any other person. Where the Court has power to vest the property it has power to appoint a person to convey it.

The lots being numerous, the parties under disabilities being numerous, two being married women, and two being infants, it would be a great convenience, and save expense, if the Court would appoint Mr. Wainwright, the Plaintiff's solicitor, to convey rather than vest the estates in him. Among the possible inconveniences to arise from vesting the estates in him would be this, that Mr. Wainwright might die before he had conveyed all the property, and the estates be vested in an infant heir to him.

[480] His Honour said he thought that such an order could be made, and he would make the order as asked.

The order upon the petition, after setting forth the evidence, proceeded thus :—

"And it appearing by the proceedings in this cause that the Defendant, Daniel Gill, is seised of one-sixth part of the lands in the said Master's report, dated the 30th day of June 1856, mentioned, being the lands directed to be sold by the said order, dated the 6th day of July 1852, and that the Defendant, Benjamin Gill, is seised of one other sixth part of the said lands, and that the Defendant, Sarah Harrison, and the Defendant, Joseph Harrison, are seised of one other sixth part of the said lands, and that the Defendant Anne, otherwise Nancy Hampton, and the Defendant, Joseph Gill Hampton, are seised of one other sixth part of the said land, and that the Defendant, Mary Weaver, and the Defendant, Phœbe Baker, are seised of one other sixth part of the said lands, and that the Defendant, Phœbe Whitehouse, and the Defendant, Sarah Whitehouse, are seised of the remaining sixth part of the said lands, and the Judge to whose Court this cause is attached being of opinion that the said Defendants, Daniel Gill, Benjamin Gill, Sarah Harrison, Joseph Harrison, Anne, otherwise Nancy Hampton, Joseph Gill Hampton, the infant, Mary Weaver, and Phœbe Baker, the infant, Phœbe Whitehouse and Sarah Whitehouse, are to be deemed to be so seised, upon a trust within the meaning of the Trustee Act, 1850. This Court doth order that Henry Money Wainwright, of Dudley, in the county of Worcester, a gentleman, be appointed to convey the lands comprised in the said Master's report of the 30th day of June 1856 for the estates of the several Defendants, Daniel Gill, Benjamin Gill, Sarah Harrison, Joseph Harrison, Anne, otherwise Nancy Hampton, Joseph Gill Hampton, Mary Weaver, Phœbe Baker, the infant, Phœbe Whitehouse and Sarah Whitehouse."

[481] BROOK *v.* BROOK. Before Vice-Chancellor Stuart and Mr. Justice Cresswell. *Nov.* 20, 21, 24, 25, *Dec.* 4, 1857 ; *April* 17, 1858.

[Affirmed, 9 H. L. C. 193 ; 11 E. R. 703 (with note, to which add *In re De Wilton* [1900], 2 Ch. 488 ; *In re Bozzelli* [1902], 1 Ch. 753.]

The law of the country in which a marriage is solemnised cannot give validity to a marriage prohibited by the laws of the country of the domicile and allegiance of the contracting parties.

Therefore, a marriage celebrated during a temporary residence in Denmark between an English widower and the sister of his deceased wife, being null and void by the stat. 5 & 6 Wm. 4, is not valid, although by the law of Denmark marriages are permitted between persons so related by affinity.

The principle of *lex loci contractûs* examined as to various qualifications and exceptions.

The question raised in this suit is the validity of a marriage celebrated in 1850, according to the rites of the Lutheran church, near Altona, in the Duchy of Holstein, in the kingdom of Denmark, between Mr. William Leigh Brook, since deceased, and Miss Emily Armitage, the sister of his deceased wife, both British subjects, domiciled in England.

On the 20th of May 1840, at Huddersfield, Mr. Wm. Leigh Brook was married according to the rites and ceremonies of the Church of England to Miss Charlotte

Armitage, who died in the year 1847; by whom he had issue two children, namely, the Plaintiff, Clara Jane Brook, and the Defendant, James William Brook, who are both living.

On the 7th of June 1850 Wm. Leigh Brook was married at the Lutheran church at Wandsbeck, in the Duchy of Holstein, in the kingdom of Denmark, to Miss Emily Armitage, the sister of his deceased wife. Both the parties were British subjects domiciled in England, and had no permanent residence in the country where they were married. There were issue of Mr. Brook's second marriage three children, viz., Charles Armitage Brook, since deceased, Charlotte Amelia Brook and Sarah Helen Brook.

On the 17th of September 1855 the second wife died of cholera at Frankfort, and on the 19th of the same month Mr. Brook himself died of the same disease at **[482]** Cologne; but having previously to his death made his will, which was as follows:—

"I hereby revoke all former wills and testaments that I may have heretofore made. I give and bequeath to my eldest son, James William Brook, all that mansion-house, called Meltham Hall, with gardener's house, ground and farmers' cottages and land adjacent to it; not to include my mill property of any description. I give and bequeath to my said son, James William Brook, to my daughter, Clara Jane Brook, to my reputed son, Charles Armitage Brook, commonly so called, to my reputed daughter, Charlotte Amelia Brook, commonly so called, and to my reputed daughter, Sarah Helen Brook, commonly so called, the rest of my property, share and share alike, except that I give to my two sons aforesaid a double portion; (that is to say) I give to my two sons two-sevenths each, and to my three daughters, one-seventh each of the property hereby disposed of; the property of Meltham Hall being already appropriated to my eldest son, with reversion to my second and reputed son, Charles Armitage Brook, commonly so called, in event of my said eldest son, James William Brook, dying during his minority, which I hereby will and make; and further, in event of both my sons aforesaid dying before they attain the age of 21 years, I then will that the property of Meltham Hall aforesaid be realized at the discretion of my trustees hereinafter named, and the proceeds divided into portions to be equally divided between the surviving sisters and reputed sisters who shall attain the age of 21 years. I wish to be paid to the Huddersfield Infirmary, free of legacy duty, the sum of £100. In order to carry into effect the provisions of this my last will and testament, I appoint hereby my brother, Charles Brook the younger, John Armitage and Edward Armitage, my brothers-in-law, sole trustees, with full power to realize and to act with the property I leave in all respects whatsoever as they shall think fit, in my said five children's and reputed children's interest."

[483] On the 26th of December 1855 letters of administration with the will annexed were granted out of the Exchequer and Prerogative Court at York to Charles Brook the younger, John Armitage and Edward Armitage, being the trustees named in the will.

On the 8th of March 1856 a bill was filed for the purpose of establishing the will and administering the trusts, under the direction of the Court.

On the 31st of the same month Charles Armitage Brook, the son of the second marriage, died, on which the suit abated. A bill of revivor and supplement was shortly afterwards filed by his sisters and half-sister against the eldest son, to which the Attorney-General was made a Defendant. The bill charged that Charles Armitage Brook, the deceased infant, was well entitled to the real and personal estate given to him by the testator's will, and that all his real estate descended to his brother, the Defendant, as his heir at law, and the personal estate to the Defendant and the Plaintiffs as his next of kin.

The bill averred that the title of the Defendant, William James Brook, to the real and personal estate of the deceased infant was denied by the Attorney-General, on the part of the Crown, who alleged that the marriage of the testator with his deceased wife's sister, Emily Armitage, was not a valid marriage, and claimed the real and personal estate of the said Charles Armitage Brook accordingly.

The bill charged that the marriage was a good and valid marriage; and even if it was not valid according to the law of England, yet that according to the laws of Denmark it was good and valid.

Under these circumstances a question was also raised as to the amount of legacy duty and succession duty.

The Chief Clerk by his certificate, dated the 17th of June 1857, approved by the Vice-Chancellor on the 22d, certified to the facts as stated above.

[484] The certificate also found that, according to the laws of Denmark, the marriage was good and the children were legitimate.

The substance of the following affidavit was used before the Chief Clerk :—

"I, Adolph Ulrick Hausen, of Wandsbeck, in the Duchy of Holstein, in the kingdom of Denmark, Lutheran pastor, make oath, and say as follows :—

"1. I am now and was during and prior to the year 1850 the pastor or minister of the Lutheran church at Wandsbeck aforesaid.

"2. On the 7th day of June, in the year 1850, I performed the ceremony of marriage between William Leigh Brook, late of Meltham Hall, near Huddersfield, in the county of York in England, and Emily Armitage, late of Milnsbridge House, near Huddersfield aforesaid, single woman. The said ceremony was duly performed and solemnized according to the rites and ceremonies of the Lutheran church, and according to the laws of the said duchy.

"3. Previously to my performing and celebrating the said marriage, I caused to be produced to me the necessary certificates and vouchers required by the law of the said duchy, and also investigated strictly and satisfied myself that there was no legal obstacle to the said marriage, and all the necessary provisions and requisitions were duly fulfilled and performed on the occasion of such marriage, in accordance with the laws of the said duchy.

"4. In my capacity as such minister as aforesaid, I have had occasion to study and I have studied, and am well acquainted with the laws relating to marriage in force in the said duchy. I say that the said marriage was legal and valid according to the laws of the said duchy, notwithstanding the said Emily Armitage being the sister of the previously deceased wife of the said William Leigh Brook, and notwithstanding that in England a man is not permitted to marry the sister of his deceased wife, and the **[485]** children born of such a marriage would be recognised as legitimate, in and by the Courts of law of the said Duchy of Holstein."

Sir F. Kelly, Mr. Malins and Mr. George Lake Russell, for the Plaintiffs, the three daughters of the testator, William Leigh Brook.

The religious and social considerations involved in and connected with the policy of such marriages as that in question are very important. There are persons who hold that they are expressly or inferentially warranted by Scripture, and that they tend to a great amount of social good; while others believe that they are contrary to the divine law, and inconsistent with Christianity. The arguments applicable to that part of the question, however important, need not be referred to on the present occasion.

