nam, vulgo quaesitam sororem quis vitatur uxorem
ducere - L. 36 Etiamsi concubinam quis habuerit So-
:roris filiam licet libertinam, Incestum committitur...

Dr Bever..... The Case of Haines & Jeffries dont appear carried into Execu:
:tion, therefore is not applicable, the Reports of that Case
differs so much from each other, that no Stress can be laid
on them - The Appell.t hav: been married 8 Yrs, had sev.l Children is not entitled to
any Favor from the Ch.

Dr Hay Judge..... If Thomas had been the lawfull Brother of Joseph, the marriage
wd certainly have been incestuous; but Thos is said to be only a
Bastard Brother; they are however Uterine Brothers by the same
Mother, therefore there is clearly a Consanguinity between them -
Thos & Anne have lived together 8 Years, wch they have Children
non constat, wch is very material - By the Jewish Laws according
to Selden de Jure nat. & Gent. juxta disciplinam Ebraeorum. Lib. 5
c. 10. fo. 544. Quod ad fratrem & Sororem attinet, eandem aiunt esse
rationem fratris ex stupro, seu Adulterio ab alterutro parente suc-
:cepti, & ejus qui thoro natus est legitimo; ut etiam Sororis di-
:versum non esse, sive ex nuptiis, sive ex stupro prognata fuerint
modo eo naturali genere, eumde cujus nuptiis quaeritur con-
:tingant - But the Jewish Laws are out of the Case, the Laws of the
Land are the only Rule where Temporal Inheritance comes in ques
:tion - Haines & Jeffries dont come up to the present Case, it is said
the Judges inclined not to grant a prohibition there; I must form my
Judgement from the Reason of the thing; a Marriage of this Nature
appears to me as much contra bonos mores, contra pudorem
as if the Party was legitimate; there is a natural Relationship &
Consanguinity. Naturale Jus & Pudor in contrahendis matrimo-
:niis inspiciendum est; says the Civil Law; 32 H 8 prohibits
marriages to the 3d Degree; the Papal Law goes farther, but
then it gives Dispensations, within the prohibited Degrees - It
wd follow, if Bastards were not to be considered, as com-
:prized within the spirit & Meaning of the Prohibition, that
Fathers & Mothers might marry their own natural Children:
If the Position, that Affinity goes hand in hand, with Consan-
:guinity, in the Prohibition, I am inclined to think it void
in the present Case, but the Matter is too weighty, to deter
:mine hastily; I own, the Judge below appears to have done
wrong - if there is any Instance, that the Jewish or Civil
Law has been received in this Country, I shall abide by it,
otherwise the Law of the Land is the Rule - a Marriage
may be called in question after the Death of either of the
Parties, with respect to the Grant of an Admon, on a pre-
:ference; I desire the Gentlemen, who are not concerned, will
assist me with their Advice next Ct -

takes Place....

4th Sep: Archs
Friday May qi
Present
Dr Marriot Kgs Adv:
Dr Lucarry l.....
~~Dr Blackst~~
Dr Harris X...
Dr Macham....
Dr Calvert.....
Dr Wynne.....
Dr Sympson....
Dr Bever X...
Dr Burrell....
Dr Compton....

The Advocates being asked, Seriatim, were unanimously of
Opinion to pronounce the Marriage void by reason of Incest -
Dr Harris said he had looked into Vaughan where the Case of
Harrison v Burwell was reported, on a Dut. wh: a man Ed. marry
his great Aunt, (in 28 H 8 the words carnally known are added)
in comparing the Acts, he says, if a man carnally know a Woman,
without marrying her, he is prohibited marrying her daur, all
Persons in Consanguinity & Affinity with her - This Statute
is omitted by Hawkins & Cay, as repealed, but Vaughan says it
is in force, & it is supposed to be virtually revived amongst
many others by 1 Eliz: See Parkers Tables 1563. & Wheatley on
the Common Prayer.
Dr Wynne quoted many Passages from the Digest & Selden wch I
noted before
Dr Burrell cited a Cause of Office agt Thos Hyatt. oth: Hiett for
Incest, in had. married & cohabited with 2 Sisters, Mary & Anne

Attwood, brought in the Consistory of Worcester in 1723. He had
sev.l Children by Both. Dr Byrche the then Chancellor gave Sentence
agt him Feb: 18. 1724, whose Sentence the Dean of the Arches
confirmed on Appeal; from him it went to the Delegates, who
confirmed on Appeal.
The solemnization of the marriage with the first Sister many was
not clearly proved, but the Cohabiting with her for several years
was, & Hiett owned it.

