

INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600



NOTE TO USERS

The original manuscript received by UMI contains pages with indistinct and slanted print. Pages were microfilmed as received.

This reproduction is the best copy available

UMI



THE MARRIAGE LAWS AS FOUND IN
THE CANONS OF THE CHURCH OF ENGLAND

by

Rev. Michael Saunders

A dissertation submitted to the
Faculty of Canon Law, Saint Paul
University, Ottawa, Canada, in
partial fulfilment of the
requirements for the Degree of
Master of Arts in Canon Law.

Ottawa, Canada, 1986

© M. Saunders, Ottawa, Canada, 1986



National Library
of Canada

Acquisitions and
Bibliographic Services

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale
du Canada

Acquisitions et
services bibliographiques

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file *Votre référence*

Our file *Notre référence*

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-26361-4

THE MARRIAGE LAWS AS FOUND IN THE CANONS OF THE CHURCH OF ENGLAND

Michael P. SAUNDERS

This study examines the marriage canons contained in the present canonical legislation of the Church of England. These canons, B30-B36, were promulgated in 1969 and may be found in *The Canons of the Church of England: Canons Ecclesiastical Promulgated by the Convocations of Canterbury and York in 1964 and 1969*.

A broad sweep through English history shows that from the time of the Norman Conquest until the reign of Henry VIII, the canon law of the Western Church operated effectively in the country. Marriage was generally accepted as being of a religious nature and the temporal power left such matters to the Church.

In 1533, Henry VIII gave statutory force to the universal *ius commune*, thereby creating a new body of national ecclesiastical law and through this act of legal fiction created a new legislator in matters canonical. The Church of England produced new codes of law for itself at different times in its history. These historical developments are traced and examined as are the various canons that applied to marriage.

While the administration of canonical marriage law remained in the hands of churchmen, and Church courts alone remained competent to settle matrimonial cases, the question is posed: has the Church of England retained the canonical traditions concerning marriage which it had operated for a millenium prior to the Reformation?

This study concludes that the present canon law of the Church of England presupposes both the statute and common laws of England and the general pre-Reformation canon law of the Western Church, except where that canon law has been affected by contrary statute or custom in England. While the State does not force its laws on the Church, the Church of England has accepted most of the statutes which appertain to marriage and has made them its own.

As to the marriage canons, the Church has continued to profess the doctrine of indissolubility of marriage from the pre-Reformation through the post-Reformation period. Although the general concept remains unchanged, its application in the life of the Church community has seen varied applications. An investigation into the preliminaries to and capacities required for marriage show varying degrees of conformity with pre-1533 canon law and the present *ius commune* of the Western Church.

Two serious interventions by Parliament are treated at length: the civil impediment of clandestinity introduced in 1753 and the notion of voidable — as distinct from void — marriages which developed latterly after the closing of the ecclesiastical marriage courts and the introduction of divorce *a vinculo* in 1857.

ACKNOWLEDGEMENTS

I wish to express my gratitude and appreciation to His Lordship the Bishop of Clifton, The Right Reverend Mervyn Alexander, who made it possible for me to come to Saint Paul University to study Canon Law and to his Vicar General and Judicial Vicar, The Right Reverend Monsignor Joseph Buckley. A special note of thanks to the Reverend Jean Thorn, Dean of the Faculty of Canon Law, Canon Barry Keeton, Rector of Howden, and most especially to the Reverend Francis Morrisey, O.M.I. for his sagacity, critique and encouragement in directing this work. Lastly, my thanks to Mrs. Ginette Lapierre who typed the final manuscript.

TABLE OF CONTENTS

	PAGE
INTRODUCTION.	vi
CHAPTER ONE: THE CANONS OF THE CHURCH OF ENGLAND .	1
A. The Place of Ecclesiastical Law in the Anglican Church.	5
B. The Place of Canon Law in English Civil Law - A Historical Perspective	7
i. From King Edgar III to King Henry VIII	7
ii. The Reign of King Henry VIII	13
iii. The Reign of King Edward VI.	27
iv. The Reign of Philip and Mary	30
v. The Reign of Queen Elizabeth I	33
C. "The Canons of 1603"	38
i. King James I and "The Canons of 1603".	38
ii. The Binding Authority of "The Canons of 1603".	42
D. The Revision of Canon Law.	45
i. <u>The Revision of The Constitutions and Canons Ecclesiastical of 1603</u>	45
ii. The Present Canon Law of the Church of England - The Authority of Parliament	54
CHAPTER TWO: THE TEACHING OF THE CHURCH OF ENGLAND ON INDISSOLUBILITY.	61
A. <u>Reformatio Legum Ecclesiasticarum</u>	64
B. Divorce.	81
i. The Divorce Act of 1857.	81
ii. The Anglican Bishops and the Act of 1857	85

TABLE OF CONTENTS

iv

	PAGE
C. The Lambeth Conferences.	87
i. Divorce.	87
ii. Other Concerns	94
a. Contraception.	94
b. Mixed Marriages.	96
D. Indissolubility.	100
i. Canon B30:1.	100
ii. Canon B30:2.	109
iii. Canon B30:3.	116
CHAPTER THREE: REQUIREMENTS FOR MARRIAGE	118
A. Notice of Marriage	120
1. Banns, Licence or Certificate - B34:1.	120
ii. Archbishop of Canterbury's Prerogative - B34:2.	125
iii. Bishops' Rights - B34:3.	130
iv. Certificate - B34:4.	135
B. Civil Requirements	138
i. Clergy Bound by Civil Law - B35:1.	138
ii. Publication of Banns - B35:2	140
iii. Prohibited Times - B35:3	143
iv. Minister's Rights - B35:5.	146
C. Requirement of Form - "The Anglican Tametsi"	152
D. Religious Service after a Civil Marriage - B36:1,2.	166
CHAPTER FOUR: IMPEDIMENTS TO MARRIAGE IN THE CANONS	172
A. The Impediment of Nonage and Parental Consent - B31:1, B32	174

TABLE OF CONTENTS

v

	PAGE
B. Consanguinity and Affinity - B31:2	184
i. The Impediment	184
ii. The Parker Table	193
iii. Post-Parker Legislation.	198
iv. Affinity - <u>No Just Cause</u>	210
C. Capacities for Marriage - B33.	213
D. The Concept of Void and Voidable Marriage.	225
CONCLUSION.	238
APPENDICES.	244
A. Marriage Canons from the <u>Provinciale</u> - 1432	244
B. The Proposed Marriage Canons from the <u>Reformatio Legum Ecclesiasticarum</u> - 1571	269
C. The Marriage "Canons of 1603".	287
D. The Proposed Marriage Canons of 1947	291
E. An Address by the Archbishop of York re "The Marriage of Divorced People in Church" - 9th March 1985	298
BIBLIOGRAPHY.	307

Marriage is an institution common to most societies and to all ages of humanity. As such, it is not a Christian concept; nor is it essentially religious in either form or origin. The union of a man and a woman is a biological necessity imposed on the species by the law of nature. As the process of civilization advanced through the centuries, the taking of a partner by force or in any other way without freely given consent was condemned. We notice that the more refined the plane of civilization, the more selective and discriminating the process became.

When the Christian religion made its impact upon the legal system of Rome as a consequence of the Edict of Milan in 313 A.D., the Church found much that had to be endured or changed if the Christians of the emerging Church were to practice their faith sincerely. This was certainly true of marriage. Roman marriage in its different forms - confarreatio (religious marriage), coemptio (higher form of civil marriage), and usus (lower form of civil marriage) - had fallen into desuetude. What

did exist and what the early Church had to contend with is what Maine calls, "a marital tie, the laxest the Western world has ever seen."¹

With the conversion of the Barbarians and a somewhat peaceful and exalted position now being enjoyed by the Church, it was only natural for the Church to assert its concept of marriage. Marriage became a spiritual concern and it was generally accepted as being of a religious nature. The Church enacted laws to protect marriage, the guardians of whom were the bishops, and the temporal powers left such matters to the Church. History shows how churchmen developed and refined the notion of marriage with the tendency at times to legislate to a degree more necessary than wise. With the advent of the Renaissance and the rediscovery of the Greco-Roman culture, other standards of morality and law became known to educated persons. These discoveries were the prelude to a systematic scrutiny of traditional mores and norms. The persons of the New Learning questioned many areas; the teaching of the Church was no exception. Within the

1. H. Maine, Ancient Law, London, John Murray, 1890, p. 156.

realm of ecclesiastical law, the laws of marriage were subject to microscopic examination and found by some to be wanting.

The Reformation produced a reformed Church in England, a Church subject to the Sovereign and out of communion with the See of Rome. While the administration of canonical marriage law remained in the hands of churchmen, and church courts alone remained competent to settle matrimonial cases, the question is posed: has the Church of England retained the tradition concerning marriage which had been its for a millenium prior to the Reformation? The object of this dissertation is to study the canon law of the Church of England, in particular, its marriage legislation. The laws of marriage are like any other legal enactments. They require a system of jurisprudence which will both establish legal principles and explain the meaning of laws. This study is restricted to the practice of the Church of England in England and is not extended to other churches within the Anglican communion. Further, three questions need to be answered: (1) what is the present canonical legislation of the Church of England, (2) what is the legislation regarding

marriage, and (3) since the Reformation, has the Established Church legislated for itself or has it been legislated for by Parliament? Do the canonical enactments which affect marriage have a basis in ecclesial law or are they purely secular, that is, without canonical foundation?

CHAPTER ONE

THE CANONS OF THE CHURCH OF ENGLAND

A consideration of marriage, as it takes place in the Church of England, must be viewed in the light of the peculiar relationship which exists between the State and the Church of England as established by law.¹ For "the process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith and given to it a certain legal position and to its decrees, if given under certain legal conditions, certain legal sanctions."²

This State protection of the Anglican Church is not without cost, for, "the effect of the Reformation settlement subjects the Church of England to the legislative supremacy of Parliament and to the executive and judicial supremacy of the Crown."³

This being the case, two major effects of establishment are discernable. Firstly, the laws of the

1. Through a series of statutes enacted by Henry VIII.

2. Marshall v. Graham 1907 218 B 112 at p. 126.

3. R. HAW, The State of Matrimony, London, S.P.C.K., 1952, pp. 11-12.

Church of England are incorporated into the law of the realm as a branch of general law. Promulgation by Parliament is now required, thereby limiting somewhat the law's application to persons and causes. Secondly, as will be explained later, the Convocation of the Church of England cannot by its own authority enter on ecclesiastical legislation without royal permission, "nor make canons without royal licence and assent."⁴

Doctor Hensley Henson, an Anglican divine, pointed out in 1939 that, "such a relationship can only be reasonable for the State and tolerable for the Church on the supposition that the law of the realm is Christian and the State, which includes the Church as 'built into its fabric', is Christian."⁵

Such a position is easily maintained if it is true that the only marriage law known by the State is Christian marriage law and if in fact, because the Church of England is that form of the Christian religion established by law, it is this Anglican marriage law with which the civil courts of England ought to be cognizant.

4. Ibid., p. 12.

5. H. HENSON, The Church of England, Cambridge, University Press, 1939, p. 48.

while such an opinion may have been true at one time in recent history, the Church of England is not the spiritual representative of the totality of the English people; nor are Church and State united to the degree they once were. In 1915, Canon Scott Holland commented on this matter:

At this moment the spiritual expression of the State has to be made, not through the Church of the State; for to do this would offend religious equality; but through a curious form of Christianity which has been impoverished for the occasion and is called 'undenominationalism'. This is the paradox. The State has a Church established as its organ on the spiritual side of life; yet whenever momentous social needs require the State to act on its spiritual side, it is forbidden to use its special organ. It can only appear on its religious side in a form which defies its official religion. There are for instance, no social needs more momentous and more near to the spiritual life [...] than marriage [...] and in marriage the [State] has frequently parted from the Church's principle and tradition.⁶

Political and social expediency may be the basis for the State's position. If the State is reluctant to apply the laws of the Church of England, which in theory are its own, it could be because the general outlook of

6. S. HOLLAND, "Church and State" in D. EYRE (ed.), Reform in the Church of England, London, John Murray, 1890, p. 156.

the English people on marriage is not in accord with the theory and doctrine of the Established Church. On the other hand, if some would expect the State to uphold the Anglican Church's teaching on marriage, it must not be overlooked that the Church is in fact a product of Statute law and is therefore subject to the wish of the legislator. In reality, the legislator exemplifies the will of the people expressed in the normal political mode and executed by Act of Parliament.

In the process of examining and commenting upon the marriage laws of the Anglican Church, notice must be taken of the historical developments as they affected the marriage laws of the Kingdom. This means that the marriage law of the Church of England as expressed in the canons of that body cannot and should not be examined in isolation from the statute law of England.

A. THE PLACE OF ECCLESIASTICAL LAW IN THE ANGLICAN CHURCH

Before outlining the historical development of the canons of the Church of England, it would be worth noting the position canon law enjoys within the Anglican communion. Cyril Garbett, the Archbishop of York (1942-1956), explained in 1950 the nature of law in the Anglican Church very succinctly:

The canons are rules for the Church's members, [...] those who dislike them can resign or withdraw from their membership [...] of their own free will they can transfer membership [...] or if they so wish they can remain outside all Churches.⁷

Such an unequivocal statement demonstrates an attitude not uncommon at that time. The Archbishop went on to say that certain canons could be augmented, amended or abrogated as the need arose. He then made the very important statement that: "there are canons which are based on natural law or revelation; these are unchangeable and universally binding."⁸

7. C. GARBETT, Church and State in England, London, Hodder and Stoughton, 1950, pp. 227-228.

8. Ibid., p. 228.

Many, if not all ecclesiastics, would agree that merely ecclesiastical laws can change and often do. They would also agree that the basis of much of the legislation on marriage prior to the Reformation is that received from Scripture and Tradition. In their introduction to the 1969 text, The Canons of the Church of England, the Archbishops of Canterbury and York stated:

this collection of canons is not a complete statement of the laws of the Church of England. It is, in fact, a revision of the Code of Canons issued in 1603 and covers roughly the same areas of Church life, but like that Code it presupposes both the Common and Statute law of England and the general pre-Reformation Canon Law of the Western Church, except where that Canon Law has been affected by contrary statute or custom in England. In this it differs to some extent from the much more comprehensive Code of the Roman Catholic Church, and it follows the English secular legal tradition in its dislike of complete codification.⁹

The Metropolitans went on to express their hopes that the new law of the Church of England could be made to perform its true function and purpose in the building up of the Christian community.

9. The Canons of the Church of England, London, S.P.C.K., 1969, p. xi.

B. THE PLACE OF CANON LAW IN CIVIL LAW - A HISTORICAL PERSPECTIVE

i. From Kings Edgar III to Henry VIII

The Doms (Anglo-Saxon book of civil laws) of King Edgar III (944-975 AD) stated:

1. and the borough court shall be held three times in the year and the county court twice.
2. and the bishop of the diocese (shire) and the ealdorman shall be present and shall direct the observance of both ecclesiastical and secular law.¹⁰

This law was re-enacted by King Canute (1020-1034 AD) in the Doms.¹¹ In both of these laws, the civil ruler commanded the Bishop to be present in order to see that justice was administered by the secular authorities. There appears to be no separation between the spiritual and secular courts.

10. C. STEPHENSON and F. MARSHAM, Sources of English Constitutional History, New York, Harper and Row, 1972, vol. 1, p. 19. The Ealdorman was an Anglo-Saxon "minor king" who governed a shire (county).

11. Ibid., p. 23. The Doom was a name given among the Saxons to a code of laws. Several of the Saxon kings published such books, but the most important one was that attributed to King Alfred (871-899 AD) containing it is supposed the principal maxims of the Common Law, penalties and the forms of judicial proceedings.

After the Norman conquest of Britain, a fundamental change occurred. King William I, around 1072, issued a document entitled Episcopal Laws. By this ordinance, canon law can be said to have been officially authorized for use in England as part of the law of the land. The act established episcopal courts in accord with canon law and not according to secular law. This action was taken by the King because the recognition of episcopal jurisdiction had not been carried out in accordance with the precepts of canon law under the Saxon administration. The law enacted by King William I stated:

I therefore command and enjoin, by my royal authority, that no bishop or archdeacon shall henceforth hold pleas affecting episcopal jurisdiction in the hundred court, nor shall they bring forward any case which concerns spiritual jurisdiction for the judgment of laymen; but whoever has been summoned for some suit or offence which falls within the province of episcopal jurisdiction shall appear at the place appointed and named by the bishop for the purpose, and shall there make answer concerning his suit or offence, and he shall make amends to God and his bishop, not according to the [decree of the] hundred court, but in accordance with

the canons and the laws established by the authority of the bishops.¹²

This act established a dual system of jurisdiction although conflicts were bound to arise between Church and State; in general, the principle was accepted that England, as part of Christendom was subject to the authority of the Church's supreme legislator and, in spiritual matters, the English people were subject to the laws of the Church. Indeed, even temporal matters which had a spiritual dimension were claimed as proper matter for jurisdiction by the Church authorities.

-
12. A. ROBERTSON, The Laws of the Kings of England: From Edmund to Henry I, Cambridge, University Press, 1925, pp. 234-235. The Latin text reads: "Propterea, mando et regia auctoritate praecipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam quae ad regimen animarum pertinet ad iudicium saecularium hominum adducant, sed quicumque secundum episcopales leges de quacumque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat ibique de causa vel culpa sua respondeat, et non secundum hundret sed secundum canones et episcopales leges rectum Deo et episcopo suo faciat".

The rulings and decrees of the Popes and General Councils of the Church were made known to the clergy and laity of the Church in England through provincial councils or local synods. These local councils also made known canonical regulations emanating from central authorities in Rome. Such laws were presented mostly as the local application of universal laws.¹³ Much of this work was accomplished through Convocation (the Provincial Synods of Canterbury and York). Not surprisingly, many of these laws found their way into "text books" not unlike William Lyndwood's Provinciale (1432), perhaps the finest example of such a work to be found in England. The author systematized the constitutions of the province of Canterbury from those of Archbishop Stephen Langton promulgated in 1221, down to those of Archbishop Henry Chichley promulgated in 1416. Lyndwood took the provincial constitutions and having abbreviated them, arranged them into five books subdivided into titles and

13. Not modifications of universal law but a means whereby such canons were locally known and enforced. Compare 1222 Constitutions of Stephen Langton, Archbishop of Canterbury with the Lateran Canons of 1215.

chapters on the same plan as the Decretals. He added a commentary to the text and presented it to the Convocations of Canterbury and York where it received official sanction for use in the "Courts Spiritual of the Kingdom". His Provinciale and the works¹⁴ of the English canonists of the Middle Ages do not as such constitute the canon law of the medieval English Church. Their works, however, contained provincial canon law, if we can call it that, and as such they were a useful supplement to the universal law, namely, the Corpus Iuris Canonici of the Western Church.

Church authorities and Church law "ruled" the English people in matters of faith and morals. The spiritual authority within the Realm expected, and in most cases received, the assistance and support of the secular authorities in times of difficulty. A broad sweep through English history shows that from the time of the Norman conquest until the reign of King Henry VIII,

14. Such works as the Legatine Constitutions of Otho (1237) and Othobon (1268) as well as the Pupilla Oculi of John de Burgh (1385).

the temporal and spiritual authorities worked reasonably well together. The system that had developed was effective and contributed to the upbuilding of English society and the advancement of the English people. Christian teaching, learning and example, in theory if not in practice, fostered lives that were lived according to the dictates of the Gospel. Such was the situation in England at the time of King Henry VIII. The Church was respected and defended by the Crown because it was the Church of God.

ii. The reign of King Henry VIII (1509-1547)

In 1532, a statute known as "The Restraint of Appeals" was enacted by King Henry VIII (24 Henry VIII, c.12).¹⁵ This law forbade any recourse to the See of Rome. The reasons given for this action were contained in Section One of the Ordinance.

The Body Spiritual whereof having power, when any cause of the Law Divine happened to come in question, or of Spiritual Learning, then it was declared, interpreted, and shewn by that part of the said Body politick, called the Spirituality, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for Knowledge, Integrity and sufficiency of Number, it hath been always thought and is also at this hour, sufficient and meet of itself without the intermeddling of any exterior Person or Persons, to declare and determine all such Doubts, and to administer all such Offices and Duties [...]

The Act further stated in Section Two:

And notwithstanding the said good Statutes and Ordinances made in the Time of the King's most noble Progenitors, in Preservation of the Authority and Prerogatives of the said Imperial Crown, as is aforesaid; yet nevertheless since the making of the said good Statutes and

15. Now known as the Ecclesiastical Appeals Act 1532.

Ordinances divers and sundry Inconveniences and Dangers, not provided for plainly by the said former Acts, Statutes and Ordinances, have arisen and sprung by reason of Appeals sued out of this Realm to the See of Rome, in Causes Testamentary, Causes of Marriage and Divorce [...] not only to the great Inquietation, Vexation, Troubles, Costs and Charges of the King's Highness, and many of his subjects and Residents of this his Realm, but also to the great delay and Let to the true and speedy Determination of the said Causes, for so much as the parties appealing to the said Court of Rome most commonly do the same for the Delay of Justice. And forasmuch as the great Distance of Way is so far out of this Realm, so that the necessary Proofs, nor the true Knowledge of the Case, can neither there be so well known, nor the Witnesses there so well examined, as within this Realm, so that the Parties grieved by means of the said Appeals be most time without Remedy: In Consideration whereof, [...] in the said Cases [...], doth therefore by his Royal Assent, and by the Assent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by authority of the same, enact, establish and ordain, That all Causes Testamentary, Causes of Matrimony and Divorces [...] appertaineth to the Spiritual Jurisdiction of this Realm, [...] shall be from henceforth heard, examined, discussed, clearly, finally, and definitively adjudged and determined within the King's Jurisdiction and Authority, and not elsewhere.¹⁶

16. Statutes at Large, London, Mark Basket, 1770, vol. 2, p. 177.

The Act continued in similar vein stating that the See of Rome must not be approached for any reason whatsoever. Any infraction of this Statute carried the penalties of outlawry, banishment and forfeiture attached to the famous Act known as Praemunire issued by King Richard II in 1393.¹⁷

With the repudiation of Papal Authority, canon law was cut off from its source and left with no authority; for the authority on which it depended was declared to have no force whatsoever in England. However, the problem was easily solved by the provisions contained in a subsequent act issued in 1533. Known as "The Submission of the Clergy and the Restraint of Appeals" (25 Henry VIII, c.19),¹⁸ the preamble to the Act recalled

-
17. The name is taken from the opening words of the writ "Praemunire facias N.N. quod sit coram nobis [...]". It concerned the introduction of a foreign power into the kingdom and creating "imperium in imperio" by paying obedience to papal process which was said by some to belong to the king. The Statute of Praemunire (16 Richard II, c.5) was repealed by the Criminal Law Act 1967.
18. Now known as the Submission of the Clergy Act 1533. The short title being given to it by the Statute Law Revision Act 1948. Hereafter cited as S.L.R.

the resolution known as "The Submission of the Clergy" passed by Convocation on May 15, 1532¹⁹ at which the clergy had "asked" for an examination and judgement concerning ecclesiastical laws. In reply to the clergy, the 1533 Act stated:

Where the King's humble and obedient subjects, the Clergy of this Realm of England, have not only acknowledged according to the truth, that the Convocation of the same Clergy, is, always has been, and ought to be assembled only by the King's Writ, but also submitting themselves to the King's Majesty, have promised in Verbo Sacerdotii, that they will never from henceforth presume to attempt, alledge, claim or put in use, or enact, promulge or execute any new Canons, Constitutions, Ordinances Provincial, or other, or by whatsoever other Name they shall be called, in the Convocation, unless the King's most Royal Assent and Licence may to them be had, to make, promulge and execute the same; and that his Majesty do give his most Royal Assent and Authority in that Behalf;

And whatever Constitutions, Ordinances and Canons Provincial or Synodal, which heretofore have been enacted and be thought not only to be much prejudicial to the King's Prerogative Royal, and repugnant to the Laws and Statutes of this Realm, but also overmuch onerous to his Highness and his Subjects; the said Clergy hath most humbly besought the

19. Dispensation in Practice and Theory: Being the Report of a Commission appointed by the Archbishop of Canterbury in 1935, London, S.P.C.K., 1944, p. 54.

King's Highness, that the said Constitutions and Canons may be committed to the Examination and Judgement of his Highness, and of two and thirty persons of the King's subjects, wherefore sixteen to be of the upper and nether House of Parliament of the Temporality, and the other sixteen to be of the Clergy of this Realm; and all the said two and thirty Persons to be chosen and appointed by the King's Majesty;

and that such of the said Constitutions and Canons, as shall be thought and determined by the said two and thirty Persons, or the more part of them, worthy to be abrogated and annuled, shall be abolite and made of no Value accordingly;

and such other of the same Constitutions and Canons [...] with the Laws of God, and consonant to the Laws of this Realm, shall stand in their full Strength and Power, the King's most Royal Assent first had and obtained to the same;

Be it therefore now enacted by the Authority of this present Parliament according to the said Submission and Petition of the said Clergy, that they not any of them from henceforth shall presume to attempt [...] or put in use any Constitutions, or Ordinances Provincial or Synodal, or any other Canons [...] in their Convocations in Time coming (which always shall be assembled by Authority of the King's Writ) unless the same Clergy have the King's most Royal Assent and Licence to make [...] such Canons, Constitutions and Ordinances Provincial or Synodal;

upon pain of everyone of the said Clergy doing contrary to this Act, and being therefore convict to suffer imprisonment and make Fine at the King's Will.²⁰

20. Statutes at Large, vol. 2, pp. 189-190.

The Act went on to state that all laws, Synodal and Provincial, that have been made in the Realm were to be looked into and that,

[...] forasmuch as such Canons, [...] as heretofore have been made by the Clergy of this Realm, cannot now at the Session of this present Parliament, by Reason of shortness of time, be viewed, examined and determined by the King's Highness and thirty-two Persons [...], that the King's Highness shall have Power and Authority to nominate and assign, at his Pleasure the said [...] Persons [...];

shall have power and authority to view, search, and examine the said Canons, Constitutions and Ordinances Provincial and synodal heretofore made, and such of them [...] as judge worthy to be continued, kept, and obeyed, shall be from thenceforth kept, obeyed and executed within this Realm [...];

and the Residue of the said Canons, Constitutions, and Ordinances Provincial [...] shall from thenceforth be void and of none Effect, [...]

No Canons, Constitutions, or Ordinances shall be made or put into execution, [...], which shall be contrariant or repugnant to the King's Prerogative Royal, or the Customs, Laws or Statutes of this Realm [...]²¹

The above Act specifically mentioned that appealing to Rome in cases concerning matrimony (Section 3) is again

21. Ibid., p. 190.

forbidden in line with the Act (24 Henry VIII, c.12) passed earlier.

Some delay was anticipated in carrying out this examination and judgement. Section Seven of the Act defined the status of canons during the interim:

Provided also, that such Canons, Constitutions, Ordinances and Synodals Provincial being already made, which be not contrariant or repugnant to the Laws, Statutes and Customs of this Realm, nor to the Damage or hurt of the King's Prerogative Royal, shall now still be used and executed as they were afore the making of this Act, till such time as they be viewed, searched or otherwise ordered and determined by the said two and thirty Persons, or the more part of them, according to the Tenor, Form and Effect of this present Act.²²

The final section of the Act, Section Seven, seemed to imply that canon law promulgated prior to the Act remained in force until specific legislation by the King and Parliament abrogated such laws.

22. Ibid., p. 191.

For canons made after the Act, Section One of the Statute is quite explicit. In summary form, it appears like this:

- a) A Convocation cannot be convened without the Monarch's consent.
- b) Convocation cannot constitute canons without Royal Licence.
- c) When consent and licence have been given, any canon "concluded" cannot be executed without Royal Assent.

The constitutional position created by this legislation remains essentially unaltered down to our own day.

The power of the Church of England to enact canon law subject to the King but not to Parliament is controlled by this Act (25 Henry VIII, c.19). With the transfer of ecclesiastical supremacy to the King granted by the earlier act (24 Henry VIII, c.12), it became increasingly impossible to recognize two practically independent lawgivers - King and Pope - whose enactments affected the lives of both the King and his subjects. The

Act which embodies the submission of the clergy (25 Henry VIII, c.19) makes plain that canon law is now English law. By accepting the Act, the clergy admit that canonical law was binding on them only because of the King's licence and authority. As has already been mentioned, this same Act tells us that canons already made and not repugnant to the realm or the King's prerogative are still in force.²³

Some authors suggest that the law which Henry wanted and intended to revise was not the Corpus Iuris Canonici, but the provincial canon law which was the local expression of universal law. The Act constantly refers to the word "provincial", sometimes joining it with "canon"; other times with "ordinance" and again with "constitution". Indeed, some have interpreted the 1534 reprinting of the Provinciale by order of the King to support the notion that his intention was to revise the provincial canon law.

23. "The King's Prerogative" is seen by some as purely declaratory of the old Common Law as it existed in pre-Reformation days. The Sovereign usually, but not always, convened, dissolved and regulated all ecclesiastical synods and convocations; cf. 5 Henry VI, c.1 - Privilege of Clergy Act 1429.

P.G. Ward reminded his readers in the 1934 publication, Standing Orders of the Church of England, that the statute considered above must and can only refer to provincial legislation; it could be no other. For,

The Canonist knows that for the Church of England in either or both of her provinces to attempt the latter [i.e. to change the C.I.C.] is beyond her authority, since a part of the Catholic Church cannot legislate for the whole. As she looks to the Universal Church in her theology and worship, so she must do in the discipline involved in canonical obedience.²⁴

However, the Provinciale contains an extensive gloss which details the relationship of provincial law to the "ius commune". This fact makes it difficult to agree with Ward's opinion.

By an act of legal fiction, Henry declared and asserted that canon law had been operative in England not because of the Pope's authority, but simply because the English people had accepted it freely and lived by it out of choice. This was made clear in the Statute of 1533

24. P. WARD, "The Past and Present of Canon Law in the Church of England" in J. BULLARD (ed.), Standing Orders of the Church of England, London, Faith Press, 1934, p. 5.

known as "The Act concerning Peter's Pence and Dispensations" (25 Henry VIII, c.21) which stated:

for where this your Grace's Realm recognizing no Superior under God, but only your Grace, hath been and is free from Subjection to any man's Laws, but only to such as have been devised, made and obtained within this Realm, for the wealth of the same, or to such others as by Sufferance of your Grace and your Progenitors, the people of this your Realm have taken at their free Liberty, of their own consent to be used amongst them, and have bound themselves by long Use and Custom to the Observance of the same, not as to the Observance of Laws of any foreign Prince, Potentate or Prelate, but as to the customed and ancient Laws of this Realm, originally established as Laws of the same, by the said Sufferance, Consents and Custom, and none otherwise [...]²⁵

In 1953, Anglican Bishop R. Mortimer²⁶ suggested that Henry attempted to solve the problem of the reception of law by the English people from a foreign prelate by declaring himself as occupying the position formerly held by the Pontiff²⁷ and by statute (26 Henry

25. Statutes at Large, vol. 2, p. 194.

26. R. MORTIMER, Western Canon Law, London, Adam and Charles Black, 1953, p. 57.

27. Statutes at Large, vol. 2, p. 203.

VIII, c.1)²⁸, the King was now the source and font of canon law. In this way the pre-Reformation canons were to continue as the law of the Church as long as they were not contrary to civil or royal law and thus canon law became transformed into national law. On this theory, the ecclesiastical law of the Church of England was now binding on the people because it derived its authority from the King's Majesty.

