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THE ANNUAL BLISTER: A SIDELIGHT ON VICTORIAN SOCIAL AND PARLIAMENTARY HISTORY*

"And he shall prick that annual blister,
Marriage with deceased wife's sister."
— The Queen of the Fairies'
curse from *Iolanthe*

IN NOVEMBER 1882, THE SEVENTH OF GILBERT AND SULLIVAN'S OPERETTAS, *Iolanthe, or, the Peer and the Peri*, opened in London. In the story, the Queen of the Fairies, angry with the House of Lords, sends Strephon, an Arcadian shepherd, into Parliament to make a little legislative mischief. Among other things, Strephon is to settle a perennial legislative problem: marriage with deceased wife's sister. This is the only time we hear of the "annual blister" from Gilbert, but it was a more appropriate epithet than he knew, for not only had it been a perennial problem before *Iolanthe*, but after 1882 the question of legalizing such a marriage came up in every Parliament except two until 1907. The issue stretched back into parliamentary history to Lord Lyndhurst's Act of 1835, and even, in some senses, to Henry VIII's quarrel with the Church.

The marriage question was only one of a number of different sides to the continuing story of the unresolved relationship between church and state in England. The English Reformation was not simply a phenomenon of Tudor and Stuart times, but extended into the political

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and religious history of later reigns. In the nineteenth century, under the general influence of liberal thought, Parliament began to assert more authority over subjects which had been chiefly in the hands of the Church. In particular, marriage law came in for much scrutiny, as attempts were made to disentangle a hideous knot of civil regulations, church custom, biblical proscriptions, common law, and conflicting jurisdictions, as well as certain inequities imposed on Jews, Roman Catholics, Quakers, and Nonconformists. Marriage law had never been solely the province of ecclesiastical authority, although from medieval times the Church had tried to impose regulations on the civil law, in the interests of greater specificity and clarity. Since so much of importance – for example, inheritance, wardship, and property – hung on the question of the validity of a marriage, the imposition of stricter standards on the marriage contract was very desirable.[1] Common law required only the declaration of consent to marriage; no religious formality was required. The Fourth Lateran Council required the publication of banns and urged the clergy to solemnize the marriage, although the Church continued to recognize the validity of a consensual marriage contract.[2]

With the more specific question of the definition of legally permissible marriages Parliament was also vitally concerned, and for the same reasons as above: the need to regulate validity. As Maitland remarks, "marriage is not a matter that can be left to judicial discretion or natural equity. It is preeminently a matter about which there must be hard and fast rules."[3] There certainly had been no lack of rules. Generally speaking, English law followed canon law and prohibited marriage within certain degrees of consanguinity, but the question was historically very complex, and might be worth examining briefly.

I

In its early years the Christian Church conformed to Jewish law and to Roman civil proscriptions. In Jewish marriage law, as found in *Leviticus* XVIII, marriage was forbidden with a long list of collateral

[1] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2 vols. (Cambridge, 1895), II, ch. vii, gives a very clear account of these problems, and of the relation between church and civil law.

[2] James T. Hammick, *The Marriage Law of England: A Practical Treatise on the Legal Incidents Connected with the Constitution of the Matrimonial Contract*, 2nd ed. (London, 1887), p. 4.

[3] *Roman Canon Law in the Church of England, Six Essays* (London, 1898), p. 38.

relatives, including one's father's widow, one's daughter-in-law, aunt, and brother's widow, among others. As one authority has remarked, it is uncertain on what principle the list was framed, but it seems likely that the purpose was to preclude discord within the home, and that those excluded from marriage were the ones most likely to be members of the same household.[4] *Deuteronomy* XXV, 5, 6, appears to be in contradiction to the earlier law forbidding marriage with brother's widow (*Leviticus* XVIII, 16), but the *Deuteronomy* passage referred to the special circumstance of the so-called "levirate" marriage: the case of a childless marriage where the widow was required to marry her brother-in-law in order to provide the deceased with an heir.

The early Christian Church also obeyed the Roman civil marriage law. In early Republican times, Romans seem to have forbidden marriage between all related persons. During the years of the Republic restrictions were gradually relaxed. In the Roman Empire, marriage was forbidden in the direct line indefinitely, and in the collateral line to the third degree, that is, between brothers and sisters, or nephews and aunts, but not between first cousins.[5] By the fourth or fifth centuries the Church began to assert its own independent authority, and canonical legislation became stricter, although the emphasis was always upon tradition, correctly interpreted, rather than on innovation. When St. Basil the Great (c. 330-379) forbade in his diocese the marriage of a man with his deceased wife's sister, he answered objections with the defense that such had always been the local law.[6] Successive Councils confirmed this principle and extended the forbidden degrees to the extreme of sixth cousins because Roman law recognized blood relationship to this degree. The prohibition was, understandably, very difficult to enforce.

The Church also forbade marriage between two persons related by "affinity" on St. Paul's principle that sexual union makes two people

[4] George Hayward Joyce, S.J., *Christian Marriage: An Historical and Doctrinal Study* (London, 1933), p. 532.

[5] H. A. Ayrinhac, S.S., D.D., D.C.L., *Marriage Legislation in the New Code of Canon Law* (New York, 1918), p. 170. There were two ways of reckoning the degree of relationship in the collateral line: the Roman, in which one counted the generations on both sides to a common ancestor, and the Teutonic, in which one counted the generations on one side (the longer if they were unequal) only. Thus, for example, second cousins would be related in the sixth degree under Roman law, and in the third degree under Teutonic law. In the eighth or ninth century the Church, which had followed the Roman method of counting, began to adopt the Germanic (pp. 168, 171). The Church has always forbidden marriage in the direct line.

