I have carefully read the judgments in the court below, and think that the reasons given by the Judge Ordinary and Mr. Justice Williams greatly outweigh the observations made by Mr. Baron Bramwell, and that the Court did well to dismiss the petition: I must therefore advise your Lordships that this appeal should be dismissed. This being a case *ex parte*, nothing is to be said about costs.

Lord Chelmsford, referring to what he had said in the course of the argument, concurred with the Lord Chancellor.

Lord Kingsdown was of the same opinion.

Order appealed from affirmed, and appeal dismissed.—Lords' Journals, 11 April 1861.

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[192] MARIA SMITH, and Another,—*Appellants;* GEORGE DURANT, and Others,—*Respondents* [April 18, 1861].

[Mews' Dig. i. 352. S.C. 31 L.J.Ch. 383.]

Practice—Dismissal of Appeal.

When an Appellant does not appear to support his appeal, it may, on the application of the Respondent, be dismissed, with costs.

On this case being called on—

Mr. Roundell Palmer stated, that he appeared for some of the numerous Respondents, others being represented by Mr. Selwyn. The Appellants had not lodged their case. An application had, therefore, been made by the Respondents to the Appeal Committee, and the Respondents had been allowed the option whether they would have the case heard *ex parte*, or would allow the appeal to be merely dismissed for non-prosecution. In order to prevent any future proceeding, the Respondents elected to have it heard *ex parte*, and if their Lordships desired it, he was ready to state the nature of the case (see *Jones* v. *Cannock*, 3 H.L. Cas. 700). And at all events he was by the practice entitled to ask their Lordships to dismiss the appeal, with costs, *Martin* v. *D'Arcy* (*id.* 698).

The Lords directed the Appellants to be formally called at the bar.

This was done; no one appeared to answer.

The Lord Chancellor (Lord Campbell).—It the appeal was simply dismissed for non-prosecution, the Appellant might apply to bring it forward again; but if the Respondents appear, and ask for judgment, that cannot be done.

Mr. Palmer.—That is the course which the Respondents now adopt; it is the duty of the Appellant to show error in the court below.

The Lord Chancellor—The precedents seem to be quite conclusive. There was a similar case in 1848 (*Wood* v. *Young*, Lords' Journals, 26 June 1848).

Appeal dismissed, with costs. Lords' Journals, 18 April 1861.

[193] JAMES W. BROOK and Others,—*Appellants;* CHARLES BROOK and Oth and the ATTORNEY-GENERAL,—*Respondents* [Feb. 25, 26, 28, March 1, 18, 1861].

[Mews' Dig. iii. 478; vii. 626, 630, 633, 635, 649; viii. 216. S.C. 7 Jur. N.S. 422; 4 L.T. 93; 9 W.R. 461; 5 Rul. Cas. 783; and, below, 27 L.J.Ch. 401; 3 Sm. and G. 481. Considered and acted upon, as to conflict of laws, in *In re Alison's Trusts*, 1874, 31 L.T. 639; and *Sottomayor* v. *De Barros*, 1877, 2 P.D. 87; 3 P.D. 6. As to marriage with deceased wife's sister, adopted in *Howarth* v. *Mills*, 1866, L.R. 2 Eq. 392; and *Pawson* v. *Brown*, 1879, 13 Ch.D. 205. As to ex-territorial application of English Acts, cf. *Whicker* v. *Hume*, 7 H.L.C. 134, and note thereto.]

Marriage—Conflict. of Laws—Personal Disability—Prohibited Degrees—Statutes 28 H. 8, c. 7, and c. 16—32 H. 8, c. 38—5 and 6 W. 4, c. 54.

The forms of entering into the contract of marriage are regulated by the *lex loci contractus*, the essentials of the contract depend upon the *lex domicilii*. If the latter are contrary to the law of the domicile, the marriage (though duly solemnized elsewhere) is there void.

The Marriage Act, 26 Geo. 2, c. 33, only applies to the forms of certain marriages celebrated in this country; it does not touch the essentials of the contract. It is, therefore, only territorial.

The 5 and 6 Will. 4, c. 54, affects all domiciled English subjects wherever they may be transiently resident. It does not affect them when actually domiciled in British Colonies acquired by conquest, where a different law exists.

The marriage of a man with the sister of his deceased wife is declared by the 28 Hen. 8, c. 7, to be contrary to God's law; and though that statute itself is repealed, its declarations are renewed in the 28 Hen. 8, c. 16, and 32 Hen. 8, c. 38, which are in force.

Being forbidden by our law, such a marriage contracted by British subjects, temporarily resident abroad, but really domiciled in this country, though valid in the foreign country, and duly celebrated according to the forms required by the law of that country, is absolutely void here.

A. and B., British subjects, intermarried; B. died; A. and C. (the lawful sister of B.), being both at the time lawfully domiciled British subjects, went abroad to Denmark, where, by the law, the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of Denmark, married:

Held, that under the provisions of the 5 and 6 Will. 4, c. 54, the marriage in Denmark was void.

William Leigh Brook, of Meltham Hall, in the county of York, married in May 1840, at the parish church of Huddersfield, in Yorkshire, Charlotte Armitage. There were two children of that marriage, Clara Jane Brook and James William Brook. In October 1847, Mrs. **[194]** Brook died. On the 7th June 1850, William Leigh Brook was duly, according to the laws of Denmark, married at the Lutheran church at Wandsbeck, near Altona, in Denmark, to Emily Armitage, the lawful sister of his deceased wife. At the time of this Danish marriage, Mr. Brook and Miss Emily Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. There were three children of this union, Charles Armitage Brook, Charlotte Amelia Brook, and Sarah Helen Brook. On the 17th September 1855, Mrs. Emily, the second wife of Mr. Brook, died at Frankfort of cholera, and two days afterwards Mr. Brook himself died of the same complaint at Cologne, leaving all the five children him surviving.

Mr. Brook, in the early part of the day on which he died, executed a will, by which he disposed of his property among his five children, and appointed his brother Charles Brook, and his two brothers-in-law, John and Edward Armitage, his executors and trustees. In consequence of the state of his property and of some pending purchases of land, and afterwards on account of the death of the infant Charles Armitage Brook, it became necessary to institute an administration suit, and a bill was filed for this purpose in March 1856, which by order of the Court, was amended, and in July 1856, a supplemental bill was filed, making the Attorney General a party to the suit.

The causes came on to be heard in March 1857, before Vice Chancellor Stuart, when certain inquiries were ordered, and in June 1857, the chief clerk certified (among others) the facts above stated, and the certificate raised the question of the validity of the marriage at Wandsbeck. Evidence was taken on this subject, and several declara-**[195]**-tions were made by officials and by advocates in Holstein, that the marriage of a widower with the sister of his deceased wife was perfectly lawful and valid in Denmark to all intents and purposes whatever.

The cause coming on for hearing, on farther directions, Vice-Chancellor Stuart called in the assistance of Mr. Justice Creswell, who, on the 4th December 1857, declared his opinion that the marriage at Wandsbeck, was by the law of England

invalid. Vice-Chancellor Stuart on the 17th April 1858, pronounced judgment, fully adopting this opinion, and decreed accordingly. This appeal was then brought.

Sir F. Kelly and Mr. Malins (Mr. G. Lake Russell, Mr. Cleasby, and Mr. Freeman with them) for the Appellants.—It is a settled rule of international law, that every contract must depend for its validity on the law of the country in which it is made. Marriage is a contract which falls within this rule. Being valid where it is made, its validity must be accepted throughout the world. There are two exceptions to this general principle: First, where the contract is *malum in se*. Secondly where, though valid in the country where made, it is by express law prohibited in another country, and all the subjects of this latter country are forbidden any where and under any circumstances to enter into such a contract (Story, Confl. of L., ss. 82, 113, 114, 117, 123). The question here will depend on this second exception.

The English law has acknowledged marriages which would have been invalid in this country, to be valid if duly celebrated elsewhere. Marriages by words of present acknowledgment only are instances of this, *Compton* **[196]** v. *Bearcroft* (Buller's N.P. 113, 114, See 2 Hagg. Cons. Rep. 444*n*), so as even to entitle the wife to dower here. *Ilderton* v. *Ilderton* (2 H. Bl. 145), *Ruding* v. *Smith* (2 Hagg. Cons. Rep. 371), *Scrimshire* v. *Scrimshire* (*id.* 395), in which last case the rule was distinctly declared, though the alleged marriage there was held to be void as being contrary to the law of the foreign country, as well as of the domicile. Gayll (Lib. 2, Obs. 36), is there quoted (2 Hagg. Cons. Rep. 408), for the principle that "*constat unumquemque subjici jurisdictioni judicis, in eo loco in quo contraxit*," and that principle was acted on in *Harford* v. *Morris* (*id.* 423), *Butler* v. *Freeman* (Ambl. 303), and *Roach* v. *Garvan* (1 Ves. 157), and the converse of it, namely, that the marriages of all subjects celebrated abroad not in accordance with the *lex loci* are invalid, was asserted in *Middleton* v. *Janverin* (2 Hagg. Cons. Rep. 437).