The Commission authorized by the Act of 1533 (25 Henry VIII, c.19) to examine the ecclesiastical laws made up to that date was not appointed. Consequently, another act was passed in 1537. The Act has no title and is referred to as 27 Henry VIII, c.15. It states in full:

The King shall have authority to name xxxii Persons, viz., xvi Spiritual and xvi Temporal, to examine the Canons and Constitutions heretofore made according to the Statute 25 H.8. c.19. But no Canons or Constitutions shall be made without the King's Assent, nor which be contrary to the King's Prerogative or the Laws of this Realm.²⁹

28. The act by which the King declared himself head of the English Church.

29. Statutes at Large, vol. 2, p. 234.

This time the King took no action; no members were appointed. This caused Parliament to promulgate another statute in 1545 (35 Henry VIII, c.16). However, in this instance the law was different. Not only were the Commissioners invested with the authority to examine existing canons and judge their worth, but they were also invested with the power to make new canons.³⁰ Foxe, the Martyrologist, suggests in the preface of the 1571 printing of the Reformatio that a code of some type was produced by this Commission. If such a code did exist, and there seems no real evidence for doubting Foxe's opinion, why did Henry not promulgate the new law? The reasons for such delays are not clear. Dibdin cites various authors who have posited reasons for Henry's reluctance to sign and promulgate new ecclesiastical laws.³¹ Among the various reasons given were the lack of

30. Ibid., p. 366. "The King shall have authority during his life to name two and thirty persons, viz., sixteen Spiritual and sixteen Temporal, to examine all canons, constitutions and ordinances, Principal and Synodal, and to establish all such laws ecclesiastical as shall be thought by the King and them convenient to be used in all spiritual courts."

31. L. DIBDIN and C. CHADWYCK HEALEY, English Church Law and Divorce, London, 1912, John Murray, pp. 4-6. Hereafter cited as E.C.L.D.

perseverance on the part of those entrusted with the task of producing a code and a possible split between the Catholic Emperor and the English King who were engaged in common political pursuits. In view of the latter, any attempt by the King to impose new laws would have created grave problems and precipitated a religious war with former political allies. Hence, for reasons of State, Henry would not authorize any new laws. It was left to Henry's successor - Edward VI - to bring about some changes sanctioned by this and similar acts.

iii. The Reign of King Edward VI (1547-1553)

With the ascent of Edward VI to the throne of England, Parliament acted to complete the compilation of the ecclesiastical laws that had been promised during the previous administration. An act of 1549 titled, "An Act that the King's Majesty may nominate and appoint two and thirty Persons to persue and make Ecclesiastical Laws," also known as 3 & 4 Edward VI, c.11, said:

Albeit the King [...] Ruler under God of this Realm, ought most justly to have the Governement of his Subjects, and the Determination of their Causes, having not of long Time been put in Use nor exercised, by reason of the usurped Authority of the Bishop of Rome, be not perfectly understood nor known of his subjects, and therefore of Necessity as well as for the abolishing and putting to utter Oblivion the said usurped Authority, as for the necessary Administration of Justice to his loving Subjects, [...] that [...] the King during Three Years have authority, by the Advice of his Council, to name thirty-two Persons to examine the Ecclesiastical Laws, and to gather and compile such Laws as shall be thought to him, his Council and them, convenient to be practiced within this Realm in all Spiritual Courts.³²

A thirty-two member Commission composed of Bishops, divines, lawyers and laymen was appointed by Act

32. Statutes at Large, vol. 2, p. 435.

of the Privy Council³³ to resolve the matter of the reformation of the canonical laws. Eight members of the Commission were directed to "rough hew the canon law, the rest to conclude it afterwards."³⁴ The eight members prepared a text which the rest of the Commission would evaluate on its completion. These men were selected with critical care since both the theology developed under their King, Edward VI, and the work of the Law Commission had become more Protestant in outlook.

The document produced was known as the Reformatio Legum Ecclesiasticarum (1552-53). Parliament was dissolved on April 15, 1552 and did not meet again until the first of March 1553. No step was taken to present the finished document to the 1553 Parliament for its ratification. It is clear that whatever the reasons for opposition to the legalization of the proposed new law, it had opponents influential enough to bar its progress. Dibdin reports that the Duke of Northumberland, whose

33. This appears in an Act of Privy Council for October 6, 1551 issued at Hampton Court Palace; cf. E.C.L.D., p. 10.

34. Ibid., p. 11.

influence was foremost during Edward's last years, did not wish the reformed canonical legislation ratified. Consequently he used his position to delay its promulgation. No reasons are given for Northumberland's actions.³⁵ On July 6, 1553 King Edward VI died.

35. Ibid., pp. 16-17.

iv. The Reign of Philip and Mary (1553-1558)

Catholic Queen Mary followed Edward on the throne. She married Philip II of Spain and for both of them matters Protestant were to be suppressed. Their aim was to restore England to its rightful faith and obedience to the See of Rome. In 1554 A.D., all articles and provisions which had been made against the See of Rome were repealed by a lengthy Statute which included the Act of Reconciliation pronounced by Cardinal Reginald Pole, Legatus a Latere. The act is known as "An Act repealing all Articles and Provisions made against the See Apostolick of Rome, since the twentieth year of King Henry the Eight, and for the Establishment of all Spiritual and Ecclesiastical Possessions and Hereditaments conveyed to the Laity." It is referred to as 1 & 2 Philip and Mary, c.8.³⁶ The following Acts were repealed by this Statute:

24 Henry VIII, c.12 - Restraint of Appeals

25 Henry VIII, c.19 - The Submission of the Clergy

25 Henry VIII, c.21 - Peter's Pence and Dispensations

36. 1 & 2 Philip and Mary, c.8 was totally repealed by S.L.R. 1863.

Section XI of the Philip and Mary Act stated:

Be it enacted by the Authority of this present Parliament that [...] all other [...] acts made in the twenty-fourth and twenty-fifth Years of the Reign of the said late King, and every one of them and all, every Branch, Article, Matter and Sentence in them and every of them contained, shall be by Authority of this present Parliament from henceforth utterly void, made frustrate, and repealed, to all intents [...] and Purposes.³⁷

Other acts of King Henry obtained special mention in Philip's and Mary's Statute, Section XXIV:

- 26 Henry VIII, c.1 - King Head of Church
- 27 Henry VIII, c.15 - Thirty-two Person Commission to examine ecclesiastical law

The Section (XXIV) went on to state:

[...] all Clauses, Sentences and Articles of every other Statute or Act of Parliament, made since the said twentieth Year of the reign of King Henry the Eight, against the Supreme Authority of the Pope's Holiness, or See Apostolick of Rome, or [...] any other matter of the same Effect, [...] that is

37. Statutes at Large, vol. 2, p. 474.

repealed in any of the Statutes aforesaid, shall [...] also by Authority hereof from henceforth utterly void and of none Effect.³⁸

Although two other acts that concern us were not mentioned by name or number in the Act of Philip and Mary, that is, 35 Henry VIII, c.16, and 3 & 4 Edward VI, c.11, it is obvious that both were implicitly included in Section 24 and therefore repealed.

38. Ibid., p. 475.

v. The Reign of Queen Elizabeth I (1558-1603)

In 1558 Elizabeth became Queen of England. Her first Statute (I Eliz. I, c.1), "An Act restoring to the Crown the ancient jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Powers repugnant to the Same,"³⁹ partially repealed the Statute of Philip and Mary (1 & 2 Philip and Mary, c.8). Elizabeth was concerned with restoring the legislation and regimen established by Kings Henry VIII and Edward VI.

[...], That the said act made in the said first and second Years of the Reigns of the said late King Philip and Queen Mary, and all and every Branches, Clauses and Articles therein contained [...] may from the last day of this Session of Parliament, by Authority of this present Parliament be repealed, and shall from thenceforth be utterly void and of none Effect.⁴⁰

However, Section XIII of Elizabeth's Act stated:

[...] all other laws and Statutes, and the Branches and Clauses of any Act or Statute,

39. Now known as the Act of Supremacy 1558. Short title given by S.L.R. 1948.

40. Statutes at Large, vol. 2, p. 509. Mistakenly printed as page 517.

repealed and made void by this said Act of Repeal (1 & 2 Philip and Mary c.8) [...], and not in this present Act specially mentioned and revived, shall stand, remain, and be repealed and void, in such like Manner and Form as they were before the making of this Act [...]⁴¹

Of the various acts which concern us, viz., those promulgated by Henry and Edward and mentioned in previous pages, the following Statutes were not specified in Elizabeth's Statute and therefore stood repealed. These Acts were:

- 26 Henry VIII, c.1 - King as Supreme Head of the Church of England
- 27 Henry VIII, c.15 - Commission appointed of thirty-two persons to examine Ecclesiastical law
- 35 Henry VIII, c.16 - Idem.
- 3 & 4 Edward VI, c.11 - Idem.

However, the subject matter of these ordinances, except 26 Henry VIII, c.1, was contained in earlier legislation effected by King Henry and specifically remained in Elizabeth's first Act which revived 25 Henry VIII, c.19 (the Thirty-two member Commission).

41. Ibid., p. 510. Mistakenly printed as page 513.

After the death of King Edward VI, the work of the Commission that had been established to revive canon law ceased and fell into abeyance. The project was resurrected by Matthew Parker, Archbishop of Canterbury (1559-1576), and revised by him after Elizabeth came to the throne. In 1571, he published a list of canons under the title Reformatio Legum Ecclesiasticarum.

An attempt was made to have this authorized by the Queen.

[...] Strickland mentioned it in a speech whilst introducing into the Commons seven bills on ecclesiastical matters. He said the book had rested with the House for twenty years, and he had it produced. Foxe, the Martyrologist, printed it in the same year. But the Queen stopped the seven bills as striking at her Prerogative and nothing more was done about the Codex.⁴²

In the same year, 1571, a short series of disciplinary canons were agreed upon by the Upper House of Convocation. None of these canons applied directly to marriage.⁴³ However, the document did not receive the confirmation of the Lower House of Convocation, or of the Queen, and thereby had no binding authority.

42. P. WARD, op. cit., p. 7.

43. Although a form of excommunication for adultery was included.

A further series of thirteen Articles concerning holy orders was drawn up by Convocation in 1575 and authorized by the Monarch. Two further lists of Articles were drawn up by the Convocation; in 1585, six Articles were produced, one of which - Article III - removed the requirement of asking banns three times.⁴⁴ These six Articles received the full approval of both Houses of the Canterbury Convocation and were authorized by the Queen.⁴⁵ Twelve further Articles passed both Houses of Convocation in 1597 and also received royal assent. They were concerned with the clergy, the sacraments and parochial registers.

These canons, as well as other ecclesiastical legislation promulgated by Queen Elizabeth I, were confirmed by her only for the duration of her life.⁴⁶ After her death, these three sets of Articles were

44. This repealed canon XI of the Synod of Westminster held in 1200 AD. It was restored by canon 62 of the 1603 Series.

45. R. HAW, op. cit., p. 91.

46. J. JOYCE, English Sacred Synods, London, 1955, p. 620.

revised and formed into a coherent code in 1603-04 under the leadership of Richard Bancroft, Bishop of London. A list of one hundred and forty-one canons was presented to King James I.⁴⁷

47. R. MORTIMER, op. cit., p. 61.

C. THE CANONS OF 1603

- i. King James the First (1603-1625) and the "Canons of 1603"

On the accession of James I, the opportunity was taken to produce a collection of canons, the majority of which were taken from various ecclesiastical laws issued during the reigns of the three previous monarchs. These one hundred and forty-one canons were approved by the Canterbury Convocation on June 25, 1604⁴⁸ and by Letters Patent of the King on September 6, 1604;⁴⁹ unlike Elizabeth, James confirmed the canons for himself, his heirs and lawful successors. It is said that James I,

in an arbitrary fashion, ordered the Code to be observed in the province of York, though it had never been considered or approved by the Convocation. The latter protested, being

48. The Canon Law of the Church of England: Being the Report of the Archbishops' Commission on Canon Law, London, S.P.C.K., 1947, p. xiii. hereafter cited as C.L.R.

49. J. KENYON (ed.), The Stuart Constitution 1603-1688: Documents and Commentary, Cambridge, University Press, 1969, p. 127.

afraid that this procedure might become a precedent and that it would in future be obliged to give automatic approval to what the other Convocation see fit to determine. The King gave way and issued the Royal Licence (to York) to enact canons.⁵⁰

The canons were subsequently approved by the Convocation of York in 1605-1606. The difference in the date of enactment by the two Convocations led to the legislation's being known as the "Canons of 1603", the date when work "commenced" upon them. Although the "Canons" were confirmed by James I, they were not confirmed by Parliament.

The question can be asked: did James I execute what Henry VIII declared his intention to be, namely the revision of laws ecclesiastical? The provincial canon law was not revised. What did appear were canons which obviated the need for revised laws. As both Mortimer⁵¹ and Ward⁵² assure us, the old canon law of

50. C.L.R., p. 73.

51. R. MORTIMER, op. cit., p. 62.

52. P. WARD, op. cit., p. 8.

the Universal Church remained in force albeit diminished by its non-acceptance and eroded by statute law. The "Canons of 1603" were new creations, the product of the theological thought of three Protestant reigns and reflecting, be it dimly, the spirit of the Reformatio Legum Ecclesiasticarum.

The "Canons of 1603" sought to impose order where chaos reigned. Clerics wanted to know what laws bound them. Such concern is understandable when ministers' lives were at stake. The crime of high treason was a constant threat for those whose feelings were directed towards a lawgiver outside of the realm. Although the new canons repeated some of the laws they were supposed to replace, they rested on a new authority. King and Church assented to them and authorized their use.

The Church of England, acting through her Convocations with the licence and assent of the monarch, could make new laws or canons. In this way, ecclesiastical laws could bind the clergy in their official capacity. As this was the only constitutional

way in which the Church of England could legislate for itself, canons were rightly regarded as a most important expression of the mind of the Church on any matter. Unlike the "Thirty-nine Articles" establishing the Church of England (1571), it can be said that the "Canons of 1603" were not themselves standards of Church teaching. Rather, with rare exceptions, they were mainly disciplinary by-laws designed to enforce the observance of laws - some ecclesiastical and others civil - which existed independently of the canons, the breach of which could lead to a penalty.

The "Canons of 1603" remained intact until minor alterations were made in 1865, 1887, 1892, 1921, 1936 and 1946 in the light of changes in the statute law. They were the only "canons" which had post-Reformation authority for the Church of England until 1964.

ii. The Binding Authority of the "Canons of 1603"

As the "Canons of 1603" were not confirmed by Parliament, the question may be asked: what authority did they have over the laity of the Church of England? The leading case in civil law which answers this question was heard in 1736 (Middleton v. Crofts) before the Chief Justice of the King's Bench, Lord Hardwicke. Giving judgment on the general principle, and speaking in the name of the whole court, he said:

We are all of the opinion that the Canons of 1603, not having been confirmed by Parliament do not proprio vigore bind the laity, I say proprio vigore, by their own force and authority, for there are many provisions contained in these canons, which are declaratory of ancient usage and law of the Church of England, received and allowed here, which in that respect, and by virtue of such ancient allowance will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons.⁵³

Lord Hardwicke's judgment was criticized by some writers; but the ecclesiastical court of Canterbury - the Court of Arches in a 1753 case (Lloyd v. Owen) - upheld his decision. His Lordship's opinion received the approval of

53. 2 Atkins 650, at p. 653. Quoted in C.L.R., pp. 76-77.

the House of Lords (the Realm's highest court) in 1868 in a case involving the Bishop of Exeter (*Exeter v. Marshall*).⁵⁴ However, Archbishop Garbett wrote in his 1950 publication, Church and State in England, that the canons of 1603 "are binding on the clergy, but not on the laity as they were not passed by Parliament."⁵⁵

Notwithstanding the Archbishop's opinion, the earlier judgments from civil and church courts cannot be ignored. That being the case then, the canons are binding on the laity as far as they declare ancient usage and were the laws of the Church "of" England received and allowed in the Kingdom. Where they do not declare ancient usage, they are not binding on the laity.⁵⁶ The word

54. LR3, HL17. Quoted in C.L.R., p. 77.

55. C. GARBETT, op. cit., p. 233.

56. The *Exeter-Marshall* case concerned itself with an interpretation of 25 Henry VIII, c.19; cf. Church Acts and Measures, a Reprint of the title Ecclesiastical Law from Halsbury's Statutes of England, 3rd edition, London, Church House Book Shop, 1969, p. 24. Hereafter cited as Church Acts and Measures. The rule that canons must be proved to have been continued and acted upon derives from the doctrine of desuetude - under which canons become obsolete by long continued non-use - which formed part of the canon law before the Reformation. Thus in *Rex v. Archbishop of Canterbury*, 1902, 2 KB 503 it was held that a practice which fell into disuse in 1400 was no longer binding though the form still required it.

"ancient" must mean in the context of the judgment a time prior to 1603. The word "sent" directs attention to the sender of ecclesial law - the Apostolic See - which is "allowed" or promulgated by the local church in England and presumably supported by the civil ruler. Therefore, it would seem that the Corpus Iuris Canonici was still binding on the laity. This is strengthened by the reminder that medieval canon law was not set aside by the State in the period of the Reformation. Thus, the Corpus Iuris Canonici and the Constitutions and Canons Ecclesiastical of 1603 in so far as they reproduced the canon law of the Latin Church in force and the usage of the English Church allowed for by particular law, indult or custom operating before the Reformation, still had authoritative value and binding force for the Church of England. Problems associated with non-observance of law and the growth of customs contrary to the law, as well as the notion of desuetude created other difficulties. However, these concepts are not germane to the present discussion.

D. THE REVISION OF CANON LAWi. The Revision of the Constitutions and Canons Ecclesiastical of 1603

A general outline has already been given of how the "Canons of 1603" came into being. That legislation saw few amendments. Four changes took place in 1865 which dealt primarily with ordination.⁵⁷ Two canons which concerned times of marriage were changed in 1887 and then again in 1936.⁵⁸ Two new canons were added, one in 1892 which affected clergy discipline,⁵⁹ the other in 1921 which dealt with the Convocation itself.⁶⁰

57. Canons 36, 37, 38 and 40 were amended; these canons refer to declarations and subscriptions made by those about to be ordained.

58. Canons 62 and 102 were amended to correspond to Statute law regarding the hours during which a marriage may be solemnized.

59. Canon 142 gave canonical effect to the Clergy Discipline Act 1892.

60. Canon 143 centred on the clerical representation allowed in the lower houses of the Convocations of Canterbury and York.

No attempt was made to revise the 1603 canons until 1866. The Convocation of Canterbury appointed a committee which produced a draft and presented it in 1873. The Archbishop of Canterbury sent the draft to the Deaneries for their comments. In 1879 the results were reported back to the Lower House of Convocation in Canterbury which dismissed the whole work as being too difficult to consider at that time. The Report lay dormant for sixty years until 1939 when it was resurrected by a new commission which had been appointed to investigate canon law in the Church of England. The Lower House of the Canterbury Convocation had requested its President, Archbishop Cosmo Lang of Canterbury, to consider the whole question of the revisions and codification of canon law.⁶¹ The Commission was appointed in 1939 by Dr. Lang and Archbishop William Temple of York. Dr. Cyril Garbett was named chairman of the committee. The Commission's terms of reference were concise: (1) what is the present state of Canon Law in

61. The York Convocation made the request in 1934.

England? (2) what is the status of canons promulgated before and after the Reformation? Depending upon the Commission's conclusion, they were to prepare a body of revised canons for admission to the Convocations of Canterbury and York.

The Commission presented its report in 1946 entitled The Canon Law of the Church of England. Much of Report is written in the form of a short history of Canon Law. It stated that the history of the law of the Church of England was divided into three main periods. (1) From the earliest times to the appearance of the Decretum Gratiani in 1140 AD, this period, known as "Jus Antiquum", was a time when the law of the Church had to be deduced from collections of varying merit compiled by private individuals. (2) The second period, characterized by the term, "Jus Novum", dated from 1140 AD until the Reformation. During this interval, ecclesiastical laws were derived from collections of codified laws that had been promulgated by the authority of the Papacy. Such "codes" were in fact the various collections that would in time be recognized as constituting the Corpus Iuris

Canonici.⁶² (3) The third period began with the Reformation and lasted until the present day (1946), "when the Church of England, now an independent national Church, has deduced its laws not from any one collection or code but from a variety of sources making up what is called the Ecclesiastical Law of the Church of England. We call this period, the period of mixed sources."⁶³

The Commission's answer to the question, "what is the status of canons promulgated before and after the Reformation", was expressed in this way:

The formulation of the question we found somewhat embarrassing owing to the uncertainty of what is meant by 'canons' where the word first occurs. We will assume that it means, or at least includes, the totality of the pre-Reformation Canon Law, or that part of it which survived the Reformation, as having been therewith received in England and not being contrary to any statute or custom of the country or the Royal Prerogative. [...] the task of analyzing the ancient Canon Law in such a manner as to identify and segregate the elements which did so survive has never been seriously attempted in any detail.⁶⁴

62. Cf. C.L.R., pp. 26-42.

63. C.L.R., p. 6.

64. Ibid., p. 79.

Consequently, the Commission decided that a revised body of canons should be produced. A revision was prepared by it and included a proposed canon (c. VIII) which would define the status of Canon Law in England.

The Canon Law of the Church of England consists not only of this Code, meaning thereby these present Canons as added to or varied from time to time, but also of the General Canon Law, meaning thereby such provisions of the Canon Law in force in England at the passing of the Act 25 Henry VIII, c.19 as are not expressly or by implication superseded by this Code and are by virtue of that Act still in force, so that, in the case of any divergence between this Code and the General Canon Law, the provisions of this Code shall prevail, and (until further order be taken) any dispute or question as to the content or effect of the General Canon Law may be referred to and shall be conclusively determined by the Archbishops of Canterbury and York, after taking such expert advice thereon as they may deem proper.⁶⁵

Because no authority in England had expressly stated since the Reformation exactly which laws had been abrogated, and since the Commission felt unable to undertake such a task, the solution outlined in the proposed canon seemed the most sensible approach to take in coming to terms with the whole problem.

65. Ibid., p. 108.

The Commission stated that it had no wish to produce a code similar to the one in use in the Latin Church or the Napoleonic Code. It would be reasonable to expect that the ecclesiastical law of a national Church would follow the legal system of the country. Since English law is common law, the great bulk of English law is not codified. Therefore, the proposed canons of the Anglican Church were couched in a form complementary to the civil statutes of the realm.

The Report of 1946 and the proposed canons were published in 1947 (Appendix D). The canons were a reworking and updating of the "Canons of 1603" (with amendments). Statute law and decisions given in the Law Reports, where they affected canonical legislation, were incorporated into the revision.

The proposed canon VIII was a brave attempt to cut a straight path through wild and difficult terrain. Some sort of continuity was shown by the Commission in preparing the schema of proposed canons. Each one was annotated to show the juridical and canonical principles underlying each of the proposed laws and how they were

derived from previous legislation, i.e., from the "Canons of 1603" and from the Latin Church prior to 1533.

Since canon VIII did not achieve legal force with the promulgation of the revised canons of the Church of England in 1964-1969, the status of pre-Reformation canon law remains questionable. However, it must not be forgotten that the laws of the Latin Church, promulgated and received in England prior to the breach in 1533 and during the reign of Philip and Mary, could still bind the baptised of the Church of England by virtue of the Henrican acts (25 Henry VIII, c.19 and 25 Henry VIII, c.21) which transformed pre-Reformation canon law into national law after the break from Rome. In addition, this law has not been abrogated "en bloc" by any act of Parliament.

As for the canon law itself, those laws and customs which were not expressly provided for in the 1917 Codex Iuris Canonici of the Latin Church were abrogated by the Catholic Church when the new code took effect in 1918. The ancient canon law was abrogated by the authority who promulgated it, the Pope himself.

Work began on the recommendations contained in the 1946 Report on Canon Law. Each of the draft canons had to be submitted to and passed by the four Houses of Convocation,⁶⁶ two in Canterbury and two in York. The drafts then had to be submitted to the House of Laity. The process of revision and comment lasted for a number of years. The present law known as The Canons of the Church of England, having received Royal Assent, was promulgated in two groups: one group in 1964 and the other in 1969. They number one hundred and twelve canons and replace the Constitutions and Canons Ecclesiastical of 1603.⁶⁷

The new canons presuppose both the common and statute laws of England "and the general pre-Reformation Canon Law of the Western Church, except where that Canon

66. Synodical Government in the Church of England: Being the Report of a Commission appointed by the Archbishops of Canterbury and York, London, C.I.O. Publishing, 1966, pp. 9-10.

67. Canon 113 (Seal of Confession) and canon 143 (membership in Convocation - since repealed) of the 1603 Canons were not repealed by these new canons.

Law has been affected by contrary statute or custom in England."⁶⁸ The Marriage Canons from this new body of law have had legal force since 1969. Since then a few changes have appeared in the promulgated text.

68. The Canons of the Church of England, London, S.P.C.K., 1969, p. xi.

ii. The Present Canon Law of the Church of England -
The Authority of Parliament

What is the authority of Parliament over ecclesiastical legislation? The Act of 1532 (24 Henry VIII, c.12) sets out a theory of the English Constitution. Under the monarch, two bodies - one spiritual and the other temporal - work together to administer justice. As Dr. Eric Kemp pointed out in 1961:

In that year, 1533, it would have been possible to argue that the Submission of 1532 had placed the clergy in Convocation under the Crown but not under Parliament. It is true that in the commission to review the canon law, for which Convocation had asked, half the membership was to be drawn from the two Houses of Parliament, but their recommendations were to be given authority by the King alone, and there was no suggestion that they should be submitted to Parliament, any more than that Parliamentary consent was necessary for the making of new canons.

This balance of powers was upset in 1534 when the Submission was embodied in an Act of Parliament. The subordination of Convocation to Parliament was not merely implied but, it may be argued, actually contained in the proviso that no canons 'shall be made or put into execution within this realm by authority of the convocation of the clergy, which shall be contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm.'⁶⁹

69. E. KEMP, Counsel and Consent: Aspects of the Government of the Church as exemplified in the history of the English Provincial Synods, London, S.P.C.K., 1961, p. 157.

After King James I authorized the "Canons of 1603", the Puritan party in the House of Commons violently attacked the canons and introduced a bill to annul the effect of some of them. Although the Puritans were unsuccessful, controversy about the status of the canons continued. In 1640, seventeen more canons known as "Archbishop Laud's Canons"⁷⁰ were passed under Royal Licence and received royal approval. As was the custom, the Synod assembled at the same time as Parliament; licence had been given to the Convocation to frame canons. Parliament was dissolved before Convocation reached any conclusion. The Synod continued to meet but its status came into question. Was that body also dissolved? James I consulted legal experts who informed him that the Convocation was not dissolved unless he so ordered under the Great Seal of England. Convocation continued to meet and eventually produced "a code of seventeen canons, which received the royal assent and were confirmed by Letters Patent."⁷¹ The subsequent Parliament expressed its disgust at the procedure that took place and condemned Laud's canons. Consequently,

70. Cf. J. KENYON, op. cit., pp. 151-152, 166-175.

71. E. KEMP, op. cit., p. 160.

they failed to achieve any force of law.⁷² Parliament passed a resolution that "the clergy of England convened in any Convocation [...] have no power to make any constitutions, canons or acts whatsoever [...] without common consent of Parliament."⁷³ It had been the practice for the Sovereign to issue a writ for the dissolution of Convocation while at the same time issuing another one for the dissolution of Parliament.⁷⁴ Between 1530 and 1760, Convocation was usually called into session concurrently with Parliament. During this period, the Synod's effectiveness gradually diminished and the concerns of the Church passed increasingly into the hands of Parliament. On February 26, 1861, Convocation received for the first time since 1640 a royal licence for the

72. These canons of 1640 have not been held binding by the courts for they were expressly excepted from the 1661 Act of King Charles II (13 Charles II, c.12) - since repealed except section 4 by the Ecclesiastical Jurisdiction Measure 1963 - which restored the ecclesiastical law as it had been before the Commonwealth.

73. Cf. E. CARDWELL (ed.), Synodalia - A Collection of Articles of Religion, Canons, and Proceedings of Convocation in the Province of Canterbury, 1547-1717, Oxford, University Press, 1842, vol. I, p. 385, note.

74. By The Church of England Convocation Act 1966 (1966 c.2), the Convocation may now be called together and dissolved by the Monarch without regard to the time at which Parliament is summoned or dissolved. Cf. Church Acts and Measures, 1969, p. 115.

revision of a canon.⁷⁵ A number of problems arose from this experience which "brought home sharply that the grant of the Royal Assent to canons was not to be the formality that the assent to Parliamentary bills had become."⁷⁶

As a consequence of this situation, a movement to secure a Council of Laity emerged. Such a group could advise the Convocation on temporal and Parliamentary matters which affected and effected ecclesiastical legislation. Although the Church had Bishops in the Upper House, it had no official representatives in the Lower House to protect its interests. After various difficulties and committee meetings, a 1916 Report⁷⁷ recommended that a Church Council consisting of the two Convocations with a House of Laymen should be given powers to legislate for the Church. These powers were to be subject only to Parliament and the Crown.

75. This concerned canon 29 of the 1603 series; godparents at a baptism.

76. E. KEMP, op. cit., p. 190.

77. The Archbishops' Committee on Church and State, London, 1916, 300 p.

The proposal was accepted. Legislation was passed in Parliament and Royal Assent was given to the bill on December 23, 1919. The Bill, "The Church of England Assembly (Powers) Act", known by the short title "The Enabling Act 1919"⁷⁸ (9 & 10 George V, c.76), facilitated reform in the matter of Church legislation.⁷⁹

The main provisions of the Act are that the Church Assembly may present to Parliament Measures which, in the first instance, are considered by the Ecclesiastical Committee representing both Houses. The Measure, together with the Committee's report then lies for forty days on the table of each House, after which a simple resolution assenting to it is proposed, and if passed the Measure then receives the Royal Assent and becomes as much part of the Statute Law of England as any Act which has passed through the ordinary bill procedure.⁸⁰

The Church Assembly was the product of the Convocations, not of Parliament, and derived its ecclesiastical power from the ancient synods of the two

78. Church Acts and Measures, 1969, pp. 47 seq.

79. Although unconstitutional changes had been made in the Church of England during the mid-17th century, they were repudiated for lack of royal assent. No fundamental changes affecting legislative powers were lawfully made between 1558 and 1919.

80. E. KEMP, op. cit., p. 198.

English Provinces of Canterbury and York; but the power of proposing legislation came from Parliament. The Assembly had no authority to define the doctrines of the Church of England nor decide on matters of theology; neither could it diminish or derogate from any of the powers belonging to any of the Houses of Convocation of the two provinces.

