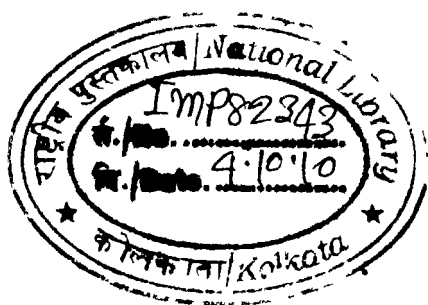


THE
C A S E
OF
MARRIAGES
BETWEEN
NEAR KINDRED
PARTICULARLY CONSIDERED.

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With Respect to
THE DOCTRINE OF SCRIPTURE,
THE LAW OF NATURE,
AND
THE LAWS OF ENGLAND,
*With some Observations relating to the late Act
to prevent* *Clandestine Marriages.*
THE SECOND EDITION.

L O N D O N,
~~Printed~~ for B. WHITE, at Horace's Head,
in Fleet-street,
M D C C L X X I I I.



T O T H E
K I N G

May it please your Majesty,

THE Subject of the ensuing Discourse, it is humbly presumed, may not be thought altogether beneath your Royal Notice ; as it is so intimately connected with the Laws of your Majesty's Kingdoms ; and as the wise Provisions of our most excellent Constitution relating to it, have been too generally misapprehended, to the great Injury of many of your Majesty's most faithful Subjects.

A Controversy upon this Topic arose in the Reign of King Charles II.
which

which so much engaged the Attention of that Prince, that the Cause then depending, was, in Pursuance of his special command, adjourned for the Opinion of all the Judges.

Your Majesty's Royal Patronage to this Essay, is most humbly desired, not with a View to preclude, but rather to countenance and encourage, the strictest Examination of these Principles and Decisions which so strongly affect the Happiness of your Majesty's Subjects ; who, from a long Experience of the paternal Indulgence and Protection, by which your most auspicious Government hath been so eminently distinguished, place their entire Confidence in your Majesty, as the Father of your People, and the generous and vigilant Guardian of all their Civil and Religious Liberties.

That

That the diffusive Influences of your wise and gracious Administration may be long continued, for the Joy of the present, and the Admiration of future Ages; and that the Protestant Succession in your most illustrious Family may convey to distant Generations all the Blessings, which the Accession of it to the Throne of these Kingdoms so happily rescued and secured, are the most fervent Prayers of,

May it please your Majesty,

Your MAJESTY'S

most Dutiful,

most Loyal, and

most Devoted Subject,

JOHN FRY



P R E F A C E.

IT may not be improper to introduce the following treatise to the candid examination of the public, by exhibiting some account of the advantages which may probably arise from a disinterested and careful discussion of the subject-matter of it. The professed design of it is, to shew the lawfulness, and, in some cases, the expediency of marriages between persons near a-kin: which is an affair of such extensive connexion and influence, that, perhaps, there are but few families, but

b

may

may have, either directly or indirectly, some concern therein; and the great importance of it we may easily discern by the ensuing considerations.

Many and very injurious consequences evidently follow from the erroneous sentiments which have been too generally entertained concerning it. For if marriages contracted between near collateral kindred are warrantable, both by the law of nature and of revelation, as the author apprehends he hath demonstrated in the following dissertation, then the separating persons so married, annulling their marriages, bastardizing and disinheriting their issue, and utterly ruining whole families, driving some out of their native country, and laying exorbitant and oppressive fines upon others [a], must certainly be unjustifiable and iniquitous.

[a] Things frequently done by ecclesiastical courts.

And

And as these severe and pernicious practices are professedly founded upon the prohibitions contained in the xviiith chapter of Leviticus; this shews the necessity of making an unbiaſſed and careful inquiry into the real occasion, and genuine design, of the Mosaic constitution, in this respect: that, by having the fullest conviction, that there is not any foundation in Scripture, for an opinion productive of the most calamitous effects, it may be exploded and renounced with a general contempt.

To have a true and consistent idea of this affair, more immediately concerns the welfare of the public than many are aware of; as from the numerous branches of the present royal family, from whom, under providence, the nation so justly felicitates itself, upon the most promising prospects

of extensive advantage, it may, on many occasions, be judged highly expedient, that intermarriages should take place between some of their near kindred. The consequences of which may be not only conducive to their own personal satisfaction and felicity, but likewise intimately connected with the national security, and the establishment and enlargement of the Protestant interest.

Again, the conduct of the enemies of our holy religion, suggests the propriety of a critical and free decision of this subject. In their abusive insults on revelation, some of them having urged, with a peculiar satisfaction, the advantages with which they pretend the Scripture history hath furnished them upon this head.

Thus the author of "*Christianity as old as the Creation*," hath charged with immorality

morality that renowned Patriarch Abraham, on this account.

“ Was not Abraham [says he] though
 “ a prophet, and so dear to God, that he
 “ would not destroy a neighbouring town
 “ without acquainting him with it, guilty
 “ of an incestuous marriage, his wife
 “ being his sister by the father’s side [b]?”
 whereas if it appear, on an impartial re-
 view, that this, and such other marriages
 as the following dissertation attempts to
 justify, were not contrary to the law of
 nature, nor forbidden by any positive law
 of God before the introduction of the
 Mosaic dispensation, no just cause of re-
 proach can be alledged against the al-
 liance Abraham contracted with his near
 relation; but the severe aspersions cast upon
 him, on account of his marriage, must,

[b] Chap. XIII. pag. 219. Second edit. 8vo.

in the judgement of the impartial, be altogether groundless and unjust.

The late Viscount Bolingbroke hath, indeed, attempted to disparage the Scriptures by a different measure. He was of opinion, that marriages between near collateral kindred were not forbidden by the law of nature, but that the Scriptures had prohibited them. From hence he endeavours to vilify the sacred writings, as being inconsistent with the law of nature. But it is presumed, that in the ensuing tract it is clearly proved, that the inconsistency is not real, but only pretended and imaginary.

By the instructions and promises of the Gospel, which are entirely consistent with reason, we are possessed of advantages for the knowledge and performance of our duty, which are far superior to the discoveries

coveries of the light of nature, which cannot fully ascertain the restoration of penitent sinners to the hopes of immortality. But, through the free and undeserved goodness of God in Christ, there is undoubted assurance given in the Gospel, that repentance towards God, and faith in our Lord Jesus Christ, exerted and displayed in the fruits of piety and holiness, will avail to acceptance unto eternal life. This glorious revelation we should highly venerate and esteem; and by its sacred instructions and precepts, which constitute a perfect rule of moral duty, as well as an unerring standard of divine truth, our sentiments and proceedings, in all affairs of religion and virtue, should be uniformly and perpetually regulated and maintained. But farther,

With regard to the particular subject of inquiry now laid before the public,

the author apprehends, he hath fully demonstrated that some marriages, which have been commonly censured as unlawful, are not only lawful, but, under some circumstances, fit and expedient: and, in particular, that such as are contracted between an uncle and a niece, and with the sister of a deceased wife, may be sufficiently justified by the authority of the law of nature, and the laws of our national constitution.

All the statutes that concern this affair are herein particularly considered, and several great and material mistakes and omissions made by the collectors and publishers of them, as printed in the statute books now in common use, clearly shewn. And all those parts of them, which concern this subject, are herein inserted at large: and, in particular, the statute of
the

the 1 M. I. Sess. 2. ch. 1. (so remarkable in this case) which is not a temporary statute, nor ever repealed, yet hath been left out of all our statute books now in common use, is here printed from a copy thereof, compared with, and corrected by, the parliament roll.

And the principal adjudged cases in the books of common law relating to this subject, are reviewed and set in a clear and conspicuous light. The canon law relating to this affair is also herein examined, and fully exhibited to the reader's view.

The table set up in our parish churches, which prohibiteth the marriages herein vindicated, is shewn to be now of no authority in law.

And

And it is herein also fully and clearly proved, that the cognizance of this matter, as the law now standeth, rightfully belongs to the courts of common law, and not to the ecclesiastical courts, though they would arrogate to themselves the sole right to it.

All which is humbly submitted to the candour of the public.

A D V E R-

ADVERTISEMENT

To the First Edition 1756.

WHEREAS there are some Authors cited in the ensuing Dissertation as now living, who have been some Time dead, and others under a lower Character than they now bear, it may be fit here to advertise the Reader, that the ensuing Treatise was written a considerable Time since, and the greatest Part of it printed off last winter, though not published till now.

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portance

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THE
C A S E
OF
M A R R I A G E S
B E T W E E N
N E A R K I N D R E D,
Particularly considered, &c.

THE case of marriage between near relations is a point both of a moral and practical nature, that has not (as I humbly conceive) been hitherto well understood: a candid attempt therefore to show it in a better light, needs no apology. This therefore I shall endeavour to do in the following method.

B

I. I shall

- I. I shall consider the original institution of marriage, by almighty God, at the creation of our first parents.
- II. Examine what light the holy Scriptures afford in the point before us, from that time to the giving of the Mosaic law.
- III. Shall enquire how the case stood under the Mosaic Dispensation, and whether the law of Moses made any alteration in this matter.
- IV. Shall then proceed to consider the law of nature; that we may see, what help may be drawn from this quarter to determine the point in question.
- V. And lastly, I shall reduce the point to the laws of our land, that it may appear, whether there be any law in force here, against the marriages I am pleading for.

I. First, I am to consider the original institution of marriage by almighty God
at

at the creation of our first parents, which is thus given us by Moses.—*The Lord God caused a deep sleep to fall upon Adam, and he slept, and he took one of his ribs, and closed up the flesh instead thereof; and the rib, which the Lord God had taken from man, made he a woman, and brought her unto the man. And Adam said, this is bone of my bone, and flesh of my flesh: she shall be called woman, because she was taken out of man. Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh* [a]. Or, as it is in the Samaritan Pentateuch, and in the Septuagint; they *two* shall be *one flesh*. Our blessed Lord and Saviour (who we are sure could not err) from God's making at first but one man and one woman, joining them in marriage, and ordaining, that they *two* should be *one flesh*, argued against the Jews, and inferred the unlawfulness or unfitness of polygamy and divorces [b].

[a] Gen. ii. 21, 22, 23, 24.

[b] Matt. xix. 4, 5, 6. Mark x. 5, 6, 7, 8, 9.

Others have inferred from these words,—*A man shall leave his father and his mother and cleave unto his wife*, the unlawfulness of marriage between parents and children; and I think with good reason; for since the command here, with respect to marriage, is—that a man *shall leave father and mother*, I think it is very plain, he ought not to marry his mother; and it is much the same as to father and daughter, and consequently, between parents and their grand-children, and great-grand-children; for in the ascending and descending line, the further removed, the more unfit and unreasonable it appears, that they should marry one another.

Let us next consider the case with respect to collateral marriages; and here it is very observable, that when our great Creator formed the first woman, that she might be a fit wife for Adam, he made her not out of the *earth*, but out of Adam's own *flesh*, so that she was truly a part of his flesh before she became his wife; and when the Almighty presented her to
him,

him [c], he said, *This is bone of my bone, and flesh of my flesh*, a phrase used for kindred [d].

And by making at first but one pair, and commanding them to multiply, so that all mankind might descend from them; it became absolutely necessary, that the next marriage should be between *brother and sister*, and that by the sovereign and righteous will and appointment of God himself.—Had there been any *impurity* in such marriages, we may be very certain, that infinite power, directed by unerring wisdom and goodness, would never have instituted marriage at first, between persons of the same flesh, and, by the original constitution of the human race, made marriage betwixt brother and sister necessary, when he could as easily have made two, or more pairs out of the earth at his first creation of mankind, as one man only,

[c] “God himself (said Bishop Patrick) made the espousals between them, and joined them together “in marriage.” Patrick on Gen. ii. 22.

[d] Gen. xxix. 14. Judges ix. 2. 2 Sam. v. 1. and xix. 12, 13. 1 Chron. xi. 1.

and then there would have been no necessity for marriage between brother and sister, nor between persons of the same flesh. And, that there is no impurity in such marriages, will, if I mistake not, be made evident in the further prosecution of this subject. I therefore proceed,

II. To examine what light the holy scriptures afford in the point before us, from that time to the giving of the Mosaic law.

Till the time of Abraham, which was about two thousand years after the creation, the Scripture gives us no particular account of intermarriages, only in general, *the sons of God took wives of the daughters of men* [e]; that is, (as I think it is generally understood) the off-spring of Seth took wives of the apostate race of Cain, which was so displeasing to God, that it seems to be represented as one reason of his bringing the *flood* upon them. But, as this text may admit of another interpretation, and it is not certain which is the right, I lay no stress on it.

[e] Gen. vi. 2, &c.

The first marriages after the deluge, of which we have any particular account, are those of Abraham and Nahor, the sons of Terah, and we find they married their near kindred [f]. Abraham married Sarah his sister, his own father's daughter; and Nahor, Milcah his brother Haran's daughter. Abraham is renowned in holy writ, as one of the greatest and best of God's servants. He is the first that has there the title of prophet [g], and the only one that had the honour to be called the friend of God [h]. He was the father of God's covenant people; and it is observable, that he not only married his kinswoman himself; but, when he was old, and thought himself near his end, he took care his son Isaac should do the same. He made his chief servant, the steward of his house, swear to take a wife of his kindred unto his son [i]. And accordingly, by the special providence of God [k], he took

[f] Gen. xi. 29.

[g] Gen. xx. 7.

[h] 2 Chron. xx. 7. and St. James ii. 23.

[i] Gen. xxiv. 3, 4.

[k] Gen. xxiv. 15, to the end of the chapter.

Rebekah, of his uncle Nahor's house to be his wife. By this marriage he had two sons Jacob and Esau. Esau (not regarding the command nor example of his father and grand father) took two wives of the descendants of Canaan, which we find was a great grief to his pious parents [1], on which Isaac charged his son Jacob to take a wife of the daughters of his uncle Laban, his mother's brother [m], which command he carefully obeyed.

Esau, observing that his parents were grieved, on account of his marrying with strangers, in order to please them in future, married his uncle Ishmael's daughter [n]; and though he had two wives before, we don't find he was ever blamed for this; his first wives being such as he ought not to have married.

We have no particular account who any of the Patriarchs, the sons of Jacob, married except Judah and Joseph.

Judah also, disregarding the commands and example of his pious progenitors, mar-

n xxvi. 34, 35, and xvii. 46.

Gen. xxix. 10, &c. [n] Gen. xxviii. 8, 9.
ried

ried a Canaanite, the daughter of **Hirah**, and by her had three sons, Er, Onan and Shelah [o]. The two first of these were struck dead for their wickedness [p]. Yet, by the account holy Scripture gives us of their marriages, it is plain, that it then was become customary, when a man died and left a widow without a child, for the next brother to marry her, which custom was afterwards turned into a law, by the divine lawgiver, as I shall have occasion to observe in another place.

Joseph underwent many vicissitudes of fortune, till at last, by the special providence of God, he was made governor of Egypt, by king Pharoah; who appointed for him Asenah, the daughter of Potiphera, priest of On, to be his wife; but as he was under a necessity to accept of her [q], nothing can be inferred from this marriage relating to this point.

[o] Gen. xxxviii. 1—5. [p] Gen. xxxviii. 7—10.

[q] Gen. xli. 45. See also Mr. Chandler's defence of the prime ministry and character of Joseph, p. 403.

The next marriage mentioned in Scripture, that gives any light in this case, is that of Amram with his aunt [r]. Amram was the son of Kohath, the son of Levi; his wife's name was Jochebed, and it is exceeding clear in holy Scripture, that she was his father's sister [s]. By her he had Aaron and Moses, even that Moses by whom God gave those laws, that have been supposed to forbid such marriages.

Moses having offended Pharaoh king of Egypt, was obliged to fly out of his kingdom to save his life. He therefore went into the land of Midian, and dwelt there with Reual (who was also called Jethro) a priest or prince of that country [t]. And after he had dwelt with him many years (as is probable) and not knowing whether it would be ever safe for him to return into Egypt to his kindred; he married Zipporah one of Reual's daughters; yet it is certain, his marriage with this woman (she not being of his kindred)

[r] Exod. ii. i.

[s] Exod. vi. 20. and Numb. xxvi. 58, 59.

[t] Exod. ii. 15—22.

produced some trouble to him afterwards [u].

On the whole, it is plain, 1st, That some of the *best* of God's people, not only married their kindred, but when they were old, recommended the same to their children; a clear evidence this, that they knew no law of God against it; and consequently, that there could be no such given by God to all mankind before the establishment of the Mosaic law, as some have apprehended there was.

2dly, It is also farther evident, that those who married their near kindred had the blessings of God more conspicuously on their offspring than those that married remotely; which seems to me an indication of his approbation of it; at least, it is a further illustration of what was observed at the close of the last general head, *viz.* That there is no impurity in such marriages [w]. I come now,

[u] Numb. xii. 1. And Miriam and Aaron spake against Moses, because of the Ethiopian women whom he had married. See also Exod. iv. 25, 26.

[w] Pag. 6.

III. To enquire how the case stood under the Mosaic dispensation, and whether the law of Moses made any alteration in this matter; the laws that have been for some ages taken for prohibitions of marriages between near kindred are contained in the eighteenth chapter of Leviticus. And the punishments which were to be inflicted on the gross and notorious breakers of those laws, are in the twentieth chapter of the same book added to each particular precept.

These laws are more than three thousand years old, and the customs and usages of those times now but little known, nor can they be known by us, any further, than they may be learned from the writings of Moses, and other antient authors who lived nearest to those times; or, from those who wrote at any time under the same divine influence and direction which was given to the Hebrew lawgiver.

It is generally allowed, that the best way to come at the true meaning of antient laws, is to examine in what sense the words
and

and phrases, in which the laws are expressed, were used at, and before the time they were given. And what evils the laws were intended to prevent, and what those who broke them were blamed for on that account.

First then, let us examine in what sense the words and phrases, in which the laws were expressed, were used at, and before the time they were given. The precepts run thus, *None of you shall approach to any that is near of kin to him, to uncover their nakedness.* Leviticus xviii. 6. and

Ver. 8. *The nakedness of thy father's wife thou shalt not uncover.*

Ver. 14. *Thou shalt not uncover the nakedness of thy father's brother, thou shalt not approach to his wife.*

Ver. 16. *Thou shalt not uncover the nakedness of thy brother's wife.*

Ver. 20. *Thou shalt not lie carnally with thy neighbour's wife, &c.*

All the words that need explanation, in order to understand the true meaning of them, are, those which are here rendered *near of kin*, the phrase *uncover the nakedness*,

ness, and the word *wife*; for I think the word *approach*, notwithstanding the criticism some learned commentators have made on it, is of itself sufficiently clear.

I will begin with the phrase *uncover the nakedness*, which, for some ages, seems to have been mistaken in these laws for a prohibition of marriage, though it is never once used in that sense throughout the whole Bible, but rather for a breach of it.

The word עריות, *nakedness*, is put in many places for *the secret parts*, and then to uncover the nakedness, is literally to *uncover the secret parts*, so as to expose them to public view; in this sense it is used, Genesis ix. 20, 21, 22, 23.—Noah—*drank—wine—and was uncovered within his tent. And Ham—saw the nakedness of his father, and told his two brethren without; and Shem and Japhet took a garment and laid it upon both their shoulders, and went backward, and covered the nakedness of their father, and their faces were backward, and they saw not their father's nakedness.* Exodus xx. 26. *Neither shalt thou go up by steps unto mine altar, that thy nakedness*

kedness be not discovered thereon; i. e. lest it be exposed to public view.

And the xxviii. 42.—*Thou shalt make them* [namely, the priests] *linen breeches to cover their nakedness*; i. e. to prevent it from being exposed to the view of the people.

The same word is used for seeing the weak or unguarded parts of a country; in this sense we find it used, Genesis xlii. 9.—*Ye are spies, to see the nakedness of the land you are come.* That is, to view such unguarded parts of the land as were unfit to be exposed to the view of adversaries, or those that might in future be such.

It is also used for any unclean, filthy, indecent or shameful thing; as, in Deuteronomy xxiii. 14.—*There shall thy camp be holy, that he see no unclean thing, עריות, nakedness of any thing in thee,* as the margin of our Bible renders it.

The same word is used in that remarkable text, Deuteronomy xxiv. 1. *When a man hath taken a wife and married her, and it come to pass, that she find no favour in his eyes, because he hath found some uncleanness*

ness in her : then let him write a bill of divorcement, and give it in her hand, and send her out of his house. And—she may go and be another man's wife. The word here rendered *uncleanness*, is the same which in Leviticus is rendered *nakedness*; and the margin of the Bible here renders it *some matter of nakedness*. What is here meant by the words, *some uncleanness*, or *matter of nakedness*, is not very plain; but it is clear from the words of our blessed Saviour, Matthew xix. 7, 8, 9, that it must be something less than *fornication*; for he there saith, *that Moses gave them that permission for the hardness of their hearts, and that from the beginning it was not so.* And then gave his own command in opposition to it. That which seems most likely to be intended by it, is some such *loose and immodest behaviour* in the woman, as caused her *chastity* to be suspected; but, whatever might be understood by it, it is evident, it was something for which Moses permitted them to put away their wives, and to dissolve their *marriage*.

I have

I have examined the holy Scriptures, with all the care and impartiality I am capable of, with relation to this point; and I think, I may safely venture to affirm, that the phrase, *uncovered the nakedness*, is never once used in Scripture for *marriage*, nor yet for the lawful use of the marriage-bed: but a phrase which is quite contrary to it, is there used in that sense, namely, *Spreading a skirt or garment over a woman, and covering her nakedness*.

Thus we have it, Ruth iii. 9. *Spread thy skirt over thy handmaid*. That is, *marry me*; or, as Mr. Poole in his note on this text expresses it, “Take me to be thy wife, and perform the duty of a husband unto me [x].”

God’s covenant with Israel is represented in Scripture as a *marriage* covenant. *Turn, O back-sliding Israel, for I am married unto you [y]*. The making of that covenant is by the prophet Ezekiel thus expressed,——*When I passed by thee, and*

[x] Mr. Poole on Ruth iii. 9. and Dr. Hammond on 1 Cor. v. 1.

[y] Jer. iii. 14.

looked upon thee, behold thy time was the time of love, and I spread my skirt over thee, and covered thy nakedness: yea, I swore unto thee, and entered into a covenant with thee, saith the Lord God, and thou becamest mine [z].

Afterward, in the same chapter, their breach of covenant with God by their abominable transgression of some of those laws, in the eighteenth of Leviticus, is set forth [a], and Almighty God is thus represented as speaking to them.—*O harlot, hear the word of the Lord. Thus saith the Lord God, because thy filthiness was poured out, and thy nakedness discovered through thy whoredoms with thy lovers, and with the idols of thy abominations, and by the blood of thy children, which thou didst give unto them; behold therefore I will gather all thy lovers, with whom thou hast taken pleasure. I will even gather them round about against thee, and will discover thy nakedness unto them, that they may see all thy nakedness. And*

[z] Ezek. xvi. 8.

[a] Ezek. xvi. 15—34. 59.

I will judge thee as women that break wedlock and shed blood are judged [b]—

And in the twenty-third chapter of Ezekiel, we have much more to the same purpose (to which I refer the reader).

The word *nakedness*, and *uncovering or discovering of nakedness*, is often used by the prophets in this sense, viz. When people are exposed to shame on account of their sinful revolting from God. Thus it is used concerning the *daughters of Babylon*, Isaiah xlvii. 1. 3. And thus it is used concerning Nineveh, Nahum iii. 4, 5. And concerning Jerusalem, Lamentations i. 8, 9. See also Isaiah iii. 16, 17. and Jeremiah xiii. 22. 26, 27.

On the whole it is plain, that for a man to spread his skirt over a woman, and to *cover her nakedness*, in the Scripture phrase, signifies the same as to marry her (as has been observed by many learned commentators [c]).

[b] Ibid. 35—38

[c] Dr. Hammond, Mr. Poole, Bishop Patrick, Mr. Pyle, &c.

And to uncover her nakedness is the reverse of it, and is put for something that is a cause for breaking or dissolving of marriage; and when it is used for carnal knowledge, always (if I mistake not) *adultery* or *fornication* is to be understood by it, and never the lawful use of the marriage-bed.

Now it is well known, and indisputable, that *adultery* is a breach of marriage. The command, Exodus xx. 14. which, in our present translation, is, *Thou shalt not commit adultery*; in our old English Bibles, was, *Thou shalt not break wedlock*.