Personal laws have no extra territorial application. Paul Voet, and other authorities, all of which are summed up by Story (Confl. of Laws, s. 7, 20-22). A contract valid where made, and capable of being performed anywhere, may be enforced in a country where it could not be legally made, as in the case of the usury laws, *Harvey* v. *Archbold* (3 Barn. and Cres. 626), *Mill* v. *Roberts* (3 Esp. 163). It is admitted that this principle is not recognised as to marriage by the law of France, but then the law of France on that matter is an exception to all laws. The Sussex Peerage case (11 Clark and Fin. 85), is not an exception to this rule, for it was held there that the words of the statute expressly attached on the persons of a particular family, and the Duke of Sussex was one of that family. But for that peculiarity, if the marriage had been proved **[197]** to be valid by the law of Rome, where it was celebrated, it would have been valid here; and so it was held in *Sarft* v. *Kelly* (3 Knapp. P.C. Cas. 257), where no such personal disability existed. The case of *Birtwhistle* v. *Vardill* (2 Clark and Fin. 671; 7 *id.* 895), and the recent case of *Fenton* v. *Livingstone* (3 McQueen Sc. Ap. Rep. 497), may both be put aside, as they relate rather to the tenure of property than to the law of marriage. In the former, especially, the marriage was undoubtedly valid, and the only question was as to its retroactive effect upon landed property in England. If this marriage should be pronounced invalid here, though validly celebrated in Denmark, it must be on the ground that such marriages are invalid as contrary to the law of God, but that is not expressly asserted by any statute in this country, the only statute which did declare it, 28 Hen. 8, c. 7, having been repealed.

In *Sherwood* v. *Ray* (1 Curt. 173; 1 Moo. P.C.C. 355) it was considered that such a marriage, though by the canon of 1603 declared to be prohibited by the law of God, was not to be so treated by the principles of the law of England. And in *Westby* v. *Westby* (2 Dru. and War. 502) Lord Chancellor Sugden sustained a family arrangement, the very object of which had been to compromise family differences by not disturbing a marriage of this sort, which he would not have done had such a marriage been contrary to God's law.

If it is held here to be contrary to God's law, that would make a marriage between two Danish subjects invalid here when they came to reside in this country, though it had been perfectly valid in their own country. No such monstrous consequence can be permitted. It cannot be asserted here that such marriages are contrary to **[198]** the law of God, for those which took place before this last Act

are by that very Act declared valid, and it cannot be supposed that the Legislature would thus have recognised that which it intended to declare to be contrary to God's law. They can only be treated, supposing them to be within the provision of the 5 and 6 Will. 4, c. 54, as contrary to the law established by the special provisions of that statute. [Lord St. Leonards: Assuming that to be so, what then?] Then the statute cannot affect marriages made abroad and valid where made, for a statute can have no such extra-territorial application. That principle has been acted on in many cases in our own Courts, and more frequently still in the States of North America, where the variety of laws is great, and the occasions of conflict between them frequent. In *Greenwood* v. *Curtis* (6 Mass. Rep. 358), a balance of account was in Massachusetts allowed to be recovered, though the account consisted almost entirely of the value of negro slaves; the contract itself being made in a State where such a contract was legal, though wholly illegal in the State of Massachusetts. In the same manner, in *Medway* v. *Needham* (16 Mass. Rep. 157), a marriage between a mulatto and a white woman made in Rhode Island, where it was lawful, was in Massachusetts treated as valid, though it was not lawful there; and the broad proposition laid down was, that a marriage valid in the country where it is entered into is valid in any other country, and that too even though it should appear that the parties went into the country of the contract with a view to evade the laws of their own country. So in *Sutton* v. *Warren* (10 Metc. Mass. Rep. 451), it was held that a marriage valid where it is contracted was valid in the State of Massachusetts, though not valid by the laws of **[199]** that State, if it was not incestuous by the laws of nature. In *Wightman* v. *Wightman* (4 Johnst. Cas. in Ch. 343), an American court considered whether, there being no statute regulating marriages within the prohibited degrees, or defining what those degrees were, the Court would declare marriages void between persons in the other degrees of collateral sanguinity or affinity.

In *Simonin* v. *Mallac*, Sir Cresswell Cresswell (29 Law Jour. Prob. Cas. 97) acted on a principle the opposite of which he adopted in the present case. A marriage between two French subjects had been celebrated in this country, in a manner valid here; it was invalid by the law of France, and had been so declared by a competent Court in that country; yet even after that decision, the learned Judge dismissed a suit for nullity instituted here. If that was a correct decision, because the marriage was good in the country where it was celebrated, it ought to govern the present.

The operation of the statute 5 and 6 Will. 4, c. 54, cannot be extended to other countries. It is a settled principle of law that where a statute purports to operate on contracts or any other acts, so as to avoid them, it must, by express terms, have its operation extended to the colonies and to foreign countries, or that operation will be limited to the United Kingdom. There are no such express terms in this statute; and, on the contrary, one part of the United Kingdom itself, namely, Scotland, is distinctly excepted from its operation. There is, indeed, the expression "All marriages," but that cannot mean all marriages in the world; then does it mean all marriages of British subjects? In order to have that meaning, the expression should have been used—it cannot be implied,—and certainly not implied to the extent **[200]** of affecting all British subjects all over the world. It is clear that it cannot apply to the colonies without their being directly named.

[Lord St. Leonards.—May not the law affect the colonies without their being named, if it is fitted to them?]

No; Clark on Colonial Law (p. 23 *et seq.*). Nor can it affect British subjects in foreign countries; *Santos* v. *Illidge* (29 Law Jour. C.P. 348), where the selling, by British subjects, of slaves in Brazil was held in the Exchequer Chamber to be legal, even though the purchasing of them there might be a felony in a British subject; and there Mr. Baron Bramwell expressly went on the principle that legislation must be confined to the country of the legislator, a principle which had been previously declared in the most express terms in the opinion declared to this House by Lord Chief Baron Pollock in the case of *Jefferys* v. *Boosey* (4 H.L. Cas. 938). And, in point of fact, it would be impossible to apply this law to the colonies, for in them we have millions of Roman Catholic fellow subjects, who think such marriages perfectly good. Even in the conquered colonies all the law of the conquering state does not, as of course, prevail. Such a marriage would therefore be good in some of our

own conquered colonies, for the French, Spanish, or Dutch laws, which permitted it, still prevail there. The prohibition of it which existed in the English law, is an exception to the law of the rest of Europe, unless it may be that of the little Pays de Vaud in Switzerland. It cannot be contended that, without naming our colonies or British subjects in foreign countries, the legislature meant that such a marriage between individual British subjects, wherever contracted, should be invalid. Without such **[201]** expression it can have no such effect, Clark on Colonial Law (p. 16 and *n.*). If it had been intended to apply to them, nothing was easier than to say so; the absence of any such declaration is conclusive to show that no such intention was entertained.

The Act is nothing more than a Local Act, with a local exception. It forbids these marriages in future in England, but it excepts those which had already been contracted, and it is to have no operation in Scotland. If any such marriage between English persons had, before the passing of this Act, taken place in Scotland, where it is not valid, this Act would, therefore, have had the effect of rendering such marriage valid here, for it makes valid all such marriages had previously to the passing of the Act. The only object of the Act was declared by Lord Chancellor Lyndhurst, on the Sussex Peerage case (11 Clark and Fin. 137), to be to declare that void which was before only voidable, and so get rid of a doubt capable of affecting most prejudicially parties interested in the question. Without, therefore, disputing the decision in *The Queen* v. *Chadwick* (11 Q.B. Rep. 173), it is contended that that decision cannot affect marriages which have taken place abroad. Dr. Radcliff, in the Ecclesiastical Court, in Dublin, held that an Irish statute similar to this, the 9 Geo. 2, c. 11, did not follow Irish persons so as to invalidate a minor's marriage duly contracted in Scotland, according to Scotch forms (*Steele* v. *Braddell*, Milw. Ecc. (Ir.) Rep. 1).

The Attorney-General (Sir R. Bethell), and Mr. Wickens, for the Crown.—This is purely a question of English law, and arises in determining the right of succession to real and personal **[202]** estate, the form and validity of the contract of marriage deciding the title by heirship. *Birtwhistle* v. *Vardill* (7 Clark and Fin. 895) is, therefore, expressly applicable to this case. There are here five propositions. First, the *lex loci* determines the form of the contract. Secondly, the capacity of the parties to contract is determined by the *lex loci* of their domicile. Thirdly, that even supposing the contract to have been duly solemnised according to the law of the forum of its constitution, and even supposing the parties to have the capacity to contract, yet, if there is anything in the contract which is prohibited by English law, or is at variance with the institutions and policy of the English law the contract cannot be accepted as valid in an English court of justice. These are the general principles that must be applied to the decision of this case. The particular principles to be added are these. Fourth, that by the Common and Statute Law of England all subjects, if within the prohibited degrees of affinity, are incapable of marriage, and a contract of marriage in disregard of that law is void. Fifthly, there is a marked distinction between the present case and that of a Scotch marriage, which is admitted in the English courts as valid, because the parties to such a marriage are capable of marrying, and there is no incapacity created or declared by the English Marriage Act, 26 Geo. 2, c. 33, which does not prevent the marriage of minors, but only relates to the observance of certain forms in their marriages: forms that of course cannot be required out of England.

