from the Reformatio Legum Ecclesiasticarum, pp. 45, 46, the table of Archbishop Parker, incorporated in the 99th Canon of 1603: the letter of Bishop Jewell, already cited (Appendix to Strype's Life of Parker, vol. iii. p. 55); 2 Inst. 683; the passage referring to the canons in *Butler* v. *Gastrill* (Gilb. Ca. Eq. 156, 159); and, it may be added, from the uniform practice of the Ecclesiastical Courts, the jurisdiction of which existed before stat. 32 H. 8, c. 38, and was unimpaired by it, and which are for this purpose Superior Courts, and of the highest authority; Littledale J., in *Ricketts* v. *Bodenham* (4 A. & E. 433, 446), Lord Coke in *Bunting* v. *Lepingwell* (4 Rep. 29 a.), Lord Lynd-**[203]**-hurst C. in *Regina* v. *Millis* (10 Clarke & Fin. 534, 844), *Watkinson* v. *Mergatron* (Sir T. Raym. 464), *Faremouth* v. *Watson* (1 Phillim. 355), *Chick* v. *Ramsdale* (1 Curteis, 34), *Sherwood* v. *Ray* (1 Moore, P. C. C. 353); confirmed by *Hill* v. *Good* (Vaughan, 302), *Harris* v. *Hicks* (2 Salk. 548), and *Collet's case* (2 (T.) Jones, 213).

As to the point peculiar to the present case namely, that which arises from one of the parties being illegitimate: it is remarkable that it should never have been expressly decided in this country. But that the laws of consanguinity and affinity apply to bastards as well as to other persons, is to be collected from many cases; *Haines* v. *Jescott* (5 Mod. 168; 1 Ld. Raym. 68, 1 Comyns's Rep. 2), *Regina* v. *Chafin* (3 Salk. 66), *Rex* v. *Hodnett* (1 T. R. 96), (the dictum in which is adopted in the note F to 1 Thomas's Co. Litt. 146), *Horner* v. *Horner* (1 Hagg. Cons. R. 337, 352).

Bracton, fol. 21 a. (l. ii. c. 7, s. 2), in discussing the reversionary right of the donor in cases of failure of heirs of the donee, says that a bastard is "extraneus" to his brother "quoad successionem, licet non quoad sanguinem." So Ayliffe, Parerg. 326, adopts the doctrine that, without a marriage contract, "affinity may be contracted in bar to matrimony." In the Pupilla Oculi (part 8, c. 10, A), it is said: "Oritur affinitas tam ex coitu fornicario quam matrimoniali seu legitimo. Et generaliter ex omni carnali commixtione per quam vir et mulier dicuntur effici una caro." In the Declaratio Arboris Consanguinitatis, in Corp. Jur. Can. tom. i. p. 1853, are the words following: "Quoad probationem conjugii non distinguo, an tales consanguinei sint pro-**[204]**-ducti ex uxorio coitu, vel ex fornicario;" and similarly, in the Arbor Affinitatis, in Corp. Jur. Can. vol. iii. (ad finem), it is laid down that affinity, arising from illicit intercourse, is on the same footing with affinity arising from marriage. In the Aurea Summa of Hostiensis, p. 1198, the question as to civil succession is distinguished from that regarding marriages: as to which latter it is said, "Non est inspicienda nisi sola conjunctio naturaliter." Brouwer, De Jure Connubiorum (l. ii. c. 13, p. 482), distinguishes actual (as opposed to fictitious) affinity into the "legitima" and the "naturalis ex stupro, scortatione, vulgivagâ venere, concubinatu, incestu;" and he treats the latter as an impediment to marriage, including even cases of violation, &c. The Jewish law (Selden, De Jure Naturali et Gentium Juxta Disciplinam Ebræorum, lib. v. c. 10, p. 544), equally repudiates the supposed distinction. The same principle prevailed in the civil law. Cujacius, tom. ii. p. 1049, after enumerating some prohibited degrees, adds, "Etiam si qua in patris tantùm concubinatu fuisset." So Voet, Comm. ad Pandect. (l. xxiii. tit. 2, tom. iii. p. 33), says that such affinity arises "ex vetito cum meretrice congressu seu fornicatione." And Vinnius, in Inst. lib. i. tit. 10, p. 66, says: "Ambigitur, an etiam ex illegitimâ conjunctione contrahatur affinitas;" and he answers this in the affirmative, adding: "Neque ob aliam causam, quam ob affinitatem, prohibetur filius patris sui concubinam uxorem ducere," "aut in concubinatu habere" (*a*).

Cur. adv. vult. (*b*).

[205] The case of *Regina* v. *Chadwick* was as follows.

James Chadwick was indicted at the Sessions of Oyer and Terminer and Gaol Delivery held at Liverpool, in and for the County Palatine of Lancaster (Liverpool Winter Assizes, December, 1846), for bigamy. The indictment charged in the usual form that the defendant married one Ann Fisher, and afterwards, and whilst he was

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(*a*) But, by the Scotch law, "incest is not committed by connexion with bastard relations, how near soever;" Allison's Principles, ch. xxix. s. 2 (p. 565).

(*b*) The argument in this case is partly reported by H. Merivale Esq.

so married to the said Ann, feloniously married one Eliza Bostock, his said former wife being then alive. A special verdict was found, in the following words.

"That, on the 14th day of September, A.D. 1845, the said James Chadwick was married to one Ann Fisher, spinster, at," &c., "according to the rites and ceremonies of the Established Church; and that afterwards, viz. on the 23rd day of March A.D. 1846, the said James Chadwick was married, at," &c., "to one Eliza Bostock, spinster, according to the rites and ceremonies of the Established Church, she the said Ann Fisher then being still alive. And that the said Ann Fisher, to whom the said James Chadwick was so married as aforesaid, on the 14th day of September, A.D. 1845, was the lawful sister of one Hannah Fisher to whom the said James Chadwick had been lawfully married on the 27th day of June, A.D. 1825; and that, after the marriage of the said James Chadwick with the said Hannah Fisher, they the said James Chadwick and Hannah Fisher lived together as man and wife: and which said Hannah Fisher departed this life before the said time when the said James Chadwick was married to the said Ann Fisher as aforesaid. But whether or not upon the whole matter," &c. "found the [206] said James Chadwick is guilty of the felony," &c., "the said jury are altogether ignorant;" &c.

Judgment was given, at the assizes, by Wightman J., that the said J. C. is not guilty, &c., and that he go without a day, &c.

Error was brought on the judgment; the only cause assigned being that judgment had been given for the defendant on the special verdict, whereas it should, by law, have been given against him. Prayer of reversal, &c. Joinder.

The writ of error was argued in the present Michaelmas term, November 17th and 20th.

Sir F. Kelly for the Crown. Stat 5 & 6 W. 4, c. 54, s. 2, annuls all marriages thereafter to be celebrated between persons within "the prohibited degrees of consanguinity or affinity:" and the question will be what, and by whom imposed, is the prohibition to which this force is given. The principal statutory authority, before the Act of William, is stat. 32 H. 8, c. 38, s. 2; and that confirms, notwithstanding any pre-contract (not consummate) or dispensation, all marriages contracted within the Church of England between "lawful persons," such marriages being contract and solemnized in the face of the Church, and consummate; and declares "all persons to be lawful, that be not prohibited by God's law to marry." Then, what is prohibited by God's law? The prohibition must be looked for in the express words of scripture. By the law of nature all marriages are free, though some may be highly inexpedient. A law to abridge that natural freedom must be construed strictly, not extended by analogy or on the ground of a supposed parity of degree. [207] The divine ordinance on this subject is found in the 18th chapter of Leviticus, and does not in terms include marriage with a wife's sister: and the letter of that law was acted upon by the Jews and early Christians down to the year of our Lord 313, when the Council of Eliberis imposed a penance on the man who should contract such a marriage. The history of this and similar usurpations is traced in Reeve's History of the English Law, vol. iv. 52, et seq. (3d ed.), c. 25, and Hallam, Middle Ages, c. 7 (vol. ii. p. 293, &c., 4th ed.): and they were still in force when, by stat. 32 H. 8, c. 38, the prohibition was, in this country, brought within the limits prescribed by the law of God. (He then proceeded to discuss the material passages of the 18th chapter of Leviticus. This part of the argument, being laid out of consideration by the Court in its judgments, is not further stated here: but a notice of the discussion on the same points will be found in the report of the preceding case.) It is suggested, in favour of the inferential construction, that, without it, some marriages clearly not allowable, as between a man and his grandmother, are unprohibited by the Levitical law; but in many other instances the divine law is silent as so offences which God cannot have intended to sanction, but which it has been unnecessary to point out, either because there was no likelihood that men would be tempted to them, or because it was clear, without their being specified, that they were contrary to the divine will. If the 18th chapter of Leviticus does not contain a complete code, the same may be said of the 20th chapter of Exodus. The judgment of Vaughan C.J. in *Harrison* v. *Dr. Burwell* (Vaughan, 206), shews the impression, at [208] the time when that case was decided, to have been that our law, in forbidding marriages as contrary to the law of God, included degrees which, "in the meaning of the 18th of Leviticus, were not absolutely, but circumstantially prohibited" (Vaughan, 240); among which was the marriage with a brother's wife, not

