Heat, I am with you, but as you desire more you must give notice — Greene prayd the Faculty to be decreed, Leave given to cut a door way & build a Stair Case thro, the East Wall of the Nook or Recess of sd Church, to take away the Crown of the Arch, at the Entrance of the Nook, & place a strong Beam of Timber in the room of sd Arch, to open a Dormer Window, if not, to rescind the Conclusion Collins prayd Greene's petion to be rejected, his Clients to be condemned in Costs; the Judge granted Greene's prayer, by rescinding the Conclusion, & reserved the Consideration of Costs to the end of the Suite...

Arches. 3. Sess. E. J. April. 29. 1766.

Nº 62.

Ware agt Ware.

Bishop — Dr Harris — Dr Bever — Collins.

Wh: a Marriage of a Woman with the Bastard Brother of her Husband is incestuous?

Dr Bever for the Appellants

This Cause comes by Appeal from the Consistory of Wells at the Complaint of Anne Ware — Sir in May 1722 Geo. Ware & Frances his Wife had Issue a Son named Joseph; 1728 G. W. was convicted of Felony for Sheepstealing, & transported to America for 7 Years, from wch it dont appear he returned — May 1732 his Wife Frances was delivered of a Son Thos the Appellate, who was christened by the name of Thos a Base Son of Frances Ware — 1747 Joseph Ware was married to Anne Dobell they lived together till June or July 1755, when Joseph died, Novr 1755, the Banns were published between Thos the illegitimate Brother, & Anne the Widow, they were married in March 1756 & cohabited together till 1764. when Citation issued from the Consistory of Wells agt S. W. to shew cause, why the Marriage shd not be Anhulled on account of Incest; a libel was given & admitted for Anne, stating these facts, that the Marriage was prohibited by the Laws of God, the 99th Canon 1603 & the Table of forbidden degrees, or Admonition set forth 1563. "Item "That by the Laws, Consanguinity & Affinity (letting or dissolving marriage) is contracted as well by unlawfull Company of many woman, as by lawfull Marriage". On Anne's Allon 6 Witnesses were examined, who proved the alld facts — June 1764 an Allon was admitted, on behalf of Thos pleading his own Illegitimacy, & that he was no Object of the Canon, wherefore the Marriage ought not to be set aside; The Judge below dismissed Thos from the Cause, whence Anne has appealed.

99 Canon ..... Table 1563 ..... see 2 Burn. fo. 70 q. 83.

26 March. 1765.

Dr Harris ....

The facts are in general agreed on between us, except as to the Birth of Thos who they say was illegitimate, but have brought no witns to prove it, we hope the Ct will think him legitimate, for tho, the Father might be transported, as the Marriage continued, the presumption is, he returned before the Time of his Sentence was compleated — The Proctor gave an Affirmative Issue, & only denied the point of Law.

Dr Bever .....

It is an established Rule, where the father is extra quatuor maria, during the time the Issue was begotten & born, it is to be presumed illegitimate — tho, the present Case is not instituted in a Criminal way, yet being of a criminal nature it ought to be tied down to strict forms — Dr H alledged the Man took advantage of the Woman's Ignorance, but it is the Reverse, she Wheels Temptations in his Way; the Ct will not suffer her to take advantage of her own turpitude Misconduct, she is no Object worthy of favor; It is a Question, wh such a Relation under the particular Circumstances of this Case is to be deemed incestuous; a Bastard is nullius filius. the Case of Hames & Jeffries reported by Ld Comyns as follows. "as to a Bastard being the Son of no one. See 1 Inst: 123. 157. 6 Co. 65. Al Pd: 3. 96 - 1 Bendl. 102. The Bp of Worcester says the Words in Levitics are, "You shall not approach to your next of Kin". i.e. "You shall not approach to the Remainder of

Comyns. fol. 2. Ld Raym: 68 Comberbach 356 5 Mod: 168 & seq:

your flesh; the Latin says ad proximam sanguinis sui, by wch it appears, the Intent of the prohibition was, to prohibit an approach to any of his Blood; so the Expositors extend this Precept to Persons who proceed as well from an illegitimate as from a lawfull Embrace; Ld C. J. held, all the Ct seemed to think, it wd be very mischeivous, if a Bastard shd not be accounted within 32 H 8. for by that Rule a man might marry his own daur, where it is said a Bastard is the Son of no one, this is in Civil respects, where there is an Inheritance.

