

**THE REPORT OF HER
MAJESTY'S
COMMISSION ON THE
LAWS OF MARRIAGE**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649409815

The Report of Her Majesty's Commission on the Laws of Marriage by Alex. J. Beresford Hope

Except for use in any review, the reproduction or utilisation of this work in whole or in part in any form by any electronic, mechanical or other means, now known or hereafter invented, including xerography, photocopying and recording, or in any information storage or retrieval system, is forbidden without the permission of the publisher, Trieste Publishing Pty Ltd, PO Box 1576 Collingwood, Victoria 3066 Australia.

All rights reserved.

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

This book is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form or binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

www.triestepublishing.com

ALEX. J. BERESFORD HOPE

**THE REPORT OF HER
MAJESTY'S
COMMISSION ON THE
LAWS OF MARRIAGE**

50
THE REPORT

OF

HER MAJESTY'S COMMISSION

ON THE

LAWS OF MARRIAGE,

RELATIVE TO

MARRIAGE WITH A DECEASED WIFE'S SISTER,

EXAMINED IN

A LETTER

TO

SIR ROBERT HARRY INGLIS, BART. M.P.

BY

ALEX. J. BERESFORD HOPE, M.P.

*FOURTH EDITION,
REVISED AND ENLARGED.*

24734 - c. 4
LONDON:

JAMES RIDGWAY, PICCADILLY.

1850.

N.B.—The following letter, as originally published, was written before the question had come before Parliament during the last Session. In republishing it I have made such alterations and additions as have occurred to me, or have become necessary in consequence of the present state of the question.



MY DEAR SIR ROBERT,

YOU so kindly accepted the first edition of this pamphlet, written before the question of Marriage with a deceased wife's sister or niece had received the consideration bestowed upon it in the last Session of Parliament, that I make no scruple of heading this revision of it with your name.

In what I propose to say, I shall avoid, as much as possible, entering upon the main question of the permissibility or the contrary of such alliances, and confine myself to the consideration of the single point, of great practical importance, and in some respects, prior, as far as Parliament is concerned, to the question of the abstract right or wrong of such Marriages. Did those, who are anxious to effect the change make out in the first instance a sufficient case to entitle them to come before Parliament, and to ask for the repeal of the Act which passed a few years ago with such general consent, and which has the recommendation of bringing the law of the State into conformity with the regulations of the Reformed Church of England; and have they at all, during the recent debates, strengthened their cause, and put themselves in a more favourable position against next Session? Whether or not Lord Lyndhurst's Act were a salutary or a foolish one—whether it has been effectual or ineffectual, moral or immoral in its tendency, we have a right to demand from those who are agitating for its repeal—that they should give us sufficient data to ground our decisions upon. We are in the habit of claiming this from private and self-constituted Commissions of Inquiry; much more have we a right to demand it when legislating upon a Bill founded on the Report of a Royal Commission, carefully chosen, formally appointed, and endowed with all those means and appliances for full investigation, which only such a body can possess.

This Commission was appointed (in consequence of a motion of the Right Hon. James Stuart Wortley), on the 28th June, 1847, and composed of the Lord Bishop of Lichfield, Mr. Stuart Wortley, the Right Hon. Dr. Bushington, the (late) Right Hon. Anthony Richard Blake, Mr. Justice Vaughan Williams, and the Lord Advocate of Scotland, (Andrew Rutherford, Esq.) with Herman Merivale, Esq. Secretary, succeeded (on his receiving an appointment in the Colonial Office), in November, 1847, by Dr. Haggard, its defined object being “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,” and in about a year it presented its first Report

relating to the prohibited degrees of affinity, or to speak more correctly, the two degrees of deceased wife's sister or niece. Mr. Wortley, pursuant to his intimation of the preceding year, and grounding his claims upon this Report, brought in a Bill, as we very well recollect, early last Session, to permit the marriages of a man with his sister or niece in law by the wife's side, and to continue the prohibition which now prevents a woman contracting Marriage with a brother or a nephew in law on the husband's side—both cases of course involving the same relationship. I need not tell you that Mr. Wortley, although he secured a majority on the second reading, was not able to carry the bill through the House of Commons, but that he withdrew it with the promise of bringing it forward next Session, unless some one else should take it up for him. It still remains a question which can be canvassed as well outside as within the House of Commons, whether or not he possessed in that Blue Book a sufficient body of evidence to justify him in calling upon the Legislature with much more than the weight of his own convictions to sanction such a change, or whether, in the course of the debates, he added much to its cogency.

Of course, an inquiry like the present into the operation of an existing prohibitory law, and the advisability of retaining or repealing it, must necessarily divide itself into two heads, of which the first is, whether it be one which is necessary by the immutable laws of right and wrong. If it be so, of course all further investigation ceases; if not, the second expedient remains behind, whether it is expedient or not to retain it. The Commissioners have, as may be concluded, addressed themselves to both these considerations in the Report, with which the Blue Book commences, and have in the evidence which forms the staple of the volume, accumulated a body of facts enabling us to draw our own conclusions upon both sides of the question.

