

The legal degrees of marriage stated and considered in a series of letters to a friend / By John Alleyne.

Contributors

Alleyne, John, -1777.

Publication/Creation

London : Printed for W. Harris [etc.], 1774.

Persistent URL

<https://wellcomecollection.org/works/bf7rd3fk>

License and attribution

This work has been identified as being free of known restrictions under copyright law, including all related and neighbouring rights and is being made available under the Creative Commons, Public Domain Mark.

You can copy, modify, distribute and perform the work, even for commercial purposes, without asking permission.



Wellcome Collection
183 Euston Road
London NW1 2BE UK
T +44 (0)20 7611 8722
E library@wellcomecollection.org
<https://wellcomecollection.org>

519
2

[P.]

P. 038

18090

10742/P

T H E
 L E G A L D E G R E E S
 O F
 M A R R I A G E

STATED and CONSIDERED,

I N A

SERIES OF LETTERS TO A FRIEND.

By JOHN ALLEYNE, Esq;
 BARRISTER AT LAW.

L O N D O N :

Printed for W. HARRIS, *St. Paul's Church-Yard*; T. DURHAM, *Cockspur-Street, Charing-Cross*; J. FOX, *Westminster-Hall*; and F. BLYTH, *Finch-Lane, Cornhill.*

1774.

Here

18090



THE
LEGAL DEGREES
OF
MARRIAGE
STATED AND CONSIDERED, &c.

LETTER I.

SIR,

YOUR request is made with so exact propriety, that it needs not the least apology—indeed as my opinion of the subject on which you did me the honor to consult me, proves to be different from the general received sentiments of the legal world, I ought to thank you for giving me the opportunity of explaining myself at large, as hereby

either I may vindicate my own judgment, or the source of my error may be detected.

The prejudices of mankind on religious topics, are ever deep-rooted, and difficult to be shaken,—they are handed down from father to son, without the least examination,—and are taken for the most serious truths, when they cannot stand the fire of argument—hence I conceive it to be, that the very important subject of Marriage, with regard, to those personal prohibitions of intercourse between the sexes, which have oppressed so many, and prevented so much happiness, has been so little discussed, and remains even in these enlightened days, burthened with the absurdities of crafty and designing priests,—and shocking to the liberal mind, each time it is reviewed—

I am hereby induced to think that a candid reconsideration of the matter will have its use.—Should the attempt to reduce matrimonial prohibitions to the standard of rational law and sound policy, be attended with success, what a vast accumulation of happiness would ensue!—Should the attempt be frustrated—

trated—there can be no mischief derived from making it—

Under the influence of these sentiments it was, that I told you, I could see no objection to your intended application to the legislature,—for though the explaining the subject would be attended with trouble, yet it would be attended with the happy circumstances of rescuing the mind of man from the illiberal absurdities of papal relicts,—and would administer peace, and happiness to numbers, whose natural liberty is now unwisely restrained, and who therefore were entitled to call upon the legislature, for relief, at the expence of any trouble.—Indeed I went further, and told you, that if the legislature should not interpose, that my sincere opinion was, that the temporal courts would give relief in many more instances than was generally supposed,—for that the law, when fairly expounded, was by no means so rigid as it has been represented, on a partial and prejudiced view of it.

To vindicate these general conclusions, I shall now consider the subject of your case, under two general questions.

1. It

I. Is the Marriage, solemnized between a man and his deceased wife's full sister legally valid and unimpeachable?

II. Would an application to parliament be proper, to explain the subject of Marriage, and relieve it from the intricacy in which it has been long involved?

This subject is not the mere creature of policy,—it has its foundation in nature,—and the law of nature has fixed certain limits, as degrees, within which, parties should not intermarry.—The shades of political institutions have much obscured these great outlines of nature,—but still in the discussion of the question, it will be proper to resort to these original principles, in as much, as they are eternal, and decisive unless the clearest declarations of positive law can be opposed to them.

Having described the principles of natural law, on the question of matrimonial prohibitions, I shall pass on to a consideration of the particular case before me, as regulated under the Jewish and Christian dispensations—
from

from whence the transition will be with advantage to the positive system of our own country.

1. To describe the principles of natural law, applicable to the question.

The fundamental truth, on which all rational law is built, from whence all human rights are derived, and to which all controversies respecting them must be referred, is this:—

Let man so conduct himself, as to secure his own happiness, without invading the present, or future happiness of another.

It is impossible that this proposition can be disputed,—it would therefore be mispending time, to demonstrate it—it carries internal conviction.

While the mind contemplates this theorem it resolves, that all persons whose marriages would disturb the general system of happiness calculated by nature, and which would level distinctions, or confound duties, the observance of which promote the welfare of man, are forbidden to form the conjugal union.

Beyond

Beyond such degrees it follows necessary, that any two persons of the sexes, may connect, and constitute the happy relation of husband and wife.

To investigate these relations, wherein two people standing are incompetent to marry, it may be proper to consider the natural state of man, as to the several relations in which he stands, the consequences resulting from them, and the duties attending them, the observance of which promotes the happiness of man, and the departure from which occasions the contrary.

The natural relations of man are, parent and child, brother and sister, persons in the various degrees of consanguinity and friendship.

The relation of parent and child is the gravest of all, and the most solemn duties result from it—the observance of which lays the foundation of human happiness,—and the violation of which begets the various species of human misery.

Parental

Parental authority and filial piety promote the nurture and education of the child, and the heartfelt joy of the parent;—by the first, the intemperance of youth is justly restrained, his defective inexperience is supplied, and his excrecent warmth moderated—by the latter the cares of life are relieved, and the bitterness of old age sweetened;—and as the child advances in life, the awful distance at which he has been wisely kept diminishes, and this relation is mellowed into the purest, and most endearing friendship.

Here is a source of human happiness!—
what wretch dare disturb it!—

But once admit the daughter to the arms of her father,—let the son once ascend the mother's couch,—parental authority and filial piety will be confounded and lost in the luxurious warmth of conjugal attraction.