The passing of "The Enabling Act" of 1919 facilitated many long, overdue reforms in the Anglican Church. However, such reforms were effected by Statute Law and any further alterations can only be made by subsequent action of Parliament. The Church Assembly continued its work until the Synodal Government Measure (1969)⁸¹ transferred the powers of the Church Assembly into the hands of a new creation - the General Synod of the Church of England. This new body is a product of both Church and State. Since 1970, this Synod is the legislative authority within the Church of England.

81. The Public General Acts and Church Assembly Measures 1969, London, Council of Law Reporting, 1969, pp. 1713-1765.

The effects of the Tudor statutes left the Church of England in virtual possession of its traditional jurisprudence and papal legislation which serves as the basis of its ecclesiastical law. The subsequent history of the law of the Church of England is one of adaptation to meet particular needs - both civil and ecclesiastical - in accordance with the secular tradition of English Common Law.

CHAPTER TWO

THE TEACHING OF THE CHURCH OF ENGLAND ON INDISSOLUBILITY

In English civil law, marriage is an agreement made between a man and a woman by which they enter into a certain legal relationship with each other; an agreement which creates and imposes mutual rights and obligations. From this point of view, marriage is a contract; a contract sui generis in many respects. Marriage also creates a special status in law: married persons are those to whom the civil law assigns certain legal capacities and incapacities. The classic definition of marriage in English law is that given by Lord Penzance¹ who stated in 1866: "I conceive that marriage, as understood in Christendom, may [...] be defined as the voluntary union for life of one man and one woman to the exclusion of all others."

From such a definition, four conditions can be deduced concerning marriage. The marriage must be the product of a free choice and consent of both partners - a view generally held since at least the time of Ulpian.

1. L.R.I. P.D. 130, 131.

Marriage is for life. However, it must be remembered that Lord Penzance made the statement after the Divorce Act had made judicial divorce possible for almost nine years. Although his view had an air of ecclesiastical purity and theological soundness about it, the fact is that under English law such is not really the case. The law provides that marriage must be for life in the sense that it is capable of lasting indefinitely, irrespective of the intention of the partners at the date of the marriage. It may be terminated, however, by the mutual consent of either party with formal conditions of official registration. Finally, such unions must be monogamous and heterosexual.

These are the four elements found in the English civil concept of marriage. The Church of England also has its own concept of marriage which differs from the civil law. The Book of Common Prayer, in its revisions approved by Parliament and used by the Church, together with the canonical legislation, states the Church's official doctrine. It is to these sources that one must go to determine the doctrinal and juridical teaching of the Church.

The present canons of the Church of England were published in two parts. After receiving Royal Assent, some were promulgated in 1964 and the remainder in 1969. The marriage canons, B30 to B36 inclusive, have enjoyed legal force since 1969. By commenting on each canon, it is hoped that this will show not only its place in the stream of the Western Church's tradition on the teaching of marriage, but also demonstrate its general fidelity to the property of indissolubility still held in principle by the ecclesiastical law of the Church of England.

A. REFORMATIO LEGUM ECCLESIASTICARUM

Since the concept of dissolubility of marriage was put to the test during the lifetime of King Henry VIII, it is understandable how the notion remained in the minds of other people after his death.

In responding to the call of the Tudor monarchs for a revision of ecclesiastical law, certain divines incorporated the notion of dissolubility in the first code of law presented to the Sovereigns. This document, written in Latin, was published in 1571 and is known as the Reformatio Legum Ecclesiasticarum. Although not promulgated, it has had an influence far beyond that of a rejected schema of proposed law. In tracing the Church of England's teaching on the matter of matrimonial indissolubility, it is worthwhile to examine the concepts held in this text and see the viewpoint of certain influential ecclesiastics who were directing the Church during a turbulent time in its history.

The Reformatio Legum Ecclesiasticarum was a proposed code of law for the nascent national church. The marriage section, De Matrimonio, was presented under

three titles subdivided into chapters. It is in this work that we first encounter a radical departure from the tradition of the Western Church's position on marriage. While it can be stated that the pre-Reformation Church only allowed what is called by some divortium a mensa et thoro, and by others, "judicial separation", which discharged the husband and wife from the duty of living together, leaving them husband and wife with no right to remarry any other person, the Reformatio Legum Ecclesiasticarum² proposed a new idea approximating a divortium a vinculo but without using those words:

It was formerly customary in the case of certain crimes to deprive married people of the right of association at bed and board, though in all other respects their marriage be remained intact; and since this practice is contrary to the Holy Scriptures, involves the greatest confusion, and has introduced an accumulation of evils into matrimony, it is our will that the whole thing, by our authority, be abolished.³

-
2. E. CARDWELL, The Reformation of the Ecclesiastical Laws as attempted in the Reigns of King Henry VIII, King Edward VI, and Queen Elizabeth, Oxford, University Press, 1850, lviii-344p. Being a copy of Reformatio Legum Ecclesiasticarum. Hereafter cited as R.L.E.
 3. R.L.E., p. 58. Title X "De Adulteriis et Divortiis", cap. 19. "Mensae societas et thori solebat in certis

With this total separation and breaking of the marriage bond, the right to remarry was given to the innocent party should he or she wish to do so:

When one of the parties has been convicted of adultery, the other, being innocent, shall (if he/she wishes) be allowed to proceed to a new marriage. For the innocent party ought not to suffer for another's crime to such an extent that celibacy should be forced upon him against his will, and therefore the innocent party is not to be considered guilty of adultery if he binds himself by a new marriage, since Christ Himself accepted adultery as a cause.⁴

criminibus adimi coniugibus; salvo tamen inter illos reliquo matrimonii iure. Quae constitutio cum a sacris literis aliena sit, et maximam perversitatem habeat, et malorum sentinam in matrimonium comportaverit, illud auctoritate nostra totum aboleri placet."

4. R.L.E., p. 51. Title X, cap. 5.

"Cum alter coniunx adulterii damnatus est, alteri licebit innocenti novum ad matrimonium (si volet) progredi. Nec enim usque adeo debet integra persona crimine alieno premi, coelibatus ut invite possit obtrudi. Quapropter integra persona non habebitur adultera, si novo se matrimonio devinxerit, quoniam ipse causam adulterii Christus excepit."

If the other spouse would not allow a reconciliation, nothing could be done. "But should it be impossible for the guilty to be admitted to the former condition, no new marriage is permitted to him."⁵

A number of possibilities besides adultery were listed in various canons of the section entitled De Adulteriis et Divortiis as being sufficient grounds to end one marriage and enter a new one: desertion, emnity, long absence of one spouse and ill-treatment.

The opening words of De Matrimonio state: "Marriage is a lawful contract".⁶ The concept held by the compilers of the Reformatio Legum Ecclesiasticarum seemed to be that of a simple contract that could be rescinded whenever one of the parties in the agreement failed to fulfill any of the conditions specified.

It cannot be doubted that the pre-Reformation canon law did not allow for or recognize the possibility of

5. R.L.E., p. 51. Title X, cap. 6.
"[...] Quod si damnata persona non possit ad superiorem conditionem admitti, nullum illi novum matrimonium conceditur."

6. R.L.E., p. 39. Title VIII "De Matrimonio", cap. 1.
"Matrimonium est legitimus contractus [...]"

divorce a vinculo. It is obvious, therefore, that it did not furnish a basis for this part of the Reformatio Legum Ecclesiasticarum.

The opinions expressed in this corpus of proposed law were thus alien to the Church of England and it is therefore not surprising that royal or ecclesiastical assent was withheld.

The well-known expert, Sir Lewis Dibdin, D.C.L., Dean of the Court of Arches (the court of the Archbishop of Canterbury), maintained that the section on divorce was only a literary relic that showed the views of few radical continental divines who possessed a certain influence and eminence in England during a given period of time. Sir Lewis was convinced that there could be no doubt as to what the law of the Church of England was prior to the Reformation. R. Haw maintained the same opinion that the law of all western Christendom was the "ius commune" codified in the Corpus Iuris Canonici⁷: marriage is indissoluble during the joint lives of husband and wife. Dibdin supported his opinion by stating:

7. R. HAW, The State of Matrimony, London, S.P.C.K., 1952, p. 32.

If a specially English authority is required for this proposition it will be found in the well-known compendium of church law supposed to have been written about 1385 by John de Burgh, Chancellor of the University of Cambridge, and entitled Pupilla Oculi under the heading De accusatione coniugum de adulterio, (cap. xiv, fol. cxi, 1516 edition). 'Maritus potest uxorem accusare et dimittere propter adulterium et uxor virum; quos in tali casu ad paria indicantur. Non tamen ea vivente potest alteri nubere.'⁸

After examining various parish registers⁹ and episcopal visitation records between 1547-1603, Dibdin reasonably concluded that remarriage during the lifetime of a former spouse was not allowed by Anglican Church authorities.¹⁰ He found this negative result decisive in showing

8. L. DIBDIN and C. CHADWYCH HEALEY, English Church Law and Divorce, London, John Murray, 1912, p. 46. Hereafter cited as E.C.L.D.

A translation: "A husband can accuse and dismiss his wife on account of adultery and the wife her husband; in which case they are to be brought to be judged. However, she is not able to marry while the other party (husband) is living."

9. A collection of 850 registers from English parish churches held at the library of Lincoln's Inn, London.

10. Three cases of remarriage seem to occur in these registers; two of them were bigamy cases and the third was declared null ab initio by a judge at Chester Consistory Court in 1565. The third case concerned a marriage that was not consummated, entered under duress and without the Petitioner's consent.

the non-existence of any practice on the part of the clergy to permit the remarriage of persons divorced a mensa et thoro in the second half of the sixteenth century.

A. Winnett examined registers from other parts of England; he also found no clear instance of a second marriage being solemnized after divorce a mensa et thoro during the period between 1547 and 1603.¹¹ Moreover, further research by Dibdin into the records of the London Consistory Court - the most important matrimonial court in England at the time - and the Diocesan Consistory Courts, which were in existence in the sixteenth century, gave evidence of divorce a mensa et thoro on the grounds of adultery or cruelty, but none of divorce a vinculo.¹²

In the immediate post-Reformation period, two civil cases of divorce a vinculo are to be found: the Sadler case of 1546 and the Parr case of 1551. Private Bills were passed for both Sadler and Parr who needed

11. A. WINNETT, Divorce and Remarriage in Anglicanism, London, Macmillan, 1958, p. 39.

12. Ibid., p.39.

Parliamentary action to validate their second marriages since their former partners were still alive.¹³

A case which demonstrated an attitude held by a certain churchman of the time occurred during the reign of Elizabeth I. The cause involved Sir John Stawell who obtained a decree a mensa et thoro in 1565 on the grounds of his wife's adultery. In 1572 Sir John consulted Bishop Gilbert Berkeley of Bath and Wells about his intention to enter a new marriage. The Bishop referred the matter to Archbishop Matthew Parker of Canterbury who issued a

13. In 1534, Sir Ralph Sadler married Elene Barr whose husband, Matthew, was missing and was presumed dead. After the wedding, Matthew reappeared and in 1546 an Act (37 Henry VIII, c.30) was passed which provided that if an ecclesiastical decree a mensa et thoro was obtained, Elene would be declared a single woman and be free to marry Sir Ralph Sadler. Matthew Barr obtained the Church decree on the grounds of his wife's adultery. This case set a precedent and enabled the Marquis of Northampton, William Parr, to pursue a similar way. He obtained a decree a mensa et thoro in 1542 on the grounds of his wife's adultery. In 1547, he petitioned King Edward VI for a Commission to enquire whether he may marry again. A nine-member commission was appointed under Archbishop Cranmer to investigate the matter. Before the Commission could give a decision, Parr married his mistress. Eventually, the Commission replied in the affirmative and the second marriage was declared lawful by Act of Parliament (5 & 6 Edward VI, Private Act No. 4).

licence "for the marriage to take place in any parish church without banns". However, the decree contained the proviso "so long as [...] no controversy concerning any other marriage contracted, so far as concerns the person of one of you, be put in motion and remain in dispute still undecided". The phrase "notwithstanding any contrary canonical institute" also was used.¹⁴ The issuing of such a licence was irregular. It could be said that the Archbishop granted a dispensation from the strict law of the Church,¹⁵ from a teaching that he believed was not of divine law but of ecclesial law, allowing an "innocent partner" to contract a subsequent marriage. A. winnett suggests that the Archbishop had serious misgivings about the second marriage because in 1572, Sir John was charged in the Archbishop's Court with cohabiting while his wife was alive. Stawell too, may have had misgivings because his son from the second marriage received his inheritance by purchase rather than by descent.

14. A. WINNETT, op. cit., p. 45.

15. Ibid., p. 45, note 2. "Dummodo [...] nec ulla controversia de alio matrimonio contracto, quantum ad personam alterius vestrum attinet, mota sit et in lite pendiat adhuc indecisa, [...] contrariis canonum institutis non obstantibus quibuscumque."

A famous case occurred in 1602. Hercules Fuljambe, twice married and twice divorced, married a third time. When his new father-in-law (Edward Rye) found out, suit was taken in the Star Chamber which

held that the marriage [...] was void, and in reaching this decision was guided by the advice of Archbishop Whitgift, who after consulting a body of divines and civilians at Lambeth declared for the marriage being void on the grounds that divorce granted by the ecclesiastical courts were only a mensa et thoro, and not a vinculo.¹⁶

Dibdin rejected the opinion put forward by William Salkeld (1671-1715) who, in his Reports,¹⁷ published in 1724 after his death, held that the Fuljambe case marked a change in practice from what had previously prevailed: divorce with the right to remarry was permitted since the beginning of Elizabeth's reign and only changed in the forty-fourth year of her reign by the judgment issued in the Fuljambe case.¹⁸ Dibdin quoted Sir Edward Coke (1552-1634) whose writings on marriage indicated nothing

16. Ibid., p. 47.

17. Vol. 3, p. 137.

18. A. WINNETT, op. cit., p. 47. In modern times, the view of Salkeld was followed by J. Montmorency in his

about a valid marriage being dissolved on account of the subsequent action (adultery) of one of the partners.¹⁹ It would seem that Salkeld took the views of individual doctors and divines to be the practice of the Church. Dibdin said that Bishop Lancelot Andrews (1565-1625) whose 1601 publication, A Discourse Against Second Marriages after Sentence of Divorce with a Former Match, the Party Then Living, treated as a matter beyond controversy that the Church Courts did not grant divorce a vinculo. Dibdin called Bishop Andrews:

[...] a contemporary witness of first rate competence in this context [...] to that the view which he desired to combat was confined to some divines, and that it had brought them into conflict with what he describes as 'the present practice of the law ecclesiastical'.²⁰

history of divorce which forms Appendix 1 to the Report of the 1909 Royal Commission (on Divorce and Matrimonial Causes). Montmorency held that the Northampton case as well as others showed that in the second half of the sixteenth century, marriages were regarded as lawful after divorce.

19. E.C.L.D., p. 59.

20. Ibid., pp. 60-61.

While the Reformatio Legum Ecclesiasticarum, which had a proviso for the dissolution of the marriage bond in cases of desertion, adultery and serious cruelty, reflected the opinion of a small but influential group of people within the Church of England at the time of its compilation, the weight of evidence is against the view that the proposed code ever governed the practice of the Church of England in the latter half of the sixteenth century. During this period, the Church of England remained officially constant in its teaching and acceptance of the pre-Reformation standard of law and practice concerning marriage. It is true to say, however, that some divines held that adultery dissolved the bond, leaving the innocent party free to remarry. Yet, there was no significant attempt by ecclesiastics to put into law the provision of the Reformatio Legum Ecclesiasticarum.

The "Canons of 1603" in referring to marriage made no mention of its nature or purposes. They were juridical norms which established the procedures required for a lawful marriage and clearly demonstrated how the Church remained faithful to the "ius commune" of the western Church on marriage. Canon 107 declared:

In all sentences pronounced only for divorce and separation a thoro et mensa, there shall be a caution and restraint inserted in the act of the said sentence, that the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with any other person [...]21

These canons are significant because they enunciated the official Anglican position on indissolubility at the end of the Reformation period. It becomes apparent on reading the marriage canons (cf. Appendix C), that the term "divorce a vinculo" does not appear. Although the word "divorce" is mentioned, the

21. The Constitutions and Canons Ecclesiastical, London, S.P.C.K., 1960, p. 47.

context of the canon clearly shows that the term is a general one covering nullity of a pretended marriage and separation from bed and board which later became known as "judicial separation". Another canon (105) has caused some problems because of its ambiguity in the English translation when it speaks of marriage being dissolved or annulled. From the Latin version of canon 105, the word "divorce" (separari vel nullam pronunciari) shows that only separation is meant rather than the dissolution of the bond.

The writer of the "Canons of 1603" and some commentators on them did not use the term "divorce" with the precision one would have expected from jurists. This lack of precision, as Professor F. Maitland pointed out in 1898, was the result of a breach of continuity in the study of canon law caused by Henry VIII. The King strongly encouraged the study of civil law by establishing a chair at Oxford University though an endowment and he prohibited the study of canon law.

Ecclesiastical judges and jurists would no longer be "steeped and soaked" in canon law. By emphasizing the study of civil law alone, "the unhallowed civilian usurped the place of the canonist on the bench".²² The result was confusion.

While the "Canons of 1603" did not change the Church's discipline and notion on the indissolubility of marriage, they reaffirmed what had been its official teaching and practice. These canons clearly stated the Anglican position at the beginning of the seventeenth century.

22. F. MAITLAND, Roman Canon Law in the Church of England, London, Methuen and Company, 1898, p. 93.

Besides W. Lyndwood, three other ecclesiastics in succeeding years may be regarded as the outstanding canonists of England. John Godolphin (1617-1678) wrote on marriage and showed the opinions held by both the Church and some of the divines.

Although the doctors of divinity are much divided in this point of second marriage whilst its divorced parties are alive; yet the law generally seems much more to incline to favour such second marriages where the cause is ex causa praecedenti than where it is ex causa subsequenti; for when it happens ex causa praecedenti as when the degrees prohibited are violated, pre-contract, frigidity in the man, impotency in the woman, or other perpetual impediment, the marriage was void and null ab initio, it being a rule and truth in law that non minus peccatus iungere non coniugendos quam separare non separandos; but where the divorce happens ex causa subsequenti, there the marriage was once good and valid in law and therefore (as some hold) indissoluble and that such subsequent cause have no influence quoad vinculum matrimonii but only quoad separationem a mensa et thoro which is but a partial or temporal not a total or perpetual divorce.²³

23. Quoted in E.C.L.D., p. 62. Taken from J. Godolphin, Abridgement, 3rd ed., 1687, p. 504. John Ayliffe, a civil lawyer, published his Parergon Iuris Canonici Anglicani in 1726. His work largely appropriated John Godolphin's work reaffirming the traditional teaching of the Church concerning marriage.

In 1713, Edmund Gibson published his Codex Iuris Ecclesiastici Anglicani. Title XXII of the work treats of marriage; and the seventeenth chapter dealt specifically with the subject of divorce. The author commented on the "Canons of 1603" and provided further evidence that in the preceeding 100 years or so since their publication, the only forms of divorce recognized by the Church of England were judicial separation and decrees of nullity.

Finally, the Reverend Sir Richard Burn, Chancellor of the Carlisle Diocese, published his Ecclesiastical Law in 1736. Besides presenting the Church of England's stand on no divorce a vinculo, he quoted the Fuljambe case virtually repeating the erroneous opinion contained in the Salkeld Report of 1724. Despite this particular comment, however, there is no reason to doubt that the Church of his day had diverged substantially from the belief in the indissolubility of the marriage bond.

B. DIVORCE

Until the middle of the nineteenth century, the common law and ecclesiastical law of England were at one in making no provision for divorce a vinculo.²⁴ In 1850, a Royal Commission on Divorce was appointed and published its report in 1853.²⁵

i. The Divorce Act of 1857

The majority opinion held by the Commission was that the offense of adultery was an adequate cause and justification for the dissolution a vinculo of marriage.

A. Winnett states:

24. In 1669, Lord Roos obtained a decree of divorce from the Spiritual Court on the grounds of his wife's adultery. In 1670, a bill was introduced into the House of Lords, debated on at great length, and was eventually carried through all stages by narrow majorities. Two Anglican bishops supported the bill - Cosin of Durham and Wilkins of Chester. The debate, mainly theological, centred on the idea that adultery ipso facto dissolved the bond. The bishops, apart from the two mentioned, maintained the actual discipline of the Church. This case set a precedent for divorce a vinculo through private act of Parliament, 317 of which were granted before The Divorce Act 1857 became law.

25. Under the chairmanship of Lord Campbell.

The Commissioners did not regard themselves as innovating as much as restoring the state of affairs in the latter half of the sixteenth century, when in their opinion marriage was treated by the Church as dissoluble. According to the historical survey with which the Report opens, the doctrine of indissolubility was not reinstated until the celebrated case of Fuljambe in 1602 [...]²⁶

Therefore, the Commissioners recommended that divorce a vinculo be introduced and that a civil tribunal examine such causes so that ecclesiastical courts would not be required to give a sentence a mensa et thoro in such cases. These recommendations were embodied in an act accepted by Parliament and passed as a bill in 1857 taking legal effect from January 11, 1858. It became known as "The Matrimonial Causes Act 1857."²⁷ However, according to Sir Lewis Dibden, the Commission was both mistaken and ill-informed. He pointed out that:

[...] the Latin form of the 105th canon (of 1603) (being the fifth canon of 1597) although in the English version it is made to cover marriages 'dissolved' as well as marriages annulled shows that these words are intended to be equivalent to 'separari vel nullam pronuciari,' which can only describe

26. A. WINNETT, op. cit., p. 135.

27. 20 & 21 Victoria, c.85.

separations from bed and board and nullities. It should, however, be mentioned that the Report of the Royal Commission on Divorce, 1853 (p.8) quoting the English version of this canon (cited by mistake as the 105th canon of 1597), and ignoring the Latin, relies on it as a strong proof that 'marriage was not held by the Church and therefore was not held by the law to be indissoluble.'²⁸

Under the Act, a matrimonial court, known as the "Court of Divorce and Matrimonial Causes",²⁹ was to be set up. All jurisdiction in such causes and affairs that hitherto had resided in the ecclesiastical courts was transferred to this new body.³⁰ The canonical provisions for decrees of nullity, of jactitation and restitution of conjugal rights were adopted as statute law. The decree of divorce a mensa et thoro became known as a judicial separation.

With the passage of this Act, the law of Church and State parted company. As O.D. Watkins pointed out in

28. E.C.L.D., p. 72.

29. Since The Judicature Act of 1873 known as "Probate, Divorce and Admiralty Division of the High Court". Since The Administration of Justice Act of 1970 known as the "Family Division of the High Court".

30. With the exception of the privilege of Diocesan Bishops to issue marriage licences.

1895, "From the Divorce Act of 1857, the secular law of England had not been in harmony with the law of the Church".³¹ This was not because the Act established a new court of the Crown to exercise the jurisdiction of the State over marriage, but because the State gave, for the first time, general authority for the issuing of decrees of divorce a vinculo for causes which arose subsequent to the union, together with a right to those so divorced to marry another party during the lifetime of their "former" spouse. Thus, a clear distinction was created between English Statute Law in matrimonial causes and the Canon Law of the Church of England.

31. Cf. R. HAW, The State of Matrimony, London, S.P.C.K., 1952, p. 156.

ii. The Anglican Bishops and the Act of 1857

A number of bishops of the Church of England sit in the House of Lords as Lords Spiritual and possess full voting rights. The Parliamentary reports of the day indicated that the bishops were divided over this bill. Some felt that their presence in the Upper House demanded that they act as legislators for the whole state and not only for those members of the population who adhered to the doctrine of the Church of England. The Bishop of Salisbury summed up the position of the Church of England when he said in the House of Lords:

The clergy are ministers of a branch of the Church of Christ, the law of which is that marriage is indissoluble. That law has been expressed in the canons and service of the Church. How is it possible for any person who believes that the Church of England is a true exponent of the law of Christ to solemnize marriages between persons who have either been previously married and whose marriage is not yet dissolved by death? There can be no question what the law of the Church of England is [...] marriage is indissoluble.³²

32. Hansard, 147 (1857), pp. 2057-2058.

The Matthaean exceptions (19:9;5:32) also played a role in formulating the episcopal viewpoint:

It is important to recognize that the critical knowledge of the New Testament had not, in 1857, reached the level it has since attained. Certain amongst the bishops and clergy conscientiously believed that the exceptive clauses in St. Matthew's Gospel gave the 'ipsissima verba' of Christ and that, therefore, the Scriptures sanctioned the severing of the marriage bond for the cause of adultery. They gave their approval to a measure which went no further than making a provision which they believed to be supported by Holy Writ.³³

Although Sections 57 and 58 of the Divorce Act gave both the petitioner and respondent the right to remarry in church after a divorce a vinculo had been granted by the secular courts, the clergy were released from any obligation to perform such a ceremony. However, they were obliged to allow their churches to be used for the ceremony if a willing clergyman from outside the parish could be found.³⁴ This Act undeniably diverted the law of the State from the stem which had previously been common to both civil and ecclesiastical law in England.

33. R. HAW, op. cit., p. 102.

34. Section 12 of The Matrimonial Causes Act 1937 removed the obligation that had been imposed upon the minister to allow his church to be used for the marriage of divorced persons.

C. THE LAMBETH CONFERENCES

Official Church reaction was negligible following the passage of the Divorce Act. Silence seemed to be the order of the day. In 1865, a letter was sent to the Archbishop of Canterbury, Dr. Charles Longley, from the Synod of the Anglican Church in Canada. Various legal decisions that had been enacted by the Privy Council in London were causing concern for the colonial church. Their request for a Pan-Anglican Synod, which was to meet under Archbishop Longley's leadership, was received with mixed feelings in England. However, such a conference was held in 1867 " [...] to discuss matters of practical interest, and pronounce what we deem expedient in resolutions which may serve as safe guides to future action."³⁵

i. Divorce

Marriage was not mentioned at the first conference nor at the second one held in 1878. The Lambeth

35. Encyclopaedia Britannica, 14th ed., 1962, vol. 13, pp. 615-616.

Conference of 1888, the third such gathering of Anglican bishops, addressed the subject of marriage for the first time since the passage of the Divorce Act of 1857. Having accepted the inevitability of the situation, viz., divorce a vinculo granted by the State, the episcopate listed some regulations for those involved in divorce proceedings. Resolution 4 stated: "[...] that under no circumstances ought the guilty party [...] to be regarded, during the lifetime of the innocent party, as a fit recipient of the blessing of the Church on marriage". The innocent party was also prohibited from entering a new marriage in Church, but surprisingly, if such a party did so enter a second and therefore civil marriage, that person was not to be deprived of the sacraments.³⁶ Resolution 4, in pericoping paragraph 4 of the Conference's discussion on divorce stated: "The bishops were unsure if marriage in church was permitted to the innocent party and left it to the judgement of the diocesan bishop".³⁷

36. Lord DAVIDSON, The Six Lambeth Conferences 1867-1920, London, S.P.C.K., 1920, pp. 119-120.

37. Ibid., p. 133.

To determine the matrimonial practices of the Church between 1857-1888, one would have to examine the marriage registers of that period to ascertain whether any second marriage was celebrated after divorce a vinculo had been granted by the civil courts.

The remarriage of the innocent party posed the same problem for the 1908 Lambeth Conference. Prohibition against the innocent party's marrying in church was contained in Resolution 40.³⁸ In addition, the Conference discussed the topic of marriage problems and declared its official understanding of marriage:

The Church does not make marriage. The marriage is made by the man and the woman; their consent being duly certified. The function of the Church is threefold: to bear public witness to the fact of the marriage; to pronounce the blessing of Almighty God upon the pair who of their own accord entered upon the holy state of matrimony, instituted by God Himself; and ever after to guard the sanctity of the marriage bond so long as they both shall live.³⁹

38. Ibid., p. 327. The vote was 87-84 in favour of the Resolution.

39. Ibid., p. 396.

The 1920 Conference, aware of the changing attitudes toward sexual morality and marriage, addressed the matter succinctly but unambiguously. Urging the clergy to give their people "plain teaching and instruction about marriage", the gathered episcopate discussed marriage under four headings: law, essence, conditions, and purposes. The Conference defined marriage as a lifelong exclusive union between one man and one woman (the law) expressed by their consent (the essence), in the presence of the Church, by those unhindered by civil or ecclesial impediments (conditions), having as its end the control of sexual instincts, the procreation and education of children and mutual support of the couple (purposes).⁴⁰

What may have been considered by some to be a retrograde step was taken by the 1930 Conference. The prevailing custom (since 1888) of allowing the innocent

40. Encyclical Letter 1920, pp. 109-110.

party in a divorce to receive the sacraments was now a matter to be referred to the local bishop for consideration in each case.⁴¹ The Second World War necessitated a postponement of any further Conferences and the bishops did not meet until 1948. "The Matrimonial Causes Act" of 1937 which allowed for an easier divorce a vinculo, coupled with the moral laxity caused by the war and becoming increasingly prevalent in the post-war years, called for strong moral leadership from the heads of the Anglican Communion. Once again, in 1948, the traditional teaching of the Western Church on marriage was affirmed. However, an interesting development became evident in the doctrinal teaching of this Conference. In its report entitled The Church's Discipline in Marriage, the fundamental principles of lifelong unity, exclusivity, purposes and free consent were presented in the section "The Meaning of Marriage". What was different was the concept that:

41. Encyclical Letter 1930, p. 42, Resolution 11(b).

Marriage entered upon by Christians is endowed with the gift of special grace to the man and the woman for the fulfillment of its obligations and the realization of its ideals. The blessing of the Church hallows and enriches the union. The efficacy of the grace received depends on the cooperation with God of both husband and wife (or one of them) in the use of it.⁴²

Would one be going too far in suggesting that from the above text that the bishops recognized marriages between the baptized as being somewhat sacramental or of a sacramental nature?

The 1958 Conference marked another change in the Anglican notion of marriage. At this meeting, the bishops addressed the problems of the family in contemporary society. In their report, they forcefully stated a new position on the "hierarchy of ends" in marriage: that having a primary and secondary end in marriage served no useful purpose. Furthermore, the episcopal report added that marriage had, in fact, at least three functions, viz., the procreation of children, the fulfillment and completion of husband and wife in each other, and the

42. Encyclical Letter 1948, pp. 98-99.

establishment of a stable environment within which children could grow up seeing and learning what mature life was really like.⁴³ The "tria munera" as expressed at this meeting could be called an exercise in semantics, unless of course, St. Augustine was being quoted more now than he was at the 1920 Conference.

43. Encyclical Letter 1958, p. 144.

ii. Other Concerns

In subsequent meetings, the Lambeth Conferences discussed other issues concerning marriage. Two areas that drew their attention and should not be passed over are those concerning the regulation of birth by artificial methods and the problem of marriage between an Anglican and a Roman Catholic.

a) Contraception

The subject of artificial methods of birth control arose during the 1908 Conference which reacted strongly against such practices and declared in Resolution 41 that they were "demoralizing to character and hostile to national welfare".⁴⁴ In Resolution 42, the Conference further affirmed that the deliberate tampering with "nascent life is repugnant to Christian morality".⁴⁵

After World War I, the 1920 Conference was unambiguous in its opposition to artificial methods of birth control which frustrated conception: "Marriage is

44. Lord DAVIDSON, op. cit., p. 327.

45. Ibid., p. 327.

intended [...] for the procreation of children [...] to ignore or defeat [this purpose] is a violation of God's institution."⁴⁶

During the 1930 Conference, a different stance was taken by the Anglican bishops who stated their position in an Encyclical letter issued at the end of their deliberation. Resolution 15 of the letter read:

Where there is a clearly felt moral obligation to limit or avoid parenthood, the method must be decided on Christian principles. The primary and obvious method is complete abstinence from intercourse [...] in those cases where there is such a clearly felt moral objection to limit or avoid parenthood and [...] a morally sound reason for avoiding complete abstinence, the Conference agrees that other methods may be used.⁴⁷

This Resolution received the approval of almost 75% of the attending bishops.⁴⁸

As a result of the 1958 Conference's discussion on the family, the new notion of the three ends of marriage and contraception were linked with planned parenthood.