Let us see how they deal with the first consideration. In page ix of the Report, after discoursing about a variety of other topics, to which I propose shortly to draw your attention, they remark: "some persons contend that these Marriages are forbidden, expressly or inferentially, by Scripture. If this opinion be admitted, *cadit questio*. But it does not appear from the evidence that "this opinion is generally entertained." Whether or not the amount of evidence which they have been at the pains to put together, warrants so decided an expression of opinion is, in some sort, the point to which I am now endeavouring to call your attention. But, to let this pass, it is most certain that if such be the case, "*cadit questio*." Have we not, then, every reason to expect that even if the Commissioners should not have been able to satisfy their own minds upon it, they would at all events have taken every precaution that such incertitude should not be the result of any the least carelessness, or want of zeal on their part, in

making themselves masters of all reasonably available helps towards coming to a conclusion. The momentous interests on one side or the other which their decision imperilled, demanded nothing less of them. If, after all their care and their study they could not come to a conclusion, would not the impression which this indecision would leave on any candid mind be, that, in a case where the right was so doubtful, and the risk on one side so great, it would be very venturesome to peril it. By changing the law we might share in the guilt of legalising Incest; by leaving it as we found it, we could not possibly incur any such danger. Such is the ideal conduct of a Royal Commission dealing with this question—"Are we or are we not handling what may result in a national permission of incest?" What are its actual proceedings? The eighth line of the Report commences a paragraph, which runs as follows:—

"We conceive that it is not necessary, in the discharge of the duty intrusted to us, that we should attempt to enter into any examination of the law, or practice, in respect of such marriages in the early ages of Christianity. In reference to this, it may be sufficient to state, that for several centuries, marriages within certain degrees of affinity were prohibited by the Church, but that, by the authority of the Pope, dispensations were granted, though to what extent, and in what cases, we do not inquire. In England we apprehend that this was the state of the law up to the time of King Henry VIII. Marriages within the present prohibited degree of affinity were null and void, unless dispensation had been first obtained."

I appeal to you, as one believing that Christianity is of Divine origin, if you can read these sentences without amazement. It is really impossible to say any thing which will not weaken the effect of its inimitable coolness, coming whence it does, and from whom it emanates, and on such an important subject. One would really almost fancy oneself in a Parisian club, when one hears the tenets and the practices of the earliest and purest days of Christianity, so cavalierly dismissed in three lines as "not necessary" to bestow a passing thought upon. If such marriages are contrary to Christianity "*cadit questio*," but to ascertain this "it is not necessary" "to attempt to enter into any examination of the law, or practice "in respect of such marriages in the early ages of Christianity." The only fact which the Commissioners seem to lay down about these "early ages of Christianity" is that during them the Pope granted dispensations for marriages within the prohibited degrees. Of course the Commission could not mean to say this, but their Report reads as if they did.* Having thus compendiously disposed of the historical portion of the inquiry, the Commissioners state the present state of the law.

"The question, whether marriages within the present prohibited degree of affinity were permitted by the law of God, was the subject of much discussion when King

* It is stated that the first Pope who did grant a dispensation for marriage with a deceased wife's sister was Alexander VIth, (Roderick Borgia) in the beginning of the 16th century, notoriously a monster of profligacy, and generally suspected of improper intercourse with his own illegitimate daughter.

Henry VIII. sought to be relieved from his marriage with Queen Katherine. This marriage was pronounced null and void by Archbishop Cranmer. From that period the Ecclesiastical Courts dealt with these marriages, at first, by pronouncing them null and void, notwithstanding one or both of the parties might be dead when the suit was sought to be commenced. But in the time of James I. the Courts of Common Law interfered, and prohibited the Spiritual Courts from proceeding to pronounce them null and void after the death of one of the parties. Hence all these marriages came to be called voidable marriages, in contradistinction to those which were void, as in the case of a marriage where there was a first husband or wife living at the time of the second marriage; or where any one of the parties was a lunatic at the time of celebrating a marriage. Marriages therefore within the prohibited degrees were only voidable; and if they were not pronounced null and void, by the competent ecclesiastical tribunals, during the lives of both parties, their validity could not be afterwards questioned, nor the legitimacy of the children be impeached.

"This state of the law continued unaltered in England until the year 1835, when the Statute 5 and 6 Will., c. 54 (commonly called Lord Lyndhurst's Act), passed. The effect of that statute was to prohibit the Ecclesiastical Courts from entertaining any suit for the purpose of pronouncing null and void marriages, within the prohibited degrees of affinity, celebrated before passing of the Act; and all such marriages, celebrated after the passing of the Act, were declared by it to be null and void.

"This statute extends to Ireland; and, consequently, the law on this subject is the same in that country as in England.

"The law of Scotland does not recognise, in this matter, the distinction between void and voidable marriages, but holds void, *ab initio*, all marriages contracted within the prohibited degrees of consanguinity, or affinity. In that country the sister of a deceased wife is declared to be within the prohibited degrees, by the whole authority of the Church, and, generally, by lawyers. Doubts, however, have been stated, and upon strong grounds, by some eminent Scottish lawyers, whether that degree be within those prohibited, so as to render void the marriage which may be contracted by a widower with the sister of his wife."

After some details commenting upon the incertitude which exists as to the legal value in England, of such marriages, contracted by English subjects in countries where they are not forbidden, the Report continues—

"We have directed our inquiries to the laws of other countries with respect to marriages within the prohibited degrees of affinity, and more especially to a marriage with the sister of a deceased wife. From the evidence which we have taken, there can be no doubt that this last class of marriages is, of all those within the prohibited degrees, by far the most frequent; so much so, that it necessarily forms the most important consideration in the whole subject. When, therefore, for the future, we speak, in this report, of marriages within the prohibited degrees, we intend, when it is not otherwise declared, to confine our observations to marriages with the sister of a deceased wife.

"We find, from the evidence, that marriages of this kind are permitted by dispensation, or otherwise, in nearly all the Continental States of Europe. We have inquired upon what principle these marriages are permitted, or prohibited. In the Roman Catholic Church they are prohibited as matter of discipline: but such prohibition may be, and is, dispensed with by the Pope, or where, from distance, resort cannot without great inconvenience, be had to Rome, by others authorized by him; and upon this principle, that the Church, and not the law of God, has imposed the prohibition; and therefore that the Church, for fitting reasons, may dispense with it.

"Protestant States on the Continent of Europe, with the exception of some of the cantons of Switzerland, permit these marriages to be solemnized by dispensation, or licence, under ecclesiastical or civil authority.

"With regard to the law on this subject in the United States of America, we cannot better illustrate it than by quoting the following passage from the late Mr. Justice Story: he says, 'In many, and indeed most of the American states, marriages between a man and the sister of his former deceased wife are not only deemed in a civil sense lawful, but are deemed in a moral, religious, and Christian sense lawful, and exceedingly praiseworthy. In some few of the States the English rule is adopted.'

And in a letter, which has been communicated to us, the same learned Judge thus expresses himself: 'Nothing is more common in almost all the States of America than second marriages of this sort: and, so far from being doubtful as to their moral tendency, they are among us, deemed the very best sort of marriages. In my whole life I never heard the slightest suggestion against them, founded on moral or domestic considerations.'

In all this you will notice that there is not the slightest intimation given, that in the Protestant countries of Europe, and in the United States, the marriage law is different from and much laxer than that of England in other respects, besides the prohibited degrees. A reserve on this point is observable in the evidence.

"In the Greek Church these marriages are considered incestuous and unlawful," and are not allowed. But in Russia, such a marriage between Roman Catholics would not be invalidated by the State. The Jews do not object to them.

"The various bodies of Dissenters in England do not appear to entertain the opinion that these marriages are interdicted by Holy Writ; or that they are in themselves reprehensible."

We now come to a very important part of the Report.

"The number of Clergy in England is so great, that we have found it impracticable to collect the opinions of the individuals composing that body. We have, however, to the utmost of our power, caused it to be known that we were ready to receive information from every quarter, and more especially from the Clergy; and we have taken the evidence of those who were known, by their published opinions, or otherwise, to have carefully considered the subject; and on both sides of the question.

"We are satisfied that a great diversity of opinion prevails, among the Clergy of the Established Church in England, upon both questions. We think that very many of them do not consider such marriages to be prohibited by the law of God; but that the majority object to them either upon this, or upon other grounds.

"In Ireland, the great majority of the Clergy of the Established Church are represented as disapproving of these connexions; which are rare also among the Presbyterians in that country, and are generally disapproved of by their ministers.

"In Scotland, the opinion of the Clergy is decidedly against these Marriages."

What "the utmost of the power" put forth by the Commission has resulted in, and how far it has enabled them to be "satisfied" of this great diversity of opinion, I hope before concluding this letter to make clear to you.

But of course it was necessary to gather also the prevalent tone of feeling among the laity. The conclusion to which the Commissioners have come upon is this:—

"Among the laity of the United Kingdom, divers opinions obtain; but we think that the prevalent feeling is against these Marriages; and that a large majority, if asked their opinion, without time for consideration, would express a very strong dislike and disapprobation of them. But, judging from the evidence before us, we cannot entertain any reasonable doubt that families of a religious and moral character have, in several instances, when such connexions have taken place among themselves or their friends, been perfectly satisfied, upon a consideration of the whole subject, that such Marriages were not objectionable, either in a religious or moral point of view. We are persuaded, however, that comparatively few, either of the clergy or laity, have carefully considered the subject; unless where circumstances have forced it upon their attention."

We must conclude that the Commissioners have sufficient data to convince them that there is nothing in marriages of this sort which makes them at the first blush repugnant to the moral instinct of any