[331] LOUSIA ADELAIDE PIERS, and FLORENCE A. M. DE KERRIGUEN (formerly PIERS),—*Appellants;* Sir HENRY SAMUEL PIERS, Baronet,—*Respondent* [March 15, 19, 22, 1849].

[Mews' Dig. i. 350, 370; vii. 640, 655. S.C. 13 Jur. 569; 10 Ir. Eq. 341. Commented on as to presumption in favour of marriage in *De Thoren* v. *A.-G.*, 1876, 1 A.C. 689; *Collins* v. *Bishop*, 1878, 48 L.J. Ch. 32; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, 1881, 6 A.C. 372; *Lauderdale Peerage*, 1885, 10 A.C. 761. As to preparation of appendix, see *Annual Practice*, 1901, vol. 2, p. 667, *Directions for agents*, 24.]

Marriage—Evidence—Presumption—Costs—Practice—Appendixes.

The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage.

There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof.

Where, therefore, two persons had shewn a distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special licence, and the parties, by their acts at the time, shewed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no licence could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the Bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage.

The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in the result decided by the Court, was one which might have required to be tried as a question of fact.

The House strongly condemned the custom of each party printing an Appendix to his Case, and desired that, in future, a joint Appendix might alone be printed.

This was an appeal against a decree pronounced in the Court of Chancery in Ireland, by Lord Chancellor Brady, in a suit instituted by the appellants on the 29th October, 1845, in which they sought to establish **[332]** their title to a charge for raising a sum of £4000 out of certain estates, now in the possession of the respondent Sir H. S. Piers. The appellants claimed to be the lawful daughters of the late Sir John Bennett Piers, who when he became of age, in 1794, had joined his father, Sir Pigott W. Piers, in suffering a recovery of certain lands settled upon the father's marriage. By the re-settlement of the estate then made, it was "provided, declared, and agreed upon, by and between all the parties thereto, that it should and might be lawful to and for the said John Piers (and the other persons to whom estates for life were therein limited), when and as they should respectively be in possession of the premises and hereditaments aforesaid, by virtue of the limitations aforesaid, to settle by way of jointure for any wife or wives, a sum of money not exceeding in the whole the sum of £600 a-year, which jointure or jointures should be in bar of dower or thirds, and also that they the said John Piers and the said other persons therein named, to whom estates for life were limited as aforesaid, respectively, as they should be in possession under the limitations aforesaid, might charge said premises and hereditaments, as and for a portion or portions for younger children, with a sum of money not exceeding in the whole the sum of £4000."

Sir Pigott William Piers died in the month of April 1798, leaving his eldest son John (who was thenceforth known as Sir John Bennett Piers), and five other sons, him surviving, three of whom died in the lifetime of Sir John, without issue. The

fifth son Frederick died after his father, leaving the respondent, now Sir Henry Samuel Piers, his eldest son and heir at law, surviving.

Sir John Bennett Piers, upon the death of his father, entered into the possession of the estates comprised in **[333]** the deed of 1794, and so continued till his death. In the year 1803, he became acquainted with Elizabeth Denny, *alias* King, then an actress at Astley's theatre, in Dublin, whom he removed from the theatre, and who went to live with him, and had by him seven children: Henrietta, born November 1803; Henry, born October 1805; John Edward, in October 1807; W. Stapleton, born November 1809; George, December 1810; and the appellants, Louisa and Florence, born respectively the 23d June, 1815, and 17th April, 1819.

It was alleged on the part of the appellants, that while their parents were resident in the Isle of Man, namely, on the 27th of May 1815, a marriage was solemnized between them in the parish of Kirk Bradden, in that island, by the Reverend T. O. Stewart, an Irish clergyman, then assistant curate of St. George, Douglas, and it was in virtue of this alleged marriage that the appellants claimed, in the character of lawful "younger children," to be entitled to a charge on the respondent's estate, created in their favour by Sir John Bennett Piers, in pursuance of the power reserved to him by the deed of 1794.

The evidence, given by the appellants, as to the marriage was in substance as follows:—The Reverend Thomas Orpen Stewart, A.M., was, on the 2nd of November, 1810, named domestic chaplain to Dr. Crigan, then Bishop of Sodor and Man, and on the 25th of January, 1812, was appointed by the Bishop assistant to the curate of Saint George's Chapel, Douglas. Sir John Bennett Piers lived at a house called Leece Lodge, near Douglas, situate in the parish of Kirk Bradden, but not within the district of Saint George's Chapel. In the year 1814, the Rev. Dr. Murray succeeded Dr. Crigan, as bishop of Sodor and **[334]** Man, and the Rev. T. O. Stewart continued occasionally to perform duties as a clergyman at St. George's Chapel. Previously to the year 1815, Sir J. B. Piers, finding that there was likely to be fresh offspring from his connexion with Miss Denny, expressed, in strong terms, his desire to have legitimate children, who could succeed to his estate. Lady Piers, in her deposition, made with regard to this matter the following statement:—

"I am quite certain that my late husband fully contemplated and intended that a marriage between him and me should be solemnized, for a period of more than two years before it took place in the year 1815; and I am also quite certain that he intended to solemnize a legal and valid marriage, as he frequently expressed to me an anxious wish that I might have issue which would inherit his estates, and that he would make a certain and safe provision for me and my children; and I know that my late husband was desirous that his brother, the Reverend Octavius Piers, who was then residing in England, should perform the ceremony of marrying us; and that his said brother would come to the Isle of Man for that purpose, which he was unable to do, as his wife objected, in consequence of her approaching confinement, and was afterwards delayed, until my late husband became intimately acquainted with the Reverend Thomas Orpen Stewart, who was at that time assistant chaplain at the chapel of Saint George's, Douglas, in the Isle of Man.

It was alleged, that this intended marriage actually took place in the year 1815, being celebrated under a special license, at Leece Lodge, by the Reverend Thomas Orpen Stewart, in the presence of John Edwards, then a captain in the regiment of Ancient Britons. The following certificate was given:—"I certify, that I have **[335]** this day, the 27th May, 1815, in the parish of Bradden, Isle of Man, celebrated, according to the rites and ceremonies of the church of Great Britain and Ireland, as by law established, a marriage between John Bennett Piers, Baronet, of Tristernagh Abbey, county Westmeath, Ireland, and Elizabeth King, alias Denny, spinster. Signed the day and year above." "T. O. Stewart, clerk, A.M.

"John B. Piers,
"Elizabeth Piers, } In the presence of John Edwards."

This document was produced in evidence by the appellants, as proof of the marriage of their parents. It was also argued upon as shewing the intentions of the parties. And, for the purpose of proving Sir J. B. Piers' belief that a valid marriage had been celebrated, evidence was given that, immediately afterwards, he executed a will in the following form:

"I hereby will and bequeath to my wife, Elizabeth Piers, a jointure of £600 per annum, to be paid out of my estates in Westmeath and Longford.

"Witness my hand and seal, May 27th, 1815. "John B. Piers.

"Present, T. O. Stewart, John Edwards."

In 1821, Sir John and Lady Piers went to reside in Ireland, and then a second marriage was duly solemnized between them. In 1836, Sir John executed, under the powers of the deed of 1794, a charge of £2000, in favour of each of his two daughters, born subsequently to May 1815, and by a will, dated 30th of May, 1842, he ratified the appointments of the jointure and charges. Sir J. B. Piers died, in July 1845, without lawful issue male, and the respondent entered into possession of the settled estates, and took the title.

A bill had been filed against the respondent and others, in the lifetime of Sir J. B. Piers, praying that **[336]** the charges in favour of the appellants might be declared to be established. That bill was dismissed as premature, but without costs, as the then Lord Chancellor (Lord Plunket) was of opinion that the legitimacy of the plaintiffs in that bill (the present appellants) had been unnecessarily and improperly contested, and had been satisfactorily established (*Piers* v. *Tuite*, 1 Dru. and Walsh, 298).

Several witnesses were examined in that cause. Sir J. B. Piers had himself been examined, and as to the *fact* of marriage, deposed: "I have looked on the paper writing marked (A), and endorsed my name thereon. It is the certificate of my marriage, dated the 27th of May, 1815; the said certificate and the signature, 'T. O. Stewart, clerk, A.M.,' is the handwriting of the Rev. Thomas Orpen Stewart, since deceased, who performed said marriage ceremony, on said day, between me and Elizabeth King, otherwise Denny, spinster, my present wife. The said Thomas Orpen Stewart was a beneficed clergyman of the established church, and at that time officiated as one of the curates in the parish church of St. George's, Douglas, in the Isle of Man. The said marriage took place at my residence, at Leece Lodge, near Douglas, in the forenoon of said day. Captain John Edwards, formerly of the regiment called the Ancient Britons, was present at and witnessed said marriage. He died in about four or five years afterwards; his name is subscribed as a witness to said marriage certificate, and in his proper handwriting; the signatures John Piers and Elizabeth Piers thereto, are the proper handwritings of me and my said wife; the said Thomas Orpen Stewart informed me and my said wife, at said time, that said marriage was perfectly valid, which from my own knowledge I **[337]** believed was perfectly true." He also identified the paper by which, on the same day, he created the charge of £600 a-year for his wife.

Lady Piers, in her examination in this cause, deposed in the same terms as to the marriage, and added that "at the conclusion of the marriage ceremony, the Rev. T. O. Stewart stated to my late husband, in my presence, in answer to an inquiry if all was correct and legal, that the marriage ceremony had been all duly solemnized." Both parties accounted for the marriage being kept secret, by stating that the mother of Sir J. B. Piers was alive in 1815, and that she having absolute controul over the greater part of the family estates, he was afraid of offending her by a marriage which she might not consider sufficiently advantageous.

