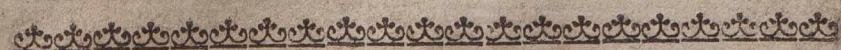


...the ... to their Duty
... the ...
... the ...
... the ...
... the ...
... the ...

... of a very ...
... not ... upon the
... I they had I
... would have been regarded: the
... too late for the ...
... something done even this
... the ... which this
... of putting the Act in
... may ...

F I W I S



A N

ENQUIRY

INTO THE

FORCE and OPERATION

OF THE

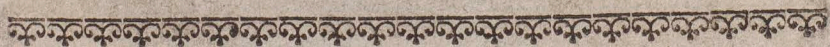
ANNULLING CLAUSES

In a late Act for the better preventing of

Clandestine MARRIAGES,

With Respect to CONSCIENCE.

[Price SIX-PENCE]



STORY

FOR THE OPERATION

OF THE

OF THE

OF THE

[]

A N
E N Q U I R Y

I N T O T H E
F O R C E a n d O P E R A T I O N
O F T H E
A N N U L L I N G C L A U S E S

In a late Act for the better preventing of
Clandestine M A R R I A G E S,
With Respect to CONSCIENCE.

In which

The Rights of Marriage both in and out of
Society are briefly discussed upon the Prin-
ciples of the Law of Nature.

*The Force of Civil Laws is ultimately founded in the Obligations
of the Law of Nature.*

DR. GALLY. *Considerations, &c* p. 6.

L O N D O N :

Printed for M. COOPER, in *Pater-noster-row*,

1754.

EMORY

1800

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

R

OW 1752/5e

51.1.155.





A N

ENQUIRY

INTO THE

Force and Operation, &c.

Anno Regni GEORGII Secundi viceffimo
fexto, &c.



ALL Marriages solemnized
— in any other Places
than a Church or publick
Chapel, or that shall be
solemnized without Pub-
lication of Banns or Li-
cense of Marriage from a Person—
having Authority to grant the same, first
had and obtained, shall be null and void
to all Intents and Purposes whatso-
ever. Again,

AN

All Mariages solemnized by Licence, where either of the Parties (not being Widower or Widow) shall be under the Age of Twenty-one Years, which shall be had without the Consent [of Parents or Guardians] shall be null and void to all Intents and Purposes whatsoever.

COMMENTARY.

NULLITIES are such either in Law or in Conscience, or in both. The Force of these Clauses, as to their CIVIL Effects, it belongs to the Gentlemen of the Law to consider, and with them I shall leave them. But with the Law of CONSCIENCE every one is concerned who has a Conscience; and the present Question shall be, Whether if any Persons should marry in any other Way than this Act directs; the Law, by declaring such Marriage NULL, discharges Conscience from the Obligation.

To come at the Bottom of this Question, we must consider how the Right of Marriage stands upon the Foot of the natural Law, antecedently to Society; and then enquire what Alteration the Intervention of Society will make in the Case.

I TAKE

I TAKE it for granted, that by the natural Law, Mankind are not permitted to live together like Herds of Cattle, and propagate their Species by casual Commerce, but under some Contract between the Man and the Woman for mutual Society, Help and Comfort of one another, and their Joint Care and Assistance in the Support and Protection of their Offspring. Whether by the Law of Nature a Man may have more Wives than one, or for what Causes he may put her away; are Cases entirely out of the present Enquiry. Our Laws, in conformity to the Law of Christ (which, in this Respect, is but the Transcript of the original Law of God as given *from the Beginning* *) admit of but one Woman to one Man; and this must be understood as supposed in the present Act. The first Question then will be, what it is that creates the married State, or which constitutes the marriage Contract? And I answer (with *Grotius* † and others) it is THAT FAITH by which the Man and Woman *bind themselves* to each other to live together as Man and Wife. The Law of Nature prescribes no particular Form in which this Contract shall be made; but in what Words, and under what Circumstances soever it be

* Matt. xix. 8. † De Jure Belli. Lib. 2. Cap. 5. 82. & Ibid. 15. 2.

made

made, and whether with Witnesses or without; the State of Marriage arises immediately upon it, binding the Consciences of both Parties, especially if Consummation follows.