And, I think, according to our blessed Saviour himself, *fornication* also, when committed before marriage, but not discovered till afterwards, is allowed by him to be a just cause for a breach or dissolution of marriage, Matt. xix. 9.—*I say unto you, whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery*: here you see our Saviour, when he prohibits a man's putting away his wife, excepts the case of *fornication*: so that fornication, as I said

Imp82343 Dt 4.10.10 before,

before, was allowed by him to be a sufficient cause for the breach of marriage: that is, as Dr. Whitby on this text observes, *fornication committed before matrimony, and found after cohabitation.*

From what has been observed, it is very evident, the phrase *uncover the nakedness*, though never once used in Scripture for marriage, ^{is} there used in an extensive sense; not only for uncovering the secret parts in a literal sense, or for *seeing them*, and for *debauching* the persons there mentioned; but also for any thing that is filthy, shameful or immodest. And therefore it may be reasonably understood in these laws, to be not only a prohibition of the act of uncleanness, but also of every thing that may be a temptation to it.

Let us next examine what is meant by *שאר כשר*, translated *near of kin*, in Leviticus xviii. 6. The word *שאר*, translated *kindred* (saith Dr. Willet on this text) signifieth properly a *remainder*, because the kindred is *tanquam aliquid carnis*, as a part or remnant of one's flesh; but Mr. Ainsworth, in his note on it, affirmed it

signifieth *flesh*, and for proof of it cites Psalm lxxiii. 26. Prov. v. 11. and xi. 17, as *נֶשֶׁר* also doth, and is used for *kindred*, Gen. xxix. 14. He translated the words *near kindred of his flesh*. Our old Bibles, viz. Tindal's, Matthew's, and the Great Bible, all render it *nearest kindred*; most of the other translations since (except that now in use) have rendered it, *kindred of his flesh*; and though our present translation has rendered it, *near of kin*, yet in the margin it is put, *remainder of his flesh*. And Bishop Patrick and Bishop Kidder both think this to be the meaning of the Hebrew. "It must be confessed" (said Bishop Patrick, in his comment on this text) "that these words, *near of kin*, do "not sufficiently express the full sense of "the Hebrew phrase, nor are they of a "determinate signification."

On the whole, it is plain, the phrase must mean, one that is flesh of the same flesh. Now I beg leave to remind the reader what I observed under the first general head; *namely*, that God Almighty himself, at the first institution of marriage,

riage, in the time of man's innocency, ordained the first marriage to be between persons of the same flesh; and thereby made it necessary, that the next marriage should be betwixt brother and sister: and I further observed under the second general head, that some of the best of God's people married their near kindred; and that those that did so, had the blessing of God more conspicuously on their children, than those that married otherwise; and particularly, that Moses himself, by whom these laws were given, was descended from a marriage of a nephew with his aunt.

Is it not absurd then to imagine, that a holy and righteous God should prohibit marriage with such, under the denomination of the abominations of the Egyptians and Canaanites, for which he cast them out of the land, when he was bringing into their room, a people that were descended from, and contracted the like marriages? If this is not an absurd supposition, I know not what is. I take the prohibitions to be pointed against all carnal impurity, as well as that foul and de-

testable sort of it, which was so customary among the Egyptians and Canaanites. And if so, they must be of a moral nature; and it may be observed here, that all such prohibitions ought to be taken in their largest and most extensive sense for preventing the evils against which they were intended. This is a rule generally allowed. I will give an instance or two. It is agreed that the command, *Exod xx. 12. Honour thy father and mother, &c.* is to be extended, not only to our natural parents, to whom it most immediately relates, but to *rulers and governors*, and other *superiors*: and there are many that also extend it to *equals* and *inferiors*. So the command, *Exod. xx. 14. Thou shalt not commit adultery*, is extended, not only to the act of uncleanness committed by *two*, one of whom is a married person, (which is the meaning of it, strictly taken) but it is extended also to *fornication* and all *approaches to uncleanness* of any kind.

And by the same rule it is reasonable to take this prohibition, now under consideration (if it is indeed a moral one) in

its largest sense. So that the words here translated, *near of kin*, which, according to the Hebrew, might have been rendered *remainder of his flesh*, must be extended, not only to all such as we usually call kindred (though they are especially included in it) but to all that are descended from the *same flesh*.

So that the sixth verse of the eighteenth chapter of Leviticus may be thus paraphrased; “None of you (namely) no man shall come near to any that are descended from the same flesh, to do any action, or use any such freedom, as may be a temptation to him to commit adultery or fornication with her.” Nay, may it not be extended to *any woman whatsoever*? all the offspring of our first parents being as much [the same, or] *one flesh*, as [the same, or] *one blood* [d].

I come

[d] Οἰκτιῶν ἅπας ἀνθρώπων ἀνθρώπων καὶ φίλων. “All men naturally are of kin and friends to each other,” saith Aristotle. *Et fratres etiam vestri sumus jure naturæ matris unius: We are all your brethren in the right of nature, our common mother*, said Tertullian of old, in the name of the Christians to the Heathens. We are
“but

I come now to examine what is meant by the word אִשָּׁה wife. Now it is well known to the unlearned as well as the learned, that the word wife signifies generally a married woman, her husband being alive; and after his death she is commonly called a widow, not a wife. Yet it must be confessed, that this cannot be inferred merely from the use of the word itself; for the Hebrew word אִשָּׁה signifies no more than a woman, whether married or unmarried; it is therefore 'by the context and connection we must judge when it is used for a man's wife, and when for a single woman. By this then

" but several streams issuing from one primitive source;
 " several *branches* sprouting from the same *stock*, several
 " stones hewed out of the same quarry.—One blood
 " flows in all our veins;—we are only distinguished by
 " some accidental, inconsiderable circumstances of age,
 " place, colour, stature, fortune, and the like; in which
 " we differ as much from ourselves in succession of
 " time

" So that what Aristotle said of a friend, is applicable to every man: every man's is ~~another~~ $\alphaὐτοῦ$,
 " another *ourselves*." Barrow's Works, Folio, Vol. I,
 Serm. xxx.

let

let us examine how the word is to be understood in the 8, 14, 15, 16, and 20th verses of the 18th chapter, and in the 10, 11, 20, and 21st verses of the 20th chapter of Leviticus, where the laws, and the punishments for the breach of them, are set forth. The 20th verse of the 18th chapter runs thus, *Moreover, thou shalt not lie carnally with thy neighbour's wife, to defile thyself with her.*

And in the 20th chapter, verse 10, where the punishment is set forth for the breach of that law, the words are ; *The man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death.* I suppose it will be admitted here, by those that are in a different way of thinking from me, in the main point, that the word wife in those places, denotes a woman whose husband is alive ; otherwise this must be a prohibition of marrying a widow-woman, (in which sense, indeed, some of the Jews took it) but that sense, I apprehend, to be plainly contrary to the doctrine of St. Paul,

Paul, as well as to the opinion and practice of *christians* in general. Let us then examine into the meaning of the word wife, in the other places above mentioned, that relate to the point, chap. xviii. ver. 8. *The nakedness of thy father's wife thou shalt not uncover, it is thy father's nakedness.* Ver 14. *Thou shalt not uncover the nakedness of thy father's brother, thou shalt not approach to his wife, she is thy aunt.* These words here translated, *she is thy aunt*, might as well have been rendered, *she is thy father's brother's wife*, as was noted in the margin of some of our old Bibles, though it is omitted in the translation now in use. Ver. 15. *She is thy son's wife.* Ver. 16. *She is thy brother's wife; it is thy brother's nakedness.* And chap. xx. ver. 11. *The man that lieth with his father's wife, hath uncovered his father's nakedness.* Ver. 20. *If a man shall lie with his uncle's wife, he hath uncovered his uncle's nakedness.* I think the phrase, *it is thy father's nakedness*, in the 8th verse of chap. xviii. and the words in the 14th verse, which, as was observed, might have been rendered, *she*
is

is *thy father's brother's wife*; and in the 15th verse, *she is thy son's wife*; being all in the present tense, shew it is meant of their wives, they being living. And the words in chap. xx. ver. 11. *hath uncovered his father's nakedness*; and ver. 20. *he hath uncovered his uncle's nakedness*, also shew, it is meant of their wives, they being alive; for after their deaths, it cannot be properly said *it is*, but only *it was their nakedness*. For as the apostle argues, 1 Cor. vii. 4. the woman is the husband's as long as he lives only; afterwards, according to the 29th verse of that chapter, she is not so. The 21st verse runs thus—*If a man shall take his brother's wife, it is an unclean thing, he hath uncovered his brother's nakedness, they shall be childless*; or, (as it is in the Samaritan copy) *they shall die childless*. The word here translated *an unclean thing*, signifies, as the margin of our Bible observes, *a separation*; the meaning therefore of the whole verse may be thus expressed, “if a man take his brother's wife, to commit lewdness with her, he hath thereby made a separation

“ *paration*

“ paration betwixt her and her husband,
 “ and done that wicked thing, which the
 “ law I gave you (chap. xviii. 16.) was
 “ principally intended to prevent; they
 “ shall therefore, for such their wickedness,
 “ be put to death, and not suffered to
 “ have a child by such an unlawful and
 “ detestable act.” So that, hence also (if
 I mistake not) it is plain the word wife
 must be taken properly for a woman, whose
 husband is living; how else can it be a
separation betwixt her and her husband;
 and how can he thereby uncover his bro-
 ther’s nakedness, since her nakedness was
 his brother’s no longer than during his
 life? If, then, it is unreasonable to under-
 stand the word wife for a widow woman,
 in the 20th verse of chap. xx. (as is above
 shewn, and is in itself very evident); it is
 also unreasonable to take it in that sense
 in any of those other texts here examined:
 from hence therefore arises another good
 argument to prove, that the phrase, *un-*
cover the nakedness, in these laws, when it
 is used for *carnal knowledge*, must mean
 adultery or fornication with near kindred,
 and

and not *marriages* with them; which will be further evident from what I shall observe concerning the evil practices the laws we have been considering were intended to prevent; which I will now therefore proceed to examine.

The introduction to them is [e], *After the doings of the land of Egypt, wherein ye dwelt, shall ye not do; and after the doings of the land of Canaan, whither I bring you, shall ye not do; neither shall ye walk in their ordinances: and at the end of them it is added [f], Defile not yourselves in any of these things, for in all these the nations are defiled that I cast out before you, and the land is defiled: therefore do I visit the iniquity thereof upon it, and the land itself vomiteth out his inhabitants.—That the land spue not you out also when ye defile it, as it spued out the nations that were before you: for whosoever shall commit any of these abominations, even the souls that commit them shall be cut off from among their people; therefore shall ye keep mine ordinances, that ye commit not any*

[e] Levit. xviii. 3.

[f] Ibid. 24, 25. 28, 29, 30.

of these abominable customs which were committed before you, and that ye defile not yourselves therein.

And in chap. xx. after the conclusion of the penalties that are added to each particular precept, [g] *Ye shall not walk in the manners of the nations which I cast out before you: for they committed all these things, therefore I abhorred them.*

Is it not very plain from hence, that the sins forbidden in these precepts, are all of them such as were abominable in those heathen nations; and therefore such as were so in their own nature? things that were not only practised by them in their lewd frolicks, but were so common among them, as to be called their *ordinances* [b] and *customs*; and practised too, as expressive of a religious veneration, and as ceremonies in the worship of their shameful and detestable deities, *Every abomination*

[g] Levit. xx. 23.

[b] "The word in the original (saith the Rev. Mr. Moses Lowman) properly signifies some constitution, "as a law directing a thing to be done." Rational of the Ritual, p. 9.

to the Lord, which he hateth, have they done unto their Gods [i].

It is surely then altogether unreasonable to suppose the things here forbidden, were any of them such as God himself made necessary to be done at the first institution of marriage, in the time of man's innocence; or, which the best of his own people, even the fathers of those very persons to whom these laws were especially given, frequently practised, and that not only without blame, but even with approbation. Thus much in general.

But it may be fit here to enquire more particularly, what the evil practices of the Egyptians and Canaanites were, that are called in chap. xviii. and xx. of Leviticus, their *ordinances* and *customs*, that we may the more clearly see what the abominations were, that the laws we are considering were intended to prevent. And in doing this, I shall not confine myself to the ~~heathen~~ customs only, but, as I proceed, shall also examine what were the abominable

[i] Deut. xii. 31.

practices of the children of Israel, after they had mingled themselves with those wicked people, and learned their most shameful works; and also observe, what the sins were that the prophets reprov'd them for. That the Israelites broke all these laws, is very clear.

They did not destroy the nations concerning whom the Lord commanded them, but were mingled among the heathen, and learned their works: and they served their idols, which were a snare unto them [k]. They did according to all the abominations of the nations which the Lord cast out before the children of Israel [l].

First, they practis'd the most unnatural and barbarous of all crimes, viz. *Burning their own children in the fire, as sacrifices to their idols [m].* This is an abomination forbidden in Levit. xviii. 21.

And yet, as shocking as this was, the children of Israel did the same; they also burnt their innocent babes to death as

[k] Psal. cvi. 34, 35, 36. [l] 1 Kings xiv. 24.

[m] Deut. xii. 31. See also Whitby's Necessity and Usefulness of the Christian Révelation, p. 220, 221.

sacrifices

sacrifices to Moloch, Adramelech or Ananmelech [*n*], which are supposed by some [*o*], to be only different names for the same idol.—*They sacrificed their sons and their daughters unto devils, and shed innocent blood, even the blood of their sons and their daughters, whom they sacrificed unto the idols of Canaan: and the land was polluted with blood* [*p*].

Secondly, They committed the unnatural and detestable sins mentioned in the 22d and 23d verses of the same chapter. The first of these had been long common among the Canaanites [*q*]. And as for the second, Bishop Patrick, on the text, hath shewn from antient history, that “the Egyptians did it in the worship of Pan—openly—in the view of all; and that it

[*n*] 2 Kings xvi. 3. and xvii. 31. 2 Chron, xxviii. 3. Jer. vii. 31. and xix. 5. and xxxii. 35. Ezek. xvi. 20, 21.

[*o*] Lowman on the Civil Government of the Hebrews, p. 24, 25.

[*p*] Psal. ciii. 37, 38.

[*q*] Gen. xix. 5. See also Whitby's Necessity and Usefulness of the Christian Revelation, p. 225, 226, 227—280, and Bishop Gibson's second Pastoral Letter, p. 27.

was so far from being kept secret, that they rather made *ostentation* of it, which I look upon (says he) as an argument, that this had been an old practice[r].” These crimes are called by the common name of sodomy; and (shocking as it is to nature) they committed all these abominations as sacred rites to the deities they worshiped[s]: and yet, as shameful and detestable as those things were in themselves, and so plainly forbidden in their law, the Israelites committed the same atrocious crimes—*There were sodomites in the land, and they did according to all the abominations of the nations, which the Lord cast out before the children of Israel [t]—The houses of the sodomites were by the house of the Lord [u].*

Thirdly, They committed the sin prohibited in the 19th verse; as also the other crimes mentioned in the said chapter;

[r] Bishop Patrick, on Levit. xviii. 23.

[s] Deut. xii. 31.

[t] 1 Kings xiv. 24. and xv. 12. and xxii. 46.

[u] 2 Kings xxiii. 7.

as is evident from the 24th to the 27th verses thereof.

The Israelites did the same. *In thee* (that is, in Jerusalem) *have they humbled her that was set apart for pollution* [w].

Fourthly, They were guilty, not only of the indecent acts of uncovering and exposing those parts of their bodies that modesty requires should be kept covered, and which our first parents made *aprons* to cover [x]; but they also committed shameful

[w] Ezek. xxii. 10. See Poole's Annot. on that text.

[x] Gen. iii. 7. Mr. Weems observes, that "when the Israelies were coming out of Egypt, travelling towards Canaan, the Lord forbiddeth them to follow the beastly idolatry of the Moabites, to discover their nakedness, as their priests did.—This filthy idolatry (said he) was the worshiping of Baal-peor, who was also called Priapus. This Priapus was a young man in Hellepont, who was expelled out of the country as a corrupter of youth. He went into Greece, where beastly persons made a god of him. The Moabites made choice of him also for their god, and he was called Baal-peor, because he was made with his nakedness discovered—These filthy Moabites made choice of a god like unto themselves; and as their god

ful and detestable adulteries and fornications,

"Baal-peor was a filthy god, so were his priests, in shewing their nakedness." Wicams's Works, Part I. p 74, 75.

Baal-peor is mentioned, Numb. xxv. 1—8. and called by the prophets [Jer. xi. 13. 15. and Hosea ix, 11.] *That shameful thing.*

Dr. Fuller says, "he took his name from a word which signifies to lay open, an idol, which shewed all that Adam covered with fig-leaves" Pifgah Sight, l. 17. ch. vii. sect. 26.

And Mr. Poole, in his Note on the word Peor [Numb. xxv. 3.] "A verb (saith he) signifying to open or uncover, because of the obscene posture in which the idol was set, as Priapus was, or because of the filthiness which was exercised in his worship."

Bishop Patrick, on Deut. xxiii. 17. saith, "How abominable were such persons as prostituted their bodies in honour of Venus and Priapus, and such filthy deities of which sort there were both males and females, consecrated to such impure services. And this (says he) was practised in the days of Moses, as appears from the history of those who committed fornication with the daughters of Moab, who exposed themselves in honour of Baal-peor."

"What (says Dr. Whitby) can strike a greater horror into our thoughts than this consideration, that they worshipped τὰ ἀγενῆα μυσία, what modesty will not permit us to mention, paying their worship to Pri-

pus,

tions, and that too, with their nearest kindred [y].

And all these things were done by them publickly in the worship of their deities,

“ pus, and saying, τὸ δὲ μέρος τῆ σώματος τὸ τῆς γενέσεως
 “ αἰτίαν τιμαῖσθαι προσηκούως, that part of the body was
 “ fit to be worshiped, whence we receive our being.
 “ Diodorus Siculus informs us, it was not only wor-
 “ shiped among the Egyptians in the Sacra of Isis and
 “ Osiris, ἀλλὰ καὶ τῶν ἄλλων ὁλίγας καθιερομένη κατὰ τὰς
 “ τιμὰς, but in the solemnities of many other nations,
 “ &c.—Theodoret adds, that in the Eleusinian solem-
 “ nities they worshiped *Pecten muliebre*, as the Phallus
 “ was revered in the solemnities of Bacchus.” *Necessf.*
of Ch. Revel. p. 226, 227. As for their adultery, see
Ibid. 272, &c.

See the story of Isis and Osiris, in Mr. Chandler’s
 Defence of the prime ministry and character of Joseph,
 p. 512, 513, 514, and 570, 571.

[y] Bishop Jer. Taylor tells us, from ancient history,
 that from the time of Nimrod, among the Persians,
 lying with their *mothers*, *daughters*, and *sisters*, was
 made a qualification for the priesthood. *Duct. Dubit.*
B. ii. ch. ii. sect. 23. p. 224.

Mr. Jurieu, a learned French protestant divine, well
 read in antient history, tells us the same, and adds, that
 this custom was carried by the Magi into Egypt, and
 several other countries. *General Hist.* p. 212. See
 also Whitby of *Ch. Revel.* p. 275. And the late
 Bishop of London’s Second Pastoral Letter, p. 28.

as tokens of their obedience and veneration. Deut. xii. 31. *Every abomination to the Lord, which he hateth, have they done unto their gods.*

These are the things forbidden in the eighteenth of Leviticus, from the sixth to the twentieth verse; to prevent the children of Israel from committing the like enormous crimes. Is it not shocking then to find, that, notwithstanding these plain prohibitions, the fate of those heathen nations, and the many great and signal favours Almighty God was pleased to bestow upon the Israelites, bringing them into that delightful, rich, and plentiful land, in the room of these wicked people, which he cast out of it for their execrable wickedness, they should be guilty of all the same gross enormities? And yet, it is evident this was the case (as hath been already observed)—*They did according to all the abominations of the nations which the Lord cast out before the children of Israel* [z].

If we attend to the reproofs given them by the prophets, for their breaking the

[z] 1 Kings xiv. 24.

laws God gave them, in the 18, 19, and 20th chapters of Leviticus, it may throw some further light on this matter. Concerning their adulteries, the prophet Jeremiah thus expresses it, *When I fed them to the full, then they committed adultery, and assembled themselves in troops in the barlots houses. They were as fed horses in the morning: every one neighing after his neighbour's wife; shall I not visit for these things? saith the Lord* [a]. The prophet Ezekiel was more particularly commanded (as I take it chap. xxii. 2.) to shew her, (viz. Jerusalem) all her abominations, that is, all her gross and heinous crimes; which he did very concisely. He began with their bloody idolatry, from the 3d to the 6th verse; the same, I apprehend, that is forbidden, Leviticus xviii. 21. and xx. 2, 3, 4, 5. of which we took notice before, p. 35. Next he proceeds, ver. 7.

To their *undutifulness* to their parents; forbidden, Levit. xix. 3. and xx. 9. See also, Deut. xxvii. 16.

[a] Jer. v. 7, 8, 9.

And in the same verse, their *oppression* and *vexing* of the *stranger*, *fatherless* and *widow*; forbidden, Levit. xix. 33. and Exod. xxii. 21, 22.

And in the 8th verse, their *prophanation* of the *sabbath*, forbidden, Levit. xix. 30.

The 9th verse mentions, *talé-bearers* to shed the *blood* of their neighbours; forbidden, Levit. xix. 16.

He proceeds thus, *In thee they eat upon the mountains, in the midst of thee they commit lewdness*. This (if I mistake not) is pointed against their obscene and unnatural *crimes* prohibited, Levit. xviii. 22, 23. (which they practised as sacred rites in their idolatrous worship) referred to, 1 Kings xiv. 23, 24. and 2 Kings xxiii. 7. And herein before treated of, p. 35. For the word *למנו*, which is here translated *lewdness*, and in the former translations of the Bible, *abomination*, and in Leviticus xviii. 17. and xx. 14. is rendered *wickedness*, signifieth more than *wickedness* [b], viz. “ an execrable and detestable degree

[b] Bishop Patrick on Levit. xviii. 17. and the Assembly’s Annot. on the same text.

“ of

“ of wickedness.” As I shall have occasion again to observe.

What follows next relates more particularly to the case in hand, ver. 10. *In thee have they uncovered their father's nakedness.* You see this is the sin expressly forbidden in Levit. xviii. 7.

Then he proceeds to mention the sin prohibited in the same chapter, verse the 19th, taken notice of before, p. 36.

Ver. 11. He comes to their gross adultery expressly prohibited, Levit. xviii. 20. which was then become so common among them, observed before, p. 41. from Jeremiah v. 7, 8, 9.—and proceeds to their most infamous practices of debauching their near kindred, particularly forbidden in Levit. xviii. 8, 9, &c. The whole verse, in that translation of the Bible which was in common use before our present translation, stood thus—*Every one hath committed abomination with his neighbour's wife, and every one hath wickedly defiled his daughter-in-law; and in thee hath every man forced his own sister* [c].

[c] Ezek. xii. 11.

But

But in our present translation this text is greatly altered. It is there rendered thus—*And one bath committed abomination with his neighbour's wife, and another in thee bath lewdly defiled his daughter-in-law, and another in thee bath humbled his own sister*—You see here the universal terms *every one* are changed into the particular terms *one* and *another*, contrary (I think) to the plain sense of the Hebrew **וְאֶחָד**, contrary to the vulgar *Latin*, and to its rendering in all our old English translations of the Bible [*d*], and also contrary to the rendering of it in other places in the same translation. In this text the word **וְאֶחָד** occurs three times. In the first place, instead of *every one*, it is rendered *one*; and in both the other places (without the least shadow of reason, as far as I

[*a*] In Tindal and Coverdale's translation of the Bible, printed in the year 1535, it was rendered *every one*; so it was in Mathews of 1537, and in the great Bible of 1539; and in the Geneva translation of 1560; in Bishop Parker's of 1568; and, as far as I have been able to learn, in all the English translations of the Bible, ever printed before that now in use.

can perceive) *another* : but the authors of this translation in the margin, with a note of reference, have also signified to the reader that it may be rendered *every one*.

It may be fit to observe here, that it must not be understood, as if every individual person among them did it ; but that those horrid crimes of debauching their near kindred, were become common among them : and, as hath been observed by the learned [*e*], they likewise committed such shocking debauchery, as religious rites in their idolatrous worship, which the Canaanites did before them ; who were driven out of the land, or destroyed, for such detestable wickedness.

But, besides this general account, we have particular instances of great and remarkable persons, who brake some of those laws : let us here also take a view of them. The first I shall mention is, that of debauching or forcing a man's own sister : this horrid crime Amnon, king David's son, was guilty of, as is evident from

[*e*] See Mr. Poole's Annot. on Ezek. xxii. 11. and chap. viii. 14.

1 Samuel xiii. 11, 12, 13, and 14. for which he was put to death by the means of Absalom her brother.

And yet Absalom also was guilty of a most notorious breach of another of those prohibitions [*f*], viz. defiling his own father's wives [*g*], (those called concubines in Scripture, were wives [*h*]) for which crime, with that of rebelling against his father, he also (by the righteous providence of God) came to a shameful end [*i*].