Cuffend: B. 6. Ch. 1. 532. fo. 470 ..... The Roman Laws paid so great a Reverence, to the bare name of
Father that they allowed no man to marry his adopted daughter,
tho, all the Right of Adoption, had been formally taken off & reversed

L. 23. Ff. L. 55 Dig: de ritu nuptiarum.....

Ibid 472. 534... The Jews in their prohib.n of marriage between Brothers & Sisters,
thought it made no difference, wh.r the Sister in such a case, came
by Adultery, or by a lawfull Bed; nay, if she was born of a Mother
in Law in a dishonest Way, the Rule held agt her in this Respect -
Qu: if there is sufficient Proof before the Ct. of the Illegitimacy of
Thomas Ware?

Dr Hay. Judge.. By the Ecclesiastical Law, the Carnal Knowledge creates the incestu
:ous Turpitude; the Common Law Doctrine relates only to Civil
Rights - The Proof of Bastardy is not very clear; there is no proper
Evidence, of the Fathers Transportation before the Ct: if it is necess:
:ary to shew the Record, that not being done, the Party must be pre-
:sumed legitimate, so the marriage clearly incestuous - In the
Civil Law there were 3 sorts of Brothers, Frater Consanguineus,
Germanus, & Uterinus; all different in regard to Civil Purposes, all
had different Rights of Succession, yet they were considered in the
same Light, with respect to marriage - By the Laws of England
the half Blood cant succeed to an Inheritance, yet a marriage of
the half Blood wd be incestuous; the Ecclesiastical Law regards the
Public Honesty - the Puzzle in the Books seems to have arisen
from the different Views of considering Relationship; a marriage
de Jure, is the only Point determinable here; but the Consequence
of such Determination, is, the temporal Rights are affected thereby,
wch makes the Ct so mild - The Rule to adjust marriage by, is
pointed out by 32 H 8, it is there finally settled, that none are to be
controverted, except those, wch are within the Levitical degrees -
if 28 H 8. is in force as Dr Harris contends, there is an End of the
Question; If the Illegitimacy is proved; I am of Opinion the
Marriage is incestuous, & as such, pronounce it to be void...

Prerogative
3d Sep: P. T.....

No 63 Griffin v Barwell & Hindley — touching the Validity of a Codicill

H Stevens Jun.r — Dr Wynne & Bever — Dr Marriot & Calvert — Greene —

Dr Wynne..... Dec.r 30. 1758. Mr Barwell Smith made his Will, & therein bequeathed
2000 £ to Eleanor Griffin, & constituted his Cousin Rd Barwell, Friderick
Hindley Esq.r Exors & Sd Rd B. residuary Legatee. May 22. 1760 The Testator executed
a Codicil, wherein, after reciting his said Will, & that he devised certain Lands at Esher
in Surry to Major Nath.l Bateman & his Heirs, & also his Shaving Plate, Table &
Razors, & also the said Major B's death since making sd Will; he by this
Codicil revokes sd devise, & gives sd Lands &c. to Rd Barwell & his Heirs.
Sep.r 14. 1762. The Testator made another Codicil, (now in dispute) & after
reciting, he had made his Will in July 1761 & given the Residue to Rich.d
Barwell, he by sd Codicil gives 1000 £ to Eleanor Griffin over & above
what is already bequeathed her; & gives her Niece Ann Howard 100 £
& his Godson Thos Smith Barwell, Son of his Cozen Wm Barwell 1000 £.
Nov: 14. 1762. The Testator died, a Widower, without Children, leaving no
nearer Relations, than Cozens German, in wch Degree, Rd & Wm Barwell,
being own Brothers, are both related, & are two of his next of Kin.
Nov: 18. Rd B. & Fr: H. proved the Will & first Codicil only, taking no Notice of
the 2d Cod: whereupon 3 Sep. M. T. Collins exhibited a Special Proxy for E. G. &
brought in sd 2d Cod: sinis propounded, & prayd a Citation agt RB. & F. H. Exors
to accept Probate of sd Codicil, wch was decreed - Bye day Collins Allon was