[6] Ayrinhac, p. 174. Father Green comments that some scholars have conjectured that the greater strictness exercised by the Christian Church was probably due to sensitiveness about the charge of incest, which was a commonplace of anti-Christian propaganda, possibly owing to garbled reports of the kiss of peace in the eucharist, and of Christians calling each other brother and sister.

"one flesh," a principle which was derived from Jesus' teaching (*Mark* X, 8) and the Old Testament (*Genesis* II, 24). Thus the blood relatives of one's spouse were considered to be one's own relatives and the same impediments to marriage would exist as in consanguineous relationships. These two principles – consanguinity and affinity – carried, as they were, to the seventh degree, so limited and complicated the marriage question that by 1215 the Church recognized that some simplification was necessary. The Fourth Latheran Council reduced the limitation to the fourth degree (that is, third cousins) in the collateral line, and in the late medieval period both fourth and third degrees were widely dispensable.

The Christian law, based on these two traditions of Roman and Jewish codes, but with considerable subsequent accretion, lasted until the Reformation, when the Protestant churches swept away the medieval rules and based their rules on those to be found in scripture. In the Anglican Church the subject of permissible marriages was a thorny one, since for both of Henry VIII's daughters the legitimacy of birth and throne depended on interpretation of the marriage law. Henry had also tinkered with the question of affinity in trying to extricate himself from his first and second alliances (Hammick, pp. 7-8). In 1563, Archbishop Matthew Parker, apparently on his own authority, issued a Table of Prohibited Degrees, a table which became the official list for the Anglican Church. He also restated the medieval Church's principle that affinity was contracted by illegal as well as legal company of a man and woman (Joyce, p. 556). This idea had been widely accepted since the eighth century; indeed, Henry VIII claimed that his marriage to Anne Boleyn was void on the ground that her sister Mary had previously been his mistress.

In 1603, the convocation for the province of Canterbury issued several Canons concerning the government of the Church, the ninety-ninth of which stated that "No person shall marry within the degrees prohibited by the laws of God and expressed in a table set forth by authority in the year of Our Lord 1563. And all marriages so made and contracted shall be judged incestuous and unlawful and consequently shall be dissolved as void from the beginning."[7] Although the Canons received the royal assent, they did not have the assent of Parliament and thus did not have the force of statutory law, but, in stating ancient usage of the Church they became, in effect, morally binding on the

[7] Quoted in G. K. A. Bell, *Randall Davidson, Archbishop of Canterbury*, 2 vols. (New York, 1935), I, 551.

laity. In fact, the laity were already bound by Tudor statute law which had recognized the prohibited degrees even before Archbishop Parker had issued his table.[8]

II

All human societies have been fearful of incest, and have wrestled with the problems of definition and with various incest taboos. In the nineteenth century many European countries relaxed their rigid restrictions on permissible marriages. In England, too, there was pressure for reform, in part from the Nonconformists, who did not subscribe to the Anglican rules. Since 1753 the members of the dissenting religions had also been under the onus of conforming to Anglican ceremony in order that their marriages be recognized as valid. Lord Hardwicke's Act (26 Geo. II, c. 33) had attempted to do away with the "evil" consequences of clandestine marriages by establishing that all marriages had to be solemnized in a parish church or public chapel, after proper publication of banns, in the presence of two witnesses, and officially registered. Quakers and Jews were specifically exempted from these provisions, but not Roman Catholics and Nonconformists. The law was so stringent in its terms that many people deliberately evaded it by getting married in Scotland.[9] These grievances were removed by the Marriage Act of 1836 (6 & 7 Will. IV, c. 85), which allowed marriages according to different religious customs, and recognized the validity of a marriage which was purely civil in character.

The pressure for liberalization of the degrees of affinity led to consideration of the matter of permissible marriages at this time, too. The ecclesiastical courts had been in the habit of pronouncing marriages within the prohibited degrees as null and void. Either or both of the parties might be dead when the suit was brought to court. It could lead to some bitterness if the heir to a marriage found himself declared illegitimate on the success of a suit brought by a spiteful or jealous relative. In the time of James I the common law courts interfered and prohibited

[8] 32 Henry VIII, c. 38, confirmed by 1 Elizabeth I, c. 1, s. 3. See *Halsbury's Laws of England*, 2nd ed. (London, 1935), XVI, 566, notes k and l, which contain the complete table.

[9] For more detail on the provisions of this Act and its amendments, see P. M. Bromley, *Family Law* (London, 1957), pp. 35-38; Nevill Geary, *The Law of Marriage and Family Relations, A Manual of Practical Law* (London and Edinburgh, 1892), pp. 12-15; and Hammick, pp. 12-16.

the ecclesiastical courts from intervening after the death of one of the parties. Since then, these marriages were called "voidable," meaning that their validity could be questioned only during the lifetime of both partners.[10] Lord Lyndhurst's Act (5 & 6 Will. IV, c. 54), passed in 1835, changed the situation. Marriages within the prohibited degrees, which had been *voidable,* now became null and void *ab initio,* at the outset. This act caused a great outcry. Previously, the easiest way to assure yourself of an "unimpeachable" marriage if there were some question about its validity had been to get a friend to bring a suit in court challenging the marriage – a suit which would be continued more or less indefinitely. While a suit was before the court it was impossible to bring another on the same subject, therefore the marriage was safe from question and the children safe in their inheritance until the death of the parents. And thereafter they would still be immune because of the common law provision. But such was no longer the case.

