Regina v Millis [1843-44] 10 Clark and Finnelly 534, 8 ER 844
Report Date: 1843, 1844
[10-Clark & Finnelly-534] THE QUEEN, - Plaintif in Error; GEORGE MILLIS, - Defendant in Error; and THE QUEEN, - Plaintiff in Error; JAMES CARROLL, - Defendant in Error [February 13, 14, 16, 17, July 7, Aug. 10, 11, 1843; Feb. 23, March 29, 1844.]
Canon Law-Marriage-Practice.
[Mews' Dig i. 354; vii. 633, 631, 643, 646. S.C. 8 Jur. 717; 17 Rul. Cas. 66. Followed in Beamish, v Beamish, 1861, 9 HL C. 274. Commented on in Exeter, (Bishop, of) v Marshall, 1868, L.R. 3 HL 35; Phillips v Eyre, 1870, L.R. 6 QB 25; Mackonochie v Penzance, 1881, 6 AC 446; In re De Wilton (1900), 2 Ch. 481; and, as to rule semper praesumitur pro negante, cited in Anderson v Morice, 1876, 1 AC 751. See as to marriages (i.) in Ireland, 7 and 8 Vict. c. 81; 26 Vict c. 27; 33 and 34 Vict c. 110, ss. 32-42; 34 and 35 Vict c. 0; (ii.) in England, 4 Geo iv. c. 76; 6 and 7 Will iv. c. 85; 19 and 20 Vict c. 119, s. 11.]
A., a member of the Established church in Ireland, went, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract

10 Clark & Finnelly 535, 8 ER p845
of marriage with the said B; the minister performing a religious ceremony between them, according to the rites of the Presbyterian church. A. and B. lived together for same time as man and wife; A. afterwards., B. being still alive, married another person, in a parish church in England. Qu. whether the first contract, thus entered into, was sufficiently a marriage to support an indictment against A. for bigamy?
Lord Brougham, Lord Denham, and Lord Campbell, were of opinion that it was: - The Lord Chancellor, Lord Cottenham and Lord Abinger, were, of opinion that it was not. The Lords being thus divided, the rule " semper praesumitur pro negante " applied, and judgment was given for the Defendant in Error.
It is an inflexible rule of the House to hear only two counsel for each party in any one case; and the House will not avoid the effect of this rule, by permitting one senior and one junior counsel to be heard in the opening, and a third counsel to reply [10 Cl. and F. 536].

At the Spring Assizes of 184: -2 for the county of Antrim, the Defendant in Error, Millis, was indicted for bigamy, under the statute 10 Geo. 4, c. 34. He was arraigned upon this indictment, and pleaded not guilty, and thereupon issue was joined. The jury found the following special verdict.: - " That in the month of January 1829, George Millis, accompanied by Hester Graham (spinster), and three, other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there, being the placed and regular minister [10-Clark & Finnelly-535] 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 Rev. John Johnstone and the said other persons, and the said Rev. John Johnstone 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 the 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 Millis And the jurors aforesaid, upon their oath aforesaid, further say that the said George Millis was, at the time of the 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 the 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, and while the aforesaid Hester was, still living, the said George, Millis was married to one Jane Kennedy, then spinster, in the parish 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; but whether," etc.

The indictment and special verdict were afterwards removed by Certiorari into the Court of Queen's Bench in. Ireland, and the case was argued there in. Easter Term 1842.

[10-Clark & Finnelly-536] The Judges of the said Court afterwards delivered their judgments seriatim on the said case: - Mr. Justice Perrin was in favour of the validity of the first marriage, even as a marriage, per verba de praesenti, and consequently of the) conviction: - Mr. Justice Crampton thought it a valid marriage, but only so, as being celebrated by a Presbyterian clergyman: - Mr. Justice Burton, thought the marriage invalid in every way; and with that opinion Lord Chief Justice Pennefather entirely concurred (see, " Report of the Cases of Regina v Millis, and Regina v Carroll, in the Queen's Bench in Ireland, in Easter and Trinity Terms 1842; by Edmund Spencer Dix, Esq. Barrister-at-law. Dublin

Afterwards, and for the purpose of obtaining the judgment of this House, Mr. Justice Perrin in form withdrew his judgment; and thereupon the said Court adjudged that the said George Millis, the now Defendant in Error, was not guilty of the felony in the indictment charged against him, and he was thereupon acquitted.

This writ of error was then brought, and now came on for argument in the presence

10 Clark & Finnelly 537, 8 ER p846

of Lord Chief Justice Tindal; Justices Patteson., Williams, Coleridge, Erskine, Cresswell and Maule; and Barons Parke, Alderson and Rolfe.

The Attorney-general applied to the House, to permit the hearing of counsel in the following manner: - He proposed to address the House in the first instance, and requested that Mr. Waddington should be permitted to follow; and that after the counsel for the Defendant in Error had been heard, the Solicitor-general should be allowed to reply.

The Lord Chancellor: - We cannot do that; it is contrary to our rule. The House can only hear two counsel. If the Solicitor-general is to be heard, he must address, the House in the first instance.

The Attorney-general then addressed the House, for [10-Clark & Finnelly-537] the Plaintiff in Error. In the first instance he addressed himself to the case of Carroll, in which the ceremony of marriage had been performed by a Presbyterian minister not having any pastoral charge; but he was desired by the House to take the case of Millis as that to which his argument was to be directed, as one in which the question of the validity, in Ireland, of a marriage per verba de praesenti, and the validity of a contract of marriage made in the presence of a regularly placed minister of the Presbyterian church, could be respectively considered. Having stated the circumstances of the case, he said,-There is a sufficient marriage de facto in this case to sustain this indictment. The first authority to be referred to is that of Blackstone; his Lectures were delivered in 1753, one year before the passing of the Marriage Act. His declaration of what was then the law is extremely strong: - he says (Comm. Bk. I, c. 15, p. 433), " Our law considers marriage as no other than 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; " and he puts consent as constituting the substance and essence of the marriage contract This declaration of the law is fully supported by the authorities there referred to Bracton, one, of those authorities, wrote in the reign of Hen. 3, about the time of the Statute of Merton, which was passed in 1235; and in his 4th Book (De, Actione Dotis, fol. 302 b.) he says: - " Ideo de Matrimonio videndum de quo sequitur dotis exactio. Et ad hoc sciendum, quod habet quis legitimam concubinam, et ex ea prolem in concubinatu, et postmodum contrahit cum eadem clandestinum matrimonium, et post contractum clandestinum [10-Clark & Finnelly-538] suscitat ab ea prolem. Item postmodum contrahit cum eadem publice et in facie ecclesiae et dotat eam ad ostium ecclesiae: - In hoc casu erit ille legitimus qui ex clandestine matrimonio natus fuerit, dum tamen hoc probetur, et haereditatem obtinebit. Et ille qui post solemnitatem, progenitus, fuerit (quamvis legitimus) non erit haeres propinquior quoad successionem, sed mulier propter solemnitatem et dotis constitutionem in facie ecclesiae dotem obtinebit." And after speaking of marriages contracted in the church, and of marriages contracted not there, but by words of present acceptance or of future promise, followed by a copula; he says (De Actione Dotis, fol. 303 a), " Cum qua legitime, contraxerit ad ostium ecclesiae vel alibi (dum tamen sponsalia probentur) sive per verba de praesenti sive per verba de futuro, dum tamen carnalis subsecuta fuerit commixio, erit uxor legitima quantum ad successionem et commodum haered et quantum ad dotis exactionem, dum tamen ad ostium ecclesiae fuerit dos constituta. In clandestino vero matrimonia nunquam dotem consequetur." These passages seem clearly to establish that there was then recognised a clear distinction between a marriage valid for the purposes of succession and one valid for the purpose of dower. A clandestine marriage would be sufficient for the first; a marriage in the face of the church was necessary for the second. It is worthy of note as affecting the question of the validity of his opinion, that, writing about the time of the controversy which ended in the Statute of Merton, he says, "A child born before, any marriage of any sort, is illegitimate, notwithstanding any rites which may be afterwards performed." So that he may be treated as an authority not under any influence of [10-Clark & Finnelly-539] those opinions against which the Barons entered their celebrated protest. He lays down the broad proposition that the offspring of a clandestine marriage are legitimate, but that such a marriage will not entitle the wife to dower ad, ostium ecclesiae. This distinction is afterwards taken in language, the most clear, in a passage, under the same head, where, after putting a case of A. and B., he, says (Bract de Actione Dotis, 304 a), " Si illam desponsavit in lector suo mortali absque aliqua solemnitate, et ibi eam dotavit sicut praedict.

10 Clark & Finnelly 540, 8 ER p847

talis dicit. Et inquisitionem quam inde feceris scire facias justiciariis nostris literas, etc. etc. Et ita poterit esse matrimonium legitimum, quoad per haereditatis successionem ubicunque contractum fuerit, dum

tamen probatum, et illegitimum quoad dotis exactionem, nisi fuerit in facie ecclesiae contractum, et ibi dos constitute cum solemnitate, quae tune adhiberi potest tam tempore interdicti quam alio tempore." This passage, which is decisive on the other point, clearly indicates no necessity at all for the presence of a priest. The consensus was all that was required. In Viner's Abridgment, under the heading, " What-persons shall be said to be Baron and Feme " (Tit. Baron and Feme, C. fol. edit), the marriage, is taken as depending on consent alone, and the age of consent is declared in a manner agreeing with the law Of Scotland as it now exists, and also with the civil law. In the same book, and under the same title, the plea of ne unques accouple en loyale matrimonie is mentioned, o that the declaration now made is not made in ignorance of nor without reference to that plea: - and under another title (Id tit. Bastard, B.) it is said, "By the law of the land a man cannot be a bastard after espousals, unless it be by special matter." There can [10-Clark & Finnelly-540] be no doubt that the word espousals, there used, does not mean a perfect ceremony of marriage according to the rites of the church, but only a marriage contract perfect as to legal validity, which is afterwards perfected as an ecclesiastical matter. In the same work (Vin. Abr. tit. Marriage, F.) it is said, "The solemnisation of marriage was not used in the church before an ordinance of Innocent 3; before which the man came to the house where the woman inhabited, and carried her with him to his house; and this was all the ceremony." Hutchinson v Brookbank (3 Lev. 376), and Haydon v Gould (1 Salk. 119), are there referred to; and from the citing of these two cases it would appear that the opinion of the writer was, that a marriage might be perfectly valid without the intervention of a priest, provided it was public, that is that it took place in the presence of witnesses. The presence of a priest was customary, but it was not essential to the validity of a marriage, any more than was the ceremony of giving away the bride. Comyn, in his Digest, (Tit. Bar and Fem; Marriage, B. (B. 1.)), says, " ut conjugium subsistat non aliud natura requirere videtur, quam ut talis sit cohabitatio quae foeminam constituat quasi sub oculis et custodia maris; ad hoc in homine accedit fides qua se foemina marl obstringit; " and after citing various authorities to the same effect, he adds, " and so by the common law, Co. Lit. 34 a if it be a contract per verba de praesenti, Dy. 369 a; 6 Mod. 155; Sal. 437; Carth. 99: - " a mode of stating the doctrine which shows that the Lord Chief Baron held it to be then settled law.

In Bacon's Abridgment (Tit. Marriage, B.), Swinburne is cited (Swinburne of Espousals, s. II; Bac. Ah. tit. Marriage, B.), [10-Clark & Finnelly-541] and it is said, "a contrast in praesenti, or marriage per verba de praesenti; as I marry you; or, You and I are man and wife; 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 ecclesiae; with this difference., that if they cohabit before marriage, in facie ecclesiae, they are for that punishable by ecclesiastical censures, and if, after such contract, either of them lies with another, such offender shall be punished as an adulterer." Further it is said, "if A. contracts himself to B. and after marries C., and B. sues A. on this contract in the Spiritual Court, and there, sentence, is given that A. shall marry and cohabit with B. which he does accordingly, they are baron and feme without any divorce, between A. and C., for the marriage, of A. and C. was a mere nullity." Reeves' History of the Common Law (4 Reeves, 52)thus treats-of the matter: - " Matrimony is defined by the canonists in this manner, Viri et mulieris conjunction individuam vitae consuetudinem cum divini et humani juris communicatione, continens. This union of man and wife was preceded by sponsalia or espousals, the nature of which must be first considered before we come, to speak of matrimony. Espousals were the promise of a marriage that was to take place, and were, divided into espousals de praesenti, and espousals de futuro." This explains why a man cannot be a bastard if born after espousals between his parents, as stated, by Bacon. Reeves goes on thus: - " Those of the former kind were considered in the same light as matrimony; so that espousals, properly so [10-Clark & Finnelly-542] called, were the latter." If that is accurate, it fully explains the apparent differences between text written as to the meaning and effect of espousals. Having laid down that espousals, in his view of the matter, mean a contract per verba de futuro, he proceeds to say that the party so

10 Clark & Finnelly 543, 8 ER p848

espoused or promised might maintain a suit to compel the other, party to consummate marriage; indeed if concubitus followed, that alone was sufficient, for then the church said that intercourse between either of these and other parties amounted to. fornication. Consummation was necessary after espousals; but, says Reeves (vol. 4, p. 55), " Espousals de praesenti, were in effect a contract of marriage; " and he then goes on to explain that " matrimony was divided into legitimum et non ratum, and ratum et non legitimum, and legitimum et ratum; " all which he then proceeds fully to explain. He says (Ibid.), " A marriage was said to be et legitim-um et non ratum, if it was celebrated between Jews and Infidels, and it was called non ratum because it might Le dissolved by repudiation; whereas marriage among Christians was indissoluble, and was therefore called ratum: - so that a marriage ratum et non legitimum was such as was among Christians without the canonical solemnities; that which was ratum

et legitimum was a marriage among Christians, attended with all, the due, canonical solemnities." Swinburne, a great authority on this subject, shows that the securing of witnesses was the great object of the law, and he lays it down broadly that (evidence of the contract being secured) a contract per verba de praesenti was, fully equivalent to marriage, and he thought that a ceremony before, the church was merely necessary to satisfy the views [10-Clark & Finnelly-543] of the churchmen; but that even they never, doubted that such a contract was, without the ceremony, a perfectly good marriage. He says (Treatise of Spousals, s. 4, par. 2, p. 13, 4th ed.), " But that woman and that man which have contracted spousals de praesenti, cannot by any agreement dissolve those spousals, but are reputed for very husband and wife, in respect of the sub-stance, and indissoluble knot of matrimony; " and he afterwards expresses the same thing in as strong terms in another place (Id. s. 11, par. 30, p. 104). In another place, when treating of " public and private Spousals," he says (S. 14, par. I, p. 193), " So careful were the ancient lawmakers to avoid those mischiefs which commonly attend upon secret and clandestine contracts, that they would have the same, solemnities observed in contracting spousals which were requisite in contracting matrimony. Private spousals are, they at the contracting, whereof are omitted some of those solemnities aforesaid, but especially when there be no witnesses present at the contract." He then describes in detail these, private, spousals, and goes, on to say, oven, of them, that some "hold the contract firm and indissoluble; for the confirmation whereof they allege, a very round text extant in the body of the law; the words are, these: - clandestine conjugia contra leges quidem fiunt, contracts tamen dissolvi non possunt; yielding this reason, that, because these solemnities are not of the substance of spousals or of matrimony, but consent only, naked consent is sufficient to make spousals."

[Lord Campbell: - Do you find any definition of what a clandestine marriage was?]-No. satisfactory definition of it exists. There is a great difficulty in [10-Clark & Finnelly-544] defining it. Some say all marriages were so considered that were not celebrated in the face of the church; others, all those that were, had without witnesses. [Lord Campbell: - Then there may be a clandestine marriage where there is an interposition of the priest?]-Certainly; there may be a clandestine marriage, according to the) first class of these reasoners, even in the presence of the priest, if it is not celebrated in the face of the church. The second supposed excludes that in which the priest is present, for it supposes the contract to be one, made between the parties, alone. In treating " of the effect of Spousals," the validity of a present contract is most strongly shown. Swinburne there says, (S., 17, par. 6, p. 223), " The parties having contracted spousals de praesenti, albeit the one party should, afterwards marry another person in the face, of the church, and should consummate, the same by carnal copulation and procreation of children, notwithstanding the first contract is good, and shall prevail against the second marriage. Nothing can more strongly show the validity of a contract per verba de praesenti; for here, even in competition with a regular marriage had in face of the church, this contract is declared to prevail, and even to bastardise, the children born under the second marriage. It is decisive to show that the contract is as all the ancient writers express, it, very matrimony itself. In the same page he likewise states, that after a contract de praesenti, a contract de futuro followed by a copula would be void; but that must be of course, when, a marriage in the face of the church is void, and children, born within it are bastards if a previous contract de praesenti is in existence. The 18th section of Swinburne shows [10-Clark & Finnelly-545] the various instances in which spousals de futuro may be dissolved; but he begins that

10 Clark & Finnelly 546, 8 ER p849

declaration with a statement that " spousals de praesenti are as indissoluble as perfect matrimony solemnised," which must mean in the face, of the church, "and consummate." The result of all that Swinburne says is just what Reeves states to be the law of England; namely, that spousals de futuro cum copula, or spousals de praesenti without copula, are ipso facto matrimony in respect of the indissolubility of the contract.

In speaking of the common law of matrimony, it is impossible to forget that this law has sprung up among many nations speaking our language and using our, laws; and we may, therefore, refer to what has been considered the law in some of those nations. In the United States, where the decisions of our Courts have long been quoted as authorities, the rule now contended for has been adopted. In Kent's Commentaries it is said (vol. 2, sect. 26, p. 74, s. 5), " 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 gentimi, 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: - Nuptias non concubitus sed consensus facit. If the contract be made per verba de praesenti, though it re, mains without consummation, or if per verba de futuro followed by cohabitation, it is a valid marriage, and is equally binding as if made in facie ecclesiae. It is considered in the light of a civil [10-Clark & Finnelly-

546] contract. This was the rule of the common law, and also of the canon law which governed England before the Marriage, Act." And for these statements he quotes a whole head-roll of cases. He goes on thus,: - " 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. There are some of the States of the Union where it appears that this law has not been altered. Chancellor Kent mentions the States in which it has, undergone alteration, but that was by express provision of the Legislature; the law being taken as so clearly settled, that nothing but a direct intervention of the Legislature could change it. The same doctrines are stated by Story, in his work on the Conflict of Laws (ch. 5). Such are the opinions, of two, most eminent lawyers who have, written in a country where the old common law of England is still in existence, and must, of course, be the subject of daily experience. There can be no doubt but what they describe to be the law, is the same as that which was recognised by our most ancient writers. In Lyndewoode (Provinciales sive Constitutiones. Angliae, Bk. 4, tit. I, p. 271, fol. edit.: - " De Sponsalibus, et Matrimonio "), which was written in 1446 though the book was not published till 1679,-it is said: - " Matrimonium sicut alia, sacramenta cum honore et reverential, de die et in facie ecclesiae, non cum risu et joco ac contemptu celebrator. Ne dent sibi fidem mutuò de matrimonio, contrahendo, nisi in loco celebri coram publicis et pluribus personis ad hoc convocatis" That is the text; the notes are in the same spirit, showing that publicity and attestation were the purposes required [10-Clark & Finnelly-547] to be fulfilled. To pluribus there is a note (n. i.), with these words: - " Duobus ad minus." In the next section (p. 272) it is said, "Ubi non, est consensus utriusque non est conjugium." Then follows an article, " De clandestine desponsatione; " and neither there nor anywhere else, in treating of what is required to constitute a valid marriage, is anything said of the presence of a priest. After this general description the subject is fully treated in the article De clandestine desponsatione, but no mention, whatever is to be found of the necessity for the presence of the priest: - all that is required, it is said, is that there should be witnesses. Upon this subject it may be observed, that Johnston's Ecclesiastical Law, which was published in 1720, and contains the Constitutions of Archbishop Reynolds, first introduces in those Constitutions the word priest; but from the manner in which it is introduced, there can be no doubt that even that ecclesiastical authority, in dictating an ecclesiastical law, did not deem the presence of a priest absolutely necessary to the validity of the ceremony. The Constitution says, " Let matrimony be celebrated as other sacraments, with reverence, in the day-time, and in the face, of the church, without laughter, sport, or scoff. And let priests often forbid such as are disposed to marry, to plight their troth anywhere but in some notable place " [not " the Church"] " before [priests or] public persons called together for this purpose, under pain of excommunication " (A.D. 1322. App. Reynolds' Constitutions, s. 7). In the

10 Clark & Finnelly 548, 8 ER p850

Constitution itself the disjunctive or is used, as if either priests or other public persons (that is persons known in the place) might confer by their presence validity on the ceremony; and in a note upon it, the learned [10-Clark & Finnelly-548] author of the work observes, " Priests are not mentioned by Lyndewoode. A contract in praesenti was absolutely obliging, as it still is if made before any two good witnesses; and Lyndewoode, by 'public persons' understands two, such witnesses in any public place " (Johnston Eccl. Law, AD 1343, s. 11, note q). There can, be no doubt that the construction thus put upon the Constitution is the correct one. In a note to Stratford's Constitutions, a definition, though not a satisfactory one, is given of clandestine marriage: -

"A marriage is clandestine, says Lyndewoode, if it be without witnesses, if the bride be not demanded of him at whose disposal she is and endowed according to law, and if the married couple do not abstain from each other two, or three days in honour of the benediction (yet he confesses there is no sin in these omissions), or if it be done without banns."

[Lord Campbell: - The word " benediction " there points to the fact that there was a priest.]-It does so, but then this note, appears appended to a Constitution which was promulgated to direct the manner in which the priests should proceed, and it clearly does not assume the absolute necessity of the presence, of the priest. in like manner the Constitutions of Archbishop Zouche (id. AD 1347, S. 7), though forbidding, under severe penalties, priests to celebrate, clandestine marriages, and denouncing those marriages as hurtful to the souls of those, who contract them, never once hint that they are invalid.

In Sanchez (Bk. 2, Disp. 6, p. 121) there is to be found a Disputation headed thus: -

"Quis sit minister sacramenti matrim an sit sacerdos, ita ut minimè sacramentum esset [10-Clark & Finnelly-549] ante Tridentinum, celebratum absque sacerdotis presentia."

And his own opinion is most clearly given, that consent constitutes the marriage, and that when the parties are thus married without a priest, they must be taken to have, administered the sacrament to each other. He thus expresses himself: -

" Caeterum omnino tenendum est nunquam parochum fuisse, neo post Tridentinum esse ministrum sacramenti matrimonii: - et ita ante Tridentinum, clandestinum matrim fuisse verum sacramentum. Probatur, 1. Quia cum matrimonium sit contractus, nec illius, naturam Christus mutaverit, sed tantum elevarit ad esse, sacramenti, sequitur aliorum contractuum naturam, quae est, ut ipsi contrahentes suis consensibus se ligent, nec alios praeter ipsosmet contractus, afficiat. 2. Quia ante Tridentinum matrim clandestine erant vera matrimonia, et rata, ut definit ipsum, Trident Sess. 24, c. 1, de matrim. ergo et vera sacramental quia ideo e Quanto de divor vers. Nam et si matrimonium infidelium matrimonium non appellatur ratum, quia Sacramentum non est. 3. Quia verba, parochi non sunt de essentia matrimonii, sed iis penitus omissus constat matrimonium: - ut dicemus lib. 3, disp. 38, n. 4, ergo parochus nullo modo est minister."

The conclusion to be drawn from this is that even in countries where marriage was most strictly a sacrament, the presence of a priest was not necessary. The opinion thus expressed he, subsequently confirms in another place, (Sanchez, Bk. 3, Disp. 17, p. 238). Heineccius, another author of great learning and authority in these matters, says (vol. 5, pt i; Elementa Juris, Bk. I, Tit x., s. 148): -

" Quum ergo nuptiae sint conjunctio consequens est ut consensum utriusque, accedere oporteat. Isque consensus solus [10-Clark & Finnelly-550] jure, Romano faciat nuptias, adeoque, concubitus damumque deduction ad implementum, instrumenta dotalia ad signum duntaxat, Ron ad substantiam earumdem, pertineant. Jure, canonica tomen connubium non gaudet effectibus ecclesiasticis, priusquam accesserit."

It must be admitted that this passage, seems to imply the necessity for observing the rites of the church. But he goes on: -

" Hinc distinctio inter matrimonium, legitimum et ratum. Hinc clandestinum habetur matrimonium. Immo Protestantes retinentes, ne effectus quidem eiviles relinquunt nuptiis, sine ritu solemni cujusque loci contractis"

Such are the statements of the text-writers, of the greatest authority; and these statements of what was considered to be the law of marriage are amply borne, out by the cases decided in our Courts. Foxcroft's Case (1 Roll. Abr. 359), which is the first, appears to be the other way. It was a case where one R., being ill and in his bed, was married to A., a single woman, by the Bishop of London, privately, in no church nor chapel, nor with celebration of any mass, the said A. being then pregnant by the said R., and 12 weeks after the marriage the said A. was delivered of a son, and he, was

10 Clark & Finnelly 551, 8 ER p851

adjudged a bastard, and the land escheated to the lord by the death of R. without heir. That case is relied on by the other side, but it is of no value, for it was decided, before the passing of the Marriage Act, not to be law. And the same: - may be said of Delheith's Case.* This, in fact, was admitted by [10-Clark & Finnelly-551] Mr. Smith, now Attorney-general for Ireland, in "his argument for the prisoner in the Court below, not to be law; for he said (Dix's Rep. 62), " I admit that afterwards the strictness which required the celebration by the priest in church was relaxed, and mere celebration by a priest was held sufficient." So that in fact these two cases must be considered as removed from the argument. Gray's Case (Dyer, 369) has been cited in the argument below, but it is not important, for the marriage there was " solemnised in the face of the church," and the only question as to its validity arose from the tender age of the youth, who was made the husband. Bunting v Lepingwell (4 Rep. 29; Moor, 169) is the next in point of date, and is a strong authority. There Bunting and Agnes Addingshall had contracted matrimony per verba de praesenti, and afterwards the said Agnes took to husband Thomas Twede, upon which Bunting libelled against the said Agnes, on the said contract, in the Court of Audience, and it was decreed that Agnes subiret matrimonium cum praefato Bunting, and the other marriage, was declared void. The legitimacy of Bunting's issue was afterwards disputed, but he) was held to be) legitimate, although Twede had not been a party to the proceedings in the Ecclesiastical Court. Here it appears that a contract per [10-Clark & Finnelly-552] verba de praesenti was treated as very matrimony in the fullest sense of the word, for the subsequent marriage of Agnes with Twede was, even after cohabitation between them, declared null, and she was, compelled to marry, in the face, of the church, Bunting, to whom she had been so contracted; this marriage being required by the Ecclesiastical Court to give ecclesiastical regularity to a contract which, even as it then stood, that Court recognised as a perfect marriage. It was contended in the Court below, that as the 58 Geo. 3, c. 8 I, took away the power of the Ecclesiastical Courts in Ireland to enforce any contract of marriage, this contract could not be considered a good marriage; and the point was, put with great force by Mr. Justice Crampton (Dix's Report, p. 251). But the answer to his observations is this: - In Bunting's Case it is clear that there was an order or decree of the Ecclesiastical Court that Agnes should marry Bunting, and sentence was pronounced without its being deemed necessary to call on. Twede-to appear, or indeed without taking any step to annul his marriage. It is impossible that the Ecclesiastical Court would have directed her to commit bigamy, which (though the Statute of Bigamy had not then passed) was, as it always had been,

an offence in the Ecclesiastical Courts. Again, although there is a statute which now takes away the power of the Ecclesiastical Courts enforcing the performance of such a contract, there is none which takes away the power to perform it without enforcement. And if the parties willingly perform the contract, that contract being one per verba de praesenti, it is sufficient; for such a contract is very matrimony for all temporal purposes., Paine's [10-Clark & Finnelly-553] Case (Siderf. 13) occurred in 1660, and a difference of opinion is referred to there; it being said that Twisden, Justice, was of opinion that, notwithstanding a contract, the marriage, must be solemnised before the parties were complete baron and feme. But the case is of no farce either way, for it, does not appear what was the sort of contract which existed in that case, or was the subject of consideration. Tarry v Browne (id. 64) was a case depending on circumstances which occurred during the Commonwealth. At that time there, were ordinances in force, on

10 Clark & Finnelly 554, 8 ER p852
the subject of marriage: - the first took away any necessity for marriage in a church; the second made any other marriage but before a justice void. Of course these ordinances could not be received in the Courts after the Restoration, and that case really depended on the question whether there had or had not been consent on the part of the woman. Dickison v Holcroft (Keb. 148) is a direct authority for saying that marriage is a civil not au ecclesiastical matter. Crosse v Hunt (Carth. 99) is hardly an authority, as that case turned chiefly on the pleadings; but there it seen-is to have been intimated that words de praesenti show an actually executed contract. In Hutchinson v Brookebanke (3 Lev. 376) the parties had married by words of present contract before witnesses, in the face, of a dissenting congregation, and they were libelled in the Ecclesiastical Court for fornication; but the Court of King's Bench, on these facts being shown granted a prohibition. It could not be that the marriage in face of a dissenting congregation made, it good as an ecclesiastical ceremony, any more than a Quaker's marriage would be good for that reason, but [10-Clark & Finnelly-554] that it was a public ceremony, ensuring testimony of witnesses, which was what the law chiefly. I required. The 26 Geo. 2 was passed merely to enforce that principle, by requiring certain forms, which must secure the presence of respectable witnesses, easily to be produced should their testimony become necessary. Jesson v Collins (2 Salk. 437; 6 Mod. 155; Holt, 158) is a very important case; it expresses the deliberate opinion of Lord Holt, that " a contract per verba de praesenti is a marriage; " an opinion which three years Afterwards he repeated in Wigmore's Case (2 Salk. 438). At a later period Haydon v Gould (1 Salk. 119 b) came before the Delegates, and it was there determined that administration ought not to be granted to one who was married by a mere, layman; and the letters of administration which had been, granted were re-called. This, at first, appears to be in favour of the argument on, the other side, but the reason given by the Court makes it a strong authority for the Crown. The reason was, " for that Haydon; 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." The ruling in that case amounted therefore to this, that as the husband had not in his marriage, conformed himself to the ecclesiastical law, he, should not have the authority of that law to assist him in enforcing any claims as husband. But nothing was said in that case to show that for purely civil purposes, for all other purposes but this, the marriage was not a completely valid marriage. The statute there referred to as " confirming marriages, contracted during the Usurpation," is the 12 Car. 2, c. 33; and though sometimes, called a declaratory Act, it was in. [10-Clark & Finnelly-555] fact an enacting statute. It is not found in the: - usual editions of the Statutes, as it has long since expired, but in the ancient editions it still exists, and it distinctly enacts that " all marriages had or solemnised " according to the ordinances of the Commonwealth, to which it refers, " shall be deemed of the same force and none, other, as if had and solemnised according to the rites of the church of England." The decision, therefore, in Haydon, v Gould cannot apply to this case; but the reason given for that decision is most important, as it completely explains the principle on which many of the authorities relied on by the other side depend.

Scrimshire v Scrimshire (2 Hag. Cons. Rep. 395) has been commented on in the Court below as possessing a degree of importance, beyond what really belongs to it, for it did not depend on any general law of marriage, but on the local law of France. In like manner the observations of Lord Mansfield in The King v Hodnett (1 Term R. 96) have had attributed to them a weight which they really do, not deserve, as applied to this case; but those which he made, in Morton, v Fenn. (3 Dougl. 211 (Rose ed.)) do appear to deserve consideration. That was an action, for a breach of a promise to marry; it was brought long after the Marriage Act had passed. The defendant who was a man of fortune, had promised to marry the plaintiff if she would go to bed with him; she did so., and afterwards lived with him a considerable, time: - he several times afterwards repeated his resolution to marry her, but finally married another woman. She then brought her action for damages, and the answer was turpis contractus. Lord Mansfield is reported to have said, "I thought the objection would not lie, on [10-Clark & Finnelly-556] two grounds; first, that before the Marriage. Act this would have, been a good marriage,

and the children would have been legitimate by the rules of the common law." It is plain that there must be some mistake here; for if it was a good marriage, then the action would not have been maintainable; and if not a good marriage,

10 Clark & Finnelly 557, 8 ER p853

then the objection ex turpi causa non oritur actio, would certainly have been an answer. Still the case is a clear expression of Lord Mansfield's opinion on the old law. Reed v Passer (Peake's Ni. Pri. 231, 1 ed; 303 ed. of 1820) is the next case to be considered; there Lord Kenyon rejected the Fleet books, which were offered in evidence to prove a marriage; but he said, "a marriage in the Fleet, at that time, was good and lawful. I think, though I do, not mean to speak meaning to be bound, that even an agreement between the parties per verba de praesenti was ipsum matrimonium." Lindo v Belisario (1 Hagg. Cons. Rep. 216) deserves attention, for this reason, that it is in pari materiâ with Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 54). It occurred 16 years before that case, and it shows that what was held in Dalrymple v Dalrymple, had 16 years before been the settled opinion of the very eminent Judge who decided that case.

[Lord Brougham: - Dalrymple v Dalrymple went through all the Courts. We considered that that decision rested upon two grounds: - the first of which was the genera l law of Europe as to marriage per verba de praesenti; the second was the Scotch law. I never heard till now that the opinion of Lord Stowell, as to what, had been the general law of Europe, was obtruded into that judgment.]-In Lindo v Belisario, the particular marriage there in question was invalid, because, being set up as a Jew's marriage, it was shown [10-Clark & Finnelly-557] to have been contracted not in conformity with the laws of the Jews. The judgment there given was afterwards confirmed by Sir W. Wynne (1 Hagg. Cons. Rep. App p. 4, and see note in p. 9), who said, "The Marriage Act did not make, the marriages of Quakers legal, but they were held entitled to civil rights." [Lord Campbell: - The last Act does make them legal.]-That is so, and it may be said that that was done because it was found necessary; but that is an unsound line of argument. It was done to prevent the possibility of raising questions at any future period. In The King y. Brampton (10 East, 282),Lord Ellenborough held that a contract of marriage per verba de praesenti was before the Act a perfect marriage, and he appeared to treat the presence, or absence of the priest as a thing wholly immaterial.

[Lord Brougham: - There, is a case, in which Sir G. Hay struck out from the form of judgment on a marriage case, the words Presbytero stante or presentee I should like to see that case.

The Queen's Advocate promised to furnish it.]

The Attorney-general continued. This brings the argument to the case of Dalrymple v Dalrymple, [2 Hagg. C. R. 54]. The judgment in that case was pronounced in 1811, and of it nothing more need now be said than this, that it has been read, admired, and approved of by every lawyer, in the civilised world, and if entitled to weight and authority, it is decisive of the present question; and with that single observation, it is left to the consideration of the House. What are the cases which followed it? Elliott and Sugden v Gurr (2 Phill. 16) is the first, and that decided that a voidable marriage cannot be rendered void after, the death of [10-Clark & Finnelly-558] either of the parties. Then followed, and perhaps will be now referred to The Queen v The Justices of Gloucestershire (15 East, 537), which, however, does not seem at all applicable to this case. Latour v Teesdale (8 Taunt. 830; 2 Marsh, 283) was the next case, and there the case was most elaborately argued and fully considered; and the Lord Chief Justice, in delivering the judgment of the Court, in order that the foundation of that judgment might not be mistaken by any one, abstained from mentioning a fact, found in the case, that there was, present at the marriage a person who might be said to be a priest. That judgment was pronounced in 1816, and up, to the present time has, never, been doubted. Steadman v Powell (1 Ad. and Ell. 58) decided that, " As in Ireland marriages may he had without any Celebration in facie ecclesiae or in the presence of witnesses, it would be unreasonable to deny that a marriage had in Ireland may be proved by slenderer evidence than is requisite to the proof of a marriage celebrated in this country." And in the judgment there it is said (Id. p. 64), "The marriage law of Ireland is what that of this country was prior to the Marriage Act; and as marriages in England were proveable by circumstantial evidence prior, to the Marriage Act, marriage, in Ireland are, I apprehend, proveable by the same species of evidence at this day." The judgment there distinctly proceeded on the ground that the presence of a priest was wholly unnecessary. Smith v Maxwell (1 Ry. and Moo. 80) was a case

10 Clark & Finnelly 559, 8 ER p854

which occurred before Lord Wynford when Chief Justice of the Common Pleas, and there it was held that a marriage in Ireland performed by a clergyman of the church of England in a private place., [10-Clark & Finnelly-559] was valid, although no evidence, was given that any license was granted to the parties. The Lord Chief Justice there said, "I know of no law which says that celebration in a church, is essential to the validity of a marriage in Ireland." This has been the doctrine held by the highest

authority in the Courts in Ireland. In Houghton v Houghton. (1 Molloy, 611) there was a devise, to S. and J. Houghton, on condition that if they formed a marriage contrary to the established rules of the Quakers, such devise should cease and be void. They did so, and a bill was filed praying that the will might be established, and the trusts thereof executed, and that the estates might be declared forfeited, the parties having married contrary to the condition in the will mentioned. In the argument it was said that Quaker marriages were not recognised by law, but Lord Manners answered, " As to the question of the legality of a Quaker's marriage. I have no manner of doubt. I am quite, satisfied that they were meant to be included in the 21 and 22 Geo. 3, c. 25, though the words of that Act may not apply to them;" and his Lordship decreed in accordance with the prayer of the bill. The King v Bathwick (2 Barn and Ad. 639) appears to have been much relied on in the argument in the Court below, but it is certainly difficult to see how it can be made applicable to the present case. Wright v Elgood (1 Curteis, 662) is a case in which, in the judgment, Dalrymple v Dalrymple [2 Hagg. C. R. 54] was cited with marked approbation by Sir Herbert Jenner, who said (Id. 670), " Before, the statute, marriages without publication of banns or any religious ceremony, contracted per verba de praesenti, might be good and valid, though irregular. The [10-Clark & Finnelly-560] parties and minister might be liable to punishment, but the vinculum matrimonii was not affected." In The Queen v Orgill (9 Car and P. 80) there was an indictment for bigamy. Two persons had been married in Ireland by a Roman-catholic priest; the woman was a Roman-catholic, the man represented himself to be so, but the case seems to show that that was not a true representation; when indicted afterwards for contracting, another marriage, he was not allowed to set, up his supposed Protestantism as an answer to the charge. The first marriage then could only have been valid as a contract per verba de praesenti. In that, case reference was made to Swift v Swift (3 Knapp, 303); and The Queen v Orgill will, no doubt, be attempted to be explained on the ground, that if parties go on such an occasion before a minister of a particular persuasion, they must be taken afterwards to have been followers of his creed. But such an argument cannot fairly be deduced from the case, which shows in substance that marriage by words of present contract has always been deemed valid in Ireland, and many convictions for bigamy have proceeded on that ground. These, observations conclude the argument on the cases.

Something still remains to be said upon the statutes. With regard to these, it must be admitted that some appear to bear one way, some another. It is clear that if the rule of Lord Coke (Co. Litt. 290; 1 Bl. Com. 86) with regard to the construction of a declaratory Act, " whereby it appears, what the law was before the making of the Act," is to be deemed the Correct rule, then marriages of this description are proved to have been good before the statute. The 32 Hen. 8, c. 38, was an Act passed to [10-Clark & Finnelly-561] give validity to marriages regularly performed, notwithstanding any pre-contract; but taken in the most extensive application, that statute leaves open the question as to cases where such pre-contract had been consummated.[Lord Campbell: - It may be doubted whether, a contract peg, verba de praesenti can be considered within that statute.] It is clear that it is not, and that the statute only refers to contracts per verba de futuro. Then comes the 2 and 3 Edw. 6, c. 23, repealing the statute of Hen. 8, and leaving the law, as it was before. The. 12 Car. 2, c. 33, was merely an Act to confirm those marriages which had been celebrated under the ordinances of the Commonwealth. That was a confirmatory Act, but to be so, there must have been something for it to confirm: - besides, it was passed to assert the authority of the Crown, and to make it appear, that everything which had been done, in the meantime, might be questioned but for that confirmation by the Crown. The 58 Geo. 3, c. 84, relates to Indian marriages, the legality of which it was passed to confirm, and it declared in the words of Coke, " what the law was

before the making of the Act," so, as to show that the doubts which it was intended to remove ought never to have been entertained. It is clear that even under the provisions, the somewhat unnecessary provisions, for the regulation of future, marriages, to be found in that statute, the present must be considered as a valid marriage, for the minister who performed the ceremony here was, as the special verdict finds, the regularly placed minister of the town where the parties resided.

Supposing it therefore to be necessary that a ceremony should be performed by a clergyman, the presence of a Presbyterian clergyman is sufficient. The [10-Clark & Finnelly-562] marriage would certainly be good with his presence, but it would have been good without his presence. If the latter point should be conceded, there is an end of the question altogether. But supposing that point to be disputable, then it is contended that if the presence, of a priest was necessary, the presence of a regular Presbyterian minister, would, in Ireland, completely fulfil that condition. The regularly ordained ministers of the Presbyterian, church in Ireland are as much recognised by law as the clergyman of the church of Scotland. They have the regium donum, the same privileges, and the same, character. The statute last mentioned recognised as a rule that the person officiating at a marriage need not be in the holy orders of the church of England. The same, rule was recognised in a more recent statute. In the 4

Geo. 4, an Act was, passed (c. 67) to declare valid certain marriages which had taken place, at St. Petersburgh since the British factory there, had been abolished. That factory was abolished in 1807. The Act in question was passed in 1823. The doubts which this, statute was passed to remove arose., in all probability, from these circumstances: - There had been a factory at St. Petersburgh, with peculiar privileges, being recognised by the Emperor of Russia as a place within which British laws, customs, and privileges were permitted to a certain extent to be treated as law. These factories existed in many cases under treaties; that was not the case with the factory at St. Petersburgh, and in 1807 the Emperor, abolished that factory. Marriages between British subjects afterwards took place, in the chapel of the British Commercial Company at St. Petersburgh. As doubts had arisen whether such marriages were [10-Clark & Finnelly-563] good, as the factory had been abolished, the Act declared that they should be as good as if the factory still continued in existence. The 4 Geo. 4, c. 91, was another Act passed " to relieve his Majesty's subjects from all doubts concerning the validity of certain marriages solemnised abroad." Officers of the or-my and navy, and even captains of merchant ships had celebrated marriages. This statute, was passed with reference to this very practice. The preamble, declares that " Whereas it is expedient," not to confirm the marriages, but " to relieve the minds of the subjects from any doubts as to marriages solemnised by a minister of the church of England in the house of a British minister, or, in the chapel of any British factory, or, in the private house of any British subject residing in such factory, or solemnised by any British chaplain within the lines of any British army serving abroad." So, far, therefore, the Act seems, only to apply to marriages celebrated by a person in holy orders; but the second section enacts that nothing therein contained shall " Confirm Or impair or in any-wise affect the validity in law of any marriages solemnised beyond the seas," except those specially named therein. This is a recognition that marriages beyond seas, without the presence of a person in holy orders, were valid. The objection raised with regard to this and other, Acts of the same kind has been, that if it was the intention of the Legislature to lay down a general rule, it ought to have declared in a plain and direct manner that all marriages per verba de praesenti, celebrated out of the jurisdiction of the English, Marriage Act, should be good. The answer to this objection is that such has, not been the practice, of the Legislature. The particular Act to [10-Clark & Finnelly-564] which reference is now made has no prospective purpose of legislation at all. That Act enacts nothing new; it declares that marriages that had so taken place were good. This statute puts the presence of a priest and of any officer on the same footing.

The Lord Chancellor: - Why was a legalised officer necessary under that Act to render valid a marriage within the lines of a British army; an officer " officially under the authority of the commander?"

The Attorney-general: - That was done for the purpose of not interfering with the lex loci.

Lord Campbell: - Do you go so, far as to say that the marriage of two British

subjects in a foreign country, not at the chapel of the Ambassador, or within a factory, or within the lines of an army, by an officiating chaplain or officer, would in all cases be valid?

The Attorney-general: - Certainly not, for then the parties would be interfering with the lex loci, which is always to be avoided; but the marriage would be valid if there was no such interference. There are two other Acts deserving of attention. The first is 57 Geo. 3, c. 51, which relates to marriages in Newfoundland. That Act requires that all marriages there shall, after the 1st of January 1818, be celebrated by persons, in holy orders. But then comes a proviso, which is not an enactment, to the effect that the Act shall not affect marriages where there were unforeseen difficulties in obtaining the presence of a person in holy orders. This is a perfectly new provision; it has no precedent in the treaties of text-writers or in the decisions of any Courts, but it has nevertheless been established as clear law with respect to Newfoundland. The second section of that statute [10-Clark & Finnelly-565] declares that nothing therein contained should be construed to extend to marriages, celebrated in Newfoundland before the 1st of January 1818, nor to. Jewish nor Quaker marriages. On this section the observation arises, that it recognises the validity of all marriages thus excepted from the Act, and of course marriages per verba de praesenti among the rest; for as there is no doubt of the validity of Quaker and Jewish marriages, and as these and the others are put on the same, footing and treated in exactly the some way, the Legislature must be considered to have, recognised the validity of all alike. This Act was followed by that of the 5 Geo. 4, c. 68, which made other provisions for the celebration of marriages, but which, though subjecting the parties who violate these regulations to certain penalties for such offence, declares in every case the marriage, to be valid. This marks the principle on which the Legislature proceeded.

This brings, the argument to the point where it becomes necessary to consider the provisions of the Irish statutes. They may be obscure, if the ordinary rules of construction applicable to bonds and such instruments are applied to them, and if the great principles of the law are not to be applied to them; but otherwise they will be clear enough. The Acts which were passed to discountenance or

suppress the Roman-catholic religion, may, with regard to such matters, be passed over almost altogether; but these statutes must be referred to for the purpose of elucidating other things. The 12 Geo. I, c. 3, is the first statute to be referred to. That was passed to prevent marriages by degraded Roman-catholic priests, and by laymen pretending to be clergymen of the church of Ireland; and t 6 prevent marriages consummated [10-Clark & Finnelly-566] from being avoided by pre-contracts. In that respect it resembles the spirit of the 4 Geo. 4, c. 91, which relates to marriages abroad. The celebration of marriage by the popish priest is made felony without benefit of clergy. It is curious that in this statute persons are forbidden to celebrate marriages, who would have, been entitled to celebrate them; and persons who never could have been entitled to celebrate them, are put on the same, footing with the others-[The Lord Chancellor: - Are the marriages themselves, when so celebrated, declared void? They are not expressly so, declared, but it is not to be denied that the Legislature did, in more cases than one, intimate such to be its intention[Lord Campbell: - Is it not clear that a marriage between a Roman-catholic and a Protestant in Ireland, or between two, Protestants there, if celebrated by a Roman-catholic priest, is void? It is void; but the general spirit of the Legislature in Ireland, as in England, has been to check the celebration of certain marriages rather by penalties on persons who improperly celebrated marriages, than by declaring such marriages to be void. There can be no doubt that, from the earliest times, a religious ceremony has been adopted in marriage; but that circumstance alone no more shows a religious ceremony to be necessary to the validity of the contract, than the fact, that from the earliest times it has been the custom from a religious feeling to have prayers before entering on any important business, renders that business invalid if the prayers are not uttered. There can be little doubt that people have erroneously confounded the desire to have a religious Sanction, with the necessity for having it. [The Lord Chancellor: - The statute says that marriages of this sort have been celebrated " to the manifest ruin of [10-Clark & Finnelly-567] many families;" which implies that the marriages were valid, but by reason of being clandestinely

10 Clark & Finnelly 568, 8 ER p857

had with improper per-sons, brought ruin on the families.]-That is certainly the proper interpretation of the statute. Again, the Act speaks of a lay-man pretending to be a clergyman of the church of Ireland. What if the person celebrating such a marriage had actually been a clergyman of the church of England? no distinction is made between them; but there is a distinction made between a popish priest of Ireland and of England. This is remarkable, and shows that the statute has been loosely framed and must not be strictly construed. The second section is also remarkable. It makes provision for the discovery of the marriages and the punishment of the offenders; but nothing whatever is said of dissolving the marriage or declaring it to be illegal. The parties are, to be sought out and examined, not with a view to put an end to the marriage, but to discover and punish the parties who have celebrated it. Then there is a provision respecting consummation, to the effect that no contract of marriage only, not consummated by carnal knowledge of the parties, shall be avoided by a contract that has been so, consummated. The pre-contract thus alluded to must be a contract per verba de praesenti.

This statute was followed by 19 Geo. 2, c. 13, by which the marriages between Papists and Protestants, and between two Protestants, celebrated by a popish priest, are declared null and void without any sentence or process of law whatever. This statute gives a degree of force to a previous argument that makes it irresistible. The 12 Geo. I did not make the marriages void; and 19 Geo. 2 makes all such marriages void for the future-and some of them that had been already celebrated. What then becomes of a marriage [10-Clark & Finnelly-568] celebrated by a layman pretending to be a member of the Irish church; for there is no reference whatever, in this last statute to marriages so celebrated? It is good under these two, statutes, though the person celebrating it may be punished under the earlier of them. The English Marriage Act itself directed that thenceforth all marriages should be in a church and by banns; but even that statute did not direct that the) marriage should be celebrated by a person in holy orders-[The Lord Chancellor: - But some, years ago a person of the name of Smith, not being a person in holy orders, celebrated in a church and by banns many marriages, and it was deemed necessary to pass an Act to validate them; which would show that the presence of a true priest was considered necessary under that statute.]-That might have been only to satisfy doubts. The 23 Geo. 2, c. 10, which recited the two previous statutes (Irish), contains this remarkable provision, s. 3, that the priest should suffer notwithstanding the marriage, should be declared void under the 19 Geo. 2; a provision which, in the clearest manner, shows the intention of the Legislature, and the view it entertained of the existing law. The whole scope, of the argument on the three statutes, the 12 Geo. I, and 19 Geo. 2, and the 23 Geo. 2, is that marriages celebrated by one class-of the persons described in those statutes, namely the laymen, though forbidden to be so celebrated, would be valid but for the) provisions of one of these, statutes, yet the consequence would be that the persons celebrating them render themselves amenable to punishment.

Then comes 21 and 22 Geo, 3, c. 25; but before, mentioning it, perhaps it will be as well to mention an observation of Lord Coke, in Twyne's Case (3 Rep. 82, b.), as to the construction of a declaratory Act: - " Note well this [10-Clark & Finnelly-569] word (declare), by which the Parliament expounded what the common law was before." The Act 21 and 22 Geo, 3, c. 25, was passed for the purpose of recognising marriages which had taken place before its enactment; it is intitled "An Act for the relief of Protestant Dissenters in certain matters therein contained." The recital was, " Whereas the removing any doubts that may have arisen," it does not pretend to say that the doubts are well-founded, " concerning the validity of matrimonial contracts or marriages entered into between Protestant dissenters, and solemnised by Protestant dissenting ministers or teachers, will tend to the peace and tranquillity of many Protestant dissenters and their families;" not that it would change) the status of the parties, but that it would tend to the peace of their families. If the marriages had not been valid, the statute never would have been introduced by such a preamble. It then goes on to declare that all marriages between Protestant dissenters should be held valid, in like manner as if such marriages had been duly solemnised by a clergyman of the church of Ireland, but that nothing in it contained should be construed to extend to make void the provisions as to offences against the statutes

10 Clark & Finnelly 570, 8 ER p858

against clandestine marriages. On this Act Mr. Justice Perrin founds his judgment, and observes that "This is a declaratory Act-The marriages were good before." Why were they good? It must be either because all contracts of marriage were valid, if they were before witnesses and capable, of being proved; or that, if any religious Ceremony war necessary, it was not necessary that it should take place before, a person in full orders in the church of England. There, is no escape from this conclusion. This statute, was the foundation of Lord Manners, [10-Clark & Finnelly-570] judgment in Haughton v Haughton [I Moll. 611], when he held that a Quaker's marriage was valid. The 12 Geo. I recognised a marriage by a layman to be) a good marriage, and the 21 and 22 Geo. 2 declares what the common law, is and makes a marriage good on one or other of the suppositions just stated. These are the arguments which suggest themselves on the Irish statutes.

The case of the Quaker's may be now considered. There is no instance of an administration in the Ecclesiastical Courts being refused to a Quaker. [The Lord Chancellor: - You must go farther, and show that there have been applications, for them. Unless the question has been raised, there is nothing in the argument. Their affairs are, settled in their own societies.]-Cases of claims of administration by Quakers must have arisen, and there is no instance of a refusal to allow an administration to a Quaker, on the ground of the invalidity of his marriage. On the contrary, they have, never, been considered included in the Marriage Act; and though lately their marriages have been expressly recognised, no one ever before doubted respecting them. In the printed report (Dix's Report, p. 240), this matter was thus remarked on: - " The case, of Dee v Thomas (Moo and Mal. 361) proves beyond question that a ceremony according to the form of the Quakers constituted a valid marriage, and that the interposition of a clergyman is not necessary, if the ceremony is celebrated before witnesses, according to the rites and customs of that respectable society." If there is no case of a suit for the grant of administration to a Quaker, there is the case of a suit for a divorce, in which a Quaker applied to the Ecclesiastical [10-Clark & Finnelly-571] Court for a divorce., and the marriage, was treated as a good marriage, and the suit was entertained: - yet in such a case an actual marriage is required to be most strictly proved. No observations need be made on the case of the Jews; for however anomalous their right to celebrate a marriage in their own forms, it must be admitted that they have been considered and treated as a peculiar people: - so that no arguments of any great weight can be derived from the case of the Jews. But the case of the Quakers is decisive. They are English subjects; they are, dissenters from the church; they sprang up within legal memory, and at the time of the earlier decisions upon them, the-in, origin was within living memory. They were Christians-English subjects-not claiming any connection whatever with any foreign power-they severed themselves, from the church of England, and yet their marriages have always been considered valid. It is Therefore clear that a religious ceremony in marriage has not always be-en held to be in law a necessary part of the Christian religion. No. ceremony of that sort was bequeathed to the world by the great Founder of our religion; though from the earliest, times all persons had no doubt a desire to sanctify, by religious rites, a contract of so much and such lasting importance-[Lord Abinger: - What was the case in which the validity of a Quaker's marriage was, first admitted?]-In a case, referred to in a note to the case, of Linda v Belisario (1 Hagg. Cons. Rep. App. 9, n.). The name of the case is not given, but it is quoted from Sewell's Hist, Quakers, p. 492. There the marriage was held valid for the purposes of an action of ejectment. This was decided in 1660, at the Nottingham assizes. [Lord [10-Clark & Finnelly-572] Abinger: - But that marriage might have, taken place under the ordinances of the Commonwealth.]-It might be so; the case, does not show that one way or, the other; but the authorities, most of which are collected in the note, referred to clearly show that the validity of such a marriage has long been established, and constant practice, and

legislative recognitions now leave no doubt upon the matter. In Woolston v Scott (Bull. N. P. 28) it is spoken of as a matter of clear law. From the earliest times the marriages of Quakers have been considered good for all purposes; for ejectment, succession, Administration, actions for criminal conversation, and every other, legal purpose. That is utterly irreconcilable with any other, notion than that, by the(Common law of England, a priest in holy orders was not essential to matrimony; and it shows

10 Clark & Finnelly 573, 8 ER p859
that when the Legislature insisted on other sects of Christians adopting a form of marriage which an ordained priest was required to celebrate, the Quakers were still allowed to enjoy the benefit of the old common law.

This brings the case to the third branch of the argument; namely, that a Presbyterian minister fully satisfies the supposed necessity for the presence of a Priest. Upon this point Sanchez (Bk. IN. Disp. 38, par. 4, and 5, p. 297, 298) may be referred to and he shows the priest there more in the character of a witness than an officer, and requires him to receive the declared consent of the respective parties, and not to put the form of consent into their mouths and ask them if they adopt it. In M'Adam v Walker (1 Dow, 181), Lord Eldon adopts the expression of Lord Stowell in Dalrymple v Dalrymple [2 Hagg. C. R. 54], and says, [10-Clark & Finnelly-573] " 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. By the canon law, the distinction between the contract de praesenti and the promise de futuro was well known; the former constituting a good marriage of itself; the other not, unless followed by copula, or, some other act which is held in law to amount to the carrying the promise into, effect." It may be said, perhaps, that this was an obiter dictum of Lord Eldon; but if so, the only observation necessary, in answer to that objection, is that or, he, was the most cautious as well as learned Judge that ever, sat on the bench, his very obiter, dicta, if so they can be called, are entitled to the weight of the highest authority. It is difficult to find the law which requires in terms the presence of a person in holy orders. It is lex non scripta. There is no case whatever to that effect, before) our own Marriage Act. What is the meaning of the phrase, " Per, Presbyterum sacris ordinibus constitutum?" Could not a deacon marry before our, Marriage, Act?-[Lord Campbell: - Could he?]-No doubt has ever been entertained upon the subject. [The Lord Chancellor: - The expression means a full priest, a priest capable, of performing a mass.] [Lord Campbell: - Where do, you find that a deacon can marry?]-It is one of the first acts be performs. A residence in a university makes every one, aware of the fact. The discussion of this paint will carry the House to the root of the question, and will show that it arose not in the law, but in the religious feeling of the Community. The marriage ceremony, as directed by the Act o Uniformity, allows a deacon to per-form the ceremony. He, can do, anything but give, absolution and bless, the [10-Clark & Finnelly-574] elements of the sacraments; though he, may assist in the distribution of them. Very many of the curates of England are only deacons. In the church of Rome a deacon could not marry: - a priest was required there. But that was because the mass accompanied the act of marriage; and a mass-priest was therefore required. But that reason does not exist in the English church, and therefore a deacon can marry in the English church. If any priest is necessary, a Presbyterian minister is sufficient to fulfil the demands of the law. The special verdict finds that the Rev. John Johnstone was a placed and ordained minister. The meaning of that phrase must be the same in Ireland as in this country. [The Lord Chancellor: - In Watson's Clergyman's Law (C. 14, p. 259) it is said that a deacon can marry: - " So also, by parity of reason, he hath used to solemnise matrimony and to bury the dead."]-That is so. The Presbyterian minister is sufficient, if a priest is required. The Act of Union with Scotland recognises, and establishes the Presbyterian church as a church. And in article 25 an Act of the Scottish Parliament is recited, and is made part of the law of Great Britain: - so that the Scotch church is now made, part of the true Protestant religion of Great Britain. The Presbyterian minister, is therefore fully recognised by law. There are two Presbyters in the Scotch church; one elected by a district, the other ordained by the laying On of hands. The latter is Presbyter sacris ordinibus constitutes , and, indeed, they are called ordained ministers in the 25 of Geo. 3, which declared valid the marriage by Presbyterians in the East Indies. If the Presbyterian minister, is recognised by law in Scotland, he is equally [10-Clark & Finnelly-575] so as a member of the Scotch church, when resident in Ireland. The 41 Geo. 3, C. 63, supports this view of the case. That statute was passed to exclude persons in holy orders from sitting in Parliament. It excludes Scotch clergymen. That is a legal recognition that a Scotch Presbyterian minister is a person in holy orders. The history of the Scotch Presbyterians in the

10 Clark & Finnelly 576, 8 ER p860
north of Ireland shows their regular descent from, and connexion with the Scotch church.

The result of the whole argument is this: - The case before the House will decide not only this individual matter, but the legal rights of many other persons.

Marriage in this country, as well as elsewhere, has been, in accordance with the civil law, treated as a matter of civil contract alone. To. this the piety of the world has added a religious observance; but this was not necessary, till a statute of this country required that it should be so. [The Lord Chancellor: - Suppose a promise of marriage in Ireland, and a seduction thereon, and then the man marries; could not an action of breach of promise of marriage be maintained? If it could, how would the promise de futuro cum subsequente copula be sufficient to constitute a marriage?]-It cannot be said that such an objection would or, would not be fatal to the right of the action; for there, is no instance of such an objection having been thought of. But it is possible to conceive that the evidence in such a case) might disclose a state of facts which would show that the copula was not a completion of the promise, but was obtained as the condition on which that promise was to be performed; in which case the copula would not fulfil the character which the law requires it to possess when rendering perfect a contract de futuro. For these [10-Clark & Finnelly-576] reasons it is submitted that the judgment of the Court below must be reversed.

The Solicitor-general, on the same side: - It is not necessary to travel again over the mass of authorities put before, the House. The authorities are not only to be found in the arguments in the Courts, below, but in a very learned note, of Mr. Jacob's Roper on the Law of Husband and Wife (p. 445). It is in fact that note which has given rise to this discussion. It is contended, on the part of the prisoner, that the present contract of marriage, entered into before witnesses, and followed by cohabitation, was altogether null and void. Why is it so? Because, as it is said, the absence of a priest in holy orders made it so. It is not clear whether he is required merely to be present at the ceremony, or to take a part in it; to observe it merely, or to pronounce the nuptial benediction. It never was essential to the validity of a marriage, by the common law of England, that a priest should be present. This marriage, must be considered in exactly the same light as the marriages of English subjects before our Marriage Act. The importance of declaring what is the common law of England as to marriage may be estimated, when it is remembered that that law is in force in all Her Majesty's dominions, except in England itself. In all those dominions the contract is good; and the Act passed but a few years ago, for this country recognises the principle of the old common law, that a marriage per verba de prcesenti is good without a religious ceremony, but that the Legislature assumes that, for the decent and solemn performance of this most solemn [10-Clark & Finnelly-577] act, a religious ceremony will be superadded. What were-the exceptions from the Act of 26 Geo. 2? Take the case of the Quakers. If their marriages between the time of that statute and the recent Act of Parliament were not valid, they never could have succeeded to inheritances in land; their property would not have been administered by them, but would have vested in the Crown; and all the consequences of illegitimacy would have attached on their offspring. Yet none of these things has ever happened; and why? Because, after the Marriage Act, their marriages were allowed to be good on the same principle as before, namely, the principle of a present contract under the common, law. How was our own law derived? It was derived from the canon law, which was received into this country, and had been adopted here, except for one great purpose, that of legitimating children by the effect of a subsequent marriage. In Lindo v Belisario (1 Hagg. C. Rep. 216), Lord Stowell says of the canon law,

"The principles which regulate English marriages, are such as are, also generally applicable to the marriages of foreign countries; the marriage law of England being founded on the same general principles, and having for its basis the ancient canon law. So that there is not much danger that the Court can proceed wrongly on such general principles and on such a basis"

There is another very high authority in M'Adam v Walker (1 Dow, 148. 181), where Lord Eldon says, " The fact was, that the canon law was he 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. By the canon law, the distinction between the contract de prcesenti and the promise de futuro [10-Clark & Finnelly-578] was well

10 Clark & Finnelly 579, 8 ER p861

known; the former constituting a good marriage of itself; the other not, unless followed by copula, or some other act which is held in law to amount to the carrying the promise into effect. With respect to the decisions, it was a position again and again clearly recognised in them, that the contract de prcesenti formed marriage, ipsum matrimonium, and the judgments of the House of Lords had not trenched on the general doctrine." Here is the principle stated by the very highest authority. The basis of the canon law was, that it was not necessary to have any religious ceremony; a contract per verba de praesenti was ipsum matrimonium. Then, has the common law of England superadded to that the necessity of the presence of a priest, and the observance of some religious ceremony? That was not likely to be done by the common law, when the ecclesiastical law itself did not require anything of the sort. It is

admitted on the other side, that by the common law if the parties entered into a contract of marriage per verba de prcesenti, it was a binding contract for themselves; and if, after such a contract, the parties had gone to live with other persons, they could be punishable for adultery. On the other hand, if the parties lived together, though they might be censured for omitting the ceremonies of the church, they could not be punished as for fornication. And still further, if, after such a contract, the two parties afterwards married other persons, even by the most regular forms, in facie ecclesiæ, the children of these latter marriages would be bastards, and the marriages void. All this is conceded on the other side; and yet it is said that this contract is not a marriage; that the husband would not be entitled to lands in right of his wife; the wife would not be entitled to dower; [10-Clark & Finnelly-579] and the children would not be legitimate. So, that they admit many of the incidents of marriage, but deny some of them. But Lord Stowell, in the judgment in Lindo v Belisario (1 Hagg. Cons. R. 229), says, " The addition that the parties are living in sin, venially but not criminally, has been pushed too, far in argument, when it is contended that the parties would not have the lawful use of each other's persons in the way of marriage; for I conceive it only means that they were, offending against the orders of the church: - that it was an irregularity, similar to what is known to have existed in the books of the canon law, where it is held that marriages, though clandestine and irregular, are nevertheless valid." It can be shown, that though the ecclesiastics required the marriage to be performed in the face of the church, still a marriage not so celebrated was a perfectly valid marriage.[Lord Campbell: - That is clearly the case in Scotland.]-And this argument arises thereon: - If the marriage is not valid, what right have the Ecclesiastical Courts to command, at a subsequent period, the observance of the ceremonies of the church? These Courts would have no right, never pretended to have any right, to enforce the completion of a contract; all that they could do. was to enforce the observance of certain rules in the making of the contract. But to go on with. Lord Stowell's judgment: - he says, speaking of the irregularity of the marriage, " The sin they commit is against public order, but will have no effect on the validity of the marriage." He adds, " It is held by some persons, that marriage is a contract merely civil; by others, that it is a sacred, religious, and spiritual contract, and only so, to be considered." [10-Clark & Finnelly-580] He himself thinks that " neither of these opinions is perfectly accurate." He then goes on to describe what would, as a matter of principle, constitute a marriage, and says, " 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." These he remarks upon at some length, and then expresses his opinion that, though certain public ceremonies may be necessary to constitute) a regular marriage, the marriage may nevertheless be good, and the vinculum may well subsist without them. Following out his reasoning on this subject, he quotes and adopts Swinburne, who in his book on Espousals, says (s. 4, par. 3), " A present and perfect consent alone maketh matrimony, without either public solemnisation or carnal copulation; for neither is the one nor the other of the essence of matrimony, but consent only." In his opinion, therefore, no religious ceremony was required by the church as essential before the 26 Geo. 2; and if not required by the church, it can hardly be supposed to have been required by the law, which originally was derived from the church. It is impossible to conceive the law insisting on religious ceremonies which the church itself did not consider essential.