There is nothing in the comity of nations, or the *jus gentium*, which affects the case, *Warrender* v. *Warrender* (Per Lord Brougham, 2 Clark and Fin. 529, 531). That case shows, that the law of the domicile **[203]** governs the marriage; for there, though the marriage, as to the solemnisation, was English the domicile was Scotch, and the marriage was treated as a Scotch marriage. The law of all countries merely adopts the *lex loci contractus* with relation to the solemnities of the marriage, not the capacity of the parties. The statute 5 and 6 Will. 4, c. 54, is of universal application to English subjects as its expressions are universal in their form. The words are, " all marriages," not " all marriages solemnised in England." Scotland is expressly exempted from its operation, because the same law already existed there. The sort of marriage thus forbidden by statute is, in *Harris* v. *Hicks* (2 Salk. 547), described as incestuous, so that there does exist a legal declaration as to the nature of such a marriage, even if the 28 Hen. 8, c. 7, should be held to have

no authority. But though that statute was repealed, its declarations of the forbidden degrees are, in fact, incorporated into the 32 Hen. 8, c. 38, which expressly adopts the Levitical degrees.

The parties cannot be allowed to evade the law of their domicile by fraudulently going into another country to do that which the law of their own country has forbidden. Huberus (De Confl. Leg. bk. I. tit. 3, s. 8) puts the very case, and says, "*Brabantus uxore ducta, dispensatione Pontificis, in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur;*" and he looks on these personal incapacities as tied round the necks of the subjects. As to this question of personal capacity Story (Confl. of Laws, s. 50, *et seq.*) does not controvert the doctrine, which he **[204]** admits to be laid down in the same manner by Froland, Voet, Pothier, and other writers.

It has been assumed throughout this argument that this marriage would be valid in Denmark. It may be doubtful whether that is so; but, at all events, it is not certain that, though the law of Denmark holds such a marriage among its own subjects to be valid, it would not hold it to be invalid as contracted between persons who were the subjects of a country where it was forbidden, and who merely came to Denmark to evade their own law.

Marriages within the prohibited degrees were, *Hill* v. *Good* (Vaugh. Rep. 302), void by the common law of England, which was founded upon God's law; but when the ecclesiastical courts attempted to enforce that law to the extent of declaring, after the death of the parents, the children to be illegitimate, the common law interfered to prevent that consequence, and hence grew up the distinction between marriages void and voidable. The latter word is not quite accurate. It should have been said, that the marriage was void, but that the law would not allow it to be so treated after the death of one of the parties. The ecclesiastical jurisdiction, however, continued with regard to the punishment of the survivor, as *Harris* v. *Hicks* (2 Salk. 547) expressly declares. In such marriages, the persons are *inhabiles*. If so, the law of the place of celebration cannot make them *habiles*, for that law affects only the validity of the forms of celebration; and a marriage may be good in the place of celebration and yet be bad in the place of domicile, and that was the case in *Simonin* v. *Mallac* (29 Law Jour. Prob. and M. 97), which, therefore, is not inconsistent with the present. Where the marriage is between two **[205]** persons who are not domiciled abroad, they cannot set up the *lex loci contractus*, except for the forms of celebration, for going abroad *animus redeundi*, they carry the English law with them. In *Fenton* v. *Livingstone* (3 Macq. Sc. App. Rep. 497) this House left it to the Scotch courts to declare whether the marriage there contracted was incestuous by the law of Scotland.

It is impossible to use language stronger than that which is employed in this statute. It leaves the law, as to capacity, just as before, but it declares that to be absolutely void which had been before voidable only during the life of both the parties.

The decision in *Steele* v. *Braddell* (Milw. Ecc. Rep. (Ir.) 1) does not affect the present, for there the case failed because proceedings had not been instituted in the time limited by the statute.

Sir F. Kelly, in reply, referred to *Swift* v. *Kelly* (3 Knapp, P.C. Cas. 257) as a case in which a marriage had been sustained solely because it was good by the law of the place where it was celebrated.

The Lord Chancellor (Lord Campbell) (March 18).—My Lords, the question which your Lordships are called upon to consider upon the present appeal is, whether the marriage celebrated on the 9th June 1850 in the duchy of Holstein, in the kingdom of Denmark, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, they being British subjects then domiciled in England, and contemplating England as their place of matrimonial residence, is to be considered valid in England, marriage between a widower and the sister of his deceased wife being permitted by the law of Denmark?

[206] I am of opinion that this depends upon the question whether such a marriage would have been held illegal, and might have been set aside in a suit

commenced in England in the lifetime of the parties before the passing of statute 5 and 6 Will. 4. c. 54, commonly called Lord Lyndhurst's Act.

I quite agree with what was said by my noble and learned friend during the argument on the Sussex peerage, that this Act was not brought in to prohibit a man from marrying his former wife's sister, and that it does not render any marriage illegal in England which was not illegal before. The object of the second section was to remedy a defect in our procedure, according to which marriages illegal, as being within the prohibited degrees either of affinity or consanguinity, however contrary to law, human and divine, and however shocking to the universal feelings of Christians, could not be questioned after the death of either party. But no marriage that was before lawful was prohibited by the Act; and I am of opinion that no marriage can now be considered void under it, which, before the Act, might not, in the lifetime of the parties, have been avoided and set aside as illegal.

There can be no doubt that before Lord Lyndhurst's Act passed, a marriage between a widower and the sister of a deceased wife, if celebrated in England, was unlawful, and in the lifetime of the parties could have been annulled. Such a marriage was expressly prohibited by the legislature of this country, and was prohibited expressly on the ground that it was "contrary to God's law." Sitting here, judicially, we are not at liberty to consider whether such a marriage is or is not "contrary to God's law," nor whether it is expedient or inexpedient.

Before the Reformation the degrees of relationship by **[207]** consanguinity and affinity, within which marriage was forbidden were almost indefinitely multiplied; but the prohibition might have been dispensed with by the Pope, or those who represented him. At the Reformation, the prohibited degrees were confined within the limits supposed to be expressly defined by Holy Scripture, and all dispensations were abolished. The prohibited degrees were those within which intercourse between the sexes was supposed to be forbidden as incestuous, and no distinction was made between relationship by blood or by affinity. The marriage of a man with a sister of his deceased wife is expressly within this category. *Hill* v. *Good* (Vaugh. 302) and *Reg.* v. *Chadwick* (11 Q.B. Rep. 173, 205) are solemn decisions that such a marriage was illegal; and if celebrated in England such a marriage unquestionably would now be void.

Indeed, this is not denied on the part of the Appellants. They rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted.

There can be no doubt of the general rule, that "a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the mar-**[208]**-riage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.

This qualification upon the rule that "a marriage valid where celebrated is good everywhere," is to be found in the writings of many eminent jurists who have discussed the subject.

I will give one quotation from Huberus de Conflictu Legum, Bk. 1, tit. 3, s. 2, "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur.*" Then he gives "marriage" as the illustration: "*Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione, prejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit,*" Id. sec. 8. The same great jurist observes: "*Non ita praecise respiciendus est locus in quo contractus est*

initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt." Id. s. 10.

Mr. Justice Story, in his valuable treatise on "the Conflict of Laws," while he admits it to be the "rule that a marriage valid where celebrated is good everywhere," says (S. 113 *a.*) there are exceptions; those of marriages involving **[209]** polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country, he adds (S. 114), "in respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognise polygamy or incestuous marriages; but when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous." The conclusion of this sentence was strongly relied upon by Sir FitzRoy Kelly, who alleged that many in England approve of marriage between a widower and the sister of his deceased wife; and that such marriages are permitted in Protestant states on the Continent of Europe and in most of the States in America.

Sitting here as a judge to declare and enforce the law of England as fixed by King, Lords, and Commons, the supreme power of this realm, I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion of the majority of my fellow citizens at home, or to try to find out the opinion of all Christendom. I can as a judge only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of foreign nations? Is my interpretation of these laws to vary with the variation of opinion in foreign countries? Change of opinion on any great question, at home or abroad, may be **[210]** a good reason for the legislature changing the law, but can be no reason for judges to vary their interpretation of the law.

Indeed, as Story allows marriages positively prohibited by the public law of a country, from motives of policy, to form an exception to the general rule as to the validity of marriage, he could hardly mean his qualification to apply to a country like England, in which the limits of marriages to be considered incestuous are exactly defined by public law.

That the Parliament of England in framing the prohibited degrees within which marriages were forbidden, believed and intimated the opinion, that all such marriages were incestuous and contrary to God's word I cannot doubt. All the degrees prohibited are brought into one category, and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before English tribunals, till the law is altered, they are to be treated alike.

An attempt has been made to prove that a marriage between a man and the sister of his deceased wife is declared by Lord Lyndhurst's Act to be no longer incestuous. But the enactment relied upon applies equally to all marriages within the prohibited degrees of affinity, and on the same reasoning would give validity to a marriage between a step-father and his step-daughter, or a step-son and his step-mother, which would be little less revolting than a marriage between parties nearly related by blood.

