APPENDIX.

(*See page* 109.)

THE remarks referred to by Mr. Justice Grier, in this page, as "clear and satisfactory," were contained in a review not generally accessible to the profession, of the unreported case of *McDermond* v. *Kennedy*, in the Supreme Court of Pennsylvania. The late Chief Justice GIBSON had spoken of that case as furnishing *an authority in point*, for a particular position; a statement which the Editors of the "Pennsylvania Law Journal" for December, 1846, considered was not warranted by the facts of the case. The case, it appeared, had come before the Supreme Court of Pennsylvania on an appeal, involving, in an abstract form, a question relating to the power of municipal corporations to tax in a particular instance. The court below denied the right. The case was argued in the Supreme Court, and there fully considered by the four judges present; but no opinion was delivered, and the judgment below was simply affirmed. There was no report or evidence of any other particulars in the case. The observations of Mr. H. B. Wallace are as follows:

"If the case, in fact, was deliberately considered by the judges in consultation, and in consequence of this consideration the judgment of the Court of Common Pleas was affirmed, it is a matter of inferior moment, and not in the least degree affecting the authority of the decision by the Supreme Court, that no written opinion was delivered, or that by misapprehension or otherwise the case was not assigned, after consultation, to any particular judge to prepare an opinion upon the subject. The absence of a written 'opinion' may render it difficult, or perhaps wholly impossible, to determine what principle the judgment of the Supreme Court did establish, but the judgment is an *authority* for some principle, whatever it may be.

"There is some doubt as to a part of the history of this case. We do not know all that was done in the Supreme Court. But materials enough exist to enable us to determine, beyond doubt, that there was here a judgment of the Supreme Court on a point of law.

"We know that a judgment of the Common Pleas denying the right of the borough to assess a certain tax was brought into the Supreme Court, by writ of error, in order to try the right. We know that there was an argu-

ment by counsel before the court, and a consultation upon the case by the court. And we know that, during the term, the judgment of the Common Pleas was affirmed. Four judges, only, sat; and what were their individual opinions we do not know. There could not have been a majority in favor of the right, or else the judgment of the Common Pleas would not have been affirmed. Either the judges were unanimous, or a majority of them were against the right; or they were equally divided in opinion, and the judgment of the Common Pleas was affirmed from necessity. How this was, no evidence exists to show. Take it at the worst that is possible, and what is the nature and effect in law of a judgment affirmed from necessity in a court of error, on an equal division of the court? The history of the late case of *The Queen* v. *Millis*, will afford an illustration on this subject.

"This case, reported in 10th Clark & Finnelly's Appeal Cases, 534, involved the question, whether a contract of marriage *per verba de præsenti*, but not made in the presence of a minister, in Episcopal orders, constituted a full and complete marriage at common law? On an indictment for bigamy, which depended on this question, the Court of Queen's Bench in Ireland, four judges sitting, were equally divided; but afterwards, and for the purpose of obtaining the judgment of the House of Lords, one judge, who had been in favor of the validity of the marriage, in form withdrew his judgment, and thereupon a judgment of acquittal was entered, and the case was brought by *certiorari* to the House of Lords. In the House of Lords, Lords Abinger and Cottenham and the Lord Chancellor were of opinion that it was not a perfect marriage, and were for affirming the judgment; Lord Brougham, Denman, and Campbell were of the opposite opinion. The entry on the journals of the Lords is: 'It was ordered and adjudged by the Lords that the judgment given in the said Court of Queen's Bench be, and the same is hereby affirmed; and that the record be remitted,' &c. And the fuller entry on the minutes states, that Lords Cottenham and Campbell having been appointed to tell the number of votes, it appeared, on report thereof, that the votes were equal, that is, two for reversing, and two for affirming, 'whereupon, according to the ancient rule in the law, *semper præsumitur pro negante*, it was determined in the negative. Thereupon the judgment of the court below was affirmed, and the record remitted.'

"While this case was pending in the Lords, the case of *Catherwood* v. *Caslon*, involving the same general question, came on in the English Court of Exchequer,* and, after argument, judgment was suspended until the decision of that case. 'The case of *Regina* v. *Millis*,' says the reporter of the case in the Exchequer, 'having been determined, and the invalidity of a marriage at the common law, contracted *per verba de præsenti*, but not in the presence of a priest in holy orders, having been thereby established, the present case came on again for argument.' The counsel sustaining the side of the marriage admitted that, 'according to the decision of the House of Lords, it must be taken that no valid marriage had been contracted;' and Parke, B., in pronouncing the judgment of the court said: 'The parties in this case entered into a contract of marriage *per verba de præsenti*, in the presence of witnesses, but not proved to have been made in the presence of a

* 13 Meeson & Welsby, 261.

minister in Episcopal orders. Since the original argument, it has been decided in the House of Lords, in the case of *The Queen* v. *Millis*, that unless in the presence of such a minister, such a contract does not constitute a valid marriage at common law in this country; *and by the authority of that case we are bound.*'

"Undoubtedly, the affirmance of the judgment in *The Queen* v. *Millis*, was against what had been the general impression of the profession after the case of *Dalrymple* v. *Dalrymple*, yet no one in the Exchequer suggested that the affirmance in the House of Lords by an equally divided court had not settled the law by conclusive authority. An equal division of a court of error, on a question of reversing a judgment, is like a tie vote in a legislative assembly on a question of enacting or repealing a law. The binding nature of the decision is the same, as where the action of the body is unanimous. The influence of an opinion, on the minds of professional persons, will depend on the character of the judge who delivers it, and on the number of judges who unite in it; but the authority of a judgment of a supreme tribunal, as establishing a principle and settling the law, is the same, whether the court be full and unanimous, or partial and divided. A judgment affirmed by a divided court binds inferior courts, and of course is a precedent in the court in which it was entered. And not only is the judgment of a court, in itself, an authority, but it is the only thing that is an authority.

"It follows that Chief Justice GIBSON was strictly accurate in saying of *McDermond* v. *Kennedy*, that 'had the case been reported, it would have furnished AN AUTHORITY IN POINT.'"