A LETTER TO THE RIGHT HONOURABLE THE LORD BROUGHAM AND VAUX, &C. ON THE OPINIONS OF THE JUDGES IN THE IRISH MARRIAGE CASES; IRISH MARRIAGE QUESTION. OBSERVATIONS ON THE OPINION DELIVERED BY THE RIGHT HONOURABLE THE LORD COTTENHAM, 23D OF FEBRUARY, 1844

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A Letter to the Right Honourable the Lord Brougham and Vaux, &C. On the Opinions of the Judges in the Irish Marriage Cases; Irish Marriage Question. Observations on the Opinion Delivered by the Right Honourable the Lord Cottenham, 23d of February, 1844 by Sir John Stoddart

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SIR JOHN STODDART

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A

LETTER

TO THE RIGHT HONOURABLE

THE LORD BROUGHAM AND VAUX,

&c. &c. &c.

ON THE

Opinions of the Judges

IN

THE IRISH MARRIAGE CASES.

WITH

AN APPENDIX,

CONTAINING THE OPINIONS OF THE JUDGES, &c.

BY

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A LETTER,

&c.

My Dear Lord,

I have perused, with great attention, the parliamentary paper, which your Lordship was so kind as to communicate to me. (H. L. 1843, 171.) I collect from it, that the House of Lords had propounded to the learned judges of the common law certain questions, on the legality of two convictions, which took place in Ireland, for bigamy; and that the unanimous opinion of those venerable persons was, that the convictions could not be sustained. From so high an authority, on such a point, it is not for me to dissent. But far the greater part of the paper is occupied with the reasoning of the Lord Chief Justice of the Common Pleas, on a preliminary question, of a more general and abstract nature. It is to this reasoning (for which, it appears, the other learned judges "are not to be held responsible" (Opins. p. 15)), that I venture, with great deference, to call your Lordship's particular attention.

Your Lordship, I am sure, will readily believe, that I share with yourself, and with the whole legal profession, a profound respect for the great talents and attainments, which the Lord Chief Justice has ever displayed, as well at the bar as on the bench. Many years ago, I had a personal opportunity to witness them, in a remarkable case, before the Privy Council, which was argued by his Lordship (then Mr. Tindal) for the Hudson's Bay Company, and by myself for the Earl of Selkirk. And of his Lordship's

antiquarian knowledge of the common law, his celebrated speech, at the bar, on trial by battle, will ever remain a memorable example.

I should therefore feel, that I was acting with inexcusable rashness, were I to presume to question any doctrine *purely* of the common law, in opposition to the *clear* and *decided* authority of so experienced a jurist. But the point, which I propose to examine, is of a very different kind. The Chief Justice considers separately the question, "What was the nature and obligatory force of a contract of marriage, *per verba de præsenti*, by the English common law, previous to the passing of the Marriage Act, 26 Geo. II.?" (Opins. p. 1.) Now this, as I shall presently show, far from being *purely* a common law question, is one that depends for its resolution, primarily and essentially, on the law of the Ecclesiastical Courts, in which I had for many years the honour of practising: and the Chief Justice not only does not deliver a *clear* and *decided* opinion on it, but he expressly declares, that it is one "involved in much "obscurity," nay, "in still deeper obscurity now, than in "the time of his predecessors" (Opins. p. 1); that it was "only after considerable fluctuation and doubt, in the minds "of some of his brethren, that they acceded to the opinion "formed by the majority" (Opins. p. 2); and particularly with reference to the law of the Ecclesiastical Courts (which I conceive to be the most important branch of the inquiry), he says, he is only able to state "the result of a somewhat "*hasty* consideration of authorities, for the due research "into which, he and his learned brethren were anxious to "have obtained a longer time." (Opins. p. 11.)

My Lord, uncertainty in the principles of the law must inevitably lead to evils in the practice. *Misera servitus est, ubi jus vagum et incognitum.* In the present instance, an uncertainty in the law of marriage has wrought much misery to individuals, and spread alarm through large

classes of the community. If my professional studies have lain among authorities calculated to throw light on a subject so mischievously obscure, it may be thought, in some sort, my duty to bring the fruits of my research to the notice of learned persons, to whom they are necessarily less familiar.