10 Clark & Finnelly 581, 8 ER p862

Then comes the argument, that the Ecclesiastic al Courts will not; presume in favour of a marriage not had in the face of the church; but that presumption is not asked or needed, if, in the words of Bracton, the contract can be proved. The English canonists are clear on this subject. In the Pupilla Oculi, by John De, Burgh, published at the beginning of the 14th century, and mentioned in Lyndewoode, it is so said in [10-Clark & Finnelly-581] a part intitled " De Sacramento matrimonii " (Pupilla Oculi omnibus Presbyteris precipue Anglicanis summé necessaria, Pt. 8, c. 1). On this title some comment has been made. It has been said that, being a sacrament., it requires the intervention of a priest. That, however, is a mistake. There are sacraments which do and some which do not require the presence of a priest.[Lord Brougham: - If that is not so, there is an end of the case decided in the Privy Council the other day (MS. [ ]), where baptism by a layman was held sufficient.]-Certainly. Marriage and baptism are both sacraments, and yet the presence of a priest was not absolutely required by the canon law at either of them. The passage from De Burgh's Pupilla Oculi (for which the counsel for the Plaintiff in Error are indebted to the researches of a learned friend) (Mr. J. R. Hope, of the Chancery bar) is to this effect (Part 8, c. 1): -

" De ministro hujus sacramenti notandum est quod non requiritur alius minister distinctus ab ipsis contrahentibus: - ipsimet enim ut plurimum sibi ipsis ministrant hoc Sacramentum, vel mutuò, vel uterque sibi. Et si omnis verus contractus matrimonalis sit Sacramentum potest hoc Sacramentum ab aliis conferri, nam quandoque patres contrahunt pro filiis, i, e. profilio et filiâ prasentibus non exprimentibus signa proprii consensus; ex quo videtur quod quilibet talis potest esse minister hujus sacramenti indifferenter qui potest esse minister idoneus in contractu matrimoniali secundum Sco. di

xxvi. Patet etiam quod ad collationem hujus sacramenti non requiritur ministerium sacerdotis, et quod illa benedictio, sacerdotalis quaniquam solet presbyter facere, sive proferre super conjuges, sive alios orationes ab ipso prolatæ non sunt forma sacramenti, nec de ejus essentiæ, sed quoddam sacramentale ad ornatum, pertinens[10-Clark & Finnelly-582] sacramenti."
In another part of the same work it is said (Part 8, c. 5): -
" Dicit etiam Wil. quod mortaliter peccat qui ante benedictionem nuptialem uxorem cognoscit, saltem in locis ubi consuetum est eas benedicere."
From which it clearly appears, even according to this great ecclesiastical authority, that though it was a sin towards the church to proceed without the benediction of the church, that benediction, was not necessary to the validity of the contract. The decree of the Council of Trent made provision for the presence of a priest. How that decree affected the law of the countries where the decree was in force, will be seen from a judgment of Lord Stowell, in the case of Herbert v Herbert (2 Hagg. Cons. Rep. 263; 3 Phill. 58-64). But that decree requires not a priest, but the priest of the parish; and the object of it was, not to ensure the performance of an ecclesiastical rite, but to secure evidence of the marriage by some local authority, induced by duty and interest to preserve a memorial of it. But to proceed with this author, who shows that such was the object, while he is explaining the meaning of the words clandestine marriage (Pupilla Oculi, Part 8, c. 4;
" De Matrimonio Clandestino "): - " Inhibitum est contrahere nuptias occult, sed publicè coram Sacerdote sunt nuptiæ in Domino contrahende (xxx q. v nullus) prohibentur etiam clandestine matrimonia duplici ratione; ne videlicet sub specie matrimonii fornicatio committatur, et ne matrimonialiter conjuncti injustè separentur. Sæpe enim in Matrimonio occults contracts alter conjugum mutat propositum, et dimittit reliquum probationis destitutum et sine remedio restitutionis (xxx quæst in summæ). Item matrimonium clandestinum sive occultum [10-Clark & Finnelly-583] omissis solemnitatibus consuetis non præsumitur conjugium, sed adulterium sive fornicatio (ut xxx quæstio v aliter); non tamen intellige quin matrimonium, ritè contractum, quamvis occulter sit verum matrimonium. Sed canon loquitur secundum quod ecclesia de tali Matrimonio præsumit. Unde nota (secundum Pe.) quod dupliciter potest consensus dici clandestinus. Uno modo quandofit contractus in præsentiâtestium tamen sine solemnitate ecclesiastics et publica: - et talis consensus facit verum matrimonium et etiam præsumptum."
Nothing can be clearer or more direct than this authority; and it is to be recollected that the writer was an ecclesiastic holding high office, one who would be called on to enforce the law he was thus laying down, and who yet shows in the plainest manner, that, though the church ceremony was required as a matter of regularity, and though

10 Clark & Finnelly 584, 8 ER p863
the parties might be ecclesiastically punished for not observing it., yet the absence of it did not affect the validity of the contract. Surely, if the laws of the church did not render such a ceremony necessary to the validity of the contract, the laws not of the church could hardly be more strict in a matter entirely relating to the church. De Burgh thus goes on: -
" Alio, modo quando, fit sine solemnitate, et etiam absque præsentia, testium; et talis facit matrimonium verum sed non præsumptum. Unde consulendum est talibus quod de novo et publicè contrahant, et agant penitentiam quin scandalizaverunt ecelesiam."
It is hardly possible to conceive a doctrine of law more, fully asserted and explained, than is the law of marriage in these extracts from the works of De Burgh. From him, who was a Roman-catholic priest, who was Vice-chancellor of Cambridge and held high preferment, giving instructions to the clergy [10-Clark & Finnelly-584] of England, we learn most distinctly that the presence of a priest was not necessary. No authority can be well conceived to be more direct. In Dalrymple v Dalrymple, Lord Stowell gives the explanation of what he calls clandestine marriages. He says (2 Hagg. 65),
" Different rules, relative to their respective effects in point of legal consequence, were applied to these three cases, of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage, everything was presumed to be complete and consummated, both in substance and in ceremony. In the irregular marriage, everything was presumed to be complete and consummated in substance but not in ceremony, and the ceremony (Swinb s. 17, par. 1) was enjoined to be undergone as matter of order. In the promise or sponsalia de futuro, nothing was presumed to be complete or consummate, either in substance or in ceremony."
This opinion of Lord Stowell is so exactly in conformity with the expressions of De Burgh, that though that writer is not expressly mentioned, it must be supposed that Lord Stowell was familiar with his work. There is another authority (likewise furnished to the counsel here from the same learned source) to be found in the work of Walter, a German writer on the canon law, of which he was appointed professor at the University at Bonn. He says, in the paragraph of " Marriage as a sacrament " . (Manual of Ecclesiastical Law of all Christian Confessions, 8 edit p. b 79, par. 295, s. 4)

" Marriage is a relationship proper to the order of nature, which by the law of the new covenant has been brought back to its primitive purity, and raised to the rank of a sacrament. The subject-matter of this sacrament, then, is the married state as such: - the form depends upon the [10-Clark & Finnelly-585] manner in which two persons enter into the Christian marriage state, which, according to the discipline of the particular time may change, and in reality has changed. Lastly, it is the spouses themselves who by the fact that they enter into the state in a lawful manner, perfect the sacrament. This conception of the matter arises from the internal essence of this relation-ship, and is the dominating one. Some persons maintain that the spouses, between themselves, do no more than complete a civil contract of marriage, and that this contract is not raised to the rank of a sacrament until after the sacerdotal benediction. But this opinion, despite some apparent reasons that may be adduced in favour of it, has too much, against it to be maintained. If then we proceed from the first position, as that which alone is the right one, the distinction between contract and sacrament will disappear, and a connexion will exist in the sense of the church; the contract being either no marriage at all, and therefore something not allowed, or else it will be at the same time a contract and a sacrament. Even the marriages of Protestants, considered in this point of view, are in themselves to be treated as sacraments. From this it follows that the distinction between an active and passive assistance of the priest, is not admissible in the cases of marriage; because every and any assistance, even that in which the priest merely looks on and listens to makes the connexion a sacrament, and is therefore in truth an active assistance. But though, according to this view, the sacerdotal benediction is not essential to the sacrament, yet the endeavour to obtain it ought not unnecessarily to be neglected, If it be omitted in disobedience to the church, then, though the marriage in itself is still a sacrament, it [10-Clark & Finnelly-586] is so far as the spouses are concerned, a sacrament that has been abused, one without sacramental grace, and a sin."
Here it may plainly be seen why the absence of the ceremonies of the church was an offence punishable by the church, while at the same time the contract that ought to have been solemnised according to its rules was indisputably valid. This writer shows, in the clearest manner, that at no time was the

10 Clark & Finnelly 587, 8 ER p864
religious ceremony an essential part of the contract. So far from it, that even the opposition of the minister cannot affect the validity of the marriage, provided only he has heard the declaration. And even from the decree of the Council of Trent, it is plain that clandestine marriages might be good. The object of that decree was simply to enforce what had before been the object of the church, to obtain the presence of some person who could attest the marriage. And Walter shows this, for he goes on to say (Walter, Par. 293),
"According to the circumstances that have thus been described, it was often difficult to distinguish an informal marriage from concubinage, and in fact the church had no means in its own hands of carrying on a direct and wholesome superintendence over the law of marriage. Upon this account, the Council of Trent felt itself induced to promulgate an ordinance on the contracting of clandestine marriages, which ordinance contained a very important innovation. First, it adhered to the principle that the marriage must be preceded by a triple proclamation in the church; but that, even now, is not absolutely necessary to the validity of the marriage, but its importance consists in this, that it may afford the means for third persons to enforce their reasonable) objections to the marriage. [10-Clark & Finnelly-587] If they neglect to do this, their right to make the objection has gone. Secondly, the direction is now that both parties must make known their intentions before their lawful priest and at least two witnesses. This form has been declared so essential, that without it a marriage shall be entirely invalid. The object nevertheless is simply this, to obtain the presence of a witness who can be relied on, in order that a marriage may with certainty be ascertained to be such. Therefore, the persons who have been named need not have been expressly invited to be present at the particular act, and even the objection of the priest himself does not hinder the validity of the marriage, if he really has heard the declaration of the parties. If the two parties live under different priests, the presence of one of them is sufficient. Further, the marriage is valid even though the declaration should be made before the priest within the year in which he has not obtained the higher orders. Thirdly, the marriage so contracted shall be confirmed by sacerdotal benediction, according to the ancient usages and that shall be imparted by the lawful priest, or by him whom he has commissioned for the purpose, and registered in the church. Other ceremonies are also to be observed; but all this is not essential to the validity of the marriage."
[Lord Campbell: - If the priest's opposition will not prevent the marriage, it must be presumed that when he declares his opposition, he does not administer the mass.]That may be so, and then the contracting parties may be liable to ecclesiastical censure, but still the contract will be binding. To return to the Council of Trent: - The effect of the decree of that Council was brought under the notice of the Ecclesiastical [10-Clark & Finnelly-588] Courts of this country, in Herbert v Herbert (3 Phillimore, 58, 64

3 2 Hagg. 263, 271). Lord Herbert had married a Sicilian lady in Sicily. The marriage did not take place in the face of the church, but in the house of the lady, in the presence of two persons and the parish priest. Evidence was given to show that, though clandestine, the marriage was good by the laws of Sicily. The Council of Trent anathematises those, who say that clandestine marriages are void-and the marriage was held to be good. In the Grand Coutumier (C. 27, fol. 46, La Rochette Sur la Grand Coutumier), it is stated that if a man promise a woman that he will marry her, and they have carnal knowledge of each other, the children are reputed legitimate although it was not a marriage in face of the church 3 for that the promise and the consummation constituted the marriage, and the Solemnities of the church only served to confirm and notify what the parties had done. These old authorities are in strict conformity with the principle of the recent Act of Parliament, and that Act itself is in strict accordance with the old common law. The strongest authorities against the validity of clandestine marriages are those occurring in cases where a priest was present. A Bishop was present and solemnised the marriage in Foxcroft's Case (10 Ed. I; I Roll. Abr. 359), which case, however, is not law, and therefore can-not affect the present. The case of-Del Heith (Rog. Ecc. Law, 584, cited from Harl. MSS. 2117, fol. 339, 34 Edw. 1) is the same, and is-liable to the same observation. It is not contended on the other side that these cases are law, but still the presence of the priest is insisted on. There is no authority for that. Nobody doubts that a marriage [10-Clark & Finnelly-589] per verba de praesenti will be decreed by the Ecclesiastical Courts to be performed in the face of the church. That could only be on the ground that the marriage was a

10 Clark & Finnelly 590, 8 ER p865

narriage, and that the parties having so contracted marriage, must pay the respect due to the orders of the church, by celebrating it in the face of the church. What are the authorities for this proceeding? Burn's Ecclesiastical Law (Tit. Marriage, II. 5, p. 400, 2 edit.) gives them, and plainly states the reason and purpose of the after celebration in the church: -

"Heretofore, if any having contracted matrimony de praesenti, and being convented by the Ecclesiastical Judge, did refuse to execute the sentence given by him, to celebrate the matrimony accordingly, after lawful admonition given in that behalf: - he or she so refusing might, for their contumacy or disobedience therein, be excommunicated, and be imprisoned on a writ de excommunicato capiendo, until he or she did submit to obey the monition of the Ordinary in that behalf."

The proceeding is here spoken of merely as an enforcement of church discipline; not one word is said of the validity of the marriage contract being affected. And then he goes on to make this, distinction: -

"But as for persons who had contracted spousals de futuro only, the Judge was not to proceed to the significant into Chancery for an excommunicate capiendo, but rather to absolve that cursed party which contended the censures of the church, albeit there might be no cause of favour, but for fear of further mischief by compelling them to go together which did hate one another. Yet was not this froward party thus to be dismissed, but was to Suffer penance for the breach of his promise: -: - nor was he or she to be dismissed or absolved [10-Clark & Finnelly-590] if those spousals de futuro, by reason of carnal knowledge or some other act equivalent, did become matrimony; for in that case, as in the former where spousals were contracted de praesenti, the disobedient party was to be excommunicated, apprehended, and imprisoned; and not to be absolved or released before satisfaction, or death, or other just cause of divorce."

There the distinction is clearly taken; one was a marriage, the other was not. In Holt v Ward, which is referred to in Burn's Ecclesiastical Law (Tit. Marriage, p. 402), the grounds of the jurisdiction of the Ecclesiastical Courts in marriage cases was discussed, and it was there said (2 Str. 937),

"The only reason why they hold jurisdiction in the case of a contract per verba de praesenti, was because that is looked upon amongst them to be ipsum matrimonium, and they only decree the formality of a solemnisation in the face of the church."

But where there is a contract only, as in the case of words de futuro, the Ecclesiastical Courts never decree the performance of any solemnity of marriage, but merely punish the party breaking a solemn promise, pro salute animae.

The doctrine of the Ecclesiastical Courts is therefore, uniform. It is true that one extraordinary case of Scrimshire v Scrimshire (2 Hag. Cons. Rep. 395) has occurred, but that does not affect the present, for the marriage there was in France, and ought to have been celebrated according to the law of that country; and the simple, question was, whether it had been so, celebrated or not.

It may now be convenient to refer to Bracton who is a high authority. In the chapter on Dower he says (Bk. 4, De Actione notis, p. 303), that

"whether the marriage, is per verba de [10-Clark & Finnelly-591] praesenti or per verba de futuro cum subsequente copula, the marriage will be good as to her and as to the children, but that she will not be entitled to dower ad ostium ecclesiae."

This is an important point; for it seems to have been assumed in the Court below that the children would not be legitimate, which is certainly an error. Bunting v Lepingwell (Moor, 169; 4 Rep. 29) is either mistakenly reported or is erroneous: - it is certainly on that point opposed to all other authorities. [The Lord Chancellor: - What you object to in that case was merely said by the civilian in argument there.]-And it is not mentioned by Lord Coke in his report. There is another passage in Bracton (5 Book, 419 b. 420 a), which bears directly on this subject: -

"Haeres est legitimus quem justae nuptiae demonstrant sive clandestinum fuit matrimonium sive publicum, sive per verba de praesenti sive per verba de futuro sive sub conditions contractum dum tamen dissolvi non possit, nee in vita contrahentium fuerit dissolutum, cum sponsalia sive matrimonium sit conjunctio maris feminae individuam, vitae retinens consuetudinem."

A similar doctrine, is found in this author in various other parts of his work (Bk. 2, c. 29, 63, De acquirendo rerum dominio, Bk. 4, c. 8, p. 303, and c. 9, p. 304). In all of them he shows that the marriages of the irregular kind are indissoluble, and that the children are legitimate. To the same effect is Fleta (Bk. 5, c. 28, De Exceptionibus, pp. 353-4); and also Britton (c. 107, De Exceptione, de Concubinage, p. 253), who

discusses the matter, and shows that though the mother, for not conforming to the rules of the church as to the ceremony taking place in the church, cannot claim dower ad ostium ecclesiae, yet that the children of such a marriage are esteemed legitimate.

[10-Clark & Finnelly-592] After these ancient writers, the grounds on which it is said that this marriage is not valid cannot be relied on. It is argued that this marriage is not sufficient for all purposes: - that the husband cannot receive administration Of his wife's estate; and for this Haydon v. Gould (1 Salk. 119) is relied on. That case occurred after the Statute of Distributions. But what would be the principle of the Ecclesiastical Courts? They would say, " you have not obeyed the laws of the church, and therefore shall not be allowed to ask the church to assist you." That is the utmost length to which the church could go if it could go even so far as that: - " for Haydon, 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." The whole case was therefore directed against the husband, who was the offender; and taking the law of that case to the utmost extent, it only amounted to this, that the husband being the wrongdoer to the church, was not to be assisted by the church. That is the view taken of the case in Comyn's Digest (Tit. Bar and Feme, b.): - " So by the common law, till the marriage be solemnised, the wife cannot be endowed ad ostium ecclesiae. 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. 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." This is the real distinction to be observed in deciding this case. in the argument of Mr. Jacob, in the Appendix to Roper's Husband and Wife, after speaking of the [10-Clark & Finnelly-593] law of marriage with regard to dissenters, he passes to the consideration of Irish marriages, and says (p. 479),

"The Irish statute 21 and 22 Geo. 3, c. 25, was in form declaratory, but it is clear that it in fact introduced a new law. This appears from the previous statute Geo. 2. A learned writer before referred to who states the general matrimonial law of Ireland to require the intervention of a priest, considers, indeed, that the marriages of dissenters had, before the statute 21 and 22 Geo. 3, acquired validity for some purposes. He states that such marriages, if celebrated according to their own rites, and if both parties were of the same persuasion, were good to all civil effects; for instance, to support an ejectment where legitimacy came in question, or an action for criminal conversation; but that if they came to entitle themselves to any rights in the Ecclesiastical Courts, as to administration, they must prove a marriage according to ecclesiastical law."

So that the distinction now contended for is admitted by Mr. Jacob himself: - and in thus expressing himself, he cites Haydon v Gould. It is extraordinary indeed that the common law, should, for the purposes of the church, Superadd, as a matter essential to the validity of the marriage, a ceremony which the Ecclesiastical Courts themselves have always treated as a matter the want of which does not vitiate, the marriage, though it may subject the parties to ecclesiastical censure. And it is to be observed, that in the passage from Mr. Jacob's note just quoted, he refers the distinction rather to the rules of evidence than to the principles of law.

Now with respect to the question of dower. Dower was of two descriptions. In cases where the wife has not been entitled to dower, the dower claimed has [10-Clark & Finnelly-594] been of that sort known as dower ad ostium ecclesiae. Blackstone, in enumerating the different sorts of dower, takes this ad ostium ecclesiae first, and thus describes it (Bk. 2, c. 8, p. 133): -

" Where tenant in fee-simple of full age, openly at the church door, where all marriages were, formerly celebrated, after affiance made and (Sir Edw. Coke, in his translation of Littleton, adds) troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands, at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without further ceremony. 2dly. Dower ex assensu patris, which is only a species of dower ad ostium ecclesiae, etc. In both of these cases they must (to prevent frauds) be made in facie ecclesiae et ad ostium ecclesiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestine fuere conjugia."
That shows that though the wife cannot be endowed in this particular way, except at the church-door, the marriage itself is good. The absence of the ceremony, the neglect of the orders of the church, entails a loss on one of the parties contracting marriage, but does not affect the validity of the marriage itself. Wickham v Enfeild (Cro. Car.

10 Clark & Finnelly 595, 8 ER p867
351) shows what is the wife's right to dower at the common law, the claim to dower there not depending on the endowment ad ostium ecclesiae, When she proceeded for it, the issue joined, being nunque accouplé in loyal matrimonie, would be one not triable at the common law, but by the ecclesiastical law. It was of course directed to the Bishop. [Lord Campbell: - Not accouplé by a priest; but accouplé. That is so. The certificate of the Bishop was, that she was accouplé not en loyal matrimonie, but in vero matrimonio sed clandestine. There was [10-Clark & Finnelly-595] error on that; and the Court said, that as the Bishop had returned the fact of marriage, that fact, though the marriage was clandestine, was sufficient to entitle the demandant to her dower. [Lord Campbell: - In that case, perhaps, the Ecclesiastical Court would have refused administration to the husband.]-Perhaps so; and probably it was to put an end to this sort of discretion claimed by the Ecclesiastical Courts that the Statute of Distributions was passed. There cannot be any doubt as to the meaning of the words clandestinum matrimonium. That must have been without the presence of a priest; but the return was held sufficient, and judgment for the dower was given. [Lord Campbell: - It would have been equally a clandestine marriage if a priest had been present or absent, provided the ceremony had not been performed in the face of the church.]-And no judicial presumption ought to be made that a priest was present at such a marriage, for such conduct would subject him to the severest punishments. But turning to the Common Law Courts, it will be seen that in such circumstances the Courts have been in favour of the marriage. In all the cases now to be cited the question arose incidentally. In Allen v Gray (1 Show. 50; Comb. 131; 2 Salk. 437) there was no doubt as to the accoupling in loyal matrimony; but the plea was held bad, as it would send the question to be tried by the Ecclesiastical Courts; whereas the plea ought to have put the fact of the marriage into issue, and then the issue would have been tried by the Law Courts. Norwood v Stevenson (Andrews, 227) was exactly to the same effect.[The Lord Chancellor: - "Loyal," as used in these cases, means "regular." Lord Campbell: - The Courts of Common Law [10-Clark & Finnelly-596] would not require more than the church; so if the church did not require the presence of a priest to make the marriage valid, the Courts of Common Law would not require it.]-That strong observation runs through the whole of these cases. [The Lord Chancellor: - The cases may not prove much, for you need not prove a marriage in fact, in an action on a bond.]-Yes, it must be proved if issue is taken on it. [Lord Campbell: - Undoubtedly. The Lord Chancellor: - Reputation would be sufficient proof for such a purpose.]-But that only shows that some sort of proof is necessary. The marriage must be proved, though the proof required in a particular case may not be the proof of the strictest kind. There are other cases on this point; Jesson v Collins (2 Salk. 437; 6 Mod. 155) is one. That was a motion for a prohibition to stay a suit for performance of a marriage, and Lord Holt said a contract per verba de praesenti is a marriage, and is not releasable, but a contract per verba de futuro is releasable. Nothing is there said of the presence of a priest. In the next page is Wigmore's Case (id. 438), and Lord Holt then repeats what he had before said. That was a case of an application to the temporal Court for a prohibition, and Lord Holt said that the spiritual Court could not punish for fornication when the parties had married per verba de praesenti. The case is the stronger, for there the parties had got a licence to marry; but, being Anabaptists, they had no person in holy orders present, and no ceremony was performed according to the church of England. That case shows clearly that the common law had not engrafted this necessity of the presence, of the priest upon the ecclesiastical law.

[10-Clark & Finnelly-597] There are two notes of Lord Hale, which, it is asserted, show that he differed on this matter from the other great common lawyers. That is a mistake. The note on which reliance is placed on the other side is in Coke on Littleton (33 a note 10), where it is said, "A. contracts per verba de praesenti with B. and has issue by her, and afterwards marries C. in facie ecclesiae. B. recovers A. for her husband by sentence of the Ordinary," which assumes that the first marriage is valid;

"and for not performing the sentence he, is excommunicated, and afterwards enfeoffs D. and then marries B. in facie ecclesiae, and dies. She brings dower against D. and recovers, because the feoffment was per fraudem mediate between the sentence and the solemn marriage; sed reversatur coram Rege et Concilio quia praedictus A. nun fuit seisitus during the espousals between him and B. Nota: - Neither the contract

10 Clark & Finnelly 598, 8 ER p868
nor the sentence was a marriage;"
and Lord Hale is referred to. That is not intelligible. The question was whether the husband was seised, not whether the marriage was a good marriage; and the judgment was that he was not seised: - and on that and on no other question does the decision turn. The additional question is a mere piece of speculation of Lord Hale; and that it is so may be seen by the quere which he appends, "Whether husband shall have trespass de tali uxore abducta? " a question about which nobody at this day would have any doubt whatever. [Lord Brougham: - W-hat is a writ of error before the King in Council, on a writ of dower? There must be a mistake.]-There is no trace of this case except in the Year Books, 9 and 10 Edw. 1; the reference in [10-Clark & Finnelly-598] Mr. Jacob's note to 10 Edw. 4,* being clearly a misprint. Assuming then the note to represent the facts truly, the inference attempted to be drawn from them is not warranted. The validity of the marriage appears to have been established, and the case was decided on the question of the seisin of the husband, and on that alone. Lord Hale is not, therefore, to be cited as an authority against the doctrine now contended for.

At this time there appeared to be much doubt as to the occasions on which a woman was entitled to dower: - even dower at the common law was not given, in the time of Henry 3, to a wile, if she had been married in a chamber. She was required to be married in the church; but Perkins, who stated that case, added, " but the law is contrary at this day." [Lord Campbell: - That is as to the place where; not by whom, or before whom?]-That is so; and the authority for the statement seems to have been that of Bracton. The note in Lord Hale's MS. seems to refer to something in Edw. 1. Perkins, who says (Perkins, tit. Dowers. 306, p. 135), that, " if a wife had married in a chamber, she would not have dower by the common law; but the law is contrary at this day," refers to the time of Henry 3. The case mentioned by Hale must have arisen in the common way, and have been referred to the Ecclesiastical Judges. [Lord Campbell: - The reference to the Council has been suggested to be a reference to the House of Lords, which sat with the Lords of the Council, attended by the Judges.]-It is probable that that was so, Roper shows (2 Rop. Hus. and Wife, 463 et seq.) what was the law with regard to Quaker[10-Clark & Finnelly-599] marriages. They were always held to be valid. In the first Institute there is another note of Lord Hale to this effect (34 a note (1)): - " Post affidationem et carnalem copulam sunt quasi husband and wife, and gift by him to the wife is void." That shows how Lord Hale regarded this sort of contract, namely, as an actual marriage. Bracton lays it down clearly, that after a contract per verba de praesenti, a gift or feoffment by the man to the woman is void. That can only be explained by the fact that the law treated that as a marriage. The same doctrine is laid down in Fitzherbert (fol. 16, s. 117), and he, refers to the 16 Henry 3. Bracton (p. 29, c. 9, De acquir Rer dom) cites a case where the same point was held before the King at Lincoln. Perkins (p. 87, s. 195) admits the authorities, but says, " that at this day such a feoffment is good enough," and refers in like manner to Mich. 16 Henry 3.

The King v. Luffington (1 Wils. 74) is a case which occurred a short time before the Marriage Act, and goes to show that a marriage of this sort was valid; but it is hardly authority, since no actual decision was given on it. Still, however, that case shows that the Court thought that it would depend on particular circumstances whether a contract by present words might be a marriage; a fact which proves that at that time the law was not considered to be opposed to the validity of a marriage so contracted. An authority much relied on by the other side was quoted in the argument below (p. 35, Dix's Report), from the Concilia of Wilkins (p. 217), where it was said that, by the Saxon laws, it was [10-Clark & Finnelly-600] declared that, " At the nuptials there shall be a mass-priest by law, who shall, with God's blessing, bind their union to all prosperity." An allegation made by some critics, that Wilkins had been mistaken in this quotation, was noticed, and his authority was confirmed by a reference to a collection made by the Record Commissioners, and intitled " The Ancient Laws and Institutes of England, comprising the Laws enacted under the Saxon Kings from Ethelbert to Canute," in which the very same words are to be found. Mr. Wilkins'

10 Clark & Finnelly 601, 8 ER p869
accuracy of quotation may be confirmed by this reference; but these words themselves do not show that the presence of a mass-priest was necessary to the legal validity of the marriage. The presence of a priest may be proper and even desirable, and yet his absence may not affect the validity of the marriage. A marriage without his presence may be admitted to be irregular for ecclesiastical purposes, but it is not void for civil purposes: - though the priest ought to give his benediction to a marriage, his

presence is not necessary to constitute the marriage itself; Watson's Clergyman's Law (p. 146), and Burn (tit. Ordination, s. xi., p. 45). No attempt can be made to deny that the law was correctly laid down by De Burgh; all the other writers are to the same effect. In Walter (s. 579 n.) the law, exactly as given in De Burgh, is stated from Thomas Aquinas (in quatuor libros sententiar: - Lib iv. Dist. xxvi. Qu. unic. Art. 1): -

" Verba exprimentia consensum de praesenti sint forma hujus sacramenti, non autem sacerdotis benedictio quae non est de necessitate sacramenti sed de solemnitate;"

and from Duns Scotus, Lib iv. Dist xxvi. Qu. unic.: -

" Ut plurimum ipsimet contrahentes ministrant sibi ipsis hoc Sacramentum vel mutuo vel uterque sibi."

There [10-Clark & Finnelly-601] are many authorities to this effect; and from the period when M'Adam v Walker (1 Dow, 148) was decided, till this moment, it never appears to have, been doubted. The only question was as to the evidence to prove, the making of such a contract.

In the Manipulus Curatorum (Sept. Tract. Pt. I, De Matr c. vi.) published in 1430, the reason for the) law is given by Guido de Monte Rocherii: -

" Matrimonium dicitur multis modis. Nam matrimonium aliud legitimum, aliud clandestinum. Matrimonium legitimum est quando ab his qui super foeminam potestatem habent uxor petitur, et a parentibus sponsatur, et legibus dotatur, ac a sacerdotibus, ut mos est, benedicitur, a paranymphis custoditur et solemniter accipitur. Non tamen intelligas quin sine solemnitatibus istis posset esse verum matrimonium. Sed sicut est in aliis sacramentis, quia quaedam sunt de necessitate sacramenti, quaedam de solemnitate tantum, ita et in Matrimonio quaedam sunt pertinentia ad substantiam matrimonii, sicut consensus per verba de praesenti expressus, et iste solum facit matrimonium; "

the last expression showing that consent, and consent alone, was of the very essence of the contract; the forms were not absolutely essential. But then he goes on to give the reason for which he should advise parties to marry in the face of the church, and says: - "

Quaedam sunt ibi ad solemnitatem et decorem sicut solemnitatis praedictae, sine quibus est verum et legitimum matrimonium quantum ad virtutem, licet non quantum ad honestatem. Clandestinum matrimonium est quod fit sine solemnitatibus praedictis, et qui sic contrahunt exponunt se periculo magno: - possit enim alter alterum dimittere quando vellet, et de facto cum alio vel alia contrahere,[10-Clark & Finnelly-602] et sic in adulterio manere. Unde talibus consulendum est in foro poenitentiae, ut de novo in facie ecclesiae contrahunt."

There is a similar passage in Zallinger, Institutiones Juris Ecclesiastici (Lib iv. tit in s. 69, p. 63): -

" Ex his deduces primo, valide contrahi coram parocho etiam non rogato ad assistendum, inducto per dolum, vi compulso, invito et contradicente, aut affectante ignorantiam, ut si terga vertat, vel aures obturet, cum a partibus consensum praestari animadvertit."

This is decisive as to the object of the decree of the Council of Trent. That object was to secure evidence of the marriage; and the passage from Zallinger is very strong to show that it had no other, since even if the priest was brought to the place by contrivance, and affected to be ignorant of what was passing, his presence as a witness was obtained, and the marriage thereby became valid. And Ferraris (Encyc. Ecc. Imped. Matr. 130) says that the marriage ought to be celebrated by the " parochus etiamsi non sit sacerdos," the object being here, distinctly avowed to secure, sure and available, testimony of the contract.[Lord Campbell: - Then according to the Roman-catholic law there might be a parochus not in orders for a year.]-There might; Walter is decisive on that point. If that was the case in Roman-catholic countries, it is impossible to believe that countries which did not accept the decree of the Council of Trent, should require the presence of a priest for a purpose more strictly ecclesiastical than that Council had in view. Lord Herbert's Case (3 Phill. 58; 2 Hagg. Cons. Rep. 263) affords clearly the distinction between a clandestine but valid marriage, and a marriage legal in its ordinary form. By the law of Sicily a marriage, contracted as it was there, namely, in a [10-Clark & Finnelly-603] clandestine manner, was the object of punishment to the in

10 Clark & Finnelly 604, 8 ER p870

dividuals so contracting it, for violating the law by making a secret marriage; but Lord Stowell said that that did not affect the validity of the marriage. In Zallinger (bk. iv. tit in s. 68) it is said,

"Munus parochi Matrimonio assistentis situm non est in actu quodam ordinis, aut exercitio propriae jurisdictionis, sed in praesentia ipsius tanquam testis specialiter, authorizati, ut de inito contractu testimonium det ecclesiae;"

in this manner confirming his previous statement, that the object of the church was to secure a witness. [Lord Campbell-Like the case, of a notary.]-In no manner; and in one of the cases it appears to have been said that it was necessary to have a priest present at the making of a will: - a proposition which, strictly taken, could never be seriously entertained by any one. There is another case of high authority. It is to be found in the Memorials of Cranmer by Strype (1 Vol. c. 12, p. 45), and is thus stated: -

" The Lord Cromwell did use to consult with the Archbishop on all his ecclesiastical matters, and there happens now, while the Archbishop was at Ford, a great case of marriage; whom it concerned I cannot tell, but the King was desirous to be resolved about it by the Archbishop, and commanded Cromwell to send to him for his judgment therein: - whether a marriage contracted or solemnised, in lawful age, per verba de praesenti and without carnal copulation, be matrimony before God or not? What the woman may thereupon demand by the law civil, after the death of her husband? The Archbishop, who was a very good civilian as well as a divine, but that loved to be wary and modest in all his dealings made this answer: - That he and his authors were of opinion that matrimony contracted per verba de praesenti was perfect [10-Clark & Finnelly-604] matrimony before God, but he knew not what she could demand by the law, for that all manner of causes of dower be judged within this realm by the common law of the same; warily declining to make any positive answer on a matter so ticklish."

The statute of Henry 8 puts marriages per verba de praesenti, followed by carnal knowledge, on the same footing as marriages in facie ecclesiae, followed by carnal knowledge; which seems to have been considered in both cases as requisite to the perfection of the marriage. Yet it is known that that was not the law, as the words of the question to the Archbishop, and his answer, most plainly show.

The cases of the Quaker marriages are most important. The issue of such marriages has never been said to be illegitimate. As to the question of the refusal to give the husband administration, that depends on another ground, and so does the matter of the claim of the wife to dower. It depends, and is completely to be accounted for on the principle of the Ecclesiastical Courts refusing to give their assistance to enforce rights which have not been acquired in strict obedience to the ecclesiastical laws. The refusal does not show that the rights themselves are not valid, but is directed to punish those who have not obeyed ecclesiastical discipline. The 26 Geo. 2, c. 33, contains an exception as to Scotland, Quakers, and marriages beyond the sea. That exception left all these marriages to be dealt with as before the passing of the Act. [Lord Campbell: - There was as little legislation as to them as there was with regard to marriages in Scotland.]-It is so; and the only Act that at all dealt with their marriages, is that which relates to the tax payable by married persons. Then how did these marriages stand? if void, they must [10-Clark & Finnelly-605] have been constantly coming before the Courts. The Crown, if the marriage was not lawful, would have been entitled to the real and personal property of the deceased; but such property was never taken by the Crown. Several of the authorities on this subject are collected by Dr. Haggard (1 Hagg. Cons. R. App p. 9); they prove the validity of these marriages. It is said that the marriages of Jews are valid, because they are looked on as a foreign people; but the Quakers are English subjects, and if their marriages are valid, they must be so by the law of England. In 1661 a Quaker marriage was held valid, in an action of ejectment; and in Harford v Morris an action of crim. con. was said to have been held maintainable. In Dodgson v Haswell a contract of that sort was held valid.

In the 6 and 7 W. and M., c. 6, entitled an Act for carrying on the war with France with vigour, which is not printed in any of the modern editions of the Statutes at Large, is an enactment relating to the marriages of Quakers. It is in these terms: - after reciting the existence of Quaker marriages and imposing a tax on married Quakers, it provides that

"Nothing herein contained shall be construed to make good or effectual any such marriage or pretended marriage, but that they shall be

10 Clark & Finnelly 606, 8 ER p871

of the same force, and no other, as they would have been if this Act had never been made."

That statute, like that of the 26 Geo. 2, left them untouched. Their validity has never been doubted, property has descended to the issue of such marriages, and it is therefore clear that they must have been valid by the common law, and in no other way. In Buller's Nisi Prius (p. 28) it is stated that in an action for criminal conversation, it is sufficient to prove [10-Clark & Finnelly-606] the marriage according to the form of the Quakers. The form of such marriages is given in Shelford (On Marriage and Divorce, p. 65). This matter has been from time to time under the consideration of many of the Common Law Judges. Lord Holt's opinion, in lesson v Collins, and in Wigmore's Case, has been already cited. In Reed v Passer (1 Peake, 23 I, 1st ed; 303 mod. ed.) the question arose before Lord Kenyon. In Reg. v. Brampton(10 East, 282) the opinion of Lord Ellenborough and the other Judges was given; and in Latour v Teasdale (8 Taunt. 830) the whole matter is discussed. That case was argued by the present Lord Chancellor, who at the conclusion of his-argument, said,

"The law is distinct and uniform; a marriage per verbal de praesenti was a marriage Without the intervention of a priest. It is unnecessary to enter on doubted points, whether dower, community of goods, etc follow on a marriage without a priest; the question here is whether this was a legal and irrevocable contract, not whether all the consequences follow."

And Lord Wynford, who argued on the other side, only raised the point whether the parties carried to Madras the law of England; for he admitted that if they did, the marriage was valid. And Lord Chief Justice Gibbs said,

"It follows from what I have stated that this was a legal marriage, since it was a marriage between British subjects, celebrated in a British settlement according to the laws of this country as they existed before the Marriage Act, and which, if it had been celebrated here before that statute, would have been valid."

In Beere v Ward, Lord Tenterden's opinion, according to a note of one of the counsel in the cause (Mr. now Mr. Serj. Clarke), [10-Clark & Finnelly-607] was given distinctly to this effect: -

"The marriage might lawfully be celebrated in a way in which 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 equally celebrated without a clergyman: - for a declaration by the parties, in the form of a contract, that they were man and wife, a contract per verba de praesenti made between them, and a declaration of that in the presence of witnesses, would, at that time, have made a good and lawful marriage in England, as it does now in Scotland."

[Lord Denman: - I was in that case, and the Lord Chancellor was on the other side. On our side we objected that Lord Tenterden said that the marriage law of England and Scotland had been the same. We insisted that that was not so, for that the law of Scotland allowed of legitimation by a subsequent marriage, which we said had never been allowed in England.]-The legitimacy there was admitted when the fact of marriage was shown to be capable of proof, and the parties claiming under the marriage received all that the could receive; they obtained the land on the footing of that legitimacy. These authorities show that wherever the question has come before the great common-law authorities, they have been of opinion that such a marriage was valid. The same doctrine has been laid down by the greatest Judge of the Ecclesiastical Court, Lord Stowell, not only in Dalrymple v Dalrymple [2 Hagg. C. R. 54], but in Lindo v Belisario [1 Hagg. C. R. 216]. The decision in the former case) was not an obiter dictum; it was the clear, considerate, and deliberate opinion of Lord Stowell; and the first instance in which it has been questioned and treated as an obiter dictum, is in the note by Mr. Jacob, in his edition of Roper's Law of [10-Clark & Finnelly-608] Husband and Wife (vol. 2, p. 445, Adden), where the question now presented to the House was for the very first time raised in the profession.

Then comes the question whether the second marriage is void or voidable. It is void. Though it is a hardship, still the law declares that the children of such a marriage are illegitimate. It may be admitted that there are dicta which appear to raise a doubt upon this subject, but they only appear to do so. In the cases which declare a subsequent marriage void, the word used is pre-contract, which is put on the same footing as affinity and consanguinity, that is as something which renders void a contract made in spite of it. [Lord Campbell: - There is great confusion in it. The word pre-contract may mean a mere contract to marry, or a contract of

10 Clark & Finnelly 609, 8 ER p872

marriage.]-It is so; and the suits in the Ecclesiastical Courts raise no decisive argument on the point; for if there have been suits there to declare such marriages void, there are equally instances of suits of the same sort in the Ecclesiastical Courts where the first marriage has been not merely a pre-contract, but has taken place in facie ecclesiae. In D'Anvers (D'Anvers, Bar and F. s. 21) the law is distinctly stated thus: -

"If A. contracts himself to B. and after marries C., and B. sues A. upon this contract in the Spiritual Court, and there sentence is given that A. shall marry and cohabit with B., which he does accordingly, they are baron and feme without any divorce between A. and C., for the marriage between A. and C. was a mere nullity."

And he refers to cases in support of this doctrine, and remarks that in one of them C. was no party to the suit; and it was held that the second marriage was void.[Lord [10-Clark & Finnelly-609] Campbell: - The only doubt about that case arose from the equivocal nature of the statement of the first marriage. The words prit femme show nothing.] But the case states, that the parties promised under age, and had canal knowledge at full age; which shows that it must have been a mere betrothment in youth, and a fulfilment of the contract in full age.

[Lord Brougham: - But what are, the relative rights of the Presbyterian ministers in Ireland?]-They are, Protestant dissenters. Kemp v Wickes (Rogers Eccl. Law, 70-594; 3 Phill. 264, 298) shows that in the case of Protestant dissenters, " the Toleration Act allowed them publicly to exercise their worship in their own way, under certain regulations: - it legalised their ministers; it protected them against prosecutions for nonconformity;" and therefore, as Sir J. Nicholl there said, "it could not, any longer be said that rites and ceremonies performed by them are not such as the law can recognise 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 Christian."

One important point would be to ascertain for what purpose the minister was to be present. If for the purpose of attestation, one would do as well as the other. But at all events, after the union of the two kingdoms, and after the statutes passed on that subject., it must be taken that the Presbyterian ministers possess authority sufficient I for purposes of this sort. The fact that on many occasions Acts of Parliament have been asked and obtained to remove, doubts as to marriages, cannot be used to show that this marriage is invalid. If used at all, that fact would show that [10-Clark & Finnelly-610] the marriage was valid, for the Legislature would not have consented on so many and such various occasions to say that doubts had arisen, and to declare those doubts erroneous, if in fact they had been such as the law did recognise as well founded.

[Lord Brougham: - I have communicated with Sir John Nicholl on the subject of Babington v Babington, (not yet reported), and I have received a note from him to this effect: - That the marriage, was stated, on the face of the record there, to have taken place in the face of the church; but these) words were struck through by the Judge before sentence. This was done because he, could not, as an Ecclesiastical Judge, say that the marriage had taken place in the face of the church when it was not the church of England; and he could not say according to the church of Scotland, because what was the rule of that church was not proved before, him as a matter of fact. So that no question of lex loci was raised there.]

On all the authorities now referred to on the practice of the country and the profession, and on these frequent recognitions by statutes, it is confidently submitted that the first marriage here was valid, and that judgment must be given for the Crown.

Mr. Pemberton, for the Defendant in Error: - There is one circumstance which has not been adverted to on the other side of the bar; namely, that this is not a marriage between two members of the Presbyterian church, but it has been solemnised, if at all, by a member of a church to which neither of them belonged. This circumstance would materially affect the validity of the first marriage under any circumstances: - but it is submitted that, without going into [10-Clark & Finnelly-611] that question, that which is here called the first marriage was not valid in law. The argument on the other side goes to this extent,-that a marriage, may be solemnised without any religious solemnity at all. This law is said to extend to Scotland, Ireland, and all the colonies of this country: - and this argument rests altogether on the authority, and greater it is admitted there cannot well be of Lord Stowell. It has been assumed that the authority of that learned Judge was never questioned till the note to Roper's

10 Clark & Finnelly 611, 8 ER p873

book, by Mr. Jacob, was published. But that is a mistake; for learned as that note is the whole, of its learning may be found in the arguments of counsel in the case of Beere v Ward. In that case there was a clandestine marriage, a regular but secret marriage, in 1742. A child had been born in 1739. The legitimacy of the child was in question. It was said that a marriage had taken place in 1736. It was necessary to make the forms of that marriage as few as possible. Lord Eldon refers, in the beginning of his judgment, to the way in which the then Attorney-general opened the case to the jury, and makes the following observations * on the law which had been laid down to the jury.

10 Clark & Finnelly 612, 8 ER p874

Lord Tenterden on that occasion had stated the law to the full extent of Dalrymple v Dalrymple [2 Hagg. C.R. 54]. But [10-Clark & Finnelly-612] in his judgment Lord Eldon does not quite adopt the law from Lord Tenterden, but says, that loose as the law of England was, it was not so loose as the law of Scotland.

It may be true, that the canon law was the basis [10-Clark & Finnelly-613] of the marriage law throughout Europe; but there were qualifications in some, countries. What were they in England, with respect to the adoption of the canon law? It is said on the other side that it lies on those who dispute the canon law, to show where it came into conflict with the municipal law. This is not so: - the burden of showing that the canon law was received and how far received here, lies not on the Defendant, but on the other side: - and the difference between the canon law itself, and the adoption of that law in this country, is the meaning of the phrase, " The King's Ecclesiastical Law " (Caudrey's Case, 5 Rep. lxv.). And the subsequent passages from Lord Hale and Sir J. Davies (Rep tit. Commenda, 190) justify this: - "And to show how the canon law was introduced into England, and what person of right could dispense with the ecclesiastical law in this case, before the making of the Statute of Faculties; it was [10-Clark & Finnelly-614] observed that, after the Bishop of Rome had assumed to himself to be the spiritual prince or monarch of all the world, he attempted also to give laws to all nations, as a real mark of his monarchy; and for this he caused certain rules to be collected for the government of his clergy only, which he called decretal and not leges or statuta. But these were not entirely and absolutely obeyed in any part of Christendom, but only in the temporal territory of the Pope, which was called by the canonists Patria obedientiae: - but on the other part several of these canons were utterly rejected and

disobeyed in France and England, and other realms, which are called Patria consuetudinariae. All the ecclesiastical laws of England were not borrowed from Rome; for long before the canon law was authorised and published (which was after the Norman Conquest, as is shown before), the ancient Kings of England, Edgar, Athelstan, Alfred, Edward the Confessor, and others, have, with the advice of the 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 Constitutions have been made in both realms of England and Ire, land, all of which are part of our ecclesiastical laws at this day." This passage was properly commented on by Mr. Justice Crampton (Dix. Rep. 249), as showing that what the ecclesiastical law in England is must be decided by our own writers and our own authorities, and cannot be settled by reference to foreign jurists.

What is now proposed to be shown is this, that the ecclesiastical law of England never did recognise a marriage as a lawful marriage which was not celebrated [10-Clark & Finnelly-615] by a priest. A marriage consists of two parts: - a contract, which being made, the marriage was perfect as between the parties themselves. That is the first part. But the second part is solemnisation, and that is as necessary as the contract; and till solemnisation the law never gave effect to the marriage for the purpose of conferring civil rights. The distinction between contracts executory and executed is admitted. They form a well-known branch of the law of England and the executory contracts confer, as do marriage contracts, certain rights on each of the contracting parties, but they are altogether wanting in many of those particulars which distinguish a complete and perfected contract.

When the contract was made per verba de praesenti, or per verba de futuro cum subsequente copula, no valid marriage could be subsequently contracted. The

10 Clark & Finnelly 616, 8 ER p875

marriage was complete as between the parties themselves, but no further; but the parties obtained no civil rights till the church had solemnised the contract. [Lord Campbell: - The contract per verba de praesenti was indissoluble, of itself; the contract per verba de futuro only became indissoluble after a copula; was it not this latter that was merely an executory contract?]-That may be admitted as between the parties themselves. Such a contract, it may be said, would, before the statute, have prevented a subsequent valid marriage, for it became, so far as they were concerned, an indissoluble contract. It therefore makes the second marriage voidable, but not void. But for many purposes both contracts are merely executory. The only right which the marriage per verba de praesenti on the one hand, or the executory contract executed by the copula on the other, gave, was this, that the contract as between [10-Clark & Finnelly-616] the parties was complete, but that till the solemnisation, the marriage was not a perfect valid marriage for any other purpose. It was not like the case of a clandestine but regular marriage. There the sentence was not quod subiret matrimonium; but such was the sentence in either of the two cases already supposed. But if the party remained obstinate, that sentence did not make a marriage. The parties could not cohabit; or if they did without first obeying the sentence, that is marrying in the face of the church the issue was illegitimate. But where a party had contracted with one per verba de praesenti, and then married another in the face of the church, this second marriage in the face of the church was, till suit and sentence on the first contract, or good and valid marriage, and the party under the first had no civil rights whatever; and if one of the two parties to this second marriage died before any sentence pronounced, the marriage was good notwithstanding the previous contract, and the issue would inherit. When the statute took away from the Ecclesiastical Courts the power of enforcing the performance of a pre-contract by a marriage in facie ecclesiae, it did not do anything so absurd as to leave the party at liberty of his own free will to do what it prevented the Courts from doing; namely, render a marriage in the face of the church void, by solemnising there the pre-contract.

This was the view taken of the subject, in the Ecclesiastical Court. How did the common law regard such a marriage? it never regarded it as a marriage till solemnisation, but only as a contract for breach of which either party might recover damages. It is said that it was the general doctrine of the canon law that a marriage might be good without the presence of a priest. How is that shown? The civil law prevailed [10-Clark & Finnelly-617] in countries where the canon law was received; and the Popes, by decree after decree, but in vain, required religious ceremonies to give validity to the marriage, until the decree of the Council of Trent was passed; and when that was passed, the countries that received that decree submitted. In France, which did not receive that decree, the Kings issued ordinances to a similar effect. What was the case with England? The statutes published by the Record Commissioners, of the Saxon laws in the year 940, show (P. 108, 109) that, " at nuptials there shall be a mass-priest by law, who shall by God, s blessing bind their union to all prosperity."

In 1076 (Johnst. Ecc. Law, AD 1076, s. 5), 10 years after the Conquest, the canons at Winchester were declared, by Lanfranc, in these terms: - " Further it is ordained that no man do give his daughter in marriage without the priest's benediction. Other marriage shall be deemed fornication." In 1175 there was another canon (id. AD 1175, s. 17): - " Let no faithful man of what degree soever marry

in private, but in public, by receiving the priest's benediction. If any priest be discovered to have married any in private, let him be suspended from his office for three years." In 1200 (id. AD 1200, s. 11) Archbishop Walter, in his Constitutions, declared, "Let no marriage be contracted without banns thrice published in the church, nor between persons unknown. Let none be joined in marriage but publicly in the face of the church; otherwise let it not be allowed of except by the special authority of the Bishop." In 1160 Pope Alexander issued edicts in which marriages Without the presence of a priest were declared good; but almost immediately [10-Clark & Finnelly-618] afterwards came the canons already cited, to guard against the abuse of the permission thus given by the Pope. But from what follows it is clear that the law which admitted the canon law in other countries, as part of the law of the land, was never adopted in England. In 1253 the attempt was made to introduce the canon law of marriage recognised by the Popes, against the ecclesiastical law of England; and the answer was the well-known answer, that the Barons would not consent to have the laws of England changed. At

10 Clark & Finnelly 619, 8 ER p876

that time, before whom would the question of the validity of marriage come for decision? It would come before those Courts which had issued those canons; before that very Lanfranc who had said that a private marriage would be only fornication. What certificate would the Bishop have returned in that case? It must have been an answer conformable to these Constitutions. Glanville, speaking between 1154 and 1189, states that the inquiry of bastardy and of marriage shall be before the Bishop, and that the law was not that which was established in 1153. In Beames' edition of Glanville (p. 181) it is said, "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 the 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." And then he gives the writ. So that it was the ancient ecclesiastical law of England, founded on the common law, that was recognized [10-Clark & Finnelly-619] here before the promulgation of the canon law. That law treated marriage as a religious solemnity, without which marriage could not be completed. The canon law as such, and unmodified by our municipal law, never was the law of England. If the religious ceremony was a mere matter of order and form, how could that have affected the validity of the marriage; how could it have made the parties guilty of fornication? When did it become matter of order merely? No satisfactory answer can be given to that question.

[Lord Campbell: - It is difficult to suppose that the question of marriage was wholly referred to the Bishop in the ancient Saxon times, for in those times the Bishop and the Earl sat together in the county court. The Lord Chancellor: - We do not know for what purpose the Bishop sat there, whether for any special purpose or for general purposes.]-In Merlin (Repertoire, tit. Marriage, sect ii. S. 1) the history of these decrees is shown; and finally, the Council of Trent published that decree which required not the presence of a priest merely, but that of the parish priest. But though the ecclesiastical la-w as to the necessity for the presence of a priest, might have fallen into frequent desuetude abroad, it did not fall into desuetude, in England. The Constitution of Archbishop Reynolds (Johnston's Ecc. Law, AD 1322, s. 7) in 1322 says, " Let matrimony be celebrated as other sacraments are, with reverence, in the day-time, and in the face of the church, without laughter, sport, or scoff. Let the priest, while the marriage is contracting, interrogate the people," etc. This assumes the necessity of the presence of a priest; and it adds, " Let the priests often forbid such as are [10-Clark & Finnelly-620] disposed to marry, to plight their truth anywhere but in some notable place, before priests."

[Lord Cottenham: - Does it not add, " or public persons?" *]-Yes, but that was as to the espousals, not the marriage.

In 1343 is a Constitution of Archbishop Stratford, in these terms (Johnst. Ecc. Law, AD 1343, s. 11): -

"The lust of men is most prone to what is forbidden: - therefore, persons too near akin, or who cannot de jure be married on account of other impediments, yet often desire to be married de facto, that under colour of matrimony they may fulfil their unlawful desires: - "

and it then goes on to require the publication of banns in the parish where the parties are, making many other provisions and declaring many penalties, but in all assuming the necessity for the presence of a priest at the marriage.

In Archbishop Zouche's Constitution, in 1347, it is said (id. AD 1347, s. 7), although the sacred canons forbid clandestine marriages;" and it then goes on to provide that chaplains who celebrate such marriages, that is marriages without publication of banns shall be punished. In this as in all the rest the necessity for the presence of the priest is assumed; and the only purpose of these Constitutions is not to secure his presence, for his absence never seems to have been thought of but to compel him, notwithstanding any wishes of the parties, duly to observe the laws of the church.

These Constitutions show that that law which had [10-Clark & Finnelly-621] prevailed never had fallen into desuetude, and that the abuses consisted now in celebrating marriages without a

10 Clark & Finnelly 622, 8 ER p877
priest, which could not be done at all, but in the assumption of that character by those who had no right to assume it, or in the neglect of the due, observances of the church. Why should parties have gone away from their own parishes, why have got men to assume the habit of priests who were not priests, if the marriage would have been perfectly valid by a simple contract per verba de praesenti, in the presence of any ordinary witnesses - [Lord Campbell: - Without the presence of a priest, they would have subjected themselves to ecclesiastical censures; what they did might be to avoid that danger.]- That alone will not explain the matter. Suppose a marriage by contract to be good and perfect in itself, any subsequent marriage would bid null and void, and in case of desertion the wife would be entitled to sue for restitution of conjugal rights; and the judgment, founding itself on the marriage, would be to grant the prayer of the suit. But if celebration by religious rites is necessary, these consequences would not follow a marriage by mere contract; and in the event of a second marriage in the face of the church, and then of a suit for the performance of the first marriage the judgment would be that the second marriage was bad. But no instance can be produced in which such a judgment has been given; on the contrary, where the contract has been made not in the face, of the church, the judgment has been that the party subiret matrimonium, which would have been absurd had the matrimonium been already complete. What has been the practice of the law on this point? In Babingon v Babingon there was a valid Scotch marriage, and the subsequent marriage was therefore void. [Lord Brougham: - But if that case had [10-Clark & Finnelly-622] depended on the lex loci, the marriage ought to have been pleaded as valid on account of the law of Scotland, not as valid in se. The Scotch law was distinctly pleaded in Dalrymple v Dalrymple [2 Hagg. C. R. 54], and the issue was raised on that plea.]-By the paper here given (see ante 610), it appears that the woman there did plead a marriage in Scotland, valid by the laws of Scotland. It was for that very reason that the sentence could not decree it to be a good marriage in facie ecclesiae, for that could only be said by our Ecclesiastical Courts of the church of England. The word " solemnised " was left in because it had been solemnised in the face of a church, according to the law of the country where that church was the established church. This illustrates, in the strongest degree, the difference between an irregular marriage and a contract which did not amount to a marriage. In Fitzmaurice's Case (MS. case before the Delegates, 14 March 1732; 1 Lee Rep by Phil. 28 n; cited by Lord Stowell, 2 Hagg. Cons. Rep. 69,100),the sentence declared that then marriage was good and valid. It declared that the parties had, by fit and proper words de praesenti, entered into and solemnised and consummated a marriage, so far as the contract was concerned. In all the cases, the sentences are that the matrimonial contract is perfect as a mere contract between the parties; but then they direct solemnisation, which shows that without that ceremony the marriage is not perfect and complete for all purposes. In Baxter v. Buckley(l Lee Rep by Phill. 42) the marriage took place in a regular manner, except that the person who celebrated it was an innkeeper. The decree was not that the marriage was a perfect marriage, but that Buckley should be enjoined to solemnise the marriage within 60 days after monition. In [10-Clark & Finnelly-623] the Clerk's Instructor in the Ecclesiastical Courts (p. 313), is the form of an order on a marriage of that sort. It is to this effect. Where there is a certificate of the party's disobedience, then an excommunicate capiendo shall issue which shall be directed to the sheriff, who shall take the party and keep him in prison till obedience done; and when the church and the party suing am both satisfied, then is the officer to certify to the Bishop that obedience has been done by the contracting spousals of matrimony; and the prayer of a suit in such a case is that the defendant may be decreed to complete and perfect the contract of marriage, under penalty of excommunication. Swinburne (p. 231) shows that that was all the Ecclesiastical Courts could do. So that wherever there has been no interposition of a priest, the sentence is to solemnise the marriage; but if the marriage has taken Place before a priest, then the sentence is to perform its duties. The single decision, properly so called, that a contract per verba de praesenti is ipsum matrimonium, is that of Bunting v Lepingwell (4 Rep. 29; Moor, 169). Both the reports of Lord Coke and of Moor must be looked at; for the arguments are in one, and the judgment in the other. In Moor the facts are thus stated: - " Bunting contracted himself to one Agnes Adingsel, and then Agnes was married to one Twyne and cohabited with him, and afterwards Bunting sued the said Agnes in the Court of Audience and proved the

10 Clark & Finnelly 624, 8 ER p878
contract; and for that the said Agnes could not show cause to the contrary, the sentence was pronounced that she shall espouse the said Bunting and cohabit with him, which she did. They had issue one Charles Bunting, and the father devised, etc. The question was whether [10-Clark & Finnelly-624] Charles, their issue, was heir to Bunting and the point in the King's Bench was this, whether the

espousals between Bunting and Agnes were lawful, (loyals), without divorce between Twyne and Agnes, and without requiring Twyne to answer whether he had anything to say why Bunting and Agnes should not be married." And then follow all the arguments both as to the previous contract and as to the faith which ought to be given to the judgment of the Ecclesiastical Court; and finally it was adjudged that Charles, the issue of Bunting and Agnes, was legitimate. If the first marriage there made a good marriage, the second was actually null and void. The solemnisation ordered by the Court was therefore needless and good for nothing; yet the whole of the argument went on the sentence, of the Ecclesiastical. Courts. What was the reason of this judgment? It was not given thus because the contract was a marriage in itself, but that it was made a marriage by solemnisation, and there was the sentence of a competent Court, in a matter over which it had jurisdiction. The civil lawyer who argued the case there, expressly declared that a pre-contract did not make a subsequent marriage void ipso facto, but was only good cause to avoid such a marriage, and that it was needless to summon Twyne in the suit against Agnes, because the first contract had disabled her from making a contract with or espousing any other man, and that ubi nullus habitus ibi nulla privatio; and finally, because the Ecclesiastical Court, having jurisdiction in the matter, must be presumed to have exercised the jurisdiction properly. The decision was not that no sentence was necessary, but that, being the sentence of a Court of competent jurisdiction, it was good. This case therefore proves, first, that the contract did not make the marriage; secondly, [10-Clark & Finnelly-625] that the solemnisation was necessary; and thirdly, that the solemnisation could not he had but upon the sentence of a Judge. When therefore this case comes to be properly considered, it is an authority against the Crown in the present argument. In Paine's Case (1 Siderf. 13),

" Serjeant Windham said, that if a man contracts with a woman to marry her, and afterwards he marries himself to another woman, and the first woman sues him in the Spiritual Court, and by sentence there the marriage is adjudged null, that the man and the first woman are thereby baron and feme; and this, he said, Nov, Attorney-general, had held in Mr. Harrison's reading in Lincoln's Inn; for that, by this sentence, the man and the first woman were complete man and wife, without further ceremony: - but Twisden, J. denied it, and said that the marriage ceremony must be solemnised before they could be complete baron and feme."