Mrs. Mary Stewart deposed, "I have a very distinct recollection of the day and occasion of the said marriage certificate, viz., the 27th of May, 1815, and I remember very well that my said husband, the late Rev. T. O. Stewart, upon that occasion, left home from his residence at Douglas aforesaid, in the forenoon of the said day, for Leece Lodge, the residence of the said Sir J. B. Piers, for the purpose of solemnizing a marriage between the said Sir J. B. Piers and Elizabeth Denny; and I recollect perfectly well, upon my said husband coming back from Leece Lodge aforesaid, upon the same day, he told me that he had performed the marriage between the said parties; to the best of my recollection and belief it was about the hour of one o'clock in the afternoon when he returned home upon that occasion; and I am quite certain that the marriage ceremony was performed before the hour of twelve o'clock in the forenoon of that day, because I have a distinct recollection of my husband's telling me at the time how **[338]** very anxious the said Sir John Bennett Piers was, that said marriage should be solemnized within canonical hours; and I recollect his saying at the same time, 'Well, I have just married Sir John to Miss Denny, and I am very glad of it, for it is a pity that there should be any slur upon such a mild, amiable,

nice person as she is.'" It was proved that the said Mr. Stewart died in Jamaica in 1819, having for two years held the living of St. Dorothy's, in that island.

Miss Margaret Christian, daughter of the late Vicar General of the Isle of Man, and sister of the Rev. John Christian, curate of St. George's, deposed that the Rev. T. O. Stewart was appointed to assist her brother in the curacy, "as her brother was too young to perform the whole service himself, he being only in deacon's orders, and there being no other clergyman. I heard a report of Sir J. Piers' marriage with the present Dame Eliz. Piers, which, I believe, must have taken place about 1815." "I never visited the plaintiffs' mother as Lady Piers; I knew her to be styled Lady Piers, and I also knew that Mrs. Stapleton, a lady of most correct conduct, and the wife of General Stapleton, did visit Lady Piers, and was very intimate with her in the Isle of Man."

Upon the question of credit and repute, Mrs. Stewart deposed that, after May 1815, "I know that the said Sir John B. Piers owned and acknowledged her to be the mother of the complainants in this cause, and his lawful wife, and the said complainants to be his legitimate children, issue of the said marriage; and the said Dame Elizabeth was introduced to his friends, acquaintances, and visitors, as I have always understood, and do believe, as his lawful wife; and immediately after it became a matter of notoriety and well known in the **[339]** town of Douglas, that they had been married by my said husband as aforesaid."

Sir William Hillary, bart., a justice of the peace in the Isle of Man, deposed:—"I was acquainted with the late Sir John Bennett Piers, on or about the 27th of May, 1815, and subsequently thereto I was informed by the Rev. Thomas Orpen Stewart, sometime in or about the latter part of the year 1815, that he had married Sir John Piers to Miss Denny; and subsequently I was informed by Sir John Piers, that he deeply regretted that he had not secured the inheritance to his sons of his estates and title, but that he had done everything in his power to rectify the error by marrying their mother, as" he (Sir John Piers) added, "you have no doubt, already heard;" and I said, "I had heard that they were so married." "I was in the frequent habit of dining, with other gentlemen, at Sir John Piers's residence, Leece Lodge, and Hampton, subsequently to the 27th of May, 1815, until his departure from the island, and ever after I had been so as aforesaid informed of the marriage of Sir John Piers with Miss Denny, I believed them to be man and wife; they lived together as man and wife, and at various times when I have dined with him, she presided at his table, and I believe their acquaintances generally believed them to be man and wife."

Captain Caesar Bacon, formerly of the 23d Light Dragoons, deposed:—"I returned to the Isle of Man in the year 1817; I then heard of the marriage of Sir John Bennett Piers with Miss Denny, and from that time they lived together as man and wife, and I considered them to be lawful man and wife."

No entry of any licence could be found, nor any register of the marriage. These circumstances were accounted for by the appellants as the consequence of the **[340]** great irregularities which, up to a very recent period, had occurred in matters relating to marriages in the Isle of Man; and much evidence was given to shew that marriages, the lawful celebration of which was undoubted, had not been registered, and if celebrated by licence, no trace of the licence was to be found. One of this latter class was in the case of two marriages of the Hon. Captain Murray, first cousin of the said Dr. Murray, then bishop of Sodor and Man, and now Bishop of Rochester. The first of those marriages was celebrated in the year 1811, and the second in 1819, but of neither of them was an entry made till 1822, some years after his Lordship had come into possession of the see.

In further evidence of those irregularities and omissions, the Rev. Francis Broderick Hartwell deposed—"I hold the situation of chaplain to the protestant chapel of St. George's, at Douglas, in the Isle of Man, and have held that office nearly eleven years; I held the offices of Vicar-General and Surrogate for the southern part of the Isle of Man, in which the parish of Kirk Bradden is situate, from the year 1832 until the 1st of January, 1846, when I resigned the office of Vicar-General; but I still hold the office of Surrogate for issuing of marriage licenses. I have not the possession of any registry book of marriage licenses granted by the Vicar-General for the time being of said island in the year 1815, or prior, or subsequent thereto; I have no knowledge, nor do I believe that there are, or ever had been any such books of

registry of marriage licenses, or affidavits, or bonds grounding same, at all registered by the Vicars General. I have never known, and I do not believe, that marriage licenses in, or previous to the year 1815, or the affidavits or bonds to ground such marriage licenses, were regularly entered in any books of registry, in **[341]** or previous to said year 1815; and when I knew the parties, I have usually dispensed with written bonds or affidavits, but I have always required them to be sworn before me, that they were eligible to be married, and I believe that my predecessors in office adopted the same practice. I have the custody of the registry books for marriages by special license in the chapel of St. George's, Douglas. I have carefully examined the entries of marriage by special license in said registry book, which amount in number to fifty-nine, and I only find two out of the whole number of fifty-nine licenses recorded or forthcoming."

It was stated in evidence that the practice in the Isle of Man was, to hand the special licenses to the officiating clergyman, who had not been in the habit of depositing them in any office, or taking any care to preserve them.

The Reverend Joseph Qualtrough, Vicar of Kirk-Lonan, who was a beneficed clergyman in the island from 1810, deposed—"I do not recollect what became of the original marriage licenses; I do not believe that I returned the special marriage licenses which I received for performing the marriage ceremony, to any public office or registry, but that I kept them probably for some time, and I cannot tell what became of them afterwards."

The Rev. Joseph Brown, episcopal registrar of Sodor and Man, stated that in 1818 he received special directions from the Bishop to take affidavits according to the canons of the church, previously to granting marriage licenses. He afterwards deposed:—"I have searched in the ecclesiastical registry of the Isle of Man, to ascertain whether or not the special marriage licenses, in or previous to the year 1815, or the affidavits or bonds **[342]** to ground such marriages by special license, were regularly or at all entered; but I have not been able to discover any entry in such registry, and I cannot state whether or not they have been registered elsewhere, in and previous to the year 1815; there is not any registry of special marriage licenses, or affidavits or bonds, that I know of, since the year 1815. I am unable to state whether or not it was the custom of clergymen, celebrating such marriage, to destroy the licence." He added that affidavits to obtain licenses were made by the parties before him, the registrar. As to baptisms, he stated that it was a common custom to specify in the certificate the christian and surname of the father of the child, and the christian and maiden name only of the mother, without adding her marriage surname.

Lawrence Adamson, law clerk, deposed:—"I have inquired, in order to search for licenses, bonds, or affidavits, to ground licenses for marriages. I am quite certain that there is no public registry or office in Douglas for the preservation of licenses, or bonds, or affidavits to ground licenses for marriage. The paper-writing marked (H) purports to be a copy of the entries of marriages by special licence in the registry book of St. George's chapel, Douglas, in the Isle of Man; I have compared such copy and list of marriages by special licenses with the original registry book of marriages by special license kept in the chapel of St. George's, in Douglas aforesaid, and it is an accurate list of such marriages by special license appearing therein, and such document is, as nearly as I could make the same, a *fac simile* of said registry, differing from the same as little as possible, having bestowed great labour thereon. I believe the chapel of Saint George's to be within the parish of Kirk Bradden, and **[343]** a chapel of ease to the parish church of Kirk Bradden; I have made diligent search in the original parish registry books at Kirk Bradden for corresponding entries of those marriages so contained in said list abstracted from the said registry at St. George's chapel, and I only found one entry of the said several marriages duly entered in the parish registry at Kirk Bradden, viz., the entry of the marriage of Francis Matthews and Alicia Forbes, who appear to have been re-married by licence on the 12th day of April, 1813, at Kirk Bradden aforesaid; I have examined the registry of the parish church of Kirk Bradden, and there are not any marriages by special licence registered therein in the years 1814, 1815, or 1816, respectively. I have examined the book of registry for marriages at St. George's chapel, Douglas, which appears to have been kept down to the year 1816, and find that many of the marriages therein entered are not entered consecutively and regularly, according to

their numbers, and the dates and years of such marriages; several of the marriages are entered in wrong places, and there are four entries of marriages in said book purporting to have had only one subscribing witness. I found that after the fourth leaf in the said last mentioned registry book, that two leaves appeared to have been cut out; and I found after the fifth leaf of said book, that one leaf appeared to have been torn out; and I also found immediately after the said two leaves, so appearing to be cut out as aforesaid, four leaves had been inserted in the said book, and sewn into it with strong thread, and many marriages are entered in such introduced leaves."

For the respondent, defendant in the suit in which the decree now appealed against was pronounced, it was **[344]** contended that there had not been any valid marriage between Sir J. B. Piers and Miss Denny in May 1815, and in the first instance, the "Act to prevent Clandestine Marriages," passed at the Twynwald Court, held at the Castle Rushen on the 27th of May, 1757,* was relied on. Evidence was also given to show that no **[345]** such marriage had taken place. The first piece of evidence was a certified extract from the register of baptism of one of the appellants, who was baptized as the child of "Elizabeth Denny," and not Elizabeth Piers. The extract was in these terms:—"Anna Maria Stapleton Florence Fredrica, daughter of Sir John Bennet Piers and Eliza Denny, born 17th April, 1819, and baptized November 24th, 1820."

