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(16)

A SHORT LETTER

ON

THE BISHOP OF EXETER'S SPEECH

ON THE

MARRIAGE BILL.

BY

EDMUND BECKETT DENISON,

AUTHOR OF A PAMPHLET ON MARRIAGE WITH A WIFE'S SISTER.

THIRD EDITION.

LONDON:
JOHN W. PARKER AND SON, WEST STRAND.
MDCCCLI.

For several reasons I should not have thought this Letter worth publishing at present. But the gentleman to whom it was written has asked me to allow it to be published, and so I do. It may be considered an appendix to that part of my pamphlet on Marriage with a Wife's Sister which deals with the theological objections to allowing such marriages.

My dear Sir,

I have now read the Bishop of Exeter's authorized version of his speech on the Marriage Bill; and I am surprised to find that, except the mere dressing up of the old arguments which have been answered fifty times, there is hardly anything more substantial in it than in that speech of the Archbishop's, from which one might infer that he had been living in New Zealand for the last fifteen years, and had returned to deliver it in complete ignorance of all that has been said and written on the subject in the mean time. There are, however, two or three novelties in the Bishop's speech on which I cannot help remarking.

By way of bringing in the authority of the Christian religion for the prohibition of marriage with a brother's wife, he said that he was 'ready to establish by proofs from Josephus himself' that Herodias's first husband was dead before she married his brother for her second husband. I need not remind you that the whole of this transaction, whatever were the facts, was as independent of any law of Christian authority, as the marriages of Jacob with Leah and Rachel; but passing that by, let us see in what terms it is that Josephus, according to the Bishop of Exeter, 'adds to the account of the Evangelists the fact that Philip was dead.' 'Herodias married Herod (Philip), the son of Herod the Great by Mariamne, and they had a daughter Salome; after whose birth Herodias, being minded to confound her country's laws, married Herod (Antipas), brother on the father's side to her husband [not her *former* husband, observe], having parted from him living' (διαστᾶσα ζῶντος). Antiq. B. 18, c. 5, s. 4. This sentence the Bishop considers equivalent to something of this kind: 'after whose birth Herodias separated from her husband, and after his death, being minded to break her

country's laws, she married his brother by the father's side.' The whole of this extraneous information the Bishop extracts from the single word ζῶντος. Josephus can have had little idea of the pregnancy of the word he was using for the very obvious purpose of indicating the precise nature of the guilt of Herodias.

But the Bishop says that the mention of Herodias 'breaking *her country's laws*' is a proof that Philip was dead, because, if he had been alive, her marriage would have been adultery, and against the laws of other countries besides her own; and that the evangelists do not call it adultery. The evangelists do not call it anything; and if the Bishop had looked at the beginning of the chapter of Josephus from which he quotes, he would have seen that the evangelists might have mentioned at least one other very sufficient objection to Herod's marriage, which they nevertheless omitted just as much as the adultery. For Josephus states expressly that *Herodias was Herod's own niece.* He might well say she had set her mind on confounding her country's laws (ἐπὶ συγχύσει τῶν πατρίων). And if it was contrary to the laws of other countries as well as her own, that would have been no aggravation of the offence in the eyes of a Jew; and, therefore, it was perfectly natural for Josephus to use that expression, whether Philip was alive or dead, inasmuch as in either case Herodias did undoubtedly break her country's laws in marrying his brother and her own uncle.

Further, the Bishop tells us that Tertullian, 'an early authority, *assumed* that Philip was dead.' If he did, it appears that other early authorities assumed just the contrary: at least, I find several quoted to that effect in the only commentary I have at hand (Whitby's); and that assumption appears to be at least as good as the other; and indeed rather better, when you observe (what the Bishop of Exeter did not) that to the account of the evangelists Josephus adds yet another fact—viz., that the arrangements for Herodias's *translation* from Philip to Herod were actually made between the lovers in Philip's own house while Herod was staying with him. I think after all this, that, as Josephus happens nowhere to mention Philip's death, he could not well have left us less reason to doubt that Philip was alive when Herod took his wife.

2. The Bishop's other two discoveries comprehend nothing less than a new translation of Lev. xviii. 18, and a new attempt to recover that ill-treated verse to the use of the prohibitionists; who, after trading upon it for several centuries, have of late ungratefully turned round and trampled it under their feet, as having nothing to do with the matter, as soon as they found that it had become a more serviceable weapon in the hands of their opponents than in their own. On the authority of Dr. Mill, the new Regius Professor of Hebrew in the University of Cambridge, the Bishop propounds this as the true translation and punctuation of the verse:—

'And a woman unto her sister thou shalt not take: to annoyance; to uncover her nakedness upon her in her life.'

Now, although the language of mankind was confounded at the tower of Babel, there remains unconfounded a principle of interpretation, which I will venture to say is applicable to every language upon earth, dead or living, viz.—that if you know that a given sentence in some original language was *sense*, and you are presented with a translation of it which is *nonsense*, you may, without further examination, pronounce that the said translation is wrong. Dr. Mill and the Bishop say this new translation is the true translation of the verse in question; and, moreover, that a stop equivalent to our colon is inserted in the original, to show that the first part of the verse is to be taken absolutely, or independently of the second; and consequently, of course, the second independently of the first. The result, therefore, of this astonishing piece of Hebrew criticism is this:—1st, Here is a sentence (the part after the colon) without any verb or any conceiv-

able meaning whatever: 2ndly, Dr. Mill has introduced a phrase, 'uncover her nakedness *upon her*,' which is, to say the least of it, unique in the Bible, though the phrase 'uncover nakedness' is a very common one; and, 3rdly, for the purpose of introducing it, he arbitrarily confines the meaning of the preposition, which is rendered by the LXX ἐπὶ, to *upon*, in the physical sense, for which we have nothing but his bare assertion that such is its necessary meaning; 4thly, if, as this translation makes them do, the two last '*her*'s in the sentence mean 'the superinduced sister,' the expression 'in her life' is mere superabundance and tautology, and does not add any force or meaning whatever to the sentence; whereas, on the common construction it does add very considerable force, though it is not absolutely necessary to the understanding of the prohibition; 5thly, it would have been ridiculous to forbid a man to *annoy* a woman herself by committing fornication with her, when the whole of these prohibitions proceed on the hypothesis that the woman is a consenting party, as is plain from the penalties by which they are enforced in the twentieth chapter; and, 6thly, suppose we do, by virtue of Dr. Mill's colon, take the first clause absolutely, without reference to the second, how much better will he be for it? 'A woman *unto her sister* thou shalt not take.' It will require something more than either Dr. Mill's learning, or the Bishop of Exeter's ingenuity, to make out that this means, 'A woman after the death of her sister, who was thy wife, thou shalt not take.' For I am glad to see that the Bishop not only did not resort to, but expressly disclaimed the aid of that absurd marginal mistranslation, (which the Archbishop believes to be of nearly equal authority with the authorized version) of '*another woman*,' for '*her sister*.'

3. Dr. Mill has enabled the Bishop to throw some further light upon the meaning of this verse. He says that the mere use of the words translated in these 18th and 20th

chapters of Leviticus, *nakedness*, and in the Greek ἀσχημοσύνη of itself implies turpitude and pollution, and so indicates, without anything more, that the union to which that phrase is applied is incestuous and abominable. The Bishop does not, perhaps, explicitly acknowledge his obligation to Dr. Mill for this last service; but I happen to know independently, that Dr. Mill did give him this information. He says that the passages where the word is so used are above twenty in number. He does not specify them; but with the help of a Concordance and of a friend who is very well versed in the Hebrew language, I believe I have found all the passages in the Old Testament in which this expression is used; and these are just twenty, independently of those in Leviticus xviii. and xx., in which the expression obviously does not of itself imply turpitude or pollution, inasmuch as the word *marry* might have been used throughout those chapters with exactly the same effect upon the present question. And you will probably be even more surprised to hear than I was to see, that not only in *some* of these passages does the word in question bear a meaning entirely different from this, but that there is actually *not one* in which it necessarily implies what the Bishop of Exeter, on the authority of Dr. Mill, assured the House of Lords it implies in all of them—viz., an impure sexual connexion. Here they are, that you may judge for yourself:—

Places where the word generally translated 'nakedness' occurs.

Gen. ix. 22, 23,	*applied to*	father.
xlii. 9, 12,	,,	land.
Ex. xx. 26,	,,	priests.
Deut. xxiii. 14,	,,	thing; xxiv. 1, ditto.
1 Sam. xx. 30,	,,	mother.
Isai. xx. 4,	,,	men and women.
xlvii. 3,	,,	virgin.
Ezek. xvi. 8, 36, 37, 38,	,,	virgin.
xxii. 10,	,,	father; xxiii. 10, 18, 29, woman.
Hos. ii. 9, 10,	,,	woman.
Nahum iii. 5,	,,	woman.

I think after this specimen of the new contributions to the stock of theological arguments in favour of the prohibition of marriage with a wife's sister which were furnished by the late debate, you might be very well contented, even if two other bishops, not altogether without reputation for learning, had not expressed an equally positive opinion that the prohibition is *not* to be found in the Bible. It was a suitable termination of the business, that the only other bishop who spoke—the same who on a former occasion appealed to one of the '*Apostolical Canons*' on matrimony, and broke all the rest of them himself—now declares that after this fifteen years' agitation of the question he cannot yet fully make up his mind whether the canon which he so successfully and beneficially attempted to enforce in 1835 is right or wrong, in declaring the prohibition to be a part of the law of God.

It was cruel of Lord St. Germans to keep that letter of Lord Denman's in his pocket until his successor introduced Lord Denman's authority and opinion as agreeing with his own. As to the vote, I suppose you never expected anything else at the first trial in the House of Lords, especially in the peculiar state of the House when the debate took place.

Believe me, yours very truly,

E. B. Denison.

THE END.

(17)

THE VALIDITY

OF

MARRIAGES

WITH A WIFE'S SISTER,

CELEBRATED ABROAD.

BY

EDMUND BECKETT DENISON,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

'ENGLISH DECISIONS HAVE ESTABLISHED THIS RULE, THAT A FOREIGN 'MARRIAGE, VALID ACCORDING TO THE LAW OF THE PLACE WHERE CELEBRATED, 'IS GOOD EVERYWHERE ELSE.'—*Lord Stowell.*

LONDON:

JOHN W. PARKER AND SON, WEST STRAND.

MDCCCLII.

BY THE SAME AUTHOR:

MARRIAGE WITH A WIFE'S SISTER:

THE SUBSTANCE OF AN ARTICLE IN *Fraser's Magazine.*

1851. Octavo. 1*s.*

ALSO,

A SHORT LETTER

ON THE

BISHOP OF EXETER'S SPEECH ON THE MARRIAGE BILL,

1851. Octavo. 1*d.*

LONDON: J. W. PARKER AND SON, WEST STRAND.

MY DEAR SIR,

IF you wish to know whether I should *advise* you and your late wife's sister to go and get married at Hamburgh and return here, I must answer, that that depends very much upon the relative value you put upon the urgency of the case on the one hand, and the possibility that such a marriage may be held void on the other, measuring that possibility as well as you can.

You have already, it appears, got legal opinions as likely as any in the kingdom to be correct, that such a marriage would be held by any Court, and finally by the House of Lords, to be untouched by the Act of 1835. And therefore in making your calculations as to the prudence of the step, you have a clear right to assume, and nobody has a right against you to assume the contrary, that your marriage is more likely to be held good than bad.

The dilemma is simply this: You must either abstain from a marriage which you and a large majority of Christians in every country believe to be perfectly lawful and right, which you believe will be the best marriage you can make for yourself and your children, and which may be determined after all, when it is too late for you to profit by the knowledge, to have been no more prohibited by the laws of this realm than it is by the laws of God; or else you must run a certain degree of risk of it being determined that your marriage has not been valid by the laws of the realm.

In the latter case you will be in the same condition as everybody was who married his wife's sister before 1835, and against whom a suit had been instituted to annul the marriage; except that your case ought to be regarded much more favourably than theirs, because they married with the

perfect certainty that any interested or spiteful person might annul their marriage whenever he pleased; whereas if you now marry as you propose, it is quite the reverse of certain that your marriage can ever be annulled by any proceeding whatever. And we know that those who so married before the Act were generally well received in society, and their marriages were regarded both by themselves and others as good and valid; and in fact there was not even a court of justice in the kingdom which was able to regard them in any other light, unless that particular process had been resorted to during the life of both the parties by which alone their marriage could be annulled.

Of course those who choose to pronounce marriage with a deceased wife's sister intrinsically bad, or immoral, or incestuous, or anything else they please to call it, cannot be deprived of that satisfaction. But they may as well remember that they would retain, and would undoubtedly use, exactly the same privilege of vituperation, even if an Act of Parliament were passed to-morrow expressly declaring all such marriages to be lawful. There is, you know, no small number of persons who disapprove of marriages of cousins just as strongly as others disapprove of marriages with a sister-in-law. Whether they are right or wrong is no concern of mine: all I have to say about it is, that nobody who wants to marry his cousin cares a farthing about their opinion, but takes his stand and his wife upon the Act of Parliament (of Henry VIII.) which abolished nearly all the Popish prohibitions.

And so, in like manner, until it is clearly established that a foreign marriage with a deceased wife's sister is not a lawful marriage, the opinion of a certain number of individuals that such a marriage is improper and ought not to be lawful, cannot reasonably be expected to influence the conduct of anybody who does not agree with them.

But you wish that I should give you a statement of the

grounds on which I think that your marriage (as I shall hereafter call it for shortness) is likely to be held unaffected by the Act of 1835; which undoubtedly made it impossible for you to contract *in England or Ireland* a valid marriage with your wife's sister, just as the marriage Acts of 1756 made it impossible for minors to contract a valid marriage *in England* against the consent of their parents or guardians,—at least without extraordinary contrivance and perjury, for which all parties concerned in it might be punished. Notwithstanding that Act, and the still further restrictions of another Act to the same effect in 1823, every post-boy on the old North Road knew (while they lived), and most ladies'-maids and their young ladies too now know, that minors *can* marry without consent and without perjury, by going the smallest possible distance, not even across the sea, but across the border of Scotland.

But, familiar as those individuals may be with this important point in the 'Conflict of Laws,' they are probably not aware of the fact that a very famous Judge* once expressed considerable doubt, whether such runaway marriages were not to be considered by Courts of Justice void, as being '*a fraud upon the law*,' that is to say, as being a manifest evasion of the English law by persons who were properly domiciled within its jurisdiction. This suggestion of Lord Mansfield's, however, was not followed in any decision upon any actual question of marriage; on the contrary, it was overruled at the first opportunity, and that notion of 'fraud upon the law' exploded, in the case of *Crompton* v. *Bearcroft*;† and this was soon followed by a number of other cases in which attempts were made, under many slightly varied circumstances, and always made in

* Robinson *v.* Bland, 1 W. Black, 234, and 2 Bur. 1077; a case, not on marriage, but on a bill of exchange.

† 2 Hag. Con. Rep., 444, note.

vain, to get rid of marriages which had been duly solemnized according to the laws of Scotland, France, Holland, and other places, but which would not have been lawful or valid if solemnized in England.

I will mention at present the names only of some of the cases in which this fundamental rule was acted upon or recognised, that a marriage valid according to the *lex loci contractus* is valid everywhere; such cases are *Scrimshire* v. *Scrimshire*, *Middleton* v. *Janverin*, *Dalrymple* v. *Dalrymple*, *Ruding* v. *Smith*, *Harford* v. *Morris*,* *Warrender* v. *Warrender*,† and two earlier cases than any of them, *Butler* v. *Freeman*,‡ and *Roach* v. *Garvan*,§ both before Lord Hardwicke.

You see therefore at the outset, that if your opponents have nothing better to say against you than that your marriage at Hamburgh, or wherever you go for the purpose, is a plain evasion of, or fraud upon, the law of England, and must consequently be void, because you were not *bonâ fide* domiciled abroad, they may as well say nothing.

None of these Scrimshires, or Dalrymples, or Lord Eldons, or Archbishop Suttons, or other runaway bridegrooms, were domiciled where they were married; and most of them got married there for the express purpose of evading the English law; and yet in every case which has been tried, the Judges have admitted, or decided, that if the parties were really married according to the *lex loci*, there was no room for further question, and the marriage was good.

What your opponents have to make out then is, that the foreign marriages of English folks within the prohibited degrees of affinity (or at least this one of them) form an exception to this general rule of marriages being valid everywhere which are valid where they are celebrated. The

* All in 2 Haggard's Consistory Reports.
† 2 Cl. and Fin. 438.
‡ Ambler's Reports, 301. § 1 Vesey, 157.

onus probandi clearly lies upon them, not only because it always lies upon everybody who seeks to apply a restrictive statute to any given case, but because, in addition to that general obligation, Lord Stowell, probably the highest of all authorities upon such a point, distinctly declared, that 'in suits of nullity of marriage the Court gives a reluctant 'obedience to the provisions of the law; the first inclination 'of the Court is to support the marriage as far as it can 'legally indulge such an inclination.'* And you are not to understand from this that it was only Lord Stowell's individual inclination to support a subsisting marriage if he could; so that Lord Campbell may as fairly indulge his inclination one way as Lord Stowell in the other; but it is the judicial inclination of the Courts, as evidenced by their actual decisions; the result of which the same great judge thus expressed in another case before him.† 'English de'cisions have established this rule, that a foreign marriage 'valid according to the law of the place where celebrated, is 'good everywhere else; but they have not, *e converso*, 'established, that marriages of British subjects not good 'according to the general law of the place where celebrated, 'are universally, under all possible circumstances, to be 'regarded as invalid in England.' And a still further proof of the disposition of the English courts and the English law to support marriages is, that there are many cases in which the prohibited marriage itself stands good, although all the parties concerned in making and procuring it remain liable to various penalties, both civil and criminal.

In short, there are few things to which the rule of *fieri non debet sed factum valet* is more liberally applied by the Courts and the law of England than to marriages, even where the *non debet* arises from the marriage being flatly in the

* Creswell *v.* Cousins, 2 Phil. 283.
† Ruding *v.* Smith, 2 Hag. Con., R. 371.

face of prohibitions and penalties; and for the very obvious reason, that one of the parties at least, and probably the most innocent one, would generally be very much injured by annulling the marriage, and without any corresponding good to society. So much does this rule prevail, that Dr. Lushington said, in *Catterall* v. *Sweetman*,* that 'so far as 'his research extended, it appeared there was not a single 'decision to be found in which a marriage had been held void 'merely because it was prohibited by an Act of Parliament, 'without express words of nullification.' In the Act of 1835, of course I know there are such words, though no prohibitory ones; but the question is, whether the objectors to marriages with a deceased wife's sister can prove that marriages *abroad* are necessarily comprehended in the words, 'Be it enacted, that all marriages which shall hereafter be 'celebrated between persons within the prohibited degrees of 'consanguinity or affinity, shall be absolutely null and void 'to all intents and purposes whatsoever;' this being the Bishop of London's clause in the Act of 5 and 6 William IV., c. 54, introduced and passed, as its title declares, for the purpose of 'rendering certain marriages valid;' which 'certain 'marriages' were, as I need not tell you, all the existing marriages within the prohibited degrees of affinity, those of consanguinity being left unrelieved. For a short account of the contrivance by which this clause was got into the Act, I will refer you to my pamphlet on 'Marriage with a Wife's Sister.' I was glad to see that account confirmed in the most material point by Lord Lyndhurst in his speech on this subject on the 21st of June this year.

It will perhaps save a little trouble if we concede at once that the Bishop of London, when he thrust his clause down the throat of the gasping House of Commons in August 1835, had not the smallest intention of allowing people to slip out

* 1 Robertson, 304.

of his fingers by merely going and marrying their wives' sisters at Hamburgh, or New York, or indeed almost anywhere else in the world. Few persons however, who are likely to read this pamphlet, need be told that the legal effect of an Act of Parliament cannot be determined by the personal intentions of its contrivers, however notorious they may have been.

Of this, a very curious illustration may be derived from this Act itself. For reasons not relating to the clause in question, it is expressly provided, 'that nothing in this 'Act shall be construed to extend to Scotland.' Now it turns out, probably to the no small surprise of all the English prohibitionists both legal and ecclesiastical, that eminent Scotch lawyers, including a late Lord Advocate, now a Judge, declare that there actually is no Scotch law under which marriage with a wife's sister is null and void. There was indeed, and is, a Scotch Statute of 1567, which enacts, that 'whoever shall commit the abominable crime 'of incest with such persons in degree as God in his Word 'has *expressly forbidden*, as is contained in the 18th chapter 'of Leviticus, shall be *punished with death*.' It is clear that this will not do, inasmuch as this marriage, at any rate, is *not* expressly forbidden in Leviticus xviii. Then it appears that the only other Scotch Statute upon the subject is not a hanging, nor even a disabling one, but, on the contrary, an enabling Statute, which declares marriage to be 'as free to all estates of men and women as God's law 'hath made it,' having been passed in order to sweep out the rubbish of the Popish prohibitions of marriage with second cousins and god-daughters, and pretty nearly everybody whom you did not buy a dispensation to marry.

In this state of things, we can hardly wonder at the Scotch lawyers considering it at least a perfectly open question, whether a marriage of this kind is not good and valid in Scotland. And if it is, then it inevitably follows that, how-

ever certain we may be that the persons who contrived the prohibiting clause of the Act of 1835 never contemplated anything of the kind, they have, nevertheless, inadvertently provided, by another clause of the Act itself, a piece of machinery for making any marriage with a wife's sister valid by the purchase of a couple of railway tickets to Dumfries.

But this is by no means the whole of what they have done; even if the Scotch lawyers should be wrong in saying that there is no law against these marriages in their country.

For in truth this exclusion of Scotland from the operation of the Act affords a clear proof that the Act cannot be, according to legal construction, held to have any operation on foreign marriages any more than on Scotch ones. For although the exception of Scotland is not in the same words, it must clearly be held to have the same meaning, as the corresponding exception in the general Marriage Act of George IV., viz., 'that this Act shall only extend to that part of the United Kingdom called England,' and, here we must add, Ireland.

It was evidently only for shortness that the exception was made in the form of naming the one-third of the United Kingdom which was excluded, instead of naming the two-thirds which were included. And the effect must be just the same, because the general rule of construction of all our Statutes, especially of restrictive ones, as you may see in any book upon them, is, that however wide the words may grammatically be, yet they do not extend to other countries even within the dominion of the Crown, much less out of it, without some clear indication of intention the other way.

But besides this, the express exclusion of Scotland by name shows still more clearly, that this Act is not to be regarded as an exception to this general rule; because, if it were to be held otherwise, then this absurd conclusion would follow, that the Act is to be construed as if it contained such a clause as this, 'Be it enacted, that this Act shall extend to every country in the world except Scotland.' It really seems to me that the whole question is disposed of *in limine* by this one argument. If the Act had been expressly limited to England and Ireland, as the general Marriage Acts of 1756 and 1823 were expressly limited to England, there could have been no question that it had no more operation upon foreign marriages than those Acts have: but it is, in fact, limited to England and Ireland; first, by the general rule I have just now mentioned, and, secondly, by the express exclusion of one part of the United Kingdom, showing that the Act was never intended, at any rate, to have any operation beyond the United Kingdom.

What then is the mode by which the prohibitionists are to get over all these difficulties: first, of the general rule, that a marriage allowed by the law of the place where it is contracted is good everywhere; secondly, of the general rule, that a restrictive Statute has no operation out of the United Kingdom; and thirdly, that, independently of that rule, there is, in this particular Statute, a special exclusion of even a part of the United Kingdom from its operation?

The only argument for the purpose which I am acquainted with is, that both these general rules are capable of being excluded in certain cases, either by the common law, or by express legislation, and then, that they are so excluded in this case by the Act having (as they contend) created a personal incapacity in all Englishmen to contract matrimony with their wives' sisters wheresoever they may be, or, at least, to contract what will be regarded as matrimony for English purposes. And, by way of enforcing this argument, they would no doubt refer to the incapacity of Englishmen to marry a second wife on the strength of a Scotch or foreign divorce, as an instance of common law exception to the rule of *lex loci*; and, as an instance of legislative exclusion of both the above rules, they refer to the decision upon the Royal

Marriage Act in the *Sussex Peerage Case*,* where it was held that the late Duke of Sussex had been made by that Act as incapable, without the consent of the king, of contracting matrimony at Rome, as he was in England.

By way of preparation for considering these exceptions, it will be as well that you should understand how different Judges have expressed themselves respecting the different cases in which it has been contended that for one reason or another certain marriages celebrated abroad were not to be held good here. And I will begin with one in which that contention was successful.

In the case of *Scrimshire* v. *Scrimshire*,† a couple of English minors, neither of them domiciled in France, had, without the consent of their parents, and by the contrivance of two Irish officers, (who, one is glad to read, were tried and sent to the galleys for it), contracted a marriage in France. The marriage was duly set aside by the *French* Courts, to which, the English judge said, the mother very properly applied for the purpose, it being as bad by the French law as by ours. Nevertheless, it was afterwards contended by one of the parties that it must be held good in England, as being an actual contract of marriage *per verba de præsenti*, for which no particular formalities, or conditions, or consent, were required by the English law before the passing of Lord Hardwicke's Act in 1756, and that that Act had no operation upon foreign marriages; and it was further argued, that to hold it void because the formalities required by the French law were not complied with, would be to acknowledge the laws of a foreign country as binding upon our English Court. But the Court replied that that was a fallacy; the judgment of the French Court was produced, not for the purpose of annulling a marriage which had once been good, but as the best possible evidence that there never

* 11 Cl. and Fin., 85. † 2 Hag. Con. Rep., 405.

had been a good marriage according to the law of France. 'The only question before me,' added Sir E. Simpson, 'is, 'whether this be a good or bad marriage by the law of '*England;* and I am inclined to think it is not good. On 'this point I apprehend that it is the law of this country to 'take notice of the laws of France or any foreign country in 'determining upon marriages of this kind. I apprehend 'that, by the law of England, marriages are to be deemed 'good or bad according to the laws of the place where they 'are made,' with much more, in the course of a long judgment, to the same effect.

Lord Stowell put this point in a still more striking view, in his judgment in the case of *Dalrymple* v. *Dalrymple*,* of a runaway Scotch marriage. 'The only principle applicable 'to such a case by the law of England is, that the validity 'of Miss Gordon's marriage rights must be tried by refer- 'ence to the laws of the country where, if they exist at all, 'they had their origin. Having furnished this principle, '*the law of England withdraws altogether*, and leaves the legal 'question to the exclusive judgment of the law of Scotland.' —'I pronounce that Miss Gordon is the legal wife of Mr. 'Dalrymple, and that, in obedience to the law, he is bound 'to receive her home in that character.'

There is a remarkable expression in Lord Hardwicke's judgment in a case that occurred nearly a hundred years ago.† 'This is the first case under the late (Lord Hard- 'wicke's own) Marriage Act. As to such a marriage—I was 'going to call it a robbery—there is a door open in the 'Statute as to marriages beyond seas and in Scotland. It is 'said by the witness that he saw them married (at Antwerp) 'according to the rites and ceremonies of the Church of 'England. But it will not be valid here unless it was so by 'the laws of the country where it was had.' We have seen

* 2 Hag. Con. Rep., 54.
† Butler *v.* Freeman, Ambl. 301.

indeed, in *Ruding* v. *Smith*, that, from the leaning of our Courts to support a marriage once made, this negative part of the rule of *lex loci* has not been applied so universally as the positive. But nothing can show more strongly Lord Hardwicke's conviction of the obligation of that rule, than such an admission as this, that his own Act might be evaded with impunity, if the parties only set about it in a proper way.

I need not multiply authorities to the same effect, which might be cited from every case where the question has been raised. But it may possibly occur to you, that in the cases from which I have quoted these judgments, the question was merely about what may be called *formal* conditions, which the parties must have complied with if they had married in England, but which they were expressly exempted from complying with if they married abroad, by the excepting clause of the Marriage Act.

In answer to this, I have to remark, in the first place, that the consent of parents to the marriage of girls who will not be *sui juris* for three or four years, is very often anything but a formal matter, and very often involves a great deal more than the mere question whether the gentleman shall marry the young lady now or wait three or four years for her. At any rate, the want of consent was not a formal matter in the Duke of Sussex's case, which (as you will see presently) was just the same as these; only the Royal Marriage Act had done the business effectually, and the general Act against marriage of minors without consent had not.

But, secondly, I remark that there was yet another case before Lord Hardwicke, in which the objection to the marriage which had been had abroad was something much more serious than any want of formalities or consent required by an Act of Parliament; since it directly involved that very incapacity to contract, which is now alleged to be affixed

by Act of Parliament to you with respect to your late wife's sister. *Roach* v. *Garvan** was a case where a Frenchman had got hold of an English ward in Chancery, aged eleven, and married her to his son, aged seventeen, apparently in a manner not invalid by the laws of France. Now, by the common law of England, as you may see in Blackstone, a girl of eleven was absolutely incapable of contracting marriage at all. Nevertheless, Lord Hardwicke, though declaring that he would punish the Frenchman if he could catch him, and naturally enough desiring to find an excuse, if possible, for not acknowledging the marriage, said, 'Then 'as to the fact of the marriage, if good, the Court will take 'care that the husband makes a suitable provision (out of her 'fortune, which was in the hands of the Court); but the most 'material consideration, is the validity of the marriage; it has 'been argued to be valid from being established by the sen-'tence of a French Court having proper jurisdiction. *And it 'is true that, if so, it is conclusive*, whether a foreign Court or 'not, from the law of nations in such cases; otherwise, the 'rights of mankind would be very precarious and uncertain.' And he deferred making any order about the money until he was satisfied that the validity of the marriage had in fact been established by the sentence of a French Court of proper jurisdiction; that being, as was said in Scrimshire's case, the best evidence that there had been a good marriage in France.

I think if your advocates had set to work to invent the kind of case which they would like to find in the books, they could hardly have imagined one better adapted for their purpose than this, except of course a favourable decision in a case identically the same as yours.