Reuben (Jacob's eldest son) was guilty of the like crime before those laws in Leviticus were given [*k*]; but it was a sin in him notwithstanding that; for it was a

[*f*] Levit. xviii. 8.

[*g*] 2 Sam. xvi. 21, 22.

[*h*] "After the phrase of Scripture, a concubine is "an honest name, for every concubine is a lawful "wife." Vid. Homily, intituled, "An information "for them that take offence," &c. Part 1st.

"Certain it is [said Bishop Patrick] such persons "were real wives; and it was adultery in any other "person that lay with them, but they who had married them." Patrick's commentary on Judges xix. 1.

[*i*] 2 Sam. xviii. 14, 15.

[*k*] Gen. xxv. 22.

trans-

transgression of the primary law of nature; and accordingly it was resented by his father, and for which he lost his right of primogeniture [l].

And it was for a crime of a like nature (though in some circumstances different) that the Apostle St. Paul reprov'd the Corinthians [m].

We have likewise a remarkable instance in the New Testament of a great man's transgressing another of those laws [n], not much unlike the last mentioned, saving only in the difference of relation, *that* being adultery with a father's wife, and *this* with a brother's [o].

Object. But both these last mentioned instances have been often produced by way of argument against *marriage with near kindred*, on supposition they were instances of persons reprov'd under the gospel dispensation for marrying such: though when

[l] Gen. xlix. 4. 1 Chron. v. 1.

[m] 1 Cor. v. 1.

[n] Lev. xviii. 16. and xx. 21.

[o] Matth. xiv. 3. Mark vi. 17. and Luke iii. 19, 20.

rightly understood they will be found to be nothing at all to the purpose. Let us examine them.

St. Paul's words are; *It is reported that there is fornication among you, and such fornication as is not named amongst the Gentiles, that one should have his father's wife* [p].

By having the father's wife here, is not meant marrying the father's widow (as many seem to think) but taking the father's wife from him to his great wrong, and adulterously living with her in his father's life-time; as is evident from 2 Corinthians vii. 12. [q] in which commentators are generally agreed.

If the Apostle had meant it of marrying the father's widow, he would not have said it was *such fornication as was not named amongst the Gentiles*: for, marrying

[p] 1 Cor. v. 1.

[q] 2 Cor. vii. 12. *Wherefore though I wrote unto you, I did it not for his cause that had done the wrong, [i. e. the fornicator mentioned 1 Cor. v. 1.] nor for his cause that suffered wrong [i. e. the father of the fornicator, who was injured by his son's wickedness, &c.]*

the

the father's widow was not only named, but allowed, and frequently practised *at* and *before* that time by many gentile nations in the neighbourhood of the land of Canaan[r]; which I take to be another unde-

[r] It is observed by Bishop Jeremy Taylor, that "in Syria and the Pontick kingdom, before his [St. Paul's] time, it [viz. *marrying the father's widow*] " had been named and practised and passed into a law, " and yet that kingdom consisted of two and twenty " nations of different languages." *Duct. Dubit.* l. ii. c. i. r. i. sect. 6. p. 174.

Syria lies on the other side of the land of Canaan. And Dr. Hammond tells us, " among the ancient Arabians it [viz. *marrying the father's widow*] was " used, and the custom so described by Al. Mostrarraf, " Ebnol Arhir, &c. that when a woman was left a " widow, or put away by the husband, the eldest son " should take her by inheritance, and *cast his garment over her as a sign of it*; or if he would not, then the " next heir; and so the son, they say, succeeded to the " father's bed, as well as wealth, by inheritance.— " And such there were of the tribe of Banikais, who, " three of them, one after another, had married his " father's wife. Now it was a custom among the " Arabians, ~~that~~ when any man was separated from " his wife by death or divorce, his eldest son, if he " wanted her, *cast his garment upon her*; that is, took

E

" her

undeniable proof that the fornicator's crime here mentioned was not marrying the father's widow, but adulterously living with his wife.

The other instance is that of Herod with Herodias. The case is thus related by St. Matthew [s]. *Herod had laid hold of John, and bound him, and put him in prison for Herodias's sake, his brother Philip's wife. For John said unto him, it is not lawful for thee to have her.* This hath been alledged as an evidence of the unlawfulness of marrying of a brother's widow. But that notion will be sufficiently confuted, by only relating the true state of the fact, as given us by Dr. Whitby [t] from Josephus, and the Old Jewish Chronicles, which in short was as followeth. *This Herod was married to the daughter of Aratas king of Petrea; yet (in breach of faith with her, and violation of the marriage covenant, she being then living, and* "her to wife; or if he wanted her not, one of his brothers married her." Dr. Hammond's Annot. on 1 Cor. v. 1.

[s] Matth. xiv. 3, 4.

[t] Whitby on the same text.

his lawful wife) he took away Herodias his brother's wife from him, and kept her as his own wife: which was a most gross act of adultery. Therefore (as Dr. Whitby rightly observes) John the Baptist might well say, *It is not lawful for thee to have hers*

There are some other objections that may be supposed to lie against my notion of these laws, which I will now proceed to consider.

Object. 2. The Jews (to whose forefathers the laws now under consideration were particularly given) must be supposed to understand their own laws, and they took them to be prohibitions of marriages with the persons therein mentioned; therefore we ought to take them in that sense.

Answer. There is no reason (that I can find) to think that the Jews took those laws to be prohibitions of marriages with near kindred, till since the time of their royal prophet king David, but great reason to think the contrary [u]. And after that

[u] Nay, it is more probable they never took them for prohibitions of marriages till after the times of

that time they fell into the most detestable idolatry (as has been already shewn) and before the reign of Josiah king of Judah (which was more than six hundred years before the time of our blessed Saviour) it seems, they had forgotten what their law was, (Hosea iv. 6. 2 Kings xxii. and xxiii. and 2 Chron. xxxiv. 18, &c.) no wonder then if they had forgot the true sense of it.

All the Jewish traditional books were composed long since the times of their prophets; most of them since our Saviour's time [*w*]: what authority, therefore, can they be of?

Our blessed Lord himself, when here on earth, observed that the Jews by their their prophets: it is not evident to me, that they generally took them in that sense, till since the times of our blessed Saviour, and the Apostles, when they entertained the most absurd notions concerning them.

[*w*] Mr. Poole tells us, that "all the Jewish writers which are now extant, lived and wrote since Christ's time, when the doctors of that people were very ignorant of many great truths, and of the plain meaning of many Scriptures." Annot. on Job xix. 25. See also Dean Prideaux's account of the Jewish writers. Connect. Part II.

traditions

traditions transgressed the commandments of God, and made them void and of no effect [*x*]. No regard can be therefore due to such traditions [*y*].

Object. 3. But there were a sect among the Jews, commonly called the Karrites,

[*a*] Matth. xv. 3—6. And Mark vii. 8—13.

[*y*] Mr. Moses Lowman, in his dissertation on the civil government of the Hebrews, from page 151 to 158, hath observed, that in *several cases* the authority of the Talmudist and Rabbinical writers is very low with learned men: in his ninth chapter concerning the senate of Israel, page 155, he saith, “The Rabbinical writers have greatly darkened, and even confounded this question; they have given us their own chimerical imaginations, instead of real historical facts. For though they could have no other good foundation to build upon but the Scripture history, yet they have given us such an account of their Sanhedrim, as the Senate and supreme court of the Hebrew nation, as is no where to be found in the Scripture history, and is in many things absolutely inconsistent with it.” And one that has a mind to know what notions the Jewish traditional writers had concerning marriages betwixt near kindred, may find enough of their most absurd assertions in Mr. Jurieu’s general history of all religious worship (both true and false) vol. I. chap. xxi. from pages 200 to 212.

who rejected their traditions, and those also understood these laws as prohibitions of marriages with near kindred; therefore we also ought to adhere to that sense of them.

Answer. The Kairites were a sect that sprung up among the Jews some hundreds of years since the time of our blessed Saviour (just as the Quakers sprung up among us); and as those Kairites rejected tradition, they could know no more as to this point than we can now. It would be as reasonable to appeal to the opinions and practices of the Quakers, in order to discover what the doctrine of the church of England is in the case of swearing before the civil magistrate in matters of truth and judgment, as to appeal to the Kairites in this case. I know no other way that can be safely depended on to find out the true sense of those laws, but to search and examine in what sense they were understood by the inspired penmen, at, and since the time they were promulgated, which is what I have endeavoured with the utmost care to do; and for the more

fully perfecting such examination, shall be glad of the aid and assistance of any learned and honest enquirers.

Object. 4. Is it not evident, from chap. xviii. 17. (which is a prohibition of uncovering the nakedness of a woman and her daughter or grand-daughter) when compared with ch. xx. 14. (where the punishment is added for taking a wife and her mother) that both relate to the same thing? (since all the difference is, one mentions the mother first, and adds the grand-daughter; the other mentions the daughter first [z], and omits the grand-daughter.) And consequently that marriage must be understood to be prohibited by the phrase *uncover the nakedness* in the 17th verse of the xviiiith chapter, and therefore likewise throughout the whole chapter. And may not the same be also inferred from the 18th verse next following of the same chapter?

[z] We have a like instance in the tenth commandment, in the xx of Exodus ver. 17. the neighbour's *house* is put before his *wife*: in Deuteronomy v. 21. his *wife* is put before his *house* yet the command is the same.

And then (as matches betwixt kindred by consanguinity are forbidden from the 7th to the 16th verse, and the women here prohibited are of kin to the man only by affinity) may it not be further inferred from hence, that it is as unlawful to marry kindred by affinity as by consanguinity: and that therefore it is no more lawful for a man to marry his wife's sister than his own sister.

Ans. 1st. I admit that it is probable those texts, viz. chap. xviii. 17. and xx. 14. do both *relate to the same thing*, not only for the reason mentioned in the objection, but also because the heinous nature of the crime is prohibited in both places by the same word רע which is translated "*it is wickedness*," as before observed. But Bishop Patrick, in his note on the word, tells us, "it imports more "*than wickedness*." And another learned commentator [a] tells us, it signifies, "an "*execrable and detestable degree of wickedness*," which word no where occurs

[a] See the Assembly's Annot. on Leviticus xx. 14.
either

either in the said xviii or xx chapters, but only in these two places; for the word which in the 17th verse of the xx chapter, is rendered *it is a wicked thing* is רָעָה which is a word of a much milder signification than the word זָנָה before-mentioned. And as those texts belong both to one thing, it is reasonable to suppose, that by comparing them, the one may give light to the other.

But then, *secondly*, it is very evident, that the marrying a mother and daughter, or grand-daughter; or a daughter and mother successively one after the *death* of the other (which is generally understood by it) cannot be the thing here prohibited. For it can be no greater crime for a man to marry his mother-in-law or daughter-in-law, than his own mother. But it is plain the crime here prohibited is a greater one, it being set forth by a more emphatical word, as a high and extraordinary wickedness: and the punishment to be inflicted for the breach of it, the most severe of all the punishments mentioned in the Levitical law, viz. burning with fire:
and

and that not only the man and woman that might be supposed to be guilty of this sin after the mother or daughter's death, but *he* and *they*, both the man, mother and daughter, or grand-daughter, which is a demonstration that it must be for something done by them whilst they were all living: so that if marriage is meant here, it must be the marrying the mother and daughter, or grand-daughter, both being living and consenting to it. But neither is it likely that this is the meaning of the precept: for let it be remembered (as hath been already observed) that the things here forbidden were the abominations of the Egyptians and Canaanites, their *customs* and *ordinances*, such as they practised in, or with relation to, their religious worship [b]. But it is not likely that marrying a mother and daughter, or grand-daughter together, was a thing commonly practised by those people (or any people) much less that it was done by them as an act of worship, or in the ser-

[b] Deut. xii. 31.

vice of their gods (though the defiling of them might be so): for had that been the case, there would have been no need to have added the most dreadful of all deaths, as a punishment for the breach of it. For it is not probable any woman would be so fond of taking her daughter as a co-partner with her in her marriage-bed; or that any daughter would be so fond of her mother in the same case, as to make it needful to inflict such a punishment to deter them from it.

But if neither of these things is to be understood here, what can be the meaning of the prohibition?

If I can give no satisfactory answer to this question, it will by no means follow from hence, that the words *uncover the nakedness* must here signify marriage, (and much less in other parts of those laws) though I think what hath been already said is sufficient to shew the improbability of the words being used in that sense here. It was observed before, p. 38. that when the phrase *uncover the nakedness* is used for carnal knowledge, then always
adultery

adultery or *fornication* is to be understood by it. The words of the 17th verse of the xviii chapter are *Thou shalt not uncover the nakedness of a woman and her daughter, neither shalt thou take her son's daughter, or her daughter's daughter, to uncover her nakedness*. Now according to the fore-mentioned sense of the words, this must be a prohibition of debauching those persons. In the 14th verse of the xxth chapter, the words are, if a man *take a wife* and her mother, &c. it hath already been observed, that the word rendered *wife* signifies woman in general, whether married or unmarried; it is the word which is translated *woman* in the 17th verse of the xviiiith chapter, as also in the 18th and 19th verses of the same chapter, and in the 18th verse of the xxth chapter; and there is as good reason to translate it *woman* in this 14th verse, as there is for rendering it so in the 17th verse of the xviiiith chapter.

This 14th verse, therefore, I think should be translated thus, *If a man take a woman and her mother, &c. viz. to uncover their naked-*

nakedness, (that is) to debauch them. For the words, *to take a woman*, may as well signify to take her to debauch her, as to take her to wife: so we read Gen. xxxiv. 2. concerning Dinah—And when Shechem the son of Hamor, —saw her, *he took her*, and lay with her and defiled her. This I think is clear.

But then perhaps it may be asked, 'what need was there of such a prohibition as this [c]? and of adding too, a more severe punish-

[L] Bishop Patrick in his commentary on the 23d verse of the xviith chapter, hath started the like question concerning the crime of bestiality there prohibited: his words are, "some are apt to say, what need was "there of such prohibitions? when it is so monstrously "unnatural to mix with creatures of a different species "from us, as all beasts are. But such persons (says "he) do not understand, that this was not only practised in Egypt (against whose doings he cautions "them, ver. 3.) but was also made a piece of religion — "Goats, which were there also worshiped, lay with "women—openly—in the view of all," *for the proof whereof he cites authors of undoubted credit*, and then adds, "how long this beastly custom had been among "them none can tell. But these words [*what he had "cited*] import that then it was notorious; and so "far from being kept secret, that they rather made
" an

punishment for the breach of it, (*viz. burning with fire,*) than for the breach of any other of these laws?

It is observed in the notes, p. 39. from an ancient history cited by Bishop Jeremy Taylor, and Mr. Jurieu, that from the time of Nimrod, among the Persians, lying with their mothers, daughters, and sisters, was made a qualification for the priesthood [d]. And as the Canaanites were much addicted to the most abominably idolatrous customs, there might be some custom of a like nature among them, though now unknown to us, which seems

“an ostentation of it: which I look upon [adds he]
 “as an argument that this had been a very old practice, otherwise they would have blushed at it.”

[d] Whatsoever is made a qualification for any office must be done so publickly, as to be capable of being proved *by witnesses*: (this is the case at present among us, as to the *sacramental test*;) and the crime prohibited by this precept, must likewise be of such a nature, as to be capable of being so proved: and so must all the other crimes mentioned in these laws be, where death is the penalty: for without two or three witnesses no person by the Levitical law was to be put to death. Numb. xxxv. 30. Deut. xvii. 6. and xix. 15.
 probable

probable from the prohibition itself: for it is observable, that this prohibition, as above explained, is an express prohibition of that most shocking custom: [for he that debauches his mother, and sister, debauches a *woman and her daughter*; and he who debauches his mother and his daughter, debauches a *woman and her grand-daughter*.]

Now, since to be a priest in Egypt (from whence the children of Israel were brought forth) was to be a man of great dignity; (for the priests were nobles and privy counsellors in those countries [e]) it is no unreasonable conjecture to suppose that people might be aspiring after grandeur then, as well as in latter times; and, therefore, that not only the man himself might desire it, but his mother, sister, and daughter might permit it to be done, to qualify him for such preferment, which might be a cause of their advancement also. The temptation, therefore, being so *great*,

[e] Mr. Chandler's Defence of the prime ministry and character of Joseph, p. 403, 419, 421, 422, and 424.

and the *wickedness* so *heinous*, no punishment could be too severe to deter them from it.

The 18th verse in the objection mentioned, is another very difficult text; many learned commentators have tried their skill on it, and have scarcely been able to satisfy themselves as to its true sense.

This, however, I think is plain, that whatever sense is put upon it, the words, *uncover her nakedness* there, cannot signify marriage. Mr. Ainsworth, who gave us a more literal translation of the Hebrew text, than that in our Bible now in use, rendered it thus, *And a woman unto her sister thou shalt not take, to vex (her) to uncover her nakedness upon her in her life*. Many learned men have thought it to be a prohibition of polygamy; but that sense of it is rejected by the best commentators [f].

Mr. Poole observed, from a learned man, whom he doth not name, “ that this text
“ doth not simply forbid the taking one

[f] Bishop Patrick, Bishop Kidder, &c.

“ wife

" wife to another; but the doing it. in
 " such a manner, or for such an end, that
 " he may vex, or punish, or revenge him-
 " self of the former: which, (says he)
 " probably was a common motive among
 " that hard-hearted people to do so." Bi-
 shop Patrick and Bishop Kidder say, there
 is the like reason to understand the word
sister properly in the common acceptation
 of it in this place, as the words, daughter,
 mother, &c. in other places in this chapter.

If the observations of those learned
 commentators be right, may not the sense
 of the text be, "*Thou shalt not take thy*
 "*wife's sister and debauch her in thy wife's*
 "*presence, or before her face, thereby to*
 "*vex, or be revenged of thy wife,*" that
 being the most effectual way to vex her.

But be it as it will, surely it is altoge-
 ther unreasonable to make the dark and
 obscure parts of Scripture a key to ex-
 pound those that are plainer. And as to
 the consequence drawn at the end of the
 objection, if what hath been before ob-
 served be of any force, the whole founda-
 tion of it is destroyed. But if all I have

said on those texts in the objection mentioned should stand for nothing, and it could be proved that the phrase, *uncover the nakedness*, did indeed signify marriage (the contrary to which, I think, hath been fully shewn); yet, even in that case, the consequence would not hold good. For the persons in the objection mentioned are in the ascending and descending line; therefore, to argue from thence, that because kindred by affinity in the ascending and descending line are forbidden to marry, therefore collateral kindred are so, is very weak and inconclusive.

Object. 5. If marriage with near kindred is not the thing intended to be forbidden in the xviiith and xxth chapters of Leviticus, what need could there be, after the general prohibition of defiling all such, to proceed so particularly to the kindred following, viz. the father, mother, father's wife, sister of the half blood, and of the whole blood, the son's daughter, and daughter's daughter, the father's sister, and mother's sister, the daughter-in-law, the brother's wife, the father's brother's
wife,

Wife, &c. ? Doth not the particularity of those precepts clearly shew, that marriage with the persons there named, is the thing chiefly intended to be prohibited by them ?

This objection contains the most plausible argument, and seems to carry greater weight with it, in opposition to the notion I have advanced, than any other that ever yet was, and, I think, that can be offered in opposition to it. And I am fully persuaded; it is this consideration, together with the prejudice of education, that has kept so many great, learned, and worthy men in that way of thinking : yet, specious as it is, I doubt not but it will admit of a clear and full answer. I shall endeavour to obviate the force of it by shewing :

First, that it is usual in the law of Moses to prohibit expressly some particular aggravating circumstances of some sins, on account of their heinous nature, the danger people may be under of being tempted to the commission of them, and the dreadful consequences that must attend them if committed ; notwithstanding they are

included under some general prohibition, as many other sins of a like kind are, that are not particularly prohibited.

Secondly, that the defiling of near kindred are sins of that nature, and therefore fit to be particularly prohibited on that account.

First then, I am to shew, that it is usual in the law of Moses to prohibit expressly some particular circumstances of some sins, on account of their heinous nature, &c. notwithstanding there are many others of the like kind also unlawful, though not so particularly prohibited. I shall instance, first, in the case of profane cursing. I suppose it will be allowed that all *profane cursing* is sinful; yet because it is more heinous to curse such as ought to be *feared, revered, and honoured*, than to curse others; therefore those are particularly prohibited, though others are omitted: thus it is prohibited to "*curse* their *parents*, and that under pain of death [g],

[g] Exod. xxi. 17. Levit. xx. 9.

and

and their *rulers* [*b*]; also they were prohibited to curse the deaf [*i*].

Secondly, it will also be allowed, that to *afflict* or *oppress* any persons is sinful; yet because it is more barbarous with respect to some than others, therefore the oppressing of such is particularly forbidden: as to oppress a *stranger* [*k*], a *widow*, and *fatherless children* [*l*], and a hired servant that is poor [*m*].

Thirdly, they were commanded to do no unrighteousness in judgement [*n*] to any persons: yet because it was a more aggravated crime to wrest or pervert judgement, by doing wrong to such as are less able to defend themselves; therefore it is in that case expressly and particularly forbidden. As to wrong the poor [*o*], by perverting judgement, the stranger, fatherless, and widow [*p*].

[*b*] Exod. xxii. 28.

[*i*] Levit. xix. 14.

[*k*] Exod. xxiii. 21. and xxiii. 9.

[*l*] Exod. xxii. 22.

[*m*] Deut. xxiv. 14.

[*n*] Levit. xix. 15.

[*o*] Exod. xxiii. 6.

[*p*] Deut. xxiv. 17.

Fourthly, they were particularly commanded to do no unrighteousness in *measure* [q]. And yet after this *two measures* were particularly mentioned [r]: *A just ephah and a just bin shall ye have.* They had other measures, which, by the general command to do no unrighteousness in measure, they were obliged to have just. But because those two particularly mentioned were in more common use among them, they were under *greater temptation* to have those unjust than others; therefore this is particularly prohibited.

Fifthly, the making any sort of idol gods to worship was expressly forbidden. *Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image* [s]. *Turn ye not unto idols, nor make to yourselves molten gods; I am the Lord your God.*

And yet, after the general command some idols are particularly prohibited [t]

[q] Levit. xix. 35.

[r] Exod. xx. 3, 4. Deut. v. 8.

[s] Levit. xix. 4. Exod. xxxiv. 17.

[t] Exod. xx. 23.

Ye shall not make with me gods (that is, idols) of silver, neither shall ye make unto you gods of gold. It was as unlawful by virtue of the general command to make idols of *brass, iron, wood, or stone.* But because idols of *gold and silver* were more *pompous*, and more generally esteemed than the others, and on that account they were more likely to be tempted to worship these than others, therefore these are particularly prohibited, while the others are omitted. I could produce many more instances of the like nature to prove this point, but I think these already mentioned are sufficient. I shall therefore proceed,

Secondly, to shew, that the defiling near kindred is a *sin* of a more *heinous nature*, and must be attended with more dreadful consequences than the defiling other people, (to which they were yet very likely to be tempted by the *evil examples* of those *nations*, as well as by the *frequent opportunities* that must offer for committing this sin;) therefore it was as fit to be particularly prohibited (though before

included in a general command) as the others abovementioned.

It is evident, that near kindred, such as are of the same house (even by the ties of nature) are much more obliged to aid, assist, direct, and admonish one another, to save and prevent each other from such evils as they are likely to be tempted to, than others are; insomuch that, under the christian institution, he that neglected these duties is said to be *worse than an infidel* [u]. Perhaps it may be said, that these words of the Apostle have respect there to the sin of a man's neglecting to take due care for the temporal welfare of his family; and I doubt not but this was the more immediate and direct intent of them. But certainly not to take care of the souls of his household must be more heinous; as particularly not to take care of their purity and chastity. What greater injury can be offered to a virtuous woman, than, instead of preserving, to violate her honour, and debauch her? The sons of Jacob

[u] 1 Tim. v. 8.

highly repented this, when done by Shchem to Dinah *their sister* [w]; as did Absalom, when Amnon defiled Tamar his sister [x].

How great then must the *crime* be, when such as, by the ties of *nature* and *blood*, are peculiarly obliged to defend one another from such injuries, become themselves the authors of them! And when it is considered that the injury is done to persons of the same family, to friends, it adds a peculiar sting to the remembrance and recollection of it. See how the royal prophet David speaks of an injury done him by one that ought to have been his friend: *It was not an enemy that reproached me, then could I have borne it,—but it was thou, a man, my guide and mine acquaintance* [y]. Injuries from such persons heaviest upon the mind, and are of all others the most difficult to be borne.

From hence then it plainly followeth, that as the *crime* in defiling the kindred

[w] Gen. xxxiv. 5, 7, and 26.

[x] 2 Sam. xiii. 13, 28.