IN every Contract there is supposed a Capacity of Contracting; and therefore all Contracts made where there is no Capacity are *ipso facto* null and void. It must be considered then what the Capacity is which qualifies Persons to make the Marriage Contract; and this I take to be the very same (neither more nor less) with that which qualifies them to make any other Contract; *viz.*

1. That they be *sui Juris*, or that the Thing about which they contract be in their own Power; and
2. That there be a Sufficiency of Reason or Understanding to enable them to discern what it is about which they contract, and what is the proper End, Use, and Effect of such a Contract. If a Man contracts about Goods or Possessions, which of Right belong to another Person, the Contract is void. So it will be if a Fool or an Idiot makes a Bargain, though the Goods be his own.

Now to apply this to the Marriage Contract. I apprehend that all Persons have a Sufficiency of Knowledge to make this Contract

tract who understand, that by it they bind themselves to live together as Man and Wife, in mutual Love and Fidelity, for the Purpose of Procreation, and for the joint Support and Protection of their Offspring. For he that knows this knows the true End, Use, and Effect of the Marriage Contract. And so has the wise Providence of God (studious for the Propagation of Mankind) order'd it, that this Capacity follows close at the Heels of the Capacity of Procreation, and the natural Appetite to Marriage. Every Man confesses this who marries his Daughter at fifteen, sixteen, or seventeen Years of Age (which there is scarce a Parent in the Kingdom who would not do for the Sake of an advantageous Match) and the Reason is plain. For the Contract arises, not from the Parents Consent, but from the Consent and Will of the Child; which Consent, if the Child were not in a Capacity of Contracting, would be absolutely of no Force.

THE only Question then remaining is, Whether such a Child be *sui Juris*. And my Answer is, that every Child who has a Capacity that qualifies him or her to make the Marriage Contract is (naturally) in this Respect *sui Juris*. For if the Right does not lie in the Child it must (in a State of Nature) lie in the Parent. It can lie no where else

else. But the Right cannot lie in the Parent. For though the Being of the Child comes from the Parent, the Rights of the Child as a distinct Individual do not. Every-body understands, that Right may accrue to the Child, separate from the Rights of the Parent. If a Friend gives my Son an Estate; the Estate is his and not mine; nor is he in the Use of it, subject to my Controul. Now can you tell me of any Thing which is more a Man's *his* than HIMSELF? Nothing. An Estate given to my Son is *his*, by the Gift of the Donor. Himself is *his* (by the Instrumentality indeed of the Parent, but) by the Gift of God. Otherwise a Parent might at his Pleasure maim, dismember, or murder his Child, which no reasonable Man will say are not high Violations of the natural Law.

I HAVE purposely omitted one Thing in this Account of the Capacity of Children to make the Marriage Contract; and that is a Capacity to maintain themselves and Families. Because, though all prudent Persons will take Care that there be a Prospect of a Livelihood before they contract Marriage; this does not enter into the Essence of the Marriage Contract, but is a Consideration of a subordinate and inferior Nature. All Nations confess this. For is there a Country in the World where the Laws deny the Liberty

ty of Marriage to any Persons, because they are Poor? They would be wicked Laws if they should. God made the Poor as well as the Rich; and it is his Will that both should increase and multiply. Every Person who is of Age to marry is of Age to work, and may be compelled to maintain himself and Family, so far as his own Labour and Industry will go. But if this is not sufficient, he stands for the rest, as an Object of the charitable Assistance of those who abound. So Nature speaks; and so God ordains.

It is not to be denied, that as entering into the married State is a Matter of the greatest Importance, so it should never be entered into but with the greatest Deliberation; a Point in which young Persons often fail, who attend more to the Appetite that incites to Marriage, than to Reason which directs them to act properly. Against this Evil, Providence hath provided a proper Guard by placing them under the Inspection of their Parents; and if there is any Point in the World in which Children should take the Advice of their Parents, it is in the disposing of themselves in Marriage. A Person may have Right in himself, and yet in the Use of that Right be under a Variety of Obligations to others; and the Child's Right to dispose of himself in Marriage, does not destroy his Duty to consult his Parent, and