(as is there said) prohibited by the Levitical law, "but when the dead brother left issue by his wife" (Deut. c. xxv. v. 5-10). Vaughan C.J. adds: "A man is prohibited by 28 H. 8" (stat. 28 H. 8, c. 7, s. 11, which, however, had been repealed), "and by the received interpretation of the Levitical degrees, absolutely to marry his wife's sister: but within the meaning of Leviticus, and the constant practice of the commonwealth of the Jews, a man was prohibited not to marry his wife's sister only during her life, after he might:" and this agrees with Michaelis, vol. ii. p. 112, cited in T. C. Foster's "Review of the Law Relating to Marriages within the Prohibited Degrees of Affinity," p. 79. It was argued in *Regina* v. *St. Giles in the Fields* (ante, p. 193), that, in the enactment of stat. 32 H. 8, c. 38, s. 2, "that no reservation," &c. "God's law except, shall trouble or impeach any marriage without the Levitical degrees," the word "degrees" must not be confined to the particular instances of degree mentioned in the 18th of Leviticus, but must be taken as extending to similar degrees, and as comprehending classes. There is, however, no expression in the clause warranting this assumption. And the word "degrees" had before been used in stat. 28 H. 8, c. 7, ss. 11 and 13, as signifying particular relationships enumerated in that Act, and not as a technical term signifying a mode of being related. In G. L. Boehmer's Principia **[209]** Juris Canonici, p. 322, b. 3, s. 2, tit. 6, s. 398 (7th ed., 1802), it is laid down that, where the divine law specifies persons who may not marry, the interpretation by parity is inadmissible; and it is also said that marriages not expressly prohibited may be permitted by dispensation; "cujusmodi sunt nuptiæ cum defunctæ uxoris sorore" (*a*)[1].

Kelly then discussed the effect of the repeal and revival of statutes from 25 H. 8 to 1 Eliz.; but the principal arguments on this head are already reported in the preceding case. He observed that stat. 32 H. 8, c. 38, did not, when declaring the lawfulness of certain marriages, refer to the definitions of illegality contained in former statutes, although there were two on that subject in force at the time; he urged that, when a former Act of the same reign (28 H. 8, c. 16, s. 2) intended to limit the law by reference to previous enactments, it made express allusion to the statute (28 H. 8, c. 7): and he inferred that, in construing stat. 32 H. 8, c. 32, the Court were bound to consider only "God's law," the sole authority there pointed to, and must enquire this out for themselves. He further contended that, even if this could have been otherwise, there remained no statutory declaration of God's law to be embodied in the last two Acts of H. 8, since all the clauses of stat. 28 H. 8, c. 7, which contained such declaration had been repealed by stat. 1 & 2 Ph. & M. c. 8, ss. 17, 20, and were not revived by stat. 1 Eliz. c. 1, the language of which Act, from sect. 10 to sect. 13, shewed no intention to carry back the rule of law on this head, but only to abolish some **[210]** Acts of the late reign on other subjects, and to continue the repeal of those enactments, made in the time of Henry 8th, which affected the Queen's legitimacy (*a*)[2]. When an Act, explained and amended by other Acts, has expired, and is revived, the other Acts, if they also have expired, are revived for the purpose, strictly, of explanation and reference, and no farther: this is the whole effect of *Williams* v. *Rougheedge* (2 Burr. 747).

It might be expected from the variety of legislation on this subject that there would be confusion and inconsistency in the decisions. The first case extant, after stat. 32 H. 8, c. 32, is *Manue's case* (*c*) (32 Eliz.), where, according to Moore's report, the party was sued in the Court Christian for marrying one of his wife's sister's daughters, and a prohibition was awarded, because such marriage is not prohibited by the Levitical law. In Leonard's report it is said that, although the marriage was "not expressly within the Levitical degrees, yet because more farther degrees are prohibited the Archbishop of Canterbury and other the commissioners gave sentence against him, upon which he sued a prohibition upon the stat. of 32 H. 8, c. 38." A consultation was afterwards granted; but only (as appears by the report in Leonard, with which that in Croke agrees) because "the prohibition was general where it ought to be

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(*a*)[1] In this part of the argument Kelly also referred to Jeremy Taylor's Ductur Dubitantium: see book 2, c. 2, rule 3. Works (ed. by Heber, 1822), vol. xii. pp. 307-350.

(*a*)[2] See 1 Gibs. Cod. 410 (2d ed.), notes b., c.

(*c*) Moore, 907; S. C. Cro. Eliz. 228, 4 Leon. 16. See Vaughan, 321, 247, 8, 9.

special." The next is *Parsons's case* (*d*) (2 Ja. 1), where, as Lord Coke states: "A man married the daughter of the sister of his first wife, and was drawn in question in the Ecclesiastical Court for this marriage, alleging the same to be against the canons; and **[211]** it was resolved by the Court of Common Pleas, upon consideration had of the said statute, that the marriage could not be impeached, for that the same was declared by the said Act of Parliament" (32 H. 8, c. 38) "to be good, inasmuch as it was not prohibited by the Levitical degrees, et sic de similibus." Mr. Butler's note (149) on this passage shews how a contrary doctrine gained ground by the influence of the ecclesiastics. *Parsons's*, or *Pearson's, case* is noticed at length in *Harrison* v. *Dr. Burwell* (Vaugh. 248, 9); and it appears there that a consultation was granted, but on a point in the pleadings. The next decision, *Hill* v. *Good* (Vaugh. 302), (25 Car. 2), is contrary to those preceding: and almost every subsequent decision to the same effect has been founded upon this, without any deliberate argument. Vaughan C.J. grounds his judgment against the writ of prohibition on three reasons: 1. That the marriage with a wife's sister is expressly prohibited by the 18th Leviticus: 2. That, although it were not expressly prohibited, it is still not without the Levitical degrees: both which assumptions are incorrect if the preceding argument in this case be well founded: and, 3. That the marriage, if without the Levitical degrees, is yet prohibited by God's law, and therefore may be impeached, consistently with stat. 32 H. 8, c. 38. But for this last proposition he relies (Vaugh. 323), upon the non-repeal of stat. 28 H. 8, c. 7 (sects. 11, 12, 13), and upon the canons. Of the canons which existed at the passing of stat. 32 H. 8, c. 38, those only were in force, by stat. 25 H. 8, c. 19, sects. 2, 7, which were "not contrariant or repugnant to the laws, statutes and customs of this realm:" and the only canons framed after the year 32 H. 8, were those **[212]** of 1603, which have not in themselves any binding authority over the laity; *Middleton* v. *Crofts* (2 Atk. 650, 653), *Matthew* v. *Burdett* (*b*)[1], *Regina* v. *Millis* (10 Cl. & Fin. 534, 680, 875), opinions of Tindal C.J. and Lord Cottenham. *Hill* v. *Good* (Vaugh. 302), was followed by *Wortly* v. *Watkinson* (2 Lev. 254; 3 Keb. 660), (31 Car. 2), where, in the case of a marriage between a man and the daughter of his first wife, a consultation was granted, and *Hill* v. *Good* (Vaugh. 302), was relied upon in the argument. *Snowling* v. *Nursey* (2 Lutw. 1075), (13 W. 3), where also *Hill* v. *Good* (Vaugh. 302), was referred to, seems to have been decided partly on reference to the Canons of 1603. In *Butler* v. *Gastrill* (Gilb. Ca. Eq. 156; Bunb. 145), (8 G. 1), where a consultation was awarded in a case of marriage with the wife's aunt, the judgment turned upon the authority of the Church to enact canons which should be recognised by laymen; and reliance was placed on *Hill* v. *Good* (Vaugh. 302), and the later decisions founded on that case. Two other cases, of the times of Car. 2, and W. & M., may be cited: but the first, *Watkinson* v. *Mergatron* (Sir T. Ray. 464), clearly proceeded on an error; for, the suit being for marrying a sister's daughter, and the defendant having "prayed a prohibition, because out of the Levitical degrees," this was "denied by the whole Court, because it is a cause of ecclesiastical cognizance, and divines better know how to expound the law of marriages than the common lawyers;" an argument which would deprive the Common Law Courts of their authority under stat. 32 H. 8, c. 38, s. 2. The other case, *Harris* v. *Hicks* (2 Salk. 548), cannot be considered a decision on the point **[213]** now before the Court. In *Sherwood* v. *Ray* (*a*) (1 Vict.) this point was not directly raised. There is indeed a dictum of Parke B., in the judgment of the Court delivered by him, that the marriage with a wife's sister, "having been celebrated between persons within the Levitical degrees, and prohibited from intermarrying by Holy Scripture, as interpreted by the canon law and by the statute 25 H. 8, c. 22, s. 3, was unquestionably voidable during the lifetime of both, and might have been annulled by criminal proceedings or civil suit" (*b*)[2]. But that cannot be looked upon as a considered decision of the point of law. It may be that the practice in the Ecclesiastical Courts for many years has been to dissolve these marriages; but, when this Court is called upon to apply a statute (5 & 6 W. 4, c. 54,) by which, if a marriage falls within it, the issue is bastardized, they must exercise their own judgment, and determine, without regard to ecclesiastical

