

quia libera debent esse Matrimonia: which Plea was repelled 16 December 1620 Craig contra Sinclair Spotswood Pract. lit. Marriage. We may observe this Difference ^{between} ^{long out of Marriage} and other Contracts that whereas other Contracts bind the Parties irrevocably from the Moment that the Contract is formed; a Contract of Marriage is in Suspence, till the Marriage is solemnized, and unless this Condition that it shall not take Place, unless the Marriage be accomplished and that it shall remain void if the Marriage be not accomplished l. 60. l. 10. & 4. ff. de pure dot.

Having spoke of Espousals before Marriage, I proceed to treat of Marriage itself. In doing whereof I shall set forth 1^o What is Marriage, and the several Kinds of it. 2^o What Persons may not contract Marriage. 3^o The Effects and Consequences of Marriage while it stands. 4^o How Marriage may be dissolved, and the Effects of the Dissolution.

Sect. 1.

What is Marriage, and the several Kinds of it

Marriage, is a Conjunction of Man and Woman, by mutual Consent, in a constant Society of living together till Death part them. Mutual Consent makes a Marriage, and founds the conjugal Rights before Consummation; l. 30. ff. de reg. jur. & be. the Parties are capable to consummate it, i.e. to seal the Bargain by Copulation. For the Consent of a Man naturally frigid, or a Woman naturally impotent or sterile, or nimis arida, or of dubious Hermaphrodites where neither Sex doth eminently predomine makes not a Marriage. But Consent by Persons able to copulate, tho' not to procreate Children thro' their being superannuated, is sufficient to constitute a Marriage, which will subsist, and found the conjugal Rights, tho' the Parties never put their carnal Capacity in Practice. Stair ibid. Affinity

Marriage is 1^o Either formal, by an express Consent; in these Words I marry you, or I take you for my Husband or Wife; or presumed, by tacit Consent, implied from the Parties cohabiting as Man and Wife, or owning themselves to be married; or from Copulation subsequent to Espousals or a Promise of Marriage. Stair ibid. l. 3. tit. 3. §. 42. vers. it will not be sufficient. Which presumed Marriage cannot be passed from by either or both Parties, and founds the conjugal Obligations, and makes the Children procreated lawfull. Thus a Contract of Marriage was sustained to oblige the Man to solemnize the Marriage; seeing he had procreated Children with the Woman; and had by his Wives acknowledgement her to be his Wife; albeit she had renounced the Contract of Marriage by a posterior Agreement. Hope lit. Husband &c. Barclay contra Napier, Husband will have Right to the Curtesy of Scotland; and a Wife to a Force without proving a lawfull Marriage; if the Marriage was not quarrelled in the Lifetime of the Parties, out of whose Lands the Curtesy or Force is claimed, and cannot be dispensed with, till the Marriage appear to have been unlawful Act. 77. Par. 6. §. 4. It sufficed to intitle a Woman to a Force of a deceased Man's Lands, that he had owned his being married to her, in his Letter to a third Person, and left and bequeathed certain Sums by Testament to her therein design'd his Spouse, and she was reputed his lawfull Spouse 23 Feb. 1714 Maderfon contra Wisheart. In a Process against one for the Delivery of Goods belonging to the Pursuer's deceased Wife, intromitted with by the Defendant who had cohabited some years with her as his Wife, and

and for Delivery of a Bond granted by him, payable to her and failing of her by Decease to her Son procreated betwixt her and the Pursuer, the Defendant having denied, that the Woman deceased was the Pursuer's Wife, and contended that the goods claimed ~~belonged~~ to the Defendant in Property, Commission was granted to Ireland where the Marriage was alleged to have been celebrated, and Children thereof procreated, for proving the Marriage and Cohabitation, and that the Pursuer's Wife was the same Woman who cohabited with the Defendant, and the Defendant was ordained to exhibit the said Bond for further administering the Marriage. But the Consideration of the Point, whether the Pursuer had Right to the said Moveables jure mariti, was superseded till admision in Pract. aforesaid. Near time some Witnesses upon the Place or shortly going off were allowed to be cited and examined, that their Depositions might be in retentis till the Relevancy were determined, and Women Witnesses to be taken cum nota 22 July 1714, Mullidine contra Brown. 'Tis true the Canon Law c. i. Can. 30. qu. 5. Concl. Friden. Sect. 8. the Greek Constitutions, and the Customs of some Countries

requires the sacerdotal Benediction as essential to Marriage. But seems we do not as the Roman Catholics reckon Marriage a Sacrament, our Law doth not require the ierologica as essential to it; but considers the Ceremony of the Church as a Piece of good Order, to ascertain so important a Matter. And tho' the Bond of Matrimony ought to be celebrated in such a Manner as becomes the Sacredness of that Institution, viz: by the Ministry of the Church, where it can be had: yet I see no Reason why, if Ministers are wanting to perform it, the Civil Magistrate may not marrie Persons, as a Justice of Peace can do in England.

Marriage hath been encouraged in all civilized Governments, but not at all times. The Romans were very superstitious in Reference to the particular times of Marriage, fancying several Days and seasons very unfortunate to this Design. The Calends Nones and Ides of every Month were strictly avoided, so was the whole Feast of the Parvordia in February. The whole Month of May was looked on as ominous to contract Matrimony in, according to the proverb: mensis malus Maio, nubere vulgus ait. Ovid Fast. 5. But the most happy season for celebrating the nuptial Solemnity, was that which followed the Ides of June. So in England there are some particular seasons of the Year, wherein Marriage ought not to be celebrated, as in Lent, or on fasting Days: because the Mirth and rejoicing which usually accompany Marriages are not suitable to the Humiliation and Sorrow which they ought to have at the Time for their Sins Nelson's Rights of the Clergy tit. Marriage in fine

Marriage is 2^o Either Regular and Solemn, or clandestine and Irregular. Regular Marriage in Jurisdiction of Prelacy, was either after proclaiming their Names and Designations or Additions of the Parties three several times in their parish Churches, called Proclamation or Publication of Banns and termed in the Law of England asking the Parties in the Church 2 & 3 Edw. 6. c. 21. Or by a Dispensation from the Bishop. But now Marriage is Regular, if celebrated by a Minister of the Gospel authorized by the established Church Act 12. Sept. 5. Par. 10. W. or tolerated by Law 10. A. cap. 7. vid. vol. 2. part. 1. Book 3. chap. 5. tit. 1. After Proclamation of Banns. This Proclamation (which in Holland may be made either