The question involved in the present inquiry ought to be strictly confined to ascertain the true construction of the Act 5 & 6 Wm. 4, c. 54, on which the decision in this case must depend.

It is a general rule in the laws of all countries that *leges extra territoriam non obligant*. The question is whether the Act rendered such marriages unlawful only when solemnized in England, or whether it rendered them unlawful also when solemnized in the colonies, or even in foreign countries.

Wherever a statute for the first time prohibits or makes any act unlawful, such statute cannot, without express words or necessary intendment to that effect, have operation out of Great Britain. This is a rule well recognised in the construction of statutes.

The *Sussex Peerage case* (11 Cl. & Fin. 85) will occur to the Court in which it was held that the enactments of the Royal Marriage Act were personal, following the individual and **[486]** binding him everywhere, and it may possibly be inferred that the Act of William 4 has a similar construction; but the effect attributed to the Royal Marriage Act arose partly from the policy of that Act, but more especially from the construction to be put on the peculiar wording of that Act. If it had been intended that the Act 5 & 6 Wm. 4, c. 54, should also be personal and attach to the persons of all Englishmen wheresoever they might solemnize marriage, whether in or

out of England, why did not the Legislature, with the precedent of the Royal Marriage Act before it, use similar language? The difference between the two enactments is remarkable.(1)

[487] It is conceded on the part of the Plaintiffs that an Act of Parliament may be so expressed as to operate on all Englishmen everywhere; but, unless it be so expressed, its operation must be confined within the realm of England. The distinction between the language of the two Acts formed the ground of the judgment of the Judges in the *Sussex Peerage case*, as delivered by Lord Chief Justice Tindal. (11 Cl. & F. 85, 102.) The question here raised was adverted to in the following terms by Mr. Justice Erle, who was counsel for the claimant in that case:—

"And it is yet doubtful whether the 5th & 6th Wm. 4, c. 54, prohibiting all marriages of persons within certain degrees of relationship, and declaring such marriages absolutely null and void, would apply to such marriages contracted by British subjects out of the realm of England." (11 Cl. & F. 137.)

On which Lord Lyndhurst, who was then Lord Chancellor, remarked:—

"With respect to the statute just mentioned, I wish to observe that I am supposed to have brought in a bill to prohibit a man from marrying his former wife's sister. I did no such thing. The statute simply says that such a marriage shall be void, not voidable. The statute was passed merely for the purpose of getting rid of the doubt which might for years leave two parties and their children in the belief that a valid marriage had taken place, subject, **[488]** in fact, to have that marriage declared void by a suit instituted just before the death of one of the parties." (11 Cl. & F. 137.)

What Lord Lyndhurst then said clearly shewed that he intended to leave the law applicable to such a case as the present as he found it.

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(1) The words of the 12 Geo. 3, c. 11 (the Royal Marriage Act), are as follows:—

I. "That no descendant of the body of His late Majesty, King George the Second, male or female (other than the issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs or successors, signified under the Great Seal, and declared in Council (which consent to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent, first had and obtained, shall be null and void to all intents and purposes whatsoever."

And the Act contains a third section, imposing penalties on persons assisting at any such marriage without such consent.

By the 5 & 6 Wm. 4, c. 54 (1835), it is recited as follows:—

"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 marriage 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;" and it is enacted as follows:—

I. "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.

II. "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."

III. "Provided always that nothing in this Act shall be construed to extend to that part of the United Kingdoms called Scotland."

Then would such a marriage as that in question have been held before the Act of William 4, to have been invalid in England, if celebrated abroad? Clearly not.

There is no instance of any marriage which had been solemnized abroad, and which was valid according to the law of the place in which it was solemnized, having been declared to be invalid by any Court in this country. This marriage being valid by the law of Holstein would, without doubt, have been upheld in this country before the Act of William 4; but that Act contained nothing to invalidate such a marriage, and it was not the intention of the framer that it should do so. In *Butler* v. *Freeman* (Amb. 301), which was before Lord Hardwicke in 1756, the Plaintiff, at the age of 18, had been seduced away from a clergyman in Buckinghamshire, with whom he had been placed for education by one Medwin, a shopkeeper in Marlow, and Mary Dolben, his wife's sister, a woman without any fortune, and they all went to Antwerp, where the Plaintiff and Mary Dolben were married according to the rites and ceremonies of the Church of England. Lord Hardwicke said, "As to such marriages (I was going to call it robbery) there is a door open in the statute (*i.e.*, the Marriage Act of George 2), as to marriages beyond seas and in Scotland," and further on in his judgment Lord Hardwicke admitted the principle now contended for on behalf of the Plaintiffs, for he said the marriage of the Plaintiff would be good in England if it were good in the country where it was celebrated. So also in *Compton* v. **[489]** *Bearcroft* (Buller's Nisi Prius, 114) the Appellant and Respondent were both English subjects, and the Appellant, being under age, ran away without the consent of her guardian, and was married in Scotland. On a suit brought in the Spiritual Court to annul the marriage it was held that the marriage was good.

It is decided by authority that a foreign marriage, valid according to the law of the place where celebrated, would be good in England. This principle is expressly recognised by Lord Stowell in *Ruding* v. *Smith* (2 Hagg. Consist. Rep. 371). In the recent case of *Fenton* v. *Livingstone* (18 Fraser; S. C. Court of Session Case (1855) 865), before the Scotch Courts, the marriage of a man with his deceased wife's sister was upheld, and if this Court should now come to a contrary decision the anomaly would exist of such a marriage being lawful in Scotland, but unlawful in England or Ireland.

In a case of this kind, where a statute makes an act unlawful, it is necessary that the provisions of the enactment should be express in order that they should attach to British subjects elsewhere than in England, Wales or Ireland. In the *Sussex Peerage case* Lord Brougham held that the marriage of the Duke of Sussex was void, expressly because he thought the words of the Royal Marriage Act, 12 Geo. 3, c. 11, were clear, and he added that he thought it was necessary they should be clear in order that they might accomplish the object of that Act. "I say this," said his Lordship in that case (11 Cl. & F. 151), "because it is not sufficient ground to hold that the purpose is clear unless the words are sufficient to accomplish that purpose; otherwise the Act might have been nugatory. It was so in the case of the General Marriage Act (26 Geo. 2, c. 33). It was quite clear that that Act was intended to prevent minors from marrying without consent, unless with the publication of banns, and yet, notwithstanding that, by going to Scot-**[490]**-land, a very short journey, the parties intended to be affected by the Act—namely, wealthy persons—could easily accomplish the purpose and defeat the Act. My opinion is that, if the Act had used the same phraseology, and had rendered the parties incapable of contracting matrimony, we should never have heard of *Crompton* v. *Bearcroft* (Buller's Nisi Prius, 114) and *Ilderton* v. *Ilderton* (2 H. Bl. 145)."

If, then, the language of the Royal Marriage Act had not been larger and more comprehensive than that of the Marriage Act, 26 Geo. 2, c. 33, the former Act would, in Lord Brougham's opinion, have failed of its effect in the *Sussex Peerage case.*

It is no answer to the argument on behalf of the Plaintiffs to say that if this marriage were upheld by declaring the children legitimate, the Act of William 4 would be easily evaded; because the Marriage Act of George 2 had been evaded as easily by parties going to Scotland.

Even assuming that it was the intention of the Legislature to prohibit marriages of this description by Englishmen, wheresoever solemnized, they have endeavoured to accomplish their purpose by language so imperfect that opinions have been given

by most eminent and experienced counsel that the Act does not apply out of England or Ireland, and that when a widower goes abroad, as the testator, Mr. Brook, has done, and marries a deceased wife's sister in a place where such marriage by the *lex loci* is good, such marriage must be upheld in this country, and the legitimacy of the issue cannot for a moment be questioned.

In considering this case it should also be borne in mind that it is one of affinity, and not of consanguinity, between which jurists have always drawn a marked distinction.

Mr. Justice Story, in his Conflict of Laws (s. 115, p. 206), says:—**[491]** "The prohibition has also been extended in England to the marriages between a man and the sister of his former deceased wife, but upon grounds 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 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 best construction of the Act is that it does not create any personal disability on the part of Englishmen, wheresoever they may be abroad, to contract such marriages as that the validity of which is now disputed, but that its operation is confined strictly to marriages celebrated in England, Wales or Ireland.

In the consideration of the question now before the Court it should be remembered that the Plaintiffs do not ask the Court to recognise the marriage of Mr. Brook with his second wife as between the parties to that marriage, and that the present is not a case for the restitution of conjugal rights; but that it is a case in which the status and legitimacy of the children of that marriage are called in question after the death of their parents.

But for the Act of William 4 the question in this case could not have arisen. Even if the marriage had taken place in England the question after the death of the parents could not have been raised before the passing of that Act: *Scrimshire* v. *Scrimshire* (2 Hagg. Consist. R. 395); *Dalrymple* v. *Dalrymple* (*Ib.* 54); and other cases support the proposition laid down by Lord Stowell in *Ruding* v. *Smith* (*Ib.* 371), in the following terms:—"It is true, indeed, that English deci-**[492]**-sions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else."

There is no case in which a marriage which was good by the law of the country in which it was celebrated has been held by the Courts in England to be invalid.

If then it can be shewn, as it has been in this case by the certificate of the Chief Clerk, that the marriage was good where it was had, that is enough.