The general principles of jurisprudence which I have expounded have uniformly been acted upon by English tribunals. Thus, in the great case of *Hill* v. *Good* (Vaugh. Rep. 302), **[211]** Lord Chief Justice Vaughan and his brother Judges of the Court of Common Pleas, held, that "When an Act of Parliament declares a marriage to be against God's law, it must be admitted in all Courts and proceedings of the kingdom to be so."

In *Harford* v. *Morris* (2 Hagg. Con. Rep. 423, 434) the great judge who presided clearly indicates his opinion, that marriages celebrated abroad are only to be held valid in England, if they are according to the law of the country where they are

celebrated, and if they are not contrary to the law of England. He adds, "I do not say that foreign laws cannot be received in this court, in cases where the courts of that country had a jurisdiction. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the court to determine by those foreign laws."

I will only give another example, the case of *Warrender* v. *Warrender* (2 Clark and Fin. 488), in which I had the honour to be counsel at your Lordships' bar. Sir George Warrender, born and domiciled in Scotland, married an Englishwoman in England according to the rites and ceremonies of the church of England; but instead of changing his domicile, he meant that his matrimonial residence should be in Scotland, where he had large landed estates, on which his wife's jointure was charged. Having lived a short time in Scotland, they separated. Sir George, continuing domiciled in Scotland, commenced a suit against her in the Court of Session, for a dissolution of the marriage on the ground of adultery alleged to have been committed by her on the continent of Europe. It was objected that this being a marriage celebrated in England, a country in which by the then existing law, marriage was indissoluble, the Scotch court had no jurisdiction to dis-**[212]**-solve the marriage, and Lolly's case was relied upon, in which a domiciled Englishman having been married in England, and while still domiciled in England, having been divorced by decree of the Court of Session in Scotland, and having afterwards married a second wife in England, his first wife being still alive, he was convicted of bigamy in England, and held by all the judges to have been rightly convicted, because the sentence of the Scotch court dissolving his first marriage was a nullity. But your Lordships unanimously held that as Sir George Warrender at the time of his marriage was a domiciled Scotchman, and Scotland was to be the conjugal residence of the married couple, although the law of England where the marriage was celebrated, regulated the ceremonials of entering into the contract, the essentials of the contract were to be regulated by the law of Scotland, in which the husband was domiciled, and that although by the law of England, marriage was indissoluble, yet as by the law of Scotland, the tie of marriage might be judicially dissolved for the adultery of the wife, the suit was properly constituted, and the Court of Session had authority to dissolve the marriage.

It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native born English subjects, who had abandoned their English domicile, and were domiciled in **[213]** Denmark. But I am by no means prepared to say, that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

Sir FitzRoy Kelly argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of Danish subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages, if examined, would be held valid in all English courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated.

I may here mention another argument of the same sort brought forward by Sir FitzRoy Kelly, that our courts have not jurisdiction to examine the validity of marriages celebrated abroad according to the law of the country of celebration,

because, as he says, the Ecclesiastical Courts, which had exclusive jurisdiction over marriage, must have treated them as valid. But I do not see anything to have prevented the Ecclesiastical Court from examining and deciding this question. Suppose in a probate suit the validity of a marriage had been denied, its validity must have been determined by the Ecclesiastical Court, **[214]** according to the established principles of jurisprudence, whether it was celebrated at home or abroad.

Sir FitzRoy Kelly farther argued with great force, that both Sir Cresswell Cresswell and Vice Chancellor Stuart have laid down that Lord Lyndhurst's Act binds all English subjects wherever they may be, and prevents the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. I am bound to say, that in my opinion this is incorrect, and that Lord Lyndhurst's Act would not affect the law of marriage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony. I again repeat that it was not meant by Lord Lyndhurst's Act to introduce any new prohibition of marriage in any part of the world. For this reason, I do not rely on the Sussex Peerage Case as an authority in point, although much reliance has been placed upon it; my opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act on all Englishmen, and carried about with them all over the world; but on the ground of the marriage being prohibited in England as "contrary to God's Law."

I will now examine the authorities relied upon by the counsel for the Appellants. They bring forward nothing from the writings of jurists except the general rule, that contracts are to be construed according to the *lex loci contractus*, and the saying of Story with regard to a marriage being contrary to the precepts of the Christian religion, upon which I have already commented.

But there are various decisions which they bring forward as conclusive in their favour. They begin with *Compton* v. *Bearcroft*, and the class of cases in which it was held that Gretna Green marriages were valid in Eng-**[215]**-land, notwithstanding Lord Hardwicke's Marriage Act, 26 Geo. 2, c. 33. In observing upon them, I do not lay any stress on the proviso in this Act that it should not extend to marriages in Scotland or beyond the seas; this being only an intimation of what might otherwise have been inferred, that its direct operation should be confined to England, and that marriages in Scotland and beyond the seas should continue to be viewed according to the law of Scotland and countries beyond the seas, as if the act had not passed. But I do lay very great stress on the consideration that Lord Hardwicke's Act only regulated banns and licenses, and the formalities by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in England, and the whole frame of it shows it was only territorial. The nullifying clauses about banns and licenses can only apply to marriages celebrated in England. In this class of cases the contested marriage could only be challenged for want of banns or license in the prescribed form. These formalities being observed, the marriages would all have been unimpeachable. But the marriage we have to decide upon has been declared by the legislature to be "contrary to God's law," and on that ground it is absolutely prohibited. Here I may properly introduce the words of Mr. Justice Coleridge in *Reg.* v. *Chadwick* (11 Q.B. Rep. 238), "We are not on this occasion inquiring what God's law or what the Levitical law is. If the Parliament of that day [Hen. 8] legislated on a misinterpretation of God's law we are bound to act upon the statute which they have passed."

[216] The Appellant's counsel next produced a new authority, the very learned and lucid judgment of Dr. Radcliff, in *Steele* v. *Braddell* (Milw. Ecc. Rep. (Ir.) 1). The Irish statute, 9 Geo. 2, c. 11, enacts, "that all marriages and matrimonial contracts, when either of the parties is under the age of twenty-one, had without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes; and that it shall be lawful for the father or guardian to commence a suit in the proper Ecclesiastical Court in order to annul the marriage." A young

gentleman, a native of Ireland, and domiciled there, went while a minor into Scotland, and there married a Scottish young lady without the consent of his father or guardian. A suit was brought by his guardian in an Ecclesiastical Court in Ireland, in which Dr. Radcliff presided, to annul the marriage on the ground that this statute created a personal incapacity in minors, subjects of Ireland, to contract marriage, in whatever country, without the consent of father or guardian. But the learned Judge said, "I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it, on the principle that parties endeavoured to evade it." And after an elaborate view of the authorities upon the subject, he decided that both parties being of the age of consent, and the marriage being valid by the law of Scotland, it could not be impeached in the courts of the country in which the husband was domiciled, and he dismissed the suit. But this was a marriage between parties who, with the consent of parents and guardians, might have contracted a valid marriage according to the law of the country of the husband's domicile, and the mode of celebrating the marriage was to be **[217]** according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of Ireland as "contrary to the word of God," undoubtedly the marriage would have been dissolved. Dr. Radcliff expressly says, "it cannot be disputed that every state has the right and the power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments and not according to the laws of the country wherein it was formed."

Another new case was brought forward, decided very recently by Sir Cresswell Cresswell, *Simonin* v. *Mallac* (29 Law J., Probate and Mat., 97). This was a petition by Valerie Simonin for a declaration of nullity of marriage. The Petitioner alleged that a pretended ceremony of marriage was had between the Petitioner and Leon Mallac of Paris, in the parish church of St. Martin's-in-the-Fields; that about two days afterwards the parties returned to Paris, but did not cohabit, and the marriage was never consummated; that the pretended marriage was in contradiction to and in evasion of the Code Napoleon; that the parties were natives of and domiciled in France, and that subsequently to their return to France the Civil Tribunal of the department of the Seine had, at the suit of Leon Mallac, declared the said pretended marriage to be null and void. Leon Mallac was served at Naples with a citation and a copy of the petition, but did not appear. Proof was given of the material allegations of the petition, and that the parties coming to London to avoid the French law, which required the consent of parents or guardians to their union, were married by license in the parish church of St. Martin's-in-the-Fields. Sir Cresswell Cresswell, after the **[218]** case had been learnedly argued on both sides, discharged the petition. But was there anything here inconsistent with the opinion which the same learned Judge delivered as assessor to Vice-Chancellor Stuart in *Brook* v. *Brook?* Nothing whatever; for the objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoleon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable. The case, therefore, comes into the same category as *Compton* v. *Bearcroft* and *Steele* v. *Braddell* [Milw. E.R. (Ir.) 1], decided by Dr. Radcliff. None of these cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled.

Some American decisions, cited on behalf of the Appellants, remain to be noticed. In *Greenwood* v. *Curtis* (6 Mass. Rep. 358), the general doctrine was acted upon that a contract, valid in a foreign state, may be enforced in a state in which it would not be valid, but with this important qualification, "unless the enforcing of it should hold out a bad example to the citizens of the state in which it is to be enforced." Now the legislature of England, whether wisely or not, considers the marriage of a man with the sister of his deceased wife "contrary to God's law," and of bad example.

Medway v. *Needham* (16 Mass. Rep. 157), according to the marginal note, decides

nothing which the counsel for the Respon-[219]-dents need controvert. "A marriage which is good by the laws of the country where it is entered into, is valid in any other country; and although it should appear that the parties went into another state to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will, nevertheless, be valid in the country in which the parties live; *but this principle will not extend to legalize incestuous marriages so contracted.*" This judgment was given in the year 1819. As in England, so in America, some very important social questions have arisen on cases respecting the settlement of the poor. Whether the inhabitants of the district of Medway, or the inhabitants of the district of Needham, were bound to maintain a pauper, depended upon the validity of a marriage between a Mulatto and a white woman. They were residing in the province of Massachusetts at the time of the supposed marriage, which was prior to the year 1770. As the laws of the province at that time prohibited all such marriages, they went into the neighbouring province of Rhode Island, and were there married according to the laws of that province. They then returned to Massachusetts. Chief Justice Parker, held that the marriage was there to be considered valid, and, so far, the case is an authority for the Appellants. But I cannot think that it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and in the country of domicile were different; and he took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the [220] distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognised as lawful. Indeed Chief Justice Parker expressly allowed that his doctrine would not extend to cases in which the prohibition was grounded on religious considerations, saying, "If without any restriction, then it might be, that incestuous marriages might be contracted, between citizens of a state where they were held unlawful and void, in countries where they were prohibited."

The only remaining case is *Sutton v. Warren* (10 Met. Mass. Rep. 451). The decision in this case was pronounced in 1845. I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding American decisions resting upon general jurisprudence. The question was, whether a marriage celebrated in England on the 24th of November 1834, between Samuel Sutton and Ann Hills, was to be held to be a valid marriage in the state of Massachusetts. The parties stood to each other in the relation of aunt and nephew, Ann Hills being own sister of the mother of Samuel Sutton. They were both natives of England, and domiciled in England at the time of their marriage. About a year after their marriage they went to America, and resided as man and wife in the state of Massachusetts. By the law of that state a marriage between an aunt and her nephew is prohibited, and is declared null and void. Nevertheless, the supreme court of Massa-[221]-chusetts held that this was to be considered a valid marriage in Massachusetts. But I am bound to say that the decision proceeded on a total misapprehension of the law of England. Justice Hubbard, who delivered the judgment of the court, considered that such a marriage was not contrary to the law of England. Now there can be no doubt that although contracted before the passing of 5 and 6 Will. 4, c. 54, it was contrary to the law of England, and might have been set aside as incestuous, and that Act gave no protection whatsoever to a marriage within the prohibited degrees of consanguinity; so that if Samuel Sutton and Ann Hills were now to return to England, their marriage might still be declared null and void, and they might be proceeded against for incest. If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the state in which it was celebrated, and in which the parties were domiciled, is to be held valid in another state into which they emigrate, although by the law of this state, as well as of the state of celebration and domicile, such a marriage is prohibited and declared to be null and void. This

decision, my Lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers ever since the Reformation.

I have now, my Lords, as carefully as I could, considered and touched upon the arguments and authorities brought forward on behalf of the Appellants, and I must say that they seem to me quite insufficient to show that the decree appealed against is erroneous.

The law upon this subject may be changed by the Legislature, but I am bound to declare that in my opinion, by the existing law of England this marriage is [222] invalid. It is therefore my duty to advise your Lordships to affirm the decree, and dismiss the appeal.

Lord Cranworth.—My Lords, the important question to be decided in this case is, whether the marriage contracted in 1850, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, in Denmark, where such marriages are lawful, was a valid marriage in England, both parties to it being, at the time it was contracted, native born subjects of Her Majesty domiciled in England.

The Court of Chancery decided that it was invalid, as having been prohibited by the second section of the 5 and 6 Will. 4, c. 54.

One argument on behalf of the respondents was, that this enactment is of a nature so general and extensive that it must be construed as affecting all her Majesty's subjects wheresoever born or domiciled, so that it would operate throughout all our colonies, and on all who owe allegiance to the British Crown wheresoever they may be. I cannot concur in that construction of the statute; no doubt the Imperial Legislature can, and occasionally does legislate so as to affect our colonies, but ordinarily our Acts of Parliament speak only to the inhabitants of Great Britain and Ireland; and I see nothing to lead to the inference that the enactment in question was meant to have a wider import; indeed, the exception of Scotland in the next section seems to me, independently of other considerations, conclusive on the subject.

Excluding, then, this more extensive operation of the enactment, it seems plain that the prospective effect of the Act is to make all marriages within the prohibited degrees absolutely void, *ab initio*, dispensing with the [223] necessity of a sentence in the Ecclesiastical Court declaring them void.

The persons whose marriages by the second section are declared to be void, are the same persons, and only the same persons, whose marriages before the passing of that Act might, during the lives of both parties, have been declared void by the Ecclesiastical Court.

The question, therefore, is, whether before the passing of that statute the Ecclesiastical Court could have declared the marriage now in dispute void. It certainly could, and must have done so if it had been celebrated in England; and all that your Lordships have to say is, whether the circumstance that it was celebrated in a foreign country, where such unions are lawful, would have altered the conclusion at which the Court ought to have arrived.

In the first place, there is no doubt that the mere fact of a marriage having been celebrated in a foreign country did not exclude the jurisdiction of the Ecclesiastical Court, while the jurisdiction as to marriages was exercised by that court. It was of ordinary occurrence that the court should entertain suits as to the validity of marriages contracted out of its jurisdiction. So that the question for decision is narrowed to the single point whether in deciding on the validity of this marriage, if it had come into discussion before the year 1835, and during the lives of both the parties, the Ecclesiastical Court would have been guided by the law of this country, or by that of the country where the marriage was contracted.

The case was most elaborately argued at your Lordships' bar, and we were referred to very numerous authorities bearing on the subject. The conclusion at which I have arrived is the same as that which my noble and [224] learned friend on the Woolsack has come to, namely, that though in the case of marriages celebrated abroad the *lex loci contractus* must *quoad solennitates* determine the validity of the contract, yet no law but our own can decide whether the contract is or is not

one which the parties to it, being subjects of Her Majesty domiciled in this country, might lawfully make.

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. And if the marriages of all its subjects were contracted within its own boundaries no such difficulty as that which has arisen in the present case could exist. But that is not the case; the intercourse of the people of all Christian countries among one another is so constant, and the number of the subjects of one country living in or passing through another is so great, that the marriage of the subject of one country within the territories of another must be matter of frequent occurrence. So, again, if the laws of all countries were the same as to who might marry, and what should constitute marriage, there would be no difficulty; but that is not the case, and hence it becomes necessary for every country to determine by what rule it will be guided in deciding on the validity of a marriage entered into beyond the area over which the authority of its own laws extends. The rule in this country, and I believe generally in all countries is, that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong.

The real question therefore is, whether the law of this **[225]** country, by which the marriage now under consideration would certainly have been void if celebrated in England, extends to English subjects casually being in Denmark?

I think it does; of the power of the legislature to determine what shall be the legal consequences of the acts of its own subjects done abroad, there can be no doubt, and whether the operation of any particular enactment is intended to be confined to acts done within the limits of this country, or to be of universal application, must be matter of construction, looking to the language used and the nature and objects of the law.

It must be admitted that the statutes on this subject are in a confused state. But it must be taken as clear law that though the two statutes of Hen. VIII., *i.e.*, the 25 Hen. 8, c. 22, and the 28 Hen. 8, c. 7 (being the only statutes which in terms prohibited marriage with a wife's sister as being contrary to God's law), are repealed, yet by two subsequent Acts of the same reign, namely, the 28 Hen. 8, c. 16, and the 32 Hen. 8, c. 38, which had for their object to make good certain marriages, the prohibition is, in substance, revived or kept alive. For in both of them there is an exception of marriages prohibited by God's law, and in one of them, 28 Hen. 8, c. 16, the language of the exception is, "which marriages be not prohibited by God's laws limited and declared in the Act made in this present Parliament;" that is the repealed Act of the 28 Hen. 8, c. 7, s. 11; so that it is to that Act, though repealed, that we are to look in order to see what marriages the legislature has prohibited as being contrary to God's law. It was, perhaps, unnecessary to advert to this after the decision of the Court of Queen's Bench in *Reg.* v. *Chadwick* (11 Q.B. Rep. 173), but **[226]** it is fit that the grounds on which we proceed should be made perfectly clear.

Assuming, then, as we must, that such marriages are not only prohibited by our law, but prohibited because they are contrary to the law of God, are we to understand the law as prohibiting them wheresoever celebrated, or only if they are celebrated in England? I cannot hesitate in the answer I must give to such an inquiry. The law, considering the ground on which it makes the prohibition, must have intended to give to it the widest possible operation. If such unions are declared by our law to be contrary to the laws of God, then persons having entered into them, and coming into this country, would, in the eye of our law, be living in a state of incestuous intercourse. It is impossible to believe that the law could have intended this.