I own that I have a motive, which your Lordship will easily appreciate, of a more personal nature. The argument of Sir Nicholas Tindal, as I view it, tends to impugn the judgment of the late LORD STOWELL in the case of *Dalrymple* v. *Dalrymple* (1811). The memory of that highly gifted personage I have every reason to venerate. For many years I had the honour of pleading before him, in the Consistory, the Admiralty, and the Privy Council. If it were not too presumptuous, I might say of him as Lord Mansfield did of Lord Hardwicke, "it was impos-"sible to attend him so long, to sit under him every day, "without catching something of his light." And finally, it was on his recommendation, that I was placed at the head of the legal department at Malta, where I continued, for nearly thirteen years, to administer a system of jurisprudence, with which both the civil and canon law were closely interwoven.* As to the case of Dalrymple, I was counsel in it from first to last; and in the court of *dernier resort*, I had the honour to be associated with your Lordship.

Of Lord Stowell's deservedly celebrated judgment I shall speak more fully hereafter. At present I shall only observe, that in reference to the period between the Reformation and the Marriage Act of 1753, he says, "that the "Ecclesiastical Courts of this country, which had the "cognizance of matrimonial causes, enforced that rule of

* How far my performance of those high duties proved satisfactory to your Lordship, I am precluded from stating, by the panegyric, which you were pleased to pronounce on it in the House of Lords, in the year 1839.

" the Canon Law, which held an irregular marriage, con-
" stituted *per verba de præsenti*, not followed by any con-
" summation shown, *valid*, to the full extent of voiding a
" subsequent regular marriage, contracted with another
" person." (2 Hag. E. R. 67.) And that " the same
" doctrine was *recognised* by the temporal Courts, as the
" existing rule of the matrimonial law of this country."
(Ibid. 68.) Sir Nicholas Tindal, on the other hand, holds,
that " by the English *ecclesiastical* law, a contract of mar-
" riage, *per verba de præsenti*, was not alone sufficient;
" but that by the same law, to make the marriage com-
" plete, there must be the presence and intervention of the
" priest" (Opins. p. 6), and that " the *common law* has
" never held a marriage complete without such celebra-
" tion." (Ibid. p. 2.) In the sense, in which these positions
of the learned Chief Justice will be understood by ordinary
readers, they cannot but derogate from that weight and
authority, which has hitherto been ascribed to the judg-
ment of my noble master, friend and benefactor.

Such being my motives for addressing your Lordship, I
proceed, without further preface, to state the point, which
it is the chief object of this letter to maintain, namely,
that by the law of England, prior to the year 1753, a con-
tract of marriage *per verba de præsenti* alone, between two
competent persons, constituted a marriage.

My Lord, the learned Chief Justice says, it did not con-
stitute " a *complete* marriage." I am unwilling directly
to controvert this assertion, because I confess, I do not
clearly comprehend the force and effect, which it is intended
to carry. The learned Chief Justice elsewhere uses the
terms " a legal marriage" (Opins. p. 8), " an actual mar-
riage" (Opins. p. 9), " a valid marriage" (Opins. p. 10),
intimating, at least, a doubt, that they were ever consti-
tuted by a consent *per verba de præsenti* alone. What I
mean to assert is, that such a consent constituted what the

canonists call " matrimonium ratum," " ipsum matrimonium," " very matrimony," and which was in England actual, legal, and valid; in short, it was marriage *de jure*, that indissoluble bond, which unites a husband and wife "until death them do part;" and which, so long as it lasts, incapacitates each of them from forming a like union with any other person. Doubtless, my Lord, a marriage so constituted, though valid, was irregular; it was forbidden by the laws spiritual and temporal; it was discountenanced, it was detested, it was punished; but it could not be *annulled*. The church denounced against it grievous censures; the state refused to it important privileges; public opinion stigmatised it with contempt; private conscience tortured it with remorse; but still it was A MARRIAGE, a yoke which must be borne, a knot which could not be untied. Such, I say, was the law of England from the thirteenth century, the earliest period at which we have any clear and systematic view of that law, to the middle of the eighteenth. During all that time a contract *per verba de præsenti* alone was deemed a clandestine marriage, and as such was prohibited; but still the legal maxim applied to it, " *actus non redditur nullus, ex solâ prohibitione legis.*" Who was to pronounce it null? A sentence, to that effect, by an incompetent Court would have been itself a nullity; and in a competent Court no judge could have pronounced the marriage null, without a law for the annulment recognised in that Court. But no such law existed; nay, the law constantly recognized and acted upon, in the only Courts competent in England to entertain the question, did, as I shall presently show, most clearly and unequivocally declare all such marriages to be valid.

My Lord, this is matter of legal history, and is to be examined on the best historical evidence, that the case will afford: and I need not remind your Lordship, that the present age is much better furnished with such evidence,