The reason of that rule has been very well enunciated by the late Mr. Justice Story (Conflict of Laws, s. 121), as follows:—"The ground, however, upon which the general rule of the validity of marriages according to the *lex loci contractûs* is maintained, is easily vindicated. It cannot be better expressed than in the language of Sir Edward Simpson, already cited. All civilised nations allow marriage contracts. They are *juris gentium*, and the subjects of all nations are equally concerned in them. Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, succession and other rights, if the respective laws of different countries are only to be observed as to marriages contracted by the subject of these countries abroad; and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country where they are celebrated. By observing this rule few, if any, inconveniences can arise; by disregarding it infinite mischief must ensue. Suppose, for instance, a marriage celebrated in France according to the law of that country should be held void in England, what would be the consequences? Each party might marry anew in the other country. In one country the issue would be deemed legitimate, in the other illegitimate. The French wife would in France be held the **[493]** only wife, and entitled as such to all the rights of property appertaining to that relation. In England the English wife would hold the

same exclusive rights and character. What, then, would be the confusion in regard to the personal status of the parties, in its own nature transitory, passing alternately from one country to the other? Suppose there should be issue of both marriages, and then all the parties should become domiciled in England or France, what confusion of rights, what embarrassments of personal and conjugal relations must necessarily be created!"

It must be admitted that incest forms an exception to the rule laid down by Lord Stowell in *Ruding* v. *Smith;* but such a marriage as that in question is clearly not considered incestuous by the greater portion of Christendom. In the Papal States a valid dispensation can be, and frequently is, granted, which enables parties to solemnize it, and it cannot be presumed that the Pope would grant a dispensation for the commission of incest.

[MR. JUSTICE CRESSWELL. If these marriages were not voidable before the statute of William 4, on the ground of incest, on what ground were they voidable?]

They were clearly not voidable on the ground of incest; for, as the Act of William 4 rendered valid all marriages of that nature which had been celebrated before the passing of the Act, that Act would have the effect of having rendered valid incestuous marriages, if such marriages had been previously voidable on the ground of incest. If they were before voidable as being incestuous, the Legislature has said that such marriages theretofore celebrated should be valid, and has thereby sanctioned incestuous marriages—which cannot be presumed.

If the Legislature had intended to create a personal incapacity on the part of Englishmen, wheresoever they **[494]** might be, it would have used words large enough for that purpose. On referring to other Acts, which are *in pari materiâ*, different and more comprehensive language is used than that to be found in the 5th & 6th Wm. 4, c. 54. That is the case with the Marriage Act, 25 Hen. 8, c. 22, which in the 4th section enacted, "That no person or persons, subjects or resiants of this realm, or in any of our dominions, of what estate, degree, or dignity soever they be," should hereafter marry within certain degrees of relationship. In two Irish Marriage Acts, the one the 4th Wm. 3, c. 3, and the other the 2d Anne, c. 6, as well as in the Royal Marriage Act, 12 Geo. 3, c. 11, equally comprehensive language is used. Can it be said that the absence of language equally comprehensive from the statute of William 4 was unintentional, when it is found that wherever the Legislature wished to give effect to an intention personally to bind its subjects everywhere it could find language to express such intention?

Mr. Elmsley, Mr. Cleasby (of the Common Law Bar) and Mr. Pemberton, for the Defendants, Charles Brook the younger, John Armitage and Edward Armitage, the trustees under the will of the testator, and James William Brook, the eldest son and heir at law, in support of the Plaintiff's case.

The rule laid down by Lord Stowell, in *Dalrymple* v. *Dalrymple* (2 Hagg. Consist. Rep. 54), that in questions of the validity or invalidity of marriages the *lex loci contractûs* must prevail, is the rule which must prevail in this Court, unless the 5th & 6th Wm. 4, c. 54, has changed that rule; but it has been already shewn that no such effect can be attributed to that Act.

But whatever and however comprehensive an effect is attributed to that Act as an inference, another principle of law applies to it, countervailing the effect which might possibly otherwise be attributable to the enactment. It is **[495]** this, that by the comity of nations this Court is bound to respect the law of a foreign State; and where the law of that State gives validity to a marriage contracted within its limits between subjects of this country whilst sojourning there, then the law of this country must recognise such a marriage when the contracting parties shall have come back to this country. (See Huber, "Prælectiones Juris Civilis," "De Conflictu Legum," b. i., tit. 3, ss. 3, 8, *et al.* (ed. 1766).)

But the rights of the Legislature are ordinarily limited to its own subjects only whilst they are resident within its local jurisdiction. Thus, in *Jeffreys* v. *Boosey* (4 Ho. Lds. Cases, 815, 926, 939), on a question of copyright involving international rights, Mr. Baron Parke said, "It is clear that the Legislature has no power over any persons except its own subjects, that is, persons natural-born subjects or resident, or whilst they are within the limits of the kingdom." Chief Baron Pollock in the same case used similar language.

In *Arnold* v. *Arnold* (2 My. & Cr. 256-270), above cited, Lord Cottenham said, "All the cases bring the rule to this, that where you find in enactments general words which may be applicable to all places, they are so construed as to be limited by the Courts territorially; and this principle must be as applicable to the Marriage Act of William 4 as to the other Acts which the Courts have so limited.

The difficulty as to the word "all," which occurs in 5 & 6 Wm. 4, c. 54, occurred in *Arnold* v. *Arnold*, and it must be met in the same way.

The Commissioners appointed to inquire into the state and law of marriage make some very important remarks on this subject. After referring to the case of *Regina* v. *Chadwick* (11 Q. B. 173), in which the Court convicted the prisoner for marrying his deceased wife's sister, the Commissioners state that many questions of great difficulty in relation to such marriages had been **[496]** submitted to the consideration of eminent counsel, but had not received any judicial decision, and as one of such questions they state the question whether a marriage bond abroad between two English subjects within the prohibited degrees of affinity would be held null and void by the tribunals in England, if it were legal by the law of the country where it was solemnized, and whether a *bonâ fide* domicil would make any distinction. The Commissioners find from the evidence before them that marriages of this kind are permitted by dispensation or otherwise in nearly all the continental States of Europe, and that in particular all the Protestant States of Europe, with the exception of some of the cantons of Switzerland, permit these marriages to be solemnized by dispensation or licence under ecclesiastical or civil authority.

From the same report it appears that these marriages are allowed by dispensation from the Pope, that although in the Greek church such marriages are held to be unlawful, and that there is no dispensation, yet, that where in Russia such marriages are solemnized between persons not in the Greek communion, they are not invalidated by the law of the State—that the Jews hold that the Scripture does not invalidate such unions, and that the various bodies of Dissenters in England do not entertain the opinion that these marriages are invalidated by Holy Writ, and that although the majority of the clergy of the Church of England object to such marriages, yet very many of them do not consider these marriages to be prohibited by the law of God.(1)

The learned labours of these Commissioners, including one bishop, two Judges and learned counsel, prove that the marriage with a deceased wife's sister is not incest, according to the acceptation of the term throughout Christendom, but that it is entirely distinguishable from **[497]** incest from consanguinity; and that the prohibition is a mere human ordinance—a matter of ecclesiastical discipline to be imposed or relaxed as circumstances should render it expedient, and that therefore there is no reason why the laws of this country should not, according to the comity of nations, recognise the law of Holstein.

The opinion of Lord Meadowbank, cited in Story's Conflict of Laws (sec. 97), and the arguments of Mr. Justice Story (secs. 100-103), and the cases of *Conway* v. *Beasley* (3 Hag. Ecc. R. 639), *Rex* v. *Lolley* (1 Russ. & Ry. Cr. C. 236), and the American case of *Greenwood* v. *Curtis* (6 Mass. R. 378), lead to the same conclusion.

Much confusion has arisen from the use of the word incest, as applicable to these marriages. That is owing to the poverty of our language, in which incest by consanguinity and incest by affinity are designated by the same word, when all mankind draw a broad distinction between the two. But it might be asked, does the English law recognise the distinction between incest of affinity and incest of consanguinity? The very Act before the Court draws that distinction, for it confirms the marriage of all persons under the prohibited degree of affinity, which it does not confirm as to persons within the prohibited degrees of consanguinity.

But referring especially to the recital in the Act of William 4 in the following words:—"Whereas marriages tween 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

(1) See First Report of the Commissioners (1848) pp. vi. and vii. in the Reports from Commissioners, 1847, 1848.

remain unsettled during so long a period; and it is fitting that all marriages which may here-**[498]**-after be celebrated between persons within the prohibited degrees of consanguinity or affinity, should be *ipso facto* void, and not merely voidable;" it is clear that this recital must be taken to be the measure of the extent of the Act, and that it is confined to marriages which were then voidable by the ecclesiastical law, and it is submitted that those marriages could only be the marriages solemnized within the jurisdiction of the Ecclesiastical Courts, and such a marriage as the present is not within the jurisdiction. *Munro* v. *Munro* (1 Rob. R. Ho. Lds. 493), and *Birtwhistle* v. *Vardill* (5 B. & Cr. 488; S. C. on appeal, 2 Cl. & F. 571).

They referred to the 20th section of Story's Conflict of Laws, reading at length the quotations from Voet and Boullenois therein; and they illustrated the present question by reference to the usury laws and the Statute of Frauds, reading thereon Story on the Conflict of Laws, ss. 262 and 291.

They also referred to *The Attorney-General* v. *Forbes* (2 Cl. & F. 48) and *Thompson* v. *The Advocate-General* (13 Sim. 153; S. C. on appeal, 12 Cl. & F. 1).

THE ATTORNEY-GENERAL [Sir R. Bethell], THE SOLICITOR-GENERAL [Sir H. S. Keating] and Mr. Wickens, for the Crown.

It is satisfactory that a determination will be at last come to upon the present question, which will put an end to that doubt, anxiety and suffering which must be the result of the delusive anticipation which has led many persons to rely on the validity of such marriages as that which is now in question in this cause.

The Court is here called upon to recognise as valid a marriage which is plainly, according to the laws of this country, absolutely void. It is not a marriage of persons who were domiciled in Holstein, but it is a marriage in that duchy of British subjects domiciled in England who resorted to Holstein for the particular purpose of evading the laws of this country.

[499] It is evident that one of the parties who contracted the marriage had no faith in its validity or legality, according to the laws of England, for in his will the testator speaks of the children of his second marriage as his "reputed children."