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* By which it was enacted, "that no license of marriage shall, from and after the publication of this act, be granted by the bishop, vicar-general, or other person having authority to grant such licenses, to solemnize any marriage in any other church or chapel than in the parish church of, within or belonging to, such parish in which the usual place of abode of one of the persons to be married shall have been within the space of three months immediately before the granting of such license, and in no other place whatsoever; provided always, that nothing herein contained shall be construed to extend to deprive the bishop and his successors of the right of granting *special licenses to marry at any convenient time or place, so that the said license be under his own proper hand and seal episcopal.*

"And it is hereby enacted, that such licenses for solemnizing marriages shall not be valid unless the same be under the hand and seal of the persons authorized to grant such licenses respectively, and that no such licenses shall be granted to any person whatsoever, but according to the directions of the several ecclesiastical canons of 1603 relating to marriages.

"And whereas many persons do solemnize matrimony without publication of banns or license of marriage first had and obtained as aforesaid, therefore, for prevention thereof, be it enacted by the authority aforesaid, that if any person shall from and after the publication of this act, solemnize matrimony in any other place within this isle, or the dominion thereof, than in a church where banns have been published, *unless by special license from the bishop* as aforesaid, or shall solemnize marriage without publication of banns, unless license of marriage be first had and obtained from some person or persons having authority to grant the same as aforesaid; every person knowingly and wilfully so offending, and being lawfully convicted thereof, or persons holding any ecclesiastical living, or exercising any ministerial function in the church or chapel of this isle, shall be deemed and adjudged to be guilty of felony, and shall be transported to some of his Majesty's plantations in America for the space of fourteen years; and if such person solemnizing marriage contrary to this act be an alien, foreigner or stranger, and not of the ministry of this isle, and convicted as aforesaid, such alien shall be publicly exposed, with his ears nailed to a pillory, to be erected for that purpose at Castletown Cross, upon the next court day of general gaol delivery after such conviction, at twelve o'clock at noon, and there to remain for the space of one hour, when his ears are to be cut off and remain on the said pillory, and the said offender to be returned to prison in Castle Rushen, there to remain confined till the governor, or his deputy or deputies for the time being, shall think proper to release him, upon paying a fine not exceeding the sum of £50, and abjuring this isle, and all marriages solemnized from and after the publication of this act in any other place than a church, *unless by special licence* as aforesaid, or that shall be solemnized without publication of banns or license of marriage from a person or persons having authority to grant the same first had and obtained, shall be null and void to all intents and purposes whatsoever."

Other exhibits shewed that the registers of the bap-[346]-tisms of the children of Sir J. B. Piers, born before 1815, had been in the same form.

For the purpose of discrediting the character and acts of the Rev. T. O. Stewart, who was said to have celebrated this marriage, evidence was given of an action for adultery, commenced by one *R. O. Smith* v. *the Reverend T. O. Stewart*, in February 1815, which terminated in October 1816, by a sentence of divorce *a mensa et thoro*, of Smith from his wife.

A certificate of the marriage of Sir J. B. Piers with "Elizabeth King," at St. Catherine's, in Dublin, on the 19th day of March, 1821, was put in evidence. This marriage was celebrated by license, and in both the bond to obtain the license and the *fiat* granted thereon, the lady was described "Elizabeth Piers, otherwise King, otherwise Denny."

The evidence chiefly relied on by the respondent was that of the Right Reverend Dr. Murray, Bishop of Rochester, who deposed, "I do not know any of the parties in the title named. I was Bishop of Sodor and Man previously to my becoming bishop of Rochester, and I was consecrated at Whitehall chapel, Westminster, in the month of March 1814, and I continued Bishop of such former diocese until the year 1827, when I was translated to my present diocese. I was not personally acquainted with the late Sir John Bennett Piers, but I knew him by character, and had seen him in the streets of Douglas, in the Isle of Man, in and previous to the year 1815; the said Sir John Bennett Piers was living in said island in that year, and had been a resident there previously thereto, and also, I believe, continued to reside there some years afterwards, but for how long I cannot say. I was resident in said island continuously, from the [347] month of April 1814 till the Autumn of the year 1816, during the whole of which period I was never absent from said island. I do not know of any marriage having been celebrated between Sir John Bennett Piers and any person, while he was so resident in the said island; and I never heard of any such marriage, or any intended marriage; and I verily believe that no such marriage could have taken place without my knowledge, inasmuch as such an event would have been well known, and talked of in the neighbourhood of Douglas, where I resided; and because, also, the clergyman by whom any such marriage ceremony had been performed would, I have no doubt, have mentioned to me the circumstance, if banns had been called. I never was applied to, to grant a special license for the celebration of a marriage between Sir John Bennett Piers and Elizabeth Denny or Elizabeth King, or any other female, in the year 1815, or at any other time; and I never did grant any such special license to celebrate such marriage; and I have good and particular reason for being certain that I never did grant any such special license, inasmuch as the known characters of the parties would have prevented me from doing so, a special license being an act of favour; and moreover, in order to obtain such special license, Sir John Bennett Piers must have personally appeared before me to take the prescribed oaths, and I am perfectly certain that I never spoke to him or was in the same room with him in the course of my life. It was generally reported and believed, that some female lived and cohabited with the said Sir John Bennett Piers, in the said island, in the year 1815; but whether she so lived with him previously, or subsequently thereto, I cannot [348] set forth. The said female was not, to my knowledge or belief, known or reported to be Lady Piers, or associated with in the said island as such; and I always heard her spoken of as a Miss Denny, and she was generally known by that name. I never heard any reports relating to such cohabitation, save than that the said Miss Denny was at such time supposed to be living with the said Sir John Bennett Piers in a state of concubinage. Special licenses for marriages were granted exclusively by myself during the period that I was bishop of Sodor and Man; and no such special licenses were ever granted by a Vicar-General, Surrogate, or any other person appointed by me as Bishop, in the years 1814 and 1815. It was a usual thing to grant such special licenses for marriages in a private house or place, other than a church or chapel within the said diocese, and the granting of such licenses is altogether discretionary. I am positively certain that I never did, and also that no person by my authority ever did, grant any special license to marry the said Sir John Bennett Piers to the said Elizabeth Denny, otherwise King, at Leece Lodge, or any other private house in the said Isle of Man; and in addition to the reasons already given by me for being certain that I never did grant any such special license, I have to add, that I

should naturally have stated the fact of my having so done, on the occasions of my hearing her (as I did subsequently for many years) always spoken of as Miss Denny, and never as Lady Piers. The steps usual and necessary to be taken previously to granting such special marriage license in the said Isle of Man, during the time that I was Bishop of that place, were, for the gentleman going to be married to appear before me, together with **[349]** two bondsmen, and previously to granting such special licenses, the gentleman was required to make an affidavit or oath that there was no legal bar or impediment to such marriage, and no such special licenses were ever granted without requiring such oath or affidavit. I do not now recollect the express form of such special license, nor can I set forth whether or not it contains any injunction or clause respecting the registry of such marriage. I was acquainted with the Reverend Thomas Orpen Stewart, and so knew him in and previous to the year 1815. The said Reverend Thomas Orpen Stewart was not a person of respectable character, and in consequence of his having been a convicted defendant in an action for damages brought against him for criminal conversation, I prohibited him from officiating in said diocese or island; but save than, as aforesad, I knew nothing of the said Thomas Orpen Stewart, or his character and conduct, he having been merely a casual resident in said island, and I believe that he left said island in consequence of his having been convicted of the offence aforesaid."

Several witnesses deposed that they knew of Sir J. B. Piers and Elizabeth Denny or King living together, but did not know that they were ever married. One of these witnesses, however, admitted on cross-examination that, in the year 1815, the servants at Leece Lodge told him that Sir J. B. Piers and Miss Denny had been married the day before, and married by Mr. Stewart, but he did not believe it to be true.

The cause was heard in the Court of Chancery, in Ireland, on the 22nd, 23rd, and 26th days of April, 1847, and the Lord Chancellor offered—provided the Bishop of Rochester would come to Ireland for the **[350]** purpose of being examined—to grant an issue to try whether any special license was granted for the solemnization of the alleged marriage of 27th of May, 1815, under the hand and episcopal seal of the then Bishop of Sodor and Man. This offer could not be accepted on the part of the appellants without the Bishop's consent to pass over to Ireland, which after a letter of request had been written to him, he refused to do, and the decree was, therefore, made on the 10th of May, 1847, dismissing the bill, without costs (10 Ir. Eq. Rep. 341).

The appeal was brought against that decree.

Mr. Bethell and Mr. Glasse for the appellants:

The question raised here is as to the validity of a marriage celebrated in the Isle of Man. The appellants submit that that marriage is valid both in law and in fact.

The marriage is valid in law on the ground of legal presumption. There are three presumptions of law, all of which are here in favor of the appellants. The first is, *Semper praesumitur pro matrimonio:* this is a presumption of law. The next is, that every intendment shall be made in favor of a marriage *de facto;* so that if any clergyman was present performing the ceremony, the law will presume that he was a clergyman properly authorised. The third is, that where an act appears to have been performed by proper persons, the law will intend that everything was done in a proper manner. The burden of impeaching this marriage lies therefore on the respondent.

The extent and effect of these legal presumptions were not adverted to in the Court below, and hence the error into which that Court has fallen. The force of a legal presumption, especially in the case of marriage, **[351]** and of legitimacy of children, is complete, unless it is absolutely rebutted by proof; *St. Devereux* v. *Much Dewchurch* (1 Sir W. Bl. 367). In *May* v. *May* (Bull. N.P. 112), the presumption of fact in favor of marriage was allowed to prevail against a recital of a private act of Parliament, founded on the oath of one of the parties. In *Wilkinson* v. *Payne* (4 Term. Rep. 468) the jury having found a verdict on a presumption of a legal marriage, the Court would not afterwards disturb that verdict, though there was actually evidence to shew that that presumption was unfounded. In *Steadman* v. *Powell* (1 Addams, 58), probate of a will was refused to a person who claimed to be executor

to a female, such female having been a married woman, and the Ecclesiastical Court there held the marriage to be proved by circumstantial evidence alone. In like manner the Court of Common Pleas, in *Doe d. Fleming* v. *Fleming* (4 Bing. 266), held reputation to be good evidence of marriage, though the party adducing it as evidence sought to recover property as heir at law, and his father and mother were still living. And the Ecclesiastical Court, first by a decision at the Peculiars, and then on appeal before the Delegates, held, in *Smith* v. *Huson* (1 Phillimore, 286), that a marriage of a minor by license, though there was only the implied consent of the father, was good.