Nature therefore in this instance loudly forbids the bans,—her system would be entirely disturbed, her laws grossly violated, were the father permitted to stoop so low, or the son allowed to presume so high, as to approach to

B

equality

equality with his daughter or his mother——
To preserve the happy consequences of the relation the distinction must not be levelled——
even in a single instance.

The charities of brother and sister are another source of human happiness—the persons composing this relation are concerned, in comforting the common parents, in promoting the peaceful harmony of the family, and in continual acts of mutual friendship and endearment——

The brother is bound to protect the honor and virtue of his sister,—she on her part to return his love, by every instance of affectionate regard—and in the growth of virtuous females all human happiness depends——

Let Hymen light his torch,—let sensual Love, be once admitted,—every house will become a brothel, and the rage of passion will repel all those charities, the observance of which Nature has prescribed, as a security of general happiness.—Here violence would be offered to the law of Nature,—and Reason condemns the marriage.

The

The elder kinsman, immediately connected with the parent—as the uncle or the aunt,—are entituled to particular respect from the nephew or the niece——To their protection the infant child may be consigned if an untimely death take off the parent. They are often concerned with the nurture and education of the child.—The argument against a marriage between the parent and daughter, in some degree, (though not so cogently) applies to enjoin the uncle against a marriage with his niece,—that due respect and authority may always be preserved between them, and that the anxious care of the uncle may not be exchanged for conjugal attachment, or the duty of the niece suspended for the familiarity of the wife—left hard necessity should sometime require the uncle to assume the father, and for the sake of the orphan to exercise parental authority.

Beyond this relation, I know of no restraint,—I can conceive no duty subsisting, or any relation, the good effects of which may not be heightened by a more intimate union.

The particular instance of a marriage between a man and his deceased wife's sister,

can never be presumed to be unnatural, or bad.—What duty can be confounded?—What violence offered to human happiness?—Many conveniences may result from it.—Experience teaches us, that the aunt, however kind as such, becomes the more affectionate mother-in-law;—the severe loss of the husband is in some degree mitigated,—and the hope of her children being tenderly bred, comforts, in the moment of departure, the expiring mother.

This relation adds to the mass of human happiness—Nature approves and encourages it—natural law adds its sanction, and the feeling heart laments the rigour of such positive system as forbids the union.

The principles of natural justice seem to be decisive in your favour—the argument I have used brings conviction to my mind—'tis perfectly simple—it receives, as agreeable to Nature, those rules, which enjoin and promote happiness;—it rejects all such as tend to create misery, or to disturb the comfort and felicity of man,—and by this mode of reasoning all abstracted truths must be collected.

I have

I have purposely avoided the argument urged by many naturalists against persons too nearly connected intermarrying, drawn from the degeneracy of the offspring which may ensue such marriage.—I cannot find (though I think it very probable to be so) that history and experience warrant that argument in the instance of the human race,—though all sportsmen will inform us, that such observation prevails throughout the rest of the animal creation.—If it prevails with us also, it adds force, and corroborates our theory, in the instances of prohibitions—and no way affects the particular instance in which I contend for the rectitude of the marriage.—I chose therefore to adopt what I take to be rigidly certain, and not speculate on the ground of probability.

I desire too that you will remember, I have been investigating general principles of abstracted law;—particular exceptions may be opposed to me, in particular instances; but all true philosophy is raised on the general state of things.

But now, our adversaries will be ready to call me to a strict account.—I shall be told,

told, what signify these abstracted reasonings—

The law of God supravenes your conclusions.

The canon laws of England render their operations ineffectual.

Positive acts of parliament contradict you, and authoritative adjudications, have settled the laws of England on the other side; so that however right you may be in prohibiting some degrees of relation the privilege of Marriage, yet you indulge others, who are prohibited by the above authorities.

But if I have been successful in the argument hitherto, I am confident as to the rest,—and the very minute examination which I will give to each of these heads of objection, will, I hope, prove that the law of God does not supravene my conclusions, nor the positive system of English prudence stop the free operation of natural justice—

This

This will lead me into some length of discussion, and of the second and third heads under which I arranged the subject, and for this, I shall beg your patience till the ensuing post.

I am, &c.

J. A.

LET-

L E T T E R II.

S I R,

THE oftener I review the argument of my last letter, the better founded the conclusions of it appear to be—nevertheless, however confidently I have expressed myself, I hope that you will do me the justice to believe that I am ever ready to submit my thoughts to the correction of riper understandings—With this apology premised I proceed to consider how our subject stands affected by the laws of England, under which general description I include the divine revealed law—the ecclesiastical canons—and the common law of the land—

The divine revealed law must be derived from the Mosaical and Christian dispensations, and not from the particular experience of individuals in the primitive state of the world, when the paucity of mankind might warrant certain instances of conduct, which cannot
be

be recommended, or even justified in a later time.

The Mosaical institutions were calculated for the government of a nation, and the Christian Morality is immutable and eternal;—from these sources mankind must trace the divine will—and when these guides fail them, their own natural faculties must direct their wandering steps.

To these fountains I have resorted to discover the divine law of marriage, but after the most impartial and diligent enquiry, I cannot discover any precise degree of relation ascertained by Scripture, as the limit of matrimonial intercourse.—I am in this place well aware, that most readers of divinity will refer me to the 18th chapter of Leviticus, to satisfy my doubts, and seem amazed that it should have escaped me.

Indeed it is a prevailing opinion, and has been received for ages, that the Levitical law is the standard of legal and incestuous marriages; but from my earliest attention to this subject, I ever entertained my doubts of the solidity of that opinion, and am now fully con-

vinced that *that* chapter contains no prohibition of marriage, but leaves the subject at large;—Adultery was in that place the object of the inspired legislator, and not a single expression throughout the whole section will warrant the application of those rules to the subject now under consideration.