Is not this a decisive authority? The declaration of Serjeant Windham, founded, as he says, on Attorney-general Noy's holding in a reading at Lincoln's-Inn, is precise, but the contradiction from the Bench is clear and positive; and that contradiction is in accordance with all the authorities. On the whole, it is clear that the first contract was not a marriage, but was a contract which prevented another marriage, but which itself still required to be perfected by solemnisation before it became a perfect marriage. And Lord Hale's opinion is to the same effect (1 Co. Lit. 33a, n. 10; see ante, p. 597). Nothing can be more distinct than this declaration of Lord Hale's opinion, and the question of marriage is here considered with reference to one of its most important consequences. That opinion is supported by judicial [10-Clark & Finnelly-626] authority. Morton v Fenn (3 Doug. (Roscoe's ed.) 211) cannot be relied on for the expression of Lord Mansfield's opinion; for it is admitted on the other side that the report is erroneous, as to the application of the rule of turpis contractus. [Lord Campbell: - If a man was to say to a woman, I will marry you in six weeks, if you will sleep with me to-night; that would not be a marriage by the law of Scotland. Lord Brougham: - I never heard that such a promise could have effect in Scotland as a marriage. A marriage is constituted per verba de futuro, followed by a copula; for that, as it is said, by relation backwards purifies the condition; but not, as in the case supposed, where the copula is the condition of the promise.]-If so, then the case of Morton v Fenn may be! wholly dismissed from consideration here; for the contract which Lord Mansfield is supposed to have said would be a marriage, is now stated by your Lordships to have no such effect, even in the law of Scotland. The report of Lord Mansfield's observations must therefore be taken to be wholly erroneous.

10 Clark & Finnelly 627, 8 ER p879

Perkins (Tit. Dower, 3 05, and 2 following ss p. 13 5) shows, in the fullest manner, the difference between a marriage, and a contract which does not constitute a Marriage: - " If a woman take a husband, and, leaving the same, husband, she marrieth another husband who is seised of land in fee, and the second husband die, she shall not have dower of his land causa patet. But if A. make a contract of marriage with C. D., and before the marriage solemnised between them she marrieth with J. K., who is seised of land in fee, etc and J. K. die, she shall have dower as wife of J. K. if the marriage be not avoided, [10-Clark & Finnelly-627] for it was but voidable. And if a man seised of land in fee make a contract of matrimony with J. S., and he die before the marriage solemnised between them, she shall not have dower, for she never was his wife." Then comes the passage already referred to on the other side, about the marriage in a chamber, and the statement that " the law is contrary at this day." No doubt the law had been altered, but only to a certain extent: - the necessity of the marriage in the

church had been dispensed with, but the presence of a priest remained, as it always had been, necessary. And in another passage in Perkins (Tit. Feoffment, p. 87, ss. 194, 195) it is said,
"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 solemnised between 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."
That shows that till the solemnisation they are not man and wife.
" But after the marriage celebrated between a man and a woman the man cannot enfeoff his wife, for then they are as one person in law."
This is decisive. Thus we have the concurrent declaration of the common and ecclesiastical lawyers that the contract did not make the marriage, but left the man free; and by leaving him free, enabled him to make that disposition of his property to the woman which it is clear he could not make if in law she had been his wife. The law, as laid down by Lord Coke, shows the difference between the wife de facto and the wife de jure. He says (1 Co. Lit. 33 a b. 34 " If a marriage de facto be [10-Clark & Finnelly-628] 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, this wife de facto shall be endowed; for this is legitimum matrimonium (as in the other cases where the wife is infra annos nubiles) quoad dotem... But if they were divorced a vinculo matrimonii in the life of her husband, she loseth her dower: - otherwise it is if they were divorced causa adultery" Here is a clear distinction taken between the wife de facto and de jure; and the distinction is still further enforced by the fact stated in the same place, that " a wife de facto shall not have, an appeal of the death of her husband, but only a wife de jure." In what arose this distinction but in the performance or absence of a religious ceremony? Lord Coke's authority, therefore, may be cited to show that in his opinion the contract did not make the marriage. And Rolle's Abridgment Tit. Bar and Fem. A. pp. 310, 341), and the Epitome of Sheppard (Tit. Mar. C. 109, p. 20),who wrote in the time of the Commonwealth are to the same effect. In Sheppard it is expressly said, "They were by the laws formerly to be married by a minister before witnesses, according to the substance of the Common-prayer. But now by the new Act the law is altered herein, and marriages are to be made up by the justices of the peace, and not by the ministers." The Epitome was dedicated to Oliver Cromwell, and this declaration of the old law is therefore very important. In Haydon v Gould (1 Salk. 11 9), the right of the husband to the administration of the wife's estate came into question. It was not a question of [10-Clark & Finnelly-629] contempt of the Ecclesiastical Court, but of the right of the man who claimed to be husband, and that of the heirs. The man was held not to be the husband, because no priest had been present at the marriage, and the heirs had the administration-[Lord Campbell: - Was it held in Haydon v Gould that the marriage was void for all purposes?]-It was not quite said so. [Lord Campbell: - But was it not said that though, as to the man, the marriage gave him no rights as to the administration, still that the children were legitimate?]It is said so. [Lord Campbell: - The legitimacy of the children is the test of marriage. They could not be legitimate if they were not born in wedlock; and the refusal of the right to the man may be accounted for on the ground of the Ecclesiastical Court refusing its assistance to a man who had disregarded the ecclesiastical law.]-The asser-

10 Clark & Finnelly 630, 8 ER p880
tion that the children were legitimate appears, however, to have, been made by the counsel, not by the Court. But assuming it to be otherwise, that is not a distinct decision. Swinburne on that point says (p. 233, s. 17, par. 28), " Other effects there be of spousals, whereof some respect the issue or children begotten before celebration of the marriage between those who have contracted spousals. Concerning their issue, true it is that by the canon law the same is lawful, but by the law of this realm their issue is not lawful, though the father and mother should afterwards celebrate marriage in the face of the church." He then refers to the law of the ancient world as shown in the case of Jacob and his handmaids, and proceeds thus: -
"But it is otherwise by the laws of this realm; for as the issue is not legitimated by the subsequent marriage, no more can he [10-Clark & Finnelly-630] inherit his fathers land; and as he cannot inherit, no more is she to have any dower of the same land. 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 husband's death, during her life); 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. Indeed it was sometimes held 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, the 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 one person in law. Which thing is also agreeable to the civil law and to the canon law also, whereby the donations which are forbidden between the husband and wife, are interpreted likewise to be forbidden between them who have contracted espousals de praesenti, or who having contracted espousals de futuro, do afterwards, lie together, whereby these espousals 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 own 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."

[10-Clark & Finnelly-631] Such is Swinburne's statement. If he is to be taken as an authority and he has been appealed to as such on the other side, his statement is decisive of the question. Here is no general vague and doubtful expression of opinion or statement of facts. The old law is stated, and the changed opinions of the lawyers, the " temporal lawyers," of Swinburne's time. The circumstances, and the doctrine upon them, are both set forth with the utmost particularity; and there can be no doubt that if at first the lawyers of England yielded to the foreign priests on this, point, they soon emancipated themselves from this foreign authority, and asserted that of the English law, which they thus rendered consistent in all its parts. So that all the authorities show that though the contract, as between the parties themselves, binds them to this extent that they cannot resile from it, yet it gives no rights to the parties till the contract has been solemnised with religious ceremonies. Comyn (Dig tit. Bar and Fem.) and Bacon (Abr. tit. Marriage Dower) have adopted these ancient authorities, and there is nothing in the law of this country which has rendered these authorities unavailable. A contract of this kind cannot be considered a marriage; when it will not prevent a man from disposing of his property, it will not entitle the woman to dower, nor to the administration of his estate. A decree for enforcing such a contract does not say that that is a good marriage, and that the other is a bad marriage, but that the contract is a good contract, and that it shall be completed by such a ceremony as will alone give effect to it as a marriage.

Turning from this view of the subject, it is proper to see what has been the practice in this country regarding marriages: - and here the matter of the Fleet [10-Clark & Finnelly-632] marriages requires consideration. If marriages per verba de praesenti could have been had in England without any religious ceremony, why should there have been the Fleet marriages and the Scotch elopements?- [Lord Campbell: - There were Fleet marriages, but not Scotch elopements, before the English Marriage Act.]-But there have always been Scotch elopements. And with regard to Fleet marriages, all the facts proved upon the public inquiry, and even all the works of fiction and the plays

10 Clark & Finnelly 633, 8 ER p881

which represented such events, described a person officiating as a parson and falsely assuming that character as a necessary personage to every marriage there celebrated. All this would have been unnecessary, had it not been the universally recognised law that the presence of a priest was necessary to the celebration of the marriage. It is impossible to explain away this fact. The statute of [26] Geo. 2 [c. 33] did no more than the canons, which have been referred to did. They assumed the presence of a priest, but required that he should be a duly authorised priest who should perform the ceremony in a particular form, with particular observances preceding the ceremony. The evils to be remedied were those which were compatible with the existence of the priest and his presence at the ceremony, and the remedy itself assumed his existence, but put his interference under certain regulations which should prevent the simulation of the priest's authority; and it added the pain of nullity as a punishment for disobedience.

Where was the necessity for those statutes which were passed to prevent the celebration of marriages by Romanist priests, if the parties, without any ceremony or any priests could contract marriage in a valid form? Then what has the Legislature done since the [10-Clark & Finnelly-633] case of Dalrymple v Dalrymple? The statutes passed since that case have been passed to remove doubts as to whether the colonists carried with them all the laws of England, or only such as were suited to the condition of the colony. That is the explanation to be given of the Newfoundland cases; and if the law in England had left the question of marriage in England as loose as the argument on the other side supposes, could it have been doubtful whether such a law could have been applied to the condition of Newfoundland? Then as to the Indian marriages. It is clear that these marriages had been good and valid, and even regular, according to the law of Scotland, but they were not regular according to the law of England; and as the people who went to India carried with them the law of England, it was necessary to make marriages contracted in India, but contracted according to the customs of the law of Scotland, good and valid by the law of England. The law was not a declaratory law, it was an enacting law; it said that those marriages shall be and shall be adjudged to be good. This Act would certainly have been

wholly unnecessary, had the law in England been such as the other side maintains. Dalrymple v Dalrymple was not recognised in 1817, as affecting marriages under the English law: - the regulations made with regard to marriages in our colonies prove this to be the fact. In Burge's Treatise on Foreign and Colonial Law (vol. I, p. 144 I56, et sev.), it will be found that regulations have been specifically established in all the colonies, and precisely on the ground that the law of England was not such as the case of Dalrymple v Dalrymple supposes it to have been.

Now what is the state of the case as to the marriages [10-Clark & Finnelly-634] of Jews and Quakers? It is said on the other side that the contract, the consent itself, makes the marriage: - but in Lindo v Belisario (1 Hagg. Cons. Rep. 216, and App. 7) the consent was as plainly given as it could be; but a part of the Jewish law was left unobserved in that case, and the contract was therefore held to be bad. That case is a strong authority to show that more than mero consent between the parties, namely, the proper performance of a religious ceremony, is necessary to constitute, a Marriage valid by the law of England. Then take the case of the Quakers. Their marriages have been repeatedly acknowledged; but so far is it from being clear that their marriages were always good, that they were, with the Jews, excepted from the first Marriage Act, and in 1835 it was thought necessary to protect them by a distinct legislative declaration; but even then the provisions of the statute were confined to the case of two parties both of them being Quakers. So careful was the Legislature to guard against extending a particular privilege, in derogation of the general law.

The principles which explain the cases on the other side are, thereof ore, easily to be understood. In the first place, the cases relied on by the other side are those in which the validity of the marriage did not come directly in question. Some are cases of actions for trespass on land in the possession of the wife, but in all of them the possession was sufficiently proved to establish the right of the party against a wrongdoer. Another class of cases is of this sort: - The religious ceremony was held to be necessary, but two other principles were introduced: - the first of which was that the supposed marriage took place ii; a chapel, by which it appeared to have been performed by a person in [10-Clark & Finnelly-635] holy orders; the marriage therefore was,

10 Clark & Finnelly 636, 8 ER p882

not invalidated; Hawke v Corri (2 Hagg. Cons. R. 280), decided by Lord Stowell, is a case of this sort. Another principle was, that if the party went to a minister of another sect, and represented himself as belonging to that sect, and his representation was believed by the woman becoming his wife to be so, a marriage contracted under such circumstances was held to be good, for the proceeding would otherwise be a fraud; Swift v. Swift(3 Knapp, 257. 303)is a case of this sort. There is nothing which does not fall within, or cannot be clearly explained by, the principle above stated, except the case of Collins v Jesson. (6 Mod. 155; 2 Salk. 437), and Wigmore's Case (2 Salk. 438), and these were cases of prohibition. The doctrine stated in these cases was extrajudicial; it was not required for any purpose of either of them. In addition to which, it may be observed that the doctrine, supposed to be laid down in Collins v Jesson, is differently stated in the two reports and it is besides, inconsistent with what had up to that time been considered to be the law. The only remaining case, is that of Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 54), and the first observation on that case is that it does not apply to the point, for the point there was the validity of a Scotch marriage; nor was the dictum, used material to the case. The question was solely one, of a Scotch marriage; whether the canon law had been received in Scotland, what the canon law was, and how its rules affected the particular circumstances of that case. Not one of the authorities on which this case must be decided, could have any bearing whatever upon that. Both sides here agree as to what is the canon law; but the question is whether that [10-Clark & Finnelly-636] law has been introduced into England. On the part of the Defendant in Error, it is denied that the canon law was ever received as the settled law of England.

On the question of a Presbyterian minister being sufficient to celebrate a marriage, little need now be said; that question seems to lie in a very small compass. The House has now to consider what is the meaning, in the English law, of " Presbyterum sacris ordinibus constitutum." Where is that term to be construed? In the English Courts, in the Bishops Courts. But to decide it in the sense now sought to be given to it, the House must call on the Bishop to decide that sacris ordinibus constitutum, in the sense in which it is explained by the laws of his church, does not necessarily mean Episcopal ordination. The Bishop cannot do so; the Act of Uniformity has settled that point. The establishment of Presbyterian discipline in Scotland cannot affect the sense of the term when the question of its sufficiency is to be decided in England, and by an English Bishop, acting under the authority and administering the provisions of the English law.

Mr. Kindersley, on the same side: - The case, as now to be considered, appears in the form of two, questions: - first, whether a contract per verba de praesenti constitutes a marriage; secondly, whether, as between two persons not of the Presbyterian church, a Presbyterian minister is so far in holy orders as to give, by his presence and celebration of a marriage, validity to the ceremony. The

other side had proceeded altogether on the assumption that the canon law is the basis of the marriage law of England. This is a mistake. The civil and the canon law existed together in the other countries of Europe, and in Scotland itself; but in England a Saxon law, both civil and ecclesiastical, [10-Clark & Finnelly-637] existed. The House is perfectly well aware how the Saxons, after the Conquest, resisted every attempt to introduce the foreign laws into, this country. Hale, in his History of the Common Law, describes the common law as divided into two portions; that which existed before, the Conquest, and that which sprung up afterwards (pp. 4. 24. 29); and he expressly describes the canon and civil laws as wholly dependent, for any part of their authority, on the permissive recognition of them by the common law of England. It is said to be a principle of the civil law, that marriage was merely a civil contracts But that was not so in ancient Rome itself; the confarreatio was, a religious ceremony. The later periods of Rome, saw the confarreatio abandoned, and the coemptio and usus introduced; but that was done merely for the purpose, of giving the parties greater facility of divorce. The civil law, therefore, must be assumed to have required a religious ceremony in the first instance; but whether it did so or not is immaterial for that law was never received in this country. The law which refused to admit the legitimacy of the antenati had its basis, not in the civil nor in the canon law, but in the ancient English Saxon law; and when the Bishops instanted, as it was said, the rule, of allowing the antenati to become legitimated by a subsequent marriage,

10 Clark & Finnelly 638, 8 ER p883
because the church habet pro legitimis, it was refused as contrary to the old Saxon law of England. If it can be shown that there was an ancient Saxon law on this subject, the common law of England must be admitted to be as the Defendant in Error now contends. In the ancient laws of England from the seventh to the tenth century, published by the Record Commissioners, there appears this law.[Lord Campbell: - Has not [10-Clark & Finnelly-638] the authenticity of many of these, laws been doubtful. Everything ancient is doubted; but these are records preserved for centuries as the records of the country. These may be considered as the Anglo-Saxon laws; Wilkins so considered them. In this publication (1089; tit. Laws of King Edmund) is a law on this subject. It should be observed that these laws purported to be passed in 940 at a great assembly of the laity and clergy at London, " utriusque ecclesiastici ordinlis et politici." There are various laws on ecclesiastical and on criminal laws, and then " as to the betrothing of a woman;" and there, is this rule, " At the marriage, there, shall be a mass-priest, by law, who shall, with God's blessing, bind their union to all prosperity." The expression " adunare," in the old law writers, seems to mean to tie the knot: - and the equivalent of this expression is used in this old law, which the Commissioners have given in the Saxon words and character. Palmer, in the Origines Liturgicae (C. 7, p. 208), shows, that the form and expressions of our present ritual are the same, now as they have been for upwards of 1000 years. [Lord Campbell: - Does the form differ materially from the form in Roman-catholic countries?]-I do not know. Even after the Conquest, the Italian laws, as they are called, were forbidden to be introduced; Blackstone (1 Comm. 15. 82, 83, 84; 4 Comm. 422). Then, as the law just quoted existed in the reign of Edmund, there is shown an origin of an English ritual, requiring the presence of a priest. Then where is there any proof of an alteration in that? The decretals of Gregory IX. were published in 1230; in 1235 the Barons refused to introduce the law from them. The earliest case is that which is mentioned in the first Institute (Co. Lit. 33 a). [10-Clark & Finnelly-639] If that was law at that time, it is clear that a contract per verba de praesenti was not marriage; nor such a contract with a copula; nor such contract and copula, with issue born: - nothing can be more decisive. In a short time afterwards Foxcroft's Case (1 Roll. Abr. 359; Rogers' Ecc. Law, 584) occurred, and is mentioned by Rolle as law, without any note, of dissent on his part. If that is law, it is impossible to conceive, that anything can be more, direct or conclusive. That case shows decisively that a religious ceremony was required; and though not perhaps showing what the law was in later times, it is good to show what it then was; and on that point the Defendant in Error says the law never has been altered. Then comes Del Heith's Case (Harl. MSS. 2117; Rogers' Ecc. Law, 584). The ceremony there was performed with a mass-priest, but not in the church, and the marriage, was therefore, held bad.

[Lord Cottenham: - Can you refer to the law which absolutely required a marriage in the face of the church? Because otherwise, those cases are not consistent with what you say was the ancient Saxon law.]-It was at the 4th Council of Lateran, under Pope Innocent IV; and these cases occurred shortly after that time. The Saxon laws existed before the canon law was known as a corpus juris There is a difference between the canon law and the law of England, on the subject of divorce. Except by an Act of Parliament, no divorce a vinculo matrimonii is known to the law of England. In that respect the most important difference exists, between these two systems of marriage law. In the continental States the ecclesiastical authorities pronounce such a divorce. [Lord Campbell: - That was the rule in all countries where [10-Clark & Finnelly-640] Christianity prevailed.]-In Scotland the civil tribunals pronounce such a divorce. [Lord Campbell: - Yes, but the Court of Session therein represents the

Commissary, who rep-resented the Bishop. [Lord Brougham: - And the Bishop represented, in former times, the Pope: - it is a popish relic.]-[The Lord Chancellor: - The principle is that the intervention of the supreme power of the State is necessary; the mode of exercising that power is the only difference.]-The Saxon canon law existed here from a very early period. In 1076 there is a canon of Lanfranc (2, Johnst. Ecc. Law, AD 1076, s. 5) expressly on this subject, commanding that "no man give his daughter or kinswoman in marriage without the priest's benediction. Other marriages shall be deemed fornication."

[Lord Cottenham: - But how do you reconcile, that canon with the Saxon law of

10 Clark & Finnelly 641, 8 ER p884

940; which you have already quoted? That canon seems to me, to lay down a rule for the first time.]-The civil law was part of the law of pagan Rome, and the canon law followed it in many respects. The argument on the other side is that marriage is merely a civil contract. But what says Lord Stowell in Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 63): - " A religious ceremony was superadded;" and in Lindo v, Belisario he says (1 Hagg. Cons. Rep. 230): - " Opinions have divided the world as to the nature of the contract. It is held by some persons that marriage is a contract merely civil, by others that it is a sacred, religious, and spiritual contract;" and he himself thinks it a civil contract, with a religious ceremony superadded. So that there is even his authority for saying that marriage is partly a civil and partly a religious contract, and he nowhere says that it is perfect without [10-Clark & Finnelly-641] both. Then again it seems to be decisive of the matter, that after the separation of the Bishop and the Earl in the county court, the question of marriage was sent to the court of the Bishop. If marriage was not a religious contract, why send it there? They might as well have sent thither questions of partnership. Another matter shows by analogy the difference of the question occasioning a distinction in the tribunala. Originally there were two sorts of bastardy, general and special. The Bishop decided one.

[Lord Cottenham: - No canon was ever by its own force a part of the law of this country. When, therefore, there was a separation between the civil and ecclesiastical tribunals, the latter must have decided the question sent before them according to the law as they found it.]

Of course they must: - and as they found the ancient Saxon ecclesiastical law established, they would act on that. What was the origin of the distinction among the different sorts of dower? What but this, that a religious ceremony was necessary. And did not the customs of the people show that? What but that occasioned the Fleet marriages and the marriages at May Fair? and what made the writers of plays and novels always describe marriages as: - taking place before, a priest, if a mere, contract per verba de praesenti was sufficient to constitute marriage?

[Lord Campbell: - But that authority is worth no-thing in any way; for these writers always represent that a marriage in the presence of a pseudo priest is bad, whereas that is confessedly good.]

But their writings show what was the popular estimation of the matter. The foreign jurists and canonists are of no authority in this case; the Pupilla Oculi and the Manipulis Curatorum therefore are of no worth as authorities. But if canonists are to be [10-Clark & Finnelly-642] cited, there is one whose work, called " The Law's Resolution of Woman's Rights," is cited with approbation by the Vice-Chancellor of England, in Beere v Ward. In that work it is said, "If a woman and a man marry, they are not una persona in the eye of the law before a marriage had between them in the church." If that was so, how is it possible to say that a contract per verba de praesenti is and always has been ipsum matrimonium, when, from the earliest time up to the period of Dalrymple v Dalrymple [2 Hagg. C. R. 541, not one single case, is to be found in which there is a decision (not a dictum but a decision) that such a contract amounted to a valid marriage? The case mentioned by Hale, Foxcroft's, Case, and Del Heith's Case, are, authorities the other way. [Lord Campbell: - Do you rely on Del Heith's Case? for that requires, a marriage in facie ecclesiae.]-Yes, that was the case, then; it was not law in the Saxon time, but it had sprung up since. Then comes Bunting v Lepingwell (4 Rep. 29; Moor, 169), which has already been disposed of. Payne's Case, (1 Siderf. 13) occurred in 1660; there counsel asserted that the contract was a marriage, but Justice Twisden said that religious solemnisation was necessary; and in Tarry v Browne (1 Siderf. 64) he says the same thing. Then comes another case not long afterwards, Holder v Dickeson, (Freem. 95), whereas Vaughan, Chief Justice, held that the woman must allege that she had tendered herself before a priest. In Weld v Chamberlain (2 Show. 1200), Chief Justice Pemberton inclined to think it a good marriage, as the woman had repeated the words after a priest. In Hutchinson v Brookebanke (3 Lev. 376) the parties had married in their own dissenting chapel, and there the legality of the marriage was disputed. Haydon. [10-Clark & Finnelly-643] v Gould (1 Salk. 119) was the case of the marriage off Sabbatarians, and the Ecclesiastical Court actually recalled the letters of administration; and that was not done on the ground of contempt, but because the marriage, being before a layman,

10 Clark & Finnelly 644, 8 ER p885

was void. And, indeed, a refusal of letters of administration never could be made on such a ground. But there the case was stronger than a mere refusal of letters of administration would have been; for the man had got the letters, and they were recalled because he was not her husband. Then come, the cases of Jesson v Collins (2 Salk. 437) and Wigmore's Case (Id. 438), where Lord Holt says that the words were by the canon law ipsum matrimonium. The question in both these cases was one of prohibition, and therefore he naturally referred to the canon law; would he have, confined himself to the canon law, if this had been in his opinion the common law of England? at all events, the opinion was extrajudicial. The next is Fielding's Case (14 Howell's State Tr. 8 vo. ed. 1327), and there the marriage was a contract celebrated by a priest in holy orders. The next case is Lord Fitzmaurice's Case (1 Lee by Phill. 28, n), where there was a contract de praesenti, and the lady libelled Lord Fitzmaurice have the marriage, contracted in this manner, declared a good and perfect marriage. The Court did not make such a decree, but the decree was quod subiret matrimonium. Now in the cases of the Fleet marriages, where a priest was, present, that never was the sentence; for though clandestine, there, had been a religious ceremony.

[Dr. Haggard, at the desire of the House, here made a statement relative to some matters as to which inquiry had been directed (see ante, p. 556): - that the parties in the Fleet marriages subjected themselves to the censure of the church, but that [10-Clark & Finnelly-644] the marriages were deemed sufficient. Babington v Babington was a suit for nullity of marriage. The second wife gave in her label, in which she stated that Babington, a soldier, paid his addresses to her; that she gave her consent and banns were published, and they were married " according to the rites and ceremonies of the kirk of Scotland."

Lord Brougham asked whether the Scotch law ought not to have been differently pleaded.

The Queen's Advocate, said that the pleading of the Scotch law" in Babington v Babington was not in form sufficient. It might have been demurred to but not having been demurred to it must be taken to have been treated there as sufficiently alleged.]

Mr. Kindersley continued. The sentence there was that true, pure, and lawful matrimony had been contracted between them. And wherever there has been the performance of a religious ceremony before a priest, the Courts never make the decree quod subiret matrimonium. Then comes The King v Luffington, (2 Burr. Sett. Cas. 322; 1 Wils. 74), and there an order of removal was qua-shed for want of an allegation that the person who celebrated the marriage was a priest in holy orders. There was clearly a contract, in that case, per verba, de praesenti. Lord Chief Justice Lee said, "The sessions should have determined whether the marriage was by a clergyman in holy orders or not." If the presence of a man pretending to be a clergyman had been alone sufficient, the order would not have been quashed for want of the other allegation. The next case, that of Scrimshire v Scrimshire (2 Hagg. Cons. R. 395), is not of any applicability here. The next is Woolston v Scott (Bull. N. P. 28); that was an action of crim. con.; and there, as it was an [10-Clark & Finnelly-645] action against a wrongdoer, and not a claim of right, Mr. Justice Denison held that the proof of marriage by a contract per verba de praesenti was sufficient. Lindo, v Belisario (1 Hagg. Cons. R. 216) does not apply to the case. In Reed v Passer (Peake, N. P. 232), Lord Kenyon merely said, "I think, though I do not mean to be bound, that a present contract is a marriage." This surely cannot be any authority. The King v Brampton (10 East, 282) is cited on the other side for a dictum of Lord Ellenborough. The answer to that case is first, that that dictum was not at all necessary for the decision of the case: - and, in the next place, Mr. Justice Bayley says, that on the facts as there stated, he could not say that a priest in holy orders was not present. The very next case is Dalrymple v Dalrymple (2 Hagg. Cons. R. 54). That is the main, if not the only case in favour of the other side. But that was a question of Scotch marriage in Scotland, by Scotch persons. Sir W. Scott set out with saying (Id. 58), " Being entertained in an English Court, it must be adjudicated according to the principles of English law applicable to such a case. But the only rule applicable to such a case is that the rights must be tried by reference to the law of the country where, if they exist at all, they had their

origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." Then completely obiter, without, according to his own statement, its having anything to do with the case, he pronounces the sentence which has been relied on. But even he says that the common law had scruples in applying the rights of legitimacy, community of goods, and dower, to this looser sort of marriages. [10-Clark & Finnelly-646] Now, allowing everything proper to the authority of Sir W. Scott, the question is whether this House will give the effect of direct authority, as to what is the common law of England, to the obiter dicta of an Ecclesiastical Judge who had himself previously declared that, after furnishing the principle of proceeding, the English law withdrew altogether from the contest. Latour v Teasdale (3 Taunt. 830; 2 Marsh, 233) is objectionable, because, without examination, it assumed the correctness and authority

of Dalrymple v Dalrymple, and decided according to it. But with the exception of this case, which goes too, far, no other has adopted that decision. The case of Smith v Maxwell does not adopt it (1 Ryan and Moo. N.P. 80). There the action was on a bill of exchange, and coverture was pleaded; and Chief Justice Best says that he is aware of " no law which says that celebration in a church is essential to the validity of a marriage in Ireland." But there the religious ceremony had been performed, and performed by a clergyman of the church of England, and the only doubt was as to the place, where the ceremony had been performed. In The King v The Inhabitants of Bathwick (2 Barn and Adol. 639) the persons were married by a Protestant priest in Ireland, with a religious ceremony; and, without any declaration that a contract per verba de praesenti was sufficient to constitute a marriage, the case was decided on the ground that the evidence of a marriage was sufficient. There was a case at Nisi prius in Ireland, Verner's Lessee v Robertson, cited in the Court below (Dix's Rep. 39 I43), and there Mr. Justice Foster distinctly stated that he did not agree with the authority of Dalrymple v Dalrymple.

These are the cases, and there is not one among them deciding in terms that a contract per verba de [10-Clark & Finnelly-647] praesenti is a marriage. Most of the cases were decided on points that would have been wholly immaterial had that been the law. These a-re cases opposed to the supposition that such is the law. The whole, then, depends on the dictum in Dalrymple v Dalrymple; and that dictum was there uttered with respect to a matter not properly under the consideration of the Court. Turning, then, from the cases to the text-writers, what is the result? If the House finds that a writer of authority, declaring the canon law, says that it is not the law of the country, it must be held decisive. Now several writers of great authority may be cited for that purpose. Swinburne (Espousals, 223) has been already cited (ante, p. 629), and Godolphin (Repertorium, tit. Bastardy) agrees with him. Comyn says (Bar and Feme, B. 6) " If a man marry with a woman pre-contracted, they are husband and wife till divorced," which could not be if the contract was a marriage; and Coke (6 Rep. 66, 67), " If a man marry with a woman pre-contracted, and has issue by her, this issue in law and truth bears the surname of the father. But if, after, husband and wife be divorced for the pre-contract, now the issue has lost his surname and is bastard." That is after the second marriage is set aside, the issue is bastard, but till then he is lawful. In Blackstone (Comm vol. i. p. 434), after speaking of disabilities affecting marriage, and mentioning pre-contract among them, it is said,

"But such marriages not being void ab initio, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is made during the life of the parties; for after the death of either of them, the Courts of Common Law will not suffer the Spiritual Court to [10-Clark & Finnelly-648] declare such marriages to have, been void."

Therefore the issue of such second marriage, until it is avoided is lawful. How can that be if the first marriage, is good? Another consequence is that neither party can enfeoff the other after marriage, though each can after contract. Again, a woman after contract may make her will, but not after marriage: - and the same is the case with regard to dower.

Now take some of the consequences in the Ecclesiastical Courts themselves. Haydon v Gould (1 Salk. 119) is decisive that a mere contract of this sort does not entitle the husband to administration: - and as to the wife's goods, Swinburne (p. 234) declares espousals de praesenti, or ut futuro cum copula, will not entitle the husband

10 Clark & Finnelly 649, 8 ER p887

to the wife's goods; nor can the wife ask for administration to her husband. In Lemon v Lemon (1 Crauf. and Dix Cir. C. 498), in the Consistory Court of Armagh, Dr. Miller has recently held that he cannot agree with Lord Stowell's doctrine, and he, refused a woman administration in the case of a contract de praesenti with a copula following. Another consequence of lawful marriage is the suit to compel restitution of conjugal rights: - with regard to that, Green v Green (1 Hagg. App p. 9) is in point. A suit of that sort instituted by a Quaker was dismissed, because a Quaker's marriage was held bad: - this, was before the statutory, recognition of Quakers, marriages. By the law of this country a wife cannot sue a husband for damages; they are una persona in law. But in Ireland it is now very common for a woman to sue a man on a promise of marriage. That would be impossible if the promise, itself made her his wife. Nor can she be a witness, against the husband: - yet in an action of seduction brought in that country by the father, the [10-Clark & Finnelly-649] first witness is the woman, who if the doctrine on the other side, of a marriage, being constituted by a contract de futuro cum copula, is true, is the man's wife, and is not admissible as a witness, There can be no way of getting out of this difficulty but by saying that they are not man and wife. To hold the of-her doctrine will be to allow a man two lawful wives at the same time and two, lawful heirs, until by a process of law a decision is made between them, giving a preference to one at the expense of the other.

Then, what is the argument to be deduced from the ordinances and the statutes? The ordinances in the time of the Commonwealth required the parties to go before a justice of the peace. Two statutes of Charles 2 repealed them. The 12 C. 2, C. 33, for England, and 17 and 18 C. 2, c. 3, for

Ireland, were these statutes. Both recited that by certain ordinances persons had been compelled to marry in a way not according to the ancient mode. How came such a declaration to be made, if a contract per verba de praesenti was sufficient? The presence of a justice, of the peace could not have made such a contract of less, value than it would have been if made in the presence of any other person. In the same spirit, the statutes 9 and 19 Geo. 2 treat marriages before a Roman-catholic priest as mere contracts, and not as perfect marriages. Then what is the Marriage Act of England? It recites that evils, had a-risen from clandestine marriages. These were marriages without banns, but not marriages without a priest. The eighth section having mentioned that many persons do solemnise matrimony in prisons without banns or licence, directs that none such shall be solemnised in future; and that if any such shall be solemnised without banns and in a prison, such marriage shall be null. One of these two, consequences [10-Clark & Finnelly-650] must follow: - Either the evil was left without a remedy, if a marriage, was good by words alone without any religious ceremony, for the Act takes no notice of such a contract; or it is clear that even before the Act a marriage was good for nothing, without solemnisation by some religious, rite. Then again, in the forms of that Act, the words are, the clergyman who marries and the parties married; but the Act says nothing of the parties marrying each other, but of having marriage solemnised between them. This difference of expression is very important. Then returning to Ireland, the 25 Geo. 3 makes the marriages between two Protestant dissenters by their own ministers good. That Act would not have been necessary to be passed had a me-re contract by present words been sufficient to constitute a marriage. And again, it should be observed that that Act relates only to the marriages between two persons of one sect; which was not, or at least is not shown to have been, the case here.

Then as to the point whether, supposing a minister to be necessary, a Presbyterian minister is sufficient: - It must be admitted that the citation of ecclesiastical writers on holy orders has no-thing to do, with the question. The common law must decide what for this purpose are holy orders. Take the periods before the Reformation from the Reformation to the Revolution, and from the Revolution to the present time. In the first, all holy orders were the same throughout Christendom. To show what the law considered the clergy, the 9 Ed. 2, st. I, and the 14 Ed. 3, st. 4, are in point. They speak of the Archbishops, and Bishops, and clergy of the realm. Several other statutes use the same expression. Then, after the Re-formation, the 24 Henry 8 put an end to appeals to Rome; it did not alter what was the law of the church, but left the same orders, and [10-Clark & Finnelly-651] in many cases even the same individuals, in full authority and power. The Acts at that time speak of the clergy of the realm. The Act of Uniformity, 13 and 14 C. 2, for England, and 17 and 18 C. 2, for Ireland, state what is

10 Clark & Finnelly 652, 8 ER p888

to be the form of ordination. The Toleration Acts, do not alter their position. The Act of Union establishes the two, churches in the two, kingdoms. Then comes the Act for preventing persons in holy orders from sitting in Parliament, and that of course extends to ministers of both churches in the two countries. In all these Acts, ministers of the Established Church are alone referred to. It is clear, therefore, that clergymen of the church of England must be for this purpose, the clergyman whose act alone would make the marriage lawful. Under these circumstances there can be) no doubt as to the conclusion at which the House must arrive. It must decide, first, that a contract per verba de praesenti is not a good marriage; and, secondly, that a dissenting clergyman is not a person who is a person capable of solemnising this marriage.

The Attorney-general, in reply: - The declaratory Acts being so., must be considered to imply that the common law, previously to their being passed, allowed the things to be done which those Acts declared when, donee to be good.

With respect to the cases; there is no authority in the common-law reports opposed to the argument now submitted to the House on behalf of the Plaintiff in Error. There is one case, Latour v Teasdale, a common-law case, decided by a full Court, and after time taken to consider, in favour of this argument. The note, in Roper's Husband and Wife is a misrepresentation of the case; and that case is decisive. [The Lord Chancellor: - I know that Lord Chief Justice, [10-Clark & Finnelly-652] Gibbs did not always write his opinions.]-Then as to Dalrymple v Dalrymple, it was a most deliberate judgment, and exhibited the settled opinion of Lord Stowell; for in 1795, no less than 16 years before, he had, in Lindo v Belisario, taken exactly the same view of the law; but the law as there laid down was, not new. Blackstone in 1753, and Jacob's Law Dictionary in 1729, had stated the law in the same, manner. Then the authority referred to by Perkins (Tit. Feoffments, 194), to show that a man might enfeoff after contract but before marriage, but could not enfeoff if the marriage had taken place, is altogether erroneously quoted by him: - there is not a syllable, about a pre-contract in the case itself.

It is said that in. 1230 this: - country adopted the rule to marry only in the church, but that that was afterwards relaxed. How relaxed? What relaxed when the church of Rome was day by day more strictly enforcing its discipline, and its authority over the nations of Europe? The answer to the objection

respecting the calling of the young woman as a witness, in an action, brought by her father for her seduction, is clear enough. She may say that he promised to marry her. Suppose he did; before, whom did he make the promise? before nobody. She could not, then, under any system of law be deemed his wife; for the contract of marriage must be made in the presence of witnesses, or authenticated by the writing of the party making the promise. If neither of these circumstances existed, she would be admissible as! a witness, not because of any defect in the contract itself, but of defect in the means of proving it. On the second point of the argument, the case may be left as it was at the opening.

[10-Clark & Finnelly-653] Questions were then put to the Judges, who required time to consider them.

Lord Chief Justice Tindal: - My Lords, the first question, which your Lordships have proposed to Her Majesty's. Judges is the following: -

"A. and B. entered into a present contract of marriage per verba de praesenti in Ireland, in the house, and in the presence) of a placed and regular minister, of the congregation of the Protestant dissenters called Presbyterians; A. was a member of the Established Church of England and Ireland; B. was not a Roman-catholic, but was either a member of the Established Church or a Protestant dissenter; a religious ceremony of marriage was performed on the occasion by the said minister between, the parties, according to the usual form of the Presbyterian, church in. Ireland; A. and B., after the said contract and ceremony, cohabited and lived together for two year's as man and wife; A. afterwards, and while B. was living, married, C. in England: - Did A. by the marriage in England commit the crime of bigamy?" *

10 Clark & Finnelly 654, 8 ER p889

In order that your Lordships, should apprehend clearly the grounds of our answer to this question, we think it will be convenient to consider, in the first instance, separately, the general and abstract question, what were the nature and obligatory force of a contract of marriage per verba de praesenti, by the English common law, previous to the passing of the Marriage Act, 26 Geo. 2: - And that we should then consider the same question with reference to the particular conditions and circumstances with which it has been submitted for our opinion.

My Lords, the abstract question we propose first [10-Clark & Finnelly-654] to consider is one involved in much obscurity: - and if Serjeant Maynard, the most learned lawyer of his day, was compelled to state, in a debate on the commitment of the Marriage, Bill passed by the Parliament in the time of the Commonwealth (see 2d. vol. Burton's Diary, 337), " that the law lies very loose as to things that are naturally essential to marriages, as to pre, contracts and dissolving marriages; " and if Lord Chief Justice Holt and other eminent Judges have since been found to express themselves with considerable uncertainty upon the same subject; it may well become us, the Judges of England of the present day, when for nearly a century the whole, doctrine relating to contracts of marriage, as contra-distinguished from marriage itself, has become nearly a dead letter in our Courts, to confess that the subject is involved in still deeper obscurity than in the time of our predecessors, and to acknowledge ourselves unable to trace out and define the boundary between the contract and marriage itself, with absolute, certainty. Indeed the learning and ingenuity which have been brought to bear on the subject, as well by the Judges, of Her Majesty's Court of Queen's Bench in Ireland, amongst whom a difference of opinion has prevailed, as by the counsel at your Lordships' bar, upon, the argument of this case, is a proof that arguments of great weight, and authorities of which it is impossible to deny the application to the subject-matter of controversy, may be advanced on either side, of this disputed proposition.

In this state of the question; it is only after considerable fluctuation and doubt in the minds of some of my brethren that they have acceded to the opinion [10-Clark & Finnelly-655] which was formed by the majority of the Judges upon hearing the argument at your Lordships' bar, and that I am now authorised to offer to your Lordships as our unanimous, opinion, that by the law of England, as it existed at the time of the) passing of the Marriage Act, a contract of marriage per verba de praesenti was a contract indissoluble between the parties themselves, affording to either of the contracting parties. by application to the Spiritual Court, the power of compelling the solemnisation of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence, and with the intervention, of a minister in holy orders.

It will appear, no doubt, upon referring to the different, authorities, that at various periods of our history there have, been decisions as to the nature and description of the religious solemnities necessary for the completion, of a perfect marriage, which cannot be reconciled together; but there will be found no authority to contravene the general position, that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage, that there must be some religious solemnity; that both modes of obligation should exist together, the civil and the religious; that, besides the civil contract, that is the contract per verba de praesenti, which has always remained the same, there has at all times, been also a religious ceremony, which has not always remained the same,

but has varied from time to time, According to the variation of the laws, of the church: - with respect to which ceremony it is to be observed, that whatever at any time has been held by the law of the church to be a sufficient religious ceremony of marriage, the some) has at all [10-Clark & Finnelly-656] times satisfied the common law of England in that respect. If, for example, in early times, as appears to have been the case, from the Saxon, laws cited in the course) of the argument, the presence of a mass-priest was required by the church; and if, at another time, the celebration in a church, and with previous publication of banns, has been declared necessary by the ecclesiastical law; and lastly, if, since, the time, of the Reformation, the church held a deacon competent to officiate, at a regular marriage ceremony; with each of these modes of solemnisation the Courts, of Common Law have given themselves no concern, but have altogether acquiesced therein, leaving such matters to the sole jurisdiction of the Spiritual Court. So that, where the church has held, as it often has, done, down to the time of passing the Marriage Act, that a

10 Clark & Finnelly 657, 8 ER p890
marriage, celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns, and without licence, to be irregular, and to render the parties liable to ecclesiastical censures, but sufficient nevertheless, to constitute, the religious part of the obligation, and that the marriage was valid notwithstanding such irregularity, the law of the land ha-si followed the Spiritual Court in that respect, and held such marriage, to be valid. But it will not be found (which is the main consideration to be attended to), in any period of our history, either that the church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, or that the common, law has held a marriage complete without such celebration.

My Lords, in endeavouring to show the grounds, upon which we hold that such is the common law [10-Clark & Finnelly-657] of this, realm, I shall first consider the decisions which have taken place in our Courts of Common Law; as to which, it is scarcely necessary to say that decisions of the Courts of Common. Law are at once, the best expositors and the surest evidence of the common law itself. I shall next advert to certain, statutes passed by the Legislature at various periods, tending to throw light upon the obscure subject now under discussion, and which appear to confirm the opinion we have formed; and lastly, shall call attention to the doctrine of the King's ecclesiastical law, as established and administered in this country; by which alone, and not by the general canon law of Europe, still less by the civil, a-re the marriages of the Queen's subjects regulated and governed.

And with respect to the decisions of the Courts of Law and the other CO-Damon-law authorities, if no case can be referred to directly and distinctly laying it down as law, in so, many words, that a contract per verba de praesenti alone, and without the intervention of a minister in orders, is not sufficient to create a valid and complete marriage, yet such conclusion is necessary from many of the decided cases., and is inconsistent with none nor in fact could the difficulty to be determined in any of the cases ever have existed, except upon the supposition that some religious ceremony was necessary to the contract: - thus leading to the conclusion above laid down, that by the law of England the contract per verba de praesenti alone, did not constitute a full and complete marriage.

And in referring to these authorities I do, not propose to take) up each in succession which has been brought in review before your Lordships; it will be sufficient, to support the conclusion, above stated, to [10-Clark & Finnelly-658] call attention to those which are the most important, and More especially to those, of earlier date, as deserving the greater weight.

The earliest case, referred to in the argument is the note from Lord Hale's manuscripts, to be found in Coke., Littleton, 33a, n. 10. That case is that A. contracts per verba de praesenti with B. and has, issue) by her, and afterwards marries C. in facie ecclesiae; 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 ecclesia, and dies. B. brings dower against D., and recovers, because the feoffment was per fraudem mediate between the sentence and the solemn marriage, " sed reversatur coram Rege et Concilio quia praedictus, A. non fuit seisitus., during the espousals between him and B. Nota, neither the contract nor the sentence, was a marriage."

My Lords, the Curia Regis et Concilii, before which the reversal took place, appears, according to the researches of antiquarians, to have been, in the time of Edward I, a tribunal of appeal in cases of difficulty, and to have) consisted at that time of the Chancellor, the Treasurer and Barons, of the Exchequer, the Judges of either Bench, and other functionaries; which Court of the Concilium Regis was perfectly distinct from the Commune Concilium Regni, the probable, original of the English Parliament.

Lord Hale speaks, largely of this Court in his Treatise, on, the Jurisdiction of the House of Lords; and various references to and extracts from its proceedings are to be found in the) learned Introduction to the Rotuli Litterarum Clausarum, lately published by the Record Commissioners. The

judgment, therefore, of such a Court of Error, is of the highest [10-Clark & Finnelly-659] weight. Lord Hale's observation on the case is " that the sentence was not a marriage; " in making which observation he is probably allud-

10 Clark & Finnelly 660, 8 ER p891
ing to a question which, about the time, he was, making his collection of notes., was a matter of contest in Westminster Hall: - viz., whether the man and woman were not complete husband and wife by the sentence of the Spiritual Court, without any other solemnity: - as it appears in Payne's Case (1 Siderf. 13; in the year 1660) that Mr. Attorney-general Nov had affirmed such to be the law, whilst Twisden, Justice, denied it, saying that the marriage must be solemnised before they were complete, husband and wife.

The result, however, of the case above referred to is that in the judgment of the Court of Error there was no complete marriage until after the actual solemnisation of the marriage under the sentence of the Court; and, upon the ground that the husband enfeoffed D. before such solemnisation, there was no seisin in him during the marriage and therefore no dower. But the object at present is to-learn from the case whether, in the opinion of the Court, the contract per verba de praesenti did alone constitute a marriage; and, both from the judgment of the Court below and of the Court of Error, the conclusion appears inevitable, that each Court thought such contract alone did not constitute marriage: - for the case sets out with stating that " A. contracts with B. perverba de praesenti; and if this contract had alone constituted marriage, then was there seisin in the husband during the marriage and before the feoffment to D., and the reason given by each of the Courts, for their respective judgments would have, [10-Clark & Finnelly-660] failed. Observe, also, the difference of language employed in the statement of the facts of the case: - the contract per verba de praesenti; the subsequent statement that A. married B; the contract; and the subsequent reason by the Court of Error, that there was no seisin during the espousals. Can, the expressions of contract on the one hand, and of marriage, and espousals on the other, possibly be considered as synonymous, and referring to the same, obligation? And this agrees expressly with Hale's inference from the case, " that the contract is not a marriage."

Foxcroft's Case (1 Rolle's Abridg. 359), which appears to have been in the same year, is next in order: - " R. being infirm, and in his bed, was married to A. by the Bishop of London, privately, in no church or chapel, nor with the) celebration, of any mass, the said A. being then pregnant by the said R; and afterwards, within. 12 weeks after the marriage, the said A. is delivered of a son, and adjudged a bastard, and so the land escheated to the lord, by the death of R. without heir." Now it is to be observed that this case must have been decided upon the usual plea of bastardy in a real action; the writ must have been sent in the usual form by the Court of Law to the Ordinary; the certificate also returned by him in the usual form. Bracton in book 5, c. 19, gives various instances of the proceedings, in cases of bastardy, with the greatest possible minuteness; and amongst others, that in s. "probably would be the form applicable to this particular case; viz. " an pater suus desponsavit matrein suam and it could not have been until after the certificate of the Ordinary, affirming or denying the marriage, that the judgment of the [10-Clark & Finnelly-661] Court could be given. Let it be conceded that the) Ordinary certified in this instance the marriage to be void, which, according to the ecclesiastical law, as then in force, in England, he ought to have found good, but irregular only, and exposing the parties to ecclesiastical censures; and let it be further conceded that the Court of Common Law acted upon such finding, and gave judgment against the demandant, as indeed it could not do otherwise; still the weight of this authority on the question before us remains the same. Was a contract per verba de praesenti, without anything more, held at that time to be a complete marriage? is the question. If it was, the Ordinary must have returned that R. had married A; for no doubt has been or can be raised, that when the Bishop of London married the two parties, as stated in the case, he married them per verba de praesenti. If, therefore, the contract per verba de praesenti had by the law of England then made a marriage, the parties were actually married; but if the Ordinary finds the marriage bad, even where the ceremony was performed by a Bishop, because celebrated at an improper place, the inference appears irresistible that some religious ceremony was necessary, and that words of present contract alone did not at that time, by the law of England, constitute a marriage.

Del Heith's Case, 34 Edward I, is precisely the same in its leading facts, and in the conclusion at which the Court of Common Law arrives, that a contract per verba de praesenti, even before the parish priest, was not sufficient; but the concluding words of the record are too strong to be passed over in silence: -
"Quaesitum fuit si

10 Clark & Finnelly 662, 8 ER p892
aliqua sponsalia in facie ecclesiae inter eos celebrate fuerunt postquam praedictus [10-Clark & Finnelly-662] Johannes convaluit de praedicta infirmitate. Dicunt quod non. Et quia convictum est per assisam

istam quod praedictus Johannes Del Heith nunquam desponsavit praedictam Katherinam in facie ecclesiae per quod sequitur quod praedictus W. filius Johannis nihil juris clamare potest in praedictis tenementis sed in misericordia profalso clamore."

The conclusion to be drawn from the comparison of two cases to be found in 1st Rolle's Abridgment, p. 360, leads, to the same inference, that the contract per verba de praesenti was not a complete marriage in the time of Henry 6. The first is at F. placitum 1: - " A man who hath a wife takes another wife, and hath issue by her; this issue is bastard by both laws (that is the common law and the ecclesiastical law), for the second marriage is void." On the same page he lays it down, in G. placitum. I, a divorce causa praecontractus bastardises the issue: - the same case, in the Year Book 18th Hen. 6, p. 34, being cited for both positions. But if the contract alone makes the marriage, if it is itself ipsum matrimonium; where is the necessity for a divorce in the second case to bastardize the issue, which it is admitted is not necessary in the former case? They cannot be reconciled together, except upon the supposition that " having a wife" and "taking a wife," that is "actual marriage," was at that time held to be one thing, and " a contract of marriage " another, falling short of the marriage itself. The authority of Perkins, sec. 306 (whose statements, from his citation of the Year Books, may be placed conveniently amongst the decisions of the Courts of Law), is to the same effect: - " If a man seised of land in fee make a contract of matrimony with 1. S., and he die before the marriage is solemnised between them, she shall not have [10-Clark & Finnelly-663] dower, for she never was his wife." Perkins, indeed, goes on to say, in the same section, " and it hath been holden in the time of King Henry 3, that if a woman had been married in a chamber, that she should not have dower by the common law; but the law is contrary at this day." But, whatever is his opinion of the alteration of the law as to the case of the private marriage (by which he probably meant the ecclesiastical law as to the solemnities requisite, which in fact had been altered), still it has no relation to his first position, which is full, complete, and express to the very point now under consideration. His observation amounts to no more than this, that in Henry the 3rd's time a marriage was held void which in his day (the reign of Queen Elizabeth) would be held irregular only; and, further, the observation is strong, that Perkins must have meant a different thing by the two phrases, " contract of matrimony " and " marrying in the chamber;" and what other difference can be suggested, except that the one was a contract by words only, the other a contract accompanied by a religious ceremony?

Again, the doctrine laid down by Perkins, title Feoffments, placitum 194 (for which he cites the Year Book 38 Edw. 3, pl. 12), shows the diversity at that time between a contract and a marriage: - " 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; inasmuch as if the woman dieth before the marriage solemnised 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, etc;" and at the close of the next placitum he says, " but [10-Clark & Finnelly-664] after the marriage celebrated between a man and a woman the man cannot enfeoff his wife, for then they are as one person in law." Bracton, in book 2 c. 9, intitled " Si vir uxori donationem facere possit constants Matrimonio," may be thought to leave the matter in some doubt whether such gifts would be good even after the contract, as he says, " Matrimonium autem accipi possit sive sit publice contractum vel fides data quod separari non possunt; et re vera donationes inter virum et uxorem constants Matrimonio valere non debent." Now, even if it is considered that by the " fides data " Bracton understood a contract per verba de praesenti, without any solemnity, it is enough to say he could not be writing as a common lawyer (in fact he was a civilian) when he is found to differ from the authority of the Year Books.

The case of Bunting v Lepingwell (Moore, 27 and 28 Eliz.) is of great weight, and of immediate bearing upon the point in question. Taking the facts from the two Reporters (Moore, 169; and 4 Coke, 29a), it appears that Bunting and Agnes

10 Clark & Finnelly 665, 8 ER p893

Addishall contracted matrimony between them per verba de praesenti tempore, and afterwards Agnes took to husband Thomas Twede, and cohabited with him; and afterwards Bunting sued Agnes in the Court of Audience, and proved the contract, and the sentence was pronounced, " Quod praedicta Agnes subiret matrimonium cum praefato, Bunting, et insuper pronuntiatum decretum et declaratum fuit dictum matrimonium fore nullum, etc;" which marriage between Bunting and Agnes took place according to the sentence, and they had issue one Charles Bunting; and whether Charles Bunting was son and heir, was the question for the jury in an [10-Clark & Finnelly-665] action of trespass brought by him; and the Court held him legitimate, and no bastard. The argument before the Court turned principally on the invalidity of the sentence of the Spiritual Court, by reason of Twede, the husband de facto, not being made a party to the proceedings by which his marriage was declared null; the Court, however, holding itself bound to give credit to the Spiritual Court that the proceedings were regular. But the bearing of the case upon the point now under discussion is whether it establishes a distinction

between the contract to marry and "ipsum matrimonium," and such seems the necessary inference. This was a trial before the Judges of the common law, who called for the assistance of civil lawyers to argue the case before them, but who must be supposed to know themselves what was the common law; and if the contract per verba de praesenti between Bunting and Agnes had been what the common law had then recognised as an actual marriage, the second marriage would have been held void without any controversy; no doubt would have existed, and no civilian would have been consulted, any more than if it had been a marriage celebrated in facie ecclesiae. It is also not unworthy of remark, that the sentence of the Spiritual Court, " Quod praedicta Agnes subiret matrimonium cum praefato Bunting," proves that not even by the ecclesiastical law, as administered in England, was such contract held to constitute a complete marriage without the intervention of the religious ceremony.

The case of Wild v Chamberlayne (2d Shower, p. 300) is so far of importance as it affords direct proof that in the opinion of Chief Justice Pemberton, on the trial of an issue [10-Clark & Finnelly-666] " marriage or no marriage," words of contract de praesenti tempore, repeated after a person in orders, was a good marriage; for it was only by importunity of counsel a case was to be made thereof. If such a contract, alone and unaccompanied by a religious ceremony, had been a marriage, surely the case would have been decided on a shorter ground, and the objections, that the parson was an ejected minister, and that the ring was not used at the ceremony, according to the ritual of the church of England, would never have been urged.

In the case of Haydon v Gould (1 Salk. 119), Haydon and his wife were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, using the form of the Common-prayer, except the ring; but the minister was a mero layman, and not in orders; and after administration granted to Haydon, and subsequently repealed, the Court of Delegates affirmed the sentence of repeal. The reason given is " That Haydon, 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." In this case, the book adds, it is urged that this marriage was not a mere nullity, because by the law of nature it was sufficient; and though the positive law ordains it shall be by a priest, yet that makes such a marriage as this irregular only, but not void; but the Court ruled ut supra; the Reporter adding, that the constant form of pleading marriage is " per Presbyterum sacris, ordinibus constitutum." Perhaps the more correct expression might have been, " per ministrum sacris ordinibus constitutum;" for undoubtedly, after the Reformation, a marriage might [10-Clark & Finnelly-667] be as well solemnised by a deacon as a priest. But what is the whole result of the case but this, that by the English ecclesiastical law a contract of marriage per verba de praesenti was not alone sufficient (for such contract there was in fact); but that by the same, law, to make the marriage complete, there must be the presence and intervention of the priest? And when it is asked, as it was at your Lordships' bar, what had the priest to do, or what had he to say? the answer must be that he married them, and in doing so he used such form of words as were customary at the time of his performing the ceremony. The form of words of present contract found in the ritual of the church of England as established by the authority of Parliament, in the 2 and 3 Edw. 6, c. I, was not then for the first time made, but in part altered

10 Clark & Finnelly 668, 8 ER p894

and in part retained from the former rituals which had been handed down from the greatest antiquity; just as it was declared by the Council of Trent (Session 24, c. 1), when it prescribes certain words to be used by the parish priest when performing the office of matrimony; viz. " Ego vos in matrimonium conjungo, in nomine Patris et Filii et Spiritus Sancti." The decree also adds, " vel aliis utatur verbis, juxta receptum uniuscujusque provinciae ritum."

The only remaining decision of a Court of Common Law, to which it may be necessary to refer, is the case of The Queen v Fielding, upon an indictment for bigamy (14 State Trials, 1327). The evidence given of the first marriage was, that the parties made a contract per verba de praesenti in English, in the presence of and following the words of a priest in orders, though he was a priest in the orders of the church of Rome; and Mr. Justice [10-Clark & Finnelly-668] Powell, in summing up the case to the jury, more than once adverts to the fact that the marriage was by a priest. "If you believe Mrs. Villars," he says, " there was a marriage by a priest." There is no reason to infer from this direction to the jury, that if the first marriage in this case had been merely a contract per verba de praesenti, in the presence of a layman, the offence of bigamy must have been committed; but the inference to be drawn from the summing up of the Judge is directly the reverse.

My Lords, this being the state of the decided cases from the earliest time to the time of Queen Anne, the principal direct authority adduced on the part of the Crown is the dictum of Lord Holt, in Jesson v Collins (2 Salk. 437), " that a contract per ver a de praesenti was a marriage, and this is not releasable;" and the decisions which have subsequently taken place. That case came before the Court upon a motion for a prohibition, upon a suggestion that the contract was in fact per verba de futuro, for which the party had remedy at common law, and the case was disposed of by the Court, and the

prohibition refused, upon the ground that the Spiritual Courts have jurisdiction of all matrimonial causes whatsoever, and that there was no reason to prohibit them, because this may be a future contract for breach of which an action at law will lie. This appears distinctly from the Reports of the same case in 6 Modern, 155; and Holt's Reports, 457. This being the state of the case, Holt, Chief Justice, in speaking to it before the Court, used the expression above referred to. It is obvious, in the first place, it was unnecessary to the case before the Court; for whether present words or future words, the prohibition [10-Clark & Finnelly-669] must equally be refused. The observation, therefore, is not entitled to the same weight and authority as if it had been the very point of the case before the Court. If by the terms "ipsum matrimonium," Lord Holt intended to lay down the position that it was so held by the common law of the land, notwithstanding the unbounded respect which all who have succeeded him have ever felt and still feel for his learning and ability, we cannot accede to his opinion. If, however, the observation was intended with reference to the civil law or the canon law of Europe, then it is perfectly correct; and that such was the intention of Lord Holt we think abundantly clear from Wigmore's Case, which follows the former in the same page of Salkeld, and which was decided three years later than the first. In that case the husband was an Anabaptist, and had a licence from the Bishop to marry, but married this woman according to the forms of his own religion; et per Holt, Chief Justice, by the canon law, a contract per verba de praesenti is a marriage."

In Holt's Reports the expression is precisely the same, by the canon law;" and Lord Chief Justice Holt is there made further to say, " In the case of a dissenter married to a woman by a minister of the congregation who was not in orders, it is said that this marriage was not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made, by a priest, that law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the church of England to entitle the privileges attending legal marriage, as dower, thirds, etc." It cannot be supposed that Lord Holt would limit the observation [10-Clark & Finnelly-670] to the canon law, as undoubtedly he did in Wigmore's Case, if it had been maintainable in the larger and unqualified extent supposed to have been stated by him in the case of Jesson v Collins; and if the latter statement agrees with all the authorities, and the former is not, as we conceive, supported by or consistent with them, we are

10 Clark & Finnelly 671, 8 ER p895

bound to infer, either that there is some error in the Reporter, or that he really meant the proposition to be limited to its more restrained sense.

My Lords, this dictum of Lord Chief Justice Holt is of the more importance because it appears to have been the origin of all the subsequent opinions expressed by different Judges to the same effect. When Sir William Scott lays it down as the law recognised by the temporal Courts of this kingdom, he cites this dictum of Lord Chief Justice Holt, which he observes (as he is justified in doing by the Report in 6 Modern) was agreed to by the whole Bench. When Gibbs, Chief Justice, makes the same observation, he expressly relies on the authority of Sir William Scott; Latour v Teasdale (8 Taunt. 832). When Lord Kenyon makes a similar observation, probably on the same authority, observe how carefully he guards himself: - " I think," he says, " though I do not speak meaning to be bound, that even an agreement between the parties per verba de praesenti is ipsum matrimonium;" Reed v Passer and Others (Peake's N. P. 303). When Lord Ellenborough lays down the same doctrine in Rex v The Inhabitants of Brampton (10 East, 289), he is giving judgment in a case of a marriage per verba de praesenti celebrated by a priest (though whether Roman-catholic or Protestant, he says, does not appear); and when he refers to the [10-Clark & Finnelly-671] authority of Holt, Chief Justice, it is clear he considered Lord Holt to have been speaking of a marriage through the intervention of a priest. It is therefore of very great importance to estimate justly the weight of Lord Holt's observation, when contrasted with the large, field of authorities which has been opened; upon which authorities I have been longer occupied, because the question whereon we are called to answer depends upon the common law of England, of which the ecclesiastical law forms a part.