According to a supporter of reform, a barrister and Member of Parliament named James Archibald Stuart Wortley, there were many people who wished the law changed. He presented to the House "numerous petitions, praying for an alteration of the law of marriage as relating to the prohibited degrees of affinity," and claimed that among the petitioners were: 100 Anglican clergymen, 141 Dissenting ministers, 126 solicitors, 6 mayors of boroughs, and 68 magistrates.[11] Mr. Wortley concluded his speech with a motion that a Royal Commission be appointed to look into the question. The House agreed, and accordingly in 1847 such a commission was appointed, among whose members were the redoubtable Mr. Wortley himself; Dr. Stephen Lushington, an expert on ecclesiastical law; Justice Sir Edward Vaughan Williams; a Mr. Blake, a Roman Catholic and late Chief Remembrancer of Ireland; the Lord Advocate, Mr. Rutherford, an expert on Scots law; and the Chairman, John Lonsdale, Bishop of Lichfield. This Commission heard a great deal of testimony, both of support and opposition, from clergy and laity, legal experts and anonymous "interested" people, and ultimately recommended liberalization of the prohibited degrees along the lines of the laws of the Continental nations, including marriage with deceased wife's sister. The fact that other countries were moving in this direction left some critics unimpressed. Dr. E. B. Pusey, in his testimony before the

[10] *First Report of the Commissioners Appointed To Inquire Into the State and Operation of the Law of Marriage as Relating to the Prohibited Degrees of Affinity, and to Marriages Solemnized Abroad or in the British Colonies, Parliamentary Papers* (*PP*) (1847-48), xxviii, 237; and Hammick, pp. 32-33.

[11] Hansard, *Parliamentary Debates*, 3rd Ser., xcii, 742 (Thurs., 13 May 1847).

Commission, sharply disposed of this argument when he pointed out that it was perfectly possible for all other countries to be wrong, and England to be right![12] But his position on the question was probably a minority one.

It was commonly assumed that the Church forbade such marriages on the grounds that ancient Jewish law forbade them. A rabbi, a certain Dr. Adler, in a letter to the Commission, stated that "the marriage of a widower with the sister of his deceased wife is not only not considered as prohibited, but it is distinctly understood to be permitted, and on this point neither the Divine Law, nor the Rabbis, nor historical Judaism leave room for the least doubt."[13]

If the Jews allowed such alliances, where did the idea that they were impermissible originate? Clearly, with the early Christian Church, which was following Roman tradition as much as Jewish. But the reformed churches, as part of their "protest," had rejected the authority of the Catholic Church, and substituted scripture as sole authority. This attitude then put them in an awkward spot: marriage with deceased wife's sister was not prohibited in *Leviticus*, yet most people felt that it *ought* to be. Argument for prohibition was made by a parallel to the prohibition of marriage to brother's wife (*Lev.* XVIII, 16), but it was certainly a weakness in the Protestant case. Dr. Pusey offered this explanation: "It is as reasonable an account as any other, of this omission, to suppose that He willed that it should be omitted, in order that we might not think that the whole range of forbidden relations was contained in those which are expressly, and in the letter, laid down" (p. lv). In other words, God purposely left out obvious prohibitions in order that we should realize that the list was incomplete. This rather Machiavellian explanation surely puts God in an odd light, but perhaps Pusey did not mean it quite the way it sounds. The more usual explanation was that what held for one partner held also for the other. An Anglican vicar later in the century commented that though marrying a wife's sister might not be expressly forbidden, "yet by parity of reason it is virtually implied."[14] The fact that both these positions open the door to purely arbitrary rules seems not to have bothered anyone.

As pressure for reform mounted, the Anglican Church brought up its theological heavy artillery. Members of Parliament learnedly

[12] E. B. Pusey and Edward Badeley, *Marriage with a Deceased Wife's Sister, Prohibited by Holy Scripture, As Understood by the Church for 1500 Years* (Oxford, 1849), p. lxxxv. It contains Pusey's evidence before the Commission.

[13] *Report on the Law of Marriage, PP* (1847-48), xxviii, 424.

[14] Charles Wheatly, *A Rational Illustration of the Book of Common Prayer of the Church of England* (London, 1885), p. 404.

quoted the Bible, and biblical authorities, but there was no real agreement on just what constituted that authority, nor on how scripture was to be interpreted. Gladstone argued in debate that Levitical law (as amended by "parity of reason," presumably) applied to everybody, not just to Jews, using this ingenious analogy: "the Canaanites were punished for offending against the law of God by this crime [incest]; but if it had been a law prohibitory to the Jews only, then it was not binding on the people of Canaan. But since they, too, were punished under this law, the inference was that it was of universal application to mankind."[15]

Feeling ran high on both sides of the question, and one frequently comes across references to Marriage with Deceased Wife's Sister (for brevity's sake, hereinafter MDWS) in essays and fiction of the whole mid-Victorian period. Kathleen Tillotson mentions as an example of the use of fiction for propaganda purposes an anonymous novel published in 1849; *The Inheritance of Evil, or the Consequences of Marrying a Deceased Wife's Sister*.[16] There were undoubtedly many other examples, too. E. M. Forster in 1956 wrote a biography of his great-aunt, Marianne Thornton, in which he tells with affectionate sympathy of the bitterness and upheaval caused in the Thornton family by the marriage in 1850 of Marianne's brother Henry to his deceased wife's sister.[17] Henry was ostracized by most of the family, and had to live abroad for many years. He spent a good deal of his own money in trying to persuade influential members of Parliament to change the marriage law, but of course with no success.