2 Inst: 683

7 Wm 3. Hil. S... Selden de jure Hebr. Lib. 5. c. 10. fol. 591 Paff. lib. 6. c. 1. par. 32. Lipper. lib. 4. c. 19. p. 502. M. Cumb: says y Prohib. was denyd See 2 Lev: 254. 255.

Ld Raym: 68 On prohib. to stay a Suite to the Ct of Worcester, Doctors said the Jews made no difference between Bastards, & others. It seemed to the Ct no prohibition shd be granted, for tho Bastards are deprived of Privileges, by particular Laws, the same Reason prohibits them from marrying, as others. adjornatur

Cumb: 356. The Child of a Concubine amongst the Hebrews, was not illegitimate; Bastards are by particular Constitutions & Laws deprived of the privilege of Children; yet the reason of the prohib. seems yet to remain; if there be any morality in the Law, tis as morally unlawfull to marry a Bastard as Legitimate issue: It must be Sanguis naturalis, & not Legalis, or Civilis, else a Woman might marry her Bastard Son

Hil. 7 W .... 5 Mod. fo. 168, seq:. For the Prohib. it was said, By 18 Canon of the Apostles, a man who married his Sisters Daur, Clericus non potest esse, wch is all the punishment, the Church in those days cd inflict, on the person so married; & con: q Levitical Law expresly prohibits, ad proximum sanguinis sui accedere, & when this Law was established, there was no difference between a Child born in Wedlock, & lawfull Marriage amongst the Israelites, therefore a Bastard was proximus Sanguinis, amongst these people, whose were the best Expositors of the Law to whom it was first promulged; & all their Commentators on that Law, allow, the unlawfull Issue to be incapable of Inheritance, tis unlawfull in Nature; the Levitical Law was grounded on a natural as well as politic reason, to enlarge their Kindred & unite their families, for there are natural as well as legal Kindred

See Gibson A 13 2 Burn. 12.

Dr Harris ... The Qu: were Joseph & Thos Ware by the same Mother? Were they married to the same Person? if they were, it is immaterial wh we have made out our whole allon; for it then becomes a Question of Law, wh the Marriage with Joseph, creates such an Affinity, as bars the Marriage with Thomas? Affinity holds the Place of Consanguinity, nobody will deny that; but does this take Place with Bastards? 32 H 8. c. 67. Abp Parker's Tables set forth 1563 "That by the Laws, Consanguinity & Affinity (letting & dissolving Marriage) is contracted as well by unlawfull Company of Man & Woman, as by Lawfull Marriage —

2 Burn. fo. 9. 83.

If it holds between Brother & Sister, it holds between 2 Brothers, the same bad Consequences arise from a marriage in both Cases; Dr B. dont see the word adjornatur in Comyns, the natural Inference then is that a Prohibition was not granted — If then there is a Consanguinity between Bastards, Affinity must be grounded on it, it follows of course, as the Shadow the Substance. Lancelot. Instit. Jur: Can: Lib: 2. fo: 118 Nec interest quod ad Consanguinitatem, vel Affinitatem contrahendam, ex justis nuptiis aliqui, an ex damnato coitu inicem copulati fuerint — Voet Lib. 23. Tit. 2. fol. 33. §35. de ritu nuptiarum. Certum non tantum ex matrimonio, sed et ex delito cum meretrice congressu, seu fornicatione, eam nasci affinitatem, quæ ex Iuris Canonici præcepto nuptiis impedimento est. Dig: Lib. 23. Tit. 2. L 14. Si quis filium adoptaverit uxorem quidem, quæ nurus loco est, ne quidem post emancipationem filij ducere potest, quoniam aliquando, nurus ei fuit. Ib. §2. Nec volgo quæsitam filiam pater naturalis potest uxorem ducere: quoniam in contrahendis matrimoniis, naturale Ius & Pudor inspiciendus est. Idem quod in servilibus Cognationibus constitutum est, etiam in servilibus affinitatibus servandum est. Ib. §4 nihil interest ex justis nuptiis cognatio descendat an ex nonnulla

Id: Mantin: 1566

Covarruvias de matrimonio. pt 2. c. 6. §7. nu. 3 .....

Sed Brower de jure con: Rubiorum. Lib. 2. Cap. 6. Quia in prohibendis — p. 309 Brower. p. 446 affinitas vera

Vinnij Comment. Instit: Lib. 5. T. 10. p. 69. — Decret: Gregor. L 4. T 13. — C 10 Laus: 35 qu: 2. 3 — C 2. X De Consang: & Affin: