer that the Irish Presbyterian church is a colony from, and a branch of, the Scotch church; and the doctrines, orders, and discipline of both are one and the same. True it is not established in Ireland, but it is allowed, it is protected, and it is pensioned and paid by parliamentary sanction. Its ministers are ecclesiastically ministers of the church of Scotland, and are therefore included in the terms of the 58 Geo. III. c. 84, before referred to. The Irish Presbyterian clergy, are described in the Appropriation Acts, as Protestant non-conforming ministers, and referring to the acts of Union, these ministers must mean ministers of the church of Scotland, and therefore ministers of the Protestant religion of a true church. The history of this country informs us, that the first Irish Presbyterian ministers were ministers of the church of Scotland; they settled in Ireland upon the invitation of the then governing powers, and for several years they performed parochial offices, they filled benefices, and discharged parochial duties as Presbyters of the church of Christ. The Act of Conformity displaced all this, and

deprived them of their offices, and of their ecclesiastical character; but the subsequent enactments, to which I have referred, seem to me to have once more recognized their clerical character and orders. They are ministers of the church of Scotland, though not in the establishment of that church, and may in some sense be said to be like the Roman Catholic Bishops *in partibus infidelium*. They are ordained ministers of the Scotch church, having the same orders, the same doctrine, and the same discipline, taken not by imitation, but by succession from the parent church.

There is also the 57th Geo. III. c. 51, referred to by my brother Perrin, which I use for the purpose of shewing what the law of England and Ireland is upon this point. It is entitled an act to regulate the celebration of marriages in Newfoundland.—And its preamble is this, "Whereas a "doubt has existed, whether the law of England requir- "ing religious ceremonies in the celebration of marriages "to be performed by persons in holy orders, for the "perfect validity of the marriage contract, be in force in "Newfoundland; and by reason of this doubt marriages "have been of late celebrated in Newfoundland, by "persons not in holy orders, &c." Now this recital and the legislation founded on it, leads to the conclusion that by the law of England, although it was required for its perfect validity that marriage should be celebrated by a person in holy orders, yet it was not essential that such orders should be episcopal orders. The doubt recited is not a doubt as to what the law of England required, but a doubt as to the validity of marriages celebrated by persons not being in holy orders. And the law of England here spoken of must be the common law, since the Marriage Act could not extend to the colonies.

Again, by the statute of the 41st Geo. III. c. 63,

entitled, "An Act to remove doubts respecting the eligibility of persons in holy orders to sit in the House of Commons," the clerical character of the Presbyterian minister is expressly recognized. The recital is as follows: "Whereas it is expedient to remove doubts which have "arisen respecting the eligibility of persons in holy orders "to sit in the House of Commons, and also to make "effectual provision for excluding them from sitting "therein." It is thereupon declared and enacted that no person having been ordained to the office of priest or deacon, or being a minister of the Church of Scotland, is or shall be capable of being elected to serve in Parliament as a member of the House of Commons. Here two classes of persons are described as being in holy orders—ordained priests and deacons, and ministers of the Church of Scotland; and they are described in the Statute by the names by which they designate themselves—the priests and deacons of the English Church, and the ministers of the Church of Scotland—for these ministers have never assumed the designation of priests or deacons, or even of presbyters, (which they are,) but ministers of the Church of Scotland, or Presbyterian ministers only. And these two classes are excluded from the House of Commons upon a common ground—the ground of their being in holy orders; and in this respect the Presbyterian ministers are separated from all other dissenting ministers, and placed on the same ground with the priests and deacons of the Established Church. Two lines are thus drawn, separating the ministers of the two great Churches of England and Scotland from all other divisions of Protestants in the United Kingdom. One is a line of privilege, recognising them as ordained ministers of the Christian religion; the other a line of exclusion, by which, as being in holy orders, they are disabled from sitting in the House

of Commons. A similar enactment as to Roman Catholic priests is found in the 10 Geo. IV. c. 7, s. 9; but all other ministers are looked upon as laymen, and not excluded from being senators. Will it be said that an Irish Presbyterian minister could, after this enactment, sit in the House of Commons? No; it could not be maintained.

We thus have it upon the highest authority, that of the Legislature, that Presbyterian ministers are ordained ministers, and that they are in holy orders. The difference is, that they are not in Episcopal orders—a difference more theological than legal; and without entering into the discussion of it, I may refer to the language of Jerome, as quoted by Hooker in his Ecclesiastical Polity, B. 7, Ch. 7, p. 269, who says:—"And to this very marke "doth St. Jerome evermore aim in telling Bishops that "presbyters were at first their equals—that in some "Churches for a long time no Bishop was made." And though it is the opinion of Hooker, as I believe it to be of the English clergy generally, that Bishops are an order different from and superior to that of presbyters, yet that opinion has not universally prevailed, even in the Established Church. We know that the great and venerable founder of Methodism, the Rev. John Wesley, himself a priest of the Established Church, and remarkable for his attachment to its doctrine and discipline, held a contrary opinion—that he considered Bishops and presbyters to be of the same order, and to differ *in gradu*, not *in ordine;* and he himself ordained Bishops, or Superintendents, "to be over the brethren in North America." It is right, however, to add that he did so on the ground of necessity, and because, to use his own words, he "violated no order, "and invaded no man's right by appointing and sending "labourers into the harvest;" see Moore's Life of

Wesley, v. 2, p. 327. Bishop Burnet also, in his exposition of the 23d article, p. 338, places this subject in a rational and Christian light. He tells us that the 23d article was framed with a view to the acknowledgment of the foreign Churches, and on purpose not to exclude them. "Finally, if a company of Christians find the public "worship where they live to be so defiled that they cannot "with a good conscience join in it, and if they do not "know of any place to which they can conveniently go, "where they may worship God purely, and in a regular "way—if, I say, such a body, finding some that have been "ordained, though to the lower functions, should submit "itself entirely to their conduct, or, finding none of these, "should by a common consent desire some of their own "number to minister to them in holy things, and should, "upon that beginning, grow up to a regulated constitution, "though we are very sure that this is quite out of all "rule, and could not be done without a very great sin, "unless the necessity were great and apparent, yet if the "necessity is real and not feigned, this is not condemned "or annulled by the article; for when this grows to a "constitution, and when it was begun by the consent of a "body who are supposed to have an authority in such an "extraordinary case, whatever some hotter spirits have "thought of this, since that time, yet we are very sure "that not only those who penned the article, but the body "of this Church for above half an age after, did, notwithstanding those irregularities, acknowledge the foreign "Churches, so constituted, to be true Churches as to all "the essentials of a Church, though they had been at first "irregularly formed, and continued still to be in an imperfect state. And therefore the general words in which "this part of the article is framed seem to have been "designed on purpose not to exclude them." The

consideration of this 23d article, and of Burnet's commentary on it, seems to me to go far towards deciding the point in controversy, for the article tells us that all those are lawfully called and sent which are chosen and called to this work by men who have public authority given unto them in the congregation to call and send minister's into the Lord's vineyard; and the Bishop's explanation is that the article was so framed in order to include the foreign Churches. Now, which are they? Why, the Genevese and the Lutheran Churches; and if their orders are thus solemnly recognised by the Church of England, can it be argued that the orders of the Scotch Church, the same in doctrine and in discipline with the Genevese, are intended to be excluded from the comprehensive terms of this wisely framed article?

I hope I am not misunderstood as undervaluing the orders of the Church to which I belong; I revere the principles and the forms of that Church, and prefer it to all others; but in the spirit of that Church I wish the rights of other Churches to be regarded with a brotherly feeling.

In fine I would say that it is not upon any legal principle that the Roman Catholic priest is allowed, by the clergy of the Established Church, to be in holy orders, and that the Presbyterian minister is deemed to be a mere layman. It is founded upon the dogma that none but Bishops can confer valid orders, a dogma not of the English Church, but of its clergy; a dogma not universally received by the English clergy but doubted by many, and denied by some of their own most pious ministers. The case of the Huguenots who upon the revocation of the edict of Nantz, fled from France, and took refuge in this country, and several of whom settled in Dublin, and had their own Church and minister, was referred to by my brother Perrin, and I think

it much in point. Some of the most influential and wealthy, of our citizens are the descendants of these Huguenots; their Church was Calvinistic, and of course, rejected episcopal orders, no doubt the marriages celebrated amongst the Dublin Huguenots, both with each other and with persons of other denominations, were in numerous instances celebrated by their French clergymen. We never heard that their marriages were bad, or the issue of them bastards, because the celebrator was only in Presbyterian orders. We have had also a Lutheran Church in Dublin; and it is known to most of those who hear me that a late clergyman of that Church was a well known celebrator or perpetrator of clandestine marriages, none of which were questioned because the clergyman had not episcopal laws.