(*d*) Co. Litt. 235 a. And see 2 Inst. 683.
(*b*)[1] 2 Salk. 412; and see ibid. 672, 3.
(*a*) 1 Moore's P. C. 353. See *Ray* v. *Sherwood & Ray*, 1 Curt. 173, 193.
(*b*)[2] Pp. 395, 6. And see p. 397.

authority, what marriages are really within stat. 32 H. 8, c. 38, as "prohibited by God's law." Even if, in so doing, they should reverse that which has been deemed the law for two hundred years, yet, as Lord Denman C.J. argued in *O'Connell* v. *The Queen* (11 Cl. & Fin. 155, 368-371), such a consideration must not deter them from correcting an ascertained error.

Aspland, contrà. Stat. 5 & 6 W. 4, c. 54, in using the term "prohibited degrees," does not refer directly to prohibitions by the law of God, and, therefore, had not in view either the parts of the Old Testament **[214]** relating to such prohibitions, or the older statutes declaring the law of God on this subject. It was passed to enforce a merely civil regulation; and it adopted the term in question as one of well understood import in the English language, recognising the practice of the Ecclesiastical Courts with respect to marriages included in the commonly known table of prohibited degrees. That the term "prohibited degrees" has long acquired a definite meaning, and includes the relationship between a man and the sister of his deceased wife, appears from 2 Inst. 683, where a table is given of "degrees of affinity or alliance prohibited," in which such a marriage is included; from Archbishop Parker's table of 1563, given in 2 Burn's Ecc. L. 442, and 4 Burn, Eccl. L. 659, 9th ed.; from the Canons of 1603, can. 99, in 2 Burn, Ecc. L. 446; from 1 Gibs. Cod. p. 414 (2d ed.); and from the general course of decisions in the Ecclesiastical Courts. To shew how universally it was understood that such a marriage is included in the list of prohibited degrees, reference may be made to a judgment pronounced by Lord Brougham in the House of Lords, only a few days before the statute received the Royal assent. He says, in *Warrender* v. *Warrender* (2 Cl. & Fin. 488, 531; 9 Bligh, N. S. 89): "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, though solemnized under Papal dispensation, because it would clearly be avoidable in this country:" and proceeds to express an opinion that English Courts would refuse to sanction such marriages, though solemnised in countries where the law permits them. The preamble of stat. 5 & 6 **[215]** W. 4, c. 54, supports the view now contended for. A civil inconvenience (the uncertain condition in which the issue of such marriages are kept while the parents live) is recited; and the practice of the Ecclesiastical Courts is referred to. Whether that practice was correct or not, is immaterial; the reference to it explains the intention of the statute. Sect. 1 declares that past marriages, where no suit is pending, are not to be annulled for affinity: it is not to be supposed that, if the degrees were treated as marked out by the law of God and by statutes defining that law, the Legislature would have felt authorised to lay down a different rule for marriages within those degrees happening before, and such marriages happening after, a certain date. Stat. 9 Geo. 4, c. 31, s. 22 (on which indictments for bigamy are founded) contains a saving proviso for any one who, at the time of the second marriage, shall have been divorced from the bond of the first marriage, or whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction. As a marriage within the degrees prohibited is now absolutely void, there will be no sentence of an Ecclesiastical Court to declare it void; the operation of the proviso in such a case has, therefore, been repealed; and it is reasonable to suppose that the repealing statute meant to substitute some other guide in lieu of a sentence in the Ecclesiastical Court; and that substitute must be the past practice (which the statute recites) of the Ecclesiastical Courts. Stat. 5 & 6 W. 4, c. 54, has always, since its passing, been understood, both in and out of the profession, to avoid such a marriage as this; and such appears to be the plain and obvious construction.

[216] Assuming, however, that the recent statute is not alone decisive of the question, it can be shewn in various ways that this marriage is prohibited by the older statutes. Stat. 25 H. 8, c. 22, s. 3, mentions this as amongst the degrees of marriage "prohibited by God's laws," and "plainly prohibited and detested by the laws of God." Stat. 28 H. 8, c. 7, if it partly repealed the former statute, re-enacted its provisions on this subject, by sect. 11: and stat. 28 H. 8, c. 16, enacts (sect. 2) that certain marriages shall be valid whereof there is no divorce, "and which marriages be not prohibited by God's laws, limited and declared in the Act made in this present Parliament" (c. 7), "or otherwise by Holy Scripture." These statutes, if they can now be looked at, decide the present question. And, 1. The portions of stat. 28 H. 8, c. 7, material to the present inquiry, have never been repealed. 2. If repealed, they have been revived, and are now in force. 3. If not revived so as to have a binding

force of themselves, yet they are so referred to by, and incorporated with, other statutes now in force, that their declarations as to God's laws must be received as parts of those statutes.

1. There is no reasonable ground for contending that stat. 32 H. 8, c. 38, affected the general marriage law as declared by stat. 28 H. 8, c. 7. Its object was entirely different; it was passed in 1540, just before the King's marriage with Catharine Howard, who was the cousin-german of his former Queen Anne Boleyn, but not related to himself: it recites (sect. 2) "an unjust law of the Bishop of Rome," whereby persons have, upon pretence of former contracts, "been divorced contrary to God's law; and further also, by reason of other **[217]** prohibitions than God's law admitteth, for their lucre by that Court invented, the dispensations whereof they always reserved to themselves, as in kindred or affinity between cousin-germans, and so to fourth and fourth degree, carnal knowledge of any of the same kin, or affinity before in such outward degrees, which else were lawful, and be not prohibited by God's law," &c.; and then enacts that all and every such marriages as "shall be contracted between lawful persons (as by this Act we declare all persons to be lawful, that be not prohibited by God's law to marry) such marriages being contract and solemnised in the face of the Church, and consummate," &c., shall be "lawful, good, just and indissoluble, notwithstanding any precontract," &c., and "notwithstanding any dispensation," &c., "and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." The object of the Act, as appears both by the preamble and by the express provisions, was merely to prevent divorces for precontract, or on the ground of the kindred or affinity subsisting between cousins-german or more distant relations. This statute is quite consistent with stat. 28 H. 8, c. 7; and the two (being in pari materiâ) must be construed together. And, even if stat. 32 H. 8, c. 38, must be looked at alone, it plainly admits, first, that a marriage within the degree of relationship of cousins-german is illegal; secondly, that relations by blood and by affinity are, for this purpose, on the same footing. It therefore strengthens the argument against the legality of marriage with the sister of a deceased wife.

