costs of this cause the sum of £100, which was directed by the deed of appointment itself to be paid "to the sole and separate use of Mrs Newton."

The Lord Chancellor.—By whom is the petition presented to the Lord Chancellor?

Mr. Newton.—The petition is that of Sir Cornwallis Ricketts and Mrs. Newton's brothers and sisters under the Trustee Act. Then we are served with that petition, and we go in and oppose the application for the distribution of the fund. That question is now decided against us, and I am not here to say for a moment that the order of costs in the Court below as regards myself was wrong, but as regards Mrs. Newton I submit that it was wrong, because the deed of appointment expressly directs the money to be paid to her separate and sole use. In the case of *Newton* v. *Askew* (11 Beav. 145) in which there was judgment against me in the hands of the same parties who are opposing us here, or their solicitors, Mr. Justice Cresswell had made an order charging the fund in Court recovered in that suit and ordered to be paid to Mrs. Newton; and upon an application to the Master of the Rolls to carry out that judgment, to the amount of about £300, against the fund which he had decreed to be paid to the sole receipt of Mrs. Newton, his Honour decided that he had no power to do it, and he dismissed the application with costs.

[273] The Lord Chancellor.—The proceeding there was totally different. That case has no bearing upon it.

Mr. Willcock.—There is no ground whatever for this application. The position of the fund is this: after the death of Lady Ricketts, and therefore after the money became payable to Mrs. Newton, she mortgaged all her interest under that appointment, to different persons, which certainly she had full power to do. These mortgagees, together with Mr. and Mrs. Newton, appeared collectively as parties in the Court below, and this order was made.

Lord Cranworth.—Then that sum of £100 is made liable for those costs, not in respect of the relation of Mrs. Newton to her husband, but in respect that the mortgagees are ordered to pay?

Mr. Willcock.—There was no order that the costs should be paid by Mrs. Newton, but the order was that the costs should be paid out of the fund.

Mr. Newton.—The order is upon me to pay the costs; it speaks for itself.

Lord Cranworth.—It is perfectly obvious what the case was; the mortgagees were to pay the costs. The Vice-Chancellor's order was quite right.

The Lord Chancellor.—The appeal must be dismissed with costs.

Order appealed against affirmed, and appeal dismissed with costs. Lords' Journals, April 18, 1861.

---

[274] BENJAMIN S. BEAMISH,—*Plaintiff in Error;* HENRY ALBERT BEAMISH,—*Defendant in Error* [July 7, 8, 1859; July 2, 3, 1860; February 21, April 22, 1861].

[Mews' Dig. i. 362; v. 333; vii. 633, 643. S.C. 11 Ir. C.L.R. 511; 8 Jur. N.S. 770; 5 L.T. 97. See *Reg.* v. *Millis*, 10 Cl. and F. 534, and note thereto.]

Marriage by Priest in his own case.

It being settled by the decision in *The Queen* v. *Millis* [10 Cl. and F. 534], that to constitute a valid marriage by the common law of England, it must have been celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid.

As to the manner in which a marriage is to be celebrated, the law does not admit of any difference between the marriage of a clergyman and of a layman.

Goole v. *Hudson*, and *Holmes* v. *Holmes*, commented on and explained. See *post* [9 H.L.C. 298, 300].

Per Lord Campbell (Lord Chancellor): A decision of this House, occasioned by the Lords being equally divided, is as binding upon this House itself and

upon all inferior courts, as if it had been pronounced *nemine dissentiente.* (See *The Attorney-General* v. *The Dean of Windsor, ante*, Vol. 8, p. 369.)

Semble, that the decision in *The Queen* v. *Millis* is not to be applied to a case where the presence of a minister in holy orders is impossible.

Doctor Samuel John Beamish was entitled to certain estates in the county of Cork. He had several sons, of whom the Rev. Samuel Swayne Beamish was the first, and Benjamin S. Beamish, the present Plaintiff in Error, the second. The Rev. S. S. Beamish, in the year 1831, became attached to a young lady named Isabella Frazer (both being members of the united church of England and Ireland), and as he did not obtain his father's consent to his marriage with her, he persuaded her into a clandestine marriage, which, according to the special verdict found in this case, was performed in the following manner:—"On the 27th November 1831, the Rev. Samuel Swayne Beamish, being then a clergyman in holy orders, went to the house of one Anne Lewis, in the city of Cork, and there performed a ceremony of marriage between himself and Isabella Frazer, by read-**[275]**-ing between them, in a room in said house, the form of solemnization of matrimony used in said united church of England and Ireland, as set forth in the Book of Common Prayer, and Administration of the Sacraments and other rites and ceremonies of said united church, by declaring that he, the said Rev. S. S. Beamish, then took her, the said Isabella Frazer, to be his wedded wife, and by receiving the declaration of the said Isabella Frazer, which she then and there made, that she took him the said Rev. S. S. Beamish, to be her wedded husband, and by the said Rev. S. S. Beamish placing a ring on the finger of the said Isabella Frazer, and by his pronouncing the blessing in said form appointed, etc. That there was not any clergyman of holy orders present at the performance of the said ceremony of marriage, save and except the Rev. S. S. Beamish himself; and there was not any person present in the room where same was performed, save the Rev. S. S. Beamish and Isabella Frazer, but that the performance thereof was seen by one Catherine Coffey, who privily, and without the knowledge or sanction of the said Rev. S. S. Beamish and Isabella Frazer, or either of them, saw the said ceremony performed as aforesaid from a yard adjoining said room, but did not hear what passed between the said parties." Henry Albert Beamish is the eldest son of this marriage; his father, the Rev. S. S. Beamish, died intestate in 1844. Doctor Samuel Beamish did not die till eight years afterwards, namely, in 1852, and on his death, Henry Albert Beamish claimed, as the eldest son of the Doctor's eldest son, to enter into possession of the estates. This claim was contested by Benjamin Swayne Beamish, the Doctor's second son, on the ground that there had not been any valid marriage between the Rev. S. S. Beamish and Isabella Frazer. Proceedings were taken in the Court **[276]** of Chancery in Ireland, by H. A. Beamish, to enforce his claim. By an order of that Court, dated 20th July 1854, the proceedings were ordered to stand over, with liberty to him to bring an action of ejectment against Benjamin S. Beamish, who was made a Defendant therein. This action was brought, and was tried at the Cork summer assizes in 1855, before Henry Martley, esq., Q.C., when the special verdict already set forth was found. The Court of Queen's Bench in Ireland gave judgment on this verdict for the Plaintiff, H. A. Beamish. Error was brought in the Exchequer Chamber, where the Judges were divided in opinion; but, by a majority, the judgment of the Court below was affirmed (6 Ir. Law Rep., N.S., 142). The case was then brought up to this House.*

The Judges were summoned, and Mr. Justice Willes, Mr. Baron Watson, and Justices Byles and Hill attended in the year 1859. Before the hearing in July 1860, Mr. Baron Watson died; and that hearing took place in the presence of Justices Willes, Byles, and Hill.

---

* The General Marriage Act for Ireland was not passed till August 1844, 7 and 8 Vict. c. 81. The question in this case was therefore considered with relation to the requirements of the law of England as it stood before the English Marriage Act, 26 Geo. 2, c. 33. The very full and exhaustive opinion delivered by Mr. Justice Willes, and the judgments of the Lords who took part in deciding the case, have rendered it unnecessary to do more than indicate the course of the arguments.

Sir F. Kelly and Mr. Chatterton (of the Irish Bar), for the Appellant.—The authority of *The Queen* v. *Millis* (10 Clark and Fin. 534) is assumed to be binding. The presence of a priest is, therefore, necessary to the validity of a marriage. But it cannot be [277] valid when performed by the priest himself in his own case, and without any other priest being present. The 2 and 3 Ed. 6, c. 21, permitted the marriage of priests, but this was to be after asking in the church, and according to the order prescribed in the Book of Common Prayer. That in fact, made the ceremonial in the Prayer Book part of the statute. This was recognised and enforced by 5 and 6 Ed. 6, c. 12, s. 3. It is clear, therefore, that the coming into the church, the man standing on the right hand and the woman on the left, and being there asked, was a substantive part of the ceremonial, and the priest asking as priest must be one person, and the priest, the bridegroom, must be another.

There are three cases in which the minister or official has attempted to perform the marriage ceremony for himself. The first is *Goole* v. *Hudson* or *Boyce* (M.S.; see *post*, where the case is stated by Mr. Justice Willes) in the Arches Court, 1733, in which it appeared that the marriage ceremony was performed by the minister himself. The lady married again; a suit was instituted, and a decree pronounced, treating the previous act merely as a pre-contract, not as a marriage; and directing a marriage to be celebrated in the face of the church. The same occurred in Portynton's case (see this case stated, 10 Clark and Fin. 841); and the third was that of a case decided in France (Nouvelles Causes Célèbres, 23 June 1807). The man there was mayor of the district, and he did for himself those acts which the law absolutely required to be done by the mayor, and he was held incapable of performing them for himself, and therefore what had been done was treated as void. The principle of that case exactly applies here.

[278] [Lord Chelmsford.—*Holmes* v. *Holmes* (see post p. 300) is another instance.]

That principle is expressly adopted in the United States; Bishop on the Law of Marriage (Boston ed. 169). And this was plainly according to the ancient canons (A.D. 940, 1076-1175. Ancient Laws and Institutions of England; see also Johnst. Ecc. Law A.D., 943, s. 8; 1076, s. 5; 1175, s. 17). "At nuptials there shall be a mass priest present who shall by God's blessing bind their union to all prosperity." "Farther, it is ordained that no man do join his daughter in marriage without the priest's benediction. Other marriage shall be deemed fornication." This last phrase is much more than directory; it is final, and the penalty is the utter invalidity of the marriage. Again, "Let no faithful man of what degree soever marry in private, but in public, by receiving the priest's benediction." Palmer, Origines Liturgicae (ch. vii., Matrimony) is to the same effect. In *Herbert* v. *Herbert* (2 Hagg. Cons. Cas. 263, 269) the marriage, though irregular in some forms, was held valid, the parish priest having performed the ceremony. For a man to pretend to give a blessing to himself looks like an act of blasphemy, but it is clear that the priest must pronounce a blessing, and do other things which are essentially necessary to constitute a formal marriage; some of these things being impossible to be performed except by one person to another, the attempt by a person to perform them for himself makes the whole proceeding null.

The priest is a solemnly accredited functionary, invested with authority as the representative of the church, and importing into the ceremony the religious elements [279] which the law requires; he is also the solemnly accredited witness to the acts of the parties. For these purposes the law requires him to be present, Scobell's Ordinances (A.D. 1644, c. 51, p. 86. A.D. 1653, c. 6, p. 236), the marriages under which were confirmed by statute (12 Car. 2, c. 33). The English Marriage Act, 26 Geo. 2, c. 33, the 21 and 22 Geo. 3, c. 35, relating to Ireland, and the 5 Geo. 4, c. 68, relating to Newfoundland, contemplated, throughout, that the priest should be a person distinct from either of the parties. So do the 7 and 8 Vict. c. 56, relating to Dissenters' marriages, and 7 and 8 Vict. c. 81, the General Marriage Act of Ireland, and the 6 Geo. 4, c. 92, for validating marriages celebrated in any church or chapel erected since the passing of the statute of Geo. 2. Whether looking to England or the colonies, it is clear, as stated by Mr. Burge (Comm. on Col. and For. Laws, vol. i. p. 161), that marriages, to be valid, must be performed by a minister. On the same principle, the French code, which admits of civil marriages, requires

(Code Civil, art. 165) the presence of the public officer. Public as well as private interests are protected by this precaution of requiring a clergyman to be a witness of the ceremony; and this was probably the reason for the penal declaration attached to the canon of 1076. In Mant's edition of the Common Prayer Book (Oxf. Ed. p. 454), Dean Comber is cited for the statement, that the priest's blessing is so comprehensive, "that it is sometimes called the blessing of God." That blessing is given after the parties are declared to be man and wife. Everything therefore shows that the church never contemplated, and never was deemed to contemplate, the possibility of the ceremony being performed except by a third person.

The rules of the common law in various matters show **[280]** that a man may not, under such circumstances, perform the required act for himself. Finch's Law (p. 19, pl. 20): and Bacon's case (Dyer, 220 *b*), where a recognizance given to three, and taken before one of the three, was held bad as to him. So a man may offer himself to a bishop for induction, but cannot present himself (Burn, Ecc. Law, Benefice, Presentation, 16), nor can a cognizee of a fine take his own cognizance (West's Symboleography, Part 2, pl. 5, s. 17), nor a contracting party be his own agent, within the Statute of Frauds, *Farebrother* v. *Simmons* (5 Barn. and Ald. 333. See *Darrell* v. *Evans*, 6 Hurl. and N. 662).

Dr. Gayer and Mr. Isaac Butt (both of the Irish bar) for the Respondent.—The cases of *Goole* v. *Hudson* (MS.; see these cases fully referred to in the Opinion of Mr. Justice Willes, and in the Judgment), *Holmes* v. *Holmes* (*id.*), and the French case (Nouvelles Causes Célèbres, 23 June 1807), have no application here; they all depended on the insufficiency, not of the ceremony but of the evidence of the marriage; and the Court, in the first two, pronounced the only sentence it could, namely, that the marriage should be duly celebrated. In the French case, too, the real difficulty was, that the mayor was required, in his judicial capacity, to give a certificate, and it was held that he could not possibly assume the character of a judge in a case in which he was a party. The difference between a judicial and a merely ministerial duty is manifest.

The present was merely an irregular, but it was a completely valid marriage; and such marriages have only been forbidden in Ireland since the 7 and 8 Vict. c. 81, as **[281]** they were forbidden in England by the 26 Geo. 2, c. 33. Till the statute of Victoria such marriages were frequent in Ireland, *Steadman* v. *Powell* (1 Addams, 58), before Sir J. Nicholl, in 1822, recognised that fact, and so did *The King* v. *Fielding* (14 St. Tr., 8vo. 1327). In *Maxwell* v. *Maxwell* (Milw. Ecc. Rep. (Ir.) 280) an irregular and clandestine marriage, celebrated by a priest in holy orders, though he was of the sort commonly styled a "couple beggar," without any witness being present, the priest being dead at the time of the suit instituted, was declared valid. So in *Le Geyt* v. *O'Brien* (Milw. Ecc. Rep. (Ir.) 325), administration was granted on proof of celebration by a clergyman since deceased; and the learned judge, Dr. Radcliff, expressed some doubts as to whether the intervention of a priest was necessary, and he would not allow an inquiry whether the clergyman had duly received ordination, holding that the performance of the ceremony was the important point, and that, as it had been performed, it must be taken to have been performed by a competent person, and he held the marriage, though irregular, to have been legally constituted.

It is no offence for a man to ask the blessing of God upon himself, and the ordinary form of benediction is, that of a request to God to bless the persons named; the priest never pretends to bestow the blessing, but only to ask it. That alone, therefore, can form no obstacle to a clergyman performing the ceremony for himself. Nor can any of the other forms prescribed by the Book of Common Prayer have that effect. Many of these forms were merely directory of the course to be pursued in the case of a regular marriage, but there was no penalty, **[282]** and certainly none in the shape of avoiding the marriage, attached to the breach of any one of them. [They referred with considerable minuteness to the words of the articles in the Matrimonial Service.] Admitting that there are some cases in which a person cannot validly do acts in two characters, there are others in which he can do such acts. A trustee may execute a lease to himself and others, and a partner in one firm may draw a bill on another firm, of which he is likewise a member, and, as a member of that second firm, may bind it by his acceptance. A man may not

do inconsistent acts in the same identical character, but he may do such acts where he fills two characters with reference to the same transaction. In the case of a female reigning sovereign, she may, on marriage, promise to obey as a wife, though she would be undoubtedly at the same moment sovereign to the man who became her husband.

Though a marriage may be so celebrated as to subject the parties celebrating it to ecclesiastical censure that will not avoid the marriage itself.