46. Encyclical Letter 1920, pp. 109-110.

47. Encyclical Letter 1930, pp. 43-44.

48. Motion was carried by 193 votes to 67.

Techniques and devices for controlled conception now make it generally and easily possible to plan for parenthood at will. Thus the old direct relationship between sexual intercourse and the procreation of children has been broken. The fear which has so often dominated sexual intercourse has largely disappeared.⁴⁹

Such was the view of the Church of England in 1958 which thirty-eight years earlier held contraception to be a violation of natural moral law and Christian principles. The Conference had now changed its position presenting contraception as something almost good in itself. This view is contrary to the teachings of the Western Church from the time of Augustine of Hippo.⁵⁰

b) Mixed Marriages

The Lambeth Conference has been very positive in instructing its Church members about marrying outside their own communion. An uneasiness can be detected from the declaration made by the 1908 Conference on the question of Anglicans marrying Catholics. It feelingly stated that right thinking people could not agree that

49. Encyclical Letter 1958, pp. 145-146.

50. De Nupt. et Con., i, 15.

children in a mixed marriage should be brought up as Catholics, " [...] that is to say in a religious system which the Anglican parent cannot conscientiously accept".⁵¹

In 1948, Resolution 98 was passed by the Conference⁵² urging Anglicans not to marry Catholics based on the same objection: the Catholic upbringing of the offspring. The Committee report attacked the notion of having the children educated into a religious system in which the parents did not believe:

To give such an undertaking is a sin as it is an abrogation of a primary duty of parents to their children [...]. We strongly deprecate such marriages, and we assert that in no circumstances should an Anglican give any undertaking as a condition of marriage that the children should be brought up in the practice of another communion.⁵³

Held at a time of heightened ecumenical awareness, the 1968 Conference had little to say about marriage. While

51. Lord DAVIDSON, op. cit., p. 427.

52. Encyclical Letter 1948, p. 50.

53. Ibid., p. 103.

it welcomed the establishment of a joint-commission composed of Anglican and Catholic experts to study the question of mixed marriages, the rights of Anglicans in mixed marriages were expressed in a markedly different way from earlier Conferences. A quotation from Vatican II⁵⁴ was used by the Lambeth Conference to make its point: "Parents [...] have the right to determine, in accordance with their own religious belief, the kind of religious education that their children are to receive".⁵⁵

The 1978 Conference, the latest held to date, welcomed the 1975 Report, The Theology of Marriage and its Application to Mixed Marriages,⁵⁶ - a product of the joint Anglican-Catholic Commission. The Report restated, in a more forceful way, the sentiments of previous Conferences. Resolution 34 of the Report reads in part:

54. Dignitatis Humanae: 5.

55. Quoted in The Lambeth Conference 1968 - Resolutions and Reports, London, S.P.C.K., 1968, p. 136.

56. Anglican-Roman Catholic Marriages, London, C.I.O. Publishing, 1975.

The problems associated with marriages between members of our two Communion continue to hinder inter-Church relations and progress towards unity [...] the general principles underlying the Roman Catholic position are unacceptable to Anglicans. Equality of conscience as between partners in respect to all aspects of their marriage (and in particular with regard to the baptism and religious upbringing of children) is something to be affirmed both for its own sake and for the sake of an improved relationship between the Churches.⁵⁷

Thus, what is seen by Catholics as a product of unity is seen by Anglicans as a means of unity. The deliberations of the 1988 Conference are eagerly awaited.

57. The Report of the Lambeth Conference 1978, London, C.I.O. Publishing, 1978, pp. 107-108.

D. INDISSOLUBILITY

i. B30 Of Holy Matrimony

1 The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union permanent and life-long, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help, and comfort which the one ought to have of the other, both in prosperity and adversity.

It is evident from reading the reports of the early Lambeth Conferences that the Church of England was slow to make any attempt to reassert its own "doctrine" on marriage after the 1857 Act. Although some comments were made at the 1888 and 1908 Conferences, it was not until after the 1909 Royal Commission on Matrimonial Causes published its recommendations in 1912 which would extend the causes from one to six under which divorce a vinculo would be allowed,⁵⁸ that the Bishops were

58. The proposed new grounds were: desertion for three years, cruelty, incurable insanity after five years confinement, habitual drunkenness after three years from a separation order, and life imprisonment after a commuted death sentence. These were to be added to the one cause already accepted as grounds for divorce: adultery.

stirred into action. In 1917, the Bishops responded to these recommendations and restated the traditional Anglican teaching on marriage and divorce.

The government of the day was in no hurry to introduce new legislation, and the Church did not respond in any forceful way until 1917. Doctor Randall Davidson, the Archbishop of Canterbury, urged the government to resist the pressures being exerted by some parliamentarians which allow "separated people" to marry.⁵⁹ The Archbishop was a strong buttress against any further attempts to weaken the Christian ideal of marriage enshrined in the "Canons of 1603" and the Book of Common Prayer of the Church of England.

While some members of the House of Lords advocated easy divorce, the Archbishop was not slow in affirming that the Church would not consent to relinquishing its own law and substituting a rule of Parliament in its

59. G. BELL, Randall Davidson - Archbishop of Canterbury, Oxford, University Press, 2nd ed., 1938, p. 991.

place. Addressing the House of Lords, he said: "If any of your Lordships think that the mere connection of the Church and the State, or the application of the system which we call 'establishment' carries with it that, I utterly and entirely repudiate it."⁶⁰

The 1932 Convocations of Canterbury and York appointed a commission to study the whole question of marriage, nullity, divorce, the service of marriage, and the preliminaries to marriage. The Commission's Report, The Church and Marriage,⁶¹ reiterated the western Christian teaching on the nature of marriage. Furthermore, the Report highlighted the obligation of the Church to leaven the secular legislation with the Christian concept of marriage by objecting to those laws which rejected such a viewpoint. Two years after the Report, "The Matrimonial Causes Act 1937" became law and extended the grounds for establishing a sufficient and adequate cause for the granting of divorce a vinculo by the State.

60. Ibid., p. 993.

61. The Church and Marriage, London, S.P.C.K., 1935.

The then Archbishop of Canterbury, Cosmo Lang, stated that the proposals were alien to the Church's teaching.⁶² Nevertheless, he recognized that the State was obliged to legislate for its non-Christian members. Similarly, the Archbishop of York, William Temple, agreed with Dr. Lang and maintained that it was inappropriate for any bishop to support the bill. However, some bishops did vote in favour of it,⁶³ speaking on its behalf, and thereby denying the concept of marriage laid down in the canons of their own Church. The Times reported it in this manner: "The Church is left free. It is put under no compulsion to recognize in its own practice what will in other respects be the law of the land."⁶⁴

The Convocations of Canterbury and York, in June 1938, passed resolutions⁶⁵ which declared that people

62. The Times (London), 20th July 1937.

63. Bishop Ernest Barnes of Birmingham and Bishop Hensley Henson of Durham.

64. The Times (London), 24th July 1937.

65. A. SMETHURST and H. WILSON (ed.), Acts of the Convocations of Canterbury and York, London, S.P.C.K., 1948, p. 90.

entering second marriages, apart from those with a decree of nullity granted by the civil court and recognized by the Church, were not permitted to remarry during the lifetime of their former partner in facie ecclesiae.

In recent years, various reports have been published treating the nature of marriage, the question of indissolubility, divorce and remarriage. Putting Asunder,⁶⁶ a report published in 1966 on the subject of the civil law on marriage, had a considerable influence in framing "The Divorce Reform Act 1969".⁶⁷ The Act abolished the "matrimonial offence" and substituted "no fault" or "one ground" divorce which could now be obtained by simply proving that a marriage had irretrievably broken down.

At the request of the Convocation of Canterbury in 1967, a group was appointed by the Archbishop to prepare a statement on the Christian doctrine of marriage. The Report entitled Marriage, Divorce and the Church, also

66. Putting Asunder: A Divorce Law for Contemporary Society, London, S.P.C.K., 1966, 142p.

67. Legal effect 1 January 1971.

known as the Root Report, was published in 1971.⁶⁸ It advocated the marriage of divorced persons in church giving scant attention to the question of indissolubility as traditionally held by Western Christendom. Not surprisingly, the Root Report was rejected twice by the General Synod of the Church of England and finally for a third time in November 1974. The Synod called for a fresh enquiry into the doctrine of marriage and the results were disclosed in a 1978 report entitled Marriage and the Church's Task.⁶⁹ Although the topic of indissolubility appears toward the end of the publication, an earlier statement seems to have left the Commission with one position, namely that the doctrine of indissolubility was untenable.⁷⁰

68. Marriage, Divorce and the Church, London, S.P.C.K., 1971, 170p.

69. Marriage and the Church's Task: The Report of the General Synod Marriage Commission, London, C.I.O. Publishing, 1978, 183p.

70. Ibid., pp. 57, 123-135.

The view permeating both reports (1971 and 1978) was a "personalist" one: marriage, subjectively understood and experienced, met certain fundamental needs of people - sociological but less theological and canonical. Moreover, the 1978 Report advocated the remarriage of divorced persons in church during the lifetime of a former partner. Paragraph 152 of the Report reads:

The Church of England, Catholic and Reformed, has never officially committed itself to the scholastic doctrine of the indissolubility of the marriage bond. Nor, on the other hand, has it officially repudiated it [...]71

The teachings of the Lambeth Conferences, although not de iure, nonetheless, carry some standing in the Anglican Communion. Within the Church of England, the 1957 Act of Convocation prohibiting second marriages in church between parties, one or both of whom are divorced, is well known. However, the most recent authoritative statement on marriage is found in canon B30:1. According to the canon, marriage is a life-long exclusive union of

71. Ibid., p. 54.

one man and one woman for the procreation and nurture of children, for the direction of natural instincts and for mutual help and comfort. Listed in The Canon Law Report as the proposed canon XXXVI:1 of the 1947 schema, canon B30:1 has undergone only one change between what was proposed in 1947 and what was finally enacted in 1969. "Indissoluble union" has become "union permanent".

David Atkinson, in his 1979 book To Have and To Hold, states that:

[...] in the Convocation debate on the proposed revised canon 36 (in September 1950) Canon Lindsay Dewar [...] changed the wording [...] from 'indissoluble' to 'permanent'. His intention was to make clear that what was meant was 'absolute indissolubility' ('indissolubilis,' he said, 'constantly occurred in the writings of the canonists') rather than meaning 'ought not to be dissolved,' which was gaining currency. [...] 'It was beyond reasonable doubt, said Canon Dewar, that our Lord's teaching was that marriage was permanent in nature, not permanent as an ideal.'⁷²

72. D. ATKINSON, To Have and To Hold, London, Collins, 1979, p. 26.

Canon B30:1 is based on two sources: first, the teaching of marriage found in Luke 16:18; second, the Decretum Gratiani⁷³ which expands on the Lucan text. The Corpus Iuris Canonici is cited to support and/or explain the Church of England's position on children⁷⁴ and mutual comfort within marriage.⁷⁵

This, then, is the fundamental teaching on marriage of the Anglican Church. Its general conformity with the "ius commune" of the Western Church, both pre- and post-Reformation, is evident. The present discipline of the Church is governed by a 1957 Act of Convocation (following a 1930 Conference recommendation and a 1938 Convocation Resolution) which states that "the Church should not allow the use of that Service (the Marriage Service) in the case of anyone who has a former partner still living."⁷⁶

73. c.41, C. 27, q. 1.

74. c.12, C. 31, q. 1.

75. c.11, C. 32, q. 2; 7, X, iv, 5.

76. The Chronicle of Convocation, No. 2(1957), p. 211.

ii. Canon B30:2

2 The Teaching of our Lord affirmed by the Church of England is expressed and maintained in the Form of Solemnization of Matrimony contained in the Book of Common Prayer.

The Book of Common Prayer referred to in this part of canon B30 is the prayer book that was legally established by King Charles II⁷⁷ in 1662 by what is now called "The Act of Uniformity".⁷⁸ The history of the English prayer book began in 1537 when Convocation appointed a committee to compose a book of prayer in the vulgar tongue. In 1540, Henry VIII appointed a committee at the request of Convocation to reform the offices and rituals; and five years later (1545), a primer was published.

A group, under the chairmanship of Archbishop Thomas Cranmer, published the first complete English Prayer Book which received legal sanction⁷⁹ by the 1548 Act of Uniformity.⁸⁰ This first Prayer Book retained

77. 14 Charles II, c.4. Short title being given to it by The Statute Law Revision Act 1948. Hereafter cited as S.L.R.

78. Short title given by the S.L.R. Act 1948.

79. 2 & 3 Edward VI, c.1.

80. Short title given by S.L.R. 1948.

some usages of the rite of Salisbury (Sarum) in the marriage service, i.e., the words of consent, vow formula, and the blessing and giving of a ring. In this service, marriage is stated as being "God's holy ordinance", rather than the pre-Reformation "if holy Church it will ordain;" thus conveniently denying the sacramental status of matrimony.

The Second Prayer Book of 1551⁸¹ received legal sanction⁸² and its use became mandatory in 1552.⁸³ The marriage rite had a slightly more Protestant stance than its immediate predecessor, but the theology underlying the service remained essentially the same. A Third Prayer Book was sanctioned in 1558 by Act of Uniformity.⁸⁴ However, the marriage service contained in the Second Prayer Book was reproduced.

81. 5 & 6 Edward VI, c.1.

82. Known as the Act of Uniformity 1551. Repealed by 1 Mary, Sess. 2, c.2 (1553). Short title given by S.L.R. 1948.

83. The ordinal for making bishops, priests and deacons was added to the 1548 Prayer Book, but the most important difference between the books of 1548 and 1551 was that the latter made a significant rearrangement of the Communion service.

84. 1 Elizabeth I, c.2. Short title given by S.L.R. 1948.

During the Commonwealth period, when the Puritan party reached the zenith of its power, the use of the Book of Common Prayer was forbidden by ordinance⁸⁵ of Parliament and in 1645 the Westminster Directory was substituted in its place. As a result, a thoroughly Calvinistic marriage rite came into use. With the restoration of the monarchy, a committee was appointed to work on a revision which received the assent of Convocation and legal obligation by the 1662 Act of Uniformity. Influenced by the immediate political events of the civil war and the Calvinistic pressures to remove certain words (the names of women from the Old Testament) in the nuptial blessing and to separate it from the Eucharist during which the ceremony was to be performed, the 1662 Prayer Book compilers produced a compromise version of the marriage rite found in the Second Prayer Book.

It is worth noting that the 1662 Prayer Book, commonly referred to as the Book of Common Prayer and mentioned in this canon (B30:2), expresses the teaching

85. I. BREWARD, The Westminster Directory: Introduction and Text, Bramcote, Notts., Grove Books, 1980, 32p. (Grove Liturgical Studies 21).

of the Church of England on marriage in the nuptial service. In his book Nuptial Blessing published in 1982, K. Stevenson made a study of the Christian marriage rites. He concluded that:

[...] classical Anglican marriage rite, so beautifully fashioned by Cranmer [...] and gently adapted by succeeding generations to suit their needs [is seen by] later generations as a variation of its Sarum predecessor, rather than a reform.⁸⁶

The marriage rite itself is a liturgical one whereby the partners exchange their consent before witnesses in the presence of the Church's minister who imparts the nuptial benediction within the context of the Eucharistic service. The rite speaks about the purposes of marriage: the procreation of children, a remedy against sexual frustration, and mutual help - the "three goods" enunciated by Augustine. The doctrine of indissolubility is clearly stated in the exchange of

86. K. STEVENSON, Nuptial Blessing, London, S.P.C.K., 1982, p. 151.

consent and in the declaration by the minister that, "I pronounce that they be man and wife together" and "those whom God hath joined together, let no man put asunder". This principle is repeated in a prayer which expresses the relationship of husband and wife as signifying and representing the "spiritual marriage and unity" between Christ and His Church.

The 1662 Prayer Book remained unchanged until 1965 when Parliament passed the Alternative Service Measure⁸⁷ authorizing the use of newer forms of services as alternatives to those prescribed in the Book of Common Prayer. Approval by Convocation was a prerequisite for each rite and its use was permitted for a specified time. Experimentation began on May 1, 1966. The final draft of the marriage service was published in 1977 and appeared in its definitive form in The Alternative Service Book 1980. Important changes in the rite are to be found in

87. The Prayer Book (Alternative and Other Services) Measure 1965, (1965, no.1).

the minister's introduction which declares marriage to be a holy mystery and a means of grace with a reordering of the "goods of marriage" which places mutual comfort first followed by sexual love and the procreation of children. The minister no longer pronounces the couple to be man and wife but declares, "what God has joined, man must not divide" - a concept which is forcefully expressed in the revised nuptial blessing.

Some theologians see the new rite as reflecting the notion that the couple are the "ministers of the sacrament".⁸⁸ It can be said that Cranmer's rite has been altered in favour of basing the service within the synaxis. Unity and indissolubility as expressed in the vows⁸⁹ are seen as essential properties of the marriage bond brought about by the free consent of the couple

88. The Alternative Service Book: A Commentary by the Liturgical Commission, London, C.I.O. Publishing, 1980, p. 124.

89. Cf. Book of Common Prayer, London, Eyre and Spottiswoode, 1844, pp. 160-161. The Alternative Service Book, Sevenoaks, Kent, Hodder and Stoughton, 1980, pp. 289-290.

expressed before the Church and directed towards the couple's mutual good and the good of the children.⁹⁰

The basis of this canonical regulation (B30:2) is a reflection of a resolution emanating from the 1930 Lambeth Conference⁹¹ which found expression in canon V of the 1947 schema⁹² and is similar to others inserted into the 1964-1969 canons concerning Baptism and Eucharist.

90. Cf. Book of Common Prayer, p. 160. The Alternative Service Book, p. 288.

91. Encyclical Letter 1930, pp. 134-135.

92. The Canon Law of the Church of England: Being the Report of the Archbishops' Commission on Canon Law, London, S.P.C.K., 1947, p. 107. Hereafter cited as C.L.R.

iii. Canon B30:3

3 It shall be the duty of the minister, when application is made to him for matrimony to be solemnized in the church of which he is the minister, to explain to the two persons who desire to be married the Church's doctrine of marriage as herein set forth, and the need of God's grace in order that they may discharge aright their obligations as married persons.

The injunction of canon B30:3 comes from the Convocations. The Canterbury assembly⁹³ stated in a resolution:

In view of the alarming increase of divorce, this House urges [...] the need for more definite teaching on marriage as a life-long relationship, and impresses upon the parochial clergy the importance and necessity of careful preparation of those about to marry.⁹⁴

One year later,⁹⁵ the Convocation of York expressed a similar concern and enjoined the clergy to be active in this work of preparing couples for marriage. These

93. 12th October 1944.

94. A. SMETHURST and H. WILSON, op. cit., p. 96.

95. 12th October 1945.

recommendations found their way into the 1947 schema as part of another canon⁹⁶ and were promulgated in their present form in 1969.

This chapter has demonstrated how the Church of England has continued to profess the doctrine of indissolubility of marriage from the pre-Reformation through the post-Reformation period. Although the general concept remains unchanged, its application in the life of the Church community has seen varied approaches. The current position of the Church of England is affirmed in the canons on marriage, especially those enacted in 1969, and in the marriage rite found in the Book of Common Prayer and The Alternative Service Book.

96. C.L.R., p. 128 as part of proposed canon XXXIX.

CHAPTER THREE

REQUIREMENTS FOR MARRIAGE: PRELIMINARIES TO THE
SOLEMNIZATION OF MATRIMONY

In England, civil marriage and religious marriage exist side by side, but both require civil registration. It is the contracting parties who must decide the manner in which they wish to marry. Unlike the Roman Catholic Church which demands that a marriage involving Catholics be conducted in facie ecclesiae before a priest (deacon, or qualified lay person) and two witnesses unless dispensed, the Church of England accepts marriage before a civil registrar as valid. Those who wish to marry in a church or exchange their consent before God and the church are free to do so, provided they are not prohibited by a civil or ecclesiastical impediment of prior bond and possess the legal qualification of residence. Furthermore, civil law has established that Christians who are not members of the Anglican Church are entitled to be married according to the rites of the Church of England. Whether unbaptized persons can claim a right to marry in the Church of England has never been

decided, but such a marriage, if otherwise legal, would be valid.¹

According to the rite of the Church of England, marriage may be solemnized in one of four ways: with banns, special licence, common licence, and certificate. The purposes of the chapter will be two-fold: (1) to examine the formalities and qualifications required to obtain a licence or certificate; (2) to examine the basis for the canonical legislation.

1. Great Britain, Laws, Statutes, etc. Ecclesiastical Law, being a reprint of the title Ecclesiastical Law from Halsbury's Laws of England. 3rd ed., London, Church House, 1957, p. 351. Hereafter cited as Ecclesiastical Law.

A. NOTICE OF MARRIAGE

i. Banns, Licence or Certificate

B34

1 A marriage according to the rites of the Church of England may be solemnized:

a) after the publication of banns of marriage;

b) on the authority of a special licence of marriage granted by the Archbishop of Canterbury or any other person by virtue of the Ecclesiastical Licences Act, 1533 (in these Canons, and in the statute law, referred to as a "special licence");

c) on the authority of a licence (other than a special licence) granted by an ecclesiastical authority having power to grant such a licence (in these Canons, and in the statute law, referred to as a "common licence"); or

d) on the authority of a certificate issued by a superintendent registrar under the provisions of the statute law in that behalf.

Marriage, according to the rites of the Church of England, is now governed both by statute law, "The Marriage Act 1949", as well as by canon law. The ecclesiastical prescriptions laid down in canon B34:1 are taken substantially from Part II of the 1949 civil ordinance. Ordinarily, the announcement of an intended marriage is made through the publication of banns. The purpose of publishing banns is to give notice of the proposed nuptial union and allows persons who may know of some impediment to the marriage the opportunity to

lodge an objection. The announcements must be called in the parish church of the parish (district) where the parties reside; or if they live in different parishes, in the parish church of each of the two parties.

According to some authors,² the earliest legislation on this matter was inaugurated by Odo, Bishop of Paris, who issued a synodal constitution on the subject in 1197.³ Others attributed the practice to a Council of London held in 1200 which ordered that the names of those who were about to be married be published before the assembled congregation.

Canon XV of the London Synod (1200) stated: "nec contrahatur aliquod matrimonium sine trina denunciacione publica in ecclesia, [...] nisi speciali auctoritate episcopi".⁴ The publication of banns was an attempt

-
2. J. ROBERTS, The Banns of Marriage: An Historical Synopsis and Commentary, Washington D.C., Catholic University of America, 1931, pp. 10-11, (Canon Law Studies, No. 64).
 3. J. MANSI, Sacrorum Conciliorum nova et amplissima collectio, Paris, Welter, 1901, vol. XXII, col. 679. Hereafter cited as Mansi.
 4. Ibid., col. 719.

to reduce the number of clandestine marriages being entered into in the Church at the time. Many of these illicit unions were precipitated by the comprehensive lists of consanguinity and affinity formulated by the Church which were deemed to be diriment impediments to marriage. Given the social conditions of the time, many people would have been denied the benefit of a church wedding. Therefore, universal legislation was enacted to halt the abuse of invalid marriages. The Fourth Lateran Council (1215), conscious of prevailing customs in various places, decreed that the publication of banns⁵ should be extended to the entire Church. At the same time, the Council reduced the prohibited degrees of consanguinity and affinity from the seventh degree inclusive to the fourth degree⁶ according to the then current computation which used the Germanic method. However, the general law laboured under certain defects. One was that the regulation did not specify the number of times banns should be called. Particular legislation in

5. c.3, X, iv, 3 (Canon 51 of Lateran IV).

6. Canon 50.

England required a triple publication and subsequent synods repeated the local law adding minor circumstantial determinations.⁷ Lyndwood's Provinciale noted that the three-fold publication was ordered by Archbishop Walter Reynolds (1313-1327). The practice was upheld in a metropolitan decree issued by Archbishop Simon Mepham (1328-1333) who, in turn, restated the decree "Cum Inhibitio" (canon 51) of Lateran IV which, in addition to the banns, imposed a three-year suspension on priests who celebrated marriages without their publication.³ The provincial regulation of the thrice-fold calling of banns as well as the Lateran suspension (c.51) declaring it ipso facto for clergymen who violated the regulation were incorporated into the "Canons of 1603" (c.62).

7. The Council of Exeter (1287) demanded the interval of eight days between the third calling of banns and the wedding ceremony; cf. Mansi, vol. XXIV, col. 795. The Synod of Lambeth repeated the law of triple publication in 1330; cf. Mansi, vol. XXV, col. 894. The Synod of London (1460) allowed a dispensation from the third publication; cf. Mansi, vol. XXXV, col. 139.

3. W. LYNDWOOD, Provinciale seu Constitutiones Angliae, Oxford, Hall Davis, 1679, pp. 270, 273. [Republished in 1968 by Gregg International, Farnborough, England]. Hereafter cited as Provinciale.

There can be no doubt that the triple calling of banns required by the Church of England originated from particular and subsequent universal law and not from the reception of the later decree of Trent (session XXIV, c.1). In the proposed canon XL of the 1947 schema, the practice of calling the three banns was retained, using as its remote source the Lateran IV canon and the two decrees already referred to in the Provinciale. The 1969 canonical legislation continued to maintain the traditional position on this matter. Hence, the Church of England clearly demonstrates a continuity with pre-Reformation universal and particular law regarding banns.

ii. Archbishop of Canterbury's Prerogative

B34

2 The Archbishop of Canterbury may grant a special licence for the solemnization of matrimony without the publication of banns at any convenient time or place not only within the province of Canterbury but throughout all England.

Proposed canon XLI of the 1947 schema was based on the Archbishop's authority to grant a special licence given to him by statute law, namely "The Ecclesiastical Licences Act 1533".⁹ The special licence mentioned here permits a couple to marry without prior publication of banns or a residential qualification according to the rites of the Church of England in the presence of a minister and two witnesses in any Anglican church, chapel or any building - consecrated or not - at any convenient time. The licence¹⁰ is granted by the Archbishop acting

9. 25 Henry VIII, c.21.

10. A Registrar General's Licence allows non-Anglicans the same rights granted to Anglicans by the Special Licence of the Archbishop of Canterbury, that is, to marry at any time and in any convenient place. The Registrar General's Licence Act 1970 restricts the occasion for the issue of this licence to where he is satisfied that one of the persons to be married is seriously ill and not expected to recover and cannot be moved to a place where the marriage could be solemnized under the provisions of The Marriage Act 1949. Such a licence cannot be issued for marriages to be celebrated according to the rites of the Church of England. Cf. F. HOPKINS, Formation and Annulment of Marriage, London, Oyez Publishing, 1976, p. 35, (Oyez Practice Notes 64).

through the Master of Faculties (an office performed by the Dean of Arches)¹¹; to obtain one, reasons must be given to show why the marriage may not take place by banns or common licence. Various documents and letters supporting the reason must be forwarded to the Archbishop's office. In addition, one of the parties must make an affidavit at the Faculty Office in London or before an Anglican clergyman stating that there is no impediment to the union.

Ordinarily, a special licence is granted only in exceptional circumstances or grave emergencies. This could happen when a proposed partner is dying in a hospital and cannot be moved and the couple wish to marry as soon as possible or when a partner is institutionalized or confined and cannot leave the area. An average of about two hundred and fifty special licences are granted each year.¹²

11. 37 & 38 Victoria, c.85 - Public Worship Regulation Act 1874.

12. P. BROMLEY, Family Law, London, Butterworths, 1981, p. 45.

According to J. Roberts, bishops acquired the faculty to waive the calling of banns through papal rescript or legitimate custom and many used their authority to dispense from this obligation.¹³ In the fifteenth century, ordinaries were cautioned to be slow in granting this favour and to do so only when one or two publications had already been made.¹⁴

Implied in canon B34:1b is the Archbishop of Canterbury's right to dispense from general and particular law throughout England. This would seem to be more than an act of a metropolitan. Since the Archbishops of Canterbury were sometimes appointed papal legates¹⁵ and given the necessary faculties for the exercise of their office, it could be argued that such a dispensation was granted by legatine faculty and not by metropolitan authority.

13. J. ROBERTS, op. cit., p. 15.

14. Synod of London (1460), canon 6. Cf. Mansi, vol. XXV, col. 139.

15. Cf. F. MAKOWER, The Constitutional History and Constitution of the Church of England, London, Swan Sonnenschein and Company, 1895, pp. 291-293.

From the beginning of the thirteenth century, the Archbishops of Canterbury were usually conferred with legatine powers as soon as their elections were recognized by Rome. These powers made them superiors of the Archbishops of York. However, some Archbishops of York obtained legatine powers for themselves and since 1352 almost all of the northern Metropolitans held this jurisdiction for their own province dispossessing the Archbishops of Canterbury's rights to superiority claimed by them in virtue of the papal commission. The conferment of the legation on both Archbishops did not exempt them from the visit of special legates during whose stay the Metropolitans' own legatine powers were suspended. As in the two centuries prior to the Reformation, the legatine office had customarily been conferred on both Metropolitans. It had become the rule that both had equal rights of jurisdiction; nothing beyond honorary precedence had been left to the Archbishops of Canterbury. Such was the relationship after the Reformation, except the Archbishops of Canterbury have in

respect of jurisdiction only the more prominent position as given them by 25 Henry VIII, c.21 which at an earlier time both they and the Archbishops of York had in virtue of legatine faculty. At the present time, such prerogatives would be exercised in the archepiscopal court of Canterbury. This opinion was supported by Charles Wheatly, the eighteenth century Anglican liturgist.¹⁶ Therefore, the privilege granted by this canon of not having to marry in a church building without the publication of banns is probably papal in origin, but is seen as a faculty bestowed by the statute law of King Henry VIII and confirmed by subsequent monarchs.¹⁷

16. C. WHEATLY, A Rational Illustration of the Book of Common Prayer of the Church of England, Oxford, University Press, 1846 ed., p. 343.

17. 26 George II, c.33 - Clandestine Marriage Act 1753;
4 George IV, c.76 - Marriage Act 1823; 12, 13 & 14
George VI, c.76 - Marriage Act 1949.

iii. Bishop's Rights

B34

3 The archbishop of each province, the bishop of every diocese, and all others who of ancient right have been accustomed to issue a common licence may grant such a licence for the solemnization of matrimony without the publication of banns at a lawful time and in a lawful place within the several areas of their jurisdiction as the case may be; and the Archbishop of Canterbury may grant a common licence for the same throughout all England.