This rule of presumption is strongest in favor of the validity of marriage, but it also extends to other matters. Thus, where the law requires a particular act to be done by a particular person, and the omission of it would make him guilty of a criminal neglect of duty, the law will presume that he has done it, and **[352]** will throw the burden of proving the negative on the other side; *Williams* v. *The East India Company* (3 East, 192). There notice to the captain, by the charterers, of having put on board a ship a dangerous commodity was presumed, and the burden of proving that there had been no notice was held to lie upon him. That application of the rule of presumption is important as to another part of this case, for it is clear that, had the clergyman who celebrated this marriage, wilfully violated the provisions of the Marriage Act of the Isle of Man, the provisions of which he was bound, not only as a resident, but still more as a clergyman, to know, he would have subjected himself to very severe penalties. This doctrine of presumption was applied in the case of *The King* v. *Twyning* (2 Barn. and Ald. 386), in favor of the valid marriage of one party, not only because of the presumption in favor of marriage, but also on account of the presumption against the committing of a crime. This last case was recognised, and not overruled, in *The King* v. *Harborne* (2 Ad. and El. 540; 1 Har. and Wol. 36); and all these authorities, together with that of *Cunninghams* v. *Cunninghams* (2 Dow, 482), were brought under the attention of this House, and admitted in the case of *Lapsley* v. *Grierson* (*ante*, Vol. I., p. 498).

Assuming, then, the rule as to the presumption of law in favor of the validity of a marriage, and against the committing of a crime, to be established, the question here turns upon the application of that rule to the circumstances of the present case. The parties impeaching the marriage, having the burden of proof thrown on them, rely on the testimony of the Bishop of Ro-**[353]**-chester, who, in 1815, was the Bishop of Sodor and Man. It is submitted that that testimony is quite inconclusive for such a purpose. In the first place, the event was a distant one; and throughout his evidence the Bishop speaks of what was done, not with the positiveness of a clear and undoubting recollection, but with a belief founded on reasons of probability and convenience. These reasons are not in themselves satisfactory, and some of the supposed facts which constitute some of the reasons, or which are the foundations for others, turn out to be mistaken. Thus it is clear that parties requiring a special license might not appear personally before the Bishop; they might go, and, according to the Rev. J. Brown's testimony, appear, as a matter of course, to have gone before him, and not before the Bishop for a license. Besides this, a license, either on personal application to the Bishop, or on the ordinary application to the registrar, might be granted and acted on, and a regular marriage take place, and yet no entry of it, or no entry of it at the proper time, be found in the register. The marriages of the Bishop's nephew, Mr. Murray, were instances of this sort, and furnish another argument in favor of the appellants; for not only were there regular licenses in those cases, and not only did regular marriages take place, but the first of those licenses was granted by Dr. Crigan, the predecessor of Dr. Murray, in 1811, and yet no entry of the marriages appeared until some years after Dr. Murray had held the see, namely, in 1822. The license, in the case of Sir John Piers, might have been in like manner granted by Bishop Crigan, and probably was so granted at the time when Sir John Piers' brother was expected to perform the ceremony. If so, it would not be used at the moment **[354]** because the brother did not come; but it would be used afterwards, and would constitute a valid authority for celebrating the marriage. The maxim *Omnia rite acta*, is in support of this supposition; for it cannot be imagined that a clergyman who, like Mr. Stewart, knew the law of the island, would, without any interest to influence

him, expose himself to penalties for violating it. It must be presumed that he, being a properly authorized person to celebrate a marriage, celebrated this marriage upon proper authority, and in regular form.

The fact of a formal marriage in 1821 between these parties by no means impeaches the validity of the marriage in 1815. It is in evidence that Sir John B. Piers desired to conceal his marriage from his mother, from whom he had expectancies, and the second marriage was nothing but a public re-assertion of the parties' intention, which had lawfully been carried into effect some years before. Nor is the circumstance of the lady being described in the certificate of that marriage, and signing it, in her maiden name at all material—

[Lord Campbell:—There is nothing in that. Lord Eldon was married a second time. The second marriage took place in Newcastle; and though there was no doubt that he had been validly married in Scotland, yet his wife used her maiden name on this second marriage.*

The Lord Chancellor.—In cases where a ward of Court has been married clandestinely, the Court always directs a second marriage; and in such marriages the maiden name of the lady is always used.]

By a similar reason, the use of the maiden name of Lady Piers in the certificate of baptism of one of the **[355]** children in November, 1820, is accounted for. It was a frequent practice in the island to describe the mother by her maiden name, and such description did not in any manner affect the question of her marriage, or even shew that a doubt was entertained upon the subject of it.

Mr. J. Parker and Mr. F. Goldsmidt.—The respondent is willing to take on himself the burden, which, according to the doctrine of the other side, is cast upon him, of shewing that there was no valid marriage of Sir J. B. Piers and the mother of these appellants in the year 1815. He admits that he must shew that there was a high degree of probability that there was no license authorising this marriage. The Court below proceeded on the assumption that the duty of impeaching this marriage lay with the respondent; and he, having completely and satisfactorily discharged that duty, Lord Chancellor Brady gave judgment in his favour. That judgment is right both in law and in fact.

It has been said that the effect of the law of presumption was not properly considered in the Court below; but there is nothing to support that argument. The case of *Lapsley* v. *Grierson* (*ante*, vol. I., p. 498) is an authority for the respondent, for it shews that presumption may be **[356]** rebutted by evidence,—a rule which had, years before, been acted on by the Court of Queen's Bench, in the case of the *King* v. *Harborne* (2 Ad. and El. 540; 1 Harrison and Wol. 36), where it was held that the weight that was to be attached to a presumption of fact was to be regulated by the facts of each particular case. The decision of that case in favor of the validity of the first marriage was in consequence of the weight of evidence there most favoring such a conclusion, and Lord Denman expressly denied that there was any such rigid presumption of law as that now contended for.

[Lord Campbell.—That was as to the presumption of life or death. But that does not affect the presumption of law that when a properly qualified person does an act within the limits of his authority, the presumption, *Omnia ritè acta*, is to be applied. We are bound to presume here that there was a license. It is true that that presumption may be rebutted; but it must be by very strong evidence.

The Lord Chancellor.—We can see what presumption the Court below had in

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* The following is extracted from the parish register of Saint Nicholas, Newcastle:—"John Scott and Elizabeth Surtees, a minor, with the consent of her father, Aubone Surtees, Esq., and both of this parish, were married in this church by license, the 19th day of January, 1773, by me,

CUTH. WILSON, Curate

"This marriage was solemnized between us,

"JOHN SCOTT.

"ELIZABETH SURTEES.

"In the presence of us,

"AUBONE SURTEES. HENRY SCOTT."

Lord Campbell's Lives of the Chancellors, vol. vii., p. 34.

consideration; for the issue proposed by the Court was whether the Bishop of Rochester had granted a license.]

In the Banbury Peerage case, the Judges gave answers to certain questions which very exactly ascertain the limits of this doctrine of presumption upon the question of the legitimacy of a child. Those answers are to be found in a note to a report of a case of *Morris* v. *Davies* (5 Clark and Finnelly, 163; see p. 229, n), which occurred in this House. From those answers, and from that case itself, the rule of presumption appears to be this, that the presumption of **[357]** legitimacy from the birth of a child in lawful wedlock, may be rebutted not only by proof of non-access, but of such circumstances, even where the husband and wife are in the same house, as tend to disprove any sexual intercourse having taken place between them. Surely the presumption in favor of the celebration of a marriage cannot be stronger than the presumption of the legitimacy of a child, born in lawful wedlock. The same reasons in favor of the application of the doctrine of presumption exist in both cases, but more directly in the latter than in the former. In *Head* v. *Head* (Turn. and R. 138, 141), Lord Eldon said, "where there is personal access under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and this presumption must stand till it is repelled satisfactorily by evidence that there was not such sexual intercourse." What that satisfactory evidence is, he goes on in that case to shew, and it amounts to no more than that which the respondent has offered here. The respondent is entitled to succeed if, on the evidence, he can satisfy the House that it was in a high degree more probable that there was not a license, than that there was one. Such was the doctrine adopted by this House in the case of *Morris* v. *Davies* (Cl. and Fin. 163).

[Lord Campbell.—In considering that case, it must be remarked that the birth of the child was concealed from the husband.]

But independently of the particular facts of that case, the Lord Chancellor there lays down the rule that the presumption of law may be rebutted by circumstances, and especially speaks (*id.* 242) of "Evidence diminishing **[358]** the probability or shewing the improbability that such intercourse did in fact take place."

The case of *Wilkinson* v. *Payne* (4 Term Rep. 468) can hardly be said to affect the present, for there the jury having found a verdict on the facts, the Court would not, on a mere presumption, set aside that verdict, when the parties were clearly entitled in equity and justice to recover. Again, in *Williams* v. *The East India Company* (3 East, 192) the plaintiff was merely nonsuited, because he did not produce the best evidence in support of a material allegation in his declaration, namely, that the servants of the Company knew of the dangerous nature of the material they put on board the plaintiff's vessel. Here the case could not fail on that ground The case of *The King* v. *Twyning* (2 Barn. and Ald. 386) was questioned in *The King* v. *Harborne* (1 Har. and Wol. 36; 2 Ad. and El. 540), where it was expressly denied that there was such a rigid presumption of law as that which is now asserted.