It was contended that, according to the argument of the Respondent, such a marriage, even between two Danes, celebrated in Denmark, must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of

the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our laws which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction.

The authorities showing that the general rule which gives validity to marriages contracted according to the laws of the place where they are contracted, is subject to [227] the qualification I have mentioned, namely, that such marriages are not contrary to the laws of the land to which the parties contracting them belong, have been referred to not only by my noble and learned friend, but in the able opinion of Sir Cresswell Cresswell, delivered in the Court below, as also in the judgment of the Vice-Chancellor. I abstain, therefore, from going into them in detail: to do so would only be to repeat what is already fully before your Lordships.

I cannot, however, refrain from expressing my dissent from that part of Sir Cresswell Cresswell's able opinion, in which he repudiates a part of what is said by Mr. Justice Story as to marriages which are to be held void on the ground of incest. That very learned writer, after stating (sec. 113) that marriages valid where they are contracted, are, in general, to be held valid everywhere, proceeds thus: "The most prominent, if not the only known exceptions to the rule, are marriages involving polygamy or incest; those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the laws of their own countries." And then he adds that, "as to the first exception, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognize polygamy or incestuous marriages; but when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of all Christendom, are deemed incestuous." With this latter portion of the doctrine of Mr. Justice Story, Sir Cresswell Cresswell does not agree. But I believe that this passage, when correctly interpreted, is strictly consonant to the law of na-[228]-tions. Story, there, is not speaking of marriages prohibited as incestuous by the municipal law of the country. If so prohibited, they would be void under his second class of exceptional cases; no inquiry would be open as to the general opinion of Christendom. But suppose the case of a Christian country, in which there are no laws prohibiting marriages within any specified degrees of consanguinity or affinity, or declaring or defining what is incest; still, even there, incestuous marriages would be held void, as polygamy would be held void, being forbidden by the Christian religion. But then, to ascertain what marriages are, within that rule, incestuous, a rule not depending on municipal laws, but extending generally to all Christian countries, recourse must be had to what is deemed incestuous by the general consent of Christendom. It could never be held that the subjects of such a country were guilty of incest in contracting a marriage allowed and approved by a large portion of Christendom, merely because, in the contemplation of other Christian countries, it would be considered to be against God's laws. I have thought it right to enter into this explanation, because it is important that a writer so highly and justly respected as Mr. Justice Story should not be misunderstood, as, with all deference, I think he has been in the passage under consideration.

Having thus expressed my opinion, I do not feel that I should usefully occupy your Lordships' time by going again over the cases which have been so carefully examined by my noble and learned friend. I agree with him that the cases decided as to Gretna Green marriages, do not assist the Appellants. Lord Hardwicke's Act, 26 Geo. 2, c. 33, directs that marriages shall only be celebrated after publication of banns or by license; if either party is under age, the 11th section makes the marriage [229] void unless there has been the requisite consent of parent or guardian. That section evidently cannot be extended to marriages celebrated out of England; the necessity for banns or license clearly shows that the operation of the statute was to be confined to this country, and on that ground such marriages as those I have alluded to have always been deemed valid.

It was on this same ground that the Irish case, *Steele* v. *Braddell* (Milw. Ecc. Rep. (Ir.) 1) was decided. Dr. Radcliff held that the Irish statute prohibiting the

marriage of a minor without certain consents, was, from the nature of its provisions, and attending to all its enactments, to be deemed to be confined to marriages celebrated in Ireland; not that the nature of the provisions might not have been such as to show that its operation was intended to be universal; indeed he expressly stated the contrary. It has therefore no bearing on the present case, where the ground of the prohibition shows that it must have been meant to be of the widest possible extent.

I also concur entirely with my noble and learned friend that the American decision of *Medway* v. *Needham* cannot be treated as proceeding on sound principles of law. The state or province of Massachusetts positively prohibited by its law, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds of distinction pointed out by Mr. Justice Story, such a marriage certainly ought to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful.

I shall not farther detain your Lordships. I think that this marriage is one clearly prohibited by the statutes of Henry VIII. wheresoever celebrated; and therefore that **[230]** the statute of 5 and 6 Will. 4, c. 54, makes it absolutely void.

I therefore concur in thinking that the appeal should be dismissed.

Lord St. Leonards.—My Lords, the question before the House is one of great importance, but not of much difficulty. The learned counsel for the Appellants insisted that as marriage was but a civil contract, it must, by international law, depend upon the law of the country where it is contracted, and that the question of domicile was excluded; that certain marriages in Scotland were allowed in England to be good, notwithstanding Lord Hardwicke's Marriage Act; and that but for the Act of Will. 4, this marriage could not be impeached. It was admitted that this country would not recognise a contract in a foreign country, which was contrary to religion or morality, or was criminal; but it was argued that the allowance of marriages, such as that under consideration, by other States, showed that they were not contrary to religion or morality, or criminal, and that the very Act of Will. 4, virtually repealed any former law of this country impeaching the validity of such marriages as contrary to the law of God; for if deemed to be contrary to God's law, Parliament would not have given legal validity to those which had been solemnised. And it was forcibly urged that no Act of Parliament treats a marriage with a deceased wife's sister as incestuous.

I consider this as purely an English question. It depends wholly upon our own laws, binding upon all the Queen's subjects. The parties were domiciled subjects here, and the question of the validity of the marriage will affect the right to real estate. *Warrender* v. *War*-**[231]**-*render* (2 Clark and Fin. 488), shows how the marriage contract may be affected by domicile. We cannot reject the consideration of the domicile of the parties in considering this question; I may at once relieve the case from any difficulty arising out of Scotch marriages in fraud, as it is alleged, of our Marriage Act. When those marriages are solemnised according to the law of Scotland, they are no fraud upon the Act, for it expressly, amongst other exceptions, provides that nothing contained in it shall extend to Scotland. Lord Hardwicke observed in *Butler* v. *Freeman* (Ambl. 301), that there was a door open in the statute as to marriages beyond seas and in Scotland. I may observe that the door was purposely left open, and such marriages have no bearing upon the question before the House.

The grounds upon which, in my opinion, this marriage in Denmark is void by our law, depend upon our Act of Parliament, and upon the rule that we do not admit any foreign law to be of force here, where it is opposed to God's law, according to our view of that law.

The argument, as I have already observed, for the Appellants, was, that no law in this country branded marriages with a deceased wife's sister as incestuous. Let us see how this stands. The 25 Hen. 8, c. 22, s. 3, states, "that many inconveniences have fallen as well within this realm *as in others*, by reason of marrying within degrees of marriage *prohibited by God's law*, that is to say," and then several instances are stated, "or any man to marry his wife's sister, which marriages albeit they be plainly prohibited and detested by the laws of God," and it then alludes to

the " dispensations by man's power [232] which is but usurped," and declares that no man hath power to dispense with God's law.

It then by section 4 enacts, " that no persons, subjects or resiants of this realm, or in any of the King's dominions, should from thenceforth marry within the said degrees; and if any person had been married within this realm, or in any of the King's dominions, within any of the degrees above expressed, and by any Archbishop, etc. of the Church of England, should be separate from the bonds of such unlawful marriage, every separation should be good, and the children under such unlawful marriage should not be lawful nor legitimate, any foreign laws, etc. to the contrary notwithstanding."

The statute of 28 Hen. 8, c. 7, repealed the 25 Hen. 8, c. 22, but by section 7 again prohibited at large the marriages prohibited by the 25th Hen. 8. The marriage of a man with his wife's sister is included in the prohibition, and that and the other prohibited marriages the Act states to be " plainly prohibited and detested by the law of God." The statute 28 Hen. 8, c. 16, made good all past marriages whereof there was no divorce, and which marriages were not prohibited by God's laws, limited and declared in the Act made in this Parliament or otherwise by Holy Scripture.

These Acts were followed by the 32 Hen. 8, c. 38, " For marriages to stand, notwithstanding pre-contracts." It enacted that all marriages as within the Church of England which should be contracted between lawful persons (as by this Act were declared all persons to be lawful that were not prohibited by God's law to marry), were not to be affected by pre-contracts, and that no reservation or prohibition God's law except, should trouble or impeach any marriage without the Levitical degrees, and [233] no process to the contrary was to be admitted within any of the Spiritual Courts within this the King's realm, or any of his Grace's other lands and dominions.

It appears from these Acts, that the marriage in question is by the law of England declared to be against God's law, and to be detested by God plainly, because, although there is only affinity between the parties, it was deemed, like cases of consanguinity, incestuous. We are not at liberty to consider whether the marriage is contrary to God's law, and detested by God; for our law has already declared such to be the fact, and we must obey the law. That law has been so clearly and satisfactorily explained by the learned Judges in the case of the *Queen* v. *Chadwick*, as to render it unnecessary to observe farther upon it, or to trace the repeals and re-enactments of the laws to which I have referred. As one of the learned Judges observed, we need not tread the labyrinth of statutes to discover which of the enactments in question has been repealed or revived, and which has not. We may use the prior Acts simply as the best interpreters of the statute 32 Hen. 8, c. 38, which is clearly in force.