Some of the authorities are express to the point, that though matrimony is spoken of as a sacrament, it is one which may be administered to each other by the parties themselves, De Burgh (Pupilla Oculi, part 8, c. 1; see the whole passage quoted, 10 Clark and Fin. 581); and Walterius, a professor of the canon law at Bonn, is to the same effect (Manual of Ecclesiastical Law, 8 ed. p. 579, par. 295, s. 4; see 10 Clark and Fin. 584). The Council of Trent requires the priest to utter the words *Ego vos conjungo*, but the English ceremonial has no equivalent words in it. Indeed the words "what God has joined together" not what "I have joined together," show that the ceremony is one in which the priest does **[283]** not actually take part. Nor is there anything in that part of the church service which must necessarily be uttered by a third person.

[Lord Wensleydale.—It is clear from the report of *Herbert* v. *Herbert* (2 Hagg. Cons. Rep. 263), that the priest there did not utter those words, and yet the marriage was held good according to the law of Sicily.]

Admitting, therefore, on the authority of *The Queen* v. *Millis*, that the presence of a priest is necessary as he has nothing to do which may not be done by one of the parties, his presence as one of the parties is sufficient. In *Harrod* v. *Harrod* (18 Jur. 853; 1 Kay and J. 4) Vice-Chancellor Wood declared that no particular form of words was necessary to constitute a valid marriage under the old law of England. The marriage may be irregular because of the use of certain words instead of others, or the omission of certain forms, as for instance, the omission of giving the ring; but that would not in the least degree affect the validity of the marriage.

Here there is a valid civil contract made in a binding form in the presence of a priest, and that being so the marriage cannot now be impeached merely for want of regularity. Even in *The Queen* v. *Millis* (10 Clark and Fin. 534), nothing was said as to what the character of the religious ceremony was to be. It required that a priest should be present, and that requisition has been complied with. The old Saxon law which first in terms declared that a mass-priest should be present, speaks only of his blessing the union to "all prosperity," such a blessing could surely without any impropriety be invoked by the priest himself on his own marriage. And *Herbert* v. *Herbert* (2 Hagg. Cons. Rep. 263) shewed distinctly that a marriage was recognised in this **[284]** country as valid, though the priest there appeared not to have taken any active part whatever in the ceremony.

Sir F. Kelly replied.

The Lord Chancellor (Lord Campbell), after thanking the counsel for the great assistance given to the House, moved that the following question be put to the Judges. Agreed to.

Question, "Upon the facts found by the special verdict in this case, is the Plaintiff below, Henry Albert Beamish, the legitimate son of the late Rev. Samuel Swayne Beamish?"

Mr. Justice Willes (Mr. Justice Byles being present, Mr Justice Hill being on circuit, and therefore excused attendance) delivered (February 21) the following Opinion on behalf of himself and his learned brethren:—My Lords, the answer to this question depends upon whether, after the Reformation, and before Lord Hardwicke's Act in England, or 7 and 8 Vict. c. 81, in Ireland, a clerk in orders could effectually contract marriage without the presence of another clergyman; in short, whether a clergyman can marry himself.

In dealing with the question we must bear in mind, that by direction of the House the argument proceeded upon the assumption that the case of *The Queen* v. *Millis* (10 Clark and Fin. 534) is a binding authority for the proposition necessary

to sustain the result therein arrived at, as appears by the record; which proposition is, that a marriage, however solemnly celebrated, was invalid at the common law, [285] unless contracted in the presence of a priest in holy orders.

That being so, all authorities and arguments tending only to prove that no clergyman need have been present at the marriage are excluded by the hypothesis upon the one hand, whilst, upon the other, it may be considered that if a second clergyman had been present, and had married the father and mother of the Plaintiff, the other circumstances in which the marriage actually took place remaining the same, such marriage, however irregular and reprehensible, and to whatever extent it might have exposed all parties to censure and punishment, would have been valid.

The precise question which we have to answer, therefore, is, whether, assuming that by the common law the presence of a priest was essential to the validity of a marriage, which involves that at the marriage of a layman there must have been a third person present, the marriage of a clergyman might yet be effectually performed without the presence of any other than himself and the person taken as his wife.

We have found it necessary to look at the subject from two principal points of view, in considering the following questions:

First, whether the history of the law relating to the marriage of the clergy points to any and what distinction in this respect between the clergy and the laity, and herein whether the clergy used at any time to be married in a different manner from the laity?

Secondly, whether the history of the laws requiring the presence of a clergyman as proper for the due celebration of a regular marriage, or essential to the contracting of a valid one, points to any duty incumbent upon the clergy-[286]-man such as could not be discharged with equal effect and propriety by one of the contracting parties?

The first of these questions was not much argued at the bar. It was assumed in general terms, and scarcely disputed, that the marriages of the clergy were prohibited in early times; and it was even argued that one effect of the Reformation may have been to give a new privilege to the clergy, without imposing any restriction as to the manner in which that privilege was to be exercised; in short, that the previous law, when made, may only have applied to the marriages of laymen, and that the marriages of the clergy may stand upon a distinct footing.

We have found it necessary to examine this part of the argument closely, and have arrived at conclusions altogether opposed to the propositions thus put forward, and which we conceive to have an important bearing upon the main inquiry.

In dealing with this first question, it is necessary to refer to the history of the enforced celibacy of the clergy, and afterwards more particularly to the statutes by which at the period of the Reformation this restraint was removed. It appears that a distinction existed in that respect between the regular and secular clergy, and that such distinction was especially observed in this country. The regular, unlike the secular clergy, appear from an early period to have taken what was called the solemn as distinguished from a simple vow of chastity, accompanied by an express, not merely a tacit or implied, profession, publicly made, and accompanied by entering into a recognized religious order, and not merely into a lawful ecclesiastical society.

With respect to both classes of the clergy, the general law of the Western Church will be found stated in Pothier, [287] "Traité du Contrat de Marriage," part 3, chapter 2, article 5; "De l'Empêchement que forment les Voeux solennels" (volume 6, page 47, of the Paris edition of 1846, by M. Bugnet, to which we shall throughout refer); and article 6, "De l'Empêchement qui résulte des Ordres sacrés" (6 Pothier, page 51).

As to the regular clergy abroad it appears that before the first Council of Lateran, held in 1123, their marriages were valid; and their profession constituted only *impedimentum prohibitivum*, not *impedimentum dirimens*.

The prohibition thus imposed upon the regular clergy included only those who had taken the solemn vow already mentioned, and entered into a regular house of

religion. A simple vow of chastity, whether tacit or express, did not of itself constitute an impediment (6 Pothier, 50, sec. 6, *id.* 213, *et seq.*).

With respect to the regular clergy, professed and entered in a house of religion in England, their condition was, probably, from a time before the conquest up to the reign of Hen. VIII., considered, for all purposes of personal benefit, as that of civil death; and their marriages, contracted after profession, were, according to the better opinion, absolutely void. (Coke Littleton, 135 b; Littleton, sec. 200, 202, and the Commentary.) The dictum referred to in 1 Rolle's Abridgment, Baron and Feme (A. 9-10), *contra*, seems incorrect.

As to the secular clergy, not entered or professed in religion, of the degree of bishops, priests, deacons (and sub-deacons in the Roman Catholic Church), it appears that, except for a short period, under the code of *Justinian* (A.D. 529) lib. 1, tit. 4, *de Episcopis et Clericis*, mitigated by the effect of the 6th Novel, cap. 5, which substituted the penalty of loss of orders for that of nullity, there was no instance of any law, civil or ecclesiastical, for annulling [288] the marriages of the secular clergy, before the twelfth century. The canon of the first Council of Lateran (A.D. 1123), confirmed and more distinctly expressed at the second Council of the same name (A.D. 1133), was the first which decreed the nullity of marriages contracted by persons in holy orders. How much this restriction has been treated as one *positivi juris* appears by St. Augustin's question, and the answer of Gregory the Great (1 Wilk. Conc. 9), and in the present day by the notes to Pothier (51, 53), in which it is stated that the marriages of the clergy are, by reason of the provisions of the code civil, no longer subject to any legal impediment in France.

With respect to England, there exist proofs that the marriages of the secular clergy, though considered objectionable by the higher ecclesiastics, constantly occurred, and were not either void or voidable here before the latter part of the twelfth century. Numerous traces of this subject are to be found in the collection of the ancient laws and institutes of England, published in 1840, under the direction of the Record Commissioners. The earliest is in the Penitential of Theodore, Archbishop of Canterbury (A.D. 660 to 690) where, in chapter 18, section 4 (1st Ancient Laws, 14) it is laid down that for a married man, raised to holy orders, afterwards to cohabit with his wife, is adultery, by reason of the notion, elsewhere expressly put forward, that the Church is his spiritual spouse. To the same effect is the fragment of the same prelate at page 74, where it is said of such a case, "unde et de carnali fit spirituale connubium. Oportet eos nec dimittere uxores et quasi non habeant sic habere; quo salva sit charitas connubiorum et cesset operatio nuptiarum." Then section 6, page 14 of the Penitential, treats of priests and deacons marrying whilst in holy orders. "Presbyter vel Diaconus si uxorem [289] extraneam duxerit in conscientiâ populi, deponatur. Si vero adulterium" (explained by the preceding section to mean by reason of his being married to the Church) "perpetraverit cum illâ, et in conscientiâ populi devenit, projiciatur extra ecclesiam et poeniteat inter laicos quamdiu vixerit." It is clear that this passage relates to actual, not *quasi* wives, because the context refers to the wives of those who were raised to orders after being married, and makes a distinct provision for the case of fornication with a woman not the priest's wife, and that of adultery with the wife of another.

To the same effect is the Penitential of Ecgbert, Archbishop of York, A.D. 735 to 736. "Si presbyter vel diaconus uxorem duxerit perdat ordinem suum; et si postea fornicati fuerint, non solum ordine priventur, sed etiam septem annos jejunent, juxta sententiam episcopi."

To the same effect is a document of the tenth century, called Institutes of Polity, civil and ecclesiastical, to be found in 2 Ancient Laws, 335, chapter 22, which recites as the doctrine of the previous councils, that "it was right if a minister of the altar, that is, a bishop, or a mass priest, or a deacon married, that he forfeited his order for ever, and should be excommunicated, unless he should repent, and the more deeply atone." * * * * "A priest's wife is nothing but a snare of the devil, and he who is ensnared thereby on to his end, he will be seized fast by the devil, and he also must pass afterwards into the hands of fiends, and totally perish," etc.

The same is laid down in Ælfric's canons, shortly before the Conquest, (Wilkins'

Anglo-Saxon Laws, 154; 2 Ancient Laws, 345), which state the penalty to be forfeiture of orders.

The Anglo-Saxon clergy, however, were far from being of one mind upon this subject. The law of the Northum-[290]-brian priests (stated by Pothier to be of the tenth century), provides, section 35, "If a priest forsake a woman (Cwenan), and take another, let him be excommunicated." The word here translated "woman" is neither the word applied to a wife in the same law, canon 64 ("Æwe"), nor that applied to a concubine ("Cyfese"), in other laws of the same period. It may, according to the dictionary, be translated wife, woman, or harlot.

These ecclesiastical documents only refer to penance and deprivation, not nullity, which indeed they could not impose.

In the laws of the kings during the same period we find no direct mention of the subject of marriage of the clergy whilst in orders, though there are several in which the duty of chastity is inculcated.

The first is the law of King Edmund (who reigned A.D. 940 to A.D. 946), Ecclesiastical Division, No. 1 (1 Ancient Laws, 245). The canons called of Edgar (who reigned A.D. 959 to 975), if they can properly be classed as laws, provided specially for the case of a married person raised to orders (Canons 17, 2 Ancient Laws, 271); and as to the rest, canon 60 enjoins, "That no priest love overmuch the presence of women, but love his lawful spouse, that is, his church." The next is the law of Ethelred II., who reigned A.D. 978 to 1016, chapter 5, No. 9 (1 Ancient Laws, 307). The last is the law of King Canute, who reigned A.D. 1017 to 1036, Ecclesiastical Division, No. 6.

All these laws enjoin chastity, but under sanctions not involving nullity of marriage.

It seems, therefore, that before the Conquest there was no law, either civil or ecclesiastical, in this country, making orders *impedimentum dirimens*. Dr. Lingard states (compare 1 Anglo-Saxon Church, 176; 2 *id.*, [291] 252 *et seq.*) that at the end of the Anglo-Saxon period "the married priests at length became sufficiently numerous to bid defiance to the laws of both the church and the state." He expresses an opinion that such marriages first began in the latter part of the ninth or even as late as the tenth century; and he states that for three centuries after the mission of St. Augustin there is no mention of a married priest in any written document. The inference, however, seems hardly reconcileable with the articulate recognition of the fact of the marriage of priests, and other their intercourse with women, in the Penitential of Theodore, who wrote less than a century after Augustin. And Mr. Kemble, in his History of the Saxons in England, vol. 2, pp. 439 to 447, refers to many instances in which the children of priests are spoken of, and other traces of their marriages occur in ancient documents, as affording an "almost unbroken chain of evidence to show, that in spite of the exhortations of the bishops and the legislation of the Witan, those, at least, of the clergy who were not bound to a cœnobitical order, did contract marriage, and openly rear the families which were its issue."

Dr. Lingard farther states (History of Anglo-Saxon Church, vol. 2, p. 254, note 1), that "married priests were, strictly speaking, those who had been married before ordination. After ordination they were more loosely said to marry, *wiffian*, to take wives, when the parties lived together by mutual agreement only; for there existed no legal form by which they could be married." This statement can, however, amount to nothing more than that by the church their marriages were considered objectionable, though not void, and that there was no ceremony provided other than that by which laymen could be married. The priests who, as a rule, held out against the bishops, and persisted in marrying [292] and in living with their wives, could have felt little difficulty in performing the marriage ceremony for one another.

This state of things appears to have continued long after the Conquest, and after the charter of William had separated ecclesiastical causes from civil, and in the amplest manner transferred the former to the jurisdiction of the bishops; and indeed until late in the twelfth century, long after the second Council of Lateran.

The constitution of Lanfranc in 1076 only enforced the former law. It allowed priests already married in certain cases to retain their wives, and forbade for the future the ordination of married persons; "Decretum est ut nullus canonicus uxorem habeat. Sacerdotes vel in castellis vel in vicis habitantes, habentes uxores non

cogantur ut dimittant; non habentes interdicantur ut habeant, et deinceps caveant episcopi ut sacerdotes vel diaconos non presumant ordinare, nisi prius profiteantur ut uxores non habeant." (1 Wilkins' Concilia, 367.)

At many subsequent councils before the year 1175 the language held is uniform, that the consequence of a priest marrying was simply forfeiture of his orders. For instance, the Council of London, A.D. 1126, s. 13 (1 Wilkins' Concilia, 408); and that of Westminster, A.D. 1127, s. 5 (*ibid.* 410). The language of this council indicates that wives of priests were regarded less unfavourably than their concubines: "Quodsi concubinis (quod absit) vel conjugibus adhæserint," etc. The same can hardly be said of that of Westminster, A.D. 1173 (*ibid.* 474,) III. "Clerici focarias non habeant. IV. Conjugati ecclesias non habeant seu ecclesiastica beneficia." From about this period the change in the law may, we think, be dated.

During the early part of the twelfth century, an oc-**[293]**-currence took place which shows the then existing state of things in so singular a light, that we cannot forbear from calling attention to it. The bishops on two occasions in the reign of Henry I., applied to that monarch to punish the marriages of the clergy with the secular arm. Upon the first, when the king required concessions from the holy see, they were successful; to cite the margin of the account in Sir Henry Spelman's Codex (at the end of Wilkins' Anglo-Saxon Laws, 300)—"*Sacerdotes acrius luunt conjugia sua.*" Upon the second occasion (A.D. 1129), six years after the first Council of Lateran, the result was altogether different, as appears from Spelman's Codex, 309, referring to the chroniclers. "Anno 1129, regis 29° rex ad calend. Aug. magnum Concilium Londini tenuit de uxoribus sacerdotum prohibendis, præsentesque ambo episcopi cum suffraganeis suis, justitiam de eorundem uxoribus (focarias vocat Parisiensis) regi concesserunt. Imprudentia, ut calumpniabant, Gulielmi Archiep. Cantuariæ, sed aliis omnibus episcopis consentientibus. Rex autem accepta a sacerdotibus ingenti nummorum mole, uxores eis permisit denuo, et illusa hoc commento episcoporum constitutione, ipsi in ludibrium transiere." In 1 Wilkins' Concilia, 411, the same occurrence is related, without mention of the fine, and the account concludes thus: "Rex eis omnibus dedit domum redeundi licentiam, adeoque domum reversi sunt, nec ullam vim habuerunt omnia illa decreta. Cuncti retinuerunt suas uxores regis venia sicut ante fuerant."