[y] Psal. lv. 12, 13.

of a man's own house is *greater* than in defiling *others*, because it is generally like to be attended with *more shocking* consequences; as the temptations to it were strong from the frequent practice of it in the nations around them; and in consideration of the numerous opportunities that may offer in this case for the committing that sin.

So, if any *crimes* could deserve to be specified in *particular prohibitions*, after having been included in a general one, it must be that of *defiling* our *near kindred*; which is accordingly drawn out into several cases, and in each distinctly forbidden.

Thus have I proved (if I mistake not) that marriages betwixt *near kindred* are not prohibited by the Mosaic law, and have considered and answered the objections that seem to lie against my notion.

Yet, before I proceed to consider what the law of nature teaches in the case, I shall make some farther observations from Scripture, for the clearer and more full confirmation and illustration of the point,
by

by shewing, that *marriages betwixt near kindred* are not only not prohibited by the *Mosaic law*, but were well approved of, and in one case expressly commanded there.

I will begin with the case of the daughters of Zelophehad, where we find five brothers married five sisters, all of them brothers children.

This happened, in the time of Moses, by whom the laws we have been explaining were given, and under his inspection and approbation. [Numb. xxxvi. 10, 11.] *Even as the Lord commanded Moses, so said the daughters of Zelophehad: for Meliab, Tirza and Hoglab, and Milcab and Noah, the daughters of Zelophehad were married unto their father's brother's sons.*

So we find, Judges i. 13. that eminent servant of God, Caleb, gave Achsah his daughter to Othniel *the son of Kenaz, his younger brother, to wife.*

And Ruth said unto Boaz (Ruth iii. 9.) *Spread thy skirt over thine bondmaid, for thou art a near kinsman.* In answer to her, Boaz said, (ver. 12.) *It is true, that I am thy near kinsman; howbeit, there is a kins-*
man

man nearer than I. And in the next verse, he promised her, that if that kinsman would not marry her, he would. For that I take to be the meaning of his words. And we find, in fact, he performed his promise.

Hence it is evident, that the being *near of kin* was then made a *reason* for marriage, and not an *objection* against it. And as the kindred there mentioned was by affinity, it may be further inferred, that the nearer any collateral kindred were, they were then esteemed more fit to be joined together in matrimony.

And as to collateral kindred by consanguinity; though it is probable that marriage betwixt the nearest of them, (*viz, brother and sister*) was unusual; yet from the story of Amnon and Tamar, it is highly probable that such a marriage was not then deemed *unlawful*: for surely, if these laws in Leviticus had been then taken for prohibitions of marriages with near kindred, King David, whose *delight* it was to study and exercise himself in God's law day and night, must have been well acquainted with

with them. And as there are therein commands to teach the law *diligently unto their children*, &c. without doubt the *royal prophet* did it; therefore, if there had been therein any prohibitions of marriages with *near kindred*, his children certainly must have known it. And if those laws had been then taken for such prohibitions, as Tamar could not have been *ignorant of it* herself, so she must likewise have known that her *brother Amnon* also knew it. But by her words to him, *I pray thee speak unto the king, for he will not withhold me from thee* [z], viz. in marriage; it is plain she knew of no law against such a marriage; from whence it is, therefore *highly probable* these laws were not then taken in that sense.

But that which puts it beyond all doubt, is God's *absolute command* [a] to marry the *sister-in-law*. I take this to be a full demonstration that the law relates not to marriage.

For certainly Almighty God, who is infinitely holy, and hates all manner of impurity, and every thing that has any ten-

[z] 2 Sam. xiii. 13. [a] Deut. xxv. 5.

dency to it, would not have given such a command, if there had been either the least *impurity* or *unsiftness* in such a marriage.

In order to datken the point, this express command has been represented by some to be only an exception to the prohibition of Leviticus xviii. 16. which they misunderstood for a prohibition of *marrying a brother's widow*, supposing it to be like the allowance that Moses gave the Israelites to divorce their wives [b].

But the cases are quite different; in one it is said, *When a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness (or matter of nakedness) in her, then let him write, &c.*; which it is plain was but a *permission*, according to our blessed Saviour himself, Matth. xix: 8.

But in the other case (Deut. xxv. 5.) the words are: *If bretheren dwell together, and one of them die and have no child, the wife of the dead SHALL NOT marry without unto a stranger: her husband's brother SHALL go*

[b] Deut. xxiv. 1.

in unto her, and take her to him to wife; and if he would not, he was not only to be then treated contemptuously, but was also to bear a perpetual reproach for his refusal, as appears from the 7, 8, 9, and 10th verses. So that it is plain this was an *express command* for marriage in the case there mentioned betwixt brother and sister-in-law. They were at liberty, by the Mosaic law, to marry, if the brother, at his death, had left children, as I think is plain from what hath been proved in the former part of this discourse : but if he left no child, the brother was under an *express command* to take her to wife.

By this law, and the instances mentioned under the second general head, men of *learning and judgement* have been convinced, that there could be no immorality in such marriages : for though, through prejudice of education, and for want of a more free examination of the case, they have generally taken the laws we have been considering to be prohibitions of marriages betwixt near kindred ; yet, because they have been convinced as abovementioned, that *such marriages*

marriages could not be contrary to the law of nature, they therefore concluded that they were not *moral* but only *positive* prohibitions.

And as to their being spoken of as the abomination of the heathens, they (*some of them*) have been inclined to restrain it to the most abominable things mentioned in those chapters, and not to the marriages in general, which they thought to be there prohibited. The learned Grotius was of this mind.

But, in answer to this, Dr. Hammond well observes,—“ how ill a precedent this
 “ is, and how *dangerous* a way of *interpret-*
 “ *ing*, to *restrain*, where the law doth so
 “ distinctly *not restrain*; to *except* some *par-*
 “ *ticulars*, where the words are repeated
 “ over and over in the most *unlimited com-*
 “ *prehensive* form of *universality*: *defile not*
 “ *yourselves in any of these*; for in *all these*
 “ the nations, &c. ver. 24. And *ye shall*
 “ *not commit any of these*, ver. 26. for *all*
 “ *these abominations*, &c. ver. 27. And
 “ *whosoever shall commit any of these abo-*
 “ *minations* — ver. 29. And so again,
 “ chap.

at chap. xx. 23. *The nations committed all these.*

“ It is not possible [says he] words should be more providentially formed to exclude all *exception or restraint*, and to define every of the forenamed practices to be *abominations (all of them)* for which the Canaanites were *cast out* [c].”

And therefore the learned Doctor (who also thought that such marriages could not be transgressions of the *law of nature*, but only of some *positive law*) concluded they were prohibited by some positive law, long before the law of Moses was given, viz. to the sons of Adam or Noah, and in them to all mankind. But what I have observed under the second general head, is a clear confutation of that supposition [d]:

For if God had prohibited marriage betwixt near kindred, by a law given to the sons of Adam or Noah, and in them to all mankind, by means whereof they became so *abominable* in the heathens, as to pro-

[c] Hammond's letter of resolution of six queries in the first volume of his work, Q. 2d. Sect. 38.

[d] See p. 6, to 11.

voke God to *cast them out of their land* on that account, surely such marriages would not have been contracted by the *best* of God's own people, and that without blame too. It is, therefore, an unreasonable and absurd supposition.

This law then for the marriage of brother and sister-in-law, in the case above-mentioned, compleats the *demonstration*, that it was not *marrying with*, but the *defiling of, near kindred*, the laws which we have been considering were designed to prevent; that is, upon supposition *they are moral laws*; and if they are not, *they* do not oblige us as christians [e].

But

[e] If they are not *moral laws*, they stand on the same foot with those laws in *Leviticus, chap. xi.* that prohibit the eating divers kinds of meats, as *hares, fowls, &c. Their flesh shall ye not eat, and their carcase shall ye not touch.* And the law that forbids wearing *a garment of linen and woollen, Lev. xix. 19.* And the *rounding the corners of their heads, and marring the corners of their beards, ver. 27.* These laws never obliged any people but the Jews only: and even as to them, to all of them that embraced the christian religion, it was abolished at our Saviour's death. See *Dean Prideaux's Connections, part II. Preface;* and
Dr.

But were there then no marriages *forbidden in Scripture*? Yes; I have observed under the first general head, that at the original institution of marriage by Almighty God, he commanded them, with relation to marriage, to *leave father and mother*, by which I think it is very plain marriages between *parents and their children* were *prohibited*, and consequently all marriages in the ascending and descending line. And as to marriages betwixt kindred, (if I mistake not) this is *all that is prohibited in the holy Scriptures*: but some other marriages were there clearly forbidden to the children of Israel, and that not in dark and doubtful expressions, but in such plain words as cannot be mistaken.—*Thou shalt make no covenant with them* [viz. the Canaanites, and other inhabitants of the countries that God drove out before the children of Israel]. *Neither shalt thou make*

Dr. Benson's *essay concerning the abolishing of the ceremonial law by the death of Christ*, at the end of his paraphrase and notes on St. Paul's epistle to Titus. The learned are well-agreed in this; I mention it for the sake of the unlearned only.

marriages with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take to thy son [f]. You see this law is so plain, that it is scarcely possible to mistake it, as the laws of Moses generally were (though to us, at this distance of time, and by alteration of customs, it may not be so easy to find out the reason for which some of them were given).

And it is very evident they also broke this law, and were severely reprehended for it. [g] *Ezra the priest stood up; and said unto them, Ye have transgressed, and have taken strange wives to increase the trespass of Israel. Now, therefore, make confession unto the Lord God of our fathers, and do his pleasure; and separate yourselves from the people of the land, and from the strange wives. Then all the congregation answered, and said with a loud voice, As thou hast said, so must we do.—We are many that have transgressed in this thing.—Let all them which have taken strange wives,—come at appointed times, and with*

[f] Deut. vii. 2, 3.

[g] Ezra x. 10, 11, 12, 13, 14.

them the elders of every city, and the judges thereof, until the fierce wrath of our God for this matter be turned from us.

[*b*] Again, *In those days also saw I Jews that had married wives of Ashdod, of Ammon, and of Moab: and I contended with them, and cursed them, and smote certain of them, and plucked off their hair, and made them swear by God, saying, ye shall not give your daughters unto their sons, nor take their daughters unto your sons, or for yourselves. Did not Solomon king of Israel sin by these things?—Shall we then—do all this great evil, to transgress against our God, in marrying strange wives [*i*]?*

Do we find any thing like *this* with respect to marriages betwixt [†]*near kindred*? Do we find any where in Scripture, that any were *separated*, or in the least *blamed*, on that account? Is there any thing like it in the whole Bible? Shew me but *one* instance, and I will give up the whole point.

[*b*] Nehemiah xxi. 23, 25, 26, 27.

[*i*] 1 Kings xi. 1, 2, 3, 4.

The quite contrary is the truth. The being *near kin* (as hath been already observed) is there [*k*] made an argument for marriage, and those that married their near kindred are commended for it.

And (as Bishop Jeremy Taylor observed [*l*]) it was “the most general practice “[of the Israelites] to marry their own “near kindred in their own tribe.” And this practice continued among them until after the times of our blessed Saviour; as is evident from Josephus and other histories. And not among the Jews only, but among several Gentile nations also in the neighbourhood of Canaan. “No- “thing has been more frequent in all ages “in the east” [said Mr. Jurieu] “than “marriages betwixt brother and sister [*m*].” And Bishop Jeremy Taylor said,—“that “among the wisest nations, some whom “they esteemed their bravest men, did “this. Cimon, the son of Miltiades, mar-

[*k*] Ruth iii. 9. Numb. xxxvi. 10, 11. Tobit i. 9. and ch. iii. 15. and iv. 12, 13.

[*l*] Duct. Dubit. B. II. ch. ii. § 84.

[*m*] Critical History, p. 211.

“ ried his sister, Elpinice, *non magis amare*
 “ *quam patrio more ductus*, said Æmilius
 “ Probus, not only led by love, but by
 “ his country’s custom. So Archetolis,
 “ the son of the brave Themistocles, mar-
 “ ried his sister Mnasiptolema; Alexan-
 “ der, the son of Pyrrhus king of Epirus,
 “ married his sister Olympias. Mithri-
 “ dates married his sister Laodice. Ar-
 “ temisia was sister and wife to Mausolus
 “ king of Caria. So was Sophrosina to
 “ Dionysius of Syracuse. Eurydice to
 “ Ptolemæus Philopater. Cleopatra to
 “ Ptolemæus Physcon. Arsinoë to Pto-
 “ lemæus Philadelphus.—But I need not,
 “ [says he] bring particular instances of
 “ Egyptians: for Diodorus Siculus af-
 “ firms, that they all esteemed it lawful.”
 As he further tells us other nations also
 did [n].

This

[n] Duft. Dubit. B. II. ch. ii. rule 3. Sect 25, 26.
 p. 226. I do not mention this, nor did the before
 cited learned authors, to bring marriages betwixt bro-
 thers and sisters again into ufe, (their opinions, as
 to that, may be known by what they added afterward
 in the same books; as mine may from what I shall

This then being the case before, and even to, the times of our blessed Saviour (who could not but know all this) there was the greatest reason to expect, that if there had been any impurity in such marriages he should have shewn it: it was his constant practice, to take all opportunities to rectify the erroneous opinions, and reprove the wicked practices of his followers. We have an instance of this (among many others) in the case of divorce [*o*]. And though it is certain, that the case of marriage betwixt brother and sister-in-law came before him [*p*], yet we do not find he spake one word against it.

Neither did the holy Apostles (who were sent by him, and to whom he gave the spirit of *truth*, to lead them into *all truth*; and who [*q*] *kept back nothing that was pro-*

observe concerning it under the next general head) but only to let the reader know how the case then stood as to marriages betwixt near kindred, among some of the Gentiles, as well as among the children of Israel.

[*o*] Matth. xix. the 3d to the 9th verse. Mark x. 2.

[*p*] Matth. xxii. 24, &c. Mark xii. 19, &c. Luke xx. 28, &c.

[*q*] Acts xx. 20, 27.

fitable,

stable, but declared all the counsel of God) leave us one line against marriages betwixt near kindred. No! the greatest and most famous prohibitors of such marriages were a quite different sort of people.

For instance, Alexander the Great (as he is wont to be called) was a *very famous* prohibiter of marriages betwixt near kindred; for he did by a law forbid such marriages [r]. But what was his character? he was, as Dean Prideaux tells us, a man noted for robberies, plunders, and murders, and for the destruction of cities and nations [s]; and of some of the best of his friends too, and that without any provocation. “Were all his actions “duly estimated,” (says the learned Dean) “he could deserve no other character than “that of the *great cut-throat* of the age “in which he lived [t].”

His pride and vanity was so great, that by corruption he got the oracle of Jupiter

[r] Prideaux's Connect. part I. B. iv. Anno 486. p. 226.

[s] Ibid. part I. B. vii. and viii.

[t] Connect. part I. p. 489. Anno before C. 332.

to declare him Jupiter's son [*u*], and endeavoured, by many acts of violence and cruelty, to make it pass upon others that he was so [*w*]; and after that, required *divine honours* to be paid him (as a God) which he affected to be thought: and accordingly commanded that all who were admitted to make addresses to him should adore him [*x*].

He was a most exorbitant drunkard, and so much given to debauchery, and particularly to the shameful and detestable crime of unnatural lust, that he pardoned Nabazanes, a Persian nobleman (who had most treacherously conspired the imprisonment, and afterwards death, of Darius his king) only for the sake of Bagaas, a young eunuch, which he presented to him as a Catamite for the service of his lust.

And afterward he sacrificed Orsines, a noble Persian of great wealth, as well as of ancient nobility, though he had been his faithful friend, and done him great services,

[*u*] Connect. Part I. p. 492. Anno before C. 332.

[*w*] Ibid. p. 493.

[*x*] P. 305.

at the instigation of the same vile Catamite [y].

The great impostor, Mohammed, was another *notable* prohibiter of such marriages; witness the fourth chapter of his Koran, entitled; *Women*. But then what was his character? He was a man, who (as the learned dean, before cited, tells us) “much delighted in rapine, plunder, and bloodshed [z]. His two predominant passions ‘were ambition and lust. The course he took to gain empire, abundantly shews the former; and the multitude of women he had to do with, proves the latter. And indeed (says the Dean) these two run through the whole form of his religion, there being scarce a chapter in his Alcoran which doth not lay down some law of war and bloodshed for the promoting of the one; or else give some liberty for the use of women here, or some promise for the enjoyment of them hereafter, to the gratifying of the other [a].”

[y] Page 512.

[z] Life of Mahomet, 6th Edit. p. 116.

[a] Prideaux's Life of Mahomet, 6th Edit. p. 116,

Yea, if the story Dr. Willet mentions of him is true, no one could be more abandoned to brutality [*b*].

Surely such men as these were worse than *brute beasts*. Can it be imagined then, that they prohibited marriages betwixt near kindred out of *zeal for purity*? No! you may as well suppose it of the *devil* himself.

It is very probable (says Bishop Jeremy Taylor), that those barbarous people (the Goths) were the great precedents and introducers of the prohibition [*c*].

I will mention but one more, and that shall be a man of a much better character than the others before named, viz. the *eloquent* and renowned philosopher, Cicero, who sometimes “ speaks against the marriage of cousins; so that (says Bishop Jeremy Taylor) it is but too reasonable “ to suppose he did it to remove suspicion “ from himself; it having been objected “ against him by Q. Fufius Calenus in Dio, “ that he was too kind and amorous to his

[*b*] Willet's Hexapla, on Leviticus, chap. xviii. ver. 23. p. 434.

[*c*] Duct. Dubit. B. II. ch. i. N. 64. p. 237.

“ own

“ own daughter. *Filia matris pellex tibi*
 “ *jucundior atque obsequentior quàm parenti*
 “ *par est*; so unequal, so uncertain, a way it
 “ is to trust the sayings of a man, when
 “ so frequently the man’s opinion is not
 “ caused by his reason, but by a secret in-
 “ terest [*d*].”

On the whole, I think, I have clearly proved, that marriage betwixt near kindred is not prohibited in the xviith and xxth chapters of Leviticus; but that the prohibitions there given were intended to prevent all debauchery, even the beginnings of it, and all temptations to it, especially betwixt near kindred; but have no relation to marriages between such.

Let us now proceed,

Fourthly, To consider the law of nature in this case; and here it may be fit to observe, that according to the state and condition of mankind, and the relation they stand in towards their Creator, and one another, there are some things in their own nature fit, and others unfit, to be done,

[*d*] Duct. Dubit. B. II. ch. ii. Rule 3. N. 78.
 p. 240.

as is very evident to all rational and considerate persons: and as our great Creator is a being of infinite wisdom and rectitude; it cannot but be his will, that whatsoever is fit to be done, should be done; and whatsoever is unfit to be done, should be left undone. All this, I think, is plain and clear.

To apply it then to the case in hand; It must be observed, that by the *relation* parents and children bear to each other, there are such *relative duties* which they owe one another, as makes it *unfit* for them to be joined together in marriage. This is not only granted on all sides, but is insisted on by those that differ from me in the case of marriages betwixt near kindred in general; which makes it needless to enter into a particular proof of it. I shall therefore only further observe here, that as marriage is *unfit*, and therefore *unlawful*, betwixt *parents* and *children*; so it is likewise *equally*, or rather *more so*, betwixt *parents* and their *grand children*, and all others in the right ascending and descending line: for the further off in that line, the *more unfit* that they

they should be joined together in marriage ; because to the natural duties that subsist between such, there is to be added also that of *inequality of age* ; which (where it is very great) I look upon as another *moral impediment* of marriage : for the inconveniences and evils that naturally follow from it, are so great, and so very plain and common, that every considering person must have observed them.

Let me therefore add here, that as marriage in the right ascending and descending line, is thus prohibited by the law of nature ; so, *proportionably*, all such as stand in the place, or are the representatives of such ; as all fathers and mothers-in-law, and all that are appointed guardians, with those that are left under their care (at least as long as they are so under their care, and till their trust is legally discharged) are to be looked on as *effectually* barred from marrying one another. This hath been set forth by the learned in different lights, and is so plain, and I think so intirely agreed on all hands, that I shall insist no longer on it ;

But

But shall proceed to consider the case of marriage betwixt collateral kindred on the foot of nature ; and here, if I mistake not, it will be found to be vastly different. Most learned and judicious authors that have written concerning it, both ancient and modern, have agreed in this, that marriage betwixt near kindred is forbidden by the law of nature in the ascending and descending line only [e], which exactly agrees with the Christian *law* in this case, as was well observed by Bishop Jeremy Taylor: his words are, “ Of that which Christ said, the
 “ sum is this only : *For this cause shall*
 “ *a man leave father and mother, and cleave*
 “ *to his wife, and they two shall be one flesh.*
 “ By which words he did establish all that
 “ was natural and moral in this affair. [A
 “ man shall leave father and mother.] By
 “ these words are forbidden the marriage
 “ of parents and children. [He shall
 “ cleave to his wife.] By this is forbidden
 “ *concubitus masculorum.* [His wife.] By
 “ this is forbidden adultery, or the lying

[e] Duct. Dubit. B. II. ch. ii. Rule 3. N. 17. p. 222.

“ with

“ with another man’s wife, and extra-nuptial pollutions. [*Erunt duo.*] They two, by that is forbidden polygamy. [*In carnem unam*] shall be one flesh. By this is forbidden bestiality or the abuse of *caro aliena*, the flesh of several *species*; which (*said he*) are all the unlawful and unnatural lusts forbidden by God in the law of nature [*f*].”

The true distinction between *moral* and *positive* laws, is this; moral laws flow from the *nature and reason of things*, and are *immutable and unchangeable*, and not only obligatory on all rational creatures, but also a rule of action to Almighty God himself, by which he governs them: for though he cannot be bound by any *external laws*; there being no power comparable to his,—none but what is derived from him, and depends upon him; yet he is obliged by his *infinite wisdom*, and the *rectitude of his own nature*, to do that which is holy, just and good; and cannot will or command any thing to be done that is unjust, evil, or

[*f*] Duct. Dubit. B. II. ch. ii. Rule 3. N. 56. P. 234.

H

in

in any wise unfit to be done : but *positive laws* are of a different nature, they depend on the will of the lawgiver, and may be varied and altered at pleasure. Learned and ingenious men, therefore, generally allow that marriage in the ascending and descending line only, is prohibited by the law of nature (the *nearest collateral marriages* having been made *necessary* by God himself) : yet they now as generally think, it is more fit that marriages betwixt brothers and sisters should be prohibited than allowed : they seem to make such marriages stand as a *medium* between the *law of nature* and *positive laws*. Dr. Wood (who hath published a learned institute of the civil law, as well as of the laws of England) concerning marriage betwixt near kindred, thus expresses himself, “ the law
 “ of nature forbids it in the ascending
 “ and descending line ; the law of nations
 “ between brothers and sisters ; and the
 “ civil and positive laws, where there is
 “ any other prohibition [g].”

[g] Wood's Institut. of the civil law, B. iii. C. x.
 Par. 6.

Many

Many have offered reasons for prohibiting marriage betwixt brother and sister. The pious and learned Bishop Taylor (before cited) when he was considering this scruple of St. Austin's [as he calls it] viz. "There is in the modesty of mankind something that is natural and laudable, by which they abstain from congression with them, to whom they owe the honour of reverence and modest bashfulness," (*said*) "this indeed is a good account, where the modesty of nature does really make restraints, and owes duty and reverence; and therefore is one of the most proper and natural reasons against the marriage of parents and children, and is by the allowance of some proportions extended to brother and sister; but if it be sent out one step further, you can never stop it more, but it shall go as far (as) any man please to fancy: therefore let it stop where God and nature have fixed its first bounds, and let not the pretence of a natural reason or instinct carry us whither nature never did intend; for it is

“ certain she gave larger commissions, how-
 “ ever the fears, or the scruples, or the
 “ interest of some men have made them to
 “ speak otherwise. [*b*]

It hath been said by others, that *the familiarities and freedom with which they converse together, would give occasion to fornications and adulteries, if such amours might terminate in a lawful marriage:* therefore such marriages ought not to be permitted.

This hath been set forth by different authors in various forms of words, and mentioned by many casuists as the reason of prohibiting collateral marriages betwixt near kindred; and perhaps as to brothers and sisters, who now usually are, from the time of childhood, brought up and freely converse together, there may be something in it: and therefore, as all temptations to sin ought, as much as possible, to be avoided, this may be worthy of the consideration of our legislators on that account. Yet the learned Dr. Hammond,

[*b*] Duct. Dubit. B. II. ch. ii. R. 3. N. 78. p. 240.
 though

though a strenuous opposer of such marriages, did not seem pleased, that this should be urged as the reason of their prohibition.

