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Sir William Scott and the law of marriage

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The judgment of Sir William Scott in *Dalrymple v Dalrymple*¹ has been lauded by subsequent judges and academic writers, and is frequently cited as authority for the proposition that under the canon law the exchange of vows in words of the present tense was sufficient to create a marriage that was valid for all purposes.² Of course, by 1811 legislation had long supplanted the canon law in England and Wales, and so this proposition was only of relevance in Scotland, and to marriages celebrated overseas (including, in certain limited circumstances, those celebrated in Ireland). Despite this, his judgment has also been seen as conclusive as to the law that preceded the Clandestine Marriages Act of 1753 in England and Wales. In this paper I aim to show that *Dalrymple* proceeded on a mistaken understanding of the law in England and Wales prior to 1753 and does not deserve the weight that has been attached to it.

So deeply has the decision in *Dalrymple* permeated scholarship in this area that it is a hard task to persuade anyone that it might be wrong. As lawyers, we tend to read history backwards, interpreting earlier precedents through the filter of subsequent cases. *Dalrymple* instructs us that a contract *per verba de praesenti* created a valid, if clandestine, marriage, and we interpret earlier cases and materials accordingly, ascribing to contemporary confusion any evidence that does not fit. Yet if we disregard *Dalrymple*, and look at evidence from the early eighteenth century, a rather different impression emerges: that a clandestine marriage had a rather narrower meaning – being a marriage celebrated by an Anglican clergyman otherwise than in accordance with the canon law – and that it would be more appropriate to regard a contract *per verba de praesenti* as a binding contract, rather than an actual marriage. To make such a claim is not to ignore the fact that eminent canon lawyers had held that such an exchange created a marriage. It is, rather, to suggest that the practice was very different from the theory: if a contract *per verba de praesenti* did not entitle the parties to the same rights as a couple who had married in church, or even to cohabit with one another, can it really be described as a marriage in the eyes of the law?; if there is no evidence that couples set up home together after a mere exchange of consent, can it really be described as a marriage in the eyes of society? And if the main right that such an exchange conferred was to allow one party to enforce the contract, would it not be better to think of it as a contract?

¹ (1811) 2 Hag Con 54; 161 ER 665.

² The case is cited by, among others, R.B. Outhwaite, *Clandestine Marriage in England, 1500-1850* (London: The Hambledon Press, 1995), p. 2; R.H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge: CUP, 1975), p. 26.

The aim of this paper is to show that Sir William Scott was responsible for a fundamental change in the law in *Dalrymple*. Since the case has long been regarded as authoritative, I will proceed by small steps. The first part of this paper accordingly advances a number of reasons for exercising caution in accepting *Dalrymple* as an authority on the law of England and Wales prior to 1753. The second shows that, despite the assumption of continuity, *Dalrymple* did effect a change in the way in which the contract *per verba de praesenti* was regarded in English law. Part three considers the authorities on which Scott relied, and shows that they are capable of a different interpretation, one that is consistent with the argument advanced above, while the fourth part undertakes a broader survey of the law and practice of marriage in England and Wales before 1754. The final part considers *why* Scott asserted that a contract *per verba de praesenti* constituted a marriage in this particular case.

‘It was long ago, and it was far away...’

The very circumstances in which *Dalrymple* was decided should make us wary of relying on it as an authority as to the law prior to 1754. The case originated in a suit for restitution of conjugal rights brought by Johanna Gordon, a Scotswoman, in the London Consistory Court. She claimed to have married John Dalrymple, an Englishman, when he was quartered in Scotland with his regiment several years earlier. Young Dalrymple – only nineteen when he ventured north of the border – had subsequently been required to leave Scotland. Initially he wrote passionate letters to the woman he termed his wife, but his affections waned and then became fastened on a new object. It was when he went through a ceremony of marriage with Miss Laura Manners that the spurned Johanna brought her claim.

So the question for the court was whether the declarations made by John and Johanna constituted a valid marriage according to the law of Scotland, where the relevant events took place. Sir William spoke frankly of his ‘inferior qualifications’³ to decide the matter, but then took the view that the Scottish law of marriage was the same as the canon law of marriage that had been applied across Europe until the Council of Trent in the mid-sixteenth century unless the contrary could be proved, remarking airily that ‘[i]t is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation.’⁴

This should immediately alert us to the need for caution in relying on *Dalrymple* as a precedent in the English context. It may be true that, as Sir William pointed out, there are very few cases ‘upon acknowledged and settled rules.’⁵ But if the most convincing authority for the proposition that English law regarded an exchange of vows *per verba de praesenti* as an actual marriage is a Scottish case decided sixty years after the issue ceased to be of immediate practical relevance for those marrying in England and Wales, and based on the canon law as it stood in the sixteenth century, one does begin to wonder.

Continuity or change?

³ At p. 59.

⁴ At p. 70. He made some attempt to trace the law of England from the Reformation to the 1753 Act (pp 68-70), but his analysis of the law occupies less than a page in the English Reports, and its deficiencies are considered in the third part of the paper.

⁵ At p. 93.