On the other hand, it is clear that when a marriage has been questioned in the Ecclesiastical Court on the grounds of non-compliance with the statute in the publication of banns, that Court has decided on the balance of evidence, and not on any mere doctrine of legal presumption; *Frankland* v. *Nicholson* (3 Maule and S. 259, n), *Pougett* v. *Tomkyns* (*id.* 262, n), and *Mather* v. *Ney* (*id.* 65, n). The Court of Exchequer in Equity, too, has adopted the same course of proceeding, in a case where the validity of a marriage by license was in question; *Poole* v. *Poole* (1 Younge, 331). And **[359]** finally, this House, on a claim of peerage, expressly recognised the rule as laid down in *Morris* v. *Davies* (5 Cl. and F. 167), of admitting presumption in such matters to be rebutted by proof, and decided the claim on the ground that the proof there given was sufficient to establish a case of illegitimacy; The Barony of Saye and Sele (*ante*, vol. I. p. 507).

It is therefore submitted that the judgment of the Court below in this case was right. In the first place, there is no such absolute presumption of law as to exclude evidence; and in the next, evidence being admitted, that evidence was conclusive against the validity of the pretended marriage. What was that evidence? It was in substance this, that there was no trace of the grant of any license; that there was no entry of any solemnization of marriage under any license; that the Bishop of

Rochester had been Bishop of the island for a year before the pretended marriage took place, and had not granted any such license, but would, on account of the known character of the parties, have refused it if applied for. Then come the facts of the misconduct of the person who is said to have solemnized the marriage; the absence of any general recognition of the parties as married; the baptism of one of the appellants, with the name of "Denny" given as that of her mother; and, lastly, the formal marriage of these parties in Dublin in 1821. No one of these facts might be conclusive against the alleged marriage of 1815, but the whole of them, taken together, render it impossible to believe that any such marriage took place. The decree of the Court below must consequently be affirmed.

Mr. Bethell, in reply.—The fallacy of the argument on the other side is, that the *praesumptio legis vel facti* **[360]** and the *praesumptio juris*, are confounded together. The one may certainly be rebutted by evidence; for it is in truth nothing but a conflict of presumptions. But the other, which flows from facts already established, cannot be rebutted. The rule of the civil law, which has been everywhere adopted, is well expressed in the Digest, "*Estque nihil aliud quam dispositio legis praesumentis, et super praesumpto tanquam sibi comperto statuentis: contra quam non admittitur probatio*" (Dig. bk. xxii. Tit. iii., "De Probationibus et Praesumptionibus").

[Lord Brougham.—And in pleading, the *praesumptio juris* can never be traversed.]

That is so. In the present case, the facts are established, and the *praesumptio juris* applies. The authority of *The King* v. *Twyning* was not impeached in *The King* v. *Harborne*, so far as the rule of law was concerned; but it was held not to apply with all its force to that particular case. The language of Lord Denman related only to a presumption of the fact of the continuance of life, in that case, being liable to be considered with reference to the weight of evidence in its favour and against it. That is a mere balance of presumptions, and it was so considered in this House in the case of *Lapsley* v. *Grierson* (*ante*, vol. I., 498, 505).

This case has not been properly tried; and the two conclusions of the Court below are wrong. The decree ought to be reversed, and the legitimacy of the appellants declared.

The Lord Chancellor (March 22): This is an appeal from the decision of the Lord Chancellor of Ireland, upon the adjudication to which **[361]** he has come, as to the legal validity of the marriage upon which the legitimacy, and therefore the rights of the appellants, depended. It appears that the Lord Chancellor ultimately decided that point on the evidence before him, but he, at the same time, offered an issue, which he thought would try the question of the validity of the marriage. The issue which he offered to the parties was, "whether there had been a special licence from the Bishop of Sodor and Man, authorizing the clergyman of that island to celebrate the marriage."

Now it does appear to me that the issue so tendered goes very much to explain the ground upon which the Lord Chancellor decided the case, because it shows that according to the view which he took of it, the question in dispute depended upon the greater or less weight of the evidence upon the one side or the other; otherwise the issue would not reach the question so as to decide upon the validity of the marriage. Such an issue would rest upon the balance of evidence as to a particular fact, upon the result of which the validity of the marriage undoubtedly would depend; but that is not the mode in which the law contemplates matters of proof relating to the lawfulness of a marriage. It entirely lays aside all that strong legal presumption upon which the law proceeds in the case of marriage, and adjudicates upon the point as upon any other matter of fact, with respect to which there is no presumption one way or the other, but where, upon the result of the investigation as to the existence of the fact, the right of the parties might depend.

My Lords, I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lyndhurst in the case of *Morris* v. *Davies*, **[362]** as determined in this House (5 Clark and Fin. 163). It is not precisely the same presumption as exists in the present case; but the principle is strictly applicable to the presumption which we are considering. He says (see p. 265), "The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." No doubt, every case must vary as

to how far the evidence may be considered as "satisfactory and conclusive;" but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question.

Now, my Lords, here the legitimacy of the plaintiffs, which is the question in the cause, depends upon the validity of a marriage celebrated in the Isle of Man by a clergyman whose *status* is not a matter in dispute, he having been a regularly ordained clergyman, doing duty in a church there, and as to whose capacity to celebrate marriage there is no dispute. The question arises as to whether the marriage so celebrated was valid according to the law of the Isle of Man, requiring the special license of the bishop in cases where the marriage is celebrated, as this was, in a private house, and not in a church.

Of the fact of the marriage there is no dispute whatever; there is not even a question raised about that. But not only is the fact of the marriage proved, but it is proved to my entire satisfaction that the clergyman and the parties to the marriage were all anxious that a valid marriage should be celebrated, and all supposed that a valid marriage had been celebrated. It is in **[363]** evidence that Sir John Piers—the lady whom he married being at that time near the period of her confinement—was anxious to have a child born who might be the heir to his property. There is no doubt that the woman, at all events, must have been anxious for a valid marriage. The clergyman not only must have been anxious not to incur the penalties which the law imposes upon clergymen celebrating marriages otherwise than according to the law of the island, but the evidence shows that he could not possibly have been in that situation, in which he is attempted to be described in the cause, namely, that of a person ignorant of the law, and therefore likely to err, as not knowing what the law of the island was. He not only was a clergyman who had been for a considerable time exercising the functions of a clergyman of one of the churches in the island, but he had been the private or domestic chaplain, as it is called, of the preceding Bishop of Sodor and Man; and he, it appears, had also been previously engaged in celebrating marriages of this description. We therefore have it for certain, that all the parties must have intended that a valid marriage should be celebrated; and that at least one of the parties understood the law relating to the marriage which he was celebrating.

Then we have the subsequent conduct of the parties, proving beyond all question that they supposed that a valid marriage had been celebrated. The children are treated as legitimate children; the wife is treated as the lawful wife; and the conduct of the parties, from beginning to end, shows that they believed a valid marriage to have been solemnized. This is not at all shaken by the fact of a subsequent marriage having taken place in Ireland. We know that that does frequently happen without the slightest imputation on the validity of the first marriage.

[364] Now, under these circumstances, the validity of the marriage is impeached upon this ground, that there is no proof of there having been a special license granted by the Bishop. Then we have a marriage unimpeached by any circumstances to show the knowledge of the parties, or the opinion of the parties, that other than a valid marriage had been celebrated, accompanied by the anxious wish that such marriage should be celebrated—and we have a clergyman engaged in celebrating the marriage, who must be supposed to have been cognizant of the law of the island; he appears to have been so; and, in point of fact, from his position there can be no room for doubt as to whether he was or was not cognizant of the law of the island; and opposed to these circumstances is the absence of proof of the license under which the marriage was celebrated.

Then here is a case which raises all the presumptions the law can raise in favor of a valid marriage. There is nothing to shake it but this—Was there or was there not a special license? Now, that that may be matter to be inquired into, I do not at all deny. It might be possible to disprove, even at this distance of time, some circumstances upon which the validity of the marriage might depend; but, if disproof was offered, it must be met with all that strength of legal presumption which would operate in favor of the marriage being valid.

Of what then does the evidence consist?—It consists of the testimony of the Bishop, who can only speak to his not recollecting having granted a special license. He states reasons why he has confidence in his belief that there was no special license.

If the opinion which he has given is maintained altogether by those reasons, his conclusion from those reasons is hardly entitled to **[365]** more weight than the conclusion which your Lordships yourselves may draw. It does not appear that he gives any other reason for coming to that conclusion, except that he has no recollection of having granted a special license, and that, from certain circumstances, he thinks it very improbable that he should have granted it.

Those reasons, when examined, beyond all doubt do not appear to be very satisfactory. Some of the facts upon which he proceeds, if not entirely displaced, are very much shaken by evidence in the cause; as, for instance, that a party wishing to obtain a special license must appear before the Bishop personally, and inform him of the fact. We have very good evidence from Mr. Brown—who held an official situation which must have brought to him a knowledge of the usual practice—from which it is to be inferred that that is not the universal practice. It certainly would be rather an extraordinary practice in matters of that description, which are matters very much of course, and are usually transacted by officers authorized for that purpose, and not by the Bishop himself. For instance, Mr. Brown says, that in the year 1818 (it is true that that is after the marriage in question), he received certain directions from the Bishop as to the course to be pursued upon application for a special license. From that, one would infer that the Bishop, in the ordinary course, permitted that part of his duty to be exercised by his lawfully constituted officer, and did not himself personally interfere in the details of all those transactions.

But, however, giving all the weight to the Bishop's testimony which can possibly be asked by those who rely upon the effect of it, it comes to no more than this **[366]** —a mere negative,—a mere absence of recollection of a transaction which took place thirty years ago, with certain grounds stated, upon which, either in the whole or in great part, that conclusion, to which the Bishop has come, has rested. I cannot say that that is evidence, in the language of Lord Lyndhurst "strong, distinct, satisfactory, and conclusive." It appears to me to be the very contrary of what we understand by the meaning of those words.

But independently of that, there is not only evidence of possibility, but of probability, entirely outweighing the probability of the marriage having been celebrated without a special licence, in the fact that the preceding Bishop may have granted such a licence. There is nothing whatever at variance with that, except the period which elapsed between the time when the special licence is supposed to have been granted, and the time when the marriage was celebrated. But there is evidence that it is not at all an unusual thing for a considerable time to elapse between the one and the other. And we have this in proof, that the marriage was contemplated two years before—the brother of Sir John Piers was intended to be the clergyman to officiate. He was not able, however, to come to the Isle of Man, and the postponement took place on that account. We have therefore the fact of the intention having existed at the period at which, if the license was granted by the preceding Bishop, the license in question would have been so granted. That is not a fact upon which we can rely as conclusive, but it undoubtedly removes a great deal of the alleged improbability of the license having been granted at a period so long antecedent to the time of the marriage.

