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in the earth after the flood" (x. 32), while here JE states that the "earth" was "overspread" by them. It seems hardly possible to contend that these passages are independent of one another. And if not independent, then, as far as these particular passages are concerned, the whole theory goes to the winds. Nor is it easy to see what particular proofs can be offered, as distinct from guesses or assertions, that the critics have rightly divided these particular passages, and rightly indicated their date and author. That the relations between the Jehovist and Elohist in verses 26, 27 are close enough to justify the theory that J and E are practically one narrative we are not disposed to deny. But that there are any cogent grounds on which a portion of this passage can be shown to belong to the pre-exilic, rather than the post-exilic, Elohist, we are disposed respectfully to deny. At least, we may suggest that whatever grounds there are should not be left in books such as Wellhausen's not very convincing treatise on the "Composition of the Hexateuch," but should be stated for the benefit of a wider circle of readers than are likely to consult that work.

ART III.—MARRIAGE WITH A DECEASED WIFE'S SISTER.

THE late Archbishop, not long before his death, mentioned to a friend the maintenance of the ancient marriage laws of the Church as one among three questions which were causing him particular anxiety. He alluded, no doubt, primarily, if not exclusively, to the attack made upon these laws in reference to marriage with a deceased wife's sister. For, as regards the re-marriage of divorced persons, no one will affirm that the law of our Church is at present in a perfectly satisfactory state, and ought to be maintained as it actually exists. Whatever divergent views we may hold on the subject, all Churchmen will admit that it requires amendment of some sort. But the law of the Church as regards marriage with a deceased wife's sister has substantially remained unaltered for centuries. It is clear, consistent, and well-defined. It admits of no refinements or gradation of opinion. Only two views are possible upon it. At the same time, its maintenance is unmistakeably threatened. Last year the House of Lords, by a substantial majority, passed a Bill for legalizing these marriages from a civil point of view, with no adequate reservation of the right of the Church to hold an independent

position in reference to them. Moreover, a law was actually enacted in Jersey which gave to them civil validity in that island—a part of the diocese of Winchester—without any allusion to the ecclesiastical effect of the measure. It will, therefore, be not inopportune to review briefly the whole subject, pointing out (1) How the law of our Church in reference to it has reached its present condition; (2) What inroads on this law are made by the recent Jersey Act, and are threatened in the United Kingdom by the Bill which passed the Lords last year; and (3) What attitude the Church ought to assume in the matter.

(I.) The earliest actual legislation on the subject is contained in the following decree of the Emperors Constantinus and Constans, made in A.D. 355, and incorporated into the Code of Theodosius (Lib. iii., tit. xii. 2):

> "Etsi licitum Veteres crediderunt nuptiis fratris solutis, ducere fratris uxorem, licitum etiam post mortem mulieris aut divortium contrahere cum ejusdem sorore conjugium; abstineant hujusmodi nuptiis universi nec æstiment posse legitimos liberos ex hoc consortio procreari, nam spurios esse convenit qui nascentur."

It will be observed in connection with this law, first, that the ancient opinion referred to as in favour of the legitimacy of these marriages, was a civil and non-Christian opinion, since it treated divorce equally with death as an event which put an end to marriage and conferred liberty to re-marry; and secondly, that the law itself, like the ancient opinion which it corrected, follows reason and common-sense in regarding marriages with sisters-in-law of both descriptions—the widow of a brother, and the sister of a deceased wife—in precisely the same light. These marriages, therefore, were prohibited almost as soon as Christianity was able to influence the laws of the Roman Empire, and they continued to be regarded as unlawful throughout Christendom until, at the beginning of the sixteenth century, the infamous Pope Alexander VI. began the practice of legalizing them in particular cases by dispensations. Human nature was then, as now, impatient of restraint, and the increasing tendency to resort to these dispensations led to the first English legislation on the subject. It is contained in the Act concerning the King's succession (25 Henry VIII., c. 22), passed in 1534, and runs as follows:

> 3. And furthermore since many inconveniences have fallen as well within this realm as in others, by reason of marrying within degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the stepmother, the brother the sister, the father his son's daughter or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt being his father's or mother's sister, or to marry his uncle's wife, or

the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter or his wife's son's daughter or his wife's daughter's daughter or his wife's sister; which marriages, albeit they be plainly prohibited and detested by the laws of God, yet nevertheless at some times they have proceeded under colours of dispensations by man's power, which is but usurped and of right ought not to be granted, admitted, nor allowed; for no man, of what estate, degree or condition so ever he be, hath power to dispense with God's laws, as all the clergy of this realm in the said convocations and the most part of all the famous universities of Christendom and we also do affirm and think.

