as mother and son and grandfather and granddaughter; between those who are both in the first degree of descent from a common stock, as brother and sister; and between those, one of whom is descended in the first and the other in the second degree from the common stock, as aunt and nephew.

What, then, the Statute 1567, cap. 14, means by "sic persons in degrie," &c., is persons who are within the range of seconds in degree, and neither actually seconds in degree of relationship nor outwith the range of that relationship.

The panels in the present case are, as uncle and niece, persons within the degree to which the prohibition of the statute attaches, and the libel is therefore relevant.

The case of *Stewart*, 1845, 2 Broun 544, may not be technically a judgment to that effect and so binding on us as I apprehend a judgment of a full bench of the High Court of Justiciary on a question of law or procedure would be. But I cannot read the words of the Lord Justice-General in disposing of the case, as speaking for a bench consisting of himself, Lords Mackenzie, Moncreiff, Medwyn, Cockburn, and Wood, as having any other meaning than that the question which we are here considering was before them as the essential foundation of the sentence which they were pronouncing, and that they had no hesitation in accepting the law as your Lordships who have already spoken, and with whom I respectfully agree, have determined.

LORD SALVESEN—I am of the same opinion.

LORD MACKENZIE—I agree with the Lord Justice-Clerk.

LORD SKERRINGTON—I agree.

LORD JUSTICE-GENERAL—I agree with your Lordships. In my judgment the 6th verse of the xviii chapter of Leviticus prohibits the act charged here, and the prohibition in that verse is powerfully reinforced by the illustrations contained in the following verses.

We shall therefore hold this indictment relevant.

The Court found the indictment relevant.

Counsel for the Crown—The Solicitor-General (Morison, K.C.)—M. P. Fraser, A.-D. Agent—Sir W. S. Haldane, W.S. (Crown Agent).

Counsel for the Panels—Maclean. Agent—J. M. Smart, Clydebank.

COURT OF SESSION.

Saturday, November 4.

SECOND DIVISION.

WALKER *v.* WALKER'S TRUSTEES AND OTHERS.

Husband and Wife—Succession—Courtesy—Conquest—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 37.

A widower, as father of his deceased wife's heir, claimed courtesy out of property which was conquest of the wife and not heritage. *Held* that, section 27 of the Conveyancing (Scotland) Act 1874 having abolished all distinctions between conquest and heritage, conquest is subject to courtesy just as heritage is.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 37, enacts—"The distinction between fees of heritage and fees of conquest is hereby abolished with respect to all successions opening after the commencement of this Act, and fees of conquest shall descend to the same persons, in the same manner, and subject to the same rules, as fees of heritage."

James Walker, *pursuer*, brought an action against James Walker junior and another (trustees of his deceased wife Mrs Walker) and others, *defenders*, claiming courtesy out of certain heritable property in which the wife, having acquired it by purchase with her own funds, was at the date of her death infeft.

The defenders, *inter alia*, pleaded—"(2) The deceased not having died possessed of any heritage in respect of which courtesy is due to the pursuer, the conclusions as regards courtesy should be dismissed."

On 17th June 1916 the Lord Ordinary (ORMIDALE) sustained the defenders' second plea, and dismissed the action as regarding courtesy.

Opinion.—"Mrs Walker died on 6th January 1916, survived by her husband, the pursuer of this action, and by three children of their marriage, one of whom, James, is heir-at-law of his mother.

"As father of his deceased wife's heir the pursuer maintains that he is entitled to courtesy out of certain heritable property in which his wife was at the date of her death infeft. It is not disputed that Mrs Walker acquired the property, not by succession, but by purchase with her own funds. The heritable property is therefore conquest of the wife, not heritage.

"It is admitted by the pursuer that prior to 1874 courtesy was not due from conquest, but it is maintained that by section 37 of the Conveyancing Act of that year the distinction between conquest and heritage was abolished to all intents and purposes, with the result of rendering conquest subject to courtesy just as heritage is.

"The question does not appear to have come up for decision. That is, Mr King Murray says, because it has been regarded as too clear for argument. The practice, he

understands, is in accordance with the construction which he seeks to put upon the section.

"What the section says is—' . . . [*quotes, v. sup.*] . . .'

"The expressed purpose of the section therefore is to abolish the distinction between fees of heritage and fees of conquest. Now courtesy cannot be termed a fee of conquest or a fee of heritage. It is in no sense an estate of fee. The word 'fee' is ordinarily used in contradistinction to liferent in matters of succession. Courtesy is a proper estate of liferent. It does not fall directly therefore within the purview of the section. It is said, however, that it is a rule affecting the descent of a fee of heritage that it passes to the heir burdened with courtesy, and that therefore the descent of a fee of conquest is now subject to the same rule, with the result that courtesy is due out of conquest also.