For these reasons my opinion is, that a marriage duly celebrated in Ireland, by a Presbyterian minister, according to the rites of his Church between two Protestants of the Established Church, is now by the law of Ireland *de jure* a valid marriage. I must own that it was only at a late stage of the argument upon these cases, that my mind was brought to this conclusion. In the case of *The Queen* v. *Smith*, this ground was not relied on; but that case was argued on both sides as if the disputed marriage had been performed by a layman. The question I am now discussing was not raised or decided in it. I also felt the difficulty of limiting the extent to which the principle could be carried, and of distinguishing between the mere layman and any clerical character short of the clergymen of the English Church. But it appears to me that the legislature has itself drawn the line with accuracy. That it has recognised and acknowledged the clerical character in the two great Churches which are established by the statute law of the land, viz. the Churches of England and Scotland;—and although there may be other Christian denominations, and congre-

gations, whose ministers are ordained ministers in holy orders, according to Scripture doctrine, yet I find in the statute law of England no recognition of their orders, or of their clerical character; only the ministers of the two great Established Churches are, in the eye of the law, to use the language of the old writ, *Presbyteri sacris ordinibus instituti.* I cannot go so far as the learned and able counsel who have argued the case did in their notion of the plastic and flexible character of the law of England. It is the business of judges to expound and not to improve the law, and in dealing with statutes especially they should take care not to pass the limits of their office, which is that of interpreters *only.* But thus far I will go with them, I think the common law of England is truly an equitable law. In the language of its great oracle it is a "nursing mother," it contains within its fertile bosom principles of justice and equity which though long latent often develop themselves as new circumstances and exigencies arise. Like those seeds which may have lain dormant for years imbedded in the earth, but which vegetate, spring up, and grow, as the turning of the soil admits the access of the sun and of the air.

As to the consequences of the decision in this case, I enter not into them; that is for the legislature. But I may remark, that any decision which tends to draw into more intimate union, and cordial fellowship with each other, the two great branches of Protestants who together inhabit these realms, and are connected together by so many ties, cannot but be in unison with the spirit of those statutes to which I have referred, and to that spirit of christian charity which should be the soul and the bond of all christian communities. These two bodies, differing only in discipline and church government, are perfectly agreed in all the essential doctrines of the christian faith. And if the clergy

of the Church of England should be induced to abate somewhat on the score of their Episcopal orders, and the Presbyterian clergy to moderate their aversion to prelacy, and both meet upon the middle platform of the Lutheran Church (which admits of both forms), it would tend much to the peace of both Churches and (which is paramount to all other considerations) to the extension of His kingdom who is acknowledged equally by both to be the spiritual Head of the universal Church. My opinion, upon the whole case therefore is that there should upon this last ground, be judgment for the crown.

11TH JUNE.

Burton, J.—The length of investigation which this case has undergone, and the further illustration that it will receive from the judgment of my Lord Chief Justice, induce me to think that I shall sufficiently discharge my duty by stating in a very summary manner the opinion I have formed on the different questions that have arisen; adding to them some observations on a few topics of great importance that have been brought under the consideration of the court at a very late period in this discussion.

I think this case may not improperly be considered, first, as it would have stood previous to the Marriage Act (26 Geo. 2, c. 33,) in England, and to the 58 Geo. III. c. 81, in Ireland; and then, as it has been affected by these statutes.

In this view of the case the following questions arise. 1. Whether the intervention of a priest in holy orders was by the common law of England and Ireland during the first period essential to the due and legal solemnization of a marriage in those countries. I mean to say, was essential *generally*, subject to certain statutable exceptions. 2. Whether a Presbyterian minister (not having had episcopal ordination) could under that law and for that purpose be held to be a priest in holy orders. 3. Whether if he could not, he might yet be legally considered and held to be a person whose office, for the purpose of giving validity to the solemnization of marriage, was equivalent to that of a priest in holy orders. 4. Whether previous to the Marriage Act in England, and to the 58 Geo. III. c. 81, in Ireland, a marriage contract *per verba*

de præsenti without the intervention of a priest in holy orders was effectual to any civil rights or purposes. 5. If it were, whether an indictment for bigamy could be sustained in cases where the first marriage was of that description. And 6. Supposing it could, whether the English Marriage Act entirely invalidated such contracts as marriages in England; and, whether the statute 58, Geo. III. c. 81, had the like effect in Ireland.

Upon the first of these questions I apprehend that the intervention of a priest in holy orders was, by common law, essential to the due and legal solemnization of a marriage generally; that is, subject to certain legal qualifications, and subject also to statutable exceptions.

As to the second question, I think that the designation of a priest in holy orders, means a priest who is so by episcopal ordination, and consequently that a Presbyterian minister (not having had episcopal ordination) is not within that description. Nor, as to the third question, is he, as I conceive, a person whose office, for the purpose of giving legal validity to the solemnization of a marriage, is to be considered as equivalent to that of a priest in holy orders.

I speak of this as matter of positive law; without entering upon the question as to whether it is also a matter of sound and just, or reasonable provision. And therefore I abstain from any examination of the historical and critical discussions that have taken place on the subject; the law (I mean by that the canon law so far as it is received into that of the Established Episcopal Church,) appearing to me to be such as I have stated it upon both points, viz.: as requiring the intervention of a priest in holy orders by episcopal ordination, and as not warranting the suggestion that any person, not in such orders, can, from an approximation (however near) to their nature and character, be considered as equivalent thereto for the purpose of giving

legal validity to the solemnization of a marriage between members of the Established Church.

I have stated these propositions as being subject to some legal qualifications and to some statutable exceptions. With respect to the qualifications thus referred to, they are those which have arisen and been allowed under peculiar circumstances. As when a person accused of bigamy has been held to be estopped or precluded by his own act or declaration, from denying the legal validity of the first marriage; or when the first marriage was celebrated in a church by a person believed to be, and ostensibly being, in holy orders, and acting as such, or when whatever may have been the actual irregularity of the marriage ceremony, it has been held to be cured or put beyond question, by circumstances from which a legal marriage might be presumed.

With regard to one of those qualifications of the rule, namely, that of a person being estopped by his own conduct from denying the validity of the marriage ceremony, if that were to be carried to the extent of his being estopped by having been an assenting party to the ceremony, it would undoubtedly put an end to all discussion upon this, or any other case, where the party who insists upon the invalidity of the marriage was of mature age and of sound mind, and not actually imposed upon. But I am not yet aware of any authority going that length. The case of *Jones* v. *Robinson*, 2 *Phill*, 285, certainly does not; nor as my brother Crampton has observed, does any thing appear on these special verdicts amounting to such an estoppel, or warranting such a conclusion. If that is not the case then I apprehend that in order to raise the question of estoppel, it would be necessary that such facts should be shewn to the court as would induce them to believe that the conduct of the party had had the effect of deceiving, or imposing upon, the minister who officiated at

the ceremony, or the person with whom the marriage was performed. But this presumption cannot arise upon a special verdict, unless the facts are there put upon record, which they are not here.

With respect to the statutable exceptions they are such as, in my apprehension, tend to confirm the propositions themselves. For to what purpose were the laws enacted for making valid the marriages of Protestant dissenters by their own ministers, if such marriages were already valid, as to legal solemnization, not only between themselves but between members of the Established Church? As to the principal statute on that subject, indeed, (the 21 and 22 Geo. III. c. 25, Irish,) it has been suggested that it admits of a construction that would make valid a marriage celebrated by a dissenting minister, when only one of the parties to be married was a dissenter. But this construction, though suggested, was not pressed in argument, or supported by any authority, the words of the clause being "That all matrimonial contracts or marriages heretofore "entered into, or hereafter to be entered into between "*Protestant dissenters*, and solemnized or celebrated by "Protestant dissenting ministers, or teachers, shall be "valid and taken to be good and valid to all intents and "purposes." There has also been another argument drawn from this statute, viz.: that it may and ought to be considered as a declaratory act, and that the declaration may and ought to be extended not only to the express cases referred to and concerning which it was specially made, but to all cases within the reason of it. And this upon the authority of *Co. Litt.* 76. And then it is argued that the reason of it extends to marriages between members of the Established Church, and that consequently such marriages celebrated by Presbyterian ministers are by this statute declared to be good and valid. But this is an application of the principle laid down by Lord Coke, to

which I cannot accede. For when I see that the statute in express terms limits the enactment (or declaration) to marriages between dissenters, I find it not only difficult, but it appears to me unwarrantable, to carry the provision beyond and against its clear and unequivocal expression, and to interpret it as applicable to members of the Established Church also.

But then there are upon this part of the case two other grounds upon which it has, very late in the discussion, been suggested that the solemnization of a marriage by a Presbyterian minister may and ought to be held as perfectly equivalent to the solemnization by a priest whose orders are episcopally received. One of these is the effect of the Act of Union between England and Scotland, and of the Act of Union between Great Britain and Ireland. By virtue of these it has been supposed that ordination according to the Presbyterian discipline or rules, being taken from and identical with that of the Church or Kirk of Scotland, is put upon exactly the same footing throughout Great Britain and Ireland, as it is in Scotland. I do not conceive this to be an accurate exposition of the Act of Union between England and Scotland. It certainly enacts that the "Act of the same session, entituled an "act for securing the Church of England as by law estab-"lished, and all things therein contained, and also the "Act of Parliament in Scotland, entituled an act for "securing the Protestant religion and Presbyterian church "government shall at all times be, and shall for ever be "held and adjudged to be essential, and fundamental parts "of the said Act of Union, and that the said articles of "Union, and these two acts are thereby ordained to be "and continue in all times coming the complete and "entire union of the two kingdoms of England and "Scotland;" but I do not think this can be properly construed to mean that the Presbyterian Church govern-

ment of Scotland shall become also, and to the same extent the Church government of England, any more than that the Episcopal Church government of England shall become and be admitted to be the Church government of Scotland. It can at most only mean that the Episcopal Church government of England shall be admitted to be the Episcopal Church government of Scotland for Episcopalians, and that the Presbyterian Church government of Scotland shall be the Presbyterian Church government in England for Presbyterians. And as to the Union of Great Britain and Ireland, the statute 39 and 40, Geo. III. c. 67, provides by the third Art. "that the Churches of England "and Ireland be united into one Protestant Episcopal "Church, to be called the united Church of England and "Ireland, and that the doctrine, worship, discipline and "government of the said united church, shall be and "remain in full force for ever as the same are now by law "established for the Church of England, and that the "continuance and preservation of the said united Church, "as the Established Church of England and Ireland shall "be deemed and taken to be an essential and fundamental "part of the Union; and that in like manner the doctrine, "discipline and government of the Church of Scotland "shall remain and be preserved as the same are now "established by law, and by the acts for the union of the "two kingdoms of England and Scotland." Now this cannot, as I conceive, be construed to mean that the doctrine, discipline and worship of the Episcopal Church shall become also the doctrine, discipline and worship of the Presbyterian Church, nor on the other hand that the doctrine, discipline and worship of the Presbyterian Church shall become also that of the Episcopal Church. It could only mean, at most, that the one mode of doctrine, discipline and worship shall remain and be the doctrine, discipline and worship of the Episcopal Church, and the other

remain and be the doctrine, discipline and worship of the Presbyterian Church.

And upon this there may be good ground for holding (though it is not now necessary to give an opinion upon it) that the solemnization of marriage according to the form of the Presbyterian Church, would be valid as to Presbyterians, both in England and Ireland; but it could never, as I conceive, be held (at least, I am satisfied, that these statutes have never yet been supposed to imply) that the Presbyterian manner of solemnizing marriage, should be a valid mode between Episcopalians in England and Ireland.

The statute 41 Geo. III. c, 63, has also been referred to as creating or acknowledging (if not declaring) a legal parity of ordination between the Presbyterian and Episcopalian Churches. This has been deduced, first, from the recital of the expediency of removing doubts respecting the eligibility of persons in holy orders to sit in the House of Commons, and secondly from the enactment that no person having been ordained to the office of a priest or deacon, (that ordination meaning of course Episcopal ordination,) or being a minister of the Church of Scotland, shall be capable of being elected to serve in Parliament as a member of the House of Commons. And this statute certainly does exhibit a clear and just sense of the parity of the two classes of persons in orders, the one in Scotland and the other in England, and a just assimilation of the two kinds of order, for the purposes of that act, and for these therefore it must be taken as having put the Presbyterian orders on the same footing with Episcopalian orders as being *for these purposes* within the same reason. But this cannot, I think, be justly considered as having explained away the sense and meaning of the term "holy orders" as applied before and since the making of this statute, to the capacity of solemnizing marriages. How-

ever strong the reasons may be for applying the term "holy" to the orders of the Presbyterian Church, and however justly the similarity which exists between them may have suggested the propriety of making the one of equal effect with the other, as far as relates to a capacity for becoming members of the House of Commons, it cannot, I think, affect the question of the meaning in which the term "holy orders" has been used and acted upon in the government of the Episcopalian Established Church in relation to the solemnization of marriage.

Two other statutes have been referred to in support of this branch of the argument. The one relating to marriages in India, the other to marriages in Newfoundland. I shall confine myself to the act relating to India, the 58 Geo. III. c. 84, as the observations which I shall find it necessary to make upon it, will be found equally applicable to the act concerning Newfoundland. It has been observed that our establishments carried to that country not merely the laws of England but those of Great Britain also, and that as in England and Scotland the Presbyterians were entitled by law to particular privileges or capacities, they should be intended to have carried them to India, and that therefore this act was passed declaring this principle, and extending to Presbyterians in India, the rights which they enjoyed in Great Britain. But it strikes me (though I am fully aware of the danger of carrying out too far the principles deducible by arguments from local statutes,) that the proper inference from this statute is not only opposed to the view thus expressed, but that it operates in a quite contrary direction. If as the law theretofore stood, marriages solemnized by Presbyterian ministers were considered marriages celebrated by a person in "holy orders," and attended with the same effects and consequences as if solemnized by a person possessing Episcopal ordination, there would not seem to have been any neces-

sity for the statute; and the subsequent restriction of the authority of Presbyterian ministers, in respect of the celebration of marriage, to cases where one, at least, of the parties was a Presbyterian would have had no foundation in reason. And therefore this legislative measure appears to me to contain an enactment rather than a declaration, and to have operated by giving a limited capacity to their ministers which they did not before possess, and not by limiting or restraining a legal capacity theretofore subsisting.

It is from inferences thus deduced that the court is now called upon to affirm the proposition that these statutes should be carried into effect by adjudging that the term "holy orders" is by law (that is by the canon law as received into and becoming part of the law of the Established Episcopal Church) equally applicable to Presbyterian and Episcopalian ordination. But it seems to me that this can only be effected upon the principle contended for by the counsel for the crown who last addressed the court, and by whom it was first mentioned, viz.: that the canon law so received into and being the law of the Established Church, should now be given an extended sense. That, in short, the present improved habits of thinking and reasoning on the subject of different religious persuasions are to be received in the nature of a new light by which we should be guided in the exposition of a somewhat obsure and antiquated system of law. This seems to me a principle that if carried out to its full extent would lead (as perhaps it ought, if admitted at all,) to the necessity of applying it to every separate congregation of Christians. This indeed was the position assumed by the counsel who first argued the case for the crown. But as to this I can only say that I am not bold enough to act upon such a principle of exposition, especially in a criminal case in which, if adopted, it must lead to conviction, and that

too, a conviction assuming a knowledge, by the culprit, of the law, not as it was then known but as it has been since his trial for the first time ascertained and declared. So that giving, as I do, the utmost credit to the parity, in point of reason and religious sense, between Presbyterian and Episcopal ordination, I prefer leaving the declaration of its binding legal effect, to the discretion of the legislature in a new enactment, which may be guarded by suitable provisions, rather than, by an adjudication, hazard the introduction of inconveniences and inconsistencies which could not in such a proceeding be easily or sufficiently guarded against.

Assuming that I am right in the conclusions to which I have arrived upon the points thus far considered, the fourth question now arises. Whether previous to the statute 26 Geo. II. c. 33, in England, and to the statute 38 Geo. III. c. 81, in Ireland, a marriage contract *per verba de præsenti* (but without the solemnization) was a marriage *per se*. This question divides itself into two branches. First, was it a marriage in any sense, and for any purpose, and second, if so, was it a legal marriage, that is, a marriage creating any civil rights, or effectual to any civil purposes.