4. Be it therefore enacted by the authority aforesaid that no person or persons subjects or resiants of this realm or in any your dominions of what estate, degree or dignity soever they be, shall from henceforth marry within the said degrees afore rehearsed, what pretence soever shall be made to the contrary thereof; and in case any person or persons, of what estate, dignity, degree or condition soever they be, hath been heretofore married within this realm or in any the King's dominions within any the degrees above expressed, and by any the archbishops or ministers of the Church of England be separate from the bonds of such unlawful marriage, that then every such separation shall be good, lawful, firm and permanent for ever, and not by any power, authority or means to be revoked or undone hereafter, and that the children proceeding and procreate under such unlawful marriage shall not be lawful ne legitimate; any foreign laws, licences, dispensations or other thing or things to the contrary thereof notwithstanding.

The Act containing this enactment was repealed by 28 Henry VIII., c. 7; but that statute re-enacted the same provisions in almost identical language, expressly extending them, however, so as to prohibit these marriages not only as regarded the relations of a lawful wife, but also as regarded those of a concubine.

Four years later a further statute (32 Henry VIII., c. 38) was made on the subject of marriage, which recited that the usurped power of the Bishop of Rome had always entangled and troubled the meet jurisdiction and regal power of the realm of England, and also unquieted much the subjects of the same by his usurped power in them, as by making that unlawful which by God's word was lawful both in marriages and other things. It then enacted, among other provisions, that no reservation or prohibition, God's law except, should trouble or impeach any marriage without the Levitical degrees.

In accordance with these statutes, the table of prohibited degrees which is printed in our Prayer-Books was put forth in 1563 as a table of degrees within which marriage was prohibited by the law of God and the laws of the realm. It is thus referred to in No. 99 of the Canons of 1603:

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 God 1563. And all marriages so made and contracted shall be judged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law

be separated. And the aforesaid table shall be in every church publicly set up and fixed at the charge of the parish.

The degrees within which this table of 1563 prohibits marriage are called the Levitical degrees because they are all forbidden in Lev. xviii., either expressly, or else by implication, as being on a par with those actually mentioned in that chapter. For instance, marriages between a man and his nephew's widow, or between a man and his wife's niece, or even his own niece, are not there forbidden in so many words, but they are included by analogy in the prohibitions which the chapter contains against marriages between a woman and her husband's nephew (verse 14), or a woman and her own nephew (verses 12, 13). Similarly the marriage of a woman with her sister's widower is prohibited by analogy when the marriage of a man with his brother's widow is expressly forbidden (verse 16). The importance of extending the express prohibitions of the Mosaic law to analogous cases is evident not only from the cases above mentioned, but also from the fact that even the marriage of a father with his own daughter does not appear to be prohibited by that law in so many words.

Until the reign of William IV. marriages within the prohibited degrees, *whether of consanguinity or affinity*—although, as we have seen, they were regarded by both the Church and the State as prohibited by the law of God—were nevertheless not held to be initially void, but only voidable by a sentence of the ecclesiastical court pronounced during the lifetime of both parties. Such a sentence annulled the marriage and bastardized the issue; but if either of the parties died before it was pronounced, the marriage, even if it had been between a man and his own sister, remained valid, and the children were legitimate. But in 1835 an Act, known as Lord Lyndhurst's Act (5 and 6 William IV., c. 54), was passed for England and Ireland, which first declared that marriages within any of the prohibited degrees *of affinity* which had been already celebrated, and had not been already annulled by the sentence of an ecclesiastical court, should not thereafter be so annulled unless a suit for the purpose had been instituted before the Act was passed. It then went on to enact that all future marriages within the prohibited degrees, *whether of consanguinity or of affinity*, should, instead of being voidable, be *ipso facto* void *ab initio*.