The idea that the law had flowed in an unbroken stream since the sixteenth century is rather difficult to reconcile with the fact that *Dalrymple* clearly effected a shift in the way that a contract *per verba de praesenti* was regarded in the English courts. Indeed, it is clear from Scott's earlier decision in *Lindo v Belisario*⁶ that his own views on the status of such a contract had changed. *Lindo* concerned the validity of a Jewish ceremony of marriage, and Scott contrasted the situation of the parties before him, having gone through such a ceremony, with that of a couple who had exchanged vows in words of the present tense:

'There is then, on this state of the parties, more than the mere *contract per verba de praesenti* in the Christian Church, which was a perfect contract of marriage law, though public celebration was afterwards required by the rules and ordinances of the canon law.'⁷

As I have argued above, a contract *per verba de praesenti* should be understood – at least in the context of England and Wales before 1754 – as a contract to marry, rather than as a marriage in itself. This explains why Scott in *Lindo* describes it as a 'mere' contract, and notes the requirement of public celebration. Yet it was a contract that was binding on the parties. If the exchange of consent could be proved to the satisfaction of the ecclesiastical court it would be legally binding and enforceable.⁸ Even if it could not be proved, the parties remained morally bound to each other: married in 'the sight of God' or 'in nature'.⁹ So it is common to find references to a contract *per verba de praesenti* as a marriage, but with crucial qualifications of this kind – as in *Lindo* itself, in which Scott suggests that in Scotland, as in England and Wales before 1754, 'a mutual engagement, or betrothment, is a good marriage, without consummation, *according to the law of nature*, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purpose to describe.'¹⁰ Here, the implication is that the contract is binding

⁶ (1795) 161 E.R. 530.

⁷ At p. 242.

⁸ Either party could bring an action to compel specific performance of the promise. As one writer noted, '[i]f any doth contract Marriage, but doth not solemnize it in the Face of the Church; and if the Woman doth deny this contract; the Man may Institute an Action in a Cause of Contract.': H. Consett, *The practice of the spiritual or ecclesiastical courts* (London, 1708), p. 253; see also H. Swinburne, *A Treatise of Spousals*, (London, 2nd ed 1711), p. 222. (By contrast, once a marriage had been solemnized in church, the appropriate remedy to bring back a reluctant spouse was an action for restitution of conjugal rights: Consett, p. 253.) The same rule applied if a supervening marriage had been declared to be void: 'in case of Divorce for Precontract, the Person before Contracted is bound, by the Decree of the Spiritual Court, to marry the person with whom the first contract was made.': R. Grey, *System of English Ecclesiastical Law* (London, 4th ed 1743), p. 146. For an example of the court ordering that the marriage be solemnised, see *Baxtar v Buckley* (1752) 1 Lee 42; 161 E.R. 17. Various legal mechanisms existed to reinforce the order that the contracted couple should solemnize their union: in ascending order of severity, these were admonition, excommunication and imprisonment: T. Salmon, *A Critical Essay concerning Marriage* (London, 1724), p. 202; see also Swinburne, *A Treatise of Spousals*, p. 231; P. Floyer, *The proctor's practice in the ecclesiastical courts* (London, 1744), p. 78.

⁹ As the Solicitor-General noted in the course of the debates over the bill that became the Clandestine Marriages Act, 'I believe it will be allowed, that if a man and woman seriously and sincerely enter into a marriage contract, without the interposition of a clergyman, or any religious ceremony whatever, it will be a good marriage both by the law of God and the law of nature, yet the law of this society, and, I believe, of every Christian society, has declared it not to be a good marriage.': *Hansard's Parliamentary Debates*, Vol XV, p. 78.

¹⁰ At p. 232, emphasis added.

on the parties, in that it requires them to solemnize their marriage in church, but it is only a marriage ‘in nature’, not in the eyes of the law. Similarly, Scott cites Swinburne with approval to the effect that ‘it is a present and perfect consent, the which alone maketh matrimony, without either public solemnization or carnal copulation, for neither is the one nor the other the essence of matrimony, but consent only.’¹¹ This would at first sight appear to be conclusive evidence that a contract *per verba de praesenti* did constitute a marriage, but it needs to be read in context. Swinburne was simply referring to the fact that a contract *per verba de praesenti* (as distinct from a contract *per verba de futuro*, which he discussed on the preceding page) was binding on the parties. In this context it was appropriate to say that consent was of the essence of marriage – although of course such consent had to be proved before an ecclesiastical court would uphold the contract. For other purposes, solemnisation was necessary – as Swinburne went on to explain.¹² It is also significant that Scott does not appear to have interpreted Swinburne as stating that a contract *per verba de praesenti* would create a marriage that was good for all purposes – had this been his understanding of the law, much of the discussion in *Lindo* would have been redundant.

Other decisions confirm that prior to *Dalrymple* a contract *per verba de praesenti* was regarded as a binding contract rather than an actual marriage. Three years before the decision in *Dalrymple*, in *R v Brampton*,¹³ the court struggled with competing interpretations of a contract *per verba de praesenti*. The case involved the issue of a woman’s settlement, and required the court to determine the validity of a marriage celebrated in St Domingo. The evidence was that the parties had gone through a public ceremony of marriage in a chapel in the town, conducted by a person they had reason to suppose was a priest,¹⁴ and according to what they assumed was the marriage-service of the Church of England (read in French and interpreted for the parties by a person officiating as a clerk). A complicating factor was that St Domingo was a Roman Catholic country. This added a further layer of uncertainty to the status of the person celebrating the marriage: was he a priest at all, and, if so, was he a Roman Catholic priest? And what would the status of the marriage be in either case?

It was decided by the court that this was a good marriage both by the law of England and (in default of evidence to the contrary) by the law of St Domingo. For present purposes the interest of the case lies in the arguments that pertained to English law. Those contending that this was not a valid marriage argued that even before the 1753 Act it had been necessary for a marriage to be celebrated ‘by a person in holy orders’; those arguing for its validity cited *Jesson v Collins*¹⁵ in support of their contention that a contract *per verba de praesenti* constituted an actual marriage. The ambiguities of *Jesson* are considered further below; for now the important point to note is that the judgment of Lord Ellenborough shows him to be wavering between these two different ideas. He noted that a contract *per verba de praesenti* would have been

¹¹ *Ibid.*, quoting Swinburne, *A Treatise of Spousals*, p. 28

¹² Thus he explains that the principal effect of a contract was that the parties were ‘bound by the Laws Ecclesiastical of this Realm, to perform their promise, and to celebrate Matrimony together accordingly’ (p. 222); and that a woman contracted to a man who subsequently died was not entitled to dower (pp. 233-4).