For, says he, “ 1. By that reason *incest* “ should be *forbidden* only to keep men “ from *fornication*, and so *fornication* be “ the *greater*, and *incest* the *lesser sin*; as “ that, certainly, which is therefore forbid- “ den, that it may *secure* another *precept*, “ is to be looked on as a *lighter* fault than “ the *breach* of that precept, as the means “ are inferior, because *subordinate* to the “ end.” This no doubt is true; but the learned Doctor further saith, “ by this “ reason, those severe *penalties* should only “ have been made against *fornication* or “ *adultery* committed with those with whom “ we most familiarly *converse*, but not against “ marrying of them. For, supposing it “ were still lawful for *brothers* and *sisters* “ to marry, the making it *capital* for “ them to *commit uncleanness* one with ano- “ ther out of marriage, would as much “ deter them from such uncleanness, as “ if it were also *capital* for them to *marry*.

“ He that were sure to be *hanged* for
 “ *swearing*, would be as certainly deter-
 “ red from *swearing*, as if the same pu-
 “ nishment were denounced against *swear-*
 “ *ing* and *cursing* also; which [says he]
 “ makes it probable, that the *ground* or
 “ *end* of those *prohibitions* was (not) the
 “ *lessening* of, or *restraining* from *unclean-*
 “ *ness* [1], but more probably that *peace*
 “ and *amity* might by this means be *ex-*
 “ *tended* more largely, than the *natural*
 “ bands of *relation* had *extended* it, as both
 “ Plutarch in his 101st Roman Question,
 “ and St. Augustine de Civ. Dei, l. xv.
 “ ch. xvi. have affirmed [k].” The learn-
 ed Doctor thought the laws in the xviiith
 and xxth of Leviticus to be prohibitions
 of marriages betwixt near kindred, which
 was a thing generally taken for granted,
 as I conceive, without due examination.
 For (if I mistake not) I have demonstrated

[1] Thus you see in the judgement of Dr. Ham-
 mond, the preventing of uncleanness is no good reason
 for prohibiting marriage betwixt near kindred

[k] Dr. Hammond's letter of resolution of six que-
 ries. Query 2. § 22. in the first volume of his works.

they

they ought not to be *understood in that sense*; but were given to prevent fornication and adultery between all persons whatsoever, but especially betwixt near kindred, by prohibiting all temptations to it; and the *severe penalties* are only leveled against the grosser acts, viz. of *fornication* and *adultery* committed by such, as the learned Doctor saith they should be, on supposition the preventing of uncleanness was the reason of them.

The preventing of uncleanness therefore (as families are now generally circumstantiated, male and female children being usually brought up together) may, notwithstanding what the learned Doctor said to the contrary, be a *good reason* for the discountenancing of marriage betwixt brother and sister; but then it cannot reasonably be extended *any further*; for if you extend it *any further* than to *brother* and *sister*, you may as well extend it to *neighbours*, *school-fellows*, and *all other persons* that use to converse freely together. And as to the other reason which the Doctor hath mentioned for those prohibitions, instead of the above-

mentioned, viz. the extending peace and amity more largely, or, as others have expressed it, that new acquaintances, and thereby trade and commerce, might be more largely extended, and not restrained to particular families: it is not (as the learned and judicious Grotius observes) “ of so much weight and consideration, as to make one believe that marriages contrary to such an end are to be reputed void or unlawful; for that which is less useful is not merely upon that account unlawful. Add to this, that it may possibly so happen that some greater advantage, however great this may be, may interfere with and oppose it [1].”

And it may easily be shown, that there *often has happened*, and probably will often happen, *greater advantages* to oppose it.

Besides, let me observe here, that this was never made by our all wise Creator and end of marriage: universal love and charity was ordained for the end abovementioned.

[1] Grotius of War and Peace, Eng. Transf. B. II. ch. v. p. 195.

All the ends for which marriage *was ordained*, are excellently well set forth in the *matrimonial office*. The third whereof, viz. “the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity,” is many times not very consistent with the above-mentioned reason: for experience shews, that those married people who were well acquainted with one another’s behaviour before marriage, and were used to the same customs and manner of living as neighbours, familiar acquaintance, and near relations usually are, are more likely to prove helps and comforts to each other, than those that were strangers, and lived at a great distance, are. And therefore wise and good men usually advise their sons not to go among strangers to take wives.

So Abraham (who himself married his half sister) made his steward swear to take a wife of his kindred unto his son; and Isaac gave a like charge to Jacob his son; which I think was well approved of by all the prophets: and after their times we find Tobit, who had himself married his kins-
woman,

woman [m], thus instructing his son, *Be ware of all whoredom, my son, and chiefly take a wife of the seed of thy fathers, and take not a strange woman to wife, which is not of thy father's tribe: for we are the children of the prophets, Noe, Abraham, Isaac, and Jacob: remember, my son, that our fathers from the beginning, even that they all married wives of their own kindred, and were blessed in their children. Now therefore, my son, love thy brethren, and despise not the sons and daughters of thy people, in not taking a wife of them [n].*

And further I observe, that if the fore-mentioned reason of extending friendships, &c. proved any thing, it would prove too much; for it would prove we ought to marry none but strangers, which is much more than is intended to be proved by it. That argument, therefore, which proves too much, is generally allowed to be good for nothing.

And this (if I mistake not) is a fault all the arguments are subject to, that can be offered against any marriages betwixt kindred

[n] Tobit i. 9. iii. 15. [*] Tobit iv. 12, 13
that

that are more remote than brothers and sisters. Some of the Canonists (as Bishop Jeremy Taylor observes) were for extending the prohibitions of marriages to a *great length*; some to the *fourth*, others to the *seventh* degree. “ They that were for four
 “ gave this grave reason for it. There are
 “ four humours in the body of a man, to
 “ which, because the four degrees of con-
 “ sanguinity do answer, it is proportionable
 “ to nature to forbid the marriages of
 “ cousins to the fourth degree. Nay more,
 “ there are four elements. *Ergo*. To which
 “ it may be added, that there are upon a
 “ man’s hand four fingers and a thumb.
 “ The thumb is the stirps or common pa-
 “ rent; and to the end of the four fingers,
 “ that is the four generations of kindred
 “ we ought not to marry, because the *life of*
 “ *a man is* but a span long. There are
 “ also four quarters of the world; and in-
 “ deed so there are of every thing in it, if
 “ we please, and therefore abstain at least
 “ till the fourth degree be past. Others,
 “ *who are graver and wiser*, (particularly
 “ Bonaventure) observe cunningly, that be-
 “ sides

sides the four humours of the body,
 “ there are three faculties of the soul, which
 “ being joined together make seven, and
 “ they point out to us, that men are to
 “ abstain till the seventh generation. These
 “ reasons, such as they are, (says he) they
 “ therefore were content withal, because
 “ they had no better; yet upon the strength
 “ of these they were bold, even against the
 “ sense of all mankind, to forbid these de-
 “ grees to marry [o].”

Such reasons as these need no confutation.

It hath been (I think) the general opi-
 nion of the best and most learned authors
 that have treated of it, that no good natural
 reasons can be assigned for prohibiting of
 any marriages, but in the ascending and
 descending line only, except that of brother
 and sister (where inequality of age, guardian-
 ship, or the like, do not intervene to hin-
 der it). Concerning this point the learned
 Grotius observed, that “ the question about
 “ the marriages of those who by blood or
 “ affinity are related, is a nice and difficult

[o] Duft. Dubitan. B. II. ch. ii. Rule 3. N. 66.
 p. 237, 238.

“ point,

“ point, and which has frequently been
 “ managed *pro* and *con* with no little heat
 “ and commotion. For whoever attempts
 “ to assign certain and natural reasons why
 “ such marriages are prohibited by the laws
 “ and customs of nations, will by expe-
 “ rience find it a task not only difficult,
 “ but impracticable [*p*].” Bishop Jeremy
 Taylor fully agrees in the same sentiment.
 His words are: “ Whosoever shall go about
 “ to assign the proper reasons why certain
 “ degrees are forbidden to marry by the
 “ law of God,” [*The pious bishop meant by
 the laws in the xviiith and xxth of Leviticus,
 which he took to be prohibitions of such mar-
 riages*] “ will by experience find it be too
 “ hard for his head [*q*].”

The learned author of a work, entitled
Scripture vindicated, said to be Dr. Water-
 land, on this point, thus expresses it, “ cer-
 “ tain it is, that in those early ages of the
 “ world,” [*viz. the time of Abraham,*]
 “ the rules about marrying with their kin-

[*p*] Grotius of War and Peace, English Translat.
 B. II. ch. v. par. 12. sect. 1. p 194, 195.

[*q*] Duñt. Dubitan. B. II. ch. II. Rule 3. N. 74.
 P. 239.

*dred were not so strict, neither was there
 “ any reason that they should [r].” And
 the pious Bishop before cited saith, “ no
 “ nation of old did observe all these laws”
 [of Moses;] “ and there was never any
 “ sufficient argument to inforce upon us
 “ their obligation, because it must needs
 “ remain to us as it was before the law;
 “ if they were not obliged then, neither are
 “ we [s].” And in the next section he fur-
 ther saith, “ That all mankind was not
 “ bound by all these laws of consanguinity
 “ and affinity, appears in all the foregoing
 “ instances: and the marriages of the pa-
 “ triarchs must conclude them to be as im-
 “ pious as the Canaanites in theirs, or else
 “ that these laws did not oblige all man-
 “ kind; and if not from the beginning,
 “ then not now: if these laws were not na-
 “ tural, they are not Christian [t].”

Thus have I considered all the argu-
 ments (that I know of) that have been
 urged from the nature and reason of things,

[r] Scip. Vind. Part I. p. 461.

[s] Duct. Dubit. B. II. ch. ii. Rule 3. N. 36. p. 233.

[t] Ibid. N. 37. p. 230.

against marriages betwixt collateral kindred, that seem to carry any force with them: and, if I mistake not, have shewn that when they are extended to any kindred more remote than brothers and sisters, they are all inconclusive, and of no force.

Let us next try, whether nothing can be said *for the expediency of some of those marriages*, and whether it cannot be shewn from the *nature and reason of things*, that it may be fit and reasonable, *under some circumstances*, that matrimony should be contracted betwixt such.

I observe then, that next to *procreation of children*, and the concomitants of it, the chief end of marriage is, *mutual society, help, assistance, comfort, and support, both in prosperity and adversity*: and therefore those matches must be the *fittest* that are contracted between such as are most likely to answer these ends. Now the nature and reason of the thing itself, as well as constant experience, both in ancient and modern times, shew us, that the forementioned ends are much more likely to be answered, when the persons contracting
matrimony

mattimony are such as were well acquainted with each other's life and conversation, domestic customs, and manner of living before marriage, than betwixt such as were strangers to each other as to these things.

Now let us put a case. Suppose a younger brother to be descended from parents that have a large family of children, and that his elder brother hath a daughter *for age agreeable to his*, a virtuous woman, educated, and in all respects accomplished, according to his heart's desire ; and for whom, therefore, he hath deservedly a great esteem and veneration, and a strong inclination to her as a partner for life. Suppose too, he is so happy as to find that her sentiments on this head are the same with his own, and that their *parents* also on both sides approve of it ; and consequently that the marriage (if contracted) is likely on all accounts to be agreeable and happy, what marriage, in such circumstances, can be supposed more fit and proper ?

Again, suppose a man had married a virtuous woman, every way fit for him, with whom he lived happily, till it pleased

God to take her off by death, leaving him a widower with young children, and his circumstances such as made it fit for him to marry again, and his deceased wife had a maiden sister much like herself, and therefore on all accounts fit for him, who, on account of his kind and obliging behaviour to her sister, had conceived so good an opinion of him, and such fondness for his children, as engaged her consent to supply her sister's place; can any reasonable person say it would not be fit for him to marry her [u]? But if, instead of her, he married one who was not of his former wife's kindred, and had children by her; is it not reasonable to think, that nature would prompt her to love her own children better than his former wife's

[u] A learned Treatise, published in the year 1752, in two volumes, entitled, *THE SPIRIT OF LAWS*, translated from the French of M. de Secondat, Baron de Montesquieu, speaking of marriages between near relations, mentions it as a custom in the Indies, that "*if a husband has lost his wife, he does not fail to marry her sister.*" and this (says he) is *extremely natural*, for his new consort becomes the mother of her sister's children, and not a cruel step-mother. Vol. II. B. xxvi. ch. xiv. p. 209.

children, and that she would shew it plain enough in her behaviour towards them? In that case, would it not be his duty to interpose in behalf of his former wife's children? and is it not highly probable his doing so would make her uneasy, and suspect he loved his former wife's children better than her's, and that her relations and intimate acquaintance would further and promote such suspicions; which certainly would create great uneasiness in the family, the consequences of which might be deplorable?

But if he married his former wife's sister (being a person of the character before supposed) these evils might be in great measure prevented; for though he had children by her, and nature prompted her to love them better than her sister's, yet it is probable she would have more regard for her sister's children than for strangers. But (however that might be) if it was observed she made considerable difference between them and her own children, on informing her parents or nearest relations of it (they being as nearly related to his
first

first wife's children as to her's) would, no doubt, readily admonish her of her duty in that respect, by means whereof the evils beforementioned might be better prevented; whereas, in the other case, the near relations would be the great furtherers and promoters of such evils.

More examples might be added, to illustrate this point; but I humbly conceive these are sufficient to shew, that there are some marriages with near collateral kindred; which, for such reasons as these, will appear to be fit and right, and, on that account, must be agreeable to the will of God. It is impossible, therefore, that any thing of weight can be said against them.

Object. What! can there be nothing of weight said against these marriages? what think you of the laws of our land against them? will you say they are to be considered as of no weight? have not we, in our books of Reports, cases wherein marriages within the degrees abovementioned, have been adjudged unlawful; and instances of marriages dissolved by ecclesiastical sentence on that account?

Ans. If it was true, that the laws of our land did indeed prohibit these marriages, it would, in my judgement, be the strongest objection that remains against them.

But I conceive this objection is wholly built on a mistake of the law in this case; which, with humble submission to our reverend and learned Judges; and Students of the Law, I shall endeavour to shew. Which brings me to the last general head, which was,

Fifthly and lastly, to examine, whether there is any law in force here against the marriages I am pleading for.

And to do this, it will be fit to begin where the statute law did; which was in the 25th year of the reign of King Henry VIII.; for before that time, I know of no law pretended to be in force in this kingdom, relating to this point, but the *canon law*, and that was varied and altered at different times by the popish clergy, as best suited their interest or inclinations; so that, on disobliging them, they could on
some

some pretence or other by them invented, dissolve almost any marriage; so that no man was sure, without a dispensation, to keep his wife [w].

But, on giving them a sum of money to their content, they would procure a dispensation from the pope, to marry any kinswoman they thought fit; and then (how near soever they were related) all objections were suppressed.

There have been five acts of parliament made touching this point.

The *first* was that of 25 Henry VIII. chap. 22. concerning *the succession of the crown.*

The *second* was made in the 28th year of the same king; chap. 7. *for the establishment also of the succession of the crown.*

The *third* was made in the same year and sessions of parliament, chap. 16. relating to *pretended licences and dispensations from the see of Rome.*

[w] See the preamble to the statute of the 32 king Henry VIII. ch. 38. herein after cited.

The *fourth* was that of the 28th year of the same king, ch. 38. which wholly concerns marriage, viz. *Precontracts of marriages, and touching degrees of consanguinity.*

The 5th and last of these statutes was made in the *first year* of the reign of Queen Mary, sess. 2. chap. 1. *declaring the queen to have been born in a most just and lawful matrimony, and also repealing all acts of parliament, and sentences of divorce, made or had to the contrary.* All these acts (except this last mentioned of the first of Queen Mary) have been repealed, and some of them again revived by acts since made. And as to one of them in particular (viz. the *second* of the abovementioned acts) it is a disputed case, whether it is now in force as to the point at present under consideration, or else repealed and void. And as the rightly determining this, is a matter of great weight and consequence, in order to discover what is law with relation to marriages betwixt near kindred; I shall therefore endeavour to investigate this with the utmost care and impartiality, and treat of each of these
acts

sets in order, and give a short account of the occasion of making of them, for the better understanding thereof.

The occasion of making of the first of them was as followeth.

King Henry VIII. when young, married the princess Catharine, his brother Arthur's widow, with whom he had lived above twenty years, and had by her two sons (that died young) and a daughter called Mary (afterward Queen); who being about twelve years of age, a treaty was proposed by King Henry her father, and the French king, for a marriage between her and the duke of Orleans, the French king's second son.

On which a question was started (it is said) at Paris, whether or no she was legitimate, being begotten by the king on his brother's widow; by means whereof a scruple was then (it is said, not first infused, but) revived in the king's mind of the unlawfulness of his marriage, which was also strengthened by one or more learned men that were of his council: on account whereof, our two universities, and several foreign

ones were applied to for their opinions in the case, and answers obtained from some of them under their seals, *That the king's marriage with his brother's widow was unlawful.* -

Upon which determination, Bishop Jeremy Taylor, before cited, made the following remark, that "learned men upon that occasion gave too great a testimony, with how great weakneses men that have a bias do determine questions, and with how great force a king that is rich and powerful can make his own determinations. For though Christendom [said he] was then much divided; yet before there was almost a general consent upon this proposition, that the Levitical degrees do not by any law of God bind Christians to their observation [x]."

On the abovementioned decision of the universities, the king and queen were summoned before Archbishop Cranmer, &c, and a sentence of divorce passed, by which his marriage with her was declared null and

[x] Duct. Dubit. B. II. ch. ii. Rule 3. N. 17. E. 222.

void, and the king married the Lady Anne Boleyn; and upon that account the *first Statute* (25 Henry VIII. ch. 22.) was made, intituled, *An Act declaring the Succession of the King's most Royal Majesty in the imperial Crown of this Realm*, to confirm the said divorce, and to establish the king's said marriage, and settle the succession of the crown on his heirs by the said Anne Boleyn, and to make it high treason to speak against the said marriage, and to confirm the succession so settled by an oath to be taken by all the king's subjects in such manner as he should appoint: and therein was particularly set forth the degrees of consanguinity and affinity within which marriage was *then asserted* to be forbidden by God's law.

But this act was clearly and fully repealed by two subsequent acts [y], as herein after will plainly appear; and yet this statute is fairly printed in the late pompous collection of the statutes at large, as collected and published by Mr. Serjeant Hawkins and others.

[y] 28 H. VIII. c. 7. and 1 M. Sess. 2. c. 1.

in six volumes, in the year 1735, without the least notice of its being repealed; and both of the acts that repealed it are left out of that collection; by means whereof, all students of the statute law, who make use of that collection only, must necessarily be misled in this point.

About the beginning of the 28th year of the king's reign, anno 1536, an accusation was raised against Queen Anne Boleyn, for which she was tried and condemned, and on the 29th of May beheaded in the Tower.

The *next day*, the king was married to the lady Jane Seymour; and the month following (viz. in June) the parliament met, and made the second statute (28 Hen. VIII. ch. 7.) intituled, *An Act for the Establishment of the Succession of the Imperial Crown of this Realm*. By this act the last mentioned (of 25 Hen. VIII. ch. 22.) and one other act (of 26 Hen. VIII. ch. 2.) intituled, *An Act ratifying the Oath that every of the King's Subjects hath taken, and shall hereafter be bound to take, for due Observation of the Act made for the Surety of the Succession of the King's Highness in the Crown of the Realm,*
being

being therein particularly recited, were both repealed in the following words:—"En-
 " acted by the authority of this present par-
 " liament, that the said two acts, and every
 " of them, and all clauses, articles, and pro-
 " visions therein contained, from the first
 " day of this present parliament, shall be
 " repealed, annulled, and made frustrate,
 " and of none effect."

And therein both the king's two former marriages were declared void; and his daughter Mary by the first, and Elizabeth by the second, (afterward *queens*) were declared *illegitimate*; and it was thereby made high treason for *either* of them to claim any right to the crown, and for any other person to affirm they any such right; and the king's marriage with the Lady Jane Seymour was confirmed, and the succession settled on his heirs by *her*; and in default of issue by her, on his heirs in general, whether male or female, by any *other woman* he should marry; and in default of any *heirs of his body*, on such person as the king by his letters patent, or his last *will*, should appoint: and it was also made thereby high treason for
 either

either of the king's children, or any other person, to claim any *right*, or to assert that any one had any *right* to the *crown*, otherwise than as so settled and appointed by him.

And all the king's *subjects*, when at *age*, were thereby obliged to *swear* to maintain the succession, as it was *settled*, or should be *settled* and appointed by the king, according to this act.

And therein was again particularly set forth and prohibited, the same degrees of kindred that were before prohibited by the first abovementioned act.

But this *act* also was afterward wholly repealed and made void, as far as it related to the point now under consideration, and was generally allowed to be so. Mr. Raftal, the *first* considerable collector and publisher of the statutes at large, marks it as such. Mr. Polton, the next collector and publisher of them, at the end of the statute, tells his reader, it was altered by 35 Henry VIII. ch. 1. and repealed by 1 M. 1. Mr. ~~Polton~~ ^{Polton}, the next publisher of the statutes, left it out of his collection, and only gave his reader this
short

short memorandum of it, viz. "chap. 7.
An Act concerning the succession of the crown."
 (and then adds) alt. 35 Henry VIII. c. 1.
 repealed 1 M. 1. And I think *all* the *statute*
books published from that time, till
 the last pompous collection of Mr. Ser-
 jeant Hawkins, &c. abovementioned, fol-
 lowed Mr. Keble in leaving it out, with
 the same memorandum of alt.—rep. &c.
 And that collection also has *left it out*,
 and given the same abbreviated title; and
 in the *margin*, overagainst it, said, altered
 35 Henry VIII. c. 1. rep. 1 M. sess. 2. c. 1.
 and so far it agrees with the former pub-
 lishers: but then adds, *revived by* 1 El.
 c. 1.

This is the first time, as far as I can
 find, that any one of the *publishers* of the
statutes affirmed this statute to be *revived*.
 But, since it is here so *affirmed*, I think in
 such a collection of the statutes, which
 pretends to so much *accuracy*, the purcha-
 sers thereof had reason to expect *all* the
 statutes that were in *force*, as *this* is there
pretended to be, that they might have had
 an opportunity to have examined what it
 was.

was. But it may be plainly *proved*, that *all* the collectors and publishers of the statutes since Mr. Rastal have made a mistake with relation to it: they all indeed affirm, it was altered by 35 Henry VIII. c. 1. and that is right; for by that statute, both of the king's *daughters* were intirely *illegitimated*, and cut off from the succession to the crown. But by 35 Henry VIII. c. 1. in case of *failure of other heirs of the king's body*, the crown was *intailed* on *them*. But what the publishers of the statutes *all* next affirm, viz. that the statute was repealed by the 1 M. c. 1. is a *mistake*; for though that statute did indeed clearly and fully *repeal* again the first abovementioned statute of 25 Henry VIII. c. 22. (which, as has been observed, was *fairly printed* in the new statute books, without *any the least notice* of its being *repealed*) yet it did not repeal the 28 Henry VIII. c. 7. any further than as it related to the king's *first marriage*, and Queen Mary's *legitimacy* and right of inheritance, as in and by the said statute may be clearly seen. But though 1 M. 1. did not *repeal*

peal it, the 1 and 2 of P. and M. ch. 8. sect. 17. *plainly did*, as far as it related to the *prohibited degrees* of marriage, in the following words: “ And also all that part
 “ of the act made in the said eight and
 “ twentieth year of the said king, intitled,
 “ An Act for the establishment of the suc-
 “ cession of the imperial crown of the
 “ realm, that concerneth a prohibition to
 “ marry within the degrees expressed in
 “ the said act—shall from henceforth be
 “ repealed, made frustrate, void, and of
 “ none effect.”

And this repealed part of the said act of the 28 Henry VIII. c. 7. was so far from being *revived* by 1 Eliz. ch. 1. as, in the margin of the forementioned book of statutes at large, is *asserted*. that, on the contrary, the said *repeal* is thereby *strengthened and confirmed*, as will (if I mistake not) be *fully shown*, when I come to consider what Sir John Vaughan alledged for the revival of it, on Hill and Good’s case.

However, (as this point hath been made a matter of controverly; and because that part of this act which relates to the case
 under

under consideration, was not repealed, till after the other acts herein after mentioned were made; and the whole act, as was before observed, has been left out of all our statute books that have been published, since the time of King Charles :) that my readers may have a full view of it, as far as it relates to the case in hand, I will here subjoin [z] all that part of it that

[z] “ And furthermore, since many inconveniencies
 “ have fallen, as well within this realm, as in others,
 “ by reason of the marrying within the degrees of
 “ marriage prohibited by God’s laws; that is to say,
 “ the son to marry the mother, or the step-mother;
 “ carnally known by his father; the brother the sister;
 “ the father his son’s daughter, or his daughter’s
 “ daughter; or the son to marry the daughter of his
 “ father, procreat and born by his step-mother; or
 “ the son to marry his aunt, being his father’s or mo-
 “ ther’s sister; or to marry his uncle’s wife carnally
 “ known by his uncle; or the father to marry his
 “ son’s wife carnally known by his son; or the bro-
 “ ther to marry his brother’s wife carnally known by
 “ his brother; or any man married and carnally know-
 “ ing his wife, to marry his wife’s daughter, or his
 “ wife’s son’s daughter, or his wife’s daughter’s daugh-
 “ ter, or his wife’s sister.