The historical bases for this canon appears to be "The Ecclesiastical Licences Act 1533" of Henry VIII, statute law¹⁸ and canons 100-102 of the 1603 series. A trace of the legatine prerogative still lingers in this piece of legislation which enables the Archbishop of Canterbury to dispense from general law for the whole of England by granting a common licence, in addition to being able to issue a special licence. Both the metropolitan - who has ordinary jurisdiction for this purpose throughout his province - and the bishop within his own diocese can issue the same dispensation.

18. Marriage Act 1949.

Common licences that allowed for the solemnization of marriage without the publication of banns had been issued since the fourteenth century. The Synod of London (1328) allowed a couple to marry outside their parish church and also dispensed them from the calling of banns by the grant of a licence from the diocesan bishop.¹⁹ The 1603 canons made passing reference to the episcopal authority required to issue such licences (c.101), undoubtedly based on a gloss found in the Provinciale²⁰ and 25 Henry VIII, c.21 which stated: "[...] this act shall not be prejudicial to the Archbishop of York or to any bishop or prelate of this realm, but that they may lawfully dispense in all cases in which they were wont to dispense by the common law or custom".

An historical anomaly still remains in force in relation to the Archbishop of Canterbury. According to 25 Henry VIII, c.21 ("Ecclesiastical Licences Act 1533", Section 17), should the Archbishop (or the guardian of the See of Canterbury "sede vacante" - same Act, Section 16) refuse a licence - special or common - without reasonable cause, an appeal can be laid before the Lord

19. Mansi, vol. XXV, col. 814.

20. Provinciale, p. 274.

Chancellor who may enjoin the Archbishop or guardian to grant it. In the event of his refusal to do so, the Lord Chancellor may commission two other bishops to grant it. No appeal can be made against the refusal of the Archbishop of York or any other diocesan bishop to grant a (common) licence.²¹

The common licence was and is presently issued by the diocesan bishop acting through his Chancellor or the Chancellor's deputy. The licence is a privilege not a right and may be granted for the parish church or an authorized chapel within the ecclesiastical district where one of the parties has resided for at least fifteen days prior to the granting of the licence, or usually worships. Before a licence is granted, however, one of the parties must swear that (1) no impediment exists to the marriage; (2) the qualification for residence or worship has been satisfied by one of them; (3) parental consent has been obtained, if one of the parties is a minor (now eighteen years of age).²² The common licence remains valid for three calendar months after it has been granted. The couple has the right to marry at the church

21. Ecclesiastical Law, p. 365.

22. F. HOPKINS, op. cit., pp. 25-26.

named in the licence; the minister to whom it is presented is required to celebrate the marriage. However, no minister is compelled to solemnize the marriage of any person whose former marriage has been dissolved and whose "former spouse" is still living, or to permit the marriage of such a person to be solemnized in a church of which he is the minister.²³

The present Anglican rule (B34:3) substantially repeats the 1947 Canon Law Report's proposed canon XLI:2. However, the words "and all others who of ancient right have been accustomed to issue a common licence may grant them", acknowledges the executive power possessed by the Chancellor (Commissary for Faculties) to grant such a request. As Chancellor of the diocese (Commissary General in the Archdiocese of Canterbury) - a position open to a qualified layman or cleric - he is appointed by the diocesan bishop to handle legal matters but may sometimes be called upon to grant marriage licences on behalf of the Bishop. "In this capacity, he has the title of Vicar General. He is allowed to appoint deputies for this

23. Matrimonial Causes Act 1965 (S.9(2)).

purpose, who are known as surrogates; these are clergymen of standing with a delegated authority to issue marriage licences."²⁴

There is a similarity between the granting of a common licence and the publication of banns. In either case fifteen days residence is the minimum before which a couple may marry. Fifteen days is the shortest time possible for the calling of banns on three successive Sundays after which a marriage may be solemnized. The essential difference between marriage by banns and marriage by common licence lies in the residential qualification of the parties concerned. For marriage by banns, both persons require the residential qualification, whereas, for marriages by common licence only one of the parties has to fulfil this requirement.

24. J. MAYFIELD, The Church of England: Its members and its business, London, Oxford University Press, 1963, p. 141.

iv. Certificate

The fourth way to announce a marriage and obtain permission to marry is on the authority of a certificate²⁵ issued by a Superintendent Registrar. Marriage by certificate has been possible since "The Registration Act 1836" and was included under proposed canon XLII:5 of the 1947 schema. Presently, marriage under this form is governed in statute law by "The Marriage Act 1949" which is the source of the canonical regulation allowing marriage in the Church of England according to certificate. These certificates are not issued by the Church.

Under the present legislation, the couple obtains the certificate by giving notice to the Registrar and signing a declaration that: (1) no impediments exist to

25. The other form of certificate, namely with a licence, allows non-Anglicans the same privilege that a Common Licence permits to members of the Church of England. No marriage under a Registrar's Certificate with licence may be celebrated according to the rites of the Church of England. Cf. F. HOPKINS, op. cit., p. 27.

prevent the proposed marriage; (2) the residential requirements have been satisfied; (3) if one party is a minor (under eighteen years of age) the requisite consent has been either obtained or dispensed with. Notification of the intended marriage is then displayed in a conspicuous place in the Registrar's office for twenty-one successive days after which time, if no objections have been raised to the marriage, the marriage certificate is issued. The marriage is to be celebrated within three months from the date of notice given at the Registrar's office.

The residential requirement demanded by statute law - seven days - is in effect really a month. The couple need to reside in the place for seven days, after which they give notice of intention to marry. Then, the certificate remains on public view in the Register Office for twenty-one days. The three full weeks required for the publicity of the certificate replaces the period of three Sundays required for the calling of banns.

The formality of a Registrar's certificate is more likely to be used by nominal Anglicans who desire a

church wedding or who do not wish the publication of banns. The couple may marry in any church or chapel in which their banns could be published within the registration district where the parties have resided for at least seven days or in their usual place of worship. The consent of the minister is required and the marriage must be celebrated by a clergyman.

B. CIVIL REQUIREMENTS**i. Clergy Bound by Civil Law**

B35

1 In all matters pertaining to the granting of licences of marriage every ecclesiastical authority shall observe the law relating thereto.

This administrative canon is a reminder to bishops and those who act in their name to ascertain conscientiously that the civil prerequisites are satisfied and fulfilled before granting special or common licences. In view of the frequency with which common licences are issued, officials called "surrogates"²⁶ are deputed to execute this office by law. It is their responsibility, and ultimately the diocesan bishop's in whose name they act, to ensure that one of the parties has resided for at least fifteen days in the parish or district of the church or chapel where the proposed wedding is to be solemnized. Although the granting of a licence is a favour, once it has been issued the couple is in possession of a right which has been established by

26. Ecclesiastical Law, p. 366.

civil law.²⁷ When the licence is presented to a minister directing or authorizing the marriage of two persons, he is required by the "rights of the parties" to solemnize the marriage according to that licence unless he suspects fraud. In that case, the minister may justify a delay until the suspicion is removed, or he may take advantage of the option given him by the "Matrimonial Causes Act 1965" which allows him not to perform the ceremony if a party is divorced and the former spouse is still living. Normally, a minister is guilty of a breach of canonical obedience if he refuses to perform the ceremony without just cause. Such an action on his part may lay him open to action in the civil courts.²⁸

27. *Tuckniss v. Alexander* (1863) 32 L.J. Ch. 794, at p. 806.

28. Ecclesiastical Law, p. 317.

ii. Publication of Banns

B35

2 In all matters pertaining to the publication of banns of marriage and to the solemnization of matrimony every minister shall observe the law relating thereto, including, so far as they are applicable, the rules prescribed by the rubric prefixed to the office of Solemnization of Matrimony in the Book of Common Prayer.

The law referred to in this canon is a statutory provision, "The Marriage Act 1949". The requirements laid down for the publication of banns are comprehensive. A clergyman is not obliged to publish the banns of a couple who wish to marry unless they have delivered a notice to him in writing at least a week before they wish the banns to be called for the first time stating the relevant details of name and residence.

Banns must be published from a Register Book in an audible manner using the formula prescribed by the rubric²⁹ prefixed to the office of Matrimony found in the Book of Common Prayer:

29. This rubric is of statutory obligation having been given legal force by the 1662 Act of Uniformity.

I publish the Banns of Marriage between M. of _____ and N. of _____. If any of you know cause, or just impediment, why these two persons should not be joined together in holy Matrimony, ye are to declare it. This is the first [second, or third] time of asking.³⁰

Should the couple live in different parishes, their respective ministers must call banns. Likewise, if neither person resides but only worships in the particular church or chapel in which they choose to marry, the banns must also be called in that building. In either case, a certificate testifying to the fact that banns have been published must be sent by the other clergymen to the minister who is to perform the ceremony.

Ordinarily, banns are called at Morning Service. However, "The Marriage Act 1949"³¹ allowed them to be called at the Evening Service if the Morning Service was not held. A clergyman usually calls the banns; but the

30. Book of Common Prayer, London, Cambridge University Press, 1926, p. 301.

31. Section 7(1) modified both the rubric and canon 62 (1603 Series).

same Act allowed a layman - duly authorized by the bishop - to publish banns when no clergyman officiates at the service held in the church or chapel.

Since the purpose of the publication of banns would be defeated if the parties could not be identified, the names by which they are generally known are used. As P. Bromley stated: "[...] where it has been held that the banns have not been duly published, there has been some fraudulent intention to conceal the party's identity."³²

There is no prescription to determine whether the intended wedding should take place in the church of the bride or the groom. A 1753 Act of King George II (26 George II, c.76)³³ removed the preference for the woman's church by stating that the marriage could take place in either church where banns had been called.

32. P. BROMLEY, op. cit., p. 43.

33. The Statutes of the United Kingdom of Great Britain and Ireland, Vol. IX, London, H.M.S.O., 1824, pp. 525-528.

iii. Prohibited Times

B35

3 A marriage may not be solemnized at any unseasonable hours but only between the hours of eight in the forenoon and six in the afternoon.

This canon reflects the awareness that the Church of England has with regard to liturgical times and seasons. The Anglican Church retained the prohibition of solemnizing marriage during Lent set forth by the Council of Laodicea in 363 (c.52). The Provinciale³⁴ also listed the other seasons during which marriage could not be celebrated, viz., the first Sunday of Advent to the day preceeding the Octave of The Epiphany, Septuagesima Sunday to the first Sunday after Easter inclusive, and the first Rogation Day to Saturday of Pentecost week.³⁵ Moreover, it required the ceremony to be performed during the light of day. Since marriage was celebrated during the Eucharistic service, this factor also placed parameters on the times when the nuptials could be solemnized.

34. Provinciale, p. 271.

35. Ibid., p. 274.

In studying the various prayer books of the Church of England during the post-Reformation period, a transition in the way marriages were celebrated can be detected. The 1548 directive stating that "the eucharist must be celebrated after the marriage" and retained in subsequent editions was changed in 1662 to "the eucharist should be celebrated".³⁶ This was done to effect a compromise with the Puritans who had come into power during the Commonwealth period.

Although the "Canons of 1603" (c.62 and c.102) did away with the prohibition on solemnization during "times of fasting and feasting", the canonical norms still reflected eucharistic practice by prescribing the hours during which marriages could be celebrated, taking into account the various fasting laws. The celebrations could take place between 8:00 a.m. and noon. Subsequently, on two occasions the Church amended these canonical regulations to accommodate civil law. In 1887, the time

36. F. BRIGHTMAN, The English Rite, London, Rivingtons, 1921, vol. 2, pp. 816-817.

permitted for solemnization was extended to 3:00 p.m., and in 1936 to 6:00 p.m.³⁷ The latter time still remains in force for both civil and ecclesiastical laws.

37. A marriage celebrated in facie ecclesiae outside these hours would not be void. Cf. Ecclesiastical Law, p. 368.

iv. Minister's Rights

835

5 When matrimony is to be solemnized in any church, it belongs to the minister of the parish to decide what music shall be played, what hymns or anthems shall be sung, or what furnishings or flowers should be placed in or about the church for the occasion.

what might first appear to be an inconsequential canonical regulation is, in fact, a very practical piece of legislation. This canon, proposed in the 1947 schema (c. XLII:8), evolved out of various disputes between the ministers, on the one hand, and church-wardens, organists and lay helpers on the other during the post-Reformation period.

Two court cases, cited by the compilers of the 1947 schema, are the sources for this ruling which gives the minister complete, discretionary freedom to select the music, songs and decorations used for the church service. The first case (Hutchins v. Denziloe and Lovelace, 1 Hag. Comm. 170) occurred in 1792 and centred on the relational authority between the minister and church wardens. The latter, whose office has existed

since the fourteenth century,³⁸ exerted considerable influence in the life of the parish. Church wardens were lay men elected by fellow parishioners to represent them in the duties of caring for church property and providing what were required for divine services. Their duties, listed in the 1571 canons³⁹ and the 1603⁴⁰ series, also included preserving good order in church and "reporting to the Ordinary [Bishop] offences committed by the clergy and laity of the parish in respect of matters cognizable by the ecclesiastical courts".⁴¹

In the case cited, proceedings⁴² were instituted by the Reverend John Hutchins of the parish of St. Botolph, Aldersgate, against two of the wardens, Denziloe

38. Provinciale, p. 251.

39. Canon 5. Cf. Synodalia - A Collection of Articles of Religion, Canons and Proceedings of Convocations in the Province of Canterbury, 1547-1717, Oxford, University Press, 1842, vol. 1, pp. 122-126.

40. Canon 89.

41. F. MAKOWER, op. cit., p. 347.

42. 5 & 6 Edward VI, c.4. "If any person shall by words only, quarrel, chide or brawl in any church or

and Lovelace. The minister had ordered the playing of the organ and the singing of Psalms with the addition of the "Gloria Patri". The wardens interposed to stop what they considered a wrongful liturgical act basing their action on canon 113⁴³ (1603 series). They forbade the execution of the minister's orders. In rendering his judgement, Sir William Scott focused on two questions: (1) did the church wardens have a right to interfere in a church service? (2) if they possessed such a right, was it used to hinder a legal or an illegal act? Sir William pointed out that the duties of a church warden were confined to

church-yard; it shall be lawful unto the ordinary of the place, where the same shall be done and proved by two lawful witnesses, to suspend every person so offending; if he be a layman, from the entrance of the church, and if he be a clerk, from the ministration of his office, for so long a time as the said ordinary shall think meet, according to the fault."

43. Canon 113 (1603) - [...] Churchwardens, Sidemen, Questmen, and such other persons of the laity as are to take care of the suppressing of sin and wickedness in their several parishes, as much as in them lieth, by admonition, reprehension, and denunciation to their Ordinaries, [...] at such times and when else they think it meet, all such crimes [...] as by them [...] shall be thought to require due reformation.

the care of ecclesiastical property over which they exercised a discretionary power. Moreover, their office was one of observation and complaint (in virtue of canon 113 in the 1603 series) and not of ordering divine worship. It was their duty to prevent indecency in church and to direct complaints in this regard to the Bishop. If the minister did err in this respect (according to the wardens' interpretation), they may complain "but the law would not oblige them to complain if they (the wardens) had a power in themselves to redress the abuse".⁴⁴ Having established that point, the judge addressed the second question: were the actions of the warden occasioned by the minister's illegal act? The wardens were of the opinion that the singing of Psalms while legal in cathedral and collegial churches, was illegal in parish churches. Commenting on the post-Reformation liturgy and the desire of the English people to have plain, simple music and singing in their worship, Sir William held that the first liturgies of the Reformed Church sanctioned the continuance of singing in

44. The English Reports, Volume CLXI. Ecclesiastical, Admiralty, and Probate and Divorce I, Edinburgh, W. Green, 1917, p. 516.

all churches though it be different in standard and degree. In essence, the judge ruled that the singing in St. Botolph's parish church was not contrary to the law and that the church wardens had no right to interfere with the directions given by the minister in divine service. Furthermore, the wardens' interpretation of what was legal and illegal was incorrect.

The second case,⁴⁵ Wyndham v. Cole (1875), occurred in the Arches Court of Canterbury. The minister (Wyndham) instructed the organist (Cole) to play the organ only at certain times. Proceedings were taken in the Court to establish the incumbent's control over the use of music during a divine service. Cole, who appealed the suit, maintained that he was appointed by the Parish Council, paid by them from parish funds, and enjoyed the support of a majority of the parishioners who wanted the customary performance on the organ before and after the service to continue. The minister objected to the playing of the

45. The Law Reports. Probate Division, Volume I. 1875-1876, London, Clowes and Sons, 1876, pp. 130-134.

Organ Voluntary prior to and after services. In his decision, Sir Robert Phillimore ruled that the wishes of the parishioners were irrelevant in such matters and precedent (Hutchins v. Deniziloe and Lovelace and other cases) had established the rights of the minister to control the singing and music during divine service. Hence, the minister has, within the limits imposed by canonical and liturgical law, complete freedom in ordering any service conducted according to the rites of the Church of England.

C. REQUIREMENT OF FORM - "THE ANGLICAN TAMETSI"

B35

4 Every marriage shall be solemnized in the presence of two or more witnesses besides the minister who shall solemnize the same.

The history of English law which deals with the formalities of marriage is still a matter of speculation. Various authors⁴⁶ hold different opinions regarding the celebration of marriage and the formation of the marriage bond. The Provinciale mentions the requirement of at least two witnesses and one priest for a licit celebration.⁴⁷ Moreover, while the consensual aspect of the union was emphasized prior to the Council of Trent, the exchange of consent did not necessarily have to take place at a religious ceremony; however, the practice was strongly encouraged. This situation, coupled with the impediments of consanguinity and affinity that still remained in effect after Lateran IV, engendered and

46. Cf. H. SWINBURN, Secusals; J. JACKSON, Formation and Annulment of Marriage; F. POLLOCK and F. MAITLAND, History of English Law.

47. Provinciale, p. 271. A gloss in the work states that at least two witnesses are required; however, one is sufficient.

perpetuated the problem of clandestinity. All that was needed was a declaration made by the parties that they took each other as husband and wife without witnesses, either per verba de praesenti (I take you as my wife/husband) in which case the union was binding immediately, or per verba de futuro when it became binding as soon as it was consummated. In some cases, clandestine marriages were also celebrated at the church door per verba de praesenti in the presence of the priest without the witnesses and the calling of banns, after which the couple went into church for the nuptial Mass.⁴⁸

The Provinciale gives evidence of efforts made by the medieval English Church to eradicate clandestine marriages by excommunicating couples who entered such unions and suspending priests who celebrated the

48. The Marriage Service of the 1662 Book of Common Prayer - which is still in use - preserves this ancient form. The first part of the service takes place in the body of the church and consists of the espousals ("I will") and the exchange of consent per verba de praesenti ("I do"). The remainder of the service takes place before the altar.

weddings.⁴⁹ Likewise, those persons who entered irregular though valid per verba de praesenti marriages could be obliged under pain of excommunication⁵⁰ to regularize their unions by submitting to the accepted form.⁵¹

The Roman Catholic Church proposed a solution to the problem when the Council of Trent issued the decree "Tametsi" in 1563. The Council declared that the ordinary form of marriage recognized by the Church consisted in the exchange of vows before the parish priest or his authorized delegate and two witnesses. Because the writ of the Roman Pontiff no longer had force in England,⁵² the Tridentine decree had no effect either on the theory or practice of the Established Church regarding the formation of the nuptial bond. Indeed, the ecclesiastical

49. Provinciale, pp. 273-274.

50. Ibid., pp. 275-276.

51. Ibid., p. 274.

52. "Tametsi" did not apply to Roman Catholics in England because the decree was never promulgated. The decree "Ne Temere" which required the observance of the canonical form bound English Catholics since Easter 1908. Cf. M. O'REILLY, Marriage Impediments, Ottawa, Saint Paul University, 1985, pp. 13-14, (ms.).

courts continued to maintain the maxim of medieval canonists that marriage was created solely by the exchange of (present) vows between two capable people and that neither the presence of witnesses nor the solemnization in facie ecclesiae was essential for its validity. Henry Swinburn, judge of the Consistory Court at York in his Treatise of Spousals published in 1686 wrote: "Albeit there be no witnesses of the contract, yet the parties have verily (though secretly) contracted matrimony, they are very man and wife before God; neither can either of them with safe conscience marry elsewhere so long as the other party liveth."⁵³

The courts were consistent in upholding the concept that "consent makes marriage". E. Gibson demonstrated this by reporting a judgement rendered by Lord Chief Justice Holt (Collins v. Jesset) who ruled that a marriage made per verba de praesenti amounted to an actual marriage which the parties were unable to dissolve by mutual agreement "for it is as much a

53. Quoted in R. Haw, The State of Matrimony, London, S.P.C.K., 1952, p. 3.

marriage in the sight of God as if it had been in facie ecclesiae; with this difference, that if they cohabit before marriage in facie ecclesiae, they are for that punishable by ecclesiastical censures".⁵⁴ As long as the sanction of the spiritual courts carried sufficient weight to enforce the ecclesiastical requirements that marriage be celebrated publicly in facie ecclesiae, the problems caused by clandestine unions were limited.

Consequent to the religious upheaval of the sixteenth and seventeenth centuries and the non-reception of "Tametsi", the Anglican Church availed itself of the few remaining means it had to prevent an increase in the number of irregular unions. The "Canons of 1603" legislated the publication of banns, but this did not wholly resolve the problem. Therefore, some recognizable form of registration and public witness of a marriage was imperative.

54. G. JOYCE, Christian Marriage, London, Sheed and Ward, 1933, p. 139, quoting E. GIBSON, Codex Iuris Ecclesiastici Anglicani, 1761 ed., p. 417.

Clandestine marriages not only created problems for the Church authorities, but also for civil lawyers who found themselves immersed in the work of settling disputes over inheritances. The common law favouring the publication of banns and a church wedding made their work easier. Property rights and the determination of a legitimate heir could be established. In the post-Reformation period when ecclesiastical sanction had lost much of its potency, an increasing number of people took advantage of the fact that clandestine marriage, while not invalid, provided a legal loophole which prevented an exchange of material and financial assets.⁵⁵

Until the middle of the eighteenth century, a marriage could be contracted in one of three ways: (1) in facie ecclesiae - after banns or with licence before witnesses and with parental consent, if one party was a minor (then under twenty-one); therefore, the marriage was considered valid in both civil and canon laws; (2) clandestinely per verba de praesenti - before a

55. Some persons entered clandestine marriages to avoid paying the duties levied on a marriage licence, the income of which helped finance a war against France by virtue of 6 & 7 William & Mary, c.6 (1695).

priest (or clerk in holy orders - after the Reformation)⁵⁶ but not in facie ecclesiae; such marriages though irregular were valid; (3) clandestinely per verba de praesenti vel per verba de futuro - not spoken in the presence of an ordained minister or witnesses. This third form was recognized as being valid and indissoluble when consummated. If either party entered a subsequent marriage, this later marriage could be annulled.⁵⁷ Moreover, either party could obtain an order from an ecclesiastical court calling the other to solemnize the marriage in facie ecclesiae.⁵⁸

In the middle of the eighteenth century, certain social problems associated⁵⁹ with the inmates of the

56. Clergyman means a clerk in holy orders of the Church of England according to the 1949 Marriage Act. Marriage may be solemnized by a deacon. Cf. Ecclesiastical Law, p. 368.

57. This rule had been abrogated by 32 Henry VIII, c.38 (1540) but revived in 1548 by 2 & 3 Edward VI, c.23.

58. *Baxtar v. Buckley* (1752) 1 Lee 42.

59. Other social concerns involved persons who believed themselves to be married for years only to find suddenly that their marriage was null because of a partner's clandestine union. Children would marry without their parents' consent; and if the minor was a girl with a large fortune, the common law rule vested a wife's property in her husband on marriage. This made the girl an attractive catch.

Fleet Prison where profligate clergymen ("the Fleet parsons") traded in clandestine marriages aroused public interest and concern. The Fleet was a debtor's prison where conditions and accommodations were poor and insufficient. Those who could give security upon appearance in the prison when summoned were allowed to take up private lodgings or set up a private establishment within a well-defined area surrounding the Fleet prison. There were clergymen in this prison who were ready to celebrate marriages for a fee. As a writer of the times described it, "The Fleet was cheap, there was no publicity, and above all, no embarrassing questions were asked and parental consent was disregarded. A popular error of the times, that a woman by marriage ceased to be liable for debts previously contracted, played its part."⁶⁰ The activities of the Fleet parsons forced the civil legislators to examine the problem of clandestinity more minutely. Eventually, the House of Lords initiated legislation that ended the practice.

60. Cf. J. JACKSON, Formation and Annulment of Marriage, London, Butterworths, 1969, p. 62.

Many politicians of the period felt that marriage was a contractual obligation and as such came under their control as did other contracts. The Temporal Lords received support from the Lords Spiritual in their efforts to eliminate the problem. As a result, an act known as "Lord Hardwicke's Act" (1753)⁶¹ became law, putting a stop to the practice of clandestinity. R. Haw summarized the main provisions of the Act in this way:

Only those marriages were henceforth to be accepted as valid which had been solemnized in the parish church of one of the persons concerned, the banns having been previously published in the parish church or churches of both upon three Sundays preceding the solemnization. No licence for marriage was to be granted for its solemnization in any other church than that of the parish within which one of the persons dwelt. The right of the Archbishop of Canterbury to grant special licences was preserved. A marriage of parties under the age of twenty-one was to be null and void if celebrated against the dissent of their parents or guardians, or without their consent to the issue of a licence. Any clergyman who solemnized marriages without publication of banns or without a licence was to be adjudged guilty of felony and be liable to transportation [to America] for fourteen years. The courts spiritual could no longer hear suits to enforce solemnization in facie ecclesiae on the ground of a clandestine union, either de praesenti or de futuro.⁶²

61. 26 George II, c.33.

62. R. HAW, oc. cit., pp. 149-150.

Consequently, if the stringent provisions stated in this Act were not carefully observed, the marriage would, in the vast majority of cases, be declared void. Those who did not subscribe to the Church of England found themselves in difficulty because a wedding in the parish church was the only legal method of marriage open to them.⁶³

While this Act effectively put a halt to clandestine marriages, it created other problems. Persons could enter a marriage which they knew to be void or arrange it to be so for their own purposes. This was done in cases of a person contemplating marriage with a minor, who, on applying for a marriage licence would swear on oath that the necessary parental consent had been obtained when in fact it had not; also, when a party used a pretended or void marriage as a basis for the seduction of young ladies.

63. Quakers and Jews celebrated marriage according to their own discipline. Only Roman Catholics and Protestant dissenters had the option of going through a religious form of marriage which might have been repugnant to them. The provision of the 1753 Act was repealed with the promulgation of the 1836 Marriage Act (5 & 7 William IV, c.85).

Motivated by pastoral solicitude and concern for their members, the Anglican bishops supported the Hardwicke Act. It paralleled the decree promulgated by Trent ruling against clandestine marriages and can analogically be termed "The Anglican Tametsi". The Church of England depended on Parliament and the Crown for its laws. By this time, Parliament had become the legislator for the Anglican Church.⁶⁴ By accepting the Hardwicke Act, the Church of England had to disregard, for practical purposes, its position that consent alone makes marriage. Understandably, lawyers and politicians felt construed to "invent" the requirement that a clergyman should officiate at a wedding. This was not canon law. Marriages per verba de praesenti were still considered valid by the Church courts until the Hardwicke Act achieved legal force. Although in petto marriages may have been sacred to the couple, it was essential for the State and its spiritual arm to require that certain formalities of marriage recognizable to society be

64. The Convocations were in virtual abeyance during much of the seventeenth, eighteenth and nineteenth centuries. Cf. E. KEMP, Counsel and Consent, London, S.P.C.K., 1961, pp. 165-166.

observed for the sake of justice and the status of marriage itself.

Because of its strict provisions, efforts were made to repeal the 1753 Act. The passage of "The Marriage Act 1823"⁶⁵ repealed and replaced the Hardwicke Act retaining some of the positive elements. The new Act differed from the former one by considering a marriage to be void only if both parties knowingly and willfully intermarried contrary to the prescription of the 1823 legislation.

In 1836, two important acts were promulgated: "The Marriage Act" and "The Registration Act". The former ordinance allowed non-Anglican Christians the option of marrying without a religious ceremony before a civil registrar and two witnesses, or with a religious ceremony in their own church building in the presence of a registrar⁶⁶ and two witnesses, permitting the couple to

65. 4 George IV, c.76.

66. The need to have a Registrar present was removed by The Marriage Act 1898, by allowing the trustees of a "Registered Building" to appoint an "Authorized Person" (the minister) to act as the civil witness. Cf. P. BROMLEY, op. cit., p. 38.

marry per verba de praesenti. With "The Marriage Act", the State returned to the ancient position that consent makes marriage, not the action of a clergyman. Since civil law required the presence of a clergyman ex necessitate through the passage of "The Hardwicke Act" (1753), the civil law had the power to declare that a clergyman was no longer necessary to validate a marriage.⁶⁷ This it did with "The Marriage Act 1836". The Church of England was obliged by its own doctrine of matrimonial consent to recognize the validity and liceity of all marriages entered into by virtue of the new statute. "The Registration Act" established the office of Registrar General and a central bureau for recording marriages.

By the early nineteenth century, the State became increasingly aware of the fact that the administration of marriage law should not be left to a church that was ceasing to be the complete spiritual expression of the nation. The viewpoint gaining popularity at the time held that since statute law could prescribe how a marriage

67. An 1861 civil court case established that one witness was sufficient. Cf. Ecclesiastical Law, p. 368.

ought to be made, it could also declare how a marriage could be "unmade". Given the political climate of liberalism and toleration of the day, it became inevitable that a new stance on marriage, albeit contrary to the Church of England's position, would be taken by social reformers. As R. Haw pointed out: "If the State could legislate about marriage, could not the civil courts adjudicate upon it? If the State could decree how marriage might or did come into being, could it not decree how it might be terminated?"⁶⁸

68. R. HAW, op. cit., p. 157.

D. RELIGIOUS SERVICE AFTER A CIVIL MARRIAGE

B36

1 If any persons have contracted marriage before the civil registrar under the provisions of the statute law, and shall afterwards desire to add thereto a service of Solemnization of Matrimony, a minister may, if he see fit, use such form of service, as may be approved by the General Synod under Canon B 2, in the church or chapel in which he is authorized to exercise his ministry: Provided first, that the minister be duly certified that the civil marriage has been contracted, and secondly, that in regard to this use of the said service the minister do observe the Canons and regulations of the General Synod for the time being in force.

2 In connection with such a service there shall be no publication of banns nor any licence or certificate authorizing a marriage: and no record of any such service shall be entered by the minister in the registrar books of marriages provided by the Registrar General.

The 1856 "Marriage and Registration Act"⁶⁹ is the source of this regulation and the 1947 schema included the permission as proposed canon XLIII. "The Marriage Act 1949" repealed the Victorian Statute but included the

69. 19 & 20 Victoria, c.119. S. 12.

same proposition under Section 46. The canon as promulgated in 1969 was taken substantially from the Statute law. In 1975, an amendment to the canon was passed allowing the use of a service authorized and approved by the General Synod. This would permit the observance of the Alternative Services then in experimental use throughout the Church of England.