to please him if he can; for the Parent has a natural Interest in the Happiness of his Child, of which he cannot divest himself. And yet it is as true on the other Side, that in no Point it is more necessary that Children should have the Liberty of pleasing themselves than in this. * Happy is it when these two Things may be reconciled, and the Parent and the Child be both pleased: Nor is this impossible, but very likely to happen, if the Parent and the Child are both wise. But if this cannot be; the Right of Decision is in the Child. For he is (as I have said) *his own*, and it infinitely more concerns him than it does the Parent, whether he is or is not happy in the married State, the best and surest Foundation for which is the conjugal Affection. But I must observe, that though the Child has a Right to dispose of himself in Marriage whenever there is a Capacity to make the Marriage Contract; he has no Right to his Father's Substance to support him in such Marriage without the Father's Consent: For this is not *his* as *himself* is, but the Father's. The Father then may withhold the Patrimony; he cannot forbid or annul the Contract.

I HAVE now settled the Right of contracting Marriage, as it stands in a State

* Nusquam *Libertas* tam necessaria quam in *Matrimonio* est *Quintilian*, ex *Grot. de Jur. Bel. Lib. 2. Cap. 5. Sect. 10. n. 3.*

Sense,

of Nature; according to my own plain Sense, which, (so far as I know) concurs with the Sense of the ablest Masters in natural Law. Let us now consider what Alteration the Intervention of Society makes in the Case; and I think it makes none. There can be no Doubt but that Society may aid the Parent in such Rights over his Child, as he naturally has: And therefore as in a State of Nature the Parent has a Right to disinherit a Child who marries against his Will; the Law may, in Aid of the Parent's Right, disinherit too. But as in a State of Nature the decisive Right of contracting Marriage lies in the Child, so it must under Society; unless the Child is to be understood as having made a Cession of this Right into the Hands of the Society. If such a Cession may be presumed, it shall be granted, that so far the Person is not *sui Juris*, and therefore unqualified to make a Contract. For a prior Contract subsisting with the Society, all subsequent Contracts made in Contravention to it, must be void. But a Cession of natural Rights can have no Place but in such Things as are *naturally alienable*; which every natural Right certainly is not. Every Man has a natural Right over his own Body; but it is a Right for Preservation, and not for Destruction. He cannot therefore make a Cession of this
 Right

Right to another so as to bind himself, to be fed, or clothed, or otherwise treated, just as that other pleases. He must consult his own Necessities. This will appear in a yet stronger Point of Light if you take Religion into the Case, and say, that no Man can make a Cession of his natural Right to another so as to bind himself to worship God in such a Manner as that other shall direct. He must worship God according to his own Judgment and Conscience. This Principle shuts out from Society all oppressive Laws to compel Men to this or that particular Manner of Worship; and no other Principle can.

It is in this Light that I place the Right of contracting Marriage; which was given, by the Author of Nature, for the Propagation of the Species, as Food and Rayment were given for the Preservation of the Individual; but in such a Way is it given, as is consistent with the Law of God; and the free Use of this Right may be as necessary to secure a Man's Virtues, as the Liberty to eat and drink as he finds most convenient, may be to the Preservation of Health and Life; or the Liberty of Worshipping God in in the Way he most approves may be to the Safety of his Conscience. If you want Authority for this, I will give you the highest. It is the Authority of Christ himself, *Matt.*
xix.

xix. 11. *All Men cannot receive this Saying save they to whom it is given.* Be pleased to look into the Context, and you will see what *this Saying means.* But *St. Paul* explains it. *1 Cor. vii. 8, 9. I say to the unmarried, — if they cannot contain, let them marry: For it is better to marry than to burn; which Power of Continency, is here also expressly mentioned as a proper Gift of God. Nor does this stand merely upon the Authority of Christ. For if there had been no such Thing as Revelation, it would have been found that every one has not the Power of Continency; and Fornication is a Sin against the natural Law as well as against the Law of Christ. It follows then, that no Man, by entering into Society, can or ought to be presumed to have yielded up into the Hands of the Society, his natural Right to contract Marriage, as shall seem to him most expedient for the Security of his Virtue. He cannot yield it up. It is a Right unalienable.*

If you yet doubt, pray tell me what you think of Vows of Celibacy, as practiced in the Church of *Rome.* I suppose myself writing to Protestants: And as a Protestant you must answer, that they are unlawful and null *ab initio.* But why are they unlawful? but because they are a *Renunciation* of the Means appointed by God for the Preservation
tion

tion of Chastity. The Law of God forbids Fornication. To prevent it he has appointed Marriage as the proper Remedy. If then a Person shall renounce the Use of this Remedy, it will be presumptuous; and if he sins his Offence will be so much the worse; because he had the Remedy before him, and would not make Use of it; just as a Man would be looked upon as the most determined Self-murderer, who, when he is in Danger of being drowned, should put back the Hand that stretches itself forth to pull him out of the Water. This Reasoning would be submitted to, if Minors were put out of the Question. But what? (you will ask) is it so hard a Thing for young Persons to abstain from Marriage for three or four Years, and keep themselves honest too?—I have nothing to say to this more than what I see, and what every body sees as well as I, *viz.* that some are more and sooner disposed to the Marriage Bed than others; and it may serve to many wise Purposes of Providence, that it should be so. This is certain that God does not consult our Statute-Books to know where and when to bestow his Gifts. He hath not told us that he will give the Power of Contineny, till Persons are one - and - twenty; and how shall Man pretend to limit for himself that which God hath left open?

THE

THE Drift of this is to make good what I have just now laid down, *viz.* That no Man, by entering into Society, can be presumed to have yielded up into the Hands of the Society his natural Right to contract Marriage, as shall seem to him most expedient for the Preservation of his Virtue. The Right then admitted, let us suppose a Marriage Contract made in Pursuance of this Right; and the Question to be, whether this Contract may be dissolved by human Laws. Yes, say some, if the Contract be not made according to the Form and Manner prescribed by Law. There can be no doubt but that all Societies have a Right to prescribe in what Form and Manner the Marriage Contract shall be made, in order to bring it under civil Cognizance. But it is carefully to be observed that the legal Form of contracting Marriage hath nothing to do with the Essence of the Contract as it lies before God. This was the Doctrine of all our Laws before this Statute was made; and therefore if two Persons contracted Marriage in a private Way, the Ecclesiastical Court, upon Proof of such a Contract, would oblige them to celebrate Marriage *in facie Ecclesiæ*. To what End? Why not to *create* a Marriage Contract, but to *notify* a Contract already made. The present Act hath taken away this Power; but it hath not altered nor can any
Law

Law alter the Nature of the Contract as it concerns Conscience, which, the Right of contracting supposed, is full and compleat in the mutual Stipulation of the Parties as known to God. But what Effect then (you will ask) does the Neglect of the legal Forms of contracting Marriage produce? And I answer it produces,) not a *Nullity* of the Marriage Contract as it lies in Conscience, but,) a * *legal Incapacity* to enjoy the
civil

* Uti aliis Contractibus atque Negotiis certa quædam requisita siveverunt addere *Leges Civiles*, quæ si observata non fuerunt, in foro civili pro *validis* non habentur; ita et circa *Matrimonium* contingit, dum alicubi per *Leges Civiles* honestatis et boni Ordinis *Causa solennia* quædam requiruntur. Quæ, licet extra jus naturale sint, *citra illa* tamen, qui legibus civilibus subjiciuntur, *legitimum* Matrimonium non contrahent; aut saltem ejusmodi *Conjunctio effectus justæ Matrimonii in Civitate non habebit*. Puffendorf de Off. Hom. & Civ. L. 2. Cap. 2. § 9.

Id quidem habent *Matrimonia* cum aliis pactis commune, ut per *leges civiles* certæ quædam *Ceremoniæ* et ritus solennes iis adjungantur, quibus sepositis, in foro civili pro *validis* non habentur. *Vera* tamen et *indissolubilia* esse possunt *Matrimonia*, licet quibusdam effectibus civilibus destituantur. Nam *conjunctio illa Matrimonialis fit per mutuum Utriusque Partis Consensum*. Johnson in loc.

— *Leges* quædam civiles facultates alias *Morales* requirunt, ut *Maturitatem Ætatis*, *Consensus Parentum*, &c. de quibus hoc observandum est; non ideo *Matrimonia* jure esse irrita, quoniam *Juri* repugnant: sæpe valet hæc regula, *quod fieri non debet, factum valet*; et sunt diversa, *prohibere et irritum facere*. Ibid.

Si *Lex humana* *Conjugia* inter certas *Personas* contrahi *prohibeat*, non ideo sequetur *irritum* fore *Matrimonium*; si reipsa contrahatur. Sunt enim diversa, *prohibere et irritum quid facere*. Grovius de jure L. 2. Cap. 5. § 16.