The occasion of my early doubt was this—If the law of marriage is the object of the 18th chapter of Leviticus, how can the 16th verse of it be reconciled with the 5th and subsequent verses of the 25th chapter of Deuteronomy?—By the former, the marriage of a man with the widow of his late brother, would be prohibited—by the latter, the same match is strictly enjoined.—Divines endeavoured to reconcile the seeming contradiction by saying—that the latter command was, an indulgence, favourably granted to preserve the brother's line;—but how shocking and monstrous does such argument appear, if we are to consider the law of the 18th of Leviticus as the eternal law of God—if we are to consider the intercourse of these parties as essentially wicked, and abstractedly immoral! What, shall the trifling accident of a brother's death without issue, induce the wise Creator of

of

of the world to dispense with moral law, and tolerate impurity? — My ideas of the God whom I adore, forbid me to receive with patience such argument.

At length, a work entitled “ *The Case of Marriages between near Kindred particularly considered,*” fell into my hands—I admired the book, and found great satisfaction in the perusal of most parts of it; but being entirely ignorant of the Eastern languages, I applied to an eminent and learned divine, and through his means procured the interpretation of the text of Leviticus from one whose masterly acquaintance with the Hebrew languages is known and revered in every learned society.— I will leave you to judge what were my feelings, when I found a gentleman of such distinguished abilities referring me to the above pamphlet, as being the most correct and accurate comment on that chapter to be any where found.—I could here with the greatest pleasure refer you to that book, but, for your convenience, I will insert the substance of his interpretation.

The term which has occasioned the mistake, is, the rather indelicate one of “ *Thou shalt*

“ *not uncover the nakedness,*” &c.—This term the learned author of the work above cited, observes, is never used throughout Scripture to signify *marriage*, but the contrary expression is always used in the case of marriage—viz. *spreading a shirt over a woman, and covering the nakedness*.—He elucidates this by many instances in the holy scriptures, and from thence concludes, that uncovering the nakedness must mean, wanton and luxurious intercourse; but the purity of conjugal relation is alone to be expressed by the figurative expression of *covering the nakedness*;—and he authorises these conclusions by many citations from Dr. Hammond, Mr. Poole, and other learned commentators.

The 18th chapter of Leviticus I receive now as the law of adultery, and seeing it in that light, all difficulty is removed, the serious mind is freed from the paroxysm of pain, which it suffers, in hearing an attempt made to reconcile the seeming contradiction by supposing God the author of evil.—And the text of the 25th chapter of Deuteronomy stands an unimpeachable authority to prove the sanctity of a marriage solemnized between a man and his late brother's widow.

I shall

I shall here spend a little time in discussing somewhat particularly the case put in Deuteronomy, for a reason which will appear in good time.

I hold this text to be a decisive authority to shew the validity of a marriage solemnized between two persons standing in the degree of brother and sister in law;—if there be no issue of the first marriage, this contract is expressly commanded;—and I hold the argument to be sound, that is derived from hence to prove, that if there be issue, it is still *lawful*, though not *commanded*.—I agree that the letter of the authority does not warrant this idea, but I contend, that the principle of it does.

What difference can the circumstance of children make?—What impurity can be occasioned by the existence of a third person?—Reason can point out none!—there being children may be a ground for withholding the positive command, but cannot weigh a feather in the scale of justice to induce an opinion, that the match would be impure—for *cobabitation*

tation and *copulation*, make no difference in the case, they are not mentioned as terms in the general order.—If therefore every degree of intimacy may have passed, if there may have been children who happen to die before their father, and yet the marriage be good,—why can the circumstance of those children surviving their father create a difference?—In my apprehension it is impossible there can be any!

I draw therefore my general conclusions with confidence, and venture to assert, that the divine revealed law, warrants the inter-marriage of any two people standing in the degree of brother and sister-in-law.

As a corollary it follows, that the marriage of one with his late wife's sister, is valid—for they are in the same relation, and no objection can be urged to one, which cannot be directed to the other;—and it is an eternal truth, that, where all circumstances exactly concur, there must be the same measure of right and wrong.

But here I shall be opposed by two or three texts of Scripture, derived from the Christian doctrine:—

doctrine:—they are worthy my consideration, though the force of them will be easily repelled.—(I entirely pass by the arguments which are produced against these near affinite connections, founded on the idea of *a man and woman* being *one flesh in marriage*; this is merely figurative and political, and such objection must be anticipated by what I have already written, *if I have been successful.*)

The first of the passages in the New Testament is in the 14th chapter of St. Matthew's Gospel, verses 3. and 4. wherein St. John the Baptist is reported to say unto King Herod, “It is not lawful for thee to have Herodias, thy brother's wife.”

The second is in the 1st of St. Paul's Epistles to the Corinthians.

As to the latter of these I shall leave every man in full possession of it, without any remark of mine.

The former can afford no serious objection, when it is recollected that Philip, the brother of King Herod, was alive at the time—when
the

the infamous tyrant glutted his lust, in the rank stew of adultery—and this too at a time, when his own wife was yet alive.

St. John does not therefore allude to marriage—he condemns adultery;—how can that apply to the matter before us?

But now let us remember, that the text of Deuteronomy is impliedly confirmed by the first authority—by no less authority than that of the founder of our religion—of Christ himself—The subject of marriage between a brother and sister-in-law is proposed to him,—he no wise objects to it; and though he does not expressly say it is lawful, yet from the text it is clear, that he by no means disapproves it.*

I know of no objection therefore to the legality of a marriage such as we are treating of, that can be adduced from the divine revealed law.

What positive constitutions the Jewish nation had, in regulation of this subject, I do
not

* See 22 Matt. v. 24.

not enquire; they are no more obligatory in this country, than the edicts of the Mogul, or the decrees of a Roman Prætor.