Persons who wish to marry in a Register Office do so in the presence of a Superintendent Registrar, a Registrar and two witnesses according to the civil form. No religious service is allowed to take place at a marriage contracted in the office of a Superintendent Registrar. Should the parties desire to add a religious ceremony, the couple may do so upon the presentation of their marriage certificate to the minister of the church of which they are members. The minister may then read or celebrate the appropriate service in the church or chapel of which he is the regular minister. Such a service does not supersede or invalidate the prior civil ceremony. In fact, as part two of the canon states, the celebration must not be recorded as a marriage in the marriage registration book. According to the tenor of the statute

law, should the Register Office marriage be void, the religious service has no legal merit in the civil forum since the statute law declares it to be no marriage.

"No person who is not entitled to solemnize marriages according to the rites of the Church of England becomes entitled to read or celebrate the marriage service in any Established Church or chapel by reason of these provisions [Marriage Act 1949, Section 46]."⁷⁰ what is envisaged in this canon is some form of service designated as a "Thanksgiving for a Civil Marriage". However, "forms of service, often offered to the clergy by 'The Diocesan Bishop', vary from a near copy (vows and all) of The Prayer Book to a carefully worded form of benediction to be used with persons only 'of their immediate family'".⁷¹

Why should people marry before a Registrar and then wish to follow it with a service of blessing in church? This canon helps "in the handful of cases in this country [England] where a couple wish to have the

70. J. JACKSON, op. cit., p. 198.

71. J. MULLETT, A Church Service Following a Second Marriage, Luton, Cortney Publications, 1983, p. 11.

religious ceremony in an unlicensed building, e.g., a college or school chapel [...]. In our Anglican understanding, marriage before a civil registrar is unquestionably marriage. All that remains is for the marriage to be blessed [...]"⁷² The canonical regulation also facilitates a blessing for people who were refused a church wedding in the belief "that the refusal of the actual marriage in church was the best way to operate a consistent discipline which witnessed to the fact that divorce was at best the lesser evil, but that the welcome to a service in church subsequent to the civil marriage could demonstrate in appropriate cases that the Church was glad to give its blessing"⁷³

This practice was criticized by many people within the Anglican Church and no doubt contributed to the carefully worded 1957 Act of Convocation, Resolution 2B.

72. Marriage and the Church's Task: The Report of the General Synod Marriage Commission: Being a Commission set up by the Archbishops of Canterbury and York, London, C.I.O. Publishing, 1978, p. 66. Hereafter cited as Marriage and the Church's Task.

73. D. ATKINSON, To Have and to Hold, London, Collins, 1979, p. 193.

No public service shall be held for those who have contracted a civil marriage after divorce. It is not within the competence of the Convocations to lay down what private prayers the curate in the exercise of his pastoral ministry may say with the person concerned, or to issue regulations as to where or when these prayers shall be said.⁷⁴

The Resolution attempted to forbid what had become increasingly prevalent - a public service in church with everything done as far as possible to resemble a normal wedding service except the actual exchange of vows. Since the Church of England must recognize Register Office weddings as being valid by its own teaching that "consent alone makes marriage", there is no need for the vows to be exchanged in a religious service immediately following

74. In 1957, the Convocation of Canterbury restated the 1938 Resolution (No. 2) "that marriage after divorce during the lifetime of a former partner always involves a departure from the true principle of marriage as declared by our Lord". The 1957 Convocations also repeated Resolution 3, "in order to maintain the principle of lifelong obligation which is inherent in every legally contracted marriage and is expressed in the plainest terms in the Marriage Service; the Church should not allow the use of that service in the case of anyone who has a former partner living". Cf. Marriage and the Church's Task, p. 3.

on a civil service. Statute law, too, is quite explicit in stating that such a religious service does not constitute a marriage in the true sense.

This situation can cause confusion to onlookers, but more importantly shows a confusion in the Church's position. If the Church on the one hand is glad to permit an almost full marriage service to divorced persons with the exception of the expression of commitment by the couple, while on the other forbidding a full church wedding to the same persons, what is being denied to the couple? Is it the role of the minister as civil registrar? Such a position does not aid the Church in its witness to its teaching on indissolubility and needs clarification.⁷⁵

75. A good synopsis of the problem can be found in Marriage and the Church's Task, pp. 92-101.

CHAPTER FOUR

IMPEDIMENTS TO MARRIAGE IN THE CANONS

For a man and a woman to become husband and wife, two conditions must be satisfied: first, they must both possess the capacity to contract a marriage; and second, they must observe the necessary formalities. In civil law, generally speaking, capacity to marry is determined by the parties' lex domicilii, while the formalities to be observed are those required by the lex loci celebrationis. Both Church and State determine through statute law and ecclesiastical canon a person's capacity to contract a valid union; not every man is free to marry every woman, and vice versa. The impediments to marriage imposed by both authorities arise from natural law; others have their origin in the common experience of society. A Christian is subject to both State and Church and must observe the regulations legislated by them.

At one time, the Church enjoyed control both over marriage and the laws determining the impediments that obstructed or invalidated a nuptial union. Since the Reformation period, however, the State has brought the

institution of marriage under secular control through various legislative enactments. Accordingly, the Church, as the spiritual arm of the State, has taken notice of civil law and has amended its canonical regulations to accommodate the civil law. Just as the concern for the formalities governing the celebration of marriage has caused State and Church to pass laws pertaining to this area, there is concern also for a person's capacity or freedom to marry. It is these capacities, demanded by the Church of England and the State, which will now be considered.

A. THE IMPEDIMENT OF NONAGE AND PARENTAL CONSENT

B31

1 No person who is under sixteen years of age shall marry, and all marriages purported to be made between persons either of whom is under sixteen years of age are void.

B32

No minister shall solemnize matrimony between two persons either of whom (not being a widow or widower) is under eighteen years of age otherwise than in accordance with the requirements of the law relating to the consent of parents or guardians in the case of the marriage of a person under eighteen years of age.

The espousal of infants was a common practice during the Middle Ages. A gloss¹ in the Provinciale acknowledged the fact and stated that this practice should not occur until after the children reached seven years of age. An ordinance attributed to Archbishop Walter Reynolds of Canterbury (1313-1327), referring to the matter of future marriages for such "couples" declared: "Where there is no consent of both parties there is no marriage; therefore such who give to young

1. W. LYNWOOD, Provinciale seu Constitutiones Angliae, Oxford, Hall Davis, 1679, [Republished in 1968 by Gregg International, Farnborough, England] p. 272. Hereafter cited as Provinciale.

boys young girls in the cradle do nothing, except both of the children after he/she come to the time of discretion, consent."² The Archbishop supported his ordinance by appealing to a ruling of an earlier provincial council on the matter.³ This consent could not be given by the children until they reached the age of puberty - twelve for the girl and fourteen for the boy. Another item mentioned in the gloss was a principle held in Roman Law that majority was attained at twenty-five years of age. Perhaps this obliquely concerned parental consent to be obtained prior to a wedding.⁴ The validity of such unions in law was not affected by lack of parental consent and remained so in the Catholic Church (The Council of Trent,

-
2. "Ubi non est consensus utriusque non est coniugium. Igitur qui pueris dant puellas in cunabulis nihil faciunt, nisi uterque puerorum, postquam venerit ad tempus discretionis, consentiat. Huius ergo Decreti Auctoritate inhibimus, ne de caetero aliqui, quorum uterque vel alter ad aetatem legibus Constitutam et canonibus determinatam non pervenerit, coniungantur: nisi urgente necessitate pro bonis pacis talis coniunctio toleretur." Cf. Provinciale, p. 272.
 3. His ordinance is a restatement (substituting "venerit" for "venerint") of canon XIX of the Council of London, 1175. Cf. J. MANSI, Sacrorum Conciliorum nova et amplissima collectio, Paris, welter, 1901, voi. XXII, col. 152. Hereafter cited as Mansi.
 4. C. O'DONNELL, The Marriage of Minors, Washington D.C., Catholic University of America, 1945, pp. 23-39 (Canon Law Studies, No. 221).

Session XXIV, c.1 made parental dissent a prohibitive impediment). There is little doubt that if physical maturity resulted in procreation between a couple espoused but below the canonical ages, viz., twelve and fourteen, the consummated union was held to be valid.⁵ Another gloss in the Provinciale referred to the Decretum Gratiani⁶ which established that this principle⁷ taken from Roman law was a universal law for the whole Church.

The Reformatio Legum Ecclesiasticarum accepted the customary ages of fourteen (for the boy) and twelve (for the girl) and retained them in its proposed legislation.⁸

5. X, iv, 2, 9.

6. X, iv, 2, 6. Pope Alexander III in a letter to the Bishop of Norwich.

7. At one time, a physical examination determined the onset of puberty. In deference to modesty, the examination of girls ceased at a very early period and the age of twelve was declared to be the age of pubescence. In 529, Justinian halted the practice of male examination and decided that puberty commenced on the boy's fourteenth birthday. Cf. P. CORBETT, The Roman Law of Marriage, Oxford, Clarendon Press, 1930, pp. 51-52.

8. E. CARDWELL (ed.), The Reformation of the Ecclesiastical Laws as attempted in the Reigns of King Henry VIII, King Edward VI, and Queen Elizabeth, Oxford, University Press, 1850, p. 41.

Although the "Canons of 1603"⁹ did not mention a minimum age as a requisite for a valid marriage, they did state that parental consent was needed for children below the age of majority in civil law, namely twenty-one. As Sir Robert Phillimore pointed out in his Ecclesiastical Law of the Church of England: "Consent given by males of fourteen years and females of twelve was holden to be valid"¹⁰ and the lack of parental consent did not vitiate the union.

The English civil law under "The Hardwicke Act 1753"¹¹ instituted a legal minimum age which made marriages between parties under twenty-one years void unless parental consent had been given. Later statutes, while requiring the consent of parents or guardians, did not extend their provisions to invalidating a marriage solely on the absence of such consent.

9. Canons 62, 100, and 102.

10. R. PHILLIMORE, The Ecclesiastical Law of the Church of England, London, H. Sweet, 1873, p. 713.

11. 26 George II, c.33.

A basic change was effected in the civil law in 1929.¹² Modern reformers considered it socially and morally wrong that immature persons should have the stresses of married life, sexual freedom and the physical strain connected with childbirth. The marriages of such persons were deemed detrimental to society, to the participants, and to the very institution of marriage. In light of these considerations, the "Age of Marriage Act 1929" made two changes in the laws. Firstly, a valid marriage could not be contracted unless both parties had reached the age of sixteen; secondly, any marriage to which either party was under this age was made void and not voidable as it had been prior to this Act.

Since 1929, nonage has become a diriment impediment to marriage in civil law and consequently by implication in ecclesiastical law. This civil impediment was accepted by Church authorities and included in the proposed canon XXXVII:3 of the 1947 schema. The civil prohibition was reenacted in "The Marriage Act 1949" and is the basis of canon B31:1 promulgated in 1969 making nonage an explicit canonical diriment impediment.

12. 19 & 20 George V, c.36. Reenacted in The Marriage Act 1949 and The Matrimonial Causes Act 1973.

Lack of parental consent did not invalidate marriages of minors in both civil and ecclesial law in pre- and post-Reformation England. Canon 100 of the "Canons of 1603" required parental consent for children below twenty-one years of age who intended to marry. In line with canonical custom, lack of permission did not invalidate any irregular unions. Civil law was no different until the passage of "The Hardwicke Act 1753" which made such marriage void in secular law only. By this Act, a person who applied for a marriage licence was required to swear an oath that parental consent had been obtained if the other party to the marriage was a minor. Should it transpire after the union that no such consent had been given by the minor's parents or guardian, the marriage was held to be void ab initio in civil law. This "new notion" lasted until 1823 when a new "Marriage Act"¹³ amended "The Hardwicke Act" in the matter. Under the 1823 Act, if a licence had been issued in good faith, even though it had been obtained by perjury, the marriage solemnized by its authority was held to be valid in civil and ecclesiastical law despite the lack of parental consent. "The Guardianship of Infants Act 1925"¹⁴ finally

13. 4 George IV, c.76.

14. 15 & 16 George V, c.45.

lifted the absolute power of parents to withhold consent to their minor children's intended marriage.

The 1947 schema in proposed canon XXXVIII:4 worded the norm: "persons under twenty-one ought not to marry against the will of their parents".¹⁵ In expressing it this way, the compilers showed a knowledge and awareness of pre-Reformation canon law and post-Reformation canonical legislation - that lack of parental consent did not invalidate such unions. As a consequence of "The Marriage Act 1969", the civil provision held that parental consent was not required for widows/widowers under the age of majority. This was incorporated into the proposed canons then under discussion in the Convocations. When the canon was finally promulgated in 1969, an important change was made in the canon from that originally proposed in the Canon Law Report. The promulgated version placed the onus on the minister who is bound by ecclesiastical law, when he functions in an

15. The Canon Law of the Church of England: Being the Report of the Archbishops' Commission on Canon Law, London, S.P.C.K., 1947, p. 128.

official capacity, to be certain that parental consent has been obtained in those cases when it is necessary. However, if the marriage is solemnized without consent, this would not make the marriage void in civil or ecclesiastical law. In 1969¹⁶ the civil law reduced the age of majority to eighteen. In 1975, the General Synod of the Church of England altered canon B32 in order to bring it into line with statute law; thereby making the age of canonical majority eighteen.

As marriage is possible according to the rites of the Anglican Church in one of four ways, the requirements for parental consent differ in each of them.¹⁷ The salient distinctions could be summarized in the following manner:

1) Marriage by Superintendent Registrar's Certificate, without licence:

- i) The necessary parental consent must be given.
- ii) If one parent is absent, inaccessible or insane, the consent of the other parent suffices.

16. Family Law Reform Act 1969.

17. This section generally taken from P. BROMLEY, Family Law, London, Butterworths, 1981, pp. 40-41.

- iii) If there is only one person who can give consent (e.g. the other parent has died), the Registrar General may dispense with the necessity of any consent or the consent of a court must be obtained.¹⁸
- iv) If any person who must consent refuses to do so, then consent must be obtained from a court.

2) Marriage by Registrar General's Licence:

The position is the same as above except that the consent of the person who is absent, inaccessible or insane is never dispensed with automatically. The Registrar General has the discretion of dispensing from it in all cases, whether or not there is any other person whose consent is required.

3) Marriage by Episcopal Licence:

- i) Consent must be expressly given.
- ii) The same rules apply as for a Superintendent Registrar's Certificate except where the consent of only one person is required and that person is absent, inaccessible or insane; the necessity of obtaining any consent may be dispensed with by the Master of the Faculties.

4) Marriage after Publication of Banns:

- i) In this case, express consent need not be given.
- ii) To refuse consent, the person must declare openly and publicly in the church in which banns are published at the time of publication his or her dissent from the proposed marriage. Thereupon the publication is void.

18. The court for this purpose is the High Court, a County Court or a Magistrate's Court. In practice, almost all applications are made to a magistrate's court.

- iii) The court has no power to supply consent in this matter. If the court's consent is obtained, it is necessary for the parties to marry on the authority of a common licence or a Superintendent Registrar's Certificate.

Marriages which take place in the church on the basis of an episcopal licence, Superintendent Registrar's and Registrar General's certificates are the responsibility of those authorities who grant them. A person who is under age, marrying after banns, is presumed to have parental consent. Proof of this is not required by the canon and so it would seem that the requirement placed on the minister by this regulation is only exhortative and made out of pastoral solicitude and sensitivity while also upholding the canonical principle that lack of parental consent does not vitiate the union.

B. CONSANGUINITY AND AFFINITY**i. The Impediment**

B31

2 No person shall marry within the degrees expressed in the following Table, and all marriages purported to be made within the said degrees are void.

A TABLE OF KINDRED AND AFFINITY

<i>A man may not marry his</i>	<i>A woman may not marry with her</i>
mother	father
daughter	son
adopted daughter	adopted son
father's mother	father's father
mother's mother	mother's father
son's daughter	son's son
daughter's daughter	daughter's son
sister	brother
wife's mother	husband's father
wife's daughter	husband's son
father's wife	mother's husband
son's wife	daughter's husband
father's father's wife	father's mother's husband
mother's father's wife	mother's mother's husband
wife's father's mother	husband's father's father
wife's mother's mother	husband's mother's father
wife's daughter's daughter	husband's son's son
wife's son's daughter	husband's daughter's son
son's son's wife	son's daughter's husband
daughter's son's wife	daughter's daughter's husband
father's sister	father's brother
mother's sister	mother's brother
brother's daughter	brother's son
sister's daughter	sister's son

In this Table the term "brother" includes a brother of the half-blood, and the term "sister" includes a sister of the half-blood.

Throughout most of its history the Church has prohibited certain kinds of marriages on the grounds of their being incestuous. This prohibition may arise from consanguinity (blood relationship) or from affinity (relationship by marriage) and has its foundation in the moral law set forth in the Book of Leviticus, chapters eighteen and twenty. Gratian made note of a decree issued by Pope St. Fabian¹⁹ (236-251) who allowed marriages to take place within the fifth degree with the injunction that if a couple were already married although related in the fourth degree, they were not to be separated.

The rule in seventh century England seemed to have been a strict observance of the fourth degree according to the Decretum Gratiani²⁰ which recalled the problems associated with sibling marriages and their issue.

19. C. XXXV, 2, 3.

20. C. XXXV, 2, 20. "Quedam lex Romana permittit, ut sive frater et soror, seu duorum fratrum germanorum seu duarum sororum filius et filia misceantur. Sed experimento didicimus, ex tali coiungio sobolem non posse succrescere. Unde necesse est, ut quarta vel quinta generatio fidelium licenter sibi iungantur [...]."

In 731 Pope Gregory III, writing to Boniface - Archbishop of Germany - decreed that the degrees of prohibition be extended to the seventh degree.²¹ However, the German method of computation was adopted. In computing degrees, the common ancestor was omitted and the count made in one line only. The earlier Roman system counted up to the common ancestor and down to the relation. The seventh degree of the German method corresponded to the fourteenth degree by the Roman reckoning.

A London Council held in 1075 under Lanfranc repeated the Gregorian ordinance making it particular law under canon VI of that synod.²² John de Crema, Cardinal Legate, presided over the 1125 Council of London which restated that the impediment was binding to the seventh degree and those married within the prohibited degrees

21. C. XXXV, 2, 1.

22. "Decretum est etiam, ex decretis maioris Gregorii necnon minoris: Ut nullus de propria cognatione, vel uxoris defunctae, ieu quam cognatus habuit, uxorem accipiat, quoadusque parentela ex alterutra parte ad septimum gradum perveniat." Cf. Mansi, vol. XX, col. 454.

should be separated.²³ Provincial law remained unaltered until 1215 when the Fourth Lateran Council removed all impediments beyond the fourth degree collateral (third cousins) in canon 50.²⁴ Marriages within the fourth degree were declared void and the children from such unions carried the stigma of illegitimacy. The Provinciale²⁵ referred to the Lateran decree and stated that consanguinity arose out of illicit connections and had the same effects as those arising out of marriage.

The impediment of affinity²⁶ was "logically developed in the course of the eighth century in precise agreement with that of consanguinity. It was not based, as in civil law, on the entire union of man and wife effected by lawful marriage, but on the bare fact of carnal copulation".²⁷ The development of the impediment

23. "Inter consanguineos seu affinitate coniunctos usque ad septimam generationem matrimonia contrahi prohibemus: si qui vero taliter coniuncti fuerint, separentur." Cf. Mansi, vol. XXI, col. 333, c. XVI.

24. H. SCHROEDER, Disciplinary Decrees of the General Councils, St. Louis, Herder, 1937, p. 280.

25. Provinciale, p. 275.

26. Based on I Cor. 5:1, I Cor. 6:15.

27. T. LACEY, Marriage in Church and State, London, S.P.C.K., 1947, p. 129.

of affinity by theologians and canonists coupled with the lack of social mobility prevalent at the time resulted in a network of relations - secret and avowed - which made lawful marriage almost impossible for the inhabitants of a small village. The Council (Lateran IV), aware of the intolerable situation, took steps to remedy the difficulty by removing the more remote or artificial²⁸ kinds of affinity and reduced the impediment of natural affinity like that of consanguinity to the fourth degree collateral.²⁹ These reforms implicitly weakened the proposition that the impediments of consanguinity and affinity - now abrogated - were of divine law. It particularly weakened the contention that the Levitical impediment of affinity, in general, was of divine law. After Lateran IV some theologians claimed as being of divine law only the prohibitions explicitly mentioned in the "Mosaic Books". Others drew distinctions by stating that some were immutable while others could be dispensed by the Pope.

28. Lateran IV, 1215, canon 50.

29. By the eleventh century, the laws of affinity were held to include not only all the blood relations of a wife, but also the men and women whom they in their turn married. This "secundum et tertium genus" of affinity was abolished in 1215 by Lateran IV.

What had been a protracted theological and canonical discussion during the Middle Ages became a matter of practical affair. As T. Lacey pointed out: "There were consequent disputes which affected the practice of dispensation, and which set all Christendom by the ears when Henry VIII of England sought relief for a carefully burdened conscience."³⁰ The problems associated with Henry and his "wives" belong essentially to the pre-Reformation history of marriage. Its effects upon English marriage law lay in the fact that it led to the desire for a simplification and clarification of the tables of consanguinity and affinity, and to declare which prohibitions and impediments were of divine law and therefore indispensable.

A series of statutes were issued by Henry and approved by Parliament which came as a consequence of his matrimonial difficulties. The first of these was in 1533³¹ which was directed against Queen Katherine and her daughter Mary. Having failed to obtain a decree of nullity

30. T. LACEY, op. cit., p. 130.

31. 25 Henry VIII, c.22.

from the Apostolic See on the basis of publica honestas³² because of the affinity arising from the Queen's marriage to his brother, Prince Arthur, Henry produced an act concerning the King's succession which declared fifteen specified kinships and affinities as diriment impediments of divine law and therefore without the possibility of dispensation. These fifteen kinships were taken from Leviticus, chapter eighteen, with the addition of a wife's sister³³ which is doubtfully included in the Old Testament text. His marriage to Katherine, validated by dispensation from the Pope, was consequently "annulled" by the Archbishop of Canterbury.

To safeguard his "new" marriage with Anne Boleyn, the King limited the indispensable impediments to cases where marriages were solemnized and carnal knowledge was had. An act of 1536³⁴ removed this limitation, allowing

32. Then the impediment of affinity arising from prolonged and notorious concubinage and from espousals per verba de futuro.

33. This legislation was not without precedent. In 511, the First Council of Aurelia stated in canon XVIII: "Ne superstes frater torum defuncti fratris ascendat, neve se quisquam amissae uxoris sorori audeat sociare. Quod si secerint, ecclesiastica districtione feriantur." Cf. Mansi, vol. VIII, col. 354.

34. 28 Henry VIII, c.8.

Henry's marriage with Anne to be annulled on the grounds of his illicit connection with her sister, Mary. By this act, Princess Elizabeth was declared illegitimate and excluded from succession. In 1540, having dismissed Anne of Cleves on the grounds of pre-contract (per verba de futuro) with the Duke of Lorraine's son, Henry, wanting to marry Katherine Howard, first cousin to Anne Boleyn, enacted a Statute³⁵ in that year which provided that not only espousal de futuro, but also unconsummated contracts de praesenti, should no longer be impediments to marriage. It also forbade marriages within the fourth degree which, though voidable, were not void. The act included a brief clause which stated: "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees".³⁶ This clause facilitated his rebuttal of Katherine Howard and enabled him to marry Katherine Parr.

King Edward VI repealed the act of 1540.³⁷ However, the clause "without the Levitical degrees" was

35. 32 Henry VIII, c.38.

36. Dispensations within the degrees were not possible.

37. 2 & 3 Edward VI, c.23.

retained and confirmed. Although the statutes of Henry VIII already mentioned were repealed by Queen Mary,³⁸ Queen Elizabeth I revived the Henrican Act of 1540³⁹ and thus by implication as much of the other two, viz., 25 Henry VIII, c.22 and 28 Henry VIII, c.8, as it referred to them vaguely restricting diriment impediments to those of God's law, and still more vaguely referring to the Levitical degrees for guidance.

38. I Philip & Mary, c.8.

39. I Elizabeth I, c.1.

ii. The Parker Table

ARCHBISHOP PARKER'S TABLE OF 1563

A TABLE
OF
KINDRED AND AFFINITY⁴⁰

WHEREIN WHOSOEVER ARE RELATED ARE FORBIDDEN IN
SCRIPTURE AND OUR LAWS TO MARRY TOGETHER

A man may not marry his | A woman may not marry with her

Con. Avia.	Secundus gradus in linea recta ascend.	1 Grandmother.	1 Grandfather.	Con. Avia.	Secundus gradus in linea recta ascend.
Aff. Avi relicta.		2 Grandfath. wife.	2 Grandm. husb.	Aff. Aviae relictus.	
Aff. Prosocrus vel socrus magna.		3 Wifes grand-mother.	3 Hus. grandfath.	Aff. Prosocer, vel socer magnus.	
	Secund. gr. inaequalis in linea transversali ascendente.			Aff. Secund. grad. inaequalis in lin. transvers. asc.	
Con. Amita.		4 Fathers sister.	4 Fathers broth.	Con. Patruus.	
Con. Matertera.		5 Mothers sister.	5 Mothers broth.	Aff. Avunculus.	
Aff. Patruu relicta.		6 Fath. bro. wife.	6 Fath. sist. husb.	Aff. Amita relictus.	
Aff. Avunculi relicta.		7 Moth. bro. wife.	7 Moth. sist. hus.	Aff. Matertera relictus.	
Aff. Amita uxoris.		8 Wifes fath. sis.	8 Husb. fath. bro.	Aff. Patruus mariti.	
Aff. Matertera uxoris.		9 Wifes mo. sist.	9 Husb. moth. bro.	Aff. Avunculus mariti.	
	Primus grad. in linea recta ascendente.			Primus grad. in linea recta ascend.	
Con. Mater.		10 Mother.	10 Father.	Con. Pater.	
Aff. Noverca.		11 Stepmother.	11 Stepfather.	Aff. Vitricus.	
Aff. Socrus.		12 Wifes mother.	12 Husb. father.	Aff. Socer.	
	Primus grad. in linea recta descendente.			Prim. grad. in linea rect. descendente.	
Con. Filia.		13 Daughter.	13 Son.	Con. Filius.	
Aff. Privigna.		14 Wifes daugh.	14 Husbands son.	Aff. Privignus.	
Con. Nurus.		15 Sons wife.	15 Daughters hus.	Aff. Gener.	
	Primus gradus aequalis in lin. transversali.			Primus gradus aequalis in lin. transvers.	
Con. Soror.		16 Sister.	16 Brother.	Con. Frater.	
Aff. Soror uxoris.		17 Wifes sister.	17 Husb. broth.	Aff. Levir.	
Aff. Fratris relicta.		18 Brothers wife.	18 Sisters husb.	Aff. Sororis relictus.	
	Secund. grad. in linea recta descend.			Secund. grad. in lin. recta descend.	
Con. Neptis ex filio.		19 Sons daughter.	19 Sons son.	Con. Nepos ex filio.	
Con. Neptis ex filia.		20 Daughters dau.	20 Daughters son.	Aff. Nepos ex filia.	
Aff. Pronurus, i. relic. nepotis ex filio.		21 Sons sons wife.	21 Sons daug. hus.	Aff. Progener, i. relic. nepotis ex filio.	
Aff. Pronurus, i. relic. nepotis ex filia.		22 Daughters sons wife.	22 Daughters dau. husb.	Aff. Progener, i. relic. nepotis ex filia.	
Aff. Privigni filia.		23 Wifes sons dau.	23 Husb. sons son.	Aff. Privigni filius.	
Aff. Privigni filia.		24 Wif. daug. dau.	24 Husb. daug. son.	Aff. Privigni filius.	
	Secundus gradus inaequalis in linea transvers. descend.			Secundus grad. inaequalis in linea transvers. des.	
Con. Neptis ex fratre.		25 Broth. daught.	25 Brothers son.	Con. Nepos ex fratre.	
Con. Neptis ex sorore.		26 Sisters daught.	26 Sisters son.	Con. Nepos ex sorore.	
Aff. Nepotis ex frat. rel.		27 Bro. sons wife.	27 Bro. daug. husb.	Aff. Neptis ex frat. rel.	
Aff. Nepotis ex sor. rel.		28 Sist. sons wife.	28 Sist. daug. hus.	Aff. Neptis ex sor. rel.	
Aff. Neptis uxor. ex fra.		29 Wifes brothers daughter.	29 Husb. brothers son.	Aff. Leviris filius, i. nepos mariti ex frat.	
Aff. Neptis uxor. ex sor.		30 Wifes sist. dau.	30 Husb. sist. son.	Aff. Gloria filius, i. nepos mariti ex sor.	

40. E. CARDWELL (ed.), Documentary Annals of the Reformed Church of England, Oxford, University Press, 1844, vol. 1, p. 320. Hereafter cited as Doc. Ann.

Matthew Parker, Archbishop of Canterbury, convinced that recent statute law of 1540 did not fully enunciate all the prohibited degrees, issued in 1563 an admonition on the subject.⁴¹ This metropolitan's ordinance encompassed consanguinity, affinity, clandestinity and the impossibility for marriages after obtaining a divorce a mensa et thoro.⁴² He appended a table which set out in detail sixty kinships and affinities which were contrary to God's law and therefore diriment impediments to any marriage.

The list produced by the Archbishop went far beyond the Levitical degrees mentioned in the statute 32 Henry VIII, c.38. Parker extended the scope of the prohibitions and asserted the existence of impediments to an even greater degree. Of these possible unions, the Archbishop declared: "In contracting between persons doubtful, which be not expressed in this Table, it is most sure first to consult men learnt in the law, to

41. Ibid., vol. 1, p. 318. 1563 Admonition, LXIV, n. 111.

42. Ibid., vol. 1, p. 316.

understand what is lawful [...] before the finishing of their contracts."⁴³ Parker made no mention of any dispensation for those within these possible illicit unions. Both state and Church remained constant in that regard.