The Act 2 stat. 1 Mary, c. 1, did not repeal the portions in question of stat. 28 H. 8, c. 7. This Statute **[218]** of Mary was not a general Marriage Act; it was passed for the purpose of declaring one particular marriage (that of Henry and Queen Katharine) valid. It did not profess to set up any class of marriages. Besides, if it implicitly extended to a class, that class was of marriages with two brothers in succession; which marriages stand on different grounds from the marriage now under discussion. It is to be observed, also, that this statute proceeds partly on the ground of the Queen's absence at the time of sentence given (sect. 4); and it is a matter of history that the sentence was founded (*a*) partly on the consummation of the marriage with Prince Arthur, which was denied by Queen Mary; and that is, probably, the true foundation on which the statute rested: if so, it is no way inconsistent with the prohibitions contained in stat. 28 H. 8, c. 7, which apply only where there has been consummation of a former marriage. Nor were the prohibited degrees altered by stat. 1 & 2 Ph. & Mary, c. 8: that statute was not passed to alter the general marriage laws, nor to set up the legitimacy or title of Queen Mary. The latter purpose had been fully effected by 2 stat. 1 Mary, c. 1. To pass a further statute with that object would have been to weaken her title; whereas, a marriage having in the mean time taken place between the Queen and a Roman Catholic prince, a strong supporter of the Church of Rome, it was natural that statutes should now be passed to reinstate the Pope in his former power. Accordingly, by stat. 1 & 2 Ph. & M. c. 8, s. 2, all statutes against the supre-**[219]**-macy and See of Rome passed since 20 H. 8 are repealed. Besides this sweeping repeal, particular statutes and parts of statutes are specially named, and among them, by sect. 17, "all that part of" stat. 28 H. 8, c. 7, "that concerneth a prohibition to marry within the degrees expressed in the said Act" is repealed. It is to be observed that stat. 28 H. 8, c. 7, by sections 11, 12, declares the prohibited degrees, and by sect. 13 forbids marriages

(*a*) The sentence does not, in terms, refer to the supposed fact: but it is much insisted upon in the depositions. See the proceedings at length in the Proceedings relative to the Divorce of Katharine of Arragon, 1 Howell's State Trials, p. 299, pp. 325-8, 358.

within the degrees, though proceeding on dispensation, "for no man, of what estate, degree, or condition soever he be, hath power to dispense with God's laws" (s. 12). There was no dispute between the two Churches as to the extent of God's laws on this subject; but there was a struggle as to the dispensing power (*a*)[1]. There is every reason, therefore, to conclude that the intention of stat. 1 & 2 Ph. & M. c. 8, was to leave the general law as to prohibited degrees untouched, and merely to establish an exception where a marriage may have been solemnized under Papal dispensation.

2. If, however, the portions of stat. 28 H. 8, c. 7, relating to prohibited degrees were ever repealed, they have been revived. Stat. 32 H. 8, c. 38, which was repealed by stat. 1 & 2 Ph. & Mary, c. 8, s. 19, was (with an exception not now material) revived by stat. 1 Eliz. c. 1, s. 11. Stat. 32 H. 8, c. 38, as has been already **[220]** shewn, must be read with stat. 28 H. 8, c. 7, being founded upon it; there is, therefore, ground to contend that the revivor of stat. 32 H. 8, c. 38, has drawn with it the revivor of stat. 28 H. 8, c. 7. Precisely the same argument may be used with reference to stat. 28 H. 8, c. 16, which is directly founded on stat. 28 H. 8, c. 7, and which, after being repealed by stat. 1 & 2 Ph. & Mary, c. 8, s. 16, is revived, and in very strong words, by stat. 1 Eliz. c. 1, s. 10.

3. Even assuming that, from whatever cause, stat. 28 H. 8, c. 7, cannot be now considered in force so as to have a binding power of itself, yet it is, historically, on the statute book, and must be looked at in order to explain statutes 32 H. 8, c. 38, and 28 H. 8, c. 16, with which it is in pari materiâ. It would be an anomaly in language to say that the two statutes are revived, if they are not to exist in the same sense in which they stood at the time of their repeal; and this would be so, if the former statute on which they are founded, and which gave them their meaning, could not be looked at to explain them. On this part of the case, *Regina* v. *Stock* (8 A. & E. 405, 410), *Strickland* v. *Maxwell* (2 Cro. & M. 539; 4 Tyr. 346), and 7 Bac. Abr. 454, 5 (7th ed.), tit. Statute (I), 3, may be referred to.

The argument from the Mosaic law (assuming that it is necessary to consider what that law actually declares) is in favour of the defendant. The 18th chapter of Leviticus lays down two general laws: one, v. 6, against marriage between a man and any that is near of kin to him; the other, in v. 17, against marriage with his wife's near kinswoman. This particular marriage is not included; but marriage with a daughter, which no one alleges to be lawful, is not in specific **[221]** terms prohibited, and is proved to be so only by reasoning and inference, which apply equally to marriage with a wife's sister. There are strong reasons why the general laws just referred to should not be considered as limited to the particular instances stated in 18th Leviticus. (For the reason before given, p. 207, a detail of this part of the argument is deemed unnecessary (*a*)[2].)

(*a*)[1] Even at a later period the power of dispensing with the Levitical prohibitions was claimed for the Church of Rome. The 3d canon, De Sacramento Matrimonii, decreed in the 24th session of the Council of Trent (held in November 1563), is as follows;—"Si quis dixerit, eos tantum consanguinitatis, et affinitatis gradus, qui Levitico exprimuntur, posse impedire matrimonium contrahendum, et dirimere contractum; nec posse ecclesiam in nonnulis illorum dispensare, aut constituere, ut plures impediant, et dirimant; anathema sit."—Concilii Tridentini Canones et Decreta, p. 241. Antwerp, 1779.

(*a*)[2] Aspland observed, on this head, that the 20th chapter of Leviticus, and 22nd of Deuteronomy, forbid some of the marriages mentioned in the 18th of Leviticus; yet it could not be argued that the instances mentioned in those two chapters limit the general laws and repeal some of the specific prohibitions in 18 Levit. And, as to the text, 18 Levit. v. 18, forbidding to take a wife to her sister in her lifetime, that writers of authority were divided on the proper translation; and the law, if correctly given in the authorized version, was probably so framed in opposition to some heathen practice then commonly prevailing; a reason frequently assigned by commentators for particular precepts in the Mosaic law. Referring to the argument that a marriage with sisters successively must be as legal as marriage with brothers successively, which is said to be commanded in 25th Deuteronomy, v. 5, et seq., he answered, that this argument depended on parity of reasoning, which was declared on the other side to be inadmissible: but, supposing that objection waived, the cases were not the same, since marriage with the second brother was permitted only where the first had died

The authorities are, with remarkable uniformity, in favour of the defendant.

In Bro. Abr. Conditions, pl. 194 (12 H. 8, 3), is a **[222]** case where it was recognized, as part of the Ecclesiastical law, that a marriage between a woman and two brothers successively is not permissible, though a question arose as to the effect of a dispensation. In both *Manne's case* (Moore, 907. Cro. Eliz. 228; 4 Leon. 16), and *Parsons's case* (*b*)[1], a prohibition was followed by a consultation; though in the latter case, it is left in some doubt on what ground the consultation was awarded: and in *Rennington's case* (*c*), where the High Commissioners had sentenced for incest in marrying a wife's niece, there was no prohibition. In *Hill* v. *Good* (Vaughan, 302), the marriage had been with a sister of the deceased wife, and was held unlawful. This is a clear authority for the defendant. There is an elaborate judgment, which has been often followed, and never hitherto questioned: and it proceeded upon grounds in full force at the present day; for the marriage there was held void, not merely as against the canon law, but as being prohibited by the Levitical and statute laws. In *Harrison* v. *Burwell* (Vaughan, 206), where a man had married with the widow of his great uncle, the affinity was more remote than that now in question; and the general grounds of decision are confirmatory of those taken in *Hill* v. *Good* (Vaughan, 302). If certain expressions in the judgment in *Harrison* v. *Burwell* (Vaughan, 240, 241), point the other way, it must be remembered that *Hill* v. *Good* (Vaughan, 302), was a subsequent case, and entitled to more weight from the fact that those expressions had been uttered. In *Wortley* **[223]** v. *Watkinson* (2 (T.) Jones, 118; 2 Lev. 254), a consultation was awarded, the marriage questioned in the Court below being that of a man and the daughter of a sister of his former wife. In *Collet's case* (*b*)[2], a prohibition was refused, the marriage being with the sister of the former wife. A prohibition was subsequently granted, because the proceedings in the Ecclesiastical Court were fraudulent on the part of the husband; but that does not weaken the previous decision. So in *Harris* v. *Hicks* (2 Salk. 548; Comb. 200), where a man had married two sisters in succession, both dead at the time of the suit in the Ecclesiastical Court, the Court was allowed to proceed to punish the husband for the incest. In *Snowling* v. *Nursey* (2 Lutw. 1075), a prohibition had been obtained on the ground that the marriage with the daughter of the sister of the former wife was without the Levitical degrees; but, after two or three several arguments, a consultation was granted. In *Denny* v. *Ashwell* (1 Stra. 53), and *Ellerton* v. *Gastrell* (Comyns's Rep. 318), prohibitions were refused in cases of similar marriages. In *Butler* v. *Gastrill* (Gilb. Eq. Ca. 156; Bunb. 145), the female plaintiff in prohibition was aunt (mother's sister) to the deceased wife of her husband, the other plaintiff; and a consultation was granted. It has been said that decisions have proceeded on the canon law: but from the last cited case, as reported by Bunbury (who was counsel for the defendant), it is evident that that was not even one of the grounds of the decision; and the same appears by inference as to **[224]** *Snowling* v. *Nursey* (2 Lutw. 1075); for Eyre C.B. said, in *Butler* v. *Gastrill* (Bunbury, p. 156), that "the case of *Snowling* v. *Nursey* (2 Lutw. 1075), was a proper foundation for the Court's present determination;" but (the reporter adds) "seemed to think, that the parochial tables were not binding on the laity." It is probable, also, that some of the earlier cases were decided without reference to the canon law. The binding power of the

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childless; and the declared object was to raise up a name to him, a purpose which could not exist with reference to a deceased wife. And that, in reality, marriage with brothers successively was not commanded by the Jewish law, but permitted only, the reason of the permission being the inveteracy of a previously existing custom. That by the context of 25 Deuteronomy the custom appeared not to have been looked at with much favour; and it had been said that such marriages have now fallen into desuetude amongst the Jews: see 2 Michaelis, Comm. L. Mos. pp. 21-33 (Smith's Translation): and, if such a marriage were to be permitted now, because permitted to the Jews, all the consequences, as to inheritance and other points, must be carried out; which would be wholly inconsistent with our law.

(*b*)[1] Co. Lit. 235 a.; S. C. Vaughan, 248 (in *Harrison* v. *Burwell*), 322 (in *Hill* v. *Good*).

(*c*) Hob. 181, 5th ed. (in *Howard* v. *Bartlet*). See *Rennington* v. *Cole*, Noy's Rep. 29.

(*b*)[2] 2 (T.) Jones, 213, 15 Vin. Abr. 255; tit. Marriage (E), 5.

canons on the laity had long been denied. In the judgment in *Middleton* v. *Croft* (Ca. K. B. temp. Hardw. 332, 334), Lord Hardwicke cites a case of *The Prior of Leeds*, 20 H. 6 (Yearb. Mich. 20 H. 6, fol. 12, B, 13, A) to this effect; and other cases from Coke's Reports; and quotes an observation of King (C. J. of C. P.), made in the 1 Geo. 1, that it was "the prevailing opinion, that the Convocation cannot make canons to bind the laity." Several years after the judgment in *Middleton* v. *Croft* (Ca. K. B. temp. Hardw. 332, 334), Lord Hardwicke, in *Brownsword* v. *Edwards* (2 Ves. sen. 243), held it good cause of demurrer to a bill filed against a woman for a discovery as to an alleged marriage between her and the husband of her deceased sister, that she might subject herself to punishment in the Ecclesiastical Court.

The cases in the Ecclesiastical Court, accessible to the profession, are to the same effect; *Aughtie* v. *Aughtie* (1 Phillim. 201), *Faremouth* v. *Watson* (1 Phillim. 355), *Blackmore* v. *Brider* (2 Phill. 359), *Chick* v. *Ramsdale* (1 Curteis, 34), and *Ray* v. *Sherwood* (1 Curteis, 173, 193), and *Sherwood* v. *Ray* (1 Moore's P. C. C. 353). The last mentioned case is of the greater weight from being finally decided in a Court of ultimate **[225]** resort, and from its being a decision upon the recent statute. The opinions of Dr. Lushington in the Consistory Court, Sir H. Jenner in the Arches Court, and Parke B. in giving judgment on behalf of the Judicial Committee of the Privy Council, support the present argument. It is true that, in the judgment of the Judicial Committee, as reported (*a*)[1], reference is made to the statute 25 H. 8, c. 22, as still in force: but this appears to be an oversight; for the arguments had brought to the notice of the Court the repeal of this Act by stat. 28 H. 8, c. 7 (1 Moore's P. C. 390, 1).

This large body of authority is in accordance with the canon law. It was shewn by an elaborate argument, in *Regina* v. *St. Giles in the Fields* (ante, p. 173, 200-202), that, by the canon law, not only of England, but of all Europe, and extending over several centuries, a marriage such as this was forbidden. It is no impeachment of the earlier cases, to say that they rest partly on the canon law: canon law made before stat. 25 H. 8, c. 19, and not contrary to the laws of the realm, is valid by sect. 7 of that statute. If the Court entertain any doubt as to the correctness of former decisions, they will yet be legitimately bound by those decisions, and by the understanding known to have prevailed, both in and out of the profession, as to the law on this subject. *Crease* v. *Sawle* (2 Q. B. 862, 885), is a strong instance of the weight given to a series of authorities. There even the Court of Exchequer Chamber felt itself bound by a course of decisions of the Court of King's Bench on the rating of mines, though the series relied upon consisted only of four, the earliest (*Rowls* v. *Gells*, 2 Cowp. 451), in 1776.

[226] It is not unimportant that the law of Scotland on this subject expressly prohibits the marriage in question, as forbidden by the law of God (*a*)[2]: and there are instances even of capital conviction for incest committed with a wife's sister (*b*). In a case turning merely on municipal law, as of rights under a bankruptcy or insolvency, there may be no inconsistency in recognizing different laws for the different parts of the kingdom: but it would be strange if two cases like the present should come before the House of Lords, and they should be called upon to pronounce that one law of God prevailed in one part of the kingdom, and a second and conflicting law of God in another.

Sir F. Kelly, in reply. Before stat. 32 H. 8, c. 38, the Common Law Courts had no power to prohibit the Ecclesiastical Courts in cases of marriage. The statute gave that power where the marriage was "without the Levitical degrees." Thenceforward the real question as to prohibition was, whether the marriage was without the Levitical degrees or not. The decision in *Hill* v. *Good* (Vaughan, 302), proceeds mainly upon the assumption that a marriage, though not expressly prohibited by Leviticus, c. 18,

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(*a*)[1] 1 Moore's P. C. C. 396.

(*a*)[2] See Acts of the Parliaments of Scotland, Jac. VI. A.D. 1567, c. 26 (vol. iii., p. 26, of the edition by the Record Commissioners;) ib. A.D. 1690, the Confession of Faith, c. 24 (vol. ix. p. 128, s. 4); Erskine's Institute, book i. tit. 6, s. 9, p. 123 (ed. 1828); 1 Stair's Institutions, book i. tit. 4, s. 4, p. 23 (ed. 1826). See the Trial of Nairn & Ogilvie, 19 How. St. Tr. 1235.

(*b*) Alison's Principles, p. 564, c. 29, s. 1. 2 Brown's Justiciary Reports, p. 549, note.

may still not be "without the Levitical degrees;" a proposition already shewn to be unfounded. It is noticed in that case, and was observed in *Regina* v. *St.* **[227]** *Giles in the Fields* (ante, pp. 186, 193), that the Karaite Rabbis construed the specific prohibitions in Leviticus, c. 18, as giving instances only: but it is conceded that they differed in their construction of the law from other Jewish theologians; and they were not its recognised interpreters (*b*)[1]. As to the argument from the law of Scotland, the Legislature of that country has expressly specified the marriages it meant to prohibit: therefore, in the cases which it is supposed might come before the House of Lords, no difficulty would arise in applying the Scotch law. [Lord Denman C.J. The kind of anomaly suggested is constantly occurring.] To the argument that these marriages are essentially at variance with the law of God, it is a strong answer that the greater number of Christian countries hold them lawful. The validity of Henry the Eighth's marriage with his brother's widow is sometimes supposed to have depended on the question whether or not the former marriage had been consummated; but this is inconsistent with the bull of Julius the Second in 1503, authorising the marriage of Henry and Katharine (*c*)[1], which recites the petition of Henry and Katharine as alleging that the marriage of Katharine with Arthur was perhaps consummated.

