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Banister v. *Thompson and Afterwards: The Church of England and the Deceased Wife's Sister's Marriage Act*

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I

The medieval canon law of affinity as an impediment to marriage combined a large range of prohibited degrees with a wide power of dispensation. After the Reformation, however, English law, in line with mainstream Protestant opinion, prohibited marriages within the degrees mentioned in Leviticus,[1] with no provision for dispensation. The prohibited degrees were set out in 'Archbishop Parker's Table' in the Prayer Book, beginning with the memorable declaration that 'A man may not marry his grandmother'. In the nineteenth century, however, some of these restrictions came to be challenged. The classic case was that of marriage with a deceased wife's sister, and it was under this title that successive bills were introduced to alter the law.

Until 1857 the law of marriage was administered by the ecclesiastical courts, according to the canon law.[2] However, the civil courts modified

All archive sources cited are in Lambeth Palace Library. BM = Bishops' Meetings; CUDep. = Church Union Deposit; PP = *Parliamentary papers*. Legal sources are cited according to legal convention.

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[1] There was a question as to whether the list of prohibitions was exhaustive (as Luther maintained) or whether analogous cases should also be included (as Calvin argued). Leviticus forbids marriage with a brother's wife, but marriage with a deceased wife's sister is not explicitly mentioned. In fact English law followed Calvin's view.

[2] The church courts retained jurisdiction over incest until the 1908 act: Victor Bailey and Sheila Blackburn, 'The Punishment of Incest Act 1908: a case study of law creation', *Criminal Law Review* (1979), 708.

and controlled this canon law by means of the writ of prohibition:[3] canon law was now subordinate to common law, and where the two conflicted the civil courts would over-rule the ecclesiastical courts. Marriage with a deceased wife's sister was illegal, and, as with other impediments to marriage, a case could be brought in the ecclesiastical courts to have such a marriage declared void. A case on these grounds could only be brought during the lifetime of both spouses. Nevertheless, the marriage had theoretically been void *ab initio*,[4] and even after one spouse had died the survivor could still be proceeded against for incest.[5]

Consequently, marriage with a deceased wife's sister was possible, in practical terms, provided that no-one challenged it during the spouses' lifetimes. In 1835 an act of parliament (Lord Lyndhurst's Act) clarified the situation: any marriages with a deceased wife's sister existing at the time the act came into force were declared to be immune from challenge,[6] but any future such marriages were made absolutely void.[7] However, this closing of the loophole led in turn to one of the nineteenth century's longest-running controversies (described by Gilbert and Sullivan as 'that annual blister'), the movement to legalise marriage with a deceased wife's sister. The proposal was fiercely resisted by the Anglican hierarchy. The problem became more acute when some of the colonies legalised such marriages, and the couples concerned found their marriages unrecognised in England. The Church of England seemed increasingly isolated, as reform was supported by Nonconformist and Roman Catholic opinion. Queen Victoria was in favour,[8] and the Prince of Wales spoke and voted for change in the House of Lords.[9]

Finally, the proponents of change carried the day. In 1906 an act made colonial marriages with a deceased wife's sister valid in England,[10] and in 1907 the Deceased Wife's Sister's Marriage Act[11] permitted such marriages in England. However, the bishops in the House of Lords secured certain provisos. No clergyman was obliged to conduct such a marriage (removing the parishioner's usual right to be married in the parish church),[12] nor was he liable for any act or omission 'done by him

[3] The writ (later order) of prohibition is an order directed to an inferior tribunal to cease proceedings which exceed its authority or which contravene the law.

[4] *Fenton* v. *Livingstone* (1859) III Macqueen 497.

[5] *Harris* v. *Hicks* (1693) 2 Salkeld. 548.

[6] It appears that the parties could still have been punished for incest (*Ray* v. *Sherwood* (1836) 1 Curt. 193, at p. 202).

[7] Marriage Act 1835, 5 & 6 Will. 4 c. 54. This was, however, sometimes evaded: PP 1847–8 xxviii 233, p. 145.

[8] Kenneth Rose, *The later Cecils*, London 1975, 234–5.

[9] *Parliamentary debates*, 3rd ser. ccxlv. 1789, 1804 (6 May 1879); 4th ser. xli. 1537 8 (22 June 1806).

[10] Colonial Marriages (Deceased Wife's Sister) Act 1906, 6 Edw. 7 c. 30. Where such marriages were legally contracted (under dispensation) by parties domiciled abroad, they had always been recognised by English law (see below).

[11] 7 Edw. 7 c. 47.