In the year 1175 a change is distinctly observable; for at the Council of London in that year (1 Wilkins' Concilia, 476), reference is made to a decretal of Alexander III., who was pope in the time of Henry II., and the avenger of a'Becket. After providing for the case of the **[294]** inferior orders of the clergy, it proceeds, "qui autem in subdiaconatu vel supra ad matrimonia convolaverint mulieres etiam invitas et renitentes relinquant."

The constitution of Richard Wethershed, Archbishop of Canterbury (A.D. 1229 to 1231), Lyndwood's Provinciale, 118, follows the terms of the decretal of Alexander III. These constitutions could not of themselves make law, but they may serve to indicate the date at which the discipline of the Council of Lateran was first introduced.

Up to nearly the end of the twelfth century, therefore, it seems that orders did not constitute *impedimentum dirimens*, but from that time forward until the sixteenth century they did, not absolutely, but subject to the condition that the marriage was valid unless annulled by divorce in the Court Christian during the lifetime of the parties. This point was more than once decided by the courts of common law in cases referred to by Lord Coke in the margin of Coke upon Littleton, 136 *a.*, where, after speaking of the four orders of friars, monks, canons, and nuns, he says, "For all these are regular and votaries, and are dead persons in law; but so are not the secular persons, as prebends, parsons, vicars, etc. And therefore it is holden in our books, that if a secular priest taketh a wife and hath issue, and dieth, the issue is lawful, and shall inherit as heir to his father, etc., for (as it was then holden) (Year Book, 21 H. 7, M. 39 *b*, is in point) the marriage was not void, but voidable by divorce, and after the death of either party no divorce can be had. But if a man marrieth a nun, or a monk marrieth, their marriages were holden void, and the issues bastards, because (as it was then holden) the marriage was utterly void, for that the nun and the monk were dead persons in the law."

[295] Such was the law up to the passing of the 31st Hen. 8, c. 14; for the 1st

Hen. 7, c. 4, does not mention, and if it included did not annul marriages, but only gave the Ecclesiastical Courts power to punish by imprisonment clerks guilty of " adultery, fornication, incest, or any other fleshly incontinency."

The 31st Hen. 8, c. 14, was the Act " abolishing diversity in opinions." And amongst other questions therein resolved was, " whether priests, that is to say, men dedicate to God by priesthood, may marry or no." This question it answered in the negative. The second section made the marriage of a priest felony, without benefit of clergy, both in the man and woman. The fourth section enacted that such marriages " shall be utterly void and of none effect," and that the proper ordinaries " shall from time to time make separation and divorces of the said marriages and contracts." Subsequent sections imposed minor punishments upon concubinage, and subjected the wife in the one case, and the concubine in the other, to the same penalties as the priest. It is observable that this statute related to priests, and not to those lesser orders of clergy (*see* for the probable reason, Lyndwood, 118, note *i*) which were included in the general prohibition, and that it pointedly recognized the difference between the wife and the concubine of a priest, clearly pointing, in the case of the former, to actual marriage.

The Act of 31st Hen. 8, c. 14, was amended in the following year (1540) by the 32d Hen. 8, c. 10, an Act " for moderation of incontinence for priests," by which the penalty of death was taken away, and minor pains were substituted.

Thus matters stood until the passing, in the year 1548, **[296]** of the Act of 2d and 3d Edw. 6th, c. 21, " An Act to take away all positive laws against the marriage of priests," the recital of which is material: " Although it were not only better for the estimation of priests and other ministers in the church of God to live chaste, sole and separate from the company of women and the bond of marriage, but also thereby they might the better intend to the administration of the Gospel, and be less intricated and troubled with the charge of household, being free and unburdened from the care and cost of finding wife and children, and that it were most to be wished that they would willingly and of theirselves endeavour themselves to a perpetual chastity and abstinence from the use of women; yet forasmuch as the contrary hath rather been seen, and such uncleanness of living and other great inconveniences not meet to be rehearsed, have followed of compelled chastity, and of such laws as have prohibited those the godly use of marriage, it were better and rather to be suffered in the commonwealth that those which could not contain should, after the counsel of Scripture, live in holy marriage, than feignedly abuse, with worse enormity, outward chastity or single life." The statute goes on to enact, that every law and laws positive, canons, constitutions, and ordinances heretofore made by authority of man only, which do prohibit or forbid marriage to any ecclesiastical or spiritual person which by God's law may lawfully marry, in all and every article, branch, and sentence concerning only the prohibition for the marriage of the person aforesaid, shall be utterly void and of none effect; and that all manner of forfeitures, etc. " concerning the prohibition for the marriage of the persons aforesaid be of none effect, as well concerning marriages heretofore made by any of the ecclesiastical or spiritual persons aforesaid, as also such which hereafter **[297]** shall be duly and lawfully had, celebrate, and made betwixt the persons which by the laws of God may lawfully marry."

Then follows a proviso showing the anxiety of the legislature that the marriages of the clergy should be subject to the same rules and contracted with the same ceremonial as those of the laity: " Provided that this Act or anything therein contained shall not extend to give any liberty to any person to marry, without asking in the church, or without any ceremony being appointed by the order prescribed and set forth in this book, entitled ' The Book of Common Prayer and Administration of the Sacraments,' etc., anything above mentioned to the contrary in anywise notwithstanding."

Doubts appear to have arisen upon that statute, whether it made the children legitimate; and to remove those doubts the 5th and 6th Edw. 6, c. 12, enacted, that such marriages should be valid to all intents and purposes, the children legitimate, and the husbands and wives entitled to estates by the courtesy and dower; with a proviso, section 3: " Provided always, that this Act nor anything therein contained shall extend to give liberty to any person to marry without asking in the church, or

without the ceremonies according to the Book of Common Prayer and Administration of the Sacraments, nor shall make any such matrimony already made or hereafter to be made good which are prohibited by the law of God for any other cause."

These statutes of Edw. VI. were repealed in 1553 by the statute of 1 Mary, s. 2, c. 2, and were revived by its repeal in 1603, by the Act of 1 James, c. 25.

During the reign of Elizabeth the liberty of marriage of the clergy appears to have rested upon the 32d article of the 39 passed in convocation and confirmed, 1562, and **[298]** as to part (*see* 1 Hallam's England, 4 ed. 170, 188) recognised by Parliament in 13 Eliz., c. 12, s. 5, which required subscription and assent thereto: "Bishops, priests, and deacons are not commanded by God's law either to vow the estate of single life, or to abstain from marriage; therefore it is lawful for them, as for all other Christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness."

This inquiry into the history of the law relating to the marriage of the clergy has led us to the conclusion that there is nothing either in the common or statute law which points to any distinction between the clergy and the laity, in respect of any superior facility given to the former as to their own marriages, or the mode of celebrating them. There was no provision for their marriage at the common law distinct or different from that applicable to laymen. Nor was it likely that there should be, seeing that their marrying was considered by the higher ecclesiastics to be objectionable, as, indeed, the recital of the 2 and 3 Edw. 6 shows that it so continued to be looked upon by many until the dawn of the Reformation; and the statutes of Edw. VI. and the 32d Article, upon which the present state of things is founded, expressly put the clergy into the same condition in this respect "as other Christian men;" the statutes, moreover, with a proviso for such marriage taking place after the usual notice, and with the established ceremony, to which the clergy, above all, were in duty bound to conform.

To this must be added, that, with the exception of the present case, and of the two unreported cases which were mentioned in argument, viz., *Goole* v. *Hudson*, in the Court of Arches, 1733, and *Holmes* v. *Holmes*, in 1814 to **[299]** 1818, in the Consistorial Court of Dublin, we have not been able to find an authentic account of any instance, nor, except what has been already mentioned, a suggestion of any instance of a clergyman having at any time married himself. This seems the proper place at which to notice those two cases.

Goole v. *Hudson* appears to have been a suit instituted in the Arches Court by a clergyman over fifty and a widower, against the daughter of one of his parishioners, a young woman under age, whom he had induced on the 10th of June 1731, in the house of her mother, during her temporary absence from home, to go through, with him, whilst they were alone, a form of marriage, by their saying that they took one another for man and wife, according to the formulæ, in the Marriage Service: "I, N., take thee, M.," etc., and "I, M., take thee, N.," etc.; and by the giving of a ring, with the words, "With this ring I thee wed," etc. The other parts of the service were omitted. The libel also stated a promise to marry, independent of this ceremony, and referred in proof thereof to certain letters, of which no copies are forthcoming. There had been no cohabitation; and the prayer was, that a subsequent marriage contracted by her on the 29th July 1731, *in facie Ecclesiæ*, with one Boyce, should be declared void, that the Proponent and Respondent should be declared man and wife, and that she should be compelled to solemnise matrimony with him *juxta juris exigentiam*. The answer of the Respondent admitted that the alleged ceremony had taken place, but stated that it was in jest, and without any intention of contracting marriage. She admitted the letters, and that she subscribed them as his "spouse," but at his request. The evidence is not before us, but only the interrogatories.

The decree pronounced that the parties "did enter **[300]** into and celebrate between themselves, on the 10th June 1731, a pure and lawful matrimonial contract by words in the present tense effectual," etc., and went on to pronounce for the validity of the "matrimonial contract and espousals so entered into and contracted," and pronounced them to be husband and wife, and pronounced and declared the marriage with Boyce to be null, and that the Respondent ought to be compelled by law to solemnise a true, pure, and lawful marriage in the face of the Church with the Proponent, and admonished her so to do.

In explanation of this decree, pronouncing the parties to be man and wife, we may remark, that in this respect it is substantially the same as that in the case of Cecilia de Portynton, in the fourteenth century, cited by Lord Lyndhurst (10 Clark and Finnelly, 841), which his Lordship used as illustrating the proposition, that such a contract or espousal was considered as irrevocable, and as *verum matrimonium*, for many purposes, by the Court Christian; although he went on to argue that for other purposes affecting civil rights it was not operative before it was celebrated *in facie Ecclesiae;* and thus Lord Lyndhurst accounted for the decree, after pronouncing the parties to be man and wife, going on to enjoin a solemnisation of the marriage in the face of the Church.

No such case could have occurred in England after 1754, the date of Lord Hardwicke's Act; but in Ireland it could, until 1818, when suits for compelling the performance of a marriage ceremony, and celebration of marriage *in facie Ecclesiae*, were first put an end to there.

The case of *Holmes* v. *Holmes* in the Consistorial Court in Dublin first came before it in 1814, in the form of a suit by the woman for the restitution of conjugal rights. **[301]** In that suit the present question could not have arisen upon the proceedings, because, as amended, they stated a marriage generally according to the rites of the Church, but did not state any celebration of the marriage by the Respondent as a clergyman in holy orders. That suit was dismissed without prejudice and without costs. A suit was then instituted by the woman similar to that in *Goole* v. *Hudson*, and the farther amended allegation of the Promovent stated that the Impugnant, being a clergyman in holy orders, a ceremony of marriage was celebrated between them on the 11th April 1811, in the same manner as that which appears by the special verdict to have been performed in the present case, except that no ring was used. In that case there was cohabitation before and after the alleged marriage contract. The Respondent denied that he ever promised or intended to marry the Promovent, but admitted that, being in her power, and moved by her importunity and threats, and in order to avoid exposure, he had, on the occasion alleged, read portions of the marriage service, but not the whole thereof, and not as a celebration of his marriage, but in order that she might obtain a more solemn promise or contract than she thought she otherwise could; and that he did not intend it to be binding on him as a legal ceremony, or as a legal or sufficient contract. The alleged ceremony of marriage was proved by one witness, who was present, and her evidence was confirmed by that of another witness, whom the Defendant had sent for the Prayer Book. These seem to be the material facts.

The decree pronounced that the parties did, on the 11th of April 1811, make a valid matrimonial contract, and take one another *per verba de praesenti* as man and wife; and it ordered that a lawful marriage should be celebrated in the face of the Church, by a priest in holy **[302]** orders of the Church, according to the rites, ceremonies, and canons thereof; and enjoined both parties to enter into and cause the said marriage to be solemnised *in facie Ecclesiae.*

We have no account of the argument, or of the judgment of the Court in either of these cases, and we cannot tell upon what grounds the decrees respectively proceeded. The same decrees would have been made if the husbands had been laymen. Whether the Court considered the fact of their being in orders, and intended to decide that it made no difference in the effect of what had been done, or whether the matter passed *sub silentio*, we cannot tell and have no means of ascertaining.

We cannot, therefore, treat these cases as of any binding authority. All that can be said of them is, that, except the present case, they are the only authentic instances within our knowledge in which such a course was adopted; and that what was done in those cases does not appear to have been treated as constituting a complete marriage.

It has, however, been argued, that the course pursued, though admitted and proved to be eccentric, does not transgress the bounds of irregularity; and it was endeavoured to sustain that proposition by taking the usual ceremony of marriage to pieces, and showing that each of its parts in succession might be dispensed with as unnecessary, except the presence, in fact, of a clerk in holy orders, which presence in this case literally there was, for the intended husband was a clergyman, and was present.

This brings us to the second proposed head of inquiry; namely, into the history of the law requiring the presence of a clergyman as proper or necessary at the celebration of a marriage, for the purpose of ascertaining **[303]** the character of his functions, in order that we may thus be in a condition to determine whether they can properly or effectually be discharged by one of the contracting parties.

This inquiry again divides itself into three branches: In respect of, first, the religious character of the ceremony; second, the notoriety and proof of marriage; and third, the prevention of such marriages as are forbidden by law.

First, is the clergyman required to be present only as an ecclesiastical entity representing the church, for the purpose of giving a religious character to the ceremony, and of invoking by ordained lips the blessing of Heaven upon the union; and is this all that he has to do? Because, if so, all this is supplied by the fact of one of the two contracting parties being ordained. If these are all the uses of the officiating clergyman, it is in vain to argue that a man cannot invoke a blessing upon his own marriage, in the form and substance of the nuptial benediction, as used from the earliest times. It seems inconceivable that such or any benediction can emanate in any respect from, though in terms it need not include, the human being who pronounces it; or that a blessing is anything more than a prayer to the Almighty that He will vouchsafe to bless those who are its object. If such be the office of the clergyman, it is in vain to say that marriage was formerly in this country, as now in the church of Rome, considered as a sacrament; and that a person could not administer it to himself; or to cite authorities to show that in the opinion of theologians a man cannot administer one sacrament, that of baptism, to himself. The contrary is established and enjoined as to the sacrament of the Lord's Supper. The contrary is main-**[304]**-tained by a host of authorities as to marriage itself, when considered as a sacrament.

The next view which has been suggested is, that the law requiring the presence of a clergyman as essential, is not sufficiently explained by the desire to introduce a religious element alone; and that it was intended that he should be present as a trustworthy witness to the contract, who might be able to form a judgment whether the parties take one another, freely and entirely, for man and wife, and to bear witness thereafter to the fact. If that view be adopted, a strong reason will suggest itself why the clergyman who marries the parties ought to be a third person; because the ceremony of a clergyman being present at his own marriage is not, in point of notoriety and the preservation of evidence, the same as, nor equivalent to, that which the law in this view of it would require, as generally necessary to the validity of a marriage; namely, the presence of a clergyman as a witness thereto.

The remaining view of the office of the clergyman suggests the inquiry, whether he has indeed but a passive part in the ceremony; so that although his presence is necessary as a witness, yet that, being present, he cannot prevent the parties from marrying one another, whatever may be the impiety or illegality of the proceeding; or whether, on the contrary, he really has an active duty or choice in this matter. Whether he may not require the proper steps to be taken to make the marriage regular, before he allows of its celebration? Whether, if a probable objection were urged to the marriage, and sufficient security given, he could effectually postpone it? Whether, if he knew of a "just impediment why the parties should not be joined together in holy matrimony," such **[305]** an impediment as before Lord Lyndhurst's Act (5 and 6 W. 4, c. 54), would have left the marriage valid for all civil purposes, unless and until it was annulled by a decree of the Court Christian, pronounced during the lifetime of the parties, and until then would have left them man and wife; he had authority to forbid the incestuous union, or possessed no means of repelling the profanation, except by taking flight before the words of consent were gabbled in his presence? In fine, whether the clergyman has power to prevent the marriage by dissent?