Lord Denman C.J. The only point to be decided by this Court is, whether or not the marriage in question be void by the law of England. And that depends entirely on the statute 5 & 6 W. 4, c. 54. (His Lord-**[228]**-ship here read the first and second sections of the Act.) I do not advert to the circumstances under which the Act was passed, though I had more than common opportunities of knowing what occurred on that subject, because I then presided in the House of Lords, the Great Seal not being in the hands of a Lord Chancellor (*a*)[1]. I proceed to look at the statute itself. The second section enacts that all marriages shall be absolutely null and void, which shall thereafter be celebrated between persons "within the prohibited degrees of consanguinity or affinity." What the prohibited degrees are, depends entirely on the statute 32 H. 8, c. 38. That monarch was one who dealt very lightly with his own contracts, and with the principles of justice and humanity. In the 25th year of his reign, he caused an Act of Parliament (*b*)[2] to be passed, declaring his marriage with Katharine of Arragon void and their separation effectual: and in that statute was introduced a general clause (*c*)[2] stating what marriages were to be deemed prohibited by God's law, and not allowable under dispensation. In that enumeration is included the marriage of a man with his wife's sister. Then came stat. 28 H. 8, c. 7, declaring the King's marriage with Anne Boleyn, as well as that with Katharine, void and annulled, and the issue of both marriages illegitimate. In that statute is again contained (s. 11) the same list of prohibited marriages (I do not dwell on the distinction between prohibited marriages and prohibited degrees): and there that most wholesome prohibition is repeated (ss. 12, 13), that such **[229]** marriages, forbidden by God's law, shall not be permitted by virtue of any human dispensation. The first of these Acts was passed chiefly for the purpose of setting aside the King's marriage with Katharine; the second for the purpose of repealing the former Act and limiting the Royal succession to the King's issue by Jane Seymour. Then followed the Act 32 H. 8, c. 38. But stat. 25 H. 8, c. 22, was repealed in the first year of Queen Mary. If the intention of that Act (2 stat. 1 Mary, c. 1, s. 8), had been to deny the declaration of prohibited degrees formerly made by the Legislature, very simple words would have served the purpose. But that was not done. The marriage of Henry with Katharine was declared good, but on other grounds. The Act, which shewed the wisdom of the Parliament of that time, inferred the validity of the marriage from the many years during which it had subsisted, its prosperity, the offspring it had produced, and the corrupt practices and untrue suggestions by which the divorce had been brought about: the object of the statute being (as its title (*a*)[2] implies) to affirm

(*b*)[1] On the insufficiency of their authority he cited the "Case of Marriages between near Kindred," &c. (London, 1756.) See pp. 37, 8.

(*c*)[1] Set forth in 1 How. St. Tr. 320. Proceedings Relating to the Divorce of Katharine of Arragon.

(*a*)[1] The Great Seal was put into commission, April 23d, 1835, on the resignation of Lord Lyndhurst. See 3 A. & E. 1.

(*b*)[2] 25 H. 8, c. 22. (*c*)[2] Sect. 3.

(*a*)[2] "An Act declaring the Queen's Highness to have been born in a most just and

the Queen's legitimacy and right to the Crown, and not to affect the general rule laid down in former statutes for the marriages of all subjects of the realm, and by which the Legislature declared what they took to be the Levitical law, or (in terms considered synonymous) the law of God. One, indeed, of the grounds on which the Act of 1 Mary proceeded might be that the marriage between Katharine and Prince Arthur, Henry's brother, was falsely supposed to have been consummated. **[230]** If the only appeal had been to holy writ, the marriage of Henry with his brother's widow would not have been invalid on that account: but the question of consummation had been made an important one in the proceedings for Katharine's divorce. She herself appealed directly to the King upon it, called him to witness that she had come a virgin to his embraces (*a*), and offered to pledge her oath to the truth of that protestation. Queen Mary, at her accession, held the honour of her mother more important than any other point: and that appears to have been the motive for declaring the legitimacy of her own succession in the terms adopted in 2 stat. 1 Mary, c. 1: a motive wholly irrespective of any thing on the subject of future marriages enacted in the great law already referred to, the statute 32 H. 8, c. 38.

This statute, in its object one of the most beneficial ever passed, being intended to abolish the power claimed by the Pope in this country of avoiding marriages on pretence of former contract, and permitting them by dispensation, recited the abuses which had prevailed in these respects, and then laid down the liberal and well considered rule: that "all and every such marriages as within this Church of England shall be contracted between lawful persons (as by this Act we declare all persons to be lawful, that be not prohibited by God's law to marry) such marriages being contract and solemnized in the face of the Church, and consummate with bodily knowledge, or fruit of children or child being had therein between the parties so married, **[231]** shall be by authority of this present Parliament aforesaid deemed, judged and taken to be lawful, good, just and indissoluble, notwithstanding any pre-contract or pre-contracts of matrimony not consummate with bodily knowledge, which either of the parties so married or both shall have made with any other person or persons before the time of contracting that marriage which is solemnized and consummate, or whereof such fruit is ensued, or may ensue, as afore, and notwithstanding any dispensation, prescription, law or other thing granted or confirmed by Act, or otherwise; and that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." The evil to be cured was the power assumed by the Court of Rome to inquire into the circumstances under which marriages had been contracted, and to confirm or set them aside: it was of no importance at that time to inquire into the rule which might exist for determining what marriages were or were not prohibited by God's law. That rule had been laid down by former statutes; and I think the prohibition declared by them to be that of God's law is left wholly untouched by the last Statute of Henry the Eighth. I found that opinion, not only on the words of the statute, but on its declared object.

The question what marriages were prohibited by God's law remained under that Act to be determined by the opinion of the Judges; though the only Judges who would be called upon to decide it at that time were those of the Ecclesiastical Courts, of whom the statute intimates so much jealousy. Yet, to procure certainty in the marriage contract, and to avoid the inconvenience of such disputes as had been complained of, **[232]** the wise and public spirited men who passed the Act were content to trust the Ecclesiastical Judges with the future decision on that point.

It has been argued here that the Judges of the Common Law Courts who may now be called upon to decide these questions must take their rule from the scriptures. But what scriptures? If I am called upon to determine what the law of God is, am I to be bound by what a particular translation tells me? We have been occupied here by a discussion of five days, in which as many different interpretations have been put upon the texts under dispute. If any end could be put to such controversies, it would be by calling upon the Spiritual Courts to decide them, only leaving it to a

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lawful matrimony; and also repealing all Acts of Parliament and sentence of divorce had or made to the contrary."

(*a*) See Cavendish's Life of Wolsey, ed. (Singer's) 1827, p. 215, and 214, note 4. Compare Holinshed, vol. iii. p. 737, ed. 1808, with the statement in the text of Cavendish.

Common Law Court to interfere, if it became necessary, by prohibition. Are we to talk here of the opinions of the Scribes and Pharisees? to sit as a Court of Error from the Karaites and Talmudists? to inquire into the doctrines of the Council of Eliberis? These are curious points, and may occupy men of leisure: but for us to decide upon them would be doing the very thing which the Legislature intended to prevent when it took upon itself to determine what were the prohibited degrees. That had been laid down, rightly or not, by the Legislature of Henry the Eighth's time; and their decision has not since been over-ruled by Parliament. To the statutes of that time we must refer, to ascertain what are the prohibited degrees spoken of in the statute 5 & 6 W. 4, c. 54. Looking to the statutes alone, their language, their object, and the mode in which they aim at effecting it, I come to the undoubting opinion that the law of the prohibited degrees is well laid down in the Statutes of Henry the Eighth, and that the degrees **[233]** there defined are the degrees referred to in the Act 5 & 6 W. 4, c. 54.

In the authorities there is a full and remarkable concurrence. I do not ascribe more weight to the Canons of 1603 than did Hobart and Lord Hardwicke; but the 99th canon is important, as shewing the current of opinion and the law deemed to prevail at that day; and it recognises the table of 1563 as containing the then declared law of prohibited marriages. *Manue's case* (Moore, 907; Cro. Eliz. 228), and *Parsons's case* (Co. Litt. 235 a.), have been cited, as shewing that the Courts would inquire what was or was not against the law of God: but they leave that point simply as they found it. The Court, in those cases, made no inquiry but with reference to the construction of stat. 32 H. 8, c. 38. It is remarked that the passage in Co. Litt. containing *Parsons's case* (Co. Litt. 235 a.) was expunged after the first edition. That is a circumstance we cannot now inquire into; nor is it material. Lord Coke, in the most valuable of his works, has a commentary on the statute 32 H. 8, c. 38 (2 Inst. 683), in which he sets down a table of prohibited degrees as comprehended in that statute, referring to the earlier Acts, 25 H. 8, c. 22, and 28 H. 8, c. 7, and shewing that he thought men ought to form their opinion of what was prohibited, not upon their individual views of the scriptures, but upon the plain terms of the statute law. I admit that, although a consultation was granted in *Hill* v. *Good* (Vaugh. 302), a prohibition went in *Harrison* v. *Dr. Burwell* (Vaugh. 206). But every one knows that there is no part of the law subject to so much doubt, and on which the **[234]** views have been so different in different cases, as the question when a prohibition should be enforced and when not. The mere granting or withholding it may throw little light on the substantial matter discussed. But in *Hill* v. *Good* (Vaugh. 302), we have the opinion of Vaughan C.J. on the principal point, at full length: and his view agrees with mine, that the marriage in question is against God's law as declared in our statutes. The judgment is given at much length, and is, in many points, open to observation; but the material result is this. The ground of decision in *Harrison* v. *Dr. Burwell* (Vaugh. 206), was that the marriage there (of a man with his great uncle's widow) was "without the Levitical degrees." It is admitted that, from the time when *Hill* v. *Good* (Vaugh. 302), was decided, all authority has gone with the doctrine there laid down. Now it is said that we must set aside the doctrine of that case, because the judgment is grounded on some bad reasons. I think that does not follow. It would indeed have been well if the judgment had not gone through such a variety of topics, entering into the law of the Hebrews and the opinions in Selden's treatise, but had simply declared the law as founded on the statute. I think, however, there are passages in which the judgment is put on that ground: and the opinion delivered in it has, confessedly, prevailed ever since. That opinion is not, in my judgment, erroneous: if it were, I should feel bound to say that its foundation failed. But it stands, as I think, upon the right construction of an Act of Parliament.