The propositions contended for on behalf of the Plaintiffs are—first, that the statute of the 5th & 6th Wm. 4, c. 54, has no application to marriages celebrated out of England or Ireland; and, secondly, that the law of England is bound to accept the *lex loci contractûs*, and to receive from that law the determination of the validity of the marriage and the consequences of the marriage.

The propositions contended for on behalf of the Crown are—first, that the Act of 5 & 6 Wm. 4, s. 54, is a law of universal acceptation, speaking to and binding all British subjects resident within England or Ireland; secondly, that it is a personal statute, creating a personal disability, which attaches on every natural-born British subject in England or Ireland, and follows him everywhere, on the subject of the contract of marriage; and, thirdly, that being one of our established laws, we are not bound to accept the rule of the *lex loci contractûs*, at least without qualification.

The passages read on behalf of the Plaintiffs from the late Mr. Justice Story's book on the Conflict of Laws amount to this, that no State has power to call on a foreign country to recognise within that foreign country its own peculiar laws and institutions. But that proposition leaves untouched the other proposition, that every State has a right to make laws for its own subjects, which shall be binding on them everywhere, save this only, that the subjects may not set up their own native law in opposition to the law of the country in which they may happen to be resident; but yet that the duty of obedience on the part of the subject will attach to him on his return to his native country.

It is idle for the Plaintiffs to rely on the *lex loci contractûs*, unless they can shew that the Courts of law in **[500]** Denmark have declared this marriage legal, after solemn argument, and with full information before them of the personal disqualification with which by the law of England the contracting parties had been branded and impressed, and that they had resorted to Wandsbeck *non animo morandi, sed animo revertendi*, and for the avowed and declared object of evading an express enactment of the Legislature of this country, which declared this marriage to be void.

It must first be shewn that the Courts of the foreign country have had their attention drawn to the particular circumstances of the case, and that, notwithstand-

ing these circumstances, they have held the marriage valid; but until that is shewn it is idle to talk of or to rely on the *lex loci contractûs*.

Jurists have divided statutes into two classes, real and personal. Personal statutes, Mr. Justice Story says, s. 13, are held to be of general obligation and force everywhere; but real statutes are held to have no extra-territorial force or obligation. "Personal statutes (says Merlin, cited in Story's Conflict of Laws (sec. 13)) are those which have principally for their object the person, and treat only of property (*biens*) incidentally (*accessoirement*); such are those which regard birth, legitimacy, freedom, the right of instituting suits, majority as to age, incapacity to contract, to make a will, &c. Real statutes are those which have principally for their object property (*biens*), and which do not speak of persons except in relation to property; such are those which concern the disposition which one may make of his property, either while he is living or by testament."

In a passage from the works of the celebrated French Chancellor D'Aguesseau, cited in the same work (Story's Conflict of Laws, s. 14, n.), it is said that the test of a statute being personal is its being "directed towards the person, to provide in general for his qualifications, or his general absolute capacity; as when **[501]** it relates to the qualities of major or minor, of father or son, of legitimate or illegitimate, of ability or inability to contract, by reason of personal causes;" and *Ibid.* (sec. 16), "by the personality of laws foreign jurists generally mean all laws which concern the condition, state and capacity of persons; by the reality of laws, all laws which concern property or things, *quæ ad rem spectant*. Whenever they wish to express that the operation of a law is universal they compendiously announce that it is a personal statute; and whenever, on the other hand, they wish to express that its operation is confined to the country of its origin they simply declare it to be a real statute."

Now, the statute of the 5th & 6th Wm. 4, c. 54, clearly falls within the definition of a personal statute, and, as such, it must be held on the authority of jurists to be binding. The *jus gentium* called on the Courts of Denmark to recognise that Act of Parliament as personal, and on the ground of comity to admit the inability or disability of the contracting parties. If then, after that, Denmark chose to admit the marriage, it was not incumbent on this country also to recognise it.

With reference to parties escaping the provisions of the Marriage Act, 26 Geo. 2, c. 33, by going to Scotland, it should be borne in mind that that Act expressly excepted Scotland from its provisions.

The *lex loci contractûs* applies only to the solemnities attending the celebration of marriage, and it does not prevail where either of the contracting parties is under a legal disability by the law of the domicil. In the case of *Conway* v. *Beasley* (3 Hagg. Ecc. Rep. 639) a second marriage had in England, on a Scotch divorce (*à vinculo*) from an English marriage between parties domiciled in England at the time of such marriage and divorce, was declared to be null. But Mr. Justice Story, who is so entirely relied on on behalf of the **[502]** Plaintiffs, has put the very case that has here arisen. "Suppose," says Story (sec. 116), "a case of a marriage, incestuous by the law of the country where the parties are born or are *bonâ fide* domiciled, and without changing their domicil for the purpose of evading that law they go to a foreign country where a different rule prevails, and the marriage which would not be incestuous by its laws is there celebrated, and the parties afterwards return to their own country—ought such a marriage to be held valid in such country?" Huberus has put the very case, and held that it ought not to be there held valid, and the late Mr. Burge, in his Commentaries on Colonial and Foreign Law (part 1, c. 5, s. 1, p. 147), comes to the same conclusion.

The law which prohibits persons related to each other in a certain degree from intermarrying, and declares their intermarriage to be null, imposes on them a personal incapacity *quoad* that act, and that incapacity must continue to affect them so long as they retain their domicil in the country in which that law prevails. The resort to another country where there was no such prohibitory law, for the mere purpose of evading the law of their own country, and with the intention of returning thither when their marriage had taken place, could not be considered a change of their former domicil or the acquisition of a domicil in the country to which they had

resorted. They must therefore be regarded as still subject to the personal incapacity imposed by the law of their real domicil.

Now, the question is, ought this Court to disregard all the principles of English jurisprudence, which condemn marriages of this description and give place to a foreign law? It has been said to be a question relating to the comity of nations, and it has been sought to give to the law of Holstein an extra-territorial effect, and a power of abrogating our laws. But the question is whether the *comitas gentium* could require that the law of this country **[503]** should give place to a foreign law, and should abrogate its own enactment in favour of the latter. But the English law has moreover condemned these marriages as incestuous, and as forbidden by the highest religious considerations; and is it to be said that when such marriages are declared by this country to be contrary to God's law that we are to favour the latitudinarianism of other countries?

Let the case be put of the Divorce Act of last session having forbidden the guilty parties after a divorce to marry, could it have been contended that the Act might be evaded, as it was now contended the Act of 1835 might be evaded, by their going abroad, and there marrying?

The third maxim of Huberus (Prælec. P. 2, Lib. 1, tit. 3, De Conflictu Legum, ss. 2, 3, 8, *et seq.* p. 538), on the comity of nations, is applicable to this subject. "That the rulers of every empire from comity admit that the laws of every people in force within its own limits ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other Governments or of their citizens."

By the *comitas gentium*, then, a foreign country is bound to take the rule of its own law on this subject as applicable to its own domiciled subjects.

The Act of 5 & 6 Wm. 4, c. 54, is *per se* conclusive on the subject, as comprehending all marriages of British subjects domiciled in England and Ireland, wheresoever solemnized; it is a personal statute, creating a personal disability, attending the subjects who owe it obedience everywhere, and rendering them incapable of entering into a contract such as that now in question. The allegation of the *lex loci contractûs* is insufficient, and it is impossible to yield to that rule as conclusive unless it be shewn that the foreign country knew of the statute of 1835, and proceeded nevertheless according to its own jurisprudence to pronounce the marriage valid.

The rule is laid down in *Warrender* v. *Warrender* (2 Cl. & F. 488; 9 Bligh's New Reports, 89), **[504]** "that if two parties domiciled in one country go to another country and there marry, and then return to the former country, the consequences of the marriage will be determined according to the law of the domicil." This marriage, therefore, solemnized as it was abroad, was solemnized with reference to the matrimonial domicil of the parties—viz., England; and therefore its effects and consequences, and its operation on the issue of the marriage as to whether they are legitimate or not, are to be determined by the law of the matrimonial domicil. The argument which has been derived on the other side from the rule of the *lex loci contractûs* is fallacious. The true meaning of that rule is that it governs only the solemnities and the other modes of celebrating the marriage, and it assumes the ability of persons to contract, and, by the comity of nations, supposing that the marriage was valid in every respect and in all its consequences, by the *lex loci contractûs* it remains valid in that country only, and has no claim nor any title to acceptation in ours; because such acceptation could be attained by no other means than abrogating and annulling principles which are binding on all Courts of English Judicature.

Great stress has been laid in support of the marriage on the construction of the statute, and it has been argued that the statute is territorial and not personal, because it does not contain a personal prohibition of marriage such as the Royal Marriage Act contains, as well as a clause declaring that all marriages within the prohibited degrees shall be void—a clause similar in terms to that contained in the Royal Marriage Act; but there can be no doubt that the Judges would have come to the same conclusion on the Royal Marriage Act as that to which they arrived, if the first, the personal clause, had not been contained in it.

Questions have been raised as to the meaning of prohibited degrees of affinity in the statute of 1835. What **[505]** those words meant has been determined judicially

in *Regina* v. *Chadwick* (11 Q. B. 173). The Court has there defined prohibited degrees to mean degrees prohibited by God's laws, of which incest is one; and the marriage with a deceased wife's sister is incest.

Reference has been made to enactments as to slavery, taxes and copyright; but it is enough to say, as to these topics, that they are not *in pari materiâ*.

Reference has also been made to a number of decisions on Lord Hardwicke's Marriage Act; but those cases do not apply, because there was in that Act a clause expressly limiting its operation, and declaring that it should not apply to foreign parts, or to Scotland.

Fenton v. *Livingstone* has been relied on as a case similar to the present in support of the legitimacy of the deceased infant in this case; but in that case the child had had a status of legitimacy—the child in this case has always the status of illegitimacy.