Considering the feeling generated by the question, it seems very odd that the matter was not settled for over sixty years. Sometimes a bill to legalize MDWS would pass a second reading in the House of Commons only to suffer extinction in the House of Lords; more rarely it was the other way around. In the House of Commons, between 1849 and 1907, such a Bill was carried by large majorities nineteen times, and yet never succeeded.[18] The answer to this curious situation lies partly in the fact that extra-Parliamentary support for change was never well organized. And, too, it could be a touchy subject. A supporter might be asked awkward or embarrassing personal questions. Why should any-

[15] Hansard, 3rd Ser., cvi, 629 (Wed., 20 June 1849).

[16] *Novels of the Eighteen Forties* (Oxford, 1954), p. 15.

[17] *Marianne Thornton, A Domestic Biography, 1797-1887* (New York, 1956). See especially ch. vi.

[18] There is a good summary of the Bill's parliamentary history in Lord Tweedmouth's speech, Hansard, 4th Ser., clxxxi, 348 (Tues., 20 Aug. 1907).

one want to marry his late wife's sister? There was one compelling sociological reason, particularly for the lower classes: the need to provide a mother for minor children. It was the usual custom for an unmarried sister to move in with the family of a widower in order to care for her nephews and nieces. Most men could not afford a housekeeper or nurse, and this was the most reasonable solution. Frequently, an intimacy would grow up and the parties would wish to regularize the situation with marriage. Lord Tweedmouth quoted in 1907 the Royal Commission's report of 1847, which noted that when a poor man was widowed, "all feelings point to the sister of the deceased wife, and when once she becomes a permanent inmate, the result in this class is almost invariably cohabitation with or without the form of marriage."[19] No doubt if the rich were more moral than the poor in 1847 it was because they could afford to be.

It is interesting to notice that over the sixty-year period the sociological, or familial, reason is invariably the first one advanced by the Bill's supporters in arguing for change. Its opponents usually concede the need, but attack the Bill on theological grounds. Whenever a bill to legalize MDWS was debated in Parliament, members were eloquent on the injustice of the existing law. How could Parliament discriminate against a poor man, whose gratitude to his sister-in-law for her service to his children would very naturally lead to love for her, a love which could not be legally consummated? The other side retorted that, on the contrary, reform would *not* be in the interests of the poor. As the Earl of Shaftesbury pointed out, since, under the Bill, the widower and his sister-in-law would be permitted to marry, it would then be immoral for them to live unwed in the same household. Thus, the effect of the Bill would be to *force* them to marry, whether or not they wished to: "I maintain that it is the poor man's interest to maintain the [present] law, if only to enable him to have the loving services which his sister — and she is his sister and is always recognized as such — can so well bestow."[20]

Obviously, then, the poor man with minor children was in a dilemma: under the old laws, he might not marry his devoted sister-in-law even if he wanted to; under the new, he *must* marry her, or give up free child care. As Lord Shaftesbury so emotionally put it: "It is the sanctity of home life, and the peace and purity of the English home, which are threatened by the Bill."[21] Or, as another member remarked,

[19] Hansard, 4th Ser., clxxxi, 351 (Tues., 20 Aug. 1907).
[20] Hansard, 4th Ser., clxxxi, 356 (Tues., 20 Aug. 1907).
[21] Hansard, 4th Ser., clxxxi, 357 (Tues., 20 Aug. 1907).

the effect of the Bill would be to "place our sisters-in-law with whom we now associate as freely and intimately as if they were our own sisters, upon the footing of first cousins. How cruel a privation this will be! We shall be deprived of that pure love and affection, unconnected with any thoughts of marriage, which adds so much to the charm of life."[22]

When some members argued that people who wished to marry were respectable because they did not want to live in an illegal relationship, others retorted that such people could not possibly be considered respectable since their marriage would necessarily involve perjury or misrepresentation, and no respectable person would perjure himself. The Commission of 1847 had sought evidence on the frequency of these marriages and reported the results of a private inquiry conducted over a three month period in five selected districts of the country: parts of Yorkshire and Lancashire, of Norfolk, Suffolk, Lincoln, and Essex, of Warwick and Staffordshire, of Hampshire, Dorset, and Devon, and the towns of Bristol, Bath, and Cheltenham. It was apparently a selection in an attempt to cover both rural and urban areas, but it was certainly not comprehensive. The barrister in charge of the survey, T. C. Foster, reported that he found that since Lord Lyndhurst's Act (that is, 1835, or about eleven years) in the areas studied, 1364 DWS marriages were contracted, and among these were people of "respectable" rank, including five mayors and seventy magistrates, naval and military officers, barristers, physicians, and clergymen.[23] One of Foster's assistants, who had canvassed the Bristol, Bath, and Cheltenham area, found 133 cases, but was convinced that with more time and assistance, he could have found easily twice that number (p. 285). All of the investigators thought there were more marriages than those found, but that the exact number was difficult to ascertain because of people's reluctance to admit knowledge of them.