Are there then no exceptions of any kind to be found to the rule so distinctly stated in all these cases, and in many

* 1 Ves. 158.

others which might be cited? I need hardly tell you that there are; for it will no doubt have occurred to you already, that, if the rule is invariable, that every marriage which is valid where it is celebrated, is to be held valid here also, then a man has nothing to do but to go and get married, either in a country where they openly allow polygamy, or where they grant divorces upon almost any pretence, which our law will not recognise, and he may set up as many lawful and concurrent wives as he pleases.

Then, on what principle is it, that these exceptions are made? Why, the exceptions are founded upon the very same principle as the rule itself, viz., that of supporting, against every subsequent attempt to invade it, the inviolability of a marriage once effectually made. For, according to the idea of marriage among all Christian nations,* a marriage once made is just as much invalidated and violated by the admission of another lawful wife as by an express divorce. And consequently, although it is the universal rule—subject to the higher rule, that nothing can validate bigamy—that a marriage once *made* according to the *lex loci contractus* is good here, there is no such rule as, that a marriage *dissolved* according to the *lex loci solutionis* is considered to be dissolved here also. Many persons, and even some Judges, have thought that it ought to be; but, be that as it may, several cases have decided, that a Scotch or a foreign divorce between English people will not enable them to contract a subsequent marriage, which will be regarded as a marriage in England, though it may be perfectly good in Scotland. In *Beazley* v. *Beazley*,† the Ecclesiastical Court annulled a marriage which had been so made by an Englishman in Scotland, upon the strength of a Scotch divorce. And in a case somewhat famous, or rather, infa-

* See Lord Brougham's remarks on this in Warrender *v.* Warrender, 2 Cl. and Fin., 488.

† 3 Hag. Ecc. Rep., 650.

mous to the Secretary of State who allowed such a sentence to be carried into effect for two years, a man named Jolley was actually sent to the hulks for bigamy under similar circumstances, though there was no doubt that he had acted under the *bonâ fide* belief and advice, that his Scotch divorce enabled him to marry again. So determined is the English law to allow nothing (except an English Act of Parliament which overrides the law) to dissolve or break in upon a marriage once effectually made, in whatever country it may have been made; for, as Sir E. Simpson said in *Scrimshire* v. *Scrimshire*, it has been held that a man may be convicted of bigamy for marrying a second wife after a previous marriage in France, just as much as if the previous marriage had been in England.

The use which your opponents would make of these exceptions is this; they will say that the rule of *lex loci* does not apply where either of the parties is, by the English law, under a personal disability to contract the marriage, which they cannot shake off by merely going to a country where a different law prevails. And I have no objection to that mode of stating it, seeing that it does not advance their argument the least, until they have proved that the words of the Act of 1835 do create a personal disability which follows an Englishman over all the world, *except into Scotland;* for from that favoured country the disability, so far as it is created by the English law at all, is expressly shut out.

The disability to contract anywhere and any how a second marriage, while the first is, in the contemplation of the English law, still subsisting, is, I suppose, unquestionable; but it is not equally unquestionable that a marriage, valid in nearly every other country, and which is only made void here if it took place on one side of a certain day in a certain year (the 31st of August, 1835), and was expressly made valid if it took place on the other side of that same day, must be regarded by English courts of justice as standing in the

same category of impossibilities in which, by the laws of all Christian countries everywhere, bigamy is placed.*

So much for the case, where the personal disability to contract a second marriage abroad which shall be held good here arises from the common law. Now let us examine the case in which the disability to contract is created by a special Statute, to wit, the Royal Marriage Act,† upon which the decision given by the House of Lords in the *Sussex Peerage case*‡ is confidently asserted to be decisive against you. You probably know generally what that case was; how that the late Duke of Sussex married Lady Augusta Murray, at Rome, in the year 1793, in a way which would undoubtedly have been valid but for this Act of Parliament, and how that his son by that marriage unsuccessfully contended, in 1843, that the marriage was valid, notwithstanding the Act, which enacted, first, that no descendant of King George the Second, (except the issue of princesses married into foreign families,) should be capable of contracting matrimony without the consent of the King under the Great Seal; and secondly, that any such marriage, if attempted, should be void; with a provision for what may be called publication of banns in both Houses of Parliament in case a prince twenty-five years old wished to appeal against the King's refusal. In short, the object of that Act was to place royal princes of age in much the same position as all persons under age were placed by the general Marriage Act; only in one case the Act did reach marriages abroad, in the other it did not.

It certainly would have been the most ludicrous failure of legislation that has ever been witnessed, if an Act passed

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* I have not forgotten that a celebrated writer of Legal Biographies professes to see no difference. But Lord Campbell writing semitheological notes to Lives of Chief Justices, and Lord Campbell sitting as Chief Justice, are not precisely the same thing.

† 12 Geo. II., cap. 11.

‡ 11 Cl. and Fin., 137.

for such a purpose, and (as the preamble informs us) with the gravest deliberation, after a message from the Throne, had failed from such a glaring and transparent oversight as that of not providing for the case of a marriage at Calais instead of London.

However, there was no such oversight: on the contrary, there was in that Act a concurrence of these four things: First, there was a plain indication on the face of it, of the particular mischief to be prevented, viz., the risk of having an heir to the throne of England begotten of any woman of the lowest station, and possibly of the worst character, who might seduce a young prince into a runaway marriage with her; 'Whereas your Majesty,' says the preamble, 'from 'your paternal affection, &c., and from your royal concern '*for the welfare of your people and the honour and dignity of* '*the Crown*, was pleased to recommend, &c., we having taken 'this weighty matter into our serious consideration, and being 'sensible that the marriages in the royal family *are of the* '*highest importance to the State*,' therefore, &c. This being so, the Chief Justice Tindal, who delivered the opinion of the Judges, relied much on this plain indication of the intention of the Act altogether to prevent the issue of such a marriage from inheriting the royal dignity, and possibly the Crown. Secondly, he said that the exception of marriages of the issue of foreignized princesses, which would in all probability take place abroad, afforded a further proof that marriages abroad were not overlooked by the framers of the Act, or considered as being beyond its operation. Thirdly, there was the singular provision, not to be found in any of the other marriage Acts, that the persons in question should be '*incapable of contracting matrimony*' without the proper consent; which, as the Judges said, fixed upon them, just as if they were named in the Act, a personal incapacity which follows them everywhere, and therefore altogether different from the effect of an Act of Parliament

in the usual general terms, which, however large they may grammatically appear, yet by the settled rules of construction only operate upon those who happen to be within the ordinary range of the English law, binding foreigners just as much as Englishmen when they are here, and not reaching Englishmen any more than foreigners when they have put themselves under the dominion of foreign law, which they do, of course, as soon as they set foot on foreign ground. And fourthly, there was the enactment that all marriages without proper consent between the persons thus made incapable of contracting, should be null and void.

These were the grounds taken by the Judges in delivering their opinion to the House of Lords; and Lord Brougham, the only one of the peers who gave his reasons at length for concurring with the Judges, said that he did 'so upon the 'ground, not only that the object of the Act is clear, but that 'the words of the Act are sufficient, for that is necessary 'also, to accomplish the manifest purpose of the Act; I say 'this, because it is not a sufficient ground to hold that the 'purpose is clear unless the words are sufficient to accomplish 'that purpose, *though otherwise the Act might have been nugatory.* It was so in the general Marriage Act. It was quite 'clear that that Act was intended to prevent [English] minors 'from marrying without consent, unless with the publication 'of banns [at which dissent may be declared]; and yet, notwithstanding that, by going to Scotland, the parties intended 'to be affected by the Act, viz , wealthy persons, could easily 'accomplish the purpose and defeat the Act. My opinion is, 'that if that Act had used the same phraseology as this, and '*had rendered the parties incapable of contracting matrimony,* 'we should never have heard of the cases of *Compton* v. '*Bearcroft*,* and *Ilderton* v. *Ilderton*.† The parties here 'are rendered incapable of contracting matrimony, and

* 2 Hag. C. R., 444. † 2 H. Black, 145.

'*not merely as in Lord Hardwicke's Act,* [*and in the Act* '*of* 1835,] *the marriage rendered null and void.*' Lord Lyndhurst, Lord Denman, and Lord Cottenham, shortly concurred; and Lord Campbell added that 'the intention 'is sufficiently testified *by the language which is employed.*'

Is the intention then sufficiently testified in the Act of 1835, by the language therein employed, to render English people everywhere incapable of contracting matrimony within the English prohibited degrees of affinity?

First, what says our preamble? 'Whereas marriages 'within the prohibited degrees are contrary to the laws of God, 'and great mischief and inconvenience have arisen there- 'from'? (Not that even this will do without sufficient enacting words; for Henry the Eighth's Marriage Act called them contrary to the laws of God, but only left power to the Ecclesiastical Court to separate the parties, while they are alive to be separated; and the 'mischief and inconvenience' which Lord Hardwicke's Act recited, it failed to remedy, for want of those sufficient words which the Royal Marriage Act contained.) Not exactly: but, 'Whereas marriages within the prohibited 'degrees are voidable only by sentence of the Ecclesiastical 'Courts pronounced during the lifetime of the parties, and it 'is *unreasonable* that the state of the children of parties so 'marrying should remain unsettled for so long a period: and 'it is *fitting* that marriages *hereafter celebrated* within the 'prohibited degrees should be void and not merely void- 'able.'

The first part of the preamble leaves it quite indifferent whether the unsettled state of children of such marriages should be settled one way or the other; and the second part is merely the common introduction to almost every Act which is passed, except that they seem of late to have preferred the Latin word 'expedient' to the Saxon word 'fitting.' It is clear therefore that if the enacting words of the Act want any help to extend them further than they will reach *proprio*

vigore, they cannot get it from the preamble, even if the preamble could be resorted to for any such purpose.

The uncertain condition of the children then being declared by the Act to be the moving cause for its introduction, how does it proceed to remove the uncertainty? The prohibitionists are extremely fond of saying that it is a mere fallacy to talk of these marriages as having been in any sense at all good marriages until they were annulled by the Ecclesiastical Courts, and that they were really null and void *ab initio*, and only wanted a judicial declaration to that effect to inform the world of it. Well, if that was so, and if the marriages were regarded by the Legislature as utterly *mala in se*, and not fit to be tolerated, surely the natural thing was at once to supply that defect by a legislative instead of a judicial declaration, which was little more than 'an order of course' which anybody might move for, and at any rate not to help the parties who had so misconducted themselves. But, instead of doing that, the Act at once made every one of the existing marriages of *affinity*, but not of consanguinity, valid and unimpeachable; and in order that there may be no mistake about the matter, the title of the Act, which is the last thing voted upon, proclaims that it was the object of the Act (as every person of common sense knows that it was) 'to render certain marriages *valid*.' In the face of all which, come two or three bishops and tell us that that is all a mistake too, and that the Act 'did *no such thing*,' because it did not also expressly restrain the Ecclesiastical Courts from pronouncing some nonsense called 'Ecclesiastical censures' upon the parties, if anybody was silly enough to go there for the mere purpose of getting it pronounced.

And in order to prevent the like uncertainty with regard to future marriages (so far as the vision of the framers of that clause extended) they persuaded the legislature to take the other alternative, and instead of making them valid instead of voidable, to enact that they should be void: but

without a word about personal incapacity to contract them beyond the range of the English law, without a word showing that the contrivers of the clause ever contemplated the possibility of any Englishman marrying at all out of the United Kingdom, very probably (seeing they were not lawyers) in ignorance of the fact, that, without some special provision, at a certain point 'the English law withdraws alto- 'gether, and leaves the validity of a marriage to be tried by 'reference to the law of the country where it is celebrated.'

I will not weary you with dwelling on these obvious distinctions between the whole of this Act and the Royal Marriage Act, which was held to create a personal incapacity to marry anywhere contrary to its manifest intention and express enactment. There is undoubtedly one point of resemblance between them, and only one; viz.—that they both enact that *some* marriages shall be null and void. But inasmuch as the whole question was in the Sussex case, as it would be in yours, what those marriages are, it is evident that this one point of resemblance does not contribute much to the solution of the question.

But there is yet one other point of distinction altogether independent of those which I have noticed. Suppose that into the Royal Marriage Act a clause had somehow found its way, inadvertently expressed as it is in this Act, 'that *nothing* in this Act shall be construed to extend to that part of the United Kingdom called Scotland,' what would the Judges have said then? They must inevitably have said, either that a royal duke is capable of contracting matrimony without the King's consent in that part of the King's dominions called Scotland, but nowhere else in the world; or else they must have held that this exception of a part of the United Kingdom shows that the Act was never meant to extend to any place in the world beyond the United Kingdom. The first of these constructions is so absurd that it is difficult to believe that any Court would

adopt it. The other construction is not absurd at all, though the effect of it would certainly be that the Act required extending further, in order completely to cure the mischief which it aimed at. Those who frequent the courts of justice hear the Judges every day regretting that Acts of Parliament, deeds, wills, and all other human compositions which they have to deal with, have failed to express, and therefore to do, what the authors without doubt intended; but that is an omission to which, as they constantly add, 'the Legislature only can apply the remedy.' And if the addition of this one clause for excluding Scotland would have been fatal to the extension of the Royal Marriage Act to marriages abroad, notwithstanding its otherwise clear intention, and its strong and double form of nullification, what must it be to this Act, in which there is no symptom of intention expressed to prevent marriages abroad, and in which the nullifying clause wants exactly those words of the Royal Marriage Act, which Lord Brougham says Lord Hardwicke's Act failed from not containing?

This *Sussex Peerage case* is, I believe, the only instance of anything approaching to a judicial decision against you, according to the assertion of your opponents, that the Royal Marriage Act is similar in its operation to the Act of 1835. There are, however, one or two of what the lawyers call extra-judicial opinions, or *obiter dicta*, of which no doubt, for want of anything like real authorities, ample use will be made. The first is an opinion expressed by Lord Brougham in the case of *Warrender* v. *Warrender*, in the House of Lords.* The question there was merely whether the Scotch Courts were ousted from their usual jurisdiction to grant a divorce for adultery on the part of the wife of a pure Scotchman, because he happened to have married her here. It was held, that beyond satisfying themselves that the marriage had been actually performed according to the *lex loci*, the Scotch Courts had nothing more to do with English law; and Lord Brougham, in the course of a long speech, in which he insisted upon and illustrated the doctrine of *lex loci*, threw out these collateral observations: 'I shall only stop to remark that the English jurisprudence, 'while it adopts this principle in words, would not *perhaps* 'in certain cases be very willing to act upon it throughout. 'Thus we should expect that the Spanish Courts would hold 'an English marriage avoidable between uncle and niece, or 'brother and sister-in-law, though solemnized under a Papal 'dispensation, because it would clearly be avoidable in this 'country. But I strongly incline to think that our Courts 'would refuse to sanction, and would avoid by sentence, a 'marriage between these relations contracted in Spain under 'a dispensation, although, beyond all doubt, such a marriage 'would there be valid by the *lex loci*, and incapable of being 'set aside by any proceedings in that country.'

* 2 Cl. and Fin., 488.

If ever this question has to be decided in the House of Lords, you may depend upon it, that neither Lord Brougham himself, nor any other judge, will be at all influenced by an opinion of this kind casually thrown out upon a point not in issue in the cause, nor in any way arising out of it, by no means a confident opinion—and indeed not an opinion at all upon the effect of this Act of 1835, which had not then been passed. I must say too, with all submission, that I cannot join in his lordship's expectation that the Spanish Courts would, out of regard for our law, hold one of our prohibited marriages bad which was good by their own law; at least I think they would in vain expect ours to hold a marriage here between Spanish cousins, without a Papal dispensation void, because it would have been void in Spain.

Then there are some observations of an ecclesiastical Judge in a suit of *Harford* v. *Morris*,* about not only a runaway, but a violent, or forced marriage with an infant in

* 2 Hag. Con. R., 425.

Denmark. Sir G. Hay held the marriage good, notwithstanding the violence; and therefore his judgment recognised the *lex loci* doctrine to the utmost possible extent, and indeed beyond it; for the Court of Appeal reversed his decision, and annulled the marriage, on the universal rule that a contract obtained 'by force and custody' is no contract at all; but in the course of his judgment he made these observations, which your opponents would no doubt press into their service: 'The Ecclesiastical Court certainly has jurisdic-'tion in all cases whatsoever with respect to marriages of 'English subjects wherever celebrated; and therefore, if there 'was anything to show the marriage void by the general 'law respecting marriages, or by any particular law of the 'realm, or that a marriage celebrated *in evasion of the law of* '*the realm* was to be set aside, certainly the Court has full 'jurisdiction to enter into the cause of nullity on those accounts.'

Now the only part of these remarks which bears upon your case is that about the evasion of the law of the realm; and that part, expressing in fact that opinion of Lord Mansfield which I mentioned before, we know has been flatly and distinctly overruled, and never once followed either before or since in any single decision. As to the other part of Sir G. Hay's remarks, I have not the least doubt that *if* your marriage is void by the general law respecting marriages (as it would be if you had married a second wife on the strength of a foreign divorce),* or by any particular law of the realm (as the Duke of Sussex's marriage was by a law properly framed to reach it), *then* the Courts in England may and will declare it null and void: but there is nothing very alarming in this, inasmuch as the question in your case is just whether the particular law of the realm has reached it or not.

* Beazley *v.* Beazley, 3 Hag. Ecc. Rep., 650.

I really do not know of any other case—and indeed these are not 'cases' in the legal sense of the word, but only bare opinions on points not involved in the case—which I should think worth citing against you if I were arguing on the other side. Of course I do not pretend to be able to anticipate all that could be said on the other side. I have endeavoured to anticipate the most obvious and probable arguments against you; and in anticipating that of the Sussex Peerage as the best of them, I am not likely to be wrong, because you know it was picked out for the purpose by that one of your opponents who was on every account the least likely to take up any but the best weapon that is to be found to fight or frighten you with.

But although I do not know of any other judicial opinions that could be even plausibly brought against you, I think it not unlikely that some such argument as this may be used, more especially by that class of persons who think that these questions—and indeed that any questions—may be solved by what they (sometimes very wrongly) call common sense They may say: 'How far do you mean to carry this *lex loci* doctrine? Suppose we find a *locus* where the law allows men to marry their aunts or even their sisters, are we to sit still and accept as an English husband and wife persons who have betaken themselves to such an incestuous Gretna Green, and come back with a certificate of marriage?'

It seems to me that the most proper answer to give to such a question is, 'I don't know: when such a case arises, the Courts must determine it upon its own grounds.' For anything I know, they may be able to take a distinction in England, as I showed you they are by law required to do in Scotland, between the marriages which are 'expressly forbidden' by the law of God and those which are not. Possibly they may hold that the Act of 1835 having drawn a distinction between marriages of consanguinity and of affinity, the Courts may do the same in divining the intention of that Act.

Or again, it is perfectly conceivable that the law may still be as defective on this point as it was before 1835; for at that time (however disgraceful such a state of the law might be) no Court in England could help holding a marriage between a man and his own niece or sister perfectly good, if it had not been annulled by the Ecclesiastical Court during their joint lives. At any rate, it is no business of ours, who are complaining of that Act, to prove that the framers—or rather the alterers of it—have not added this to their other mistakes, both of omission and commission.* It is their business if they require it, and not ours, to find out where the line of validity is to be drawn. In every respect, the *onus probandi* lies on them. Before 1835 a marriage with a wife's sister abroad was not null and void: if they cannot prove out of the words of their Act that it is made null and void now, it will not help them the least to say that if the Courts should hold that it is not, then it will follow that some other marriages, which no doubt ought to have been made void, are still left exactly as they were. Unquestionably they are left as they were in Scotland; and therefore it will not be very wonderful if they are in Holland or New York.

I confess that, although I have no sort of personal interest in it, I shall be very glad if it turns out, as I believe it will, whenever the question comes to be decided, that the Act has, in this ignominious way, missed fire after all. I shall rejoice at it, not only because I think that the Act—I mean of course the nullifying clause of it—has produced enormous mischief and prevented none, and that it ought never to have been passed at all, for the reasons I have stated in my other pamphlet; but also because it was passed *unfairly*, and *in evasion of the*

* One of the bishops who had a hand in it, now calls the title of the Act, 'a blundering title.' Perhaps the title might return the compliment. (See my other two pamphlets advertised on the back of the title-page.)

law that every clause of every Act of Parliament must be the deliberate will of both Houses of Parliament; which it manifestly is not, if a small portion, or even the whole, of one House, takes advantage of the wishes of the other to make a sort of bargain for some piece of legislation—and above all, restrictive legislation, which the contrivers of it could never have obtained in the regular and straight-forward way. I should therefore rejoice to see it fail, though on a mere technical slip, just as people rejoiced to see the objection, which was raised by the counsel for Frost and his confederates at their trial for high treason, defeated by an answer equally technical and equally independent of the merits of the case. If it does fail, the Bishops of London and Exeter have only got to try the House of Commons again with a Bill, *bonâ fide* and openly brought in, for the purpose of preventing marriage with a wife's sister *everywhere*, as well as in England and Ireland.

I remain, yours very truly,

E. B. Denison.

THE END.

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A

REVIEW OF THE LAW

RELATING TO

Marriages

WITHIN THE

PROHIBITED DEGREES OF AFFINITY;

AND OF THE

CANONS AND SOCIAL CONSIDERATIONS

BY WHICH

THE LAW IS SUPPOSED TO BE JUSTIFIED.

BY

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PREFACE.

Having been professionally consulted in London on the subject of Marriages with a deceased Wife's Sister, regarding the legality of which grave doubts are entertained, the uncertain state of the law being felt as a grievous hardship by my clients; and having been subsequently engaged as counsel for the prosecution in the case of the Queen *v.* Chadwick, in which case the prisoner was indicted at Liverpool for bigamy, for having married the sister of his former deceased wife and subsequently in her life-time another woman, it became my duty thoroughly to examine the whole question, both legally and morally. During the course of that examination, an inquiry, as to the frequency of these marriages, was proceeding in various parts of the country, with the object of laying the facts ascertained before Parliament, in the hope of getting the law placed on a more satisfactory footing; and the following chapters were written, in the first instance, in the form of letters, and published in the Morning Post.

This brief introduction to the succeeding chapters will sufficiently explain the popular form in which some of them are written, and may perhaps excuse some faults of repetition and want of terseness, which may offend the critical reader.

If, however, this pamphlet should succeed in diffusing information respecting a subject surrounded with prejudice, there is hope that that prejudice may be dispelled, and that the present state of the law, which inflicts upon society a vast amount of unhappiness, of injustice, and of immorality, will at length be remedied, and made more in accordance with the requirements of society, and with common sense.

If the author should in any degree have contributed to so desirable a result, he will feel more than repaid for any labour that he may have undergone.

THE TEMPLE,
March 1*st*, 1847.

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CHAPTER I.

INTRODUCTORY CHAPTER.

Introduction.—Understood prohibition of Marriages by affinity.—Reg. *v.* Chadwick; the Bigamy case at Liverpool.—The disregard of the Law.—Its mischievous effects.—Division of the subject.

The most prominent evils in a state are not always those most complained of: the worst and most tyrannical laws are not always those against which the loudest outcry is raised. There are surface evils which offend and annoy many—there are legal restrictions which subject classes of men to inconvenience in matters of commerce; those annoyed, or offended, or interested, loudly complain; party spirit takes up the cry; it resounds in public meetings, it echoes within the walls of Parliament, and public writers, *currente calamo,* hasten to waft to the four corners of the earth, the indignation of the people of England at the use of the dog-carts in the city of London, or at the cry of "sweep" in the streets of

our towns, and at matters of equivalent importance; or, as recently, their determination to abolish commercial restrictions: Parliament yields to the outcry, and the obnoxious customs and laws are remedied. But there are evils in the state, perhaps less patent because more deeply seated, around which prejudice, and ignorance, and bigotry, may have clasped their cold hands; there are laws oppressive, tyrannical, and cruel, which *force* crime and demoralisation as in a hot-bed, and give a hypocritical sanction to both; yet those injured, because of that prejudice which envelopes the source of the injustice, shrink from exposing their domestic wrongs, and suffer in silence the cruel pangs of blighted affection, of ruthless cruelty, of injured honour, and of shocked morality. Ignorance looks placidly on, and sanctions the injustice, and bigotry is at hand to perpetuate the tyranny, to resist all change, and to traduce those who dare to advocate it. Party spirit then is quiescent; public orators are silent; public writers eschew the subject, and Parliament hears not of the mischief, and permits it to continue.

A recent trial at the Liverpool assizes, for bigamy, has dragged into daylight one of those deeply seated social evils. Our courts of law have decided (for a time at least), in that case, that our Marriage Laws, as at present understood to apply, openly permit those who may marry within what are believed to be the "prohibited degrees," to commit a crime for which any man marrying out of those degrees would be liable to be transported. The ground of that decision is the supposed application of a recent statute of William IV.,

a statute avowedly passed for a temporary purpose, and in its present form resting on neither reason, justice, nor moral necessity — which, in its passage through Parliament, as then altered, was viewed simply as an *ex post facto* law, requiring future revision*—which owes its present shape to Puseyite asceticism and superficial ignorance and prejudice, and the first fruit of which—worthy scion of such a parentage—has been open, unblushing, unpunished crime.

The trial to which I allude, is that of Reg. *v.* Chadwick, tried before Mr. Justice Wightman, at Liverpool, in which the prisoner was indicted for bigamy, and in which it was clearly proved that he had within a year married a second wife, his former wife being alive. The defence set up by the prisoner's counsel, was that the first wife, named in the indictment Ann Fisher, was the sister of one Hannah Fisher, a deceased wife of the

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* Lord Ellesmere, when in the House of Commons in 1842, in a speech of much eloquence, calling upon the House to amend the law of William IV., relating to marriages within the prohibited degrees of consanguinity and affinity, as having been passed "under very peculiar circumstances of haste—of a want of due deliberation,"—says, "it is upon the records of this House that an agreement was made, and a distinct understanding implied by all, and acknowledged most distinctly by those who spoke upon it, that the law was passed in its present shape in consequence merely of the lateness of the period (the month of August) of the Session of 1835; and it was distinctly understood and expressed that those who consented to it, did not do so upon full and due deliberation of its ultimate bearings, but that it was a subject which called for further inquiry and consideration; and something almost like a promise was held out that at an early period of the next session that consideration should be given to it."

prisoner; that this marriage with his deceased wife's sister was within "the prohibited degrees," as set out in Archbishop Parker's table of kin, in our Prayer-books; and that the recent statute of William IV., rendering *voidable* marriages within the "prohibited degrees," *absolutely void*, applied to it and made it void. The marriage, therefore, of the prisoner with Ann Fisher being void, his subsequent marriage with another wife, Eliza Bostock, in the lifetime of Ann Fisher, was no bigamy. To this it was replied by the counsel for the prosecution, that the marriage was not within "the prohibited degrees," as defined by any binding Statute or Canon Law, or by the Bible: that the table of kin in our Prayer-books rests on an invalid and unbinding authority; that the Canon Law of 1603, on which it rests, has never been sanctioned by Parliament, and has been solemnly pronounced by our Courts of Law not to bind the laity; that there is no earlier Canon of the Church binding by either the Common or the Statute Law, which renders this Marriage *voidable*, and if it be not voidable, the statute of William IV. will not make it void; that the Statute Law defines "the prohibited degrees" to be those prohibited in Leviticus, of which the Judges of the Common Law Courts are expressly declared to be the expounders; and that the 18th chapter of Leviticus, in which those prohibited degrees are set out, does not prohibit this marriage, but, on the contrary, sanctions it. Mr. Justice Wightman, however, who tried the case, expressly refrained from giving any decision on the question argued, and said he should decide according to past decisions, and acquit the

prisoner; directing a special verdict to be found, to enable the prosecutors, if so advised, to revise his judgment, and have the case argued in the superior Courts.

Such, then, is one effect of the Marriage law of William IV. Do not, however, let it be supposed that this is an isolated case of mischief arising from that law, because the evils which flow from it, as now construed by our Courts, do not obtrude themselves, but rather shrink from publicity; because the sanctity of domestic relations would be invaded by publicity. I will, in the following chapters, show from facts supplied to me, and resting on unquestionable authority, the total disregard of this law amongst both rich and poor—its questionable evasion by the rich—its open infringement by the poor.* I will endeavour, however inadequately, to show the great extent to which its evasion and infringement have proceeded in the course of the last dozen years, and its results in branding some thousands of respectable women as concubines

* Lord Francis Egerton thus spoke of this law in the House of Commons, in 1842, and of its mischievous results as felt nearly five years ago:—"This law did not go forth with the authority of law consistent with the feelings of the Christian and Protestant communities of Europe—it did not carry with it that weight which secures to the statutes the obedience of all but the avowed and profligate law-breaker. I tell this House, that that statute has subsequently been resisted and evaded by men of a very different description from such professed and profligate law-breakers, and I believe that I am entitled to say, that it has been evaded to a large extent by men of all classes in this country, by persons of education, and by persons who had no other moral slur or taint upon their character, than such as may be considered to attach to an infraction of a law which they consider unjust."

in law; in rendering their children illegitimate; in sowing the seeds of enormous future litigation as to the rights of property, whether accruing by descent, under marriage settlements, or by will: I will trace its probable fruitful result in parish disputes as to settlement of children born in wedlock, but bastardised by this law; I will expose its effect in taking from helpless and deceived women their remedy against the broken faith of heartless men; and it will then be apparent, that (in the words of the late Lord Wharncliffe), "this law is unnecessarily severe—that instead of conducing to the proper moral state of the inhabitants of this country, it is in point of fact demoralising, in a great degree, many of them." If this be shown in the following pages, surely this question will not be deemed one undeserving of public attention, and though the evils flowing from this understood state of the law, cry not "from the house-top," but shrink from public ken, yet it will be believed, that the disease, though hidden, is not the less fatal to domestic purity and peace, and not the less demands and urgently requires a speedy remedy.

I propose in the following pages to make a logical division of the subject, and to examine each part of it separately (now but briefly alluded to) in more full detail.

As an answer to those who object to any change in the law, on the ground that it affects but few individuals, and that it is a question of no real public importance, I shall in the next chapter give (though an

inadequate, yet) some idea of the great extent of its infringement and of its public disregard, and lay before my readers verified cases, which can be at any time substantiated, of almost every species of meddling tyranny, of domestic disquiet, of cruel interference with sacred ties, and of immorality resulting from this law.