[12] In the case of 'guilty' divorcees, clergy were not compelled to conduct marriages, but

in the performance of the duties of his office' for which he would not have been liable had the act not been passed. Furthermore, a clergyman who himself married his deceased wife's sister remained liable to ecclesiastical censure. The act stated that such marriage should be valid 'as a civil contract', a change from the language of the 1906 act which validated colonial marriages 'for all purposes'. Other provisions also tended to suggest that sexual relations with a wife's sister were still questionable. Marriage with the sister of a living divorced wife remained forbidden, and adultery with a wife's sister remained incestuous adultery for the purposes of divorce proceedings.[13]

II

Alan Banister wished to marry his deceased wife's sister. He was a respectable businessman, the manager of the Norwich Electrical Tramways Company, and lived in the Norfolk parish of Eaton, where he was on good terms with the vicar, Canon Henry Thompson. Banister was a communicant churchman, and was the brother of a clergyman. In the summer of 1907 he and his fiancée sailed to Canada, where they married on 12 August in a Presbyterian church in Montreal, under the impression that this colonial marriage would be valid in England under the 1906 act. In fact this was not so, because their domicile was in England, but the 1907 act retrospectively validated such cases.[14] Thus, after the 1907 act, Banister was legally married, in English law, to his deceased wife's sister.

Canon Henry Thompson was a clergyman of moderate views, in his sixties. Faced with Banister's action, he consulted his bishop. The bishop of Norwich was inclined to a hard line, and did not think that a couple who had contracted a marriage of which the Church disapproved could be admitted to communion, at any rate straight away. In the bishop's eyes, Banister's attempt to circumvent the law by marrying in Canada made the matter worse.[15] Banister had apparently approached the bishop to ask whether he could receive communion in the next parish, where the priest was a friend, and held more liberal views, but the bishop refused.[16]

were obliged (until 1937) to allow the use of their church. The Deceased Wife's Sister's Marriage Act went slightly further by allowing the clergyman to refuse the use of his church.

[13] Until 1923 a wife could not sue for divorce for simple adultery by her husband, but only for *aggravated* adultery. Incestuous adultery was one recognised form of this.

[14] The 1907 act validated marriages 'heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without', unless such a marriage had been annulled, or one of the parties had lawfully married again in the other's lifetime.

[15] *Norwich Diocesan Gazette* xiii. 155 (Nov. 1907), 172–3 (bishop's pastoral letter).

[16] Revd C. L. Banister to Randall Davidson (archbishop of Canterbury), 7 Mar. 1910, Davidson papers, vol. 419, fos 241–4. This point was not brought out in the legal proceedings.

Following his bishop's advice, Thompson refused Banister communion, believing that he was empowered to do so by the proviso of the 1907 act: had the act not been passed, Banister would have been cohabiting incestuously, without valid marriage, and thus liable to excommunication. The formal request was by letter.[17] Thompson did not directly answer Banister's question whether he was considered an 'open and notorious evil liver' (the terminology of the Prayer Book's rubric on refusal of the sacrament).

Banister now wrote to the bishop of Norwich, asking him to proceed under the Church Discipline Act (that is, refer the case to the ecclesiastical courts), failing which he would have no choice but to resort to the civil courts.[18] The bishop in turn sought the advice of Archbishop Davidson, as he foresaw risks in sending the case to the Court of Arches (the chief ecclesiastical court of the Province of Canterbury). If the Court of Arches ruled against Thompson, then he expected Thompson would comply. But what would happen if Thompson won in the Court of Arches but was defeated on appeal to the Privy Council? Whereas the Court of Arches was still respected as a church court, the Privy Council was not, having come to be seen, by many in the Church, as an instrument of state interference. A defeat in the Privy Council might lead to rebellion.[19] Davidson, however, pointed out that the alternative – letting the case go to the civil courts from the start – was even more likely to lead to trouble. He himself did not believe that marriage with a deceased wife's sister was in itself sufficient cause for excommunication,[20] and was slightly critical of the bishop of Norwich for making an issue of the case.[21]

The decision to send the case to the Court of Arches posed a problem for Thompson: he was not a rich man, and the cost of legal representation would be very heavy for him. He had hoped for support from the English Church Union (ECU), the Anglo-Catholic society. Thompson was not a member of the ECU, nor indeed a member of their party, but one of the ECU's objects was to conduct court cases where it believed its principles were at stake. This was certainly such a case. The problem was that the ECU regarded the Court of Arches as hopelessly compromised, an instrument of the Church's oppression by the state. Its status as an ecclesiastical court, the ECU believed, was a sham, and they were determined not to give it any credibility. (The Anglo-Catholic paper *The Church Times* declared: 'The jurisdiction of the older Ecclesiastical Courts [as opposed to the Privy Council] remains to be destroyed. To deny that

[17] Thompson to Banister, 24 Oct. 1907, printed in *Banister* v. *Thompson* [1908] P. 362, at p. 366n.