It will now be asked, if this reasoning be well-bottomed, how came these mistakes—from whence should it arise that the laws of Moses should be so wretchedly understood, and Christianity adopt the mistake, and suffer it to prevail so long——'Tis impossible for me to account for this—happy, if I have been enabled to draw just conclusions, I shall not speculate on the origin of absurdity.—Yet, it may be as well observed, that the later Rabbinical writers were known to be most completely ignorant of their own laws,—and the lucrative doctrines of dispensation early induced the church of Rome to catch at every seeming prohibition, for the purposes of aggrandizing its own wealth, and extending its accursed domain.

L E T T E R III.

S I R,

TO those causes, with a recital of which my last letter concluded, we must originally attribute the lamentable corruption of the simplicity of Nature and of Revelation. But afterwards,—the ruin of the Roman empire,—the abject slavery of one, and the rude barbarity of the other parts of the world—the convulsions throughout Europe, and the consequent growth of *papal* authority, produced a new system of jurisprudence, generally stiled the *Canon Law*, composed of expositions of Scripture accommodated to the particular interests of designing churchmen—abounding with impositions illiberally shackling the human mind—asserting the infallibility of him whose will sanctified these enormities,—and attended with the most insolent exercise of power, in the form of bulls, decrees, interdicts, licences, and dispensations.

In

In days of such superstition you will not wonder that the liberal doctrines of rational law should be overwhelmed by a mass of monstrous absurdity,—that the purity of marriage should be impiously polluted.

I feel much pleasure in the thought, that 'tis not necessary, and would be improper to pursue this subject particularly—the object of our enquiry being the legal degrees of marriage, as now established by the laws of England; and of course the whole of *the Canon law*, which can affect the argument, must be that part of it, which is *now* of force in this realm.

I shall therefore state, and that in few words, of what general authority *the Canon law* is in England,—and then examine the legal degrees of marriage under that authority.

The whole body of the Canon law, by long usage, and under the sanction of the Pope's spiritual dominion, was certainly of obligatory force in England, prior to the time of the Reformation—but the extreme hardship,

and absurdity of it, joined to the spirit which prevailed at the time, happily produced the statute of 25 Hen. VIII. c. 19. which is the standard to which every Canon must be referred for the determination of its authority—for though that statute expired, was revived, continued and repealed several times during the remainder of that Prince's reign, and the subsequent reigns of his son Edward, and daughter Mary, yet it was finally established by a statute passed in the first year of Queen Elizabeth;—To that statute, therefore, I say we must resort, to fix the standard of canonical authority.

The substance of it is this:—

After a recital of the many inconveniences which had ensued the free operation of the body of Canon law, it empowers the Crown to appoint a commission, to re-consider the code, and to adopt or reject such parts as may appear proper to be so received or rejected, as being consistent with the laws and constitution of this country;—and which code so compiled by these Commissioners, is to be referred to the Crown for its authoritative sanction, and

and having received it, is to be of force *as the Canon law of England.*

The statute then provides, that “until
 “ such review of the Canons at large shall be
 “ taken, such of them *already made*, which
 “ will not be contrariant or repugnant to the
 “ laws and statutes, and customs of this
 “ realm, nor to the damage or hurt of the
 “ King’s prerogative royal, shall now be still
 “ used and executed.” The multiplicity of
 affairs which engaged the attention of King
 Henry VIIIth’s later days, will account for
 this work having never been set on foot during
 his time ;—it was begun, and the reformation
 of the code completed just before the death of
 the excellent young King, his successor, whose
 untimely end deprived it of the royal confir-
 mation, and therefore takes off the authority
 of the work entituled, “ *Reformatio Legum*
 “ *Ecclesiasticarum*”.—Queen Mary, on her mar-
 riage with Philip, became an impious bigot
 to the church of Rome, and of course stopt
 all progress in the business; and her successor
 had, like her father Henry VIII. too many
 objects of her attention, to bestow any part
 of it on the correction of ecclesiastical law—
 though

though her first step in government was to re-found the principles of all reformation by a repeal of Queen Mary's laws, and a revival of those which had been pointed against the *papal tyranny*.

The enquiry therefore, in every ecclesiastical subject must be, whether *the Canon* affect the royal prerogative, or be repugnant to the laws and statutes of the realm?—And whether it be an antient canon, anterior to the passing the act of 25 Hen. VIII.—By such affection the validity of the canon must be decided—for it is now certain, (and I speak it with the greater degree of confidence, because such is the judicial opinion of that consummate lawyer the late Lord Hardwicke) that no canon, since the reformation, can bind the nation at large, without the authority of parliament,—and I believe there are no *legislative acts* since that period which operate to give force to any single ecclesiastical rule.

The above opinion is *judicially* proposed by his Lordship in the celebrated decision between *Middleton and Crofts*, which I shall take occasion to state in due time, very particularly, because much argument will be derived

rived from *that* authority, to evince the truth of my present conclusions.

I proceed, therefore, to consider the acts of parliament which have passed, and are now in force, to limit, or declare the degrees of matrimonial prohibition,—and these are 32 Hen. VIII. c. 38. and 1 Queen Mary, sess. 2. c. 1.*—The latter of these will require a very attentive consideration—the substance of the former may be thus stated—“ Every
 “ marriage consummated by carnal know-
 “ ledge and issue, solemnized between persons
 “ not prohibited *by God's law*, shall be in-
 “ dissoluble, and no prohibition shall operate
 “ (God's law except) to impeach any marriage
 “ without the Levitical degrees.”

By this act, most clearly the degrees of proximity specified in the 18th chapter of Leviticus,

* The author is aware of two other acts of parliament, on the subject of marriage, passed in the time of King Henry VIII. viz. 25 Hen. VIII.—28 Hen. VIII. but he apprehends both of them to have been necessarily repealed by 32 Hen. VIII. which was intended by the legislature of those days to contain the limits of legal matrimony.

viticus, are ascertained as the legal degrees of marriage in the divine law, and on that idea, the table hung up in churches, and the 99th canon in 1603, were calculated.

If, therefore, there were no other solemn act of legislation in the way, I must in this place have submitted to the force of the positive law, and have acceded to the propriety of that table, which I shall now controvert, on the authority of the next act of parliament, which I will state with many observations.