I will then endeavour to show the historical origin of this prohibition, and it will be for us to consider how far this prohibition, if it shall be ultimately decided to exist, founded as it was upon unrestrained cruelty and lust, is deserving of our respect.

The supposed statutory prohibition of these marriages, and how far they may be in accordance with, or contrary to, the Levitical law, will then demand examination.

The Canon law on this subject will, lastly, require attention; and I hope to show its valuelessness, as a supposed foundation for the prohibition of this marriage. The valuelessness of the later Canons I shall show from the solemn decision of the courts of law; the valuelessness of the categories of the earlier Canons, which contain allusions to this marriage as infallible guides to human conduct, I shall show by examples of what they forbid, by their universal disregard in Protestant Europe, and by the unhesitating infringement of Canons in the same categories, of as binding effect, and of as great authority, by the Prelates of our Church, and by the Clergy *en masse*.

What then remains, to which Puseyite asceticism and bigotry can adhere, to urge in support of the

law as it exists? Sound argument failing, experience of its fruits failing, its Scriptural authority failing, its Canonical foundation failing, its legal foundation disputed, its historical foundation disgusting—will they still resort to the miserable doctrine of "expediency," urged by some in its support, and which the Bishop of London ventured to put forth, in the face of the hard facts which shew its *inexpediency* and *immoral tendency?* The impartial reader will form his opinion of the value of that remaining foothold of prejudice. On this part of the subject, however, I shall in the present chapter rest satisfied with quoting the opinion of the great jurist, Mr. Justice Story. That great authority on the law of nations, in a letter read by the late Lord Wharncliffe in the House of Lords, says, "Nothing is more common in almost all the States of America than second marriages of this sort, and, so far from being doubtful of their moral tendency, they are amongst us deemed the very best sort of marriages. *In my whole life I never heard the slightest suggestion against them founded on moral or domestic considerations.*"

CHAPTER II.

THE NUMBER OF MARRIAGES WITHIN THE PROHIBITED DEGREES.

The value of a sound judgment on this question.—Examination of the reasons given by the Bishop of London and Sir Robert Inglis for upholding the prohibition.—Inquiry instituted into the number of these marriages in the provinces.—Their probable number in England.—The Canon Law no reasonable prohibition.

PERHAPS the most valuable quality of mind which any man can possess, and which always elicits, as it deserves, respect, is that of a *sound judgment.* It depends upon an impartial balancing of existing facts, of surrounding circumstances, and of future probabilities; and from these materials arriving at a *just* conclusion. The opinion, therefore, of a man of sound judgment is deservedly valued. On the contrary, that quality of mind, whether it may arise from bigotry, from prejudice, or from inability and want of power, which on the one hand either wilfully shuts out of view parts of a subject under consideration, or on the other is unable to grasp the whole bearings of any subject, leads its possessor to arrive at either an unjust or an unsound conclusion. The opinions of such men

carry with them little weight. The public know how to discriminate between sterling gold and tinsel; and whilst they willingly accord its value to the one, they are apt to view the other with indifference, or, it may be, to "make game of it," and ridicule it, according to their humour.

In discussing a question such as the Law of Marriage, and the propriety of abolishing certain restrictions on marriages between persons related only by affinity, which, on the one hand, are desired to be removed, because they are tyrannical in their operation, and are found to produce in practice great social misery, discomfort, and crime, but which, on the other hand, are thought necessary to be retained as being in accordance with ancient practice and the opinions of the Church —(no matter how founded, or how partaking of the spirit of a barbarous age, which in other matters as essential the Church of the Reformation has disregarded)—no quality of mind is, perhaps, more required than a *sound judgment*. For the decision of this question may have an important bearing upon the domestic comfort and happiness of every man at one time or other of his life.

That opinion, therefore, on this question, which may be founded solely on the inconvenience of the law, without an examination of the validity of the reasons which support it, would be unsound; so also that opinion, which may be founded on ancient practice and on the early laws of the Church alone, without examination as to the reasonableness of the practice, or the validity and authority attached to those laws by the Church at the

present day, in matters as essential and as important, and which excludes from view also the inconveniences and mischiefs arising from the law, would be unsound and worthless.

I hope to fall into neither fault. I will by and by examine the validity of the reasons which support the law as it is. In the present chapter I shall confine myself to an examination of the value of the opinions of those who reject all consideration of the inconveniences and mischiefs resulting from the law, forget the crime and immorality to which it leads, and assuming them to be of a trivial nature and of little weight, throw them out of consideration, and arrive at a judgment (which according to them should bind the people for all future time) resting solely on ancient practice and the early laws of the Church.

The leaders of the opposition to any change in the present law, and who opposed the bringing in of a Bill with that object in the House of Lords in 1841, and in the House of Commons in 1842, were the Bishop of London and Sir Robert Inglis. Without meaning the slightest disrespect to those gentlemen, we have a *right* to examine the value of their opinions as legislators when they were legislating for us. And if we find that those opinions were formed irrespective of facts and surrounding circumstances, we shall not be inclined to pin our faith on them as the result of a sound judgment.

The Bishop of London, in his speech, says, "Our guides ought to be first the laws of God, and then social expediency." We will examine in due course

what are the "laws of God" on this question, from His inspired word, as we find it in the Bible, and we shall prefer this authority even to that of Gibbon on this subject, to which latter author his Lordship was somewhat curiously driven, in dire necessity, to prove these marriages by analogy to the custom of ancient Rome, to be forbidden by the "laws of God."

We will also examine how far the Marriage Law of William IV. is "socially expedient." Further on, his Lordship says, "*It may be expedient* that persons who are now living in a state of discomfort and anxiety, if not in a worse state, from the present condition of the law, which they well knew, but disapprove, should be placed in a state of less anxiety and less discomfort, and perhaps, in many instances, of less immorality. But are we to sacrifice *the barriers of domestic comfort and good morals*, to gratify the scruples or remove the difficulties of *comparatively a few persons*, who have knowingly involved themselves in difficulty?"

If "the barriers of domestic comfort and good morals" be the impossibility of marriage with a deceased wife's sister, those barriers are daily overleapt to the great advantage of domestic comfort and good morals, even though the law is thereby openly disregarded, and the parties, in one shape or another, must pay the penalty of acting contrary to the law; and I shall prove in this chapter that his Lordship was mistaken in supposing that "comparatively few persons" thus overleap "the barriers."

In the House of Commons, Sir Robert Inglis said, "It was for practical, political, and general reasons, that he felt bound especially to offer the Bill for the alteration of the law every opposition in his power." The honourable Baronet was not more definite in his reasons; but whatever they were, and on whatever basis they rested, I shall now proceed to show that they had no foundation on every-day facts, and, as applied to those facts, were perhaps the most impolitic that could be devised.

I propose, in the present chapter, to give some idea of the extent to which these marriages take place.

On a question of statistics, on which there has been no information obtained, and regarding which it is difficult from the circumstances of the case to obtain information, the efforts of a few private individuals to obtain that information must necessarily be imperfect and inconclusive.

From what has been done, however, in portions of the country, some estimate may be formed of the residue. If, then, we take the number of these "prohibited" marriages of widowers, ascertained in a given district of sufficient extent, and compare them with the total number of marriages of widowers in that district, we may thus arrive at some approximation to the proportion of widowers who marry again within the prohibited degrees of affinity, or, in other words, who marry their deceased wives' sisters or nieces. In no case can this be an *over*-estimate, because the number of widowers who marry again each year is an official return, and contains *them all*, whilst the return of

marriages within the prohibited degrees of affinity, ascertained by private effort, cannot be expected to be, and we know it is not, any thing like a full return. The proportion, therefore, which any privately ascertained estimate of these marriages may bear to the marriages of widowers each year, must be below the mark.

An inquiry has been instigated into the number of these marriages in different parts of England. I will give you the time occupied in that inquiry, the number of gentlemen engaged in prosecuting it hitherto, the towns in which it has been prosecuted, and the result.* *Four* gentlemen have been engaged in four different districts of the provinces exactly one month. Their inquiries, so far, have not progressed beyond fourteen towns: their names are—Manchester, Huddersfield, Doncaster, York, Rotherham, Ipswich, Yarmouth, Norwich, Southampton, Winchester, Portsmouth, Salisbury, Bristol, and Bath. In these fourteen towns (a fair sample of every class in England), in that one month, the unaided efforts of four gentlemen have ascertained upwards of 500 cases of infringement of the marriage law of William IV.† In all these cases, the names, residences, occupations of the parties, the date of the marriages, and the circumstances constitut-

* At the time when this chapter was written and published in the Morning Post, the inquiry had only proceeded one month. The calculations here made are more than borne out by the extension of that inquiry over a period of three months.—See last chapter.

† This number has now been extended to about 1600.—See *post*, last chapter.

ing their illegality, have been furnished to me; whilst the gentlemen engaged in the inquiry have heard of about as many more such marriages, the names of the parties to which were *concealed* and *refused to be made known*, lest it should subject them to unpleasant proceedings, or to injury because of their illegality. Now, these 500 ascertained void marriages are far from being all that are in like manner illegal in those fourteen towns, for in some of them the inquiry is not yet half finished; nor are these fourteen towns more than a mere fraction of England; yet the ascertained result in them by such insufficient means is *five hundred* cases of infringement of the law. In these fourteen towns, therefore, you have 500 respectable women branded as concubines by law, and their children, whatever their number, made bastards.

This must be a source of pain and annoyance to the relatives of each of these wives, and to the relatives of each of these husbands, and it must be a source of unspeakable pain to themselves in their own families; for their children are bastards. You have, therefore, in fourteen towns, three times 500, or 1,500 families, pained and annoyed and made ashamed by this law, anxious to *conceal* their own marriages, or the marriages of their friends. With such a proportion of these marriages in society, how "expedient" the law must be which prohibits them! How likely it is to bring the law into habitual disregard!

But I will attempt at least something like an approximation to their number throughout England from the returns ascertained. About 200 of these

cases have come from the five towns named in Yorkshire and Lancashire, and the gentleman there writes to me that he has little doubt, from what he has already learnt there, that he shall be enabled to find out 1,000 cases in those two counties alone by the time of the meeting of Parliament. I do not think this is an over-estimate, considering that Manchester is the only town in Lancashire to which attention has been turned, together with some small towns in Yorkshire. There are yet Liverpool and Preston, and Wigan and Bolton, and Oldham and Rochdale, and Stockport, and the enormously populous manufacturing districts of Lancashire, to inquire into; and in Yorkshire, Leeds, Halifax, Barnsley, Sheffield, Bradford; and, in fact, almost all the chief towns.

I will now briefly direct attention to the last Report (the seventh) of the Registrar-General of the Births, Deaths, and Marriages in England. It appears there from the return (in pages 8 and 33) that the total number of widowers who married again in 1843 was 16,305; in 1844 the number was 16,941.

In the year 1843 there were in the York division, including Yorkshire, 1,630 marriages of widowers; and in the north-western division, including Lancashire and Cheshire, 2,722 marriages of widowers, or a total of 4,352 in those three counties. In 1844 the marriages of widowers in these three counties had increased to 4,671, there being in the north-western division 2,897 of these marriages, and in the northern division 1,774.

From Cheshire I have had no return whatever of the

number of prohibited marriages, and Cheshire is included in the north-western division return of the marriages of widowers; the only information I have received as to prohibited marriages in that district is from Manchester and its neighbourhood. If we suppose, therefore, that in round numbers the marriages of widows in Lancashire and Yorkshire alone, leaving out Cheshire, amount to about 3,000 a year, and this is about correct, leaving the remaining marriages for Cheshire, we have, in eleven years since the passing of the Act of William IV., 33,000 such marriages. Taking it for granted that the gentleman now in Lancashire and Yorkshire collecting facts on this question is accurate in the estimate of the number he expects to ascertain there (though manifestly the number of such marriages which his activity and zeal may discover must be an incomplete and very deficient return), we have 1,000 prohibited marriages in those two counties; the proportion then is as 1,000 to 33,000, or one in every 33 widowers marries his deceased wife's sister.

When we take into consideration the number of cases in which a wife's sister remains to take charge of the bereaved husband's house, and to act as a mother to his children; that she is by blood, and perhaps by previous acquaintance, as much a stranger to him as his deceased wife was before his marriage to her; and that the amiable attentions of a lady under such circumstances, acting upon a bereaved and broken spirit, together with gratitude for a mother's kindness shown to his children, are likely to win a widower's regard and affection, few will think this proportion of 1 in 33

of the marriages of widowers to a deceased wife's sister overrated, coupled with the known fact that such marriages are openly and constantly contracted. It might indeed with safety be alleged that the proportion is much greater; but I must adhere to and calculate from such imperfect data as I have. We then have, in round numbers, 16,500 marriages of widowers a year throughout England. If 1 in every 33 of these be a marriage with a deceased wife's sister, which is the fairly assumed proportion in Lancashire and Yorkshire (and the returns show the proportion to be quite as great in the south of England, people there having pretty much the same feelings with regard to marriage with those whom they love and esteem as in the north), we have at the rate of 500 such marriages every year; or no less than 5,500 such marriages since the Act of William IV., prohibited by law, the wives concubines, the children bastards, and three times 5,500 families suffering annoyance, disability, shame, and disrepute, because of their own or their relatives' marriages made contrary to law, which fact they are anxious to *conceal.* Oh, most "expedient" law! Why force honest Englishmen to be ashamed of, and wish to *conceal,* that of which they should be most proud? But when those honest Englishmen know that the law which makes them so ashamed has no foundation in Scripture, in morality, or in second policy, think you not that they are something else besides ashamed? Will they not be indignant? Ay, and indignant at those who thus impose shackles on them under the pretence of their being imposed by canons of the early Christian Church,

which canons the clergy of the present day, in matters affecting their own marriages, entirely disregard. Will they not be disposed to ask, with scorn somewhat akin to contempt, at *such* an argument, in the quaint phraseology of one of our own great Judges?—

"But suppose the canon or civil law were to be taken as a measure in the subject of marriage, of what were lawful. With the Canon Law of what time would you begin, for it varies as the laws civil of any nation do, in successive ages? Before the Council of Lateran it was another law than since; for marriages before were forbid to the seventh degree from cousin germans inclusively, since to the fourth. Every council varied somewhat in the Canon Law, and every Pope from the former, and often from himself, as every new Act of Parliament varies the law of England more or less; and that which always changeth can be no measure of rectitude, unless confined to what was the law in a certain time, and then no reason will make that a better measure than what was the law in a certain other time: as the law of England is not a righter law of England in one King's reign than in another, yet much differing."*

Yes, contented will be these 5,000 Englishmen to have their wives esteemed harlots and their children bastards, because a canon of the Church in the fourth century renders them incapable of becoming bishops, priests, or deacons, if they marry their wives' sisters; and another canon of the Council of Eliberis, passed by certain Spanish Bishops in Granada in Spain, in

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* Lord Chief Justice Vaughan, in Harrison *v.* Burwell, Vaughan's Rep., p. 245.

that enlightened period of Europe's history A.D. 305, subjects them to a five years' penance for such a marriage, especially when they know that those same canons absolutely *prohibit* the clergy from marrying at all—prohibit marriage with an actress—prohibit the marriage of widows—prohibit a man to marry twice—prohibit a man to marry his maid-servant, under penalty of his being unable to fill any sacerdotal office.*

I fancy I see a contemptuous laugh on their 5,000 faces, when, after reading the Bishop of London's reference to the weighty authority of those canons, they begin to look a little into them themselves, and exclaim with old Chief Justice Vaughan, "Well, well, we are disposed to think that the Canon Law, like the law of England, is not a righter law in one king's reign than another, yet much differing, and we think (apart from what the law of the land may be, which we leave for the lawyers to settle) that the practical disregard of those canons by our clergy of the present day, as regulating their marriages, is a very sensible proceeding; and we think we cannot do better than follow their example, and disregard them also as regulating our marriages."

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* Apostolical Canons 16 and 17.

CHAPTER III.

EXAMPLES OF THE OPPRESSIVE AND INJURIOUS EFFECT OF THE PRESENT LAW.

Examples of the effect of the law.—Its infringement by all classes.—Its oppressiveness and demoralizing influence.—Its evasion by the rich, and tyranny over the poor.—Opinion of the Rev. J. F. Denham, Rector of St. Mary's le Strand, as to the effect of this law in his parish.

In the last chapter I proved that at least five hundred marriages a year within the supposed prohibitions of affinity under the existing law are contracted in this country, and that the number of these marriages since the Act of William IV. prohibiting them, must amount to several thousands. I shall proceed now without further preface to lay a few cases before my readers, culled at random out of a great number, to show the hardships, the cruelty, and the crime which the present state of the law leads to and compels.

For obvious reasons, the names of the parties in all these cases are suppressed; but the facts in all of them have been ascertained and verified by gentlemen of character, and I have not the slightest doubt of their strict accuracy.

——, professor of music at Manchester, has ill-used and deserted his wife (his former wife's sister), avowedly

on the ground that the marriage is invalid, and he cannot be made to keep her.

A dissenting minister at Macclesfield, the Rev. Mr. ——, was about to marry his deceased wife's sister at the time of the passing of Lord Lyndhurst's Act, 5th and 6th of William IV., c. 54. The marriage was fixed for the third day after the royal assent was given to that Act. On applying for a license on the day of the royal assent, he was informed that a statute, forbidding such a marriage, was actually passing. His marriage was, in consequence, prevented. His sister-in-law still lives in his house, and they are most anxious to marry.

A clergyman of extensive property, residing in Leicestershire, was left a widower with a large family of young children. His wife on her death-bed had implored him to marry one of her sisters who had been her constant companion, and to whom her children were much attached. The lady's mother approved of the intended marriage; the eldest brother, then the head of the family, in ignorance at that time of any legal disability, also expressed his entire approbation of it, but upon hearing that an Act had passed making such marriage void, not only forbade it, but quarrelled with his brother-in-law for daring to propose it so long as the obnoxious Act was unrepealed. Thus a connection, regarded by the whole family as most desirable, was prevented, and dissensions created amongst intimate friends for no other reason than because an Act of Parliament, founded upon an erroneous interpretation of Scripture, had interposed a legal barrier. All the

parties in this case were in a high position of society, fully capable, from their education and habits of life, of appreciating sound religious or moral objections, if any had existed.

The wife of Mr. ——, solicitor, Doncaster, died in childbirth. Her sister lived in the house during her illness, and remained with him and his mother for some time afterwards. Mr. —— and his deceased wife's sister became strongly attached to one another, and were desirous of being married at the period when the statute of 1835 was brought before Parliament. Mr. —— thought he should not be doing justice to the lady by leading her into a marriage upon which the Legislature was in the very act of casting a reproach. The Act having passed, the marriage did not take place, and, so far as he is concerned, it has cast a blight on his whole existence, and has destroyed his happiness. He has told my informant that the sacrifice had almost overpowered him, and that he had never been a happy man since.

The wife of Mr. ——, of Doncaster, a gentleman filling an important professional position, having died, her sister came to reside with him and to take charge of his children. Her residence with him became the subject of comment. He was anxious to marry her; the law prevents him: and that very case which the advocates of the law put forward as their strongest argument, namely, the possibility of a lady of marriageable age residing with her deceased sister's husband without reproach under the law, has been proved in this case to be a fallacy.

Mr. ——, printer, of Fleet-street, London, was engaged to be married to his deceased wife's sister. In consequence of doubts raised as to the legality of the marriage, he disposed of his business, and went to France to be married, where he continues to reside.

A lady, residing in Hyde Park Gardens, married her deceased sister's husband. Having cast her eyes upon another gentleman more suitable to her taste, she caused a suit to be instituted in the Ecclesiastical Courts, to avoid her marriage, as prohibited, and shortly afterwards married that other gentleman.

A tobacconist, in Kingsland Road, London, married his deceased wife's sister. The supposed illegality of the marriage is the prompter, on every fit of ill-humour or drunkenness, of constant and open threats to leave his wife.

The young wife of a clerk in a merchant's house in the city of London, died, leaving two infant children. Her dying request to her husband was that he would marry her sister, that she might be a mother to her children. He proposed to marry his deceased wife's sister, who lived in charge of his house. Her mother assented to the marriage. The marriage was prevented by the law.

A merchant in the city of London, at the death of his wife, requested her sister to superintend his house, and take care of his children. The lady educated his children herself, and two of his sons obtained distinction at their school. So great was the interest of the aunt for the children, and their affection for her, that their father, out of gratitude, esteem, and strong

regard, proposed to marry her, with the full knowledge of the law, which he looked upon as tyrannical and unjust, and required neither by social expediency nor morality. They were married, and that estimable lady is alleged to be in law his concubine.

A gentleman, residing in the Isle of Thanet, proposed to marry his deceased wife's sister, to which marriage the father of the lady was opposed, on the ground of its illegality, and in his will, in order to prevent the marriage, he directed that if his daughter persisted in contracting it, certain property left to her should go to other parties. After his death the lady did marry her deceased sister's husband. The parties to whom her property was to pass on her marriage taking place, being relatives, raised a great family outcry, refused to visit her, on the ground of the marriage being illegal and void, and then claimed the property left to her. "No," said the lady, "if my marriage is no marriage in law, and I am to be slighted on that account, I will at any rate keep the property; for, if the marriage is 'no marriage,' the property will not pass from me under the will." The lady was well advised.

A labourer in the employment of a coal merchant at Winchester applied to the Rev. Mr. Williams, of his parish, to get married to the sister of his deceased wife. Mr. Williams refused to publish the banns. They were, however, afterwards married at Chilcome, and for some time lived as man and wife. The man subsequently refused to support her, on the ground that their marriage was illegal.

In the parish of St. Giles, London, the settlement of

some children, the issue of such a marriage, is disputed, on the ground of the children being bastards, and not chargeable to the husband's parish. The case will shortly be before the Court of Queen's Bench.

A respectable shoemaker at Winchester, some years after the death of his wife, became attached to her sister. The law has hitherto prevented their marriage; but he told the gentleman who is my informant, with an air of firmness and indignation, "that he is determined to marry his sister-in-law, though it drove him to go and live abroad."

——, a labourer at Winchester, was anxious to marry his deceased wife's sister, who kept his house for him. The law prevented his marrying her. He now cohabits with her, and has a large family by her, and is still anxious to marry her.

A labourer from Mitcheldever applied to the Rev. Mr. Thom, dissenting minister of Winchester, to be married, but in his simplicity let out the secret that the woman he wanted to marry was his deceased wife's sister. Mr. Thom told him the state of the law, and refused to marry him, but advised him to try his hand with the Established Clergy, and if he could prevail on one of them to marry him, he need not give himself any undue uneasiness about such a connection being improper because it happened to be forbidden by law.

A farmer, and man of property, near Winchester, lost his wife shortly after the passing of Lord Lyndhurst's Act. His sister-in-law went to keep his house. He became attached to her, and it was at length agreed that they should marry. He was refused to be married

at Winchester. They went to Southampton, but his relationship became known before the ceremony was performed, and he was refused to be married there. At length they found a clergyman who married them. Not satisfied with the legality of the marriage, and to satisfy his wife, they went to Scotland, and were again married there, being ignorant that this was of no avail to them.

The bailiff to Sir W. Heathcote, at Hersley, near Winchester, married his deceased wife's niece, who came to keep his house at his wife's death, and to whom he became attached. It might be thought that the affinity was remote enough here; but upon his marriage taking place he became exposed to the fiercest persecution by the late Professor of Poetry at Oxford, the Rev. Mr. Keble, the curate of his parish, and other Puseyite associates. They threatened to take steps against him in the Ecclesiastical Courts, and the poor fellow, though a good servant, and his conduct in every other respect unexceptionable, was obliged to give up his place. He then went to Wiltshire, and got into the service of a gentleman named Rawlinson, in the diocese of Salisbury. But here Messrs. Keble and Co. would not let him rest, for they wrote to the Archdeacon at Salisbury to prosecute him for incest, and he was only rescued from this rabid persecution by his employer taking up the cudgels for him, and directing his solicitor to take measures to protect him.

A respectable man at Salisbury married his deceased wife's sister. On his death-bed his wife became

anxious that he should make his will, and instructions were given to an attorney to prepare a will; the man, however, died before it was executed. He had no relatives of his own, and no family by his first wife. His second marriage being esteemed illegal, the Crown took possession of his property, administration of his effects being refused to his second wife. Some two years afterwards, the Crown, moved by her representations, returned a part of the property.

———, living at Hallstock, in Dorsetshire, went about six years ago, to live with her sister's husband, to look after the children during her sister's last illness. After her sister's death she remained in the house as housekeeper, and her brother-in-law afterwards proposed marriage to her. The marriage ceremony was refused to be performed in several places, the clergyman of his parish putting the clergy of neighbouring parishes where he applied on their guard. The result has been what was to be expected, the parties cohabit together without marriage. This instance is a sample of some scores reported to me, almost precisely the same in circumstances and results.

The Rev. Mr. ——, dissenting minister at Ipswich, married his deceased wife's sister at Altona, three years ago, where he went to have the marriage ceremony performed, such marriages there being legal. It was the dying request of his first wife that he should marry her sister. The legality of the marriage in this country is a matter of doubt.

A surgeon residing at a village near Ipswich married the sister of his deceased wife at her dying request.

The lady's friends are highly respectable people in Ipswich, and the mother of the lady went with her to Scotland, to give her away to her brother-in-law at the marriage ceremony, under the mistaken impression that the marriage was legal if performed in Scotland. There is no doubt whatever, in this case, that this lady ranks in law simply as a concubine.

A respectable farmer, near Ipswich, on the death of his wife, invited her sister to come and take charge of his child. An attachment arose between them. The obstacle to marriage led to an improper intimacy, which has since been endeavoured to be repaired by their marriage.

A twine-spinner, residing at Yarmouth, married the sister of his deceased wife at Goodeston. She had been for several years the domestic servant of a clergyman in Yarmouth, and previous to her marriage was assured by her master that the marriage would be void. Her answer was, that her sister lived cook with Admiral Sir George Parker, who married two sisters sixteen or seventeen years ago, and that if it were not wrong in him to marry two sisters, she did not see that she should be doing wrong.

A respectable man in Yarmouth, wishing to make his will, and to leave his property to his wife, who was the sister of a former wife, the solicitor employed felt obliged, in regard to this respectable woman, to describe her in the will as so and so, "the reputed wife" of the dying man.

A member of the Society of Friends, a highly respectable bookseller in Bristol, on the death of his

wife became anxious to marry her sister, that she might be a mother to his children. It is one of the rules of the Society of Friends to expel members who do not obey the laws. The elders, knowing the circumstances of the parties, admonished both; and both underwent resignedly great annoyance and vexation. They, however, considered the marriage law of 1835 to be so tyrannous and unjustifiable, that others, as well as friends of their own persuasion, not merely connived at, but approved of their resolution to set at naught an unjust law. Great expense was incurred in ascertaining if the marriage could legally be solemnised, and various legal opinions were taken. The more they examined into the law, the more they scoffed at the reasons on which it is founded. At length they resolved to go through the marriage ceremony in Denmark, and to go through the necessary preparation. He was accordingly subjected to most irksome and inquisitorial proceedings. Before leaving for Denmark he had to prove his identity, that he had his father's sanction, and that the contemplated marriage was within his father's knowledge. The same thing had to be done by the lady, the Danish and British Consuls in turn inspecting and affixing their respective official seals to the required documents. Armed with these papers, he and his intended lady proceeded to Altona, where they put themselves in communication with Dr. Leimppert, whose fee as a civilian to enable an Englishman and an Englishwoman of character in approved society to marry, as refugees under doubtful domiciliation in a foreign country, was twenty guineas. After the required residence within the jurisdiction of the free state of Altona, the parties were at length solemnly married under a fiat from the King of Denmark, by an officiating clergyman in state orders, after incurring an expense of nearly £200. On their return to Bristol, instead of being avoided or "cut," they were congratulated, and met with increased respect from all their friends, because of their determination as upright people of strong minds not to submit to an oppressive and unjust law. Dr. Leimppert showed to them a column of names of refugees who sought for honourable marriage abroad, rather than part with each other's society, or live in invited concubinage in England, under the temptation of the law of 1835. This marriage took place in 1844.

Within the last month, a highly respectable citizen of Bristol went to Teignmouth to have the marriage ceremony performed with his deceased wife's sister. The event was publicly announced in the Bristol newspapers.

An eloquent clergyman, much beloved by his congregation, the Rev. Mr. Irvine, of St. Mary's Redcliffe, Bristol, having married a respectable man to his deceased wife's sister—his dying wife having implored him, for her children's sake, to marry no step-mother for them but her own sister—a Puseyite clique of young clergymen, more offended, it is said, at this reverend gentleman's successful eloquence than at his ecclesiastical fault, eventually procured his suspension on account of this marriage. One thousand of his

parishioners, in two days, signed a protest against his suspension. The Puseyite object, however, was accomplished, and a successful and dangerous rival was got rid of.

The following letter was written by a highly respectable farmer to the gentleman making inquiries in that district. It shows that the possession of £100 enables the law to be broken with impunity, whilst those who cannot afford that sum must bear the yoke of this oppressive law.

"Raunds, near Thrapston, Feb. 5th, 1847.

"Sir,—Your letter of the 1st instant came duly to hand. In answer, your information is quite correct; the following are the particulars of my case:—I had formed my attachment before the passing of the Act, and the first impression it produced was, that that attachment must be given up. It was, however, found that that conclusion could be sooner come to than acted upon; still an union, under existing circumstances, seemed very formidable. We therefore resolved to lay our case before Dr. Lushington, and he informed us as the best step to a consummation of such an attachment, that a marriage might be effected in America, where such marriages are perfectly lawful. This advice we determined to take, especially as there never appeared anything prohibitory in the Levitical law upon this subject. Accordingly we proceeded to New York, and our marriage was solemnized in that city by the Rev. J. Milner, Rector of St. George's Church, on the 26th of July, 1838, at an expense to ourselves of upwards of one hundred pounds. This, however, we considered but trifling, compared with the sacrifice of the very strong attachment which had been formed between us. How far the alteration of the law may affect our case I cannot tell; but feeling deeply affected for the welfare

of the class of persons who are circumstanced as we were, or who have contracted marriages upon such attachments, I heartily wish you success in your undertaking.

"I am, Sir,

"Yours humbly,

"R. Ekins.

"To Wm. Paterson, Esq.