[367] But, my Lords, I will not go into all the circumstances in detail, simply because the view which I take of this case does not depend upon such an examination of them, but it depnds upon this: there is a strong legal presumption in favour of the validity of the marriage, particularly after the great length of time which has elapsed since its celebration, which is not met in this case by that species of positive, distinct, and satisfactory disproof which is essential in order to get rid of the probability of the marriage having been duly celebrated.

Under these circumstances therefore, I cannot come to the conclusion to which the Lord Chancellor of Ireland has come, either as to the result, namely, dismissing the plaintiffs' bill upon the ground that they had not made out their title as legitimate children, or still less as to the form in which he proposed to try the issue upon the validity of this marriage. I really have no difficulty whatever on this part of the case. It never appeared to me that there was made out that species of contradiction of the legal presumption, which would justify any Court in coming to a conclusion against the validity of the marriage. The only doubt which I had was as to the course

which a Court of Equity ought to have adopted for the purpose of disposing of the question.

Beyond all doubt, my Lords, in an ordinary case in which a question arises as to the legitimacy of children, or the validity of a marriage, it would be a case for a Court of Equity to send to trial. But there are peculiar circumstances in this case, which, after some consideration, I am satisfied make it the duty of this House not to adopt that course. In the first place, it is hardly possible to adopt that course in a mode **[368]** which would lead to a satisfactory conclusion. It is not a case in which a Court of Equity is bound to do it. It would only do it in the ordinary course of administering its jurisdiction in order to satisfy itself as to the fact upon which the issue would be directed. If the marriage is disproved, there can be no issue directed. Here then the question is, whether the facts are such as, in the discretion of the Court, make it the duty of the Court to direct an issue to be tried by a jury. First of all, it does not depend in any great degree, as we see now from the evidence produced before the Court of Chancery, upon parol testimony; it depends more than anything else upon the effect and validity to be given to the legal presumption. It is not that kind of case which is peculiarly to be investigated before a jury by parol testimony, the aid of which a Court of Equity requires in ascertaining a disputed fact.

But there is another great difficulty. If this issue is to be directed, it will be directed to be tried in Ireland. Now it does so happen, that the evidence upon which the fact is to depend seems to be found anywhere but in Ireland. Part of it, and a most important part on one side of the question, is to be found in this country—that of the Bishop. Now the Bishop of Rochester is residing here, and he has, as it appears, declined to go to Dublin for the purpose of giving his testimony there. But the other part of the evidence, and perhaps next to that of the Bishop, the most important part of the evidence, is to be found in the Isle of Man. So that you would have the jury in Ireland, but you would have no evidence in Ireland; besides which, if evidence could be obtained, the trial by jury would not in this case be a satisfactory mode of investigating the fact.

[369] Another ground which appears to me to be conclusive as to the course which this House ought to adopt is this:—the question depends a good deal upon the effect to be given to the legal presumption, as opposed to the description of evidence which we have here. If a jury should come to the conclusion to which the Lord Chancellor of Ireland has come, namely, that the evidence is sufficient to repel the legal presumption, and that fact should be brought before this House in proper form, could this House be satisfied with such a verdict proceeding upon these grounds? I think it could not, and I believe therefore that an attempt to try the question by an issue would lead to great and unnecessary expense; and that we should by no means come, in all probability, to a more satisfactory result upon the real merits of the case than we may come to on the evidence we have now before us.

My opinion therefore being that the strong legal presumption is not repelled by the evidence in the cause, my advice to your Lordships is to reverse the decree of the Lord Chancellor of Ireland, and to declare that the appellants have established their *status*. That decree upon the finding is quite of course. There will be no reason for sending it back to the Court of Chancery. If there should be anything else to be adjudicated upon, I apprehend that this House will not decide it, but in that case will remit it to the Court of Chancery for the purpose of having that matter disposed of there. As far as I have been able to see into the cause, there is no defence set up against the claim of the appellants, except the question of whether they are legitimate children, and entitled to the property. If that is so, this House will not be departing from **[370]** its ordinary course in making a decree in favour of the appellants.

Lord Brougham.—My Lords—I am altogether of the same opinion, and for the same reasons. I consider the rule of law to have been very clearly laid down in *Morris* v. *Davies* (5 Clark and Finnelly, 163, 265), by my noble and learned friend, Lord Lyndhurst. My noble and learned friend there laid down that rule in very plain terms; and if I had any doubt as to any one of the four descriptions which he gave of the evidence required to rebut the legal presumption of legitimacy, it is as to the last. I should say, "clear, distinct, and satisfactory evidence." I am not quite prepared to use the word "conclusive." I think some doubt may arise upon

that, which it is unnecessary to raise, because if the evidence required be clear and satisfactory, that is quite sufficient for me. I do not like ever to lay down the rule that evidence must be "conclusive," because that gives occasion very frequently to needless and inconvenient doubt.

Have we, then, in this marriage; alleged to have been had 35 years ago in the Isle of Man; always acknowledged to have been intended by the parties for a considerable time before the fact; acknowledged to have been satisfactory to the parties to a certain extent immediately after the fact; recognised by them, and by their acts and deeds at the very time, and subsisting till brought into dispute by two circumstances, the one a matter of fact, namely, an unquestioned marriage solemnized in 1821, the other, the proceeding in question to get rid of the charge of £4000 upon the estate; **[371]** always acknowledged to have been a sufficient marriage except in those two instances, and until those two periods:—have we, I say, sufficiently "strong, distinct, and satisfactory" evidence to repel the legal presumption in accordance with that course of action and acknowledgment?

I say nothing of what took place in 1821, for I am entirely of opinion that that is no argument whatever against the parties believing that they had contracted and solemnized a legal and valid marriage in 1815. It is a constant course with persons who solemnize irregular marriages, which, though irregular, are perfectly valid and perfectly legal, and against which nothing either of presumption or of law can be alleged; it is a constant course for them afterwards, needlessly, superfluously, and, in my opinon, irregularly, to solemnize what is termed a regular marriage, *in facie ecclesiae*. I say "irregularly," for an obvious reason; because, if the first marriage is valid, the second marriage becomes an irregular marriage. The first marriage was irregular for want of certain ecclesiastical or legal solemnities; but in law it was valid. The second marriage is a mockery; because, for two persons who are single to marry is intelligible, but for two persons who are already married to marry is mockery, and I may almost say a profanation of a very solemn rite of the church. Therefore, though I do not consider that that acting of theirs is at all to be commended, yet it is constantly had recourse to. It is a constant course for persons in a certain station of life, who make what is commonly called a runaway or irregular marriage, afterwards to marry *in facie ecclesiae*, for the purpose of quieting the scruples of persons of nice conscience, but also for the purpose of putting down any public clamour that may **[372]** have arisen. In England, where the law is so different from the Scotch law, it is a very common thing; for the public here do not know that the Scotch law requires no proclamation of banns, no license, and no consent of parents or guardians, to solemnize a marriage. They do not know these things; and, therefore, they say, "Oh, these people have only been married at Gretna Green, and it is not a valid marriage." In order to meet that public clamour about the fancied illegality and invalidity of the marriage, persons very naturally, but, as I said before, very irregularly, and not commendably therefore, in my opinion, marry again in the Established Church. The same parties would be excessively annoyed and very indignant if you were to tell them that the second marriage was necessary, for they would say, "Why, we have cohabited a week before; were we living in concubinage at the time?" They would be excessively angry if you were to tell them that. I have seen the experiment tried in the families of those persons who were the fruits of such a marriage, and they did not at all like it; but, nevertheless, they were the very first people, I have observed, to complain of others as having been married at Gretna Green, and to say, "Oh, yes, but our fathers and mothers were married in certain churches in England." My answer to that always was, "but if the second was a necessary marriage, in what position were your father and mother previously to that solemnization taking place in that church?" And that generally brought the matter to an issue, and put an end to the clamour. However, the existence of those feelings in the public mind upon so very delicate a matter in valuing character, and especially female character, is quite sufficient to account for the marriage in 1821 in this case, and to take away all presumption, **[373]** which might thence arise, of the parties not believing themselves to have been married in the Isle of Man; not, perhaps, that that of itself would be decisive as the cause of the subsequent marriage, but still it is a strong circumstance.

It appears to me, therefore, that we may take this to be a marriage not questioned

till these proceedings took place, and, therefore, the presumption of law, both as to marriage and legitimacy is, in the words of Lord Lyndhurst, only to be rebutted by "strong and satisfactory evidence." Have we that in this case?—Certainly not. I entirely agree with my noble and learned friend that, from the way in which the issue was tendered, we can quite see what it was which misled the very learned and excellent Judge in the Court below. To send the question of the legitimacy of the marriage to be decided, not upon the whole case, as it ought to be, not upon the whole matter, but to be decided upon one point, to make that one supposed circumstance of fact, the pivot upon which the whole is to turn, is, to my mind, a monstrous error in the Court below—it is an error which cannot be exceeded, because it is a total confounding of two perfectly different things. It would not be much better than to do this:—We say that a parson in a tithe suit has a right to an issue—we say that an heir at law has a right to an issue—we say that—but did anybody ever, in sending an issue upon a tithe suit, which the parson has a right to have against the man setting up a *modus*, did anybody ever, in sending an issue, which the heir at law has a right in like manner to have, think of making it depend upon a particular fact, not upon the whole question, whether a right to tithes is established, or a *modus* is established or not, upon the whole fact of heir or not; but upon **[374]** some question in the one case, of whether A. B. was churchwarden at the particular time when the terrier was made, or whether a particular fact took place which tended to show that A. B. was heir at law to C. D. or no? No such thing was ever heard—the whole matter is sent to be tried. But it is worse here, because there you have the mere fact in question, and I could much more easily tolerate an order directing an issue, though it would be a most erroneous direction, to try one special circumstance of fact in those two cases that I put, than I could tolerate this issue which has been proposed to be directed here, because this issue is not the thing in question. The thing in question is the validity of the marriage—the thing in question is rebutting or not the presumption of law in favor of the marriage—that is the question; and the issue proposed would have been an issue trying one fact among many in the case; and this appears to me perfectly erroneous, and a total miscarriage as far as it goes, but a miscarriage fatal to the whole judgment, for it goes to affect the whole.