[18] Alan Banister to bishop of Norwich, 23 Dec. 1907, Davidson papers, vol. 419, fo. 83.

[19] Bishop of Norwich to Davidson, Holy Innocents' Day [28 Dec. 1907], ibid. fo. 81.

[20] Minutes of Bishops' Meeting, 22 October 1909, BM 5, p. 8.

[21] Davidson to bishop of Norwich, 3 Jan. 1908, Davidson papers, vol. 419, fo. 86.

jurisdiction is to affirm the spirituality of the Church.'[22]) Thus, while they would support Thompson in the civil courts, they would not become involved in the Court of Arches. A public subscription on Thompson's behalf was launched by the archdeacon of Norwich,[23] but it was not very successful.[24]

At issue in this case was Thompson's obligation to give communion, or, conversely, Banister's right to receive it. According to the Sacrament Act of 1547, no communicant could be denied the sacrament without 'lawful cause',[25] while the Book of Common Prayer, in the relevant rubric, empowers the priest to exclude an 'open and notorious evil liver' until he has 'amended his former naughty life'.[26] Did Thompson have lawful cause to repel Banister? Was Banister an open and notorious evil liver because of a lawful marriage?

Thompson's case rested on the proviso in the 1907 act. Had the act not been passed, Banister's marriage would have been void, and his cohabitation would have been illicit (and indeed incestuous). Thus, Thompson could have refused him the sacrament. Therefore, he still had the right to do so.

This, however, was not accepted by the Dean of the Arches (Sir Lewis Dibdin). Being legally married could not be lawful cause for Thompson's action, and he was ordered not to refuse communion to Banister in future.[27]

As Dibdin pointed out in his judgement, the rubric did not give the priest a general power of excommunication.[28] Sentence of excommunication was a matter for the church courts, and since auricular confession had become voluntary, the primary responsibility for the decision to communicate was upon the individual communicant.[29] The power of the priest to repel was a power to prevent public mischief and protect the community: the rubric refers to sinners whose notoriety is such 'that the Congregation be thereby offended'.[30]

Dibdin noted that by referring to validity 'as a civil contract', the 1907 act seemed to distinguish between the civil and ecclesiastical validity of marriage with a deceased wife's sister. He concluded, however, that such a marriage could not be considered void in ecclesiastical law, although he did not rule on the precise status of such marriages.[31]

[22] *The Church Times*, 24 July 1908, 109.

[23] T. T. Perowne (archdeacon of Norwich), circular letter, Mar. 1909, Davidson papers, vol. 419, fo. 100. [24] Thompson to Davidson, 22 May 1909, ibid. fo. 109.

[25] 1 Edw. 6 c. 1 s. 8. [26] Holy Communion, second rubric.

[27] *Banister* v. *Thompson* [1908] P. 362.

[28] See Robert E. Rodes, Jr, *Law and modernization in the Church of England: Charles II to the welfare state*, Notre Dame 1991, 290–2, on the courts' consistent reluctance to concede such a power to individual priests.

[29] *Banister* v. *Thompson* [1908] P. 362, at pp. 380–3. [30] Ibid. at p. 385.

[31] Ibid. at p. 390.

The crucial point was the scope of the proviso. Was a priest's repelling an intending communicant an act 'done by him in the performance of the duties of his office' for which he would not have been liable had the act not been passed? Dibdin ruled that it was not. The proviso could not mean that a clergyman could simply behave in all respects as if the act had not been passed, or absurd consequences would follow. For example, if the act had not been passed, then Banister's marriage would have been void, and so Thompson could legally have married him to some other woman, but obviously he could not do so now without aiding and abetting bigamy. The 'duties of his office' to which the proviso referred were not all of the clergyman's possible duties, but those duties (such as proclaiming banns) connected with the actual marriage. The proviso was therefore limited to the clergyman's right to refuse marriage in church.[32]

Thompson, and the ECU, saw themselves as defending the Church and resisting the state's interference. However, Banister equally considered himself a loyal churchman, and there were many, especially on the evangelical wing of the Church, who agreed with him. The fact of Establishment was seen, by many, as an essential part of the Church of England's character. The laity had secured certain rights in what they considered their Church, and the Church's regulation through English law maintained this position. It was, after all, the state which had dictated the Reformation in England, and the Prayer Book rested on statute for its authority. Low Churchmen feared that Anglo-Catholics were introducing alien novelties against the wishes of the laity. Against this threat, they looked to the law to defend what they believed were their traditional rights. Where Anglo-Catholics complained of obligations imposed upon priests, Low Churchmen saw rights of the laity. The evangelical *Record* hailed Dibdin's decision, in a leading article, as 'a righteous judgment'.[33]