This survey constitutes the only statistical evidence that the Commission had, and we may be sure that there were more instances of MDWS than this rather superficial survey reported, although Mr. Wortley may well have overestimated the facts when he suggested in Parliamentary debate that the number of such marriages was as high as 13,000, affecting at least 40,000 children.[24] Evidently, however, it was not only the poorer classes who contracted such marriages, particularly

[22] Hansard, 3rd Ser., civ, 1237 (Thurs., 3 May 1849).
[23] *Report on the Law of Marriage, PP* (1847-48) xxviii, 249.
[24] Hansard, 3rd Ser., cii, 1111 (Thurs., 22 Feb. 1849).

as the investigators found that all but thirty-eight of the reported cases had been Scottish or foreign marriages (in an attempt to get around the provisions of Lord Lyndhurst's Bill), and the poor might not be expected to afford the expense of a foreign trip to evade the law. Furthermore, the investigators for the survey admitted that it was very difficult to get information from the working class, so that on the whole they had confined their inquiries to the "middle ranks."[25] The Commission reported: "We do not find that persons who contract these marriages have a less strong sense than others of religious and moral obligation, or are marked by laxity of conduct" (p. 243). Not everybody was convinced, however; many people considered it preposterous that a "moral" person could contract an "immoral" marriage. Furthermore, it would be very unwise for Parliament to reward such persons for their immorality by making their marriages legal.

Nevertheless, it was usually stated that it was the poor whom the Bill to legalize MDWS was to benefit, and the second half of the nineteenth century was a period in which "reforms" for the benefit of the poor were popular. Yet it is certainly debatable how closely in touch Parliament was with the real desires and needs of the working class. As the Archbishop of Canterbury, Edward White Benson, rather shrewdly pointed out in debate, it was significant that "the working man was always brought forward as a sort of spectre on occasions of this sort, or he was thrown in as an unknown quantity to make up some weight that was felt to be too light to pass without him."[26] The Archbishop was of the opinion that the poor were just as much against the Bill as the rich, and in about the same proportion, but one might ask the Archbishop whether he was not in fact also throwing in the working man to make up some weight. In any case, Benson's position was a personal one and by no means all of the Anglican clergy agreed with him. The point was, the clergy (a minority of them) who formed the core of opposition to the Bill were unable really to find a compelling argument for their side. Those who contended that the prohibited degrees represented the "law of God" were on shaky ground, inasmuch as the pre-Reformation Church and the present Roman Catholic Church had never contended that these degrees of affinity represented God's law, but only Church law, an important distinction since God's law would not have been dispensable by the Church. According to the evidence given before the Commission, a wide variety of opinion prevailed even within the

[25] *Report on the Law of Marriage, PP* (1847-48), xxviii, 285.
[26] Hansard, 3rd Ser., cccv, 1815 (Mon., 24 May 1886).

Anglican communion, although apparently a "majority" opposed reform. The Dissenters, by and large, did not feel that MDWS violated the law of God.[27]

Deprived of this argument, opponents then contended that the chief benefit of the existing law was social – that is, the object being to prevent discord within a family. But, as the Commissioners rather wryly remarked, since none of the reasons – religious, social, or legal – seemed to prevent the contracting of such marriages, it did not matter much *what* the law said. A DWS marriage occurred, they felt, much as any other marriage did: as the result of a man's and woman's desire to marry (p. 242).

The major push for reform came from Dissenters, and from liberal-minded people who felt that the law of the land should not impose theological proscriptions upon those of a different religious persuasion. Matthew Arnold was particularly scathing in his remarks about his "Liberal friends" who confused liberty with licence. In an argument not unlike Pusey's, he favored the principles of Jewish law while deploring that Western man would or should follow the practices of a "semitic people, whose wisest king had seven hundred wives and three hundred concubines."[28] There seems to be no evidence that the feminist movement was particularly interested in the MDWS question. Feminists who were concerned with reform of marriage law were much more exercised by the inequalities which the law imposed upon wives – the question of married women's property, for example, or the rights of guardianship over minor children. MDWS was, by its very nature, of course, an issue that would concern men rather than women as a group.

There was much vague discussion in Parliament about whether or not the Bill was "really" wanted or needed. Members quoted petitions both for and against the Bill, but according to Lord James of Hereford, it was very difficult to know precisely what the public thought. It was not a question on which you could have popular meetings of support. Who would go to such meetings? A bachelor? Hardly. A married man? He would be very foolish to do so. A widower? "Is it likely he would parade his wish [to marry] at a public meeting?"[29] When we read Hansard we feel that there is indeed a little of the Gilbertian farce about the subject. The sound of several generations of members all solemnly talking about the "purity of the English home" seemed a little amusing

[27] *Report on the Law of Marriage, PP* (1847-48), xxviii, 238-239.

[28] "Our Liberal Practitioners," *Culture and Anarchy*, ed. William S. Knickerbocker (New York, 1935), pp. 180-184.

[29] Hansard, 4th Ser., clxxxi, 368 (Tues., 20 Aug. 1907).

even at the time. But the recurrence of arguments over the years obscured the fact that progress was actually being made toward a settlement.

In 1906, Parliament was asked to approve a Colonial Marriages Bill which would, its supporters claimed, merely remove an inequity in English law which wrought hardship on colonists. As the situation then stood, MDWS was permissible in many parts of the Empire and had been for many years, through action of the local legislatures. These marriages were recognized as valid in the United Kingdom, but problems arose in the area of inheritance of real property and of honors and titles. For example, if a colonist who had contracted a MDWS were to retire to England, purchase an estate, and perhaps receive a title, his children would be prevented from succeeding to that title and estate because of the marriage.

Lord Elgin, in moving the second reading of the Bill, said that the Bill was simply intended "to remove a bar which prevents a person who has been honourably united in legal wedlock within the Empire from enjoying the rights and privileges in this part of the Empire which we ourselves enjoy." What could be fairer? He went on to suggest another, mercenary, and less sentimental reason: "I cannot see that anything but loss could result if we were to throw an obstacle in the way of the colonist who desired to return home to take up his abode in this country to add to its resources the wealth he had accumulated in other regions."[30] (It is tempting to think Lord Elgin was speaking tongue-in-cheek, but, of course, there is no way of knowing.) All of the Bill's supporters pointed out that there was pressure from the colonies and dominions for passage of remedial legislation, and they emphasized the need to prevent colonists' feeling they were being slighted or treated as second-class citizens.