"P.S.—There is a very respectable farmer of this place, Mr. Thomas Brown, who had formed an acquaintance under similar circumstances, who found it necessary to go into a distant part of the country to effect a marriage: he has already a family of four children by the same, and consequently it is to him a matter of the highest importance that an alteration should take place in the law. I have given this information in accordance with his wish."

I have more than exceeded reasonable space, or would quote many more cases of hardship, cruelty, and oppression under this law. Amongst the cases communicated to me are some scores of marriages of respectable parties who went abroad to evade the law. Several persons of condition proceeded to foreign countries and married there, after the rejection of Lord F. Egerton's motion in 1842; and several others, who were still restrained by the letter of the law in so delicate a matter, have since acted upon Mr. Justice Erle's opinion, and solemnised their marriages in this country, that learned judge having pronounced them unimpeachable, as being "*without* the Levitical degrees." A very common case amongst the lower class is, that the parties go to a parish where they are

not known, and get married by the clergyman. In very many instances among the lower classes the parties get found out when they go to be married, and the clergyman refuses to marry them. The almost invariable result in such cases is, that the parties subsequently cohabit without marriage. They satisfy themselves that they have endeavoured all they can to do what is proper, and moral, and right, and if the law will not let them marry, why it is not their fault, so they cohabit without marrying. It is reported to me, that at Portsmouth, at Salisbury, at Dorchester, at Ipswich, and at other places, applications for licenses to marry by parties thus related are continually being made, and of course refused; and these towns the Bishop of London will see are not manufacturing districts, where the population can be assumed to be "suffering under long and criminal neglect on the part of those who ought to have provided for them clergymen, churches, and schools."

I shall appropriately close the subject of this chapter by quoting the opinion and experience of one of the respected rectors of the Strand churches:—

"In the course of my experience as a clergyman, during twenty years, in the country and the metropolis, I have known many instances of a *man marrying his deceased wife's sister*.

"I believe that the great inducement in such cases has been that the parties have considered themselves *more assured of each other's real character and disposition*, than mere *strangers* could hope to be. A man also naturally expects that the sister will take a greater interest in his deceased wife's children than any one else would do.

"As far as my knowledge and recollection extend, I have had reason to consider the parties in such a marriage respectable in conduct, and apparently attached to each other. I know instances in which the females have made *excellent stepmothers*.

"I have for these reasons felt commiseration for the parties themselves, and for their children, as exposed to odium and other disadvantages under the present state of the law.

"It is, I believe, often made use of as a means of *persecution and annoyance* to those whom it concerns. The parties are also conscious of the real or supposed disadvantages of their position, and I doubt not are ofeen intimidated in consequence from maintaining their various rights with proper spirit.

"Among the lower orders, if a party so circumstanced by any means offends a neighbour, it is often found that the offended party indulges his spite by adverting, in *some way or other*, to the *illegal position of his opponent and partner, and the illegitimacy of their children*. The same handle for resentment or contempt is, I doubt not, made use of among children when they quarrel. Still the inducements are so many to contract this kind of marriage, that parties are often found willing to encounter *all the attendant evils* for the sake of them.

"For these reasons, I should hail with satisfaction the repeal of the present legal prohibition, if any really exist, which is thought by some to be at least questionable, or the *authoritative declaration that there is none*.

"The Scriptures do *not*, I believe, afford the *slightest countenance* for the present, real or supposed, state of the enactment; indeed, the analogy of the ancient Levitical law, which *required* that a man should marry his deceased

brother's *wife*, is in favour of the kind of marriage in question.

"Joshua Frederick Denham, M.A., F.R.S.
"Rector of St. Mary-le-Strand.

"December 19, 1846."

Few, I think, after reading these cases, descriptive of the evil tendency and tyranny of the present law—few, after marking the thousands of these marriages which take place, as proved in the last chapter, will be disposed to accord in the opinion of the Bishop of London, that their prohibition, as now existing by law, is "expedient;" and still fewer, I think, will feel disposed to become disciples of Sir Robert Inglis, and openly anywhere express his opinion, "that, for practical, political, and general reasons," the present state of the law ought to be upheld.

CHAPTER IV.

HISTORICAL SKETCH OF THE PROHIBITION.

Its early ecclesiastical history.—Early restraints on marriage generally.—Marriage "lay in disgrace."—The first canons against it.—Progress of superstition; the clergy forbidden to marry.—Prohibitions of marriage extended to the seventh degree of relationship.—Spiritual affinity.—Prohibitions made a source of profit by the Church of Rome.

Having in previous chapters shown the extent to which the infringement of the laws supposed to prohibit marriages between parties related by affinity is carried (or rather its almost total disregard), and the injustice, cruelty, and oppression in which such a state of the law necessarily and in fact results, I shall proceed to give an historical sketch of the origin of these prohibitions—of the spirit of the ages which riveted them on society; and, bearing in mind that we shall look for them in vain in Scripture, or in any divine ordinance, let us see if these regulations of men of bygone barbarous ages for our government are deserving of our reverence and respect for the reasons which gave rise to them, or for the spirit which continued them and graved them into our laws.

The question is now proved not to be one of hypothetical mischief or mere individual hardship. It is assuming its just proportions as a question of grave national importance touching our social government; for there are thousands of such invalid marriages

amongst men of all classes, and hundreds of cases of grievous hardship under the law. Neither are these numbers hypothetical; the last two chapters have proved the great number of these marriages, extending to at least 5,000, and the grievous oppression of the law in some hundreds of those cases.

The historical sketch which I propose naturally divides itself into two parts: first, the ecclesiastical history of these prohibitions; and, secondly, their statutory or legal history. I shall confine myself in the present chapter to their ecclesiastical history.

In the early ages of the fathers of the Church, their chaste severity led them to abhor every enjoyment which might gratify the sensual and degrade the spiritual nature of man. "It was their favourite opinion," says Gibbon, "that if Adam had preserved his obedience to the Creator, he would have lived for ever in a state of virgin purity, and that some harmless mode of vegetation might have peopled Paradise with a race of innocent and immortal beings. The use of marriage was permitted only to his fallen posterity as a necessary expedient to continue the human species, and as a restraint, however imperfect, on the natural licentiousness of desire. The hesitation of the orthodox casuists on this interesting subject betrays the perplexity of men unwilling to approve an institution which they were compelled to tolerate. The enumeration of the very whimsical laws which they most circumstantially imposed on the marriage bed would force a smile from the young and a blush from the fair. It was their unanimous sentiment that a first marriage

was adequate to all the purposes of nature and of society. The sensual connection was refined into a resemblance of the mystic union of Christ with his Church, and was pronounced to be indissoluble either by divorce or by death. The practice of second nuptials was branded with the name of *legal adultery*, and the persons who were guilty of so scandalous an offence against Christian purity were soon excluded from the honours, and even from the alms, of the Church.* Such is Gibbon's account of the chaste and mortifying spirit which influenced the lives of the early fathers of the Church, in the first three centuries of the Christian era. The state of celibacy was conceived to be one of greater purity than that of matrimony. Chastity rapidly partook of the spirit of asceticism, and celibacy, first recommended as a state of greater purity, became enjoined and at last enforced on the clergy. In that purer age of the Church's history, the rules of strict morality, as taught in the precepts of Christ and his Apostles, were alone adhered to, and it was not until after this period that the Mosaic prohibitions and other regulations respecting marriage were adopted with certain modifications in the Church.† "An instinct almost innate and universal," says Gibbon,‡ appears to prohibit the incestuous commerce of parents and children in the infinite series of ascending and descending genera-

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* Gibbon, c. xv. p. 191.
† Riddle's Christian Antiquities, book viii. c. 1.
‡ Ch. xliv. p. 768.

tions. Concerning the oblique and natural branches, nature is indifferent, reason mute, and custom various and arbitrary." Gibbon then relates the customs of various countries, and adds, that "the profane lawgivers of Rome inflexibly condemned the marriage of sisters and brothers, and hesitated whether first cousins should be touched by the same edict." When marriage thus had begun, in the words of Milton, "to lie in disgrace," "as a work of the flesh, and almost of defilement, wholly denied to priests, and the second time dissuaded to all," then it was that the Mosaical prohibitions were adopted and extended, and the natural restraints on marriage imposed by Pagan Rome became incorporated into the decrees of Christian councils, with all the strained interpretations of "mystical consanguinity," and of a prevailing asceticism. Accordingly, we find that the first council of the church in which this subject was discussed, that of Eliberis, which was assembled A.D. 305, enjoined five years' penance to the man who married his wife's sister;* and the Council of Neo-Cæsarea (A.D. 314) ordered that the woman who married two brothers should remain excommunicated to the day of her death.†

Pari passu with these growing restrictions were the morality and the purity of the earlier Christians departed from. Inspired by "the savage enthusiasm which represents man as a criminal, and God as a tyrant," the ascetics of the age "abjured the use of wine, of

* Labbé, i. p. 977. † Ibid. i. p. 1481.

flesh, and of marriage; chastised their body, mortified their affections, and embraced a life of misery as the price of eternal happiness."* It was soon found that by these habits their votaries "acquired the respect of the world which they despised." The monastic orders were invented, and "crowds of obscure and abject plebeians gained by these means in the cloister much more than they had sacrificed in the world." Imposture and credulity went hand in hand, and vitiated the faculties and the minds of men; and "superstition gradually extinguished the hostile light of philosophy and science."† This was the period when these prohibitions were invented, and such were the motives which actuated the men who imposed restrictions on marriage, such as are no where found in the pure fountain of morality and truth—

> "Condemning as impure what God declares
> Pure, and commands to some, leaves free to all."

We will now briefly turn to some of the *reasons* on which these restrictions on marriage were founded, and by which they were attempted to be justified. Mosheim, in describing the manners of the clergy of the fourth century, says, "Marriage was permitted to all the various ranks and orders of the clergy, high and low. Those, however, who continued in a state of celibacy obtained by this abstinence a higher reputation of sanctity and virtue than others. This was owing to

* Gibbon, p. 602. † Ibid. p. 608.

the almost general persuasion that they who take wives were, of all others, the most subject to the influence of *malignant demons*. As it was of infinite importance to the interests of the Church that no impure or malevolent spirit entered into the bodies of such as were appointed to govern or instruct others, so the people were desirous that the clergy should use their utmost efforts to abstain from marriage."* This led to the clergy forming connections with "holy concubines," about whose purity and chastity solemn declarations were made; nevertheless, scandal was not silent, and the more pious among the bishops, alarmed at this laxity, increased their efforts to abolish it, and to impose further restrictions on marriage. The council of Agde (A.D. 506) forbade marriage with a brother's widow, with a cousin german, with a near relative by consanguinity, and with a near kinsman's widow.† Gregory III. (A.D. 731) extended prohibitions of marriage to the seventh degree of relationship, and Zachary forbade marriage in every case in which any relationship, however remote, could be traced between the parties. At this period the spirit of the doctrine of "mystical consanguinity" became extended, and marriages within "spiritual relationship," or *cognatio spiritualis*, were prohibited; so that, according to Lord Coke,‡ "a husband might be divorced from his wife

* Letter on the Law of Marriage, by H. R. Reynolds, Esq. M.A., Barrister at Law, p. 32.
† Labbé, iv., p. i. 1393.
‡ Co. 2d Inst. p. 683.

or a wife from her husband, and the heir of them be bastarded, for that the husband before marriage had been *godfather either at baptism or confirmation to the cousin of his wife*, or that she had been *godmother before the marriage to the cousin of her husband*."

"Not only was *affinity*," says Hallam,* "or *relationship by marriage*, put upon the same footing as that by blood, but a fantastical connection called *spiritual affinity* was invented in order to prohibit marriage between a sponsor and godchild."

Gregory Nazianzen called the man of four wives no longer a man, but "a downright hog." The children of such a marriage were declared bastards. But a man might by penance wipe out this fault, as he might by marriage with his deceased wife's sister, for the Roman penitential ordered "a fasting of three weeks for a third wife, and twenty-one for a fourth; after which all was well again."†

"The reasons," says Jeremy Taylor, "why the projectors of the Canon Law did forbid marriage to the seventh degree, were as fit a cover for this dish as could be imagined. They that were for four, gave this reason for it:—

"There are four humours in the body of a man, to which, because the four degrees of consanguinity do answer, it is *proportionable to nature* to forbid the marriage of cousins to the fourth degree." Nay,

* Vol. ii. p. 8.
† Letter of H. R. Reynolds, Esq., on the Law of Marriage, p. 43.

more. "There are four elements; *ergo*, to which it may be added, that there are upon a man's hand four fingers and a thumb; the thumb is the stirps or common parent, and to the end of the four fingers, that is, the four generations of kindred, we ought not to marry, because 'the life of a man is but a span long.' There are also four quarters of the world; and, indeed, so there are of every thing in it if we please, and therefore abstain at least till the fourth degree be passed. Others, who are graver and wiser (particularly Bonaventure), observe, cunningly, that 'besides the four humours of the body, there are three faculties of the soul, which, being joined together, make seven; and they point out to us that men are to abstain till the seventh generation." "These reasons," says the good Bishop, "such as they are, they therefore were content withal, *because they had no better;* yet, upon the strength of these, they were held, even against the consent of almost all mankind, to forbid these degrees to marry."*

Such was the spirit of the early ages of the Church which enacted and perpetuated these prohibitions, many of which the good sense of mankind has since got rid of, although, as in the case of the marriages of first cousins, the removal of the prohibition was opposed on precisely the same grounds as is the removal of the prohibition of marriage with a deceased wife's sister.† Such was the *reasoning* on which these pro-

* Jer. Taylor, Duct. Dub. lib. xi. c. 2, s. 66.
† Ibid. lib. ii.

hibitions were founded, and by which they were defended. After the "four humours of the body and three faculties of the soul" mode of argument, the "four fingers and the thumb" and the "span long" illustration, in defence of the prohibition of the marriages of relatives to the seventh degree, we ought to receive with becoming gravity the *three reasons*, "practical, political, and general," of Sir Robert Inglis, in defence of the prohibition of marriage with a deceased wife's sister.

There was, however, another ingredient which increased the number of these prohibitions and perpetuated them, to which I shall briefly allude. The Church of Rome reserved to itself the power of granting dispensations for those prohibitions, which, for objects "of discipline and ecclesiastical economy," it enforced by "decrees of councils and decretals of Popes."* "The key note which regulated every passage of this dispensing power was the superiority of ecclesiastical to temporal authority;" "and dispensations were made more easy when it was discovered that they might be converted into a source of profit."* Thus were these prohibitions, at first established in a barbarous age by unreasonable and senseless asceticism, and continued and extended by the policy of the Romish Church for the purposes of power and aggrandisement by a code of canon laws, perpetuated and

* Hallam, vol. ii. p. 7.
† Ibid. vol. ii. c. 7, p. 9, and see Appendix, No. 1, Stat. 32, Henry VIII. c. 38.

"almost entirely founded upon the legislative authority of the Pope,"* and "the doctrines contained in which most favourable to the power of the clergy were founded on ignorance, and supported by fraud or forgery."†

And yet we in the nineteenth century—in the third century of the Reformation, with the Bible as our guide—in an age of literature and diffused knowledge, are supporting those very canonical prohibitions of marriage (when almost every other Protestant nation has scouted them), because—because, as Sir R. Inglis tells us, he thinks there are "practical, political, and general reasons" in their favour, and because the Bishop of London is charmed with the ascetic spirit of the canons of Eliberis, and would perpetuate the prohibitions against "mystical consanguinity!" But why stop here, if the canons are to be our guide? "Mystical consanguinity" ought not to be severed from its nuptial fellow '*cognatio spiritualis*,'—and grant this clerical re-enactment, this revival of "ignorance, fraud, or forgery," and we shall again be in that happy state of mental bondage and spiritual slavery when no man who hopes to marry dare stand godfather to his friend's child, lest the lady of his affections should chance to be that child's cousin, or remotely related to it, and the "spiritual affinity" which he has taken upon himself should prevent his marriage.

Such was the state of the Canon Law till the thir-

* Hallam, vol. ii. c. 7, p. 9.
† Robertson's Hist. Chas. V.

teenth century, when fourth cousins were permitted to marry by a relaxation of the canons, and in this ameliorated form they so continued till the period of Henry VIII. An historical account of the statutory enactments regarding marriage, and the reasons of the prohibition of marriage with a deceased wife's sister in that monarch's reign, will form the subject of the next chapter.

CHAPTER V.

THE STATUTORY HISTORY OF THE PROHIBITIONS.

Henry the Eighth's marriage to his brother's widow, Catherine of Arragon.—A fresh beauty at Court, Anne Boleyn.—Application to the Pope for a divorce.—Controversy as to the validity of the King's marriage.—The Universities consulted, bribed, and threatened into an answer favourable to the King.—Marriage to Anne Boleyn, and first Statute passed declaring the King's last marriage "prohibited by God's laws."—A new appetite; Anne Boleyn beheaded, and marriage to Lady Jane Seymour.—Second prohibitory statute passed.—Marriage to Ann of Cleves.—Divorce, and third prohibitory statute passed to pave the way for a future marriage.—Archbishop Parker's Tables.—The Canons of 1603.

In the present chapter I intend giving an historical sketch of the statutory history of these prohibitions. If their ecclesiastical history, as related in the last chapter, excited a smile of pity at opinions and doctrines which Robertson, in his History of Charles V., most justly pronounces to be "founded on ignorance, and supported by fraud or forgery," their statutory history now given will not improbably extort an expression of strong disapprobation or disgust. As in the last chapter I merely gave a history of the passing of condemning canons, and the reasons which were vouchsafed for their origin and in their defence, without entering into a minute account of the canons themselves; so in the present chapter I shall confine myself to an historical account of the passing of the statutes

containing prohibitions of marriages between persons related by affinity, and of the reasons which led to their passing. What the canons themselves may be, which contained restrictions and condemnations of marriages by affinity, and what the statute law may be, which is supposed to prohibit such marriages, will be treated of separately.

The historical reader will remember that the first wife of Henry VIII., Catherine of Arragon, was the widow of his elder brother Arthur, to whom he was married in the year 1509—the year that he ascended the throne. Some objections were urged against this marriage on the ground of the Princess Catherine being Henry's deceased brother's widow. After the question, however, had been fully discussed, "with the unanimous assent of the council, Henry was publicly married to the Princess by the Archbishop of Canterbury,"* amidst great rejoicings. Seventeen years after this marriage a fresh beauty appeared at Court as Maid of Honour to the Queen in the person of Anne Boleyn. Taught wisdom by the fate of her sister Mary, who had been seduced by the King, and after being his mistress for a short time was deserted by him, she indignantly repelled the King's advances, saying that, "Though she would be happy to be his wife, she would never condescend to be his mistress."† This repulse increased Henry's passion, and though

* Lingard's History of England, vol. vi. p. 3.
† Ibid. p. 113.

"seventeen years had passed without a suspicion of the lawfulness of his marriage,* in the company of his confidants he affected to fear that he was living in a state of incest with the relict of his brother."

> "'Twas love first taught our Henry to be wise,
> And gospel light first dawn'd in Boleyn's eyes."

Or, as our great dramatist better puts it:—

> "Chamberlain.
> "It seems the marriage with his brother's wife
> Has crept too near his conscience.
>
> "Suffolk.
> "No; his conscience
> Has crept too near another lady."†

Hume gives the following account of what caused these "conscientious scruples" of the King. "The Queen (says Hume) was older than the King by no less than six years: and the *decay of her beauty*, together with particular infirmities and diseases, had contributed, notwithstanding her blameless character and deportment, to render her person unacceptable to him." "But Henry was carried forward, though perhaps not at first excited, by a motive more forcible." "Anne Boleyn, who lately appeared at Court, had been appointed Maid of Honour to the Queen; and having had frequent opportunities of being seen by

* Lingard's History of England, vol. vi. p. 113.
† King Henry VIII., Act ii. sc. 2.

Henry, and of conversing with him, had acquired an entire ascendant over his affections." "Finding the accomplishments of her mind nowise inferior to her exterior graces, he even entertained the design of raising her to the throne; and was the more confirmed in this resolution when he found that her virtue and modesty prevented all hopes of gratifying his passion in any other manner."* He therefore resolved to apply to the Pope (Clement) for a divorce. The Pope, however, refused to grant it; and during three long years gave evasive replies to his repeated and urgent applications. Canonists and divines were consulted, and those who advocated the divorce admitted the marriage to be lawful by the Mosaical law, there having been no issue by the Queen's first marriage,† and abandoned their arguments from Scripture, but contended that the Pope's dispensation for the marriage was insufficient, because it had been obtained by false pretences. The marriage, therefore, being forbidden by the Canons, without a valid dispensation, was unlawful.‡ The chief arguments of those who advocated the divorce were, that the Levitical law, by which such a marriage is in ordinary cases forbidden by the Jews,§ is binding upon Christians; this doctrine was, however, strenuously disputed by the Universities.

* Hume's History of England, ch. xxx. p. 310.
† Deuteronomy, ch. xxv. v. 5 and 6.
‡ Lingard's History of England, vol. vi. p. 119.
§ See Leviticus, ch. xviii. v. 16.

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† Deuteronomy, ch. xxv. v. 5 and 6.
‡ Lingard's History of England, vol. vi. p. 119.
§ See Leviticus, ch. xviii. v. 16.

"Such were the arguments upon which Henry rested the supposed unlawfulness of his marriage, in order to procure a divorce, when, says Hume, 'One evening, by accident, Dr. Thomas Cranmer, then a Fellow of Jesus College, in Cambridge, fell into company with Gardiner, the Secretary of State, and Fox, the King's Almoner; and as the business of the divorce became the subject of conversation, he observed that the easiest way, either to quiet Henry's conscience or extort the Pope's consent, would be to consult all the Universities of Europe with regard to this controverted point. If they agreed to approve of the King's marriage with Catherine, his remorses would naturally cease; if they condemned it, the Pope would find it difficult to resist the solicitations of so great a monarch, seconded by the opinion of all the learned men in Christendom. When the King was informed of the proposal, he was delighted with it, and swore with more alacrity than delicacy, 'that Cranmer had got the right sow by the ear;' he sent for the divine, entered into conversation with him, conceived a high opinion of his virtue and understanding, engaged him to write in defence of the divorce, and immediately, in prosecution of the scheme proposed, employed his agents to collect the judgments of all the Universities in Europe."*

For three more years this object was striven for, but from every University Henry met with the most obstinate opposition to his wishes. "In England," says Lingard, "it might have been expected that the influence of the Crown would silence the partisans of Catherine; yet even in England it was found necessary to employ commands and promises, and threats,

* Hume's History of England, ch. xxx. p. 314.

sometimes secret intrigue, and sometimes open violence, before a favourable answer could be extorted from either of the Universities;"* and favourable answers were extorted from the foreign Universities by open and notorious bribery;† or, as Cavendish terms it, "by notable sums of money."‡ Wood tells us in his Annals,§ "that had not the University of Oxford been overawed by the King's power, and threatened as it were with ruin, they would never have consented with the King's desire, or with the opinions of other Universities," and that "notwithstanding the King's thundering letters, and all the entreaties used by his agents, his design would not have come to pass," but for a violent interference with the statutes of the University. It was the same with the University of Cambridge. The ground of their resistance was, that the Jewish law was not binding upon Christians, and that Henry's marriage was therefore valid.

Henry having by these means obtained answers favourable to his purpose from several of the Universities, set the Pope at defiance, and privately married Anne Boleyn. The Pope, hearing of this proceeding, assembled his cardinals, pronounced the marriage of Henry and Catherine valid, and declared Henry to be excommunicated if he refused to adhere to it.‖ The

* Lingard, vol. vi. p. 140.
† See evidence as to this in Notes to Lingard's History of England, vol. vi. p. 385.
‡ Page 417; and see Stat. 1 Mary, Sess. 2, c. 1, *post*, Append.
§ Book i. p. 43—46.
‖ Hume's History of England, ch. xxx. p. 318.

King disregarded the Pope, and that session of Parliament, A.D. 1533, passed the Act the 25th Henry VIII., ch. 22, rendering his issue by Catherine illegitimate, establishing the succession to the Crown in his issue by Anne Boleyn, setting out a table of prohibitions of marriage, which the statute says are "prohibited by God's laws," rendering his own former marriage invalid, and amongst these prohibitions is included the marriage with a "deceased wife's sister."

To this vile and vicious source do we trace the first appearance of the prohibition of marriages between persons related by affinity in our statutes, opposition to which heaped disgrace upon Cardinal Wolsey, and eventually brought one of the brightest ornaments that England has ever had cause to be proud of—the great and the good Sir Thomas More—to the block.

But in three short years Henry's passion for his fresh Queen "languished from satiety." "His love was transferred to another object. Jane, daughter of Sir John Seymour, and Maid of Honour to the Queen, a young lady of singular beauty and merit, had obtained an entire ascendant over him, and he was determined to sacrifice everything to the gratification of this new appetite."* Pretexts were not wanting, and this human monster speedily caused his accomplished wife to be beheaded, and married Lady Jane Seymour next day. It became necessary again to settle the succession to the Crown, and the King, in an address

* Hume's History of England, ch. xxxi. p. 327.

to the Speaker of the House of Commons, which reads strangely in these days, when we can look impartially on the facts, stated that "for the sake of his people, and notwithstanding the *misfortunes* attending his two former marriages, he had been induced for their good to venture on a third;" which address the Speaker received with suitable professions of gratitude, taking thence occasion "to praise the King for his wonderful gifts of grace and nature, comparing him for justice and prudence to Solomon, for strength and fortitude to Samson, and for beauty and comeliness to Absolom."* After this, an obsequious Commons passed the Act, 28th Henry VIII., c. 7, repealing the last Act, declaring the issue of his two former marriages illegitimate, settling the succession on his issue by Lady Jane Seymour, and re-enacting the former prohibitions against marriage, including a wife's sister. His third Queen died in giving birth to Edward VI. The King then married Ann of Cleves, but soon procured a divorce from her. Soon after followed a statute, the 32d Henry VIII., c. 38, declaring simply "all marriages to be lawful without the Levitical degrees." One object of this last statute, says Collier, was supposed to be to open a way to Elizabeth's accession to the Crown; and another, allowing all marriages except those prohibited in Scripture, "was supposed a provision for removing impediments against the King's marriage with Mrs. Catharine Howard. For this lady being cousin-german

* Hume's History of England, ch. xxxi. p. 328.

to Anne Boleyn, the nearness of the alliance would embarrass the King's design by the Canon Law."* All these statutes were subsequently repealed in Queen Mary's reign; and Queen Elizabeth revived the statute 32d Henry VIII., c. 38, which now continues law.

In Queen Elizabeth's reign, Archbishop Parker, in 1563, published a table of kin, within which persons were forbidden to marry, extending the prohibitions of the Acts of Henry VIII. It is needless to say that he had no more authority than the present Archbishop of Canterbury, or any other Bishop, to publish that table; and that it was of no binding effect whatever as a law.

In 1603, a convocation of the clergy framed a number of canons, one of which, the 99th, adopted Archbishop Parker's table. But those canons never having been ratified by Parliament, have been solemnly decided not to be binding on the laity.† Thus, then, we have a rapid historical sketch of the statutes on this subject up to the period of the late Act of William IV., rendering "voidable marriages void," which was notoriously passed in haste to patch up a nobleman's marriage made within the prohibited degrees, and who feared a suit in the Ecclesiastical Courts, the chief object of the Act being to legalise all such past marriages.

The object, however, of this chapter is not to inquire into the law, but to give an historical sketch of the foundation and origin of the prohibitions of marriage between persons related by affinity; and I ask any

* Collier's Ecclesiastical History, vol. ii. p. 170, folio edition.
† Middleton *v.* Croft, 2 Atkin's Rep. App. 600.

reasonable man is there anything in the statutory origin of these prohibitions deserving of our respect? Springing from the unrestrained viciousness of an absolute monarch, whose boast it was that "he never spared a man in his anger, nor a woman in his lust," are they not a disgrace to our statute-book? Yet being without warrant of either Scripture or morality, there are those who would seek to revive them by modern legislation!

Take, then, the early history of these prohibitions of marriages of persons related by affinity—their origin in a barbarous age in a spirit of aceticism—their continuation "from ignorance, fraud, and forgery," as a matter of policy and revenue by the Romish Church—their statutory engraftment into our laws founded on unexampled lust—and, finally, their unbinding adoption in the canons of 1603, is there one particle of their whole history deserving of either reverence or respect? If not, when we see the mischief and misery which they create amongst thousands of innocent men and women, shall we hesitate to put an end to them because some few well-meaning but very partially read gentlemen think that, "for practical, political, and general reasons," they should be continued?

I have better faith in the practical good sense of my countrymen, when they shall be thoroughly informed of what the question really is, and when the hoodwinks of bigotry or prejudice are removed from their eyes.

CHAPTER VI.

THE STATUTE LAW RELATING TO MARRIAGES WITH A DECEASED WIFE'S SISTER.

No decision in the Courts of Law on the subject since the reign of Charles II.—The 25th Henry VIII. c. 22.—28th Henry VIII. c. 7.—32d Henry VIII. c. 38.—Rule of construction of contradictory statutes.—1st Mary, sess. 2, c. 1.—1st and 2d Philip and Mary, c. 8.—1st Elizabeth, c. 1.—Strained construction by the Courts of these Acts.—5th and 6th William IV. c. 54.—"Parity of reasoning."

Having now given an impartial historical survey of "the rise and progress" of the canons and statutes condemning and supposed to prohibit the marriages of persons within certain degrees of relationship by affinity, including a deceased wife's sister, and wife's brother's and sister's daughter, and having exposed the sour aceticism, the whimsical absurdity, the venality and the viciousness of the *reasons* on which alternately those canons and statutes were founded, I propose now to examine the authority of those canons and statutes themselves, in order that we may judge what really is the law on the subject.

The statutes in force will be ascertained from the Statutes at Large, by applying to them the ordinary

rules of construction as given by Lord Coke, and from the decisions of the Courts upon them.

The authority of the later canons, since the Reformation, which prohibit these marriages, will be ascertained from the solemn decision of the courts of law; and the binding authority of the earlier canons, prior to the Reformation, will be tested by the mode in which the highest authorities on the subject, namely, the prelates of our Church, followed by the clergy, treat them and act upon them.

As of more immediate importance, I propose first to examine what statutes are in force on this subject, and what is the statute law which binds us. I shall do this with all respect for the opinions of the learned Judges who are understood to have expressed opinions upon the subject.

Looking at the fact that there has been no decision in the courts of law on the legality of a marriage with a deceased wife's sister since the twenty-fifth year of the reign of Charles II., or above one hundred and seventy years ago, when the case of Hill *v.* Good * was tried, the decision in which, partly founded as it was on the assumed binding effect of the canons of 1603, which have since, in the case of Middleton *v.* Croft, † been pronounced by Lord Hardwicke not to bind the laity, and partly, it is submitted, on a strained construction of the law, and on an omission to notice an unrepealed and binding statute of

* Vaughan's Rep. p. 302.
† 2 Atkin's Rep. App. p. 650.

Mary,* which rendered lawful one of the degrees supposed to be prohibited in Leviticus, on which, by "parity of reasoning," depended the supposed prohibition of marriage with a deceased wife's sister—this is a legal question fairly open to argument.

As this necessary part of our inquiry is what in popular language is called "a dry subject," I must intreat the patient attention of my readers until we get through it.

The 25th of Henry VIII., c. 22, is the first statute containing any prohibitions of marriage whatever. This statute is not to be found in the older editions of the Statutes at Large, being considered as repealed by the 28th Henry VIII., c. 7, and by the 1st of Mary, sess. 2, c. 1.† This statute (25th Henry VIII., c. 22) enacted (sections 3 and 4), as follows:—

"Since many inconveniences have fallen by reason of marrying within the degrees of marriage prohibited by 'God's laws,' that is to say, the son to marry the mother or the stepmother, the brother the sister, the father the son's daughter, or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt, being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or *his wife's sister;* which marriages,

* 1 Mary, Sess. 2, c. 1, see *post*, Appendix, No. 2.
† 2 Burn's Ecc. Law, p. 439, 9th edition; 2 Chitty's Stats. Notes to 25th Henry VIII., ch. 22, p. 711.

albeit they be prohibited by the laws of God, yet nevertheless at some time they have proceeded under colour of dispensation by man's power: it is enacted, that no person shall from henceforth marry within the said degrees." *

No doubt, within most of these degrees it is forbidden by "God's law," and by the law of nature, as instinctively felt within us, to marry; but, within the last degree named, it is not forbidden by "God's law" to marry, and a repealed Act of Parliament, saying that it is so, will not make it so. There are here fifteen prohibitions of marriage; in Leviticus there are seventeen prohibitions. The difference between this Act of Parliament and the prohibitions in Leviticus is in the following degrees:—Leviticus does not prohibit marriage with a deceased wife's sister, but it prohibits marriage with a sister by a different father, with a wife's mother, and with a daughter, which this Act of Parliament does not. In all other respects the degrees prohibited in each are identical. This makes out the difference in the number of prohibited degrees. But Archbishop Parker's table of kin in our Prayer Books spins out these prohibitions, by "parity of reasoning," to thirty degrees.

The reason of the passing of the above statute—to enable Henry VIII. to get rid of his first wife, Catherine of Arragon, who was his brother's widow—has already been explained.†

* 2 Burn's Ecc. Law, p. 439, 9th edition.
† Vide last chapter.

The next act on this subject was the 28th Henry VIII., c. 7, the ninth section of which, with the addition of "carnal knowledge," repeats *totidem verbis* the same prohibition.* This act also is not in the older editions of the Statutes at Large, because considered to be repealed. This act, Mr. Justice Vaughan, in Hill *v.* Good,† says, "expressly repealed the 25th Henry VIII., c. 22," above quoted. We have therefore now only to do with this last act.

The reason of the passing of this act was, by this and other clauses, to render illegitimate Henry's issue by both his former marriages, and to settle the succession on his issue by Lady Jane Seymour. The introduction of the words "carnally known" after each degree in this act, was done no doubt advisedly, because the King had seduced the sister of his second Queen, Anne Boleyn, before his marriage with her, whose issue this act was passed to render illegitimate.

The next act in the order of time on this subject (I prefer adhering to this order as the most simple and clear) is the 32d Henry VIII., c. 38. After reciting that

"Whereas heretofore the usurped power of the Bishop of Rome hath always entangled and troubled the mere jurisdiction and regal power of this realm of England, and also unquieted

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* 2 Burn's Ecc. Law, p. 439, 9th edition.

† Vaughan's Reports, p. 323; and see Notes to Chitty's Stats. vol. ii. p. 711.

much the subjects of the same, by his usurped power in them, as *by making that unlawful which by God's word is lawful both in marriages and other things*,"

goes on to recite that marriages ought not to be set aside because of pre-contracts, and then recites :—

"Further, also, by reason of other prohibitions than God's law admitteth, for their lucre by that Court (the Court of Rome) invented, the dispensations whereof they always reserved to themselves, as in kindred or affinity between cousin germanes, and so to fourth and fourth degree * * * which else were lawful, and be not prohibited by God's law, *and all because they would get money by it, and keep a reputation to their usurped jurisdiction*."

Then this Act proceeds by the 2d section to enact as follows :—

"Be it therefore enacted, that all and every such marriages, as within this Church of England shall be contracted between lawful persons (*as by this Act we declare all persons to be lawful, that be not prohibited by God's law to marry*) such marriages being contract and solemnised in the face of the Church, and consummate with bodily knowledge, or fruit of children or child being had therein between the parties so married, shall be by authority of this present Parliament aforesaid, *deemed, judged, and taken to be lawful, good, just and indissoluble*, notwithstanding any pre-contracts * * *; and that *no reservation or prohibition, God's law except, shall trouble or impeach any marriage* WITHOUT THE LEVITICAL DECREES; and that *no person of what estate, degree, or condition soever, he or she shall be, shall be admitted to any of the spiritual Courts within this King's realm*, or any of his

Grace's other lands and dominions, *to any process, plea, or allegation, contrary to this foresaid Act.*"*

So that this Act renders lawful all marriages "*without the Levitical degrees,*" and prohibits "the spiritual Courts" to exercise any jurisdiction "contrary to this Act."

The reason of the passing of this Act has also been explained, namely, to enable Henry to marry Mrs. Catherine Howard, who was the cousin-german of Anne Boleyn, his former wife.

Now, inasmuch as this act throws us back upon Leviticus to ascertain what God's law is,† and Leviticus does not prohibit marriage with a *deceased wife's sister*, which the prior Act, the 28th Henry VIII., c. 7, does, this Act, the 32d Henry VIII., c. 38, is contrary in that respect to the prior Act, the 28th Henry VIII., c. 7. That is, the 28th Henry VIII., c. 7, prohibits marriage with a deceased wife's sister; the 32d Henry VIII., c. 38, renders such a marriage lawful. Did the argument rest here, it is apprehended that this state of the law would be sufficiently clear to render this marriage lawful; for in the construction of contrary statutes Lord Coke lays down the rule that *leges posteriores priores contrarias abrogant.*‡ This latter statute must therefore be construed to abrogate and annul the prior statute as regards this marriage.

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* The Statutes at Large, and see Appendix, No. 1, *post*.
† See 18th chapter of Leviticus.
‡ Coke's 2d Inst. p. 685.

But the argument is much stronger than this.

The next statute in order is the 1st Mary, sess. 2, c. 1. This statute was passed by Queen Mary on her accession to the throne, to render lawful her mother's (Catherine of Arragon's) marriage with Henry VIII. This statute terms Catherine of Arragon, who was the widow of Henry VIII.'s brother, Henry's "most lawful wife," notwithstanding "the pretences that the same was against the Word of God," of "certain Universities," whose testimony was obtained by "corruption with money," "by great travail, sinister working, secret threatenings. and intreatings of some men of authority." Then, after reciting the 25th Henry VIII., c. 22, and the 28th Henry VIII., c. 7, above quoted, and stating the marriage of Henry with Queen Catherine to be "*in very deed not prohibited by the law of God,*" *and that* "*this* foresaid marriage had its beginning of God, and by Him was continued, and therefore was ever and is to be taken for a most true, just, *lawful*, and to all respects a sincere and *perfect marriage*;" this act then declares the divorce obtained by Henry from Queen Catherine, because of his relationship to her, to be "from the beginning and from henceforth of no force, validity, or effect, but to be utterly naught and void to all intents, constructions, and purposes;" and then repeals the 25th Henry VIII., c. 22, and the 28th Henry VIII., c. 7, above quoted, and renders them "void and of no force nor effect, *to all intents, constructions, and purposes, as if the same Acts of Parliament had never been had nor made.*" Henry's marriage is then declared to be "clearly and

absolutely deemed and adjudged to stand *with God's law* and His most holy word, and to be accepted, reputed, and taken of good effect and validity to all intents and purposes."*

The effect of this Act therefore is not only to repeal the 25th and 28th of Henry VIII., but to take out of the Levitical degrees (which are made the legal prohibitions by the 32d Henry VIII.) the marriage with a brother's widow, and to declare it "to stand with God's law."

The next statute in order is 1st and 2d Philip and Mary, c. 8. This statute again mentions the statute the 28th Henry VIII, c. 7, and enacts that, "all *that part* of the Act that concerneth a prohibition to marry within the degrees expressed in the said Act" "shall henceforth be repealed, made frustrate, void, and of none effect." This Act then goes on to repeal in the same words the 32d Henry III., c. 38, above quoted, and several other Acts.

The effect of this statute is therefore to get rid of *all* the prior Acts relating to prohibitions of marriage, except the 1st of Mary, sess. 2, c. 1, which renders lawful and declares "to stand with God's law" the marriage with a deceased brother's widow.

Then lastly comes the Act, the 1st Elizabeth, c. 1. This Act revives several statutes by name, (which were repealed by the last quoted Act) by the following clause.

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* Statutes at Large; and see the Stat. *post*, App. No. 2.

"That all other laws and statutes, and the branches and clauses of any Act or statute repealed by the said Act of repeal, made in the time of the said late King Philip and Queen Mary, and *not in this present Act specially mentioned and revived, shall stand, remain, and be repealed and void* in such like manner and form as they were before the making of this Act."*

This Act then revives, and "specially names," amongst others, the 32d of Henry VIII., c. 38, above quoted, and *does not revive* either the 25th of Henry VIII., c. 22, or the 28th Henry VIII., c. 7, which are quoted above.

"Whence it follows," says Mr. Justice Vaughan, "that marriage with a deceased wife's sister is not now moved to be against God's law by either of these repealed statutes of 25th of Henry VIII., c. 22, or 28th of Henry VIII., c. 7, unless it be made out that one of them at least remains at this day in force."†

Mr. Justice Vaughan then, by a very ingenious, but, it is submitted, by a very unsound and unfair argument, endeavours to make out that because an Act of Henry VIII., which was revived by the statute of Elizabeth—(the 28th Henry VIII., c. 16, which makes void all dispensations from the see of Rome, and renders all marriages under such dispensations good which "be not prohibited by God's laws, limited and declared in the 28th Henry VIII., c. 7," above quoted)—refers to the 28th Henry VIII., c. 7, that, therefore, that

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* Statutes at Large, and see Vaughan's Rep. p. 324.
† Vaughan's Rep. p. 325.

Statute was *by reference for all purposes revived,* and made as effectual as before it was repealed. It is submitted that this strained construction against both the spirit and the express words of the Statute of Elizabeth will not bear for a moment the test of examination. And even admitting this construction, still the revival of a later Statute, the 32d Henry VIII., c. 38, containing *contrary* provisions, would according to the law maxim above quoted, abrogate and annul the provisions of the prior Statute of the 28th Henry VIII., c. 7, as to the marriage with a deceased wife's sister. Yet it was on this construction of the Statute of Elizabeth, that there was an *implied reviver* of a *repealed Act,* by reference to it in an Act not repealed, that this case decided the marriage with a deceased wife's sister to be unlawful; *and this is the only decision of the kind.*

Then, in modern times, came the Act the 5th and 6th William IV. c. 54, which, after reciting that

"Marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto;"

and that it is unreasonable that the state and condition of the children of such marriages should remain unsettled during so long a period, renders valid all prior marriages "within the prohibited degrees of affinity;" and then enacts—

"That all marriages which shall hereafter be celebrated between persons within *the prohibited degrees of consanguinity or affinity* shall be absolutely null and void to all intents and purposes whatsoever."*

The reason of the passing of this Act was, notoriously, to put beyond cavil the legitimacy of a nobleman's children, who had contracted one of these supposed prohibited marriages.

Now this is the whole Statute Law on the subject; and I ask, what are by it "the prohibited degrees of affinity?" To ascertain this we must cast our eyes back to see what prior statutes are in force. Clearly not either the 25th or the 28th Henry VIII., above quoted, for they have both been repealed twice over, and *never have been revived,* but a negative clause in the Statute of Elizabeth, on the contrary, says *they shall not be revived.* What, then, remains? Clearly, first, the Statute of the 32d Henry VIII., c. 38, which enacts *the Levitical degrees alone,* to be the prohibited degrees, renders all marriages "without those degrees" lawful, and prohibits the spiritual Courts from having jurisdiction as to any other degrees "contrary to this Act;" that is, contrary to the degrees expressed in Leviticus. As clearly there remains, secondly, unrepealed, the Statute 1 Mary, sess. 2, c. 1,† which takes out of the Levitical degrees marriage with

* See the Statute at length, *post,* Appendix, No. 3.

† See notes to 32d Henry VIII., c. 38, in Chitty's Statutes, confirming this; the Statutes at Large; and 2 Burn's Ecc. Law, p. 439, 2d edition.

a deceased brother's widow, if indeed the Mosaic law pronounces such a marriage to be prohibited.

To what conclusion, then, does this lead us? Marriage with a deceased wife's sister is not prohibited by the Levitical degrees, and is, therefore, *not* "voidable by the Statute 32 Henry VIII.;" on the contrary, I shall be prepared to show in due time that such a marriage is in Leviticus expressly permitted and sanctioned.* But, say those who oppose such a marriage, Leviticus prohibits marriage with a brother's widow, and by "*parity of reasoning*" marriage with a deceased wife's sister is also prohibited. In answer to this, Leviticus says nothing about "parity of reasoning:" the statute 32 Henry VIII. incorporates only the degrees marked out in Leviticus, and none other; and this marriage is not in those degrees. Nay, even marriage with a brother's widow is, under certain circumstances, sanctioned and enforced by the Mosaic law;† how then stands the doctrine of "parity of reasoning?" But whether the Jewish law does sanction such a marriage or no, our own law in force, the 1st Mary, sess. 2, c. 1, makes such a marriage lawfnl; and if so, what becomes of the doctrine of "parity of reasoning?" Why, as it unites itself with "a brother's widow," it must go along with that lady into the statute 1st Mary, sess. 2, c. 1, and render marriage with a deceased wife's sister, by "parity of reasoning," *lawful also by*

* See Leviticus, chap. xviii. v. 18.
† Deuteronomy, chap. xxv. v. 5 and 6.

the law of England. Poor "parity of reasoning" is much to be pitied for the hobble it has got its subtle admirers into.

If, then, marriage with a deceased wife's sister is not prohibited in Leviticus, but, on the contrary, is sanctioned, and by "parity of reason" is sanctioned also by our law, it follows that this marriage is not *voidable;* and if it be not "voidable," then the statute of William IV. does not apply to it, and render it *void.*

So clear does this state of the law appear to my mind, that I confess it is inconceivable to me how any other construction could be entertained. A contrary construction has, however, been entertained, and it seems to me to add but another instance to the many we have of the extent to which our judgments in plain matters of fact—on the plainly and intelligibly written law, about which there can be no mistake—may be warped and swayed by early and unfounded prejudices.

CHAPTER VII.

THE LEVITICAL DEGREES.

Litigation in Chancery under the existing law.—Letter signed "Britannicus" in the *Morning Post*.—The Levitical degrees.—The 18th ch. of Leviticus, and "Parity of reasoning."—Supposed erroneously to relate to polygamy.—Various translations of the 18th verse.—Opinions of commentators on the verse.—Reason why the text perverted.—None of the Bishops oppose the marriage on Scriptural grounds.—If not prohibited by "God's law," then the marriage is valid by the law of England.

Before I address myself to the subject of the present chapter two circumstances call for a brief notice.

The first is the case of Brown *v.* Brown, recently heard in Vice-Chancellor Wigram's Court, and reported in the *Morning Chronicle* of the 19th Jan. In that case the children of a second marriage with a deceased wife's sister claimed property under their father's will, jointly with the children of his first wife. Their *legitimacy* was disputed as a ground of resistance to their claim, and the decision of the court was postponed until the writ of error in the Liverpool bigamy case, Regina *v.* Chadwick (in which marriage with a deceased wife's sister, and in her lifetime with another woman, was held to be no bigamy, subject to reversal on writ of error), has been heard and determined.

This is another instance of the extensive litigation springing up under the law of William IV., and shows the necessity of its speedy amendment.

The other circumstance to which I allude is the appearance in the *Morning Post* of a letter signed "Britannicus," in which the writer instances the case of a wife's sister whose society became more agreeable to the husband than that of his own wife, who died broken-hearted in consequence, and the husband married the sister. Upon this case the writer builds the following extraordinary conclusion—that, therefore, all marriages with a deceased wife's sister ought to be prohibited; for he says, "Happy would it have been if in this case the law had been of force to prohibit the prospect of such a consummation," This mode of reasoning—drawing general conclusions from an individual case of impropriety, or crime,—would sanction any absurdity under heaven. Of its logic I say nothing. Thus, Lord William Russell was murdered by Courvoisier, his Swiss valet; *therefore*, all Swiss valets are murderers, and every nobleman who employs one must expect to get his throat cut with a carving knife. "Happy would it have been that the law had been of force to prohibit" the employment of Swiss valets. But suppose that instead of being his wife's sister, the lady who thus stole the husband's affections had been his cousin; why then, of course, "happy would it have been that the law had been of force to prohibit" his future marriage with his cousin. But suppose the lady had been only his wife's friend and early school companion, constantly visiting her at his house, with the

like result in the subversion of the husband's love; or, say an accomplished and lady-like governess to his children, meeting him at table every day—(we might carry the principle even further than this)—and that his poor wife, seeing all this, at length died broken-hearted, because of jealousy of one or other of these ladies, and the husband married afterwards the lady who broke her heart? Why then—"happy would it have been that in each of these cases the law had been of force to prohibit the prospect of such a consummation!" As a corollary it of course follows that a law ought to be passed founded on such a *reason*, enacting that no man shall marry his cousin because she may visit his wife and win his affection—that for the same *reason* no man shall marry his deceased wife's friend, or the governess of his children, or indeed any lady who might be a frequent visitor at his house whilst his wife was alive. The only way to reason with some people is to reduce their argument to an absurdity, and show it to them in its naked folly. In the words of the Archbishop of Dublin, written on this question, such "a meddling system of government" as this "amounts practically to a most intolerable tyranny."

I propose now to examine if the Levitical degrees incorporated into our statutes, as shown in the last chapter, and of which the Judges by the statute of Henry VIII. (32d Henry VIII., c. 38) are made the expounders, do really prohibit marriage with a deceased wife's sister, or whether they do not in fact sanction it. If so, the legality of such a marriage is placed beyond question.

It must be conceded for the purpose of this argument, that the chapter in Leviticus does relate to marriage, because the statute of Henry adopts it as doing so; though Hebrew scholars deny that it has any reference to marriage. For the same reason it must be conceded that the Levitical law in this respect is binding upon Christians, at least in England, because the statute of Henry makes it so. There is no question that, so far as the Levitical law is in its own nature moral, it is *binding upon all*, whether Jews or Christians.

The verses in the 18th chapter of Leviticus, which are supposed to relate to this marriage, are the 16th and 18th. By casuists, the 16th verse, which prohibits marriage with a brother's widow, is endeavoured to be twisted by "parity of reasoning" into a prohibition of this marriage. It is unnecessary for us to follow and expose the fallacy of their arguments on this point, inasmuch as the next verse but one, the 18th, plainly relates to marriage with a deceased wife's sister, and, as I shall submit, directly sanctions such an union. To those, however, who may be caught by the fallacy of arguments founded on "parity of reasoning," I recommend the careful perusal and comparison with this verse, of the 38th chapter of Genesis, verse 8; the 25th chapter of Deuteronomy, verses 5 and 6; the 1st chapter of the Book of Ruth, 11th and 12th verses; and the 22d chapter of St. Matthew, verses 24 and 25. Bearing in recollection that Hebrew scholars contend that this chapter in Leviticus relates not to mar-

riage,* but that it prohibits licentiousness, they will, I think, come to a conclusion, without further argument, that the 16th verse can by no reasonable or fair construction be twisted into a *prohibition* of *marriage* with a deceased wife's sister.

We will turn now to that verse in Leviticus which does, in express terms, relate to this marriage, as plain men wishing in sincerity to arrive at the truth.

The verse is as follows :—

18. "Neither shalt thou take a wife to her sister, to vex her," &c., "beside the other *in her life-time*."

Now, taking the Bible as our guide, and believing it to be a truthful translation from the language in which it was originally written, it is submitted that the plain and fair construction of this verse is, that you shall not marry two sisters at the same time, both living; but that you may marry them consecutively after the decease of one. This plain meaning of the words has, however, been combatted by those whose interest it was to support prohibitory canons with every possible refinement of subtlety. It has been contended that the word "sister" merely means *woman*, that the true construction is, "one woman to another," and that this verse is merely a prohibition of polygamy to the Jews, to whom it was given as a law. Against this

* See Letter of Wm. Jones, Esq., in Appendix to Alleyn's pamphlet on the "Legal Degrees of Marriage," p. 5, ed. 1775.

forced construction the fact stares us in the face, that polygamy was a common practice amongst the Jews,* as well as amongst other eastern nations, both before and after this law, and David and Solomon are noted intances of it. Michael says :—

"How much soever some have denied it, nothing is more certain than that by the civil laws of Moses, a man was allowed to have more wives than one."

It is clear, therefore, that this verse cannot mean a mere prohibition of polygamy. The translation in our Bible agrees, too, with the Vulgate version, with the translations of the Syriac, the Chaldee, and the Samaritan versions, in each of which the words "*sister*," and "*in her life-time*," are used, as in our own common version.† Hard indeed must the opponents of this

* On this subject, Dr. Dodd, in his Commentary, says :—"Custom and practice are the best interpreters of the law; and it appearing from these that polygamy was allowed amongst the Jews, as well as from Deut. xxi. 15, &c. xvii. 17, it is plain that the marginal interpretation (viz. one wife to another) cannot be true, *but that the marriage of two sisters at the same time is here prohibited:*" and Grotius justly observes, that as the feuds and animosities of brothers are, of all others, the most keen, so are, generally, the jealousies and emulations between sisters. Therefore the historian used the strong expression *to vex her*: but though a man might not marry two sisters together, it seems a natural conclusion, from the phrase "*in her life-time, that he might marry the sister of his deceased wife: and thus, we learn from Seldon, the Jews in general understood it.*"

† Observations on the Prohibition of Marriages by Affinity, 4th ed., pp. 22 and 62.

The Vulgate version of the original Hebrew is as follows :—

marriage be pressed when driven to call in question the accuracy of the Bible itself. By its commands, taking its language in its simple integrity, we will abide, and leave it to the subtlety of interested canonists and prejudiced casuists to strive in vain to subvert its meaning.

On a question, however, of this kind, it is well to turn to the pages of commentators who have made the construction of the Bible their study, and to the pages of those authors who are regarded as authorities on such a question.

Fagius (*Sacred Critics, Annotations on Leviticus*, ch. xviii. ver. 18), Calmet (*Comment. Lit. in loc.*) Bishop Kidder (*Commentaries on the Five Books of Moses*), Dodd (*Commentary in loc.*)—all agree that the true construction of this verse is, "that marriage with *two sisters at the same time* is prohibited," but "that, *the wife being dead, it was lawful to marry her sister*."*

"*Sororem* uxoris tuæ in pellicatum illius non accipies, nec revelabis turpitudinem ejus, *adhuc illâ vivente*."

The translation of the Syriac version is—

"Et uxorem supra *sororem suam* ne duxeris, neve afflixeris eam, et detexeris turpitudinem ejus super ipsam *dum adhuc vivit*."

The translation of the Chaldee paraphrase is as follows:—

"Et uxorem *cum sorore suâ* non accipies ut sit ei in tribulationem; nec discooperies turpitudinem illi, *illâ vivente*."

The translation of the Samaritan version is as follows:—

"Uxorem quoque *cum sorore suâ* non accipies in afflictionem revelando turpitudinem ejus super eam, *adhuc ipsâ vivente*."

* Fagius thus writes of this verse:—

"Thou shalt not take a wife with her sister, &c.—Although the Mosaic law permitted polygamy, yet it was not lawful

Michaelis says:—

"*Marriage with a deceased wife's sister Moses permits*, but prohibits, on the other hand, the marrying two sisters *at once*. The words of the law (Levit. xviii., 18) are very clear."*

Adam Clarke says:—

"Thou shalt not marry two sisters at the same time, as Jacob did Rachel and Lea; but there is nothing in this law that rendered it illegal *to marry a sister-in law, when her sister was dead*."

The same interpretation is adopted by Grotius, Montesquieu, Mr. Justice Story, and Chief Justice Vaughan. The latter learned Judge, in the case of Harrison *v.* Burwell,† says:—

to join two sisters in marriage with the same man, lest there should be perpetual disquietude between the two wives, as happened between the wives of the Patriarch Jacob. The sense therefore is, Thou shalt not take any woman to wife, whilst thou art joined to her sister, lest thou shouldest distress her by cohabiting or living with her sister, during the life of the wife; *for if the wife were dead it was lawful to marry such sister*, g. d. Thou shalt not take two sisters together to wife; *yet thy wife being dead, thou mayest marry her sister*."

Calmet, speaking of this verse, says:—

"Ce texte, exprimé de cette manière, marque qu'il n'est pas permis d'avoir pour femmes *les deux sœurs en même temps*, comme Jacob eut Rachel et Lia, *mais seulement successivement*; et c'est le sens qui paroît le plus clair et le plus probable."

Kidder says:—

"The subject-matter requires that we take the word *sister* in the common acceptation of it, and then is an Israelite forbid to take his wife's sister *while that wife is living*."

* Michaelis on the Laws of Moses, vol. ii. p. 112.

† Vaughan's Rep. p. 241.

"Within the meaning of Leviticus, and the constant practice of the commonwealth of the Jews, a man was *prohibited not to marry his wife's sister only during her life; after he might*—so the text is. This perhaps is a knot not easily untied, how the Levitical degrees are God's law in this kingdom, *but not as they were in the commonwealth of Israel, where first given.*"

The "knot" is "untied" easily enough; the reason was, because it was the *interest* of the Romish Church to extend the prohibitions against marriage by every contrivance, reserving to itself power to dispense with the prohibitions, the dispensation being sold for money. Canons were, therefore, passed by that Church, prohibiting not only a marriage which, "by *God's law* in the commonwealth of Israel," was not prohibited, but marriage as far as any relationship could be traced between the parties by blood. The doctrine of "mystical consanguinity" was invented to extend the same prohibitions to relations by affinity, and finally the doctrine of "spiritual affinity" was found out to place under the same prohibitions godfathers and godmothers, and all their relations by blood or by affinity. By these means, what in vulgar parlance is termed "a roaring trade" was driven in dispensations.

Surely, surely, to every candid mind that prejudice has not hopelessly warped, it must be clear that this marriage is not prohibited by God. In that opinion I have reason to think all our Bishops concur, as while the Archbishop of Dublin, the Bishop of Llandaff, and the late Bishop of Meath, distinctly state such to be their opinion, not one of the Bishops has opposed the

legality of this marriage on Scriptural grounds.* On *those grounds only* are the Bishops an authority; on questions of mere "expediency," as they mix less with the world than other men, they are not perhaps of equal authority with other men. We, who mix with all classes in the world, are perhaps more experienced and fit judges of what is "expedient" than they who move in a confined and retired circle, and I apprehend few amongst us will think it "expedient" to uphold a law which in its supposed application creates disquietude and misery amongst thousands of respectable families, casts a slur on their innocent offspring, and which is sowing the seeds of enormous future litigation.

If, then, this marriage is not prohibited by "God's law," nor by the illustrations of that law in Leviticus—as it is plain it is not—then *the statute law of England makes it a legal marriage,* and prohibits the Spiritual Courts, who hold unbinding canons to be of authority, "to molest persons in doing that which is declared lawful to be done by the statutes of this realm."†

* See "Letters of several Distinguished Bishops," by George A. Crowder, Esq.

† See 32d Henry VIII., c. 38, s. 2; and the judgment in Butler *v.* Gastrill, Gilbert's Rep. 156.

CHAPTER VIII.

THE CANON LAW SINCE THE REFORMATION.

The Statutes sanctioned by Parliament alone constitute the Law of England.—The Bible alone the Law of God.—The Canon Law.—Acts of Parliament to amend the Canon Law.—The Reformatio Legum Ecclesiasticarum.—Archbishop Parker's Table of Degrees.—The 99th Canon of 1603.—Held not binding on the Laity by the Courts.—Stat. 25 Henry VIII. c. 19.—The case of Ray *v.* Sherwood.—Summary.

I COMMENCE the present chapter with asserting these two broad propositions as indisputable—(I will establish either if they should be questioned)—1. That the usages and customs of the realm, together with the statutes sanctioned by the King and the Parliament, *alone* constitute *the laws of this country*. 2. That *the Bible*, and the Bible *only*, is that which is received by us as *the law of God*.

In the two last chapters I have *proved* that the only statutes in force prior to the 5th and 6th William IV., relating to prohibitions of marriage on the grounds of consanguinity or affinity, are the 32d Henry VIII., c. 38, and the 1st Mary, sess. 2, c. 1, and that those statutes expressly sanction marriage with a deceased wife's sister, if not prohibited by the law of God, or within the Levitical degrees. I have proved in the last chapter, that the law of God, as found in the Bible, nowhere prohibits such a marriage, and that Leviticus, in the 18th chapter and 18th verse, expressly sanctions it.