It will be improper, however, to close the discussion of this part of the case without adverting to an argument urged at your Lordships' bar, upon which some reliance appears to have been placed; namely, the state of the marriages of Quakers (all doubt as to which marriages is now set at rest by the statute passed in 1835) and of Jews.

The argument in substance was this; that as the persons professing the opinions of those respective persuasions celebrated their marriages according to their own peculiar rites, which necessarily excluded the intervention of a person in holy orders, according to the sense which those words are asserted to convey; and as their marriages have been held legal with respect (as it is argued) to all the consequences attending marriage, such as legitimacy, administration, and other civil rights; so the validity of such marriages can only be grounded upon the assumption that a contract of marriage per verba de praesenti did by law constitute a marriage itself.

Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews amounted to a tacit acknowledgment by the Legislature that a marriage, solemnised with the religious [10-Clark & Finnelly-672] ceremonies which they were respectively known to adopt, ought to be considered sufficient; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract per verba de praesenti; but, on the contrary, the inference is strong, that they were never considered legal. The Legislature, in the statute 6 and 7 Will. 3, c. 6, s. 63, enacts, that all Quakers and Jews, and any other persons who should cohabit and live together as man and wife, should pay the duty thereby imposed on marriages, and that upon every pretended marriage made by them they should give five days notice; with an express provision in the 64th section, that nothing in the Act contained should be construed " to make good or effectual in law any such marriage or pretended marriage, but that they should be of the same force and virtue, and no other, as if the Act had not been made." And the case before Lord Hale, to which so much weight was attributed, as conveying his opinion that the marriage was good, appears rather to show his opinion to have been the reverse. 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;" a declaration which plainly intimates that the inclination of his own mind was that the marriage was not good. We cannot, therefore, think that the case of the Quakers, although certainly one which it is difficult altogether to dispose of amounts

10 Clark & Finnelly 673, 8 ER p896

to such a difficulty as to induce us to alter the opinion founded on the authority of the decided cases.

And as to the case of the Jews, it is well known that in early times they stood in a very peculiar and [10-Clark & Finnelly-673] excepted condition. For many centuries they were treated, not as natural-born subjects, but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might therefore be regarded as constituting a legal marriage, without affording any argument I as to the nature of a contract of marriage per verba de praesenti between other subjects. But even in the case of a Jewish marriage it was more than a mere contract; it was a religious ceremony of marriage; and the case of Lindo v Belisario in so far from being an authority that a mere contract was a good marriage, that the marriage was held void precisely because part of the religious ceremony held necessary by the Jewish law was found to have been omitted.

I proceed now to refer to certain statutes passed by the Legislature at different times from various enactments and expressions in which statutes, the inference appears to follow, that a mere contract per verba de praesenti could not at those several times have been generally held to constitute complete marriage.

The statute 32 Hen. 8, c. 38, for marriages to stand notwithstanding pre-contracts, in its preamble gives no support to the doctrine, that by the law of England the contract per verba de praesenti was an actual marriage. It recites the mischief, that after divers marriages have been solemnised and consummated, and fruit of children, " nevertheless, by an unjust law of the Bishop of Rome, which is that upon pretence of a former contract made and not consummate, the same were divorced and separated and then proceeds to enact, that every marriage, being contracted and solemnised in face of the church, and consummated, or with fruit of children, shall be [10-Clark & Finnelly-674] deemed lawful, good, and indissoluble, notwithstanding any pre-contract, not consummate, which either party shall have before made.

The statute 2 and 3 Edw. 6, c. 23, enacts that, as concerning pre-contracts, " the former statute should be repealed, find be reduced to the state and order of the King's ecclesiastical laws of this realm " (an expression of no slight importance, when considered with reference to the force within this kingdom of the general canon law of Europe), " which before the making of the said statute were used in this realm; so that, when any cause or contract of marriage in pretended to have been made, it shall be lawful to the King's ecclesiastical Judge of that place to hear and examine the said cause, and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnisation, cohabitation," etc. The language of the Legislature in this Act does surely imply a marked and acknowledged distinction between contract and matrimony. To refer next to the statutes passed relating to the marriages of priests, the 31st Hen. 8, c. 14, punishes with death any priest who shall carnally keep or use any woman " to whom he is or shall be married, or with whom he hath contracted matrimony;" thus assuming the contract to be one thing, actual matrimony to be another, although visiting both offences with the same measure of punishment.

The statute 12 Chas. 2, c. 33, intitled "An Act for Confirmation of Marriages," enacts

"that all marriages had and solemnised after a certain day before any justice of the peace, shall be adjudged and taken to be of the same and of no other force and effect as if such marriage had been

had and solemnised [10-Clark & Finnelly-675] according to the rites and ceremonies established or used in the church or kingdom of England"
It is true that that Act is declared to be passed " for the preventing and avoiding all doubts and questions touching the same;" but as the Act or Ordinance referred to contained a form of contract per verba de praesenti of the most accurate and precise description, and before witnesses, it affords ground to infer that a contract of that nature had not, in the general opinion, the force of an actual marriage: - and observe how very strong the inference is from the proviso, "that issues on the point of bastardy or lawfulness of marriage, depending on these marriages, should be tried by a jury." Why not let them go to the Ecclesiastical Court, as before, if by the law of that Court the contract per verba de praesenti was held an actual marriage without any religious ceremony?

The statute. 7 and 8 Will. 3, c. 35, passed to enforce the laws which restrain mar

10 Clark & Finnelly 676, 8 ER p897
riages without licence or banns, had for its object the levying a revenue by the stamps imposed by a former Act upon licences of marriages. For this purpose it lays a penalty of £10 by the fourth section, " on every man so married without licence or publication of banns as aforesaid;" that is upon reference to the preceding clause, "married by any parson, vicar, curate, or other minister as their substitute." If the Legislature had thought a contract per verba de praesenti before any person not being in holy orders was a valid marriage, it surely would not have left the remedy so defective, but would have enacted that every man married without a licence shall be made liable to the penalty.

The statute 10 Anne, c. 19, is an Act for raising money for the use of the kingdom; and in section 176 provision is made to prevent the great loss of duties [10-Clark & Finnelly-676] on marriage licences which had been sustained by the frequency of clandestine marriages. The provision is that every parson, vicar, or curate, or other person in holy orders, who shall after a certain day marry any person in any church or chapel, or in any other place whatsoever, without publication of banns, or without licence first had from the proper Ordinary for such marriage, shall forfeit £100. Would this penalty have been limited to the case of marriage by a person in holy orders, if it had been conceived by the framers of the Act that a contract per verba de praesenti alone, without the aid of the priest, had constituted a complete marriage? The inference arising from these Acts is not certainly so very strong, but whatever inference can be drawn has a tendency to support the opinion at which we have arrived.

The various Acts of Parliament which have been passed from time to time, and which have been referred to in the course of the argument, imposing penalties on the solemnisation of marriages by Roman-catholic priests in Ireland, between Protestants, or between a Protestant and a Roman-catholic, and nullifying such marriages, are founded in good sense, and with a view to attain a definite object, upon the supposition that the presence of a priest is necessary to make the marriage good, and upon that supposition only; but they are a mere dead letter, if the contract per verba de praesenti without the priest makes the marriage. And if this is no proof, as perhaps it in not, that such was necessarily the law, it is at least a proof that it was the prevailing general opinion, both amongst the people and the Government, that by law the presence of the priest was essential to the contract.

But upon referring, in the last place, to the statute 26 Geo. 2, c. 33, the Act for the better preventing [10-Clark & Finnelly-677] clandestine marriages, it will be found that the provisions thereof throw a stronger light upon the subject. If a contract per verba de praesenti had been considered by the Legislature as " ipsum matrimonium," one would have expected that all such contracts made after the Act came into force, if not made illegal, would at least be declared null and void. There could have been no more effectual mode of suppressing clandestine marriages; but there is no such enactment. The only clause that affects these contracts is the 13th, which enacts only " that no suit or proceeding shall he had in any Ecclesiastical Court in order to compel a celebration of any marriage in facie ecclesiae, by reason of any contract of matrimony whatsoever; whether per verba de praesenti or per verba de futuro, which shall be entered into after the 25th March 1754." These contracts per verba de praesenti are still, therefore, lawful, though they cannot be enforced in an Ecclesiastical Court. If these contracts did not before and at the time of passing the Act constitute a valid marriage, but were only the necessary means, the basis, for enforcing the solemnisation, there is then no injury in leaving them as they were; but if they ever constituted a valid marriages of themselves, not being made null by the Act, so do they still; and then may some great and almost inextricable difficulties occur from the absence of such provision.

Before the passing of the Act, and indeed since, put the case that A. made a contract of marriage per verba de praesenti with B., and then, in the lifetime of B., marries C. in facie ecclesiae, and that he has children at the same time both by C. and B; B. dies; are the issues of both legitimate? It in clear from the decisions, that the issue of A. and C. are legitimate;[10-Clark & Finnelly-678] and if the argument on the part of the Crown, that the contract with B. makes the marriage, be well founded, the

issue of B. is legitimate also. Suppose two sons, born at the same time one from each mother, a possible event, which is the eldest son and heir? This and many more

10 Clark & Finnelly 679, 8 ER p898
cases of difficult solution may be put, if the contract per verba de praesenti was by the English law held to be actual marriage; and from these considerations arises the necessary inference that it was not; and thus do arguments from the enactments of the Legislature combine and agree with the authority of the decided cases, to prove that such never was the law of England.

My Lords, I proceed, in the last place, to endeavour to show that the law by which the Spiritual Courts of this kingdom have from the earliest time been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those Courts proprio vigore, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical Constitutions of our Archbishops and Bishops, and by the Legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law. And if it shall appear, upon reference to this law, that there is no incontrovertible authority to be found therein that marriage was held to be complete before actual celebration by a priest, the absence of such direct authority in the affirmative is sufficient to justify us in drawing the conclusion already formed, that the contract alone is not by the law of England the actual marriage. The result, however, of a somewhat hasty consideration of the authorities upon this [10-Clark & Finnelly-679] question (for the due research into which we were anxious to have obtained a longer time) appears to us to be that no such rule obtained in the Spiritual Courts in this kingdom.

It would scarcely have been necessary to have entered upon this part of the discussion, had it not been for the observations made by Sir William Scott, in the case of Dalrymple v Dalrymple [2 Hagg. C. R. 54]. That very learned Judge, after laying down in his deservedly celebrated judgment in that case, that marriage is a contract of natural law and of civil law also, proceeds to observe, " that when the natural and civil contract was formed, the law of the church, the canon law, considered it had the full essence of matrimony without the intervention of the priest;" which canon law is then stated by that eminent Judge to be " the known basis of the matrimonial law of Europe." The observation upon which so much reliance has been placed by the counsel for the Crown then follows: - " that the same doctrine is recognised by the Temporal Courts as the existing rule of the matrimonial law of this country;" although certainly the observation is in some degree qualified by the expression, " that the common law had scruples in applying the civil rights of dower and community of goods, and legitimacy, in the cases of these looser species of mar-

My Lords, as we have already stated, in the opinion we have given, that we do not conceive it to be part of the law of the Temporal Courts that " when the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest," it is only proper to state, in the first place, that the entertaining, as we do, a different view of this subject from that eminent Judge, does not in any [10-Clark & Finnelly-680] manner whatever break in upon the authority of the decision in the case of Dalrymple v Dalrymple.

The doctrine of the Temporal Courts in England had no bearing at all upon a question which was to be decided solely by the law of Scotland; which country, it is well known, differs materially from ours in many of its legal institutions, and in none more pointedly than those which relate to marriage and legitimacy. Again, it was of no importance in that case whether the canon law of Europe was introduced into England as part of the law of the land; the only question necessary for the decision of the case then before the Court being, whether such canon law was introduced or not into the law of Scotland. The opinion, therefore, of that eminent person, so far as regards England, was uncalled for and extrajudicial; and upon that ground the question before us must be considered as unfettered by the weight of such great authority, and open to the most free discussion.

But that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law. Lord Hale defines the extent to which it is limited very accurately. "The rule," he says,
"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

10 Clark & Finnelly 681, 8 ER p899
and custom of England; for there are divers canons made in ancient times, and decretals of the Popes, that never were admitted here in England "
(Hale's Hist of Common Law, c. 2).

Indeed the authorities are so numerous, and at the same time so express, that it is not by the Roman canon law that our Judges in the Spiritual Courts [10-Clark & Finnelly-681] decide questions

within their jurisdiction, but by the King's ecclesiastical law, that it is sufficient to refer to two as an example of the rest. In Caudrey's Case (5 Co. Rep. 1), which is intitled " Of the King's Ecclesiastical Law," in reporting the third resolution of the Judges, Lord Coke says, " As in temporal causes the King, by the mouth of the Judges in his Courts of Justice, doth judge and determine the same by the temporal laws of England, so in cases ecclesiastical and spiritual, as namely," (amongst others enumerated) " rights of matrimony, the same are to be determined and decided by Ecclesiastical Judges according to the King's ecclesiastical law of this realm;" and a little further he adds, " So, albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by and with a general consent, are aptly and rightly called The King's Ecclesiastical Laws of England." In the next place, Sir John Davies, in " Le Case de Commendams " (Sir J. Day. 69 b., 70-72 b; ante, p. 612), shows how the canon law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus: - " Those canons which were received, allowed, and used in England, were made by such allowance and usage part of the King's ecclesiastical laws of England; whereby the interpretation, dispensation, or execution of those canons, having become laws of England, belong solely to the King of England and his magistrates within his dominions: - " and he adds, " Yet all the ecclesiastical laws of England were not derived and adopted from the Court of Rome; for long before the canon law, was authorised and published " (which [10-Clark & Finnelly-682] was after the Norman Conquest, as before shown), " the ancient Kings of England, viz. Edgar, Athelstan, Alfred, Edward the Confessor, and others, did, with the advice of their clergy within the realm, make diverse ordinances for the government of the church of England; and after the Conquest divers provincial synods were held, and many Constitutions were made in both the kingdoms of England and Ireland; all which, are part of our ecclesiastical laws of this day."

We therefore, can see no possible ground of objection to the inquiry, whether before the introduction of the canon law any law existed upon the subject of marriage differing from that of the canon law, and not afterwards superseded thereby; and when we find, in the collection of ancient laws and institutes of En gland published by the Commissioners of Public Records, amongst the laws of Edmund, one, which directs that at the nuptials, there shall be a mass-priest by law, who shall, " with God's blessing, bind the union to all prosperity," we can see no more ground to doubt the existence of this law (which does not now make its appearance for the first time, but was published by Wilkin (see, Wilkin's Concilia, 367) in the last century) than any Other document of antiquity which has been received as genuine without hesitation.

The Council held at Winchester in the time of Archbishop Lanfranc, in the year, 1076 (Johnst. Ecc. Law, A.D. 1076 s. 5), contains a direct and express authority with a nullifying clause, that a marriage without the bene-diction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. Numerous Councils follow, in which are decrees to prevent and [10-Clark & Finnelly-683] punish clandestine marriages, but in no one of which is there, any repeal, express or implied, of the rule laid down by the first; viz. that the presence of the priest, is necessary to constitute a legitimate, marriage; but the time of the marriage by the priest, the place where it is to be celebrated, and other, regulations, are prescribed, in order to meet, the evil which was then existing. That the marriage, through fmlled clandestine, was still, a marriage celebrated by a priest, and so assumed to be, is placed beyond all doubt by the 11th Constitution of Archbishop Stratford, established by the Council of London(Johnst. Ecc. Law, AD 1343, s. 11; 2 Wilkins! Concilia, 706): - " De celebrantibus matrimonia clandestine in ecclesiis oratoriis vel capellis" That Constitution recites in effect, that people left their own places-of residence, where the impediments to their, marriage were notorious and their parish priests not disposed to solemnise, their marriage, and betook themselves to

populous places where, they, were unknown, in order, that " aliquoties in ecclesiis aliquando, in capellis seu oratoriis matrimonia inter ipsos de facto, solemnizari procurent." What is this but a plain assumption that the marriage so celebrated, was celebrated by a priest? for surely none, others but persons in holy orders could celebrate them in churches, chapels, or oratories.

The authority of John De Burgo, a dignitary of the church of England, was much relied on, as a direct proof that a contract per verba de praesenti was sufficient to constitute complete matrimony, without the presence or, intervention Of a priest. The materials, of his work, bearing the quaint title of Pupilla Oculi, were compiled in 1385, and the work itself printed at Par-is; but afterwards, in the year 1400, [10-Clark & Finnelly-684] an edition was printed in London, " Omnibus Presbyteris precipue Anglicanis summe necessaria." The work contains, amongst other things, a treatise on the Administration of the Seven Sacraments; and under the head " De Sacraments matrimoniali " occurs the passage relied on by the Crown. The author lays it down,

"Of the minister of this sacrament it is to be observed, that no other minister is to be required distinct from the parties contracting; for they themselves for the most part minister, this sacrament to themselves, either the one, to the other, or each to themselves."
And a little further he adds, " Scotus says, that to the conferring of this sacrament there is not required the ministry of a priest, and that the sacerdotal benediction, which the priest is wont to make or, utter, upon married people, or other prayers uttered by him, are not the form of the sacrament nor of its essences but something sacramental pertaining to the adorning of the sacraments From this passage it is clear, that, whether absolutely necessary or, not, it was at least usual and customary at that time to make the contract before the priest. It appears further, from the first words of the following chapter, " De. Matrimonio, clandestine, " that such course was ordered by the church: - " Inhibitum, est contrahere, nuptias occulter sed publice, coram sacerdote, sunt nuptiae, in Domino, cohtrahendae." If, therefore, in the passage, above cited, the author intends to express thus much only, and no more, viz. that by the contra at per verba de praesenti, made privately between themselves, that mysterious sacrament of which he is speaking has been taken by them which makes the contract indissoluble, and capable of being enforced by either against the other in facie ecclesiae, such doctrine, is admitted to be consistent with the [10-Clark & Finnelly-685] ecclesiastical law received in England; but if it is supposed to mean mare, if it is held up as an authority that the marriage is complete for an civil purposes of legitimacy, dower, and other civil rights, then, before we accede to the proposition, it is the safer course to discover, if possible, whether the doctrine of the text writer is or, in not consistent with the recognised laws and Constitutions of the church of England then in force, and with the course and practice, of the Ecclesiastical Courts of England at that time; and in case of a discrepancy between them, to reject the authority of the text writer, and to adhere to that of the recognised law and the practice of the Courts; for there is no surer evidence of the law in any particular case than the course and practice of the Courts in which Such law is administered. We should treat the best of our text-writers, Sir William Blackstone, for example, precisely in the same way.

Now, at the time of the publication of John de Burgo, and of the other work, intitled " Manipulus Curatorum, " cited for the same purpose, there stood, unrepealed by any subsequent Constitution of the church, both the Constitution of Lanfranc, before stated, and the subsequent Constitutions of the church against clandestine marriages: - the former directly declaring the presence, of the priest at the marriage to be necessary to give it validity; the latter, implying such necessity. I ask whether the Courts of Ecclesiastical Law of England would take the law, if the very paint in controversy was brought before them, from the text writer, of the day, or from the Constitutions, of the church? I doubt not, however learned or in whatever, estimation the text-writers might be it would be from the law of the church; and as to the course [10-Clark & Finnelly-686] and practice of the Courts of Ecclesiastical Law in respect to a matrimonial suit to enforce marriage upon a contract per verba de praesenti, the prayer upon the libel has been, not to pronounce that the parties are already actually and completely, married, but that it may be pronounced " for the validity, full force, and strength of the said contract of marriage, to all effects and intents in law whatsoever; and that the defendant may be compelled to solemnise

10 Clark & Finnelly 687, 8 ER p901
the said marriage in the face of the church" (Clerk's Instructor, 326): - just as in Bunting's Case, before cited, the decree, was not that Agnes was married, but that Agnes " matrimonium subiret."

And when reference, is made to Oughton (Vol. I, 283), the same appears more distinctly to be the form of proceedings; and it would be most singular, if the contract per verba de praesenti was considered by the Court as an actual complete marriage, that a provision should be made for the Court to inhibit the party, " pendente lite, from contracting matrimony, or, procuring matrimony to be solemnised." If the Court held the first marriage to be entirely complete, surely the statute of James, which had then been passed more than a century, and which made the second solemnisation a felony, would have been a surer protection than the inhibition of the Court. But the necessary inference is that the Court could not have so held the effect of the contract; and it follows, therefore, that the authority of the passages above cited cannot be safely relied on, against the Constitutions of the church and the practice of the Spiritual Court.

We now pass to the consideration of the particular circumstances involved in the first question proposed [10-Clark & Finnelly-687] by your Lordships, which supposes this marriage to have taken place in the house and in the presence, of a placed and regular minister of the congregation of Protestant dissenters called Presbyterians.

As, we have already stated our opinion, that to make the marriage) a complete marriage, it must be solemnised in the presence of a minister in holy orders, it is only necessary to look back to the time when that law first obtained in England to enable us to answer, that question without difficulty.

At the early period when such law arose, and down to a comparatively recent period, the expression priest, curate, minister, deacon, and person in holy orders, which are the words met with in

the different Constitutions and Councils and authorities bearing on the subject, could point to those persons only who had received episcopal ordination; there, were, no others, known at all; all but they were laymen: - and unless some Act of the Legislature has interposed its authority, and given the Protestant dissenting minister in Ireland the same power for this purpose as the persons in holy orders did before possess, we think the entering into, the contract in his presence cannot, in the legal sense of the word, be held to be entering into it in the presence of a person " in holy orders." Now no statute has been brought forward, except the 21st and 22d. Geo. 3, c. 25 (Irish); but the operation of that statute is limited to matrimonial contracts or marriages between Protestant dissenters, and solemnised by Protestant dissenting ministers, or teachers; and as your Lordships' question goes on to state that one of the contracting parties in this case is not a Protestant dissenter, but a member of the Established Church of England and Ireland, it follows that the case does not fall within that statute, and [10-Clark & Finnelly-688] that it must be decided as if that statute had never been, passed.

My Lords, the two subsequent conditions or circumstances contained in your Lordships' question can obviously make no difference. The form of the religious ceremony cannot, upon any principle or, upon any authority, compensate for the want of the presence of the proper minister, assuming such presence to be necessary; nor can the circumstance of subsequent cohabitation carry the validity of the marriage higher than the original force of its obligation.

The main and principal point, however, of your Lordships' first question still remains to be answered; viz. whether, after, such a contract entered into between A. and B., whether, A., by marrying C. in England whilst B. is still living, commits the crime of bigamy?

And after the full discussion of the general question, and our, opinion already declared, that the first contract does not amount to a marriage by the common law, it is hardly necessary to say that we hold the offence of bigamy has not been Committed. Indeed, independently altogether of the answer we have, given to that abstract question, and admitting, for the sake of argument, that the law had held a contract per verba de praesenti to be a marriage, yet, looking to the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence, of bigamy could not be made out by evidence, of such a marriage as this The words are, " If any person, being married, shall marry any other person during the life of the first husband or wife;" words

10 Clark & Finnelly 689, 8 ER p902

which are almost the very same as those in the original statute of James 1. Now the words " being married," in the first clause, [10-Clark & Finnelly-689] and the wards " marry any other personal" in the second, must of necessity point at and denote marriage of the same kind and obligation. If, therefore, a marriage per verba de praesenti, without any ceremony, is good for the first marriage, it is good also, for the second; but it never could be supposed that the Legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counter-pleaded) the man who had in each instance, entered into a contract per verba de praesenti, and nothing more. Waiving, however, that consideration, it is enough to state to your Lordships, as the answer to the first questions that in our opinion A. did not, under the circumstances therein stated, commit the crime of bigamy.

My Lords, we have so, fully and pointedly answered the second question proposed by your Lordships, in stating the grounds of our first answer, that it is unnecessary to trouble you with any further, observation thereon, except that as the statute of 58 Geo. 3, c. 81, has enacted that no suit shall he had to compel the celebration of such a contract in any Ecclesiastical Court in. Ireland, we think this question also should be answered in the negative.

In conclusion, I would only observe, that, although I am authorised to state that our opinion on the questions proposed to us is unanimous, yet I ought to add that my learned brethren are, not to be held responsible to r the reasoning upon which I have endeavoured to establish the validity of that opinion.

Lord Brougham: - My Lords, in rising to move that the opinions of the learned Judges be printed, I am sure, I only anticipate that which must have) been the feeling of every one of the noble Lords who have [10-Clark & Finnelly-690] heard the argument in this case, - a feeling of great gratitude to the learned, Judges for the extraordinary attention which they have bestowed upon this most important case, and for the great pains which they have taken in investigating the grounds of the opinions, they were about to submit to your, Lordships, and of peculiar thankfulness, to the learned Judges for their having done, so, in circumstances which, from what passed the last time that they were here, must be understood to have imposed peculiar difficulties upon them: - I mean the extent, variety, and urgency of their occupations, with which the great attention they have bestowed upon the question must needs have interfered.

I hope, therefore, my Lords, that as I most heartily and since-rely thank their Lordships for the able statement of their, opinions with their reasons, which we have just now heard from my Right honourable friend the Chief Justice of the Common Pleas, I shall not be suspected of derogating at all

from that respect, from that profound deference which I owe to their opinion, or of at all retracting what I have said in expressing my gratitude, and your, Lordships' gratitude (for I assume that I do, express your opinions and feelings as well as my own in so thanking the learned Judges), if I proceed to state, in a very few wards, my deep regret at finding that, though there have, been considerable fluctuations and doubt in the minds of some of the learned Judges, yet - that as in the end they have all acceded to the result, though not bound by the reasons upon which that result is made to rest my regret that we have not had the benefit of those arguments and those views, which had at first given rise, to considerable fluctuation and doubt in the minds of some of those learned persons, and of the [10-Clark & Finnelly-691] process of reasoning by which that fluctuation was made to subside into calm, and by which the doubts were, to a certain degree at least, removed.

My Lords, I can very well imagine, being now left to my own conclusions from not having heard them stated, I can very well imagine the grounds of the fluctuation, and the foundation of those doubts; for in the first place, it is to be observed that we have now heard the learned Judges come to a conclusion, into which if we shall follow them, we neither more nor, less than lay clown this proposition,- Startling to me I confess, novel to my mind I admit, that England is the only country in Christian Europe, which has adopted this peculiar, law; that all Christian Europe being one great moral territory, one great field, over, which law extends one great mass, of people, bound together, by, and living together under, the some system of polity ecclesiastical. living together under the same system of faith Christian, namely the catholic faith of all Christian people,-that all this body

10 Clark & Finnelly 692, 8 ER p903

holding the same doctrine respecting marriage, and exercising the same jurisdiction touching marriage rights, founded upon the same system of religious and civil polity, whether it be derived from the civil law as its fountain, or from the canon law in its connexion with the common catholic faith of Europe, that all this mass of people, that all these realms, with all their jurisdictions, lay and clerical, have one rule, one guide, one system, one polity, one law, but that England alone is the one solitary but prominent exception to that law, that rule, that polity, that system, and alone adopts a principle, not only irreconcilable with, but in diametrical hostility and opposition to the polity and the legal and ecclesiastical system of all Christian Europe.

[10-Clark & Finnelly-692] My Lords, finding that this is a case of such exception, I naturally am led to look to see whether the Judges, in dealing with these questions, have not held that the community and universality of the canon law is of the utmost possible weight in determining the particular law of any one, given country. And I find some of the most venerable authorities, particularly Lord Stowell, precisely adopting that very view, and resting his judgment as to what was the law of one country, namely Scotland, upon that ground I am speaking now of what clearly is not extrajudicial, for it is the decision itself, resting his opinion as to what must have been the law of Scotland upon his opinion or his knowledge of what was, the law of all Europe, and therefore holding that, until you displace the general law by proving Scotland to be an exception, until you show that there are, either decisions of the Courts or statutes made, in Scotland to take it out of the common law of Europe,-he should hold it to be the law of Scotland, because it was the law of the rest of Christian Europe. It is clear, therefore, what Lord Stowell's. opinion would have been upon this most fundamental point. It is clear that he, would have felt the same difficulty which I feel in coming to a conclusion which excepts England from every other country in Europe,-England, in which the catholic religion was the same,-England, in which the ecclesiastical law was the same, and from whose decision there lay an appeal to the same common forum of appeal, namely, the Pope at Rome, till the statutes of Henry 8 took it away, and severed us from the catholic church,-that England should be an exception to all Europe, he would have found the same difficulty in believing the possibility of which I now feel, and which must therefore have been one of the grounds [10-Clark & Finnelly-693] of fluctuation and of the doubt in the minds of some of the learned Judges, to which my Right honourable and learned friend the Chief Justice has referred.

My Lords, there is another ground of fluctuation and doubt, and another very startling consequence, which I also feel grievously oppressive, if I am to come to the same conclusion at which the majority of the learned Judges have arrived, and to which they have all acceded; upon what reasons we have, not been informed. If we come to that conclusion, I also affirm this, that many, many persons are unmarried, who have thought that they were married; that many, many husbands have now a right to bid their wives, or supposed wives, abire et sibi habere res suas; that many, many children who have hitherto hoped and believed that they were legitimate, are now bastards; and that not only is that the case with respect to the status of the parties, and that not only may notice be given instantly in Ireland by those husbands who no longer wish to have their wives as wives, or by those wives who no longer may wish to have their husbands as husbands; but that, supposing a question of pedigree, shall arise in any of the Courts of Ireland or, England, and that a link of that pedigree shall depend upon a marriage had 20 or 30 years ago between the parents of the alleged legitimate heir through whom the

claim is made, or through whom the title is deduced; the proof that that marriage comes within the scope, of this decision, that it was only per verba de praesenti and before a Presbyterian parson, not a priest in holy orders, is fatal to the marriage, and fatal to the legitimacy as one of its necessary links. Now, my Lords, has, or not, the common opinion been very prevalent, very universal, that these marriages were valid? I cannot answer that question in the negative.

[10-Clark & Finnelly-694] The Lord Chancellor: - Will my noble and learned friend allow me to suggest, whether, the prudent course would not be that we should for the present abstain from making any observation upon the case, and consider what course we should take? It is a subject of the deepest interest upon which we have now heard

10 Clark & Finnelly 695, 8 ER p904

the unanimous opinion of the Judges here. We know that in Ireland the Judges were equally divided: - and upon a subject of such deep and vital interest and importance, I should propose that we should consult together, and consider what course we ought to take, but that it is not at present advisable to suggest what that course shall be

Lord Brougham: - I cannot, certainly, mean now to suggest the course, but what I meant to say is this: - my noble and learned friend must be aware that it is going out to Ireland, by this night's post, that the learned Judges have given their unanimous opinion upon this point. What I am about to state is to bring comfort to the minds of some, and to give warning to other, parties how they act upon this opinion. It appears to me to be of paramount importance that they should have that comfort, in the first place; and, if it be possible, of still more importance that, in the next place, they should have this warning; otherwise you may have parties marrying again upon the faith of this decision if they look upon this as a decision, and they may marry to their, cost, because nothing follows, from this It does not follow from this, in the first place, that your Lordships shall, agree with: - the decision of the learned Judges; and it still less follows, that if you do, agree, with that decision, no legislative, Act would pass. Therefore, my Lords, I hold that this warning ought to be given to the Queen's subjects in Ireland, [10-Clark & Finnelly-695] that no intermediate marriages may take place, though the learned Judges are of opinion that such marriages would not be bigamous. People must not go away with the idea, that because the learned Judges have come to this opinion in the circumstances to which I have adverted, therefore your Lordships will agree in that opinion, and that those second marriages would be valid, as they are according to the opinions of the learned Judges; whereas they may be in the opinion of your Lordships, notwithstanding that opinion of the learned Judges, bigamous and vo-id.

My Lords, I had arrived at the end of what I was about to submit to your Lordships, with one, single exception; and I beg the attention of your, Lordships to this observation, the last with which I now proceed to trouble you. I have known cases in which plain and manifest errors have, crept into the law; I have known those cases brought before your, Lordships for consideration; I have known a very remarkable, instance, where the error was upon the very face, of the principle introduced, I mean that case respecting the addition of 21 years to lives in being, with respect to the validity of an entail of lives in being, and where the foundation of the error was plain, and it was manifest that it was originally wholly groundless in law. When Cadell v Palmer (ante, Vol. I. p. 372) came before your Lordships, when I had the honour of presiding in this House, that question was, raised and argued at the bar, and your Lordships, had the benefit of the assistance of the learned Judges, who were all of opinion, and I argued myself that case upon that ground, and so your, Lordships were pleased to determine, that though clearly and undeniably it all rested upon an error; though the origin of the mistake was plain, [10-Clark & Finnelly-696] namely the non-existence of a per-son, till 21 years after the lives in being, who could suffer a recovery or levy a fine to bar the remainder over; though the origin of the principle, was clearly proved to be first of all an error; yet, as so many years had passed in which the principle had been received, and so, many titles depended upon it, and as so, great mischief could arise from undoing it and taking the opposite course, the error was admitted facem jus, and the decision was made according to that, and so it now remains the law. My Lords, I can hardly conceive any case which more required the application of that remedial principle I venture, to submit to the wisdom of your Lordships, than does the present: - considering the delicacy and importance of the rights both of parents a-lid children; considering the shake to be given to settled titles to property; considering the widespread consequences of affirming this doctrine, I can hardly conceive a case which more would have admitted, or more would have required, the application of that principle. to go no further back that the judgment of Sir William Scott, which has been held to make the law ever since that judgment was pronounced; Sir William Scott corrected with his own hand every line and , word and letter of that judgment, and that judgment proceeded upon the adoption of the principle to which I have referred; and it was not an extrajudicial opinion, it was the cornerstone of that judgment of Sir William Scott.

10 Clark & Finnelly 697, 8 ER p905

My Lords, it is upon these grounds that, repeating my thanks and my expressions of gratitude, on the part of your Lordships as well as of myself, to the learned Judges, for the pains which they have bestowed upon this question, I shall venture to hope that very full consideration will be; given to those arguments [10-Clark & Finnelly-697] which the learned Judges have adduced in support of the opinion which they have given to your Lordships; and that, after having fully considered those arguments, if you find unhappily that you should be obliged to arrive at the some conclusion, it will be a matter of still more anxious consideration to provide that remedial measure of legislation which will become necessary should you affirm this judgment.

The Lord Chancellor: - I move your Lordships that the) further, consideration of this case be adjourned. I will only say that I subscribe entirely to what my noble, and learned friend has stated with respect to the extreme, obligation which we owe to the learned Judges, for the attention which they have given to this case.

Lord Campbell: - My Lords, I entirely and heartily concur, with the sentiments expressed by both my noble and learned friends, in giving all praise to the learned Judges for the manner, in which they have considered this question. For the present, my Lords, I abstain from expressing any opinion of my own upon the subject. It is a matter of such unspeakable importance, that I am afraid to trust myself at present to express any opinion upon it.

My Lords, the opinion delivered by the learned Judges is entitled to be received with the most profound respect: - at the same time, your Lordships are well aware that you are not bound by it. You have the great advantage, of consulting the learned Judges, and asking for their opinions upon any matter, of law that arises in the performance of your functions, either as Judges or as Legislators; and to the opinions of the learned Judges you will always pay the most profound respect, and the strongest presumption arises that what [10-Clark & Finnelly-698] they declare to be the law, is the law., But still, when you are) to decide as Judges, you must decide upon your own opinion; you must conscientiously believe that the law is that which you pronounce, it to be

My Lords, I shall consider, the reasons assigned by the learned Chief Justice with every possible respect, and every desire, I may say, to concur in the opinion which he has announced, because, it would be with great reluctance that I should differ from the opinion of the learned Judges. At the same, time, I cannot disguise from myself and from your Lordships that it is with some reluctance that I should arrive, at a conclusion which would declare, that Quakers and Jews, believing that they were living in a state of lawful matrimony, had been living in a state, of concubinage, and that their children, who have, been supposed to be legitimate, are, all to be considered as bastards. It would be with some, reluctance) that I should come to that conclusion; and also that marriages performed by Presbyterian ministers in England, in India, and in other, parts of the Queen's dominions, which have been considered to be lawful, are unlawful, and that the parties are living in a state of concubinage, and that their, children are illegitimate. My Lords, the law may be so; there, is every presumption that it must be so, because the law has been so declared by the unanimous opinion of my Lords the Queen's Judges. But still, it will be incumbent upon every noble Lord, who is called upon to give an opinion upon this important question, to act according to the conscientious opinion which he himself forms upon it.

Further consideration adjourned.

[10-Clark & Finnelly-699] Lord Brougham: - The opinion delivered by the Lord Chief Justice of the Common Pleas, on behalf of the Judges his learned brethren and himself, has received, as it well deserved, the greatest attention from your Lordships; and it now remains that such of us, as have, made, up our minds on the subject, should express the sentiments which we entertain, after profiting by a deliberate consideration of the arguments used to explain and enforce the conclusion that the Judges have arrived at.

In discharging a duty which would be incomparably More easy and less ungrateful could I agree with those learned persons, I must be permitted, in the first place, to express my regret if the course taken by me, with, I believe, the general concurrence of your Lordships, of urging the giving an answer to our questions

10 Clark & Finnelly 700, 8 ER p906

before this session should close,* shall be found to have occasioned the Judges any inconvenience, or precluded the fullest consideration of the important matters submitted to them.

I must be allowed to say how deeply I lament the peculiar form in which the assistance of the learned Judges has been tendered to us. The opinion purports to be unanimous; but the mare, important matter of the reasons urged to support it, would not seem to be thus represented. And although in ordinary circumstances this would be of little moment, in the present case there is a fact stated which gives it great importance indeed. Affirming the difficulty of the subject; confessing " that it is involved in still [10-Clark & Finnelly-700] deeper obscurity now than in former times, when one great authority declared that the law lay very loose regarding things naturally essential to marriage, and

others expressed themselves with considerable uncertainty upon it;" the learned Judges " acknowledge themselves unable to trace, or define, with absolute certainty, the boundary of marriage itself;" that is the whole matter in dispute. Nor is this all. W6 are told that some of those, learned persons, how many we are not told, at one time " felt considerable fluctuation and doubt," after the argument at our bar, and only "acceded to the opinion of the majority" upon grounds which are not given with a convenient, or indeed with any certainty; for it is distinctly stated, that the Chief Justice alone is to be understood as giving the reasons for an opinion in which all concur, but concur upon various grounds, some of which, alone, it is probable, are laid before us; nay, none of which may very possibly be given.

Now it is to be observed, that the opinions of the learned Judges are resorted to by your Lordships, not to decide the question before you, but to give you information, suggestions, and, generally speaking, assistance in forming your, own. It therefore becomes necessary that their reasons should accompany those opinions, and accordingly they are, by the course of your Lordships' proceedings, and, indeed, by your orders, invariably required. If, indeed, any difference were to be made in the value which we attach to the opinions and to the reasons, we should certainly regard the reasons as the more valuable, of the helps which we thus derive, from those, learned persons. Nothing, therefore, can be more, a matter of regret than the circumstances to which I have, in the outset of my argument, deemed it fitting that I should advert. [10-Clark & Finnelly-701] But, at the same time, that circumstance, is so far a matter of gratulation to me, that it somewhat lessens the difficulties under, which I labour in expressing an opinion at variance with theirs.

In approaching the very important question now before your Lordships, the first consideration that we find raised by the opinions of the learned Judges is that they have declared all marriages, void, and absolutely void, which are not solemnised by a clergyman or person in holy orders, in those parts of the British dominions to which the Marriage Act (26 Geo, 2) does not extend. Therefore, wherever the English law prevails, in all our numerous colonies to which no remedial Act had been applied, every marriage celebrated without a parson is void, and the issue are bastards. But this is not all; the same is equally true of all marriages contracted by those persons in this country who are expressly exempted from the operation of Lord Hardwicke's Act. Thus, all marriages of Jews and Quakers before the legalising Act of 1835-6 are absolutely void; and it follows that every Jew and every Quaker, the issue, of such marriages, that is every Jew and every Quaker now living and above eight years of age, is a bastard: - and, furthermore, it is another consequence of this doctrine, that every pedigree, any link of which depends upon the legitimacy of any Quaker or, any Jew, or any person born of a colonial marriage at which no priest assisted, becomes wholly imperfect, because no title can be made under it. Thus, if any purchase has been made, and a claim is preferred under it, and the title of the vendor has to be traced through any Jew or any Quaker, or, any person the issue of a colonial lay marriage, the purchaser's title is gone, and none can [10-Clark & Finnelly-702] take or can hold under it, although the full consideration has been paid,

10 Clark & Finnelly 703, 8 ER p907

and the title in all its other parts is complete. I am, of course, assuming that the flaw has not been removed by the lapse of time letting in the Statute of Limitations.

It is no doubt, certainly true, that incorrect or, even dangerous consequences, furnish no argument against a proposition which is consistent with itself and with undeniable principle, and supported by unquestionable authority; but it is at least as certainly true, that when any proposition leads to perilous consequences, and when its practical enforcement would bring on such mischiefs, we are called upon to scrutinise the foundations on which it rests, with a caution and a jealousy proportioned to the evils resulting from its adoption. We are bound only to admit it when we have no choice and no escape; when, pressed by arguments which the more we examine them, appear the more irrefragable, the necessity of yielding is plain; when (all the reasons commanding our assent) nothing remains but to declare the law, and leave the remedy, whether by prospective or retrospective acts of power, to the lawgiver himself. The view of such consequences affords the best possible reason for being slow, and even reluctant, to yield our assent, and for admitting nothing without the closest scrutiny. I shall afterwards show that those consequences of inconvenience or danger., point in another way to a support of the doctrine encumbered by no such evils. Keeping, however, the considerations in view to which I have adverted, let us proceed to that examination which those considerations require to be most full and minute.

It is necessary to begin by inquiring what is really [10-Clark & Finnelly-703] meant by a contract of marriage, or the contracting of marriage, within the limits and scope of the present argument. We clearly do not thereby intend a contract in the more ordinary sense, the more general acceptation of that word; we do not mean a contracting, an engaging, or bargaining to marry; such a contract is a mere article and condition of a marriage to be afterwards had; it is to this subsequent actual marriage that the term " contract " is applied in the present argument, and not to any mere mutual promise or

engagement to marry; such promise or engagement is a promise or engagement to contract a marriage. Now, all admit, and the opinions of the learned Judges pronounce the marriage contract thus designated, to be one of a very peculiar kind; for whether, it is to be regarded as ipsum matrimonium or not, they describe it as perfectly indissoluble; neither party can repudiate it or withdraw from it; neither party can release it; neither party can renounce for himself the stipulation, or let the other free from the obligation; both together are so absolutely bound, that both together cannot put an end to the mutual obligation thus contracted towards each other.

Such being the nature of the contract, we first ask how it comes to be called by a name, which in all other cases signifies something so entirely different? What other contract is unreleasable? What other has this perpetual and enduring force? The answer is plain: - there is a contract, and a contract in the ordinary sense of the word; the parties contract to take each other for husband and wife, to live together as such, and to perform the duties of that relation. If they contract to marry at a future time, it is a common contract to do something hereafter; that something [10-Clark & Finnelly-704] is to contract a marriage, that is to contract with each other to live together, as man and wife; the former contract is executory and releasable and dissoluble by mutual consent; the latter is executed, unreleasable, and indissoluble.

We next ask how such a contract as this can be said not to be perfect as soon as made, or to have, any reference to the future, or to contemplate any further operation for its perfection, or to require any further act towards its completion? How can it be made more lasting than by being perpetual? How can it be made more firm than by being placed beyond the power of the parties and of all mankind? How can it be made more binding than by being wholly indissoluble? The imagination is lost in its endeavours to fancy any one attribute that can be added, any one quality that can make the nature of this contract more ample, or its obligations more stringent.

But we hear mention made of proceedings in the Ecclesiastical Courts to enforce a performance, as it is called, of this contract. Let us not be deceived and led away by sounds. No. Court has now the jurisdiction to compel a performance of a marriage contract, if by that is meant to compel a marriage where parties have agreed,

10 Clark & Finnelly 705, 8 ER p908

have mutually promised, to marry. At all times this contract was put an end to by a subsequent marriage of either party. Accordingly these Courts only interfere where the marriage contract has been per verba de praesenti, tempore; and the libel always pleads that fact as the foundation - the necessary foundation - of its demand to have a sentence, requiring something further to be done. What is that something? Do these Ecclesiastical Courts assume the power, of compelling parties to do something more, [10-Clark & Finnelly-705] who had already contracted a marriage de praesenti? In two respects they certainly used to do so; in one of these respects they do so still, in the other they did so, till prohibited by the Legislature. They could compel the parties to perform the contract and fulfil their engagement of living together as man and wife, for they could give restitution of conjugal rights to the party complaining against the party refusing thus to perform his engagements, and this they still do; but they could also do, that which was certainly in its origin an usurpation,-they could compel the parties who had contracted the marriage civilly, to clothe their civil contract with religious ceremonies, by solemnising in the face of the church, a marriage contracted, that is made without the intervention of the church or its ministers.

That this solemnisation could a add nothing to the force of the contract, or the rights of the parties under it, is clear; because if it were necessary to perfect the contract, or to make those rights vest completely, we are left in total inability to conceive what the contract was during the interval between the making of it civilly and its alleged completion ecclesiastically. How could parties be bound indissolubly and perpetually, and yet be bound to do nothing? How could such obligations and such stipulations possibly remain suspended, as regards all the things contracted to be done, and yet in full binding force as to the impossibility of the obligations being determined? If the contract was indissoluble, it must be to do something; it was utterly absurd to hold that the parties were indissolubly bound to do nothing.

But if the only reasonable, way of getting over this formidable, difficulty be resorted to; if it be said that [10-Clark & Finnelly-706] the contract made without a priest, is only a contract afterwards to make one with a priest; the answer, is at hand, and it seems irrefragable. There, is no difference whatever, not in a single iota, in the contract Alleged to be imperfect and that alleged to be complete. A contract to sell an estate is executory, because it binds the party to do some ulterior and different as; a contract to marry afterwards is executory in like manner; but a contract whereby parties take one another for husband and wife is only a contract to live as such, and it is identical with the same contract repeated before a priest, and with his aid. So if I contract to sell an estate and refuse to do, so, a Court of Equity will compel me, that is will compel me to perform the special thing which I had engaged to do.

When I contract to marry, neither a Court of Equity nor a Court Christian can compel me to perform by marrying; when I contract a marriage, that is contract to live as man with a wife, I may be compelled so to do; but the Court might also, till the law was changed, compel me to perform the same) identical contract over, again in another manner, not compelling me, to do anything different from that which I had already done, but only compelling me to clothe what I had done informally, with proper formalities. The object of these formalities was, something wholly foreign to the validity of the contract already executed, and had no force to improve its binding nature. It was to appease the conscience of parties who had neglected a religious observance; it was to give that which had been irregularly though bindingly done, a regular form and aspect; it was to reconcile the parties with their clerical guides; it was also to maintain the authority of those guides; it was finally, peradventure [10-Clark & Finnelly-707] primarily, to augment the emoluments of those guides.

Although, in order the more effectually to keep possession of the authority over marriage which they thus grasped, the churchmen were sometimes inclined to treat the civil contract as void in some respects, yet they for the most part held it binding; but they endeavoured to accomplish the same purpose by holding in some instances that any subsequent marriage was only voidable and not void. They never seem to have denied the validity of the first in most respects: - thus they admitted that whoever had contracted such merely civil or irregular marriage, might cohabit without committing the sin of adultery; they always held that if either party

10 Clark & Finnelly 708, 8 ER p909

cohabited with another person, the intercourse was adulterous. They never doubted that a second marriage contracted by either, standing the first, was unlawful; they only said it was voidable by suit in one of their own Courts, rather than null and void in itself. Now this distinction, clearly taken with the view of performing what is said to be the office of a good Judge, ampliare jurisdictionem, is plainly proof of the first marriage being valid, else why was the second to be declared void by sentence of any Court? The first might have been solemnised irregularly and without a priest, the second regularly and with a priest's intervention; yet the second was declared void by sentence of the Ecclesiastical Court, on the ground that the first, marriage, though irregular and merely civil or lay, was yet valid, and had all the essentials of a binding contract, a contract executed: - on no other, conceivable ground could the second marriage be declared unlawful and void, by any sentence of any Court.

It is however, equally clear that this contract may [10-Clark & Finnelly-708] be entered into by the parties so as to be in some sort merely executory; they may marry civilly, with an intention that there shall afterwards be a religious ceremony or solemnisation performed, a regular marriage celebrated as it were in face of the church. Such a contract, the first made contract, being by consent of the parties made to depend for its validity on the subsequent religious solemnity, although it may still be indissoluble, may also be incomplete until the event contemplated occurs to give it perfection. Such a marriage may justly be termed imperfect, and only completed by the religious celebration. I beg the attention of your Lordships to this, distinction, which the learned Judges appear to have overlooked; because I really venture to think it solves many of their doubts, and explains the cases on which they rely. Be it ever borne in mind that I do not say all marriages are valid where verba de praesenti are used. Those marriages only are so where the force and effect of the verba de praesenti are to bind the parties by this contract, without reference to or contemplation of any future ceremony. If the parties plainly contemplate a future solemnisation, and only bind themselves in the event of that taking place, then their contract is executory and conditional, not executed and absolute. It is like a contract or agreement to grant a lease, which may, according, to its frame and to the circumstances, be a lease or, only an agreement, according as the words amount or not to a present demise.

These considerations may clear away the difficulties which have been conjured up to encumber the ground of this argument. for in the first place, they furnish, a decisive answer to the objection, which has weighed with many, that they who maintain the [10-Clark & Finnelly-709] validity of a marriage per verba de praesenti must allow the possibility of two valid marriages subsisting at one and the same time. Now this is manifestly impossible by the whole scope of our contention; for the first marriage being valid, we of course hold the second void; nay, it is voidable even by the opposite argument. They also deny the validity of the first only contending that the second cannot be set aside without a sentence. They admit the first to be valid, at least to the effect of precluding a subsequent marriage; we hold it absolutely valid, and the second absolutely void.

In the next place, the positions which have been laid down seem satisfactorily to explain some of the cases most chiefly relied on by those who support the judgment below, and mainly by the learned Judges in their argument. It is said, that if the) marriage per verba de praesenti was complete without more, then the Court Christian would declare it to be so by its sentence, and require no further celebration: - and the distinction is taken between a Scotch marriage, as in Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 54), and a Sicilian one, as in Herbert v Herbert (2 Hagg. Cons. Rep. 263; 3 Phill. 58).

In the former no further solemnisation is ordered; in the latter "the contract is declared valid to all-intents and purposes, and therefore, the parties are decreed to solemnise it in the face of the church." But the Scotch marriage is decreed valid, and no additional celebration is added; because the only defect of an irregular marriage in Scotland is that it incurs the censures, of the church, from which a celebration in facie ecclesiae in England could not relieve the parties; and the secular marriage is not proved to be of more force and effect than a [10-Clark & Finnelly-710] similar marriage in this country, and thereof ore, the solemnisation

10 Clark & Finnelly 711, 8 ER p910

is ordered, as it would have been, before the Marriage Act, if the contract had been made in England.

The reason, and the manner of so ordering it, is clearly shown by the prayer of the libel, and the sentence as cited from the book of practice called " The Clerk's Instructor " (p. 313). After setting forth a marriage per verba de praesenti, the libel asks for a decree that it is of full force and effect to all intents in law whatsoever; and it adds these words, " and also that the said A. B. may be compelled, constrained, and ordered to solemnise the said marriage in the face of the church and the sentence is accordingly. For when Sir Geo. Lee, in Baxter v Buckley (Lee's Ecc. Cas by Phill. 57), says, " I gave sentence for the contract," this, is what he intends; and he adds, that he also enjoined Buckley to solemnise it in the church with Baxter within sixty days: - there can be nothing stronger than the inference from this manner of pleading. Had the contract only been executory, and the marriage itself had consisted in the celebration in facie ecclesiae, the libel would plead that, in respect of such contract, A. B. should be ordered to celebrate a marriage. But it says only, that " a true, pure, and lawful marriage had been contracted," and requires this to be declared: - and " also that A. B. be ordered," not to celebrate a marriage, that is a marriage not already had, but " to solemnise in facie ecclesiae the said marriage," that is the marriage already had, but not had in facie ecclesiae.

I observe that the learned Judges, in endeavouring to evade the force of the) decision in Bunting v Lepingwell [10-Clark & Finnelly-711] (4 Rep. 29; Moor, 169), rely upon the words of the decree, " quod praedicta Agnes subiret matrimonium cum praefato Gulielmo." Clearly this is only the solemnisation for order and regularity's sake. But I perceive much stress is laid upon the word " fore," as in the future tense; and it is contended, that the first imperfect marriage being only perfected by the solemnisation ordered to be made, the second was adjudged, to be void, or become so upon that solemnisation being made. I apprehend this argument rests wholly upon a mistake of the plain grammatical construction of the words. The report in Lord Coke sets forth the special verdict, and gives the statement of the Consistorial proceedings: - " in which libel decretum. fuit quod Agnes subiret matrimonium, et insuper decretum, fuit dictum matrimonium; " that is the second marriage " fore nullum; " that is " in which libel it was decreed that Agnes should solemnise marriage; and moreover it was decreed that the said (that is the second) marriage should be null." This is only a tense used in consequence of the structure of the sentence, which has reference, for the reasons I have assigned, to the sentence declaring the second marriage void, and not any reference to the solemnisation. Had the invalidity been referred to the date of the solemnisation, it would have been stated that " thereupon," or " thenceforth," or "thereafter," the second marriage should be held void; instead of this, the only word used is " insuper," moreover. Indeed how could any such sentence, as is supposed, have been pronounced by rational men? The argument for the Defendant in Error assumes it to have been declared that the second marriage was only to be held void [10-Clark & Finnelly-712] after something subsequent, something posterior to its date, was done: - in other words, A. imperfectly marries B., and then regularly marries C. in facie ecclesiae; but the regular marriage is to be set aside by something which A. is to do after its celebration. It is to be set aside by matter post; and not only so, but it is to be declared, by reason of such matter post, to have been void ab initio. Was there ever yet an instance of a declaratory sentence proceeding upon any circumstances or, facts whatsoever, other than those which existed at the date of the fact itself, whose validity or invalidity the sentence declares?

It is however, said, that in this case the special verdict found only an executory contract, namely a contract expecting and contemplating a future solemnisation; in which case there was really no marriage at all per verba de praesenti, and Agnes might be held to be compellable to solemnise according to the contract. Again, if the second marriage was to stand until the first should be solemnised, the party solemnising the first was guilty of bigamy; and the decree of the Court, in effect, ordered him to ",commit bigamy. This is the inevitable consequence of holding that the first is not perfected before solemnisation, and that the second is not void, but only voidable, if its period of invalidity refers to the solemnisation of the first contract. Yet the use of this argument, so full of absurdity, may not be quite

10 Clark & Finnelly 713, 8 ER p911

optional to the Defendant in Error; he seems bound, by the whole nature of his contention, to em-ploy it. If the first marriage is only executory, the second cannot be avoided until the first is completed.

The three older cases relied on by the learned Judges are, the one in Edward the 1st time, mentioned by Lord Hale in his manuscript notes, and [10-Clark & Finnelly-713] copied thence by Mr. Hargrave in his note (Co. Litt. 33 a In. 203]); Foxcroft's Case, (Rog. Ecc. Law, 584; 1 Roll. Abr. 357), and Del Heith's Case (Rogers' Ecc. Law, 584; Harl. MS$. 2117). The first of these authorities is involved in considerable obscurity, especially as to the Court which reversed the judgment of the Common Pleas. That Court had held A. to be seised before his feoffment to. D., and during his marriage per verba de praesenti with B., and had adjudged dower to the widow upon that seisin: - thus holding the marriage good, upon the very solid ground that the sentence of a competent Court had decreed its validity. The reversal is said to be " coram Rege et Concilio; " and the learned Judges state, from Lord Hale's book on the Lords' House, that this was a Court attended by the Chancellor, Treasurer, and Judges. Lord Hale describes it (Jurisd. Ho. Lo. 5) as the King's " concilium ordiiarium; " and he says, none were members but those called thereto by the King. He then adds, that in ancient times all Privy Councillors were called to it, with the great officers of State, whom he enumerates as Chancellor, Treasurer, Steward, Admiral, Privy Seal, Chamberlain of the Household, Master of the Wardrobe, Comptroller of the Household, Chancellor of the Exchequer, and the Judges and Masters in Chancery. He adds, that in legal matters the Chancellor and Judges used to be called. It is evident, therefore, that we have no distinct conception of the constitution of this body as a regular Court and, what is of great importance) to the present argument, I am not aware that any one of its decrees, has ever before, on any occasion, been cited in any Court, either of law or equity.

But, again, let it be mentioned that the ground of [10-Clark & Finnelly-714] the decision is here, said to be A.'s having had no seisin " during his espousals with B; " yet the phrase 4 espousals " is strictly speaking, the term used for the contacts sponsalibus; a mere contract to marry. Lord Coke defines sponsalia, by futurarum nuptiarum, conventio et repromissio, (Co. Litt. 34 a); and such strict meaning may very possibly be the one given in this very ancient case. Was A.'s, seisin then disputed, and held disproved, even before he enfeoffed DA

It is further to be observed, which may possibly explain this case, that originally dower was held to be dependent upon a public assignment of it; and, beside the common-law dower, there was one called either ad ostium ecclesiae or ex assensu patris, which, however, implied the public assignment, and was only for the purpose, of enabling a party to assign before the descent of the land was cast upon him. Therefore, Lord Coke says, in the same place, dower ad ostium castri sive messuagii is not good, it ought to be ad ostium ecclesiae sive monasterii, for the law requires publicity and solemnity; and this agrees with Bracton (lib. 2, c. 39). Now we are told that this was anciently true of all dower, as well as of the two kinds ad ostium and ex assensu, and that in Henry the 3rd's time, a wife married in camera had it not (Perk s. 306). And, among other reasons for this, we may well suppose one to have been that the feudal lord was entitled to a fine whensoever the vassal's. wife was entitled to dower. For this, a sufficient security was afterwards supposed to be afforded in the public assignment during the widow's quarantine, or the 40 days elapsing after the husband's decease. But, more anciently, the further security was taken of requiring. [10-Clark & Finnelly-715] a publicity to the marriage which gave her a title to dower. This therefore would so far explain the reversal coram Rege et Concilio and would only displace or supersede the reason given in the note, by another and a better one.

But if reliance be placed upon Lord Hale's authority, supposed to be given in his note to the MS. account of this case, surely much more weight must be ascribed, to what he did and said judicially; and this appears to be somewhat at variance with the doctrine alleged to have received his countenance, in the MS. note. We find Roger North, in the life of his brother the Lord Keeper, complaining of Lord Hale for his partiality to sectaries; and the ground of this charge is that he allowed a special verdict to find a Quaker's marriage: - which, says the biographer, could not be good without the Liturgy, and therefore this was an infraction of the Act of

10 Clark & Finnelly 716, 8 ER p912

Uniformity. Lord Hale said, he was unwilling to hold the children bastards, and he thought that all marriage made according to the principles of men severally should be held good, and receive their effects in law. I cannot agree with the learned Judges that his allowing a special verdict, which referred the question to the Court, is a proof of his holding the opposite opinion; for you must take the proceeding of allowing the special verdict in connexion with the dictum which accompanied it, and that was in favour of a marriage. There is further, another note of Lord Hale, given by Mr. Hargrave in Coke Littleton (34 a n. 209), in which he, holds a gift to a wife married " post affidationem et carnalem copulam void," and, consequently, holds the marriage good.

[10-Clark & Finnelly-716] One thing, however, is admitted to have been held by this case cited from the M.S. note, tempore Edw. 1. The marriage in facie ecclesiae and by force of the Ecclesiastical

Court's sentence, had no relation back; for it was not held to make the first marriage good ab initio, else it would have made A.'s seisin good before the feoffment to D., and standing that which had now become a perfect marriage with B. Yet the whole of the argument on the other side, upon Bunting v Lepingwell, rests upon the effect of the subsequent solemnisation of an imperfect contract, working by relation backwards the completion of that contract, and making it ab initio, valid.

Another thing is also to be observed in this note, equally at variance with the argument of the learned Judges. B. recovered A. for her husband according to the note, and how? By sentence of the Ecclesiastical Court, and that sentence never was reversed. Here then was an end of the question of validity, for by that sentence, transit in rem judicatum having been decreed by the proper authority.

Therefore this case, tempore Edw. I, so much relied on by the learned Judges, is when well considered, just as much in conflict with the argument of the Defendant in Err or as with that of the Plaintiff.

Of Foxcroft's and Del Heith's cases it may justly be said, that by proving too much, they prove nothing. According to the former, a marriage celebrated by the Bishop of the diocese is void, merely because not celebrated in a church; and according to the latter case, a marriage celebrated by the parish priest is void for the same, reason. Nor will it avail to say that such has long ceased to be the law. When did it cease? By what authority did it cease? When it [10-Clark & Finnelly-717] did cease, have we any ground for holding that the presence of any priest at all was retained as an essential part of the solemnity?

The same may be said of another and a still more ancient authority, relied on, by the learned Judges; the L. L. Edmundi, published by the Record Commissioners. To make nuptials " binding to all prosperity, it is said there must be present a mass priest." Now this excludes a deacon; yet who doubts the validity of deacon's orders for this purpose? I mean even according to the contention that requires sacerdotal presence and aid.

But the case mainly relied on, of Haydon v Could (1 Salk. 119), receives illustration from the same argument. That was a marriage of two persons of the Sabbatarian sect according to their own forms, and no priest or deacon being present. The wife died, and the husband claimed administration; which was refused. The Delegates, on appeal, affirmed the sentence. The ground, however, of the decision is distinctly stated to be that when the husband claims a right under the ecclesiastical law, he must prove himself to be a husband according to that law; that is in the manner which the ecclesiastical law approves. It is added that the wife, who is the weaker sex, and the child of such marriage which was in no fault, might have had administration, but not the husband who was in fault; he is treated as a wrongdoer, and as a matter of discipline the Court Christian will not countenance his conduct in contracting an irregular, marriage, by suffering him to take a benefit under it conferred at their hands. This is the view of the case, taken by a very high authority, Lord Chief Baron Comyn (Com. Dig tit. Baron and Feme, B. 1). Nor should it be forgotten that one part of the case clearly [10-Clark & Finnelly-718] proves too, much, for it holds the plea in the Ecclesiastical Courts to be of a marriage "per Presbyterum sacris ordinibus constitutum" which would exclude a deacon; and yet it is on all hands agreed, as I have before said, that whatever a priest can do in this respect, a deacon may do as validly.

10 Clark & Finnelly 719, 8 ER p913

I have mentioned the view taken by Chief Baron Comyn, in his Digest, as being in accordance with my argument; but he also sat in judgment himself upon a case, in which this question arose, and he then concurred in a judgment to the same effect. Fitzmaurice v Fitzmaurice, in 1732, came before the Delegates, of whom the Chief Baron was one. It was the case of a marriage per verba de praesenti; the Court held it valid, and the Lord Chancellor refused a commission of review. Sir W. Scott cites it with great respect in Dalrymple v Dalrymple (1 Hagg. Cons. Rep. 69), from a note furnished him by Dr. Swabey. Lastly, we must bear in mind, that before the Statute of Distributions, the Ecclesiastical Courts gave or refused administration at pleasure; and this case of Haydon v Gould occurred not very many years after that statute came in force, and before the new and strict rules as to granting administration were is use.