Note,

civil Privileges of the married State. The Persons so married will be considered in the View of the Law, as in a State of Fornication; the Wife can sue for neither Maintenance nor Dower; the Issue will be illegitimate and incapable of Inheritance. I state the legal Incapacities here (if I mistake not) as they stand upon the Foot of this Act. Whether all this is *right*, is a Question I have no concern with. But it is evident that this hath nothing to do with Conscience, which stands as firmly bound by the Contract how privately soever made, as if it had been made in a Church with all the Ceremonies and Formalities of Law.

THE want of observing this Distinction hath thrown great Confusion into this Subject. I have often heard it said, that a Marriage Contract made otherwise than according to the Form and Manner prescribed by Law, though before this Act was made it *would* have been Marriage, by the Intervention of this Act will be no Marriage. But upon what Authority is this said? The Act itself

Note, All these Passages *suppose*, that no Person by entering into Society is understood as having yielded up his natural Right to contract Marriage into the Hands of the Society. Because otherwise Marriages made against the Prescription of Law, must be *null*, as made by Persons *non sui Juris*. And this lay at the Bottom of all our *English* Laws before this Statute was made, which *forbad*, indeed, clandestine Marriages, but when made, admitted their *Validity*, and allowed the Persons so married the *civil* Privileges, also, of the married State. The present Act hath made an Alteration in this *latter* Respect, but none in the *former*.

C

such

says no such Thing. It says indeed, that such Marriages shall be *null to all Intents and Purposes whatsoever* ; but for ought that appears to the contrary this Expression is to be understood with the same Qualification that it must be understood in many other Acts that is, to mean no more than that they are null to all Intents and Purposes of LAW whatsoever. This indeed makes it to be no LEGAL Marriage ; but it does not make it to be absolutely no Marriage ; for what in the View of Law is null, in the Views of Religion and Conscience may bind. As for Instance. If a Minor makes a Contract to pay a Sum of Money after he comes of Age, the Contract is void in Law. And yet, (as the Case may be put) Conscience * binds him. So if a Man executes

* Because the Contract is founded upon an inherent original Right of which the Law neither does nor can divest him. This shews the Vanity of a very common Argument, *viz.* That because the Law may settle the Time when a Minor shall come to the Use of his Estate, therefore it may as well settle the Time when a Minor shall marry. For what is it that the Law *Settles* ? Why not the *Commencement* of the Minors *Right* to the Estate, but of the *civil Effects or Operations* of that Right, which arises not from the Law, but from the Person under whom the Minor claims. So in the Case of Marriage ; the Law neither does nor can settle the Commencement of the Right of Contracting, which is originally founded in the Law of God ; it can only affect its civil Operations. And perhaps the Law cannot go so far in this Case as in the other. Because a Man's Estate is an alienable Property, the Custody of which the Minor may be presumed to have given up to Society, for his own Benefit. Whereas the restraining him from Marriage may *not* be for his Benefit ; nor is it a Right that he can dispose of as he pleases ; as the Circumstance which should determine his Conduct in the Use of it depends upon a Contingency which is in the Hand of God.

a Bond,

a Bond, defective in some essential Circumstance as to Form; the Debt is no Debt in Law: But he is a Knave that does not pay the Money. It is in this Light that I consider the Act; and it can stand in no other, unless you will say that the Law aims at Impossibilities. For no Law in the World can make that which in the Nature of it is a Contract to be no Contract; or that which in the Nature of it is binding not to be binding. And what is Marriage but a Contract binding upon both Parties to live together as Man and Wife?— But at this Rate you will say there is no Difference between a Pre-contract and Marriage; and I answer, that *essentially* there is none. A Pre-contract importing that the Parties do, and from thence forth will, hold themselves as Man and Wife, differs from Marriage only in *Name*. It is called a *Pre-contract* with Reference to the publick Solemnization that is to *follow*, which (as I have said) is not a *new* Contract, but the same Contract repeated and publickly notified. This is so well understood even among the common People, that there is not a Country-man or a Country-woman who, if they are thus contracted, will not tell you that they are *Man and Wife before God*; and I hope that no new Laws will ever beat them out of this old Notion.