There is in this case a very peculiar circumstance. No doubt much, if not the whole, depends upon the fact of the license—whether there was a license or not. It is most important to consider who it was that celebrated this marriage—it is a fact which really does dispose of the question in my opinion. It is celebrated by a person in orders, and who had been for some time in orders, in the Isle of Man. It is celebrated by a person who could not by possibility be ignorant of the law of the Isle of Man respecting marriage, because it is celebrated by a person who actually, I think, was chaplain to Dr. Crigan, the predecessor of my Right **[375]** Reverend friend the present Bishop of Rochester, Dr. Murray, the Bishop in whose time the marriage was celebrated. Here then is a clergyman who had been accustomed to celebrate marriages, who knew from his position, officially, clerically, and generally, the law upon the subject; aye, and who knew another thing,—the high risk that he incurred if he did not celebrate the marriage duly. Is it to be presumed—is it to be really supposed, upon a mere want of memory in the Bishop, for there is a possibility that he might have forgotten, or upon the impossibility of Dr. Crigan, his predecessor, having granted this license, for you must exclude that also—is it upon these possibilities, or either of them, to be presumed that this clergyman should have been so reckless—he who had no kind of interest in running any risk at all? Sir John Piers had an interest, and Lady Piers had an interest in running a risk; but Mr. Stewart had no interest whatever. Mr. Stewart was a man cognizant of the law, who had acted under the law, who had been engaged officially in administering, I may say, the law, as the Bishop's chaplain, and who exposed himself to utter and absolute ruin by celebrating a marriage irregularly. I cannot suppose that likely. It appears to me that that makes a short end of the question. I cannot conceive a man in his position incurring this risk for nothing; and if he did not incur this risk, it was because, in fact, there was a license.

Then, as my noble and learned friend has most justly observed, the conduct of the parties concurs with the legal presumption, and everything is opposed to that

which would tend to rebut that presumption. Two years the marriage had been in contemplation, and it is explained why it did not take place before. That also **[376]** lets in the possibility of Dr. Crigan having granted a license, which, if you admit every tittle of the evidence in the cause, is not excluded, because all that Dr. Murray can tell you is, that he does not remember granting the license. Suppose Dr. Murray, instead of saying (for that is all his evidence amounts to), "I do not think I did—I do not recollect that I did," had actually, stringently and conclusively sworn, "I never did; I know I never did; for I have reason to know I never did; I am as certain I never did as I am certain I never committed felony, or my own self married irregularly without a license, and thereby committed a great offence." Suppose he had said that, which he has not said, he cannot tell what Dr. Crigan did; he cannot tell what happened before his time; he does not pretend to say so. Then am I to shut out all possibility of this having taken place before, when all that is to be urged against it is delay? But Sir John Piers might have let the license lie over for a particular reason; and, accordingly, a particular reason is actually afforded here with respect to the expectation of his brother coming over to celebrate the marriage.

Then they act accordingly; they intended to marry. Had they a reason to intend to marry? Most undeniably. There was a very considerable fortune and a Baronetcy depending upon it. Sir John Piers wished to have a legitimate son, and the lady was in that state which made it most likely that he should then wish the marriage to take place, because she was within some three or four weeks of her actual confinement. It might be done, therefore, to take the chance of a legitimate son and heir being produced by that lady to whom he was attached. Then they intended to marry. What did they do? They performed what they believed to **[377]** be a valid ceremony of marriage; and on the very day of the marriage Sir John Piers executed a settlement in which he calls the lady his wife.

Upon the whole, therefore, I entertain no doubt whatever in this case, that upon the merits there has been a miscarriage below. The only question,—and I was of the same opinion as my noble and learned friend the last time the cause was before your Lordships,—the only question which we had to consider was whether we ought not to direct an issue, as, generally speaking, this is the sort of matter which is sent to be tried by an issue. I should most deeply have lamented if it had been found necessary to send an issue, for this one reason among the rest that, as my noble and learned friend says, in the circumstances of this case, suppose the jury had come to the conclusion that there was no evidence of the license, or that it was disproved; and led away by that or any other circumstance, or by the play at Nisi Prius, which one, who has lived so long in that atmosphere as some of us have done, knows to be practised, and knows too that though it may be very expedient for successfully reaching the truth, is not always without the result of misleading the jury, the truth failing to be elicited. Supposing that from any such accident the jury had come to a conclusion contrary to what I verily believe the fact to have been, I am quite sure I should not have been satisfied by it, and the verdict would not have bound me. If it had gone back to the Court below, it would not have bound the Court. The Court is not bound by the verdict; it may send it to another trial, but if the Court had been satisfied with that verdict, it would have come here again, and I should have been just in the same position in which I am now—that is, always upon the supposition that a different kind of **[378]** evidence would have been producible before the jury than has been forthcoming before the Court, and is forthcoming and is produced before us. But would there have been any such further evidence? I am putting it very strongly in supposing that there might have been such evidence, the possibility of obtaining which very often tempts us, contrary to our wishes, to send cases to be tried where there is the possibility of the jury seeing and examining the witnesses when giving their evidence *viva voce*, a possibility which we have not in equity. But would that have been the case? I am putting it as supposing it had been; but even then it would not have been conclusive. We are not bound, either by law or in fact, by the certificate of a Court. But here you could not have that parol evidence, nor any thing of the kind; for, as my noble and learned friend has well observed, Ireland must be the place where the issue would have been tried. The witnesses are either in this house, the Bishop, or in the Isle of Man, and some of them dead. Then you would have, what? You would have a commission here to

examine the Bishop. But you have got his examination already. The Bishop would not give other evidence under any commission than what he has given under the last commission. The other evidence in the Isle of Man you would have, but it would be just the same as you have here. Then where should we be with an issue? We should stand precisely in the same position in which we stand at this very moment; we should have the very same evidence, together with, what I should call, the useless verdict of a jury. Therefore, I most heartily rejoice, and for these reasons, that we do not find it necessary to send it to a jury.

No doubt if there is anything to be done further, the **[379]** case ought to go back, but I see nothing here except the charge upon the estate, and the validity of that charge of £4000 depends upon the fact whether A. B. and C. D., in whose favour the power is to be executed, or the charge to be raised, are lawful children or not. If that is the whole question, I do not see, any more than does my noble and learned friend, any reason for sending it back. I therefore entirely agree with my noble and learned friend, that this case has been misdecided below, and that the judgment below ought to be reversed.

Lord Campbell.—My Lords, it seems to me that this case depends entirely upon the effect to be given to the presumption of law in favour of the marriage. It is allowed that there is a presumption in its favour, and, until the contrary is proved, we are bound to draw the inference that everything existed which was necessary to constitute a valid marriage, and among other things, that there was a special license from the Bishop of Sodor and Man. But it is likewise admitted on the other hand, that this is not a *praesumptio juris*, that it may be rebutted, and that it can only stand subject to the contrary being proved. The whole question therefore depends upon what sort of evidence is required to prove the negative, and to give effect to it. It seems to me, my Lords, as if the very learned Lord Chancellor of Ireland had been of opinion, that the only effect of the presumption is to shift the burden of proof; and that instead of the party who stands upon the validity of the marriage being obliged to shew that there was a license, it lies upon the other side to impeach the validity of the marriage, and prove that **[380]** there was no license, but that the *onus* being shifted, then it is a question to be treated as any other fact between indifferent parties, and that the conclusion to be pronounced is one which depends merely upon the balance of testimony. It is quite clear, in my opinion, that this was the view taken of it by the Lord Chancellor of Ireland, from the issue which he proposed to direct; for if that issue had been tried, it is quite clear the jurors could merely have been directed to consider whether in their private belief, there had been a marriage or not.

But it seems to me that that is entirely contrary to the well established principles of law which have been long laid down and acted upon for the security of marriage. Indeed, Mr. Parker, as might be expected from a gentleman of his great legal discrimination and high professional eminence, allowed at the bar, as he was bound to do, that that was not the mode in which the validity of the marriage was to be tried; and he said, you must shew a high degree of probability that there was not a license. That comes pretty much within the definition of the mode in which the presumption is to be rebutted, which has been cited by my noble and learned friend on the woolsack, from Lord Lyndhurst, and which has been acquiesced in by my noble and learned friend who last addressed your Lordships, with some slight modification.

My Lords, my opinion is, that a presumption of this sort, in favour of a marriage, can only be negatived by disproving every reasonable possibility. I do not mean to say that you must shew the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must shew that **[381]** this is most highly improbable, and that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the *status* of the woman and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere speculation, when in fact, contrary evidence may afterwards be produced, when it is too late, to shew that there was that in existence which would render the marriage valid, the woman the wife of the person to whom she was married, and the children legitimate. My Lords, to avoid such a peril, the law requires that you should negative every reasonable possibility. Here, there are two possibilities which are suggested:—first, that there was a license granted by Dr. Crigan, the former Bishop of

Sodor and Man; and secondly, that there was a license granted by Dr. Murray, who was the Bishop of Sodor and Man at the time when the marriage was solemnized.

In the first place, I must draw your Lordships' attention to the presumption of law which requires a Judge not to exercise his own private notion, or to indulge in his own private opinions upon the subject, but to believe that everything was solemnly and effectively done. That is greatly strengthened here by the facts of the case; because that there was a marriage *de facto* is not denied. The parties were exceedingly anxious that there should be a marriage. The clergyman not only had the means of knowing the law of the island, but there is every reason to believe that he did know the law of the island; there is every reason to believe that he was aware that if he solemnized a marriage contrary to the law, he was liable to severe penalties, and amongst others, to have his ears nailed to **[382]** the pillory. It is quite clear that the parties believed that they had celebrated a valid marriage; for on the very day on which the marriage was celebrated, Sir John Piers executed a deed, whereby he charged the estate, according to his power, with certain uses, and in that deed he calls the lady his lawful wife.