¹³ (1808) 103 E.R. 782.

¹⁴ As Lord Ellenborough noted at p. 285, he was ‘habited like and believed to be a priest, and officiating as such’.

¹⁵ (1705) 2 Salk. 437; 91 E.R. 380.

binding on the parties, but also attached importance to the status of the celebrant. The fact that the latter may have been a Roman Catholic priest led to further difficulties, with Ellenborough rather desperately reasoning that such a person ‘would be recognized by our Church as a priest capable of officiating as such, upon his mere renunciation of the errors of the Church of Rome, without any new ordination.’¹⁶ Of the other judges in *Brampton*, Grose J was more confident that it would constitute a valid marriage by the law of St Domingo than he was regarding its status in English law. Le Blanc and Bayley JJ both attached importance to the fact that the marriage was celebrated by a person in holy orders, but it is not entirely clear whether this was in the context of English law or the law of St Domingo.

The uncertainties expressed by the judges in the case reflect the fact that it was a long time since the courts had been called on to answer this question: the contract *per verba de praesenti* had been of no effect in England and Wales since the coming into force of the Clandestine Marriages Act in 1754, while marriage across the empire was generally governed by legislation. By the time that *Latour v Teesdale*¹⁷ was decided, eight years later, the status of a contract *per verba de praesenti* was regarded as settled. The facts of the case were very similar: British subjects living in Madras had gone through a Roman Catholic ceremony of marriage there and subsequently lived together as husband and wife. The reasoning of the court, however, was very different. The serjeant for the plaintiffs, arguing that the marriage was valid, noted confidently that the subject had received exhaustive treatment in *Dalrymple v Dalrymple*, and claimed that there was a ‘distinct and uniform’ line of authority that ‘a contract *per verba de praesenti* was a valid marriage without the intervention of a priest.’¹⁸ The serjeant for the defendants, arguing against its validity, did not even attempt to challenge the authority of *Dalrymple*, but argued that it was not applicable as the canon law has been displaced by local regulations. The court decided that the canon law was applicable, and that as the parties had exchanged vows *per verba de praesenti* they had been validly married in Madras.

Yet there are hints in the case that matters were not quite as straightforward as they were presented as being. The serjeant for the plaintiffs brushed aside the line of cases that might have challenged his contention that the case-law was ‘distinct and uniform’, stating that ‘[i]t is unnecessary to enter on doubted points, whether dower, community of goods &c. follow on a marriage without a priest’.¹⁹ Gibbs C.J. also acknowledged the uncertainty that had existed prior to *Dalrymple*: ‘the judgment of Sir William Scott has cleared the present case of all the difficulty which might, at a former time, have belonged to it.’²⁰ And throughout his judgment all his remarks on the applicable law were prefaced by ‘it appears that...’: *Dalrymple*, rather than any more ancient authority, was his sole authority for the applicability of the canon law and the idea that a contract *per verba de praesenti* constituted an ‘actual marriage’.

The changes effected by *Dalrymple* were subtle but significant: certainty was exchanged for uncertainty; and an exchange of vows *per verba de praesenti* began to be described as a ‘valid marriage’ rather than a binding contract. Significantly, it is

¹⁶ At p. 288.

¹⁷ (1816) 8 Taunt 830; 129 E.R. 606.

¹⁸ At p. 834.

¹⁹ At p. 834.

²⁰ At p. 837.

only in the wake of *Dalrymple* that we begin to find references to marriage *per verba de praesenti* as opposed to a contract of marriage *per verba de praesenti*.²¹

Scott's authorities

Dalrymple contains detailed discussion of the law of Scotland: there is a lengthy analysis of case-law, evidence from experts, and consideration of key legal texts. Scott's discussion of English law as it stood prior to 1754 is rather more perfunctory: a mere four cases are cited. All, moreover, are more ambiguous than Scott's interpretation of them would suggest.

First was the sixteenth-century case of *Bunting v Lepingwell*.²² The key facts were relatively straightforward. Agnes Adenshall had been contracted to Bunting, then married Twede. Bunting then sought to enforce the contract. The court upheld it and ordered the contracted couple to marry, which they did before the birth of the child whose legitimacy was in question. This, however, is perfectly consistent with the view that a contract *per verba de praesenti* was a binding contract: it was sufficient to invalidate the marriage to Twede, but Agnes and Bunting were required to solemnize their union in church before they lived together.²³

Secondly, Scott cited the statement of Holt CJ in *Collins v Jessot* that 'if a contract be *per verba de praesenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve or release by mutual agreement; for it is as much a marriage in the sight of God as if it had been in *facie ecclesiae*.'²⁴ This might appear to be unambiguous, but it must be read in context. The actual question before the court in *Collins v Jessot* was which court – ecclesiastical or secular – should try the question of whether there had been a contract. If there had been an exchange of vows *per verba de praesenti* the matter was one for the ecclesiastical court to resolve by ordering the parties to solemnize their marriage. If, by contrast, there had been a contract *per verba de futuro*, the matter could be dealt with in either court.²⁵ Holt CJ refused to prevent the ecclesiastical court from hearing the case: the mere fact that the contract might turn out to be *de futuro* rather than *de praesenti* did not justify a prohibition as the ecclesiastical court had jurisdiction in either case. Thus *Collins v Jessot* is not a decision that a contract *per verba de praesenti* was in fact a marriage, with all the attendant rights of one celebrated in church, but simply a decision that whether or not there was such a contract was a matter for the ecclesiastical court to decide. By describing a contract *per verba de praesenti* as 'as much a marriage in the sight of God as if it had been in *facie ecclesiae*', Holt CJ was merely signifying that it

²¹ A search of the electronic version of the *English Reports* yields no mention of the term before the decision in *Dalrymple* in the nineteenth century, while only one example appears in the electronic database *Eighteenth-Century Collections Online* – which contains the full text of all the 150,000-or-so books published in England in the eighteenth century – and this one reference related to the marriage law of Holland, not England.