"I am not prepared so to hold. In my opinion the section does no more than abolish the distinction between the lines of succession in heritage and conquest. That seems to be the plain meaning of its language, so that the descent of conquest will no longer be to elder brothers, but will be, as in the case of heritage, to younger brothers. To give the section the meaning contended for would be to impose on conquest a burden from which hitherto it has been free. Had that been intended one would have expected to find it provided in perfectly clear and unequivocal terms.

"It is upwards of forty years since the Act of 1874 became law, and yet by no author or editor do I find that courtesy is said now to extend to conquest. On the contrary, Lord M'Laren in Wills and Succession, while he refers (p. 81) to section 37, whereby fees of conquest are to descend as if they were fees of heritage, in treating of courtesy a little later (p. 96), states the law to be that courtesy is not due from conquest. Mr Cameron also so states the law—Intestate Succession, secs. 236, 264, and 265. So in Bell's Prin. (Guthrie's ed.); Ersk. Prin. (Rankine's ed.); Menzies on Conveyancing (Sturrock's ed.)

"Accordingly I shall sustain the second plea-in-law for the defenders and dismiss the conclusions as regards courtesy. . . ."

The reclaimer argued—The rules relating to courtesy were artificial, and the distinction between conquest and heritage was recognised to rest upon no logical basis—*Watts* v. *Wilkin*, 1885, 13 R. 218, 23 S.L.R. 131; Bell's Commentaries, vol i, p. 60. Courtesy was originally designed to enable the widower to keep up the family in the same style in which his wife's money had kept it up, it being considered unreasonable that a father should be deprived of the emoluments of a proprietor by his son—M'Laren on Wills, vol. i, p. 95. It was one of the rules of succession to heritage that it was burdened with courtesy. Other authorities referred to were—*Clinton* v. *Trefusis*, 1869, 8 Macph. 370, 7 S.L.R. 200; Bell's Prins., 1038, 1605, 1608; Erskine's Prins. (21st ed.), 239, *cp.* 562.

The respondents argued—Courtesy was not a liferent but a personal privilege of the father of the deceased wife's heir—Bell's Prins., 1606. The question was, what did the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) mean when it destroyed the difference between fees of heritage and fees of conquest. In his Prin., 1037, Bell drew a very definite distinction between fee and the estate of liferent. And courtesy was not even a liferent but a personal privilege. Cases referred to were—*Watt* v. *Wilkin* (*cit.*); *Hodge* v. *Fraser*, 1740, Morison, 3119.

At advising—

LORD DUNDAS—There is no doubt that prior to 1874 a husband's right of courtesy as regards lands in which his wife died infeft did not extend to the case of conquest. "It is not easy," says Professor Bell,—Bell's Com. (7th ed.), vol. i., p. 60—"to see a good principle for this distinction, and some of our best lawyers (as Lord Pitfour and Lord Braxfield) have declared that they can discover no good reason for the distinction." The question in this case is whether or not this old distinction was abolished by section 37 of the Conveyancing (Scotland) Act 1874. I have come to the conclusion that it was. It is clear that section 37 abolished the somewhat anomalous distinction which till then subsisted between the rules of succession regulating conquest and heritage respectively. It would, I think, be very difficult to suppose that the Legislature intentionally preserved the no less anomalous distinction between conquest and heritage in the matter of courtesy. One would surmise, as much more probable, that the precise point was not present to the minds of those who framed the Act. But even if that surmise be correct it would by no means follow that the words of section 37 are not wide enough to include the point in question. I think they are wide enough, and that the Lord Ordinary in his carefully expressed opinion has adopted a construction of rather too narrow and rigid a character. I read section 37 as reasonably importing that conquest and heritage are to be *in pari casu* as regards all their incidents—conquest following the rules of heritage, and not *vice versa*—with reference to the estates of all persons dying after 1874. One of the incidents of a "fee of heritage" is that it may be subject to courtesy, and the section seems to me to enact that in future a "fee of conquest" may be so likewise. This conclusion appears to me to be in harmony with the manifest intention of the Legislature, and with a sound and reasonable construction of the section according to the natural meaning and implication of the language used. There seems to be no authority on the point. I am unable to derive assistance from any of the text writers or authors to whom we were referred. It seems that the learned writers—with one exception (Conveyancing Practice by Burns, (2nd. ed.) 1904, p. 192)—have not had in view the particular point now under consideration. In the absence of authority I have come to the conclusion that we ought to construe the section in the sense above indicated.