How then is this presumption, so strengthened, rebutted? Simply by the evidence of Dr. Murray, the late Bishop of Sodor and Man, now Bishop of Rochester. I look upon his evidence to be most candidly given; that he is as sincere as it is possible for a man to be; and that his mind is wholly unbiassed. But what does even his evidence amount to? Merely to this; that there was a conviction,—no doubt a firm conviction,—upon his mind that he had not granted a license, but only for the reasons which he assigns. Now the principal reason was, that he surely could not have granted the license, because Sir John Piers and the lady were living in concubinage. That might certainly be a strong reason against granting the license, but possibly also it might be a reason for granting it; because, if a letter had been written, or if a memorial had been sent to the bishop, by Sir John Piers, stating that he had unfortunately been living with a lady as his mistress, that her condition was known in the island, that he was desirous of making her his lawful wife, and at the same time avoiding the publicity of the ceremony, and that he would have the marriage celebrated if he could procure a license and do it privately, it is possible that, for the purpose of rendering the connection between this man and woman a lawful one, the bishop might have granted the license, he might or he might not, but whether it was so or not, it is impossible for us, at this distance of time, to ascertain.

[383] But there is another supposition: The Lord Chancellor, when listening to the arguments at the bar of this House, and when his mind is addressed, as it always is, to what falls from the learned gentlemen at the bar, may be signing thirty or forty documents. Supposing you were called upon to negative the fact that he had signed a particular document, which, there was no doubt, bore his genuine signature, if that document should not be forthcoming, would you negative the existence of it by Lord Cottenham being called and saying, "I have no recollection whatever of having signed that instrument"? Notwithstanding all our high respect for him, should we be necessarily bound to believe that his opinion of what he had done or had not done was right, by some reason which he assigned for it, particularly if that reason should not be altogether satisfactory? Is it at all in a high degree improbable, taking Mr. Parker's test, that the secretary laid that instrument before him, that the Bishop signed it, and that, at a distance of thirty years, he has forgotten that he did so?

Your Lordships will also bear in mind, that I am not bound privately to believe either one speculation or the other. The question is, are they all satisfactorily negatived? I am not bound to believe that Dr. Crigan granted the license; but it is possible that he may have done so, and that possibility is enough for me to act upon, if it is not satisfactorily negatived. Where is the high improbability that he may have granted the license? In the first place, the license might have been granted, and Sir John Piers might have done, as I have known others do, who were living in concubinage, wait until the woman became pregnant, and he was likely to have issue by her, and then make her his lawful wife before the birth of the child. It appears in this **[384]** case, that they had been waiting for some time, till another clergyman, a brother, should perform the ceremony. I am not bound to say that that certainly took place, or that it probably took place; it may have taken place; there is no reason-

able impossibility of its having taken place, and that is a supposition, to negative which not a tittle of evidence is brought before your Lordships.

It appears to me therefore, my Lords, that the presumption of law which exists in this case, and which is strengthened by the facts, is not at all met by contrary evidence, and that therefore we are bound to believe that the license existed.

As to the second point, upon which the Lord Chancellor of Ireland did not lay much stress, but upon which some stress has been laid at the bar, I must observe, according to what has been said by my noble and learned friend, who last addressed the House, that it is entitled to no weight whatever. I think during the argument it was mentioned that the Archbishop of Canterbury and the Lord Privy Seal had both been married in Scotland, and had afterwards been married in England. My Lords, I have by me an instance in the case of a Lord Chancellor. This is what was done by a great lawyer, who, even at the time of his marriage, was eminent in his profession. No doubt was entertained about the marriage celebrated at Galashiels being sufficient both at law and in equity. He had been married in Scotland by an episcopalian clergyman, not by the blacksmith. He was married by a regularly ordained clergyman of the Church of England, according to the rites and ceremonies of the Church of England. With a view to the easy evidence of the marriage in future times, it was thought right to have the parties married in England, in conformity with the **[385]** provisions of Lord Hardwicke's act. Accordingly the ceremony was again performed in the parish church of St. Nicholas, Newcastle, in the presence of the father of the bride, and the brother of the bridegroom, and the following entry was made of it in the register:—(His Lordship read it; see *ante*, p. 355.) Now here she is described as a single woman, and only by her maiden name. In the present case there is an allusion made to the name which the woman acquired by marriage. In Lord Eldon's case it was the same. Therefore, according to that distinguished precedent, the second marriage, which, in the case before your Lordships was afterwards celebrated in Ireland, does not, in the slightest degree impugn the fact that there had been a valid marriage in the Isle of Man.

Then we come to the question as to whether there ought to be an issue or not. I should deeply have deplored if there had been any rule guiding Courts of Equity, which required that there should be an issue. I am happy to find that there is none such. Then, as it does not come within the cases where there is such a rule, if there was such, with all respect we should be governed by it; but, there being no such rule, we have to consider whether it will further the ends of justice that such an issue should be directed.

My Lords, where there is no such rule for the guidance of a judge, I apprehend that he is to consider whether upon the matter submitted to him he thinks a jury will try that question better than he can himself try it. If he has no doubt, or if he thinks he can, under the peculiar circumstances of the case, come to a safer conclusion than a jury would do, it is his duty to decide himself, without granting an issue. My Lords, I cannot know what a jury would do; but I should say that any judge who should try this cause, and who **[386]** knew how the cause ought to be tried, upon such evidence as we have here, would direct the jury to find a verdict in favor of the validity of the marriage.

Then, my Lords, it is not suggested that there is to be any parol evidence taken—we have the whole case before us. Moreover, this is not a case depending upon the credit of a particular witness, where it is suggested that he has perjured himself, or that there is a conspiracy to deceive the Court, and to pervert the ends of justice. It might be proper in such a case to submit the facts to a jury, before whom the witnesses may be examined, and cross-examined, that they may see their demeanor, and judge whether they are to be believed or not. I give implicit credit to every syllable that the Bishop has said. Then why should there be an issue? I must say, my Lords, with respect to cases which are fit to be tried by a jury, no one has more respect than I have for the decision of a jury; but cases of this sort can just as well be tried by a single Judge sitting in Equity, or by your Lordships sitting here as a Court of Appeal. I do not see why twelve gentlemen, wholly unacquainted with the rules of evidence and of law, should try it better. Therefore I rejoice to think that there is no such rule which compels us to grant an issue in this case; and there being no rule,

I have no hesitation in saying that I believe there ought not to be an issue granted, but that we ought to follow the course suggested by my noble and learned friend.

Mr. Bethell applied for the costs of this appeal, and referred to *Stokes* v. *Heron* (12 Clark and Finnelly, 203), as laying down the rule that the costs of an appeal in a case where there had been a great miscarriage in the construction of a will, should be paid out of the estate. He submitted **[387]** that that principle ought to be extended to the present case.

The Lord Chancellor.—The cases differ from each other. There the expense of the appeal was occasioned by the wrong construction of a will, which was purely an act of the Court. Here the question was one of fact, which it might have been necessary to carry to a Court of Law.

Mr. Bethell then called the attention of the House to the fact, that two Appendixes, containing the same evidence and documents, had been printed in this case, and an expense wholly unnecessary had therefore been incurred.

Lord Brougham.—There ought never to be two Appendixes. That is an abuse never practised in the Admiralty Courts, and which, though it once existed at the Privy Council, is now discontinued there. The same course ought to be followed here. The parties ought always to print a joint Appendix.*

The Lord Chancellor.—I perfectly agree with my noble and learned friend on that point.

Decree reversed, and a new decree made, declaring the appellants the lawful children of Sir J. B. Piers, and the sums claimed to be charges on the lands comprised in the settlement, and remitting the cause to the Court of Chancery in Ireland, to give effect to this decree. Journals, 22 March, 1849.

1910 : 2 K.B. 233

[388] WILLIAM HENRY ROCHFORT,—*Appellant;* THOMAS BATTERSBY, ELIZABETH BROWNE, and Others,—*Respondents* [March 19, 22, 27, 1849].

[Mews' Dig. i. 335, 336, 364. S.C. 14 Jur. 229; 2 J. and Lat. 431. Commented on as to position of insolvent debtor in *Motion* v. *Moojen*, 1872, L.R. 14 Eq. 208; *In re Leadbitter*, 1878, 10 Ch.D. 391; *Ex parte Sheffield, In re Austin*, 1879, 10 Ch.D. 434; and see the two cases last cited explained in *Bird* v. *Philpot* (1900), 1 Ch. 822.]

Appeal—Costs—Insolvent—Parties—Practice.

An insolvent debtor has not such an interest in property assigned under the Insolvent Debtors' Acts, as to entitle him to enter into any litigation respecting it.

The circumstance that a person has been made a party to a suit in the Court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit.

W. R. was the owner in fee of certain estates in Ireland, which, on his marriage with E., he charged with an annuity by way of jointure. W. R. had issue a son, W. H. R., and died. For some years the annuity fell into arrear. The widow (under the terms of the settlement) entered into possession of the estates, and received the rents. W. H. R. became insolvent, and the assignments, usual under an insolvency, were executed. W. H. R. afterwards mortgaged to B. his interest in the estates, without giving notice to the mortgagee of his pre-

* The practice had probably been adopted upon a construction of the following Standing Order. No. 119, formerly No. 194, 8th December, 1813.—"Ordered, That in all cases of appeals and writs of error, which were depending in this house, and the printed cases in which were delivered on or before the 24th day of February, 1813, the party or parties do *respectively* print an Appendix to the said cases delivered, and do therein set forth *so much of the proofs taken in the courts below as they intend to rely on respectively* on the hearing of the said causes, and which is not already set forth in the printed cases by them so *respectively* delivered; and that such Appendix do contain a reference to the documents where the same may be found, etc."