We now approach authorities not exposed to any such objections. But before I come to these I wish to state what appears to me the result of the whole, both as affirmed by text-writers, and as laid down by the decisions of the Courts. With this statement I should have begun, had not my unfeigned respect for the learned Judges made me anxious, in the first instance, to deal with the cases upon which they have relied, and thus clear the ground for my argument.

[10-Clark & Finnelly-719] The Roman or civil law is the foundation of the personal law of Europe, and the inroads of the feudal law upon that symmetrical and finished system have been chiefly confined to the rights connected with the enjoyment and transfer of real property, between which and personal estate the more ancient law made no distinction. The canon law regulating the Ecclesiastical Courts, which early assumed to dispose of questions relating to marriage, to the proof of wills of

personal estate, and to the appointment of administrators in cases of intestacy, is most specially drawn from the fountains of the civil law. This law is its foundation; the additions or superstructure were made by the decretals of the Popes and the Councils, which had succeeded both to the Emperors and to the Apostles, perhaps more clearly to the Emperors than to the Apostles, and which especially governed body of the church. Now, by the civil law, and by the earlier ecclesiastical law, indeed by that law until the 16th century, marriage was a mere consensual contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be a contract executed without any part performance; so that the maxim was undisputed, and it was peremptory, Consensus, non concubitus, fuit nuptias vel matrimonium."

Now, it is clear that, by the universal law of Europe before the Council of Trent, this contract could be validly solemnised by the parties consenting to take each other for man and wife, without the interposition of the sacerdotal office, or the presence of any one in holy orders. The church was always anxious to interfere, to require, the benediction of a priest and even the performance, of mass, and to discountenance,[10-Clark & Finnelly-720] as far as possible, any marriage not so solemnised; but in a matter so interesting to mankind, and in which their strongest feelings were embarked, the clergy in vain attempted to obtain the ascendant they sought; and it was only by the decree of the Council of Trent that the sacerdotal institution became essential to the validity of the nuptial contract. This clearly appears from the Decretals, book 4, where it is laid down, that a man and woman legally competent to contract matrimony shall take each other for husband and wife per verba de praesenti tempore, without more; that they are thereby bound as such, and that if either party contract a second marriage, living the other, it is void, and the parties to the first contract may be compelled to cohabit. In consequence of what has been said respecting the Council of Winchester in 1076, I shall now read the words of Pope Gregory IX's decree, 150 years after that Council: - Si inter virum. et mulierem legitimus consensus interveniat de praesenti, ita quod unus alterum consensu verbis consuetis expresso recipiat, utroque dicente, Ego te in meam, accipio, et Ego te in. meum, vel alia verba consensus exprimentia de praesenti, site set juramentum interpositum, sive non, non liceat alteri ad alia vota transire; quod si fecerit secundum matrimonium de facto contractum, etiamsi sit carnalis copula subsecuta, separari debet, et primum in sua firmitate manere " (Decretal, lib. 10, pl. I, c. 31). This is what I have already stated as the limit of the Ecclesiastical Court's power in regard to compelling performance: - it assumes the marriage to be perfect, and decrees performance of its obligations. The oldest and

10 Clark & Finnelly 723, 8 ER p914

most venerable authorities agree in giving this account of the matter in [10-Clark & Finnelly-721] express terms: - Sanctius " De matrimoniis " affirms the validity of a marriage without a priest, before the Council of Trent. De Burgh, in his book written at the end of the 14th century, and called Pupilla Oculi, expressly says, treating " De Sacramento matrimonial " " Patet quod ad collationem hujusce sacraments non requiritur ministerium sacerdotis; " and he afterwards goes on to say, that neither the sacerdotal benediction nor any other prayers pronounced by the priest are " forma, sacramenti, nec de ejus essential sed quoddam sacramentale ad ornatum pertinens sacramenti." He had before, said that the parties could mutually administer this sacrament to each other, or either to him or her self; and that no minister was required for its administration other than the parties themselves; " non requiritur alius minister distinctus ab ipsis contrahentibus." Words cannot be more distinct than these.

The Council of Trent required, and for the first time required, the marriage to be in the presence of a priest. But of what priest? Of the parish priest. The Council of Trent never was received or acknowledged in England; of which we may at once see the proof in this, that there we have no pretence ever set up, nor any contention, that the parish priest's presence is necessary. But if the Council of Trent never was recognised in England, have we not a right to fall back upon the common and universal law of Europe, as our own in this important matter? Now, that decree is itself the most irrefragable proof of this; for it begins by declaring all past marriages valid without any sacerdotal interposition; and consequently pronounces that the requiring a priest's presence is prospective merely, and an alteration of the former law. [10-Clark & Finnelly-722]

I next have to observe, that nothing can be more improbable than the existence of one law for all Christian Europe, and another for England on this important head. All Europe, including England, lived under the same religion, under the same ecclesiastical system, under the same spiritual rule. The presumption is that the English law touching marriage is the some with the general law of Catholic Europe; and this presumption. can only be rebutted by distinct proof that England has receded from that law, and made her own an exception to its tenor. I am entitled to lay this down upon general principles, but I have also the venerable authority of Sir W. Scott, who in the case of Dalrymple v Dalrymple, distinctly states, that the general law of Christian Europe, touching the marriage contract must be taken to be the law of Scotland, unless it be shown " that the Scotch law has actually resiled from it " (1 Hagg.

Cons. Rep. 103). Show the variation," says the very learned Judge, " and the Court must follow it but if none is shown, then must the Court loan upon the doctrine of the ancient general law " (id. 81).

If any difference were to be made between the general continental and our insular law, it would be that sacerdotal intervention would be less requisite here than abroad, especially after the Reformation; for on the Continent, that is in all Catholic countries, marriage is deemed to be a sacrament: - with us it is not. Sacraments do not, indeed, necessarily require a priest, as baptism has been solemnly decided in a late case before the Privy Council, to be valid without one; but where a rite is sacramental, it may, in dubio, be more easily presumed to require the priest's [10-Clark & Finnelly-723] ministry than where the rite is not a sacrament at all. The probability, then, being that our law is the same with the foreign, it requires clear proof to show that England had a marriage law peculiar to herself. Have we any such proof?

The first thing that strikes us on this cardinal point of the cause is that one of the authorities cited, John De Burgh, as laying down most distinctly that consent of parties is enough without a priest, and that a priest's intervention is only as to the clothing or ornament of the proceeding, and not essential, is an English divine. He was high, too, in our church, and he was Vice-Chancellor of the University of Cambridge.

But a better known and more venerable text writer, Bracton (4. 8. 303; 9. 3 04; 5. 420), gives, though more generally, a similar account of the contract, and he distinctly lays it down, that after a marriage per verba de praesenti any feoffment or gift by the baron to the feme is void; therefore he clearly holds such a marriage to be valid and perfect. So, in treating of the legitimacy of issue, he pronounces the issue legitimate " quem, justae nuptiae demonstrant," and he then enumerates the several kinds of justae nuptiae; saying that the marriage is complete, that is the nuptiae are

10 Clark & Finnelly 724, 8 ER p915

justae, whether public or clandestine, and whether per verba de praesenti, or de futuro, so it be indissoluble; the marriage per verba, de futuro requiring of course consummation or part performance, to perfect such an executory contract. What he says of dower has regard apparently to the assignment of it ad ostium ecclesiae. Wherever the legitimacy of issue is mentioned, the marriage per verba de praesenti, or per verba de futuro cum copula, [10-Clark & Finnelly-724] is given as sufficient, and no mention is ever made of the benedictio sacerdotalis as essential. However, the first case which I shall cite solves this question of dower, and shows that, whatever may have been holden in more ancient times, dower at common law was in all the more recent decisions held to accrue on marriage, though not in facie ecclesiae.

I observe that the learned Judges cite the authority of Archbishop Lanfranc's Council, holden at Winchester, in William the Conqueror's time, AD 1076, and given in Wilkin's Concilia. It is said to hold a marriage illegitimate which was unaccompanied with the benediction of a priest; but I have cited the higher authority of the Decretals, book 4. Would Archbishop Lanfranc himself have denied that Pope Gregory IX. had authority to overrule him? Yet his Decretal, which I have already cited, was promulgated 150 years after Lanfranc's Council. The whole canon law was not certainly received in England, but in Catholic times our Ecclesiastical Courts assuredly were bound by the Decretals; and the case temp. Edw. I, cited from Hale, shows this plainly, for there the Spiritual Court decreed the marriage without a priest to be good.

In looking to the authority of decided cases, I need not go back farther than Wickham v Enfield (Cro. Car. 351). There, on a writ of assignment of dower at common law, a plea was pleaded of ne unques accouple, precisely as in the well-known case nearer our own times of Ilderton v Ilderton (2 H. Bl. 145). In the latter there could be no sending to the Bishop, because the demandant had replied a marriage in Scotland; in Wickham v Enfield the replication merely took issue on ne unques [10-Clark & Finnelly-725] accouple, and a writ went to the Bishop, who certified that the parties were coupled in vero matrimonio sed clandestine, and had cohabited till the death of the husband. Judgment having been given for the demandant and error brought, one error assigned was that the answer of the Bishop was not in the affirmative to the writ, namely, that the parties had been coupled in legal matrimony; but the Court held verum matrimonium sed clandestinum as good as legitimum matrimonium, and the judgment of the Common Pleas was affirmed.

The case of Collins v Jessot (6 Mod. 155; 2 Salk. 437, nom. Jesson, v Collins) is of great importance, because it gives Lord Holt's clear and unhesitating opinion, in which the whole Court concurred, that a contract per verba de praesenti amounts to an actual marriage, and as much a marriage in the sight of God as if it had been M facie ecclesiae; with this difference, that cohabitation before the religious solemnity is punishable, by ecclesiastical censures. I do not at all understand the doubt cast upon this case by the learned Judges: - they say, " If by the terms ipsum matrimonium, Lord Holt intended to lay down the position that it was so held by the common law of the land." Now his words are, " actual marriage, and as much so as if in facie ecclesiae." But, say the Judges, he may

have meant only a marriage by the canon law: - to which I make two answers: - first, that the canon law in his time, if by that he meant the law of the Catholic church, had, by the Council of Trent, required the presence of the parish priest; but if it be said that was not received here, then I answer, secondly, that Lord Holt expressly excludes the supposition of the learned Judges as to his meaning,[10-Clark & Finnelly-726] by the distinction which he explicitly takes, namely, admitting that a cohabiting before solemnisation in facie ecclesiae exposed the parties to church censure; so that, instead of asserting the validity by the canon law, he would rather seem to admit that the validity was questionable by that law.

I cannot avoid here observing, that there is no statement by the learned Judges that this important opinion of Lord Holt was also the opinion of the whole Court, until they come to speak of Sir W. Scott's mention of it: - yet it was the opinion of the whole Court, Mr. Justice Powell differing only on another point, namely, that a contract per verba, de futuro prevents the parties contracting another and a subsequent marriage. On the main body of the Lord Chief Justice's opinion, Mr. Justice Powell, as well as the others, Mr. Justice Powys and Mr. Justice Gould, agreed with his Lordship. It is therefore, an opinion of the greatest weight; and as for the

10 Clark & Finnelly 727, 8 ER p916

observation of the learned Judges, that the case before the Court might have been decided without raising that question, I would respectfully pray your Lordships and the learned Judges to reflect how far such an argument will go in impeachment of decided cases, when we consider how vast a bulk of the law now received as decided by the Courts of Westminster Hall rests upon the resolutions of the Judges on points not strictly necessary to the decision of the questions before them.

The argument raised by the learned Judges in Wigmore's Case (2 Salk. 438) to show that in Collins v Jessot Lord Holt had spoken only with reference to the canon law, does not appear to me at all maintainable; [10-Clark & Finnelly-727] for though he there speaks of the canon law, yet he adds the words (cited from his own Reports), that the " law of man ordains marriages to be made by a priest, yet only makes them irregular, and not void, if made without one; " although he, certainly holds that dower depends on the religious solemnity, probably referring to what the books say of dower ad ostium. But the learned Judges see in wholly to omit in their consideration the force and effect of Wigmore's Case, upon the argument at the bar. That case was of a prohibition: - the Spiritual Court was proceeding to punish a party for fornication, on account of a cohabitation after a marriage by an Anabaptist minister, a layman; and the Court did prohibit, manifestly on the ground of the marriage not requiring a priest of the church. In the former case, of Collins v Jessot the Court of King's Bench had held that by church censures the parties might be punished, because it was a breach of order, ecclesiastical order, like the mere fact of celebrating a clandestine marriage, which we know in Scotland exposes the parties to church censures, though the contract is valid to all civil purposes.

I may here take notice of that class of cases in which marriage celebrated by a Roman-catholic priest has been held clearly valid by our Courts: - Regina v Fielding (14 St. Tr. 1327); Rex v Brampton (10 East, 282); Lautour v Teasdale (8 Taunt. 830). Now, if marriage requires a person in orders to constitute, its validity, I would respectfully venture to ask how he, is the more in orders with us for his being a Roman catholic priest? It is true that our church recognises the Roman-catholic ordination in the case of persons who have renounced the errors of popery [10-Clark & Finnelly-728] and become members of our national church; and this on account of the Apostolic succession. But does it recognise such orders in Roman-catholics continuing such? Would not such a priest be punishable were he to administer the sacrament in any of our churches, as much if he did it according to our own ceremonial as if he said high mass according to his own? Is he in any one particular recognised as a person in orders while he remains a Roman-catholic? Though on this subject I would be understood to speak with the hesitation which is becoming on such a subject, yet I must add that I have in vain endeavoured to find any one instance, in which the recognition of the orders does not depend on the party's recanting. I see also the consequence, of holding that Roman-catholic orders are valid to any civil or ecclesiastical purpose while the party ordained continues a Roman-catholic; and surely no one will contend that if an act is done by a Roman-catholic priest before his recantation of popish errors, his subsequent recantation can operate by relation backwards to give the intermediate act validity. I cannot therefore suppose it possible that in those cases to which reference has been made, the contract per verba de praesenti was held to be ipsum matrimonium on the ground of a Roman-catholic priest being present; they must be taken as decisions that the contract without any person in holy orders is an actual marriage. One of them indeed, Rex v Brampton, expresses Lord Ellenborough's opinion very clearly, that before the Marriage Act of 1753 such a contract was valid. That Lord Kenyon held the same opinion is plain enough from what he said in Reid v Passer (Peake, N.P. Cas. 303), although he says he speaks not so [10-Clark & Finnelly-729] as to be bound by the dictum. But this is no more than the caution which any discreet Judge would use in dealing with a proposition of such importance at Nisi

prius. In Latour v Teasdale, Chief Justice Gibbs held the same doctrine explicitly, and without any qualification, the case being in Bane: -

But these decisions, say the learned Judges, are rested expressly on the authority of Sir W. Scott; and Sir W. Scott, they add, cites the dictum of Lord Holt. Surely it is so; but does that detract from the weight of either Lord Holt's dictum, that is the dictum. of the whole four Judges of the King's Bench, or Sir W. Scott's decision and argument? Very far from it; it only furnishes an additional reason for being

10 Clark & Finnelly 730, 8 ER p917

extremely cautious how we set aside those older authorities, and break in upon the principles which they establish, which subsequent decisions have adopted, which succeeding Judges have followed, and which until the present time have never been impeached.

I now come, therefore, to the only two of these great cases not yet discussed, and they are all the more important that they are decisions in the forum proper to such questions, namely, the Courts Christian. Lindo v Belisario, in 1795 (1 Hagg. Cons. Rep. 216), came first before, Sir W. Scott, then by appeal before Sir William Wynne, and it raised the point directly of the validity of a Jewish marriage. The marriage was held invalid, a minute examination of the contract proving, by reference to the Jewish authorities and the rabbis, that the ceremony performed did not amount to a matrimonial contract, but only to a betrothment. The ceremony consisted of the taking of a ring by the woman, after saying that she admitted her knowledge [10-Clark & Finnelly-730] that by the taking it she became the man's wife: - all that the man did was to ask her that question, and put on her finger the ring, repeating Hebrew words, which mean not any consent of his but only an address to the woman that she shall be holy to him according to the law of Moses. But it was proved that a formal contract in writing, signed by the man, was required to be delivered by him to the woman, according to the Jewish customs, before the marriage took place: - thus, there wanted verba de praesenti certainly on the man's part, possibly on both his and the woman's part; but there also was this radical defect, that if these words had been used, and only meant a betrothment, expecting a further ceremony to make them a marriage, the words, though used, would have had no real meaning as verba de praesenti, and the whole proceeding would have been executory merely, according to the distinction which I set with taking. The importance of the case, however, is this: - not an attempt was made even at the bar to impugn this alleged marriage on the ground of a priest not having been present, and the Court, after full argument and in much doubt, directed questions to be put to learned men: - all which argument would have been unnecessary, all which doubt would have been removed, all which questions would have been wholly superfluous, had the doctrine of the learned Judges in the present case, and the contention of the Defendant in Error, been well grounded; for the want of a person in orders was undeniable, unless indeed those who hold an unconverted Roman-catholic to be in Protestant orders, also proceed to take another step in the same direction, and hold that a Jewish rabbi is a Christian, priest. The argument of Sir W. Scott distinctly lays it down, that in the) Christian [10-Clark & Finnelly-731] church a contract per verba de praesenti is a perfect contract of marriage, though the canon law required subsequent celebration (1 Hagg. Cons. Rep. 242); and referring to the Scotch marriage law, he says (id p. 23§) that the rule prevailed both in Scotland and in this country until other civil regulations in England interfered with it, plainly referring to Lord Hardwicke's Marriage Act.

The doctrine thus laid down by that great Judge in 1795, and not departed from by the Court of Arches, I may say, the doctrine assumed to be irrefragable by both the parties and the Judges throughout the whole of this case, was never disputed during the period which has elapsed from that day to the present, a period of nearly half a century; but it received a remarkable, confirmation in the more celebrated case of Dalrymple v Dalrymple [2 Hagg. C.R. 54], to which I must now beseech the best attention of your Lordships. The question there was, whether a marriage was valid alleged to have been had in Scotland; and the whole turned upon what was the Scotch law; the lex local, which it was admitted must entirely govern the consideration of the case. The argument both in the Court below and before the Delegates, where I was of counsel with the respondent, was most full and elaborate, bearing a just proportion to the importance of the case, which involved the status of the heir presumptive to high honours and ample estates, and involved also the consideration of great principles of law. The judgment in the Delegates was a simple affirmance, according to the custom of a Court which was never wont to give reasons for its decrees; but I will venture to assert that no one of the many advocates [10-Clark & Finnelly-732] who argued it ever thought of disputing the doctrine laid down by the Court below, in point of law; all confining themselves to canvassing the decision upon the fact of what the Scotch law was proved to have been by the evidence in the cause. In this assertion I am borne out by the learned Judge of the Court of Admiralty, with whom

10 Clark & Finnelly 733, 8 ER p918

I have consulted fully on the whole subject; he was also of counsel in the cause. This memorable judgment, therefore, remains undisputed to this hour; and it is only bestowing upon its merits at once the most just and the highest praise to say that it excels all the other performances of its eminent author, whether we regard the clearness of its positions, the close texture of its reasonings, the singular felicity of its diction, or the careful avoiding of all superfluous argument; all extrajudicial discussion. But in weighing its authority, let us rather remark that it was most minutely considered and elaborately prepared; and I will add, from the direct authority of the learned counsel who reported the case, that every line was submitted to Sir W. Scott, and every line, received his correction and approval. In the whole compass of our books there is not to be found a decision more deliberately pronounced, or a judicial argument more carefully stated. In their whole compass is no report to be found more authentic in its statements of what fell from the Court.

Sir William Scott lays it clearly down, that until the Marriage Act, which, according to Mr. Justice Blackstone, was " an innovation on our laws and constitution," the English law, agreeing with that of all Europe, held a marriage per verba de praesenti valid without the intervention of a priest; and he cites the cases of Collins v Jessott [6 Mod. 155; 2 Salk. 437], Bunting v Lepingwell [4 Rep. 29; Moor. 169], and [10-Clark & Finnelly-733] Wigmore [2 Salk. 438], in proof that his doctrine is that of the Common Law Courts, as he distinctly and authoritatively states it to be the doctrine of the Courts Christian. To suppose that he was ignorant of the case of Haydon v Gould [I Salk. 119] would be absurd, considering that it was decided in the Delegates, that he quotes from the book in which Haydon v Gould is reported, and that this case regarded a matter strictly of ecclesiastical cognisance; the granting of administration.

But he does state the case of Fitzmaurice v Fitzmaurice, which was also before the Delegates, and to which I have already referred [see 10 Cl. and F. p. 622, n. (d.)]. His observation respecting the Ecclesiastical Courts is however, very material; for as if it was more clear there than at common law, he adds, after citing Wigmore's Case, " in the Ecclesiastical Court the stream ran uninterruptedly in that course." He also in terms negatives the position that marriage, because it was a sacrament in the Romish church, therefore required to be celebrated by a clerk; and declares that until the Council of Trent altered the law of the church, this sacrament could validly be celebrated by laymen all over Europe, as even after that Council it continued lawfully to be celebrated in England, notwithstanding the decree of the Council, which in England never was recognised; and I may state that in the Judicial Committee it has been held, after the fullest consideration, that any lay person, without a priest present, may administer baptism, which is a sacrament of our church, using the form of words, " I baptise thee, in the name of the Father, Son, and Holy Ghost." Now, it is said in the argument at the bar, and I am somewhat surprised to see the observation countenanced by the learned Judges, that these dicta, as they are termed, of this great Judge, are extrajudicial. Were they mere dicta, and [10-Clark & Finnelly-734] were they wholly extrajudicial, I have yet to learn that, proceeding from such a quarter, they are not entitled to unbounded respect. No Judge was ever less prone to travel out of the case before him; I speak from experience of that learned Judge, not only having argued many cases before the Delegates arising out of his decisions, but also having practised for a long course of years before himself and Sir William Grant at the Privy Council: - none ever abstained more scrupulously from ventilating opinions uncalled for none ever was more cautious in delivering his sentiments on important points. To suppose that he would have needlessly gone out of his way rashly to declare all marriages before the Marriage Act valid without any clerical solemnity, rashly to declare that all marriages now since the Act are valid in the colonies without any such solemnity, rashly to declare that all Quaker marriages and all Jewish marriages are at this day valid; that this cautious Judge, so wedded to the doctrines of the church, so jealous of any infringement of her prerogatives, so averse to any interference with her authority, should have needlessly volunteered such opinions as these in derogation of her prerogatives, or have Stated them unless upon mature deliberation he had held them absolutely clear and free, from all doubt, is one of the most extravagant suppositions which man can make, and proceeds from a profound and gross ignorance of Sir W. Scott's judicial character and whole habits. That he should on such ground ventilate needless and

10 Clark & Finnelly 735, 8 ER p919

extraneous dicta, seems hardly credible; but if what he said on such matters be extrajudicial, it is only a stronger demonstration that he held the opinions thus volunteered to be perfectly free from all possibility of doubt, and was intimately convinced that in thus [10-Clark & Finnelly-735] needlessly stating them he moved no landmarks, brought nothing that war, fixed into any doubt, laid down nothing that could impugn any fully established doctrine.

But, with great submission, I do most distinctly deny that the doctrine of Sir W. Scott was a mere dictum and extrajudicial. The point he was proving, the point on which the whole case hinged, was the Scotch law of marriage. He undertakes to show that this is in favour of marriage per verba de

praesenti, and he accomplishes his purpose by showing that the general law of Europe, including England, is in its favour; and that, therefore, it must be taken to be the law of Scotland, unless and until Scotland be shown to have excepted herself from that law by special provisions of her own. The question being, is it the Scotch law? he argues that it is the Scotch law, because it is the European law. Had England been an exception, that argument would have failed, because, it would then have been said, the law in question is not the general law; for instance, it is not the English law. He shows that England is no exception, and that therefore it is the general law, and therefore, it is the law of Scotland; and therefore the marriage in judgment before him is good. Nothing can be conceived more close than this reasoning, nothing more solid than the connexion between the conclusion and its premises. That conclusion is the decision of the question before him; these premises are the English marriage law.

Thus far the decisions and authorities of the English Ecclesiastical Courts; and it must be observed, that they furnish a complete answer to the argument which I know has weighed with some in considering the case; namely

, that any question of marriage before [10-Clark & Finnelly-736] Lord Hardwicke's Act, per verba de praesenti, without a priest, arising in a Court of Law, would have been referred to the Ecclesiastical Courts, and that those would have certified against its validity. Most clearly they would not so have certified, if they decided according to the ecclesiastical law, as Sir W. Scott and his brethren the civilians understood it. I have shown that Sir W. Scott and his brethren considered the point as more clear by their law than it is by ours, because Sir W. Scott said that their law on this question had always flowed in a clear and unbroken stream. Therefore they must have certified in favour of the marriage, and to assume the contrary is a petitio principii.

But it is not merely on decisions and dicta in those Courts Christian that the question turns. Consider the case of Jewish and Quaker marriages. It is quite manifest that the validity of these is quite irreconcilable with the opinion of the learned Judges in the present case; yet not only are they apparently assumed to be valid by the provisions of the Act (26 G. 2, e. 33, s. 18), but we have the authority of the cases decided on the point; as the one cited by Mr. Justice Willes, in Harford v Morris (1 Hagg. Cons. Rep. App. 7), of an action of criminal conversation by a Quaker, and the objection taken and the point argued that the marriage was not good for want of a clergyman; but this was overruled, and the plaintiff recovered a verdict.

There is however, a much more material fact on this head: - the number of persons belonging to the Society of Friends and to the Jewish persuasion who have obtained administration from the Ecclesiastical [10-Clark & Finnelly-737] Court, and obtained it without a struggle. I might, indeed, add the number of cases in which titles must have been made and deduced through the issue of Quaker and Jewish marriages; nay, the number of cases of persons who born of such marriages, have been allowed quietly to take estates, real and personal, without any relative claiming or thinking of claiming to their exclusion; and also the numberless instances in which the Crown would have been entitled; no claim having, however, been made in any one instance by anyone Attorney-general. Were the doctrine of the learned judges well founded, not a single Jew or Quaker could have departed this life, without an inquisition of office, and a finding to entitle the Crown; but so entirely was the law concealed from all former times, that no in-stance has ever occurred of any such attempt being made.

Finally, the law as laid down in 1911 by the Consistory Court of London, and confirmed in 1814 by the Delegates, has ever since been acknowledged as the governing rule on this most important question; that decision only repeating more ex

10 Clark & Finnelly 738, 8 ER p920

plicitly what the same learned Judge had pronounced more succinctly, but as distinctly, in 1795. For near half a century, therefore, it has been held as established and settled law in England; and not only have the other Courts decided other cases upon its authority, never questioned by them; not only must the discovery of the present day be held to subvert those other decisions, and to hold that they were all wrongly pronounced; not only have all the learned civilians been so assuming the laws, and so advising their clients uniformly, until the present opinion respecting Sir W. Scott's decisions carried consternation into the vicinity of St. Paul's; but marriages innumerable have been contracted [10-Clark & Finnelly-738] both by sectarians in this country, and by persons of all descriptions in our vast possessions beyond the seas, possessions on which the sun never sets, all of which are now found out to be void, all these parties fornicators and concubines, all their issue bastards. Into the sad details of such a subject I will not enter; from so painful a prospect I will avert my eyes. But this I must add before I leave it, that every Quaker and every Jew born of a marriage had before the year 1835, is by the learned Judges pronounced to be a bastard; the mother of each and every of these to be living in concubinage; every married pair of these sects may separate, and marry again without committing a felony; and every title to an estate, wheresoever situated out of Scotland, that is traced through a pedigree any link of which is

a Quaker or a Jewish heir, must be shaken to its foundation, unless propped up by the Statute of Limitations and the lapse of long time.

The Marriage Act [26 Geo ii. c. 33], in exempting those marriages and the marriages beyond seas from its operation, seems to assume their previous validity, and therein to assume the universal validity of lay marriages before it was passed; but this inference the Judges will not suffer to be drawn, and they declare all such marriages void by the effect of their doctrine. It is in vain for these learned persons to seek an escape from this conclusion, so far as it affects the Jews, by setting up the notion, destitute of all warrant from analogy, and repugnant to every principle of law, that the Jews are quasi foreigners, and that therefore they are a law unto themselves. The. Judges are no more foreigners than we ourselves, or the learned Judges, are foreigners; and if they were, their laws and their usages could no more exempt them from the operation [10-Clark & Finnelly-739] of our law than any admitted foreigner could be suffered in England to set up a marriage void by our law, as good by the foreign law of the country he belonged to. Not to mention, that even were we to admit their doctrine as to the Jews, the Quaker marriages would remain annulled; and that is quite enough for my argument.

Surely it required such a doctrine to be not only reasonably clear, but to be free from all possibility of doubt, to warrant the authoritative promulgation of it in this place by such venerable authority. Surely nothing can justify the giving vent to a proposition of law so frightful in its consequences, if it is encumbered by any difficulty, if it is confessed to be " involved in much obscurity," if those who have discovered it are obliged to allow that they have only been able faintly to descry it through a " still deeper obscurity " than veiled it " from the eyes of their predecessors," and to acknowledge that its form and proportions are so ill defined in the darkness which shrouds it, that they feel " unable to trace out and define its boundaries."

In other cases, where a grave doubt has long prevailed on any matter of law, even where an admitted error had crept into the decisions of Courts and the proceedings of practitioners, the safer course has been held, when that error was discovered, to abide by it, and not to revert to the sounder principle which it is admitted should never have been departed from. I remember, when I sat on that woolsack, a case occurred which was eminently calculated to illustrate this wholesome, judicious, and humane course of decision. For a long period of time the maxim had prevailed, that in point of law a real estate could be tied up by a strict settlement for the duration of the lives in being, and for [10-Clark & Finnelly-740] 21 years longer. The Origin of the error, for it clearly was an error, was this, that in point of fact a fine never could be levied to bar the issue, in tail, or a common recovery suffered to bar the remainders over, until the son of the last tenant for life was of age. Now, when the matter came to be questioned in the case of Cadell v Palmer (ante, Vol. J. p. 372) before me here, in 1833, when I had the assistance of the learned Judges, we all were agreed that the

10 Clark & Finnelly 741, 8 ER p921

doctrine of adding 21 years as a term in gross, to the duration of the existing lives, was a mere mistake, and the more clearly a mistake because we so plainly saw how it had arisen; yet we all agreed that after the Courts had so long acted upon it, and the conveyancers had so long proceeded upon the assumption, reverting to the true principle would be most pernicious, and would shake the titles to many estates all over the country. I make bold to think that a shock given to all the titles in England would not have been more fatal to the peace and happiness of society, than the shock which disturbs numberless families, affects the character of parents, and deals out to their progeny the portion and the name of bastard, besides shaking also an almost equal number of titles to real estates.

Human legislation is exposed, is necessarily liable, to three great imperfections: - the lawgiver cannot foresee and provide for all possible cases; his provisions may in their application become inoperative or frustrated by the destructive operations of time, the powerful and sleepless enemy of all human works; and his commands, how carefully soever framed, may be erroneously interpreted. There is no good or safe remedy for the first of these evils, but a resort to the [10-Clark & Finnelly-741] legislative power for new provisions. For the second there, is a remedy, and human wisdom has applied it. " Time " (as was most eloquently said by Lord Plunket) " is the great destroyer of evidence, but the law has wisely and humanely made him the protector of title. If he comes with a scythe in one hand to mow down the muniments of our possession, he bears in the other an hour-glass, whence, he metes out incessantly those portions of duration which are to render unnecessary the muniments that he has destroyed." Thus far the wisdom of the lawgiver.

A like remedy has been applied to the third evil by the wisdom of the Judge, who after men have been suffered for a length of time to misconstrue the lawgiver's commands, will not permit advantage, to be taken of their innocent mistake to work their ruin. What once was crude error becomes sound law by the humane wisdom of the Judge, as by the healing power of nature an ulcerous mass becomes a vital part of our bodily frame. If ever there was an instance in which a common error (supposing, which I deny, that it was an error) might be permitted, mercifully towards its victims, to

make the law, it surely is that case in which the supposed misapprehension of the law, sanctioned by such illustrious names as Holt, and Comyn, and Scott, and Kenyon, has involved the dearest interests, the security, the station, the fortunes, the fame of thousands; in which the victims of such a mistake are not even those who were beguiled into it by those venerable authorities, but their offspring, wholly guiltless even of the venial offence of falling into the error.

My Lords, I humbly move you to give judgment for the Plaintiff in Error; but if you shall not feel prepared at present to take this step, I then beseech [10-Clark & Finnelly-742] you, I earnestly beseech you, not to give judgment for the Defendant in Error. I recommend you to delay your final award in this great cause, until you have an opportunity of receiving the useful and needful assistance of the learned Judges who preside in the Consistorial and other civil-law Courts of the realm. To those Courts, properly speaking, the cognisance of the question belongs which this writ of error raises, and upon which alone its decision turns. The argument of the learned Judges in the Courts of Common Law, alone now consulted, admits, nay asserts, the peculiar dominion of the Courts Christian over such questions. In the other supreme Court of Appeal, the Privy Council, we always have in such questions the inestimable benefit of that assistance. This House has undeniably a right to call for it, and I trust you will call for it, if you are not now prepared to reverse the judgment below.

Lord Abinger: - It can hardly be expected of me that I should, in the short time that I have had for deliberating, put the argument I have to submit to your Lordships into the form to which my noble and learned friend has reduced his; or that I should enter upon any elaborate discussion in answer to the very ingenious and the very learned and profound argument which he has just delivered; but yet I think I ought not to shrink from delivering my opinion upon this question, which unfortunately differs from that of my noble and learned friend. When we have so large a majority as we have of the Irish Judges, who heard this subject discussed in the most full and deliberate manner, and when we have the additional authority of almost all the English Judges, after the most elaborate arguments on both sides, I should [10-Clark & Finnelly-743] think myself indeed very bold, if, without an investigation which I cannot say

10 Clark & Finnelly 744, 8 ER p922

have had an opportunity of making in private upon this subject, I should venture to differ from so many and such profound authorities. And much as I admire the composition and respect the investigating powers of my noble and learned friend, I must say that the argument he has delivered has not convinced me that the learned Judges are wrong.

At the time when the matter was discussed at your Lordships' bar, I made it my duty to attend deliberately to the various arguments that were adduced on either side. I have since looked at the opinion delivered on behalf of the learned Judges by the Lord Chief Justice of the Common Pleas; and I must own that that opinion has confirmed the opinion I originally formed when I heard the arguments at the bar, that the judgment of the learned Judges in Ireland was right, and to that opinion I still adhere. I shall not enter into an elaborate discussion of the cases or the reasonings adduced by my noble and learned friend. There are but two or three points of his argument to which I shall venture shortly to advert. The question is whether or not a contract of marriage per verba de praesenti is ipsum matrimonium; that is the true question. No* it is admitted b my noble and learned friend that it is not for all purposes attended with the legal consequences of marriage; that it is not good for dower.

Lord Brougham: - no I do not admit that; it is distinctly denied.

Lord Abinger: - Then I have misunderstood my noble and learned friend. I consider, however, that point to have been fully established by the authorities referred to by the Judges.

[10-Clark & Finnelly-744] My noble and learned friend has quoted the case of Collins v Jessot (6 Mod. 155; 2 Salk. 437), where Lord Holt is supposed to have said that it is a marriage, but that the parties, if they consummate it before the solemnisation in facie ecclesiae, are liable to ecclesiastical censure; that it is ipsum matrimonium, but that it is nevertheless, not a marriage for the purpose of cohabitation. It seems to me very extraordinary to say that a marriage shall be valid to all intents and purposes, and yet that it shall not be followed by the immediate, object which the parties had in contemplation in the marriage. I mention that as an instance of inconsistency, which either proves that Lord Holt is not correctly represented, or that the interpretation of his opinion is more correctly given by the opinion which the learned Judges have communicated to this House than by the opinion of my noble, and learned friend.

Lord Brougham: - The learned Judges say that it is good by the canon law.

Lord Abinger: - It cannot be good, I should think, by any law, if they are liable to censure for consummation, for treating each other as husband and wife. It cannot be that it is lawful matrimony in the eye, of God and man, and yet, if the parties cohabit together, they are liable to the censure of the Ecclesiastical Court.

There is one topic which appears to me, after all, the most forcible to which my noble and learned friend had addressed himself, and that is the case of the Quakers and the Jews; and I am free to admit that that question presented very considerable difficulties before the Marriage Act. I am not prepared to say or to admit that before the Marriage Act, the [10-Clark & Finnelly-745] marriages of Jews and Quakers were good by the law of this country; but since that Act, I think that under the clause therein which excepts those marriages from the operation of that Act, they are by implication to be deemed good. The Marriage Act itself does not declare that a contract per verba de praesenti shall be null and void; it only denies to the Ecclesiastical Court the right, which it before exercised, of enforcing marriage in consequence of that contract. If such contracts were actually legal, it leaves those marriages as they were before; it makes no alteration in the actual effect of a contract per verba de praesenti, by abolishing a particular remedy, and therefore those marriages would still remain lawful marriages; it does not declare the contracts to be null and void, but only declares that the Ecclesiastical Court shall not interfere to compel a solemnisation of marriage upon such a contract; but such marriages, if good before, would still be good, the Act not declaring the contract to be null and void.

There is only one other topic to which I shall address myself on this occasion; that is respecting the ecclesiastical law of England, upon which the whole foundation of the argument rests. My noble and learned friend seems to consider that the ecclesiastical law of England is to be derived from the ecclesiastical law of the

10 Clark & Finnelly 746, 8 ER p923

Continent. Now I beg to observe that he, has not at all satisfied my mind upon that part of the argument. The learned Judges have, I think, satisfactorily derived it from the constitutions of the ecclesiastical synods and councils in England, before the authority of the Pope was acknowledged in this country. I take that part only of the foreign law to be the ecclesiastical law of England, which has been adopted by Parliament or the Courts of this country, [10-Clark & Finnelly-746] from the decretals of Popes and the authority of councils on the Continent. It is admitted that, by the Constitutions of Lanfranc in the year 1076, there is an express declaration that a marriage shall not be good unless it be solemnised by a priest. The same appears in the laws of Kin Edmund, at a much earlier period. Then how comes it that this is no longer a

part of the law of England?

Lord Brougham: - It is because it is not in facie ecclesiae: - it says a priest, not a deacon.

Lord Abinger: - I do not want to enter into minute differences now, which I think are sufficiently explained by the argument of the Judges; I am only stating the

broad lines of argument upon which I proceed, and on which I think the learned Judges are well founded in their opinion, that by the ecclesiastical law of England the presence of a priest, or, since the Reformation, of a person in holy orders, is necessary to constitute a legal marriage. Those who have taken the trouble to investigate and make written notes of the authorities, have, of course, an advantage, over me; I profess to adhere to the opinion which I formed on consideration of the arguments at the bar. It appears to me that the opinions delivered by the Chief Justice, on behalf of the learned Judges, are incontrovertible and conclusive.

Lord Campbell: - After the most anxious consideration of the opinion delivered by the learned Judges in this case, I am unable to concur in it, and I cannot advise your Lordships to act upon it. I need not express my high respect for the individuals now administering justice in the Courts of Common Law in Westminster Hall, or the reverence with which I must regard whatever is laid down by Lord Chief Justice [10-Clark & Finnelly-747] Tindal; a Judge who for learning and ability, 13 not inferior to the most distinguished of his predecessors.

I certainly much regret that, upon a subject of such infinite importance and such great difficulty, the time had not been allowed to the Judges which they themselves stated they considered necessary for duly examining and weighing the conflicting authorities and arguments brought forward at your Lordships' bar. When you avail yourselves of your privilege of consulting the Judges on any question of law which you have to consider, you generally have the advantage of knowing the reasons by which they are swayed; for they either deliver their opinions seriatim, each expressing his own reasons; or the Judge highest in rank, who delivers their unanimous opinion, expresses reasons in which they have all concurred. On this occasion the reasons are, the reasons of the Chief Justice alone, and we are left entirely in the dark as to the process by which the others arrived at the conclusion that the first marriage entered into by the prisoner with Hester Graham, before a Presbyterian minister, which both parties intended and believed to be a present valid marriage, and under which they cohabited together for years as man and wife, without any doubt as to its validity-was null and void. In the Courts below, upon questions of great magnitude, it has not been unusual for the different Judges of the Court to give their opinions with their reasons separately, even when they agree in the judgment; of which we have a memorable instance in the case of Stockdale v Hansard (9 Adol and E. 1); and I think your Lordships

will not have the full benefit of consulting the Judges unless they deliver their opinions separately, or are understood [10-Clark & Finnelly-748] to concur in the reasons assigned by the Judge who delivers their unanimous opinion. It is possible that for the same opinion contradictory reasons might be given, and that the weight to be ascribed to it may be much lessened by those who join in it combating and overthrowing the arguments of each other. In the present case we have particularly to lament that we are informed of the reasoning only of one Judge, as he states that " it was only after considerable fluctuation and doubt in the minds of some of his brethren that they had acceded to the opinion which was formed by the majority." I should have been much gratified and edified by being informed of the course of this fluctuation; what the doubts were which weighed in

10 Clark & Finnelly 749, 8 ER p924
the minds of those learned persons, and by what train of reasoning those doubts were dispelled.

Now it is most essential that your Lordships should bear in mind the facts found by the special verdict. If George Millis had merely entered into a contract per verba de praesenti to marry Hester Graham, the parties not considering the engagement a present marriage, and intending that before they lived together as man and wife it should be solemnised by a subsequent ceremony, I should have agreed with the Judges that the man would not have committed bigamy by afterwards marrying another woman. Betrothment is not matrimony. Were a priest in orders accidentally present at such a betrothment, and the parties, instead of intimating be-fore him that they intended to be then married, expressed their intention that it was only an absolute engagement that they should afterwards become man and wife; by whatsoever form of words that engagement might be expressed, this would not have been ipsum matrimonium. But the jurors, by the special verdict, say, " that in January 1829, [10-Clark & Finnelly-749] George Millis, accompanied by Hester Graham, spinster, and three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there being the placed and regular minister of the congregation of Protestant dissenters commonly called Presbyterians; and that the said G. Millis and H. Graham then and there entered into a contract of present marriage, in the presence of the said Rev. J. Johnstone and the said other persons, and the said Rev. J. Johnstone then and there, performed a religious ceremony of marriage between the said G. Millis and H. Graham, according to the usual form of the Presbyterian church in Ireland; and that after the said contract and ceremony the prisoner and the said Hester for two years cohabited and lived together as man and wife, the said Hester being after the said ceremony known by the name of Millis" Now this was not a mere betrothment; this was not a mere executory contract per verba de praesenti for a marriage thereafter to be solemnised; this was, as it was meant to be ipsum matrimonium. Here we have not only pactum, not merely sponsalia, but nuptiae per verba de praesenti. I rely upon the distinction between a contract per verba de praesenti for a marriage to be afterwards solemnised, and nuptiae per verba de praesenti, without any contemplation of a future ceremony as necessary to complete the relation of man and wife; a distinction (I speak it with the most profound respect) which I think the learned Judges have not sufficiently kept in view. The use of the expression " contract of marriage " is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean only an irrevocable engagement to be afterwards carried into effect, the parties not meaning then to become husband and [10-Clark & Finnelly-750] wife, and their engagement therefore, though words in the present tense, are used, not amounting to nuptiae.

This distinction may be illustrated by the decisions respecting leases. The general rule is that a contract to let land per verba de praesenti is ipsa locatio; the term is instantly created, and the interest vests in the lessee, without the execution of a formal instrument of demise; but if it appears to have been the intention of the parties that., till a formal instrument of demise was executed, the relation of landlord and tenant for the stipulated term should not be constituted between them, the instrument containing words of contract per verba de praesenti is considered only an executory agreement, the specific performance of which may be enforced in a Court of Equity, and a subsequent lease to another would be good at law till set aside on the ground of the pre-contract; but where the contract to let per verba de praesenti is intended by the parties to operate immediately, it is ipsa location however informal it may be and a subsequent lease to another is merely void. In the present case, it is clear that the parties contemplated no farther ceremony completely to constitute the conjugal relation between them, and that they at the time of the ceremony intended to become, and believed that they had become, husband and wife.

The only objection that can be taken to the validity of this marriage is that there was not present at it a priest or deacon episcopally ordained, or a person believed by the parties to be a priest or deacon episcopally ordained; and the question arises, whether by the common law of England, which is allowed to be the common law of Ireland, there could not be a valid marriage, without the presence of a priest or deacon [10-Clark & Finnelly-751] so ordained, or believed by the parties to be so ordained.

10 Clark & Finnelly 752, 8 ER p925

The condition contended for as indispensable to the validity of marriage, is the presence of a person believed by the parties to be in priest's or deacon's orders. It is not considered essential that he should pronounce a benediction, or join in any religious ceremony; and though he never was episcopally ordained either as priest or deacon, his presence is sufficient, if the parties believe that he is in priest's or deacon's orders: - while a marriage celebrated by a clergyman who is actually in Presbyterian orders, and who is believed by the parties to be entitled by the law of God and the law of the land to marry them effectually, is a nullity. Such is the common law contended for by the counsel for the prisoner; but surely the onus lies on those who maintain that such is the common law, to make out their proposition by decided cases and text-writers of authority.

I must be allowed to point out to your Lordships the extreme improbability of the common law of England requiring the presence of a priest to the validity of marriage. I think it is quite clear that by the general law prevailing in the western church prior to the Council of Trent,-although a marriage, to be regular, ought to have been in facie ecclesiae,-for a marriage to be valid, so that the parties would not be considered as living together in fornication, and their issue would be legitimate, the presence of a priest was quite unnecessary. Marriage, as a sacrament, was considered a matter of ecclesiastical jurisdiction; the validity of marriage was decided in the Ecclesiastical Courts; from those Courts there was an appeal to Rome as a common forum. The proceedings in the divorce suit between Henry 8 and Catherine of Arragon afford the most recent and the most striking [10-Clark & Finnelly-752] instance of the law of marriage in England being considered as governed by the law of marriage prevailing in other Christian countries.

Now, that by the general marriage law of Europe, before the Reformation and before the Council of Trent, there might be a valid marriage without the presence of a priest, is clearly demonstrated by the canonists cited at the bar. I will confine myself to two authorities as quite sufficient for this purpose. In the work of John de Burgh (a canonist of the highest reputations, intitled " Pupilla Oculi," there is a chapter " De sacramento matrimonii," in which we find this doctrine expressly laid down: - " De ministro hujus sacramenti notandum est quod non requiritur alius minister distinctus ab ipsis contrabentibus; ipsimet enim ut plurimum sibi ipsis ministrant hoc Sacramentum, vel mutuo vel uterque sibi. Patet etiam quod ad collationem hujus sacramenti non requiritur ministerium sacerdotis, et quod illa benedictio sacramentalis, quanquam solet presbyter facere sive, perferre super conjuges, sive, aliae orationes ab ipso probatae, non sunt forma sacramenti, nec de ejus essential sed quoddam sacramentale ad ornatum pertinens sacramenti." He afterwards goes on to state that marriage ought to be solemnised openly before a priest, but intimates that, a clandestine marriage, where no priest is present, is binding and valid in law. Fernando Walter, now a professor in the University of Bonn, in his Treatise on, the Canon Law, a work highly esteemed on the continent of Europe, speaking of the decree of the Council of Trent on this subject, says: - The provision is new that both parties must declare, their intention before the-in proper parochial minister and at least two witnesses: - this form is declared so essential that without it the marriage is [10-Clark & Finnelly-753] altogether vo-id; but yet the object is only to secure a trustworthy witness in order to the precise ascertainment of the marriage, wherefore the persons mentioned need not have been expressly invited to be present. Nay, even the opposition of the parochial minister does not prevent the validity of the marriage, if he has merely heard the declaration. He goes on to explain the difference between a regular marriage before a priest and a clandestine marriage without a priest, but considering them equally effectual: - he says, " Marriage is a contract which ought, according to the ancient usage, to be confirmed by the priestly benediction; and properly this ought to be given by the proper parochial minister, or some, one authorised by him according to the rules of the church. Other ceremonies are also, to be observed. None of all this, however, is essential to the validity of the marriage." The decree of the Council of Trent respecting the solemnisation of marriage, requires the presence of the parish priest or some other priest specially appointed by him or the Bishop; but, even under this decree, the priest is present merely as a witness; it is not necessary that he should perform any religious service, or in any way join in the solemnity. This view of the subject is illustrated by the case of Lord and Lady Herbert (3 Phill.

10 Clark & Finnelly 754, 8 ER p926

58 2 Hagg., Cons. Rep. 263). They were, married in Sicily, where the decree of the Council of Trent is received. They of the parish priest to attend at the house, of the lady, and two of her servants were called up. In the presence of these witnesses she said, "I take you for my husband; "and he said, "I take you for my wife." Nothing more passed, and this was held to be a valid marriage in Sicily, and therefore, all the world [10-Clark & Finnelly-754] over. It thus appears quite certain that, according to the doctrine, of The Roman-catholic church, no religious ceremony was or is necessary to the constitution of a valid marriage. Although marriage, is considered a sacrament, this sacrament, like, baptism, might be administered, under certain circumstances, without the intervention of a priest; the parties being

liable to be censured for the irregularity of dispensing with the conjugal benediction and neglecting to make the proper offering to the church. There is not a trace in any ecclesiastical writer of the law of marriage in England being different from the law of marriage in other Christian countries. I earnestly entreat your Lordships to be-or in mind that I by no means say every contract of marriage using words de praesenti was Ipsum matrimonium; on the contrary, in England, and I believe, in the rest of Europe, an absolute engagement to become man and wife, at a future, time did not amount to present marriage; but if the parties had wished and intended to enter into present marriage without the presence of a priest, they might have, done so., subject to church censures for irregularly contracting the relation of man and wife,-not for living together, in sin; and I will use, the freedom to make an observation upon what has fallen from my noble, and learned friend who last addressed your Lordships, who would infer that the parties who have contracted per verba de praesenti were not man and wife, till the marriage, was celebrated, because, Lord Holt says that the parties might be liable to censure if they lived together before the celebration of marriage. Now, I believe it is not disputed that in Scotland there, may be a valid marriage per verba de praesenti without the intervention of a priest; and I can: - state, of my own knowledge, being the son, [10-Clark & Finnelly-755] of a minister of the church of Scotland, and having myself been present at such proceedings, that the parties who have been living together as man and wife after, an irregular marriage are considered as liable to church censure, and are not admitted to the communion of the church until they have been censured, and have, expressed their-regret for not having complied with the; rules of the church; but that the: - marriage is ipsum matrimonium, has never been doubted. The Lord Chancellor: - Suppose there is a contract per verbs de praesenti, and nothing further, no cohabitation; would the Church under such circumstances interfere, by its censures?

Lord Campbell: - That case had not come, within my observation. The cases to which, I refer, and which are not at all unfrequent, are those, of a runaway or what is called a half-mark marriage, where, the parties contract per verba de praesenti, and where, they live together as man and wife, and are, unquestionably man and wife, and where the children would be legitimate if the parents died without any further ceremony; that was decided by your Lordships' House, in the case of MacAdam v Walker (1 Dow, 148), where the man shot himself the instant he declared that the woman he had married was his wife. In those cases still the church considers the marriage, as irregular, and summons the parties before the kirk session, and rebukes them for not having observed the rules of the church.

Lord Brougham: - I have heard the censure, of a clergyman for solemnising a marriage without, publication of banns, which is reckoned irregular; but I [10-Clark & Finnelly-756] never heard of parties being liable, to rebuke, or that they have, come before the congregation or kirk session, for merely marrying privately without cohabiting.

Lord Campbell: - It is for living together as man and wife, without having been married by a clergyman, that the censure is pronounced.

But to show that there, was a peculiar law in England on this subject, even in the time of the Anglo-Saxons, there is cited to us a supposed law of King Edmund,
directing that at the nuptials there shall be a mass-priest, who shall, with God's
blessing, bind their union to all prosperity." Setting aside, the grave, doubts which
have been entertained of the genuineness of this document, does it show, that while a
mass-priest is directed to be present at nuptials, nuptials without the presence, of a mass-priest would be void, and that this ever after was the law, of England? Then

10 Clark & Finnelly 757, 8 ER p927
is a marriage void that is celebrated by a deacon, for he is not a mass-priest, and his presence would as little satisfy the law as that of the verger or the sexton.

There were then cited to us numerous decrees of provincial councils on the subject of marriage, the great object of which was to discourage clandestine marriages, and to require that all marriages should be celebrated in the face of the church; but there is no reason to suppose that the prelates who presided at these, councils, many of whom were foreigners, intended to introduce any law touching the essentials of marriage different from what prevailed in the rest of Christendom; they were only in the nature of bye laws, to be observed in a particular diocese or province, to prevent as much as possible, all clandestine marriages, either with or without the intervention of a priest. I believe, there is only one of these constitutions, that of Archbishop Lanfranc: - in the year 1076, [10-Clark & Finnelly-757] which professes to nullify a clandestine marriage, by declaring that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. But this denunciation goes further than the law is supposed ever to have, gone: - for the blessing of the) priest was not essential to the validity of the marriage if her was present, and the denunciation may rather be taken to be in terrorem than as making or declaring the law.

The different decrees against clandestine marriages seem to me to have no cogency to show that there was in England any peculiarity respecting the law of marriage as held by the Ecclesiastical

Courts. These decrees, if they were supposed to apply to the validity of the marriage, are, contrary to the plainest propositions of canonists, both foreign and native, and to the universal practice of Christendom. The existence of such a peculiarity seems wholly inconsistent with the procedure by which that law was administered. The church of Rome, in every country under its Jurisdiction, was most anxious that marriages should be publicly celebrated in the presence of a priest; first, for the laudable object of preventing imprudent unions by which the peace, of families might be disturbed; and secondly, for the excusable object of collecting fees from the faithful. It was proved before your Lordships' Committee on the Law of Marriage in Ireland, that a principal part of the emoluments of the Roman-catholic clergy in Ireland now arises from fees on marriages, and that for this reason they are, celebrated at the times, in the places, and under, the circumstances when it may be expected that the contributions will be most bountiful. But till the Council of Trent, when marriages were absolutely required to [10-Clark & Finnelly-758] be before the parish priest, or some other person duly authorised by the Bishop or the parish priest to officiate,-and all other marriages were declared to be null,-the doctrine of the church of Rome certainly was that there might be a valid marriage without the intervention of a priest; and if that Was so, it was hardly possible, that any different law, should prevail in any state subject to her jurisdiction.

In England the common-law Judges professed, with respect to marriage, to be governed by the Ecclesiastical Courts; those Courts alone took direct cognisance of the validity of marriage; and when the question arose incidentally before the common-law Judges, they referred themselves to the Bishop as the ecclesiastical Judge, and were, governed by the certificate, which he returned. Upon some occasions the validity of marriage, arose as a question before the common-law Judge's when they could not consult the Bishop. On such occasions they would have regard to the ecclesiastical law, and decide accordingly: - but the Bishop would not on any occasion disregard the general ecclesiastical law, and be guided by any different rules laid down by the Courts of Common Law.

Let us now see whether there are, any common-law decisions to the effect that there cannot be a valid marriage without the presence of a priest. I must again remind your Lordships that this is the question, and not whether a mere executory contract to marry constitutes marriage. There has been cited to us from Lord Hale's Manuscripts the note of a case (Co. Litt. 33 a n. 10) supposed to have been decided in the reign of Edw. I, the statement of which is so scanty and obscure that I think no weight can safely be given t-o it as an exposition of the law in that reign. We are not told how A. contracted [10-Clark & Finnelly-759] with B., or that any ceremony or form intended as spousals passed between them. It is said that A. married C., from which it may be inferred that he, did not intend that his contract with B. should operate, as a present marriage, and that his contract with her, although per verba de praesenti, was only meant to be

10 Clark & Finnelly 760, 8 ER p928

executory. However, in the Court in which the action was originally brought, it was held that B. was dowable of the lands in question, which could only be on the ground that A. and B. were husband and wife from the time of the contract, for the marriage could not possibly date from the sentence of the Ordinary. The judgment was reversed " coram, Rege et Concilio." This is suggested at the bar to have been, on a writ of error in Parliament. There can be no doubt that one of the King's Councils at that time consisted of the Chancellor, the Treasurer, the Barons of the Exchequer, the Judges of either Bench, with the King's Serjeant and the King's Attorney-general, and that they assisted in deciding cases brought before Parliament; but I am not aware that a writ of error in Parliament was ever said to be: - coram Rege et Concilio. On the contrary, my Lords, this was the style of the Star Chamber, and I conceive that the case must be considered as an instance, of the irregular interference by the King and his Privy Council with the ordinary administration of justice; the reversal of the judgment may have been out of favour to D., to whom the feoffment was made by A. after he was excommunicated. Lord Hale adds, " Neither the contract nor the sentence was a marriage." The sentence could not be a marriage, no more could the contract, if it was intended not as nuptiae, but only as an engagement to marry.

[10-Clark & Finnelly-760] Then come the two cases of Foxcroft [1 Roll]. Abr. 359] and Del Heith [Rogers' Eccl. Law, 584; see 10 Cl. and F. 550 n (k)], and I must express my astonishment that any reliance should be placed upon them in support of the proposition that marriage without a priest is void. If they prove anything, they prove that marriage by a priest is void unless celebrated in facie ecclesiae. Foxcroft was married in a private chamber by the Bishop of London, and the only objection taken to the validity of the marriage was, that it did not take place in a church, or chapel., and that it was without the celebration of mass. Del Heith's Case, is precisely the same in its leading facts; there was not a mere contract per Verba de praesenti, but nuptiae were actually celebrated. Del Heith was solemnly married to the woman by his parish priest; and because the marriage was in a private chamber, and not in facie ecclesiae, the son born after the marriage, was adjudged a bastard. Can, these cases have been decided according to the law of England as it stood in the reign of Edw. I? Was a marriage solemnized

by a priest in orders or by a Bishop in a private chamber absolutely void? If so, when was the law introduced by which it was made void? It is not pretended that in the time of the Anglo-Saxons more was required than a benediction by a mass-priest, which might as well be given in a private chamber as in a church or chapel. If in the reign of Edw. I all marriages were void except such as were celebrated in the face of the church, when and by what authority did private marriages by a priest in orders become valid? Could an ecclesiastical canon, sanctioned by the Pope, without the consent of the King and Parliament, effect the change? If it could, where is any such canon to be found?

I had always thought that these two cases had been allowed to have been decided contrary to law, and I have no doubt that they were so. They may now be [10-Clark & Finnelly-761] cited quite as much to show that a marriage is void by the canon law if privately solemnised by a Bishop, as that an actual marriage is void without the presence of a priest. They prove a great deal too much, or they prove nothing at all. But I cannot dismiss them without this observation, which they fully illustrate, that you cannot safely take the law upon such a subject from two or three cases, supposed to have been, decided in very remote times, which may be misreported, and which may be the result of haste, violence, or corruption. I should cite Foxcroft's and Del Heith's cases to show that the law upon such a question may best be learned from text-writers of authority, calmly and deliberately and impartially speaking the general opinion of the legal profession at the time when they were, published. In any writer, lay or ecclesiastical, is it said that a marriage privately solemnised by a priest is void, or that a marriage is void there being no priest presents It is laid down that a second marriage by a man already married is void, while a marriage after a contract per Verba de praesenti is only voidable. This shows that the mere executory contract, although indissoluble, is not marriage; but does not show that there might not have been a complete marriage without a priest, had the parties so wished and intended.

The authority of Perkins has been greatly relied upon at the bar as showing that unless there be a marriage by a priest, the woman shall not have dower. Now, with

10 Clark & Finnelly 762, 8 ER p929

out considering whether this may mean dower ad ostium ecclesiae, I would first question whether the right to dower would be a certain test of marriage. For the church, the test is whether the parties are considered as living together in lawful wedlock; and for the lay tribunals, whether the issue [10-Clark & Finnelly-762] be legitimate. But I think it is quite clear that the woman who according to Perkins, shall not have dower, is a woman who had entered into an executory contract of marriage to be afterwards solemnised; for he, says (s. 306), "If a man seised of land in fee make a contract of matrimony with J. S., and he dies before the marriage is solemnised between them, she shall not have dower for she never was his wife." Does he not in the most explicit manner, intimate that, according to the intention of the parties, the contract, of matrimony between them was to be afterwards solemnised; that they never intended the contract to operate, as marriage, and that, till the solemnisation, they were not to live together as man and wife? Wherever Perkins uses the expression " contract of marriage," be places it in opposition to actual marriage; as in title " Feoffments," where he says, " 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, inasmuch as if the woman dieth before the marriage solemnised betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband." He is here plainly speaking of an engagement to marry. Bracton, on the contrary, when he is considering the subject of gifts between husband and wife, supposes the parties to be married whether they marry with or without the forms of the church, their intention being to enter into the married state: - " Matrimonium autem accipi possit, sive sit publice contractum vel fides data quod separari non possunt, et re Vera donationes inter virum et uxorem constants matrimonio valere non debent." With the slighting of troth, which he, supposes to take place without any public ceremony, the parties come together as man and wife, so that they [10-Clark & Finnelly-763] cannot be separated. This is totally different from the contract of Perkins to be afterwards solemnised and is attended with totally different consequences.

The next case much relied upon at the bar was Bunting v Lepingwell (4 Rep. 29 Moor, 169): - and supposing that Bunting and Agnes Addishall had gone through the form of a present marriage without the presence of a priest, or had said or done anything which they intended to operate as present marriage, the case would have been very important; for on that supposition, if I am right in supposing that by the common law the presence of a priest was not necessary to the validity of marriage, no doubt could have arisen as to the legitimacy of Charles Bunting, the second marriage being

absolutely void, and there being no occasion for any sentence of the Ecclesiastical Court to set, it aside, or " quod praedicta Agnes subiret matrimonium cum praefato Bunting." But in referring to the special verdict it is quite clear that Bunting and Agnes, although they used verba, de praesenti, did not thereby mean to become mail and wife, but merely entered into an absolute engagement to solemnise a marriage between them at a future time; it was only an executory contract; and when Agnes had

taken Twede to husband, Bunting libelled her on the contract. Bunting and she under this engagement never had lived together, or intended to live together, as man and, wife; their engagement, therefore, was only in the nature of a pre-contract, which might then be enforced in the Ecclesiastical Court, and which rendered a subsequent marriage with another voidable, but which did not in itself amount to a marriage. But where is the case in [10-Clark & Finnelly-764] which it has been held that if parties intend to enter into the state of matrimony, and use a ceremony per verba de praesenti, and live together as man and wife, and believe that they are lawfully united in holy wedlock, this was a mere executory contract; that a subsequent marriage by one of them during the life of the other would not be void; and that such a subsequent marriage must be set aside on the ground of pre-contract? I quite agree that the contract actually entered into between Bunting and Agnes neither constituted, nor was ever intended to constitute, a complete marriage, without the intervention of a religious ceremony.

The case of Weld v Chamberlaine (2 Show. 300) is relied upon by both sides; Chief Justice Pemberton having there held that a marriage by an ejected minister, without a ring, and without following the ritual of the church of England, was valid. But I cannot help thinking that the opinion of the Chief Justice was chiefly influenced by the consideration that this was not a mere contract to marry hereafter; that both parties intended at the moment to enter into the married state; that nuptiae had

10 Clark & Finnelly 765, 8 ER p930

been celebrated between them; and that he would have given the same effect to the ceremony, if, instead of an ejected minister who had been episcopally ordained, but was not then recognised by the church, the clergyman present had been ordained by the imposition of hands of several ejected ministers, or, in other words, a Presbyterian minister.