This being so, what did stat. 5 & 6 W. 4, c. 54, contemplate? Was the Legislature ignorant of the **[235]** construction which had prevailed down to that time? The preamble speaks of the sentences which have been given by the Ecclesiastical Courts in cases of marriage within the prohibited degrees. Did not the makers of the law know what had, with reference to such sentences, been deemed prohibited degrees under the Statutes of Henry the Eighth? And did not they recognise that construction? When the Act recites that "marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court pronounced during the life-time of both the parties thereto," and enacts that "all marriages which shall

hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void," are there any considerations of justice or expediency which can warrant us in saying that the Legislature did not intend a prohibition grounded upon the statutes.

I am aware that painful instances may be stated, where ignorant persons in the inferior classes of society have contracted marriages of this kind and now find them invalid. Such cases it is melancholy to contemplate. But, as to persons in a higher rank of life, if there are any, who have contracted these alliances since the passing of the late Act, they have defied the law, and have no right to complain.

My conclusion is, that the judgment below was right; and that the defendant could not be guilty of bigamy, his first marriage having been void. This applies only to *Chadwick's case.* On that of *Regina* v. *St. Giles in the Fields* we say nothing at present, because our decision in the case of *Chadwick* may be appealed from, **[236]** and we would wait the result of that proceeding before we pronounce judgment in a case where there can be no appeal.

Coleridge J. I am of the same opinion. The defendant's case rests on the construction of the statutes; and, if that entitles him to acquittal, we must do him justice, whatever may be the consequence to others. The whole question turns on the meaning of the words "prohibited degrees" in the short Act, 5 & 6 W. 4, c. 54. The guide to interpretation must be the statute itself; reference being had to the state of the law when it passed, and the current of judicial decisions at the time. The statute refers, in its preamble, to the decisions of the Ecclesiastical Courts as well known, and assumes that the marriages of which it is about to speak are liable to be set aside in those Courts. It saves those already celebrated, which are not yet brought in suit, that is, litigated in such suits as are known to have been entertained by the Ecclesiastical Courts; but it leaves suits already commenced to take their course, thus continuing the power of the Ecclesiastical Courts to decide judicially on certain past marriages as they have been in the habit of doing. It is idle to suppose that, in clauses framed as these are, the term "prohibited degrees" has a particular meaning in one place and a different meaning in another: and in sect. 2 it is enacted that future marriages within the "prohibited degrees" of consanguinity and affinity shall be null and void.

Let us suppose that, if stat. 32 H. 8, c. 33, were now under consideration for the first time, we should have **[237]** construed it in the manner contended for on the part of the Crown: could we, even then, all other facts remaining as they now are have given the same construction to stat. 5 & 6 W. 4, c. 54? Must not we have noticed the decisions which have taken place in the mean time? But, when we look to stat. 32 H. 8, c. 38, and construe it on the principle I have applied to the Act of W. 4, I think we can have no doubt that the Legislature intended by the earlier statute that which I have supposed them to mean by the later. Much curious historical learning has been shewn in the investigation of the older Acts; but I think we need not thread the labyrinth of statutes to discover which of the enactments in question has been repealed, or revived, and which has not. We may use the prior Acts simply as the best interpreters of stat. 32 H. 8, c. 38, which is clearly in force. This Act declares all persons "lawful" for the purpose of marriage "that be not prohibited by God's law to marry." The words "God's law" there may mean more than the Levitical law; they may refer to the state of body or mind. Then it is added "that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees:" and this Act, like that of W. 4, points to the decisions of the Ecclesiastical Courts, enacting that no person shall be admitted in any of the Spiritual Courts to any process, plea, &c., contrary to the statute. Now, when "God's law" and "the Levitical degrees" are mentioned in the same branch of an enactment, they cannot mean merely the same thing: it is assumed that God's law, though it includes the Levitical degrees, may prohibit something beyond them. If it were necessary, for the **[238]** right interpretation of these terms, used in a statute, to examine into the 18th chapter of Leviticus, we must do so, however painful the inquiry might be on such an occasion: but we could not be assisted in it by any criticism on the now authorized version of the Bible; for it did not exist when stat. 32 H. 8, c. 38, was passed: what translation the Legislature referred to we do not know; probably not to any English translation. We are not, however, on this occasion, inquiring what God's law or what the Levitical law is. If the Parliament of that day

legislated on a misinterpretation of God's law, we are bound to act upon the statute they have passed. That statute cannot be better interpreted than by reference to the prior ones in pari materiâ: and these, whatever may be said of the tergiversation of Parliaments in Henry's time, lay down the rule with great uniformity. Stat. 25 H. 8, c. 22 (ss. 3, 4), takes in succession the degrees mentioned in Leviticus, c. xviii. to verse 18, inclusive, and declares marriages within those degrees to be prohibited by God's law, though they had been allowed by dispensation; and sect. 4 forbids all persons to marry within those recited degrees. Stat. 28 H. 8, c. 7, goes through the same enumeration (sect. 11; adding, in some instances of the wife's kindred, carnal knowledge of the wife as a condition of the illegality); declares (sect. 12) that marriage within each of these degrees is prohibited by the laws of God, and, by sect. 13, absolutely prohibits them. Stat. 28 H. 8, c. 16, s. 2, confirms all marriages had in the King's dominions before November 3d, 26 H. 8, of which there has been no divorce by the ecclesiastical laws, and which are "not prohibited by God's laws, limited and declared in the Act" 28 H. 8, **[239]** c. 7, "or otherwise by Holy Scripture." When, therefore, the Act 32 H. 8, c. 38, speaks of "God's law," without further explanation, and introduces the term "Levitical degrees," can it be doubted that the first expression means the law of God as declared by the three former Acts, and the second the very degrees, which are the Levitical degrees, enumerated at length in two of those prior Acts?

This is the course of reasoning which might suggest itself if the Statute of 32 H. 8 were under consideration for the first time. But, from that period downward, there are few points better established by authorities than that the marriages in question are unlawful. It appears that, in the first two reported cases after the statute, the Courts were disposed to grant a prohibition; but a consultation was finally awarded: the reasons are not distinctly known, and may have been technical. Some observations have been made upon *Parsons's case* (Co. Litt. 235 a.), mentioned in Coke's First Institute, and which is said to have been withdrawn from that work in the third and some subsequent editions. But, in 2 Inst. p. 683, Coke gives a formal exposition of stat. 38 H. 8, c. 38, and, after stating that by Leviticus, c. xviii., "not only degrees of kindred and consanguinity, but degrees of affinity and alliance do let matrimony," he sets forth a table of degrees, including "his wife's sister," and adds, in the margin, "See these degrees truly set down in the stat. of 25 H. 8, c. 22, and 28 H. 8, c. 7." And, at the end of the table, he says: "These be the Levitical degrees, which extend as well to the woman as to the man. **[240]** And herein note, that albeit the marriage of the nephew cum amitâ et materterâ is forbidden by the said 18th chapter of Leviticus, and by express words the marriage of the uncle with the niece is not thereby prohibited, yet is the same prohibited, quia eandem habent rationem propinquitatis cum eis qui nominatim prohibentur, et sic de similibus." As to the cases in Vaughan, it may, as my Lord has observed, be difficult to sustain some of the arguments in *Hill* v. *Good* (Vaugh. 302): though I am not sure that, on examination, these would be found objectionable, taking the whole course of reasoning together. But suffice it that, from that time downward, all the Courts, both the temporal and the ecclesiastical (which by our Constitution have an original jurisdiction in such matters), have followed the ruling in *Hill* v. *Good* (Vaugh. 302), as to the invalidity of these marriages: and it is too much to ask of this Court, which is not a final but only an intermediate Court of Error, to reverse so many decisions. I have no doubt that, in *Hill* v. *Good* (Vaugh. 302), the right interpretation was put upon stat. 32 H. 8, c. 38: and, if I had only this view of the subject to decide by, I should say that the present judgment was right.