Should this question be answered in the affirmative, it will be obvious that the intended husband cannot properly be the person to marry the parties. It would be irrational to entrust the person whose interest it is to effect the marriage with the duty of saying whether it be fit that it should take place. It is no sound argument to say that a third person might neglect his duty by passing over objections to the regularity, decency, or other requisities of a properly conducted marriage, and

that if he did so, the parties might, notwithstanding, become man and wife. If the law demands the presence of an officer upon whom the duty is imposed of requiring the observance of the conditions under which the marriage ought to take place, it is not because that duty may be disregarded by the proper person to fulfil it, and yet the marriage stand good, and censure and punishment of the offender be the only consequence, therefore that the duty may be and is entrusted to a person whose interest it must be to disregard its fulfilment in every instance in which that could be efficacious.

We proceed with the object of ascertaining the true answers to these several questions; and in doing so, your Lordships are aware to how great an extent we are as-[306]-sisted and anticipated by the argument and the judgments in *The Queen* v. *Millis*, and also by those in the present case, both here and in the Court of Exchequer Chamber in Ireland. It is no part of our duty or our design to repeat what has already been better said by others; but it is necessary for us to make a general statement of what we conceive to be the law; to consider the authorities which have been relied upon as bearing more particularly upon the present case; and to state such new matter as we think worthy of consideration.

The general law of western Europe, before the Council of Trent, seems clear. The fact of marriage, namely, the mutual consent of competent persons to take one another only for man and wife during their joint lives, was alone considered necessary to constitute true and lawful matrimony, in the contemplation of both Church and State.

This is fully established by the authorities collected by Pothier in the treatise already referred to, part 4, chap. i., sec. 3., sub-sec. 31, p. 152: "De l'antiquité de la bénédiction nuptiale, et de la célébration du mariage dans l'Eglise, et si elles étaient nécessaires dans les premiers siècles pour la validité des mariages;" and sub-sec. 3, p. 156: "Du droit qui s'observait dans le douzième siècle et les suivants, jusqu'au temps du Concile de Trente, à l'égard des mariages clandestins; c'est-à-dire, qui n'étaient pas célébrés en face de l'Eglise." The author points out that the celebration of the marriages of christians in the face of the Church, and with the nuptial benediction pronounced by a priest (nubere in Domino), dates from the earliest christian times. He cites a passage from Tertullian, who lived in the second and third centuries, extolling the marriage "quod Ecclesia conciliat, confirmat oblatio, obsignat benedictio." In explanation of the origin of the nuptial benediction, he cites a passage [307] from St. Isidore of Seville, who lived in the fifth and sixth centuries, to show that this benediction, to which a certain peculiar efficacy appears to have been attributed, was a similitude of that given by the Almighty to our first parents: "Fecit Deus . . . et benedixit eis, dicens, Crescite, etc. Hâc ergo similitudine fit nunc in Ecclesiâ quod tunc factum est in Paradiso." In more modern times Jeremy Taylor seems to have had this figure present to his mind, though his application of it was different, when he wrote (Sermon on the Marriage Ring, vol. 4, of Jeremy Taylor's works, edition of 1848, p. 207):—"The first blessing God gave to man was society, and that society was a marriage, and that marriage was confederate by God himself, and hallowed by a blessing." His similitude for marriage is that of the spiritual union of Christ with his church; and he says, not that it ought to be *per Presbyterum*, etc., but that it ought to begin and end "*in Christo et in Ecclesiâ.*"

Pothier goes on to show, that these religious ceremonies were before the sixteenth century regarded in the light of pious usages of high importance, but not as essential to a valid marriage; and that even when regarded as a sacrament, marriage was held to be complete by the contract of the parties without the intervention of a priest: "Non seulement la bénédiction nuptiale, quoique pratiquée dans l'Eglise, n'était pas nécessaire pour que le contrat de mariage fût valable comme contrat civil, mais encore elle n'était pas plus nécessaire pour qu'il fût sacrement." (6 Pothier, s. 45, p. 154.) The same doctrine is repeated at pp. 157 and 160, where he also shows that to have been the doctrine of the Council of Trent itself as to past marriages.

We forbear from citing other authorities which can be consulted with equal advantage in the work of Pothier, [308] but there is one, remarkable from its especial reference to England, and, as Pothier cites it, to marriages in England,

and from its date, two centuries after the law of Edmund, and before there was time to forget its existence, which ought not to be omitted. It is the decretal of Alexander III., who was pope A.D. 1159 to 1181, to the bishop of Norwich, as follows:—"Ex tuis litteris intelleximus virum quemdam et mulierem sese invicem recepisse, nullo Sacerdote praesente, nec adhibitâ solemnitate quam solet Anglicanâ Ecclesiâ exhibere, et alium praedictam mulierem antè carnalem commixtionem solemniter duxisse et cognovisse; tuae prudentiae duximus respondendum quòd, si prius vir et mulier ipsa, de praesenti se receperint, dicendo unus alteri, ego te recipio in meam, et ego te recipio in meum: etiamsi non intervenerit illa solemnitas, nec vir mulierem carnaliter cognoverit, mulier ipsa primo debet restitui, quum nec potuerit nec debuerit post talem consensum alii nubere."

Even if there were no witnesses present at such a marriage, that created a difficulty of proof only, and did not affect its validity. Upon this Pothier is express; and he refers to the authority of the same pope, to be found in the *Corpus Juris Canonici, Decretal, Greg.* 9, lib. 4, *tit.* 3, *c.* 2:—"Quod nobis ex tua parte significatum est, ut de clandestinis matrimoniis dispensare deberemus, non videmus, quae dispensatio super his sit adhibenda. Si enim matrimonia ita occulte contrahuntur, quod exinde legitima probatio non appareat; qui ea contrahunt, ab Ecclesiâ non sunt aliquatenus compellendi. Verum si personae contrahentium hoc voluerint publicare, nisi rationabilis et legitima causa praepediat, ab Ecclesiâ recipienda sunt et comprobanda, *tanquam a principio in Ecclesiae conspectu contracta.*"

Whilst, however, it was thought unnecessary, and per-**[309]**-haps at first incompetent for the Church to nullify the effect of that which, in the view of a lawyer, was marriage, and, for centuries, in that of the Church herself a sacrament, though irregularly celebrated, yet the practice of clandestine marriages, that is to say, of marriages otherwise than by a priest in the presence of witnesses, was looked upon as odious. This idea, and the understanding of early times as to the part which the priest took in the performance of the ceremony, even when his presence was not absolutely essential, are well expressed in a work of great research, "*Martene de Antiquis Ecclesiae Ritibus,*" vol. 2, c. 9. art. 2: "De ritibus ad sacramentum matrimonii pertinentibus." "Ex his patet ecclesiam etsi quandoque toleraverit clandestina nunquam approbâsse matrimonia, sed quae publice in facie Ecclesiae coram testibus *confirmante pastore* celebrarentur."

The same writer, in another place, vol. 2, c. 9, art. 3, gives an account of the ceremony of marriage in ancient times, before there was any established ritual or usual form of words; and this passage throws light both upon the question what was the theory of marriage celebrated in the presence of a priest, and upon what was, at first, considered to be the essential element in such a ceremony. After minutely describing the espousals, which, as your Lordships are aware, were quite distinct from, and formerly often preceded, the marriage by a considerable interval, and at which, in the form referred to by Martene, the ring was given, he proceeds: "Constituto ad celebrandras nuptias die adveniente sponsus et sponsa benedicendi, a parentibus aut paranympho, qui, ait S. Augustinus (Sermo 293), erat amicus interior conscius secreti cubicularis, sistebantur sacerdoti ad portas ecclesiae, qui secundum quosdam eos interrogare debebat de fide quam profitebantur. Deinde datis sibi mutuo dextris *exigebat* **[310]** *ab utrisque consensum,* in quo totam sacramenti matrimonii essentiam reponebant antiqui. Inauditâ quippe inter eos erant illa verba parochi: 'Ego vos conjungo in nomine patris,' etc., in quibus aliqui ex recentioribus scholasticis formam hujus sacramenti constituunt, quae tamen decide-rantur in duobus antiquis ritualibus * * et in aliis pene omnibus quae a nobis postea exhibebuntur. Quibus adjungere possemus Constitutiones Richardi Episcopi Sarum, anno 1217, editas c. 56, in quibus haec lego: Item precipimus quod sacerdotes doceant personas contrahentes hanc formam verborum in Gallico vel in Anglico. 'Ego N. accipo te N. in meam.' Similiter et mulier dicat: 'Ego accipio te in meum.' In his enim verbis consistit vis magna et matrimonium contrahitur."

The Constitution of Lanfranc (A.D. 1076), referred to in *The Queen* v. *Millis,* laid stress upon the benediction only. We must, however, observe, that if this constitution, which of itself could not make or alter the law, and was, in fact, but the epitome of an old decretal (Selden, Uxor Ebraica, Book 2, c. 28, 2 vol. of Works,

col. 690, supposed Decretal of Evaristus), is to be read as pointing out the actual repetition of a blessing, to be, for civil purposes, essential to matrimony, it can, in our opinion, no more be considered as having been adopted into the law, or retained as part of it, when Lord Hardwicke's Act passed, than other such constitutions, which, like that of Durham (*post*), required the presence of three or four or several witnesses. For more respecting the nuptial benediction, its origin, when it was pronounced, and when not, and the religious duty of receiving it before the *consummation* of the marriage, we must refer to Selden, Uxor Ebraica, book 2, c. 28, vol. 2, col. 687 *et seq.*

The early history of Christian marriages seems, no **[311]** doubt, to point to the religious explanation of the presence of a priest, in order to superadd a blessing to the civil contract; though publicity and the presence of the congregation also appear to have at all times been considered important. It would be erroneous, however, to suppose that even in times prior to those of King Edmund, a consideration for the religious character of the ceremony was the only motive for such legislation. There were other reasons which led, in France, to the enactment of secular laws, to which we believe attention has not been called, for the prevention of marriages within the prohibited degrees; an object which the law of Edmund, so much discussed in *The Queen* v. *Millis*, also has expressly in view.

In those times, before the Council of Lateran, the prohibited degrees included numerous cases not now within them; and the strict enforcement of the law of the church as to marriages within certain limits of kindred and alliance was repugnant to national habits (see Decretal, Gregor 9, l. 4, t. 14, *De consanguinitate et affinitate;* and History of the Anglo-Saxon Church, vol. 2, p. 6). The prohibition at one time extended to the seventh degree, but it was found necessary from time to time considerably to limit its operation.

The law of Edmund in the tenth century (1 Ancient Laws, 257), which we here state for the sake of comparing it side by side with the others of a similar kind, was passed at a time when an extraordinary degree of confidence was placed in the testimony of the clergy, when the "word" of a bishop ranked with that of the king, and could not be gainsayed; when the priest was a thane, and his oath equal in value to those of 160 churls, whilst that of a deacon counted for but 60 (1 Sir F. Palgrave's Rise and Progress, 164, and 2 Kemble's **[312]** Saxons in England, 432); when, moreover, the clergy were the lettered class, and there was some truth in the saying, "*Nullus clericus nisi causidicus.*" At that time, therefore, the presence of a mass-priest was a pledge for the notoriety and certainty and also for the legality of what was done.

The law of Edmund, after describing the espousals and their effect, proceeds:—

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

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

To the same effect were the laws of Charlemagne (Emperor of the West, A.D. 800) and his successors, referred to by Pothier, part 4, c. 1, s. 3, "des lois qui ont requis pour la validité des mariages qu'ils fussent célébrés en face de l'Eglise;" from which it would appear that, whilst those laws were in operation, France, equally with England, furnished an exception to the general law of the Western Church.

The first which we cite is the 408th capitulary, which applies not merely to a first marriage, at which only was the nuptial benediction given, but also to subsequent marriages which were not considered worthy to be clothed with that blessing (6 Pothier, 155): "Ne Christiani ex propinquitate sui sanguinis connubia ducant, nec sine benedictione sacerdotis cum virginibus nubere audeant, neque viduas absque suorum sacerdotum consensu et conniventiâ plebis ducere praesumant." Upon which Pothier remarks, "Ces capitulaires comprenant dans une même défense les mariages entre parents, et ceux qui se con-**[313]**-tractent sans bénédiction nuptiale, ou au moins sans l'intervention de curé, il s'ensuit que cette défense était faite à peine de nullité."

He cites other laws of a like character, all of which were passed for the purpose of preventing clandestine marriages. The most remarkable is capitulary 179, book 7, where it is said: "Sancitum est ut publicè nuptiae ab his qui nubere cupiunt,

fiant, quia saepe in nuptiis clam factis gravia peccata. Et hoc ne deinceps fiat, omnibus cavendum est, sed prius conveniendus est sacerdos in cujus parochiâ nuptiae fieri debent, in ecclesiâ coràm populo, et ibi inquirere unà cum populo ipse sacerdos debet, si ejus propinqua sit an non . . . . Postquam ista omnia probata fuerint, et nihil impedierit, tunc, si virgo fuerit, cum benedictione sacerdotis, sicut in sacramentario continetur, et cum consilio multorum bonorum hominum, publicè et non occultè ducenda est uxor."

These laws were not, it is true, without their peculiarities. Martene, vol. 1, page 604, cited as a reason for the law just referred to, capitulary 179, book 7: "Quia inquit ex clandestinis conjugiis procreari solent caeci, claudi, gibbi et lippi, sive alii turpibus maculis aspersi." That reason, however, need not be understood as addressed altogether to superstitious fears, but as setting forth the evils believed to result from marriages between too near relations.

Another of these secular laws, adopted from the Visigoths, imposed a fine of 100 sous, or, in default of payment, the penalty of 100 lashes, upon such Christians as should contract matrimony without the nuptial benediction.

The Law of Capitulary, 179, book 7, is stated by Pothier to have been adopted and incorporated in the decree of a Gallic council held A.D. 909.

[314] It appears, therefore, that by this ancient legislation a valid marriage could only have been made with the assistance of a priest, whose duty it was, amongst others, to take care that the parties were not within the prohibited degrees, and not to marry them if they were, or if there appeared any other just impediment, "postquam ista omnia probata fuerint, et nihil impedierit."

Another place, in which we find the same object avowed, and the duty of the priest plainly expressed, is in the decree of the Council of Lateran (12th century); by which, however, the performance of the duty was not enforced by annulling the marriage when it was neglected, or even when no priest was present to perform it; except, it should seem, in one class of cases, namely, that of persons within the degrees in which marriage was prohibited by the Church, subject to dispensation, those being more extensive than the degrees in Leviticus. In such cases the Council of Lateran contemplated that persons ignorant of such impediment might become man and wife by contracting marriage *in facie Ecclesiae*, through the intervention of a priest, though without such a ceremony their union would not have been marriage. "Quum inhibitio copulae conjugalis sit in ultimis tribus gradibus revocata, eam in aliis volumus districte servari. Unde praedecessorum nostrorum vestigiis inhaerendo, clandestina conjugia penitus inhibemus, prohibentes etiam, ne quis sacerdos talibus interesse praesumat. Quare specialem quorundam locorum consuetudinem ad alia generaliter prorogando statuimus ut, quum matrimonia fuerint contrahenda, in ecclesiis per presbyteros publice proponantur, competenti termino praefinito, ut infra illum, qui voluerit et valuerit, legitimum impedimentum opponat, et ipsi Presbyteri nihilominus investigent utrum aliquod impedimentum obsistat. Quum autem apparuerit probabilis **[315]** conjectura contra copulam contrahendam, contractus interdicatur expresse, donec, quid fieri debeat super eo, manifestis constiterit documentis. 1. Si quis vero hujusmodi clandestina vel interdicta conjugia inire praesumpserit in gradu prohibito, etiam ignoranter, soboles de tali conjunctione suscepta prorsus illegitima censeatur, de parentum ignorantiâ nullum habitura subsidium, quum illi taliter contrahendo non expertes scientiae, vel saltem affectatores ignorantiae videantur. Pari modo proles illegitima censeatur, si ambo parentes, impedimentum scientes legitimum, praeter omne interdictum, etiam in conspectu ecclesiae contrahere praesumpserint."