Although Thompson had acted on his bishop's advice, this advice was unofficial and Thompson found himself bearing full personal responsibility. Nevertheless, he now felt that a principle was at stake, and refused to comply. Having again refused Banister communion, Thompson was now in contempt of court, and the next step would be a further hearing in the Court of Arches, to have the monition enforced. Thompson's contempt could be signified to the civil courts, which could send him to prison. (This had actually happened to obstinate Anglo-Catholic priests in the recent past.) The ECU would not support him in such a hearing, or in an appeal to the Privy Council, but it would pay for a case in the civil courts, seeking an order of prohibition. Thompson therefore turned to the civil courts.

In April 1909, the King's Bench Division ruled against Thompson. One judge dissented, noting that whereas the 1906 act had declared colonial

[32] Ibid. at p. 393.

[33] *The Record*, 24 July 1908, 764.

marriages valid 'for all purposes', the 1907 act had validated marriage with a deceased wife's sister 'as a civil contract', and concluded that this implied a distinction between civil and ecclesiastical validity.[34] But the other judges rejected this view. According to them, it was hard to attach any specific meaning to the phrase: English law only recognised one sort of marriage, which *was* a civil contract, albeit a special one. The judgement stressed the fact that statute completely over-rode all other sources of law. Mr Justice Darling stated that '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.'[35]

Thompson increasingly felt himself trapped in a situation beyond his control. In May 1909 he wrote to Archbishop Davidson, in great distress at the prospect of being imprisoned for contempt. He was sixty-seven, and the affair had broken his health.[36] He was reliant on the ECU, but he did not find them natural allies, and in fact he rather suspected that some Anglo-Catholics would like to see him in prison, as a martyr to discredit the Court of Arches – a role for which he had no desire.[37] Davidson tried to reassure him that this fate was unlikely.[38]

Next the case was taken to the Court of Appeal, which delivered its judgement in December 1909. Not only did Thompson lose again, but the implications of his defeat were carried further. Lord Justice Fletcher Moulton declared that the words 'as a civil contract' were in no sense a limitation on such marriages' validity, and the effect would have been the same had the act declared them to be valid 'for all purposes'. The framers of the act might have intended some distinction, but their intentions were irrelevant to the interpretation of the statute. Lord Justice Farwell cast doubt on the meaning of the proviso that a clergyman was still liable if he himself married his deceased wife's sister; since this marriage would be valid for all purposes he could not be censured for incest, though perhaps his marriage might be regarded as a sort of unbecoming conduct.

Thompson's interpretation of the 1907 proviso was decisively rejected, following Dibdin's argument that absurd consequences would follow. Fletcher Moulton made the provocative (and in Davidson's opinion deliberately offensive[39]) statement that the effect of the act was that marriage to a deceased wife's sister had 'ceased to be contrary to God's

[34] *Rex* v. *Dibdin* [1910] P. 57, at p. 87, *per* Bray J. [35] Ibid. at p. 82.
[36] Thompson to Davidson, 18 May 1909, Davidson papers, vol. 419, fo. 105.
[37] Thompson to Davidson, 22 May 1909, ibid. fo. 109.
[38] Davidson to Thompson, 21 May 1909, ibid. fo. 107.
[39] Davidson to Cosmo Lang (archbishop of York), 23 Dec. 1909, ibid. fo. 141.

law' as far as the law of England, including the ecclesiastical law, was concerned.[40]

Fletcher Moulton's bizarre remark is explicable in terms of legal concepts developed in cases involving foreign marriages. In general, the law of the parties' domicile determined whether a marriage would be recognised in England. Thus, the English courts would recognise a marriage with a deceased wife's sister contracted in a country where it was legal, if the parties were domiciled in that country,[41] but not if they were domiciled in England.[42] However, the English courts would not recognise marriages they considered contrary to the common culture of Christendom.[43] Marriage with a deceased wife's sister, interestingly, did not fall into this category, but was held to be forbidden only by positive law. Although statute had declared marriage with a deceased wife's sister to be contrary to the law of God,[44] this was not the general view of Christendom, and the 1907 act had implicitly repealed this declaration. This view of the basis of the prohibition contributed to the courts' unwillingness to recognise any limitation on the validity of such marriages after the statute law had changed.