²² (1585) 4 Co Rep 29a; 76 E.R. 950.

²³ This is explored further in part 4 below.

²⁴ (1705) 6 Mod 155; 87 E.R. 913 at p. 913.

²⁵ A party could elect between a remedy in the common-law courts (damages for breach of contract) or in the ecclesiastical court (an order that the parties should perform their contract). The powers available to the ecclesiastical court to enforce a contract *per verba de futuro* were considerably weaker than those available to enforce a contract *per verba de praesenti*: the parties would be admonished rather than compelled (see Swinburne, *A Treatise of Spousals*, p. 232).

would be binding on the parties.²⁶ That a contract did not have the same consequences as a marriage in church is clear from his very next words: ‘with this difference, that if they [i.e. the contracted couple] cohabit before marriage *in facie ecclesiae*, they are for that punishable by ecclesiastical censures.’²⁷ The fact that this important qualification did not appear in some reports²⁸ (and was not mentioned by Scott) may have contributed to subsequent misunderstandings of the case. Indeed, Scott actually suggested that consummation would be *presumed* in the case of a marriage *per verba de praesenti*. But it would be perverse if the law had presumed that contracted couples had done something that they were forbidden to do, and there is no authority for this proposition prior to *Dalrymple*.

Scott’s third authority was *Wigmore’s case* – another decision of Holt CJ, who stated that ‘i[f] the contract be executed, and he does take her, ‘tis a marriage, and the Spiritual Court cannot punish for fornication.’²⁹ Again, this statement needs to be read with care. That the ecclesiastical courts could not punish a contracted couple for the specific offence of fornication did not mean that they could not punish them at all: it is unlikely that Holt would have forgotten what he had said in *Jesson v Collins*, only two years earlier. They were not treated in the same way as couples not bound by any contract (who would have been punished for fornication), but neither were they treated in the same way as couples who had solemnized their marriage in church, in that they were punishable for contempt.³⁰

And again, the context – and the report cited by Scott – is important. All of the reports of *Wigmore’s case* are brief, but certain facts can be pieced together. The couple obtained a licence to marry, but the actual ceremony was conducted by a Baptist minister, who was not in orders. The wife then sued the husband for alimony in the ecclesiastical court. The outcome of this is not clear, but the fact that the common-law courts were discussing the issue of punishment, together with the fact that the case resulted in a prohibition being issued to the ecclesiastical court, suggests that the ecclesiastical authorities, on learning the circumstances of the marriage, had sought to punish the couple for fornication.

What, then, did Holt CJ mean when he referred to the contract being ‘executed’? Was he referring to the ceremony that had taken place between the parties, or to the fact that they had engaged in sexual relations? None of the reports offer any assistance on

²⁶ And this was how the case was interpreted by contemporaries: see, e.g. *R v The Inhabitants of Luffington* (1744) (1744) Burr Sett Cas 232, No 79, in which counsel noted Holt’s comments in *Wigmore’s case* (1707) Holt K.B. 460; 90 E.R. 1153 and argued that in the latter, which referred to a contract *per verba de praesenti* as a marriage, ‘he can only mean what he here [i.e. in *Collins v Jessot*] explicitly says with Respect to the very Parties themselves, that they could not release one another, or dissolve their own mutual Agreement.’ (Sir J. Burrow, *A series of the decisions of the Court of King’s Bench upon settlement cases* (London, 1768), p. 234).

²⁷ At p. 155.

²⁸ See e.g. Holt KB 457; 90 E.R. 1152; 2 Salk 437; 91 E.R. 380.

²⁹ (1707) 2 Salk 438; 91 ER 380.

³⁰ See e.g. *Bunting’s case* (1580) Moo. K.B. 303; 72 E.R. 510: ‘contempt encounter un edict del Eglise, que avoit phibite carnal copulacōn devant espousals solemnised in facie Ecclesiae.’ For the practice of the ecclesiastical courts, see R.A. Marchant, *The Church Under the Law: Justice, Administration and Discipline in the Diocese of York, 1560-1640* (Cambridge: CUP, 1969), p. 137. And note too that in *Hilliard v Phaly* (1723) 8 Mod 180; 88 ER 132 the judge reasoned matters differently, suggesting that there was ‘no better proof that there was no marriage than sentence that they were guilty of fornication.’

this point, but it is clear from the longer account in Holt's own reports that matters are not quite as simple as the quotation that Scott chose would suggest:

'In the case of a Dissenter, married to a woman by a minister of the congregation, who was not in orders; it is said, that this marriage was not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes this marriage irregular, and not expressly void: but marriages ought to be solemnized according to the rites of the Church of England, to intitle the privileges attending legal marriage, as dower, thirds, &c.'³¹

Again, we have a reference to the law of nature, here contrasted with the positive law – which dictated that a priest was necessary – and then considerable doubt as to what the status of such a marriage, conducted according to the rites of a dissenting congregation, should be. But why would eighteenth-century judges have had any difficulty in determining the status of such a marriage if a contract *per verba de praesenti* was regarded as a marriage?

Finally, Scott referred to an unreported decision of the ecclesiastical courts, *Fitzmaurice v Fitzmaurice*, decided in 1732. It had been held in this case that a contract *per verba de praesenti* that had been proved in writing was binding on the parties and that the marriage should be solemnized in church.³² Once again, this proves that a contract *per verba de praesenti* was binding on the parties, but not that it was a marriage in and of itself.