Some members objected that the Bill was simply a foot in the door to get an MDWS Bill passed for the home country. But the Government protested this was not the case. Winston Churchill, then Under-Secretary for the Colonies, stated in Commons that the general question of the deceased wife's sister did not arise in the Bill in any way. "The argument for this Bill [is] solely the Colonial argument."[31] But there were several opponents who agreed with the Marquess of Salisbury's sour prediction that "what is intended is, by a flank movement, to give strength to the case for the Deceased Wife's Sister Bill."[32] Curiously

[30] Hansard, 4th Ser., clvii, 319 (Tues., 15 May 1906).
[31] Hansard, 4th Ser., clxii, 583 (Mon., 30 July 1906).
[32] Hansard, 4th Ser., clvii, 328 (Tues., 15 May 1906).

enough, all the opposition to the Bill came in the House of Lords; it aroused very little interest in the Commons, where there was no debate. Even the opponents in the upper chamber realized that opposition was pointless since the Government apparently had a comfortable majority. The Bill passed with ease in August 1906.

Perhaps its success can be attributed to the fact that the important question – the legalizing of a form of marriage which was anathema to many sincere individuals – seemed remote, and in spite of Lord Salisbury many members were indeed lulled into a false security by the Government's protest that the Bill was not a change in the marriage law, but simply an Act to remove an injustice done to colonials. At any rate, in 1907, when the MDWS Bill was again presented to Parliament, the fact of the previous year's Bill seemed to make it psychologically easier for Parliament to accept the idea of change, although Lord Tweedmouth's argument that because a Bill had passed for the colonies it ought therefore to be passed at home prompted Lord Shaftesbury to make the mock-serious protest: "I submit that that is carrying the feeling of imperialism too far."[33]

One new feature was that the MDWS Act, always previously a private member's bill, was now a Government measure; the weight of a large Liberal majority was behind the reform. This fact plus a change in the social climate are of great importance in the ultimate success of that perennial failure. By the turn of the century, England had become more secular in outlook; theological arguments carried less weight; people were more tolerant of dissent and of the idea that personal morals were the business of the individual, not of the state. Finally, too, it seemed less equitable in 1907 than it had in 1847 for the law of the land to support the strictures of one religion (albeit the majority one) against those of others. As one writer in the *Contemporary Review* stated, after the final success of the Bill, "The whole question was one not of morals but of social convenience, and that is a question for the nation and not the Church to decide. And the nation has decided."[34] Lord Tweedmouth, speaking for the Government, stressed that while they surely did not want to force any man to marry his sister-in-law, or even to abandon his religious principles, they claimed "an equal freedom for those who take a different view, and we do not think it right that the civil law of the country should impose grave disabilities and hardships on a number of

[33] Hansard, 4th Ser., clxxxi, 357 (Tues., 20 Aug. 1907).

[34] J. E. G. de Montmorency, "The Marriage Law – II," *Contemporary Review*, XCII (1907), 559.

men, women, and innocent children, who are at present penalised solely out of deference to the theological opinions of a section of their fellow-subjects."[35]

The extent to which the Church should be governed in its conduct by the civil authority had always been a touchy one, but the clergy had assumed that in aim the two would usually be in harmony. As Archbishop Benson wrote rather bitterly in his diary in 1883 – on one of those occasions when there seemed some possibility that a MDWS Bill would pass – "This is the first real dissilience of the Law of England and the Law of the Church."[36] (The Archbishop was entitled to his opinion, of course, though probably more people would regard the Divorce Act of 1857 as the real turning point.) Benson dolefully remarked in debate that it would be a "grievous day when . . . the Divine law and the law of England should be at variance."[37] Grievous or not, the day was to arrive, and Benson's prediction of a lessening of Church influence in English life had already been fulfilled. The traditional stress of European liberalism on the separation of church and state is reflected in the Government's position of 1907. Tweedmouth's speech clearly stated that "in questions of theology the civil law of the land should adopt an impartial attitude and leave full liberty of conscience to all shades of opinion, provided that its abstention from interference cannot be shown to entail serious dangers to the religious, moral, and physical welfare of the community at large."[38]

III

The essential difference between 1847 and 1907, then, is precisely this last point. To Dr. Pusey and others, the danger seemed clear and present; therefore the Government did have an obligation to interfere. To the majority of sixty years later, there seemed to be no danger at all; therefore the Government had an obligation *not* to interfere. At any rate, in 1907, the MDWS Bill had smooth sailing. In August, it passed the final reading and received the royal assent. The Government did agree to an amendment making it optional for the clergy to celebrate, or allow the

[35] Hansard, 4th Ser., clxxxi, 353 (Tues., 20 Aug. 1907).

[36] Arthur Christopher Benson, *The Life of Edward White Benson, Sometime Archbishop of Canterbury*, 2 vols. (London, 1899), II, 12.

[37] Hansard, 3rd Ser., cccv, 1817 (Mon., 24 May 1886).

[38] Hansard, 4th Ser., clxxxi, 354 (Tues., 20 Aug. 1907). One might remark in passing that it could probably be demonstrated that mortality of wives was much lower by 1907 than in the mid-nineteenth century.

use of their churches for the celebration of, such marriages. (This provision, incidentally, was a marked difference from the Divorce Act of 1857, in which a clergyman, while free to refuse to celebrate the re-marriage of the "guilty party" to a divorce, could nevertheless be required to lend his church for the marriage.)