The Court of Appeal's ruling caused widespread concern, and the Bishops' Meeting agreed that Davidson should publish a statement.[45] An exchange of letters between W. R. Inge and Davidson was accordingly published in *The Times* on 8 February 1910. Davidson answered Inge's concerns by stating that he did not think the state was claiming to rule on who should be admitted to communion. The ruling did not say whether the Bishop's Court could have excommunicated Banister, only that Thompson himself did not have the authority to do so. Davidson's typically soothing minimalist interpretation did not satisfy Lord Hugh Cecil, who pointed out that before the act, Banister could be excluded, and after the act, he could not, which made it hard to deny that the state was determining admission to communion.[46]

Thompson was still in contempt of court. Despite Davidson's dismissal of the possibility, and whatever the hopes of some zealots, the ECU's legal committee was seriously concerned to protect him from the risk of prison. It was decided that an appeal should be made to the House of Lords; while this would not necessarily protect Thompson, it was unlikely that any action would be taken while it was pending.[47]

[40] *Rex* v. *Dibdin* [1910] P. 57, at p. 119.
[41] *In re Bozzelli's settlement* [1902] 1 Ch. 751.
[42] *Brook* v *Brook* (1861) 9 H.L.C. 193. See also *Sottomayor* v. *De Barros* (1877) 3 P.D. 1.
[43] For example, polygamous marriages: *Hyde* v. *Hyde* (1866) L.R. 1 P. & M. 130.
[44] This declaration was implicit in unrepealed Henrician statutes: *Brook* v. *Brook* (1861) 9 H.L.C. 193 at p. 225.
[45] Minutes of Bishops' Meeting, 20–1. Jan 1910, BM 5, p. 136.
[46] Lord Hugh Cecil to Davidson, 10 Feb. 1910, Davidson papers, vol. 419, fo. 220.
[47] Minutes of the ECU Legal Committee, 14 Dec. 1909, CUDep. 33, p. 316.

Meanwhile, Thompson had decided to retire. The stress of the case, he believed, had damaged his health and he felt unable to cope with the parish.[48] Archbishop Davidson intervened to facilitate the granting of a pension (Thompson had been in the benefice less than the seven years normally required for a pension from its income) and assumed that the case was now over. To his consternation, he then discovered that Thompson intended to continue the case. Thompson explained that he was still liable for contempt, and was reluctant to accept Davidson's assurances that there could not be any real danger now he was retired. In any case, he insisted, he had been persuaded that in the interests of the Church he should continue, much as he would like to let it go.[49] Davidson found the case's continuation increasingly pointless: Thompson had retired, Banister had moved, even the bishop of Norwich had been replaced. 'I imagine it is done in the hope of eliciting in the House of Lords statements which can be denounced as intolerable and thus to exacerbate feeling. I can see no other object.'[50]

Thompson was indeed now convinced of the need to continue the case; in fact he was bombarding the ECU with requests that it do so.[51] The ECU was delaying its appeal because it wished to raise the issue in various public forums, including the Representative Church Council, and this would not be possible once the appeal was lodged and the matter became *sub judice*.[52]

It was June 1912 when the House of Lords gave the final ruling in the case. Yet again, Dibdin's judgement was upheld.[53] The case could go no further; the law was now clear. Davidson issued a statement again denying that the courts had explicitly claimed the right of parliament to determine admission to communion, though he admitted that their language came 'perilously close' to such a claim – a claim which if made would have to be resisted.[54] He had hopes for a new act of parliament to give the Church the freedom it had thought the 1907 act conferred, but nothing materialised. Instead, the issue went off the boil. The ECU passed resolutions declaring that the law of the Church remained unchanged and must be obeyed.[55] Lord Halifax warned the archbishops that unless they told clergy to follow the historic law of the Church and resist the judgement, there would be 'a perfect stampede in favour of disestablishment'.[56] The archbishops, as usual, disappointed Halifax's hopes

[48] Thompson to Davidson, 25 Feb. 1910, Davidson papers, vol. 419, fo. 232.
[49] Thompson to Davidson, 9 Apr. 1910, ibid. fo. 259; Davidson to Thompson, 12 Apr. 1910, ibid. fos 263, 265–73 passim.
[50] Davidson to bishop of Norwich, 16 Nov. 1910, ibid. fo. 274.
[51] Minutes of the ECU Council, 6 July 1910, CUDep. 18, p. 197. [52] Ibid.
[53] *Thompson* v. *Dibdin* [1912] A.C. 533. [54] *Guardian*, 28 June 1912, 849.
[55] Minutes of the ECU Council, 24 July 1912, CUDep. 19, pp. 63–8.
[56] Halifax to Davidson, 20 June 1912, Davidson papers, vol. 419, fo. 289.