All four cases relied upon by Scott are more consistent with the view that a contract *per verba de praesenti* was a binding contract; a marriage before God but not before man; treated differently from a regular marriage and needing solemnization for the completion of the marriage.

Law and practice before 1754

Nor do these cases stand alone: the weight of authority – from decided cases and legal textbooks – shows that a contract *per verba de praesenti* was regarded as distinct from a marriage. This appears particularly clearly in the discussion as to the effect of a subsequent marriage to a third party while a contract *per verba de praesenti* was in existence. Such a marriage was, of course, forbidden: as one writer explained:

'if they were solemnly contracted to any other, it ought to be confess'd as an impediment to this Marriage; for though such Contracts *be not properly Marriage* (because they do not give the Persons contracted power to use the Freedom of Marriage towards each other) yet it binds them so fast, that it takes from them all possibility of being married to any body else, and makes it no less than Adultery for them to join themselves to any other Person.'³³

³¹ Holt KB 459, p. 459-460; 90 E.R. 1153.

³² For an account of the case, see *Love without Artifice: or, the Disappointed Peer: A History of the Amour between Lord Mauritio and Emilia, being the Case of Elizabeth Fitz-Maurice, alias Leeson, and the Lord William Fitz-Maurice, Relating to a Marriage-Contract Between Them* (London, 1733).

³³ C. Wheatly, *The Church of England man's companion, or a rational illustration of the harmony, excellency and usefulness of the Book of Common Prayer* (Oxford, 1710), p. 152 (my emphasis).

But if a person contracted by words *per verba de praesenti* did subsequently marry a third party in church, that marriage was voidable, rather than void, and could not be challenged after the death of either party. The distinction between a marriage that was void and one that was voidable was not exactly the same as that which exists today, but is clear from contemporary sources. Coke, for example, noted that ‘if a marriage *de facto*³⁴ be voidable by divorce in respect of consanguinity, affinity, precontract or such like, whereby the marriage might have been dissolved and the parties freed à *vinculo matrimonii*, yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife *de facto* shall be endowed, for this is *legitimum matrimonium*.’³⁵ By contrast, in *Hemming v Price*, Holt CJ, when faced with an allegation that the ‘wife’ had a previous husband still living, stated that ‘[t]he meaning of the saying, that one shall not be bastardized after the death of either of his parents, is that the Spiritual Court shall not proceed to dissolve a marriage *de facto* after the death of either parties, as in case of consanguinity, *precontract* etc, but in this case, if the republication below be true, the marriage was *ipso facto* void.’³⁶ We can see here a clear distinction being drawn between the effect of a precontract and the effect of a previous marriage, and can draw the conclusion that they were not regarded as being the same.

Significantly, a contract *per verba de praesenti* did not render a subsequent marriage to a third party bigamous. Some historians have used the term ‘bigamous’ to refer to marriages invalidated by a precontract,³⁷ but this reflects twentieth-century misunderstandings of the nature of the contract *per verba de praesenti* rather than contemporary language. One early eighteenth-century commentator, discussing bigamy, noted that a man might be guilty of bigamy if he went through a second ceremony of marriage, even if the first marriage was voidable because of a precontract, but significantly did not suggest that this *first* marriage was itself bigamous by virtue of that precontract.³⁸ This is supported by the complete absence of bigamy cases based on a contract *per verba de praesenti*.³⁹ As Lord Lyndhurst pointed out in *R v Millis*, ‘it seems never to have occurred to any one, in suits to annul a marriage by reason of precontract, to suggest that the party had been guilty of bigamy. There is no trace of any such intimation.’⁴⁰ If a pre-contract had rendered a later marriage to a third party bigamous, then one would expect such contracts to feature in bigamy trials. To test this, a sample of 168 bigamy trials heard at the Old

³⁴ A marriage *de facto* was one in which the parties had gone through a ceremony of marriage, but to which some impediment might exist.

³⁵ E. Coke, *The first part of the institutes of the laws of England. Or, a commentary on Littleton* (London, 10th ed, 1703), p. 33

³⁶ (1701) 12 Mod 432; 88 ER 1430 (emphasis added).

³⁷ See e.g. D. Cressy, *Birth, Marriage and Death: Ritual, Religion and the Life-Cycle in Tudor and Stuart England* (OUP, 1997), p. 307, although his use of quotation marks indicates some doubt about the appropriateness of the term; L. Stone, *Road to Divorce: A History of the Making and Breaking of Marriage in England* (Oxford: OUP, 1990), p. 53.

³⁸ E. Gibson, *Codex juris ecclesiastici Anglicani* (London, 1713), p. 508.

³⁹ Or indeed on a non-Anglican marriage – with the sole exception of *R v Fielding* (1706) 14 State Trials 1327, in which the status of Beau Fielding’s first marriage, celebrated according to Catholic rites, was not discussed. One legal commentator doubted whether a marriage celebrated by a dissenter would be relevant for the purposes of the crime of bigamy: ‘I believe no Man will affirm, that a Marriage celebrated by the Dissenters will bring a Man in Danger of the Statute which makes it a Felony to have more Wives than one.’: Salmon, *Critical Essay*, p. 209.

⁴⁰ (1843-44) 10 Cl & F 534; 8 E.R. 844, p. 871.

Bailey between 1715 and 1755 was examined: in not one case was such a contract alleged. In fact, it was not until after the decision in *Dalrymple* that it was suggested that an individual would be guilty of bigamy if she or she went through a ceremony of marriage with one person after having married another according to the rites that were not those of the Established Church.⁴¹

It is also clear that a couple were not regarded as married until their union had been solemnized in church. That a decision of the court in favour of a contract *per verba de praesenti* did not automatically make the parties husband and wife is illustrated by the decision in *Sir Robert Paine's Case* in 1661.⁴² Here, the ecclesiastical court had pronounced in favour of the first contract, but when the question of the parties' status was raised in the common-law courts Twisden J insisted that the marriage would have to be solemnized before the parties would be accounted 'baron & feme.'

