therefore English Subjects, are prevented, from contracting clandestine Marriages in England; & Scots Subjects in Scotland, by such Sanctions, as the Legislature of the two Countries, thought Fit & sufficient.

But if two English Subjects go into Scotland, get married clandestinely there, & come back to England directly, their Marriage is not only valid, & they liable to no Punishment, but as much favored, entitled to as many Privileges, as if it had been celebrated, with the strickest Conformity to the Laws of the Land –

I do not know what words can expose the Unreasonableness of this Opinion more, than the bare stating it:

Can it possibly be Law!

But it has been said, This is a Penal Statute, & as such, according to the constant known Rule, is to be construed strictly.

It has certainly a penal Clause in it, against the Minister, who performs a Marriage in any other Place, than a Church or Chapel, & without Banns or Licence; but with respect to the Parties there is no Penalty.

The Person who performd this Marriage, I presume to be a Resident Scots Subject: he is answerable to the Laws of his own Country; & by them, as I have stated, banishd that Country, not to return on pain of death.

But the Party before you, is not applying for a Penalty, (this is not the Place to apply for it) but praying the Benefit of the Law of England, to be relieved from a Contract, which she was drawn into during her Minority, without the Consent of her Guardians, & contrary to the express Prohibition of the Law. And as it is a maxim of the Law of England, that Penal Statutes, i.e. such parts of Statutes as are Penal, shall be construed strictly; so is it likewise a maxim of the same Law, that the Statutes against Frauds shall be liberally & beneficially expounded: which, tho, it may seem hardly consistent with the former Rule, (most Statutes against Frauds being in their Consequences Penal) yet the Difference is, where the Statute acts upon the Offender, & inflicts a Penalty, as Transportation, the Gallows, or a Fine, it is there to be taken strictly; But, when it acts upon the Offence, by setting aside the fraudulent Transaction, which is the present Case, it is to be construd liberally. Co. 3 Rep. 82.

Blackstone's Commentarys 1. 88.

It was said by the Gentlemen, & has been strongly urged & very popularly received, in the frequent Discussions, that this Question has undergone, in Conversation & in Print, since 26 Geo. 2. passd, "That it is a Law restrictive of an Act, in which above all others, from the nature of the Act, People ought to be, are in general, & were in this Country, before this Act was passd, left at their Liberty; & therefore the Operation of it, ought to be restraind within as narrow Bounds as possible.

Now, tho it is certain, that the Equity or the Expediency of an Act of Parl.t is not a Subject for the Examination of this, or any Court of Justice, yet as the Question is upon the Extent of its Operation; & it is urged by those who maintain the other Side, that it is a Law by which new, & unusual Restrictions are imposed; upon an act in which men were before left at their Liberty, therefore ought to be construed strictly, & restraind in its Operation; it may not be improper to submit to your Lps Consideration, shortly, what Alterations have been made by the late Statute; & how the Law relative to Marriages, as it now stands in England, differs from the general Canon Law on that Subject, as anciently, & now practiced in other Countries, & from what was the Law upon the same Subject in England before the late Marriage Act.

The first Xtian Emperors adopted the antient Roman Law in its full Extent: That Filii Fam: i.e. Children not emancipated, whether Minors or Majors, could not contract lawfull Matrimony (without strictly complying with the Rules prescribed by the Laws) without Consent of their Parents.

Justinian. I. 10. Tit. 10. de Nuptiis.

"Justas Nuptias inter se Cives Romani contrahunt, qui secundum Legum Præcepta coeunt: dum tamen si Filii Fam. sint, consensum habeant Parentum, quorum in potestate sunt: nam hoc fieri debere, & Civilis & Naturalis Ratio suadet. §12. Si adversus ea quæ diximus, aliqui coierint, nec Vir, nec Uxor, nec Matrimonium nec Dos intelligitur."

The most antient Papal Constitutions in the Body of the Canon Law, speak almost the same Language, with respect to the Marriages of Women, without Consent of Parents or Guardians. In the 2d Part of the Decrees. Cause. 30. C. 5. C. 1. Is a Decree pretended to be a Decretal Epistle of Pope Evaristus (who died as early as 220 Years after Christ) addressd to the Bishops of Africa.

Tho, it is well known, these early Decrees are Forgeries, yet are they Forgeries of the 8th & 9th Centuries, which have always been allowd, as Authorities for the Discipline of the Church at that Time. The words are,

Cited by Hericourt p. 434. Sec. 73.

"Alter legitimum non sit Conjugium, nisi ab his, qui super ipsam Faminam, dominationem habent videntur, et a quibus custoditur, uxor petatur, et a Parentibus et Propinquis sponsetur, et Legibus detur, et suo tempore, ut mos est, cum precibus & oblationibus, a Sacerdote benedicatur. Ita peracta legitima scitote esse connubia. aliter vero, præsumpta, non Conjugia, sed Adulteria, vel Contubernia, vel Stupra, aut Fornicationes potius, quam legitima Conjugia esse, non dubitate. (nisi Voluntas propria suffragaverit, et Vota succurrerint legitima.)"

In later Times the Decretals establisht the difference between legitimum & ratum matrimonium; & tho, they forbad the Solemnization of Marriage between Parties, without the Consent of their Fathers, Mothers, or Guardians, & required the Publication of Banns, in the Churches of the Parishes, where the Parties lived