With respect to this it appears to me that the authorities are cogent, and to my mind, convincing, that such a contract was, in itself, and to certain effects a marriage; (*ipsum matrimonium*;) incomplete however as well as irregular, and not having therefore all the legal effects of a marriage solemnized; not entitling the wife to dower, and leaving, at least, questionable the still more important effect of the legitimation of issue. I say questionable, because I think it must be so esteemed upon a full consideration of the authorities on one side and on the other. It had however certainly and beyond question, these important effects; it enabled either party to enforce against the other the so-

lemnization of such a marriage; and to obtain a divorce *a vinculo matrimonii*, in case of his or her marrying another; thus avoiding a regularly solemnized marriage by force of the precontract. This latter effect of a marriage contract is, I think, singly sufficient to justify the epithet so often applied to it of very marriage, or "*ipsum matrimonium.*"

I now come to consider the fifth question, namely, whether an indictment for bigamy could be sustained against a person so precontracted, who should regularly and solemnly marry another person, during the life time of both parties to the first contract, the second marriage not being avoided by sentence of divorce. In a moral sense the offence would certainly be committed, but it would be a strong objection to such an indictment that the first marriage could not be a good, valid. and effectual marriage, while the second was voidable only, and not void. These considerations might lead to the conclusion that (according to the language of the canonists) the first marriage though good in substance was bad in form; that it was not a perfect or complete marriage until solemnization; and that until then it was not (at least in one sense) a marriage, *ipso facto*, that is, good until avoided by sentence); whereas the second marriage would be, *ipso facto*, a marriage, because good until so avoided.

Whatever doubts however might arise upon the case considered thus far, the sixth question remains to be determined; and that is whether supposing (on the one hand) that there has not here been a due solemnization of the first marriage, and supposing (on the other hand) that before the English Marriage Act, and before the 58 *Geo.* 3 *c.* 81, in Ireland, such a contract had the effect of sustaining an indictment for bigamy on a subsequent duly solemnized marriage with another person, such an indictment could be sustained on marriages contracted *after* these statutes

respectively. Or in other words whether the operation of s. 13 of the Marriage Act, which is literally transcribed into the 58 *Geo.* 3. *c.* 81, is or is not to abolish the effect of the contract *per verba de præsenti* as constituting a marriage in any legal sense. I think it has that effect, because I conceive that in the first place it has abolished the jurisdiction of the spiritual court to deal with it as a marriage and next that the words of the clause "that in "no case whatever shall any suit or proceeding be had in "any ecclesiastical court to compel a celebration of any "marriage *in facie ecclesiæ* by reason of any contract of "matrimony whatever, whether *per verba de præsenti*, or *per* "*verba de futuro*," take away the jurisdiction of the ecclesiastical courts to decree a divorce *à vinculo matrimonii*, on the ground of a precontract, as well as its jurisdiction to decree the solemnization of that precontract. The operation of the clause must therefore in my judgment be to make a mere contract of matrimony, without solemnization, wholly ineffectual as a marriage. I am not aware that any express decision has been made upon this point, but the view which has been taken of it by text writers whose opinions are entitled to respect, supports the conclusion that I have arrived at. (1 Black. Com. 440, and Christian's note p. 435, and Rogers' Ecclesiastical Law 593.) Lord Stowell in *Dalrymple* v. *Dalrymple*, Dod. 19, appears to have entertained the same view, when he expressed himself in these terms, "the Marriage Act "swept away the whole subject of irregular marriages, "together with all the learning belonging to it, by es- "tablishing the necessity of resorting to a public and "regular form without which the relation of husband and "wife could not be supported." The opinion of this great canonist appears to me to put this question out of all reasonable doubt as to the operation of the English Marriage

Act, and I do not think there is any thing to warrrant a sound distinction between that act and the Irish statute of the 58 G. 3, c. 81, in this respect. The 8th section of the English Marriage Act, makes void all marriages *solemnized* from and after the 25th of March 1754, in any other place than a Church or public chapel unless by special licence, or that shall be *solemnized* without publication of banns or licence of marriage first had and obtained. The terms of this section, not extending to *marriage contracts not solemnized*, the 13 section was added, which is the one that is literally transcribed into the Irish statute 58 G. 3, and upon which, I think, the operation of rendering all such matrimonal contracts ineffectual *as marriages*, mainly if not altogether depends, as well in the English as in the Irish statute.

I cannot therefore see the ground upon which it can possibly be held that in Ireland a matrimonial contract *per verba de præsenti* without solemnization can now be held to constitute "*ipsum matrimoniam.*"

Upon these grounds I am therefore of opinion that there should in this case be judgment for the prisoner. But I may be allowed to express a hope that in order to remove the doubts which the division of opinions in this court may strengthen, the principles of the late Marriage Act in England may be extended to this country, and the law in this respect may be placed on so clear a footing as to prevent the recurrence of cases which, like the present, cannot fail to produce discontents and consequences injurious to morality, and dangerous to the best interests of society.

Pennefather, C. J.—In the case of the *Queen* v. *Carroll*, which is the only one of the two cases now before the court which I have heard argued, my judgment entirely concurs with that just pronounced by my brother Burton, and my opinion is that the prisoner here ought to be acquitted;—the offence with which he is charged, viz: of having married one woman during a subsisting marriage with another, not having been brought home to him.

This case turns upon positive law. It is not one in which we are allowed to indulge in abstract reasoning, or in exercise of the imagination; it is no matter of inclination or of feeling; it is simply a question of law, and if the law appears unjust or harsh, though that may well form a reason for legislative interference, it can in no manner influence our judgments, for we sit here to interpret and administer, not to alter or amend the laws. The whole question turns upon the meaning of the words "being "married." These are the words used in the late statute constituting the offence of bigamy, as they are also the words of the statute of James. This offence was once capital, and punishable with death; it is still a felony, and it appears to me that to convict a prisoner on this serious charge, the case should be reasonably free from doubt. So far from this, it seems to me that there can be but very little doubt that the offence here has not been legally established. The words of the statute "being married," are interpreted in a book of unquestionable authority, and are said by Lord Coke in 3 Inst. 88, to extend to a "marriage *de facto* or voidable by reason of precontract, "consanguinity, affinity, or the like, for it is a marriage

"in judgment of law until it be avoided." But the voidable marriage here alluded to does not mean an *imperfect* marriage—it relates to a marriage which is good until avoided, and one of the grounds of avoidance is stated to be precontract. Now this appears to be inconsistent with the idea of an actual previous marriage. If it is a precontract only, it is not marriage, and though some confusion may exist in the use of the term *ipsum matrimonium*, yet it appears clear that a precontract is not synonymous to a pre-marriage; and a prisoner is not to be convicted of a felony when there has been no double marriage. The same doctrine as laid down by Lord Coke, is also to be found in *Russell on Crimes*, 192, where the rule is repeated that though it is not necessary to prove a lawful canonical marriage, yet that a marriage *in fact* whether regular or not must be shown in order to constitute bigamy. But whilst all authorities agree in this point, I find it no where laid down that a void marriage, a mere nullity, is to be taken to constitute bigamy, and to amount to the perpetration of felony. In *Hale's* P. C. 693; 1 *East.* P. C. 466, a void marriage is declared to be insufficient for this purpose, and a case is given in which it was so held. In the present case, therefore, if the first marriage be a mere nullity, the consequence is that it cannot form a constituent part of an indictment for bigamy.