for a bold stand, but no stampede ensued. The Bishops' Meeting made plans for a weighty statement on the principles of marriage to be drawn up by expert scholars,[57] but Davidson had great difficulty in finding suitable experts to do this.[58] No action was taken against Thompson. Over the next five years, the Deceased Wife's Sister's Marriage Act regularly appeared on the agenda of Bishops' Meetings, and just as regularly was crowded out by more urgent questions.[59]

III

In 1913 Thompson published a pamphlet setting out the history of the case, and correcting some misapprehensions. He commented that a breach had been made in the principle of affinity as a bar to marriage, and predicted that eventually, no bar would be left but consanguinity: 'Presently shall we have nothing to fall behind but the inner line, the *horror naturalis*.'[60] Alarmist though this may have seemed at the time, Thompson had correctly identified the logic of change. The 1907 act applied only to the deceased wife's sister, and not to other comparable cases, and years passed before they were brought into line. In 1921 an act permitted marriage with a deceased brother's widow.[61] In 1931, marriage was permitted with the spouse of a deceased uncle, aunt, nephew or niece.

The Church of England continued to disapprove, at first, of such marriages, but as Davidson had pointed out in 1912, the Anglican Communion was not united on the subject, with the Episcopal Church of the United States in particular finding no fault with marriage with a deceased wife's sister.[62] The 1908 Lambeth Conference did not reach any clear conclusions on the matter, though a report suggested that marriage with a deceased wife's sister was irregular rather than invalid.[63] Even in the English Church, there were doubts on whether the issue was of fundamental importance. Anglo-Catholics had to consider the point that Rome regarded such cases as dispensable,[64] while moderates such as Davidson sometimes wondered whether a marriage with a deceased wife's sister was any worse than marriage between first cousins, which was

[57] Minutes of Bishops' Meeting, 22–3 Oct. 1912, BM 5, p. 313.

[58] Ibid. 30–1 Jan. 1913, BM 5, p. 327.

[59] Ibid. 1913–16, BM 6, passim.

[60] Henry Thompson, *Banister v. Thompson: a short history of the case, by the respondent*, London 1913, 11.

[61] This is the same relationship as marriage with a deceased husband's brother, as seen from the point of view of the man.

[62] Davidson to Fr Puller, 3 Feb. 1912, Davidson papers, vol. 420, fo. 65.

[63] *Guardian*, 19 Aug. 1908, 1379.

[64] See, for example, ibid. 12 Aug. 1908, 1337, concerning the possible case of a Roman Catholic who marries his deceased wife's sister under dispensation and then becomes an Anglican.

permitted in England.[65] During the inter-war period, the strength of feeling in the Church of England seems to have greatly subsided, and in the 1940s the Church decided to drop its objections.

A 1935 convocation report, *The Church and marriage*, included the suggestion that the Church's table of prohibited degrees should be revised. This was endorsed by both convocations, and Archbishop Lang appointed a commission (known as the Palmer commission) which was intended to report to the Lambeth Conference in 1940, so that the question could be dealt with at a pan-Anglican level. However, the Convocation of York went ahead with a committee of its own which reported in 1939 that the Church's table should be brought 'into accord with the civil law'.[66] The York convocation voted in favour of this on 18 January 1940.

The Lambeth Conference had been cancelled because of the war, and so it was decided to publish the commission's report.[67] It attempted to set out a clear basis for the Church of England's rules of affinity, and explicitly rejected some of the reasoning which underlay Parker's Table. 'We do not hold (as, apparently, Archbishop Parker held) that Leviticus xviii contains the law of God on this matter binding on all peoples at all times.'[68] Rather it was the law of the ancient Hebrew state, and 'therefore as much capable of revision in the interest of a better understanding of God's will as the various provisions of the Mosaic Law which our Lord criticised'.[69] Only some of the prohibitions in Leviticus were really universal. The report also rejected the principle (based on the texts referring to husband and wife as 'one flesh') that a spouse's relatives are forbidden as marriage partners as if they had been his or her own blood relatives.

The report distinguished affinity in the direct line from collateral affinity, and held that only the former was a bar to marriage 'by the law of Christ's Church as it is everywhere received'.[70] Collateral affinity, such as that between a man and his deceased wife's sister, need only be prohibited where patterns of social organisation made such marriages undesirable. In twentieth-century England there was no justification for such a ban, though other Anglican Churches might legitimately impose prohibitions, with or without a system of dispensation, according to their cultural circumstances.[71] The report opposed any system of dispensation in England itself.[72]

In January 1940 York had requested the co-operation of Canterbury in proceeding with reform in England. A Canterbury committee was appointed in 1942, and in 1944 the York and Canterbury committees

[65] Davidson to Hugh Cecil, 31 Dec. 1909, Davidson papers, vol. 419, fo. 158.
[66] *Convocation of York*, *Reports*, *1939*, *No. 452*, xxiv.
[67] *Kindred and affinity as impediments to marriage: being the report of a commission appointed by the archbishop of Canterbury*, London 1940. [68] Ibid. 85. [69] Ibid.
[70] Ibid. 87. [71] Ibid. 83. [72] Ibid. 85.

presented identical reports, in favour of removing the prohibitions in the cases already legalised in civil law. These recommendations were accepted by the convocations with only a few lonely voices raised in opposition, but many speakers seemed uncomfortable at the apparent surrender to secular opinion. In the York convocation, it had been openly recognised that the reform was a response to the change in civil law: speakers had argued that the Church should avoid clashes with the state except where there was a clear and agreed principle at stake,[73] but others, especially in Canterbury, tried to minimise the connection between the secular and ecclesiastical reforms. The bishop of Oxford, in presenting the report in 1944, expressed some doubts about the soundness of the Palmer report: the parts of it which attempted to go back to first principles were 'open to discussion … The procedure involved, first of all, a rather free use of *a priori* arguments, which produced in application something so completely identical with the modern secular legislation of this country that there was at least a possibility that at some point it had unconsciously begged the question'.[74] He regarded the proposed changes as a pragmatic measure rather than an ideal table. But even so he declared, unconvincingly, that the changes in the civil law were 'quite irrelevant'.[75]

The debate demonstrated that there was no longer any agreed justification in Anglican theology for the old prohibitions. As the Palmer report made clear, the argument from Leviticus was no longer regarded as tenable. The few members of convocation who did oppose change did so mainly on the basis of the New Testament references to 'one flesh',[76] but few now agreed that this could be considered the basis of a legal principle. As was now admitted, a satisfactory theological basis had in fact been lacking for some time. The Church of England had been sure that it did not want the Deceased Wife's Sister's Marriage Act, but less sure why.

The Church of England's overt volte-face over affinity is the more striking in view of its increasing strictness, in the same period, over divorce. The key, in both cases, is the significance attached to state policy. At least until 1857, the law of the state and the rules of the Church of England, in matters of marriage, were one and the same. Afterwards they had diverged, and when, both with divorce and with affinity, the Church had failed to hold the traditional line, it had to establish more clearly what was its own standard. In the case of divorce this meant a stricter opposition, rejecting the concessions made in pre-1857 practice to secular law. In the case of affinity, it meant a decision that collateral affinity had been a matter of social policy rather than absolute divine law. At the time of the Banister case, this had not yet been resolved, and the Church found

[73] *York Journal of Convocation*, 18 Jan. 1940, 21; 18 May 1940, 44–5.
[74] *Chronicle of Convocation* [Canterbury], Upper House, 24 May 1944, 176.
[75] Ibid. 180.
[76] Ibid. Lower House, 16 May 1945, 86.

itself in conflict with the state. Even so, the crucial issue in the controversy was not, in fact, the validity of Alan Banister's marriage, so much as the question of access to the sacraments. Were the courts asserting a right to determine this? Davidson was anxious to show that they were not, as this would mean a clash between Church and State, and perhaps even disestablishment. For exactly the same reason, the ECU was anxious to show that they were. Some Low Churchmen were anxious to assert that laymen had legal rights which could not be set aside by priests. But none of them, when it was all over, found that they were quite as anxious as they had thought about marriage with a deceased wife's sister.

The 1907 act had permitted marriage with a deceased wife's sister, but not with a divorced wife's sister,[77] and this principle was followed in the later acts. The law as consolidated in 1949 therefore distinguished two classes of prohibited degrees of affinity: those absolutely prohibited, and those prohibited during the lifetime of the intermediate spouse. In 1960, however, this distinction was abolished, and it became possible to marry a divorced wife's sister, and in analogous cases.

This left only the case of a spouse's relatives in the direct line, such as a step-daughter or mother-in-law. These cases were still evidently felt to be incestuous, although they were not criminal.[78] However, the bar sometimes caught people who were only technically step-parent and step-child.[79] In a few cases special Personal Acts were passed to allow such couples to marry,[80] and in 1984 a committee appointed by the archbishop of Canterbury recommended the abolition of these bars except for some restrictions in the case of step-children under twenty-one.[81] In 1986 a bill was passed which removed most but not all restrictions. Marriage with a step-child over twenty-one was permitted, but only if the step-child had never, before the age of eighteen, lived as a child of the family. Marriage with a mother-in-law or father-in-law was permitted only if both the former spouses were dead – a revival of the distinction between deceased and divorced spouses' relatives.[82] The act contained a conscience clause permitting clergy to refuse to solemnise such marriages, though the

[77] Deceased Wife's Sister's Marriage Act, 1907, s. 3.