1st, For the purposes of shewing the full extent of the same, the ground on which it proceeds, and the effect which it necessarily has on the subject of my letter;* and 2dly, because a want of attention to it has produced the error (if I may be allowed to say so) into which so many seem to have fallen;—indeed so little have lawyers and civilians thought of this act, that I do not find it printed in any collection of the statutes to which I have referred, except the last, by *Mr. Pickering*, though it is
 recognized

* This act may be seen in the Appendix to *Pickering's Edition of the Statutes*, 1 Mary, sessions 2. c. 1.

recognized as *still continuing unrepealed*, by Dr. Gibson† and Mr. Cay.‡

The act passed the legislature for the purpose of declaring the marriage of King Henry VIII. with his first Queen, *Catherine, the widow of his brother Arthur*, to be agreeable to the divine revealed law, and perfectly consonant to Scripture.—It sets out with an awkward kind of rhapsody on the nature of truth, and then recites, That the parliament perfectly understanding the *very truth of the state of matrimony*, between the two most excellent Princes King Henry VIII. and Queen Catherine, and the several transactions of the divorce of them, (which the act describes to be through the wicked intrigues of Cranmer and others) proceeding from the *misunderstanding of Scripture*;—and further, that *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 considering, *that the said marriage had its beginning of God, and was and is to be taken for a most true, just and lawful marriage, and to all respects a sincere and perfect one, nor could ne ought, by any man's*

E power,

† See Codex, vol. I. p. 495.

‡ Collection of Statutes.

power, authority or jurisdiction, be dissolved, broken, or separated, &c. therefore it is enacted, that the marriage had and solemnized between Henry VIII. and Queen Catherine shall be definitively, cleerly and absolutely declared, deemed and adjudged to be, and stand with God's law and his most holy word, and to be accepted, reputed, and taken of good effect and validity, to all intents and purposes.

On this act of parliament the following observations occur:—

1st, It is a solemn, public, notorious, legislative declaration, of the purity of a marriage solemnized between a man and his own brother's widow.

This observation will relieve it from the possible objection of being a confirmation of a particular marriage, through the medium of legislative omnipotence.

2dly, The whole tenor of the act shews, that the legislature proceeded on the ground of the marriage being perfectly righteous in the eyes of God, and agreeable to the divine revealed law.

This

This observation *appears to me*, to anticipate any objection which may be made against the present obligation of the act, on the idea of the marriage being solemnized under the sanction of the *papal licence*.

No such idea can be derived from the most rigid construction—but the contrary is evinced in every clause of it;—for if it proceeded on the opinion of King Henry's marriage with Queen Catherine being made lawful by the *impudent usurpation* of the See of Rome,—it should impliedly admit, *the thing to be contrary to God's law*, which, in that instance, had been *dispensed* with by his Holiness—but it expressly declares it to *be agreeable to God's law and his most holy word*,—and therefore, in my understanding, obviates the force of the objection.

I wish to insist on this observation, the more because a candid and learned friend started the above objection in conversation, and it might therefore have occurred to others;—indeed if it could prevail, there would at once be an end of my argument derived from the authority of the

act, because that which has been legitimated on the foundation of *papal absurdity*, must now be no longer received as lawful, since such absurdity has been happily exploded by the highest authority, in a subsequent time.

This observation further anticipates *any possible* objection arising from a supposition of the marriage between Prince Arthur, the brother of King Henry VIII. with Queen Catherine, not being *consummated*—because *copulation, and cohabitation*, were found to be no conditional terms in the divine revealed law, on which the marriage of a man with a brother's widow was allowed;—the act therefore proceeding on the divine law, could not adopt such circumstance, as the term of legality—nor are we to adopt it for the legislature (it not appearing on the face of their act)—who profess to obey that law, which does not make the distinction supposed.

Besides, the circumstance of consummation is made doubtful in history,—to me it should seem certain;—the Prince was turned of sixteen,—his wife full eighteen years of age.

3dly, This

3dly, This act of parliament is subsequent to, and explanatory of the 32d Henry VIII. whereby many difficulties under that statute are removed.

This observation goes a great way, and will bring me to a more particular discussion of the statute of King Henry VIII. which I purposely reserved for this place, that in the course of my reasoning on this head I might obviate certain objections, which I have reason to suppose will be set up in argument against the present obligation of the statute of 1st Mary.

I have already stated the statute of Henry VIII. substantially.—The spirit and policy of that act was certainly to reduce the law of marriage to the just regulation of divine and natural law, in opposition to the enormities which occurred, whilst it was subject to ecclesiastical severity,

This is most evident from every expression in the course of the act.—All persons are declared by it competent to intermarry, who are competent thereto *by God's law*,

At

At the time this act passed, the degrees of relation, as specified in the 18th chapter of Leviticus, were conceived to be, *by the law of God*, the legal degrees of marriage; and therefore all marriages, without those degrees, are declared to be exempt from any spiritual prohibition.

I contend that the sentence, wherein the Levitical degrees are mentioned, proceeds upon the idea of those degrees being, *by divine law*, the legal degrees of marriage, and are adopted by the legislature, as *illustrations* of the law of God, and not made the limit of legal marriage *by the political laws of England*.

If the contrary be true, we arrive at this strange conclusion, viz. The act declares all persons to be competent to marry, but those who are prohibited *by God's law*;—and yet, (supposing the Levitical, not to be the divine law) allows a marriage to be impeached, which *by God's law may be good*.—I have *noticed* the evident absurdity of this conclusion because the conclusion itself has been seriously adopted by Sir John Vaughan,* in the case of *Hill and Good*, and for the purpose of meeting an objection more securely which may occur hereafter.

This

* Vaughan's Reports, 321.