It is clear, therefore, that in this, as in the earlier laws to which we have called attention, one object of the presence of the clergyman was to prevent marriages within the prohibited degrees; and, accordingly, that a duty was imposed upon him, if present, to prohibit, and, so far as in him lay, to prevent such marriages.

The same object was one of those contemplated in the constitution of Richard de Marisco, Bishop of Durham, and Lord Chancellor, A.D. 1217 (1 Wilkins, Concilia, 581, 582), which contains the substance of the present rubric. The first article upon this subject, headed, "De matrimonio contrahendo," sets forth the dignity and advantage of marriage as "Sacramentum Christi et Ecclesiae." The next, "Ne matrimonia contrahantur in tabernis," provides for its decent celebration, "cum honore et cum reverentiâ, et non cum risu, non joco, non in tabernis, pota-

tionibusve publicis, seu commessationibus. Ne quisquam annulum de junco vel quacunque vili materiâ, vel pretiosa jocando manibus innectat mulierecularum, ut liberius cum eis fornicetur: ne dum ce jocari putat honoribus matrimonialibus se abstringat. Nec de caetero alicui fides detur de matrimonio contrahendo, nisi coram sacerdote, **[316]** et tribus vel quatuor personis fide dignis, propter hoc convocatis, ita quod nullatenus per verba de praesenti contrahant nec post matrimonium per verba de futuro contractum carnaliter commisceantur, nisi rite canonicis denunciationibus praemissis, tam ubi mas quam ubi foemina retro conversati sunt." Persons violating this article were to be punished as disturbers of the peace of the Church; and it was directed to be openly read to the people every Sunday. The next article, "De formâ matrimonii contrahendi," is in the same terms as the constitution of Richard Poere, the Bishop of Salisbury of the same date (1 Wilkins, 599), mentioned in the passage of Martene already cited: "Item praecipimus quod sacerdotes praecipiant et doceant personas contrahentes hanc formam verborum in Gallico vel Anglico, 'Ego accipio te N. in meam;' similiter et mulier dicat, 'Ego accipio te N. in meum.' In his enim verbis consistit vis magna, et matrimonium contrahitur." It then directs that no priest shall marry any, "aliquas conjungere personas matrimonialiter," without banns being published three times, which was to be done gratuitously; that a priest should not marry unknown persons, "nisi prius ei legitime constiterit quod personae legitime sint contrahendae;" and if one of them were unknown, then not without letters testimonial certifying that such person could lawfully marry, and that banns had been published in his or her parish. The article at the foot of the same page (582), "ne matrimonia sine termino praefinito contrahantur," contains the substance, almost in the words of that part of the decree of the Council of Lateran already stated, beginning at the words "quum matrimonia."

These constitutions serve to show the very origin of the ancient services out of which that in the Prayer Book was mainly composed.

[317] We need do no more than refer to the subsequent constitutions to the same effect collected in Lyndwood, 271 *et seq.*

Before we proceed to a consideration of the rubric, it will be convenient to inquire whether any light is thrown upon the subject by the decree of the Council of Trent, to which we must direct particular attention, because of so much reliance having been placed upon it by Dr. Gayer, in his able argument for the Plaintiff.

The "Decretum de Reformatione Matrimonii" was passed at the 24th session of that council held in 1563, and it was carried against the opinion of 56 prelates, who held that the Church had no power to nullify the effect of a sacrament. The decree is prefaced by a statement of the nature of matrimony according to the views of the Roman Catholic Church, and by 12 canons respecting marriage, divorce, and celibacy, and the power and exclusive jurisdiction of the Church concerning them. The decree itself commences by stating as indubitable that clandestine marriages made with the free consent of the parties are valid both in law, and also, it should seem as sacraments, "Rata et vera esse Matrimonia" (6 Pothier, 157), so long as the Church does not hold them to be null. And it anathematises those who assert the nullity of such marriages, or of marriages of children without the consent of their parents; stating, nevertheless that Holy Church had always, for the best reasons, detested and prohibited such unions. It goes on to recite the inefficacy of former prohibitions, and the evils which had arisen from allowing of marriages contracted by the mere consent of the parties; especially that husbands had left their first wives, with whom they had secretly contracted marriage, of which there was no evidence forthcoming, and then publicly married others, with whom they lived in perpetual adultery: "Cui malo quum ab ecclesiâ, **[318]** quae de occultis non judicat, succurri non possit, nisi efficacius aliquod remedium adhibeatur, idcirco," etc.

The decree goes on to direct (*praecipit*), that for the future, before any marriage is contracted (*contrahatur*), banns shall be published on three continuous feast days in church during Divine service; which having been done, "Si nullum legitimum opponatur impedimentum, ad celebrationem matrimonii in facie Ecclesiâ procedatur, ubi parochus, viro et muliere interrogatis, et eorum mutuo consensu intellecto, vel dicat, 'Ego vos in matrimonium conjungo in nomine patris, et filii, et

spiritus sancti,' vel aliis utatur verbis, juxta receptum uniuscujusque provinciae ritum."

It then provides that, in case there is probable cause to suspect that the banns may be maliciously forbidden, then they shall be published but once: "Vel saltem parocho et duobus vel tribus testibus praesentibus matrimonium celebretur." In such case, the banns are directed to be published before the consummation of the marriage, unless the ordinary, in his discretion, dispense with them; in other words, unless the marriage be by license. Then follow the operative words of the decree, by which marriages are declared to be null, unless the conditions therein specified be complied with, which conditions being satisfied, a marriage is by construction valid, notwithstanding that in other respects the decree may be disregarded: "Qui aliter, quam praesente parocho, vel alio sacerdote de ipsius parochi seu ordinarii licentiâ, et duobus vel tribus testibus, matrimonium contrahere attentabunt eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit prout eos praesenti decreto irritos facit et annullat."

The decree then imposes penalties upon persons taking part in any such contract where the clergyman and the **[319]** proper number of witnesses are not present. It exhorts married persons not to cohabit before receiving the priestly benediction in church (*in templo*), which blessing only the *parochus*, or a person licensed thereto by him, or by the ordinary, is to give. It forbids the clergyman to marry persons without the consent of the *parochus*. It directs the keeping of a marriage register. It exhorts the parties before they contract marriage, or at least three days before consummation, to confess and receive the Sacrament. And it earnestly recommends (*vehementer optat*) the continuance of the laudable customs and ceremonies then used in any province, in addition to those which are thereby prescribed. The chapter relating to this subject gives directions for its promulgation in each parish, and concludes by enacting that it shall come into force thirty days after such publication.

Upon the construction of this decree, it has been holden that, provided the marriage takes place *per verba de praesenti*, in the presence of the *parochus* and two witnesses, though the priest take no part in the ceremony, and even dissent from and reluct against it, the terms of the decree are satisfied, and the marriage is valid.

This is the result of the passages which were referred to in the argument from *Sanchez de Matrimoniis* and *Zallinger's Institutiones Juris Ecclesiastici*.

To the same effect is the passage cited in argument and referred to, with approbation, in the judgment of the present Lord Chancellor, in *The Queen* v. *Millis* (10 Clark and Fin. 753), which clearly expounds the scope and intention of the decree, and the office of the priest thereunder. "Fernando Walter, now a professor in the University of Bonn, in his Treatise on the Canon Law, a work highly es-**[320]**-teemed on the continent of Europe, speaking of the decree of the Council of Trent on this subject, says, the provision is new that both parties must declare their intention before their parochial minister, and, at least, two witnesses; this form is declared so essential, that without it the marriage is altogether void; but yet the object is only to secure a *trustworthy witness*, in order to the precise ascertainment of the marriage; wherefore the persons mentioned need not have been expressly invited to be present; nay, even the opposition of the parochial minister does not prevent the validity of the marriage, if he has merely heard the declaration. He goes on to explain the difference between a regular marriage before a priest, and a clandestine marriage without a priest, but considering them equally effectual. He says, 'Marriage is a contract which ought, according to the ancient usage, to be confirmed by the priestly benediction; and, properly, this ought to be given by the proper parochial minister, or some one authorised by him according to the rules of the Church. Other ceremonies are also to be observed. None of all this, however, is essential to the validity of the marriage.' The decree of the Council of Trent respecting the solemnization of marriage requires the presence of the parish priest, or some other priest specially appointed by him or the bishop; but, even under this decree, the priest is present merely as a witness; it is not necessary that he should perform any religious service, or in any way join in the solemnity."

This law was acted upon in *Herbert* v. *Herbert* (2 Hagg. Cons. Rep. 263).

Now we must observe that, although the decree of the Council of Trent, and the decisions upon its construction, are in no respect authority in this country, yet, so far as **[321]** they proceeded upon any principle generally recognised in Christendom, we should be prepared to consider them with attention, as guides in any obscure and difficult case. So far, however, as the construction of that decree by the canonists depends upon its form and language, such construction can here give us no assistance.

It appears to us that the construction put upon the decree turned upon the terms of the nullifying words which we have already pointed out as forming the keystone of its enactments. Such construction could not have proceeded upon any doubt as to the power of the church to make the prescribed ceremony, or the active intervention of the priest, essential to the validity of a marriage, because the absolute control of the church over that relation was laid down in the twelve canons immediately preceding the decree, even to the extent of enabling her by Canon 3 to create new prohibited degrees, and to dispense with such prohibitions; and, by Canon 4, to constitute "*Impedimenta matrimonium dirimentia.*"

Moreover, we must observe that if the decree, and the authorities upon its construction, establish anything, it is that there must be three witnesses to a marriage, and that one of those witnesses must be the priest. If the Church of Rome were to-morrow to change her views as to the celibacy of the clergy, and to revoke the ninth canon of the Council of Trent, and the decrees of the Councils of Lateran, annulling the marriages of the clergy, the decree of the Council of Trent in other respects remaining in force, and the question were to arise, whether the priest could take a wife in the presence of two lay witnesses only, he himself acting the double part of husband and clerical witness, it might well be thought that the decree was not complied with, because it obviously **[322]** contemplates three witnesses, one of whom is to be the *parochus*, or another priest appointed by him or the bishop. That case would nearly resemble the present. Those which have actually occurred, when attentively considered, do not appear to us to approach it.

This will still further appear when we call attention to what is equally relevant as the decree of the Council of Trent, namely, the legislation which took place in France soon after that council, and the very different construction which that legislation received.

The laws of Charlemagne and his successors had at that time fallen into desuetude and oblivion (6 Pothier, 156), a state theoretically impossible in our more positive institutions. The decree of the Council of Trent, notwithstanding the efforts of the pope and the clergy, was, for political reasons, not received into France. The example which it set was, however, soon followed there. The 40th article of the ordonnance of Blois, in the time of Hen. III. (King of France, 1574 to 1589), enacts as follows: "Avons ordonné que nos sujets ne pourront valablement contracter mariage sans proclamations précedentes; après lesquels bans, seront épousés publiquement; et pour témoigner de la forme, y assisteront quatre témoins dignes de foi, dont sera fait registre, etc."

This was followed by an edict of Hen. IV. (A. D. 1606), which declared that marriages which were not made and celebrated in the church, and with the solemnities required by the ordonnance of Blois, should be null and void. Then came the declaration of Louis XIII., 1639, art. 1, which ordained that the ordonnance of Blois should be strictly observed, and that, in its interpretation, it should be deemed that there must be present four witnesses, with the parish priest, who was to receive the consent of the parties, and marry them, "qui recevra le consentement **[323]** des parties, et les conjoindra en mariage, suivant la forme pratiquée en l'Eglise."

These laws were interpreted to mean, that the priest must not only have been present, but must have taken an active part, must have consented to marry, and have married the parties, in order to make a valid marriage. "Cette présence du curé requise par nos lois pour la validité des mariages, n'est pas une présence purement passive; c'est un fait et un ministère du curé qui doit recevoir le consentement des parties, et leur donner la bénédiction nuptiale. Cela résulte des termes de la déclaration de 1639, ci-dessus rapportée, où il est dit que le curé recevra le consentement des parties, et les conjoindra en mariage, suivant la forme pratiquée

en l'Eglise. Il ne suffirait donc pas, pour la validité du mariage, que les parties allassent trouver à l'Eglise leur curé, et qu'ils lui déclarassent qu'ils se prennent pour mari et femme; il faut que le curé célèbre le mariage."

Pothier adds, in explanation of why the clergyman was not considered by the law of France a simple witness, but as having an active duty to perform in marrying the parties (353): " Ce que nous avons dit, ' que le prêtre qui célèbre le mariage n'est pas un simple témoin, et qu'il y exerce un ministère,' n'est pas contraire à ce que les théologiens enseignent, ' que les parties qui contractent mariage sont elles-mêmes les ministres du sacrament de mariage.' Il est vrai qu'elles en sont les ministres quant à ce qui est de la substance, et qu'elles se l'administrent reciproquement par leur consentement, et la déclaration extérieure qu'elles se font de ce consentement; mais le prêtre est, de son côté, le ministre des solennités que l'Eglise et le Prince ont jugé àpropos d'ajouter au mariage pour sa validité, et il est préposé par l'Eglise et par le Prince pour exercer ce ministère."

[324] Such was the state of the law of marriage in France up to the time of Pothier; and in this discussion it makes an equipoise with the Council of Trent.

It is not necessary that we should notice the more modern laws by which marriage is treated purely as a civil contract, and required to be in a prescribed form. The validity of a marriage under such laws must depend upon the express language of the legislator. We may, under this head, class the case in 1807, cited from the " Causes Célèbres," vol. 1, p. 295, and that referred to in the annotated edition of the Code Civil, by M. Gilbert, Law 165, n. 11, from which we have not derived much assistance.

It remains to make some more particular remarks upon our own law and practice. In doing so, it would be a useless task to pass in review the cases cited in argument, and all of which, with the exception of *Maxwell* v. *Maxwell* (Milw. Ecc. Rep. (Ir.) 290, A.D. 1832), and *Legeyt* v. *O'Brien* (*id.* 225, A.D., 1834), before a very learned Judge, the late Dr. Radcliff, and *Harrod* v. *Harrod*, before Vice-Chancellor Wood (A.D. 1855) (18 Jur. 853; 1 Kay and Jo. 4), were stated, marshalled, and criticised in the case of *The Queen* v. *Millis*. A comparison of the judgment of Lord Lyndhurst and that of the present Lord Chancellor will supply all that can be said on this part of the subject. As to those authorities, however weighty they may be, which, in *The Queen* v. *Millis*, were, in the result, disregarded, it would be useless to cite them again. With respect to those which it left untouched, they may be considered as showing that, notwithstanding some early decisions, it had come to be considered as law, that, before Lord Hardwicke's Act, a marriage might be valid, though it departed from the rubric in respect of being celebrated in a private house instead of the Church; **[325]** with no witness other than the clergyman, instead of in the face of the congregation; with no person to give the bride away; without banns or a license; without the use of a ring; without the repetition of the whole service; provided only that the parties took one another for man and wife by words in the present tense before a priest, or since the Reformation, for the reasons explained by Lord Lyndhurst in *The Queen* v. *Millis*, a deacon. There is not, however, any authority in our law, of which we are aware, that if the clergyman refused to receive the consent, or allow of the marriage taking place in his presence, the parties could, in spite of him, take advantage of his being present to marry one another.

That was the link which the argument for the Plaintiff below sought to supply, by urging that as all the duties imposed by law upon the clergyman might be neglected without invalidating the marriage, therefore the consideration that the proposed husband, as being an interested party, was not likely to perform those duties with impartiality or effect, was immaterial; and that the rubric might also be disregarded or modified, in so far as it contemplates that the officiating minister shall be a third person.

This leads us to consider what is the essential part of the marriage service. It seems probable that the service in the Prayer Book is substantially the same as that which was in use for more than two centuries before the Reformation, so far as the end of the address to the people following the formula, " I, M., take thee, N.," etc., and " I, N., take thee, M.," etc. Whether any part of it was in use before the 13th century is a question upon which historians are not agreed.