What are the facts in this case? [Here his Lordship read the special verdict and continued.] Now I must first observe, that I have some difficulty in determining whether the court has before it sufficient legal information to enable it to say what the form of marriage is in the Presbyterian Church. The Church of England is by law the church of this kingdom, and its forms and ceremonies are established with it, and this court is bound to notice them as part of the law of the land; but where is the law that defines the

rites and ceremonies of the Presbyterian Church? Such a law exists in Scotland, in the Act of Union, but where is it to be found here? And if the special verdict is silent in this particular, what means has the court of forming a judgment whether this marriage is valid, even according to the rites and ceremonies of the Presbyterian Church? It may also be remarked that the special verdict states, that the Presbyterian minister who performed this ceremony, resigned his charge about ten years ago. It is therefore plain, that he had no congregation at the period when he solemnized this marriage. Presbyterian orders are not indelible, and though by resigning his charge, he did not consider himself to have ceased from being a Presbyterian minister, yet it is found that since his resignation he has done no duty but marry and baptize, (which a layman may do,) and preach in private houses. Who can tell whether he ought still to consider himself a minister? Where are the laws by which he is bound? To what censure is he liable? He has attended no synod or presbytery for nine years, nor received salary or regium donum. If we are to take the "Rules and Constitution of the Presbyterian Church," contained in a book handed up to us during the argument, as authentic and in force, this marriage is in violation of every law and usage of that church. The minister here had no congregation, and the two persons married were both members of the Church of England; yet, at p. 37 of that Book, s. 17, title "Marriage," it is laid down, that "no minister can celebrate marriage, who "has not a congregation," and subsequently that, (with certain exceptions,) one of the parties at least must belong to *his congregation*—thus plainly contemplating that both parties should be Presbyterians, and limiting the rights of ministers, in the celebration of marriages to cases where one of the persons is a member of his congregation. But however opposed this marriage may appear to the rules

contained in this book, the court cannot be thus influenced in its judgment; for we cannot acknowledge the authority of these rules, and are ignorant how far they may be received by the Presbyterians, who, it is well known, are divided amongst each other upon many points of discipline. Thus, though I were even at liberty to say that the law acknowledged *generally* the validity of Presbyterian ordination, I could only view this ceremony as an alleged marriage, not being provided with means of judging of its regularity, But although I might under these circumstances, omit any further discussion upon this part of the subject, yet the question of Presbyterian ordination is one of such very general importance and interest, and has called forth upon the present occasion so much learning and ability, that I should be sorry to withhold my opinion upon it. The point to be considered is, whether, assuming the presence of a clergyman in holy orders to be necessary for the valid solemnization of a marriage, an ordained minister of the Presbyterian Church can be esteemed sufficient to satisfy the law in this behalf. In my humble judgment, no marriage can be celebrated according to law between members of the Established Church of Great Britain and Ireland, unless by a person episcopally ordained—and if I am right in this, the necessary consequence is, that a ceremony purporting to be celebrated between such persons by a Presbyterian minister is not valid, nor such as is required by law. The question now is, not whether there is or is not solemnity in the form of Presbyterian ordination, or whether equal solemnity should not give ministers of that church equal rights with those of the Establishment. We do not sit here to reform the law, but to expound it, and the first step towards obtaining an alteration of the law, where any is reqnired, is clearly to understand its provisions.

It seems conceded that in England and Ireland, before the reformation, episcopal ordination was the only mode of entering into the ministry of the church. I should say that the change which took place at that period was not so much the substitution of one religion for another, as the alteration of that religion in some particulars. Previous to that time the church of England was Episcopalian—from Bishops alone were orders derived, and whether they were or were not assisted in the ceremony of ordination by Presbyters is a matter of no consequence, as the one important part was the imposition of hands by the Bishop, without which the ceremony could not be valid. When the reformation took place in England, therefore, it is to be assumed that this form was retained in conjunction with all others not expressly altered; and that *Protestant* was substituted for *Romish* episcopal ordination. Accordingly, in 2 Burn's Ecclesiastical Law, 192, 8 Ed., a Dissenter "having holy orders," with reference to the Toleration Act, is defined as having received episcopal ordination, while a Dissenter having "pretended holy orders," is described as having his orders conferred by some form, other than episcopal ordination, acknowledged by Protestant dissenters. A dissenter might possibly happen to have been episcopally ordained, but still there are but two descriptions of orders—holy orders, and pretended holy orders; the one confined to Episcopalians, the other different from the first, and adopted by Protestant dissenters. That the law after the reformation upon these subjects was considered to be as near as possible a continuance of the old order of things, appears from Co. Litt. 95 b. where, commenting on these words in the first part of s. 135, "they which hold in "frankalmoyne are bound of right before God to make "orisons, prayers, masses, and other divine services," Lord Coke observes, "Since Littleton wrote, the Lyturgye

" or Booke of Common Prayer, and of celebrating divine " service is altered, and such prayers and divine services " shall be said and celebrated as now is authorized." In the same manner I think that Protestant ordination was then substituted for Romish ordination. Lord Coke then adds, " and if a tenant says the service as now is authorized, it sufficeth." How is a Presbyterian to perform this? He knows no Liturgy, and it cannot be said that the selection of prayers made by one Presbyterian or another, is a valid substitute for masses. When new forms of worship were substituted for those formerly in use, they became equivalent to the old in their legal effect and operation. And it is upon the same principle, that if a Roman Catholic Priest were to conform to our Church, he would be admitted into the ministry without fresh ordination, because the one church is a continuation of the other in a reformed state. But it is otherwise in the case of dissenters. The Church of England does not recognize these orders, nor indeed could she do so by law. Uniformity in discipline and worship, is treated by our law as a virtue, and a thing to be commended. It is thus spoken of in the preamble to the 17 & 18 C. II. c. 6, " nothing conduceth " more to the honour of God, the settling the peace of the " nation, or the advancement of religion, than an universal " agreement in the public worship of Almighty God." Non-conformity on the other hand, is treated in the nature of a crime, whether evidenced by persons absenting themselves from church, or not adopting its forms and ceremonies; and at one period penalties were imposed upon all who thus offended, 4 Black. 52, 3. How therefore can these persons, whom the law considered as acting criminally, be taken to possess orders which that same law recognizes as legal? That dissent was not recognized before the reformation is clear from the case of *R.* v. *Larwood*, where the second opinion expressed by the judges, is to the fol-

lowing effect:—"They all agreed that the Act 1 W. & M., "which indulges dissenters, is a private act, and therefore "the court could not take notice of it without pleading, "and they were of opinion that it was a private act, be- "cause, time out of mind, &c., there was a discipline "established in the Church of England, which all persons "were obliged to observe by the canon law before the "reformation, *Linwood*, 8; and since the reformation by "the Statutes Ed. VI. and 1 Eliz., so that the law took "no notice of any such person as dissenters before this act." And although this is not now the case, and in other respects the authority of *R.* v. *Larwood* is opposed to *Evans* v. *Harrison*, Wilm. 160, yet I do not consider the reasoning of that passage to be overruled.

It has been suggested in the course of this argument, that one of the articles in our church (the twenty-third) is so general in its terms, as to embrace Protestants of every denomination, members of foreign churches, and non-conformists. But I cannot understand the article thus; it is in these words. "It is not lawful for any man to take "upon him the office of public preaching, or minister- "ing the Sacraments in the congregation, before he be "lawfully called and sent to execute the same. And those "we ought to judge lawfully called and sent, which be "chosen and called to this work by men who have public "authority given unto them in the congregation, to call "and send ministers into the Lord's vineyard." Who are these persons having public authority? The Bishops alone, as appears by the 36th Article. "*Of Consecration of* "*Bishops and Ministers.*" It says, "The Book of Conse- "cration of Archbishops and Bishops, and ordering of "Priests and Deacons, lately set forth in the time of "Edward the Sixth, and confirmed at the same time by "the authority of Parliament, doth contain all things "necessary to such consecration and ordering; neither

" hath it anything that of itself is superstitious or ungodly. " And therefore, whosoever are consecrated or ordered " according to the rites of that book, since the second year " of the aforenamed King Edward unto this time, or here- " after shall be consecrated or ordered according to the " same rites, we decree all such to be rightly, orderly, and " lawfully consecrated and ordered." What are the *rites* here referred to? The answer is given by the Act of Uniformity, " to the intent that we his Majesty's subjects in the Church " of Ireland, hold the same conformity of common prayers, " and administration of the Sacraments, and the other rites " and ceremonies of the church, according to the use of " the Church of England, together with the Psalter or " Psalms of David, and the form and manner of making " and ordaining, or consecrating Bishops, Priests, and " Deacons, as agreed to by both houses of Convocation." It then provides that the said book of Common Prayer to that act annexed, shall be used in all places of public worship. And that no mistake may exist as to the obligations imposed by the church and the law as to ordination; the 8th section provides and enacts, " that after the 26th Sep- " tember, 1667, no person who now is incumbent, or in " possession of any parsonage, vicarage, or benefice, or " who is not already in orders by episcopal ordination, or " shall not before the 29th September, be ordained priest " or deacon, according to the form of episcopal ordination, " shall hold or enjoy the said parsonage, vicarage, or bene- " fice, or other ecclesiastical promotion within this king- " dom of Ireland, but shall be utterly disabled, and *ipso* " *facto* deprived of the same, and all his ecclesiastical pro- " motion is to be void, as if he were actually dead." Now, how is it possible to conceive that the Presbyterian clergyman could range himself within the limits of this clause? Yet, this is the law of the land, except as far as it has been relaxed by particular acts, which it will be seen have all