IN

In short, there is but one Supposition upon which it is possible that the Laws of Society can make a Marriage to be NO Marriage; and that is, that by entering into Society a Man commits his natural Right to contract Marriage to the Will of the State; for upon this Foot the Man will not be *sui Juris*, and the Contract will be null both in Law and in Conscience. But the contrary to this I have been endeavouring to prove. If I have not done it, I have done nothing, and all that I have said is to pass for nothing. The *Form* and *Manner* and *Circumstances* of making the Marriage Contract, as relative to the *Solemnity* and *publick Notoriety* of the Transaction, he may commit to the Regulations of Society, and as a Member of Society he must be understood to have done so. But the *Right* to contract either now, or a Year or two Years hence, he *cannot* give up to Society, nor can he lay himself under any *Conditions* that are *subversive* of that Right (as the Consent of Parents may be) because he has it not in himself to dispose of, as he will stand bound by the Law of God (which is superior to all Laws) if he finds he has not the Gift of Continency, to have Recourse to Marriage as the proper Remedy; and when, in Pursuance of this Right (or Duty I should say

say) the Contract is once made, no Power on Earth can destroy it. *

VARIOUS are the Fallacies by which this plain Truth is kept out of the Sight of many. Some will tell you that Marriage is a mere *civil* Contract, and therefore may be discharged by the *civil Authority*. But do they understand what they say? It is more than I do. A Contract merely civil, is so called, I suppose (for I know not what else it should mean) in Contradistinction to a Contract merely religious, that is a Contract which lies between God and Man, in which Society hath no Concern. Of this Sort are all religious Vows and Promises. But can you tell me of a Contract in which GOD is not concerned? There is no such Thing. The most trifling Bargain you make at Market, or upon the Exchange, is under his Inspection, and subject to his righteous Judgment; and, though all the Laws in the World should reclaim, you cannot break it without offending him. And shall we, *dare* we, break a Contract made in the most important Affair in the World, and under the most awful Solemnities of Religion, amounting to nothing

* The Contract may be destroyed by a Failure in some Condition upon which it was made; as in the Case of *unfaithfulness to the Marriage-bed*. But in this Case, the Contract voids itself; the Law only declares it void.

less than a solemn Oath? In this Sense it cannot be denied that Marriage is a religious Contract. But the Argument has no kind of Dependance upon this Circumstance. For strip it of all religious Rites and Ceremonies, and suppose the Contract made seriously and deliberately, with Purpose and Intention, even in a common Parlour; still it is the same Contract, and if it is made by those who have a *Right* to make it, it cannot be dissolved. If you say, that a Man has *no Right* to marry, except he marries in the legal Form; it will be saying (in Effect) that the Form gives the Right, which is very absurd. The Form does not *give*, but *supposes*, the Right, and only directs the Use of it.

BUT is a Man then at Liberty under Society to marry in what Way he thinks fit? I answer he is *not*. For as a Member of Society he stands bound by the Laws of Society, which in all Things lawful and expedient are the Law of God. If two Persons then, in *Contempt* of the Laws of Society, whilst the legal Forms are *open* to them, shall cohabit together as Man and Wife, under a private Contract, it is an Offence to God, and *one* Species of that unlawful Commerce which the Scripture calls FORNICATION; a Word not *invented* by
Scrip-

Scripture, but taken from the common Usage of all Nations, and always applied to such as had Commerce together without being contracted according to the legal Forms. But if such Contracts, for want of the legal Forms will not justify Cohabitation as Man and Wife, no Man in his Senses will pretend to say that they are therefore *null*. For the Contract receives its binding Force not from the Law, but from the Consent of the Parties.

I THOUGHT it highly feasonable and necessary to communicate these Thoughts to the Publick to secure (so far as in me lies) *Obedience* to the Law which will now soon come to Execution ; and to shew that Men and Women may not play with Marriage Contracts, as Children do with *Shuttle Cocks*, because the Law takes no Notice of them. The Law has done all it can to prevent clandestine Marriages. That it will (absolutely) prevent them is more than I can tell, or any one else. We see by every Day's Experience, that young Persons will force their Way through all Obstacles (Friends, Parents, and Loss of Fortunes) rather than suffer a Disappointment. It is fit that such should be told, that if in Defiance of this Act they shall do the like, and see Cause afterwards to repent their Conduct, this Law gives them

no

no Relief in Point of Conscience. They will stand bound together as Man and Wife before God, as firmly as if the Act had never been made ; and this (if they *cohabit*) under the *civil disadvantages* of a State of *Fornication*. A dreadful Situation! which the Law intends to prevent, and which every Man and Woman who mean well to themselves will avoid with the utmost Caution.