Doctor Lingard (Anglo-Saxon Church, vol. 2, pp. 9 and 10) states that in early times no form of words was **[326]** used at the nuptials, and that there was no express

contract of marriage at the ceremony, of which he gives a detail (much to the effect of one of those in Selden, Uxor Ebraica, book 2, chapter 27, without the words of the marriage ceremony); but that the consent of the parties was only signified by the giving and receiving of the ring at the church door in the presence of the priest, who blessed it, and by afterwards attending in the church the celebration of the Eucharist, during which the nuptial benediction was pronounced. He states that there is no trace of any form of marriage contract in ancient sacramentaries previous to the close of the twelfth century; and that the earliest mention of any form is in the constitutions of the two English prelates already mentioned, Richard Poere, or Poore, Bishop of Salisbury (A.D. 1217 to 1228), and Richard de Marisco, Bishop of Durham during the same period.

Sir Francis Palgrave ("Rise and Progress of the Commonwealth," part 2, p. cxxxv.), however, concludes, from the peculiar language, rhythmical form, and general use of the *verba de praesenti*, that they represent an Anglo-Saxon oath, in use before Christian times, as the civil ceremony of marriage, to which the Church has since added the blessing; and that, "notwithstanding the labours of Augustin, it is to be suspected that the ancient wedding form is yet retained in our ritual, where the wife is taken 'to have and to hold,'" etc.

The oldest known forms of the English marriage service, according to the uses of Salisbury and York, which agreed in substance but differed in detail, will be found at large in Selden, "Uxor Ebraica," book 2, chapter 27, 2d vol. of works (3d if bound in 6 vols), column 676; and those parts of the rituals from which the present service was composed will be found in a convenient arrangement, side **[327]** by side with it, in a modern work, 2 Palmer's "Origines Liturgicae," page 212. The double form of consent is explained by the fact, that the early part of the service, from the preface or banns to where the woman says, "I will," consists of the espousals, which formerly used to take place some time before the day of the solemnization of the marriage. In the introductory part of the ceremony the expression which in the Prayer Book stands thus: "Dearly beloved, we are gathered together here in the sight of God, and in the face of this congregation, to join, etc.," stands in the ancient form, "coram Deo, angelis, et omnibus sanctis ejus, *in facie ecclesiae*, ad conjungendum," etc.

This form of banns (banna) was to be spoken in the mother tongue, and it admonished, as in the present form, any one who might know of cause or just impediment to declare it.

Then followed a similar admonition to the man and woman, the terms of which are remarkable, as even more distinctly than the present form indicating a discretionary power in the minister to prevent an improper marriage. "Also I charge you both, and eyther be yourselfe as ye wyll answer before God at the day of dome, that yf there be any thynge done pryvely or openly betwene yourselfe, or that you know any lawful lettyng why that ye may not be wedded togyder at thys tyme, say it nowe, *or we do any more to this matter.*"

Then follows a rubric in the terms of that in the Prayer Book, directing that if any one puts forward a just impediment, and gives security to prove it, "et ad hoc probandum cautionem praestiterit, differantur sponsalia quousque rei veritas cognoscatur."

The questions are then put, to which the man and woman answer, "I will," and so end the espousals.

The ancient form proceeds to direct that the woman be **[328]** given away by her father or friends, and that her husband shall plight her his troth "*per verba de praesenti*," saying after the priest.

The most remarkable difference between the intermediate and more modern forms of those "*verba de praesenti*" is in the substitution of the words "according to God's holy ordinance" for the words, "if holy Chyrche it wol (or wel) ordeyne." These latter words are considered by Sir Francis Palgrave to have been added in early Christian times to the formula, which, in his opinion, claims a more remote antiquity.

This, the most significant portion of the marriage service, stood as follows in the ancient rituals: "Deinde detur foemina a patre suo, vel ab amicis ejus. Vir eam recipiat in Dei fide, et suâ servandam, sicut vovit coram sacerdote, et teneat

eam per manum suam dexteram in manû suâ dexterâ, et sic det fidem mulieri per verba de praesenti, ita dicens docente sacerdote—' I, M., take the, N., to my wedded wyf, to have and to hold, fro this day forwarde [at bedde and at borde, for fairer for fouler (York use)], for bettere for wors, for richere for porere, in sicknesse and in hele: till death us departe [if holy Church it wol (or wel) ordeyne (not in York form)], and thereto I plight the my trouthe.' Manum retrahendo. Deinde dicat mulier docente sacerdote, ' I, N., take the, M., to my wedded husbonde, to have and to hold fro this day forward, for better for wors, for richer for porere, in syknesse and in hele, to be bonere and buxome (biegsam, obedient), in bedde and at borde, tyll dethe us departe, if holy Church it woll (or well) ordeyne, and therto I plight the my trouthe.' "

Then followed the giving of the ring, and the blessing thereof.

[329] Anciently up to this point the marriage was celebrated at the door of the church, " *ad ostium ecclesiae.*" The parties then entered the church, and after the thanksgiving and prayer the eucharist was celebrated, and the solemn benediction was given.

That part of the service in which the minister joins the right hands of the parties together, and says, " those whom God hath joined together let no man put asunder," is ancient, and it is stated by Mr. Palmer to be perhaps peculiar to the Church of England. It is observable that the authors of this form appear to have carefully avoided the style " *ego vos conjungo,*" adopted at the Council of Trent.

The address to the people which follows, contains an explanation of the preceding service, and points out the distinction between that which is essential, and that which is only declaratory or formal; and with it we may conclude our citations from the Book of Common Prayer, " *Here the minister shall say unto the people* (of whom before 1754 there need have been none), forasmuch as M. and N. have *consented together in holy wedlock*, and have witnessed the same before God and this company, and thereto have given and pledged their troth, either to other, and have *declared* the same by giving and receiving of a ring [and of gold and silver], and by joining of hands, I *pronounce* that they be man and wife together, in the name," etc.

This is almost word for word taken from the ancient Latin Form, Selden, Uxor Ebraica, book 2, c. 27, v. 2, col. 683.

If it be our duty to answer a question raised during the argument, and to say at what part of the service the marriage is knit for civil purposes, we answer, in the words of the 39th section of Littleton, " after affiance and **[330]** troth plighted between them." This period before the solemn nuptial benediction which was afterwards pronounced inside the church, was that at which dower " *ad ostium ecclesiae* " might have been assigned; and according to the commentary, Co. Littleton, 34a, that could, by the better opinion, only have been assigned " after marriage solemnized." The subsequent giving of the ring, and joining of hands, and publication of the fact of marriage by the minister, are in their nature, and are stated to be, symbolical and declaratory of a marriage which has already taken place by the consent of the parties. The blessing is as of persons who have already consented together in wedlock, and anciently, as well in England as abroad, the nuptial benediction was given only at a first marriage; Selden, *ubi supra*, col. 678. The rest of the service consists of thanksgiving, exhortation, and prayer.

Lest, however, there should by possibility any mischief result from our expressing this opinion, we must protest against its being supposed to be, in our view, either wise or right to leave out any part of the service.

The Rubric gives directions with reference to marriages by banns only, and therefore must be capable of modification to suit the case of marriage by license. This may explain why those circumstances which were to accompany a marriage by banns, but which might be dispensed with in the case of a marriage by special license, amongst others, celebration in a church by the minister of the parish, in the presence of the congregation, had, before the Marriage Act, come to be considered as non-essential, the want of a dispensation for such purpose having been before Lord Hardwicke's Act treated as an offence against the ordinary, and, therefore, only as an irregularity. The want of a person to give **[331]** away the bride is not visited by the Rubric or by the general law with any consequences. The omission of the

giving of the ring, and the subsequent part of the ceremony, may, for reasons already given, be considered for civil purposes non-essential. An omission by the minister to give the proper warning would be his fault, and the Rubric does not profess to visit that upon the parties.

These considerations may explain in what manner, consistently with *The Queen* v. *Millis* [10 Cl. and F. 534], the decisions and dicta as to the validity of irregular marriages, which have varied in those several respects from the prescribed and accustomed forms, may still be law, may still be considered as legitimate applications of the rule which seems to have pervaded the law of marriage, viz., that directions as to the manner, and even prohibition under a penalty other than nullity, do not necessarily imply nullity; a rule acted upon since *The Queen* v. *Millis*, in *Catterall* v. *Catterall* (1 Robertson, 580. In the report of this case in Robertson, a "not" seems to have been omitted by mistake, in the second page of the judgment, p. 582, l. 9).

The Rubric, explained and confirmed as it is, can, however, hardly mislead us as to the duties of the minister, who, it appears, must be present, or as to the character in which he attends; and it abundantly indicates that the duties are other than those of a mere bystander, and that the character in which the minister attends is not only that of a witness to the contract, but that of a functionary entrusted with the duty of preventing the marriage from taking place, if a just impediment be brought to his knowledge. The evidence of such an impediment is left to the knowledge of the minister himself, to the conscience of the parties, and to the unen-**[332]**-forced interference of third persons. The parties are not made answerable for the performance of the minister's duty at the penalty of their marriage; but the duty exists, and its character is such that the person to perform it ought to be one other than either of the interested parties.

Had the case been *res nova*, we might have thought that the law of Edmund, the Rubric, and other indications that by the law of England a priest was to be present at a marriage, were but reflections of the general law of the Church, by which, from the earliest times, the intervention of a priest had been inculcated, and from time to time enforced by penalties, though never before the Council of Trent, by nullifying the marriage at which no priest assisted.

That view was presented and considered in *The Queen* v. *Millis*, and it raised a question worthy of all the zeal, learning, and genius which it called forth; but that view was not adopted in the result, and it is not competent for us to restore it. It is to be assumed, for the purpose of to-day, that England, from time immemorial, divided from the Church, held the presence of a priest to be essential. And whatever hardship such a law may, in the course of years, have wrought to dissenting bodies, and also to British subjects in the colonies and in foreign countries, where no priest could be procured, if the law was ever rightly held to apply under such circumstances (compare *Catherwood* v. *Caslon*, 13 Meeson and Welsby, 264, *Catterall* v. *Simpson*, 1 Robertson, 304, and *Catterall* v. *Catterall*, id. 580; and see *Maclean* v. *Cristab*, Perry's Oriental Cases, 75), as to which we say nothing; those hardships (now mitigated by numerous statutes passed before and since the decision in *The Queen* v. *Millis*) were very unlikely to have been foreseen at the time when the law, **[333]** assumed to exist, must have been established. It cannot with justice be said, that at that time it was either an unintelligible or irrational law, nor that the objects which it had in view, namely, the prevention of unlawful marriages, and the preservation of evidence of those which should take place, besides the addition of a religious sanction to the duties which spring from the relation of man and wife, are either obscure or even less important at the present moment than they were ten centuries ago.

The law assumed to exist appears to us, for the reasons which we have stated, to require, that, equally in the case of the clergy as of the laity, marriage in this country should (in the absence of express statute), take place in the presence and with the assent of a clerk in holy orders, who must be a third person, and whose duty it is to prevent or put off the marriage if there be opposed a just impediment; and who, in case he allows of its proceeding, is then, in the primary sense of the word, to marry the parties by receiving their mutual consent to become man and wife.

If just exception be made to the length at which we have stated our unanimous

opinion, and the reasons upon which it is founded, our excuse must be looked for in the unaccustomed nature of the case, and the grave importance of the general subject; nor are we ashamed to own that our minds fluctuated during the discussion, and that we deliberated with more than ordinary anxiety and caution, before we felt constrained to be of opinion, that the act of competent persons who in fact contracted with one another to become man and wife, by a ceremony as binding upon them in conscience (with reverence be it spoken) as if an archbishop had pronounced the blessing, was, for reasons which still affect the security of titles, and the peace of families, unavailing in point of law.

[334] We, that is to say, my brothers Byles and Hill, and myself, being the only Judges who were present during the whole of the argument, thus answer the question in the negative.

The Lord Chancellor (Lord Campbell) after stating the facts of the case (April 22), said:—This appeal in two preceding sessions was most elaborately and learnedly argued on both sides at your Lordships' bar before the English judges, who were summoned to assist your Lordships with their advice, and who have favoured us with an opinion which displays extraordinary research, and will hereafter be considered a repertory of all the learning to be found in any language upon this important subject.

My Lords, had the present case been brought here by writ of error previously to the decision of this House in the year 1844, in the case of *The Queen* v. *Millis* (10 Clark and Fin. 534), I should not have hesitated in advising your Lordships to affirm the judgment in favour of the validity of the marriage and the legitimacy of the Respondent. The special verdict sets out a proved contract of marriage *per verba de praesenti*, intended and believed by the parties to make them husband and wife without any farther ceremony. The effect of such a contract would have depended on the common law of England respecting the constitution of marriage before Lord Hardwicke's Act, which passed in the year 1753; and, according to this law, I should have said, without any regard being had to the fact of the husband being a priest episcopally ordained, this was *ipsum matrimonium*, conferring on the parties, and insuring to their children, all the civil rights flowing from a valid **[335]** marriage. Without the intervention or presence of any priest such a contract certainly amounted to an indissoluble and perfect marriage by the canon law, which was understood to have so far been adopted and acted upon by all the countries belonging to the Western Church, till it was modified by the decree of the Council of Trent, requiring, on pain of nullity, that at the celebration of the marriage there should be present the parish priest, or the bishop of the diocese, or a priest appointed to represent one of them. So strongly was the maxim, "*consensus facit matrimonium*," understood to be the universal law in Christendom, that a large minority of the bishops assembled in the Council of Trent protested against the power of the Church to alter it, and the old canon law was still in force in every Roman Catholic state in which the decree of the Council of Trent has not been received. England, having been for so many ages after the coming of St. Augustin under the spiritual dominion of the pope, marriage, as a sacrament, was considered a matter of spiritual jurisdiction, on which there was an appeal from the Ecclesiastical Courts of England to the pope.

By the research of the Judges, whom we have recently consulted, instances have been discovered of this mode of proceeding with respect to the validity of English marriages as early as the pontificate of Pope Alexander III., between the years 1159 and 1181, in which the validity of such marriages by a contract *per verba de praesenti*, without the presence of a priest, was decreed by his holiness; and we know from the case of Hen. VIII. himself, that such appeals were conducted according to familiarly recognised procedure down to the time of the Reformation. It would have seemed very strange, therefore, if, in England this sacrament had been governed by **[336]** peculiar rules unknown to the Western Church and its supreme head.

But we had the authority of Lord Stowell, one of the greatest of jurists, that, till Lord Hardwicke's Act, the canon law was the law of England respecting the constitution of marriage, and the same doctrine had been sanctioned by a long succession

of our most distinguished common law judges, Lord Hale, Lord Holt, Lord Kenyon, Lord Ellenborough, Lord Chief Justice Gibbs, and Lord Tenterden.

However, it must now be considered as having been determined by this House, that there could never have been a valid marriage in England before the Reformation without the presence of a priest episcopally ordained, or afterwards, without the presence of a priest or of a deacon.

The chief ground of this decision was the ordinance of a Saxon king in the year 940, requiring that " at nuptials there shall be a mass priest, who shall by God's blessing bind their union " (the complete sentence is " their union to all prosperity "). This, if nullifying all marriages not so solemnised, seems to nullify marriages by a deacon, who is not a " mass priest " more than the sexton. Many other admonitions may be found against irregular and clandestine marriages. The Church, no doubt, wished that marriages should be solemnised *in facie ecclesiae*, and that a priest should be present for the laudable purpose of seeing that the parties to be married were not within the prohibited degrees, and that banns had been proclaimed, or a proper license, with the consent of parents and guardians, had been obtained from the ordinary; and the Church farther wished that, on this auspicious occasion, a priest should attend to exhort the faithful to testify, by a liberal contribution, the sense of their obligation to their **[337]** spiritual guides. But down to the decree of the Council of Trent, the canons on this subject were merely directory without any nullifying clause, and the marriage, although irregular and clandestine, was valid, if the contract was proved to have been solemnly entered into between the parties *per verba de praesenti*. Marriage was considered a sacrament; but, like baptism, and some other of the seven sacraments, it might be administered in cases of urgency without the intervention of a priest. Indeed, the decision of *The Queen* v. *Millis* allowed that the contract, *per verba de praesenti*, established between the parties indissolubly the relation of husband and wife, insomuch that if either of them married again, the second marriage was to be dissolved as bigamous and void, and the bigamist party might be ordained to celebrate marriage with the first and true spouse in the face of the Church.