There was the further problem of Church members who were not opposed in conscience to the Bill, who might, for example, wish to marry a deceased wife's sister even though their Church deplored such a marriage. Lord Robert Cecil proposed to limit the Bill's provisions to those who were not members of the Church of England. Mr. Jesse Collings replied that two people in love would simply leave the Church in order to get married, and that this would be bad. Cecil retorted that Collings seemed to think that a church was a "kind of club which was desirous of having as many people in it as they could possibly get, quite irrespective of their opinions or conduct."[39] After a short altercation the amendment was negatived, but Lord Robert had unwittingly touched a fundamental point: to many people, being an Anglican was as natural and unpremeditated as being a British subject; in some ways Church membership was like a club membership – it denoted a certain status and privilege unconnected with religion, privilege which its members were not disposed to give up because of a few inconvenient rules. When, therefore, as the then Archbishop of Canterbury, Randall Davidson, wrote, the law of the land was brought into "direct, open, overt contrast with, and contradiction of, the specific and divine law laid down in the authoritative regulations of the national church," individual conflicts were bound to arise (Bell, I, 552).

The Archbishop was in something of a quandary. After much thought, he decided to allow freedom of conscience to his clergy, but his "advice" to them was that such marriages ought to take place elsewhere than in the church. With respect to the other ministrations of the Church, Davidson felt that those people who were otherwise entitled to the sacraments of the Church ought not to be denied them on the basis of a questionable marriage (Bell, I, 553-554).

A test case arose almost immediately. A certain Mr. Alan Neville Banister, of the village of Eaton, Norfolk, had married his deceased wife's sister in the Presbyterian Church in Canada. The couple had gone to Canada in order to marry, legally, under the Colonial Marriages Act of 1906 (6 Edw. VII, c. 30), and had later returned to their normal domicile. The vicar of Eaton, Canon Henry Thompson, refused to admit

[39] Hansard, 4th Ser., clxxx, 1468 (Wed., 14 Aug. 1907).

Mr. and Mrs. Banister to Holy Communion on the basis of the rubric in the Book of Common Prayer which allows the exclusion of "an open and notorious evil liver." There was an acrimonious exchange of letters, in which Banister, apparently a pillar of the community, asked if Thompson were actually charging him with immorality. The vicar replied:

> Dear Sir, –
> If you choose to infer that I charge you with being an open and notorious evil liver, I cannot help it. The inference is your own. . . . My simple reason for declining to admit you to the Lord's Table is that you knowingly and wilfully contracted a union which was declared unlawful both by the Church and by the law of the land; you can therefore have no claim upon the privileges of the Church. You cannot allege that you thought what you were doing was lawful, for you went away to another country to do it. The personal correspondence must now cease, for I have nothing to add.[40]

Mr. Banister accordingly brought suit in the ecclesiastical Court of Arches, and won his case. Canon Thompson then applied to the civil courts, but the judgment of the church court was upheld on all appeals. The articles of suit had cited both statute (1 Edw. VI, c. 1) and ecclesiastical law to show that "the incumbent of a parish may not, without lawful cause, deny the holy sacrament to any parishioner that would devoutly and humbly desire it" ("Banister v. Thompson," p. 366). The Archbishop of Canterbury himself conceded that there was no real justification for Thompson's position, remarking that "it is in my judgment impossible rightly to apply these words [of the rubric] on account of their marriage to a man and wife who have contracted as a civil contract a marriage expressly sanctioned by English law" (Bell, I, 554).

The possibility of trouble on account of this rubric had been anticipated earlier. Lord Horace Davey protested in parliamentary debate in 1896 that it appeared to him "monstrous that clergy of the Established Church should be at liberty to stigmatise people as notorious evil livers when they were married with the sanction and approval of the law."[41] George Edward Arundell, Viscount Galway, agreed, noting that such liberty would "set the clergy above the law of the land, because it would enable them to say that people were not married although their marriage was recognized by law."[42] The anomaly of the position was acknowledged by some of the clergy, however, and many of them no doubt would have agreed with Archbishop Davidson, who wrote: "We may, and probably most of us will, discourage these marriages in every

[40] The exchange of letters is reproduced in the reports of the case: "Banister v. Thompson," *Law Reports Probate* (1908), pp. 365-366.

[41] Hansard, 4th Ser., xlii, 1091 (Thurs., 9 July 1896).

[42] Hansard, 4th Ser., xlii, 1090 (Thurs., 9 July 1896).

reasonable way. But this is a very different thing from imposing upon persons who have contracted such a marriage the gravest censure which we can legally lay upon an evil-doer" (Bell, I, 554). It is clear that the Archbishop recognized that, however much he might regret it, times were indeed changing and it was necessary for the Church to change, too, at least to some extent.