“ And further, to dilate or declare the meaning of
 “ these prohibitions, it is to be understood, that if it
 “ chance

that concerned marriages betwixt near kindred in general.

The

“ chance any man to know carnally any woman, that
 “ then all and singular persons, being in any degree
 “ of consanguinity or affinity, as is above written,
 “ to any of the parties so carnally offending, shall be
 “ deemed and adjudged to be within the cases and
 “ limits of the said prohibitions of marriage. All
 “ which marriages, altho they be plainly prohibited
 “ and detested by the laws of God, yet nevertheless,
 “ at some times, they have proceeded under colours
 “ of dispensations by man’s power, which is but usurp-
 “ ed, and of right ought not to be granted, admit-
 “ ted, nor allowed. For no man, of what estate, de-
 “ gree, or condition soever he be, hath power to dis-
 “ pense with God’s laws, as all the clergy of this
 “ realm in the said convocations, and the most part of
 “ all the universities of christendome, and we also do
 “ affirm and think.

“ Be it therefore enacted by authority aforesaid,
 “ according as it is declared and contained in the said
 “ act, made in the last parliament for the establishment
 “ of your succession, that no person or persons, subjects
 “ or residents of this realm, or in any your dominions,
 “ of what estate, degree, or dignity soever they be, shall
 “ from henceforth marry within the degrees afore re-
 “ hearsed, what pretence soever shall be made to the
 “ contrary hereof.”

And then it followed—in case any persons had
 been married within any of the degrees above ex-

K

prescribed,

The third act was made in the same year, and sessions of parliament, chap. 16. intituled,

An Act for the release of such as have obtained pretended licences and dispensations from the see of Rome. And contain in paragraph the second the following clause, which relates to the point.

“ — Enacted, — that all marriages had and
 “ solemnized within this realm, or in any
 “ other the king’s dominions, before the 3d
 “ day of November, in the six and twentieth
 “ year of the king’s most gracious
 “ reign, whereof there is no divorce or separation
 “ had by the ecclesiastical laws of
 “ this realm, and which marriages be not
 “ prohibited by God’s laws limited and declared
 “ in the act made in this present
 “ parliament for the establishment of the
 “ king’s succession, or otherwise by holy

pressed, and by any archbishop, &c. and afterwards separated, — such separation should be good.

And in case they had not been separated, they should be separated, &c. without — any — Appeal — to the court of Rome. —

But all this was repealed by 1 and 2 P^l and M. chap. viii. § 17. as hath been already observ’d.

“ Scripture, shall be by authority of this
 “ present parliament good, lawful, and ef-
 “ fectual, and shall be from the beginning
 “ of such marriages reputed, esteemed,
 “ taken, adjudged, received, approved,
 “ and allowed by the authority of this pre-
 “ sent parliament, to all and singular pur-
 “ poses, effects and intents, as good, as
 “ sufficient, and as available, as though
 “ no impediment of matrimony had ever
 “ been between them that have contract-
 “ ed and solemnized such marriages; and
 “ that all children procreated, and to be
 “ procreated, in and under such mar-
 “ riages, shall be lawful to all intents and
 “ purposes.”

Though I do not think this to be now
 material in the case, yet it is fit it should
 be laid before the reader, because it has
 been made use of as a medium, to en-
 deavour thereby to prove, that the *second*
 of the abovementioned statutes, viz. 28
 Henry VIII. c. 7. was revived by the 1
 Eliz. ch. 1. which shall be herein after par-
 ticularly considered.

The *fourth* act that concerns the point, is the 32 Henry VIII. ch. 38. intituled,

“ *An Act concerning precontracts of marriages, and touching degrees of consanguinity.*”

This act related to two things, as the title thereof sets forth. One of them, the making void marriages by reason of precontracts, and the other concerning the prohibited degrees.

That part which related to precontracts, was repealed by 2 and 3 Edw. VI. ch. 23. but all the other parts of the statute which relate to *marriages within the prohibited degrees* was thereby confirmed. Then this act, and the last mentioned of 28 Henry VIII. ch. 16. were repealed (among many others made against popery) by 1 and 2 P. and M. ch. 8. but were both particularly revived by 1 Eliz. ch. 1. This is the most considerable statute now in force relating to this point; and, as far as it relates to marriages betwixt near kindred, is acknowledged on all hands to be in full force. I will therefore give my readers the substance of it, with some
notes

notes thereon for the better understanding thereof.

T H E A C T.

Whereas heretofore the usurped power of the bishop of Rome hath always intangled and troubled the mere jurisdiction, and regal power of this realm of England, and also unquieted much the subjects of the same, by his usurped power in them, as by making that unlawful [1], which, by God's word, is lawful, both in marriages and other things, as hereafter shall appear more at length, and till now of late in our sovereign lord's time, which is otherwise by learning taught than his predecessors in times past long time have been, hath so continued the same, whereof yet some sparks be left, which hereafter might kindle a greater fire, and so re-

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[1] N. B. It is here asserted to be usurpation to make that unlawful in marriage, which by God's word is lawful.

maining, his power not to seem utterly extinct.

II. Therefore it is thought most convenient to the king's highness, his lords spiritual and temporal, with the commons of this realm assembled in this present parliament, that *two things* [2], specially, for this time be with diligence provided for, whereby many inconveniencies have ensued, and many more else might ensue and follow.

2. As where heretofore divers and many persons, after long continuance together in matrimony, without any allegation of either of the parties, or any other at their marriage, wby the same matrimony should not be good, just and lawful, and after the same matrimony solemnized, and consummate by carnal knowledge, and also some times fruit of

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[2] *Two thing.*] One of them wholly related to precontracts, and all that was repealed by the 2d and 3d Edw. VI. chap. 23. and is therefore here printed in a different character, to distinguish it from the other part which was by the same Statute of King Edw. VI. confirmed.

children

children ensued of the same marriage, have nevertheless, by an unjust law of the Bishop of Rome, which is, that upon pretence of a former contract made, and not consummate by carnal copulation (for proof whereof two witnesses by that law were only required) being divorced and separate, contrary to God's law, and so the true matrimony, both solemnized in the face of the church, and consummate with bodily knowledge, and confirmed also with the fruit of children had between them, clearly frustrate and dissolved.

3. *Further also, by reason of other prohibitions than God's law admitteth, for their lucre by that court invented, the dispensations whereof they always reserved to themselves, as in kindred, or affinity between cousin-germans, and so to fourth and fourth [a] degrees, carnal knowledge of any of the same kin or affinity before in such outward degrees, which else were*

[a] This seems to be a mistake. Sir Peyton Ventris, one of the judges of the court of common pleas, cites it in the second part of his reports, p. 14.—*and so to fourth and fifth degrees*, which is more likely to be the true reading here.

lawful, and be not prohibited by God's law.

4. And all because they would get money by it [3], and keep a *reputation* of their usurped jurisdiction, whereby not only much discord between lawful married persons [4] hath (contrary to God's ordinance) arisen much debate and suit at law, with wrongful vexation, and great damage

N O T E S.

[3] It is be doubted that lucre hath been too much the motive in other courts besides that of Rome.

[4] Many and great are the mischiefs and inconveniencies that generally attend, and cannot but attend, the hindering and dissolving of lawful marriages; the consequences of such dissolutions have been most deplorable; many honest families, which otherwise might have been useful members of society, have been utterly ruined by it.

Not one half of the ill consequences can follow from permitting ten doubtful marriages to continue undissolved, as may by the dissolving one lawful marriage; therefore great caution ought to be observed in this case, and no marriage dissolved that is not plainly and clearly contrary to God's law.

of

of the innocent party hath been procured, and many just marriages brought in doubt and danger of undoing, and also many times undone, and lawful heirs disherited, whereof there had never else, but for their vain-glorious usurpation, been moved any such question, since freedom in them was given by God's law, which ought to be most sure and certain [5].

5. But that notwithstanding marriages have been brought into such an uncertainty thereby, that no marriage could be surely knit and bounden, but it should lie in either of the parties power and arbitre, casting away the fear of God, by means and compasses to prove a *precontract*, a kindred and alliance, or a carnal knowledge, to defeat the same; and so under the pretence of these allegations afore rehearsed, to live all the days of their life

N O T E S.

[5] All marriages wherein freedom is given by God's law ought to be most sure and certain. It was the express command of our blessed Saviour himself, *what God hath joined together, let no man put asunder.* Matt. xix. 6. Mark x. 9.

in

in detestable adultery, to the utter destruction of their own souls, and the provocation of the [6] terrible wrath of God upon the places where such abominations were used and suffered.

6. Be it therefore enacted by the king, our sovereign lord, the lords spiritual and temporal, and the commons in this present parliament assembled, and by authority of the same, that from the first day of the month of July next coming, in the year of our Lord God 1540; all and every such marriages as within this church of England shall be contracted between lawful [7] persons (as by this act we declare all persons to be lawful that be not prohibited by God's law to marry).

7. Such

N O T E S.

[6] *Observe*, It is here asserted, that the breaking of lawful marriages are such abominations as provoke the terrible wrath of God upon the places where they are suffered.

[7] Here it is plain as any thing possibly can be, that all marriages are by this statute declared to be lawful, good, just, and indissoluble, that
are

7. Such marriages being contract and solemnized in the face of the church, and consummate with bodily knowledge, or

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are not prohibited by God's law ; and that the making and declaring this to be so, was the main design and intent of this act.

May it not then be reasonably affirmed, that the spiritual courts ought not to be permitted to dissolve any marriage, but such as is *plainly* prohibited by the law of God, and not such as are only judged to be so by far-fetched inferences, and doubtful reasonings, about which pious and learned men are much disagreed ?

As it hath been shewn to be the design and intent of our legislators in this statute to put the case of marriages upon the foot of God's law, and to enact and declare, that all marriages not prohibited by that, should be good and indissoluble.

So here in this clause they took care to repeal and make void every thing that was contrary to that end and design ; any prescription, that is, any ancient usage or custom, any law or other thing, granted or confirmed by act [of parliament] or otherwise. Now, therefore, no law, no act of parliament, nor any ancient custom, can legally be pleaded against any marriage not prohibited by God's law,

fruit

fruit of children, or child being had therein between the parties so married, shall be by authority of this present parliament aforesaid, deemed, judged, and taken to be lawful, good, just, and indissoluble, *notwithstanding any precontract or precontracts 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 fruits is ensued, or may ensue, as aforesaid,* notwithstanding any dispensation, prescription, law, or other thing, granted or confirmed by act, or otherwise.

8. And that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees [8].

N O T E S,

[8] *The Levitical degrees.*] This is the darkest and most obscure part of the whole act, and, therefore (with humble submission to the Reverend the Judges, and all others learned in the Law) I humbly conceive, not fit to be made the standard
whereby

N O T E S.

whereby to explain the whole of it, as it was by that great and eminent Lawyer Sir Edward Coke, in his Comment thereon, which see, in his second Institute, p. 683, &c. He thought those degrees were truly set down in 25 Henry VIII. c. 22. and 28 Henry VIII. c. 7. as he observed in a marginal note on the said Comment.

But Sir John Vaughan absolutely denied this [a], and affirmed, *That some marriages within the Levitical degrees may be lawful* [b], *and that the Levitical degrees qua such, are set forth by no act of parliament* [c].—*Nor is it said in any act of parliament, that all marriages within the Levitical degrees are prohibited by God's law* [d]

Many cases [he affirmed] *may be found to prove a marriage may be lawful, though it be within the Levitical degrees* [e].

Which is undoubtedly true, according to his and the Civilians way of expounding the Levitical degrees.

But then he also affirmed, *That the act prohibits the impeaching marriages only which are absolutely*

[a] Hill and Good's case, Rep. 307, 308.

[b] Page 305.

[c] Page 319.

[d] Ibid.

[e] Page 321.

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without the Levitical degrees—[f] *though they are lawful marriages.* In which I humbly conceive he was mistaken; for the act plainly declares and enacts all marriages to be lawful that are not prohibited by God's law, and represents it as usurpation and sin to make any marriages unlawful that by God's law are lawful.

And on Harrison and Burwell's case (in the deciding whereof all the judges of England were concerned) it was declared, that some marriages were forbidden by the statute of 28 Henry VIII. c. 7. as they were not by the Levitical law; *For 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*[g]. This was the determination of all the judges of England, according to Sir John Vaughan's own report of it.

But that which puts it beyond all reasonable doubt, that the Levitical degrees, as they are commonly understood, cannot be the proper key to expound this statute by, is a determination made by our legislators themselves, who by Statute 1 M. Sess. 2. ch. 1. determined that the mar-

[f] Page 320, 321.

[g] Hill and Good's case Rep. p. 240, 241. See also Ventris, vol. II. p. 16. 17.

9. And that no person [9] of what estate, degree or condition soever he or she be,

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riage therein mentioned between the king and his brother's widow (which hath been commonly taken to be within the Levitical degrees, and certainly was within the degrees mentioned in the 28 Henry VIII. ch. 7.) was in very deed not prohibited by God's law; as by that statute may herein after more plainly appear. The Levitical degrees indeed, as set forth in act 28 Henry VIII. ch. 7. was the rule as long as that law was in force; but after the repeal of all that part of the act that concerned those Levitical prohibitions, it then (it is humbly conceived) ceased to be any longer the rule in this case: but the law of God, in general, was then the rule: and all marriages that cannot be proved to be contrary to God's law, are to be deemed lawful; for *what God hath joined together, let no man put asunder.*

But, *note*, those that marry (being under age) without the consent of their parents, are not legally married, and therefore are not to be deemed as joined together by God.

[9] This last Clause of the act clearly demonstrates, that the spiritual courts ought not to be suffered to impeach any marriages that are not prohibited

be, shall, after the said first day of the month of July aforesaid, be admitted in any

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prohibited by God's law on any pretence whatsoever, whether they are supposed to be within or without the Levitical degrees, according to the vulgar exposition of them. For the words of the act are, "no person shall be admitted in any of the spiritual courts within this realm to any process, plea, or allegation contrary to this act."

By which words his majesty's temporal courts, and not the ecclesiastical ones, are plainly made the legal judges of what marriages are, or are not, prohibited by God's law; as was determined by all the judges of England, on the forementioned case, where three questions were started, which in substance were;

First, Whether the marriage then under consideration, was a lawful marriage within the meaning of the act of 32 Henry VIII. ch. 38.?

Second, Whether the *temporal courts* were the proper judges of it?

Third, Whether the *temporal courts* of the king can take cognizance in general, that it is not an incestuous marriage by the said act, and consequently prohibit the questioning of it in the ecclesiastical courts?

In answer to the first question, it was resolved that

any of the spiritual courts within this the king's realm, or any of his grace's other lands

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that the said marriage was a lawful marriage, *per* 32 Henry VIII. ch. 38.

To the 2d, That—"the temporal courts have, "by that and other acts of parliament, tull cognizance of marriages within or without the *Levitical degrees*."

To the 3d, "That as the law stands at this time, the king's *temporal courts* at Westminster have full cognizance what marriages are incestuous or not, according to the law of the kingdom; and may prohibit the ecclesiastical courts from questioning marriages as incestuous, which the said courts, in their judgement, shall conceive not to be so."

In discoursing the second question it was said, "There was a time when the temporal courts had no cognizance of lawful or unlawful marriages; so there was a time when the ecclesiastical courts had no cognizance of matters testamentary, and probat of wills; but the law-making power of the kingdom gave them that which they had not before, and the same hath given the temporal courts this now, which they had not in former times."

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And

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The like may be seen in Sir Peyton Ventris's report of the same case, who, towards the end thereof, after having mentioned the objections made by the Civilians, one of which was, that the temporal judges could not decide questions of this nature, because they did not understand the original tongues, &c. and it was a hardship they [*viz. the spiritual courts*] should be deprived of their power; thus concludes, "there is a full and flat answer to this; this statute makes it not at all cognizable by them, for where any court has cognizance, the party must have process, &c. But now here in the case of this statute, it is enacted, That no person, &c. shall be admitted to any of the spiritual courts, &c. to any process, plea, or allegation, contrary to this aforesaid act: and therefore all cognizance of that nature is taken away from them [*i*]."

Thus you see it is plain and clear from the statute itself, that not the ecclesiastical, but his majesty's temporal courts are the proper judges of what marriages shall be legally deemed to be contrary to God's law, and what not so; and that in the opinion of all the judges of England met together by the king's order, on purpose to consider the case.

[1] Ventris, part II. p. 21.

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The like may be seen in Sir Peyton Ventris's report of the same case, 'who, towards the end thereof, after having mentioned the objections made by the Civilians, one of which was, that the temporal judges could not decide questions of this nature, because they did not understand the original tongues, &c. and it was a hardship they [*viz. the spiritual courts*] should be deprived of their power; thus concludes, "there is a full and flat answer to this; this statute makes it not at all cognizable by them, for where any court has cognizance, the party must have process, &c. But now here in the case of this statute, it is enacted, That no person, &c. shall be admitted to any of the spiritual courts, &c. to any process, plea, or allegation, contrary to this aforesaid act: and therefore all cognizance of that nature is taken away from them [i]."

Thus you see it is plain and clear from the statute itself, that not the ecclesiastical, but his majesty's temporal courts are the proper judges of what marriages shall be legally deemed to be contrary to God's law, and what not so; and that in the opinion of all the judges of England met together by the king's order, on purpose to consider the case.

Fifth Statute. I proceed now to the *fifth* and last Statute, which touches the case (viz. 1 M. Sess. 2d. c. 1.) intituled,

An Act declaring the Queen's Highness to have been borne in a most just and lawful matrimonic, and also repealing all acts of parliament and sentences of divorce made or had to the contrary.

The occasion of making of it appears plain enough in the *preamble* thereof [k],
in

[k] As this act, though never repealed, hath been left out of all our statute books that have been published since the time of King Charles, and therefore probably hath been seen but by few, and perhaps may not be ready at hand to be consulted by the generality even of our students of the law; I will, therefore, here give my readers the substance of it, taken from a copy thereof corrected by the parliament roll.—“ Truth
“ (being of her own nature of a most excellent virtue, efficacy, force and working) cannot but by
“ process of time break out, and shew herself, how-
“ soever for a while she may by the iniquity and
“ frailty of man be suppressed and kept close; and
“ being revealed and manifested ought to be embraced,
“ acknowledged, confessed, and professed in all cases
“ and matters whatsoever, and whomsoever they touch
“ or concern, without respect of persons, but in such
“ cases and matters especially, as whereby the glory
“ and honour of God in heaven (who is the author
“ of

in which you see our legislators set forth,
 “ that proceſs of time had brought *truth*

“ to

“ of truth, and truth itſelf) is to be ſpecially ſet
 “ forth, and whereby alſo the honour, dignity, ſurety,
 “ and preſervation of the prince, and the ruler un-
 “ der God in earth dependeth, and the welfare, pro-
 “ fit, and ſpecial benefit of the univerſal people and
 “ body of a realme is to be contained and maintain-
 “ ed. WE your highneſſes moſt loving, faithful, and
 “ obedient ſubjects, underſtanding the *very truth of*
 “ *the ſtate of matrimony*, between the two moſt excel-
 “ lent princes of moſt worthy memory, king Henry
 “ VIII. and Queen Katharine, his loving, godly and
 “ lawful wiſe, your highneſſe lawful father and mo-
 “ ther, cannot but think ourſelves moſt bounden, both
 “ by our duty of allegiance to your majeſty, and of
 “ conſcience towards God, to ſhow unto your high-
 “ neſſe, firſt how that the ſame matrimony being
 “ contracted, ſolemnized, and conſummed, by the
 “ agreement and aſſent of both their moſt noble pa-
 “ rents, by the counſel and advice of the moſt wiſe
 “ and graveſt men of both their realmes, by the de-
 “ liberate and mature conſideration and conſent of
 “ the beſt and moſt notable men in learning in thoſe
 “ days of chriſtendom, did even ſo continue by the
 “ ſpace of twenty years and more between them,
 “ to the pleaſure of Almighty God, and ſatisfaction
 “ of the world, the joy and comfort of all the ſub-
 “ jects of this realme, and to their own repoſe and
 “ good contentment, God giving for a ſure token
 “ and teſtimony of his good acceptance of the ſame,

“ *to light*, and that they then understood
 “ *the very true state* of the marriage in the
 “ act

“ not only godly fruit, your highnesses *most noble per-*
 “ *son* (whom we beseech the almighty and ever-living
 “ God, long to prosper and preserve here amongst
 “ us) and other issue also, whom it hath pleased God
 “ to take out of this transitory life unto his eternal
 “ glory; but also sending us a happier, flourishing,
 “ and most prosperous commonwealth in all things.
 “ *And then afterwards*, how^t that the malicious and
 “ perverse affections of some (*a very few persons*) en-
 “ vying the great felicity, wherein, by the goodness
 “ of God, your said most noble father and mother,
 “ and their good subjects lived and continued in many
 “ years, did for their singular glory, and vain repu-
 “ tation, conceive sundry subtle and disloyal prac-
 “ tices, for the interruption and breach of the said
 “ most lawful and godly concord, and travelling to
 “ put the same in ure, devised first to insinuate a
 “ scruple into the king your father’s conscience, of
 “ an unlawful marriage between him and his most
 “ lawful wife, the queen, your highnesses mother,
 “ pretending for the ground thereof, that the same
 “ was against the word of God, and thereupon ceased
 “ not to persuade continually unto the said king your
 “ father, that he could not without danger of the
 “ soule of his soule continue with his said most law-
 “ ful wife, but must be separated and divorced from
 “ her.

“ And to this intent caused the *scales*, as well of
 “ *certain universities in Italy and France* to be gotten
 “ (as

“ act mentioned (which was a marriage be-
 “ twixt the king and his sister-in-law, viz.
 “ his

“ (as it were for a testimony) by the *corruption with*
 “ *money* of a few light persons, schollars of the same
 “ universities, as also the *seales* of the *universities of this*
 “ *realme to be obtained by great travell, fluster working,*
 “ *secret threatnings, and entreatings* of some men of au-
 “ thority, specially sent at that time thither for the same
 “ purposes. And how that finally, Thomas Cranmer,
 “ then newly made archbishop of Canterbury, most un-
 “ godly, and against all laws, equity, and conscience,
 “ prosecuting the said wicked device of divorce, and
 “ separation of the said king your father, and queen
 “ your mother, called before him (*ex officio*) the hearing
 “ of the said matter of marriage, and taking his found-
 “ ation partly upon his own *unadvised judgement of the*
 “ *Scripture*, joining therewith the *pretended testimonies of*
 “ *the said universities*, and partly upon bare and most
 “ untrue conjectures, gathered and admitted by him
 “ upon matters of no strength or effect, but only by
 “ supposall, and without admitting or hearing any thing
 “ that could be said by the queen your mother, or by
 “ any other on her behalfe, in the absence of the said
 “ late queen your mother, proceeded, pronounced, dis-
 “ cerned, declared, and gave sentence, the same most
 “ lawful and undoubted matrimony to be nought, and to
 “ be contracted against God’s law, and of no value, but
 “ lacking the strength of the law. And the said most
 “ noble king your father, and the said noble queen
 “ your mother, so married together, did separate and
 “ divorce; and the same your most noble father, King

“ his brother Arthur’s widow;)—that the
 “ said marriage *in very deed was not pro-*
 “ *hibited*

“ Henry VIII. and the said most noble queen your
 “ mother, from the bands of the same *most lawfull ma-*
 “ *trimony* did pronounce and declare, by the same his
 “ unlawfull sentence, to be free, discharged, and sett at
 “ liberty.