This brings us to the 5 and 6 Will. 4, c. 54, which was passed with a view to put an end to the uncertainty of the marriage contract arising from the decisions in our courts, that where the parties were within the prohibited degrees of affinity, the marriage was voidable only. The act drew a distinction between affinity and consanguinity. It enacted, that all past marriages between persons within the prohibited decrees of affinity, should not be annulled for that cause by any sentence of the Ecclesiastical Court; Provided that nothing in the Act should affect marriages between persons being within the prohibited degrees of consanguinity. And the Act then proceeds to enact, that all marriages which should thereafter be celebrated [234] between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever. The recital stated the intention to make them *ipso facto* void, and not voidable. Nothing can be plainer. The statute created no farther prohibition; it treated the legal prohibition already in existence as well known by the general description in the Act. The construction of the Act was settled by the *Queen* v. *Chadwick* (11 Q.B. Rep. 173), the law of which case was not disputed at the bar. By that decision the marriage now in question would have been absolutely void had it been contracted in England.

This case, then, is reduced to the simple question, Is the marriage valid in this country because it was contracted in Denmark, where a marriage with a deceased

wife's sister is valid? This depends upon two questions, either of which, if adverse to the Appellants, would be fatal to the validity of the marriage, namely, first, will our courts admit the validity of a marriage abroad by an English subject domiciled here with his deceased wife's sister, because the marriage is valid in the country where it was contracted? Secondly, is such a marriage struck at by 5 and 6 Will. 4?

I think that the marriage has no validity in this country on the first ground, for by our law such a marriage is forbidden, as contrary, in our view, to God's law. The objection that Parliament gave validity to such marriages already had, in cases of affinity, is no reason why, when we have in future carefully made all such marriages absolutely void, we should admit their validity in favour of the law of a foreign country. The learned Judge who assisted the learned Vice-Chancellor in the Court below, came to **[235]** the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid, if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it.

I shall not, however, dwell upon this point, because I think that upon the second point the marriage is clearly invalid. The Appellant relies upon the silence of the Act in respect to marriages abroad. Now the Act is general, and contains a large measure of relief as well as a prohibition. It gives validity to *all* marriages celebrated before the passing of the Act, by persons being within the prohibited degrees of affinity. This is unlimited, and we could hardly hold that such of those persons as had been married abroad were excluded from the benefit of the Act. Why should the relief be confined, and not allowed as large a range as the words will admit? Clearly no intention appears to limit the operation of the words. The next clause, which nullifies the contract, is equally unlimited. *All* marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity are declared to be null and void. We must give the same interpretation to the words in this section as to those in the former section. To whatever class the relief was extended, to the same class, in addition to those within the prohibited degrees of consanguinity, the prohibition must be applied. It is of course not denied that three or four additional words would have put the question at rest. But why when the words are "*all* marriages," without making any exception, are we to introduce an exception in order to give validity to the very marriages which the legislature in-**[236]**-tended to render null and void? The marriage now under consideration shows how expedient it was that the law should prohibit it. It is not like the exception in the Marriage Act of marriages in Scotland, which enabled parties, without any real evasion of the law, to marry there without the forms imposed by the Act. What was intended was expressed. Here, on the contrary, the enactment is general and unqualified; and as it was intended to create a personal inability, there is of course no exception. The answer to the argument that the very case is not provided for in so many words, is, that, with the Marriage Act before them, the framers of the new law would have introduced an exception to meet this case, if such had been the intention. But when we advert to the nature of the contract, and the state of our law in relation to such a contract, which law was not altered by the new enactment, and bear in mind that the contrary law in a foreign country ought to receive no sanction here, opposed as it is to our law declaring such a contract to be contrary to God's law, we cannot fail to perceive that this case falls directly within the enactment that *all* such marriages shall be null and void.

Authority is not wanting in favour of this construction. The Royal Marriage Act, as your Lordships are aware, has been held in this House to extend to marriages abroad. And yet how much weaker a case was that than the one now before us. In it there was no infraction of God's law as declared by our law. The prohibition there rested only on political grounds. There were difficulties to surmount in extending the Act to marriages abroad, which do not occur in this case; the last clause, which makes persons who assist in celebrating the forbidden marriages incur the pains and penalties, makes the Act a highly penal one.

[237] The invalidity of the marriage of the Duke of Sussex at Rome, without

the king's consent, was declared by this House (11 Clark and F. 85), with the assistance of six law Lords and seven common law Judges. The unanimous opinion of the Judges was delivered by Lord Chief Justice Tindal. He stated the only rule of construction of Acts of Parliament to be, that they should be construed according to the intent of the Parliament which passed them. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. The Act created a personal inability in the Duke to contract a marriage without consent. The prohibitory words were general, that every marriage or matrimonial contract of any such person shall be null and void. As a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage in Rome is as clearly within the prohibitory words of the statute as the incapacity to contract it in England. So again as to the second or annulling branch of the enactment, "that every marriage without such consent shall be null and void;" the words employed are general, or more properly universal, and cannot be satisfied in their plain literal ordinary meaning, unless they are held to extend to all marriages in whatever part of the world they may have been contracted or celebrated. The learned Chief Justice then addressed himself to the 2d section of the Act, and made an observation strongly applicable to my observations on the operation of the 5 and 6 Will. 4, in rendering valid, as I submit, former marriages wherever **[238]** celebrated. He said, as no doubt could be entertained by any one but that a marriage taking place with the due observance of the requisites of the 2d section, would be held equally valid, whether contracted and celebrated at Rome or in England, so the Judges thought it would be contrary to all established rules of construction if the very same words in the 1st section were to receive a different sense from those in the 2d; if it should be held that a marriage in Rome contracted with reference to the 2d section is made valid, and at the same time a marriage at Rome is not prohibited under the first; surely (the Chief Justice added), if a marriage of a descendant of Geo. II. contracted or celebrated in Scotland or Ireland, or on the continent, is to be held a marriage not prohibited by this Act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

I think your Lordships will agree with me that the opinions of the learned Judges in the royal marriage case strictly apply to this case, and ought to rule it; I adopt every one of those opinions without reserve. It is true that the Acts are not framed, as they could not be, exactly alike; because the Royal Marriage Act did not intend to establish an absolute prohibition, unless in the last resort. But where that Act, and the Act of Will. 4 have the same object, viz., the annulling and rendering void a marriage contracted contrary to their provisions, they are identical, and cannot admit of two constructions.

I may observe that these were difficulties in the Duke of Sussex's case, with which we have not to contend here; but the Judges were of opinion, and this House held, that the clause requiring the consent to be set out in the license and register of the marriage, was directory only, and applied only to a marriage in England by license. The **[239]** defect in the penal clause in not making provision for the trial of British subjects when they violate the statute out of the realm, did not operate to make the enactment itself substantially useless and inoperative.

Upon the whole, therefore, I am clearly of opinion that this marriage was rendered void by the Act of Will. 4, and I concur with my noble and learned friend on the woolsack, that the appeal should be dismissed, and the decree of the Vice-Chancellor affirmed.

Lord Wensleydale.—My Lords, I agree in the opinion expressed by my noble and learned friend on the woolsack, and my other noble and learned friends who have followed him; and, after fully considering the arguments and judgments in the Court below, as well as the arguments addressed to your Lordships on the appeal, that you ought to affirm the decree of the Court below.

The question to be decided is, as the Lord Chancellor stated, whether a marriage celebrated on the 7th June 1850, in the duchy of Holstein, between a widower and the sister of his deceased wife, both being then British subjects domiciled in Eng-

land, and contemplating England as their future matrimonial residence, is valid in England, such a marriage being permitted by the law of Holstein. The question what the consequences would have been if the parties had been English subjects domiciled there, is not the subject of inquiry. The sole question relates to British domiciled subjects.

Both the Judges in the Court below form their judgment, first, on the ground of the illegality of such a marriage in England, prohibited from very early times by the legislature, and finally by Lord Lyndhurst's Act, 5 and 6 Will. 4, c. 54; secondly, on the ground that that Act **[240]** itself is to be considered as a personal Act, in effect prohibiting all British born subjects, in whatever part of the world they might happen to be, from contracting such marriages, and declaring those marriages to be absolutely void. It was likened by them to the Royal Marriage Act, the 12 Geo. 3, c. 11, which was clearly an Act affecting personally the descendants of King George II., in the realm, or out of it. That appears from the language of the Act itself, and the object it had in view.

It is unnecessary to enter into the discussion of this part of the case, if the other ground is satisfactory, which I think it is. But as at present advised, I dissent upon this point from my noble and learned friend who has just addressed your Lordships. I think the construction put upon this as a personal Act is wrong. I do not think the purpose of the statute was to put an end to such marriages by British subjects in any part of the world. Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable, that is, which were really void according to our law, though they could be avoided only by a suit in the Ecclesiastical Court, and that could be done only during the life of both the married parties.