defined the exact length to which they were to extend. Then the 9th section, "no person shall be capable to be "admitted to any parsonage, &c., or shall presume to con- "secrate the holy Sacrament of the Lord's supper, before "such time as he shall be ordained priest according to the "form and manner in and by the same book prescribed, "unless he have previously been made priest by episcopal "ordination." There is also another instance in which the law on this subject is very precisely laid down, and in my judgment must rule this case. It is contained in the preface to the form of ordination service, and is as follows: "And therefore to the intent, that these orders may be "continued and reverently used and esteemed in the "United Church of England and Ireland; no man shall "be accounted or taken to be a lawful Bishop, Priest, or "Deacon in the United Church of England and Ireland, "or suffered to execute any of the said functions, unless "he be called, tried, examined and admitted thereunto, "according to the form hereafter following, or hath had "formerly episcopal consecration or ordination." The ceremony is laid down in the Rubric, and commences by the Archdeacon or his deputy presenting the candidates to the Bishop, concluding by the Bishop's laying his hands on each of them. It may be allowed to the Presbyters to perform this ceremony together with the Bishop, but it is imperative that it should be executed by him. Now this preface is part of the statute law of this country to this hour, except as far as relaxations and tolerations have been introduced in favour of dissenters, and here is an express enactment, that no man shall be accounted Bishop, Priest, or Deacon, unless ordained according to the prescribed form. Here is a positive existing statute binding this question, and resisting by its own operation the recognition of persons who, however holy and virtuous, have not complied with the law in these particulars. The Rubric

also is declared by Sir John Nicholl in *Kemp* v. *Wickes*, to be part of the law of the land.

It appears almost superfluous after such strong and express authorities to refer to the works of individuals for additional testimony to the principle of the law on this subject. The law requires it not, and gains nothing by it; but that there may be no mistake as to the view of eminent Theologians, whose works have been quoted in the course of the argument, I will extract a short passage from Hooker's Ecclesiastical Polity, to shew what he considered the rule to be on this subject. At p. 255, he says: "Now a part of the pre-eminence which Bishops "had in their power of order, was that by them only such "were consecrated." Again, "The power of ordaining "both Deacons and Presbyters, the power to give the "power of orders to others, this also hath been always "peculiar to Bishops. There are which hold that between "a Bishop and a Presbyter touching power of order there "is no difference. The reason of which conceit is, for "that they see Presbyters no less than Bishops, authorized "to offer up the prayers of the church, to preach the "gospels, baptize, to administer the holy Eucharist; but "they considered not withal, as they should, that the "Presbyter's authority to do such things is derived from "the Bishop who doth ordain him thereunto, so that even "in these things which are common to them both, yet the "power of the one is, as it were, a certain light borrowed "from the others lamp." Numerous other passages fully as strong, as direct, and as clear are to be found throughout this work. In Wheatly on the Common Prayer, the same doctrine is laid down, pp. 93, 94, & 98. Also in Gibson's Cod. 99; and Palmer's Orig. Liturg. pp. 249—300. But I forbear to quote from these authors, both that I may not occupy too much of the public time, and also because it is not on the opinion of these writers,

however learned, that the authority of episcopal ordination can at this time be presumed to rest. It stands on the statute law of the kingdom. It is true that as this law introduced the rights and ceremonies of the church of England, and amongst these the right of ordination, so it might alter them as it thought proper. The Act of Uniformity, as it first passed, was binding upon all the King's subjects, and at that time no such persons as Dissenters were recognized. This is evident from the case of *R.* v. *Larwood*, before cited. But it may be said that subsequent enactments relieved its strictness in many respects, and amongst others in that of ordination. Let us examine the acts which bear upon the subject. The first is the Toleration act of the 6 Geo. I. c. 5. It was passed in 1732, and defined generally the privileges of Dissenters. It recited that granting some ease and indulgence to Protestant Dissenters in the exercise of their religion, would be a means of uniting the King's subjects, and provided that a clause in the Act, 2 Eliz. which required all persons to go to church, under a penalty, should not extend to Protestant Dissenters taking the oaths therein prescribed. So that none of the benefits of that act were to extend to any but those who took the oaths. The s. 8, provided that no person being a Protestant Dissenter from the church of Ireland, in holy orders, or pretended holy orders, or any preacher or teacher of any congregation of Dissenting Protestants, who should subscribe to certain of the articles, make the declaration, and take the oaths there mentioned, should be liable to the penalty imposed by the Act of Uniformity. I have already mentioned that the phrase "Protestant Dissenter in holy orders," did not recognize Presbyterian ministers as in holy orders, but as is said by Burns, referred to ministers of the church of England, who having been once in episcopal orders, afterwards became Dissenters. There is nothing in this

section rendering the term "holy orders" applicable to any but episcopalian churchmen. Then again, s. 10, reciting that whereas some Dissenting Protestants scrupled the baptizing of infants, provided that every person in pretended holy orders, or pretending to holy orders, or any preacher or teacher who should subscribe to the articles before mentioned, except that relating to baptism, and take the same oaths and declaration, should enjoy all the privileges, benefits, and advantages, which any other Dissenting minister might have or enjoy by virtue of that act. No distinction is there taken between a Presbyterian and any other Dissenter. They are all entitled to equal privileges, which amount to no more than exemption from certain penalties, but the act leaves untouched the provisions of the Act of Uniformity, and gives no reason for assuming that the law ever recognized any orders but those episcopally confirmed; and it lies upon those who claim a right to execute a calling to which episcopal ordination alone gives a title, to shew how they are taken out of the operation of the Act of Uniformity which forms the general law of this country.

I do not apprehend that by reason of any thing statutable in the Union with England, of Scotland or of Ireland, any extra privilege was given to the Presbyterians of Ireland, or any right which they did not possess before, to be considered as ministers in holy orders. On the occasion of the union with Scotland, commissioners were appointed by both nations, and the integrity of the respective national churches was preserved with scrupulous care on both sides. But whatever may be the privileges which are thereby attached to ministers of the Presbyterian Church in Scotland, the question with which we are now to deal is as to the rights of a Presbyterian minister in Ireland. And we are, moreover, justified in thus considering the minister who performed the ceremony of marriage in the present case, as the special verdict has

not found him to be a member of the Church of Scotland. By the articles of Union between Great Britain and Ireland it is manifest that the same care was taken, as in the case of the Union with Scotland, to prevent any interference with the existing rights of the united Church of England and Ireland, and that most careful language was used to preserve them. By the Fifth Article it is provided— "That the Churches of England and Ireland, as now by "law established, be united into one Protestant Episcopal "Church, to be called the United Church of England "and Ireland; that the doctrine, worship, discipline and "government of the said united church, shall be and "remain the same as already established for the Church "of England, and that its continuance as the established "Church of England and Ireland shall be an essential "and fundamental part of the union; and that the Church "of Scotland shall continue as establisned by law and "the Scotch Union." This act was passed in the year 1800. And what was then the discipline and government of the church which it was thereby agreed to preserve inviolate? Was it not the same as declared by the Act of Uniformity, except as far as that act had been altered by subsequent statutes? I apprehend that a few well defined and strictly limited relaxations are the only changes that the legislature has made upon this statute, and I do not understand the argument of the counsel for the crown who contends that the action of liberal feeling must be taken to have altered the law in this respect. Can it have any effect in opposition to the express words of the Act of Union? My brother Burton has truly said that when we have an absolute and unquestioned law, well known and recognized, and easily understood, it is a dangerous thing to alter it by implication, or in any other manner than by an express legislative provision. We are not to be guided in our determination of the law, by any

considerations of expediency or policy. We may be of opinion that an alteration of the law in some respect would be wise and prudent, and in unison with the spirit of the age, but we are not to interpret the law as if that alteration had actually taken place, more especially when we are called upon to pronounce on the positive written statute law of the realm. Therefore it is, that the arguments on behalf of the Presbyterian community in Ireland drawn from the recognition of that church in Scotland, which were so strongly put by my brothers Perrin and Crampton have no weight with me. I cannot allow them to prevail against the authority of positive law. And this is also my reply to the arguments derived from the acts passed with regard to marriages in British India and Newfoundland, which, I may say at the same time, might afford proofs as strong in support of one position as of the other. But it is unnecessary to go minutely into these provisions, as they were plainly not intended to make any alteration in the law of this country, and as I have before remarked something more than inference is necessary to repeal positive enactments. Upon these grounds it appears to me that the law of Ireland does not recognize Presbyterian orders, because they are not episcopal, and not such as are required by the Act of Union to be preserved inviolate.