The law as laid down by Mr. Justice Story was laid down by him under the peculiar circumstances of the American States. His attention was mainly directed to the rights and obligations of those States *inter se*. Now, the connexion of those States is not international, but municipal, creating a much more intimate connexion, and involving a greater degree of respect by the different States for the laws of the other States. This consideration will explain how it is that Mr. Justice Story expressed himself with some degree of incaution, and in a way which the authorities he cites do not authorize.

Sir Fitzroy Kelly, in reply. The case of *Regina* v. *Chadwick* (*Ibid.*) has been much relied on on behalf of the Crown, as shewing that, according to the law of this country, the marriage of a widower with his deceased wife's **[506]** sister is incest. This Court is not asked to overrule the decision in that case, but I do not hesitate to say that, if I should ever have occasion to argue this question before the highest tribunal in the country, I should feel it my duty and I should not scruple to arraign that decision as being erroneous.

The statute of 32 Hen. 8 has enacted that no marriages should be invalid except those that are contrary to God's laws. The enactment now particularly under discussion of the 5 & 6 Wm. 4, c. 54, declares marriages between persons within the prohibited degrees void, and, in order to determine what are prohibited degrees, they take the interpretation of a statute of Henry 8, repealed at the time; whilst that decision left untouched the moral, the social and general questions, which are involved in the statute, which is of a penal nature.

But the decision in *Regina* v. *Chadwick* is confined in its doctrine to the validity of a marriage with a deceased wife's sister solemnized in this country, and it leaves entirely untouched the question now before the Court.

After all the argument on the part of the Crown no case has been adduced, and there is no case in which a marriage like the present, celebrated in a foreign country, is not held to be valid here, except only the decision in the *Sussex Peerage case;* and when the number of marriages open to be impeached is considered, the absence of any decision is remarkable.

There is indeed that one exception—an exception much relied upon in the argument against the validity of this marriage—the *Sussex Peerage case*—but that case is entirely distinguishable from the present. There the prohibition was personal, confined to a small number of persons, the enactment being for high State purposes. The decision of that case, independent of these considerations, was come to on the construction of the express language of the statute, which prohibited certain persons, including **[507]** the Duke of Sussex—as if he had been expressly named—from contracting matrimony without the previous consent of the Crown. That was as much a personal statute as the statute which declares that the sovereign shall be of age at the age of 18. To hold that a statute so expressly binding on the individual could be evaded by him, by merely crossing the Channel, would be absurd.

Mr. Justice Cresswell, referring to the case of *Rex* v. *Lolley* (Rus. & Ry. Cr. C. 237), asked whether the Court did not discuss the validity of the second marriage, or whether the prisoner had been treated as a felon without discussion?

Sir F. Kelly remarked that in that case the first marriage was unquestionably a good marriage in this country, and it followed the married man wherever he went,

and was indissoluble without a change of domicile, and, although the prisoner had obtained a divorce in another country, he had not thrown off his English domicil; therefore, the divorce that he had obtained in Scotland was a nullity in this country, and then he married secondly in England.

MR. JUSTICE CRESSWELL. But, supposing he had married his second wife in Scotland, might he not have come to England and have had two lawful wives living at the same time here?

Sir F. Kelly. Such a question might arise, and create the question of a conflict of law. The grounds of the decision in *Rex* v. *Lolley* are not given in the report.

The Plaintiffs here contend simply for this, that it is within the power of foreign Courts to clothe with legality acts done within their jurisdiction, provided they are not contrary to morality.

It has been contended for the Crown that the legalisation of a marriage in a foreign country is within the jurisdiction, so far as regards the form and ceremonies of it; **[508]** but that is not at all the limit of the proposition; it extends to the personal capacity to contract. In *Male* v. *Roberts* (3 Esp. N. P. 163) Lord Eldon, then being a Common Law Judge, held that a contract, though involving a personal question, must be determined by the law of the country where it was entered into. *De La Vega* v. *Vianna* (1 Barn. & Ald. 284) was to the same effect.

The law on this question is laid down accurately by Mr. Justice Story, in his Conflict of Laws (sec. 103), in the following terms:—"In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation and other personal qualities and disabilities, the law of the domicil of birth, or the law of any other required and fixed domicil, is not generally to govern, but the *lex loci contractûs aut actûs*, the law of the place where the contract is made or the act done. Therefore, a person who is a minor until he is of the age of twenty-five years by the law of his domicil, and incapable of making a valid contract there, may, nevertheless, in another country, where he would be of age at twenty-one years, generally make a valid contract at that age, even a contract of marriage."

This question is illustrated by the way in which the different States in America deal with the marriage of a white man with a black woman.

Reading v. *Smith*, *Scrimshire* v. *Scrimshire*, *Harford* v. *Morris* (2 Hag. Consist. R. 432) and *Middleton* v. *Janverin* (*Ib.* 437), confirm the views which have been enforced on the Court on behalf of the Plaintiffs.

It has been decided repeatedly that the *lex loci contractûs* determines the validity of the marriage, personal as well as ceremonial, but that the law of the domicil of the contracting parties regulates all the consequences. *Munro* v. *Munro* (7 Cl. & Fin. 842), *Birtwhistle* v. *Vardill* (5 Barn. & Cres. 438; S. C. on appeal, 2 Cl. & F. 571), *Calvin's case* (7 Coke's Rep. 1).

[509] In the present case the Crown comes into its own Court, seeking to take away from its children the property earned for them by the labour of their deceased parent. If ever there was a case in which the question ought to be considered calmly and favourably for the Plaintiffs, it is such an one as the present.

The only proper question in such a case was whether the marriage is contrary to morality or Christianity. The Plaintiffs submit that it is contrary to neither.

I do not deny the power of the Crown so to frame a statute as to have reached this case, but it has not done so; it does not even include the colonies; it would not, prior to the Union, have extended to Ireland. (2 Mer. 143.) That a statute does not even extend to our colonies is clear from *The Attorney-General* v. *Stewart* (Intro. s. 4, 100), and the numerous cases there cited, and 1 Blackstone's Commentaries (p. 101). Much less, then, could the statute of 5 & 6 Wm. 4 affect foreign countries, unless they are specially named.

In conclusion, it is submitted that the decision in this case depends on the strict construction of the words of the statute 5 & 6 Wm. 4, and that without reference to the opinions of individuals or to passages in the Scriptures; if so considered, there can be no doubt on the subject, and this marriage cannot be impeached.

The statutes 25 Hen. 8, c. 22, and 28 Hen. 8, c. 7, and two Irish statutes—the 4 Wm. 3, c. 3, and 2 Anne, c. 6; sections 103, 104, 124, 262, 291, from Story's

Conflict of Laws; J. Voet, Com. ad Pand. lib. 23, tit. 2, s. 4 (tome 2, p. 20); P. Voet, De Statut. s. 9, c. 2 (p. 267, ed. 1715); Pothier, Traité du Mariage (pt. 3, c. 3); and St. Joseph, Concordance entre les Codes Etrangers et le Code Napoléon (vol. 2, p. 139, ed. 1856, "Danemark"); *Roach* v. *Garvan* (1 Ves. sen. 157; S. C. 1 Dic. 88), **[510]** *Medway* v. *Needham* (16 Mass. R. 157, 161), *Herbert* v. *Herbert* (2 Hag. Cons. Rep. 263; S. C. 3 Phil. Ecc. Rep. 58), *Lacon* v. *Higgins* (3 Stark, N. P. C. 178), *Sheddon* v. *Patrick* (5 Paton's App. C. 194; S. C. 1 Mac. 2; Ho. of Lds. Cases, 535), *Rose* v. *Ross* (4 Wils. & Shaw, 289), *M'Carthy* v. *De Caix* (2 Russ. & Myl. 614), *Forbes* v. *Cochrane* (2 Bar. & Cress. 448, 470), *Ray* v. *Sherwood* (1 Curt. Eccl. Rep. 173, 193), *Sherwood* v. *Ray* (1 Moore, P. C. C. 353, 396) were cited.

Dec. 4. MR. JUSTICE CRESSWELL on this day delivered his opinion in the following terms:—

In this case I have been called upon by Vice-Chancellor Stuart to assist him by giving my opinion as to the validity or invalidity of a marriage solemnized near Altona, in the kingdom of Denmark, between William Leigh Brook and Emily Armitage, the sister of William Leigh Brook's former wife, then deceased.

In answer to certain inquiries the Chief Clerk of the Vice-Chancellor certified as follows:—"That William Leigh Brook and Emily Armitage were respectively, up to and at the time of such marriage, and at the time of their respective deaths, domiciled in England, and that they had not any permanent residence in the country where they married; that the marriage between William Leigh Brook and the said Emily Armitage was a lawful marriage according to the law of the Duchy of Holstein; and that, according to the same law, the children of such marriage are legitimate children."

Upon the latter part of the certificate it was observed in argument that it must be taken as a certificate that such marriages between Danish subjects are good, and not that the Danish Courts would hold them good when solemnized between the subjects of another country domiciled in that country where such marriages are prohibited **[511]** by law. The opinion which I have formed in this case renders it unnecessary to inquire into that matter. For, even assuming that in Denmark the marriage now in question would be held good, I think that by the law of England it was invalid, and the children of the parties to it illegitimate.

The question depends upon the effect to be given to the statute 5 & 6 of Wm. 4, c. 54. By the first section it is enacted, "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," &c. The second section 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." Now, putting the narrowest construction on the words of this statute, it certainly had the effect of rendering absolutely void all such marriages between parties within the prohibited degrees as would, without the aid of the statute, have been voidable by the Ecclesiastical Court. The question to be considered, then, is whether the marriage under consideration would have been so voidable. Had it been celebrated in England there could be no doubt that it would have been voidable. In *Sherwood* v. *Ray* (1 Moore, P. C. C. 395) Baron Parke, in pronouncing the opinion of the Judicial Committee, used this language:—

"That marriage—viz., between a widower and his deceased wife's sister—having been celebrated between persons within the Levitical degrees, and prohibited from marrying by the Holy Scriptures as interpreted by the canon law and by the statute 25th of Henry 8, was unques-**[512]**-tionably voidable during the lifetime of both, and might have been annulled by criminal proceedings or civil suit."