Solemnisation was necessary for full legal rights and responsibilities to arise. Legal writers pointed out that:

'The common law does not esteem a Couple who are betroth'd or espous'd, even by Words of present Time, to be so far Man and Wife, as to give either Party any Interest or Property in the other's Lands or Goods, or to Legitimate their Issue, until the Marriage be solemniz'd according to the Rites of the Church of England.'⁴³

Nor was a woman entitled to dower if she was merely contracted to the man:

'a Woman having contracted Matrimony, if the Man to whom she was betroathed dye before the Celebration of the Marriage, she cannot have any Dower of his Lands, because as yet, she is not his lawful Wife, at least to that effect.'⁴⁴

It is telling that Swinburne assumed that celebration would, in the normal course of events, follow the contract: he is not commenting on the rights of couples who set up home after a contract but rather those of couples whose progress to matrimony had been interrupted.

It is true that a marriage did not have to be regular to confer full legal rights, but it did have to be presided over by an ordained Anglican clergyman. There was a consensus among contemporaries that non-Anglican ceremonies were not accorded the same legal recognition as a marriage before a minister of the Established church.⁴⁵ Indeed, had a contract *per verba de praesenti* had the same legal consequences as a regular marriage, there would have been no need for any debate over the status of the

⁴¹ The first – the case of Lathrope Murray in 1815 – had been heard at the Old Bailey; others had been decided by Irish judges at assizes: see *R v Millis* (1843-44) 10 Cl & F 534; 8 E.R. 844, 933. The House of Lords had the opportunity to check this misunderstanding in *R v Millis* (1843), and Millis, who had gone through a Presbyterian ceremony of marriage in Ireland with one woman before marrying another in England, was duly – and rightly, on the basis of the law as it stood prior to *Dalrymple* – acquitted of bigamy.

⁴² *Sir Robert Paine's Case* (1661) 1 Sid 13; 82 E.R. 941.

⁴³ Salmon, *Critical Essay*, p. 180. See also Swinburne, *A Treatise of Spousals*, p. 235: 'neither Spousals *de praesenti*, neither Spousals *de futuro* consummate, do make her Goods his, or his Goods hers.'

⁴⁴ Swinburne, *A Treatise of Spousals*, pp 233-4.

⁴⁵ See e.g. *Wigmore's case* (1707) Holt K.B. 460; 90 E.R. 1153.

celebrant. Yet there are a number of cases that illustrate that the status of the person celebrating the disputed marriage was thought to be relevant by the courts. In *Weld v Chamberlaine*, for example, the ceremony in question had taken place before an ordained minister who had been ejected from his living. Pemberton CJ inclined to the view that ‘words of contract *per verba de praesenti* repeated after a parson in orders’ created a good marriage, although the point was not resolved.⁴⁶ In *R v The Inhabitants of Luffington*,⁴⁷ the settlement of the pauper in question rested on whether she had been validly married – and *this* turned on whether her supposed husband’s first marriage had been valid. There was evidence that the first ceremony had taken place according to the rites of the Church of England, but in a private house, conducted ‘by a Person in a black Coat and Band’. The bride assumed that he was a clergyman but ‘has since been informed that he was a layman.’ After much discussion as to the status of a marriage not celebrated by a clergyman, the court quashed the order of removal on the basis that the case had been so imperfectly stated, but confirmed the significance of clerical marriage by stating that the sessions should have determined whether the marriage was by a person in holy orders or not.

The evidence reviewed in this section gives a rather different impression of contracts *per verba de praesenti*. To focus solely on those cases that attempted to enforce a contract *per verba de praesenti* may lead to too much weight being placed on the binding nature of such a contract. That it was binding is undeniable. That it was not, by itself, regarded as a marriage in the eyes of the law – whether ecclesiastical or secular – is also undeniable. Only when a couple married before an Anglican minister were full legal rights and responsibilities conferred upon them.

There is also strong evidence that a contract *per verba de praesenti* was not regarded as a marriage by contemporaries. It is telling that throughout the debates in Parliament on the Bill that became the Clandestine Marriages Act, no-one, not even the most vehement opponents of the Bill, ever suggested that a contract *per verba de praesenti* constituted an actual marriage. Indeed, it is clear from all of the speeches that it was not regarded as such. The fact that the bill would render promises of marriage unenforceable was criticized by its opponents, but their claims merely reinforce the evidence that a contract *per verba de praesenti* did not constitute a valid marriage by itself and only gave rise to the right to enforce the contract. Henry Fox, for example, spoke passionately about those unfortunate women debauched under a promise of marriage: ‘by this Bill you are going to take from them the only remedy they have, the only method in which they can sue *for the performance of such a promise*.’⁴⁸ Throughout the debates, it was the clandestine marriage – the specific meaning of which was referred to above – that was viewed as the problem, since it made it too easy for mesalliances to occur. Yet if it had been possible for a couple to marry by a contract *per verba de praesenti*, this would have offered an even easier option than a clandestine marriage. The failure to even mention this is highly significant.

This leads on to the next point. The very popularity of clandestine marriages is in itself an argument against accepting the contract *per verba de praesenti* as a valid

⁴⁶ (1684) 2 Shaw KB 301; 89 E.R. 952.

⁴⁷ (1744) Burr Sett Cas 232, No 79.