My Lords, the decision in *The Queen* v. *Millis*, that unless a priest, especially ordained, was present at the marriage ceremony, the marriage was null and void for all civil purposes, and the children of the marriage were illegitimate, seemed to me so unsatisfactory, that I deemed it my duty to resort to the extraordinary proceeding of entering a protest against it on your Lordships' Journals.

This proceeded not from any approbation of the canon law with respect to the contract of marriage, or from any wish ever to see it restored. I consider it most unjust and tyrannical that an invariable form of celebrating a valid marriage should be indispensably required, any part of which is contrary to the religious feelings of any class in the community; but I have always been of opinion that to constitute this, the most important of all contracts on which society itself depends, there ought to be a public form of celebration to which no reasonable person can **[338]** object, admitting, by means of registration, of easy, certain and perpetual proof; the addition of a religious solemnity being highly desirable, although not absolutely necessary. Nor do I at all yield to the objection that marriage, as a civil contract, may not properly be regulated by human laws. I deprecate the expression of parties being " married in the sight of God," if the marriage is not recognised by the law of the country in which they live. Of a person pretending to be so married, I say, " *Conjugium vocat, hoc praetexit nomine culpam.*" But I wished the old established law to be observed till it was constitutionally altered.

If it were competent to me, I would now ask your Lordships to reconsider the doctrine laid down in *The Queen* v. *Millis* [10 Cl. and F. 534], particularly as the judges who were then consulted, complained of being hurried into giving an opinion without due time for deliberation, and the Members of this House who heard the argument, and voted on the question, " That the judgment appealed against be reversed," were equally divided; so that the judgment which decided the marriage by a Presbyterian clergyman of a man and woman, who both belonged to his religious persuasion, who both believed that they were contracting lawful matrimony, who had lived together as husband and wife, and who had procreated children while so living together as husband and wife, to be a nullity, was only pronounced on the

technical rule of your Lordships' House, that where, upon a division, the numbers are equal, *semper praesumitur pro negante.*

But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente*, and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and supreme Court of Appeal for **[339]** this empire, must be taken for law till altered by an Act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.

Assuming the law to be settled, that to constitute a valid marriage by the common law of England, there must have been present a clergyman in orders conferred by a bishop, the question now to be determined is, "Whether, the bridegroom being such a clergyman, and there being no other clergyman present, a valid marriage was contracted?"

It was argued, as a conclusive objection, that, the bridegroom officiating as clergyman, it would be utterly impossible for him to use the language of the marriage service in the Prayer Book, or to follow the directions of the Rubric respecting the opening address to the congregation; the adjuration to the couple about to be married, as to confessing any lawful impediment to their union; the demand, "Who giveth this woman away to be married to this man?" the putting on of the ring on the finger of the bride, and in pronouncing the benediction. But none of these is absolutely essential to the validity of the marriage, although very fit to be strictly observed; and marriages have been held to be valid where each of these parts of the service has been omitted, the essential part of the service being the reciprocal taking each other for wedded wife and wedded husband till parted by death, and having joined hands, being declared married persons.

[340] It is nowhere said what are the functions to be performed by the priest, who must be present. But even if it were held that, according to the English nullifying law, declared in *The Queen* v. *Millis* (as it has been held in construing the nullifying decree of the Council of Trent, in *Herbert* v. *Herbert* [2 Hagg. C.R. 271], and other cases), that it is a sufficient compliance with the law if a priest be bodily present, although against his will, and although he take no part in the ceremony, the bodily presence of the priest while the marriage is celebrated is, at all events, indispensable.

Thus, if the bridegroom be a layman, the presence of three persons is indispensable. If the bridegroom be a priest in orders, can the presence of two persons, the bridegroom and the bride, be sufficient?

I think that the consulted Judges show clearly, that, in the early ages of Christianity, before the celibacy of the clergy was enforced, as well as since the Reformation, when marriage has been permitted to them, no difference has been made between the clergy and laymen as to the manner in which the marriage is to be celebrated. If the priest, who is now required to be present at the marriage, has not power authoritatively to see that there is no lawful impediment to the parties being joined in lawful wedlock, and it is not meant that for reasonable cause he should prevent the marriage from proceeding, at the very least he is required to be present as a witness; and the law may be laid down as established by *The Queen* v. *Millis*, that a man and woman cannot be lawfully married except in the presence of a priest as a witness.

By a deed creating a power, the power is to be executed by the donee of the power in the presence of a credible witness. Can the donee witness his own act in **[341]** executing the power? A will is to be signed by the testator in presence of two witnesses; can he himself be witness and testator? I am bound to say, certainly not.

There is no doubt the Royal phrase is, *Teste meipso;* but this is autocratical language, asserting, that the deed requires no witness, and is binding by the sole signature of the Royal grantor.

Objection is made, that if one person may not be both bridegroom and priest, it would be impossible for a clergyman to pronounce the marriage benediction on his own daughter; but I conceive that a third person might act the part of giver away of the bride, her father being the officiating priest; and at any rate, there is

as yet no case of nullification of a marriage on the ground of the entire omission of this part of the ceremony.

I do not think it necessary to reason more at large a point which seems to me so clearly and undoubtedly to follow from the prior decision of this House in *The Queen* v. *Millis*.

But I must notice two manuscript cases which have been cited to prove that a clergyman may marry himself. The proceedings in both have been fully laid before us, and I have carefully considered them.

The first is *Goole* v. *Hudson*, in the Court of Arches in 1733. The libel was by a clergyman against the daughter of one of his parishioners, whom he had induced, in the house of her mother, to go through with him, whilst they were alone, a form of marriage by their saying, that they took one another for man and wife, according to the form in the marriage service in the Prayer Book, and by the gift of a ring, with the words, " With this ring I thee wed," etc., omitting the other parts of the service. The prayer of the libel was, that a subsequent marriage con-**[342]**-tracted by her *in facie Ecclesiae* with one Boyce should be declared void, and that the Proponent and Respondent should be declared man and wife, and that she should be compelled to solemnise matrimony with him *juxta juris exigentiam*. The answer of the Respondent admitted that the alleged ceremony had taken place, stating, that it was only in jest, and she admitted that she afterwards had written letters to him which she subscribed as his " spouse," but at his request. Evidence being taken, the Court decided that the parties did enter into and celebrate between themselves, on the 16th of June, 1731, a pure and lawful matrimonial contract, etc., and pronounced for the validity of the matrimonial contract and espousals so entered into, and pronounced the marriage with Boyce to be null, and that the Respondent ought to be compelled by law to solemnise a true, pure, and lawful marriage in the face of the Church with the Proponent, and admonished her so to do.

It must be observed, however, that not only was this case long before *The Queen* v. *Millis* first laying down the doctrine, that there can be no valid marriage without the presence of a priest in orders, and that there does not seem to have been any weight attached to the fact that the Proponent was a priest in orders, but the Proponent, by praying for a subsequent celebration of marriage with the Respondent, himself treated the former ceremony only as an executory pre-contract, intended to be followed up with a subsequent solemnization in the face of the church.

It must be recollected that such suits, founded on a pre-contract, might be instituted in England till Lord Hardwicke's Act in 1753, and that they were not put an end to in Ireland till the year 1818.

Accordingly, in the other case relied upon, *Holmes* v. *Holmes*, the suit was instituted in the Consistorial Court **[343]** in Dublin by the lady, first for a restitution of conjugal rights, which seemingly by consent was dismissed without prejudice. She then sued according to the form in *Goole* v. *Hudson*, alleging that the Respondent, a clergyman in holy orders, had, in a private house, gone through the celebration of matrimony with her in all respects according to the Rubric in the Book of Common Prayer, except that no ring was used, and that the ceremony was preceded and followed by cohabitation; she therefore prayed that the Respondent should be decreed to celebrate marriage with her in the face of the church. The Respondent answered, that he never promised or intended to marry the Promovent, but admitted that being in her power, and moved by her importunity and threats, and in order to avoid exposure, he had on the occasion alleged, read portions of the marriage service, but not the whole thereof, and not as a celebration of his marriage, but in order that she might obtain a more solemn promise or contract than she had before obtained.

Evidence being taken, the Court decided that the parties had made a valid matrimonial contract, and ordered that a lawful marriage should be celebrated between them by a priest in holy orders of the church, according to the rules, ceremonies, and canons thereof, and enjoined both parties to enter into and cause the said marriage to be solemnized *in facie Ecclesiae*.

Here again the first ceremony was treated by the Promovent as a pre-contract only. No reliance seems to have been placed upon the fact of the Respondent being

a priest in orders, and in all probability the same sentence would have been pronounced if he had been a layman.

These are the only cases to be found in which, in a dispute respecting a matrimonial contract, the alleged husband was a priest in orders; and neither of them can be **[344]** cited as authority to show that the necessity for the presence of a priest in orders being established, the same one individual can represent the two characters of bridegroom and priest, who are both to be on the scene at the same time.

Therefore, my Lords, I can neither find principle nor authority to support the judgment appealed against. It is always exceedingly disagreeable to me to advise your Lordships to reverse any judgment, and I feel peculiar reluctance to do so where the judgment in a case of this sort is in favour of legitimacy; but being of opinion, after much deliberation, that this judgment cannot stand with your Lordships' decision in *The Queen* v. *Millis* [10 Cl. and F. 534], I must not only in discharge of my duty, according to your Lordships' standing order, as speaker, put the question, "That the judgment be reversed," but if there be a division, I must for myself say "Content."

Lord Cranworth.—My Lords, like my noble and learned friend, I assume in the consideration of this case that the decision of your Lordships' House in *The Queen* v. *Millis* must be taken as settled law. I was one of the Judges who assisted your Lordships in the hearing of that difficult and doubtful case. I concurred in the opinion then delivered by Chief Justice Tindal, on behalf of all the Judges, nor have I since seen adequate reason for satisfying me that that opinion was erroneous. I do not think it necessary, however, to canvass or discuss the propriety of the decision at which the House then arrived. I assume, and am bound to assume, that case to have been correctly decided.

The language of the Chief Justice in delivering the opinion of the Judges is, that "a contract of marriage *per* **[345]** *verba de praesenti* never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders." These are the very words of Chief Justice Tindal, and if they are construed according to their strict sense, they certainly require in terms the presence, in all cases, of a minister in holy orders besides the persons entering into the contract. For it would be a solecism to say that contracting parties make a contract in the presence of themselves, or in the presence of one of themselves. According to the language of Chief Justice Tindal, the man and the woman must make the contract in the presence of a minister in holy orders. Now even supposing that by a stretch of language the woman could be said to make the contract in the presence of the man with whom she is contracting, it could not possibly be said that the man makes the contract with the woman in his own presence. There would be no sense in such a statement.

It is, however, but just to say that the language of Chief Justice Tindal was used with reference to the case then before the House, and only for the purpose of declaring the opinion of the Judges, that without the presence and intervention of a minister in holy orders no marriage would be valid. It would be making an unwarrantable use of the expressions adopted to infer from them that they were intended to have any bearing on such an anomalous case as that now before the House.

But still the conclusion at which I have arrived is the same as it would have been if I had only to interpret strictly the language I have referred to; I think it clear that the minister whose presence is, according to the law established in *The Queen* v. *Millis*, necessary in order to constitute a valid marriage, must be a third person, not one of the contracting parties.

[346] In the very able and profound opinion of the Judges, as delivered by Mr. Justice Willes, which, I may be allowed to say, will ever be a manual of learning on the subject of our early marriage law, the question is discussed, what were the objects for which the presence of a minister of religion was required in order to give validity to a contract of marriage, was it merely that he might pronounce a nuptial benediction? Was it that he might be a trustworthy witness, in after time, of the fact of the marriage? or had he functions of a more active character? was his presence required in order that he might prevent marriages between persons who could not rightfully enter into the marriage contract, as where there had been a

prior marriage or a pre-contract, or where the parties were within the degrees of consanguinity or affinity within which marriages were prohibited by the Church?

I do not propose to repeat the able reasoning with reference to these questions which is found in the opinion of the Judges. I content myself by saying that I am satisfied, by that reasoning, that the presence of the minister is not required merely for the purpose of securing a religious sanction to the contract. Though, even if that had been the only object of the law, I am by no means sure that I should have come to a different conclusion from that at which I had arrived. The presence of the mass priest originally, and afterwards of a minister in holy orders, was, in my opinion, required, partly because it was essential to have trustworthy proof of the celebration of the marriage, and partly because the priest or minister might, if he was aware of any lawful impediment to the marriage, prevent its celebration. The paragraph in the laws of Edmund which immediately follows that requiring the presence of the mass-priest, provides that it is to be looked to that the parties contracting marriage be not too **[347]** nearly allied by kinship. The inference seems to me irresistible that it was to be the duty of the mass-priest to look to this so far as it might be in his power, and, as is pointed out in the opinion of the Judges, the same, or a nearly similar rule, prevailed under the laws of Charlemagne in France, no doubt for a similar reason.

Being then, as I am, convinced that the priest or minister is required to be present in order that he may ever afterwards be a trustworthy witness to its celebration, and that, if necessary, he may, so far as it is in his power, prevent the celebration of an unlawful marriage, it follows, of necessity, that he cannot be one of the parties entering into the contract. It would be absurd to suppose that the law which requires the presence of a person whose duty it may be to prevent, or endeavour to prevent, the making of a particular contract, can be satisfied by the presence of a person who is himself one of the parties to it.

This consideration seems to me decisive, and I feel that I might only be weakening the argument so ably embodied in the opinion of the Judges, if I were to say more.

Neither of the two manuscript cases, *Goole* v. *Hudson* and *Holmes* v. *Holmes*, cited by the Respondent, bears out his argument. Indeed, both of them appear to me to militate against it. In both of them, it having been established to the satisfaction of the court that the man, being a minister in holy orders, had entered into a contract *per verba de praesenti* with the woman, whereby they bound themselves to become and be man and wife, the Court decreed the contract to be valid, and that the parties ought to be compelled to solemnise marriage in the face of the Church. This, as it is noticed by the Judges, decided no more than would have been decided, if the **[348]** parties had been laymen. The contract was held to be valid, and was to be completed by marriage *in facie Ecclesiae*. This farther ceremony would have been unnecessary if the argument of the Respondent is sound.

Before I sit down I must advert to a matter glanced at by the Judges, namely, the question how far the decision of this House in *The Queen* v. *Millis* may be held to affect the marriage of British subjects in the colonies, or on board ship, where there may have been no minister of religion. I need not say that no such question as that arises here, but the subject having been adverted to, I wish to guard myself against its being supposed to be clear that the decision in *The Queen* v. *Millis* applies to the case of marriages of necessity entered into where the presence of a minister in holy orders may have been impossible. That question must be considered in this House as still open to be determined whenever it may arise.

I concur with my noble and learned friend in the conclusion at which he has arrived, namely, that the Plaintiff in error is entitled to our judgment.

Lord Wensleydale.—My Lords, I concur entirely in the advice given by my noble and learned friends, that in this case your Lordships should reverse the judgment of the Irish Court of Exchequer Chamber.

We have had the advantage of perusing the able and elaborate opinions of the eleven Judges who formed that Court, who were divided in the proportion of six to five; we have also had the assistance of very full arguments on both sides, by most able and learned counsel; and, above all, we have the great benefit of the advice of the three learned Judges who assisted the House in this case: Mr. Justice Willes

delivering the opinion of himself, Mr. [349] Justice Byles, and Mr. Justice Hill. That opinion exhausts the whole subject, and contains an extent and variety of learning and information derived from English and foreign authors, rarely, if ever, equalled, and never, I believe, excelled; and that learning is distinctly classified, and is accompanied by most able and satisfactory judicial reasoning.

If the case of *The Queen* v. *Millis* [10 Cl. and F. 534], of which we have heard so much, was now before us, to be reviewed on appeal, I am by no means sure that I should not agree in the opinion of my noble and learned friend on the woolsack. I was one of the Judges who concurred in the unanimous advice given to the House in that case, but I did so with considerable difficulty. I was anxious for farther time for consideration, but the argument having taken place on the eve of the long vacation, the case could not be disposed of during that Session if farther time had been allowed. The consideration I could give the case was, that, though I had very great doubt, I could not satisfy myself to give an opinion contrary to that of my colleagues, and therefore I yielded to it. I am not sure that I was the only one of the Judges in the same condition.