The appeal hinged mainly on the question of the legal relationship between the Church and Parliament. Counsel for Banister and for Sir Lewis Dibdin (Dean of the Arches, who had given the original judgment) sought to show that the Church was dependent upon statute, citing in particular the raft of tortuous sixteenth-century legislation which effected the English Reformation, and remarking: "It follows that the whole of the respondent's [that is, Canon Thompson's] justification, the rubric, the canons, and the invalidity of the marriage itself, which is the basis of the defence under the rubric and canons, is statutory. *But what a statute can do a statute can undo*" [my italics].[43] This view prevailed, and Mr. Justice Charles John Darling (later Lord Darling) supported it in an acidly worded opinion: "I am of the opinion that this marriage, which before was contrary to the law of God merely because the statute condemned it as such, is so no longer, and that by virtue of the statute which legalises it." In other words, Parliament could make and unmake the "law of God." He went on to say:

> If it be thought my view does not take due account of the canons and of the Levitical rules, nor of that "law of God" to which appeal is so often made, I can only reply that the canons, and likewise the Levitical rules, have in England, since the Reformation, no authority but such as they may derive from the statute law. Then as to the "law of God," as applicable to marriage, it is manifest that Henry VIII, with the aid of Archbishop Cranmer and others, setting no more store by Leviticus than they did by the Pope, achieved by those inconsistent enactments in Parliament [which the Counsel had cited] all that certain theologians . . . claimed to do for the self-same laws by means of over-subtle interpretations. ("Rex v. Dibdin," pp. 81, 82)

With the conclusion of the appeals, the subject was virtually closed. Parliament had asserted its superiority over the Church and had been upheld in the courts. Those who had direly predicted that passage of an MDWS Bill would open the gates to all sorts of new (and to them — shocking) relaxations were correct: in 1921, Parliament allowed marriage with deceased husband's brother, and in 1931, eight prohibitions regarding marriage with persons related by "affinity," including aunt with deceased husband's nephew, and uncle with deceased wife's niece, were overturned. Further, in 1931, Parliament stated that no incumbent

[43] "Rex v. Dibdin," *Law Reports Probate* (1910), p. 67.

of a parish might refuse to allow his church to be used for the celebration of such a marriage.[44] The rout was complete.

IV

The whole story sheds light on the intricate and ever-changing relationship between the Church and Parliament. As Maitland has pointed out, one of the major effects of the Reformation in England has been to put the ecclesiastical courts under the direct limitation of the temporal legislature. Henceforward not only was their sphere of action limited by Parliament (actually an old phenomenon), but their decisions were dictated to them by a secular power (Maitland, pp. 90-91). This fact was especially true in the matter of the marriage law, although not fully apparent even in the nineteenth century. It was, of course, the ecclesiastical court which upheld the legality of Banister's position.

The decrease of Church control was not a continual and even development, however. By Lord Hardwicke's Act (1753), the Church was made the sole agent of the state in the matter of marriage contracts. It seems clear, however, that this fact was more an accidental consequence of the need to remove socially unacceptable situations than it was a move in the direction of greater Church control of the marriage law. Certainly the general trend was in the other direction, although even the subsequent modifications of Hardwicke's Act essentially rendered the legal value of the contract dependent upon a question of religious belief — surely an invidious position for the state to put itself in.[45] After 1836, through a series of definite steps, Parliament was asserting, as one barrister put it, "the paramount right of the State to define what [should] be the contract of marriage, and with what civil ceremonies it [should] be attended."[46] This statement clearly represents the majority's opinion, although the other side urged that the emotional and spiritual qualities of marriage could not be ignored; that marriage was a moral and social,

[44] See Joyce, pp. 549-550. A shrewd and perceptive writer, Father Joyce points out that the Act of 1907 must have proved very embarrassing for the Anglican Church, since it essentially affirmed Parliament's superiority to the Church in determining what marriages were dispensable: "The breach with Rome was largely concerned with this very question; and the Convocations had solemnly declared that no human power could dispense in this degree. Now Parliament had declared such marriages to be lawful, and those who contracted them were in a position to claim the privileges of the Church" (p. 549).

[45] Montague H. Cookson, D.C.L., "The Marriage Laws of England and Ireland," *Transactions of the National Association for the Promotion of Social Science* (*TNAPSS*) (1862), 173. This article contains an interesting anaylsis of several problems attendant on the marriage law in the mid-century.

[46] William O'Connor Morris, "On the Marriage Question," *TNAPSS* (1861), 212.

as well as a legal contract.[47] Parliament essentially compromised these two positions, making the civil contract the primary one, and arrogating to itself the right to establish requisites for marriage, yet allowing religious organizations, under proper control, to become agents of the state in the celebration of marriage.

V

So ends the tale of the "annual blister." It is an involved story, made even more involved by the tangling of threads of theology, social welfare, and liberalism. Progress in biblical criticism over the years meant that laymen as well as churchmen accepted with more equanimity apparent contradictions in scripture, and, as one writer pointed out, even those people who revered the Old Testament would no longer be willing to go along with Dr. Pusey in speaking of every precept in the law as the direct utterance of God.[48] By 1907 the political climate had changed too; it was certainly very different from that of 1849, when, during debate on an MDWS Bill, one member became so angry that he cried out in exasperation: "Marriages of this description are in themselves either incestuous or not; if they are incestuous, you may pass an Act of Parliament to allow them, but they will remain just as immoral as incestuous cohabitation [outside] the marriage was before."[49] By 1907, such was no longer the case. Incest is, after all, an arbitrary concept, socially defined. English society had really not considered these marriages incestuous for a long time; it simply took a good while for the law to catch up with social opinion, to change incestuous cohabitation into legal wedlock.

Post scriptum:
By the Marriage Act of 1949, a man may marry his deceased wife's sister, but he may not marry his divorced wife's sister (Bromley, p. 34).

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[47] For a particularly emotional presentation of this feeling see Rev. Nathaniel W. Carre, "The Law of Marriage in its Bearing on Morality," *TNAPSS* (1881), 235.

[48] Rev. W. E. Addis, "The New Marriage Law – I," *Contemporary Review*, XCII (1907), 553.

[49] Hansard, 3rd Ser., civ, 1232 (Thurs., 3 May 1849).