The only other case much relied upon by the counsel for the prisoner was Haydon v Gould (1 Salk. 119). Here there was an actual marriage, and the man and the woman intended to become husband and wife, and believed that they were so, and lived together as such for [10-Clark & Finnelly-765] seven years, till she died. They were of a sect called Sabbatarians, and were married by one of their ministers in a Sabbatarian congregation, and used the form of the Common-prayer, except the ring. Had there been a decision of a Court of Law that this was no marriage, and that the issue were illegitimate, it would have been expressly in point; but the case was only in the Ecclesiastical Court, and the only question there was, whether the husband was entitled to administration. It was held in the Prerogative Court, and confirmed by the Delegates, that the husband could not demand administration from the Ecclesiastical Court, as he had not been married according to the forms, of the Church, " though perhaps it should be so that the wife, who is the weaker sex, or the issue of this marriage, who are in no fault, might entitle themselves by such marriage to a temporal right." The Delegates, therefore, who allowed the husband to be punished for his nonconformity to the church, instead of deciding the marriage, to be void, appear to have intimated an opinion that under it the wife would have been entitled to dower, and the children would have been legitimate. The Reporter it is true adds the constant form of pleading marriage is "per Presbyterum sacris ordinibus constitutum." But if this were the only form, it would exclude marriages by a deacon, which are now admitted to be valid. Had there been a reference to the Court which decided Haydon v Gould, pending a real action involving the question of the legitimacy of the eldest son, there is reason to suppose the certificate would have been that he was born in justis nuptiis; and I make no doubt that in such a case such an answer would have been returned by the Bishop in early times, when it was the universal opinion of the [10-Clark & Finnelly-766] Western church that to administer the sacrament and to constitute the bond of marriage, the presence of a priest was unnecessary. With respect to the refusal of administration to the husband, I am by no means clear that the same decision would not have taken place under a clandestine marriage by a Roman-catholic priest.

Beau Fielding's case [14 St. Tr. 1327] is exceedingly entertaining to read, but throws no light upon the present controversy, as no question arose as to the validity of the first marriage, and his guilt depended upon the credit of the witnesses who swore to the second.

The Sabbatarian case was decided in the ninth year of Queen Anne, and I will venture to say, that from that time downwards till the present controversy arose, above 130 years, the opinion of all the greatest Judges who have presided in Westminster Hall and in Doctors Commons has been, that by the common law the presence of a priest in orders was not indispensably necessary to the celebration of a valid marriage.

In Jesson v Collins (2 Salk. 437), we have the dictum of treat distinguished Judge Lord Holt, " that a contract per verba de praesenti was a marriage." He, no doubt, meant where it was intended to operate as a present marriage, and he expressly excluded the presence of a priest. It seems to me plain that by a marriage, he must be understood to intend a marriage by the common law of the land. It has been supposed that this could not be his meaning, because in Wigmore's Case he says, " by the canon law, a contract per verba de praesenti is a marriage. Both propositions are true, and both are

consistent. The common law adopted [10-Clark & Finnelly-767] that maxim of the canon law with respect to the validity of marriages. This will be found to be the opinion and the language of Sir W. Scott, the Judge of the highest authority on this subject who has ever presided in an English Court of Justice. Holt appears to have said in Wigmore's Case, as was said by the Delegates in Haydon v Gould, that to entitle the parties to all the privileges attending legal marriage, marriages ought to be solemnised according to the rites of the church of England; but he gives no countenance to the notion that the marriage by the minister of the congregation who is not in orders is a nullity, and that the children would be bastards. We have the authority of Mr. Justice Gould, Mr. Justice Powis, and that distinguished Judge Mr. Justice

10 Clark & Finnelly 768, 8 ER p931
John Powell, to the same, effect as that of Lord Holt; for according to the report of lesson v Collins under the name of Collins v Jessot (6 Mod. 155), the Chief Justice saying, " If a contract be per verba de praesenti, 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 ecclesiae;" the Reporter observes that to this the whole Court agreed, " quae omnia tota Cur concess."

I do not find the subject again discussed till the publication of Blackstone's Commentaries; where, if any where, we may look to find the principles of our jurisprudence. If he has fallen into some minute, mistakes in matters of detail, I believe upon a great question like this, as to the constitution of marriage, there is no authority to be more relied upon. He began, before the Marriage Act, to read the Lectures [10-Clark & Finnelly-768] at Oxford, which became the Commentaries, but did not publish them till after, and his attention must have been particularly directed to the law of marriage. Does he say that at common law marriage could not be contracted in England without the intervention of a priest? His words are, " 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 " (1 Blacks. Comm. 437). He lays it down in the most express terms, that, before the Marriage Act, in England a marriage per verba de praesenti, without the intervention of a priest, was ipsum matrimonium. He says that for many purposes it was marriage; it must have been marriage to make the children legitimate, for that is the test by which a valid marriage is to be determined; and if it makes the children legitimate, there can be no doubt it would be valid so as to make the person who has entered into it liable for the penalties of bigamy if he enters into a second marriage. He mentions Lord Hardwicke's Act (26 Geo. 2, c. 33); he then says,

Much may be and much has been said both for and against this innovation upon our ancient laws and constitution." He adds, " Any contract made per verba de praesenti, 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." This passage is to be found in the 25 editions of his work which has now for a period approaching to a century taught the law of England to this country and to all civilised nations who have had any curiosity to inquire into our polity.

[10-Clark & Finnelly-769] At last came the case of Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 5 4), which was for many years understood to have finally settled the law by judicial decision. I believe it is universally allowed that Lord Stowell was the greatest master of the civil and canon law that ever presided in our Courts, and that this is the most masterly judgment he ever delivered. I have read it over and over again, and always with fresh delight. For lucid arrangement, for depth of learning, for accuracy of reasoning, and for felicity of diction, it is almost unrivalled. Although it seems to flow from him so easily and so naturally, it is evidently the result of great labour and research. Luckily he had full leisure to mature his thoughts upon the subjects and satisfactorily to explain to us the authorities and arguments on which his opinion was founded. Your Lordships are aware that the case turned upon the validity of a marriage in Scotland, per verba de praesenti, without the intervention of a clergyman, and it became essential to consider what was the general law respecting the manner in which marriage was contracted. Your Lordships will find he clearly lays it down that there was the same law on the subject all over Europe, and that, till the Council of Trent, by this law there was no necessity for the intervention of a priest to constitute a valid Marriage. Among other things to the same effect, he says, " The law of the church, although in conformity to 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 [10-Clark & Finnelly-770] that state the character of a sacrament, for it is a misapprehension to suppose, that this intervention was required as 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 decrees for the reformation of

marriage. Such was the state of the canon law, the known basis of the matrimonial law of Europe. The canon law, as I have before described it to be is the basis of the marriage law of Scotland, as it is of the marriage

10 Clark & Finnelly 771, 8 ER p932
law of all Europe. It becomes of importance, therefore, to consider what is the ancient general law upon this subject; and on this point it is not necessary for me to restate that by the ancient general law of Europe, a contract per verba de praesenti, or a promise per verba de futuro cum copula, constituted a valid marriage, without the intervention of a priest, till the time of the Council of Trent."

Lord Kenyon had before laid down the same doctrine, though in a less peremptory manner: - " I think," he says, " though I do not speak meaning to be bound, that even an agreement between the parties per verba de praesenti is ipsum matrimonium;" Reid v Passer (Peake, N. P. Cas. 231, first ed; 303, new ed.). But ever since Dalrymple v Dalrymple, every Judge who has touched upon the subject has unhesitatingly adhered to the law as there laid down by Lord Stowell. In Lautour v Teesdale, Lord Chief Justice Gibbs says (8 Taunt. 837), " The judgment of Sir W. Scott in Dalrymple v Dalrymple 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 [10-Clark & Finnelly-771] 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. 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, therefore, must be taken to have carried with them to Madras. It appears also that a contract of marriage per verba de praesenti is considered to be an actual marriage, though doubts have been entertained whether it be so unless followed by cohabitation."

In The King v Brampton (10 East, 282), which turned upon the validity of a marriage contracted in a part of St. Domingo occupied by the English army, Lord Ellenborough says, " I may suppose, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognised by subjects of England in a place occupied by the King's troops, who would implicitly carry that law with them. It is then to be seen whether this would have been a good marriage here before the Marriage Act. Now certainly a contract of marriage per verba de praesenti would have bound the parties before that Act."

In Smith v Maxwell (1 Ryan and M. 80), tried before Lord Wynford, Chief Justice of the Common Pleas, where a question was made respecting the validity of a marriage in Ireland which had been celebrated by a dissenting minister in a private house, he observed, "I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act, and which, as it is said [10-Clark & Finnelly-772] in the case of Dalrymple v Dalrymple, are common to the greater part of Europe. That case has placed it beyond a doubt that a marriage so celebrated as this has been, would have been held valid in this country before the existence of that statute." That was a marriage celebrated in Ireland by a Presbyterian minister (the Report in Ryan and Moody describes, him as a clergyman of the church of England).

The Lord Chancellor: - Between what parties?

Lord Campbell: - That would be quite immaterial. Lord Wynford says, "this marriage would have been valid in England before the Marriage Act." And in England there is no statute which makes any distinction as to the religious persuasion of the parties married by a dissenting minister.

The Lord Chancellor: - So far it is a dictum.

Lord Campbell: - But as far as respects this marriage in Ireland it is expressly in point. He says, " there can be no doubt that a marriage so celebrated (that is by a Presbyterian minister in a private house) would have been valid in England before the existence of the Marriage Act." In Beer v Ward (vide ante. 607 and 611), another case on the validity of a marriage in England before the Marriage Act, Lord Tenterden laid it down distinctly, that if the parties in the presence of witnesses formally acknowledged themselves to be man and wife, that before the Marriage Act constituted a marriage valid in law, and that the issue would be legitimate. He said,

"As I understand the law before the Marriage Act, a marriage might be even celebrated without a clergyman, upon a declaration by the parties, in terms of the contract, that they were man and wife, accompanied by cohabitation as man and wife. A contract verbally made before witnesses, and a [10-Clark & Finnelly-773] declaration of that in the presence of witnesses, would, at that time of our

10 Clark & Finnelly 774, 8 ER p933
history, have made a good and valid marriage in England, as it does now in Scotland."

The Lord Chancellor: - That is not in print.

Lord Campbell: - It is not in print, but it is taken from the shorthand writer's notes, authenticated by Mr. Serjeant Clarke, who was counsel in the cause.

The Lord Chancellor: - I certainly heard him express himself to that effect.

Lord Campbell: - Here then we have a most positive declaration by Lord Tenterden, a most cautious Judge made most attentive to the rights of the church, that before the Marriage Act the law of England and the law of Scotland upon this subject were the same; and that in England, if parties came together and declared that they were man and wife, and lived together as man and wife, they were married to all intents and purposes.

The doctrine of Lord Stowell in Dalrymple v Dalrymple has been recognised by all his successors, and I have reason to believe is at this day approved of both by the Judges and the bar in Doctors Commons. In Wright v Elwood (1 Curt. 670), Sir Herbert Jenner, the present Dean of the Arches, a most learned civilian, and most cautious as well as laborious Judge, says, " Before 26 Geo. 2, c. 33, marriages without publication, of banns or any religious ceremony, contracts per verba de praesenti, might be good and valid, though irregular; the parties and the minister might be liable to punishment, but the vinculum matrimonii was not affected."

Now I come to criminal cases. In criminal as [10-Clark & Finnelly-774] well as in civil proceedings, the validity of a marriage by the common law, celebrated without the intervention of a priest in episcopal orders, has been repeatedly recognised by judicial decision. Lathroppe Murray was convicted of bigamy at the Old Bailey, in the year 1815. The case turned on the legality of the first marriage, which was celebrated in Ireland by a Presbyterian minister. The prisoner was a member of the Established Church, the woman to whom he was married a dissenter; the facts were the same as here. The Recorder of London, after consulting the Judges, held the first marriage to be valid. The prisoner petitioned the House of Commons to interfere in his favour, on the ground that the first marriage was, invalid. On that occasion Sir Samuel Shep-
herd then Solicitor-general, a most learned and accurate lawyer, and then, I may say,
speaking judicially, observed, " That in his opinion and that of the Attorney-general, after having examined every Act of Parliament in Ireland respecting the validity of the marriage ceremony, the first marriage was a legal one. That certain very eminent civilians in Ireland had been consulted several years before respecting that marriage, all of whom declare it was a legal marriage, and that he had no doubt as to the legality of the conviction." This is the identical case of The Queen v Millis

In Ireland there have been many convictions for bigamy, the marriage having been by a dissenting minister, and both parties not dissenters. I will mention a few, of which I have MS. authentic reports. In the case of The King v H. Marshall, tried at Enniskillen Spring Assizes, 1828, before Baron M'Cleland, the first marriage was by a Presbyterian clergyman, the prisoner being a member of the Established Church 3 the [10-Clark & Finnelly-775] prisoner was convicted. In The King v Wilson, tried at Armagh Summer Assizes, 1828, before Mr. Justice Torrens, 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; the prisoner was convicted. In The Queen v Halliday, tried at Donegal Spring Assizes, 1838, before Mr. Baron Pennefather; the prisoner being 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. The counsel on behalf of the prisoner contended that such a marriage was invalid; but Mr. Baron Pennefather said he considered such a marriage in Ireland to be perfectly good, and directed the jury accordingly. The prisoner was acquitted; but the reason was that the witnesses to one marriage did not sufficiently identify him. In The Queen v Robinson, tried at Cavan Spring Assizes, before Mr. Baron Foster 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

10 Clark & Finnelly 776, 8 ER p934

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. The counsel for the prisoner submitted that 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 [10-Clark & Finnelly-776] considered as a layman. The counsel 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. Mr. Baron Foster, after conferring with Baron Pennefather, held that the marriage in question was good. The prisoner was found guilty. In Rex v M'Laughlin, tried at Antrim Spring Assizes, 1831, before Mr. Justice Moore, for bigamy; the prisoner, being a member of the Established Church, was married to a Presbyterian woman by a Presbyterian minister; afterwards, during her life, he was

again married by a Presbyterian minister to another Presbyterian woman. It was argued for the prisoner that the marriages were illegal, as having been celebrated by Presbyterian ministers, though one, of the parties belonged to the Established Church. Judge Moore declared both marriages legal, and added that the point had been so often ruled by the Judges on the circuits, that he had scarcely expected to hear it raised. The prisoner was convicted, and transported for seven years. In The Queen v Daniel Ancruey, tried at Down Summer Assizes, 1841, before Mr. Justice Crampton, on an indictment for bigamy; Mary O'Hara proved that she saw the prisoner married, about three years before, to Margaret Berry, by Mr. Murray, the Roman-catholic priest of Newry, in the Roman-catholic chapel of that town, and that said Margaret is still alive. John Conroy swore that he knew prisoner and said Margaret to live together as man and wife; that in May last, prisoner said he had got a divorce, from her; and that witness then accompanied him in the evening, and saw him married to Margaret Courtney, by the Rev. Mr. Weir, Presbyterian minister in Newry. Margaret Courtney stated that she was and is a [10-Clark & Finnelly-777] Presbyterian; she left prisoner at the end of a week, on discovering his first marriage. The prisoner was convicted, and sentenced to 12 months imprisonment with hard labour; which punishment he underwent.

These are the criminal cases to which I beg to draw your attention; and I ask are we now to be told that all these convictions were illegal, and that if, upon a second conviction, there had been a counter plea to the prayer of clergy, the Judges who gave effect to it would have been guilty of murder? I refrain from citing the passages from Chief Baron Comyn's and other abridgments of the common law, to show the

P constant opinion of the profession in this country; but I cannot refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. Their two greatest legal luminaries are Chancellor Kent and professor Story. In Kent's Commentaries I find this passage: - " No peculiar ceremonies are requisite by the common law " (he is speaking of the common law of England) " to the valid celebration of marriage; the consent of the parties is all that is required. If the contract be made per verba de praesenti, or if made per verba de futuro and be followed by consummation, it amounts to a valid marriage, and it is equally binding as if made in facie ecclesiae. This is the doctrine of the common law, and also of the canon law which governed marriages in England prior to the Marriage Act; and the canon law is also the general law throughout Europe as to marriages, except where it has been [10-Clark & Finnelly-778] altered." He then goes on to point out particular States, such as Maine and Massachusetts, in which particular regulations as to the form of contracting marriage are introduced by statute, but intimates that in the absence of positive statute, the common law of England, as he has expounded it, governs the marriage contract.

In Story's treatise " On the Conflict of Laws," he says (c. 5), " The common law of England, like the late law existing in America, considers marriage in no other light than as a civil contract." He goes on to explain, that wherever particular forms are not required by positive statute, a complete marriage is constituted by the consent of the parties. There can be no doubt that this view of the common law of England has been constantly acted upon in every State of the American Union; but we are

10 Clark & Finnelly 779, 8 ER p935

now told that all parties who have thus contracted the matrimonial tie, have been living together in a state of concubinage.

Now, my Lords, am I not justified in saying that the law upon this subject has long been considered settled by judicial decision? It is possible that some new discovery may have been made, and that all the eminent men whose opinions I have cited may have been in error. Rut how is this proved? If an express decision against the validity of such a marriage had been dug out from some obscure repository, I should have paid little attention to it against such a current of authority, and I should have treated it as I do the opinion of Mr. Justice Bayley, cited at the bar, that a marriage in Ireland between dissenters by a dissenting minister was void, because it was celebrated, not in a church, but in a private house. But from the earliest times, with the exception of [10-Clark & Finnelly-779] Foxcroft's and Del Heith's Cases, hitherto allowed not to be law, there is no decision discovered to show that a marriage contracted by the parties with the intention of instantly entering into the state of wedlock is void, or is not attended with the incident of marriage of rendering the issue legitimate.

The counsel for the prisoner relied very much upon the general scope of the statutes respecting marriage, as showing that there can be no valid marriage without the intervention of a priest; and there is great reason to think that this notion was entertained by those who framed the Irish statutes making it highly penal for Roman-catholic priests, to marry any except Roman-catholics, and to annul marriages celebrated by Roman-catholic priests unless both parties were Roman-catholics: - although it cannot be

said that upon a contrary supposition such statutes would be nugatory; for whatever the law of the land may be there are few who would enter into the conjugal state without the nuptial benediction from a priest; and the nullifying enactment would avoid the marriage unlawfully celebrated by a Catholic priest, even if at common law the parties might have contracted a valid marriage without any priest, Catholic or Protestant.

The statutes respecting pre-contracts, per verba de praesenti do not seem to me, by any means to show that there may not be ipsum matrimonium without the intervention of a priest; for I have already attempted to explain that there may be 8, contract per verba de praesenti which is not ipsum matrimonium, if the parties consider it executory, and do, not mean to live together as man and wife till their, marriage shall be subsequently solemnised in the face of the church. Contracts per verba de praesenti, subsequente could, [10-Clark & Finnelly-780] are exempted from the operation, of the Acts, because cohabitation is supposed to be proof that they meant to contract present marriage, and persons who have so contracted are treated as Married. But there is another class of statutes, entirely overlooked by the Judges, and which in MY mind afford a strong argument against the necessity of the presence of a priest, apostolically ordained to the constitution of a valid marriage; I allude to the statutes for removing doubts as to the validity of marriages where no such priest was present. These are declaratory Acts.

By the Irish Act, 21st and 22d. G. 3, c. 25, marriages celebrated by dissenting ministers in Ireland, between members of their own congregations, are declared to be valid. These marriages were obviously, before the passing of the Act, in the same situation exactly as the marriage the validity of which we are now considering. At common law the validity of a marriage could in no degree depend upon the religious profession of the parties. By the Act of the Imperial Parliament, 58th G. 3, c. 84, marriages solemnised by Presbyterian ministers in the East Indies a-re declared to be valid; the law of marriage being the same in the East Indies as in Ireland. Further, by the Imperial Act, 4th G. 4, c. 91, marriages in a foreign country celebrated by any chaplain, or by any officer or other person appointed by the Commander-in-Chief, are declared to be valid. The common law of England with respect to marriage prevails within the lines of the English army abroad, and here you have a Parliamentary declaration that according to the common law of England, a marriage by a layman was valid. I have always understood that although a statute in formen active is not necessarily to be taken as introductory of a new law; a [10-Clark & Finnelly-781] declaratory law is a positive announcement by the Legislature that the law declared existed before the passing of the statute, and shall hay a retrospective operation, and shall guide the decision of other cases similarly circumstanced as the case the law of which is declared. These declaratory statutes were,

10 Clark & Finnelly 782, 8 ER p936

cited at the bar, but they are not noticed by the Lord Chief Justice Tindal; and it would have been satisfactory to have known how they were, viewed by the Judges who " after considerable fluctuation no doubt, acceded to the opinion of the majority."

There is another Act of Parliament on this subject, which I humbly think is entitled to some consideration. By 32d G. 3, c. 21 (Irish), Protestant dissenting ministers may publish banns between a Protestant dissenter and a Roman-catholic, and marry them, but are prohibited from celebrating marriage between a Roman-catholic and a member of the Established Protestant Church; affording an inference that a marriage by a Dissenting minister, like a marriage by a Roman-catholic priest, would be valid where not forbidden by the Legislature.

Much reliance has-been placed on the statement that actions for breach of promise of marriage have been maintained in Ireland where there had been a copula, after the promise; and actions for seduction after a promise to marry, the daughter being called as a witness; which it is said would be upon the doctrine contended for by the Crown, instances of a wife being permitted to sue her husband, and to give evidence against him in a Court of Justice. But, in countries where the canon law certainly prevails, it does not follow that in every case marriage is necessarily constituted by a copula following a promise to r marry. To constitute such a marriage there [10-Clark & Finnelly-782] must first be mutual promises solemnly and sincerely entered into, and then there must be a copula while these promises remain unreleased and in force. Now the mere words indicating an intention to marry, used in the course of soliciting chastity, not understood to be serious, however culpable they may be cannot be construed into a binding contract to marry; and regard must he had to the circumstances under which the copula takes place; for if the woman in surrendering her person is conscious that she is committing an act of fornication instead of consummating her marriage, the copula cannot be connected with any previous promise that has been made, and marriage is not thereby constituted. In examining all contracts you must look to the intention of the contracting parties, and there, can be no binding contract without the parties intending to enter into it. In the cases referred, to., it would probably be found that, according to the intention of the parties, the copula was not in performance of the promise; and that, if

the female gave any credit to the promise, she did not think of then being made, a wife, and still treated the promise as executory, to be performed at a future time by a marriage ceremony. It may well be admitted that in Ireland marriage was not usually constituted by such means, for it was not in the contemplation of the parties so to constitute it; but this will by no means show that marriage was not constituted by a ceremony which the parties intended and believed to constitute marriage, and after which they lived together as man and wife.

Then it is said that the Statute of Merton shows that the canon law respecting matrimony was never admitted into England. The Statute of Merton does not relate to the subject we are discussing; it Settles, [10-Clark & Finnelly-783] only who are to be legitimate, and determines that none shall be legitimate who are not born after the marriage of their parents; but it leaves the question of marriage untouched, and there is no inconsistency in supposing that marriage may be contracted according to the rules of the canon law, although the marriage of the parents after the birth of children may not render them legitimate. As a reductio ad absurdum, this case is put: - "A. made a contract of marriage, per Verba, de praesenti with B., and then in the lifetime of B. marries C. in facie ecclesiae, and has children at the same time both by C. and B; B. dies. Are the issues of both legitimate? " I have no difficulty in answering this question. If A. and B. by their contract meant to enter into instant marriage, and to live together as man and wife without waiting for any other ceremony, the issue of B. are legitimate, and the issue of C. are bastards. On the other hand, if A. and B., though using words de praesenti, did not mean to become complete man and wife till a subsequent ceremony should be performed, and they afterwards came together without thereby meaning to consummate, a marriage, a possible though not a probable supposition,
their engagement resting merely in contract, and B. dying before a marriage was solemnised, the issue of C. would be legitimate: - but no case is to be found in the books in which issue of parties who have contracted per verba de praesenti have been held illegitimate indeed, in almost all those cases I believe it will be found that the

10 Clark & Finnelly 784, 8 ER p937
parties never came together, and never meant to come together as man and wife, so that issue never appeared. It is easy to conceive that parties might contract per verba de praesenti, without meaning instantly to become man and wife. Such an engagement [10-Clark & Finnelly-784] was irrevocable; but there might well be an irrevocable engagement although it was at the same time only executory. The distinction I have taken solves with equal facility the case put, " suppose two sons born at the same time, one from each mother, which is the eldest son and heir? "

But these difficulties are trifling compared to the difficulties to be encountered on the supposition that., by the common law, marriage could not be possibly constituted without the intervention of a priest episcopally ordained. What if the person who officiates as a priest, and is believed by the parties to be so, is no priest, and has never received orders of any kind? This question was suggested during the argument, but is not met by the Judges. Mr. Pemberton admitted at the bar, as according to the authorities he was, bound to do, that the marriage would be valid. Lord Stowell repeatedly expressed an opinion to this effect; and it turns out that in the instance of a pseudo parson, who about 20 years ago officiated as curate of St Martin's-in-the-Fields, and during that time married many couples, upon the discovery of his being an impostor, which became a matter of great notoriety, no Act of Parliament passed to give validity to the marriages which he had solemnised; which could only have arisen from the Government of the day being convinced, after the best advice, that in themselves they were valid.

Indeed, that parties who have vowed eternal fidelity at the altar, and, having gone through all the forms which the Church and the State prescribe, have received the nuptial benediction from one whom they have every reason to believe was commissioned to pronounce it by a successor of the holy Apostles, should run the risk of finding that some years after, [10-Clark & Finnelly-785] from the rector of the parish being imposed upon by a layman pretending to be a priest duly ordained, they are living in a state of concubinage and that their children are bastards, is a supposition so, monstrous, that no one has ventured to lay down for law a doctrine which would lead to such consequences. But what becomes of the doctrine of the necessity of a priest in Apostolical orders, to the validity of marriage? The proposition must now be changed, that there must be present one believed by the parties to be a priest in Apostolical orders; and a marriage by a layman may be good. There is a good marriage by a layman from the mistake, of the parties, who thought that he was a priest with power to marry them. Does it not seem strange that at the same time a marriage should be void celebrated by a clergyman who is actually in Presbyterian orders, having been solemnly ordained by the imposition of hands, according to the rites of his church, and who is believed by the parties to have sufficient authority by the law of God and man to join them in wedlock?

Here I must observe how little weight is to be given to what was gravely relied upon at the bar, the prevailing belief among mankind of the necessity of the presence of a priest at a and marriage, as evinced by novelists and dramatists: - for it will be found that these expounders, of the law always make a marriage by a sham parson void, contrary to the opinion of Lord Stowell and the canonists; and they give validity to marriages in masquerade, where the parties were entirely mistaken as to the persons with whom they are united; marriages which would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights.

There is another case, not met by the learned [10-Clark & Finnelly-786] Judges, which essentially breaks in upon the rule they have laid down. It has been repeatedly held, and there can be no doubt that such is the law, that in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the consent of the parties. Lord Stowell has referred to the marriage between the first parents of mankind; and looking to a more modern case, which would be determined by the common law of England, I presume the learned Judges would not doubt, that in the recent settlement of Pitcairn's Island, the descendants of the mutineers of the Bounty might lawfully have contracted marriage before they had been visited by a clergyman in episcopal orders. The necessity for the presence of such a Clergyman, must be qualified with the condition that his attendance may by possibility be procured. Again, the rule that marriage is void unless celebrated pier presby-

10 Clark & Finnelly 787, 8 ER p938

terum sacris ordinibus constitutum is broken in upon by the admission that a marriage is valid if celebrated by a deacon, who is no more a presbyter than the parish clerk. A deacon is in orders, but not in priest's orders; and if the test of marriage be the question usually put by the temporal Courts to the Bishop, on the plea of ne unques accouples in loyal matrimonie, where the marriage was celebrated by a deacon, the answer must have been in the negative; so that the widow would have lost her dower; and upon a writ of right by the son as heir, there must have been judgment against him on the ground that he was a bastard.

The Judges seem to intimate that a marriage by a deacon before the Reformation would have been bad, but that since the Reformation it is valid. I should like to know by what authority the change has been [10-Clark & Finnelly-787] brought about; Lord Hardwicke's Act is silent upon the subject, and Parliament has in no shape interfered. Has the Church authority to make such a change, with or without the consent of the Crown; and might it now be ordained by the Convocation that marriage may not be celebrated by a deacon, or that it may be celebrated by a parish clerk or a churchwarden? May the law of England, respecting a contract on which such important civil rights depend, be altered without the authority of Parliament? But if such a power does belong to the Church, where is the canon by which it was exercised? All the canons passed since the time of Henry 8 are extant, as much as the Acts of Parliament., and no one is to be found alluding to such a subject. In the book of Common-prayer it is said that a deacon may baptise in the absence of the priest; it is silent as to his authority to marry, which seems always to have been considered one of his ordinary functions.

But I will now show that at common law there might have been a valid marriage by one not even in deacon's. orders, and where no one was deceived, where there, was, no mistake by the parties. Till the 13th and 14th C. 2, c. 4, s. 14, there was no necessity for the clerk presented by the patron to a living being in orders of any sort, and he had a certain time after, his admission to be ordained. There is an important case upon this point, not hitherto cited; Costard v Windet (Cro. Eliz. 775). One who was a there doctor of the civil law, and never any spiritual person, was admitted to a benefice. Not having taken orders, he was, afterwards deprived by a sentence declaratory quia mere laicus. A question arose whether, a lease [10-Clark & Finnelly-788] granted by him after his admission was valid. Gawdy, Justice, was; at first of opinion that the lease was void, because upon the matter he was never, incumbent; but Popham and Fenner contra, " for it would be mischievous if all the Acts, by such averments should be drawn in question. And every one agreed that all spiritual acts, as marriages, etc. by such an one, during the time that he is parson, are good; and so, with the assent of Gawdy, they resolved to adjudge it.

I must likewise observe that there might have been great difficulty in determining what kind of priest is a good priest to celebrate a marriage; the test being, not whether he be a clergyman of the Established Church, but whether he, has been ordained by a Bishop. Is a priest of the Greek church sufficient? or of the Christian church of Abyssinia? or of the Lutheran church, which maintains episcopacy in Denmark and Sweden, while in other countries it is governed by a Consistory of ecclesiastics, by whom orders are conferred? Upon a question of the validity of a marriage by a priest of a foreign church, by whom and on what principle, between the time of the Reformation and the passing of Lord Hardwicke's Act, would the sufficiency of his orders have been tried? Before the Reformation there would have been no difficulty, for the only orders recognised would have, been those

of the church of Rome; but that test cannot now be applied, as a priest ordained by an English Protestant Bishop would not be competent, for there is no reciprocity between the church of Rome and the church of England on this subject; as English Episcopalian orders are not recognised by the church of Rome, and a clergyman of the church of England conforming to the church of Rome must be re-ordained by a Roman-catholic [10-Clark & Finnelly-789] Bishop. Although now no orders, are recognised by the church of England except those conferred by a Bishop, there seems for some time after the Reformation to have been considerable laxity upon this subject. It would appear that clergymen ordained by foreign churches which had laid aside episcopacy, were admitted into, English benefices without being re-ordained. Dr. Whittingham, who had been ordained by the Swiss clergy, and never by a Bishop,

10 Clark & Finnelly 790, 8 ER p939
was appointed Dean of Durham, and held the office many years, till he died. Archbishop Grindall, in 1582, issued a licence to Mr. John Morrison, stating that as he had been ordained to sacred orders and the holy ministry five years before, in the kingdom of Scotland, by the imposition of hands, according to the laudable forms and rites of the reformed church of Scotland,
"We, therefore, as much as in us lies and as by right we may, approving and ratifying the form of your ordination as aforesaid, grant unto you a licence and faculty that in such orders by you taken, you may have power, throughout the whole province of Canterbury, to celebrate divine offices, to minister the sacraments,"
etc. Would a marriage celebrated by Dr. Whittingham or by Mr. Morrison, in the reign of Elizabeth, have been held void?

It is remarkable that in the Act of Uniformity (section 15), there is a provision that the Penalties in this Act shall not extend to the Foreigners or Aliens of the Foreign Reformed Churches, allowed or to be allowed by the King's Majesty, his heirs, or successors, in England." Suppose that Charles the 2d. had allowed, as he might have done, clergymen of the church of Geneva to officiate in England, would marriages by them have been void because they had not been episcopally ordained? Such clergymen could [10-Clark & Finnelly-790] not have been recognised as priests when the common law took its origin; nor any clergy not allowed by the Pope.

The question again arises, by what authority a new class of persons, viz. Protestant clergymen, disclaimed by the Pope, are permitted to celebrate a valid marriage, who could not have done so at the common law, and there having been no statute to alter the law upon the subject? Is not the solution of the difficulty this, that at the common law the interposition of a priest was not necessary to the validity of the marriage for civil purposes, although the church, treating marriage as a sacrament, from time to time varied the forms which it declared necessary to constitute a regular marriage such as the church would entirely approve?

I now come to a difficulty met, I confess, boldly by the Judges; the consideration of the marriages of Quakers, which we are now told are all invalid, because not contracted before a priest episcopally ordained. I admit that this consequence follows inevitably from the doctrine contended for and that the validity of these marriages is a complete test of that doctrine. They are left by Lord Hardwicke's Act as they were at common law; and they cannot be good at common law, if the presence of a priest episcopally ordained was necessary to the validity of marriage. I must observe, with great deference to my noble and learned friend (Lord Abinger, who had left the House), that it never has been thought till today that that Act gave any validity to Quaker marriages, which Quaker marriages had not at common law; for it merely excepts those marriages from the operation of the Act, and leaves them as it found them. I will by-and-by cite the clause; it treats them exactly like marriages in Scotland.

[10-Clark & Finnelly-791] The Lord Chancellor: - What I understood the noble and learned Lord to state was to adopt in substance t& statement of the Chief Justice, who says, " Since the passing of the Marriage Act it has generally been-supposed that the exception contained therein as to the marriages of Quakers and Jews, amounted to a tacit acknowledgment by the Legislature, that a marriage, solemnised with the religious; ceremonies which they were respectively known to adopt, caught to be considered sufficient; but before, the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quaker, was a legal marriage on the ground that it was a marriage by a contract per verba de praesenti, but, on the contrary, the inference is strong that they were never considered legal."

Lord Campbell: - That is exactly as I view it; that it is a tacit acknowledgment that the marriages were valid.

Lord Chancellor: - I do not think that my noble and learned friend meant to say more than merely to adopt that statement. If he were present I should leave, him to speak for himself, but that is the way I understood it.

Lord Campbell: - He seemed to draw a line of distinction between Quaker marriages before Lord Hardwicke's Marriage Act, and since.

Lord Brougham: - So I understood it.

Lord Campbell: - But is not the 18th section of 26th G. 2, c. 33, a legislative

10 Clark & Finnelly 792, 8 ER p940

declaration that such marriages, if contracted so that the parties intended they should constitute the relation of husband and wife, were valid before the Act passed, and should [10-Clark & Finnelly-792] continue valid? The words are,

"That nothing in this Act contained shall extend to that part of Great Britain called Scotland, nor to any marriages amongst the people called Quakers, or amongst the person, professing the Jewish religion, where both the parties to any such marriage shall be of the people, called Quakers, or persons professing the Jewish religion, respectively, nor to any marriage solemnised beyond the seas."

Marriages were valid in Scotland before the passing of the Act without the intervention of a priest in orders, and so they were to continue.

The sect of Quakers had existed in England for 150 years before the Marriage Act passed. They did not recognise any order of priesthood, and they had contracted marriage by a ceremony which took place only among members of their own persuasion. They would have considered it sinful to be married in a church, or to have been united by a clergyman. They would have submitted to any penalty or punishment, rather than submit to the ceremony of marriage prescribed by the church of England. They could not be brought under the operation of the new Act. What was the intention of the Legislature respecting their past and future condition? Was it meant that they should be considered as then all living in concubinage, their children being all illegitimate; and that they should be incapable of entering into lawful wedlock in all time to come? If there had been then any grave doubt as to the validity of their marriages entered into according to their own forms, would there not have been an enactment giving validity to such marriages? As to the taking of oaths in Courts of Justice, a matter of much less consequence, relief had long before been afforded to them. The statute 6 and 7 W. 3, c. 6, when properly examined, I think [10-Clark & Finnelly-793] furnishes strong evidence to show that these were legal marriages. The Act is " for granting to his Majesty certain rates and duties upon marriages, births, and burials." Quakers marrying are expressly subjected to the duty. In one place the marriage between them is called a pretended marriage; but by this uncivil expression was it intended to declare that the marriage was void, and to levy a tax upon concubinage? On the contrary, it is declared that " any such marriage or pretended marriage shall be of the same force and nature as if the Act had not been made." The tax is imposed on any other persons who should cohabit and live together as man and wife; affording a strong evidence that marriage was then constituted by cohabitation and living together as man and wife.

In 1661, a marriage between Quakers according to their own ceremonies, was held valid at Nisi prius in an action of ejectment, and the ruling appears to have been acquiesced in (1 Hagg. Cons. Rep. App. 9). The casual doubt imputed to Lord Hale, when he directed a case to be made as to the validity of a Quaker marriage, can be entitled to no weight.

Since the Marriage Act in 1753, down to the present day, Quakers, many of them men not only of great wealth but highly educated, not only distinguished for literature and science, but eminent lawyers, and ladies, not only of the strictest virtue and the most refined delicacy, but of the most brilliant talents and accomplishments have contracted marriage according to the forms of their religion, without the most distant suspicion that in doing so they were violating the law of God or of man. I confess I should like to know whether all the Judges who have concurred in the opinion that a marriage is void by the common [10-Clark & Finnelly-794] law if not celebrated in the presence of a priest in Episcopal orders, are of opinion that all Quakers, male and female cohabiting as man and wife, are living in a state, of concubinage, and that all the children of all Quakers are illegitimate?

Till this controversy began by a note of the editor of a new edition of an obscure law book, I believe that the validity of the marriage of Quakers had not been questioned. Quakers have maintained actions for criminal conversation, where direct proof of a valid marriage is to be given; Dean v Thomas (1 Moo and M. 361\, Harford v Morris (1 Hagg. Cons. Rep. App. 9). Widowers and widows, being Quakers, and the children of Quakers, have received administration in the Ecclesiastical Courts; and in cases of intestacy, have succeeded to personal property according to the Statute of Distributions. In tracing a title to real property, no objection has even been made on the ground that, it had been in a Quaker family, and no doubt has

10 Clark & Finnelly 795, 8 ER p941

existed that the eldest son of a Quaker marriage would take by descent lands of which his father died seised in fee simple. I cannot help thinking that such a general understanding and such a long course of acting greatly outweigh any nice scruples that may now be raised upon the subject.

Most of those observations apply, if possible, with greater strength respecting the marriages of Jews. It was utterly impossible that Jews ever, could have been married by the intervention of a Christian priest. In every country where they have inhabited, they have been allowed to marry according to their own rites and ceremonies, and marriages so contracted have been held valid. Jews were banished from this [10-Clark & Finnelly-795] country from the time of Edw. I till the time of Oliver Cromwell; but then they were permitted to settle, and they did settle, in England in considerable numbers. They have married here according to their own rites and ceremonies, and their marriages so contracted have undoubtedly been considered valid. Did the Marriage Act mean again to banish them from England, or to prevent them from entering into the married state? It is said they were considered as foreigners. There can be no doubt that when born in England, they are in all respects British subjects. But suppose they were aliens: - aliens can only contract marriage in England according to the law of England; and if by that law the presence of a priest episcopally ordained were necessary to the due constitution of marriage, without the presence of such a priest marriage could not be lawfully constituted between any aliens in England. Therefore, the moment it is allowed that in England a marriage contracted by Jews according to their own rites and ceremonies is valid, the doctrine is gone that by the common law the presence of a priest episcopally ordained was necessary to the due constitution of marriage. Although the Lord Chief Justice intimates his opinion that Quaker marriages are void, he does not say the same of the marriages of Jews; and I think it is impossible that he should, after the express decisions on the subject.

There is the case of Andreas v Andreas, in the Consistory Court in 1737, before Dr. Henchman. That was a suit by a wife against her husband, for the restitution of conjugal rights. The parties were both Jews, and the libel alleged that they were married according to the forms of the Jewish nation. Objection was made that as they had not been married by a [10-Clark & Finnelly-796] priest in orders, the marriage was void, and the Court could take no notice of it. The Court was of opinion, however, that as the parties had contracted such a marriage as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel. Again, in the case of Vigevena v Alvarez (1 Hagg. Cons. Rep. App. 7), in the Prerogative Court in 1794, before Sir William Wynne; the libel pleaded a marriage between Jews, according to the rites and ceremonies of the Jewish religion. It was objected that the libel was bad upon the face of it, and ought to be rejected; for that persons coming before the Ecclesiastical Court to claim any right by marriage, must show the marriage to have been according to the rites and ceremonies of the Church Christian: - for which Haydon v Gould was cited. Sir W. Wynne said, that if a Jew were called upon to prove his marriage, the mode of proof must have been conformable to the Jewish rites; particularly since the Marriage Act, which lays down the law of this country as to marriages, with an exception for Jews and Quakers. That is a solemn adjudication upon the validity of such marriages. Here the allegation being that the parties were married according to the rites of the Jewish church, the Court thought that the libel ought to be admitted; as if the allegation was proved, a valid marriage was constituted. In Lindo v Belisario (Id. 216, and App. 7), which first came before Sir W. Scott in the Consistory Court of London, and then before Sir W. Wynne in the Court of Arches, a Jewish marriage was set aside because the ceremonies prescribed by the Jewish law had not been duly observed, although words amounting to a contract per verba de prcesenti [10-Clark & Finnelly-797] had passed between the parties; but if those ceremonies had been duly observed, the marriage would unquestionably have been held valid, although no Christian priest was present at it. Lindo v Belisario was cited to show that even among the Jews, mere verba de prcesenti will not make marriage without the religious ceremony. This only illustrates what I have tried to explain, that the contract per verbal de present, only constitutes marriage when the parties intend that it should do so without any subsequent ceremony; but that when a subsequent

ceremony is necessary to the completion of the marriage, the verba de prcesenti only operate as an executory contract.

I ought to observe that the language of the Legislature in 6 and 7 W. 4, c. 85, s. 2, regulating the marriage of Quakers and Jews in future, is in my opinion, very strong to show that their past marriages were valid: - " That the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnise marriages, according to the usages of the said society and of the said persons respectively, and every such marriage is hereby declared and confirmed good in law," etc. " provided that notice to the registrar shall have been given," etc. A new condition is imposed, and that being observed, the parties continuing to contract and

solemnise marriage as before, every such marriage is declared and confirmed good in law. It. comes to this, then, that marriages of Jews and Quakers, excepted from Lord Hardwicke's Act, are valid at common law, and prove that at common law there might be a marriage without the intervention of a priest in episcopal orders.

In some parts of the Lord Chief Justice's opinion he intimates that the condition required for the validity [10-Clark & Finnelly-798] of a marriage is only that there should be a religious ceremony performed on the occasion. However becoming and desirable it may be that a relation of such deep importance should be contracted in the manner the most solemn and impressive, and that the blessing of Heaven should be invoked on those entering into it, I cannot find that any religious ceremony has been considered necessary to its validity. But supposing the sound doctrine to be that some religious ceremony upon the occasion is indispensable, I think it would deserve great consideration whether the religious ceremony which the parties consider the most sacred should not be deemed sufficient. Before the Reformation when there was a religious ceremony, it was celebrated by a priest recognised as in orders by the church of Rome. Since, the Reformation, among members of the church of England, it has been celebrated by a priest whom the church of Rome, would consider, a mere layman. Among Protestant dissenters in England down to the Marriage, Act, and in Ireland down to the present time, the religious ceremony has been celebrated by a priest, not episcopally ordained, but ordained by the imposition of the hands of those who had been themselves so ordained and whom they consider duly commissioned to preach the Gospel of Jesus Christ, and to administer the sacraments of His holy religion; although, by the church of England he is considered only as a layman. The question is whether this priest might not as effectually perform the religious ceremony required by the common law, as the priest who would have been regarded as a layman by the church which was dominant when the common law took its origin, and for many centuries after.

For these, reasons, my Lords, I have arrived at [10-Clark & Finnelly-799] the clear conclusion that the marriage between the prisoner and Hester Graham was a valid marriage. Had I regarded the question as originally more doubtful, I should have thought it right to adhere to decisions by which the law has been considered settled for half a century. On questions of property it has often been said that it is the duty of a Judge to support decisions which have been some time acquiesced in and which have been acted upon, even if he would not have concurred in them when they were pronounced; lest titles should be shaken. Does not this rule apply with infinitely greater force to questions of status, and most of all to questions respecting marriage, on which the happiness of individuals and the welfare of society so essentially depend? Consider the consequences of now holding that by the common law a valid marriage cannot be contracted without the presence of a priest episcopally ordained. I do not suppose that as yet it is intended to impeach marriages in Scotland on this ground, but hundreds of thousands of marriages which have taken place in Ireland since the time of James I, and the validity of which had never been doubted, are now asserted to have been null. In England, the marriages of all Quakers and Jews, and of all persons who before the Marriage, Act may have been married by Presbyterian or other dissenting ministers, are also asserted to have been null. And do not let it be supposed that the evil is confined to the members of those sects, with whom there might be less sympathy; but the members of the Established Church may be deprived of most valuable rights of property by the invalidity of such marriages.

10 Clark & Finnelly 800, 8 ER p943

When we consider our extensive colonies in every quarter of the globe, where the common law of [10-Clark & Finnelly-800] England respecting marriage prevails, the confusion and dismay will be still greater. Vast numbers of marriages have, been celebrated in the East Indies and elsewhere by Presbyterian and Missionary ministers of various persuasions, under circumstances in which no validating statute would apply to them: - and where the attendance of a minister of religion could not be procured, many marriages have taken place without any scruple of the parties, or their parents or relatives, before consuls, military officers, magistrates, and captains of ships. As to the past, we may resort to the clumsy expedient of ex past facto legislation, and enact that all those marriages shall be as valid and effectual as if they had been celebrated by a priest in episcopal orders; but what are you to do for the future? The common law in its wisdom accommodates itself with respect to marriage to the varying circumstances in which the parties may be placed. By statute you must have rigid rules, to be strictly complied with. Such rules have, been wisely framed by the last Marriage Act for England, which proceeds on the principle that marriage is a civil contract to be accompanied by a religious ceremony, unless the parties are so absurd and perverted in their understandings that they object to a religious ceremony; in which case (which I rejoice to think has been very rare) the religious ceremony has been dispensed with. But the framing of a similar Act for Ireland, which shall give satisfaction to the Established Church, to the Roman-catholic priesthood and population, and to the Presbyterians and other Protestant dissenters, with the necessary machinery for notice, licence, and registration, I am

afraid will be found a task very difficult for any Government to accomplish. Then what [10-Clark & Finnelly-801] prospective provisions are to be made for marriages between British subjects in the colonies, in Pagan countries, and on the wide ocean,? May you not be driven to enact that the ancient canon law, which Lord Stowell, as it is now said, erroneously supposed to have been the common law of England, shall be taken to be the law of England wherever it has not been altered by positive statutes; and thus reduce things to the quiet and satisfactory state in which they were before this controversy arose?

But a wiser and more salutary course will be for your Lordships judicially to decide that, according to the opinion of Lord Stowell, the marriage is valid, and all legislation on the subject may, be unnecessary. No one can feel more strongly than I do the embarrassment of coming to such a decision against the unanimous opinion of the English Judges whom you have consulted; but it is my duty to remind your Lordships, that, paying all due deference to that opinion, you are not bound by it. By the constitution of the country judgment is to be given on this writ of error by your Lordships; you consult the Judges only to assist you in coming to a right judgment, and you are to be governed by their opinion only in as far as you are persuaded by the reasons on which it is founded. Your Lordships have repeatedly reversed unanimous decisions of the fifteen Judges of Scotland, on points of Scottish law and I myself have several times heard Lord Eldon quote with approbation a saying, that a decision of the majority, where there was a difference of opinion on the Bench, with the reasons of all the Judges, on both sides of the question, was more to be regarded than the unanimous decision of the whole, pronounced by a single Judge; which raised in his mind a suspicion [10-Clark & Finnelly-802] that some might have compromised their opinion, who might have doubted, and who had they reduced their thoughts into writing, not only might have confirmed themselves in the views originally taken by them but might have brought over the majority. The unanimous opinion of the English Judges on questions of English law, has likewise several times been overruled by this House. If I am to be governed by the authority of great names, I must say, with all respect for the distinguished magistrates now adorning the Bench, I cannot place them higher than their predecessors, Lord Holt, Mr. Justice Gould, Mr. Justice Powis, Mr. Justice, Powell, Lord Kenyon, Lord Ellenborough, Lord Chief Justice Gibbs, Lord Wynford, Lord Tenterden, and Lord Stowell.

It is a great consolation to me to find that the name of my noble, and learned friend the present Chief Justice of England, is to be added to this illustrious list.

Lord Brougham stated that Lord Denman concurred with Lord Campbell and himself on this subject; but hoped that the noble and learned Lord, who was then on circuit, would be able to attend to give his reasons in person.

10 Clark & Finnelly 803, 8 ER p944

Lord Campbell: - Your Lordships should likewise bear in mind, that two of the common-law Judges, Mr. Justice Coltman and Mr. Justice Wightman, have not expressed any opinion upon the question; and that the two Judges of the Ecclesiastical Courts, who are Privy Councillors and might have been summoned by your Lordships (who would have been peculiarly well qualified to assist you on such a question), might have adhered to the doctrine upon marriage, which has uniformly prevailed in Doctors Commons from the most remote times to the present hour.

[10-Clark & Finnelly-803] Supposing the first marriage to be valid, that the prisoner was " married " within the meaning of 10 G. 4, c. 34, and so guilty of bigamy by marrying again, I cannot doubt for one moment; and my opinion would have been the same if the second marriage had been exactly in the same form as the first, instead of being in a church according to the rites and ceremonies of the church of England. How can this be considered a mere executory contract not intended to operate as marriage till publicly solemnised, when the parties were actually married by a minister of religion, who they believed had power to marry them, and after receiving the nuptial benediction from him, lived together as husband and wife?

I must therefore very humbly advise your Lordships to reverse the judgment of the Court of Queen's Bench in Ireland, and to give judgment for the Crown.

The Lord Chancellor: - The course I should propose to your Lordships is to postpone, the further consideration of this case. With respect to the proposition which has been made by my noble and learned friend (Lord Brougham, ante, p. 742) for calling in the assistance of the Judges of the Ecclesiastical Court, I doubt very much whether it would be consistent with the forms of this House. I presume that the suggestion is founded upon what is stated by the) Lord Chief Justice in his judgment, that as far as related to the ecclesiastical part of the question, the learned Judges had not been able to give that attention to the subject which they were desirous of giving, and which they would have given under other circumstances. I am afraid that the utmost that could be done, would be to hear [10-Clark & Finnelly-804] civilians at the bar. I doubt whether we can take the advice of civilians. From what the learned Chief Justice says, speaking of the ecclesiastical law (ante, pp. 654, 678, 679), it is quite,

obvious that the Judges feel that they had not had sufficient time to consider, with the attention and care, they would have desired to give, this very important part of the subject.

Lord Brougham: - I am quite aware of the difficulty to which my noble and learned friend refers. My suggestion was grounded upon the ancient-practice of this House, having the attendance of Privy Councillors. It is not as Judges of the Ecclesiastical Court that I proposed their assistance being, obtained, but as Privy Councillors, which the learned Judges of that Court always are; but it requires a further consideration, and I only throw it out as a suggestion.

Lord Campbell: - In Mr. Macqueen's book it is stated (p. 671 et seq.) that Privy Councillors used to attend to assist the House in judicial matters; and I apprehend that the Judges of the Ecclesiastical Courts, who are Privy Councillors, would have been able, in this case to render your Lordships valuable, assistance. But, however, this may be made the subject of future consideration. I shall not oppose further argument, although I am now prepared to decide, the first marriage to be valid, and to give judgment for the Crown.

The further consideration of the cause was postponed.

Lord Denman (August 11, 1843): - In approaching this great subject, I wish, in the first place, to declare my entire concurrence [10-Clark & Finnelly-805] with those who think that this Court of Error ought to give a judgment upon the question which is brought before them. Whatever the law is I think it ought to be ascertained and declared. The consequences are of immense importance to individuals, inasmuch as the present decision acquits the prisoner of bigamy, by assuming that she with whom he, first contracted marriage is not his wife, b 4 his concubine, and all their, children illegitimate. In prosecutions of this nature both marriages are under discussion; and it is often not more desirable for the first wife to prove that she holds that relation, and enjoys the rights which flow from it, than it is for the second wife to be released from the tie into which she has been entrapped. But this judgment annuls the first contract, to the disgrace and prejudice of the female, and

10 Clark & Finnelly 806, 8 ER p945

fixes the second to the end of life, upon one who might probably be happy to escape from it.

The more general consequences of this decision are important to an extent which cannot be calculated. It will affect all marriages contracted by British subjects in foreign countries where no municipal laws prevail, on the high seas, and many in our own colonies, as well as the discussion of all marriages which may have been contracted in this country before the Marriage Act. Probably some of these may yet become the subject of controversy in the Courts of Law; and all, in my opinion, ought to be decided by the law as it now stands; not disposed of by some sweeping legislative enactment, varying the legal rights and permanent interests of thousands who cannot be heard in their own behalf.

After what has taken place in this cause, the subject itself must be confessed to be full of difficulty; a difficulty greatly increased by the respect and admiration [10-Clark & Finnelly-806] which we have habitually felt for the learning and attainments of the Irish Judges. Yet I cannot claim the praise of courage in scrutinizing what they have laid down, for to decline that task would be to abdicate the functions of a Court of Error. The single duty of such a Court is to enter freely into, the examination of what is called to review, with reference only to the correctness of the reasoning and the validity of the judgment, admitting no other influence from the authority of the former tribunal than the necessity of canvassing all its proceedings with caution, deference, and distrust of ourselves, when we may discover grounds for dissent. This course I have, pursued: - I carefully studied as well the arguments in the Court of Queen's Bench in Dublin, as the judgments which were pronounced upon them; I heard the able discussion at the bar of this House, and have since, attentively read the notes of it, and I came to my conclusion with no other hesitation in my own mind than what was produced by the feelings to which I have alluded; and I am now compelled to declare my conviction that the opinion delivered by the majority of those able Judges is not conformable to the law of England.

The great mistake (if I may so express myself without offence) which appears to me to have been committed is that of reversing the order of proof. The burden had been supposed to lie upon those who assert that a marriage may be lawful without the intervention of a priest. Now, I most confidently maintain that marriage, being a civil contract flowing from the natural law, must be taken as lawful till some enactment which annuls it can be produced and proved by those who deny its lawfulness. This mistake (as I think) pervades, in a still more striking [10-Clark & Finnelly-807] manner, the opinions of those learned Judges who have been consulted by your Lordships. The contract is lawful in its nature; its language is plain; it is entered into by parties competent to contract; surely, then, it must bind those, parties to the extent of the stipulation, unless there is some enactment that it shall not bind them. I can see no difference in this respect between marriage and any other lawful contract. Surely it behoves those who say there is such an enactment to point it out distinctly, and to show where, it exists; and if it does not exist in specie, then to give the clearest proof, by conclusive reasoning on collateral circumstances, that it has been acted upon as a law. All will admit that marriage de facto may be

vitiated by non-compliance with such a law, and that possibly the law may be traced in the history of society, though nowhere to be found in words and sentences. It may be inferred from decisions and authorities, and from the text-writers on the subject. We only require, that it should be so, inferred by the deduction of clear reason.

We must next inquire what is the proposition to be proved? Not merely (as I submit) that the church has desired and directed that such and such solemnities shall attend the contract of marriage, but that the want of them is fatal to the contract. It is not enough that there should be strong requirements that the forms must be observed, strong censures upon the impropriety and irregularity of informal marriages, but there must be declarations of their illegality. Illegal in one sense they must be admitted to be if they depart from the circumstances which the law prescribes. But the question is on the substance, not on the details. These may be wrong, as not entirely conformable with the law; and yet the law may give full [10-Clark & Finnelly-808] effect to the contract as to the civil rights and status of the parties. Therefore, I look not to exhortations, denunciations, reproachful names cast on certain mar

10 Clark & Finnelly 809, 8 ER p946

riages and married persons by men of the church, but I look for some authority promulgating the consequences that are said to attach to., a marriage not solemnised as the church prescribes. I cannot affirm that it is in point of fact void, till I clearly discern the law which avoids it.

The first document referred to is as early as the second century, the letter of Pope Evaristus to the Bishops of Africa, as showing what was the law of the church upon that subject. He denounces, he exhorts, he condemns. He says all these marriages are stupra, adulteria, contubernia. He deprecates them in the most earnest language, and urges the faithful by every consideration to abstain from them; but, with all his vehement desire to dissuade from secret marriages, he never once employs that argument which, if just, would have supplied the most powerful motive against contracting them. He neither affects to annul them by his own authority, nor refers to the law as doing so already. He utters a passionate remonstrance, but never threatens the offending parties with the nullity of their clandestine contract. Could he have overlooked a nullifying law, if such had been in force? But, my Lords, I go further still: - I say that the very evil condemned is that marriages so contracted were binding; however irregular and sinful in their manner, they, being once made, were lawful.

A Constitution of Archbishop Lanfranc, in the year 1076, has been quoted in the course of the argument, for the same purpose as this letter of Pope Evaristus. It was little touched upon in the Court of Queen's Bench in Ireland; but Mr. Pemberton [10-Clark & Finnelly-809] brought forward a translation, which I think rather a free one, approaching nearer to the consequence of nullity than the original words; which might, possibly, be properly construed to pronounce such a marriage sinful, but not declare it void. But supposing Lanfranc to have issued a constitution in the eleventh century for annulling all marriages not contracted, in the presence of a priest, did that become, and did it continue, the law of England, in the facie, of those decretals of Pope Gregory mentioned yesterday in the argument of my noble and learned friend? Could it be the law in force at the time when the Synod of Exeter, in 1270, condemned a secret first marriage, because, persons ignorant of it may be entrapped into a second marriage, which would be void by reason of the first? The first marriage is there stated to be objectionable only because it was clandestine, and so might lead to impose the consequences of concubinage and illegitimacy upon the wife, and offspring of a second marriage.

Again, in the fifteenth century Archbishop, Bourchier inveighs against the same evil. He, requires solemnity and publicity in marriages, to save innocent and unsuspecting persons from contracting them with, those already made man and wife by a clandestine union. The purport is let certain forms attend the marriage, and ensure the registration of it, so that its existence may be notorious to all. Applying his enactment to the facts of the present case, he would condemn the prisoner for not marrying his first wife in the face of the church, because, he was, thereby enabled to induce the second wife to yield to his embraces; but still more, for solemnising the second marriage, which, in spite of its solemnity, he considered void, because it came too late, after a marriage [10-Clark & Finnelly-810] which, however irregular, created the conjugal relation between the) parties. If Lanfranc's Constitution had been the law, it is impossible that either of those decrees should have appeared in the thirteenth and the fifteenth centuries. They demonstrate to my mind, that in point of fact the church held the marriage good which was complete as a marriage contract, though not celebrated by a priest.

If the law of the church was thus deficient, the municipal law's referred to as the laws of King Edmund are equally so. They also prescribe what shall be done, though most imperfectly; they require the presence at the ceremony of a mass-priest; a description not very intelligible, but explained as meaning a priest in holy orders, presbyterum sacris ordinibus constitutum. This priest is not required to take any part in the proceedings. This is quite consistent with the supposition that the want of notoriety was the evil to be remedied, and that the remedy would be found in the presence of the most

respectable neighbour to attest it, and of one belonging to the only lettered class by whom it might be recorded, but hard to reconcile with the notion that a religious rite was essential to the validity of the contract.

If such was the case by the prevailing law of the land at any period, how has

10 Clark & Finnelly 811, 8 ER p947

it been changed? That it has not operation now, is admitted on all hands; for though the language of pleading requires presbyterum sacris ordinibus constitutum, the competency of a deacon to perform the ceremony is now universally acknowledged; yet a deacon is no more a priest than is the teacher of any dissenting congregation. The same remark applies to Marriages celebrated by some impostor officiating as a clergyman without any right to that character; these have been frequently declared [10-Clark & Finnelly-811] valid and binding. There is no middle class between priest and no priest; every one must be the one or the other. We are therefore fully warranted in maintaining that if at any time the law required the presence, of a priest, that law in early times was abrogated or became obsolete: - but it seems to me more rational to infer that the presence of the priest, however desirable for many obvious advantages, was never made necessary.

If it should be said that a deacon is respected as a minister of religion, and that his intromission may supply the absence of a priest, because the conscience of the parties would be affected in the same manner; I answer, that the Presbyterian minister in Ireland might for the some reason be substituted and, indeed, that the conscience of a Christian would tell him that he is equally bound by such A promise, whether it be or be not environed by a religious ceremony.

If previously to these constitutions and decrees marriage had been a thing prohibited by law, and requiring to be licensed by a legal sanction, or if it had been a newly-discovered species of contract, which the ruling powers thought likely to be beneficial, and therefore determined upon introducing, there, might be strong reason for throwing the burden of proof on those who assert the validity of the marriage. The creatures of positive law can only exist in the form in which that law created them; but the institution of marriage is older than any law; it may be said to exist by the common law of all mankind, subject to all the varying forms which expediency may dictate, and to any consequences that legislation may attach to the neglect of them; but subject to those alone. Nothing in the Old Testament requires the presence of a priest at a marriage; nothing in the New.

[10-Clark & Finnelly-812] In the early times of Christianity we have no trace of proof that the priestly benediction or presence was required: - up to the period of the Council of Trent, marriages might be contracted throughout Christendom without the intervention of a priest. Then, if the want of that intervention has, by some positive enactment, the effect of annulling the marriage, and if that legislative Act cannot be produced, if no account can be given of its date, or the occasion of its passing, or the authority by which it was established, but I am to infer its existence from a variety of circumstances collected from loose language and equivocal appearances,-I must first call attention to the extreme improbability that a proceeding of such immense importance should be left to such an uncertain mode of proof, instead of being promulgated with as much distinctness as the ordinance of the Council of Trent, or our own Clandestine-Marriage Act of 1753. But, secondly, I must entreat your Lordships to consider how many obvious reasons there are to induce humane and considerate men to pause before they would attach the pain of nullity to irregularly contracted marriages. The husband would most commonly be responsible for the irregularity; but it is the husband who generally seeks to release himself from the matrimonial obligation. The wrongdoer would be enabled to take advantage of his own wrong, and, for the purpose of indulging in a career of vicious propensity, to sacrifice the rights, the interests, and the honour of those to whom he is bound by the strongest ties which nature and justice can impose.

Besides, in the early stages of society the attendance of a priest might in various cases be impossible, or it might be refused from personal and unworthy motives, which even the church would strongly condemn in its [10-Clark & Finnelly-813] minister. Can we believe that the power of marrying should be left entirely to his caprice, or to the accidental circumstances which might permit or forbid him to visit the district where the parties dwelt? Is it not much easier to believe, and much more respectful to the church to believe, that while it would issue directory instructions as to the course it required the faithful to pursue, and might even pronounce its censures on any who neglected them, it would yet long pause and deliberate before it assisted parties to take advantage of the defect to nullify their own marriage contract?