“ Which sentence and judgement so given by unlaw-
 “ full and corrupt meanes and wayes, by the said arch-
 “ bishop of Canterbury, was^e afterwards, upon certain
 “ affections, ratified and consumed by two severall acts,
 “ the one made in the 25th year of the reigne of the
 “ said king, your highnes father, and intituled; An
 “ Act declaring the stablishment of the succession of the
 “ King’s most Royall Majesty of the imperiall crown
 “ of this realme. The other act of parliament made
 “ in the 28th year of the said king, your highnesse
 “ father, intituled, An Act ~~was~~ the stablishment of the
 “ succession of the imperiall crown of this realme. In
 “ which said two acts was contained the illegitimation
 “ of your most noble person, which *your said* most no-
 “ ble person, being borne in so solemne a marriage, so
 “ openly approved in the world, and with so good faith
 “ both first contracted, and also by so many yeares con-
 “ tinued between your said most noble parents, and the
 “ *same marriage in very deed not being prohibited by the law*
 “ *of God, could not, by any reason or equity in this case be*
 “ *so spotted.* And now we your highnesse said most
 “ loving, faithfull, and obedient subjects, of a godly
 “ heart and true meaning, freely and frankly, without
 “ feare, flatterie, or other corrupt motion, or sensual af-
 “ fectiō,

“ *hibited by God's law, and therefore could*
 “ *not by any reason or equity be so*
 “ *spot-*

“ *fection, considering that this aforeſaid marriage had*
 “ *his beginning of God, and by him was continued,*
 “ *and therefore was ever, and is to be taken for a moſt*
 “ *true, juſt, lawfull, and in all reſpects, a ſincere and perfect*
 “ *marriage, nor could ne ought, by any man's power, au-*
 “ *thority, or jurisdiction, be diſſolved, broken or ſeparated*
 “ *(for whom God joyneth, no man can, ne ought*
 “ *to put aſunder.) And conſidering alſo, how du-*
 “ *ring the ſame marriage in godly concord, the realme,*
 “ *in all degrees, flouriſhed, to the glory of God, to*
 “ *the honour of the prince, and the great reputation*
 “ *of the ſubjects of the ſame; and on the other ſide,*
 “ *underſtanding manifeſtly, that the ground of the*
 “ *ſaid device, and practice of the ſaid divorce proceed-*
 “ *ed firſt, of malice and vain-glory, and after was pro-*
 “ *ſecuted and followed by affection and ſenſual ſan-*
 “ *taſie, and finally executed and put in effect by cor-*
 “ *ruption, ignorance, and flattery. And not only feel-*
 “ *ing, to our great ſorrow, damage, and regret, how*
 “ *ſhametull ignominies, rebukes, ſlanders, contempts;*
 “ *yea, what death, peſtilence, warres, diſobediences,*
 “ *rebellions, inſurrections, and divers other great and*
 “ *grievous, plagues, God of his juſtice hath ſent upon*
 “ *us, ever ſithence this ſaid ungodly purpoſe was*
 “ *firſt begun and practiſed: but alſo ſeeing evidently*
 “ *before our eyes, that unleſſe ſo great an unjuſtice*
 “ *as this hath been, and yet continueth, be redubbed,*
 “ *and that the ſaid falſe and wrongfull proceſſe, judg-*
 “ *ment, and ſentence, with their dependencies, be*
 “ *repealed*

“ *red*—but—to be taken for a *most just*,
 “ *lawful*, and to all respects, a *sincere and*
 “ *perfect*

“ repealed and revoked, nothing is less to be doubted,
 “ than that greater plagues and strokes are like to en-
 “ crease, and continue daily more and more within
 “ this realme, do beseech your Most Excellent Ma-
 “ jesty, as well in respect of your own honour, dignity,
 “ and just title, as for truth’s sake, wherewith (we
 “ doubt not) but your highnesse also will be specially
 “ moved in conscience, and also for the entire love,
 “ favour, and affection, which your majesty beareth
 “ to the commonwealth of this realme, and for the
 “ good peace, unity, and rest of us, your most bounden
 “ subjects, and our posterity, that it may be enacted
 “ by your highnesse, with the consent of the lords
 “ spiritual and temporall, and the commons in this
 “ present parliament assembled,

“ And be it enacted by the authority of this pre-
 “ sent parliament, That all and every decree, sentence,
 “ and judgment of divorce and separation, between
 “ the said king your father, and the said late queen
 “ your mother, and all the processe commenced, fol-
 “ lowed, given, made, or promulged by the said
 “ Thomas Cranmer, then archbishop of Canterbury,
 “ or any other person or persons whatsoever, whereby
 “ the same most just, pure, and lawfull marriage, be-
 “ tween the said late king your father, and the said
 “ late queen your mother, was, or is pronounced, or
 “ in anywise declared to be unlawfull, or unjust, or
 “ against the law of God, be, and shall be, from the
 “ beginning, and from henceforth, of no force, va-
 “ lidity,

“ *perfect marriage*, that could not, nor
 “ ought, by any man’s power, *authority*

“ lidity, or effect, but utterly nought, void, frustrate,
 “ and adnihilate, to all intents, conitructions, and pur-
 “ poses, as if the same had never been given or pro-
 “ nounced,

“ And be it also enacted by the authority aforesaid,
 “ That as well the said act of parliament, intituled, *An*
 “ *Act declaring the establishment of the succession of the King’s*
 “ *most Royall Majesty of the imperiall crowne of this realme,*
 “ *made in the 25th year of the king your father, be repealed,*
 “ *and be void, and of none effect ; as also, all and every*
 “ *such clauses, articles, branches, and matters contained and*
 “ *expressed in the aforesaid act of parliament made in the said*
 “ *28th year of the reigne of the said late king your*
 “ *father ; or in any other act or acts of parliament, as*
 “ *whereby your highness is named or declared to be*
 “ *illegitimate, or the said marriage between the said king*
 “ *your father, and the said your mother, is declared to*
 “ *be against the sword of God, or by any meanes unlawfull,*
 “ *shall be and be repealed, and be void, and of no force, nor*
 “ *effect, to all intents, constructions, and purposes, as if the*
 “ *same sentence, or acts of parliament, had never be had*
 “ *ne made. And that the said marriage had and so-*
 “ *lemnized betwixt your said most noble father, King*
 “ *Henry, and your said most noble mother, Queen*
 “ *Katharine, shall be definitively, cleereby, and absolutely*
 “ *declared, deemed, and adjudged to bee, and stand with*
 “ *God’s law, and his most holy word, and to bee ac-*
 “ *cepted, reputed, and taken of good effect, and validity,*
 “ *to all intents and purposes.”*

“ or jurisdiction be dissolved, broken or separated.”

And on the other side, they asserted— they understood manifestly that the ground of the said divorce proceeded first of *malice* [l] and *vain-glory*, and after was prosecuted and followed of *fond affection*, and *sensual fantesie* [m], and finally executed and put in effect by *corruption*, *ignorance*, and *flattery*; and particularly that the seals

[l] Cardinal Wolsey's *malice* against the queen, who reproved him for his wicked life, as also against the emperor, who was her nephew, for having deceived him by *false promises* of the bishopric of Toledo, and the Popedom. See Camden's History of Q. Elizabeth, Introduction. And Sandford's Genealogical History, p. 486 Burnet's History of the Reformation, B. i. p. 4. and B. ii. p. 37, 38.

[m] See a pamphlet printed for J. Churchill, at the Swan in Pater-noster Row, anno 1714, intituled, *Love Letters from King Henry VIII to Anne Bolcyn*. And in particular her last Letter to the king from the Tower, which is also printed in Bishop Burnet's History of the Reformation, Vol. I. Collection of Records, B. iii. N^o 4. p. 154, 155; in which are these words:—
 “ For the ground of my preferment being on no surer
 “ foundation than your grace's *fancy*, the least alteration I knew, was fit and sufficient to draw that *fancy*
 “ to some other subject.”

of the universities in Italy and France were gotten by *corruption with money* [n]; that the seals of the universities of this realm were obtained by great travel, sinister work-

[n] This Bishop Burnet endeavours to prove a mistake, and labours hard to persuade his readers to believe it. But he drops some things in his history, which I take to be *stronger evidence* of what is by our legislators here asserted than *all* he has advanced to the contrary.

For first he acknowledged, that Crook, who was employed in that affair in Italy, in *many of his Letters* &c., “That if he had *money enough*, he did not doubt but he “should get the hands of *all the d--nes* in Italy; for he “found the greatest part of them *all mercenary*.” History of Reformation, Part I. B. iv. p. 90. And in a letter of Crook’s, which he hath given us at large in the collection of Records, N^o 25. p. 88. Crook says, the seal of the university of Padua cost him 100 crowns; and that the Canonist of Ferrara had determined for the king, yet asked for their seal 150 crowns, which he refused to give that day, but would have done it afterward, but then was refused, and could not afterwards obtain it. Hist. of Ref. p. 91.

Secretary Knight, and Mr. Gardner, employed by the king, gave Cardinal Sanctorum Quatuor 4000 crowns, and his secretary 30 crowns, for the furtherance of the king’s causes, viz. relating to the divorce. See Knight’s Letter to Cardinal Wolsey, in the collection of Records, N^o 4. p. 21, 22, 23. Ibid. to the King, p. 24, 25.

ings,

ings, secret threatenings, and intreatings of men of authority sent thither *for that purpose* [o].

And that the said divorce, founded partly on *unadvised judgement* of the *Scripture*, joined with the pretended testimonies of the said universities, was prosecuted *contrary to law, equity, and conscience*.

Here it is plain what *the judgement of our legislators, after mature consideration of the case, was*. And it is very obvious they did not ground this their *judgement* of that marriage on the *pope's dispensation*, as those of the papacy did [p]; but on its *not being prohibited by God's law*, and that the divorce was through an *unadvised* [or mistaken] *judgement of the Scriptures, &c.* And it seems to me evident, it *continued to be their judgement* in the time of Queen Eliza-

[o] The truth of this is evident from the historical accounts we have of it. See Bishop Burnet's own account of the affair at Oxford. Hist. Vol. I. p. 85, 86.

And of that at Cambridge, ditto, p. 86, 87. and more largely in Gardiner and Fox's Letter. Collection of Records, N^o 32. from p. 85 to 87.

[p] Particularly Cardinal Pole. Hist. of Ref. Vol. II. B. ii. p. 260.

beth,

beth, when the spirit of the Reformation revived: for, after the marriage of Queen Mary with Philip of Spain, when popery again recovered strength here [q], in order to restore the popish clergy to their former power, and subject the people again to them, all the acts relating to this affair were repealed (this last mentioned one of the first of Queen Mary only excepted), and also all other acts made to abridge the power of the see of Rome [r]; and the case of marriage was brought back to the same state it was in before any act of parliament was made concerning it. But after that queen's death, viz. in the first year of Queen Elizabeth, our legislators *renewed the forementioned statutes of 28 Henry VIII. c. 16. concerning licences and dispensations from the see of Rome, and 32 Henry VIII. c. 38, aforementioned, which enacted, that all marriages not prohibited by God's law, should be lawful; and many other acts made against popery, that were repealed*

[q] Viz. in the first and second years of P. and M.

[r] Viz. by act 8th of 1 and 2 of P. and M. c. 8.

by the said act of 1 and 2 of P. and M. c. 8. but did *not revive the act of 25 of Henry VIII. chap. 22. though it is now fairly printed in our new statute books, as before observed; nor, as I humbly conceive, that of the 28 H. VIII. c. 7. [for reasons, which shall be hereafter mentioned;]* but rather *confirmed the repeal of it.*

Yet it must be acknowledged, as to this last mentioned act, that the point hath been *disputed*. And it hath been asserted and adjudged by a very great authority, no less than that of the honourable Court of Common Pleas [s], that the act of 28 Henry VIII. c. 7. was revived by the first of Elizabeth, c. 1. But upon what grounds, and how rightly, it was so adjudged, is the next thing, with humble submission, to be examined.

The case was thus: One Thomas Hill, after the death of his first wife, married her surviving sister; upon which being prosecuted in an ecclesiastical court, he sued out a prohibition from his majesty's court of com-

[s] In Trin. Term; 25 K. Ch. II. Rot. 1488. Vaugh. p. 302.

mon pleas, before which the case was heard, Sir John Vaughan being Lord Chief Justice.

The question was, “ Whether the marriage of the husband with his wife’s sister, after the wife’s death, be such a marriage as by the act of 32 Henry VIII. the temporal courts may prohibit the impeaching or drawing it into question in the spiritual courts, in order to a divorce or separation of the parties ?” Rep. p. 305.

In answer to which, Sir John Vaughan said, He conceived they could not, for these reasons.

Sir JOHN VAUGHAN’S Words.

First, I affirm, (said he) this Marriage to be expressly prohibited in .xviiith of Leviticus, and then it must be within the Levitical degrees [1].

Secondly,

N O T E S.

[1] This is *directly contrary* to what was observed and determined not five years before *by all the Judges of England*, Sir J. Vaughan himself being *one of them*, on Harrison and Burwell’s case, as

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by

Secondly, if it were not so prohibited, yet it is not a marriage without the Levitical degrees, but within them; and therefore no prohibition will lye for impeaching it; for marriages not to be impeached, must be without the degrees, *and for that some marriages within the degrees may be lawful* [2].

Thirdly,

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by his *own Report* of it, p. 241, where are these words :

“—Within the meaning of Leviticus, and the 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.*”

[2] This affirmation I take to be *directly contrary* to the forementioned act of 32 of K. Henry VIII. ch. 38. For in that act (as hath been herein before shewn) it is as plainly enacted and declared, as it possibly can be, That *all marriages that be not prohibited by God’s law, shall be deemed, judged, and taken to be lawful, good, just, and indissoluble.*

And lastly, it enacts, “That no person of what estate, degree, or condition soever, shall be admitted in any of the spiritual courts—within this
“*realm—*

Thirdly, that if this marriage be without the Levitical degrees, yet it is a marriage prohibited by God's law, and therefore to be impeached; notwithstanding the statute of 32 Henry VIII. whose words are, no marriage, God's law excepted, shall be impeached, without the Levitical degrees, Rep. p. 305 [3].

When an act of parliament declares a marriage to be against God's law, it must

N O T E S

"realm—to any process, plea, or allegation, contrary to this act." Therefore, it is plain, the king's temporal courts may prohibit the ecclesiastical courts, when they attempt to impeach any marriages which *are not in their judgement prohibited by God's law.*

[3] If this his third assertion could have been supported by good evidence, it would have been full to the purpose.

It would then in *very deed* have proved that the said marriage might justly and reasonably have been impeached. *But how does he do this?*

Is what he says sufficient evidence of it? Pray observe, how he endeavours to support this his third assertion.

be admitted, in all courts and proceedings of this kingdom to be so [4].

By an act 25 H. VIII. c. 22 intituled, An Act declaring the establishment of the succession of the king's most royal majesty in the imperial crown of this realm [5]:

Among sundry marriages declared by that act to be marriages within the degrees of marriage prohibited by God's law,

N O T E S.

[4] This I readily grant; and let me add, When an act of parliament declares a marriage to be in *very deed not prohibited by the law of God*, as 1 M. Seff. 2. c. 1. did a marriage contracted *between the king and his brother's widow* (which as to nearness of kindred is the very same with that in *this case*), it must in like manner be admitted *not to be so*.

[5] Here you see he cites the repealed act of the 25 Henry VIII. c. 22. (declaring that marriage to be prohibited by God's law) *as evidence in this case*: but he plainly acknowledges in the next paragraph, that this act is *expressly repealed* by 28 Henry VIII. c. 7.

Why then does he cite it? He himself tells us in his own Report of this case, but two pages further

law, the marriage of a man with his wife's sister is expressly declared to be prohibited by God's law, and that a divorce should be of such marriage, if any such were.

But this act is *expressly repealed* by 28 Henry VIII. c. 7. intituled, An Act for the establishment of the imperial crown of this realm.

He next proceeds, p. 323, to cite that part of 28 Henry VIII. c. 7. which declares what marriages were thereby asserted to be prohibited by God's law, which is the same I have given you herein before, p. 122.

And then he adds, p. 324. of his reports,

But this clause also of this act of 28 H. VIII. as some conceive, is repealed by 1 and 2 P. and M. c. 8. in these words.

And also all that part of the act made in the said 28 H. VIII. intituled, An Act for the establishment of the succession of the imperial crown of the realm, that concerneth

N O T E S.

further on, that " An Act repealed is of no effect, more than if it had been never made," p. 325.

a prohibition to marry within the degrees expressed in the said act, shall from henceforth be repealed, made frustrate, void, and of none effect [6].

By the act 1 and 2 P. and M. two other laws are likewise repealed [7], which concern the question before us; viz. An Act in 28 H. VIII. c. 16, intituled, An Act for the release of such as have obtained pretended licences and dispensations from the see of Rome. And the act of 32 H. VIII. c. 38. which have been often mentioned.

N O T E S.

[6] It is not plain *This clause, and all that part of this act that concern the question, is repealed*, by the words which he here cites ?

[7] By that act not only the *two laws* he here mentions, which concern the question in hand, but also several other laws which were made to take away the power of the pope and popish clergy in this land, *were repealed*, and their power again restored, as by the said act, relation being thereunto had, may plainly appear. Pray observe, what he here says. It is the plain truth.

But

But these *two last* are revived by the act of 1 Elizabeth, c. 1. and in force ; but neither the act of 25 Hen. VIII. nor 28 Hen. VIII. c. 7. are revived in express terms ; and not only so, but the act of 1 Eliz. c. 1. hath this negative clause, that all other laws and statutes, and the branches and clauses of any act or statute repealed by the said act of repeal made in the time of the said King Philip and Queen Mary, and not in this present act specially mentioned and revived, shall stand, remain, and be repealed and void, in such like manner and form as they were before the making of this act [8].

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[8] You see he here acknowledges that *neither of the acts*, viz. of 25 Henry VIII. nor that of 28 Henry VIII. c. 7. (now under examination) are revived in express terms ; let me therefore add, if not in express terms, then not at all.

If this act now under consideration is not therein specially mentioned and revived, it is still repealed and void by virtue of the clause of the 1 Elizabeth, which he here cites.

Whence it follows, That this marriage is not now proved to be against God's law, by *either of these repealed* statutes of 25 Henry VIII. or 28 Henry VIII. c. 7. unless it be made out, that one of them at least remains at this day in force [9]. And as for that,

The act of 28 Hen. VIII. c. 16. which makes void all dispensations from the see of Rome, and expressly revived by 1 Eliz. and all branches, words, and sentences thereof, hath these words, *As a grace of the king to drivers of his subjects, who had married by dispensation*, notwithstanding this act made all dispensations from Rome void [10].

All

NOTES.

[9] Here you see he speaks of both those acts as *repealed acts*, as it is plain they were; and generally so deemed till this time. Let us see what he has to offer to the contrary,

[10] The act of 28 Henry VIII. c. 16, which Sir John Vaughan here mentions is indeed expressly revived by the 1 Elizabeth, and hath the words which he here cites; *but that cannot revive the act* of the 28 Henry VIII. c. 7. which relates

All marriages had from the third of November 26 Hen. VIII. for which no divorce or separation is had, and which marriages be not prohibited by God's laws, limited and declared in the act made this present parliament for establishing the king's succession, or otherwise by holy scriptures, shall be good.

By which words I conceive the clause of 28 Henry VIII. c. 7. repealed in Queen Mary's time is again revived.

It may be *objected* [11], the clause of 28 Henry VIII. c. 7. concerning marriages prohibited by God's law, *continues still repealed, because it is not specially mentioned to be revived* by the act of 1 Eliz. And therefore no act is in force declaring the husband's marriage with his wife's sister to be prohibited by God's law.

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to the case in hand, *no, nor any clause of it, as (I humbly conceive) will be herein after plainly shewn.*

[11] Pray mind this objection which he here mentions, it is a weighty one; and observe how he endeavours to answer it,

Ans.

Answ. An Act repealed is of no effect, more than if it had been never made.

By the act of 28 Hen. VIII. c. 7. all marriages prohibited by God's law, limited and declared by the clause of that act, were unlawful, notwithstanding any dispensation had *before the repeal of that clause* [12].

By the reviver in 1 Eliz. of 28 Hen. VIII. c. 19. and every clause in it, all marriages prohibited by God's law, limited and declared by 28 Henry VIII. c. 7. were again unlawful, as before the repeal, notwithstanding any dispensation [13].

There-

N O T E S.

[12] The truth of this clause I think was never denied.

By that act all the marriages therein limited and declared to be prohibited by God's laws were enacted by authority of parliament to be unlawful, *before the repeal of all that part of it*, but after that repeal it was of *no effect more than if it had been never made.*

[13] The revived act of the 28 Henry VIII. c. 16. *enacts no such thing, nor any thing like it*, it only enacts, that the marriages not declared by the act of the 28 Henry VIII. c. 7. *to be prohibited*

Therefore the statute of 28 Henry VIII. c. 7. was revived by the reviver of the statute of 28 Henry VIII. c. 16. in the 1 Eliz. and made as effectual as before it was repealed, and so it continues.

If it had been enacted by parliament after the repeal of the clause in 28 Hen. VIII. c. 7. That all marriages prohibited by God's law, limited and declared by 28 Hen. VIII. c. 7. should be unlawful, notwithstanding

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bited by God's law, should be good. But it enacted nothing concerning the marriages that were therein mentioned, but left them in the same state they were in before that revival, viz. on the foot of the statutes herein before mentioned, and set forth.

How can the *revival* of one act *revive* another *that enacts nothing concerning it*? The negative clause in the first of Elizabeth before cited by Sir John Vaughan himself [*which see in p. 167. here-of*] was added in that statute, on purpose to prevent any such construction. Therefore I think it is plain, that no such consequence can follow from the premises by him here advanced.

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any dispensation, that enacting had revived the clause in 28 Hen. VIII. c. 7. [14]

Therefore the same thing being enacted by the revival of 28 Hen. VIII. c. 16. must have the same effect of reviving that clause in 28 Hen. VIII. c. 7. [15]

I will put it for more clearness, by way of a case [16]; a man before the third of
Novem-

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[14] If it had *been so enacted after that; repealed*, it would, no doubt, have been *equivalent to such a revival*: but in very deed, *no such thing was enacted* by that revival, therefore it could have *no such effect*.

[15] Pray observe how he goes on, endeavouring to answer the objection, in order further to clear up the point.

[16] I have nothing to object against what he asserts in this paragraph: but desire my reader to take notice, *that he here asserts that the marriage of the wife's sister's daughter, though prohibited by the canons of the church, is not a marriage prohibited by God's law*; but was by the express words of that revived act a marriage to *continue good*, as not excepted out of the grace intended by that act. Now all marriages *prohibited by*
Holy

November 26 Hen. VIII. by dispensation from Rome, had married *his wife's sister's daughter*, which marriage was prohibited by the *canons of the church*, and no divorce

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Holy Scripture, as well as all marriages mentioned to be prohibited by God's law, by the acts of 28 Henry VIII. c. 7. were excepted out of the grace intended by that act. It must therefore be Sir John Vaughan's judgement, that *that marriage was not prohibited by Holy Scripture*. And yet many persons have been prosecuted in ecclesiastical courts for *marriage in that degree*; and most deplorable have been the mischiefs that sometimes have ensued thereon: marriages which might have proved very happy, have been *dissolved*, and families *utterly ruined*, on that account. Some have applied to the king's temporal courts for redress in the case: and though we have perhaps *two or three* instances of persons that have been relieved; yet generally the Doctors of the Civil Law have *overborne* them: notwithstanding the act of the 32 Henry VIII. c. 38. enacts, that *all marriages not prohibited by God's law shall be lawful*, and that no persons whatsoever shall be *admitted to any spiritual court* within the realm to any *process*, &c. contrary to that act.

had

had been attempted in the case, until after 1 Eliz. and the reviver of the statute of 28 Hen. VIII. c. 16. which made void all dispensations from Rome.

It is plain, *That this marriage being not prohibited by God's law*, limited and declared in the act 28 Hen. VIII. c. 7. was by the express words of the revived act of 28 Hen. VIII. c. 16. a marriage to continue good without separation, notwithstanding all dispensations from Rome were nulled; because it was *no marriage excepted* out of the grace intended and given by that act to the king's subjects, married by dispensations before November 3, 26 Hen. VIII. and not then separated.

But if a marriage before the third of November 26 Hen. VIII. had been by dispensation between the brother and sister, or as this case is between the husband and his wife's sister, and no separation attempted, until after 1 Eliz. and the reviver of the act of 28 Hen. VIII. c. 16. these marriages were not to continue good, and without separation by 28 Hen. VIII. c. 16. because they were marriages par-

ticularly excepted out of the grace granted by that act, as being prohibited by God's law, limited and declared in the act of 28 Hen. VIII. c. 7. which proves 28 Hen. VIII. c. 7. to be in force by the reviver of 28 Hen. VIII. c. 16. and consequently the marriage in question to be clearly against God's law, which is the thing to be proved [17].

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[17] It is true, if a marriage had so been between a man and his wife's sister, it was not to continue good and without separation by *force and virtue* of the act of the 28 Henry VIII. c. 16. because it was not comprehended within that act any more than it was in any other act wherein it is not mentioned. But as, on *one hand*, it was not to *continue good by force of that act*, on the *other hand*, it was *not to be made void, nor the parties separated by force thereof*; for no such thing is enacted therein.