I think therefore that we should recal

the Lord Ordinary's interlocutor so far as it sustains the second plea-in-law for the defenders and dismisses the conclusion of the summons as regards courtesy, and also in so far as it finds the defenders entitled to expenses; find and declare that the pursuer is entitled to his courtesy out of all lands and heritages which belonged to his deceased wife, and in which she was infeft at the date of her death, 6th January 1915; repel the second plea-in-law for the defenders; *quoad ultra* adhere to the interlocutor; and remit the cause to the Lord Ordinary to proceed therein as may be just. The pursuer must have the expenses of the reclaiming note.

The LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary in so far as it sustained the second plea-in-law for the defenders, repelled that plea, and found and declared that the pursuer was entitled to courtesy out of all lands and heritages in which his deceased wife was infeft at her death.

Counsel for Pursuer and Reclaimer—Wilson, K.C. — M. P. Fraser. Agents—Patrick & James, S.S.C.

Counsel for Defenders and Respondents—Christie, K.C.—Ingram. Agents—Allan, Lowson, & Hood, S.S.C.

Thursday, November 9.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

BAILLIE AND OTHERS v. MOTHERWELL LICENSING COURT.

Public-House—Licensing Authority—Certificate—Procedure—Renewal of Certificate—Omission of Power to Sell Spirits.

The holders of innkeepers, publicans, and grocers' certificates in a burgh all applied for renewal of their certificates. They were summoned to attend the Licensing Court of the burgh; no notice of any objection to the renewal of their certificates was given them; and no objection was stated at the Court to their applications. Each case was separately called, and after calling the first case the magistrates retired, and on their return intimated to the applicant that his certificate was renewed for the sale of all the liquors which his former certificate allowed him to sell with the exception of spirits. Without retiring, they made a similar intimation to each of the other applicants in turn. In none of the cases was the applicant heard in support of his application. The applicants appealed to the Licensing Appeal Court, in which after a hearing their appeals were refused. The applicants brought an action concluding for reduction of the deliverance of the Licensing Court and subsequent proceedings, and for declarator that their certificates were valid and effectual to the same extent as if they had contained authority to sell spirits, and for decree ordaining the clerk to the Licensing Court to correct the certificates. *Held* (1) that to except the sale of spirits was "to refuse to renew" the certificates within the meaning of the proviso to section 11 of the Licensing (Scotland) Act 1903, which it was incompetent under that proviso for the Licensing Court to do without first having heard in open court the parties in support of their applications; (2) that the proceedings of the Licensing Court were therefore irregular and must be set aside; (3) (*rev.* Lord Ormidale, *dub.* Lord Skerrington) that the certificates did not therefore *ipso facto* fall to be renewed, but must be considered *de novo* by the Licensing Court.

The Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), enacts, section 11—"At any general half-yearly meeting of a licensing court, or at any adjournment thereof, . . . it shall be lawful for the said court to grant certificates for the year or half-year next ensuing as the case may be . . . to such and so many persons as the court then assembled at such meeting shall think meet and convenient, to keep inns and hotels, or public-houses, within which exciseable liquors may, under Excise licences, be sold by retail, to be drunk or consumed in the premises, within the jurisdiction of such court. . . . Provided always that all such meetings shall be held with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open court, if such party shall think fit to attend, and any certificate granted otherwise than at such meetings shall be void and of no effect."

(1) Daniel Baillie and others, all retail wine and spirit merchants, and all carrying on business in Motherwell, (2) Joseph Blair and others, all licensed grocers carrying on business in Motherwell, and (3) William Duffy, hotel-keeper, Motherwell, *pursuers*, brought an action against (1) Andrew Wilson and others, the Licensing Court of the Burgh of Motherwell, (2) James Burns, town-clerk of Motherwell, (3) Archibald Colville and others, the Licensing Appeal Court for the Burgh of Motherwell, and (4) John T. T. Brown, Clerk of the Peace for the Middle Ward of Lanark, Hamilton, concluding as follows:—"Therefore (*first*) the defenders ought and should be decerned and ordained by decree of the Lords of our Council and Session to exhibit and produce before our said Lords (*a*) a pretended deliverance of the defenders first called at the Licensing Court held at Motherwell, dated 11th April 1916, and purporting to exclude the sale of spirits from all the licences granted at said meeting, and (*b*) a pretended letter from the defender fourth-named to the defender second-named, dated 3rd May 1916, and purporting to intimate in terms of section 30 of the said Licensing Act that appeals taken by the pursuers against the said