The Archbishop's Table was confirmed by a provincial constitution of Canterbury in 1571. A rider was attached which stated that marriages within the relationship explicitly mentioned in Leviticus, plus marriage with a wife's sister,⁴⁴ were to be declared

43. Ibid., vol. 1, pp. 318-319. 1563 Admonition, LXIV, n. IV.

44. Having been declared unlawful by virtue of Parker's publication of the Table in 1563 (cf. Doc. Ann., vol. 1, pp. 316-320) and based on Scripture and Statute law (25 Henry VIII, c.22 and 28 Henry VIII, c.7) it received canonical force as a constituent part of the canons of 1571. The text as printed states: "Omnia matrimonia quae uspiam contracta sunt intra gradus cognationis, aut affinitatis prohibitos in 18 Levitici, auctoritate Episcopi dissolventur: maxime vero, si quis, priore uxore dimortua, eius sorore uxorem duxerit: hic enim gradus comui doctoru (sic) viroru (sic) consensu, et iudicio putatur in Levitico prohiberi. Non licebit cuiq (sic) matrimonium contrahere inter illos gradus, qui in tabula a reverendissimo patre Domino Archiepiscopo Cantuariensi, in eum usum scripta & publicata, prohibentur." Cf. E. CARDWELL (ed.), Synodalia - A Collection of Articles of Religion, Canons and Proceedings of Convocations in the Province of Canterbury, 1547-1717, Oxford, University Press, 1842, vol. 1, p. 130. Hereafter cited as Synodalia.

unlawful and dissolved by episcopal decree. In all other cases, the marriage was merely forbidden on the grounds of an impediment, thereby making it voidable.⁴⁵

While Parker's list was confirmed⁴⁶ as part of the new canonical regulations of the Church of England, his Table did not appear in the text of the 1603 canons, although it is contained in substance in canon 99 of that series.⁴⁷ This time no distinctions were made as had been previously done in 1571. All degrees listed (sixty of them) were God's law and those who had married within the degrees had to be judged incestuous and be separated from their spouse by law, if necessary. The regulation affected

45. Synodalia, vol. 1, p. 130.

46. Convocation which approved the Constitutions and Canons Ecclesiastical of 1603. Cf. Synodalia, vol. 1, p. 304.

47. Canon 99: "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 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."

marriages within the third degree of consanguinity either in the direct line ascending and descending, viz., with mother and grandmother, daughter and granddaughter; or in the collateral lines, viz., with aunt, sister and niece. Affinity was placed on the same footing as consanguinity. Marriages within these degrees (Roman computation) were forbidden by ecclesiastical law. The "unitas carnis" was also admitted as arising from the "copula illicita". Apart from these restrictions, no other incestuous impediments were recognized. Although the injunction stated that such marriages were considered incestuous and that the couples should be separated by law if necessary, nevertheless these marriages were voidable and not void. They could not be declared void without a sentence from an ecclesiastical court. The death of one of the spouses placed a bar on such actions.

"The Act of Uniformity 1662" ruled that the list be included in an appendix to the prayer book. In this way, the canonical legislation on consanguinity and affinity received civil recognition but was later not held to be binding in civil law because it went far beyond the statute law then in effect, namely, 32 Henry VIII, c.38.

iii. Post-Parker Legislation

When canon 99 of the 1603 series was promulgated, the canonical list of prohibited degrees extended beyond the Levitical degrees mentioned in the statute law. Parliamentarians attempted to restrict the declarations of nullity made by ecclesiastical courts for marriages that occurred within these degrees and resisted any attempt to enact legislation which would declare such marriages void ab initio.

The problem centred on both the Table and the canon. Had both stated in plain terms that such unions were not marriages at all and were to be declared void ab initio, a confusion would not have arisen. Such prohibited unions were "to be judged incestuous and unlawful" and consequently dissolved; the parties were to be separated by "course of law". The wording was ambiguous and the common law maintained that "course of law" would only refer to statute law which could only be interpreted by the King's Justices; that "judged incestuous" had to be interpreted in accord with the

Henrican statute 32 Henry VIII, c.38. This Act provided that no marriage outside the Levitical degrees was to be impeached. The Act, revived by Elizabeth (1 Eliz.1, c.1), enabled the secular courts to take exceptions to the Parker prohibitions that went beyond the Levitical list.

What was thought to be a test case⁴⁸ was heard before Judge C. Vaughan in 1672. It concerned marriage with a deceased wife's sister. Civil lawyers, in an attempt to curb the power of the Spiritual Courts to nullify such unions, sought a declaration from the secular courts as to the legality of the prohibition contained in the Parker Table. In summarizing the case, Judge Vaughan did not decide the matter as to the canonical prohibition but declared the union to be void on the basis of statute law alone. The marriage of a man to his deceased wife's sister was disallowed in virtue of an act (28 Henry VIII, c.7) which had statutory force by implication through the revision of 32 Henry VIII, c.38.

48. Hill v. Good; cf. Palmer's Reports, p. 143.

Because of this ruling by Judge Vaughan, the civil authorities had Writs of Prohibition issued from the King's Bench to prevent the Spiritual Courts from declaring any marriage within the Parker Table void (and the children illegitimate) after the death of one of the parties. The authority of the Spiritual Courts only enabled them to declare unions made within the prohibited degrees to be void after their validity had been called into question; until then such marriages remained voidable. Those who married within the prohibited degrees of the Parker Table while outside the degrees of statute law, were secure in their marriages and their children were legitimate until such marriages were impeached by the ecclesiastical court. On the death of either party, the legitimacy of a child of such a union could not be questioned in any court. The effects of this on the law concerning inheritance of property were far-reaching.

During the 1830's Lord Lyndhurst revived the issue in Parliament and agitated for statute acceptance of the Parker Table "with the provision that the forbidden unions should be not merely void in the canonical sense,

or voidable by course of law, but simply non-existent or void without process".⁴⁹ Lord Lyndhurst's hard work for this new thinking was rewarded by the promulgation of the "Marriage Act 1835"⁵⁰ which included this provision. As a result "some difficulties of [his] ducal house were solved".⁵¹

The Act provided that: (1) marriages within the forbidden degrees of affinity which had already taken place before the passing of the Act were not to be annulled for that cause by any sentence of the ecclesiastical court unless a suit was in process at the time of the passing of the Act. (2) Marriages celebrated between persons within the prohibited degrees of consanguinity before the passing of the Act were to remain voidable as before. (3) All marriages contracted after the passing of the Act between persons within the prohibited degrees of consanguinity or affinity were to be void ab initio.

49. T. LACEY, op. cit., p. 182.

50. 5 & 6 William IV, c.54.

51. T. LACEY, op. cit., p. 182.

Unfortunately the expression "prohibited degrees" was not defined in the 1835 statute. It was interpreted in an 1847 civil court case (R. v. Chadwick)⁵² which established a total parity between civil and ecclesiastical law in the matter of prohibited degrees.

By the end of the nineteenth century, dissatisfaction was beginning to be expressed in secular circles against the strict rules on affinity. After Parliamentary debate supported by strong public feeling, marriage with a deceased wife's sister⁵³ was legalized by a 1907 statute.⁵⁴ It took fourteen more years⁵⁵ for marriage with a deceased brother's widow to be legally

52. The Court of Queen's Bench refused to be drawn into a consideration of Hebrew marriage laws but took the view that 'God's Law', the Levitical degrees, and the prohibited degrees must mean the degrees within which a marriage would have been subject to annulment by the ecclesiastical courts prior to 1835. Lord Chief Justice Denman referred to Archbishop Parker's Table. The Court's judgement was approved by the House of Lords (Brook v. Brook) in 1861.

53. The act placed the clergy under no obligation to allow such marriages to take place in their churches nor to allow another clergyman to officiate.

54. 7 Edward VII, c.47 - Deceased Wife's Sister Marriage Act.

55. 11 & 12 George V, c.24 - Deceased Brother's Widow's Act.

accepted in civil law. These two ordinances removed the first degree collateral as an impediment of affinity in civil law. In 1931 the principle articulated in the two statutes was extended to eight other degrees of affinity⁵⁶ affecting aunts, nieces by marriage and uncles or nephews by marriage which had until that time been barred by civil law.

The Anglican Church responded to the matter. A 1935 report from a Convocation's committee formed to investigate "Church and Marriage" was presented to Archbishop Cosmo Lang of Canterbury. The Commission expressed its views in the following way:

Our own study of the question has led us to the opinion that the Table of Affinity (of Archbishop Parker) presupposes that a principle lies behind the prohibitions in Leviticus which is not to be found there, and that in consequence the Table should receive full and careful investigation and reconsideration by the Church.⁵⁷

56. 21 & 22 George V, c.31 - Marriage, Prohibited Degrees of Relationship Act.

57. Report on Church and Marriage, London, S.P.C.K., 1935, p. 29.

The Archbishop took cognizance of the report and established a committee in 1937 to consider the questions of consanguinity and affinity. The Committee's Report, Kindred and Affinity as Impediments to Marriage, was published in 1940. The general conclusion reached by the members of the group was that although some degrees of the impediments were observed everywhere, others stemmed from the social mores of a particular people or nation. The Commission felt some of the degrees listed in the Parker Table belonged to the latter category and could be revised to conform with contemporary secular thinking. The group recommended that the consanguine prohibitions listed in the Table should remain intact, while the impediment of affinity should only apply in the direct ascending and descending line.

The Convocations of Canterbury and York responded to the findings of the Report by initiating their own joint research in 1942. The report issued in 1944 endorsed the conclusions of the earlier commission and requested that a new canon 99 be formulated with a revised table of kindred and affinity. In the wake of the civil legislation since 1907 and the ecclesiastical

recommendation, a revised canon 99 was promulgated under the King's Assent and Licence restricting the impediment of affinity to the direct line.⁵⁸ The new canon effected a reconciliation between civil and ecclesiastical law which had been out of union for almost forty years. R. Haw suggested that there was more than a reconciliation of legal principles; a theological statement was implicit in the new ecclesiastical regulation. For it

provided a decent burial for that longlived misconception that the phrase 'one flesh' applied by our Lord to the marriage union bore a physical instead of a spiritual meaning. Since to a great extent the prohibitions in the Table of Affinity had depended upon the carnal interpretation of this phrase its sepulture prepared the way for a good deal of clearer thinking of the subject.⁵⁹

The proposed schema contained in the 1947 Canon Law Report reproduced the Parker Table as amended by the

58. Royal Assent was given May 9th 1946 and the canon was promulgated by Convocation under Royal Licence May 21st 1946.

59. R. HAW, The State of Matrimony, London, S.P.C.K., 1952, p. 127.

civil statutes of 1907, 1921, and 1931, and the regulation of the 1946 canon 99. The Table now listed fifty impediments.

"The Marriage Act 1949" reproduced the same table and legislated that marriage was prohibited between the listed degrees at all times and in all circumstances. In 1960, "The Marriage Enabling Act"⁶⁰ allowed persons who fell within the prohibited degrees of affinity mentioned to enter a second union if their former marriage had been annulled or dissolved whether or not the previous spouse was alive. The civil list of fifty prohibitions was adopted for the Anglican canon of 1969. However, the promulgated list contains only forty-eight prohibitions. Marriage between a man/woman and his/her adoptive parent is not listed. Since there is a civil impediment to this type of union, the Church cannot solemnize the marriage. In the list of prohibited degrees stated in canon B31:2, the first eight and the last four relatives mentioned in each column relate to the impediment of consanguinity; the others are bound by affinity.

60. 8 & 9 Elizabeth II, c.29.

Both the civil and canonical lists state that the impediments affect those within the prohibited degrees whether they be of the whole blood or the half blood.⁶¹ P. Bromley points out that despite the common law rule that an illegitimate child "is 'filius nullius', nevertheless, the eugenic basis of the prohibition also brings illegitimate relationships within it".⁶² Thus a man may not marry his half-brother's daughter nor his illegitimate son's widow. Since both statute law and canon law have decreed that affinity can only be created by marriage and not by illicit sexual union,⁶³ there is nothing to prevent a man from marrying the daughter of a woman with whom he has been cohabiting but to whom he has never been married unless the woman's daughter is his step-daughter de iure.

Some mention should be made concerning adopted children. Since "The Children Act 1975", an adoption order establishes the legal relationship between the

61. The Marriage Act 1949, s.78(1).

62. P. BROMLEY, op. cit., p. 34.

63. R. PHILLIMORE, op. cit., pp. 564, 575.

adopter and the adopted. This has two aspects: (1) the legal rights and duties flowing from the relationship between the child and its natural parents (or guardians) automatically cease; (2) these rights and duties are then vested in the adoptive parent(s) as though the child had been born to them in lawful wedlock. This Act states:

(1) An adopted child shall be treated in law -

(a) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnized);

(b) In any other cases, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter).

(2) An adopted child shall be treated in law as if he were not the child of any person other than the adopters or adopter.

(3) It is hereby declared that this paragraph prevents an adopted child from being illegitimate.⁶⁴

As far as marriage is concerned, an adopted child and an adoptive parent are deemed to be within the

64. The Children Act 1975, S. 1, para. 3.

prohibited degrees of consanguinity in civil law and marriage is, therefore, impossible between them.⁶⁵ This is the only prohibition arising out of adoption. Hence, adoption does not prevent a marriage between the child and its adoptive brother/sister or any other adoptive relative. However, there may be no marriage between the child and his/her natural relations because the normal impediments of consanguinity and affinity still apply.⁶⁶

65. The Children Act 1975, S. 3, para. 8, amended The Marriage Act 1949, S. 1. This continues to apply if a subsequent adoption order is made and the child may not marry a former adoptive parent.

66. Cf. P. BROMLEY, op. cit., p. 357. The Children Act 1975, S. 1, para. 7(1) and The Adoption Act 1976, S.47(1).

iv. Affinity: "No Just Cause"

Since 1979, three separate Personal Bills⁶⁷ have been successfully promoted in Parliament which enabled the subsequent marriage of three couples related within the prohibited degrees to take place according to civil form. Previously, such marriages would have been void and unlawful because in each instance, the persons concerned were related by marriage and within the degrees of affinity which are deemed - in law - as being impediments to marriage.

Between 1979-1982, four Private Member's Bills were introduced into the House of Lords in an attempt to amend the present statute law on affinity. Although none of them became law, Doctor R. Runcie, the Archbishop of Canterbury, felt obliged to set up a Commission to study the matter of affinity. The Commission was appointed in 1982 under the chairmanship of Lady Seear. Its Report,

67. Edward Berry and Doris Ward (Marriage Enabling) Act 1980; Hugh Small and Norma Small (Marriage Enabling) Act 1982; John Dare and Gillian Dare (Marriage Enabling) Act 1982.

entitled No Just Cause,⁶⁸ was published in 1984 and presented to the Archbishop for his consideration. The majority opinion recommended that: (a) impediments between in-laws should be removed;⁶⁹ (b) the impediments between step-parent and step-child should be removed when the child reaches eighteen, the age of majority under English law;⁷⁰ (c) a person over twenty-one should be free to marry a person also over twenty-one with whom he/she is related by affinity.⁷¹ The Commission further suggested that relief should be given to the clergy of the Church of England regarding the potential conflict arising from the right of a parishioner to be married in his or her parish church or the church of a parish on whose electoral roll he or she is listed, and the conscience of a clergyman who may regard such marriages to be offensive to the discipline and teaching of the

68. No Just Cause: The Law of Affinity in England and Wales - Some Suggestions for Change, London, C.I.O. Publishing, 1984, 151 p.

69. Ibid., p. 40 (paragraph 101).

70. Ibid., p. 41 (paragraph 105).

71. Ibid., p. 83 (paragraph 220:IV).

Church of England.⁷² As yet, no action has been taken in the civil or ecclesiastical spheres in response to the recommendations offered and the questions posed by this report.

72. ibid., p. 85 (paragraph 227).

C. CAPACITIES FOR MARRIAGE

B33

It shall be the duty of the minister, when application is made to him for matrimony to be solemnized in the church or chapel of which he is the minister, to inquire whether there be any impediment either to the marriage or to the solemnization thereof.

According to this canon, B33, the minister must see that all legal requirements and formalities demanded by the lex loci celebrationis have been fulfilled. Furthermore, he is to verify that the parties have the capacity to enter into marriage. The application of this canon seems restricted only to marriage when it is to be solemnized after the publication of banns, although marriage is possible in the Church of England under licence and certificate as well. In the case of marriage by certificate, the civil authorities have the responsibility to see that the legal requirements are fulfilled; for marriage by episcopal licence, that duty falls on the bishop or his official who issues the document. This being the case, the minister has two functions: (1) to establish that the parties marrying are in possession of a right to marry in his church; (2) to see that no impediment prohibits the solemnization of the marriage.

The injunctions contained in this canonical regulation have existed in English ecclesiastical law (in written form) at least since the time of the Provinciale. Lyndwood alluded to local and universal legislation which required priests to verify for themselves that the people preparing for marriage had the capacity to do so. Enquires were to be made among the local people concerning those who were about to be married. Furthermore, clerics were bound to determine the parties' freedom to marry⁷³ and to see that all the necessary formalities required by law were observed.⁷⁴

At the time of the Reformation, certain diriment impediments were explicitly abrogated by statute law. Perhaps the most widely known were the lists of prohibited degrees. New lists were established by King Henry VIII in 1533. The impediments of Holy Orders and Religious Life were removed by Edward VI⁷⁵ in 1548, reestablished by Queen Mary in 1554,⁷⁶ and finally

73. Provinciale, p. 271. Liber IV, Titulus I.

74. Ibid., p. 273. Liber IV, Titulus III, c.1.

75. 2 & 3 Edward VI, c.21. Reconfirmed by 5 & 6 Edward VI, c.12.

76. I Mary, Sess. 2, c.2.

removed by James I in 1604.⁷⁷ T. Lacey recalls that some of the other "impediments of the canon law have lapsed into desuetude, namely crime⁷⁸ [...] ; disparitas cultus, publica honestas, and the Pauline Privilege".⁷⁹

The "Canons of 1603" repeated the general requirement that ecclesiastical authorities had the duty to establish that nothing stood in the way of celebrating a valid nuptial union. This injunction applied to marriage whether celebrated after the publication of banns (canon 62) or by episcopal licence (canon 102). The general tenor of these regulations was reiterated in the 1947 Canon Law Report under proposed canon XXXIX and, on its promulgation in 1969, the norm achieved canonical status in the Church of England.

Some of the invalidating impediments presently in force have their genesis in the "ius commune" of the

77. I James I, c.25.

78. Murder or attempted murder of a husband or wife by the other spouse and paramour with a promise to marry.

79. T. LACEY, op. cit., p. 196.

pre-Reformation Church. With the progress of time, some have remained as invalidating impediments while others have been forgotten or ignored. Several have been "abrogated" by civil statute. The diriment impediments in vogue at the time of the Reformation and their present status could be summarized in the following manner:⁸⁰

(1) the impediments discontinued after the Reformation, viz., cognatio spiritualis, crimen disparitatis cultus and after 1548 ordo et votum sacer; cognatio legalis - now barred in circumstances by "The Marriage Enabling Act 1960" and "The Children Act 1975";

(2) the impediments continued after the Reformation until rendered voidable by statute law in 1937, viz., amentia and impotentia and in 1971, viz., error de persona, vis et metus and raptus;

(3) other impediments continued after the Reformation but circumscribed by subsequent civil law, viz.,

-- cognatio - limited by statute law of 1533 and subsequent ordinances as well as canon law in 1603 and 1969;

-- affinis - same as the above;

80. The Church and the Law of the Nullity of Marriage, London, S.P.C.K., 1955, pp. 57-59.

-- publica honestas - continued with regard to pre-contract (marriage per verba de futuro) until "The Hardwicke Act 1753";

-- ligamen - unchanged until "The Divorce Act 1857";

-- impedimentum aetatis - unchanged until "The Marriage Act 1929";

-- consensus - not continued after the Reformation except under the categories of error de persona, vis et metus and amentia.

The diriment impediment clandestinus was added by the civil law in virtue of Lord Hardwicke's Act in 1753.

Ecclesiastical law now mirrors faithfully the conditions laid down by statute law in the matter of the capacity to marry. Since the impediments of consanguinity, affinity and nonage have already been treated in a previous section, two areas where invalidating impediments may arise remain to be considered. These concern the freedom of the parties and, in view of recent medical and social developments, their gender.

In determining a person's freedom or capacity to marry, three qualities must be present. The first involves a right possessed by the couple who marry by banns to solemnize the service in a particular church after the required publication. This right is determined by domicile and parochial residence. In English civil law the usual rule is that a person's general capacity to marry is governed by the law of his or her domicile at the date of the marriage. Every person acquires a domicile of origin at birth which operates according to fixed principles of law. Minors under sixteen years of age and persons over eighteen of unsound mind acquire a domicile of dependence which also operates on a fixed principle of law. Moreover, a person, other than one who is a dependent, can acquire a domicile of choice by the combination of actual residence with the intention to reside permanently or at least indefinitely in the place concerned. Generally, the domicile of an independent person is the legal and territorial unit which English law recognizes as a person's permanent home; habitual residence for one year is the jurisdictional basis for

acquiring a domicile in English law.⁸¹ However, long periods of residence will not suffice if the person has not formed an intention to settle.

Canon B33 obliges the minister to verify that the couple do in fact have a domicile in either England or Wales and at the same time a concomitant right to marry in his parish church. This right exists if one of the parties resides in the parish. The other party must have a residence qualification in the same or another parish where banns must also be called. Since 1930,⁸² a couple may marry in the church where they usually worship. In such cases, banns must also be published in this parish church (cf. commentary on canons B34 and B35:1, 2). Should it happen that after a marriage by banns has been celebrated, formal defects come to light, as in the case of parental dissent (marriage of minors) which had not been expressed prior to the ceremony or when the domicile

81. Domicile and Matrimonial Proceedings Act 1973.

82. 20 George V, Measure 3 - Marriage Measure 1930. The person must be listed on the electoral roll of the place of worship if it is not his/her usual place of residence.

or residence qualification has not been fulfilled, such a marriage cannot be invalidated. Statute law makes this express provision.⁸³

After establishing the freedom and right of a couple to marry in a particular place, the minister then must ascertain that the parties entering marriage do so with full and free consent. Since it is a general principle of canonical jurisprudence that consent makes marriage, both ecclesiastical law and common law require that the couple express a present intention (per verba de praesenti) to give and receive each other in marriage. Without discussing the relative merits of whether marriage is a contract or not, it is sufficient to point out English law⁸⁴ maintains that "the contract of marriage is viewed as a very simple one, which does not require a high degree of intelligence to comprehend".⁸⁵ Accordingly, civil law works on the presumption that a

83. The Matrimonial Causes Act 1973.

84. Durham v. Durham (1885) 10 P.D. 80 and In the Estate of Park (1954), p. 112, Singleton L. J.

85. F. HOPKINS, Formation and Annulment of Marriage, London, Oyez Publishing, 1976, p. 68.

person who consents to marriage is not only free but also capable of entering and establishing such a union. Hence, in order to prove a "lack of consent" at a later date, the presumption will only cede to contrary proof and only then in a civil nullity case as set forth in statute law for determining the status of the parties in a voidable marriage.

The third area which affects freedom concerns ligamen or prior bond. In civil law the matter is quite straightforward. If either party has been in a previous union, no further marriage service may take place until the former spouse dies or the former marriage is dissolved a vinculo or annulled by the civil courts.⁸⁶ The present canon law of the Church of England does not explicitly prohibit or invalidate second marriages while a former partner is still living. The current discipline of the Church in this matter comes from a 1938 Act of Convocation (cf. commentary on canon B36) which was repeated by the General Synod in 1978. Some practical

86. If the former union is void ab initio, it needs no decree of annulment and a party may lawfully contract a valid union.

help in this matter of ligamen was given by Doctor John Habgood, the Archbishop of York, in a recent address. His instruction (cf. Appendix E) given in March 1985 attempts to clarify the present position held by the Church of England at least in its Northern Province. While Dr. Habgood's approach could be termed pastoral, its execution depends upon the local minister who may or may not see the existence of a prior bond of marriage as being a bar to the solemnization of a second union in Church. The right to allow or refuse such marriages is afforded to the minister by statute law.⁸⁷ In fact, "a party's second or later marriage in Church will depend on the conscience of the particular minister of the Church in question".⁸⁸ However, if a decree of nullity has been

87. The provision of S. 184 of The Judicature Act 1925 which enabled certain other clergymen to perform the ceremony in the church of a clergyman who refused to marry an adulterer was repealed by S. 12 of The Matrimonial Causes Act 1937, replaced by The Matrimonial Causes Act 1950, S. 13(2), now act of 1965, S. 8(2). Under this section, the Church of England clergyman may refuse to solemnize the marriage "of any person whose former marriage has been dissolved on any ground and whose former wife or husband is still living". There is no privilege in favour of an innocent party to a divorce, as under S. 57 of the 1857 (Divorce) act.

88. J. JACKSON, The Formation and Annulment of Marriage, London, Butterworths, 1969, pp. 134-135.

granted by a civil court because the prior union was void or voidable, the decree opens the door to a church wedding.

In recent years precedent has established another invalidating cause for marriage. This new criterion comes from "sex change" operations. A civil court ruling subsequently enacted in statute law⁸⁹ declared that a person's biological sex is fixed at birth (at the latest) and cannot be changed by artificial means. "There is not a statutory definition of male and female, but a test for the determination of legal sex in the context of marriage was laid down [...] that the criteria must be biological, in particular the chromosomal, gonadal and genital factors."⁹⁰ Hence, marriage is possible only between a man and a woman designated as such from birth. However, there are persons who are male by one test and female by another. Although no definitive ruling exists in this

89. Such marriages are void by virtue of The Matrimonial Causes Act 1973, S. 11(C).

90. F. HOPKINS, op. cit., p. 67.

matter, it "is arguable that such persons are neither male or female and consequently are legally incapable of marrying anyone of either sex".⁹¹

In summary, the minister may call banns for a couple after he has established that all conditions have been satisfactorily fulfilled, viz., that the couple are free from the impediments listed in the tables of prohibited degrees, are not below statutory age, are not bound by a previous union, are respectively male and female while at the same time in possession of a right by way of domicile, residence or worship to marry in the church in which he is the minister.

91. P. BROMLEY, op. cit., p. 32.

D. THE CONCEPT OF VOID AND VOIDABLE MARRIAGE

Pre-Reformation canon law made no distinction between void and voidable marriages. Marriages were either void or valid. For a time the post-Reformation canon law in England continued to distinguish between impediments which were diriment and those which were impedient. Eventually the two forms of ecclesiastical impediments fused and were classified as "canonical impediments" in contrast to others arising from statute law called "civil impediments". In addition, the "canonical impediments" resulted in a voidable marriage while the civil ones in a void marriage.⁹² J. Coulter makes the observation, "[...]it seems remarkable that this distinction in impediments should have been created so precisely [...] but in the absence of any evidence it

92. Cf. W. BLACKSTONE, Commentaries on the Laws of England, London, 1783, Book 1, ch. 15: 434. The "canonical impediments" are stated to be: pre-contract, consanguinity, affinity; and some particular corporal infirmities. Such marriages are voidable and only during the life of the parties. The "civil impediments" are prior marriage, nonage, want of parental consent, amentia and non-observance of the form.

is impossible to say with any assurance what the procedure was founded on".⁹³

It appears that the distinction between void and voidable marriages grew out of the long and complex wrangles that had plagued English common law over the question of inheritance and bastardy when Pope Alexander III (1159-1181) declared that "children born before the solemnization of marriage, where marriage followed, should be as legitimate to inherit to their ancestors as those that are born after marriage".⁹⁴ The English nobles told the assembled clergy at the Council of Merton (1234-36) that English law would not accept this papal ruling. Undoubtedly, "declared bastardy" and the consequent loss of inheritance prolonged the conflict between canon and common law. Canon law held that a marriage entered into with a diriment impediment was no marriage at all and was void ab initio because an

93. J. COULTER, "The Common Law Term 'Voidable': Its use in Canonical Jurisprudence", in Studia Canonica, 13(1979), p. 475.

94. X, iv, 1, 17.

essential condition for its validity was either missing or not fulfilled. Such a marriage could be impugned at any time and by any person. This created problems for the civil lawyers in the matter of inheritance and disinheritance.

The civil courts recognized the Church's prerogative through its courts to separate the parties pro salute animarum while they were still living together in a purported marriage. However, the common lawyers found it difficult to accept the fact that the Church would follow the same procedure after the death of one of the parties. The lawyers argued that the reason for the Church's action, the good of souls, no longer existed after the death of one of the spouses and through Writs of Prohibition they resisted any ecclesiastical attempt to act in these cases. The anxiety felt by these lawyers rested on the judicial fact that illegitimacy arose from a decree of nullity pronounced by the Spiritual Court thereby depriving the issue of their "lawful" inheritance. As a result of this increased civil intervention, a "canonically invalid" marriage became "sanated" by the death of one of the parties in the

marriage. It did not take long before the civil courts viewed as valid any "canonically invalid" marriage until it was annulled by a church court and only then during the spouses' lifetime. Admittedly, the common law did recognize that some marriages were void ab initio, namely those entered into with a "civil" disability.⁹⁵ It is from these strands that the civil law seemed to have created the unnatural distinction of void and voidable marriages.

Without itemizing all the statutory enactments that have occurred since the eighteenth century, it can be accurately stated that the present day law on this matter is found in "The Nullity of Marriage Act 1971" and reenacted in "The Matrimonial Causes Act 1973". In 1978, Lord Green, Master of the Rolls, explained the distinction between the two forms of marriage in this way:

95. Cf. Footnote 92 for a list of civil impediments.

A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and so can be treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.⁹⁶

The grounds under which a marriage is void devolve in two areas: lack of capacity and lack of formal requirements. The lack of capacity is enunciated on five grounds. They are:

1. That the parties are related within the prohibited degrees;
2. That either party is below the age of sixteen;
3. That either of the parties is already married;
4. That they are not respectively male and female;
5. That the marriage is polygamous (if a person domiciled in England enters such a union in another country, the marriage is considered void in English law).

In the area of formal requirements, only certain defects will invalidate the marriage and then only if both parties have knowledge of it.⁹⁷

96. Cf. P. BROMLEY, op. cit., p. 71.

97. Formal defects which do not invalidate a marriage by virtue of The Marriage Act 1949: (a) Statutory

The grounds under which a marriage is voidable (if celebrated after July 31, 1971) are also set out in "The Matrimonial Causes Act 1973". They are:

1. Impotence;
2. Willful refusal to consummate the marriage;

residence requirement was not fulfilled; (b) that the necessary consents had not been given in the case of the marriage of a minor by common licence or registrar's certificate; (c) that the building in which the parties were married had not been certified as a place of religious worship or was not the usual place of worship of either of them; (d) that an incorrect declaration had been made in order to obtain permission to marry in a registered building in a registration district in which neither party resided on the ground that there was not a building in which marriages were solemnized according to the rites of the religious belief which one of them professed.

Formal defects which may invalidate a marriage by virtue of the same Act for marriages according to the rites of the Church of England (otherwise than by a special licence) and only if both parties were aware of the irregularity at the time of the ceremony:

- (a) that the marriage was celebrated in a place other than a church or chapel in which banns may be published;
- (b) that banns had not been duly published, a common licence obtained or a registrar's certificate duly issued;
- (c) that in the case of marriage of a minor by banns, a person entitled to do so had publicly dissented from the marriage at the time of the publication of the banns;
- (d) that more than three months had elapsed from the completion of the publication of the banns, the grant of a common licence or the entry of notice in the registrar's marriage notice book, as the case may be;
- (e) that in the case of marriage by certificate, the ceremony was performed in a church or chapel other than that specified in the notice of marriage and certificate;
- (f) that the marriage was solemnized by a person who was not in holy orders.

Cf. P. BROMLEY, op. cit., pp. 78-80.

3. Lack of consent (duress, mistake, unsoundness of mind);
4. Mental illness as to render a person unfit to be a spouse;
5. One of the parties was suffering from venereal disease in a communicable form;
6. Pregnancy per alium at the time of marriage.

Two salient points worth noting about the six categories are that all but one, willful refusal to consummate, must exist and be proven to have existed prior to the wedding. In a marriage presumed voidable only the parties may attack the union and petition for nullity. Statute law has laid down bars to relief. In the cases of lack of consent through duress, mistake or unsoundness of mind and pregnancy by another at the time of marriage, proceedings must be instituted within three years⁹⁸ from the date of the ceremony. Lapse of time is not a bar in the case of impotence or willful refusal to consummate. This is because the party may try to overcome the difficulty for a period longer than three years.