Looking to the most ancient authorities among the text-writers on general law,

10 Clark & Finnelly 814, 8 ER p948

I find them frequently declaring that the contract is completed by the act of the parties alone; a strong direct proof that no law of nullity was known in their time, and a challenge to the makers of such a law

to proclaim its passing. The opposite opinion of other writers is of much less weight, because their proposition did not rest on opinion, but on positive enactment, that might at once, if it existed, be pointed out. The opinions of learned men on our law are so nearly balanced, that I doubt whether there is any one of the passages that has been quoted against the validity of these marriages, which might not with equal plausibility be so, construed as to arrange itself on the other side of the argument. Perkins's learned work puts forward so me particular propositions, from which it has been inferred that by the old law of England, marriages without the intervention of a priest were, no marriages. But he states that the law applicable to the case had in his time undergone alteration. How came it to be altered? How unsettled and varying the law here supposed! How unlike the distinctness and force e[10-Clark & Finnelly-814]requisite for a severe penal enactment! That which was the law in the time of Queen Elizabeth., must have been the law in the time of Henry the 3rd. we accept his admission that such was not the law in the latter reign, but we also deny that it was such in the former. The case, in the Year Books, upon which his first opinion was founded, clearly does not support it. I took the pains to translate that case as the argument proceeded, and the learned counsel perceived that Perkins had mistaken its import. No man now contends for it.

Some, cases are, however, cited to prove the necessity for a priest's presence at a marriage. Foxcroft's [I Roll. Abr. 359] is the first. But does it make, out the proposition? It proves that the presence, of no less a priest than the Bishop of London was not sufficient. If the decision is correct, the marriage must have been vitiated for some other circumstance, and those that accompanied the marriage were, no doubt singular. Another of these decisions was Del Heith's [Rogers' Eccl. Law, 584; see 10 Cl. and F. 550 n. (k)] Case, in which no priest but the parish priest was held sufficient to solemnise a marriage. These decisions are evidently of no value, because, they prove too much. So also in modern times, when Scrimshire v Scrimshire (2 Hagg. Cons. R. 395) was decided by Sir E. Simpson against a marriage celebrated by a Roman-catholic priest, he committed an error now condemned by the unanimous voice of all lawyers. These are, manifestly worthless decisions, and we shall vainly attempt to select from them any sound principle.

Most of the other cases appearing in our later Reports may be employed by ingenuity on either side. Such is Bunting v Lepingwell (4 Co. Rep. 29; Moor, 169). I feel that neither[10-Clark & Finnelly-815]-party can claim it as conclusive. It was very carefully sifted yesterday, with some fresh light thrown upon it by a more correct translation, of the Latin record. I do not think it necessary to comment more largely on the facts; but it suggests the remark, that another fallacy appears to have insinuated itself into the argument, with reference to the meaning of those weighty words, " a contract per verba de praesenti." They seem to have been taken to import a present agreement to marry at a future time, and not an agreement presently executed, whereby the parties declared themselves man and wife at that very moment. If the former meaning should prevail, we all allow that it could oily found a right to sue for completion of the contract, or for damages on breach of the promise; but the latter is beyond all dispute, the true meaning; and thus the question recurs, wherefore is not this executed contract what it purports to be?

So much reliance has been placed on, one authority that I cannot excuse myself from a full consideration of it; it is a case supposed to be stated as law by Lord Hale, and appears in a note to Coke upon Littleton (33 a n.10). The case was this: - A. entered into a contract of marriage with B; A. then actually married in church another person; then B. compelled A. to perform the marriage ceremony with B. by sentence of the Court. A., the husband, in the meantime, between the sentence and the solemnisation, had conveyed away his land per fraudem mediate, during the time of the excommunication which he had incurred by disobeying the sentence. The Court of Common Pleas bad held, that on the death of A., the wife, to whom [10-Clark & Finnelly-816] he had first contracted himself, and whom he had been thereupon compelled to marry by sentence of the Spiritual Court, was entitled to her dower out of the lands which he had alienated during that interval. From the judgment of the Common Pleas an appeal was preferred before some Court bearing the style and title " Coram Rege et Con

10 Clark & Finnelly 817, 8 ER p949

cilio," and the judgment is there said to have been reversed; and by, the appellate jurisdiction the wife was held to be thus cheated out of her dower.

Now, first, on the nature of the points decided, it appears to me that the opinion of the inferior Court was sound and just, and that the opposite doctrine upon its own face condemns itself. It is to me perfectly clear that the marriage solemnised between A. and B. in the face of the church had relation to the time of the contract, and set up that contract as binding from that time. It could not otherwise supersede the later marriage performed in the face, of the church and with all its forms, nor render illegitimate the children of such later marriage. That this was its operation is proved by the quotation of Lord Chief Justice, Tindal from Rolle's Abridgment, where it is said that a divorce by reason of pre-

contract bastardises the subsequent issue. Then, by the principle of relation, all things stood in the same, position, as to the rights, of the several parties at the time of the solemnisation, which they had occupied at the period of the contract; and whatever rights, the wife at that time, enjoyed over her husband's land, she must have retained at that of the solemnisation. It seems, to follow as a consequence, or rather to be the self-same proposition, that by alienating the land at a subsequent period, the husband could defeat no right of hers to dower; and this is the more strikingly true, [10-Clark & Finnelly-817] because fraud is found as a fact in the case. Another peculiarity belongs to the transaction which formed the subject of that antiquated lawsuit: - the husband was actually excommunicated at the time of alienating; that is he, was in a condition in which a man is disabled from performing any act whatever, or entering into any of the ordinary transactions of life; yet this his act was permitted to be available for the very purpose of getting rid of an, obligation clearly created against him, in favour of his wife, by a contract afterwards carried into effect through the medium of that very sentence, of excommunication.

Observations alone upon a case we may think insufficient to destroy its authority, if emanating from a jurisdiction known to the law and constitution, of the country; but from what Court does this extraordinary judgment come? "Coram Rege et Concilio " has been said to describe a Court of very high authority, composed of some of the eminent Officers of State and Judges; but on looking at Lord Hale's Treatise on the Jurisdiction of this House, I find that such Court is not the only one indicated by the title just mentioned. There are many. One of them should seem to be this very House of Parliament, which is now in deliberation on the law there, laid down; if, indeed, this House had in the time of Edward the 1st a separate existence. " Sometimes," says Lord Hale,

"we shall find, and that very often, that the style Coram, Nobis et Concilio, generally, in Parliament time, is intended of the Lords' House, as appears by the precedents thereof in the writs of the King or petitions of error in both Houses."

Now, I must inquire what knowledge we possess of the judicial proceedings, of the Lords' House, or of the Parliament, in the reign of Edward the 1st. [10-Clark & Finnelly-818] Are we sufficiently aware of the principle on which they acted; whether they held themselves bound by law, or thought it right to resort to some notions of equity, or, finally, assumed the freedom of disposing pro re natti according to the Circumstances of families, of the interests of their several members? Whether they professed to apply the law, or to do equity, or to confer favours, we may believe, that individual canvassing or powerful influence might not be altogether excluded from their minds; and this may account for the fact which is stated to me, that, except this single and most questionable decision, not a judgment or a dictum of that Court, whatever it may have been, is reported in any one of our books. That case is however, supposed to derive great authority from the adoption of Lord Hale. Now, what is the adoption of Lord Hale? We are informed, in the preface to the 13th edition, of Coke upon Littleton, which was commenced by Mr. Hargrave, and brought to its conclusion, by Mr. Butler, that the notes there appearing " were transcribed from a copy of Lord Halo's manuscript notes in the margin of Coke upon Littleton, presented by Lord Hale " to a gentleman named. The utmost effects then, that can, be given to the note in question is that it may have been copied out by Lord Hale from some old work not now in existence, and the result of it summed up by him in few words. How does that import any approbation by Lord Hale of the doctrine? How do I know but that he set it down for the sake of controverting and refuting it? That is a much more probable reason for his copying it out, when we recollect his known opinions upon the

10 Clark & Finnelly 819, 8 ER p950

general subject, and his little disposition to approve of the triumph of fraud on any occasion. No man who ever lived was less. [10-Clark & Finnelly-819] likely to have gone out of his way to maintain a doctrine, so, full of doubt, both in law and morals, in a Judgment subverting that of the Court of Law in which he himself for a time administered justice. Even if Lord Hale, meditating in his study on ancient and abstruse, dogmas, had at the time, when he copied the case, an impression that it was rightly decided, we ought not to be blinded by our deference, to so great a name, and yield up our own reason to every suggestion of another's mind. This is a duty of the first importance) which we owe to our own position. We have lately heard much of the distinction between, the obiter dicta that may fall from a Judge, in the course of a judicial argument, and the principles on which he himself rests the conclusion at which he arrives. But what is merely written by a Judge in his closet is not even an obiter dictum. If for any one of the great judicial characters of England this authority could be claimed, Lord Hale would assuredly be that man; but I am most confident that he, would have, repudiated the claim for himself. One of his warmest admirers, himself an eminent Judge and a most useful writer on the law, Sir, Michael Foster, actually published, among his famous Discourses, " Observations on some Passages in the Writings of Lord Hale," tending to expose mistakes in those passages. He accounts for those

mistakes in his preface to his work on Crown Law (p. xxi.), by the imperfect state in which the manuscript was left. He observers,

"The author's last thoughts were suppressed; and one may venture to say for him, now he cannot speak for himself, that the Summary, a collection of extracts hastily put together at different times and in the hurry of a public employ,-mere hints for private use, though thrown [10-Clark & Finnelly-820] into, some method, and for the most part placed under proper heads (as his collections upon every subject generally were),-was never intended for the press, nor fitted for it; and that the History itself was not intended by him for public view in the dress in which it now appeareth."

But this manuscript marginal note is open to all the objections here enumerated, and more; it is not made, part of any treatise, nor thrown under any general head, nor accompanied with any one indication that it agreed with his own opinion at any period of his life. Let me illustrate this remark: - it frequently happens that the different members of the same Court derive different impressions from the argument of counsel; they meet to consult, and the most convenient method, perhaps, of testing their opinions is for each to write his own, and afterwards compare them all. The most ordinary result is that one view is adopted by all, and announced as the unanimous opinion, of the Court; and the other, on mature reffection, is deliberately rejected as untenable. Let me now suppose that the opinions of the majority were not recorded in our, Reports, and that the rejected one, written by a Judge, finds its way from his portfolio to future ages; that rejected opinion would have far, more appearance of judicial authority than this manuscript sentence, of Lord Hale.

This very long discussion of the manuscript note, will, I trust, be forgiven for the importance which has, been assigned to it. I have endeavoured to show that it is wrong in principle, deficient in authority, unwarrantably asserted as a judicial opinion, even if shown to represent that of Lord Hale; but wholly denuded of proof that it ever was that great man's opinion; the contrary being far more probable. Yet that rotten case is the cornerstone of the argument [10-Clark & Finnelly-821] which has, been up to this time successful in the cause, now abiding your Lordships' determination.

I pass on to the modern authorities. Their uniform current does, not indeed Commence in very modern times; the doctrine, for which I contend having been, broached by Nov, when he was. Attorney-general, and being stated as the law by a Commission appointed by the Long Parliament in 1644, comprising lawyers of very great authority. These eminent men do not appear as inventors of a doctrine so often taught before, but as the reporters of it from the civil law. They must have received it from their predecessors, as they handed it down to still more eminent members of our profession. Lord Hale, according to my view, adopted it at Nisi prius, and so earned the vituperation of Roger North. His deliberate opinion we have in his life recorded by Burnet, and his general views went along with it. It is proved, to my entire conviction, to have been the opinion of Lord Holt, the opinion of Chief Baron Comyn, the opinion of Lord Hardwicke, of Mr. Justice. Blackstone, of Lord Mansfield, of Lord Kenyon, of Sir Vicary Gibbs, of Lord Ellenborough, of Lord Tenterden, and of Lord Wynford. Now I believe I have mentioned eleven names of the very highest rank in

10 Clark & Finnelly 822, 8 ER p951

reputation, all of whom appear to me to have taken it for granted, without one dissentient voice, without one single doubt, that a solemn contract of marriage executed per verba de praesenti does in fact constitute a marriage, This is proved to have been Lord Hardwicke's opinion by the Marriage Act itself; and the same proof applies to Lord Mansfield, who is supposed, nevertheless, to have held the contrary doctrine, from his speech in recommending that Act to the House of Commons. Supposing that speech correctly reported, [10-Clark & Finnelly-822] we should not forget that he was then endeavouring to conciliate a very strong and much exasperated enemy, and wished to smooth the way as much as possible to the conclusion. But after he had been above a quarter of a century upon the Bench, we have the doctrine laid down by him, in the case of Morton v Fenn (3 Doug. 211, Rose n. ed.), in exact conformity with the principle I have sought to establish. Blackstone avowed this opinion in his inestimable Commentaries, immediately after the passing of that Act. Is Lord Tenterden to be considered as rash and violent? One of the most learned and reflecting of Judges, in whose mind, as we all remember, caution was the quality, perhaps, which held undue predominance. Called upon, in the course of the trial of Beer v Ward (MS.), to decide upon the validity of a marriage before the Marriage Act, he did not shrink from directing the jury in the same manner in which his illustrious, predecessors would undoubtedly have directed them; and, this was a second trial, so that he knew beforehand that the point would arise. The issue was raised by the Court of Chancery, and he knew that his opinion would be reviewed by Lord Eldon's acuteness and sagacity. " The law of England, as I understand it," says Lord Tenterden, " was, that verba de praesenti, followed by cohabitation, was ipsum matrimonium." The cohabitation is universally known to make no difference in this matter, yet I do not think the word was introduced by inadvertence; I rather ascribe, it to that caution which led him to reject no circumstance that tended in the smallest degree, to counternance his decision in each

particular case. But the general doctrine, that a contract per verba de praesenti, though [10-Clark & Finnelly-823] without the intervention of a priest, was a valid marriage, he states to have been the old law of England as he understood it. I apprehend that Lord Tenterden did understand the law of England, and had as good a right to give a confident opinion upon it as any of the most distinguished men who have at any time appeared in Westminster Hall.

Your Lordships naturally anticipate my reference to an authority greater, if possible, than all of these, though mainly founded upon the deference) justly felt to be due to the earlier among them. I need but name it, because no man of education, or possessing those literary habits that indicate a gentleman and a scholar, no one endowed with a liberal curiosity on general matters of the most interesting re-search, can be ignorant of Lord Stowell's judgment in the case of Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 54). Lord Stowell there goes through the whole of the authorities, and gives a judgment which never can be forgotten, or read without the highest admiration; but its principal value consists in the clearness of his argument and the conclusiveness of his reasoning. Little did I expect that it could ever be my task to defend this remarkable judgment, now for the first time questioned and repudiated in England. The leading objection to the assertion, of its principal doctrine., that it was extra-judicial, I beg leave, with my noble, and learned friend, entirely to dispute. I think it is strictly and properly judicial. It is the reasoning upon which he, saw that his judgment must be founded, and upon which his mind must have been completely satisfied before he reached his conclusion. Did he, possess the knowledge, and experience requisite for discerning the [10-Clark & Finnelly-824] propositions which were necessary for his argument? He spoke on that department of the law with which he had been for half a century perfectly familiar, which he had studied from his youth, and was daily applying in his manhood and old age.

But he is boldly charged with the mistake of supposing that the canon law prevailed in England, whereas we know that by the Statute of Merton the canon law was rejected. Are we really to believe that Lord Stowell was ignorant of the Statute of Merton; or can we fail to perceive that in declaring the canon law to have prevailed in England, he was not speaking of the whole body of the canon law, but of that part which applies to the subject-matter of his judgment, the law of the marriage contract? That a subsequent marriage was never permitted in this country to legitimate, children previously born, he, well knew; but that the canon law was the law of England with

10 Clark & Finnelly 825, 8 ER p952

reference to the mode of contracting marriage (the question before him), not only does Lord Stowell distinctly affirm, but Lord Eldon, in the case, of Walker v M'Adam, (1 Dow, 148), goes along with him to the full extent. Nor was he taken by surprise or led unawares into a declaration of his opinion, having professed the same in Lindo

v Belisario (1 Hagg. Cons. Rep. 216), near 20 years before.

Another circumstance was urged in the Court at Dublin, as detracting from the

weight of Lord Stowell's judgment: - it seems, that he did not know all that is known now; recent discoveries have brought to light new matters; of law and history, with which it was his misfortune to be unacquainted. It is even surmised that a different opinion might have been expected from him, if the whole truth had been, before him. It [10-Clark & Finnelly-825] is to be lamented that these treasures are not pointed out to our attention. I find no new fact, but that the old Saxon laws have been lately printed by order of the Record Commissioners. But the) substance of all that is now put forward,-the letters of Popes, Decretals, Constitutions, Saxon Concilia.,-all these are things with which Lord Stowell was conversant from his academic days. Whatever materials they supplied for a contrary decisions were assuredly then urged with zeal and ability by the learned civilians at Doctor's Commons, and by the advocates who conducted Miss Manners's appeal before the Court of Delegates. I well remember the sensation excited by that remarkable composition, the admiration that it excited, and the value that was attached to it. Lord Chief Justice Gibbs and the whole Court of Common Pleas had a speedy opportunity of declaring their adhesion; go has every Judge of every Court, when the point has come under discussion. Considering the circumspection, the sagacity, the practical wisdom of that great master of the law of marriage, his love of order and discipline, his habitual desire to uphold the controlling power of the church; considering, too., the decisions of common-law authority by which it was both preceded and followed, I feel that that doctrine cannot be rejected without undermining the whole fabric of judicial authority.

I turn to another document which commands my highest respect; the opinion laid before your Lordships by the Judges whom you consulted. To the well-considered opinion of these excellent persons I am so much in the habit of deferring, I feel for them such true regard and attachment, that I cannot differ from them without pain. The language of apology would be misplaced; it is superseded by the just [10-Clark & Finnelly-826] sense of a higher duty. I feel the sentiment so eloquently expressed by Mr. Burke; who said, on an occasion not indeed very similar, but where he perhaps was no less

tempted to surrender what he thought right to his deference for other persons,-after descanting at Bristol on what a representative ought to do for his constituents, he proceeds: -
" but his unbiased opinion, his matured judgment, his enlightened conscience, he cannot sacrifice to you, or to any man, or any set of men: - these he does not derive from your pleasure, no nor even from the law and the constitution; these are a trust from Providence, and for the abuse of these he is deeply responsible."
With a sense of that weighty responsibility, I am bound not implicitly to abide by the conclusion, but to examine the premises upon which it rests. I have done so with care, and I find no reason to alter the opinion I had formed. If I have, been at all successful in what I have had the honour of submitting to your Lordships, some of the arguments there employed have already received some answer.

These narrow limits of time preclude my touching particularly on each matter brought to bear on the question, in the opinion delivered by my Lord Chief Justice; and a whole life would be inadequate to a full discussion of all the points stirred in it. My noble and learned friends have dealt with some of these particulars. I may venture, to say that I have not conclusively formed my opinion without weighing them all.

I think the exercise of jurisdiction by the Spiritual Court in these matters is fully explained by the single fact, that mankind in general have wished to sanction the most important of all their temporal concerns by religious solemnities. The same feeling even now [10-Clark & Finnelly-827] prompts the new-married couple in Scotland to request their minister's presence and benediction, and in this country calls in the clergyman to read the service of the church over a contract expressly made perfect by the law without his attendance.

Some religious ceremony was for these reasons found almost uniformly to accompany the contract; but where it was not so accompanied, it was still confessedly binding, for it was often made the foundation of a proceeding in the Court Christian,

10 Clark & Finnelly 828, 8 ER p953
to have it publicly solemnised in the face of the church. On this and on other occasions, the spiritual authorities may have refused to assist the parties without the performance of a marriage regular in the minutest point of ritual observance; yet there is nothing to show that the legal power either of church or state annulled a marriage contract for the want of them.

It does not appear that much reasonable argument can be drawn from the language applied, either in reports of cases or in treatises, to particular stages of the marriage contract. Contract, espousals, marriage, matrimony, are words carelessly employed in ancient times. I do not find a single passage in the writings of Lord Coke or any of our old English text-writers which points to nullity as arising from the absence of a priest. The supposed clashing of two marriages, as an argument ab inconvenienti, seems to me to assume, in every instance, the point to be proved. The various suppositions made are, in my opinion, neither more nor less than a reiterated petitio principii.

The mention of a priest, a ring, a ceremony, in some of the cases, proves no more to me than the desire of the parties there interested in upholding the marriage, to throw away no circumstance which any one might think conducive to establish it; but all and [10-Clark & Finnelly-828] each of those circumstances might possibly be of importance to the decision, as evidence of the intention of the parties. Of this disposition we see constant examples, and one was just now observed upon in the conduct of so consummate and experienced a minister of the law as Lord Tenterden.

In the remark that no marriage has been held good in our Courts where a priest has not intervened, I think the whole fallacy of the argument may be detected. It plainly shows that the question was not regarded in the only manner which I deem consistent with a just view of the case; for I have shown what strike my mind as strong reasons for thinking that there is no presumption of the necessity of a priest to make a marriage, good; but the marriage is good, as being in itself a complete contract, unless the absence of a priest is clearly shown to invalidate the marriage by force of some intelligible law. I certainly feel a consolation in coming to this opinion, from seeing, in the statement of Lord Chief Justice Tindal, that the Judges had determined the cause in some haste, and that there was much fluctuation in the minds of my learned brethren. I know personally that other impressions had been at first made on some; and confess the utmost difficulty in discovering by what logic their doubts were removed. In furtherance of that statement I may mention, that when differences to a certain degree had existed, the learned Judges appointed a meeting to consider and decide upon them; and that meeting certainly had a very short duration. How any conversion was effected might have been made apparent to your Lordships if each Judge had separately laid his own views before you, or even if you had been informed of those reasons, at least, in which there was an unanimous [10-Clark & Finnelly-829] acquiescence. we then, who are unhappily compelled to differ from the majority of the Judges, are relieved from the pain of condemning (as some of Your Lordships' predecessors have done) judicial advice deliberately resolved upon and uniformly adhered to by the whole body, for reasons approved by

all. But the document from which we dissent has not undergone all the consideration that would have been desirable; it has been adopted after much fluctuation of opinion, and is not, as far as we know, supported by a single reason which all unite in thinking just.

I find it impossible to trouble your Lordships more at length, though many other topics might have been urged in favour of my conclusion. One is indeed, of so much weight in my mind, that I cannot pass it over in silence; the clause relating to Quaker marriages, in Lord Hardwicke's Act of 1753. That clause, clearly contemplating those marriages as good, contracted, as they notoriously were, without a priest, seems to me to prove the undoubted opinion of the Legislature, acting under the guidance of that great lawyer and Judge, that such marriages were valid and binding. To this argument I have seen no answer attempted.

Upon the whole I am most clearly of opinion, that a contract per verba de praesenti was, before that Act passed, by the English law a good marriage, ipsum, matrimonium. From the ground which I have taken, I cannot descend to anything like a compromise on the principle that communis error facit jus; on the supposition that there may be error in the judicial opinion hitherto prevailing, but that it has been committed by so many persons of the highest authority, that it ought now to be sanc-

10 Clark & Finnelly 830, 8 ER p954

tioned by a legislative declaration. I think there is no error in that opinion, [10-Clark & Finnelly-830] no proof whatever that the church would at any time have hesitated to enforce this contract, or to consider it as a marriage for every purpose. I do not believe that any Bishop, in those early times when he was the proper officer to certify whether parties were married or not, or whether the issue were legitimate or not, would have done his duty if he had refused to certify that such a marriage was valid, and the off spring legitimate. It seems to me, that if there has been such a communis error, it is not the opinion of the great lawyers and Judges who have been named, but the vulgar notion current in the world confounding solemnisation by a priest with the marriage contract, to which it gave at once authenticity and respectability. The prevalence of that notion is explained by the practice, and has laid hold of the public mind from that propensity to take for granted, which we have so often seen leading to wrong conclusions. In spite, of it, however, the judicial mind of England has now for ages held with equal tenacity the opposite faith, not reported in cases (for the prudent usages of men rendered them almost impossible), but from an enlightened consideration of the nature of the contract.

A single word more is necessary with reference to the proceeding which has brought this case before your Lordships. It arises in a trial for bigamy; and we are to consider whether the first marriage was good, so as to expose him who contracted it, and afterwards contracted a second, to the punishment assigned by the law to that crime. A doubt was thrown out from high authority, whether the offending party was himself aware that his marriage was good in law, and whether it might not be good for other purposes, yet not for the purpose of making [10-Clark & Finnelly-831] him a criminal by contracting another. I am of opinion that such considerations ought to find no place in this or any Court of Law. If the first marriage be good for any purpose, it is good for the purpose of rendering him, who commits the vicious and cruel act of deserting one wife and deceiving another woman by the pretence of a marriage, a criminal in the eye of the law. The Offender takes his chance whether his first contract will be held a marriage, and whether his second will be held a crime; and, not more ignorant of the consequences than many other offenders, he must abide by them.

Whenever this question may call for our decision, I shall feel myself compelled to declare my opinion that the prisoner was duly convicted, and that the judgment of the Court of Queen's Bench in Ireland is erroneous.

The case was again adjourned for further consideration.

The Lord Chancellor (Feb. 23, 1844): - This, my Lords, is a Question of so much importance, embracing such a variety of considerations, and affecting such deep and extensive interests, that I have thought it right, agreeably to the course pursued by my noble and learned friends, to state my opinion upon it in writing; and with your permission I will read it to your Lordships.

The first and material point for consideration in this case is as to the effect by the law of England, previous to the Marriage Act, of a contract or engagement of matrimony per verba de praesenti; by which I understand a contract of present marriage, for that is the sense in which these words are, used in all the [10-Clark & Finnelly-832] text-writers and reports of decisions upon the subject. " Spousals de praesenti," Swinburne says,

"are a mutual promise or contract of present matrimony; as when the man doth say to the woman, I do take thee to my wife; and she then answered, I do take thee to my husband."

Such a contract entered into between a man and a woman was indissoluble; the parties could not by mutual consent release each other from the obligation. Either party might, by a suit in the Spiritual Court, compel the other to solemnise the marriage in facie ecclesiae. It was so much a marriage, that if they cohabited together before, solemnisation, they could not be proceeded against for

fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract was considered to be of the essence of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law verum, matrimonium, and sometimes ipsum matrimonium. Another and most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnising the same in facie ecclesiae,

10 Clark & Finnelly 833, 8 ER p955
such marriage might be set aside, even after cohabitation and the birth of children, and the parties compelled to solemnise the first marriage in facie ecclesiae. Such were the effects of a contract of marriage per verba de praesenti.

A contract of marriage per verba de futuro, that is a contract for future marriage, might be released, and the Court would not compel, in opposition to the will of either of the parties, solemnisation in facie ecclesiae, though in this case the party refusing to perform the contract might be punished propter laesionem fidei. But in the case of a contract of this nature, if it were [10-Clark & Finnelly-833] followed by cohabitation, it was then put upon the same footing as a contract per verba de praesenti, and was followed by the same consequences.

At present, however, I am directing your Lordships' attention to a contract of marriage per verba de praesenti, and its legal consequences and effects. They are such as I have, already stated, and the authorities upon the subject will upon examination be found to be uniform and consistent.

I shall, in support of this statement, refer in the first instance to Swinburne, in his Treatise of Spousals. The writer lived in the reign of Queen Elizabeth, and was for several years a Judge of the Prerogative Court at York. This treatise is a work of great learning, though tinctured with the quaintness so common with the writers of that period. Lord Stowell makes constant reference to his authority. Swinburne says,

"That woman and that man which have contracted spousals de praesenti cannot by any agreement dissolve those spousals, but are reputed for very husband and wife, in respect of the substance and indissoluble knot of matrimony; and therefore, if either of them should in fact proceed to solemnise matrimony with any other person, consummating the same by carnal copulation and the procreation of children, this matrimony is to be dissolved as unlawful, the parties marrying to be punished as adulterers, and their issue in danger of bastardy. The reason is because here is no promise of any future act, but a present and perfect consent, the which alone maketh matrimony, without either public solemnisation or carnal copulation; for neither is the one nor the other the essence of matrimony, but consent only. The ecclesiastical laws do usually give to women betrothed only or affianced, the name and title of wife; because in truth the man and woman [10-Clark & Finnelly-834] thus perfectly assured by words of present time, are husband a-ad wife before God and his church."

In another passage he expresses himself thus: - " Spousals de praesenti, though not consummate, be in truth and substance very matrimony, and therefore perpetually indissoluble, except for adultery." Again he says, " The parties having contracted spousals de praesenti, albeit the one party should afterwards marry another person in the face of the church, and consummate the same by carnal copulation, notwithstanding, the first contract is good, and shall prevail against the second marriage."

In a subsequent passage he points out the mode, of proceeding, " by the laws ecclesiastical of this realm, where a party having contracted spousals de praesenti, should afterwards refuse to undergo the holy bond of matrimony."

In the case of Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 54), so often referred to and never without just praise, Lord Stowell, the most learned ecclesiastical lawyer of his age, expresses himself in accordance with the opinions of Swinburne, whose work he, cites, and whose authority he sanctions: - " The consent of two parties, ex pressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of sponsalia per verba de praesenti; improperly enough, because sponsalia, in the original and classical meaning of the word, are preliminary ceremonials of marriage. The expression, however, was constantly used, in succeeding times, to signify clandestine marriages, that is marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere [10-Clark & Finnelly-835] engagements for a future marriage, which were termed sponsalia per verba de futuro; a distinction of sponsalia, not at all known to the Roman civil law. Different rules relative to their respective effects in point of legal consequence, applied to these three cases of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage everything was presumed to be complete and consummated, both in substance and in ceremony; in the irregular marriage everything was presumed to be complete in substance, but not in ceremony, and the ceremony was enjoined to be undergone as matter of order; in the promise, or sponsalia de futuro, nothing was presumed to

10 Clark & Finnelly 836, 8 ER p956
be complete or consummate either in substance or ceremony. Mutual consent would relieve the parties from their engagement, and one party, without the consent of the other, might contract a valid marriage, regular or irregular, with another person." In a subsequent passage he states that " this country disclaimed, among other opinions of the Romish church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin, and as well on that account as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony; but it likewise retained those rules of the canon law which had their foundation, not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognisance of matrimonial causes, enforced these rules; and, among others, that rule which held an irregular marriage constituted per verba de praesenti, not followed by any consummation shown, valid to the full extent of voiding a subsequent regular marriage contracted [10-Clark & Finnelly-836] with another person. The same doctrine," he adds, " is recognised by the Temporal Courts as the existing rule of the matrimonial law of this country;" and he cites Bunting's Case in support of this position.

In these passages-Lord Stowell is speaking of the ecclesiastical law of England. No man knew better than he did what that law was, and upon what it was founded. When he mentions the canon law he, must obviously mean that portion of the canon law received here, and which forms so considerable, a part of the ecclesiastical law of this country. It is impossible to suppose that he should for a moment have lost sight of this distinction.

The same doctrine was stated by Sir Edward Simpson in his judgment in Scrimshire v Scrimshire (2 Hagg. Cons. Rep. 395), pronounced in the year 1752, shortly before the passing of the Marriage Act. His words are these: - " The canon law received here calls an absolute contract ipsum matrimonium, and will enforce solemnisation according to English rites."

Another authority to the same effect is that of Doctor Ayliffe, the learned author of the Parergon. He states that " the ancient canon law received in this realm is the law of the kingdom in ecclesiastical cases, if it be not repugnant to the royal prerogative, or to the customs, laws, and statutes of the realm." There is in his work a chapter " on Marriage or Matrimony, otherwise called Wedlock." He there speaks of " spousals de praesenti, commonly called marriage." " The principal thing," he says, " required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. The Council of Trent," he adds, " declares [10-Clark & Finnelly-837] all clandestine, marriages to be null and void; but this is not law in England, our law only punishing such marriages with the censure of the church."

In strict conformity with these opinions is the language of Lord Holt in the case of Jesson v Collins (2 Salk. 437; 6 Mod. 155), which has given occasion to so much observation. A suit had been instituted in the Ecclesiastical Court to dissolve a marriage by reason of a pre-contract per verba de praesenti. A prohibition was moved for upon a suggestion that the contract was per verba de futuro, for the breach of which damages might be recovered at common law. But Holt, Chief Justice, observed in answer, that " though it was per verba de futuro, it was a matrimonial matter, and the Spiritual Court had jurisdiction." In the course of his judgment he, stated, as it was very natural for him to do, the distinction between such a contract and a contract per verba de praesenti. " The latter," he said, "was a marriage; viz., I marry you; You and I are man and wife; and this is not releasable, Per verba de futuro, I will marry you; I promise to marry you; etc; which do not intimate an actual marriage, but refer it to a future, act; and this is releasable; and as it is releasable, the party may admit the breach, and demand satisfaction." It cannot, I think, be justly said that he went out of his way in making these observations. A distinction had been taken between a contract per verba de Praesenti and a contract per verba, de futuro, and the ground taken for moving for the prohibition was, that the proper remedy in the latter case was by an action for damages.

In the subsequent case, viz. Wigmore's Case (2 Salk. 438), [10-Clark & Finnelly-838] the wife sued in the Spiritual Court for alimony. The husband was an Anabaptist, and had a licence to marry, but married the woman according to the forms of their own religion.
"Et per Holt, Chief Justice: - by the canon law, a contract per verba de prae-

10 Clark & Finnelly 839, 8 ER p957
senti is a marriage; as I take you to be my wife; so it is of a contract per verba de, furs, viz., I will take, etc. If the contract be executed, and he does take her, it is a marriage, and they,"
that is the Spiritual Court, " cannot punish for fornication."

We have the high authority, therefore, of this learned and eminent Judge, in accordance with the ecclesiastical authorities to which I have referred; and it is added that the other Judges of the Court concurred in the opinion expressed by the Chief Justice. It has been supposed that Lord Holt was speaking of marriage, contracts, not with reference to the ecclesiastical law of this country, but to the

general canon law, because in Wigmore's Case he used the expression, " by the canon law." Undoubtedly he did so, but by that expression he could only have meant the canon law received here, and forming part of the ecclesiastical law of this kingdom. It is quite obvious that his observations would have been perfectly irrelevant (a circumstance very unusual with this distinguished Judge) if the expressions were used in any other sense. I cannot, therefore, accede to this explanation. And why are we to put a forced construction upon his words, when they merely express an opinion relating to the ecclesiastical law, in accordance with the most eminent authorities in this branch of jurisprudence upon a subject peculiarly belonging to their jurisdiction?

The only remaining authority to which I think it necessary at present to refer, is that of Mr. Justice [10-Clark & Finnelly-839] Blackstone, who states, in the first book of his Commentaries (p. 439), that " any contract made per verba de praesenti, or in words of the present time between persons able to contract, was, before the late Act, deemed a valid marriage to many purposes, and, the parties might be compelled in the Spiritual Courts to celebrate it in fade ecolegiae." It is obvious that the learned commentator considered this statement of the law of marriage as free from all doubt, for he did not think it necessary to cite any authority in support of the position. These Commentaries passed through several editions in the lifetime of the learned author, but no change was made in the passage to which I have referred. I think your Lordships will be of opinion that-these references, which might, if necessary be greatly extended, sufficiently establish what I have stated as to the nature and effect of a contract of marriage per verba de praesenti, and in opposition to which. I conceive. no authority has been or can be adduced.

There is one branch of this subject which I have already mentioned, but to which I must more particularly advert, because it connects itself closely, as I shall hereafter have occasion to show, with the main question before your Lordships; namely, the judgment that has been pronounced in this case by the Court of Queen's Bench in Ireland. I have stated that a contract per verba de praesenti may be enforced against either of the parties to it, although such party may have subsequently been married in facie ecclesiae to another person, and even after consummation and the birth of children. This is abundantly clear from the statute 32 Hen. 8, c. 38, which recites, that " Whereas heretofore divers and many persons, after long continuance together in matrimony, without any allegation of either of the parties or any other, at their [10-Clark & Finnelly-840] marriage, why the same should not be good, just, and lawful, and after the same matrimony solemnised and consummated, and sometimes with fruit of children, have nevertheless, by an unjust law of the Bishop of Rome, upon pretence of a former contract made and not consummated, been divorced and separated contrary to God's law; and so the true matrimony, both solemnised in the face of the church and consummated and confirmed also with fruit of children, clearly frustrated and dissolved." The statute, therefore, proceeds to enact, " That such marriage being contract, and solemnised in the face of the church, and consummated with bodily knowledge or fruit of children, shall be 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 parties so married, or both, shall have made with any other person or persons before the time of contracting such marriage."

This law was pointed against the injustice of dissolving by reason of pre-contract a marriage solemnised in facie ecclesiae, and after consummation between the parties; but it left the law, where there had been no consummation, as it stood before. Great dissatisfaction appears to have been occasioned by this change, and very

early in the reign of Edw. 6 the statute was repealed, and the law restored to its former state.

Bunting's Case (Bunting v Lepingwell, 4: - Rep. 29; Moor, 169), which has been referred to on both sides in the argument, is an instance of the application of the general rule. This was an action of trespass, and upon a special verdict it was found that John Bunting had contracted marriage per verba de [10-Clark & Finnelly-841] praesenti with Agnes Adingsel, and that afterwards Agnes was married to one Twede, and cohabited with him. Bunting sued Agnes in the Court of Audience, and proved the contract, and sentence was pronounced that she should marry Bunting, which she did. They had issue Charles Bunting, and afterwards the father died. The jury found, that if Charles was the son and heir of Bunting, the defendant was guilty of the trespass. The main questions were these: - It was contended that there should have been a sentence of divorce, and that the husband ought to have been a party to the suit; but the Court decided that the sentence against the wife only, being but declaratory, was good, and should bind the husband de facto; and that as to the other point, the Court must give faith and credit to the proceeding and sentence of the Ecclesiastical Court, to which the cognisance of the subject of marriage belongs. In this case, then, the effect of a pre-contract per verba de praesenti upon a subsequent regular marriage in facie ecclesiae, which this is stated to have been, was admitted and

sanctioned by the Court of Common Law, for it was resolved that the plaintiff was legitimate, and no bastard.

I place little reliance upon the terms of the decree of the Spiritual Court, as recited in the special verdict; for as they do not correspond with the usual form in similar eases, it is probable that the substance only is stated, and that, too, in the language of the pleader.

I have been furnished, by the kindness and industry of Mr. Hope, with a case of a similar nature, extracted from the rolls of the province of York, in which the sentence is set forth in the usual and regular form. The suit, which is of ancient date (in the fourteenth century), is thus intitled: - Cecilia de Portynton versus [10-Clark & Finnelly-842] John de Steinbergh and Alicia Cristyndome, " quam idem Johannes de facto duxit in uxorem." The libel charged that the said John and Alicia contracted a marriage de facto, and solemnised the same in the face of the church. Then follows this allegation, that the said marriage does not and cannot subsist de jure, by reason of a pre-contract, cum copula, between the said John and Cecilia. It therefore prays the marriage de facto between John and Alicia may be pronounced to have been and to be (fuisse et esse) null and void, and that the said John may be adjudged the lawful husband of the said Cecilia, and be compelled to solemnise matrimony with her in facie ecclesiae, etc. The evidence is set forth, and is followed by the sentence, which dissolves the marriage de facto with Alicia, and, pronounces it fuisse et esse invalidum, and adjudges the said John " in virum legitimum Ceciliae." It then proceeds thus: - " et ad solemnizandum matrimonium cum eadem in facie ecclesiae, ut est moris, cononice compellendum et coercendum fore decernimus." The previous contract was per verba, de futuro, but it was followed by cohabitation, and was therefore in its legal effect and consequence, the same as a contract per verba de praesenti. The sentence was appealed from, and affirmed.

From this case it appears that the regular course of proceeding was to make the husband of the second marriage a party to the suit, to pronounce a dissolution of that marriage, to adjudge the husband to be the lawful husband of the party to the first contract, and to decree solemnisation in the face of the church. It further appears from the terms of the sentence, that the dissolved marriage was pronounced to have been and to be (fuisse et esse) void, agreeably to the rule of the Ecclesiastical Court, that when a marriage [10-Clark & Finnelly-843] voidable by reason of pre-contract is annulled, it is annulled ab initio.

Lord Coke (1 Inst. 33 a), in speaking of these marriages de facto voidable by reason of pre-contract, expresses himself thus: - " 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, this wife de facto shall be endowed, for this is legitimum matrimonium quoad dotem; and so in a writ of dower, the Bishop ought to certify that they were

10 Clark & Finnelly 844, 8 ER p959

legitimo matrimonio copulati, according to the words of the writ; and herewith agreeth 10 Edw. 3, 35. But if they were divorced a vincula matrimonii in the life of the husband, she loseth her dower." He cites Bracton to the same effect.

Your Lordships will therefore observe, that when a contract per verba de praesenti between two parties was followed by a marriage solemnised in the face of the church between one of the parties and another person, the latter marriage was not by reason of the pre-contract absolutely void, but merely voidable; and, as a consequence of this, that if such marriage were not annulled by sentence of the Ecclesiastical Court in the lifetime of the parties, it could not afterwards be affected; the widow would have her dower, and the children be legitimate.

Such, then, were the principal incidents of this species of contract; the engagement was indissoluble, the parties could not, even by mutual consent, release it; either party might compel solemnisation in facie ecclesiae; the parties cohabiting together could not be [10-Clark & Finnelly-844] punished for fornication, though liable to ecclesiastical censure; either party cohabiting with another person might be punished for adultery; and lastly, such a contract was sufficient to avoid, by means of a suit, a subsequent marriage entered into by either of the parties, and solemnised in facie ecclesiae.

It must always be remembered that the Spiritual Courts were the sole judges of the lawfulness of marriage, where that question was directly in issue. If the question, whether a marriage be lawful or not, was raised upon a distinct issue in the Courts of Common Law, the rule was that it should be tried, not by a jury, but referred for decision to the spiritual tribunal, and the certificate of the Bishop was conclusive.

The opinions to which I have referred, as to the nature and effect of these contracts, are not, as your Lordships will have observed, merely those of learned individuals and Judges of the ecclesiastical tribunals; I have also shown that these opinions are confirmed by common-law authorities of the most respected and highest character: - that a contract therefore per verba de praesenti was, at the period to

which we are referring, considered to be a marriage; that it was, in respect of its 4 constituting the substance and forming the indissoluble knot of matrimony " (to use the expression of Swinburne), regarded as verum matrimonium, and was followed by such incidents as I have mentioned, is I apprehend, clear beyond all controversy.

But then the same authorities inform us that such marriages were irregular, that they were a looser sort of marriages; that they were not, as Swinburne says, perfect marriages, though equally binding; that, according to Blackstone, they were marriages for many, and consequently not for all, purposes; and that, in [10-Clark & Finnelly-845] order to constitute a regular marriage-a perfect marriage-a marriage with all the consequences belonging to a marriage in its complete and perfect state, solemnisation was necessary; and your Lordships will find that the same ecclesiastical authorities admit in the fullest manner this to be the law, in conformity with the opinions of the temporal lawyers and the decisions of the civil tribunals.

Swinburne (of Espousals, s. 17), in the work to which I have before referred, thus expresses himself upon this subject: - " Spousals de praesenti, though not consummate, be in truth and substance very matrimony. Although by the common laws of this realm (like as it is in France and other places), spousals, not only de futuro, but also de praesenti, be destitute of many legal effects wherewith marriage solemnised doth abound, whether we respect legitimation of issue, alteration of property in her goods, or right of dower in the husband's lands." And in another place he says,

"Yet do not these spousals, that is per verba de praesenti, produce all the same effects here in England which matrimony solemnised 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."

Again,

"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 the [10-Clark & Finnelly-846] mother should afterwards celebrate marriage in the face of the church. Likewise concerning lands, by the canon

10 Clark & Finnelly 847, 8 ER p960

law the foresaid issue may inherit the same; 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 husband'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. 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 praesenti or de futuro, consummate with carnal knowledge, have the same effect as hath matrimony solemnised, yet by the laws of this realm it is otherwise; so that neither spousals de praesenti, neither spousals de futuro consummate, do make her goods his or his goods hers; 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 solemnisation 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 [10-Clark & Finnelly-847] surviving cannot obtain the administration of his goods as his widow, which otherwise, the marriage being solemnised, 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 solemnised, if not consummate also."

Lord Stowell, in like manner in the Dalrymple Case, states, with reference to these contracts, that " the common law had scruples in applying the civil rights of dower and community of goods and legitimacy, in the cases of these looser species of marriage;" obviously meaning, though in more general terms, to express the same opinion as Swinburne, whom, among other authorities, he cites for this position.

The same view of the law was taken by Sir Edward Simpson in the case of Scrimshire v Scrimshire, which occurred shortly before the Marriage Act; his words are these: - " 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 dower, thirds, etc." And when Mr. Justice Blackstone says "

such marriages are valid for many purposes," and therefore not for "all purposes," it is evident his view of the subject was in accordance with that of the ecclesiastical law authorities to whom I have referred.

The same opinion is expressed by Lord Holt in the case before referred to. He thus expresses himself: -

"In the case of a dissenter married to a woman by the minister of a congregation, not in orders, it is said that this marriage is not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes [10-Clark & Finnelly-848] this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the church of England to entitle to the privileges attending legal marriages, as dower, thirds, etc."

In a learned work, written in a popular form, on the subject of marriage, published in the year 1632, intitled " The Woman's Lawyer," and which has been ascribed to Mr. Justice Doddridge, is the following passage: -

"If Titus and Sempronia by words de praesenti in a lawful consent contract marriage, they are man and wife before God; but public celebration according to law is it which maketh man and wife in plain view, of law. One man keepeth out another, and a firm betrothing forbiddeth 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 agrees with the other authorities. I refer to it principally on account of its date. It shows what was the generally received opinion upon the subject at that period.

10 Clark & Finnelly 849, 8 ER p961

The next point for consideration, therefore, will be how far these opinions are supported by the decisions of the Courts of Common Law. First, then, as to dower, and the case cited with respect to it from Lord Hale's Manuscripts. An account of these manuscripts is given by Mr. Hargrave, in the preface to his edition of Coke upon Littleton. There is no doubt they were copied from originals in the handwriting of Lord Hale. The case is this: - A. contracts, per verba de praesenti, with B., and has issue by her, [10-Clark & Finnelly-849] and afterwards marries C. in facie ecclesiae; 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 ecclesiae, and dies; she brings dower against D., and recovers, because the feoffment was per fraudent mediate between the sentence and the solemn marriage, sed reversatur coram Rege et Concilio quia praedictus A. non fuit seisitus during the espousals between him and B.

There is I think, no sufficient foundation for the suggestion that this was not a decision by one of the regular tribunals of the country. It was obviously not considered by Lord Hale as liable to this objection. But as the suggestion has been made, it is proper to observe, that upon the point we are now considering, viz. whether a contract per verba de praesenti, without solemnisation, would entitle the widow to dower, the Court below and the Court of Appeal entertained the same opinion. The Court below decided the case, on the special ground of fraud, because the alienation by the husband had been made per fraudem mediate between the sentence and the solemnisation, for the purpose of defeating the claim of the wife. It is plain that they would not have taken this as the ground of decision if they had considered that the husband's seisin after the contract, and before the solemnisation, would have entitled the wife to dower. Both the Court below and the Court of Appeal agreed therefore in this, that the seisin of the husband after the contract, and before solemnisation, would not support a claim to dower.

Perkins, whose authority has always stood deservedly high in our Courts, states, in his valuable Treatise on the Laws of England, and in conformity with the [10-Clark & Finnelly-850] above decision, that if a man seised of land in fee make a pre-contract of matrimony with J. S. and die before the marriage is solemnised, she shall not have dower, for she never was his wife. It has been supposed that this might have been the case of a contract per verba de futuro; but it is I think, manifestly impossible to put such a construction upon the passage. It would have been altogether idle to have made such a statement as to the law, for it never was and never could have been supposed that a mere contract per verba de futuro could give any right to dower. And what reason is there for making so strained a supposition, where the law, as thus stated, conforms with the decision in the case mentioned by Hale, and with other authorities?

Perkins further goes on to say, that it was holden in the time of King Henry the 3 d, that if a wife was married in a chamber she should not have dower by the common law; but he adds, the law is contrary at this day. So, that at that period (the reign of Henry the 3rd) it appears that nothing short of a solemnisation in facie ecclesiae would entitle a woman to dower. Fitzherbert's Natura Brevium, 150, is

to the same effect: - " A woman married in a chamber shall not have dower at common law; 16th Hen. 3. Quaere," he says, " if marriage made in chapels not consecrated for many are by licence of the Bishop married in chapels, and it seemeth reason able that in such cases she shall have dower."

I pass from the question of dower to that of legitimate. One of the earliest cases upon the subject is that of Del Heith (Harl. MSS. 2117; Rogers' Ecc. Law, 584), so frequently mentioned, which was decided in the 24 Edw. 1. It was as follows: - John Del Heith, brother of Peter Del Heith, held [10-Clark & Finnelly-851] lands in Bishopsthorpe near Norwich, and kept a woman, named Katherine, in concubinage, by whom he had two children, Edmund and Beatrice. Being taken ill, he was advised by the Vicar of Plumstead, for the good of his soul, to marry her. As he was unable to go to church, the ceremony was performed in his own house by the Vicar, when the said John Del Heith pronounced his usual words, and placed a ring upon her finger; but no mass was celebrated. From that time the parties lived together as man and wife, and had another son called William. On the death of John Del Heith, his brother Peter entered upon his lands as his next heir; but a writ of ejectment was brought by the said William, as son and heir of the deceased. It was asked on the trial whether any

10 Clark & Finnelly 852, 8 ER p962

espousals were celebrated between his parents in the face of the church, after his father recovered from his illness? And because it was not proved that John Del Heith was ever married to Katherine in the face of the church, the jury found that the plaintiff had no right to the lands; thus proving that he was illegitimate.

Foxcroft's Case (1 Roll. Abr. 359), which occurred in the same reign, viz. in the 10th Edw. 1, is to the same effect. The marriage not having been solemnised in facie ecclesiae, the issue was held to be illegitimate. These cases it is said ought to be disregarded, as being manifestly contrary to law; solemnisation in facie ecclesiae never, as it is assumed, having been necessary to the validity and full effect of a marriage.

Why this is to be assumed, in opposition to these, express decisions, it is not very easy to understand. Foxcroft's Case is taken from Rolle's Abridgment, a [10-Clark & Finnelly-852],work always held in great estimation, and he refers to the Year Book as his authority.

The case is cited without any doubt or question in the Digest of Chief Baron Comyn, and in other similar compilations; and it was quoted as an authority, though for a different purpose, by Lord Eldon and Lord Ellenborough, in the case of the Banbury Peerage. Upon what principle, then, is it to be assumed that in the reign, of Edward the 1st, marriage in facie ecclesiae was not considered necessary upon a question of legitimacy in opposition to these decisions, and especially when we find it stated by Perkins that in the reign of Henry the 7th it was essential in the case of dower and which is also stated by Fitzherbert, in his Natura Birevium? When the Spiritual Court decreed a marriage, it always decreed it to be solemnised in facie ecclesiae, and every other marriage was irregular and clandestine.

Upon this question of legitimacy it is material to observe, that Goldingham, one, of the civilians called in for the assistance of the Court in Bunting's Case stated, that if issue be born after the contract of marriage (he is speaking of a contract per verba de praesenti), and before the solemnisation, such issue is legitimate; but he adds, that is when espousals afterwards take place, for if espousals do not succeed, the issue, he says, born after the contract, will be illegitimate; and this was not controverted by the civilian who argued on the other side. When he says that the issue would be legitimate if espousals afterwards take place, he is evidently referring to the doctrine of relation, which was always rejected by our law.

Anothor authority to the same effect is Godolphin, who states in his Repertorium
. the common law he or she that is born before marriage [10-Clark & Finnelly-853]
Canonicum, that "by marriage
celebrated between the father and mother, is called a bastard."

When the question of legitimacy depended on the lawfulness of the marriage, it was tried on the issue of ne unques accouple in loyal matrimony; the same as in dower. But it is I think, clear that a contract per verba de praesenti, without solemnisation, would not entitle the wife to dower. It follows, therefore, that upon the issue of ne unques accouple, etc. the Bishop must, in a case of dower, have certified against the marriage, or the rule of law in the case of dower must have been defeated. But the issue being the same upon the question of legitimacy, there must have been the same certificate; and as the certificate is conclusive, there must consequently have been the same result.

In the case of Wickham v Enfeild (Cro. Car. 351), which has been cited, the Bishop, instead of the usual form of certificate, returned that the parties were coupled in vero, matrimonio tied clandestine. The Judges, upon exception to the certificate, determined it to be sufficient. They considered verum to be equivalent to legitimum; for they were all one, it was aid, in intendment, and that the return was not affected by the addition of clandestine. The finding that the marriage was clandestine was not

inconsistent with its being legitimum, for though performed by a priest it might still have been clandestine.

If it is supposed that a contract per verba de praesenti would confer the right to dower, and that the issue would be legitimate, this consequence might ensue: - Suppose after such a contract the man were to marry another woman in facie ecclesiae, and have issue and [10-Clark & Finnelly-854] die, the second wife would clearly be entitled to dower. Could the first be also entitled? There could not be two contemporaneous marriages with the same man, entitling two women to dower and out of the same estate. Again, the issue of the second marriage would be clearly legitimate. If the man had sexual intercourse with the first woman after the second marriage, and had issue by her,

10 Clark & Finnelly 855, 8 ER p963

could such issue be legitimate? There could not be two legitimate children of the same father, born of two contemporaneous marriages.

There is another distinction between a contract per verba de praesenti and a regular marriage, which relates to their effect upon the property of the respective parties: -

"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, inasmuch as if the woman dieth before the marriage solemnised between them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife may make a will thereof without the agreement, of him unto whom she was contracted; but after the marriage celebrated between them the man cannot enfeoff his wife, for then they are one person in law."

It is evident that Perkins in this passage is speaking of a contract of marriage per verba de praesenti; and this, therefore, is another instance of the different legal effect of such a contract and a regular marriage.

Lord Hale, at the conclusion of the case reported by him, adds these words: - "Nota, Neither the contract nor the sentence was a marriage." By which he may perhaps have meant, not such a complete marriage as to give a right to dower. The observation of Perkins, that she never was his wife, made in the cases to which I have referred, ought perhaps to be [10-Clark & Finnelly-855] taken with the same qualification. Lord Coke, speaking of the effect, after the death of the husband, of what he calls an inchoate marriage, says it shall be accounted a lawful marriage quoad dotem.

Another and a very important circumstance in which these irregular marriages differed from a marriage solemnised according to the rites of the church, is that neither party could maintain a suit against the other for the restitution of conjugal rights. The law is so laid down by Sir Edward Simpson in the case of Scrimshire v Scrimshire, and cannot, I think, be doubted.

So also as to the right to administer to the effects of a deceased wife, a contract per verba de praesenti has been considered insufficient. That was the case of Haydon v Gould (1 Salk. 119). There was a contract per verba de praesenti, and the parties afterwards cohabited as man and wife for several years; but it appearing that the person who performed the ceremony was not in orders, but a mere layman, which was known by the parties, the letters of administration were recalled by the Court; and upon appeal the sentence was affirmed by the Delegates. This decision does not appear to have been ever questioned. It is cited with approbation by Sir William Wynne, and referred to without any doubt as to its soundness by Sir John Nicholl.

It was argued in that case that the marriage was not a mere nullity; that it was irregular only, but not void; that it was sufficient by the law of nature, though the positive law ordained that it should be by a priest. But it was said in answer, that the man demanding a right due to him by the ecclesiastical law, must prove himself [10-Clark & Finnelly-856] a husband according to that law. The decision in this case is another instance, in accordance with those which I have already mentioned, of the civil effects of a regular marriage being withheld from a contract per verba de praesenti not duly solemnised according to the rules of the ecclesiastical law.

A further and perhaps the most essential circumstance in which a contract per verba de praesenti differed from a regular and perfect marriage, is that to which I have already adverted; viz. that if a man, after having entered into a regular marriage, married a second time, his first wife living, the second marriage was absolutely void, and the issue of course illegitimate. But where the first engagement was merely a contract per verba de praesenti, the second marriage was only voidable; and if not set aside during the lifetime of the parties it could not afterwards be questioned, and the issue would be legitimate. This is abundantly clear from the passage which I have already cited from Coke Littleton, as well as from other authorities.

The subsequent decisions of the Courts of Common Law, until we come down to comparatively modern times, are not at variance but in conformity with the previous authorities.

In Welde v Chamberlaine (2 Show. 300), which was an issue marriage or no marriage, a contract per verba, de praesenti was proved; but the doubt suggested was, that as there was no ring

the ceremony was invalid, as not conforming to the Book of Common-prayer. Pemberton, Chief Justice, inclined to think that a contract per verba de praesenti, repeated after the parson in holy orders, was sufficient; but he reserved [10-Clark & Finnelly-857] the point for the consideration of the Court. It is obvious, therefore,

10 Clark & Finnelly 858, 8 ER p964
that a mere contract per verba de praesenti was considered in that case to be insufficient.

So, in Holder v Dickeson (1 Freem. 95), Vaughan, Chief Justice, was of opinion that a priest was necessary for the marriage. The other Judges did not differ from the Chief Justice in this respect, though they considered it unnecessary to aver quod obtulit se in the presence of a parson, which was the objection made to the declaration.

In Paine's Case (1 Sid. 13) it was said, that in a suit for dissolving a marriage on the ground of pre-contract, the parties contracting became husband and wife by the effect of the sentence, without further solemnity, and Noy's authority was cited for this position. But Twisden, Chief Justice, denied this, and said the marriage must be solemnised before they could be completely baron and feme. This opinion ex pressed by the Chief Justice corresponds with what was stated in Bunting's Case, and the other more ancient authorities upon the subject.

It is obvious that none of these cases impeaches the doctrine stated both by the ecclesiastical and temporal lawyers, as to the imperfect effect, with regard to its civil consequences, of a contract of marriage per verba de praesenti, not accompanied or followed by due solemnisation. It is not immaterial to observe that the cases occurred before the Marriage Act, when the subject was much more familiar to both classes of lawyers, ecclesiastical as well as temporal, than it has been since the change introduced by that statute.

I have come, therefore, to this conclusion, that although a marriage contracted per verba de praesenti [10-Clark & Finnelly-858] was indissoluble,-though it could not be released even by the mutual consent of the parties,-though either-of them might enforce it, and compel-solemnisation,-though it had the effect of rendering a subsequent marriage solemnised in facie ecolegiae, even after cohabitation and the birth of children, voidable,-though it was considered to be of the essence and substance of matrimony, and was therefore, and on account of its indissoluble character, styled in the ecclesiastical law verum matrimonium,-yet by the law of England, according to the concurrent opinion of both the ecclesiastical and temporal lawyers, this irregular and looser sort of marriage did not confer those rights of property, or the more important right of legitimacy, consequent on a marriage duly solemnised according to the rites of the church. Whatever name, therefore, is given to the connexion, this is I conceive, a correct description of the situation of the parties who previously to the Marriage Act, had entered into a contract of marriage per verba de praesenti, not followed by solemnisation.

Various questions and considerations connected with this subject have presented themselves in the course of these discussions I and to which I shall shortly advert. First, as to the religious ceremony: -

It appears from the authorities to which I have referred, that it was formerly considered essential to the full effect of a marriage that it should be solemnised in the church. The ceremony is well known; it had been in use for many hundred years, and corresponded in substance with the present form. This appears from several ancient manuals, particularly those of Salisbury and York, which are still in existence. The rule as to the necessity of a public celebration was afterwards relaxed, and it is clear that in [10-Clark & Finnelly-859] the Temporal Courts the same consequences attended these marriages as if they had been celebrated in facie ecclesiae. I of course except the case of dower ad ostium ecclesiae, which depended upon a particular rule. Such marriages, however, though performed by a person in holy orders, and according to the rules of the church, were considered to be clandestine, and subjected the parties to the censures of the church. Two instances are mentioned, in which, according to popular tradition, such censure was pronounced; viz. upon the marriage of Sir Edward Coke with Lady Hatton and the marriage of the Lord Chancellor Ellesmere. In the former case the censure is said to have been slight, the parties having erred from ignorance of the law; but in no case of this sort, where the marriage ceremony was performed by a person in holy orders, although the parties might be liable to ecclesiastical censure, were they ever compelled to repeat the ceremony in the face of the church. It is obvious, therefore, that such marriages, though clandestine, were considered by the Ecclesiastical Courts to be complete and lawful marriages, as they indisputably were by the Courts of Common Law. Still, however, the Spiritual Court, when it decreed the per-

10 Clark & Finnelly 860, 8 ER p965
formance of marriage, always decreed that it should be solemnised in the face of the church.

A question has been raised as to the celebration of the marriage ceremony by a deacon; and it has been asked, if it was formerly required that the ceremony should be performed by a person in

priest's orders, by what authority this change was introduced. It appears, by reference to the ancient rituals, that formerly the sacrament was administered before the nuptial benediction was pronounced, and that, as this could only be administered by a priest, his presence [10-Clark & Finnelly-860] was necessary. Marriage itself was also, by the mere nature and force of the contract, considered to be a sacrament; and the solemnisation, therefore, by a priest, might on this ground have been thought necessary; but; when, at the Reformation, it ceased to be considered as a sacrament, and when it was no longer required that the sacrament should be administered at the time of the marriage, there was no reason why the ceremony should not be performed by a person in holy orders as a deacon.

It is further to be observed, that in the Act of Uniformity, 13th and 14th Charles 2, it is expressly enacted, that certain of the offices contained in the Book of Common prayer shall be performed only by a priest; thereby constructively admitting that the other offices, of which matrimony is one, may be performed by a deacon.

It is said that a marriage may be valid though not performed by a person in holy orders, as in the case stated by Lord Stowell, in Hawke v Corri (2 Hagg. Cons. Rep. 280): - " It seems," he says,
"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 the sight of the minister's letters of orders, and if they saw them could not be expected to inquire into their authenticity."
I do not very well understand the inference intended to be drawn from this case. It amounts to nothing more than this, that where the law requires the ministration of a person in holy orders, if a man assumes that character under such circumstances as [10-Clark & Finnelly-861] to impose upon those who require his ministration, and they, acting fairly and bond, fide, are deceived in this particular, the Court which has to decide on the validity of the transaction, will not suffer them to be the victims of imposition and fraud, but will decree in favour of the marriage. This exception can only apply in cases where, by the general rule of law, the service of a person in holy orders is necessary; and cannot, therefore, be properly used to impeach that rule.

Another question that has been raised, and which boars immediately upon the judgment of the Court below, is this: - Assuming that a marriage can be solemnised only by a person in holy orders, whether a Presbyterian minister, regularly ordained according to the rules of the Presbyterian church, is competent to perform the ceremony between members of the Established Church, so as to give full validity and effect to the marriage?

Holy orders, according to the law of England, are orders conferred by episcopal ordination. This was the law of the Catholic church in this country, and the same law continued after the Reformation as the law of the Episcopal Reformed Church, distinguished by the appellation of the Church of England. The mode of conferring these orders is prescribed in the Act of Uniformity, 2 and 3 Edw. 6, and 13 and l4 Chas. 2. Similar laws were passed at about the same periods in Ireland, for the regulation of the church of that country, which was founded on the same principles and governed by the same rules as the church of England. A marriage celebrated by a Roman-catholic priest, as in Fielding's Case and other instances, has been considered valid. A priest of the Romish church is a priest by episcopal ordination, [10-Clark & Finnelly-862] and his orders are accounted holy orders by our church. If he conforms to the Protestant faith, and is presented to a benefice, no new ordination is necessary; nor would it, indeed, be proper.