That question is not, however, now open for consideration. It has been finally and irrevocably settled by this House, though their Lordships, who gave their opinions, were equally divided, and the judgment of the Court of Queen's Bench, in Ireland, was thereon necessarily affirmed. But that judgment was conclusive only upon this point, viz., that by the common law of England and Ireland, a marriage celebrated between two parties without the presence of a clergyman in holy orders, was null and void; it was not merely irregular and censurable or punishable, but absolutely void. But no more than this was decided, and the Courts below had, and your Lord-[350]-ships have now, the simple duty of applying that now established rule of law to the case of the marriage of such a clergyman himself with a female, no other clergyman being present.

It is to be observed that there is an inaccuracy in the expression of some of the Judges in the Court below, who state that the decision in *The Queen* v. *Millis* was, that the *intervention* of a clergyman in every marriage was required, as essential to the validity of every marriage. If that had been a part of the judgment of the House, the solution of the present question would not have presented the least difficulty, for the term *intervention* necessarily implies the presence of a third party. But that is only an expression in the opinion of the Judges, delivered by Chief Justice Tindal, and entitled only to the weight due to an opinion of eminent Judges. To speak with perfect accuracy, the decision of the House was only that a marriage between two parties without the presence of a clergyman, was invalid; but that rule, establishing the necessity of the presence of a clergyman, of itself seems to me to imply the same thing, that he must be a third person present at the contract; and the opinion of Chief Justice Tindal and the other Judges is an authority for giving that interpretation to the required presence of a clergyman.

The elaborate opinion of the consulted Judges which has been delivered to us by Mr. Justice Willes, gives very ample and satisfactory reasons why the presence of a third person, a clergyman, should be required. They suggest that there must be three reasons for requiring his presence: First, that it may be that he is to be a representative of the church, for the purpose of giving a religious character to the ceremony, and invoking from the Almighty a blessing on the union, for that is the [351] only sense in which a blessing can be given by human lips. Secondly, that he must be present, as a trustworthy witness to the contract, to see that the parties to it fully understand each other, that they really mean to contract and take each other from that time for husband and wife, and to bear witness thereafter to others to that fact. Thirdly, that he has a power to prevent the marriage from taking place, if a just impediment is brought to his knowledge, such as consanguinity, or affinity, within the prohibited degrees.

If the first reason was the only one which makes the presence of a clergyman so necessary to the validity of a marriage, the presence of a clergyman at his own marriage would be sufficient, for unquestionably he may invoke the blessing from the Almighty on himself and his wife, and in the Roman Catholic Church, where marriage is a sacrament, the parties may unquestionably administer the sacrament to each other.

But if either of the other two is the true reason why a clergyman should be present, the presence of a clergyman at his own marriage certainly cannot be sufficient. It would be irrational to intrust him with the authority to ascertain in his own case, whether he really meant to plight his troth to his intended wife, and whether he sufficiently made known that intent to her, and whether she intended also to contract. It would be irrational also to trust to him as the sole witness to testify to a marriage in which his interest would be deeply involved, and which he might affirm or deny afterwards according to his interest or pleasure; and it would be equally so to intrust him with the duty of deciding whether the marriage should take place, or not, in case a valid impediment to a lawful marriage should be suggested.

If either of the two latter reasons is that on which the **[352]** now unquestionable doctrine is founded, that at common law a clergyman must be present in order to the validity of a marriage, I cannot have the least doubt that the marriage in question is clearly void. And if there is any question as to the last reason, which I do not think there is, I feel perfectly confident that there is none as to the second, that on the marriage of a clergyman, a third person, a clergyman, should be present as a witness, for the purposes above mentioned.

I do not think it necessary to make any observations on the two cases in the Arches Court and in the Consistory Court of Dublin: *Goole* v. *Hudson* and *Holmes* v. *Holmes*. They have been already explained by my noble and learned friend on the woolsack; they were cases of pre-contracts and not of marriage; the former case arose before Lord Hardwicke's Act in 1754, 26 Geo. 2, c. 33, which deprived such contracts of their effect in the Ecclesiastical Court to compel future marriages; and the latter case arose in Ireland before the year 1818.

My Lords, I am entirely satisfied with the reasons given by the consulted Judges, and by my noble and learned friends, and I have no difficulty in concurring in the reversal of the judgment.

With reference to the question whether the case of *The Queen* v. *Millis* [10 Cl. and F. 534] would apply to marriages of British subjects in the colonies or on board ship where a clergyman cannot be obtained, I may observe that there was in the Irish courts, a question about the legitimacy of a person born after a marriage celebrated by the captain of a ship, and I think it was decided that that was not a valid marriage. I do not know whether Mr. Butt is acquainted with the case.

Mr. Butt.—There was such a case I know, but I am **[353]** not prepared to say at this moment what the decision was. Perhaps I may be allowed to refer to the case decided in India, in which it was held that the case of *The Queen* v. *Millis*, did not apply to the case of a marriage in India, where no clergyman could be procured (*Maclean* v. *Cristall*, Per. Oriental Cas. 75).

Lord Cranworth.—In this case at least the question is left open.

Lord Chelmsford.—My Lords, it is with very great reluctance that I agree with the opinions which have been expressed against the validity of the marriage in question. It is impossible not to feel for the situation of the Respondent, whose status is so seriously affected by the illegality of his parents' cohabitation. But with every desire to decide in a manner favourable to his social position and his worldly interests, I am compelled, after a careful examination of the case and a consideration of the able arguments which have been addressed to us on his behalf, to come to a different and unfavourable conclusion.

The whole question has been so thoroughly investigated in the arguments and opinions in the case of *The Queen* v. *Millis*, and the carefully considered and elaborate opinion pronounced by the learned Judges has thrown so much light upon the whole subject, that it would be an unwarrantable occupation of your Lordships' time if I were not to treat every part of the ground up to a certain point as entirely preoccupied. *The Queen* v. *Millis* must be taken to have settled that at common law a marriage was invalid unless contracted in the presence of a person in holy orders. As it is not satisfactory that a question of such importance should rest merely upon the result of an equal division of opi-**[354]**-nions in this House, I am glad to find that the researches of the Judges have brought to light additional proofs in favour of the correctness of the judgment which there prevailed. And I think it must now be admitted, that although, by the marriage law of Western Europe prior to the Council of Trent, a valid marriage might be contracted with-

out the presence of a priest, yet that from the earliest period our law differed from the general canon and civil law in this respect, and has held that the presence of a priest is essential to the validity of a marriage.

Starting from this position, if we can only ascertain the object of requiring the intervention of a person in holy orders in the ceremony of marriage, it will go far to decide the present question. I think it cannot be doubted that anciently, in order that a marriage should be complete and lawful, and accompanied by all the legal consequences of the relation of man and wife, it must have been solemnised *in facie Ecclesiae*. The cases of Del Heith and of Foxcroft, both decided in the reign of Edward I., establish this position to its full extent. I do not find that these decisions were ever questioned until the case of *The Queen* v. *Millis* [10 Cl. and F. 534], when some of the noble and learned Lords expressed their opinion that they had been decided contrary to law. But I agree with my noble and learned friend, Lord Lyndhurst, in thinking that there is no sufficient ground for impugning their authority.

That the rule which required a public celebration of the marriage before the church, was afterwards departed from, appears to be clear, though when the change occurred it is not possible to ascertain. The public solemnization of the marriage which was originally required could have been with no other object than that the church should be the witness of the ceremony. And it **[355]** is unnecessary to add, that under such circumstances, the marriage would of course be celebrated by a person in holy orders. At the earliest known period, according to the authority of Dr. Lingard (Anglo-Saxon Church, vol. 2, pp. 9 and 10), there was no prescribed form of words used at the ceremony of marriage; but the consent of the parties was signified by the giving and receiving the ring at the church door, in the presence of the priest, who blessed it; the nuptial benediction being afterwards pronounced in the church during the celebration of the eucharist. Where the marriage service, which is substantially the same as that which is at present in use, was introduced, part of the ceremony was (as before) performed outside the church, and according to the opinion of the learned Judges, that part which was sufficient "to knit the marriage for civil purposes." Now no reasonable doubt can, I think, be entertained that a person in holy orders, distinct from the intended husband, must always have intervened in this part of the service. This sufficiently appears from that solemn prefatory appeal to the consciences of the parties as to their knowledge of any impediment, and from the mode in which the endowment *ad ostium Ecclesiae* was made. The priest was apparently a necessary witness to this species of endowment; and from the account which is given of it in Coke upon Littleton, it seems doubtful whether it would have been good without his presence. This dotation took place "after affiance made and troth plighted," and in the old York ritual, there is at this part of the marriage service, the following rubric: "*Sacerdos interroget dotem mulieris, et si terra ei in dotem detur tunc dicatur psalmus iste*," etc. It would be idle and absurd for the husband to interrogate himself as to the endowment he intended to **[356]** make, although the dotation itself is in terms addressed to his wife.

This consideration of the nature of the ceremony, as consisting of two distinct parts, may serve to explain the mode in which a marriage was regarded as valid, although not solemnized *in facie Ecclesiae*, and also why the presence of a person in holy orders should be considered as essential to its validity. The use of the formal words of the marriage service was not originally required, the consent to the marriage in the presence of a priest being all that was necessary. The completion of the marriage ceremony took place outside the church, that which afterwards passed within being merely the consecration with religious rites of the previous marriage. The non-observance of the forms of this marriage service did not invalidate the marriage. All that appears to have been essential was the consent to become husband and wife in the presence of the priest. This will account for the opinion expressed by Chief Justice Pemberton in *Weld* v. *Chamberlaine* (2 Show. (by Leach, 8vo.) 300), that words of contract *de praesenti*, not following the ritual, repeated by the parties after a person in holy orders who had been ejected, and apparently therefore not in a church, made a valid marriage.

It will be observed that there is not a single case to be found which has decided

that the presence of a priest may be dispensed with. This intervention seems to have been regarded as not formal merely, but as substantial and essential. In what character then was it necessary for him to be present? Originally when the marriage was *in facie Ecclesiae*, the priest must have been regarded as the representative of the Church to receive **[357]** the consent of the parties, to give the blessing, and to interpose to prevent a marriage where any lawful impediment existed. But, as in the earliest times, the consent was signified by giving the ring at the church door in the presence of the priest, and afterwards, when the marriage ritual was adopted and used, the marriage might be completely solemnized outside the church, and was then sufficient for all purposes, the function of the priest seems to have been solely that of a witness. He had no active office to perform in joining the parties. In the earlier times he passively witnessed the giving and receiving the ring, and when the ritual was introduced, the essential part of the ceremony was that in which the parties gave their troth to each other. The question put by the priest, "Wilt thou have this woman to be thy wedded wife?" was not absolutely necessary, and was merely preparatory to the contract itself, which he was called upon to witness. Therefore, a contract *per verba de praesenti* in the presence of a priest not accidentally present, but intentionally, and in order to be a witness, had a very different effect from such a contract where no person in holy orders intervened. In the latter case, although by reason of the contract being indissoluble it was sometimes called, in the ecclesiastical law, *verum matrimonium*, and although it entailed some of the consequences of an actual marriage, and especially prevented the parties marrying any other person, yet it conferred none of the civil rights of marriage, but merely enabled either party by suit in the spiritual court to compel the other to solemnize the marriage *in facie Ecclesiae*. But where such a contract *per verba de praesenti* was declared in the presence of a person in holy orders present for the purpose of receiving such declaration, there was a **[358]** complete and valid marriage, although, in consequence of not taking place *in facie Ecclesiae*, it was considered as clandestine, and subjected the parties to the censures of the church. These marriages, however, were regarded by the Ecclesiastical Courts as complete and lawful marriages, and so they were by the courts of common law, and as drawing after them all the legal rights and consequences incident to marriage. Nor were the parties ever compelled to repeat the ceremony in the face of the church. All which is clearly explained by Lord Lyndhurst in *The Queen* v. *Millis* [10 Cl. and F. 534].

This last circumstance will have an important bearing upon the two cases of *Holmes* v. *Holmes* and *Goole* v. *Hudson*, which I shall shortly consider. I think it appears very clearly from what has been said, that whatever other reason there might be for requiring the presence of a priest in order to constitute a valid marriage, he was at least necessary as a witness to the espousals. And if his presence was requisite for this purpose, and in this character, then it necessarily follows that he must have been a person distinct from the party to whose contract he was to be a witness. In this view the two cases to which I have just referred have, perhaps, more application than seems to have been supposed. In *Goole* v. *Hudson* the decree was, that "the parties did enter into and celebrate between themselves a pure and lawful contract by words in the present tense effectual, etc., and that the Respondent ought to be compelled by law to solemnise a true, pure, and lawful marriage in the face of the Church with the Proponent." In *Holmes* v. *Holmes* the decree pronounced that the parties did on 11th April 1811, make a valid matrimonial contract, and take one another *per verba de praesenti* as man and wife, and it ordered that **[359]** a lawful marriage should be celebrated in the face of the Church by a priest in holy orders of the Church, and enjoined both parties to enter into and cause the said marriage to be solemnised *in facie Ecclesiae*. It appeared in each of these cases that the intended husband was a clergyman, and yet in each the decree was that a lawful marriage should be celebrated. Now, as when a clandestine marriage took place in the presence of a priest, the parties were never compelled to repeat the ceremony in the face of the Church, the Court, by decreeing that a marriage should be solemnised *in facie Ecclesiae*, must have decided that there had been no lawful marriage previously. Now, if the fact of one of the contracting parties being in holy orders was sufficient to give validity to the ceremony,

the marriage, although clandestine, would have been held to be good and lawful, and no farther celebration of it could properly have been directed. It is impossible to ascertain from the statement of these cases, whether this point entered into the consideration of them, or was entirely overlooked; but as far as they go, they are certainly favourable to the view which I have taken of the question before the House. It is, however, quite unnecessary to treat them as authorities upon this occasion, because the grounds upon which, from the earliest times, the intervention of a priest has been considered to be necessary in order to constitute a lawful marriage, satisfy my mind that he must always have been some independent and disinterested person distinct from the party contracting, and that his presence could not be satisfied by the accidental possession, by one of the parties, of the qualification necessary for the duty to be performed.

For these reasons, I think that the judgment of the Court below ought to be reversed.

[360] Sir FitzRoy Kelly: Your Lordships' judgment upon the special case is for the Defendant below, the Plaintiff in Error?

The Lord Chancellor.—Yes.

Judgment reversed. Lords' Journals, 22 April 18[illegible]

JOHN ARCHBOLD,—*Appellant;* WILLIAM SCULLY,—*Respondent*

[March 5, 7, April 25, 1861].

[Mews' Dig. viii. 1251; ix. 150, 153, 324; xiv. 1739. S.C. 7 Jur. N.S. 1169; 5 L.T. 160; and, below, 8 Ir. Ch. R. 177. Cited in *Webster* v. *Southey*, 1887, 36 Ch.D. 19.]

Renewable Leases—Statute of Limitations—Acquiescence—Landlord and Tenant—Trust—Costs—3 and 4 Will. 4, c. 27.

Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed:

Held, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 42d section of 3 and 4 Will. 4, c. 27, the amount to be recovered is limited to six years.

The 24th section of that statute only bars equitable rights, so far as they would have been barred if they had been legal rights.

It is not in the power of a tenant, by any act of his own, to alter the relation in which he stands to his landlord.

A. in 1699 granted to B. a lease for lives, renewable for ever. This lease, by the death of B. intestate, vested in his four daughters. The interest of three of them became, in 1778, vested in C., who got possession of the whole of the property; but upon D., who claimed one undivided fourth part, filing a bill in Chancery against C., he, in 1779, agreed to accept, and D. consented to grant him, a lease of that undivided fourth part for 999 years, at an annual rent of £40. The lives in the original lease dropped in 1784, but all the parties went on for years acting upon its terms. Up to 1828 the rent on the lease of 1779 had been duly paid. D. died, having first devised her interest in that lease to E. The representative of **[361]** C. then asserted a claim to the whole property, and refused to pay the rent of £40, and E. did not take any steps to enforce its payment. In 1835, the representative of C. obtained a renewal of the lease of 1699. In 1854, he became party to a proceeding in the Incumbered Estates Court, and from what occurred there, E. became acquainted with facts which induced him, in 1856, to file a bill