[78] The 1908 Punishment of Incest Act (8 Edw. 7 c. 45) prohibited sexual intercourse between a man and his mother, sister, daughter or grand-daughter. Scottish law was (until 1986) based on a 1567 statute (c. 15) which did include some affines (see Cmnd 8422).

[79] For example, A and B marry and have a child X. B dies, and A marries C. X is by this time grown up. A dies. Now C and X wish to marry, but are technically step-parent and step-child, although they have never lived in such a relationship.

[80] For example, Hugh Small and Norma Small (Marriage Enabling) Act 1982 (1982 c. *2*).

[81] *No just cause: the law of affinity in England and Wales: some suggestions for change: a report by a group appointed by the archbishop of Canterbury*, London 1984, 91.

[82] Marriage (Prohibited Degrees of Relationship) Act 1986 (c. 16). The proviso about parents-in-law was added by way of compromise; see 471 *Debates of the House of Lords*, 5s., 892 (24 Feb. 1986).

archbishop of York said that he did not expect it to be invoked in most cases.[83]

Several reasons can be seen for the trend to remove the remaining bars. As Thompson implied, once the uniform logic of affinity as equivalent to consanguinity is abandoned, more specific bars of affinity become harder to justify. Also, however, we may note the privatisation of morality. In English law, sexual relations between affines do not constitute the crime of incest. Why, then, should such couples not be allowed to marry? At one time it could be answered that the state thereby marked its disapproval of immoral behaviour which was not quite a matter for the criminal law, but liberal concepts of the state's role have left progressively less room for such an approach. Either something is illegal, or it is permitted, and in the latter case it becomes a matter of private morality. It would be legal for such couples to live together, and since little social stigma now attaches to living together without marriage, prevention of marriage seems more of an anomaly than a censure. A further consideration is that no bar of affinity is created in the case of an unmarried couple, even if the child has always lived and been treated a child of the 'step-parent'. On the other hand, some recent cases suggest that there is still public disapproval of such relationships where there has been a familial and not merely a legal tie.

For the Church of England, affinity has not appeared as a pressing problem since 1940. The question of a divorced spouse's relatives, raised by the 1960 act, has been subsumed within the larger question of the Church's attitude to divorce, rather than seen as a separate issue of affinity. This leaves only affinity in the direct line, and this, at least at present, presents the Church with very few actual cases.

Although the ruling in *Banister* v. *Thompson* seemed at the time to have profound significance for the future of the Establishment, it too faded from view. At the time of the Banister case, Establishment was still widely seen as intrinsic to the nature of the Church of England, and hence such a legal ruling raised profound issues. But as time passed the view prevailed that Establishment was an extrinsic, accidental aspect of the Church, a definition of the Church's relationship to the State, not a definition of the Church. The ruling was occasionally referred to in discussions of marriage law, but at least from the 1930s, the Church of England simply ignored it in regulating the admission to communion of remarried divorcees.[84] In 1907 such a ruling found significant support from the Anglican laity, as the Established Church could still be seen as an integral part of the English state. By the 1930s the idea of a court case about communion would have seemed strange: although parliament did exercise its right to

[83] 469 *Debates of the House of Lords*, 5s., 46 (9 Dec. 1985).

[84] Bruce S. Bennett, 'The Church of England and the law of divorce since 1857', this JOURNAL xlv (1994), 625–41.

veto the new Prayer Book in 1927, the event was widely seen as surprising if not anachronistic. Communion belonged to the Anglicanism of the active minority, rather than to popular or folk Anglicanism; unlike baptism, on which laypeople have continued to resist clerical restriction.[85]

The Banister ruling was never overturned legally, and a 1948 law textbook referred to the case as showing that 'a change in English law may effect [*sic*] ecclesiastical law indirectly, as where it has ceased to be sinful … to marry a deceased wife's sister'.[86] But whether or not it changed the boundaries of sin, in practice *Banister* v. *Thompson* has to a large extent been forgotten in the Church of England.

[85] See, for example, *Bland* v. *Archdeacon of Cheltenham* [1972] Fam. 157.

[86] Harold Potter, *An historical introduction to English law and its institutions*, London 1948, 209.