⁴⁸ *Hansard’s Parliamentary Debates*, Vol XV, p. 68, (emphasis added). In such a case it would not matter whether the promise was in the future tense, since the subsequent debauching would mean that it would be treated in the same way as a contract *per verba de praesenti*.

marriage. All the supposed advantages of clandestine marriages – speed, secrecy, saving money – would apply with even more force to the contract *per verba de praesenti*. Why would one pay to be married by a clergyman if the same effect could be achieved by a simple exchange of consent? One answer would be that a clandestine marriage before an Anglican clergyman carried the same legal rights as a regular marriage in church⁴⁹ whereas a contract *per verba de praesenti* did not. Yet the evidence of clandestine marriages suggests that it was an option resorted to by all classes. We must either conclude that more people attached importance to the legal consequences of marriage than has previously been assumed,⁵⁰ or that a contract *per verba de praesenti* was not regarded as a marriage.

That the latter is the correct interpretation is suggested by the absence of evidence that couples married by exchanging vows. Existing claims that marriage by consent alone was widespread are based on supposition rather than evidence,⁵¹ the assumption being that if it was *possible* to marry by exchanging consent, such a mode of marrying must perforce have been *popular*. One could turn this argument on its head, and argue that if there is no evidence that couples married simply by exchanging consent, this would indicate that such an exchange was not a valid mode of marrying. And I have indeed unearthed no such evidence. I have examined settlement examinations for a number of parishes – Bradford-on-Avon, near Bath,⁵² Olney⁵³ and Chelsea,⁵⁴ – but not one of the hundreds of couples (often the poorest of the poor) who gave evidence regarding the circumstances of their marriage claimed to have married by exchanging consent.⁵⁵ I have investigated the marital status of couples who brought their children to be baptized in the Northamptonshire parish of Kilsby, and of the residents of Cardington in Bedfordshire: in each case a marriage in church has been traced for the vast majority of couples – 80 per cent for the Kilsby couples and well over 90 per cent in the case of the Cardington sample.⁵⁶

⁴⁹ Although a clandestine marriage might expose the parties to punishment for flouting the canon law: see e.g. M. Kinnear, 'The Correction Court in the Diocese of Carlisle, 1704-1756' (1990) 59 *Church History* 191

⁵⁰ C.f. A. Diduck and F. Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (Oxford: Hart Publishing, 2nd ed 2005), who assert that the formal rites were used only by 'that minority of the population who were concerned with the proof of the bond for the purposes of the passing of property.' (p. 59).

⁵¹ See e.g. S. Parker, *Informal Marriage, Cohabitation and the Law, 1754-1989* (Basingstoke: Macmillan, 1990); J. Schellekens, 'Courtship, the Clandestine Marriage Act, and Illegitimate Fertility in England' (1995) 25 *Journal of Interdisciplinary History* 433.

⁵² P. Hembry, (ed) *Calendar of Bradford-on-Avon Settlement Examinations and Removal Orders, 1725-98* (Trowbridge: Wiltshire Record Society, 1990).

⁵³ *The People of Olney* (Aylesbury, 2006).

⁵⁴ T. Hitchcock and J. Black, *Chelsea Settlement and Bastardy Examinations, 1733-1766* (London Record Society, 1999).

⁵⁵ In the study of Bradford, for example, 57 of the 70 marriages that took place before the coming into force of the 1753 Act have been traced or involved a named church; in the thirteen remaining cases the lack of detail – often only a very approximate date – made tracing the marriage impossible. It is clear from the examinations, however, that differences in detail simply reflect the fact that the examinations were carried out by different persons over a long period of time; it would not be legitimate to infer any differences in the way that the marriages of the parties concerned were celebrated. In Chelsea the Fleet was a popular destination, reaffirming the importance of clandestine marriage to the poorer classes.

⁵⁶ The difference can be attributed to the fact that more information – including the wife's maiden name – was available in the case of the Cardington sample.

Nor have other scholars provided any concrete evidence that it was common practice for couples to set up home together after a simple exchange of consent. In Stone's case-studies,⁵⁷ which he presents as evidence of the flexibility of marriage prior to 1754, none of the parties to the disputed contracts had ever lived together. Outhwaite's examples of marriages 'without Church or Priest' appear more in the form of betrothals: the couples in question initially planned to marry but problems arose to frustrate this.⁵⁸ Gillis, one of the main proponents of the view that what he anachronistically terms 'common law arrangements' were popular, supplies only one example of a couple living under the same roof after entering into a contract,⁵⁹ and even this is far from being a clear-cut illustration of a widespread practice in the period before the 1753 Act: it dates from the 1560s; at least one of the parties did not regard the contract as binding; and the account is riddled with ambiguities.⁶⁰ If this is the best example of a contracted couple setting up home together in the two hundred years preceding the Act that Gillis could find, it hardly inspires confidence in the ubiquity of such practices.

Had it been common practice to set up home together after an exchange *per verba de praesenti*, one would expect to find some evidence of this in the case-law – particularly, given the somewhat patronizing assumption that the poor were more likely to marry by a simple exchange of consent, in settlement litigation. Yet there is none. There are, of course, plenty of cases in which one party sought to enforce the contract – but in such cases it is rare to find evidence of the parties living together. The handful of cases in which the courts commented on the legal rights that flowed from the mere exchange of consent involved ceremonies presided over by a non-Anglican celebrant rather than a bare exchange of consent. All the evidence suggests, therefore, that it is inappropriate to regard a contract *per verba de praesenti* as a marriage: in the eyes of God such an exchange might create a marriage, but in the eyes of law and society it was merely a contract.

A possible explanation

So if this had been the law pre-1754, why did Sir William Scott decide otherwise in *Dalrymple*? My suggestion is that a key influence on his decision came from across the Atlantic rather than the Channel, from a contemporary American case rather than the ancient canon law of Europe: namely the decision of the New York Supreme Court in *Fenton v Reed* in 1809.⁶¹

⁵⁷ L. Stone, *Uncertain Unions & Broken Lives: Intimate and Revealing Accounts of Marriage and Divorce in England* (Oxford: OUP, 1995).