Wightman J. The argument upon this most important question was properly commenced by Sir F. Kelly on the part of the plaintiff in error by referring to the terms of stat. 5 & 6 W. 4, c. 54, upon the effect of which this case depends, and inquiring what the statute meant by the words "prohibited degrees." (His Lordship then read the enacting part of sect. 1, and the whole of sect. 2.)

[241] The statute does not define the prohibited degrees: and the question is, what do those words mean as used in it? And, also, do they mean degrees prohibited in terms by the Levitical law, or degrees prohibited by some statute, or degrees prohibited by some canon, or all or any of these, and which? On the part of the prosecution it is said that the prohibited degrees are those which are prohibited by statute; and that the only statute unrepealed which shews what the prohibited degrees

are is stat. 32 H. 8, c. 38, by which it is enacted "that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees;" and that the marrying a deceased wife's sister is neither prohibited by the law of God nor within the terms of the Levitical degrees.

If this were a mere abstract question, whether a deceased wife's sister was within the degrees prohibited by the Levitical law, or, by inference, by stat. 32 H. 8, c. 38, I might find more difficulty in coming to a satisfactory conclusion, especially after this argument, and the critical examination which the terms of the Levitical law and of the statute have undergone, than when the question is what are the prohibited degrees referred to in stat. 5 & 6 W. 4, c. 54. In considering, however, the meaning and intention of the Legislature in stat. 5 & 6 W. 4, c. 54, it is necessary to look somewhat closely to the object as well as the language of the Legislature. The title is "An Act to Render Certain Marriages Valid, and to Alter the Law with Respect to Certain Voidable Marriages." The recital is: "Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court pro-**[242]**-nounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be ipso facto void, and not merely voidable." The "prohibited degrees" are mentioned, both in the preamble and the enacting part of the statute, without definition, and apparently as already known and understood. The preamble states that marriages between persons within the prohibited degrees were voidable only by sentence of the Ecclesiastical Court. The statute, then, would appear to be intended to apply to those marriages which were voidable only in the Ecclesiastical Court by reason of their being within the prohibited degrees, and which, for the future, instead of being voidable only upon suit in those Courts, were to be absolutely void. Upon reference to the law as administered in those Courts, appearing by a long series of decisions, too well known to make it at all necessary specifically to refer to them (they were cited in the argument, and have been referred to in the judgments of my Lord Denman and my brother Coleridge), the marriage of a man with the sister of his deceased wife was voidable, because they were within the prohibited degrees. At the time stat. 5 & 6 W. 4, c. 54, was passed, marriages incestuous because within the prohibited degrees could only be avoided in the lifetime of the parties in the Ecclesiastical Courts. Amongst those which were voidable in the Ecclesiastical Courts, because within the pro-**[243]**-hibited degrees, was the marriage of a man with his deceased wife's sister. I do not think it necessary to inquire whether, in the Ecclesiastical Courts, such a marriage was deemed prohibited by the Levitical law, the statute law or the canon law, or by all of them. It is clear from an unvarying current of authorities that such a marriage was voidable in the Ecclesiastical Courts as within the prohibited degrees, but voidable only during the life of the parties. If not avoided during the life of the parties, it could not be questioned after. This no doubt produced great uncertainty: an unfriendly suit might annul a marriage which the parties themselves would never have questioned, and which, after the death of either, would have been good. If the case had arisen before the passing of stat. 5 & 6 W. 4, c. 54, and a man had married his wife's sister, and afterwards had married another woman in the lifetime of the first wife's sister, the marriage not having been avoided in the Ecclesiastical Court, he would be guilty of bigamy, the marriage being good: but, if the marriage with the wife's sister had been annulled in Ecclesiastical Courts because within the prohibited degrees, he would not be guilty of bigamy. Now it seems to me that the object of the Legislature, by stat. 5 & 6 W. 4, c. 54, was at once to make those marriages void which might be avoided in the Ecclesiastical Courts by a suit, thereby avoiding the hardship of the validity of a marriage remaining unsettled pending a suit, or whilst it was uncertain whether a suit would be instituted or not. It is a statutory avoidance at once of that which might be avoided in the Ecclesiastical Courts: and, if the marriage of a man with his deceased wife's sister would have been avoided by suit **[244]** in the Ecclesiastical Courts as within the prohibited degrees, I think is void now by the Act of Parliament.

Upon this ground I think the acquittal right, and that the judgment of the Court below should be affirmed.

When this case was before me in the Court below, I did not mean by the judgment I then gave to pledge myself to any definite opinion, as I knew that it was intended that the facts found by the jury should be made the subject of a special verdict with a view to the question being considered by a Court of Error. But, as it was necessary that a judgment should be given to found ulterior proceedings, I gave the judgment which at the time I thought right, and which, after a careful attention to the argument on both sides, I do not find sufficient reason to alter.

Erle J. On ordinary principles of construction, I think that the marriage in question was within stat. 5 & 6 W. 4, c. 54, s. 2. The arguments have been so fully gone into by the rest of the Court that I shall add nothing further.

Judgment affirmed.

No writ of error having been brought in *Regina* v. *Chadwick*,

Lord Denman C.J., in Easter vacation (May 15th), 1848, delivered the judgment of the Court in *Regina* v. *St. Giles in the Fields*, as follows.

We think that this case is the same in principle with *Regina* v. *Chadwick*, and that the particular facts make no difference. We must therefore be taken to decide accordingly.

Orders quashed.

[245] MICHAELMAS VACATION (*a*).

IN THE EXCHEQUER CHAMBER. (ERROR FROM THE QUEEN'S BENCH.)

SYDSERFF AND ANOTHER *against* THE QUEEN. Friday, November 26th, 1847.

Indictment, charging that defendants "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" the prosecutor "of his goods and chattels:" Held good, on writ of error.

[S. C. 12 Jur. 418. Referred to, *R.* v. *Aspinall*, 1876, 2 Q. B. D. 60; *Allen* v. *Flood*, [1898] A. C. 88.]

Error was brought in the Exchequer Chamber on a general judgment given for the Crown by the Court of Queen's Bench (*b*) on two counts of an indictment.

The first was a special count for a conspiracy to obtain certain goods of the prosecutor. This count charged false pretences and other overt acts in pursuance of the conspiracy: but, as it was, upon the argument, admitted to be good, further notice of it is unnecessary.

The second count alleged that the plaintiff in error "unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud" the prosecutor "of his goods and chattels. To the great damage," &c.

There was the common assignment of errors, and also a special assignment of errors; but the latter did not apply to the second count. Joinder in error.

The case was argued in last Trinity vacation (*c*), **[246]** before Wilde C.J., Coltman, Maule, and Cresswell Js., and Parke, Alderson, Rolfe, and Platt Bs.

Pigott, for the plaintiffs in error. The second count is too general, and is uncertain. It should have alleged that the plaintiffs conspired to defraud the prosecutor by false pretences or undue means; *Rex* v. *Fowle* (4 C. & P. 592), *Rex* v. *Richardson* (1 M. & Rob. 402), *Regina* v. *Peck* (9 A. & E. 686), *King* v. *The Queen* (*d*). In *Rex* v. *Eccles* (*e*) it was alleged that the conspiracy was to be effected by "indirect means"; and even in *Rex* v. *Gill* (2 B. & Ald. 204), there was an allegation of "divers false pretences, and subtle means and devices." *Rex* v. *Gill* (2 B. & Ald. 204), has, in many cases,

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(*a*) The Court of Queen's Bench sat in Banc during this vacation on November 27th, and December 3d, 4th, and 6th to 11th, inclusive.

(*b*) May 6th, 1844. No motion was made in arrest of judgment, the defendants relying upon its reversal by the Court of Error on the ground that the judgment was general and the second count bad.

(*c*) June 14th, 1847.

(*d*) 7 Q. B. 795. Reversing the judgment of Q. B. in *Regina* v. *King*, 7 Q. B. 782.

(*e*) 1 Leach C. C. 274, 4th ed.; S. C. note (*d*) to *Rex* v. *Turner*, 13 East, 230.