And this statement of the law was fully adopted by the Court of Queen's Bench in *Regina* v. *Chadwick* (11 Q. B. Rep. 173). Indeed, this point was hardly disputed by the learned counsel, who contended for the validity of this marriage. But they relied on the fact of the marriage having been celebrated in Denmark, where such marriages are held valid, and contended that by the law of nations questions of this sort are to be decided according to the law of the country where the marriage takes place; and many cases decided by most eminent persons were cited in which that

principle was said to have been recognised and to have received full effect. I forbear to enter into an examination of them at present, for in none of them was a marriage in question which was contrary to the law of God and Holy Scripture. In order to make the cases relied upon applicable to the present it is necessary to shew that the same respect would be paid to the law of a foreign country recognising a marriage contrary to what we deem to be God's law. No such decision can be found. In the absence of any direct authority writers on international law have been resorted to, and many passages have been read to the Court from Story's Commentaries on the Conflict of Laws. In section 113 he says:

"The general principle certainly is (as we have already seen) that between persons *sui juris* marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere."

In section 113, he also says:

"The most prominent, if not the only known exceptions **[513]** to the rule are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country." Again, in section 114, he proceeds:—

"In respect to the first exception, that of marriages involving polygamy and incest, 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."

To this latter passage I cannot give my assent. How is a Judge sitting in an English Court of Justice, called upon to decide whether a marriage be incestuous or not, to be guided in his decision? Surely, if the law of his own country has already settled what is incestuous or the contrary, by that he must be governed. Is he to inquire into the opinions of all other nations in which Christianity exists, and to adopt that rule which is ascertained to prevail among the greater number, and to say that it shall be acted upon in defiance of the law of his own country? This would, indeed, be enlarging the *comitas gentium* to an extent hitherto unheard of. For the purpose of deciding whether a marriage be incestuous or not I feel bound to ascertain what is the law of England and to give effect to it. Examining that law I find that, according to many decisions, such marriages are held to be prohibited by Holy Scripture, that they are within the degrees of affinity prohibited by God's law, and punishable as incestuous; and must therefore here be deemed to fall within the exceptions stated in Story (Conflict of Laws, s. 113), and not to be recognised in this Christian country. If that were otherwise, and we were bound by the *comitas gentium* to hold this a good marriage, this consequence would follow: an Englishman domi-**[514]**-ciled in this country, cohabiting with the sister of his deceased wife, whether he has celebrated a marriage with her or not, is deemed to be guilty of incest and punishable by our ecclesiastical law; but by taking a short voyage to Denmark, and celebrating a marriage there, he would acquire the privilege of returning to this country and maintaining an intercourse by our law deemed incestuous, with perfect impunity. These considerations satisfy me that the marriage would have been voidable before the statute 5 & 6 Wm. 4, c. 54, was passed, and that by force of that Act it was absolutely void to all intents and purposes. This opinion as to the voidable character of the marriage in question, although celebrated in Altona, makes it not absolutely necessary that I should express any opinion upon another question which was discussed with much learning and ability, viz., whether the general expressions that have on various occasions fallen from the most eminent Judges in this country as to the validity of marriages here, if valid in the country celebrated, are to be construed in the widest sense which can be ascribed to them according to the ordinary meaning of the English language, or whether they are to be limited and restrained by an implied proviso that such marriages are not contrary to the laws of this country. Nevertheless, as it is a point which, if settled one way, would dispose of the case, although my opinion, already expressed, should be held to be erroneous, I think I ought not to avoid entering into the question; and I do so with the less

hesitation as my opinion on this very important subject will be open to review, and no doubt will be reviewed in this very case. Sir George Hay, in pronouncing judgment in *Harford* v. *Morris* (2 Hagg. Const. Rep. 423), expressed an opinion that marriages of English subjects having an English domicile, celebrated in other countries, have been held valid, not merely because they would be valid according to the laws of those countries, but because they were not contrary to the law of England. In page 434 he says:

[515] "I do not say that foreign laws cannot be received in this Court in cases where the Court of that country had a jurisdiction, or that this Court would not determine upon those laws in such a case. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation on the Court to determine by those foreign laws."

The judgment in that case was reversed, but upon grounds wholly irrespective of the opinion above cited. It therefore remains of such value as the reputation of the learned Judge by whom it was pronounced can give to it; and in *Warrender* v. *Warrender* (2 Cl. & Fin. 488) there are some passages delivered by Lord Brougham which throw much light on this question. In one place he says (*Ibid.* 529):

"The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts."

In another place he says (*Ibid.* 531):

"A marriage good by the laws of one country is held good in all others where the question of its validity may arise, for the question always must be, did the parties intend to contract marriage? And, if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract."

The noble Lord having used the general terms found in the first sentence quoted, by that which follows, shews that he meant to apply them only to the forms and solemnities of constituting a marriage, and to the proof of the parties having made a contract; for he afterwards says (*Ibid.*):

"I shall only stop here to remark that the English jurisprudence, while it adopts the principle in words, would not perhaps be found very willing to act upon it **[516]** throughout. Thus, we should expect that the Spanish and Portuguese Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, 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 those relations contracted in the Peninsula under 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. But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract and the meaning of the parties—that is, the existence of the contract in its construction."

The case of *The Queen* v. *Lolley* (Russ. & Ryan, C. C. R. 237), although not directly in point, almost compels me (if it be good law) to adopt that opinion. The case was this:—An Englishman married in England; he afterwards went to Scotland and obtained a divorce there, which, according to the law of that country, dissolved the marriage. He then returned to England and married another woman, the first wife living, for which he was indicted, tried and convicted. The propriety of that conviction was argued by very able counsel before the twelve Judges, and by their unanimous opinion was held to be correct. The English Court, therefore, would not recognise the law of Scotland because it was contrary to our own. But it may be said that the matter then in question was the dissolution of the marriage, not the constitution of it. True, but had the constitution of a marriage been in question and not the dissolution the result must have been the same. By the 9th Geo. 4, c. 31, s. 22, it was enacted:

"That if any person, being married, shall marry any other person during the life of the first husband or wife, whether the second marriage shall have taken place in **[517]** England or elsewhere, every such offender shall be guilty of felony."

Now, suppose after the Scotch divorce the man had married again in Scotland, that marriage would have been good there; would it therefore have been good here? If it would, then the man might have returned to England with his second wife, and had two lawful wives living at the same time by marriages held to be valid by our own law. Some rather embarrassing questions would have arisen out of such a state of things. Would both wives have been dowable? If the second had had a son born, and the first had had a son born afterwards, which would have been heir to the father? And, besides all these strange questions, the father would have been indictable and punishable as a felon, by the express words of the statute, for having contracted a marriage which by the law of this Court was perfectly legal. In addition to these reasons for supposing that the learned persons who used the general expressions so frequently brought to our notice during the argument did not intend that they should have the widest sense of which the words were susceptible, there are some passages in Huber's Prælectiones Juris Civilis which shew that, in his opinion, the *comitas gentium* did not require so large an effect to be given to foreign law. In his chapter De Conflictu Legum he states, in sec. 2, 3d axiom:

"1. Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra. 2. Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur. 3. Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur." "Sec. 8. Matrimonium pertinet etiam ad has regulas. Si lici-**[518]**-tum est eo loco ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eâdem exceptione præjudicii aliis non creandi; cui licet addere si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit."

Further on he writes—

"Brabantus, uxore ductâ dispensatione Pontificis in gradu prohibito, si huc migret, tolerabitur; at tamen, si Frisius cum fratris filiâ se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur."

There are other passages to the same effect. John Voet, Paul Voet, Sanchez, Gayll and other jurists say that the validity of a marriage is to be decided by the laws of the country where it is celebrated; but they explain that their operation extends only to the formation of the contract and the form and ceremonial of the marriage. I now proceed to examine some of the general *dicta* that a marriage valid by the law of the country where solemnized is valid everywhere. The first case cited was *Roach* v. *Garvan* (1 Ves. sen. 157). The facts of the case are thus stated:—Major Roach having two daughters, one born at Fort St. George, in the East Indies, and the other at St. ———, near it, sent them to France for their education, and put them into a nunnery. Mr. Quan, one of the persons in whose care they were left, married the eldest, who was then about 11 years of age, to his son, not then 17. Quan petitioned for cohabitation with his wife. Another petition about guardianship and fortune was also before the Court. Lord Hardwicke said: "As to the fact of the marriage, if good, the Court will take care that the husband makes a suitable provision; but the most material consideration is as to the validity thereof. It has been argued to be valid from **[519]** being established by the sentence of a Court in France having proper jurisdiction, and it is true that, if so, it is conclusive, whether in a foreign Court or not, from the law of nations in such cases." There is nothing in that case to shew that if the parties had been British subjects domiciled in England, and it had been contrary to our law, and the Courts of this country had been called upon to adjudicate with regard to it, they would have held it valid. The next case in order of time was *Scrimshire* v. *Scrimshire* (2 Hagg. Consist. 395). These two British subjects had been married in France. A suit was instituted here for the restitution of conjugal rights. The validity of the marriage was denied, as being a foreign marriage not celebrated according to the laws of the country in which it was contracted; and a sentence of the Parliament of Paris declaring the marriage null was also pleaded. Dealing with that question, Sir Edward Simpson, in giving his judgment, said (*Ibid.* 398):

"The Court was of opinion then (alluding to some earlier proceedings in the case), and still is, that a foreign sentence alone could not of itself be a bar to entering into a consideration of the question whether this marriage between English subjects was good or not by the law of England."