THEY who see this, and consider the Difficulty of restraining the natural Passion, will perhaps wish that the annulling Clause with respect to Minors may receive some *softening* if the Act should come under a Revival. The Legislature are the best Judges of this, to whom I leave it ; only observing that I am not satisfied with the Reason offered in support of this Clause by the Author of the Letter to the Publick, who tells us that it *only COMPELLS Obedience to the Ecclesiastical Law* *. For what if the Ecclesiastical Law is *itself* faulty ; will the Act that enforceth it be less so ? I have ever been of Opinion, that the Canon is *too hard*. “ NO Children under the Age of one-and-twenty, SHALL MARRY without the Consent of their Parents or Guardians”. *Can. xxi.*

Quo

* *passim.*

Quo Jure? GOD says without Limitation of Time, *increase and multiply*. MAN says you SHALL NOT till you are one-and-twenty, &c.—But would I then have Boys and Girls left at Liberty to marry just when they please, without Check or Controul from their Parents? By no means. It is the Duty of Children to acquaint their Parents with their Intentions, to consult, advise with, and please them, *if they can*; and to secure this, and that nothing may be done rashly and without Deliberation, *clandestine* Marriages should be prevented. But I do not know that God hath given, nor do I know that Man *can* give to Parents Power to COMPELL their Children either to marry whom they do *not* like, or *not* to marry whom they do like, supposing them in a Capacity to make the Contract. That Women of sixteen are in a Capacity to marry nobody ever yet questioned; and (whatsoever may be said of *Men*, who very rarely chuse to marry so early) it seems to be a very hard Case upon *them* that they should be restrained from Marriage till they are past one-and-twenty. This Rigour of the Canon, if it has not been the single Cause, hath greatly contributed to the Abuse of Licences; to which there would have been less Temptation, if a Method had been opened by Law, by which Children might

D have

have found Redress, if they thought themselves aggrieved. Can there be *no* Grievances in such Cases? Are not Parents sometimes cruel and unnatural, as well as Children hasty and imprudent? They *are*; || and our Reformers in *Edward* the Sixth's Time were so sensible of it that they proposed a Remedy. *Quod si Parentes vel Tutores, &c.* That is to say, *If Parents or Guardians are too severe, the Matter shall be referred to the Bishop.* * And this present Act allows an Appeal from the Mother or Guardians to the Court of Chancery. I do not understand the full Weight of this Clause, and therefore dare not presume to meddle with it. This however is a Confession (even from *the Law itself*) that *some* Remedy is necessary. But what can *Arbitrators* do in such Cases? They may judge of the Fitness of

|| Or, if they are not *cruel* and *unnatural*, they may be *cautious* and *timorous*, to which the *tendereſt* Parents are *moſt* liable. I have ſeen (and ſo has every-body who knows any thing of the World) many Inſtances of Matches that *would* have been ſtopped by the Parents (upon ſome unpromiſing Circumſtances) in all Probability to the *Ruin* of the Children, which have turn'd out well; that is, where the Children have lived (though not *greatly*, yet) *happily*, and the Parents have ſeen Cauſe, afterwards, to be well pleaſed. So little do we underſtand of the Ways of Providence; and ſo ill do we judge, when we attend *merely* to *distant Events* of which we know nothing!

* *Reform. Leg.* See *Gibſon's Codex.* Tit. xxii. Chap. 3.

the

the Match in Point of *Fortunes*; but as to the *conjugal Affection*, or the Fitness of the Parties having Recourse to Marriage as a Remedy against Incontinency, (which are the first and principal Points) nobody knows any thing of them but themselves. I see nothing left then but to follow the *natural Law*, and to give to Children the *decisive* Voice as having the *principal Interest*; But yet under such CHECKS till they are one-and-twenty Years of Age, as should oblige them to consult their Parents, which is all that we mean by preventing *clandestine* Marriages, or all that *should* be meant by it.