The two churches of England and Ireland the same in doctrine, in ceremony, and in discipline, have been united, and the same law which applied to each church in its separate state has become the law of the united church. It is said that we admit the validity of the ordination of the ministers of the church of Scotland, and that by the Act of Union their title, as legally ordained ministers, is valid in every part of the empire. As respects their reverend character that certainly is so, but this conveys no authority out of Scotland. Holy orders in England still mean the same thing

10 Clark & Finnelly 863, 8 ER p966
as before the union with Scotland, viz. orders conferred by episcopal ordination; and what is required to be done by a minister in holy orders, cannot therefore be done by an ordained minister of the Scotch church. The question is not affected by the Toleration Acts. These Acts remove penalties and disabilities; they confer no title. The claim made by the Presbyterians in Ireland cannot be supported upon any principle that would not apply equally to every denomination of dissenters. I respect the character of the Presbyterian ministers of Ireland, their learning and piety; but this is a question of mere legal interpretation, which must be determined without reference to the character or conduct of the parties.

The view I have taken of the effect of a marriage contract per verba de praesenti, will afford an immediate and satisfactory answer to the inference attempted to be drawn from different statutes

passed [10-Clark & Finnelly-863] with reference to this subject. I allude, in the first place, to the statute, 12 Chas. 2, c. 33, for confirmation of marriages during the Commonwealth. It is said that if a contract per verba de praesenti be an actual marriage, what necessity was there for this Act? for the marriages entered into under the ordinance were of this nature. Undoubtedly that is so; but if such contracts were not followed by all the consequences of marriages regularly solemnised, the Act was obviously necessary, and it accordingly puts these marriages on the same footing as marriages solemnised according to the rites of the church of England. Equally plain is the explanation of the clause in the statute, by which the validity of these marriages is left to the decision of the Temporal Courts. The reason is obvious: - When they were rendered valid and binding by the Act, the question in each instance would not be a question of ecclesiastical law, but merely whether the particular case came within the provisions of the statute.

The same observation will apply to the reasoning founded on the different Acts relating to marriages, celebrated by Presbyterian ministers in Ireland and in India. But then it must also be admitted that these Acts would have been unnecessary, if a contract per verba de praesenti had been attended with the same civil rights as to property, etc as a regular marriage solemnised according to the rules of the church. I place very little stress upon the argument that has been founded upon the form of certain of the statutes relating to this subject, some of them being enacting and others declaratory. They appear in a great degree, if I may so, express myself, to neutralise each other; and many of them are wholly inconsistent with the notion that the Legislature considered a contract per [10-Clark & Finnelly-864] verba de praesenti to have the full effect of a regular solemnised marriage.

I must not pass over the observations that have been made upon the marriages of Jews and Quakers. It is said they can only be supported on the ground of their being contracts per verba de praesenti, or de futuro followed by cohabitation.

No such argument can, I think, be justly raised from the decisions respecting marriages amongst the Jews. They are treated in those decisions as a distinct people, governed, as to this subject, by their own religious observances and institutions among which marriage is included. Speaking upon this subject, Lord Stowell, in the case of Ruding v Smith (2 Hagg. Cons. Rep. 371), observes that " the matrimonial law of England for the Jews is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and that law only, as has been done in the cases that were determined in this Court on those very principles." Such are the admitted grounds of decision in the case of Jewish marriages.

The question as to the marriage of Quakers is of more difficult solution. In the case so frequently referred to before Lord Hale, that learned Judge is reported to have said, that he would not on his own opinion make their children bastards; and he directed the jury to find a special verdict. It would seem, therefore, that the inclination of his opinion was against the validity of the marriage. If he had considered a contract per verba de praesenti to have been sufficient, there would have been no difficulty in the case, and he would at once have decided accordingly. Burnet states, that Hale considered " all marriages, [10-Clark & Finnelly-865] made according to the several persuasions of men, ought to have, their effects in law." It is not improbable, therefore, that this was the ground on which he refused to decide the question. Lord Keeper North, no mean lawyer, though full of religious and party prejudices, considered the point too clear for doubt; and observing upon the course pursued by Hale in this case,

10 Clark & Finnelly 866, 8 ER p967

made it the ground of a bitter and not very decent attack upon that distinguished Judge.

In a case, mentioned by Mr. Justice Willes in Harford v Morris (1 Hagg. C. Rep. App. 9), and in Woolston, v Scott (Bull. N. P. 28) before Mr. Justice Denison, the former of which was the case of a marriage between, Quakers, and the latter an, Anabaptist marriage, it was held that an action of criminal conversation might be sustained. Mr. Justice Buller, in commenting, in his Law of Nisi Prius, on the latter decision, does not suggest as the ground of the judgment that the marriage, was valid as being a contract per verba de praesenti, but observes that it had been doubled

whether the ceremony must not he performed according to the rites of the church: - but as this, he says, is an action against a wrongdoer, and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of Quakers, Anabaptists, Jews, etc. He rests this class of cases, therefore, upon the distinction made in the Courts of Law between a claim of right and proceedings against a wrongdoer.

In Green v Green (1 Hagg. C. Rep. App. 9), which was also the case of a Quaker marriage, it was considered that a marriage according to the forms used among that sect was not sufficient to support a suit for the restitution of Conjugal rights.

[10-Clark & Finnelly-866] A question as to the effect of those marriages arose in the case of Houghton, v. Haughton (1 Moll. 611), before Lord Manners, when Chancellor of Ireland. He decided in favour of their validity, but not on the ground of a contract per verba de praesenti, but because he considered that they were, included in the Irish statute 21 and 22 Geo. 3, for the relief of dissenters. Quakers are excepted from the Marriage Act., but no other dissenters; and being put in this respect on the same footing with the Jews, it, is not an unfair inference, that the Legislature intended to place, them on the same footing with respect to their marriages, and thus constructively to legalise them. This provision in the Act was considered by Sir William Wynne, in Sylveira v Alvarez, as a strong recognition of the validity of theses marriages. In none, of the cases is it rested on the ground of the form constituting a contract per verba the praesenti. Although these marriages, therefore, may afford materials for popular reasoning, they do not, I think, lead to any certain conclusion, or give a greater, effect to a contract per verba de praesenti than is ascribed to it bay the authorities to which I have before referred.

I abstain from referring in detail to the convictions for bigamy in Ireland, in the cases of marriages not authorised by the Legislature, because this is the very subject of the present, appeal; but I freely admit that the opinions of the learned Judges, under whose direction these convictions occurred, are entitled to the greatest consideration and respect.

Several modern cases have been referred to in which the question as to the effect of a contract perverba de praesenti has been more, or less, considered. I will refer to them in their order.

[10-Clark & Finnelly-867] The first is that of The King v The Inhabitants of Brampton (10 East, 282), in the time of Lord Ellenborough. In that case the marriage was publicly celebrated by a person officiating as a priest, in a chapel in the town of Cape St. Nicola Mole, in St. Domingo. What Lord Ellenborough said upon this occasion does, not admit of dispute. his words were these: - " A contract of marriage per verba de praesenti would have bound the parties before the Marriage, Act; and this appears to have been perverba de praesenti, and to have been celebrated by a priest; " and, after alluding to Fielding's Case (14 St. Tr. 1327), he adds, " There is this further circumstance, that the ceremony was performed in a public chapel, instead of in private, lodgings, as it was in Mr. Fielding's Case." All this is perfectly consistent with the view I have taken of this subject. In the case of Lautour v Teesdale (8 Taunt. 830; 2 Marsh. 233), the marriage ceremony was performed by a Roman-catholic priest in the Black Town, at Madras. This case, was the same in principle as the former, except that the ceremony here was performed, not in a chapel, but in a private, room, as in Fielding's Case. Chief Justice Gibbis, a very acute lawyer, stated on that occasion, but unnecessarily for the ceremony was performed by a priest,-The broad principle., that a contract per verba de praesenti was before the Marriage, Act considered as an, actual marriage; but he adds, that doubts have been entertained whether it was so unless followed by cohabitation. There is no foundation for the doubts that were suggested by the

10 Clark & Finnelly 868, 8 ER p968

Chief Justice, and in stating the general position he did not accompany it with any, of the explanations and qualifications with [10-Clark & Finnelly-868] which it had been, stated by Lord Stowell and other eminent civilians.

In Beer v Ward (MS. Fide ante, 61 1), which was an issue out of Chancery, the same position was stated by Lord Tenterden, an extremely cautious and very learned Judge, in his direction to the jury. But Lord Eldon, when the case afterwards came before him, and whose attention had been frequently directed to questions of this nature, appears from the shorthand writer's notes of the case, which I have carefully read, to have cautiously abstained from adopting this position, and, after suggesting some other points for consideration, directed a new trial to he had at the bar, of the Court of King's Bench.

It may be proper to observe, with reference to this last decision, that in the case of The King v The Inhabitants of Bathwick (2 Bar and Ad. 639), the Court of King's Bench seem to have considered it necessary that the marriage should have been celebrated by a clergyman, for in any other view of that case the points in controversy must have been wholly immaterial. Lord Tenterden was at that time Chief Justice of the King's Bench, and after consideration delivered the judgment of the Court.

In the case of Smith, v Maxwell (1 Ry. and Moo. N.P. 80), before Lord Wynford, the only question was, whether in Ireland a marriage, in a private houses was valid. The marriage ceremony was performed by the curate of the parish, and the learned Judge decided that such a marriage was legal, and that it need not be celebrated in the church. To the same effect was the judgment of Sir John Nicholl, in Steadman v Powell (1 Addams, 8). In [10-Clark & Finnelly-869] Ireland, he says, marriage, may he had without any celebration in facie ecclesiae or in the presence of witnesses. By celebration in facie ecclesiae, he obviously meant in a church, in contradistinction to a private house, where, the marriage in question in that case was performed. Lyndwoode's explanations of the terms in facie

ecclesiae is this, " in conspectu ecclesiae, populi scilicet congregati in ecclesia." The main point in controversy in the case of Steadman v Powell was, whether the priest who performed the ceremony was a Roman-catholic.

The opinion of Lord Eldon, in the case of M'Adam v Walker (1 Dow, 148), was pronounced in a Scotch case, and obviously had reference to the law of that country.

If I may refer to the opinion of the several eminent lawyers, both of the Ecclesiastical and Civil Courts., who were consulted upon the subject of marriages in India performed by ministers, of the church of Scotland, it will be found that they an concurred in stating that those marriages were not to all purposes, legal marriages, but that they were binding upon the parties, so that a subsequent marriage by either during the life of the other, with a third person, would be invalid. To this opinion I entirely assent.

I fully admit the learning, ability, and experience, of the several distinguished Judges to whom I have thus referred: - but with the explanations which I have given, I do not see sufficient ground in these opinions to lead me to change my view of this subject, agreeing as it does with what has been laid down by the most eminent civilians, and with the corresponding decisions of the Courts of Common Law from the earliest period of our history.

I have been led, in consequence of the range that [10-Clark & Finnelly-870] has been taken in these discussions, and the great and important interests which they involve, to enter into the consideration of this subject more extensively than is perhaps necessary for the decision of the question immediately before your Lordships. The immediate point for decision is whether the Dependant George Millis is under the circumstances stated in the special verdict, guilty of the crime of bigamy. The marriage in Ireland, which is the first marriage, is not rendered valid by statute, one of the parties being a member of the Established Church. If, therefore, it was not celebrated by a person ill holy orders, according to the meaning of those terms in the law of England, it can, I think, operate only as a contract per verba de praesenti; and the question will be whether such a contract is sufficient to support the indictment. And upon this point, I confess I should feel great difficulty in dissenting from the opinion of the Queen's Judges, as expressed by the learned Chief Justice. " If," he says (ante, P. 689), " a marriage per verba de praesenti without any ceremony is good for the first marriage, it is good also, for the second; but," he adds, " it never could be supposed that the Legislature intended to visit with capital punishment (for the offence would be

10 Clark & Finnelly 871, 8 ER p969

capital if the plea of clergy could be counter-pleaded) the man who had in each instance entered into, a contract per verba, de praesenti, and nothing more."

But independently of this consideration, it is material upon this part of the subject to advert again to the effect of such a contract. Let me suppose a contract of marriage per verba de praesenti., and a subsequent marriage duly solemnised by the same, man with another woman. The woman dies, the marriage becomes binding, and the issue legitimate. How can [10-Clark & Finnelly-871] a prosecution for bigamy be sustained for entering into a marriage which the law recognises, and will not suffer to be annulled? But if an indictment could not under such circumstances be maintained, neither could it, I conceive, during the life of the woman; for the guilt or innocence, of the husband could never be made to depend upon the) accident of her life or death.

I may further observe, to your Lordships, that it seems never to have occurred to any one, in suits to annul a marriage, by reason of pre-contract, to suggest that the party had been guilty of bigamy. There is no trace of any such intimation; and yet in every one of these cases, if a contract per verba de praesenti were sufficient for this purpose, that offence, must have, been committed.

But there, is another difficulty in the way of the prosecution in this case, arising out of the change introduced into the law of Ireland by the statute 58 Geo. 3, c. 81. It is thereby enacted, " That in no case whatsoever shall any suit or proceeding he had in any Ecclesiastical Court in Ireland, in order to compel a celebration of any marriage in facie ecclesiae. by reason of any contract of matrimony whatever, whether per verba de praesenti or, per verba de fire, which shall be entered into, after the end and expiration of ten days next after the passing of this Act." This clauses is copied from the 13th section of the English Marriage. Act. The effect of this statute, has been to change entirely the character of a contract per verba de praesenti, at least as to its temporal effect. It is no longer indissoluble; solemnisation cannot be enforced; it has no longer the effect of avoiding a subsequent marriage solemnised primâ facie [10-Clark & Finnelly-872] ecclesiae, but such marriage is from the times of its celebration valid and binding, and accompanied with all the civil consequences of a regular and perfect marriage. How then can such a marriage, which the law sanctions, and the obligations of which it enforces, constitute the crime of bigamy? In this, offence it is the second marriage that is the criminal act; such marriage is a more nullity; it is simply void, and so completely void that the woman may bet examined as a witness against the person with whom she has gone through the ceremony of

marriage. But in the case of a contract per verba de praesenti, followed by a subsequent marriage with another person duly solemnised, the second marriage is on the contrary, by the law of Ireland, legal and binding.

It cannot, I think, be contended, at least with any effect, that as the Act in its terms only prevents a proceeding to enforce, the performance of the marriage contract, a suit may still be instituted for annulling a subsequent marriage solemnised in facie ecclesiae. It is not, I think, very reasonable to suppose that such could have been the intention of the Legislature. For what purpose would such a proceeding be had, unless with a view of enforcing the performance of the first contract, which the statute declares shall no longer be done?

Sir William Blackstone appears to have entertained the same opinion upon the construction of the English Marriage, Act., which contains precisely the same provision; and from that time to the present, a period of nearly a century, no such suit has ever been, instituted, or, as far as I can learn, ever contemplated.

I am of opinion, therefore, after much anxious consideration, for the reasons and upon the grounds which I have thus stated to your Lordships, but at the [10-Clark & Finnelly-873] same time with all due deference and respect for those who differ from me on this subject, that the indictment against the Defendant, George Millis, cannot be sustained.

Lord Cottenham: - I have not, in the course of a pretty long profession in life, met with any case, so, embarrassing as the present. It is impossible to come to any conclusion without overruling authorities to which the greatest possible respect is due. The highest names in the history of the law stand opposed to each other. If the conclusion to which I have felt myself compelled to come be erroneous. The error has not arises from any prepossession of my mind. The many great modern authorities who have expressed opinions, inconsistent with the judgment under review; the presumption

10 Clark & Finnelly 874, 8 ER p970

that the law of this country respecting marriage, previous to the Marriage Act of 26 Geo. 2, c. 33 (1753), had been the same as prevailed in other countries which derived their law upon that subject from the same source; and a consideration of the great evils necessarily attendant upon a confirmation of the judgment,-had raised in my mind a very strong impression that the judgment was erroneous, and no slight wish that it might be found to be so. It was not until I came to examine in private the early authorities, and to consider the weight of the objections, which have been raised to them, that I found it impossible, consistently with the duty I owe to this House and to the public, to adopt any conclusion but that to which these authorities uniformly and of necessity lead.

It is to be observed in the outset, that the present inquiry is as to the state of the law as it existed before, 1753. Ninety years have elapsed since that [10-Clark & Finnelly-874] state of the law has ceased to exist in this country; a circumstance which adds greatly to the difficulty of the inquiry, and which it is of the utmost importance to keep in mind, when striking the balance between the authorities which preceded and those, which followed that date. The former arose in administering the then existing law, and proceeded from Judges necessarily conversant with all that affected the important subject of marriage. The latter consist principally of expressions of impressions of what the law had been at former times, and of the administration, of which the authors of those, opinions probably never had, or had ceased to have, any experience;

and it is obvious that the observation applies the more strongly to those authorities
which are the most removed from the time at which this law, by the passing of the
Marriage: - Act, ceased to exist in this country.

The question is aid a contract of marriage per verba de Praesenti tempore, without the intervention of a priest in holy orders constitute a valid marriage, by the law of this, country as it existed before the passing of the Marriage Act? In considering this matter the first question a lawyer would ask is what decisions are there, to be found of that period upon this, subject? The answer. I regret to say must be that there are many, and that all, without any exception, held that such contract did not constitute a valid marriage.

Upon an examination of these authorities the whole question, must depend. Since, the Marriage, Act there cannot have been many occasions, of decision upon the subject; and the opinions of modern Judges and writers, however important as commentators upon a law which had ceased to exist, cannot be of avail unless supported by decisions

and authorities of the times [10-Clark & Finnelly-875] during which the law prevailed. But before, I proceed to examine these authorities, it will be desirable to clear the way by disposing of some, arguments, which, if well founded, would go far to prove that there could not have been any such decisions; or that if there were any, they must necessarily have been erroneous.

The civil law, it has been said, was the foundation of the law of marriage in Europe, and that by that law, before the Council of Trent, a contract per verba de praesenti constituted marriage, as it does

in Scotland to this day; and that there was no reason to suppose that the marriage law of England was at that time different from the marriage law of other Christian countries; but, on the contrary, as the subject of marriage was under the jurisdiction of the Ecclesiastical Courts, and as there was an appeal from those Courts to Rome, it was to be assumed that the marriage law of this country and of Rome was the same.

Now it is quite certain that the civil and canon law never, had, as such, any authority in this country; but, in the language of the statute of 25 Hen. 8, c. 21, " such laws had effect only so far as the Sovereign and people of this realm had taken them at their free liberty, at their own consent, to be used amongst them; and had bound themselves by long use and custom to the observance of the same." In illustration of which, Blackstone, following the examples of Sir Matthew Hale, classes the civil and canon law in use in this country as part of the common or unwritten law. And with respect to the appeal to Rome, Blackstone (4 Comin. 115) observes, that the Act of Hon. 8, which subjected those, who should appeal to Rome to the [10-Clark & Finnelly-876] penalties of a praemunire, only punished that which was illegal before.

The rules, therefore, of the civil and canon law, as generally received, cannot materially bear upon the present inquiry; but it is highly important to ascertain, what were the rules in this respect by which the Ecclesiastical Courts in this country

10 Clark & Finnelly 877, 8 ER p971

were regulated; for as the jurisdiction of all questions of marriage has been exercised by the Ecclesiastical Courts ever since their separation from the Civil Courts soon after the Conquest, the law of those Courts must have been, at all times the law of the country. It is true that in certain cases in which questions, of marriage arose incidentally, as in personal actions, in which the right depended upon the fact of marriage, and not upon its legality, reference was not made to the ecclesiastical authorities; yet as that was the only, course in all cases in which the validity of a marriage was directly in issue: - in all which cases the Civil Court was bound to respect the certificate of the Bishop as conclusive, it follows that the Civil Courts could not have had any rules but those which they received from the ecclesiastical authorities: - and this may account for the fluctuations which appear at different times to have taken place; a clandestine, marriage, that is one not celebrated in facie ecclesiae, being at some periods treated as void, and at others only as irregular; and a mass-priest being in some cases treated as necessary to give validity to a marriage, and in others, any one in holy orders being considered as sufficient for that purpose.

It is expedient, therefore, to ascertain as far as possible what rules were prescribed to the Ecclesiastical Courts by the authorities within this realm; and if it shall appear that before the time at which the [10-Clark & Finnelly-877] canon law is stated to have been introduced into this country, that is before 1290, there were laws existing which regulated the proceedings and decisions respecting marriage, and which do not appear afterwards to have, been altered, it must be of more importance to look to such laws than to the rules of the general civil or canon law; and it appears that there, were such laws, and that by those laws the intervention of a person in orders was necessary to constitute, a valid marriage. The Institutes of Edmund direct that in nuptials there shall be a mass-priest, who shall with God's blessing join the parties together (" adunare " is the word) to 6, 11 prosperity. And by the ordinance of a council held at Winchester in the time of Archbishop Lanfranc, 1076 (Johnst. Ecc. Law; AD 1076, si. 5), it was declared that a marriage without the benediction of a priest should not be a legitimate marriage, and that other marriages should be deemed fornication; and many other provisions against clandestine marriages prove that such marriages were in fact celebrated by priests.

I see no reason to doubt the authenticity of these ancient ordinances; and if genuine, they establish the fact that from the earliest time the laws of England upon this subject differed from the civil and canon law, and required the intervention of an ecclesiastical authority to make a valid marriage. If any doubt could exist as to the authenticity of these ordinances, or as to whether they had been adopted by the laws of this country, and had so become part of such law, such doubt would be removed if it should be found that the decisions of the Civil and Ecclesiastical Courts were in conformity with the directions therein contained; which leads to an, examination of such reported cases as have been produced for this purpose.

[10-Clark & Finnelly-878] In order to judge of the weight and importance of these decisions, it is proper to consider by what tests the validity of a marriage is to be tried; and it is obvious that the consequences of a valid marriage, must be

1st. To give to the woman the right of a wife in respect to dower.

2nd. To give to the man the right of a husband in the property of the woman.

3rd. To give to the issue the right of legitimacy.

4th. To impose upon the woman the incapacities of coverture.

5th. To. make the marriage of either of the parties, living the other, with a third person, void.

Upon each of these heads there is clear authority that none of these consequences followed from a contract of marriage per verba de present, without the intervention of a person in holy orders.

First, a contract per verba de praesenti did not give to the woman the right of a wife in respect to dower.

Upon this first point, the note from Lord Hale's MSS. (Co. Litt. 33 a; n 10) if entitled to credit, and if construed according to the ordinary and technical meaning of the words used is decisive. As to its authenticity we are told in the preface to the 13th edition of Coke upon Littleton, that this and the other notes are in the handwriting of Lord Hale, in the margin of a copy of Coke upon Littleton in the possession of Mr. Gybbon, to whose father it was presented by Lord Hale; and that the copy of

10 Clark & Finnelly 879, 8 ER p972

The notes from which the notes in the 13th edition of Coke upon. Littleton were taken, was made from the original, for the use of Mr. Yorke, and then in the possession of the late Lord [10-Clark & Finnelly-879] Hardwicke. It appears, therefore, that the note in question, exists in the handwriting of Lord H-ale, and there does not appear to be any reason for doubting that what was so written by him was his own composition and not copied from any other writing, and that what he, states to have been decided was at least believed by him to have been so decided, and that the observations upon, such decision were his own.

What then does Lord Hale state to have been decided and what are his observations upon it? He states a case, coram Rege, 9th and 10th Edw. 1, in which the facts were, 1st, a contract between. A. and B. per verba de praesenti, and issue; 2d, a marriage in facie ecclesiae between A. and G; 3rd, a sentence by the Ordinary, whereby B. recovered A. for her husband, and excommunication of A. for not performing the sentence; 4th, a subsequent enfeoffment by A. of land to R; and, 5th, a subsequent marriage in facie ecclesiae between A. and B., and the death of A.

The decision of the Court below was, that B. was entitled to dower out of the lands of which D. had been enfeoffed, not by force of the contract per verba de praesenti between A. and B., but because the feoffment between the sentence and the solemn marriage was a fraud; but that was reversed coram Rege et Concilio, because there was no seisin in A. during the espousals; and of this Lord Hale expresses his approbation by the note, " Neither the contract nor the sentence was a marriage."

Now it is to be observed that both these judgments assume that the contract was not a marriage. If it had been considered to be a marriage the Court below would have found a seisin in fact during the coverture, and would not have resorted to the ground of fraud, which was applicable only to the supposition [10-Clark & Finnelly-880] that the coverture commenced either front the sentence or solemn marriage; and the Court of Appeal proceeded expressly upon the ground that the coverture did not commence until the solemn marriage.

I cannot, therefore, doubt but that at the time of this decree, about 1280, it was considered as clear law that a contract per verba de praesenti did not constitute a marriage for the purpose of entitling the woman to dower, and that Lord Hale considered the law to be the same at his time.

It has been suggested, that although the words de praesenti were used, the agreement may have been to celebrate a future regular marriage, which would have made the contract in substance, one per verba, de futuro. This supposition is inadmissible, cohabitation having followed the contract, which would have given to a contract per verba de futuro all the effect of a marriage per verba, de praesenti.

It has been suggested that the dower to which these cases refer was dower ad Rostrum ecclesiae; a singular supposition, when the marriage from which the claim arose was clandestine; and if it had been or could be so, no explanation would thereby be afforded. The question of the validity of the marriage would be decided by the same rules. Whatever might be the character of the dower claimed, the want of seisin, and not the want of an assignment ad ostium ecclesiae, was the ground of the judgment.

Secondly, a contract per verba, de praesenti did not give to the man the right of a husband in the property of the woman. This was decided in Haydon v Gould. (1 Salk. 119), which occurred in the 9th year of Queen Anne. The parties were dissenters, and the marriage was according to the form of the sect, without the [10-Clark & Finnelly-881] intervention of any one in holy orders; cohabitation followed, but the Ecclesiastical Court held that the man was not entitled to letters of administration to the property of the woman. That decision was affirmed by the Delegates.

At this time., in the 9th of Anne, the title of a husband to administer to a wife, which seems to have been at all times recognised, had been confirmed by an Act of Parliament; the statute of 29 Charles 2, cap. 3, having enacted that the Statute of Distributions, 22 and 23 Charles 2, cap. 26, should not extend to the estates of femes tovert that should die intestate, but that their husbands might demand and have administration of their estates, and receive and enjoy the same as they might have done before the making of that Act; thus recognising the previous right, or being at least declaratory of

it. The only question in the case could have been, was the woman a feme covert, and was the man her husband? That being established, the

10 Clark & Finnelly 882, 8 ER p973
Ecclesiastical Court would not have had any discretion as to granting administration to the husband; he would have been entitled to a mandamus to compel the Ecclesiastical Court to make the grant. Rel v Bettesworth (2 Strange, 891).

The decision therefore in Haydon v Could was, that what had taken place, necessarily including a contract per verba de praesenti, and cohabitation proved, did not constitute a marriage. The reasoning and suggestion at the end of the case must, I apprehend, be considered as coming from the counsel or the reporter, and cannot affect the weight of the decision. The suggestion that the husband, demanding a right by the ecclesiastical law, must prove himself to be a husband according to that law, if supposed to raise any [10-Clark & Finnelly-882] distinction between marriage by the ecclesiastical law and the common law, cannot be received as the ground of the decision. The Ecclesiastical Courts, being the sole Judges of questions of marriage, could not have had different rules as to its validity, according to the form in which the question might be presented to them. Besides which, the husband's right was so established, and so little in the discretion of the Ecclesiastical Courts, that the Common Law Courts would enforce it by mandamus.

The suggestion that the wife and issue might " perhaps " entitle themselves to temporal rights through such a marriage, seems only to mean that the Court might in their case be content with the reputation of marriage, without calling upon them to prove its validity; a distinction recognised in other cases; for it is said that the husband should not entitle himself by mere reputation, without right. This distinction, if well founded, is not material; for in the case of the supposed husband in which the right was examined into, the decision was that there had not been a valid marriage; that is that she had not been a feme covert, and that he had not been her husband.

The law so decided in 108, 9th Anne, may be traced from a very early period; for Perkins (Tit. Enfeoff pl. 191, citing Year Book, 38 Ed. 3, 12) says, that after a contract of marriage between a man and a woman, they are not yet one person in law., inasmuch as in case of the woman's death before the marriage solemnised between them, the man to whom she was contracted shall not have her goods as her heir.

These authorities trace the law from 1365 to 1708, and leave no doubt but that by the law, common as well as ecclesiastical, a contract per verba de praesenti [10-Clark & Finnelly-883] did not establish the relation of husband and wife between the parties.

Thirdly, a contract per verba de praesenti between a man and a woman did not confer upon their issue the rights of legitimacy.

This was necessarily included in the decision of the cases of Foxcroft (1 Roll. Abr. 359) and Del Heith (Rog. Ecc. Law, 584: -; Harl. MS. 2117). In the first of these a marriage by the Bishop of London and in the second a marriage by a parish priest, was held invalid, and the issue bastards, because there had not been a marriage in facie ecclesiae. It is obvious that the Courts which so decided must have assumed, and in fact held, that no marriage could be valid by a mere contract between the parties without the intervention of any ecclesiastical authority; for such a contract existed in both the cases. They therefore clearly show the state of the law at the times they took place. But it is said that these cases are not to be relied upon in the present discussion, because they prove too much, in holding that a marriage could not be valid unless celebrated in fade ecclesiae. It must not be hastily assumed that these decisions went too far, and were therefore wrong, according to the state of the law at the times they were pronounced; for Perkins tells us (Tit. Dower, s. 306) that it had been holden in the time of Hen. 3rd, that if a woman had been married in a chamber she should not have dower by common law, " but the law is contrary at this day; " that is marriage in a chamber or clandestine, in opposition to a marriage in facie ecclesiae, but without reference to the intervention of a person in orders, whose celebration of clandestine marriages was the subject of frequent denunciations; and when we observe the fluc- [10-Clark & Finnelly-884]-tuation of the ecclesiastical rules upon the subject of marriage, and consider that the Ecclesiastical Court had the exclusive jurisdiction over questions of marriage, we cannot be surprised at these fluctuations in the decisions which took place.

If, however, we assume that these cases went too far; if, as is clearly the case, the larger proposition necessarily includes the minor one, they must be considered

10 Clark & Finnelly 885, 8 ER p974
as conclusive of the state of the law upon the subject now under consideration. Such decisions could not have been made indeed the questions which led to them could hardly have been raised, if it had not been considered as certain that a contract per Verba de praesenti., without the intervention of any

person in holy orders, did not at those times constitute a valid marriage, so as to make, the issue legitimate.

The case of Bunting v Lepingwell (4 Rep. 29; Moor, 169) falls under this head. The special verdict found that the parties contracted matrimony per verba, de praesenti tempore; that the woman afterwards married another man, Twede; that Bunting libelled the woman upon the contract; and that decretum fuit quod praedicta Agnes subiret matrimonium cum praefato Bunting et insuper pronuntiatum decretum et declaratum fuit dictum matrimonium fore nullum."

Now, for the reasons which have been given by my noble and learned friend who preceded me, and more particularly from the authority which he has cited from the Court at York, it does appear to me that no reliance, whatever is to be placed upon that particular expression there used, the word " fore." Undoubtedly, according to the ordinary sense of the word, it would [10-Clark & Finnelly-885] have meant " future," " something to be hereafter; " but, as it has been well observed, that construction cannot be put upon it, because the sentence of the Ecclesiastical Court was to undo the marriage from the commencement. Now, the word " fore," would seem to show that it had been good heretofore, but that in future, it was to be void; but the effect of the sentence of the Ecclesiastical Court was to make void that which was voidable, declaring it void as if it had never had existence.

Bunting and Agnes intermarried accordingly, and had a son, and the question was as to his legitimacy. Now, if the contract of marriage per verba, de praesenti had constituted marriage, there could not have been any question; for in that case the marriage between Agnes and Twede would have been void, and the issue of Bunting and Agnes would have, been clearly legitimate, not by virtue of the sentence
or of the ceremony, but by force of the contract per verba de praesenti.

It has been suggested as to that case, as well as to the case in Coke Littleton (33 a;
n. 10), that as the parties used words de praesenti tempore, the agreement might have
een to marry by a future regular marriage, which would have amounted, therefore, only to a contract per verba de futuro. Of this there is no trace in either of the reports; and the special verdict, by stating a contract per verba de praesenti tempore, and nothing more, precludes any such supposition. The terms have at all times been perfectly well known in the law, and must be taken as used in their ordinary and well-known meaning; but had it been otherwise, the cohabitation which followed would have given the [10-Clark & Finnelly-886] same effect to the contract, even, if it had been expressed in terms of future promise.

This case proves that in the 27th and 28th Eliz no doubt was entertained but that a matrimonial contract per verba, de praesenti did not constitute a marriage so as to legitimise the issue, and make a second marriage between the woman and another man void. Had it been otherwise the proceedings in the Ecclesiastical Court would not have, been material, and the second marriage would have been treated as void, and not only as voidable.

It is also to be observed that the civilian who argued in favour of the legitimacy, as reported in Moor, after stating the rule of the civil law, contended that a child born after the contract and before the espousals, would be legitimate, by the relation of the espousals to the contract, which would make void and adulterous any intermediate marriage, but that if no espousals followed the contract the issue would be illegitimate; and this is adopted by Chief Baron Comyn, for he says (Baron and Feme, B. 1), " So by a contract of marriage, it is no marriage, if espousals do not afterwards ensue; Semble Moor, 170." These authorities establish the third proposition.

Fourthly, a contract of marriage per verba de praesenti did not impose, upon the woman the incapacities of coverture. Perkins, in the passage before quoted (Tit. Feoff. pl. 194: -, citing Year Book, 38 Ed. 3, 12), says, that after a contract between a man and a woman they may enfeoff one another, for yet they are not one person in law, but the wife may make a will without the agreement of him to whom she was contracted.

Bracton, in the passage quoted, " matrimonium [10-Clark & Finnelly-887] autem accipi possit sive

10 Clark & Finnelly 888, 8 ER p975

sit publice contractum vel fides data quod separari non possunt et revera donationes inter virum et uxorem constante matrimonio valere non debent," must be understood as describing by the words " fides data quod separari non possunt " a good and valid, though a private or clandestine, marriage, as opposed to " matrimonium publice contracture; " for he cannot be supposed to have meant a contract of marriage per verba die praesenti merely, because he cannot be supposed to have meant that such a contract would have been " matrimonium " for the purpose of making invalid gifts between the parties, contrary to the law as laid down in the 38 Edw. 3, as cited
by Perkins.

Fifthly, a contract of marriage per verba de praesenti did not make the marriage

of one of the parties, living the other, with a third person, void.

This proposition, as to the truth of which no doubt has or can be raised, appears to me to be-of the highest importance, and to lead irresistibly to the conclusion that ;such a contract never was considered as constituting a marriage. If a contract per. verba de praesenti were a marriage for the; purpose of giving civil rights and enforcing civil liabilities, it would follow that a marriage between one of the parties to such contract, living the other, with a third person, would be absolutely void. If therefore, such a marriage was voidable only, and good until set aside, and therefore indissoluble after the death of the parties to it, it follows that, as there cannot be two good marriages of the same person subsisting at the same time, the contracet per verba, de praesenti was not a marriage, for the above purpose; and that such was the case appears to be beyond all doubt.

[10-Clark & Finnelly-888] In Rolle's Abridgment (360 G. pl. 1) it is said, a divorce, causâ praecontractis bastardises the issue; that is the sentence makes the issue of the second marriage bastards who were before held to be legitimate. The second marriage was therefore voidable, and not void.

In Coke's, Commentary on Littleton (33 a) it is said, "if a marriage de facto be voidable by divorce in respect of 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, the wife de facto shall be endowed, for this is legitimum matrimonium." The term used is te pre-contract," which, it may be said, means a contract Per Verba, de futuro as well as a contract per verba die praesenti. In this case I apprehend that it clearly means the latter. It appears, indeed, from Swinburne (s. 17), and what is said in Holt v Ward (2 Str. 937), that in cases of contract per verba de futuro, where no cohabitation had followed, the Ecclesiastical Court did not compel the parties to come together, or do more than admonish them. It, is at all events, clear that the terms, include a contract per verba de praesenti, and it is sufficient for the present purpose that the Ecclesiastical Court in such cases, where one of the parties to the contract had subsequently contracted another marriage, set aside the second marriage and enforced the contract; and that if either of the parties to the second marriage died before such marriage was set aside, it remained good and indissoluble. But if so, is it possible that the contract per verba, de praesenti constituted a marriage? In the case supposed the second marriage was good and indissoluble, and if the argument for [10-Clark & Finnelly-889] the Crown be correct, so would the marriage alleged to be constituted by the contract; but as both marriages could not possibly be good at the same time, it follows that the contract did not constitute a marriage. This passage from Lord Coke is consistent with the note of Lord Hale, 33 a; whereas if the proposition in that note be erroneous, ford Coke was also in error. For if the contract constituted a marriage, the second marriage would have been void and not voidable, which it clearly was not. The case before quoted from Rolle's Abridgment, 360 G. placitum 1, proves the same thing. It says, a divorce causa praecontractus bastardises the issue. They were not bastards till the sentence, and would never become so if there should be no sentence. The second marriage was therefore voidable, but not void.

We have therefore the authority of Lord Coke, that after a contract pier verba, die praesenti, and a subsequent marriage by one of the parties with another person, and a death which prevented the second marriage, from being avoided, the wife of such second marriage was entitled to dower; but if the woman party to the contract became very wife, why is she not also to have dower? Issue of the second marriage are legitimate; but if the contract constituted a marriage, so also must be the issue

10 Clark & Finnelly 890, 8 ER p976

born to the parties to it; that is there must have been two valid marriages conferring such rights, subsisting at the same time, which is impossible. The authorities prove that such second marriage was not void, but conferred such rights; ille contract therefore did not; that is it was not a marriage.

In Bunting v Lepingwell (4 Rep. 29; Moor, 169), before referred to no. [10-Clark & Finnelly-890] question was made as to whether the second marriage was void or not, but it was assumed not to be void; and the question was, whether it had been effectually avoided. If the contract had been considered as constituting marriage., the issue would have been legitimate without reference to the subsequent conduct of the parents. The second marriage was treated as voidable, but not void; and the grounds upon which the legitimacy was contended for and apparently established, negatived the supposition that the contract per verba de praesenti constituted a valid marriage.

The Act 32 Hen. 8, c. 38, which prohibited divorces upon pretence of a former contract, and the Act 2 and 3 of Edw. 6, c. 23, which repealed that Act and restored the Jurisdiction of the Ecclesiastical Courts in such cases, prove the same thing.

In England, the Marriage Act, 26 Geo. 2, c. 33, at the same time, prescribed the form of future marriages and abolished all suit to enforce contracts, and thereby by implication abolished divorces causa praecontractus; the conflict, therefore, between a contract pier verba, de praesenti, and a

subsequent marriage, could not arise. But in Ireland, the 58 Geo. 3, c. 81, s. 3, in the same manner prohibited all future,
suits to compel a celebration of marriage in facie ecclesiae by reason of any contract,
whether per verba de praesenti or per verba, de futuro. In Ireland, therefore, a
marriage after a contract per verba de praesenti with another, cannot be the subject
of a suit in the Ecclesiastical Court; the second marriage therefore, cannot be disturbed by it, but such second marriage it has been proved was good till set aside, and is therefore now indissoluble. If, therefore, the contract constituted a marriage, there are two marriages, both indissoluble, subsisting at the same, time, which, is impossible.

[10-Clark & Finnelly-891] These authorities appear to me to establish the five propositions, and there is no balance of authority; for not one single case has been produced tending to negative or to throw doubt upon any one of them, except a passage from Perkins as to the effect of a feoffment after a contract, but which is opposed to decided cases. There are, however, others in which, although the point was not directly raised, the proposition is assumed that contract per verba de praesenti, did not constitute a marriage.

In Weld v Chamberlayne (2 Show. 300), and The Queen v Fielding (14 St. Tr. 1327), there were contracts per verba de praesenti; but Chief Justice Pemberton in the one, and Mr. Justice Powell in the other, did not upon that ground treat the marriages as established, but both marriages were made to depend upon the quality of the minister who officiated.

In Paine's Case (1 Siderf. 13), if the contract had the effect of a marriage how could the question have arisen whether the man and woman were husband and wife from the sentence of the Ecclesiastical Court, or from the ceremony, as was the opinion of Mr. Justice Twisden? If A had been considered as law that a contract per verba de praesenti constituted marriage, it is strange that no allusion should be found to it in the earlier Acts of Parliament referred to by the Chief Justice; and the whole frame of the Marriage Act, 26 Geo. 2, c. 33, seems inconsistent with the supposition. If contracts per verba de praesenti and per verba de futuro subsequente could had been considered to constitute valid marriages, can it be supposed that no allusion would have been made to this mode of contracting marriage, in an Act the object of [10-Clark & Finnelly-892] which was to prevent clandestine marriages? The Act provides that there should not be any suit or proceeding in any Ecclesiastical Court, made to compel the celebration of any marriage in facie ecclesiae by reason of any contract of matrimony whatsoever, whether per verba de praesenti or per verba de futuro, which should be entered into after the 25th of March 1754; but it does not declare that marriages by contract per verba de praesenti or per verba de futuro subsequente could should be void for the future., By section 8, it makes null and void all marriages solemnised by any persons, except in the manner prescribed, but takes no notice of marriages arising from contract without solemnisation, except in section

13 by prohibiting suits to compel celebration of marriage by reason of such contracts; a provision very natural if the contract were considered as inoperative till enforced, but not consistent with the notion of the contract itself constituting marriage. So that the Act does not in terms abolish divorces causa Praecontractus, but is supposed to have that effect by, implication from the prohibition to enforce the contract. This is observed in a note, to Coke Littleton, 79 b.

I have now, I believe, observed upon all the cases having any material bearing upon the present question, which have been produced, of a date anterior to the Marriage Act of the 26 Geo. 2, c. 33, 1753; except the two important ones before Lord Holt, Collins v Jessot (2 Salk. 437; 6 Mod. 155; Holt, 459), and Wigmore's Case (2 Salk. 438; Holt, 459). The first is reported in Salkeld, Modern, and Holt; the other only in Salkeld and Holt; and the reports require to be compared together, in order that the points decided may be fully understood.

[10-Clark & Finnelly-893] Collins v Jessot was an application for a prohibition, upon the ground that the Ecclesiastical Court was proceeding upon a marriage contract per verba de futuro; for the breach of which the parties had a remedy at common law. It was refused, upon the ground that the Ecclesiastical Court had jurisdiction over marriage contracts, whether per verba de futuro or per verba de praesenti. The jurisdiction of the Ecclesiastical Court was the only matter in question, in discussing the difference between the two contracts. Lord Holt's observations must be supposed to have reference to the subject-matter under consideration; namely, the principle upon which the ecclesiastical law proceeded in drawing a distinction between the two contracts. He particularly adverted to the contract per verba, de praesenti not being releasable between the parties., whereas the contract per verba de futuro was releasable; and he observed that, till released, the party had an option to proceed in the Ecclesiastical or Common Law Courts. This being the question before the Court, and this the reasoning he was pursuing, the expressions so much relied upon were used: -

"If a contract be per verba de praesenti, 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 ecclesiae; with this difference, that if they cohabit before marriage in Facie ecclesiae, they are for that punishable by ecclesiastical censures, and if after such contract either of them lie with another, they will punish such offender as an adulterer."

Wigmore's Case is best reported in Holt, 459. This case also was an application for a prohibition against a suit in the Ecclesiastical Court for alimony; the [10-Clark & Finnelly-894] ground being that there had been no marriage, the man being a dissenter, and the marriage having been by a minister of the congregation not in orders. The result is not stated, but it is obvious that the question must have been as to the jurisdiction of the Ecclesiastical Court. The words attributed to Lord Holt are.,

"by the canon law, a contract per verba, de praesenti; as I take you to be my wife; I marry you; or, You and I are man and wife; is a marriage: - so of a contract per verba de futuro; I will take you to be my wife; or, I will marry you; if the contract be executed, and he does take her, it is a marriage, and the Spiritual Court cannot punish for fornication: -"

(not very consistent with what is laid down in Collins v Jessot, that after a contract per verba de praesenti, and before marriage, cohabitation was punishable).

"In the case of a dissenter married to a woman by a minister of the congregation who was not in orders, it is said that that marriage was not a nullity, because by the law of nature the contract is binding and sufficient, for though the positive law of man ordains that marriage shall be made by a priest, the law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the church of England, to entitle to the privileges attending legal marriages, as dower, thirds, etc."

In endeavouring to ascertain the meaning of the expressions used by Lord Holt, the reports of these two cases must be taken together, as they relate to the same matter. In Wigmore's Case, Lord Holt tells us that in saying that a contract per verba de praesenti was a marriage, he is speaking of the canon law. Now, if the common law were the same, why specify " by the canon law? " Again, he seems to recapitulate the [10-Clark & Finnelly-895] arguments urged in support of the validity of a marriage by a dissenting minister; " it is said," etc. But what is his answer to these arguments? But marriages ought to be solemnised according to the rites of the church of Eng-

10 Clark & Finnelly 896, 8 ER p978

land, to entitle to the privileges attending legal marriage, dower, thirds, etc." I

may be doubtful how far Lord Holt may be supposed to assent to the proposition which follows the words " it is said; " but beyond all doubt the concluding words above quoted contained the expression of his own opinion; and that is that for a marriage to be legal, and to give, the rights of marriage, such as dower, thirds, etc. it must be solemnised according to the rites of the church of England. If such were the opinion of Lord Holt, in the 5th of Anne can it be supposed that he, in Collins v Jessot, in the 2d. of Anne, entertained and expressed an opinion directly the contrary? Is it not rather to be assumed that when, in Collins v Jessot, he speaks of a marriage contract per verba de praesenti amounting to an actual marriage, he means what in Wigmore's Case he expresses, that it is so by the canon law? But let the words be considered as they stand. He is showing the difference between contracts per verba de praesenti and de futuro; and he says the former amount to an actual marriage, which the parties themselves cannot dissolve by release, whereas they can release the latter sort of contract. To this extent and for this purpose the former is a marriage. When he says that it is as much a marriage in the sight of God as if it had been in facie ecclesiae, does he not mean to draw the distinction between a marriage in the sight of God, and for other or civil purposes; or could he mean to be understood to say that such marriages were good in [10-Clark & Finnelly-896] the sight both of God and man? In Wigmore's Case he tells us the contrary.

I cannot, therefore, consider Lord Holt as an authority against the judgment under review; but, on the contrary, I consider the concluding sentence in Wigmore's Case (as to the meaning of which there is no ambiguity and can be no doubt) as consistent with and confirmatory of the many cases before cited; which prove, that from the earliest time of which we have any record, down to the passing of the Marriage Act in 1753, no marriage celebrated without the intervention of a person in holy orders, was valid for the purpose; of conferring civil rights or imposing civil liabilities; for that is the real question: - and consistently with, the conclusions upon this subject, to which all the cases, lead, a contract per verba de praesenti may, in the language of civilians and canonists., and even of the common law, be said to be ipsum matrimonium; for if, to constitute a marriage effectual for civil purposes, the contract between the parties and the intervention of a person in holy orders, was necessary, the contract per. verba de praesenti was undoubtedly a most essential part of marriage, and partook so much of the essence of it as to be indissoluble. What the civil law considered as the whole, the law of England considered as an essential part of marriage. But if the authorities spread over a

period of 700 years are uniform in holding that this essential part, without the intervention of a person in holy orders, did not confer upon the parties the rights of property which belong to husbands and wives, or of legitimacy to their issue, or impose the incapacities of coverture, or render a subsequent marriage of either of the parties void; it is I think, demonstrated that [10-Clark & Finnelly-897] by the law of England the intervention of a person in holy orders was essential to a marriage for all civil purposes. I have already observed, that front the time of the passing of the Marriage, Act in 1753, the question as to the effect of a contract per verba de praesenti as constituting marriage, was not likely to arise. However high may be the character of Judges, and however entitled to respect their opinions may be it is obvious that there is the greatest possible difference between a decision and an opinion expressed, even if the decision be founded upon such opinion; because the judgment may be right, though the reason may be wrong; but if the opinion be not the foundation of the judgment, it is entitled to comparatively but little attention. Decisions ought always to be and generally are, the result of actual investigation and research; and if they are supposed to be erroneous, one of the parties must have an interest in bringing the subject before another tribunal for revision. But no man is so wise and so well informed that an opinion not essential to the judgment, but thrown out by way of illustration or argument, should be entitled to any comparative degree of weight. It is not likely to have been so much investigated and considered, and it is not capable of being disputed or--reviewed.

The first authority subsequent to the passing of the Marriage Act is Blackstone, and passages in his Commentaries are referred to and relied upon as proof that in his opinion the intervention of a person in holy orders was not necessary to constitute a valid marriage. He certainly does say that any contract made per verba de

10 Clark & Finnelly 898, 8 ER p979

praesenti was before the Marriage Act deemed a valid marriage for many purposes, and that the parties might be compelled in the Spiritual [10-Clark & Finnelly-898] Courts to celebrate, it in facile ecclesiae. But after some observations upon the provisions of the Act, he proceeds thus: - " It is held to be also essential to a marriage, that it be performed by a person in orders, though the intervention of a priest to solemnise the contract is mere juris positivi, and not juris naturalis aut divini; " and he refers to Haydon. v. Gould (1 Salk. 119).

Now, as there is no provision in the Marriage, Act requiring the intervention of a person in orders, and Blackstone states that it was necessary, and refers to Haydon v Gould in support of his proposition, there cannot be a doubt but that he recognised and adopted the law as there laid down, and considered it as establishing the proposition that it was before the Marriage Act essential to a marriage that it should be performed by a person in orders.

It is of the highest importance to understand correctly the case of Lindo v Belisario (1 Hagg. Cons. Rep. 216), as being the great case in which the validity of the marriages of the Jews was considered. It has been much relied upon in the argument for the Crown, as showing what the law was before the Marriage Act, from which Jews are excepted. If the grounds upon which Sir William Wynne and Lord Stowell proceeded in that case were correct, the case has no application whatever to the present. Both those learned Judges assumed that the validity of the marriage was to depend upon the laws and customs of the Jews. Lord Stowell, after stating the general law as to marriages, says, " There being then this ceremony, which is more than enough by the law of nature, the question is reduced to this: - whether the institutions of the Jews hold it to be insufficient?" [10-Clark & Finnelly-899] and, having required the opinion of persons learned in the Jewish law, he says, " I receive this as information upon foreign law, upon which this Court is to determine." And again he says, " I conceive that the obligation imposed upon me is to apply the peculiar principle of the Jewish law." Now, whether this was or was not the proper principle upon which the validity of a Jewish marriage in this country was to be tried, is quite immaterial to the present case, and upon that I offer no opinion. But as such was the principle acted upon, the fact-of the Jewish marriages being held to be good, which appeared to be one of the strongest arguments in favour of the validity of a contract per verba de praesenti. must be struck out of the list of arguments in favour of that proposition. If Lord Stowell had thought the law of England applicable to the case of a Jewish marriage, his decision against the validity of the marriage in that case would have been conclusive against his having supposed that by the law of this country, before the Marriage Act, a contract per verba de praesenti constituted a valid marriage. He says, " There is then in this state of the parties more than the mere contract per verba de praesenti in the Christian church, which was a perfect contract of marriage, though public, celebration was afterwards required by the rules and ordinances of the canon law." Lord Stowell, therefore, found a contract per verba de praesenti, but held that it did not constitute a marriage.

I cannot leave this case without referring to the test which Sir William Wynne uses to try the validity of the ceremony, which is directly applicable, to this case. " The question," he says, " is whether the woman is the wife of Belisario. I think it clear from the evidence, that she is not. The ceremony

which [10-Clark & Finnelly-900] has passed, although it prevents her from marrying any other man until a divorce is given, does not give, him any authority over her person or property. A man cannot be the husband of a woman without having the civil rights; which he has not. And again, can she be his wife, when it is proved that he has not a right to a penny of her fortune, and that she has a right to dispose of it, and that if she were to die he would have no right at all?"

In Goldsmid v Bromer (1 Hagg. Cons. Rep. 324), Lord Stowell says, " The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided. The Jews, though British subjects, have the enjoyment of their own laws in religious ceremonies, and the Marriage Act acknowledges this privilege, by excepting them out of its provisions. To deny them the benefit of their own law upon such subjects, would be to deny to a distinct body of people the full benefit of the toleration to which they have long been held to be entitled.",

These cases prove that the marriages of Jews have been supported upon grounds wholly inapplicable to the present case. It was assumed that the validity of these

10 Clark & Finnelly 901, 8 ER p980

marriages would be determined by their own laws and usages, and not by the laws and usages of this country; and Lord Stowell puts the marriages of Quakers upon the same footing, for in Jones v Robinson (2 Phill. 285) he says,

"The general law of the Marriage Act makes the marriage by licence of minors, without consent, null. This clause is restrained as to its effects where the parties are Quakers or Jews; that is where they are both so; they having rights of marriage of their own."

It is to be regretted that with respect to the marriages [10-Clark & Finnelly-901] of Quakers, we have not the benefit of that investigation which marriages of Jews have received in the case of Lindo v Belisario. If indeed there had been any decision in favour of those marriages, upon the ground that by the law of England contracts pier verba de praesenti before the Marriage Act constituted a valid marriage, such decisions would have been directly in point, and would require to be weighed against the other decided cases in which the contrary appears, to have been held; and had such marriages been capable of being supported upon that ground, no doubt could have existed as to their validity. But we find, in Hutchison and Wife v Brookebanke (3 Lev. 376), Quakers, after a regular marriage according to their forms, prosecuted in the Ecclesiastical Court for fornication, and a prohibition granted upon the question whether they were not protected by the Toleration Act of 1 and. 2 W. and M. cap. 18; and when the legality of Quaker marriages came before Lord Manners in Houghton v Houghton (1 Moll. 611), anxious, as he evidently was, that no doubt should be entertained of the legality of those marriages, he rested it entirely upon the construction of certain Acts to which he referred, and did not alludes to the supposed common-law foundation for them.

In the case before Lord Hale, in which a special verdict was found upon the validity of a Quaker marriage, the course he adopted, and the expressions used by him, show the difficulty he had in supporting the validity of the marriage, and at the same time the strong desire he felt to do so. But it also appears, from this case, that it did not occur to him that they could be supported upon the mere proof of a contract [10-Clark & Finnelly-902] per verba de praesenti or de futuro cum copulâ, which must have been in evidence; for he is reported to have said, that he thought that all marriages made according to the principles of men severally, should be held good, and receive their effect in law; a rule very much resembling that acted upon by Sir William Wynne and Lord Stowell in Lindo v Belisario, but very far removed from the principle that the mere contract would operate as a marriage; because, as the contract must be a part of all marriages, there could not, in giving to the contract the effect of marriage, be any question of considering the principles of the parties to it; and in Jones v Robinson, before cited, Lord Stowell says, Jews and Quakers have rights of marriage of their own.

It is impossible, however, not to feel the importance of the fact that such marriages have been recognised in several cases. I have felt it to be very difficult to be explained, consistently with the judgment below; but as I do not find these marriages established upon the ground that the contract was sufficient without the intervention of a person in holy orders, but, on the contrary, find their validity referred to other grounds peculiar to them, and observe the terms used with respect to these marriages in the Acts from the operation of which they are excluded, I cannot think the argument arising from them sufficient to affect the many authorities to which I have referred.

Lord Ellenborough is supposed, in The King v Inhabitants of Brampton. (10 East, 282), to have expressed an opinion in favour of the validity of a marriage, per verba de praesenti, without the intervention of a person in holy orders. I do not so understand that case, [10-Clark & Finnelly-903] nor was that point in question, for the ceremony was performed by a person apparently a clergyman. If he had supposed the intervention of a priest unnecessary, for what purpose did he discuss the result of the evidence of the person who officiated being in orders; or refer to The King v Fielding (14 Sta. Tr. 1327),

to prove that a marriage by a Roman-catholic, priest, before the Marriage Act, was effectual for the purpose of making the marriage valid?

The opinion of Lord Stowell in Dalrymple v Dalrymple (2 Hagg. Cons. Rep. 54), has, I think, been supposed to be much more decisive in favour of the validity, as a marriage, of a mere contract per verba, de praesenti, than, upon a careful examination of what he there says, it appears to be He says that the law of England re

10 Clark & Finnelly 904, 8 ER p981

tained such rules of the canon law as had their foundation, not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage; and that the Ecclesiastical Courts enforced those rules, and, amongst others, the rule which held an irregular marriage, constituted per verba de praesenti, not followed by any consummation, valid to the full extent of avoiding a subsequent regular marriage contracted with another person. The same doctrine, he says, was recognised by the Temporal Courts; and, after referring to Bunting's Case, adds, " Though the common law certainly had scruples in applying the civil rights of dower, community of goods, and legitimacy, in the case of these looser species of marriage." There is however, no doubt but that his high authority is properly urged against the judgment.

In Latour v Teasdale (8 Taunt. 830; 2 Marsh. 233), Sir Vicary Gibbs, professing to take the law from Dalrymple v Dalrymple, [10-Clark & Finnelly-904] certainly seems, to assume that a contract per verba, de praesenti, without more, would, before the Marriage Act, have constituted a valid marriage; but there was no such question in the case before him; the case reserved at the time, upon which the opinion of the Court was given, having stated that the ceremony was performed by a Roman-catholic priest, which, had been held sufficient.

I do not think it necessary to advert to all the modern cases in which eminent Judges have expressed opinions favourable to the proposition contended for on behalf of the Crown. Ever since the case of Dalrymple v Dalrymple, there has naturally been a prevailing opinion consistent with what was supposed to be the doctrine of so great an authority as Lord Stowell. The question in these cases was not the) subject of investigation and argument, such as we have had the benefit of in this case; and the opinions so expressed were rather assents to the doctrine so laid down, from the deference to the authority from which it proceeded, than from any judgment exercised as to the grounds upon which it was founded. Those grounds have now been examined; and if Lord Stowell really entertained the opinion which has been attributed to him, it will afford a strong instance of the difference, of weight which ought to be attributed to an opinion essential to the support of the judgment pronounced, and one advanced by way of illustration or argument; for a& such only could the state of the English law before the Marriage Act have been pertinent to the question before him. If, upon examining the grounds of the opinion so expressed notwithstanding the extent to which it has been adopted by other Judges and by the profession of the law at large, it shall be found that it is contrary to the law as established by [10-Clark & Finnelly-905] formal decisions, I think that this is not a case in which the course, often wisely adopted, of adhering to repeated decisions, although disapproved, in preference to disturbing rules supposed to be established, ought to be followed. That can only be right where there have, been actual decisions, and not where there have only been opinions casually expressed. What has taken place in England is indeed evidence of what the law of Ireland really is but it is no otherwise binding, and we have to decide in a criminal case, what that law is; whether by the common law of Ireland, which is the same as the common law of England, the first marriage was a legal marriage. I cannot hold the affirmative of this proposition because many eminent Judges have expressed opinions in favour of that conclusion, when I find, from the time of the Saxons to the passing of the Marriage Act in 1753, a succession of authorities and decisions against it, without one in its favour. And it must be observed, that notwithstanding the opinions so expressed, there has been a course, of dealing with the subject very inconsistent with the state of the law as assumed in those opinions. We hear of actions, by women for breach of promise of marriage after a contract de futuro and cohabitation; that is an action by a wife against her husband for a breach of a promise to marry, the marriage, being by the supposition, complete. It is difficult to conceive how in such case there could be a contract to support the action, which would not, with the cohabitation, be a marriage according, to the supposed law. Then there are Acts relating to Quakers, in which their, marriages are called pretended marriages; and many respecting marriages of dissenters, and of persons in the colonies, which would be wholly useless if a contract, could [10-Clark & Finnelly-906] constitute a marriage. It is true that many of these Acts are declaratory; but as they were intended to confirm past marriages as well as to establish regulations for future ones, that form was very naturally adopted. I do not observe upon

10 Clark & Finnelly 907, 8 ER p982

these Acts in detail. They have been commented upon by the Lord Chief Justice, in giving the opinion of the Judges. They do not, indeed prove that a mere contract could not have the effect of a marriage, but they certainly show a state of uncertainty not consistent with the unhesitating opinions which have, fallen from some Judges in the later cases.

It was urged that marriages were good where the person officiating was not in orders, though pretending and believed to be so. This, I apprehend, depends upon a very different principle. The Court in such a case would not, I conceive, permit the title to orders to be inquired into.

If I am right, that by the law of England the intervention of a person in holy orders was necessary to constitute a binding marriage, there is not, I think, any difficulty in coming to the conclusion that such person must be in orders recognises by the church of England. The necessity of such intervention, if it exists, must have arisen from regulations of the church, in whose Courts all questions of marriage were decided; and when the church speaks of persons in holy orders, those only can be intended whom the church conceives to be clothed with that character, in which number members of the Presbyterian church are not included.

I have now concluded what it appeared to me to be proper to address to the House upon this most difficult and important case. I have with great reluctance found myself compelled to adopt the opinion I have [10-Clark & Finnelly-907] expressed. I am aware of the difficulties and hardships to which affirming the judgment may lead. Happily it will be within the power of the Legislature to remove those difficulties, and to avert those hardships.* We have here but one duty to perform, to declare what we believe to be the law; and in the performance of that duty I am bound to declare, that in my opinion the first marriage in this case was not a valid marriage in law; and therefore that the party was not legally guilty of the offence with which he was charged, and that the judgment ought to be for the Defendant in Error.

"It was ordered and adjudged by the Lords, that the judgment given in the said Court of Queen's Bench be and the same is hereby affirmed. And that the record be remitted, to the end such proceedings may he had thereupon as if no such writ of error had been brought into this House."
Lords Journal, 29 March 1844.

In the case of The Queen v Carroll, the Order of the House states that, " regard being had to the judgment," in The Queen v Millis, the judgment of the Court of
Queen's Bench was affirmed.

The entry on the Minutes of Proceedings of the 29th March is in this case more full than the entry on the Journals, and is in the following form: - " Reg. v Millis (Writ of Error). The order of the day being read for the further consideration of this case, the House proceeded to take the same into consideration. And it being moved to reverse the judgment complained of the same was objected to and the question was put whether the judgment complained of shall be re-versed? The Lords. Cottenham and Campbell were appointed to tell the number of votes; and, upon, report thereof to the House, it appeared that the votes were equal; that is two for reversing and two for affirming. Whereupon, according to the ancient rule in the law, Semper praesumitur pro negante, it was determined in the negative. There, fore the judgment of the Court below was affirmed, and the record remitted."
An Act has since been passed (7 and 8 Vict c. 81), intitled " An Act for Marriages in Ireland and for registering such Marriages; " by the fourth section of which, marriages between parties, one or both of whom are Presbyterians, may be solemnised in certified Presbyterian meeting-houses. The 5 and 6 Vict. C. 113, the 6 and 7 Vict c. 39, and the 83d. section of the 7 and 8 Vict c. 81, severally confirm marriages celebrated by Protestant dissenting ministers in Ireland, up to the time of passing the last-named statute.

10 Clark & Finnelly 908, 8 ER p983