It may be asked, what more there is required to render this marriage valid? The answer is short—*nothing more is needed to be proved.*

The propositions with which I set out, though indisputably true, are, however, *practically* denied, and attempted to be controverted. There are those amongst us who regard the law ecclesiastical as of higher authority and superior power to the "laws of this realm;" and there are those amongst us who search for the "law of God" in the canons of the Church, and who hold those canons to be of higher authority than the Bible, and to override that Scripture which is our text-book of the law of God.

There are some who say:—

> "True, the law may not forbid marriage with a deceased wife's sister, nor, indeed, may the Scripture; but the canons—*the canons of the Church*, look you—do forbid it; the canons are law as well as the statutes, and the canons are the exposition of the law of God; *therefore*, both the law of the land and the law of God forbid such a marriage."

"The canons?" *The canons!* What be they? Like Ossian's ghosts, they are "a dim uncircumscribed shade." As darkness and mist render nature more terrible in her scenes of grandeur and sublimity, so do ignorance of their subject matter and the concealment of learned languages lead us to accord, almost with-

out question, an authority more than human to "the canons." It shall be our task to let in "a flood of light" upon them, and to strip them of their learned disguise. It shall be our task to pluck the peacock's feathers from the jackdaw's tail, and expose the wretched bird in its true proportions.

I shall, however, as the lawyers say, "go by steps;" and, first, I shall deal with the canons since the Reformation; secondly, with the canons prior to the Reformation, and give the worth and value of each, so far as they relate to this marriage with a deceased wife's sister, a little sifting. The canons since the Reformation will form the subject of the present chapter.

Sir James Mackintosh, in his History, quoted in Dr. Phillimore's last edition of Burn's Ecclesiastical Law, as having "no mean claim to the title of an eminent jurist," thus speaks of the canon law at the period of the Reformation:—

"In consequence of the changes introduced by the Reformation, it became necessary to reform the ecclesiastical laws. The canon law, consisting of *constitutions of Popes, decrees of Councils, and records of usages* (*many of which have been long universally acknowledged to be frauds*), was the received code of the Courts termed *spiritual* in every country of Europe.... But the whole system of canon law was so interwoven with Papal authority, and so favourable to the *extravagant pretensions* of the Roman See, as to become incapable of execution in a Protestant country."*

* Burn's Ecc. Law, vol. ii., p. 503, 9th edition.

It may be observed, in passing, that one of those "pretensions" was to extend the prohibitory degrees as to marriage to the utmost limit of invention, far beyond any prohibition imposed by natural or divine laws; to the end that, by a further "pretension," the Pope might *dispense* with the same for a profitable consideration.

In a Protestant country it is obvious that the Pope's dispensing power could not be resorted to, if the canons were still held binding; and as the canons related to very many things, this was felt to be a grievous hardship, inasmuch as a far more severe code of laws was imposed than before in this respect; that now the canon laws were imperative; before, a dispensation from their operation could be obtained. So with regard to the canons forbidding marriage with a deceased wife's sister, a "pretension" of the Popes and Councils of early ages imposed them; a further "pretension" of the Popes—for a *consideration*—could dispense with them. Prejudice preserved the canons embodying the one "pretension," but Protestantism put an end to the "pretension" embodying the other; and to mend matters, we, in modern times of enlightenment, have, it is said, been trying as it were to embalm the preserved "pretension" in a recent Act of Parliament, forgetting the *dispensing* plaster which the good Popes of former times sold to mend the wounds which their canons inflicted.

To mend the canon law, and fit it for reformed days, a commission was appointed by an Act passed in the twenty-fifth year of the reign of Henry VIII.

c. 19, and by another act subsequently, in the reign of Edward VI. (3d and 4th Edward VI., c. 11), empowering the King to appoint thirty-two commissioners to inquire into and digest a body of laws from the canons; meanwhile such canons were to continue in force as, by a proviso at the end of the 25th Henry VIII., cap. 19, " *be not contrariant or repugnant to the laws and statutes and customs of this realm.*" After being repealed and revived several times, this last statute was at length permanently revived by the 1st Eliz. c. 1, in which it is specially named as revived " to all intents, constructions, and purposes," and it has never since been repealed. By these commissioners a code of canon laws was framed, called the " *Reformatio Legum Ecclesiasticarum.*" This book was not, however, completed till after the close of Edward the Sixth's reign, and its complexion was not likely to be much improved in the troubled times of Mary.

This book adopts and illustrates the doctrine of " parity of reason," * and states—

" This in the Levitical degrees is to be observed, that all the degrees by name are not expressly set down: for the Holy Ghost there did only declare plainly and clearly such degrees from whence the rest might evidently be deduced."†

Subsequently, in the time of Elizabeth, Archbishop Parker, in 1563, published of his own authority a Table of Prohibited Degrees of Consan-

* Page 23 a.
† Burn's Ecc. Law, vol. ii. p. 447. 9th Edition.

guinity and Affinity, the preface to which was then as follows:—

" An admonition for the necessity of the present time, till a further consultation, to all such as shall intend hereafter to enter the state of matrimony, godly and agreeable to law.

" First, that they contract not with such persons as be hereafter expressed, nor with any of the like degree, against *the law of God,* and *the law of the realm.*

After a long further " admonition," about pre-contracts, &c., follows the list of degrees, as in our Prayer-Books, including a deceased wife's sister.

Then following this table came the canons of 1603, which were agreed to in a convocation of the Bishops and Clergy convened by the writ of King James I. Of some of these conferences, and the subjects discussed thereat, Hume in his History (ch. 45, p. 493) speaks most slightingly. One of these canons, the 99th, adopts Archbishop Parker's tables, and is as follows:—

" No person shall marry within the degrees prohibited by the laws of God, *and expressed in a table* set forth by authority in the year of our Lord, 1563, and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated. And the aforesaid table shall be in every church publicly set up at the charge of the parish."†

* Strype's Annals, vol. i. p. 332.
† Burn's Ecc. Law, vol. ii. p. 446. Vaughan's Rep. v. 244.

This is the whole canon law relative to this marriage since the Reformation; and now for its worth, its force, and effect.

The code of laws contained in the *Reformatio Legum Ecclesiasticarum*, "not having received the royal confirmation, *is not, indeed, law*," says Burn.* The "parity of reason" notion is, therefore, not binding, and even if it were, it would not get over the express words of the 18th verse of the 18th chapter of Leviticus, and the statute of the 1st Mary, sess. 2, c. 1.

We then come to Archbishop Parker's table of 1563, and to his "admonition for the necessities of the present time." The "admonition" might be very seasonable at that period, but it was not law then, and it is not law now. We have great respect for Archbishop Parker, as we have for every Bishop, but it is enough to say, that we decline to take "admonitions" of any Bishop as equivalent to the law of the land.

We come, then, last of all, to the 99th canon itself. In the case of Middleton *v.* Croft,† the validity of these canons of 1603 was called in question before Lord Chancellor Hardwicke; and one of the questions made at the bar and argued for his decision was, "Whether, by virtue of the canons made in the year 1603, lay persons are punishable by the ecclesiastical censures;" and in their judgment the Judges in banco pronounced

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* Burn's Ecc. Law, by Dr. Phillimore, vol. ii. p. 503 a. Ninth edition.

† 2 Atkin's Rep. App. 651.

the following decision on this question, and that decision now settles what is the law in this respect:—

"Upon the best consideration we have been able to give it, we are all of opinion that the canons of 1603, not having been confirmed by Parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, by their own force and authority, for there are many provisions contained in these canons which are declaratory of the ancient usage and law of the Church of England, received and allowed here, which in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons."*

I shall defer the examination of the ancient canons, anterior to the Reformation, respecting this marriage, until the next chapter. Whatever, however, were their "pretensions," a dispensing power in the Pope went along with them. It is sufficient for me now to deal with the canons since the Reformation.

Now, what is the value of the restrictions on this marriage *in law*, since the Reformation? What is the *Reformatio Legum Ecclesiasticarum* worth? In the quaint phraseology before quoted from Burn, "it is not, indeed, law." What is Archbishop Parker's table worth? Why it, too, "is not, indeed, law;" and what are the canons of 1603 worth, after Middleton *v.* Croft? Why, unhappy abortions! they, too, "are not, indeed, law." Altogether a most respectable "bag of moon-

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* Ibid. p. 653. And see Matthews *v.* Burdett, 2 Salk, 673.

shine!" What remains? The statute law of the realm.

And now we will see what the statute law says regarding itself. What the statute law is in this respect, I have already shown; namely, it sanctions this marriage, "as standing with God's law," and as being without "the Levitical degrees."

The statute Henry VIII., c. 19, revived by the 1 Elizabeth, c. 1, states expressly that such canons shall be of force "as *be not contrariant or repugnant to the laws and statutes and customs of this realm.*" Well, but canons which forbid this marriage are "contrariant and repugnant to the laws and statutes of the realm;" for these latter sanction it.

It is laid down, too, by Lord Coke, in Cawdrie's case*

"That such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm, *and are not contrary or repugnant to the laws, statutes, and customs thereof,* are still in force."

It follows, then, that where they are "contrariant" they are not in force; and the reason as assigned by Coke in his Second Institutes, in his exposition of the statute of Merton, for this conclusion, is,

"That any foreign canon or constitution made by authority of the Pope, being (as Glanvill saith) *contra jus et consutudinem regni,* bindeth not until it be allowed by Act of Parliament, which the Bishops here prayed it might have been; for no law

* 5 Rep.

or custom of England can be taken away, abrogated, or annulled but by authority of Parliament."*

It is, too, clear law that since the statute 32d Henry VIII., c. 38, "the Temporal Courts will prohibit the Spiritual Courts to impeach or dissolve a marriage out of the Levitical degrees,"† which this marriage clearly is. This rule of law is acknowledged even in the late decision of Ray *v.* Sherwood, in the Spiritual Courts, by Sir Herbert Jenner, in his judgment, for he says:—"Undoubtedly the Court (the Spiritual Court) would, if the intention or the opinion of the Legislature were clearly and expressly declared, be bound to follow the advice given to it." And, therefore, that learned civilian looks for the "expressly declared" opinion of the Legislature, as a civilian might be expected to do, precisely where it was not to be found, namely, in the preamble of the 5th and 6th William IV., c. 54, and entirely omits all reference to the statutes of 32d Henry VIII., c. 38, or the 1st Mary, sess. 2, c. 1, both in force, in which the opinion of the Legislature is expressly declared.

Now, what can be thought of the ecclesiastical definitions and canons, relative to this marriage, since the Reformation?

I have only, in conclusion, to establish the assertion with which I set out, that in the face of all this—

* Coke, 2 Inst. 96.

† Bac. Abm. tit. Marriage (A). Vaughan's Rep. 206. Butler *v.* Gastril, Gilbert's Rep. 156.

against the plain words of the Bible, as laid down in the 18th verse of the 18th chapter of Leviticus, and against the clearly expressed law as laid down in the two statutes just mentioned, such is the force of prejudice, and a "canonical education," that civilians of high repute have, in the Spiritual Courts, decided directly the reverse of all this, and in the very teeth of our law and the Bible.

In the recent case of Ray *v.* Sherwood, brought before the Consistorial Court of London, to try the validity of this very marriage, Sir Herbert Jenner, in his judgment, says, "This marriage is a contract which is prohibited by the laws both of God and man." Where? It is not prohibited by the laws of England; on the contrary, it is sanctioned. It is not prohibited by the Bible; on the contrary, it is sanctioned: and if the doctrine of "parity of reasoning" be adopted, it is in some cases *commanded.*

But let us not be alarmed at this seeming contradiction; it is easily explained, and Sir Herbert Jenner is quite right, *if certain premises be granted,* that is, that *the canons are the exposition of "the laws of God;"* for then, being forbidden by the canons, which are the laws of men, this marriage is "prohibited by the laws both of God and man."

But that it is not prohibited by the *laws of England,* I trust will ere long be established; and certain I am, that *the laws of God* will be better kept if the misery and vice and crime which result from an attempted prohibition of this marriage be put a stop to, by permitting it to those who may choose to contract it.

CHAPTER IX.

THE VALUE AND VALIDITY OF THE CANONS OF THE EARLY CHRISTIAN CHURCH.

The shifting tactiques of the upholders of the prohibition.—The opinions of the Bishop of London and Sir Robert Inglis as to the Council of Eliberis.—The *tu-quoque.*—The canons of the early Christian Church.—The apostolical Canons.—The Canons of the Council of Eliberis—of Neo Cæsarea—of Agde—of the Roman Council.

On reading past debates, and the arguments of those who oppose a second marriage with a deceased wife's sister, it is amusing to mark their almost instinctive consciousness that they have taken up an unstable position. They fly from pillar to post, and "dodge" round every tree. You look in vain for the characteristics of a "stand up fight." Those adverse arguments which I have met with usually take this form: first, such a marriage is prohibited by law—it is within the prohibited degrees. This questioned, an immediate flight is made to Scripture, and the marriage is pronounced incestuous, and contrary to the law of God; but an examination of the Scriptures quickly showing this position to be untenable, refuge is directly taken in the canons of 1603 and Arch-

bishop Parker's Table of Prohibitions; and these in their turn being shown, by the solemn decision of our courts of law, to be unbinding and of no authority, then an immediate plunge, as a *dernier ressort*, is made into the dark hiding-place which the mystification and multiplicity of the early canons of the Church appropriately afford. We then hear much about the canons of the early Christian Church. I have adapted my arguments to the *tactiques* of such opponents, and have followed them step by step into this last corner of refuge, and even out of this I do not despair to drive them. Thus, in the debate in the House of Lords on this question, in 1841, the Bishop of London, after taking this course, is reported to have said that this marriage was prohibited by the Church at a very early date anterior to the canon law; that—

"It was, if not prohibited, at least condemned by implication, in that very early body of constitutions called the Apostolic Canons. It was forbidden by the Council of Eliberis, early in the fourth century................So that when we (the clergy) stand up for these prohibitions, we do not stand up for prohibitions merely adopted by our own Church from that of Rome."

In the same manner, Sir Robert Inglis, the champion of restrictions on man's natural liberty to act according to his own taste, whilst offending against no moral law, reiterates and resorts to the same position of final refuge. He is reported to have said—

"Such marriages might or might not be contrary to Scripture; they might or might not be contrary to the revealed will of God; but certainly the universal Church for fifteen centuries declared them to be contrary to her tenets. Without entering into details regarding any decisions of the Council of Eliberis, he would simply repeat the proposition that, in no instance in Church antiquity, would the Noble Lord (Lord Francis Egerton) find these marriages to have been sanctioned."

There is a mode of argument—the *tu quoque*—for the value of which in all cases I am not going to contend, but which in some cases is both fair and appropriate; nay, more, it is conclusive. I know it is no excuse for the breach of any law *morally* binding, for a man, accused of being a drunkard or a thief, to rejoin, "You 're another;" but, with a law not morally binding—with a mere municipal regulation on a point of discipline, ecclesiastical or otherwise, the general infraction and disregard of such a law is conclusive against the law—it has become a dead letter.

Now, the prohibition of marriage with a deceased wife's sister is not a *moral* law. The infraction of the prohibition is no infraction of morality; it is merely an infraction of the prohibition. So the prohibition to men to wear long hair, to sit down to dinner with a Jew, or to marry a cousin, or to a clergyman to have a servant-maid in the same house with him, or to go to a marriage feast, are not *moral* laws, the infraction of which is morally wrong; so the prohibition to the clergy to marry at all, to marry twice, or to marry a widow, or an actress, or a maid servant, under a penalty of expulsion from the ministry, are not moral laws, the infraction of which is morally wrong. If I show that

all these things are equally forbidden by the canons of the Early Christian Church, "by the constitutions called apostolical," and by "the Council of Eliberis," and that "in no instance in Church antiquity" have most of these prohibited acts "been sanctioned," and that all these acts are notoriously of every-day occurrence—that men wear long hair when they choose, dine with Jews when they please, and marry their cousins continually—that every clergyman who can afford it keeps a servant-maid—that it is their common custom to partake of the marriage festivities of their flocks—that they almost invariably marry—and I appeal to the Right Rev. Prelate, whose speech I have just quoted, if it be not also a fact, that they sometimes marry twice, and dont hesitate to marry widows—and yet that men are not excommunicated, nor Bishops, priests, and deacons expelled from the ministry for these acts—why then surely I have shown that these laws, as laws, have grown into desuetude, are a dead letter, and are regarded as of no force or validity.

Again, the canons of a council are like the sections of an Act of Parliament. If an Act of Parliament be binding, all the sections of the act are equally binding. So, if a council of the early Christian Church is of authority, its authority extends over all the canons passed at that council, and bearing its name. Thus, if two things are forbidden by two different sections of an Act of Parliament, both things are equally forbidden. So if two things are forbidden by two different canons

any one council of authority, both things are equally forbidden.

With this introduction to the subject of my letter, I propose to examine the value of, and binding force and validity, which the clergy, as a body, attach to the apostolical canons of the early Christian Church and to the canons of the Council of Eliberis—the clergy in that respect meekly following (as the clergy ought to do), the example set them by the prelates and dignitaries of the Church. We of the laity look up to them with high respect, and will readily humbly follow in their footsteps the practical example which they set of the manner in which we ought to regard these canonical injunctions of the early Christian Church.

It is conceded, of course, that everything which these canons enjoin, which is *morally* binding, is so; but it is binding irrespective of these canons, and with or without them would be equally binding; and the test of its morality is *the Bible*. That with which we have now to do is the validity of prohibitions by these canons *qua* canons.

Without wasting space in dealing with the doubts cast on the apostolical canons, as "a fraudulent collection of clerical institutions invented subsequently to the year 450,"* we will assume that they are "all right," and go at once to the canons. The 19th canon says—

"He that marries two sisters or his niece cannot be a clergyman."

* Letter to the Bishop of London on the Law of Marriage, by H. R. Reynolds, Esq, M.A. Barrister-at-Law, p. 29.

This is the extent of the prohibition in the apostolical canons of marriage with a deceased wife's sister—a prohibition which in these days would certainly not much trouble the laity, were the canon enforced with all the rigours of the law.

But let us examine what else (amongst other things) these canons forbid. The following are some of the canons :—

"7. Let not a bishop or elder undertake worldly callings, or if he do, let him be deposed."

"20. Let the clergyman who gives security for any one be deposed."

"54. If any clerk be discovered eating in a tavern, let him be excommunicated, except him who of necessity tarries at an inn on his journey."

"27. Of those who enter bachelors into the clergy, we order *that readers and singers only* do marry afterwards, if they so please."

"17. He who after baptism has been *wedded in two marriages* cannot be a bishop, or a priest, or a deacon, or at all belong to the sacerdotal catalogue."

"18. He that marries a widow, or one that is divorced . . . . or an handmaiden, or an actress, cannot be a bishop, or a priest, or a deacon, or at all belong to the sacerdotal catalogue."

With great respect for the Right Rev. Prelate the Lord Bishop of London, I would ask how many of these canons are broken by the clergy in his diocese? But the 19th canon is of no more authority, or weight, or solemnity, than the 27th, or the 17th, or the 18th. If, then, the prelates and the clergy can break these last-mentioned canons with impunity when they please, without censure, without imputation of any kind, is it to be sup-

posed that the laity, who may wish to marry their deceased wife's sisters, are to be condemned for breaking the 19th canon, and that too, by the clergy affecting to "stand up" for the prohibition ? Pshaw ! I will not, now "the cat's out o' the bag," insult his Lordship's strong good sense by supposing him to think that we laity are all fools—poor ignorant creatures, bereft of that knowledge which formerly entitled those who had it to claim "*benefit of clergy*" for faults far greater than this.

We will turn now to the canons of Eliberis, which were quoted by his Lordship with a solemnity enough to make one's hair stand on end, as forbidding this marriage, and which were referred to as conclusive against it by Sir Robert Inglis. The 61st canon is as follows :—

"61. If any one after the death of his wife shall have married her sister, and she be a believer, let her abstain for five years from communion, unless illness render necessary an earlier reconciliation."

This is certainly a stronger condemnation than the last, and extends to all, whether they want to enter the clerical profession or no ; but it is not a *prohibition*. The marriage is not voidable or void by it ; but a five years' penance is simply imposed for contracting such a marriage ; after which penance the wrong is supposed to be atoned for.

And now for the value and binding effect of this canon, as tested by the practice of the prelates and

clergy respecting canons of the same council of the same binding effect, validity, and authority.

The following are some of the canons of the same council :—

"50. If any clerk or laic shall have partaken food with a Jew, he is to abstain from communion, that he may learn better manners."

"27. Let no Bishop, nor any other clerk, retain with him any other than a sister, or a daughter who is dedicated to God; on no pretence let him have a stranger."

The 33d canon restrains the intercourse of married "Bishops, Priests, and Deacons," with their wives, and is too indecent for publication in the vulgar tongue. Those who are curious respecting it, will find its Latin translation from the original in the note below.*

Among the canons of the Council of Neo Cæsarea, passed in A.D. 314, the period of "the early Christian Church," are the following :—

"1. If a Presbyter marry, let him be deprived of his orders. . . . ."

"3. They, whether man or woman, who contract more than one marriage, are to observe the stated time of penance. . . . ."

"7. A presbyter is not to share a second marriage feast, since a second marriage itself is a subject for repentance; who

* Canon xxxiii.—"Placuit in totum *prohiberi* episcopis, presbyteris, et diaconibus, vel omnibus clericis positis in ministerio, *abstinere se* a conjugibus suis, *et non generare* filios: *quicunque vero fecerit* ab honore clericatus exterminetur."

then is the presbyter that for the sake of the conviviality will be a party to the marriage."

The following are among the canons of the Council of Agde, passed in A.D. 506 :—

"I. Although the statutes of the fathers have otherwise decreed, they who are twice married, or are the husbands of women who are so, out of commiseration for such as are already in orders, we allow to retain the name of Presbyter, or Deacon, but they are not to discharge the functions of their respective offices."

"II. Handmaidens and freed women are to be removed from the pantry, or from private attendance, and from the same house in which a clergyman is resident."

"XXXIX. Let presbyters, deacons, sub-deacons, and such like, who are not allowed to marry, also avoid the festivity of other people's marriages." * * *

The conclusion of this canon is too indecent for publication.

The following are amongst the canons of the Roman Council in A.D. 725 :

"IV. If any one shall marry his godmother, be he anathema."

"VIII. If any one shall have married his cousin, be he anathema."

"XVII. If any cleric shall have long hair (*relaxaverit comam*), be he anathema."

And all the thirty-two Bishops, and Pope Gregory II., thrice responded, "Anathema sit"—be he anathema.

Now I have no wish to speak lightly of sacred sub-

jects, or to bring sacred subjects into contempt. But the things of which these canons treat, and which they forbid, do not happen to be sacred subjects, and are not forbidden by any moral law, and therefore I have spoken of them as they deserve to be spoken of—with utter disregard. In doing this, I follow the practical example set to me by the bishops and clergy of my Church; for they *treat them* with utter disregard, and break them all at pleasure without let or hindrance, without imputation—nay, they have so far contrived in most of these respects to beat down ancient prejudices, that the doing of nearly all these forbidden things by them is deemed to be laudable, proper, and praiseworthy. What! and shall we, the laity, quietly sanction the infringement of canons without end by the clergy in matters of no moral delinquency, and permit them *in the same matters* to threaten us with the terrors of the canons of these same councils? Pshaw! the age of superstition and ignorance, and blind reliance on human direction, is fast fleeting away. Men, now-a-days, search the sources of knowledge. This is the nineteenth century.

It therefore appears, that every clergyman and bishop who marries, or marries twice, or marries a widow, or sanctions any other absurd thing forbidden in these canons, is in the *same boat* with those who wish to marry their deceased wives' sisters. If the latter marriage is forbidden by these canons, why so are the former marriages; and it is not for the bishops or clergy, nor for "high churchmen," nor, indeed, for any one else, to prate to those who wish to contract

the latter marriage, about the canons of Eliberis and the "declarations of the Universal Church."

"Oh! but," say the clergy, "these canons have now nothing to do with us; our marriages were sanctioned by the statute 2 and 3 Edward VI., c. 21, which was revived by the 1st James I., c. 25."—"Precisely so, my reverend friends," reply those who wish to marry, and have married their deceased wives' sisters, "we swim together; these canons have now also nothing to do with us; our marriages are sanctioned by Scripture, and by the 32nd Henry VIII., c. 38, and by the 1st Mary, sess. 2, c. 1; and the statute of the 25th Henry VIII., c. 19, subsequently revived by Elizabeth, declares that no canons shall be binding which are "contrariant to the laws of the realm." This, I trust, will soon be established to be the case beyond all future cavil and question.

CHAPTER X.

THE LAWS OF NEIGHBOURING CHRISTIAN NATIONS REGARDING THIS MARRIAGE.

The prohibition unjust, as pressing unequally upon the rich and poor.—The opinions of jurists and others regarding it.—The laws and customs of other Christian nations respecting these marriages.—The mischievous and unjust consequences of a diversity of laws in this respect with neighbouring Christian nations.

In the previous chapters I have confined myself to a review of the supposed legal, canonical, and scriptural objections to marriages of persons related by affinity, and to the opinions of lawyers, divines, civilians, and canonists, regarding such marriages, *in this country only.*

The legal question must be decided by our statutes, and by the interpretation which our Judges may place upon them when the legality of a marriage of this kind shall be disputed before them. But the consideration of any supposed scriptural prohibition, or of any civil or canonical disability to contract marriage with a deceased wife's sister, are questions not confined to this country, for all Christian nations have had to decide upon them as well as ourselves. With *all* Christian

nations the same scriptural grounds must have arisen for or against this marriage, which have existed with us. With all Christian nations, too, at least in Europe, the same canon laws were formerly in force which were formerly in force with us; the same doctrines of the early Christian Church were a guide to them as have been a guide to us; and the principles of the civil law as regards marriage derived from the same fountain—the Institutes of Justinian—were of equal, if not of greater, weight with them than with us. In deciding, therefore, on the question of the scriptural and canonical propriety of this marriage, and on its expediency generally, the opinions and customs of other Christian nations regarding it become material evidence to direct our judgment.

I propose, then, in this chapter, to draw attention, first, to the opinions of eminent jurists and others unacted upon by the influence of our prejudices; secondly, to the custom of other Christian nations regarding this marriage; and, thirdly, to the mischievous consequences of a diversity of custom and a conflict of laws as to the validity of a social contract common to all Christian nations.

Perhaps the consideration of this last part of the question alone may convince some that it is most *expedient* to alter our law as commonly understood; and also, that as unequal laws are unjust, as not affecting all the members of the community alike, it is most desirable—nay, incumbent upon us—to define and alter the law which is supposed to prohibit these marriages, because it is *unjust* as pressing *unequally* upon the rich and the

poor; being to the rich a dead letter, which they *may* evade; to the poor an arbitrary enactment, which they cannot evade.

First, then, as to the opinions of jurists and others as to this marriage. Montesquieu, in his "Spirit of Laws," says—

"It is not a necessary custom for the brother-in-law and the sister-in-law to dwell in the same house. The marriage between them is not then prohibited to preserve chastity in the family; and the law which forbids or permits it is not a law of nature, but a civil law, regulated by circumstances, and dependent on the customs of each country.*

The late Mr. Justice Story, one of the most eminent jurists of modern times, in a letter read by the late Lord Wharncliffe, in the debate on this question in the House of Lords, in 1841, thus speaks of marriage with a deceased wife's sister:—

"Nothing is more common in almost all the states of America than second marriages of this sort; and so far from being doubtful as to their moral tendency, they are among us deemed the very best sort of marriages. In my whole life I never heard the slightest suggestion against them founded on moral or domestic considerations."

The late celebrated Dr. Benjamin Franklin, in a letter to Mr. Alleyne, the author of a pamphlet on this subject, published upwards of seventy years ago (which then created much sensation and is now referred to in

* Montesquieu, "Spirit of Laws," vol. ii. book 26, c. 16.

many of our legal treatises with respect,* thus speaks of this marriage:—

"Craven-street, Oct. 15, 1773.

"Dear Sir,

"I have never heard upon what principles of policy the law was made prohibiting the marriage of a man with his wife's sister, nor have I ever been able to conjecture any political inconvenience that might have been found in such marriages, or to conceive of any moral turpitude in them. I have been personally acquainted with the parties in two instances, both of which were happy matches, the second wives proving most affectionate mothers-in-law to their sisters' children, which, indeed, is so naturally to be expected, that it seems to me, whenever there are children by the preceding match, if any law were to be made relating to such marriages, it should rather be to *enforce* than to *forbid* them; the reason being rather stronger than that given for the Jewish law which enjoined the widow to marry the brother of a former husband, *where there were no children*, viz., that children *might be produced who should bear the name of the deceased brother*; it being more apparently necessary to take care of the education of a sister's children already existing than to procure the existence of children merely that they might keep up the name of a brother.

"With great esteem, I am,

"Dear sir,

"Your most obedient humble servant,

"B. Franklin."†

Without occupying space with comment on the opinions of men like these, which carry with them the

* See Mr. Chitty's notes to stat. 32, Henry VIII. c. 38, in his edition of the Statutes.

† Appendix to Mr. Alleyne's pamphlet, p. 1.

greatest weight, I will turn now to the authorities as to the second branch of my argument—viz., as to the custom of other Christian nations in this respect.

In the Commentaries of Ex-Chancellor Kent, who is esteemed the Blackstone of America, is the following passage on this subject :—

"Whether it be proper or lawful, in a religious or moral sense, for a man to marry his deceased wife's sister, has been discussed by American writers. Mr. N. Webster, in his Essays published at Boston in 1790, No. 26, held the affirmative; and it is *made lawful by statute in Connecticut.* Dr. Livingston, in his Dissertations, published at New Brunswick in 1816, and confined exclusively to that point, maintained the negative side of the question. It is not my object to meddle with that question, but *such a marriage is clearly not incestuous or invalid by our municipal law.* (New York)."

Mr. Justice Story, in the last edition of his celebrated book on the "Conflicts of Laws," thus speaks of this marriage, which in England civilians term "incestuous."

"Christianity is understood to prohibit polygamy and incest; and therefore no Christian country would recognise polygamy or incestuous marriages. *But when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous.*"*

* Story's Conflict of Laws, 2d ed., p. 174.