This brings me to the consideration of another question in this case, viz.—If the ceremony here cannot be considered to have validity as a marriage solemnized by a person in holy orders, whether it is or is not binding and effectual as a marriage contract, carrying with it the rights and obligations of that state, and rendering the person liable to be indicted for bigamy who marries a second time during the life of the party with whom the first contract was made.

Whatever may be the law of other countries, or the law of Scotland on this point, I think it is clear that by the common law of England and Ireland a religious ceremony was necessary to the validity of marriage; and though before the passing of the Marriage Act in England, and of the 58 Geo. III. c. 84, s. 3, here, a contract of marriage might have been rendered available by proceedings to enforce it, yet it was never held to constitute absolute marriage, without the intervention of a priest. I shall presently shew how far this has been required in England, but it may not be improper first to remark that from the earliest times marriage has been a religious ceremony in the Christian Church, for the due celebration of which the presence of a priest was uniformly held to be necessary. For if it appears that this has been the rule in almost every part of the Continent of Europe, it will strengthen the reasoning by which it is to be shewn as the marriage law of England. And I think it a great mistake to say that according to the canon law nothing further than a contract was ever contemplated. I think the authorities are most abundant and convincing to shew that at all times and in all countries a religious celebration was required. I should not deem it necessary to enter at any length into this part of the subject, but out of respect to my brother Perrin who differs from the rest of the court upon this part of the case. Nor in stating the authorities and reasonings that have determined my judgment shall I cite at length the passages which bear upon this part of the subjeet. They have been fully laid before the court in the speeches of the learned counsel who appeared for the prisoner, and it will therefore be more convenient to state the positions which I think they establish, referring to the parts of the work where the particulars will be found. The earliest authority is that of Pope Evaristus, who lived about the year of

our Lord 110, and whose letter to the African Bishops on this subject is to be found in Ayliffe's Parergon, 364. Next in Martene de Antiquis Ecclesiæ Ritibus, Lib. 1. c. 9, act 5, p. 127, we find a collection of old marriage rituals in several churches on the continent from the eighth to the thirteenth century. And in one which is supposed to have been written about the year 700, the form of ceremony is given, which appears to have been entirely religious. In Bingham's Antiquities of the Christian Church, Bk. 22, c. 4, pp. 328-332-3, the author in arguing against the opinion of Selden, that marriage was a civil rite only, quotes in support of his views, the writings of Tertullian, St. Ambrose, Ignatius, Gregory Nanzianzen, and the Fourth Council of Carthage, from which the practice of the church in the earliest ages is seen in a very clear light. In s. 3, of the same chapter, Bingham gives the law of Charlemagne, issued about the year 780, ordering that no marriages should be solemnized otherwise than by blessing, with sacerdotal prayers and oblations,—and in the Eastern Church Leo Sapiens revived the same ancient practice about the year 900. These passages establish beyond all doubt the early practice of the Christian Church in Asia, Africa, and Europe, to treat marriage as a religious ceremony, requiring the presence and intervention of a priest.

If this was the custom and the law over the greater part, if not the whole, of the Christian world at this early period, it affords strong evidence in support of the next position, viz.: that it was also the practice in this country during the reign of the Anglo Saxon kings. Accordingly, we find in Palmer's Origines Liturgiæ, c. 7, p. 208, extracts given from the rituals of Salisbury and York, which clearly prove that at the period when they came into use here, the sacerdotal benediction was a necessary ingredient in valid

marriages. The point of time to which those may be referred is not quite certain, but the rituals are undoubtedly of great antiquity. Bishop Osmond being said to have *corrected* that of Salisbury in the eleventh century. But the Anglo Saxon laws put all speculation out of the question, and shew how infinitely mistaken those are who hold that, by our common law, marriage was a mere civil contract. These laws form the best and safest guide to our common law, of which they record the principle features; for we are told by Sir W. Blackstone that the maxims of the common law were collected by King Alfred into his dome-book, which Edward the confessor afterwards restored. Much light has been thrown upon these laws by the publications which by royal authority have lately taken place under the direction of the Commissioners on the public records of the kingdom. They are entitled "Ancient Laws and Institutes of "England, enacted under the Anglo Saxon Kings from "Ethelbert to Cnut, with an English translation of the "Saxon. 1840." At pp. 108-9 is found one of the laws of King Edmund containing nine articles, upon "the "betrothing a woman." The first seven of these refer chiefly to her temporal rights. But the eighth article is in these words:—"At the nuptials there shall be a "mass-priest by law; who shall with God's blessing bind "their union to all posterity." Now, what does this book of authority establish? Not that it was the opinion of A or B that it would be expedient or decent to have a priest present at the solemnization of marriage; but a positive law enacted by the King, with his royal authority, and binding upon all the subjects of the kingdom from that time to this. This appears to me decisive on the point of law. It is no matter of doubt or opinion. Here is a general law passed upon the subject of marriages, and one of its provisions is distinctly that the ceremony shall be

performed in the presence of a mass-priest. But there is also abundant collateral authority for this position. And the well known ceremony and right of property *ad ostium ecclesiæ*, which is of the common law, savours much of the marriage being also in *facie ecclesiæ*. Litt. s. 39, says—"Dowment at the Church door, is where a man of full "age, seized in fee-simple, who shall be married to a "woman, and when he cometh to the Church door to be "married, there, after affiance and troth plighted between "them, he endoweth the woman of his whole land, or of "the half, or other lesser part thereof." Upon which Lord Coke says—"If this dower be made *ad ostium castri* "*sive messuagii* it is not good, but ought to be made *ad* "*ostium ecclesiæ sive monasterii.*" Can any one hesitate to say that this form of endowment resulted from the necessity of marriage being a religious ceremony, to be performed *in facie ecclesiæ?* Lord Coke then says—"*Et* "*sciendum est, quod hæc constitutio fieri debet in facie ecclesiæ* "*et ad ostium ecclesiæ.*" In accordance with the law we find the practice, so that the law cannot be said to have become obsolete, or to have fallen into disuse. In Stiernhook, *De Jure Sueonum et Gothorum vetusto*, a work of great authority respecting the laws and customs of the northern nations, from whom our Anglo-Saxon ancestors sprung, it is said, with regard to marriages, at p. 159:—"*Conjunctio autem tunc a tutore facta est, consecratio vero* "*ab ecclesiæ ministro: nihil rite fieri potuit nisi præsente* "*tutore aut qui ejus locum suppleret, absque eo enim, si* "*consecrasset sacerdos gravissimâ pœnâ puniebatur tanquam* "*si cædem fecisset.*" Thus shewing that from the earliest times the English law was opposed to clandestine marriages, and required the presence both of guardian and priest at the ceremony. It appears that the priest was sometimes induced to solemnize matrimony without the

presence of the guardian, and this (which is stated as a great offence) may explain the case cited by Mr. Brooke from Cro. Car. 351, *Wickham* v. *Enfield*. It has been said that this case affords proof that marriage was a promise only; but I do not think it supports this view. The pleading states it to have been a *true* marriage; and it might have been so, according to Stiernhook, though clandestine on account of the absence of the guardian.