But it is plain to me, *It was to continue good, and without separation, by force of the act of 28 Henry VIII. c. 38. because it is a marriage not prohibited by God's law*; as I conceive I have herein before *fully and clearly proved*: and thereunto let me add the *opinion of all the judges of England,*

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England, as delivered by the mouth of the same Sir John Vaughan, but a few years before, on Harrison and Burwell's case; as by his own Report of it, page 241, where are these words: "Within the meaning of Leviticus, and the practice of the commonwealth of the Jews, a man was prohibited not to marry his wife's sister, *only during her life, after he might.* So the text is, *Thou shalt not take a wife with her sister during her life to vex her, &c.*"

Therefore all that Sir John Vaughan has said on this point, *does not prove* the act of 28 Henry VIII. c. 7. to be in force by the reviver of 28 Henry VIII. c. 16. nor that the marriage then in question was *contrary to God's law*: no! nor any thing at all concerning that marriage. Consequently the *objection* by him started is *not answered*.

For let it be remembered, The *objection* was, "the clause of 28 Henry VIII. c. 7. concerning marriages prohibited by God's law, continues still repealed, because it is not *specially mentioned to be revived* by the act of 1 Elizabeth. And therefore no act is in force declaring the husband's marriage with the wife's sister to be prohibited by God's law."

The whole paragraph of the reviving act of the 1 Eliz., to which this objection refers, is as followeth:

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loweth: Par. 13. "—Enacted, by the authority
 "aforesaid, That all other laws and statutes, and
 "the branches and clauses of any act or statute
 "repealed and made void by the said act of re-
 "peal made in the time of the said late King
 "Philip and Queen Mary, and not in this pre-
 "sent act *specially mentioned and revived*, shall
 "stand, remain, and be *repealed and void*, in like
 "manner and form as they were *before the making*
 "of this act; any thing herein contained to the
 "contrary notwithstanding."

The plain question on the foot of the *objection* is, whether that part of the act of 28 Henry VIII. c. 7. which concerns the prohibitions to marry within the degrees thereby prohibited, is *therein specially mentioned and revived, or not?* if it is not therein mentioned, it is plain it is not thereby revived. And that it is not therein mentioned, viz. in the act 1 Elizabeth, may be seen by any one that will please to read that act with attention: and is plainly enough acknowledged by Sir John Vaughan himself in the words before recited, viz,—*Neither the act of 25 Henry VIII. nor 28 Henry VIII. c. 7. are revived in express terms, &c.* It therefore clearly followeth that the said act is so far *from being revived* by the 1st of

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Elizabeth,

In the statute 28 Hen. VIII. c. 7. there are *two clauses* [18] concerning marriages, the first declaring certain marriages there recited to be within the degrees prohi-

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Elizabeth, that on the contrary the *repeal thereof is thereby confirmed*.

I cannot think Sir John Vaughan was well satisfied with his own arguing for this reviver; for he laid no manner of stress on it, but took another method quite contrary to the former, to endeavour to shew that that part of the statute which related to the point then in dispute was in force; for hitherto, you see, he supposed it had been *repealed*, and *attempted to prove it was again revived*. but next, he endeavours to shew it was *never repealed*. Let us examine what he says in support of that.

[18] There are at least *three clauses* concerning marriages in that act.

N. B. He saith this first clause concerneth the present question, which was, Whether the marriage then in dispute, was prohibited by God's law, or not: it is plain it must therefore be included in the general words of repeal as well as the following ones.

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bited by God's law, which clause concerns the present question, and is before cited.

The second clause, in these words, be it, therefore enacted, that no person or persons, subjects or residents of this realm, or in any your dominions, of what estate, degree or degrees soever they be, shall from henceforth marry within the degrees afore rehearsed, what pretence soever shall be made to the contrary thereof.

Then it proceeds,

That if there were any divorce or separation made of any such marriages, by the archbishops or ministers of the church of England, such separation should remain good, and not be revokeable by any authority; and the children procreated under such unlawful marriage should be illegitimate.

And if any such marriages were in any the king's dominions without separation, that there should be a separation from the bonds of such unlawful marriage.

Now we must observe the act of 1 and 2 Phil. and Mary, c. 8. doth not repeal this act entirely of 28 Hen. VIII. c. 7.

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but repeals *only one clause of it* [19]; the words of which clause of repeal, are before cited,

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[19] It is true, indeed, the act of 1 and 2 Philip and Mary *did not repeal it entirely*; for it did not repeal that part of it that related to the settlement of the crown, viz. on the king and the heirs of his body by Queen Jane, &c. But it clearly and plainly repealed all that part of it which *concerned the prohibition of marriages within the degrees therein mentioned*, and not *one clause of it only* as is here asserted; for there is no mention of one clause only, *but of all that part, &c. viz. all the clauses* that concerned that point.

Sir John Vaughan's reasoning here is *wonderful*! I will set before the reader the late Bishop Gibson's observations on it in his Codex,—
 “Against this distinction it may be observed,
 “that the enumeration of degrees not dispensa-
 “ble by the pope, which was begun and car-
 “ried on 25 and 28 Henry VIII. was in order
 “to disanul the king's marriage with this queen's
 “mother, and in effect to bastardise the queen;
 “whose parliament therefore cannot well be
 “presumed to have spared these two clauses (9
 “and 10) when they repealed the 11th; espe-
 “cially since the words of the repeal are *much*
 “*more*

cited, and manifest this second clause of

NOTES.

*“ more naturally interpreted of the whole : and it
 “ is certain, that the church of Rome thought,
 “ at least one of the cases specified in these two
 “ acts as expressly against the law of God (viz.
 “ the marrying of the brother’s wife) to be a
 “ disputable case.”* Gibson’s Codex, vol. I.
 p. 496.

There were (as before observed) *three clauses* : the first particularizes the degrees ; the second directs how they should be expounded.

The third enacts, that none should marry within the degrees therein specified : and if any had so married, and afterward been separated, such separation should be good ; and if not separated, they should be separated, &c. without any appeal to the court of Rome in the case.

The *three clauses are all dependant on one another*, and therefore (as I humbly conceive) *all plainly repealed* by the words before cited.

Is it *possible* then, that Sir John could persuade himself that *his reasoning in support of this statute was sufficient* ? from his not insisting on it in the result, it does not seem very probable ; for from hence he passes to the *canon law*, and on that he chiefly rests the point. Let us follow him there also.

the act of 28 Hen. VIII. and not the first, to be the clause intended to be repealed.

For there was no reason to repeal the clause declaratory of marriages prohibited by God's law, which the church of Rome always acknowledged; nor do the words of repeal import any thing concerning marriages within degrees prohibited by God's law.

But (as the time then was) there was reason to repeal a clause, enacting all separations of such marriages with which the pope had dispensed, should remain good against his authority; and that such marriages with which he had dispensed, not yet separated, should be separated.

And the words of the clause of repeal manifest the second clause to be intended, viz., all that part of the act made in the said 28th year of King Henry VIII. which concerneth a prohibition to marry within the degrees expressed in the said act, shall be repealed, &c.

As it is true, that if a marriage be declared by act of parliament to be against God's law, we must admit it to be so;
for

for by a law (that is, by an act of parliament) it is so declared.

By the same reason, if, by a lawful canon, a marriage be declared to be against God's law, we must admit it to be so; for a lawful canon is the law of the kingdom, as well as an act of parliament [20].

And whatsoever is the law of the kingdom, is as much the law as any thing else that is so; for what is law doth not *suscipere magis aut minus* [21].

N O T E S.

[20] As on one hand a marriage must be admitted in our courts of judicature to be contrary to God's law, if by an act of parliament, (*in force and unrepealed*) it is declared to be so: so, on the other hand, it must be there admitted, that a *marriage is not contrary to God's law*, when it is declared by an act of parliament *not to be so*; as it was between the king and his brother's widow, by act 1 M. Seff. 2. c. 1.

[21] Is then a canon made by the clergy in convocation, though confirmed by the king, of *equal authority with an act of parliament*? hath the clergy in convocation, by their own and the king's authority only, without the lords and commons, a *rightful power to make laws to bind*

N O T E S.

all his majesty's subjects, *the laity as well as clergy* ? is this assertion agreeable to the *constitution of Great Britain*, and consistent with the rights and liberties of the people ?

“ I hold [said Judge Tyrrel] the king and
“ convocation, without the parliament, *cannot*
“ *make any canons which shall bind the laity,*
“ *though they may the clergy.*” ‘

What power the clergy had to make canons was then (viz. 22 Ch. II. Easter Term, in C. B. on Grove and Elliot's case [a]) disputed by the court, and it was on the result agreed on all sides that “ no canons could be made to *alter the law* “ without parliament.”

[a] Ventris, p. 41 to 44.

The same (viz. That no canon made by the clergy, though confirmed by the king binds the laity, and particularly that the canons of 1630 do not,) is proved in *Jura Ecclesiastica*, vol. i. from p. 162 to 165.

—“ The reason given wherefore the laity
“ were not bound, was that *fundamental*
“ *maxim* of our government; that *whom*
“ *bound all, must be assented to by all*; and as
“ to the canons, they were not made with
“ the

“ the assent of the laity ; for that the laity
 “ are not represented in convocation, so
 “ cannot be bound by their acts, without
 “ an act of parliament. 1 Peer Will. f. 29
 “ to 33, Moor 755.” And the Grounds
 and Rudiments of Law and Equity, published in the year 1749, proves the same by many great authorities, p. 184 and 185. And that even with respect to the clergy, the *canons* are but of slender force *in comparison of an act of parliament* [b].

If any are bound by the canons (without doubt) it is the clergy : yet, is it not evident from their answers to the dissenters on this head, as well as from their general practice, that even they do not think themselves bound either in *law or conscience* to observe them ?

Clear and plain instances might be given of *many of the canons* that are very little re-

[b] See more with relation to this in a *learned Treatise*, intituled, *An Examination of the Scheme of Church Power laid down in the CODEX JURIS*, &c. Printed for J. Roberts, near the Oxford Arms in Warwick-lane, 1735. p. 148, 149, 150, and 152, said to be written by a learned Gentleman, now in a high and honourable station in the law.

garded even by the generality of the clergy. As the Ist, the XXIXth, LVth, LXVIth, &c. But for brevity's sake I will here transcribe only part of the LIXth, which enjoins "every
 " parson, vicar, or curate, upon *every Sunday*
 " *and holiday* before Evening Prayer, for
 " *half an hour or more*, to examine and in-
 " struct the youth, and ignorant persons of
 " his parish in the Ten Commandments,
 " the articles of the Belief, and in the
 " Lord's Prayer; and diligently hear, in-
 " struct, and teach them the Catechism
 " set forth in the Book of Common-prayer,
 " &c." I cannot find that any of them
 do this; there are very few, if any of them,
 that catechise youth *one half* of the Sunday,
 and holidays in the year: and of those that
 do catechise sometimes, *scarce any spend*
half an hour in it. An undeniable evi-
 dence that the canon is not regarded by
 them.

Nor does it appear to me, that the eccle-
 siastical courts pay any regard to the canons,
 any further than it suits their interest; no
 not even the prerogative court of Canter-
 bury.

For

For canon CI. enjoins, that “no licence shall be granted for solemnization of matrimony betwixt any parties, without thrice open publication of banns—but—unto such persons only as be of good state and quality, and that upon good caution and security taken.”

And as to the security, some of the conditions by the CIId canon are to be, “That they have obtained thereunto the express consent of their parents (if they be living) or otherwise of their guardians or governors,” And “that they shall celebrate the said matrimony publicly in the parish church or chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon.”

And by the CIIId canon, “For the avoiding of fraud and collusion in obtaining such licences and dispensations:” It is further appointed, “That before any licence for the celebration of matrimony, without publication of banns be granted, it shall appear to the judge, by the oaths of two sufficient witnesses, one of them

“ to be known either to the judge himself,
 “ or to some other person of good reputa-
 “ tion then present, and known likewise
 “ to the said judge, that the exprefs con-
 “ sent of the parents or parent, if one of
 “ them be dead, or guardians or guardian
 “ of the parties, is thereunto had and ob-
 “ tained.”

I cannot find that these three canons were
 observed (before the making of the late
 marriage act) by any ecclesiastical court in
 England.

I never knew nor heard, that any of them
 enquired into the *state and quality* of the
 persons that applied for licences; or that
 they ever denied a licence to any, on ac-
 count of their poverty, provided any one
 would pay them for the licence. I have
 known licences granted (contrary to the
 Cist canon) for celebration of matrimony
 betwixt paupers relieved by their respective
 parishes.

And in disregard to the Cist canon, they
 frequently grant licences to marry in parish
 churches and chapels, *where neither of the*
parties ever dwelt; and sometimes for *mar-*
riages

riages in private houses, and that too even in the night.

And in contempt of the CHHD canon, they grant licences, without first requiring *two such witnesses as the canon directs*, to testify on their oaths, that the consent of parents, &c. had been thereunto had and obtained; though this is in itself very fit and reasonable: and the *mischiefs and inconveniencies* that have arisen on account of their disregard to these canons, have been so great, that our legislators have thought fit to pass an act of parliament to *prevent this evil*[c].

If then the clergy, and ecclesiastical courts, which the canons more properly concern, do not observe them: is it not highly absurd, and unreasonable, to expect that his *Majesty's temporal courts* should pay any regard to them?

[c] It may be fit to observe here, that nothing herein contained can reasonably be deemed contrary to any part of the late MARRIAGE ACT: for the marriages enacted and declared by that act to be *null and void*, are no other than such as are contracted contrary to law, and are therefore in very deed in the eye of the law no marriages.

But

But if the canons did oblige the laity (*as I have shewn they do not*), yet *the table* is of no authority; the *canon does not affirm* that all the marriages *forbidden in the table are contrary to God's law*.

It only says, "no persons shall marry within the degrees *prohibited by God's law*, and expressed in a *table*, &c." So that no marriage is prohibited by this canon, unless it is really and indeed *contrary to God's law*, as well as asserted so to be in *the table*. But as neither *canon* nor *table* are of any authority to *bind the laity*, it is needless to insist any longer upon it. Let me only add, that if the canon had affirmed that all the marriages mentioned to be forbidden in the table, were forbidden by God's law, it *would have been absolutely on all considerations an unlawful canon*; it being not only contrary to real fact, as has been herein before fully shown, but also *directly contrary to an act of parliament*. For the act of 1 Queen Mary, herein before inserted, expressly affirmed and enacted, that the marriage therein mentioned betwixt the king and his

his brother's widow, should be "deemed
 "and adjudged to be and stand with
 "God's law, and his most holy word,—
 "and of good effect and validity to all
 "intents and purposes." And yet a marriage in that degree, and in a degree more remote than that, was afterwards forbidden by the table, in *direct contradiction to the said act of parliament.*

Thus have I gone through what Sir John Vaughan mentioned, as alledged against the legality of that marriage, on which the judgement of that honourable Court was then founded, according to his own report of it; and have shewn (as I humbly conceive) that, that judgement was grounded on several mistaken suppositions, and therefore ought not to be made use of *any more* as a precedent in this case.

Since the determination of this case, viz. of Hill and Good, many marriages have been contracted within the degrees prohibited by the table; and some of the persons that contracted them, have been prosecuted for such their marriages in ecclesiastical courts, and have applied to the
 courts

courts of law for prohibitions, as may be seen in the books of reports, but generally with very little effect. For the courts of law were then, I imagine, (with humble submission I mention it) too much influenced by a stale objection of the Civilians, *namely*, that the determination of the lawfulness or unlawfulness of such marriages is *a matter of ecclesiastical cognizance*; *for divines better know how to expound the law of marriage than the common lawyers*, who (as hath been asserted) do not understand the language in which it was written.

This *objection* was strenuously urged, and fully answered, on Harrison and Burwell's case [d]; yet because on the *strength* thereof *prohibitions* have been *denied* by our courts of law, it may be fit here to give it a more particular consideration.

On the foot of this objection two questions may arise.

1st, Of the rightful power of his majesty's temporal courts to the cognizance of marriages betwixt near kindred.

[d] Vaughan's Rep. 207, 208. Ventris 21.

2d, Of the fitness and expediency of their exercising of that power.

As to the first, The rightful power of his majesty's temporal courts in this case, I think I may safely venture to assert (having, as I humbly presume, not only the clearest reason on my side, but also the opinion of the whole bench of judges, when met together by the king's command [e], on purpose to consider the case) that his majesty's *temporal courts*, by virtue of the last clause of the statute of 32 Hen. VIII. ch. 38. herein before inserted, p. 143, have the *whole and sole cognizance* in this case, as *all cognizance thereof is taken away from the ecclesiastical courts by that clause*. And as it was a settled point long before that time, that *all acts of parliament are parcel of the law of England, and do belong to the judges of the common law, and shall be expounded by them, and not by the Civilians and Canonists, even though they concern*

[e] King Charles the Second. See Ventris 10 and 21.

the clergy, and ecclesiastical jurisdiction [f].

This then being sufficiently clear, we proceed to the next question, where *all* the difficulty (if there is any in the case) lieth.

2d, The *fitness and expediency* of their exercising that power.

And as to this, If a marriage is contracted betwixt persons, who (after a careful examination of the *laws of God and man*) think in their conscience they may lawfully marry, and have the approbation of their parents and friends also for it; and they are prosecuted for such their marriage in an ecclesiastical court, to whom shall they go for redress? where shall they fly for protection, but to the *law* [g], which was made and ordained for the protection of the innocent? If then they apply to a court of

[f] Coke's Rep. B. xiii. p. 4.

[g] "It is most proper for the king to hinder the
" violation of his laws, by impeaching of marriages,
" which the law will not have impeached by incroach-
" ing jurisdiction, as to hinder them from impeaching
" or drawing into question contracts for lands, or other
" things whereof they have not cognizance." Vaug-
" 209.

law,

law, that hath a rightful power to relieve them, will any reasonable man assert, that it is not fit that court should hear and consider their case, and give them such redress as they find to be just and reasonable?

But here again the *question* occurs— *How can they judge in the case? They do not understand the language in which the law is written, and therefore cannot understand the law; and consequently are incapable of making a right judgement with relation to it.*

This assertion is not only contrary to reason, but is also directly contrary to the doctrine of the church of England, as established by the law, viz. by the act for uniformity, &c.

For she asserts in her Homilies, That “ in
 “ Holy Scripture is fully contained what
 “ we ought to do, and what to eschew.
 “ And, although many things in the Scrip-
 “ ture be spoken in obscure mysteries, yet
 “ there is nothing spoken under dark myste-
 “ ries in one place, but the self-same thing

“ in other places is spoken more familiarly
 “ and plainly, to the capacities both of the
 “ learned and UNLEARNED [*b*].”

And this is agreeable to the opinions of
 her best divines ever since, even home to
 this present time, as might be easily and
 clearly shewn, by great numbers of citations
 from their works : but, for brevity’s sake,
 I shall add one only from the learned Dr.
 John Conybeare, now Lord Bishop of
 Bristol.

“ The moral rules” [*saitb he*] “ are
 [viz. *in Scripture*] “ plain and clear in every
 “ respect, delivered with the utmost sim-
 “ plicity, and enforced by the strongest
 “ motives ; so that he who *errs in these,*
 “ *must be entirely without excuse.* Matters
 “ of positive institution are plain and clear,
 “ as to the meaning of the precept, though
 “ possibly in some other respects involved
 “ in darkness [*1*].”

[*b*] First Homily, Part 1st and 2d.

[*1*] Sermon on Scripture Difficulties, preached at
 Exon, Aug. 31, 1732, p. 13.

The

The same (*if I mistake not*) is also generally held by those that dissent from the church. “ God hath condescended to
 “ favour us with his written word, in
 “ which is contained ALL that we *need*
 “ to know, *believe*, and *do*, in order to our
 “ salvation. And whatsoever is *necessary*
 “ hereunto, he hath delivered there with
 “ so much *intelligible plainness*, that it will
 “ be a man’s *own fault if he perceive it not*.
 “ This word he hath given and appointed
 “ to be the common rule of *every man’s*
 “ faith and practice [*k*].”

And the learned Bishop of Bristol, before cited, rightly observes, that “ a law,
 “ as far as it is unintelligible, *ceases to be a*
 “ *law* [*l*].”

“ To give a law ; to promulge ; or to
 “ afford means of knowing it, do signify
 “ *one and the same thing*. What we are
 “ capable of discovering to be fit and rea-

[*k*] Doctrine of the Trinity stated and defended, by some London ministers, p. 126.

[*l*] Bishop Conybeare’s Defence of Revealed Religion, p. 21.

“sonable; and consequently to be the will
 “of God, *is to us a law.*” Again (says
 he) “I maintain, that no man is, or can
 “be obliged to rules he is absolutely un-
 “capable of knowing [*m*].”

Thus you see what the Protestant doctrine is, viz. That whatsoever is *necessary* to be known and *practised* or *avoided*, is plain and clear in Holy Scripture to ALL, viz to the *unlearned*, as well as to the learned; and consequently that which *is not so, is not necessary.*

If this is true, *certainly* it is altogether *absurd* and *unreasonable* to assert, that the laity are obliged to observe (or that they deserve to be punished for the breach of) any laws, which men of such *superior parts* and *learning*, as the honourable Judges of our law are, cannot understand and explain.

Object. The Judges have not time to study the Scriptures, in order to judge in such cases. The study of the law is a hard study, and the application of it to parti-

[*m*] Bishop Conybere's Defence of Revealed Religion, p. 101. See also Vaughan's Rep. p. 208.

cular cases, in order to pass judgement in the numerous causes that come before them, is very laborious, and employs all the time they have to spare.

Ans^r. I humbly conceive, it is not necessary for them to bestow one hour the more in studying the Scriptures on that account.

When a case of a doubtful marriage is before them, may they not proceed, as (I take it) they usually do, in other cases, viz. to hear what is alledged on each side for and against the lawfulness thereof? And as the statute of 32 Hen. VIII. c. 38. plainly enacts and declares ALL marriages to be *lawful* that are not *prohibited by God's law*: whoever excepts against any marriage as an unlawful one, ought to produce the law of God which prohibits it, and make it appear plain to the Judges, that the marriage in question is forbidden by that law, and that the law is now obligatory on us. If all these things cannot be made clear, I humbly conceive there can
be

be no difficulty in determining what is fit to be done in the case.

It is a maxim in law, *That such interpretation ought to be had of all laws, as that the innocent be not injured.* It is generally deemed *better and more fit*, that several guilty persons escape punishment, than that *one innocent* person should suffer.

When therefore a case of marriage appears *doubtful*, ought it not to be considered on which side the *greatest danger lies*, if a mistake should be made concerning it?

If a Levitical law is urged and pretended to be a prohibition of the marriage in question, concerning which the learned greatly differ; while some insist that it is a prohibition of marriage, others as absolutely deny it. Again, while some of those who take it to be a prohibition of marriage betwixt the persons therein mentioned, assert, that it is a moral law now obligatory on Christians; others, not in the least *inferior* to the former, either for *parts or learning*, who take it as a
prohi-

prohibition of marriage, insist that it is only a positive precept given to the Jews, and not obligatory on us. When the *learned thus differ in opinion*, and on that account the marriage in dispute appears *doubtful*; if the parties so married should be permitted to live together unmolested, what evil can thence ensue? No one's property would be invaded, no persons injured; at the worst, only a Levitical law *perhaps* might be broken.

But if this doubtful marriage *should prove to be a lawful one*, and yet (being by mistake deemed unlawful) should be permitted to be *dissolved by ecclesiastical sentence*; in that case, a *lawful marriage would be broken*, children lawfully begotten *bastardized*, and a family which might have been otherwise useful to society *perhaps utterly ruined*.

When the case is such, can there be any room to hesitate on which side to determine?

All the other cases mentioned in the books of reports of prohibitions applied
for

for to, the courts of common law (concerning marriages between near kindred only) and *denied*, or granted, and afterwards *consultations granted*; they are reported so short, that but little or nothing more can be learned from them but this; *that the prohibitions were denied, or where, they were granted and afterward consultations granted, it was always upon supposition that the marriages they concerned, were contrary to the law of God: or that it was a matter of ecclesiastical cognizance, and did not belong to them to judge whether it was, or was not so.* But I hope I have herein *fully and clearly proved* both these to be *mistaken suppositions*. Therefore it would be mis-spending my own and my readers time, to enter into any further examination of those cases.

I shall therefore conclude with the words of Sir John Vaughan, on Bole and Horton's case, 383.—“ If a court give judgement judicially, another court is not bound to give the like judgement, unless it think that judgement first given
“ was

“ was according to law. For any court
 “ may err ; else errors in judgement, would
 “ not be admitted, nor a reversal of them.

“ Therefore, if a judge conceive a judge-
 “ ment given in another court to be er-
 “ roneous, he, being sworn to judge ac-
 “ cording to law, that is, in his own con-
 “ science, ought not to give the like judge-
 “ ment ; for that were to wrong every
 “ man having a like cause, because an-
 “ other was wronged before.”

F I N I S.