This learned writer then goes on to describe those marriages "between near relations by blood" which are "prohibited by most of the countries of Europe." He then goes on to speak of marriages by *affinity*, as we regard them according to the decisions in our spiritual courts, and says* :—

"The prohibition has been extended in England to the marriages between a man and the sister of his former deceased wife; but *upon what ground of Scriptural authority it has been thought very difficult to affirm. In many, and, indeed, in most of the American States, a different rule prevails,* and marriages between a man and the sister of his former deceased wife are *not only deemed in a civil sense lawful, but are deemed in a moral, religious, and Christian sense lawful and exceedingly praiseworthy.* In some few of the States the English rule is adopted. Upon the Continent of Europe *most of the Protestant countries adopt the doctrine that such marriages are lawful.*"

The following is a note to the above text :—

"This is certainly the law in all the New England States. In Virginia the English rule prevails. In *Prussia, Saxony, Hanover, Baden, Mecklenburg, Hamburg, Denmark,* and in most other of the Protestant States of Europe, the rule prevails that a man may *lawfully marry* the sister of his former wife."†

In the debate in the House of Commons on this

* Ibid. p. 180.
† Ibid. 181.

subject in 1842, it was erroneously stated by Lord Ashley that such marriages are prohibited in France.

In a pamphlet recently published on this subject by A. Hayward, Esq., Q.C., it is stated, that

"In *France* such marriages are of constant occurrence; the license is granted by the Minister of Justice, who merely requires to be assured that no improper intercourse has taken place between the parties."*

Surely it is apparent enough that there is "no general consent of all Christendom" entitling us to term and adjudge these marriages to be *incestuous;* and surely the Protestant States of Germany and Denmark, and the Prussian, French, and American nations, are as competent to judge of the Scriptures and canons as we are; and, so far as the canons are concerned, all, excepting America, have been as much under their government as ourselves.

We come now to the third position of the argument —the mischievous and unjust consequences which manifestly must follow this diversity of our law with the laws of neighbouring Christian nations relating to this social contract.

Without entering at length upon the subject, it is sufficient for the present argument to state, generally, that marriage, being a civil contract, is governed by the *lex loci contractus.* Yet many doubts and difficulties

* Remarks on the Law regarding Marriage with the Sister of a Deceased Wife, by A. Hayward, Esq., p. 18.

have been raised on this point; able lawyers hold that there must be a *bonâ fide* domicile of the parties in the country where such a marriage is legal, in order to render the *lex loci* binding in this country; otherwise the English law, which is supposed to prohibit such marriages, still attaches to and governs the parties a British subjects; and that where the mere ceremony of marriage has been performed abroad, the parties residing in England and returning after the ceremony, such marriage is a mere fraudulent evasion of the laws of this country, and is no more valid than if the ceremony had been performed in England.

The doubts and difficulties and anxieties on this score, amongst those who have gone to the trouble and expense of being married abroad, may easily be conceived.

Mr. Burge, Q.C., a gentleman of high authority on questions of international law, in a letter to George A. Crowder, Esq., on this subject, says :—

"I have very frequent y been consulted on behalf of parties who either had married within the prohibited degrees of affinity in defiance of the statute 5th and 6th William IV., c. 54, or who were desirous of contracting such a marriage, and who, with a view of evading the consequences of the statute, intended *to resort to some country where no such prohibition existed.* The occasions on which I have been called on to consider various questions affecting the parties themselves, or their future issue, or their title to real property arising out of such marriages either already contracted, or intended to be contracted, have been *very numerous;* I could not give you the number. Most frequently my opinion has been given to the solicitors in consultation, and he has himself reduced it into writing in my

presence. There has been generally a reluctance to mention the names of parties, or even to put the question in writing. I have reason to believe many cases occur where the parties, with the view of giving effect to such marriages, and of securing the legitimacy of their children, *have made great sacrifices. They have quitted England, given up their residence there, and acquired a domicile in some foreign country, where their marriage might be legal.*"

So that is the effect of this absurd law in England. The conscientious and the deserving, who wish to contract their marriages legally, and who can afford it, are driven out of the country, to France, or Switzerland, or Denmark, or Germany, there to acquire a domicile, at great personal inconvenience and expense, and then they may return; the marriage is valid—the law, as to them, is become a dead letter, save in this, that their minds are continually beset with fears and doubts and anxieties, as to the manner in which the properties of their children may be affected. Can such a law be wise, which fails in its object amongst the wealthy and deserving, and simply fills their lives with anxiety?

But suppose the man who has means sufficient to go abroad to contract such a marriage to be a profligate man; he may persuade some virtuous and confiding lady that his marriage with her abroad will be legal, and take good care to render it invalid in this country by not becoming properly domiciliated. The marriage would then perhaps be legal in the country where contracted, but not in England; and this man might return to England, and *legally*, when he pleased, *marry*

another lady. He might, *according to our law*, ruin an innocent woman, and leave her without remedy; or, still worse, he might, *according to our law*, be a polygamist. He might marry his deceased wife's sister at Baden, and introduce her as his lawful wife to English gentlewomen there; and marry another lady in England, and introduce her as his *lawful wife* to English gentlewomen at Brighton; and, if so inclined, might pass an alternate month with each in *lawful polygamy*. These are some of the consequences of our precious law among *the rich*, conflicting, as it does, with the marriage law of neighbouring Christian nations.

But suppose the man who is anxious to contract such a marriage is *poor;* he cannot afford to go abroad to effect a legal marriage; he is, therefore, placed under a prohibition which his richer neighbour is not: this law does not, therefore, equally affect them, and is *unjust*.

If the poor man is a deserving man, he will strive to give his union with his deceased wife's sister the semblance of legality, by getting the ceremony of marriage performed by means of some evasion. Yet, if the law be as is supposed, his innocent wife is simply his mistress, and his children are illegitimate; and the man, and the woman, and the children, are subjected to all the miseries and disabilities which the consciousness of their legal position imposes. Is this "expedient," or is it *just?*

But, suppose the poor man not to be so conscientious: if he should go through the invalid ceremony of mar-

riage, he may cast off his wife when he pleases, and marry another woman, as did Chadwick in the recent bigamy case at Liverpool, or, having made two or three vain attempts to get married, and having been refused by the clergy because of the canonical prohibition of *affinity*, he may probably satisfy his conscience that it is not his fault, and openly cohabit with the woman without marriage. *This is the common case among the lower class and the poor.* Is the law which causes this *wise* —is it "*expedient?*"

Is it wise or expedient to have held out to the poor, numerous examples of cohabitation amongst themselves, to which a sort of excuse attaches, because the mere municipal law will not let them marry? Is it possible to devise a more mischievous hotbed of general profligacy and disregard of the marriage tie amongst the poor, than by the multiplication of such instances of cohabitation *compelled by law?*"

Surely those of the clergy who may oppose a change in this law, no doubt on conscientious, though mistaken grounds, have not well considered the responsibility which attaches to them for indirectly causing so much misery, and crime, and demoralisation. It is impossible that such a state of the law can long continue, against the better sense of the people of England; and it would be wise in the clergy to seem to *lead* public opinion, by advocating that salutary and necessary change in the law which *must ere long take place,* rather than be *driven* by

public opinion, and be placed in an odious light by a powerless opposition to a needed and beneficial change, in the attempt to uphold canonical prohibitions which induce domestic misery, individual crime, and general demoralisation.

CHAPTER XI.

THE PROHIBITION AN INFRINGEMENT OF THE RIGHT OF CIVIL LIBERTY.

The English "love of liberty," as a general principle, and patient endurance of particular tyrannies.—Opinion of the Archbishop of Dublin.—The infraction by this prohibition of men's liberty of private judgment in the exercise of a social rite.

There is a peculiarity about Englishmen in their love of liberty as a general principle, and in their patient endurance of particular tyrannies, which cannot have escaped the attention of reflecting minds. Let Englishmen once generally believe the principle of civil liberty to be invaded in any particular, and have a conviction of the fact fairly thrust upon them, and they are immediately fired with indignation, which quickly changes into a cool determination to get rid of the infraction of their loved and boasted "principle of civil liberty." Religious toleration is demanded and *enforced;* it is complained that it is a grievance to compel marriage in churches on those who belong not to the Church Establishment, and the infringement of an Englishman's liberty, to be married after whatever form and wherever he

pleases, is restrained. Slavery is denounced as an infringement of man's natural right of *liberty;* and, no matter at what present or future cost to Englishmen, the fetters straightway fall from the slave. The *love of liberty*, and *the right of civil liberty*, of which an Englishman is proud, are not with him vain boasts. The kicks and cuffs, on food of thistles, which a donkey patiently bears under his load, bring the animal into contempt. Yet, with all our love of the general principle of civil liberty—determined as we are to uphold it if we fancy we see it infringed—it is a plain fact that, donkey-like, we bear the load of many extreme tyrannies, of many oppressive laws, deceived either by the tact of those who uphold them, or almost unconscious of them as a people, from the patient endurance of the "kicks and cuffs" they impose, by those who are oppressed and aggrieved by them. "Amongst a people," says Paley, "enamoured to excess and jealous of their liberty, it seems a matter of surprise that this principle has been so imperfectly attended to;" * and he instances, as infractions of this principle, at the time he wrote, the laws against Papists and Dissenters, now happily abolished, and the Game Laws, which yet exist to prove our rightful claim to donkeyism.

"A law," continues Paley, "which is found to produce no sensible good effects, is a sufficient reason for repealing it, *as adverse to the rights of a free citizen,*

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* Paley's Essay on Civil Liberty, Vol. II. p. 162.

without demanding specific evidence of its bad effects." We acknowledge and applaud the truth of this sentiment; and how do we act up to it in our laws which regulate marriages by affinity? What "sensible good effects" does the prohibition of the marriage of a deceased wife's sister produce? Is there any valid reason for its continuance? Is there anything urged in its support beyond the most shallow and unsatisfactory pretexts? Is there any argument brought forward in its defence which is not founded on unreasoning prejudice, relying on ancient canons, which, when examined into, are found to be the very sinks of impurity and tyranny, and are wholly unbinding in this respect upon us. Yet, donkey-like, we patiently endure the hard injustice. But is this all? Is it not a fact "that specific evidence of the bad effects of this law, since the time when Alleyne wrote his pamphlet against it, seventy years ago, has been perpetually urged? Is it not a fact that its "kicks and cuffs" have been continually buffeting men of all classes? Yes, and *it is a fact*, founded on careful calculation, that at the very least upwards of 5,000 such marriages exist in England at this day. *It is a fact*, that in three months the determination and public spirit of a few private individuals, and the unaided efforts of four gentlemen in the provinces, have *ascertained and verified sixteen hundred instances of such marriages.* Already a brief investigation of three months by four gentlemen, met by all the difficulties and *vis inertiæ* of the uninterested mass, has *discovered and verified* 1,600 cases of individual oppression and injustice, of

innocent women degraded, their offspring looked on as bastards in law, of vice, of crime, and of cruelty; of *forced cohabitation*, of evil example, and of blighted affection; of *men* of all classes (with some degree of impatience, perhaps)—with grumblings, repinings, execrations, yet—*bearing their load*, and their neighbours calmly looking on, satisfied by the specious pretexts of a few about the "expediency" of such a law. Oh, how we love the principles of "civil liberty," and withal what very donkeys we are!

"Civil liberty," says Paley, "is the not being restrained by any law but what conduces in a greater degree to the public welfare." If this be so, is not the law which prohibits a man's marriage with his deceased wife's sister, when prudence dictates it, affection sanctions it, and the solemn request of a dying wife, careful for her children's future welfare, often enjoins it—a law which, at one time or other of his life, may restrain and interfere with the social comforts, the happiness, and the sound judgment of every man as to what is most desirable for him—which in no degree or manner infringes any moral or social law, or conduces "to the public welfare;" but, on the contrary, leads to public mischief—a most grievous tyranny hanging over the heads of all of us? Yet, donkey-like, with all our genuine love of liberty, and with all our enthusiasm in its defence and preservation, we patiently endure and tamely submit to this galling yoke!

And yet we have not been without monitors of our patient degradation in this behalf from those worthy of our respect. At the period of the debate in the House of

Lords on this question in 1841, the Archbishop of Dublin—eminent both from his position and his own great attainments and ability—thus wrote his opinion regarding the law which prohibits these marriages, in a letter to G. A. Crowder, Esq., which is published in the pamphlet written by that gentleman.*

"As no clear and strong case has been made out of important advantage to the public from such restriction, I take my stand on the broad general principle that *every restriction is an evil in itself;* that political liberty consists in a man's being subject to no restriction that is not counterbalanced by a greater amount of public advantage; that the general rule accordingly should be, to let every one do as he pleases, the *burden of proof lying upon the advocate of any restriction to show its necessity.*

"I should say, that the fair and natural result would be (supposing always no clear case of public inconvenience to be made out), that parties should be left at liberty. Those who approve of such a marriage would then be free to contract it when they might think proper; those who disapprove of it might abstain from it.

"What may be called a meddling system of Government amounts, practically, to a most intolerable tyranny. If the Legislature of a country consisted of the most disinterested and public men, but who should think it their duty to compel, by law, every individual to do everything that might seem to *them* best, and to prohibit every one from taking any step which they might not think advisable, it would be found, I believe, that even the Government of selfish oppressors would be preferred to this."

* Letters of several Distinguished Members of the Bench of Bishops on the subject of Marriage with a Deceased Wife's Sister, by G. A. Crowder, Esq., p. 29.

These are the principles of civil liberty. These are the principles we boast of and admire; but our *practice* is (regarding a law which at one time or other of his life may affect every man's social position) tamely to bear with "that meddling system of government" which prohibits a marriage contrary to no law of God, of nature, or of special opinion, but which amounts practically to a most intolerable tyranny," because there are a few amongst us of influence who cannot shake off ancient prejudices, and who do not think such marriages advisable! In the words of the Archbishop of Dublin, just quoted, if these gentlemen disapprove of such marriages, why "let them abstain from them;" but do not let them cram their notions down our throats, and prohibit us to marry as *our* judgments and affections may dictate, because *they* do not like such marriages. It is a most ill-assorted marriage to see a young girl united to an old man; it is, perhaps, more disgusting to see a young man from mercenary motives united to an old woman; no one can approve of the choice of a man in high station who marries his cook, or of the taste of the lady who descends to her footman; but because the general voice of society disapproves of such marriages are we to prohibit them? If we do not like them we can abstain from them; but it would be tyrannical if we were to say to every silly old fool who marries a girl, or to every disgusting old woman who marries a boy, or to every gentleman or lady of questionable taste, who may have a fancy to marry his or her servant, "we

dont approve of such marriages, and the law shall not allow them."

In what different position is marriage with a deceased wife's sister, excepting that it is a union which in *the majority of cases* the calm judgment of mature age, motives of prudence, and sober respect and affection, dictate; and yet it is prohibited because a few amongst us, prejudiced in favour of the cunningly devised restrictions of a bygone Popish age, and unable to free their intellects from the yoke which those prejudices impose, and which are unwarranted by the Bible, which is our rule of faith, doggedly exclaim— "*We* do not approve of such marriages; *we* think them *inexpedient*, and, therefore, *you* who are of a different opinion shall not contract them."*

In another chapter I propose to examine into what moral and political reasons this general phrase of "inexpediency" resolves itself, and to test their value; meantime, bearing in recollection the misery, the unhap-

* The *Bible*, the *Bible* only, is the religion of Protestants. Whatsoever else they believe besides it, and the plain irrefragable indubitable consequences of it, well may they hold it as a matter of opinion. * * * I will take no man's *liberty of judgment* from him; neither shall any man take mine from me. I will think no man the worse man, nor the worse Christian: I will love no man the less for differing in opinion from me. And what measure I mete to others, I expect from them again. I am fully assured that God does not, and, therefore, that man ought not, to require any more of any man than this—to believe the Scripture to be God's word, to endeavour to find the true sense of it, and to live according to it.—Chillingworth's Religion of Protestants, chap. vii.

piness, the immorality, and the crime to which the present state of the law leads, and with an overwhelming mass of verified proofs before me of these lamentable facts, I shall conclude the present chapter in the words of one of our most eminent and pious divines, which it were well, with our exalted notions of civil liberty, that we acted up to:—"*It were good, if standing in the measure of the Divine Law, we should lay a snare for no man's foot, by putting fetters upon his* LIBERTY *without just cause, but not without great danger.*"*

* Jeremy Taylor.

CHAPTER XII.

THE MORAL AND POLITICAL OBJECTIONS TO THE MARRIAGE WITH A DECEASED WIFE'S SISTER.

"The safeguard of our domestic relations."—Its value as an argument examined.—The possible scandal of residence with a brother-in-law if the prohibition should be repealed.—The discreditable selfishness of the argument.—The aunt converted into a stepmother.—Such marriages likely to prove happy marriages.

Of all mental contests, of all argumentative discussions, the most unsatisfactory is that in which vague and undefined generalities have to be combated. It is fighting with shadows. Even the celebrated charge of the Knight of La Mancha against the windmills was more real and satisfactory; for in that tilting match the renowned Knight did contrive to break a lance, though he made a slight mistake in the identity of the "monstrous giants" his fancy painted.

The moral and political objections to marriage with a deceased wife's sister, shielded as they are under general phrases wide enough to take in anything and everything, as antagonistic arguments, seem to me to partake of this unsatisfactory and shadowy character. Thus, in the debate in the House of Commons in 1842, on Lord Francis Egerton's motion to bring in a Bill to legalise these marriages, we find Sir Robert

Inglis leading the van of the opposition, and shaping his argument after this fashion :—"It was," said he, "for practical, political, and general reasons that he felt bound especially to offer the Bill every opposition in his power." The "reasons" are certainly comprehensive enough! *but what does he mean ?*

Another phrase adopted by this class of objectionists, and on which they rest themselves as an argument, is that such marriages are "*inexpedient,*" and therefore they oppose them. What do they mean by "inexpedient?" I promised, however, in the last chapter to examine into what moral and political reasons this general phrase of "inexpediency" resolves itself. I will endeavour now to do so; and will bring forward fairly every argument that I have heard or read which hides itself shrinkingly, and with good reason ashamed, under this cloak.

"The prohibition of such marriages," wrote Dr. Pusey in 1840, "*is the safeguard of our domestic relations.*"

"I look at the state of society in this country," said the Bishop of London in the House of Lords in 1841, "and I see reason to think that the prohibition which prevents the intermarriage of persons within certain near degrees of affinity *is the very safeguard of our domestic relations.*"

There is a mystical refinement about this phrase which is remarkably unintelligible. We are, however, advancing by steps, and beginning to narrow our wide margin to an approach towards a definite idea. We are quite "at sea" amidst Sir Robert Inglis's *reasons* of

objection, not much better when the objections are narrowed in the phrase "inexpedient;" but now we have some landmarks—we see that we are to "look at home" for the supposed mischief. In this opinion there is a somewhat remarkable concurrence of thought and language between Dr. Pusey and the Bishop of London,—a circumstance which will give it no additional weight with the people of England.

Such as these opinions are, however, let us examine their value. Prior to the Act of 1835 the prohibition *practically* did not exist; not existing, "our domestic relations" did without "the safeguard." What "new light" has arisen to make that "safeguard" more necessary now than then? Perhaps it may be found in Dr. Pusey's category of *revivals?* But, inasmuch as the people of England could walk alone without it before, they demur now to going into swaddling clothes, and having this new-fangled *toga* hung upon them as their "safeguard." No, their safeguard is in their own honour and rectitude of principle, and not in the words of an Act of Parliament. If their own sense of honour and morality will not serve to preserve domestic purity, an Act of Parliament will not enforce it. But neighbouring nations on the Continent have no such prohibition. Such a marriage is perfectly legal in Germany, Holland, Prussia, and Denmark, and in France, on a license being obtained. What a terrible way these nations must be in to have their "domestic relations" bereft of this "safeguard!" To be sure they dont complain, and seem well contented without it; and such is our envy of their contentment, that most

of those amongst us who wish to contract this marriage, if they can afford it, pay a visit to one or other of these countries for the very purpose of getting rid of this boasted "safeguard;" which being thus easily got rid of is surely not much to be relied on.

The dark allusion contained in the phrase, "our domestic relations," has, however, on one or two occasions, been by a stretch of condescension explained; and that explanation resolves itself, as we shall see, into a most discreditable selfishness.

It is said, first, that if this marriage were permitted, a wife would be jealous of any attention of her husband to her unmarried sisters who might visit her. If *improper attentions* were paid to her sister, the wife would be justly so, with or without the prohibition. I presume, however, the advocates of the restriction have not such attentions in contemplation. If *proper attentions* were only paid to the sister, the wife could have no more cause of jealousy than at the *proper attentions* of the husband to any other woman. If any wife were foolish enough to be jealous of such *proper attentions*, surely the folly of a few such women is not to be made the foundation of a restriction upon all sensible people. The whole force of this argument rests on the possibility of *undue familiarities* with a wife's sister under the *pretence* of brotherly license—a license which, as between parties *not* brother and sister in blood, but only by *affinity*, the good sense of most men will see the propriety of preventing. If the wife's jealousy should have real foundation in an evident affection existing in the husband for the sister, an Act of Par-

liament cannot prevent that affection arising. A good man would attempt to overcome it; if he should succeed, he would do so equally with or without an Act of Parliament; if he should fail, he would equally fail with or without an Act of Parliament prohibiting it. But if he were a profligate man, the prohibition would serve as a most dangerous cloak for his profligacy. The unsuspecting sister would find herself imperceptibly ensnared in the meshes of every seductive art boldly ventured on under the specious pretext of *brotherly freedom;* while she would be deprived of the check on the husband's profligacy—that protection which every other woman would possess—in the possible case of the wife's death, of being able to *compel* marriage or compensation from her seducer.

If those who advocate the restriction on this ground wish the power of going beyond those proper attentions which are due to every lady, the selfishness, the impropriety, and the *danger to morality* of such a power it is somewhat disgraceful to wish; and it were wise in the Legislature to put an end to the power. If *proper attentions* to a sister-in-law alone are desired to be paid, they can be paid with great propriety if the restriction is abolished. Such was the case before the Act of 1835; and there is no reason why the same liberty should not exist now.

Secondly, it is contended that if the prohibition of such marriages were removed, the sister might listen to the advances of the husband more favourably, as she might, in the event of her sister's death, become his wife. If you suppose a cool calculating wretch—a

kind of female monster—and, upon this possibility, deem it proper to found laws for society generally, of course there is an end to the argument. But surely such an imputation—such an insult on woman's nature—is most unwarrantable. The creature who could permit herself to be dishonoured on the calculation of the chances of her sister's death, and her own future marriage to that sister's husband, would be unrestrained by any law whatever, human or divine. But the argument is unsound; it is the offspring of a prurient and vicious fancy, rather than of cool judgment, founded on that

"Human nature which is still the same."

Woman's nature, so far as we know of it, revolts at such cool, calculating atrocities; and if there be instances in which it would not do this, woman's *instinctive cunning* would prevent her listening to such proposals. The man she hopes to win for her husband is the last to whom she permits such improprieties.

Thirdly, it is contended, that if such marriages were permitted, a deceased wife's sister could not, *as now*, reside without scandal in a widower's house, and take charge of his children, without marriage with such brother-in-law, except in cases where the parties were advanced in years. The simple answer to this objection is, that *she cannot do so now*, though her marriage with her brother-in-law is prohibited. This is *a fact* which numerous painful instances prove. It is not creditable, in the estimation of society, under the law *as it is*, for a young unmarried woman to reside in the

house of a young widower, the former husband of her sister, without marriage. There is no instance of such a case without scandal circulating in the neighbourhood respecting it. Such an argument is a complete begging of the whole question. But the very best antidote to such scandal would be to take away the prohibition, for, in the words of the Archbishop of Dublin, in answer to this objection—" Nothing more effectually guards against any such scandal than its being known that if the parties were disposed they were at liberty to marry*." Such liberty strikes at the very root of scandal; for if they do not marry, the presumption must be that they have no such affection for each other as to induce them to wish it. But suppose for a moment the argument to be valid, and that a sister-in-law could not reside in a widower's house without marriage if the prohibition were removed, in those cases where the parties were young, and marriage was not wished; for if old, clearly there is nothing in the objection. The cases of young widowers wishing young sisters-in-law thus to reside with them are not very numerous. Those few widowers who thus seek to obtain the society of their deceased wife's sisters, without scandal, by maintaining a restriction which prevents all other widowers (at the least, as numerous as they) from marrying their deceased wife's sisters when affection and prudence may dictate to them such an union, exhibit, to say the least of it, a most *intense*

* Letter to George A. Crowder, Esq. p. 31, in that gentleman's pamphlet on this subject.

and discreditable selfishness. Surely the one class of widowers are as much entitled to the consideration of the state as the other class of widowers. But when the whole foundation on which this argument rests is fallacious—when *it is a fact that a young sister-in-law cannot reside with a young widower without scandal*—why then such an argument proves incontestably the weakness of the cause which is compelled to resort to it, and is wholly unworthy of further consideration.

Lastly, an argument, which is quite a curiosity, has been put forward to uphold the restriction: it is, that by converting the aunt of bereaved children into a step-mother you take away her protection from the children—you overcome the feeble tie of nature towards them, and the feelings of the aunt, who may have children of her own, are converted into those of a step-mother towards her sister's children. Well, suppose the widower did not marry the aunt, but married a stranger, are the feelings of that stranger step-mother likely to be any kinder to the children than those of the step-mother aunt? And do those who advance this argument really intend that the aunt (who must be supposed to be of marriageable age, or the children of her sister would not want her care) is to devote her existence and sacrifice her own prospects in life in order to bring up that sister's children? Intense selfishness again peeps out in this argument. If she marries on her own account, as most aunts endeavour to do, and marries a stranger, which, in the majority of cases, must happen, especially if she be prohibited from marrying her sister's husband, there is

an end to her kind superintendence of the children. The value of this argument depends on the assertion either that young widowers must always remain unmarried, or that an aunt step-mother is necessarily more cruel than a stranger step-mother; and also on the selfish and absurd notion that young aunts are to be expected to devote themselves to "single blessedness" and the instruction of little nephews and nieces, for the whole of their lives. How do these notions

"Hold the mirror up to nature?"

Why, they do not reflect a true picture. It is a grimace—a Grimaldi of red and white paint and long ears—and we laugh at it. But the assertion is the very contrary of truth. Mr. Alleyne, in his able pamphlet on this subject, written the greater part of a century ago, says :—

"Experience teaches us that the aunt, however kind as such, becomes the more affectionate mother-in-law; the severe loss of the husband is in some degree mitigated, and the hope of her children being tenderly bred *comforts in the moment of departure the expiring mother*."*

Montesquieu strongly recommends such marriages, on the ground that the new consort is more likely to prove an affectionate step-mother.†

Common reflection leads to the conclusion that such marriages are likely also to prove happy marriages to

* Mr. Alleyne's pamphlet on "The Legal Degrees of Marriage," p. 12. Ed. 1775.
† Book 26, c. 14.

those who wish to contract them, because they are formed on a more complete knowledge of the tempers and habits of each other than most other marriages possibly can be.

The object of this chapter, however, is to point out the fallacy and utter worthlessness of the objections urged against the marriage as grounds for *prohibiting it*, and not to advocate the desirableness of such a marriage. All we ask is, let those who desire it be able to contract it if they wish so to do; but do not prohibit it on such "tag-rag" reasons as these, urged by those who do not desire it, and who wish "to measure out *our* corn by *their* bushel."

It has been proved that no law of God, of nature, of social order, or of morality, is against such marriages. It has been proved that their prohibition leads to much misery, mischief, and crime. What conclusion from such premises does common sense draw? Is it for such petty and fallacious reasons as those set forth in its favour to uphold the prohibition? or is it not rather to abolish it as soon as possible? I know what verdict the good sense of my readers will return. In the words of Milton they will reply—"Let us not be thus *over curious to strain at atoms*, and yet to stop every vent and cranny of permissive liberty, lest nature, wanting those needful pores and breathing places, *which God has not debarred our weakness*, either suddenly break out into some wide rupture of open vice and frantic heresy, or else *inwardly fester with repining and blasphemous thoughts under an unreasonable and fruitless rigour of unwarranted law*."

CHAPTER XIII.

GENERAL SUMMARY.

Opinions of Clergymen, &c., Ministers of the Gospel, and others, regarding the Operation of the Law.

SOME two months ago, when I commenced the consideration of this subject, I undertook to prove that marriages within the supposed prohibited degrees of affinity were very numerous, and that the grievous restrictions and penalties imposed and inflicted upon moral, respectable, and innocent persons, by the present understood state of the law, were very far from being confined to a few isolated cases. I then showed that on a fair calculation from the returns of instances of these marriages, ascertained in parts of Lancashire and Yorkshire, as compared with the official returns of the Government of the second marriages of widowers, that marriages with a deceased wife's sister were in the proportion of one to every thirty-three marriages of widowers; that, therefore, about 500 such marriages took place every year, and that since the Act of 1835 there must, therefore, be at least 5,500 such marriages

in England, the parties to which, and their children, were labouring under the disabilities of the law. I undertook to prove that every possible kind of annoyance, of oppression, of injustice, and of wrong, was inflicted by the existing state of the law, whilst it directly produced immorality and crime; and then furnished a great number of such instances, out of some hundreds in my possession, in every station of life, to show the truth of that statement. I undertook to show the origin of the law in the canons of superstitious and barbarous ages, and its perpetuation for the purposes of revenue by Popish craft. I have done so. I promised to show the first sanction of the prohibitions by the statute laws of England, and the cruelty, injustice, and lust, on which they were founded. I have done so. I undertook to show that those statute laws were repealed, and no longer disgraced our statute-book, though the spiritual Courts still strive to uphold former barbarisms. I have done so. I promised to prove that the existing prohibitions were nowhere sanctioned in Scripture—that they were against civil and religious liberty, scouted by neighbouring nations, and uncalled for by any social or moral regulations. I have done all these—hitherto with scarcely any attempt at any justification on any ground whatever, religious, social, moral, legal, canonical or historical, of the supposed prohibitions. Not because there are not some who still adhere to old prejudices which they cannot shake off, and who would desire to retain the restrictions, but because, as I really believe, there is no argumentative point whatever on which the restrictions

can be maintained. The prohibitions shrink back before the reasoning faculties of men to the dark ages of superstition; and are dragged out of their impure hiding-places only to be the scoff and the scorn of reasoning intelligence.

The inquiry which was begun, now some three months ago, has just been concluded—not because materials have failed—not because all has been ascertained regarding the injustice of the understood state of the existing law that could be learned—not because there exist no more instances of its infraction; but simply because the few public-spirited individuals who have set on foot this inquiry think that they have done enough to call upon Parliament to interfere, and stop the growing mischief; and because, looking at the great expense of such an inquiry—of paying a corps of gentlemen to superintend minute researches in different parts of England for months—as private individuals, they have done far more than enough, far more than they are called upon to do, to relieve their countrymen from such an oppression.

That inquiry, now just ceased, has fully borne out the early calculations of the number of cases in which these marriages take place. During the whole period the returns of cases ascertained and verified by the four gentlemen engaged have averaged from 100 to 150 each week. Hitherto but a fraction of England has been inquired into; there yet remain some scores of large and populous towns, in which there has been no inquiry whatever. Yet in three months four

gentlemen have ascertained and verified no less than *sixteen hundred cases* of infringement of the prohibition. Taking the number at 500 per month, which was the rate of the progress of the inquiry, this mode of calculation gives 6,000 cases as the result of a protraction of the inquiry for twelve months; and even in that period of time, with such insufficient machinery, the investigation would be very far from being satisfactorily completed.

Surely, if this is not a case for parliamentary interference to abolish an understood law, which is wholly disregarded, but which in its effects produces such an extent of injustice, unhappiness, and immorality, amongst parties whose union is looked upon in law as mere concubinage, and whose children are disinherited of their patrimony and good name, there never was any law which needed to be abolished.

I propose, now, in this concluding chapter, to give a few of the opinions of clergymen, ministers of the gospel, registrars, and others, which have been sent to me, as indications of the feeling of the people regarding the law. Compelled to be brief, I can only select a few out of a great number.

The following letter from the Rev. F. Close, of Cheltenham, has been received by J. S. Thorburne, Esq., the gentleman prosecuting this investigation there:—

"Cheltenham, Feb. 23, 1847.

"Sir,

"I have no hesitation in offering you any assistance in my power in promoting the alteration of the Law of Marriage in respect to sisters or brothers of deceased husbands and wives. Some years since the extensive evil of the existing law was brought under my notice, and I was led to consider the subject.

"I believe such marriages as you wish to make lawful are already lawful according to the letter and spirit of Holy Scripture, and I hope the civil and ecclesiastical law will speedily be made conformable to the divine.

"Your faithful servant,

"Francis Close."

"J. S. Thorburne, Esq."

The Rev. Thomas Hill, the Archdeacon of Derby, in a letter to James Brotherton, Esq., the gentleman who has been in that district, says:—

"My opinion of the law has long been that it is an impolitic restriction."

The Rev. Charles Pixell, Vicar of Edgbaston, writing to the same gentleman, says:—

"I do not think the law accords with the feelings of the people, as they appear to regard it, as far as I can judge, as an infringement of their natural liberty."

In a letter from Mr. Brotherton about a month ago, from Birmingham, that gentleman writes:—

"I have seen the Rev. Angel James (leading minister of the Independents), the Rev. Thomas Bach, Mr. Kentish (the latter a very influential man among the Unitarians, who are a very

powerful body in Birmingham), Mr. Swan (Baptist Minister), and Dr. Raphall, the Jewish Rabbi, a man of profound learning and of high estimation in the town; the latter gentleman expressed himself very strongly on the absurdity of the law. Mr. Kentish wished me success, and hoped 'we should soon erase from the statute-book one of the most absurd laws ever placed upon it.' All these gentlemen are strongly opposed to the present law. In fact, I have never met with a dissentient voice (save one) in any class of society among whom I have discussed the subject. The leading surgeons and physicians of the town whom I have seen express their entire approbation of the present movement, and hoped (to adopt the language of Dr. Wright) 'that we shall soon expunge this Tom Fool's law from our code.'"

The Rev. Thomas Davies, of Bromsgrove, Baptist Minister, thus writes to the same gentleman:—

"As to the law of 1833, I believe it to be a most unrighteous law, interfering with the rights of man and invading the prerogative of God, and most thankful shall I be when it is repealed."

The Rev. Mr. Moore, the senior Roman Catholic priest of Birmingham, assured Mr. Brotherton that these marriages were only prevented among the lower class of their congregations "by the extreme watchfulness of the clergy;" that the people considered the restriction a great hardship, and "for the most part the priesthood entirely sympathised with their complaints." A couple thus related had applied to Mr. Moore to be married a fortnight previously, and he would willingly have procured them the necessary dispensation from Rome, but that "the state of the

law rendered such a course, for secular purposes, unavailable." He was, "therefore, compelled to refuse to marry them, and very much distressed the parties were."

Dr. Raphall, of Birmingham, the Jewish Rabbi, thus writes to Mr. Brotherton :—

"In reply to your inquiries, I add at foot the particulars of the only instance of marriage with a deceased wife's sister at present in this congregation. At the same time *I beg distinctly to state that, according to the law and practice of the Jews, such a marriage is perfectly valid, since it does not at all come under the prohibition of the Levitical code.*

(Signed) "M. J. RAPHALL."

The Rev. John Sibree, of Coventry, in a letter to Mr. Brotherton, after stating that he knows of several instances of such marriages having been contracted since the late Act, "by persons of the highest standing for religion, morality, and respectability in life," proceeds to say—

"In my opinion the existing law is absurd and injurious, and as far as my observations and inquiries have gone, it is not a law which accords with the feelings of the people, as possessing any moral or religious sanction, or as tending to promote social convenience and order, and is, moreover, an infringement of natural liberty. I shall rejoice to hear of the abolition of the law."

The following is a letter, from a gentleman at Burslem, enclosing information respecting a number of such marriages at Burslem :—

"Burslem, Jan. 29, 1847.

"Sir,—I enclose herewith the names, &c., of several parties between whom marriages have taken place in contravention of Lord Lyndhurst's Act. The seven cases numbered have occurred in this town, or the immediate neighbourhood, and the parties are all well known to me. No. 6 is a lamentable case.

"The opinion I entertain of the law as it stands, formed upon the passing of the Act, and strengthened by the consideration I have given to the matter ever since, is, that it is unwarranted by any scriptural or moral obligation, as well as by sound policy, and that it is a very improper infringement of social rights.

"Its habitual violation by persons in the middle rank of life (of unimpeachable character in other respects), proves it to be repugnant to the common feelings of nature; and unless the Legislature thinks proper to enforce the observance of the law *by declaring such marriages felony in both parties*, the sooner it removes this uneasy yoke from the people's shoulders the better.

"There ought to be no restraint on marriage, except between persons connected *by blood* lineally, or collaterally within the third degree.

"I believe petitions to Parliament may be procured from medical men, Dissenting ministers, and laymen *generally*, for an alteration of the law, but the clergy of the Establishment will probably stand aloof without the sanction of their diocesans.

"It may be proper for me to add, that the law as it stands no way affects me personally, or any of my family connections, and that my sole motive for volunteering this information is a desire to contribute what I am in possession of, towards the abolition of the law in question, from a sense of its injustice and impolicy.

"I am, Sir, your very obedient servant,

"James Brotherton, Esq., &c." "JOHN WARD.

The Superintendent-Registrar of Marriages at Birmingham, writing to Mr. Brotherton, says :—

"The operation of the law is bad, is generally disliked, and is regarded as an infringement of natural liberty, having no moral, religious, or social sanction, inasmuch as it is thought no one is so proper to take care of a sister's children as the sister of their mother."

The Superintendent-Registrar of the Woolstanton and Birmingham Union, in Staffordshire, thus writes respecting the law in answer to another of the gentlemen engaged in this inquiry in that district :—

"I do not think that the statute upon the whole, in this district, has had the effect of materially lessening the number of the marriages contemplated by its provisions. I have observed that members of the Establishment pay more regard to it than others. Dissenters generally look upon it as an infringement of natural liberty, and they do not, I believe, regard it as having any moral or scriptural authority."

The Rev. J. P. Jones, of Alton Vicarage, near Cheadle, Staffordshire, thus writes on the 16th of the present month to Wm. Paterson, Esq., the gentleman conducting the inquiry in that district :—

"As a clergyman, my attention has been frequently called to the state of the law, and I am decidedly of opinion that the present law is unjust, and ought to be repealed, and all marriages with the sisters of wives should be made valid. I have read your pamphlets, which have lately been published, and the case appears to me to be completely made out in

favour of the proposed alteration of the law. If I can be of any assistance in this affair, I shall be happy to petition Parliament. Petitions from individuals do not command much attention, but I would willingly sign a petition, in conjunction with others."

The Rev. Reginald Smith thus writes from Stafford, in Dorset :—

"It is my opinion, as a clergyman, that there is nothing in the Scriptures to condemn marriage with the sister of a deceased wife, and that human governments step beyond their province in imposing restrictions in such matters, which God has not imposed. I would gladly join in a petition to have the law repealed. I know it to be often violated, and to be the occasion of much unhappiness." "Mr. Coleman, of Ventnor, Isle of Wight, one of the best Hebrew scholars we have, and a man of deep learning and piety, takes the same view as to the morality of such marriages."

A clergyman thus writes from Portland :—

"I am fully persuaded that Lev. xviii. 18, demonstrates that a man who marries his late wife's sister has the authority of God's word for so doing. The only passage in the Scriptures which apparently militates with Leviticus xviii. 18, is Lev. xviii. 16; but comparing this letter with Deut. xxv. 5, it in reality more fully demonstrates, and coincides with, Lev. xviii. 18.

The Rev. J. M. Harrington, Rector of Chalbury, Dorset, thus writes his opinion in answer to the inquiry "whether there is any scriptural objection to marriage with a deceased wife's sister." He says :—

"I need perhaps only say in a few words that I can see no scriptural objection whatever; and having put the question to

some of my brethren in the ministry, I find that this is their opinion also."

J. B. Aspinall, Esq., the gentleman who conducted the inquiry in Lancashire and Yorkshire, was informed in Liverpool by a gentleman named Preller, who has married his deceased wife's sister, and who went to Hamburgh to have the marriage ceremony performed by the laws of that country, where such a marriage is legal, "that before going to Hamburgh, he called upon the late Dr. Tattershall (whose death has lately called forth such universal demonstrations of respect and admiration), in order to ascertain his opinion, as his friend and pastor, of the step which he was about to take. Dr. Tattershall told him that if the marriage could in any way be performed legally, he saw no possible objections to it, but, on the contrary, it appeared to him the most desirable marriage which he could contract; and for the purpose of facilitating the marriage at Hamburgh, Dr. Tattershall himself drew up for Mr. Preller a statement of the English law upon the subject, and a certificate that the difficulty arising from the law was Mr. Preller's only reason for leaving England to be married in Germany, and he went before the mayor and the Hamburgh Consul to make a regular declaration to that effect. Mr. Preller, also, through Dr. Tattershall, consulted the Rev. Hugh McNeile of Liverpool, and Dr. Byrth, the rector of Wallasey, and they both entertained the same opinion."

The following letter was also addressed to James Brotherton, Esq., whilst engaged in this inquiry :—

"Bilston, Feb. 10.

"Sir,—I have personally known four cases of the kind of marriage you mention, and they were all happy ones, and less productive of filial heartburnings than in cases of a step-mother previously unrelated.

"Where the Levitical law is doubtful, and, if express, still doubtful as binding upon Christians, and where Christianity is silent, a Christian legislature might also hold its peace.

"The prohibitory Act of 5 and 6 William IV. has always appeared to me equally gratuitous on moral or social grounds, and, as such, provocative of the fate of all officious legislation, viz. evasion and popular resentment. Such is the curious idiosyncrasy of the English mind, that the interdiction has probably increased the offence, if offence there be, except the natural reaction of opposition to an oppressive statute. I think I have known one case where the prohibition operated as a main temptation to the marriage which violated it; but of this I am not sure—I rather contend for the natural tendency, notwithstanding.

"I have not met with a case where the law was approved *as a law*, though the abstract inexpediency of such marriages may have been held. For the most part, it has been deemed an unnecessary intrusion into the most private rights of the citizen, without sufficient warrant from divine injunction or human experience.

"I am, sir, your obedient servant,

"J. B. Owen,

"Incumbent of St. Mary's, Bilston."

The following letters were addressed to J. C. Macdonald, Esq., the gentleman conducting the inquiry in the south of England :—

"St. Giles's Rectory, Cranborne, Dorset,

"Feb. 24, 1837.

"Sir,—My attention having been called to the subject of a bill which is likely to be introduced into Parliament for legalizing marriages wiih a deceased wife's sister, and also to one of the petitions in favour of such a measure, I cannot but feel

and express my own humble opinion, that it would be for the interests of society, and the happiness of many a family, if the present law were to be reversed.

"It is clear that such a marriage falls within one of the degrees of affinity prohibited, and, if solemnized, would not be valid: but it is not so clear that it would be contrary to Scripture, as no such prohibtion is found in the degrees under the Levitical Law, though alleged to be deducible by fair inference from it.

"Against this inference we may set Leviticus xviii. 18, which may warrant an opposite conclusion. The passage to my mind is more forcible in the Septuagint than in our translation. At all events, it is a doubtful point. And as the prohibition does not rest upon sufficient Scripture authority, and in spite of it many such marriages are known to be contracted, it seems most desirable that the existing law should be reconsidered by the Legislature, with a view to its repeal.

"I remain, Sir, yours faithfully,

"Robert Moore."

"Sir,—When, about twenty-four years since, I was curate in a large agricultural parish, there came to my knowledge the fact of several persons who, having lost their wives, subsequently married the wife's sister.

"This led me to consider the subject in all its bearings, theological, moral, and social, and I must confess that, after the gravest consideration, there appeared to me no satisfactory reason for such marriages being regarded as illegal, and consequently the children born to be deemed illegitimate. On reference to Scripture, I discovered no passage throughout the whole Bible condemning it; the only one adduced (Leviticus xviii. 18) always appeared to me to have no reference to the question whatever.

"As to moral and social evils, so far from regarding the practice as involving one or the other, I have been led to think that, as in such cases there is no relationship in blood, there can be no moral turpitude; and that a man, being left a widower, with a young family requiring female management, he could nowhere expect such affectionate attentions to be paid as by the maternal aunt; nor would any stepmother be so likely to discharge her duties with disinterested affection as the one who stands in this relationship to the children of her deceased sister.

"I also found that, in the cases referred to, the parties desiring to be married were compelled to go from their own neighbourhood, where the discovery of the intended illegal marriage would be certain, and were married either by license or by banns of marriage (for there were then no registrars' offices for facilitating clandestine marriages), under some circumstances of deception, so that they went to the church to be united, with 'a lie in their right hand.'

"Thus, when favoured with a call to ask me to sign a petition to Parliament for the removal of the Act prohibiting the marriage of a man with the sister of his deceased wife, I could not hesitate complying with the request, and the less so, as in no instance had I ever discovered any evil consequence flowing from such a marriage, excepting that which an oppressive law might in some cases bring to bear against the children of such marriage.

"If the opinion expressed in this note be deemed of the slightest value, you have my full permission to use it as you please.

"I am, Sir,

"Your obedient servant,

"John Hatchard.

"St. Andrew's Vicarage, Plymouth, Feb. 7, 1847.

"To John C. Macdonald, Esq."

Here, then, are the voluntary opinions of ministers of the Gospel, of all persuasions, against the existing prohibitions. Clergymen, Priests, Dissenting minis-

ters, and Jewish Rabbis, all join in condemning the present law, as leading to unhappiness, injustice, and immorality. That it does so is a fact proved by *sixteen hundred verified cases,* ascertained in a few months, by most inadequate means of inquiry. At the ordinary average of five a family, these *ascertained* cases show 8000 persons to be aggrieved by the law. But, take the probable existing number of these marriages at a very low calculation—at 6000—and you then have 30,000 persons labouring under injustice because of this prohibition, without a shadow of reason or argument to support it. I will undertake to say that there is not on record any instance of Parliament refusing to interfere in such a case.

That, now, is the next step to be taken; and I confidently expect that not even the present pressure of subjects on parliamentary attention will prevent an English Parliament from doing justice to thousands of English people, when it has shown to it, and proved to it, that *justice* ought to be granted.

APPENDIX.

No. I.

Statute 32 *Henry VIII. c.* 38.

Whereas heretofore the usurped power of the Bishop of Rome hath always intangled and troubled the meer jurisdiction and regal power of this realm of England, and also unquieted much the subjects of the same, by his usurped power in them, as by making that unlawful which by God's Word is lawful, both in Marriages and other things, as hereafter shall appear more at length, and till now of late in our sovereign Lord's time, which is otherwise by learning taught than his predecessors in times past long time have been, have so continued the same, whereof yet some sparks be left, which hereafter might kindle a greater fire, and so remaining, his power not to seem utterly extinct:

II. Therefore it is thought most convenient to the King's Highness, his Lords spiritual and temporal, with the Commons of this realm, assembled in this present Parliament, That two things specially for this time be with diligence provided for, whereby many inconveniences have ensued, and many more else might ensue and follow; as where heretofore divers and many persons after long continuance together in matrimony, without any allegation of either of the parties, or any

other at their Marriage, why the same matrimony should not be good, just and lawful, and after the same matrimony solemnized and consummate by carnal knowledge, and also sometime fruit of children ensued of the same Marriage, have nevertheless, by an unjust law of the Bishop of Rome, which is, That upon a pretence of a former contract made, and not consummate by carnal copulation (for proof whereof two witnesses by that law were only required) been divorced and separate, contrary to God's law, and so the true matrimony, both solemnized in the face of the Church, and consummate with bodily knowledge, and confirmed also with the fruit of children had between them, clearly frustrate and dissolved: Further also, *by reason of other prohibitions than God's law admitteth, for their lucre by that Court invented, the dispensations whereof they always reserved to themselves, as in kindred or affinity between cousin-germanes, and so to fourth and fourth degree, carnal knowledge of any of the same kin, or affinity before in such outward degrees, which else were lawful, and be not prohibited by God's law, and all because they would get money by it, and keep a reputation to their usurped jurisdiction, whereby not only much discord between lawful married persons hath (contrary to God's ordinance) arisen, much debate and suit at the law, with wrongful vexation, and great damage of the innocent party hath been procured, and many just Marriages brought in doubt and danger of undoing, and also many times undone, and lawful heirs disherited*, whereof there had never else, but for his vain glorious usurpation, been moved any such question, since freedom in them was given us by God's Law, which ought to be most sure and certain; but that notwithstanding, Marriages have been brought into such incertainty thereby, that no Marriage could be so surely knit and bounden, but it should lie in either of the parties power and arbiter, casting away the fear of God, by means and compasses to prove a pre-contract, *a kindred and allianee*, or a carnal

knowledge, to defeat the same, and so under the pretence of these allegations afore rehearsed, to live all the days of their lives in detestable adultery, to the utter destruction of their own souls, and the provocation of the terrible wrath of God upon the places where such abominations were used and suffered: *Be it therefore enacted* by the King our Sovereign Lord, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by authority of the same, that from the first day of the month of July next coming, in the year of our Lord God 1540, *all and every such Marriage as within this Church of England shall be contracted between lawful persons (as by this Act we declare all persons to be lawful, that be not prohibited by God's Law to marry)*, such Marriages being contract and solemnized in the face of the Church, and consummate with bodily knowledge, or fruit of children or child being had therein between the parties so married, *shall be by authority of this present Parliament aforesaid deemed, judged, and taken to be lawful, good, just, and indissoluble*, notwithstanding any pre-contract or pre-contracts of matrimony, not consummate with bodily knowledge, which either of the parties so married, or both, shall have made with any other person or persons before the time of contracting that Marriage, which is solemnized and consummate, or whereof such fruit is ensued, or may ensue, as afore, and notwithstanding any dispensation, prescription, law, or other thing granted or confirmed by Act, or otherwise; and *that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees; and that no person, of what estate, degree, or condition soever he or she be, shall, after the first day of the said month of July aforesaid, be admitted in any of the Spiritual Courts within this the King's realm, or any his Grace's other lands and dominions, to any process, plea, or allegation contrary to this foresaid Act.*

No. II.

Statute 1 *Mary, Sess.* 2, *c.* 1.

An Act declaring the Queene's Highnesse to have bene borne in a most just and lawfull Matrimonie, and also repealing all Acts of Parliament, and sentences of Divorse had and made to the contrary.

Forasmuch as Trueth (being of her owne nature of a most excellent virtue, efficacie, force, and working) cannot but by processe of time breake out and shew herselfe, howsoever for a while she may by the iniquitie and frailtie of man be suppressed and kept close : and being revealed and manifested, ought to be imbraced, acknowledged, confessed, and professed in all cases and matters whatsoever, and whomsoever they touch or concerne, without respect of persons, but in such cases and matters specially, as whereby the glory and honour of God in heaven (who is the author of trueth itselfe) is to be specially set forth, and whereby also the honour, dignitie, surety, and preservation of the Prince, and ruler under God in earth dependeth, and the welfare, profit, and speciall benefit of the universall people, and body of a Realme is to be continued and maintained.

We, your Highnesse most loving, faithfull, and obedient Subjects, understanding *the very trueth* of the state of Matrimonie betweene the two most excellent princes of most worthy memory King *Henry* the eight and Queene *Katherine, his loving, godly, and lawfull wife, your highnesse lawfull father and mother,* cannot but think our selfe most bounden, both by our duetie of allegiance to your Majestie, and of conscience towards God, to shew unto your highnesse first how that the same Matrimonie being contracted, solemnized,

and consummated, by the agreement and assent of both their most noble parents, by the counsell and advise of the most wise and gravest men of both their Realmes, by the deliberate and mature consideration and consent of the best and most notable men in learning in those dayes of Christendome, did even so continue by the space of twentie yeeres and more betweene them, to the pleasure of Almighty God, and satisfaction of the world, the joy and comfort of all the Subjects of this Realme, and to their owne repose and good contentment, God giving for a sure token and testimonie of his good acceptation of the same, not onely godly fruit, your highnesse most noble person (whom we beseech the Almighty and ever-living God, long to prosper and preserve here amongst us) and other issue also, whom it hath pleased God to take out of this transitorie life, unto his eternall glory, but also sending us a happy, flourishing, and most prosperous common wealth in all things : and then afterward, how that the malitious and perverse affections of some (a very few persons) envying the great felicitie, wherein by the goodnesse of God your said most noble father and mother, and all their good Subjects lived and continued in many yeres, did for their owne singular glory, and vaine reputation, conceive sundry subtil and disloyall practises, for the interruption and breach *of the said most lawfull and godly concord.* And travelling to put the same in use, devised first to insinuate a scruple into the King your father's conscience, of an unlawfull marriage *betweene him and his most lawfull wife the Queene, your highnesse mother, pretending for the ground thereof, that the same was against the Word of God,* and thereupon ceased not to perswade continually unto the said King your father, that he could not without danger of the losse of his soule, continue with his *said most lawfull wife,* but must be separated and divorsed from her. And to this intent caused the seales, as well of certaine Universities in Italy and France to be gotten (as it were for a testimony) *by the corruption with*

money of a few light persons, scholars of the same Universities, as also the seales *of the Universities of this Realme to bee obtained by great travell, sinister working, secret threatnings, and intreatings of some men of authoritie,* specially sent at that time thither for the same purposes, and how that finally *Thomas Cranmer,* then newly made Archbishop of Canterburie, *most ungodly, and against all Lawes, equitie, and conscience, prosecuting the said wicked devise of divorse, and separation of the said King your father, and Queene your mother,* called before him *ex officio,* the hearing of the said matter of marriage, and taking his foundation partly upon his owne unadvised judgment of the Scripture, joyning therewith the pretended testimonies of the said Universities, and partly upon bare and most untrue conjectures, gathered and admitted by him upon matters of no strength or effect, but onely by supposal, and without admitting or hearing any thing that could be said by the Queene your mother, or by any other on her behalfe, in the absence of the said late Queene your mother, proceeded, pronounced, discerned, declared, and gave sentence, the same most lawfull and undoubted matrimonie *to bee nought, and to be contracted against God's Law,* and of no value, but lacking the strength of the Law. And the said most noble King your father, and the said noble Queene your mother, so married together, did separate and divorse, and the same your most noble father King *Henry* the eighth, and the said noble Queene your mother, from the bands of the same most lawfull matrimonie, did pronounce and declare by the same his unlawful sentence, to be free, discharged, and set at libertie. Which sentence and judgment so given by unlawfull and corrupt means and wayes, by the said Archbishop of Canterburie, *was afterwards upon certaine affections ratified and confirmed by two severall Acts, the one made in the 25th yeere of the reigne of the said King your highnesse father, and intituled, an Act declaring the establishment of the succession of the King's most royall Majestie of the Imperial Crowne of this Realme. The other Act of Parliament made in the 28th yeere* of the reigne of the said King your highnesse father, intituled, an Act for the establishment of the succession of the Imperial Crowne of the Realme. *In which said two Acts was contained the illegitimations of your most noble person, which your said most noble* person being borne in so solemne a marriage, so openly approved in the world, and with so good faith both first contracted, and also by so many yeeres continued betweene your most noble parents, *and the same marriage in very deed not being prohibited by the Law of God,* could not by any reason or equitie in this case be so spotted. And now we your highnesse said most loving, faithfull, and obedient Subjects, of a godly heart and true meaning, freely and frankly, without feare, fansie, or any other corrupt motion or sensuall affection, considering that this foresaid marriage *had its beginning of God, and by him was continued, and therefore was ever and is to be taken for a most true, just, lawfull, and to all respects, a sincere and perfect marriage,* nor could, nor ought, by any man's power, authoritie, or jurisdiction, be dissolved, broken, or separated (for whom God joyneth no man can nor ought to put asunder), and considering, also, how, during the same marriage in godly concord, the Realme in all degrees flourished to the glory of God, the honour of the prince, and the great reputation of the subjects of the same, and, on the other side, understanding manifestly that the ground of the said devise and practise for the divorse proceeded first of malice and vaine glory, and after was prosecuted and followed of fond affection and sensual fantasie, and finally executed and put in effect by corruption, ignorance, and flattery; and feeling, to our great sorrow, damage, and regret, how shamefull ignominies, rebukes, slanders, contempts, yea, what death, pestilence, warres, disobediencies, rebellions, insurrections, and divers other great and grievous plagues, God of his

Justice hath sent upon us, ever since this said ungodly purpose was first begun and practised, but also seeing evidently before our eyes that unlesse so great an injustice as this hath bin, and yet continueth, be redubbed, and that the said false and wrongfull processe, judgement, and sentence, with their dependences, be repealed and revoked, nothing is lesse to be doubted, than that greater plagues and strokes are like to increase and continue daily more and more within this Realme, *do beseech your most excellent Majestie*, as well in respect of your own honour, dignitie, and just title, as for truth's sake, wherewith (we doubt not) but your highnesse also will be specially moved in conscience, and also for the entire love, favour, and affection which your Majestie beareth to the Commonwealth of this your Realme, and *for the good, peace, unitie, and rest, of us your most bounden Subjects, and our* posteritie, that it may be enacted by your highnesse, with the consent of the Lords Spirituall and Temporall, and the Commons in this present Parliament assembled. And be it enacted by the authoritie of this present Parliament, *That all and every decree, sentence, and Judgement of divorse, and separation betweene the said King your father*, and the said late Queene your mother, and all the processe commensed, followed, given, made or promulged by the said Thomas Cranmer, then Archbishop of Canterburie, or by any person or persons whatsoever, *whereby the same most just, pure, and lawfull marriage betwixt the said late King your father, and the said late Queene your mother, was or is pronounced, or in any wise declared to be unlawfull or unjust, or against the Law of God*, be, and shall be from the beginning, and from henceforth, of no force, validitie, or effect, but be utterly nought, void, frustrat, and adnihilat to all intents, constructions, and purposes, as if the same had never bene given or pronounced.

And be it also enacted by the authority aforesaid, that as well the said Act of Parliament, intituled, An Act declaring

the establishment of the succession of the King's most royall, Majestie of the Imperiall Crowne of this Realme, made in the *25th yeere of the reigne of the King your father be repealed, and be void and of none effect*, as also *all and every* such *clauses, articles, branches, and matters conteined and expressed in the foresaid Act of Parliament, made in the said 28th yeere of the reigne of the said late King your father*, or in any other Act or Acts of Parliament, as whereby your highnesse is named or declared to be illegitimat, or the *said marriage* betweene the said King your father, and the said Queene your mother, *is declared to be against the Word of God*, or by any meanes unlawfull, *shall bee, and be repealed*, and bee voyd and of no force nor effect, *to all intents, constructions, and purposes, as if the same sentence or Acts of Parliament had never bin had nor made.* And that the said marriage had and solemnized betwixt your said most noble father King *Henry*, and your said most noble mother Queene *Katherine*, shall be diffinitively, *clearly, and absolutely declared, deemed, and adjuged, to be and stand with God's Law and his most holy word, and to bee accepted, reputed, and taken of good effect and validitie, to all intents and purposes.*

No. III.

An Act to render certain Marriages valid, and to alter the Law with respect to voidable Marriages. 5 & 6 *William IV. c.* 54. (1835 *August*).

Whereas Marriages between persons *within the Prohibited Degrees* are voidable only by sentence of the Ecclesiastical Court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of Marriages between persons within the Prohibited Degrees of Affinity should remain unsettled during so long a period, and it is fitting that all Marriages which

may hereafter be celebrated between persons within the Prohibited Degrees of Consanguinity or Affinity should be *ipso facto* void, and not merely voidable: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all Marriages which shall have been celebrated before the passing of this Act between persons being *within the Prohibited Degrees of Affinity* shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this Act: provided that nothing hereinbefore enacted shall affect Marriages between persons being within the Prohibited Degrees of Consanguinity.

And be it further enacted, That all Marriages which shall hereafter be celebrated between persons *within the Prohibited Degrees of Consanguinity or Affinity* shall be absolutely null and void to all intents and purposes whatsoever.

Provided always, and be it further enacted, that nothing in this Act shall be construed to extend to that part of the United Kingdom called Scotland.

And be it enacted, that this Act may be altered or repealed by any Act or Acts to be passed in this present session of Parliament.

THE END.

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