This expression too, *the Levitical degrees*, is a general one;—it is adopted as the *general* law of marriage, and therefore may have *particular exceptions*.—If therefore any instance can be put, wherein it may appear that a marriage, though within those degrees, be nevertheless divinely legal,—I hold that such marriage would be protected by the 32d Henry VIII. against any ecclesiastical prohibition.—The argument which leads to this conclusion, is too evident to require it being expressly proposed.

Many lawyers, and those to whose better judgment and more enlarged experience I bow with humble deference, seem to have fallen into curious reasoning for want of attending to this construction of King Henry's law.

Sir John Vaughan, in the case of *Hill and Good*, above cited, puts many instances of marriages, within the Levitical degrees, which are clearly found to be agreeable to the divine law,—and evinced to be so, by the regular practice of the Jews, and the authority of the
early

early Rabinical writers,*—which he allows to be *lawful marriages*, though liable to ecclesiastical impeachment.—Strange reasoning this!—Can the act legitimate that which it lays open to impeachment?—Impossible!

My best consideration of this argument draws me to this construction of the statute:—

Every marriage, which by God's law is valid, shall be so, in England.—To the divine revealed law we must refer, to determine it; and the Levitical law, because it is conceived to be the *divine law of marriage*, is adopted to *illustrate* that law by the legislature.

If, therefore, you now turn your thoughts to the statute of Queen Mary, you will find it an exposition of the law of marriage, subsequent to the 32d Henry VIII. and a solemn legislative declaration, of the purity of a marriage, between a man and his brother's
widow

* From these sources the author conceives, a *practical* exposition of the 18th chapter of Leviticus may be derived—for if the regular practice of the Jews contradict the popular construction of that chapter, the conclusion is evident, that such could not contain the law of marriage.

widow by the law of God.—In my mind it naturally follows, that all marriages in that degree, (or in a remoter *á fortiori*) are legally valid,—and the laws of England appear to be perfectly concurrent with divine institution and natural justice.

I have insisted on this argument to so great length, that I might with more security meet an objection, which, on first view appears formidable; and which I will state candidly, and submit my answer to it.

The statute of 1 Mary, refers to a marriage solemnized anterior to the statute of 32 Henry VIII. and declares it to be pure *in the eyes of God*.—Says the objector, this may be so, yet, the act of Mary may not affect the act of Henry, as the *later* statute refers to the law as it stood previous to the passing of the *former*;—and certain it is, that if the act of 32 Henry VIII. had enacted, that the several degrees specified in the 18th chapter of Leviticus should be received as the degrees of illegal marriage, *by the laws of England* the objection would hold good;—but as those degrees are adopted (as I humbly conceive) as *illustrations of the laws of God*,—and as the

F posterior

posterior statute declares *the law of God* to be otherwise, I apprehend the objection will not appear so formidable now to you, as it did to me when first proposed.

Upon these acts of parliament then I rely with some confidence,—and trust, that they, in some degree, warrant my assertion, that the temporal courts would probably interfere in more instances than was generally conceived; for by the authority of these acts, the canon law loses its force,—the table hung up in churches appears a piece of paper, and the 99th canon of 1603, which is the ground on which that table is supported, is found to be no wise obligatory on the nation at large.—The canon law, so far as it is concurrent with the laws of God, of nature, with the acts of parliament, and the law of the land, freely may operate; but the transgression of the spiritual tribunal beyond that limit, must be restrained and corrected by temporal jurisdiction.

In this place, I particularly recommend to your consideration, the case of *Middleton and Crofts*,* with Lord Hardwicke's invaluable dissertation on the *Canon law*;—it shews the truth
of

* See 2 Atkyns's Reports, in the Appendix.

of my opinion of the authority of that law at this day, and furnishes many curious observations, which serve as premises, to warrant my conclusions, That the Table of degrees set forth in 1563, and sanctified by the 99th canon, hath no obligatory force, at this day, on the nation at large.

But to this general reasoning I feel opposed the authority of several adjudged cases speaking a different doctrine, of which I am perfectly aware, and on which I must now beg leave to make a short comment.

The three most remarkable are—

Harrison and Burrell;*

Hill and Good;†

Butler and Gastrill.‡

It is not necessary that I should particularly state the case, and the reasons of each decision.

F 2

The

* Vaughan's Reports, 206.

† Ibid, 305.

‡ Gilbert's Reports, 156.

The first arose on the marriage of a man with his great uncle's widow.—By the opinion of all the Judges of England it was holden, that this was a lawful marriage, and a prohibition was granted.

This decision in itself does not contradict my principles,—but the theory on which it was made certainly does.

The general idea,—of canon law being exploded where contrariant to the laws of England, is indeed admitted,—but the ground of the decision is, that this degree of relation is *not within the Levitical degrees*, which are all received as *now* of force, and as the legal degrees of marriage.

But no notice is taken by the Judges, of the act of 1st Mary.

The two other causes arose on marriages between a man and a wife's sister, and a man and a wife's aunt.

Both of these, on the same theory, are holden to be incestuous.

There

There are some few more cases in the books, but none of them later than these, or of so much authority.

On these decisions I remark——

1st, That there is no notice taken of the statute of 1st Mary.

This has induced an opinion in some, that this act is merely a private one,—but to that opinion I have anticipated the answer—while the observation proves the argument to be inconclusive; for it shews, that a material affection of the proposition has not been considered.

2dly, The argument is bottomed too much on ecclesiastical law, and canons indisputably of no authority are introduced by the strangest twist of logic to be met with any where.—It is laid down, and *rightly*, in these causes, and by Lord Coke in his second institute,* that the legality of marriage is dependant on the laws of God.—Then say the lawyers,—the canon law is the authoritative exposition of the law
of

* In his Commentary on 32d Henry VIII.

of God—*ergo*, the canon law is to be adopted to expound the law of marriage.

What a monstrous subtilty!