And in pages 408 and 411 other expressions of similar import are to be found; but the question before the Court was whether the contract had been made in a form binding by the law of France, and whether the marriage rites had been duly celebrated according to that law, no question as to any violation of English law being involved in the discussion. The case of *Ruding* v. *Smith* (*Ibid.* 371-390) was also cited on account of one or two passages in the judgment of Lord Stowell. One of them runs thus:—

"It is true, indeed, that English decisions have established **[520]** this rule that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else. . . . It is therefore certainly to be advised that the safest course is always to be married according to the law of the country, for thus no question can be stirred."

But here again Lord Stowell was dealing with the marriage ceremonial, and not with any inquiry whether such a marriage was or was not a violation of the law of this country. But the celebrated case of *Dalrymple* v. *Dalrymple* (2 Hagg. Cons. Rep. 54) was mainly pressed upon our consideration on account of the passage in which Lord Stowell enunciated the principle on which that and similar cases should be decided. It is in page 58:—

"Being entertained (said the learned Judge) in an English Court, it must be adjudicated according to the principles of English law applicable to such a case. But 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 reference to the law 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."

But what were the questions raised? Whether Captain Dalrymple had entered into a contract of marriage, and whether that which took place between the parties constituted a marriage in fact according to the law of Scotland; and those were the two questions with which the learned Judge throughout his elaborate and learned judgment was dealing. It was not, and could not be, contended in that case that a contract of marriage made by a minor in Scotland was contrary to the law of England, nor that the sufficiency of the marriage ceremony was to be judged of by any other law than that of Scotland. It has been supposed that Scotch marriages between minors are con-**[521]**-trary to the Marriage Act, 26 Geo. 2, c. 33, but that is a mistake, for the 18th section contains *inter alia* this proviso:—

"That nothing in this Act contained shall extend to that part of Great Britain called Scotland, &c., nor to any marriages solemnized beyond the seas."

Why, then, should it be assumed that the learned Judge used the expressions relied on in a sense more extensive than was necessary for the decision of the case before him. Is it not more reasonable to suppose that he used them *secundum subjectam materiam* to enunciate the principle upon which he was about to decide the questions involved in the case under consideration, and not with reference to another question which had not been, and could not then be, raised? I certainly am disposed to apply to them the same canon of construction which in fairness and candour should be applied to all judgments, rather than to assume that they were intended to have a larger meaning, in opposition to the writings of Huber, and extending far beyond the principle laid down by John and Paul Voet, by Sanchez and by Gayll. The writings of these jurists were no doubt well known to Lord Stowell, and it is hardly to be supposed that he would have expressed an opinion at variance with theirs without condescending to notice their writings and to explain his reason for differing from them. I have found nothing to justify giving the more extensive meaning to the words of Lord Stowell, except some passages in Mr. Justice Story's work on the Conflict of Laws, and a decision cited by him from the reports of the Court of Massachusetts; and, perhaps, this greater force given in one of the United States to the laws of another at variance with its own may be accounted for by the greater

inclination that would naturally exist to give a larger scope to the *comitas gentium* between the different States of the Union than could be expected to find place among nations wholly independent of and un-**[522]**-connected with each other. I have therefore come to the conclusion that a marriage, contracted by the subjects of a country in which they are domiciled, in another country is not to be held valid, if by contracting it the laws of their own country are violated. Another question remains to be considered, viz., whether the 2d section of the statute 5 & 6 Wm. 4, c. 54, taken by itself, is so framed as to be binding on all English subjects wherever they may be; or, in other words, whether it is personal and accompanies the person of an English subject into foreign lands. It is in these words:—

"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."

The words in their common and ordinary sense would extend to marriages wherever celebrated; otherwise some only and not all would be rendered void. It is a statute affecting persons, and may be read as if it had been:—

"If hereafter any persons (that is British subjects) within the prohibited degrees contract marriages, all such marriages shall be void."

A law framed in such terms would attach upon the persons of British subjects, and accompany them to all parts of the world. Upon this point the decision of the House of Lords in the *Sussex Peerage case* appears to be conclusive. By 12 Geo. 3, c. 11, s. 1, it was enacted:—

"That no descendant of the body of His late Majesty King George II. (other than, &c.) shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs or successors (signified in a certain specified manner), and that every marriage or matrimonial contract of any such descendant without such consent, first had and obtained, shall be null and void, to all intents and purposes whatsoever."

[523] In expressing the opinion of the Judges on the question referred to them Lord Chief Justice Tindal says of this enactment (11 Cl. & Fin. 145):

"The words of the statute itself appear to us to be free from ambiguity. The prohibitory words of it are general, 'That no one of the persons therein described shall be capable of contracting matrimony;' and again, 'That every marriage or matrimonial contract of any such person shall be null and void to all intents and purposes whatsoever.' The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally and in the abstract. It is an incapacity attaching itself to the person of A. B., which he carries with him wherever he goes."

And further on he says:—

"The words employed are general, or more properly universal, and cannot be satisfied in their plain literal and ordinary meaning unless they are held to extend to all marriages in whatever part of the world they may have been contracted or celebrated."

The whole passage might have been written with reference to the enactment now under consideration. This statute does not enact an incapacity to contract matrimony within the prohibited degrees within one particular country and district or another, but to contract such marriage generally. The object of the statute was to put an end to all such marriages between English subjects for the future, and cannot be satisfied by any narrower construction. On this ground, therefore, as well as the other two urged by the counsel of the Crown, I am of opinion that the marriage celebrated between William Leigh Brook and Emily Armitage, at Altona, was void, and the children of those two persons illegitimate.

[524] *April* 17, 1858. THE VICE-CHANCELLOR [Sir John Stuart]. The late father and mother of the infant Plaintiffs were both of them English subjects, and at the time of the marriage were both of them domiciled in England. The marriage was solemnized during a temporary residence within the territories of the King of Denmark.

If the marriage had been solemnized in England, as it was a marriage between a widower and the sister of his deceased wife, it is settled that, according to the law of England, it was null and void to all intents and purposes whatsoever. As to this I have no doubt. It was so settled by the decision of the Court of Queen's Bench in the

case of *The Queen* v. *Chadwick* (11 Q. B. 205). And in hearing the present case I have had the great advantage of the assistance and advice of Mr. Justice Cresswell, who considers the law upon this point to be clear.

The law of Denmark permits such marriages, and therefore the argument has principally turned on the right claimed for the issue of the marriage to have its validity determined according to the law of Denmark, as that of the country in which it was celebrated. The evidence of the Danish law, as stated in the Chief Clerk's certificate, is not quite satisfactory. But it may be assumed that the municipal law of Denmark, as regulating the rights of the people of Denmark, permits a marriage between a widower and the sister of his deceased wife.

For the Crown it is insisted that the statute 5 & 6 Wm. 4, c. 44, which has enacted that all such marriages "shall be absolutely null and void to all intents and purposes whatsoever," binds all the subjects of the Crown of England, having their domicile in England, in whatever country the marriage may be contracted.

On the other hand, it is contended for the children of the marriage that the statute has a mere local operation; only affects marriages celebrated in England and Ireland, and has no effect on such marriages contracted in Den-**[525]**-mark, or in any other country by the laws of which they are permitted. They also contend that all questions as to the validity of the marriage are, by a general principle, to be decided according to the law of the country in which the contract is made; and they say that by the comity of nations the Courts of this country are bound to respect the laws of Denmark in this case, and to judge of the validity of the marriage by those laws, and not by the English law, as if it had been celebrated in England.

The first question therefore is as to the construction and effect of the statute 5 & 6 Wm. 4, c. 54.

Mr. Justice Cresswell has given me his opinion that the statute binds all English subjects wherever they may be. This opinion he supports by the universality of the words taken in their common and ordinary sense. He has also supported it by the authority of the Judges in the case of the *Sussex Peerage*, in construing the Royal Marriage Act, and by a reference to the scope and object of this statute itself.

The more closely the matter is examined the more clearly does it appear that this is the only true construction of the Act. The purpose of the Legislature was to annul for the future all marriages between persons within the prohibited degrees. Therefore the words are, "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." These words, clear and unambiguous, prevent the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. Scotland is expressly excepted from the operation of the Act. But the words "all marriages" are not in any other respect qualified or restricted by anything in the context. Lord Coke says "*Generale dictum generaliter est intelligendum*" (2 Instit. 21). Unless **[526]** the words mean all marriages wheresoever celebrated, the ordinary sense and meaning of the word "all" is not given to it; for if marriages elsewhere celebrated are not included, the words "all marriages" must be read as meaning that some marriages are not included in the words "all marriages," which would be absurd.

The object of the Act is to prevent the relation of husband and wife from subsisting between certain persons who are subjects of the Crown of England and domiciled in England. But that object would be defeated if, by any marriage celebrated anywhere between two subjects of the Crown of England and domiciled in England, this prohibited relation were allowed to subsist. As part of the municipal law of England this statute has its operation within the territory of England upon all English subjects, and upon all marriages between English subjects who are within the prohibited degrees.

The municipal laws of foreign countries are made to bind the subjects of foreign countries. If a law were passed in Denmark, or any other foreign country, declaring that all marriages celebrated within its territories between English subjects who are within the degrees of affinity prohibited by the law of England should be valid marriages in England; and, although declared by an English Act of Parliament to be null and void to all intents and purposes, should nevertheless be deemed valid in

England, such a law could have no force or effect in this country. It would be a law passed by a foreign State to alter the municipal law of England as to English subjects, and therefore would be merely nugatory and absurd.

But the English statute which enacts that all such marriages shall be null and void, and which prohibits the status of marriage between such persons, would be equally nugatory if such marriages celebrated elsewhere than in England should be held valid.

