

## MARRIAGE BY REPUTE—HOW TO DIFFER.

## SELECTIONS.

## MARRIAGE BY REPUTE.

The case of *Hill v. Hibbit* is sure to interest the public. It is full of incident, sensational, and highly spiced and has also some interest for the lawyer, we do not mean that any new principle is enunciated or any old principle developed, but the judgment of the Lord Chancellor in respect to the validity of the marriage of Eliza Phillips and James Hay brings into strong light the elementary doctrine of the English law of marriage.

The main facts are these: Hay met Phillips in London, and they cohabited; but, as the Lord Chancellor remarked, it is clear they were not married in England. They went to Scotland, where Hay introduced Phillips as his wife, and she was treated as his wife by the members of his family. Hay went to America. Phillips followed. In America Phillips used her maiden name, as it is alleged, for the purpose of earning her living. Phillips (said the Lord Chancellor) was plainly of unsound mind, and of a family subject of insanity; she was subject to fits, and, though perfectly sane for some time, liable to fly off at any moment. She was for some years in a lunatic asylum. Hay visited England, met Harriet Hibbit, cohabited with her for one night, subsequently met her in America, and was publicly married to her. Was this a valid marriage? Or was it interdicted by the connection between Hay and Phillips?

That there was a marriage according to the Scotch law there can be no doubt, because there was no mere repute, but there was also acknowledgment. Hay introduced the woman to his family as his wife, and she was received as his wife. This would appear to settle the case. No act of the man or of the woman can have the force of a divorce. A marriage by consent cannot be dissolved by consent. Yet it is true that in penal cases, such as bigamy, the prior marriage cannot be proved by mere repute. If Eliza Phillips had remained in a sound state of mind, the Lord Chancellor intimated that the case might have had a different complexion, because she would then have countenanced the idea that she had never been married. Certainly it would be a cruel hardship for a woman who is publicly married to find that her marriage is invalid, and her offspring bastards, because the man had years before lived in Scotland with some other woman as his wife, that woman having resumed the use of her maiden name. On the other hand, it is difficult to understand how a marriage by consent, being at law a valid marriage, can be dissolved by the acts of the man or woman, or by their joint assent. Divorce is extremely easy in some American States, but divorce by consent, without the intervention of a Court of Law, has not yet been admitted

anywhere. It is more difficult to establish a consensual marriage by mere repute than by repute and acknowledgment; but we apprehend that, the marriage being established, it is in law as binding and lasting as any other marriage.—*Law Journal*.

## HOW TO DIFFER.

Judges differ, being fallible men; but they differ with great respect for the opinions of each other, being conscious of their own fallibility. Now and then, however, we suppose that even the judicial mind chafes at legal dogmas as advanced by other judges. Else how can we explain the brusque style in which the House of Lords overruled the Court of Exchequer Chamber in *Taylor v. The Chester Railway Company*, reported in the December number of the *Law Journal Reports*? In the Court of first instance, Lord Chief Baron Pollock and Barons Martin, Bramwell, and Pigott gave judgment unanimously in favour of the plaintiff. On appeal the Court of Exchequer Chamber reversed this decision. The majority consisted of Mr. Justice Keating, Mr. Justice Mellor, Mr. Justice Montague Smith, and Mr. Justice Lush; Mr. Justice Willes and Mr. Justice Blackburn dissented, and upheld the judgment of the Court below [36 Law J. Rep. (N.S.) Exch. 201]. This state of judicial opinions, which by the way is an apt illustration of the absurd constitution of the Exchequer Chamber—the minority of judges prevailing in the result—brought the case to the House of Lords in a condition very favourable to the appellant.

To read the report one would say, not exactly that the case came up with an immense amount of prejudice in favour of the appellant, but that at an early stage of the argument their Lordships had come to a conclusion, and to a very definite conclusion, on the question before them. The Lord Chancellor is a man of mild temper, and by no means possessed of an overweening belief in his own powers and ideas. Yet the Lord Chancellor knocked the majority of the Court below down like ninepins. Thus he said: "Can anyone conceive such a contest as that being raised? \* \* \* Would such a contest ever be suggested or dreamt of? \* \* \* I need not dwell upon the plain and obvious reasoning which is consonant in every way with good sense with regards to contracts. Nobody ever heard of a contract being a one-sided one. \* \* \* I confess I have endeavoured to follow the judgment of the learned judges in the Court of Exchequer Chamber, from whom I have the misfortune to differ in this case. I cannot see any force in the reason which they there allege," &c. But all this is a trifle to the sledge-hammer style in which Lord Westbury expressed his dissent from the judges in the Court below. After stating the propositions put forward by the respondents, and sanction-