What effect has this reasoning but to introduce the canon law, with all its absurdities, into England, in spite of 25 Henry VIII.—a solemn legislative act?—And how cruelly absurd does it make English jurisprudence appear, to have the law of the land explained by such circular reasoning.—The act of 32d Henry VIII. calculated to check the enormities of the canon law on the subject of marriage, reduced it to the standard *of the law of God*, which is acknowledged on all hands;—and yet come the logicians, and say, the *canon law, which expounds the law of God*, must be received as of authority.—'Tis rather too absurd to be discussed seriously; and I feel sensibly for human nature, when I see *such men* bigotted to such prejudices.—But if the argument of these *legal authorities* be thus inconclusive;—if it be thus deficient and dependant on such reasoning,—can it be received as obliging posterity?—And must such

Judges

Judges as now fill the highest seats of judicature accede to these prejudices?

It may be said—Yes!—The courts are bound *stare decisis*.—Precedents are authoritative, and, though we may not *always* be edified by the principle, we are bound by the judgment.

I can by no means accede to *this unbounded* position.

No man can wish more ardently than I do for legal certainty, and yet, Heaven forbid! that I should always tread in the footsteps of my forerunners.

Where a question of mere positive law, unconnected with any statute, and not the subject of natural justice, occurs, there the precedents in our books are the best evidence of *general experience*, and therefore should be pursued;—for be it ever remembered, that former decisions are only evidence of general opinion and experience, and from thence derive their force;—in the language of a lawyer,—they are *evidence of law*;—but, if that evidence be opposed by an act of parliament, it loses its weight,

weight, and the *presumption* of the legality of the doctrine advanced by *the decision*, is shaken by the *positive proof* to the contrary, by *the act of parliament*.

If therefore the argument of this letter be founded in sound principle,—the decisions of our courts cannot impugn it;—and it is without the least sensibility that I wish to hear the doctrine of those cases exploded—for no inconveniences can follow their being overruled.

The length of time which has incurred, is too long to bring any title into dispute, which depends on the authority of those judgments;—and the removal of prejudice and absurdity is ever the wish of an honest and free heart.

Thus, Sir, I have complied with your request,—I have stated and considered the legal degrees of marriage, as I understand them, and have given you the reasons of my opinion at large.—They are *my* reasons, and the opinion is *my own*—*Nullius in Verba*——I think for myself, and freely communicate the result

fult of my thoughts—determined to defend the argument which brings conviction to my mind until its error be detected;—then—as willing to renounce it, as before resolute in maintaining it.

J. A.



G

L E T.

L E T T E R IV.

S I R,

IF the doctrine asserted and defended in the foregoing letter be well founded, it may appear to some unnecessary to discuss the second general topic—viz. The propriety of an application to Parliament, to have the legal degrees of marriage considered, and precisely ascertained, by legislative authority—but, I still advise such application—at least, I would not have any man rely on my opinion so confidently, as to be secure under the sanction of my little experience, and youthful ideas,—and therefore I shall subjoin some observations on its propriety.

I am not able to raise, in my own mind, one argument against the application;—there are many (which to me appear cogent) in favour of it.—I know, there are some worthy and eminent gentlemen, who think that the interposition of Parliament might create confusion, and that it would be difficult to draw a line with accurate precision;—but to me,
nothing

nothing appears more simple:—let Nature be our guide, and let the line be drawn where the conclusions of natural law seem to have fixed it, and which I endeavoured to trace in my first letter,—Where arguing on moral principles, I concluded that, the relation of uncle and niece, or aunt and nephew, was the best limit that could be fixed;—in that place, I confined my *expressions* to the degrees of *consanguinity*—but the principle of the prohibition extends wherever the convenience of family œconomy requires that it should, and those instances were necessarily implied—as where I *expressed* the relation between father and daughter, I implied that of grand-father and grand-daughter, &c. in the ascending and descending lines;—in like manner I would be understood to extend it to degrees of affinity, where the same reasoning makes it necessary, as in the case of a son, and his mother-in-law, of a nephew, and his aunt-in-law—but I can never be brought to think, that the prohibition should extend to the case of a wife's sister,—and those arguments which I mentioned in my first letter strike me so forcibly, that I am often inclined to wish, that the consummation of such marriage was enjoined in England, as it was of old in Judæa.

Nothing therefore appears to me more easy and simple, than to constitute a marriage table, and give it legislative sanction, by a *declaratory* act.—I prefer that to a new enacting statute, in as much, as a declaratory act would confirm and settle those marriages, which have been solemnized already, and which, perhaps might be, by interested persons, brought into question, in a course of odious litigation if an enacting statute should only protect those marriages in future.

But to such an attempt, it is further objected, that the subject is pretty well understood, and it may be dangerous to trouble it.

This objection proceeds on the ground of the present law being on the other side of the question:—I take it to be *clearly* on this side: and if so, the argument recoils on the objector; for, in order to settle the matter, to remove all questions, and to relieve the subject from its present state of embarrassment,—a solemn legislative declaration, is particularly requisite.

This

This objection is however carried further, and it is said, that to alter the present system, by confirming these marriages, might bring many titles to estates in question, which have devolved on the heirs at law, on bastardizing the issue of a *supposed* incestuous marriage.

But the answer is manifold.—No such title has vested within these fifty odd years,*—therefore hardly any could be questioned in law, sixty years length of quiet possession giving an indefeasible right against all the world;—besides, the legislature might safely guard against such inconvenience, in their act, by inserting a clause, whereby such titles having accrued for any time, *five* or *ten*, or *any other number of years*, shall be holden to be indisputable.