[527] Persons within the prohibited degrees are by the Act made incapable of contracting a marriage between themselves, because the Act says that such a marriage shall be null and void. Therefore, the same observations which the Chief Justice Tindal made on the construction of the Royal Marriage Act are applicable to this Act. It does not enact an incapacity to contract matrimony in any one particular country or district more than any other. The existence of the affinity between the persons makes them incapable of entering into a valid contract of matrimony. This incapacity is personal and, being impressed upon the persons by the law of their own country, cannot be cast off or removed by mere change of place. It is a personal quality which, according to Huber and other jurists, travels round everywhere with the persons; inseparable from them as their shadows.

"Qualitas personalis certo loco alicui jure impressus, ubique circumferri et personam comitari, cum hoc effectû, ut ubivis locorum eo jure quo tales personæ alibi guadent vel subjeceæ sunt, frauntur et subjiciantur."

The result is that the settled principles of construction require that a general and comprehensive interpretation should be given to this Act, which contains words the most general and comprehensive. A confined and restricted interpretation is not warranted by the context, and would make the statute nugatory. Finally, the decision of the House of Lords in the *Sussex Peerage case*, and the reasons given to me by Mr. Justice Cresswell, satisfy my mind that the marriage in this case, whether it was celebrated in Denmark or elsewhere, is by the Act of Parliament made null and void to all intents and purposes whatsoever.

All the arguments founded on the Slave Trade Acts and the Legacy Duty Acts, and other cases cited for the Plaintiffs, fail in their application to the construction of a statute which enacts that the relation of husband and wife **[528]** shall not subsist between persons related to each other in a certain degree.

The next question is whether, as this marriage was celebrated in Denmark, its validity in all respects is to be decided by the laws of Denmark.

As a general principle the *lex loci* is to govern on all questions as to the validity or invalidity of personal contracts. This principle is founded on convenience. But it has been found necessary, from a regard also to the higher considerations of duty, as well as convenience, to make certain exceptions and qualifications in applying this principle. These exceptions are well defined by high authority, and rest on unquestionable grounds.

Lord Mansfield says, in the case of *Robinson* v. *Bland*, 1st Wm. Blackstone, 258, "*Lex loci contractûs* admits of an exception where the parties at the time of making the contract had a view to a different country." Therefore it has been held that the law of the country in which the contract is to be performed is to have effect rather than the law of the country in which the contract may happen to have been made. Huber says, "Non ita præcisè respiciendus est locus in quo contractus initus est, &c. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit." And the same writer says, as to the marriage contract: "Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus, quam in quo contrahentes matrimonium exercere voluerunt."

The French jurists are generally of opinion that the validity of a marriage must be decided according to the law of the place where it is celebrated; but with a clear exception, in cases positively prohibited by their own law, to their own subjects. The necessity of this exception arises from the obligation, on each estate, to preserve its own institutions entire. Nations are bound duly to respect and recognise each other's laws. But each nation **[529]** is bound by a much higher duty to enforce obedience to its own municipal laws as regulating the rights of persons and of property among its own subjects. Therefore it is that so much weight is given to the law of the country in which the contract is to be performed.

What seemed most material of the authorities cited on behalf of the Plaintiffs were the decisions on Lord Hardwicke's Marriage Act—one passage in the judgment of Sir William Scott in the case of *Dalrymple* v. *Dalrymple*, and an extract from Story's Treatise.

Mr. Justice Cresswell has already well disposed of what was read from Story's book. Indeed, in the 113th section that writer admits the exception of marriages "positively prohibited by the public law of a country, from motives of policy."

As to the decisions on Lord Hardwicke's Act there is an express proviso in the Act that it shall not extend to marriages contracted in Scotland or beyond the seas. So far from that Act containing any general or absolute prohibition and declaration of nullity as to all marriages contracted otherwise than according to its provisions, the prohibition and declaration in it are confined to marriages contracted in England without a compliance with the solemnities and consents which that Act requires.

The words quoted from Sir William Scott's judgment in *Dalrymple* v. *Dalrymple* have no reference to anything but the acts and solemnities necessary to bind the persons. The words are wholly inapplicable to cases where there is a positive legislative incapacity to contract at all. When Sir William Scott said that the law of England leaves the question of the validity of a marriage to the decision of the law of the country in which the contract is made, he spoke as to the case before him, which was a question concerning a marriage contracted in Scotland *per verba de præsenti*, and without any religious celebration, **[530]** and therefore a question only as to the sufficiency of the acts and solemnities to constitute a valid contract of marriage.

Mr. Barge, in his very valuable commentaries, says (1, 69): "A contract, however legal it may be in itself, cannot be enforced against property situated in a country the laws of which prohibit such contract. The formalities established for authenticating and proving Acts are those prescribed by the law of the place where the Acts are passed; and if those have been observed, the Acts are, as to their form, deemed valid in all places. The formalities which are attached to, and inherent in, the property which is the subject of the contract are those prescribed by the law of the country in which the property is situated."

These propositions relate to contracts in general. But the vast importance of the marriage contract requires their application to it in a peculiar degree. It has been repeatedly decided in our Courts that the law of the country where a marriage may happen to be celebrated cannot prevail where it is opposed to the municipal institutions of the country of the domicile and allegiance of the contracting parties. Therefore, in the case of *Beazeley* v. *Beazeley* (3 Hag. 639) the law of the country where the marriage was celebrated was held not to prevail, because one of the contracting parties was by the law of the country of his domicile incapacitated from entering into the contract. It was held that this incapacity was not removed by a transient visit to another country, the laws of which did not incapacitate in such a case.

In the case of *Warrender* v. *Warrender* (2 Clk. & Fin. 488), the House of Lords decided that although the marriage was contracted in England, yet, the husband being a domiciled Scotchman, and the marriage being with a view to a permanent **[531]** residence in Scotland as the country of the husband and wife, the law of Scotland and not the law of England was to regulate, because although the marriage was celebrated in England, Scotland was the country in which the contract was to be fulfilled.

The law of England is wisely reluctant to admit any doctrine which is repugnant to the settled principles and policy of its own institutions. It is a settled principle of the law of England not to recognise or give effect to any contract illegal or immoral, or against public policy. This principle, so well established, is binding upon all English subjects, and imperative in all English Courts of Justice. The question of illegality, immorality or contravention of public policy in such cases is to be decided by the laws of England, and not by the laws of any foreign country.

All the highest authorities among foreign jurists treat as an exception from the principle of comity and respect due to foreign laws the case of such foreign laws as interfere with the power and public policy of each State in its own municipal system. The parties to this marriage contract were subjects of the Crown of England, bound

by their allegiance and domicile to the law and constitution of England. In Denmark they continued still subjects to the Crown of England. In Denmark their *status* was that of aliens to the Crown of Denmark, and owing only a temporary obedience to the laws of Denmark, under which they had only temporary protection.

The law of England, which prohibits the marriage of a widower with the sister of his deceased wife, is an integral part of our law and public policy. Therefore, by the established principles of international law, it must have a paramount effect, and cannot be evaded by having resort to the laws of any foreign country.

The law of England as to this matter is a personal law acting upon the persons of English subjects, and creating **[532]** a personal incapacity which must accompany the persons into every country. "Quando lex in personam dirigitur respicienda est ad leges illius civitatis quæ personam habet subjectam." These are the words of Hertius, and they state a principle recognised by the other jurists.

As a question on the law of contract, the validity of the contract of marriage as to the capacity to contract must depend on the law of the country in which the contract was to have its effect, and that country was England. This is a case in which three circumstances concur, any one of which, according to the jurists, excludes the application of the *lex loci contractûs*. It is a case in which the public policy of the law of England prohibits the contract. It is a case in which the law is personal in its nature, and must accompany the persons wherever they go. And it is moreover a case in which England was the country with a view to which, and in which, the marriage contract was to have its permanent effect.

No resort to the laws of Denmark, or of any other foreign country, can give validity to such a contract where the law of England has made it null and void.

It seems, therefore, the duty of this Court to declare that the marriage between the testator and Emily Armitage, the sister of his deceased wife, was not a valid marriage, but is null and void to all intents and purposes whatsoever, and that the real and personal estate of Charles Armitage Brook, deceased, has become vested in the Crown.

[533] BARTLETT *v.* BARTLETT. *March* 13, 1857.

[Varied, 1 De G. & J. 127; 44 E. R. 671 (with note), to which add *Rutter* v. *Everett* [1895], 2 Ch. 877.]

The assignee of a share in a reversionary fund, standing to the account of B. and her children, obtained a stop-order, and afterwards assigned the share by way of mortgage to M., and became bankrupt before the fund became distributable. M. presented a petition for payment of the share to her; but having obtained no stop-order, the assignees of the bankrupt claimed the share, as being within the order and disposition of the bankrupt, with the consent of the true owner thereof. But the Court held otherwise, and ordered payment to the Petitioner.

Assignees in bankruptcy are bound by the lawful contracts of the bankrupt, and where by conveyance and contract the bankrupt has only an equity of redemption in a fund in Court standing in his name, that fund is no longer within the principle of reputed ownership under the Bankruptcy Act.

Nicholas Bartlett, by his will, dated the 12th of April 1838, bequeathed a sum of £6000 stock to his executors upon trust to pay the dividends thereof to his widow, Elizabeth Bartlett, for her life, and after her decease, as to £1500 part thereof—upon trust for his daughter, Sophia Bartlett, for her separate use, remainder for her children, and in default thereof, among such of his children as should be living at the death of the said Elizabeth Bartlett.

The testator died on the 20th of May 1840, and Sophia Bartlett died on the 20th of September 1840, without children.

By an indenture of assignment, dated the 5th of March 1846, reciting the testator's will, Josiah Bartlett, one of the testator's children, for valuable consideration, assigned his one-seventh share, of one-fourth part of such sum of £6000 and all