The question, then, appears to me to be reduced to this single point: Was this such a marriage as the Ecclesiastical Court would have set aside if an application had been made to it for that purpose during the lives of both the married parties previous to the passing of the Act 5 and 6 Will. 4, c. 54? If it would have been voidable in that case before that Act, it is now by its operation absolutely void. I think it clear that it would have been set aside, and that the view taken particularly by Sir Cresswell **[241]** Cresswell in the first part of his opinion upon this part of the case is perfectly correct.

It is the established principle that every marriage is to be universally recognised, which is valid according to the law of the place where it was had, whatever that law may be. This is the doctrine of Lord Stowell in the case of *Herbert* v. *Herbert* (2 Hagg. Cons. Rep. 271). The same doctrine has been laid down in various authorities, as by Sir Edward Simpson, in *Scrimshire* v. *Scrimshire* (*id.* 417), and by Story and others. If valid where it was celebrated, it is valid everywhere, as to the constitution of the marriage and as to its ceremonies; but as to the rights, duties, and obligations thence arising, the law of the domicile of the parties must be looked to. That is laid down by Story (Confl. of Laws, s. 110).

But this universally approved rule is subject to a qualification. Huber, in his 1st Book, Tit. 3, Art. 8, says, "*Matrimonium si licitum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eâdem exceptione, prejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit.*"

A similar qualification is introduced by Story (*id.* ss. 113 *a*, 114). He states, that the most prominent, if not the only, known exceptions to the rule, are, first, those marriages involving polygamy and incest; second, those positively prohibited by the public law of a country from motives of policy, and a third having no bearing upon the question before us. And as to the first exception, he adds, that "Christianity is understood to prohibit polygamy and incest, but this doctrine must be confined to such cases as by **[242]** *general* consent of all Christendom are deemed incestuous."

It would seem enough to say, that the present case falls within the two exceptions, for it is no doubt prohibited by the public law of this country. And it is by no means improbable, that Story's meaning was to apply his first exception only to

those cases to which the second could not apply, as suggested by my noble and learned friend; to those cases, namely, in which there was no particular law in the country of the domicile of the parties to such marriages. And in that sense the position of Story is unobjectionable. His meaning would have been more clearly expressed, if the second exception had been put the first, and the first made to apply where no such particular law existed.

It strikes me that this view of the case is correct. And, therefore, it is in reality quite unnecessary to discuss the question whether, where a marriage is objected to, not on the ground of its being against the positive prohibition of a country, but on the ground of incest, where there is no such prohibition, the incest must be of such a character as is described in the first exception.

If that question is to be considered, I perfectly agree with the convincing reasoning of Sir Cresswell Cresswell on this point of the case. What have we to do with the general consent of Christendom, on the subject of incest, in a question which relates to our own country alone? Amongst Christian nations different doctrines prevail, and surely the true question would be, not, what is the doctrine of Christianity generally, in which all agree, nor what is the prevailing doctrine of Christian nations, but what is the doctrine, on this subject, of that branch of Christianity which this country professes. If it is condemned by us as forbidden by the law of God in Holy **[243]** Scripture, it is no matter what opinions other Christian nations entertain on this question. This reasoning appears so very clear, that I must think that so able a man as Mr. Justice Story could never have meant to lay down the proposition that where any country prohibited a marriage on account of incest, it must be of such quality of incest as to be of that character in universal Christendom. If he really did mean to state such a proposition, I must say I think it cannot be supported.

I proceed, therefore, though I think it unnecessary, to show that this sort of marriage is forbidden in this country on the ground of its being against the law of God deduced from Holy Scripture. We have a distinct and clear opinion on this subject in a well-considered judgment of the Court of Queen's Bench in the case of *The Queen* v. *Chadwick* (11 Q.B. Rep. 173, 205), which was argued for several days; and in which Lord Denman, Mr. Justice Coleridge, and Mr. Justice Wightman delivered very full and satisfactory judgments. It was held, that marriages within the prohibited degrees mentioned in the statute 5 and 6 Will. 4, c. 54, were those within the *Levitical* degrees, which, having been before voidable by suit in the Ecclesiastical Court, were by that statute absolutely avoided. The marriage of a widower with his wife's sister was considered as clearly falling within this class. The legislative declarations in Henry VIII.'s reign were considered as statutory expositions of what was intended by the term "*Levitical* degrees," whether those statutes in which they occur are repealed or not.

If we are to inquire into the latter question, whether they are repealed or not, it will require some research. **[244]** The whole question is ably and distinctly stated in a note appended by the learned editor to the case of *Sherwood* v. *Ray* (1 Moo. P.C. Rep. 353, 355 *a*.)

The state of the law appears to be this:—the two statutes in which the term "*Levitical* degrees" is explained are the 25 Hen. 8, c. 22, where they are enumerated, and include a wife's sister, and the 28 Hen. 8, c. 7, in the ninth section of which are described, by way of recital, the degrees prohibited by God's law in similar terms, with the addition of carnal knowledge by the husband in some cases; and with respect to them, the prohibition of former statutes was re-enacted.

The whole of this Act, 25 Hen. 8, c. 22, was repealed by a statute of Queen Mary; and so was part of 28 Hen. 8, c. 7, but not the part as to the prohibited degrees. That part was repealed by 1 and 2 Philip and Mary, c. 8. But by the 1 Eliz., c. 1, s. 2, that Act itself was repealed, except as therein mentioned, and several Acts were revived, not including the 28 Hen. 8, c. 7; no doubt because it avoided the marriage with Ann Boleyn. But by the 10th section of the 28 Hen. 8, c. 16 (which in the second section referred to marriages prohibited by God's laws as limited and declared in the 28 Hen. 8, c. 7, or otherwise by Holy Scripture), all and every "branches, words and sentences, in those several Acts contained, are revived and are enacted to be in full force and strength to all intents and purposes." The

question is, whether that part of 28 Hen. 8, c. 7, which relates to prohibited degrees and describes them, is thus revived? I think it is. But whether it is or not, the statements in the statutes are to be looked at [245] as a statutory exposition of the meaning of the term, "Levitical degrees." And that is the clear opinion of Lord Denman and Mr. Justice Coleridge in the case to which I refer.

The statute law of the country, which is binding on all its subjects, therefore, must be considered as pronouncing that this marriage is a violation of the Divine law, and therefore that it is void within the first exception made by Mr. Justice Story, and within the principle of the exception laid down by Huber. If our laws are binding, or oblige us, as I think they do, to treat this marriage as a violation of the commands of God in Holy Scripture, we must consider it in a court of justice, as prejudicial to our social interest and of hateful example. But if not, it most clearly falls within the second exception stated by Story, which alone, I think, need be considered, as it is clearly illegal by the law of this country, whether it be considered incestuous or not, and a violation of that law.

I do not, therefore, in the least doubt that before the 5 and 6 W. 4, it would have been pronounced void by the Ecclesiastical Court on a suit instituted during the life of both parties. And therefore I advise your Lordships that the judgment should be affirmed.

Order appealed against affirmed, and appeal dismissed with costs.—Lords' Journals, 18 March 1861.

[246] The DIRECTORS, Etc. of the STOCKTON and DARLINGTON RAILWAY COMPANY,—*Appellants;* JOHN BROWN, a Lunatic, by his Committees,—*Respondent* [June 12, 15, 18, July 24, 1860].

[Mews' Dig. i. 356; viii. 1329. S.C. 6 Jur. N.S. 1168; 3 L.T. 131; 8 W.R. 708. On point as to discretion with regard to taking lands, followed in many cases, among which reference may be made to *City of Glasgow Union Railway Co.* v. *Caledonian Railway Co.*, 1871, L.R. 2 Sc. and Div. 164; *Kemp* v. *South-Eastern Railway Co.*, 1872, L.R. 7 Ch. 375; *Lewis* v. *Weston-super-Mare Local Board*, 1888, 40 Ch. D. 62.]

Railway Company—Discretion as to taking Lands—"Court of Chancery."

When the legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Acts, it constitutes them the judges whether they will or not take these lands, provided that they act with the *bona fide* object of using the lands for the purposes authorised by the Act, and not for any collateral purpose. Having provided for affording compensation to the owners of the lands, the Legislature leaves it to the company to determine what lands are necessary to be taken.

Qu. Whether the words "the Court of Chancery," in the 5th section of the 18 and 19 Vict., c. cxlix (the Stockton and Darlington Railway Act), apply exclusively to the Lord Chancellor or to the Lords Justices sitting in Lunacy?

The Vice-Chancellor made a decree which was afterwards varied by the Lords Justices. This House restored the decree of the Vice-Chancellor, and farther proceedings being necessary, remitted the cause to him, to proceed with it in the same state in which it was when brought by appeal before the Lords Justices.

This was a question as to the right of the Appellants to take for the purposes of their railway certain lands belonging to the Respondent, and it depended on the construction to be put on the "Stockton and Darlington Railway Act, 1855," 18 and 19 Vict. c. cxlix, and the "Lands Clauses," and "Railway Clauses" Acts, 1845, incorporated therewith. The Stockton and Darlington Act was passed to enable the Appellants to make new branches and other works, "to acquire additional lands, and for other purposes." By this Act it was recited that the proper plans, etc. had been deposited; and by the fourth clause it was enacted, that the Appellants