It might not be difficult perhaps to point out a Method which would preserve, both to Children their natural Rights, and to Parents their just Authority. But such a Plan I am sensible will not satisfy those Parents who consider Marriage merely as a *Traffick* to get and to keep great Estates in their Families, and who would therefore have it *absolutely* in their Power to prevent UNEQUAL Matches; which is aiming at a Thing that GOD WILL NOT SUFFER, and which cannot be the Object of any just Law. It is this Spirit which hath poisoned *, almost in all

* We have a remarkable Instance in the Declaration of Lewis XIII, King of France, lately published by Dr. Gally, which

all Countries, the Laws about Marriages, and which will for ever spoil them where ever it prevails. And yet some *Help* might be given even in this respect, by *severing* (in proper Cases) the *Estate* from the *Marriage*, which every Parent may do without Aid from the Law ; and which (as I have said) Laws may do too if it is thought fit. The Care to preserve Families is natural and laudable ; and I am not one of those who think it to be out of the Sphere of the publick Authority. But this Passion hath its proper Limits, as all other Passions have. The Scripture mentions those who were desirous to add *House to House, and Field to Field*, and who hoped that *their Names should endure for ever*. God laughs at such Projects as these ; and Men should not attempt them ; for it is to attempt an Impossibility. Let us do

which passes a Disinheritance upon Minors and their Issue, if they shall marry without Consent of Parents ; and puts it out of the Power even of the Parents themselves by any after-Act to restore them. *O ! duri Infantum Patres !*

The Advocates for severe Laws lay great Stress upon the Examples of foreign Countries ; and are copious in setting forth the *bad Consequences* of clandestine Marriages. But they do not enough attend to the Mischiefs that are seen in those Countries where severe Laws prevail. *Open Violations* of the Rights of the Marriage-Bed (the natural Consequence where *Estates*, not *Affections*, are married) are frequent ; and nobody is ashamed of them. Of their *secret Practices* we are not left quite to *guess*. For it is as sure that all undue Restraints laid upon Marriage open the Door to *Fornication*, as it is certain HE is wise, who ordained Marriage to prevent it.

what

what is just and equal by our Children ; let us breed them up soberly, and in the Fear of God, and so behave as to make them love and reverence *us*, and we shall not often find them untractable ; or if they *are* to be ruined (as ruined they may be in a Variety of Ways in spite of all that Parents can do to prevent it) better it be done in their *own* Way, than in *ours*, who, in such a Case, shall have nothing to charge upon ourselves from the Event, and who should bear such Disappointments with Patience, as we bear (or ought to bear) all other Evils of God's sending. No doubt if Acts of Parliament could do it, we should all of us be pleased. There would be neither *blind* nor *lame*, nor *sickly*, nor *deformed* in all our Tribes. But God hath put these Things out of our Power ; and he hath (frequently) the *other* too, if we will mind the Bounds which he hath set us, which we can never transgress, but at our Perils. The *Foolishness of Men* is frequently *the Wisdom of God*, who hath made all Things in this World subject to Uncertainty and Change. One Family rises and another falls. Such is his Sovereign Will ; and *unequal* Matches are *one* among the *Variety* of Instruments, which he uses to bring about the Purposes of his Providence. We are to guard against these Things so far as Justice will permit, and as Prudence shall direct

direct; but it were a vain Thought (in which we shall always find ourselves disappointed) to pretend to *make that strait which he hath made crooked.* Consider the Work of GOD, * and before HIM let the whole Earth be silent.

* Eccles. 7. 13.



QUES-



QUESTIONS.

1. **I**S not Society a mutual League for the Defence and Protection of ALL natural Rights, and therefore of the natural Right of MARRIAGE?
2. IF the natural Right of Marriage in ALL Persons who are in a Capacity to contract Marriage subsists as well *in* Society as *out of* Society; are not ALL Persons, under that Capacity, entitled to the Protection of Society, if in Pursuance of such Right, they shall think fit to contract Marriage?
3. CAN any Persons entitle themselves to the legal Rights of the married State, unless they be married in the *legal Form*?
—If not; then
4. OUGHT not the *legal Form* of contracting Marriage to be left open to the Use of ALL who are in a Capacity to contract Marriage; and will not the Blocking up the Use of such *legal Form* against Numbers who are in such Capacity, be a Denial

21 APR 1956