But there are some, who are unwilling to trouble the legislature, thinking it not matter of sufficiently public import, to call upon the Parliament to interpose; in as much, as there are but few, standing in near degrees, who have intermarried—and therefore that the *private*

* Of this I am informed by a person who has made it his business to be very exact in the enquiry.

vate grievance may be submitted to.—In God's name why?—Why shall *one* individual suffer?—If a single subject be aggrieved—if natural liberty be unwisely restrained in one *only* instance,—it is the duty of rulers to interpose and relieve:—on that condition Kings hold their sceptres, Peers wear their coronets, —and the Commoner enjoys the sacred trust reposed in him by his constituents.—But, I deny the number of the aggrieved to be so small,—every day brings some instance to my knowledge, of sober, sedate and prudent persons, who have happily formed the matrimonial union, and yet are fearful, lest the fable rod of *remaining superstition*, should one day, inflict a scourging too severe for a feeling creature.—But let us give into the mistake for a moment, and suppose, the number of those *already* married to be small,—*how many* are they, who would wish now to marry;—and who are deterred by the frightful difficulties in which the subject is amazed!—What a treasure of happiness then is lost, and how many persons hereafter would bless the day—when the measure received parliamentary adoption.—This objection appeared to me too feeble to deserve an answer, until I heard that it had been urged by an eminent personage,—now no more,—whose
memory

memory I would not dare to insult, by passing by any thing, which he judged to be worthy of his notice.

Our opponents would next fright us, with a notion, that the particular instance of a marriage between a man and his late wife's sister, should above all be strongly reprobated—and this for political, as well as for moral reasons.—They say, that men, in society, ought to look abroad for wives,—that the conjugal union produces family compacts, the extending of which, forms a chief link in the great chain of society—that, therefore, by prohibiting this marriage, a man will constitute new compacts, new relations, and friendships, which might be precluded by an inter-marriage with his sister-in-law.

This argument would carry the prohibition an immense way, and would in a short time be the means of there being *no* competent degrees at all,—by prohibiting any two people, standing in any degree of relation, however distant, to encrease their charity to each other by a more intimate endearment.—It therefore proves too much.—But to what a cruel degree does it screw up the restrictions of natural

tural liberty—to which, no state of society can require it—nor any human institutions warrant.—A man having formed one connection in a strange family, has fully performed *his* duty to society, and surely should not be compelled again to go among strangers, in violence to his own happiness,—frequently, to the misery of his children, and to the jealousy and disturbance of his old and new connections—and this too, when the wealthy miser, or debauched libertine, are allowed through life to starve, or riot in a course of mean, or wanton celibacy.—The ideas of policy are soon dissipated,—for policy can, or ought to restrain nature no further, than the happiness of society may require;—and no argument can be urged to shew, that mankind can be made unhappy by a toleration of these marriages:—the contrary is evident.—The moral argument is thus proposed:—Wives' sisters often live under the same roof with the married couple.—Were the injunction, arising from the opinion of the intercourse being incestuous once removed, (as it certainly would be by a legal allowance of their future marriage)—a scene of adultery would be soon opened,—and domestic ease be disturbed by continual intrigues.—

trigues.—This argument also proves too much, —for it tends to shew, that a man *once married* ought not to live with *any female* whatever —or *any* second marriage must be pronounced incestuous.—Is it not too absurd to require a serious discussion?—In God's name,—why should a man be more likely to commit adultery with his wife's sister, than with his fifth cousin, or the dairy-maid who may live with him?—On the contrary, it is far less likely that a sister, loving and beloved by the wife, should yield to the addresses of a brother-in-law, or he succeed in his adulterous effort with her, than with an airy chamber-maid—or more distant, and probably less affectionate kinswoman.

But last of all we are threatened with the certain opposition of prelatical power,—we are told, that their reverend Lordships will reject, with indignation, *any attempt against the sacred institutions of the church*, of which I am told this is one.

Heaven forbid, that the bench of Bishops should sit tamely by, and behold *a gross infraction* of the laws of God and of Christianity!—But, if my argument be right, is

H

this

this such an attempt?—Is it not rather the direct contrary?—For my part, I conceive it to be a *pious attempt to secure man's happiness*, against the influence of the miserable relicts of the most damnable system that ever prevailed—the policy of the Church of Rome.

Are we to suppose their Lordships would refuse to pronounce the purer doctrine of religion, and to rescue the minds of Christians from the amazement of superstition—because the prejudices are antient, and the marriage-table is covered with the dust of antiquity?—Alas! if it were possible, that such opinions could prevail,—how would I pity the *lamentable bigotry* of the eighteenth century!—What a miserable contrast would it afford with *the bright genius* of the sixteenth!—If antient prejudices and received opinions had always destroyed the *impetus* of argument,—this country, like the rest of Europe, had long ago been enslaved—the Reformation—the brilliant Reformation, *would now have been celebrated as a bold and glorious attempt only*—and lamented by the pitying heart of liberality as an *unfortunate miscarriage*.

But

But how *is* it celebrated?—As the noblest struggle, gilded with the happiest success, in the history of Christianity!—How was it produced?—By surmounting prejudices—reasoning by sound logic, and concluding with free-thinking—and giving full rein and fair play to human understanding.—Shall it then now be checked?—’Till I *behold* the present attempt frustrated by prelatical bigotry, I will not suspect it.—Proceed then, my friend, to execute your intention,—may success attend it!—and if these loose and imperfect thoughts of a young mind, sincerely, though diffidently communicated, can in the least degree give furtherance to your plan, they are at your service, to be employed at pleasure;—they cannot afford the light you wish:—but if they are the cause of others thinking of the subject, with more accuracy, and judging of it with more ability—they in some,—(ay, almost in the whole measure) answer your end—of these letters, say with the philosopher, *Præparatione opus est, ut res per gradus maturascat.*

The law is in celebration—As the noble
 struggle ended with the happy success
 the history of Christianity—How was it
 produced—By an mountain of riches—
 being by hand logic and concluding with
 the final day and giving toll and the
 play to human understanding—shall it then
 new to be seen—Till I find the
 and the of the world by practical dignity
 I will not find it—I record from my hand
 to extend your attention—may focus stand
 to find a little look and insight thoughts
 of a page and, finally, though this may
 common sense, can in the best degree give
 to the world to your plan, they are as your
 to be to the world of the future—they
 engage and the light of the world—they
 and the end of the world of the future
 of with the world—of and judging of it
 with more ability—they to the world, as
 that in the world, they answer your end—
 of this world with the world of the future
 a new world of the world of the future

THE END