⁵⁸ Outhwaite, *Clandestine Marriage*, p. 21.

⁵⁹ J. Gillis, *For Better, For Worse: British Marriages 1600 to the Present* (Oxford: OUP, 1985), p. 46. His source for this is F.J. Furnivall, *Child-Marriages, Divorce and Ratifications, etc, in the Diocese of Chester, AD 1561-6* (London: Kegan Paul, Trench, Trübner & CO, 1897).

⁶⁰ One witness gave evidence that 'the neighboures thereabout did take them as man and wife, in somuche that they have Laine together in bed, and so used them selves as man & wife.': Furnivall, *Child-Marriages*, pp 58-9. Another, however, gave a rather different account of their sleeping arrangements, noting that 'they did lye in one house, and nothinge betwix them but a broken wall and a paintid cloth.' Similarly puzzling is the evidence that George had over 40 shillings out of Anne's purse, 'which the said Anne did Lend unto the said George': at a time when a woman's property passed to her husband on marriage, could a wife be said to lend her husband money that was regarded as his?

⁶¹ 4 Johns (NY) 52 (1809).

Elizabeth Reed claimed to be the widow of William Reed and as such entitled to a payment of 25 dollars per year from the Provident Society, of which William had been a member. The problem for Elizabeth was that she had previously been married to John Guest, who had disappeared in 1785. In 1792 it was reported that he had died, whereupon Elizabeth married William Reed. John Guest then turned up alive and well, but made no claims upon Elizabeth, and died in 1800. Elizabeth continued to live with William Reed until his death in 1806. The court decided that Elizabeth was entitled to the annuity, and this was affirmed by the Supreme Court of New York on the different ground that a marriage could be presumed to have taken place between Elizabeth and William after the death of John Guest. The court drew on English precedents to hold that the fact that the parties had cohabited and were reputed to be married was evidence from which a marriage might be inferred. Most significantly for current purposes, it claimed that:

‘No formal solemnization of marriage was requisite. A contract of marriage made *per verba de praesenti* amounts to an actual marriage, and is as valid as if made *in facie ecclesiae*.’

The key source for this was, again, Holt CJ’s statement in *Collins v Jessot*, discussed above.⁶² But the court in *Fenton v Reed* mistakenly assumed that if a contract was as *binding* as if the parties had married in church, it was therefore as *valid* as if the parties had married in church. And from this misunderstanding – which did not go uncontested⁶³ – sprang the idea that the exchange of consent sufficient to constitute a marriage could be inferred from cohabitation and reputation.⁶⁴

Given that Scott does not refer to *Fenton v Reed*, the argument that it influenced his decision must rest on circumstantial evidence. A brief review of this evidence shows that the dates all fit: in 1795 Scott describes a contract *per verba de praesenti* as a contract rather than an actual marriage; in 1808 this is still the prevailing view in *R v Brampton*, although an opposite view is advanced based on *Jesson*; in 1809 there was a clear assertion in *Fenton v Reed* that a contract *per verba de praesenti* was an actual marriage, it being assumed that this was the case in English law prior to 1754; two years later, in 1811, there is an equally clear assertion by Scott in *Dalrymple* to the same effect, and by 1816 the court in *Latour v Teesdale* regards the matter as recently settled by *Dalrymple*. It is possible that this is no more than a coincidence – but to attribute at least some influence to *Fenton* would explain both *why* Scott changed his views and also why he did so *when* he did.

Conclusion

In arguing that Scott misunderstood the law of England and Wales as it stood prior to 1754, it is not my intention to suggest that the actual outcome of *Dalrymple* would have been different had it been heard in that jurisdiction in the first part of the eighteenth century. Johanna Gordon would have brought a suit in contract, rather than one for restitution of conjugal rights, but John Dalrymple’s marriage to Laura

⁶² (1705) 87 E.R. 913.

⁶³ See e.g. *The Inhabitants of the Town of Milford v. The Inhabitants of the Town of Worcester* (1810) 7 Mass. 48.

⁶⁴ For the subsequent development of the law, see O. E. Koegel, *Common Law Marriage And Its Development in the United States* (Washington: John Byrne & Co, 1922), ch. 7.

Manners could have been set aside on the basis of the written evidence of the contract that Johanna produced. Dalrymple would then have been ordered to marry Johanna: ‘in case of Divorce for Precontract, the Person before Contracted is bound, by the Decree of the Spiritual Court, to marry the person with whom the first contract was made.’⁶⁵ The point is that Johanna would have succeeded on the basis that the contract was binding, rather than on the basis that there was a valid marriage.

Scott’s obiter assertion that a contract *per verba de praesenti* was a valid marriage was to have a highly significant impact on both the way in which the history of marriage was perceived and on subsequent marriages. Scott’s judgment blurred the distinction between the clandestine marriage (i.e. a marriage celebrated before an Anglican minister otherwise than in accordance with canon law) and a contract *per verba de praesenti*. This was a result of the way in which the case was argued before him: counsel had argued that the marriage was clandestine – using that word in the more popular sense of private, surreptitious, or nefarious. Scott’s classification of the contract *per verba de praesenti* as a marriage – and specifically as a form of *clandestine* marriage – has affected modern understandings of law and practice, fostering a misunderstanding of the status of a contract *per verba de praesenti*. *Dalrymple* led to men and women being convicted of bigamy who would not previously have been regarded as guilty of such a crime. And, although it was of no practical relevance within the confines of England and Wales, the decision validated marriages not celebrated according to local rites across the burgeoning British empire.

That Scott’s judgment in *Dalrymple* was influential cannot be denied. At some point mistakes become so well entrenched that they cannot be challenged. Yet this should not obscure the fact that the law was once otherwise: claims of continuity should not disguise the reality of change.

⁶⁵ Grey, *System of English Ecclesiastical Law*, p. 146.