The religious feeling and good sense of Englishmen have secured a practically unanimous acquiescence in this law as regards the prohibited degrees of consanguinity, that is to say, as regards members of a person's own family, and also (with one solitary exception) as regards the degrees of affinity,

or, in other words, members of the family with which a person becomes connected, either by marriage or by an illegitimate union. The solitary exception is the sister of the wife or mistress; and as regards her, the law has already been relaxed in many of our colonies, and was last year altered in Jersey, while the House of Lords gave their vote for its alteration in the United Kingdom.

II. The Act of the Jersey Legislature on the subject was passed in March of last year, but was not ratified by Her Majesty in Council until August 1. In considering its provisions, and comparing them with those of the House of Lords' Bill, we must recollect that Lord Lyndhurst's Act did not extend to the Channel Islands, and that consequently in Jersey, at the time when the statute of last year was made, marriages within the prohibited degrees of every kind, *whether of consanguinity or of affinity*, were not void, but only voidable by process of law while both parties were alive, and that, with the sole exception of marriage with a deceased wife's sister, which has now been put on a different footing, this remains the law in Jersey at the present moment. It will also be useful to remember that the law of Jersey as to divorce is the same as that of England before 1857; that is to say, it does not grant divorce *a vinculo* or actual dissolution of marriage on any post-nuptial grounds. Bearing these points in mind, we come to the text of the measure:

Art. I.—Tout mariage contracté en cette île, avant la promulgation de la présente Loi, entre un homme et la sœur de sa femme décédée, sera considéré comme légitime, et les enfants issus de ces mariages seront habiles à succéder, pourvu :

1°. Que les parties contractantes y fussent domiciliées au temps du dit mariage ;
2°. Que le dit mariage fut légitime à tous autres égards ;
3°. Que toutes les formalités exigées par les Lois en vigueur aient été observées ;
4°. Que le dit mariage n'ait pas été annulé par un tribunal compétent.

Art. II.—Aucun mariage contracté à Jersey, après la promulgation de la présente Loi, entre un homme et la sœur de sa femme décédée, ne pourra être, par ce fait, invalidé ; et les enfants issus de ces mariages ne pourront être, pour cette raison, déclarés illégitimes et inhabiles à succéder, pourvu que les parties contractantes soient domiciliées en cette île au moment du dit mariage.

We observe that this Act quietly ignores the ecclesiastical side of the question, and leaves any conflict which may in consequence arise between Church law and State law upon the matter to be decided by the courts of law upon general principles. The House of Lords, on the contrary, in passing their Bill, did not shut their eyes to the difficulty of legislating in antagonism to the Church, though the manner in which

they dealt with that difficulty was, as we shall see, particularly unhappy. The first clause of the Bill enacted that (with certain exceptions as to existing marriages, necessary to safeguard interests and relationships already in being) no marriage theretofore or thereafter contracted, other than a marriage thereafter solemnized by a clergyman of the Established Church in England, should be deemed to have been, or be, void or voidable, by reason only of its being a marriage between a man and his deceased wife's sister.

The second clause, as it passed the Second Reading and went through the Standing Committee of the House, ran as follows:

2. [Provided that no clergyman of the Established Church of England shall be liable to any pains or penalties for withholding the rights and privileges of Church membership from persons living together in marriage made valid by this Act or from either of them ; and] nothing herein contained shall relieve any [such] clergyman from any ecclesiastical pains or penalties to which he would otherwise be liable if this Act had not been passed, by reason of his solemnizing a marriage between a man and the sister of his deceased wife, or by reason of his contracting or having contracted or living in marriage with his own deceased wife's sister.

On the report stage the words printed above in brackets were struck out, and the Bill was read a third time without them ; but, on the other hand, with the addition of the following clause, which was inserted subsequently to the second reading :

3. Nothing in this Act shall remove wives' sisters from the class of persons adultery with whom constitutes a right on the part of wives to sue for divorce under the Matrimonial Causes Act, 1857.

To appreciate the significance of this last clause, we must refer to the Act of 1857 (20 and 21 Vict., c. 85), and note its definition of the class of persons from which, under this clause, wives' sisters are not to be removed by the Bill. The definition is contained in section 27, which enacts that a wife may present a petition for dissolution of her marriage on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of certain other offences specified in the section, and it then proceeds :

Provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity.

So that this wonderful Bill of the Lords, while it proposes expressly to legalize, so far as State law can do so, marriage between a man and his wife's sister after the death of his wife, provides at the same time that the Bill is not to remove a wife's sister from the class of persons with whom the husband, if his wife were dead, could not lawfully contract marriage by

reason of her being within the prohibited degrees of consanguinity or affinity! It is sometimes said that Parliament can do anything, even to making black white. But the Bill which passed the House of Lords last session would, on becoming law, have performed the astounding feat of making black white, while declaring all the time that it was still to remain black.

III. It is melancholy to note the inconsistencies and absurdities into which men will drift when they have once abandoned true principles. The advocates of the legality of marriage with a deceased wife's sister do not desire to legalize marriage with a deceased brother's widow, nor even with a deceased wife's niece. They would leave the thirty prohibited degrees on the woman's side of the table intact, and only expunge No. 17 out of the man's side. If they could succeed in doing this, the mutilated table, with its unexplained blank, would be a standing witness against the outrage perpetrated upon it. The advocates of the limited change which is proposed can only support it by arguments which refute themselves. There is no physical objection to the unions proposed to be legalized. Granted; but there is an equal absence of objection from a merely physical point of view to all other marriages between persons connected by affinity. If any of these are to remain forbidden, the prohibition must rest on moral and social grounds; and these grounds apply equally to a wife's sister as to a brother's wife and other connections in law. Yes, it is replied, but in the case of a brother's widow and the other women within the prohibited degrees of affinity, the idea of matrimony does not so naturally suggest itself to a widower, as it does in reference to a sister of his deceased wife. In other words, there is not the same demand for licence with regard to the others as there is with regard to her. If principles are to be abandoned and laws are to be modified to suit the desires of individuals, adieu to the well-being of the State and to the stability of society. Common-sense would suggest that the existence of a tendency, if such there be, to break through a moral and social barrier at one particular point, requires that this point should be specially safeguarded, rather than that it should be abandoned to the onslaught of the antinomian principle.

It behoves us as citizens, in the interests of the State and of society, to resist the change with which we are threatened. But it behoves us yet more as Churchmen to insist that, if the State unfortunately resolves to alter the civil law on the subject, it shall confine itself to its own province in the matter, and shall not step out of that province and outrage the Church by attempting, either openly or covertly, to alter her law. The

effect in this respect of the Jersey Act of last year is not quite clear. The Act itself is silent on the point. It merely legitimatizes and protects from liability to invalidation marriages with a deceased wife's sister contracted in the island between persons domiciled there at the time, and declares that the issue of such marriages shall not be deemed illegitimate. The question arises, How far does this override No. 10 of the Canons and constitutions ecclesiastical for the island drawn up by the Dean and ministers of Jersey, and ratified and enjoined by King James I., in 1623? That Canon runs as follows:

10. Aucun ne se mariera contre les Degrés qui sont prohibés par la Parole de Dieu; Selon qu'ils sont exprimés en la Table faite par l'Eglise d'Angleterre, sur peine de nullité et censure.[1]

It is important to note that the Canons contain at their close the following clause:

Comme aussi ne sera donné aucun empêchement par le Magistrat Civil de la dite Ile audit Doyen et ses successeurs en l'execution paisible de la dite jurisdiction, au contenu d'iceux Canons, comme n'étants prejudiciables aux Privileges, Loix et Coutumes de la dite Ile, auxquelles n'est entendu déroger.

A correspondence on the question has taken place between the present Dean of Jersey, the Bishop of Winchester, and the Attorney-General of the Island.[2] The Attorney-General's opinion was only asked as to the meaning and extent of the restriction contained in the Act, limiting its effect to *persons domiciled in Jersey at the time of the marriage.* But the letters of the Bishop and the Dean dealt with the question of the celebration of marriages with a deceased wife's sister by the clergy of the island, and the admission by them of persons who have contracted such marriages to the ordinary administrations of the Church. The Bishop expressed his decided opinion against the celebration of marriages of the kind by the clergy. With regard to the other point, in view of the possibility that a formal expression of opinion upon the subject might be shortly called for from the united Episcopate in England, he desired to refrain from laying down any rule by his individual authority, and merely stated that in his judgment every case ought to be treated upon its own merits. From a legal point of view, while it is clear that the new Act abrogates so much of the above quoted Canon No. 10 as renders marriage with a deceased wife's sister liable to be civilly annulled, it seems equally clear that it neither obliges

[1] See "Cæsarea, or An Account of Jersey," by Philip Falle, 2nd edit., London, 1734, chap. vii., pp. 296-300, Appendix xii.

[2] See *Guardian*, September 16, 1896, p. 1426; *Record*, September 18, 1896, p. 928.

the clergy of the island to celebrate such marriages, nor exempts the parties to them from the ecclesiastical "censure" to which the Canon subjects them. And if this censure survives, it will unquestionably justify in law the imposition on the parties of the ecclesiastical penalty of being debarred from the ministrations of the Church while they continue cohabitation.

When we turn from Jersey to the Lords' Bill, we find that the Peers expressly proposed to leave a clergyman of the Church of England liable to the same ecclesiastical penalties as before, if he either himself married his own deceased wife's sister, or solemnized a marriage between a man and his deceased wife's sister. But they deliberately struck out of the Bill a proviso which had been inserted, to the effect that no clergyman should be liable to any pains or penalties for withholding Church rights and privileges from persons living together in such marriages. The Bill, as it was read a third time, was therefore silent on this point. If it had become law in the shape in which it passed the Lords, would a clergyman have been liable to censure or punishment if he had refused the Communion to such persons? The Peers who eliminated the proviso evidently intended that he should; but it is by no means clear that this would have been the case. The persons, it is true, would be living together in a civilly legal matrimony. But so also do Mohammedans in India who are living in polygamy.

The State can, no doubt, in many cases, by a change in its own laws, alter the facts which constitute a man "a notorious evil liver," liable to be excluded from Holy Communion. But if an Act were passed declaring that a marriage which had hitherto been regarded by both the Church and the State as incestuous should henceforth be legal, *unless* it was solemnized by a clergyman of the Church of England, and if the Act expressly went on to leave the clergy of the Church *liable to punishment* for either contracting such marriages themselves or celebrating them between others, and moreover carefully kept alive the idea of the possibility of *incest* between the parties at a certain period, it is certainly not clear that the Act would have conferred, or even attempted to confer, on persons living together in the marriages in question Church privileges, such as the reception of Holy Communion, to which, before the passing of the Act, they would not have been entitled. The point, however, is one which ought not to be left in doubt. The proviso bearing on the subject which was eliminated from the Lord's Bill was not happily conceived. As one of its opponents urged, it purported to give to individual clergymen liberty to set themselves with impunity

above the law of the land. From a Church point of view, it was further objectionable in that, by relieving a clergyman from pains or penalties for withholding Church privileges from persons married under the Act, it implied that such persons were *per se* entitled to those privileges. Its omission, at any rate, removes this implication; but if any Act on the subject were ever to be unfortunately passed, the contrary ought to be expressly asserted in it. Instead of repeating the faulty proviso of last year's Bill, it ought to contain a clause to the following effect:

> Nothing in this Act shall relieve the parties to any such marriage from the loss of any rights or privileges as members of the Church of England which, if this Act had not passed, they would have lost in consequence of having contracted such marriage.

If such a provision were inserted, the mischief of the Act from a civil point of view would remain, but the Church's law would have been safeguarded. It may be possible to avert the evil of a declension on the part of the State from the standard of Christian morality; but in that case it will be more important than ever that the judgment of the Church on the matter shall be clearly and unmistakeably expressed, and that she shall enforce her judgment in her practice and discipline.

PHILIP VERNON SMITH.

ART. IV.—BISHOP HAROLD BROWNE.

(*Concluded.*)

THE chorus of approbation with which the appointment of Harold Browne to the See of Ely was hailed by men of all shades of opinion and schools of thought showed that the Prime Minister had been wisely advised, for there are various aspects in which the occupant of a see is regarded. Some look for a very courtly man, who will be acceptable to the "upper ten thousand"; others to a man of sympathetic heart, that the clergy and others who have intercourse with him may by actual experience be drawn towards him with something like affection; some look for a man of great learning, head and shoulders above the bulk of his presbyters, and not, as has sometimes been the case, one very innocent of his Greek Testament; others desire a man of activity and business-like habits; while a small section simply look for a mouthpiece and supporter of their own Shibboleth. Dr. Browne, though he had too much respect for his high office to become a "society Bishop," yet was