The truth of this principle of common law has been in later times supported by the authority of Perkins, who wrote in the time of Henry VIII., (ss. 194–5, 306,) and of Mr. Justice Lawrence, who is supposed to have been the author of the book cited to the court under the name of the "Woman's Lawyer," (p. 117,) published in 1652, and referred to as authority in Sheppard's Abridgment, title "Marriage;" and we have further the testimony of Swinburne, from whose treatise on Espousals so many passages have been read that it is now hardly necessary to repeat them. They are to be found at pp. 2, 15, 233 & 234. But it is not only in the books of these text writers, but in judicial authorities of the highest weight, that this view of the common law is confirmed. The cases upon the subject are collected in Rogers' Eccls. Law, p. 584 to 587; and I shall confine myself to a very brief selection from them, and to a very slight notice, as they have been already so much dwelt upon in the arguments and the judgments. One of them is the case of *Weld* v. *Chamberlain*, 2 Show. 300, where the validity of a marriage was rested upon the fact of words of present contract having been repeated after a priest in holy orders. Next there is the authority of Lord Hale's note in Co. Litt. 33, a. where it is positively laid down that "neither the contract nor sentence was a marriage;" and this opinion is supported by the case of *Bunting* v. *Lepingwell*, where it was not

until the contract was ratified by a marriage *in facie ecclesiæ* that the issue was pronounced to be legitimate. Then there is the case of *R.* v. *Inhabitants of Bathwick*, where Lord Tenterden assumed throughout that there was a necessity for the presence of a priest at a marriage ceremony, and never alluded to the question of its validity as a contract. This case was subsequent to that of *Dalrymple* v. *Dalrymple*. So in Lessee *Verner* v. *Robinson*, cited by Mr. Justice Torrens in the case of *R.* v. *Smith*, 2 Cr. & Dix. C. C. 339, when Judge Fletcher expressed his dissent from the doctrine of Lord Stowell, and held that a contract *per verba de præsenti* did not constitute marriage in Ireland.

Now, this having been the common law of England, evidenced not by tradition or by recorded instances alone, but by the actual production of the Saxon law on the subject, it follows that it continues still to be in force in England, unless expressly altered by Statute law; and that if this alteration has not been effected the original law remains in force at the present day, and the interposition of a priest is necessary to give validity to a marriage. And even if it could be shewn that a difference existed between the common law and the canon law in this respect, it could not avail to counteract this position, for we have the best authority for saying that the canon law could not affect the common law. The canon law does not *proprio vigore* bind the laity unless they adopt it. Lord Hardwicke, in *Middleton* v. *Crofts*, 3 Atk. 658, observes :—"If the clergy in convocation could "have altered the common law, the bishops need not have "applied to the barons; and though the lords, with one "voice, gave the memorable answer, 'Nolumus leges "Anglie mutari,' the clergy might have done it in con-"vocation by a new Canon." Therefore, though by the

canon law matrimony might be considered as merely a civil contract, *non constat* that it was so by the common law, for we know that upon the subject of bastardy they differed widely, and that the barons refused to assimilate them when required to do so at the passing of the Statute of Merton.

Whatever be the meaning of *ipsum matrimonium* as applicable to such a contract under the civil or canon law, I think it clear that the common law of England did not apply the term to such contracts—that they were not considered as marriage for any purpose; but as Sir John Nicholl says in *Elliott* v. *Gurr*, were treated as a mere nullity, and absolutely void. And therefore I cannot hold them sufficient to convict a prisoner of felony. Such an offender originally had not the benefit of clergy; he is still a felon; and if any doubt can reasonably be entertained as to the extent of *legal* guilt which he has incurred, tenderness to the accused should induce us to give him the benefit of it. I think it clear that for many civil purposes, such as the legitimacy of children, dower to the wife, community of goods, &c., he cannot be considered as married; and I cannot, therefore, pronounce him so in a criminal proceeding, the result of which even now would be to render him subject to the severe punishment of transportation.

But it is not even clear that in *all cases* a contract was held *ipsum matrimonium* by the Ecclesiastical Courts, for if on a plea of *ne unques accouple* the issue had been sent to be tried in the Ecclesiastical Court, it must have decided according to the principles of the common law and certified *ne unques accouple* in cases of mere contract. In one proceeding this engagement was pronounced no marriage, and in another it was adjudged to be *ipsum matrimonium*. This juggle was never introduced into or formed part of

the common law of England or Ireland. And upon what grounds is it that the principles of the common law have now been brought into question? It is because a doubt has been thrown upon the state of the law, by the expressions which fell from Sir William Scott in *Dalrymple* v. *Dalrymple*. No man can entertain a higher respect or admiration for that eminent judge than I do, and no man can feel more disposed to attach weight and importance to all his opinions. But I cannot help stating my conviction to be that the position he laid down in this case was not sufficiently considered. I think the arguments used in the present cause have clearly demonstrated it to be unsound. In Scotland the law may be as Lord Stowell stated, but we have the strongest authority to shew that it never was, and never was considered to be, the common law of England. The cases upon which Lord Stowell relied are those of *Bunting* v. *Lepingwell*; *Jesson* v. *Collins*; and *Wigmore's law*. The first as I have before stated, appears to me in no manner to establish the position that a contract is viewed in the same light by the law of England and by the canon law. And the two other cases were undoubtedly decided upon principles of canon law; and justly so, as the object of each was to stay proceedings in the Ecclesiastical Court, and a prohibition was in both cases refused, because it was held that that court had jurisdiction in cases of contract. The subsequent cases of *R.* v. *Inhab. of Brampton*, and *Latour* v. *Teesdale* cannot, I think, have application to the present point, as in both, the ceremony of marriage was performed by a priest. Upon the whole I can entertain no doubt of the truth of the principle laid down by Sir Edward Simpson in *Scrimshire* v. *Scrimshire*, that by the law of this country, any ceremony of marriage unsanctioned by the presence of a priest can be considered only in the light of a contract.

I shall now briefly glance at some of the statutes of this country which appear to me to support this rule of law. The 33 Henry VIII. c. 6, entituled "an Act for Marriages," enacts that marriages being contracted and solemnized in face of the church, and consummated with bodily knowledge, shall be deemed good and indissoluble, notwithstanding any precontract of marriage not consummate with bodily knowledge. This statute legalizes the marriage, notwithstanding the precontract, and if according to the argument which has been employed, that contract was in itself legal matrimony, there might have been since the passing of this statute, two valid marriages legally subsisting at one time. In the confusion which existed at the period of the great rebellion, marriages were directed by certain ordinances, to be celebrated by justices of the peace, but at the Restoration it was deemed necessary to pass the 17 and 18 Car. II, c. 3, to confirm them "as if had according to the rites established "or used in the Church of Ireland." Now, if marriage contracts had then possessed the force of matrimony what could have been the necessity for legalizing these marriages? They were clearly good contracts, and if the statute proves anything it must be that they were not valid as marriages. Then by the 12 Geo. I. c. 3, s. 4, it was provided that no precontract not consummated should be enforced against a marriage with consummation. Where would have been the necessity for enforcing matrimony in such cases, if the contract had been considered of equal efficacy? By the 11 Geo. II. c. 10, which recited that several Protestants dissenting from the Church of Ireland as established, scrupled to be married according to the form of matrimony prescribed by the said Church, it was provided that dissenters entering into matrimonial contracts *before their own ministers* should not be prosecuted by the

Ecclesiastical Courts, &c. provided they and their ministers had taken the oaths and subscribed the declaration prescribed by the 6 Geo. I. c. 5. All this legislation and more which is to be found on the statute-book, but which, after the lengthened discussion which this case has undergone, I do not feel it necessary to dwell upon, is totally inconsistent with the notion of a contract being sufficient to constitute matrimony, and would, if this principle were true, have been completely inoperative and absurd.

I therefore am of opinion, that from the earliest period of our history the presence of a priest at the celebration of marriage, was required by law to give it validity—and I think that the authority of all ancient text writers, the result of the large majority of decided cases, and the natural inference from the legislative measures of this kingdom proves beyond dispute that this law has been held to be in force, and has been acted on up to a very late period; and that it is only since the judgment given by Sir William Scott in *Dalrymple* v. *Dalrymple*, that this rule of law has ever been doubted. I think that the opinion expressed on that occasion was hastily expressed, and is not founded on law, and that the rule remains unchanged which requires the presence of a priest at the celebration of all marriages. I am further of opinion that this priest must be episcopally ordained. I think the court is bound to hold this according to the express and positive statute laws of this realm, and I am of opinion, that though the strictness of the law in refusing to acknowledge any orders but those episcopally conferred may have been, and has been, relaxed in certain cases, and to a certain extent, that it has not been modified or altered as relates to marriage in this country, and therefore that it is here still binding upon the court.

Upon these grounds, I am of opinion, that the marriage

in the present case, is not such as will suffice to convict the prisoner of bigamy, and that he is, therefore, entitled to judgment.

Mr. Justice Perrin afterwards stated that as it was of importance that the questions raised in these cases should be finally determined, he would *pro formâ* withdraw his judgment, in order that the decision of the House of Lords might be obtained upon them on a Writ of Error. There was therefore

Judgment for the prisoner.