Having drawn the distinctions between void and voidable marriages, a general description of some of the civil implications resulting from these concepts is in order.

98. Repeated in The Families Act 1984.

A void marriage is void ab initio and needs no decree to annul it. However, a declaration to this effect will remove all doubt regarding its invalidity and, being a judgement in rem, will satisfy all the parties concerned. On the other hand, civil law considers a voidable marriage to be valid until such time as it is annulled. In this case the decree of nullity does not act retrospectively.⁹⁹ Rather, the decree issued is not a declaratory one stating that the marriage is invalid and therefore void from the beginning, but a constitutive statement ruling that the marriage is valid until the decree absolute of nullity takes effect. Statute law created this principle in 1971 to protect the civil effects of marriage, the rights of the parties to an equitable settlement of money and property and to uphold the legitimacy of any issue.

The notion of voidability is not totally alien to canonical jurisprudence. Catholic canon lawyers may see a

99. Voidable marriages annulled by a decree of nullity were deemed to be void ab initio and the decree to have retrospective effect prior to The Nullity Act 1971. Cf. Letter 10A/1971, General Register Office, London.

parallel between it and a putative marriage. The two concepts part company where civil law decrees that a voidable marriage is a valid subsisting marriage until the day it is declared null; whereas Catholic jurisprudence sees a putative marriage as enjoying the favour of law until it is proved otherwise. It is only then that the Catholic Church will declare the marriage to be null ab initio unless it is sanated, the impediment dispensed, or consent renewed.

A closer relationship exists between the voidable marriage and the dissolution of a ratified but non-consummated marriage. The Catholic Church teaches that a marriage is effected by consent, is sacramental if both parties are baptised, and becomes indissoluble after true consummation has taken place. No human power can dissolve such a union. In the case of a non-consummated marriage, the Pope in virtue of his apostolic authority may dissolve the marriage. It is then deemed dissolved from the date of the decree of nullity issued by the Roman authority and in this way the process closely resembles the English civil law concept of a voidable

marriage. However, it must be stated that a dispensation super rato arises from a theological foundation (Christ's total self-giving for the Church of which marriage is a symbol) and is essentially different from the protection of the merely civil effects of marriage which is the basis for the practice in the civil law of England.

Since the civil law removed the competence of the ecclesiastical courts to hear marriage cases in 1857,¹⁰⁰ certain legal developments have evolved which have no basis in canon law. In the first place, the civil law courts no longer respect the mandate given to them when the newly constituted divorce court replaced the spiritual marriage courts. This mandate, expressed in "The Divorce Act 1857" required the new court to judge marriage cases according to the traditional rules and principles of canon law as the Church courts had for many centuries.¹⁰¹ Another dubious development concerns the age-old doctrine, "consent makes marriage". This seems no

100. The Matrimonial Causes Act 1857.

101. This provision was repealed by The Judicature Act 1925 and was not specifically renewed.

longer to be a tenet of English law.¹⁰² Both these positions are the result of Parliament's enactments and the Church of England has not dissented from them.

At the present time the Church of England accepts a civil decree of nullity as ipso facto enabling a "second marriage" to be solemnized in the church, and an Anglican clergyman is not free to exercise a discretion

102. Mr. Justice Walton in a judgement (Roberts Deceased) held that the wording of The Matrimonial Causes Act 1973 was unambiguous and that marriages entered into after August 1st 1971 were voidable for lack of consent and not void ab initio as before. The case concerned Edwin Roberts who married in October 1974 and who died in March 1975. It was alleged that Roberts contracted a marriage in an alleged state of senile dementia and was unable to understand the ceremony or its effects, and consequently could not have consented to the marriage. Counsel submitted that the traditional doctrine of no consent, no marriage should prevail. The Judge stated that only the parties could proceed against the marriage, but they need not use the right for the couple may well prefer the marriage to continue and it would endure in law as a valid union. In the case before him the marriage was shown to have been voidable (lack of consent) but it was a good one for neither party to the marriage had challenged it. The Walton judgement was upheld by the Court of Appeal in 1978. Cf. J. COULTER, loc. cit., pp. 477-481.

to bar a marriage from taking place in a church when such an annulment has been granted,¹⁰³ whether the prior marriage was void or voidable. The Church of England cannot be reproached for accepting these decrees of nullity issued by the State which the Church itself could have issued at an earlier time in its history. What does give cause for concern is when the Church of England accepts as null (e.g. willful refusal to consummate a marriage) a marriage that may not have been considered null according to the traditional norms of canon law; a canonical decision would have depended on why there was a refusal.

Having examined briefly the matter of impediments, it appears that since the time of King Henry VIII, there has existed a relative harmony between State and Church in the matter of declared or imposed matrimonial impediments. The vicissitudes of the Reformation period coupled with the emergence of dominant Protestant theology established a position for the Church of England that differed

103. Cf. Marriage and the Standing Committee's Task, London, C.I.O. Publishing, 1983, p. 19.

somewhat from the rest of the Western Church in communion with the Apostolic See. At times, in the recent past, the State has digressed from the position held by the Anglican Church on the matter of impediments; but has always recognized the right of the spiritual authority to determine the capacities necessary for marriage with the concurrent right to impose prohibitions on its members which flow from divine and ecclesiastical law. Today the laws of the State and the Church of England do not clash in the matter of impediments; however, they do differ in theory on the matter of second marriages, if not altogether in practice.

CONCLUSION

According to Richard Burns who was writing in 1763, there exists in England an ecclesiastical law which is composed of four strands. These entwine and form a hierarchy of laws; they are civil (or Roman) law, canon law, common law and statute law. In situations where they interfere and cross each other, "the civil law submitteth to the canon law, both of them to the common law; and all three to the statute law".¹ Burns' astute observation encapsulates a truth regarding the relative importance of post-Reformation canon law in England. By making a slight adjustment in the order, his list can still be applied today. In civil law matters, canon law often gives way to common law; the canon law, the common law and the judgment of a civil court would usually give way to a statutory enactment. To conclude this brief examination into the "strands" that contributed to form the historical basis and subsequent development of the Church of England's canon law on marriage, the following points emerge from this study.

1. R. BURNS, Ecclesiastical Law, London, Woodfall and Strahan, 1763, p. 1.

First, the force and status of pre-1533 canon law remains uncertain. Since King Henry VIII gave statutory force to the canonical laws in use in 1533, to the degree that they have not been modified or abrogated by subsequent monarchs and Parliament, they may still have legal force within the realm. In trying to ascertain the status of a particular law, the notion of desuetude or of contrary custom might have to be taken into consideration.

Second, correlative with the belief that the Sovereign is the highest power under God in the kingdom and possesses supreme authority in all matters ecclesiastical as well as civil, is the necessity of having the Monarch's assent and licence to make and enact canons; there is a fundamental dependence on and a union with the State in the matter of Church legislation. Propositions which have passed to Parliament from either Convocation (1919-1970) or the General Synod (since 1970) are known as Church Measures. Once passed by both Houses of Parliament, they have the same binding force as statutory law.

Third, the Canons of 1603 and 1964-69 have a different status from pre-Reformation canonical

legislation. Likewise, canons made by the Convocation or by the General Synod, in so far as they do not treat of matters dealt with in the statute law, would bind the clergy "proprio vigore" and may also bind the laity who hold ecclesiastical office within the Church of England. Where the canons refer back to statute law, clergy and laity are both bound. However, for canons made after 1533 without any reference to statute law, the binding authority is spiritual and not legal. Likewise, the Resolutions of Convocation or the General Synod, no matter how solemnly made, have no civil legal force but are exhortatory and have a moral authority. This principle also applies to the resolutions emanating from the Lambeth Conferences.

Fourth, it can be said that the nature of marriage as understood by the whole Church prior to 1533 remained the teaching and inheritance of the Church of England after the Reformation. However, the XXXIX Articles of 1571 appear to deny it the status of being a dominical institution. A valuable insight into the Church of England's understanding of marriage at different times can be found in the various post-Reformation liturgical books which contain the official marriage rite. "The Canons of 1603" did not have a descriptive or theological

statement about the nature of marriage. Rather, it remained for the canonical regulation issued in 1969 to make such a declaration in canon B30. This norm seems to indicate an understanding of marriage not dissimilar from that held by the whole Church prior to 1533 and demonstrates a continuity between the remote past and the present-day Roman Catholic teaching on the unitive and procreative elements in marriage. While the Church of England does not stipulate in canonical language what makes marriage, there can be little doubt that the Church holds that consent, freely exchanged between those who have the freedom and the capacity both in law and in fact, constitutes a marital union.

Fifth, after examining the six marriage regulations contained in The Canons of the Church of England, it is evident that these ecclesiastical enactments of 1969 have some basis in the pre-Reformation "ius commune" of the Western Church. However, since the time of King Henry VIII, the Church of England has been guided by extrinsic conditions in proclaiming its teaching on marriage. As a consequence, there was a continual weakening within the Church and a lack of cohesion in proclaiming and defending what was the common

teaching of Christendom on marriage. This can be attributed to two factors. First, from its very beginnings the Church of England had to grapple with the question of divorce, given the circumstances in which it was established. Second, the Church has been gradually deprived of its exclusive control over marriage by an elected Parliament (which exercises some control over the Church) in terms of legislation that catered to public opinion. Since 1857 the State has exercised a control over marriage regulations. In the present civil law, it is possible to discern some reflections of the ancient canon law, particularly in matters associated with the preliminaries and capacities necessary for the solemnization of marriage. The Church of England no longer has an ecclesiastical court competent to judge nullity cases; such petitions are decided in the civil forum. Yet, the jurisprudence of these civil procedures has a partial foundation in canon law and resembles, to some degree, the present practice of the Roman Catholic Church in the matter of nullities.

In theory, reverence is still paid by the Church of England to the principle of indissolubility, but this is departed from in practice. The Convocations have "forbidden" the clergy to perform second marriages in church while a former partner still lives; statute law

allows a minister to do just this and canon law in its proper order yields to statute law allowing the minister to make his own judgment.

Finally, while the State does not force its laws on the Church, the Church of England has accepted most of the statutes which appertain to marriage and has made them its own. Because the Church does have a moral authority, its duty is to counsel its members not to avail themselves of those civil permissions which run contrary to natural law or revelation. However, since many of the Church's members are nominal, it is possible that they will never hear this teaching. For those who do, if they wish to remain in good standing with their Church, they must observe its legislation.

APPENDIX A

PROVINCIALE,
 (feu CONSTITVTIONES ANGLIÆ)

MCDXXXI I

Auctore *GVLIELMO LINDWOOD*, J.U.D. Officiali Curiz *Cantuariz*, dein
 Privati Sigilli Custode, demùm Episcopo *Menevensi*.

OXONIÆ,

Excudebat *H. Hall* Academiæ Typographus, Impensis *Ric. Davis*.
 Anno Domini *MDCLXXIX*.

LIBER QUARTUS.

TIT. I.

De sponsalibus & Matrimonio.

Matrimonium cum reverentia contrahatur, ante habitis tribus Edictis ritè denunciatis, neque contracturi in secreto fidem dent.

Walterus.

Matrimonium, sicut alia ^b Sacramenta, ^c cum honore & ^d reverentia ^e de die & in ^f facie Ecclesie, non ^g cum risu & joco ac ^h contemptu celebretur. ⁱ In Matrimonio quoque ^k Contrahendo ^l semper ^m tribus diebus ⁿ Dominicis ^o vel Festivis ^p à se distantibus, quasi tribus ^q Edictis, perquirant ^r Sacerdotes à Populo de ^s Immunitate Sponsi & Sponsæ. ^t Si quis autem Sacerdos hujusmodi ^u Edicta non servaverit, ^v pœnam nuper ^w in Concilio super hoc ^x statutam non evadat. ^y Prohibeant etiam ^z Presbyteri frequenter Matrimonium contrahere volentibus sub ^{aa} pœna Excommunicationis, nè ^{ab} dent sibi ^{ac} fidem ^{ad} mutuò de Matrimonio ^{ae} contrahendo, nisi in ^{af} loco celebri coram ^{ag} publicis & ^{ah} pluribus personis ^{ai} ad hoc convocatis.

Distingua

Matrimonium. Hæc est Constitutio *Walteri Reynold*, Archiepiscopi, & habet quatuor dicta. In primo statuit circa Matrimonium reverenter & publice celebrandum. In secundo ibi, *In matrimonio*, mandat cetera Edicta servari circa Banorum editionem. In tertio ibi, *Si quis*, limitat penam contrahentibus. In quarto ibi, *Prohibeant*, hortatur de quibusdam servandis in contractibus matrimonialibus, quæ fiunt ante solemnizationem eorundem.

a *Matrimonium*. Hic posset tractari, quid sit Matrimonium, unde dicitur, quomodo contrahatur, ubi fuit illicitum, quæ sunt causæ institutionis ejusdem, quæ sunt ejus bonæ, & quæ ipsius impedimenta. De quibus singulis *Inno.* prosequitur *Extra. eo. c. juvenis*. sed plenius *Jo. An. in summa libri quarti Decretalium*.

Quæstio.
Matrimonium &
Sponsalia
differunt.

Sed quæro an sit differentia inter Sponsalia, & Matrimonium? Dic quod sic: & hoc patet, quia ponuntur ut diversa per hanc copulativam &, cujus natura est ut copulet inter diversa, sicut notatur *ff. de Furis & Falsi igno. in rusticis*. & si essent idem, non vocarentur diversis vocabulis. ut *l. si idem. C. de codicil.* & quod sint diversa, patet ex diversitate definitionum. Sunt enim *Sponsalia* repromissio futurarum nuptiarum. *ff. de spons. l. 1.* sed *Nuptia* sive *Matrimonium* est Viri Mulierisque conjunctio individuaque vitæ consuetudinem retinens. *27. q. 2. in prin.* & ibi notatur. *in summa*.

b *Sacramenta*. De quibus dixi *supra. de sacra. iterum*. per totum. Et sic ex hæc litera habes quod Matrimonium est Sacramentum. Unde *ad Eph. 5. Sacramentum hoc magnum est*. Sacramentum enim importat aliquod remedium spiritualis Sanctificationis à peccato in re sensibili homini exhibitum. In Matrimonio verò est remedium effectivè contra peccatum in signis sensibilibus, unde Matrimonium est Sacramentum. Est enim remedium duplex, quoddam curativum, quoddam preservativum. Primum conferitur in aliis Sacramentis. Secundum in Sacramento Matrimonii. Conjunctio autè exterior apparet per signa aliqua est Sacramenti tantum: conjunctio verb animarum interior est Sacramenti & res. Effectus autè gratiæ quæ ibi confertur est res, & non Sacramenti res, inquit, primò signata res vero signata secundario est conjunctio Christi & Ecclesiæ. *Thomas* verò dicit quod forma hujus Sacramenti sunt verba sive signa quibus consensus matrimonialis exprimitur: materia autem sunt ipsi actus exteriores. Hæc *Jo. in summa confes. li. 4. tit. 2. q. 2.*

c *Cum honore*. Qui attenditur non solum in reverentia mutuo impendenda, sed in administratione eorum quæ corpori sunt necessaria. Vel dic *cum honore*, i. e. cum modestia & absque lascivia.

d *Reverentia*. Quæ erit honor Deo in receptione ipsius Sacramenti cum pavorè exhibitus. *2. q. 8. sicut inquit. ver. reverentia. per Arch.*

e *De die.* Hic nota, ut se, melius intelligat quando est Dies quado est Nox, quod in lege *hæc verba. ff. de verb. sig. dicitur*, aut est Dies, aut est nox, unde ut ait *Bart. in l. Titius. §. Lucius. ff. de libe. & posthu.* Nox non est aliud nisi privatio lucis, & Dies non est aliud nisi positio lucis: ut colligitur in *c. consulis. Extra. de offi. del. &* propterea secundum quosdam, si dubietur an serum vel mane attribuaturs Diei aut Nocti, dicit quod de sero post solis occasum remanente luce non est Nox, Item de mane albescente celo est Dies: quia quando Nox recedit est Dies, Idem tamen *Bart. in l. aut facta. §. tempus. ff. de penit. dicit*, serum dici potest quando sol recessit, remanet tamen adhuc aliquod lumen propter claritatem cæli, & tunc Nox est: quia sol est super terram. Ex eodem modo dicit de mane quia mane potest intelligi quando sol non est super terram, sed de proximo venit: quia cælum jam albescit & tunc Nox est, ut *diBa. l. Titius. §. Lucius.* sed si sol de proximo incipit esse super terram, tunc Dies est. *C. de custo. Rorum. l. 1.* quod autem Dies intelligitur quando sol oritur habes *Extra. de homicidis c. si perfidens*, ubi etiam *Jo. An.* tractat utrum serum & mane attribuaturs Diei vel Nocti. ibi videas.

f *Facie Ecclesia.* i.e. Conspectu Ecclesie in populi se congregati in Ecclesia. *Extra. de clandest. despons. c. cum inibitio. §. pari modo.*

g *Cum ritu.* Simile habes *§. 4. c. in loco.*

h *Contemptu.* Id est, vilipensum. vel cura modica. *2. q. 7. metropolitanum. glo. ex contemptu. per Arch.*

i *In matrimonio.* Secunda pars.

k *Contrahendo.* Sc. ante ipsius solemnizationem.

l *Semper.* i.e. Omni tempore & inter quoscunq; Matrimonium sit contrahendum. Quod dic ut dicam *infra. de clandest. despons. c. 1. ver. solemnem editionem, & c. humana concupiscentia. §. sacerdotes.*

ver. suas parochianos.

m *Tribus diebus.* Illud limitat illud quod legitur *Extra. de clandest. despons. c. cum inibitio. §. 2.* & illud quod habetur *infra. de clandest. despons. c. 1. iiii. pluribus. &c.*

n *Communio.* Ubi videlicet nulli sunt dies festivi intermedii.

o *Vel festivi.* Inter quos etiam numerari potest dies Dominicus, si, sit occurrat. Vel potest intelligi, quando in una Hebdomada à Dominica in Dominicam tres occurrunt dies festivi, quod dic ut *infra. glo. proxima.*

p *A se distans.* Ad minus ut videtur uno die intermedio. Et facit ad hoc quod legitur & novatur *de sent. excommunic. c. constitutionem. li. 6.* sed puto quod si tres dies festivi successivi concurrant sicut contingit in Hebdomada Pasche &

Pentecostes sufficit, quod singulis trium dierum huiusmodi Banna edantur: *distare* namque idem est quod *differre* vel *remotum esse.* Cum itaque tres dies successivè festivos differant adinvicem, sic quod unus dies non est reliquus; sufficit si in quolibet illorum dierum Banna huiusmodi proclamantur: non tamen possunt expediri, sic quod trina, vel bina vice proclamantur in una die, ut hic innuitur. & facit ad hoc *ff. de pigno. ac. l. si comoverit. in fi. cum sua glo. ff. de publi. judi. l. inter accusatorem.*

q *Edictis.* ff. de judi. l. ad peremptorios.

r *Sacerdotes.* Supple parochiales.

f *Immunitas*. La est, libertate, hoc est, an sint liberi ad con-
trahendum.

e *Si quis*. Tertia pars.

u *Edicta*. i. e. Proclamationes sive denunciationes.

x *In concilio*. i. e. Generali. *Extra. de clandest. matrim. s. c. i. inbitia*,
y *Statutum*. Hæc poena est Suspensionis per triennium ab offi-
cio, ut ibi patet.

z *Probitas*. Quarta pars.

a *Presbyteri*. Supple, qui præfunt curæ animarum.

b *Pena Excommunicationis*. Sc. ferenda, & est comminatio.

c *Dena*. Sc. contrahere volentes.

d *Fides*. i. e. Secretitatem mutuz servituz. Multipliciter enim
dicitur fides, ut notat *Fr. 22 q. 1. c. mones te*. & dicitur hic *Fides* quan-
dam promissio facta fide præstita: & est promissio fide præstita, quæ *Fides*,
fit per Deū, vel per fidē ipsius promittentis, secundum *Imm.* qui sic no-
tat *Extra. de his que v. metuz causa s. c. ad aures*. & notatur de *se-
pul. c. 1. ver. fide interposita*. per *Archid. li. 6.* ubi habet quod fides
interpositio tantum ligat, sicut & Juramentum. Et concordant no-
tata per *Hofien. Extra. co. si c. 2. ver. fidem dederunt*.

e *Mutus*. i. e. Hinc inde, invicem, alterutro, vel vicissim. Requiritur namque in Matrimonio consensus utriusque; nam ubi alter contra-
hentiū non consentit, non contrahitur matrimonium. *Extra. co. c. tus nos*,

f *Contrahendo*. Loquitur itaque de Sponsalibus, quæ sunt de futuro, ut dixi *supra. c. 9. x. ver. Matrimonium*, vel potes intelli-
gere de matrimonio celebrando, L. e. in facie Ecclesie solemnizando:
sic tamen quod contractus ipse matrimonialis præcedens publice fit
initus, ut hic dicitur.

g *Loco celebri*. Id est, à multis frequentato, sive solenni & *† a. Al. Apto*
perito: sic quod in latebris non fiat.

h *Publicis*. Utpote, Tabellionibus. Vel dic *publicis*, i. e. palam,
& in publico presentibus.

i *Pluribus*. Duobus ad minus. *ff. de testi. l. ubi numerus*.

k *Ad hoc*. Id est, ad audiendum contractum talem fieri, & inde
testificandum. Et nota quod si secundum hæc Constitutionem non
debeant contrahi Sponsalia de futuro, nisi palam & publice coram
testibus qui velint & valeant in ea parte testimonium perhibere,
multo magis hoc fieri debet quando per verba de presenti contingit
contrahi Matrimonium: cum in Sponsalibus de futuro de consensu
partium possit rescindi à tali contractu, & in aliis casibus de quibus
notatur *co. 1. sub rubrica. de sponsalibus. §. 2. qualiter dissolvantur*.
per *Hofien. in summa*. sed in matrimonio contratto de presenti
non. *Extra. co. c. si inter*.

¶ *Ubi*

TIT. II

*De Desponsatione Impabe-
rum.*

*Ante tempus legitimum non
contrahatur Matrimonium si-
ne dispensatione pro bono pa-
cis.*

Edmundus

• **V** Bi non est ^b Con-
sensus utriusque
• non est Conju-
gium. ^d Igitur qui
• pueris dant ^f puellas ^e
in cunabulis, ^b nihil faci-
unt, nisi ⁱ uterque puero-
rum, postquam venerit ad
^b tempus discretionis, ⁱ con-
sentiatur. ^a Hujus ergo ^a De-
creti Auctoritate ^h inhibe-
mus, ne de cætero aliqui,
quorum uterque vel alter
ad ^o ætatem ^p Legibus con-
stitutam & ^a Canonibus de-
terminatam ^r non pervene-
rit, ^f conjungantur: nisi
^a urgente necessitate pro
^o bono pacis talis conjunctio
toleretur.

Diviso. a **V**bi non est. Hæc est Constitutio Edmundi Cantuariensis Archiepiscopi, & habet tria dicta. In primo ponit quasi Juris Regulam. In secundo ibi, *Igitur*, elicit quandam conclusionem ex ea. In tertio ibi, *Hujus ergo*, ponit quandam inhibitionem circa præmissa.

b **Consensus utriusque.** Sc. contrahentium. Et illud sumitur ex c. 2. *Extra. de doct. impube.*

c **Non est conjugium.** Concordæ ad idem 30. q. 2. c. ubi, unde si alter contrahentium sit furiosus, non tenet quod aditum est. *Extra. c. c. dilectus.* & idem si alter fuerit infans. *Extra. c. c. literas. & c. accessu.* tales namq; nõ habent judiciũ animi. *Extra. de co. po. vic. c. ex parte.*

d **Igitur.** Secunda pars.

e **et utris.** Intellige propriè de majoribus septennio, minoribus tamen 14. annis. *Extra. de eta. & quali. c. 2. glo. 1. & in præmio. 6. li. ad fi. in prin. magna glo.* hæc tamen sumitur *Puer* pro minore septem annis, ut patet ex hæc quod subditur, *in cunabulis &c.*

f **Puella.** Quæ quanto plus crescunt, tantum in eas plus expendendum est. *ff. de ali. & ciba. lega. 1. cum unus. §. si. in glo.*

g **In cunabulis.** Hæc Sponsalia nulli tunc, cum consensus omnino deficiat: ut patet in his quæ notat *Hustien. Extra. eo. c. puberes. ver. generare.* & in c. *litteras. ver. cunabulis.* dic ut ibi.

h **Nihil faciunt.** Supple, quoad vinculum Matrimonii, nec etiam quoad Sponsalia nisi post septimum verbum vel factum appareat eos perduræ: e in eadem voluntate: nam tunc ex tali voluntate sine consensu incipiunt inter eos esse Sponsalia, sicut legitur *e. si infantes. in prin. li. 6.*

i **Uterque puerorum.** Et sic consensus unus non sufficeret, ut patet 30. q. 2. c. ubi. *& e. si infantes. in prin. li. 6.*

k **Tempus discretionis.** Hæc intellige quoad vinculum Matrimonii: sed quoad Sponsalia sufficeret, si post septimum annũ completum uterq; eorum permaneat in eadem voluntate; *ut d. c. si infantes.*

l **Consentiat.** Sc. contractui præcedenti. Quod dic ut legitur & notatur *Extra. ea. c. de illis.* & sic habes hic quod actus nullus à principio tractu temporis convalescit, quando supervenit causa habilis ad actum de novo creandum: sicut est consensus tacitus vel expressus, de quo in *Regula Juris. Non firmatur. de Regu. Juris. li. 6.*

m **Hujus ergo.** Tertia pars.

n **Decreti.** De quo hic mentio 30. q. 2. c. ubi. Et dicitur *Decretum*, quod statuit Papa de consilio Cardinaliũ suorum ad nullius consultationem. 100. *Dis. c. 1. Canon* dicitur, id quod statuitur in Universali Concilio. *De riga. c. altercatum. li. 6. Decretalis Epistola* est, quam statuit Papa vel solus, vel cum Cardinalibus ad consultationem alicujus. 59. *di. hæc ad nos. Duena* est, quod consilium in Doctrina sicuti Chiltiarum. 23. *di. qui Episcopus. Mandatum* est, quod consilium in Doctrina de motibus. 23. *di. hic igitur. Interdictum* est, quo nulla pœna adjicitur. 32. *di. in. erdixit. Sanctio* est, ubi pœna adjicitur. 36. *di. c. 1. & simile habet eo. si. d. c. si infantes. li. 6.*

Decretum.

Canon.

Decretalis

Epistola.

Logum.

Mandatum

Interdictum.

Sanctio.

o *Statem.* Hæc ætas quoad Sponsalia est 7. annorum ubi finitur infantia tam in viro, quam in femina quoad matrimonium. In femina est 12. annorum. In masculo 14. annorum: & sic in pubertate quoad sui principium est inæqualitas, sed quoad sui finem æqualitas in masculo & in femina: quia in utroque sexu finitur pubertas in 14. anno. *C. si uiuor se uijo. dixit. l. 1. § C. si maritus* *Quare citius* *per solus. l. si. § l. si. de cura. in prin.* Sed quæ est ratio, quare *quis pubescit* non conveniunt sexus in tempore medio, sicut in fine Infantia & in *femina* sine Adulescentia? nam in principio pubertatis discrepant & citius *quæm masculus.* pubescit femina quam masculus. Quidam dicunt quod ratio est, quia uir ea idior est, unde citius impetrat veniam ætatis quam masculus. *ut. l. 2. C. de his qui æt. impetrant.* Alii dicunt quod ratio est, quia masculus citius crescit, & notatur *Extra. eo. c. licet* *scras. per Jo. An. tu dic. quod sufficit Jurista dicere, quod natura* pubertatem scire dispant in sexu, cum percipiamus naturaliter *pubescere* feminas in 12. anno, Mars uero in 14. Unde lex positiva debet concordare nature. *4. di. erit autem. In li. de adop. circa medium.* Et notatur per *Jo. An. eo. li. c. si infantes. in glo. 2. in no. li. 6.*

§ *Legibus. In li. qui. no. tu. finitur. §. pubertatem.*
 ¶ *Canonibus. Extra. e. c. puberes. 10. q. 2. si puella.*

Non peruenit. Requiritur enim in contrahere volentibus ætas completa. *Extra. c. c. puberes.* Scias tamen, quod si masculus ante 14. annum completum possit generare, etiam non esset nisi 9. annuum (sicut narrat Grege. in Dialogo de quodam impubere 9. annorum qui imprægnavit nutricem suam, & nuncatur :o. q. 1. in summo.) & etiam puella ante 12. annum, & si in septimo anno possit concipere, iuxta eam quæ ab heretico bene tenetur contractus, & celebratur Matrimonium, secundum *Floric. C. Fr. An.* qui sic notant. *Extra. c. si. c. pubertas.* & hoc verum secundum eos dum tamen tales eorum potentes discretionem habeant. *ar. ad hoc despons. c. juvenis.* & huic sententiæ concordant *not. Fr. An. c. si. c. si infans. r. r. supplement. li. 6.* Sed contra præmissa op-

ponitur & videtur quod omnino iudicabitur Pubertas ex annorum numero, non ex facultate generandi, ut *Insti. qui. mo. tu. si. in prin.* Solutio. Contrarium loquitur quoad Tutelam & Curam: sed quod dii locum habet quoad Matrimonium, in quo sufficit quod aliquis aptus sit ad generandum, ut *supra* dixi, & sic aliter in Matrimonio, aliter in Tutelis & Curis consideratur pu-

bertas, ut ex prædictis apparet. Et circa hanc materiam vide notata in *d. c. puberes. per Henr. de Bowyer.* Sed quarto per testator reliquit *Quæ* mi le cuidam puella cum nupserit, illa nubat in decimo anno & apparet viripotens, nunquid consequitur restitutum ex prædictis? videtur quod sic: & quia illud restitutum debetur in Consequentiâ Matrimonii, in eo ergo, ut in Matrimonio metiamur ætatem. Quod verum intelligas quando constat per aspectum vel aliter quod sit apta, alia præveniendâ in nuptiis tempus à Jure Naturum non præsumerem eam aptam: & in hoc ætatis taxatio quæ fit à Jure est utilis & necessaria, ut nihil contrarium appareat semper cõsideretur. Item quarto, quid si quis cõpleverit 14. annum, & apparat quod nullo modo potest generare, sit talis contrahat cum muliere viripotente, an tenebit Matrimonium? *Quæ* Quicquid alius dicant, tu dic quod tenet Matrimonium. Sic notat *Inno. C. Hosti. d. c. puberes.* & hoc verum nisi talis naturaliter esset frigidus & maleficiatus, & sic intelligitur *c. quod sedes. Extra. de frigi. C. malef.* Unde si mulier intret ut separetur à tali, quia vult fieri mater, consulit *Hosti.* ut Juxta caperet donec masculus ille compleverit 18. annum, & postea per tres vel duos, ut videat si duret talis impotentia: quo casu separetur servata solennitate, de qua *Extra. de frigi. C. malef. c. 1.* Moveat autem *Hosti.* ex eo quod ætas 14. annorum licet regulariter apta sit ad Matrimonium, tamen quandoque prorogatur. *Antibent. de nup. §. per occasionem. Coll. 4.* ætas enim 18. annorum est plena pubertas: & hac ratione, quia lex consilii quod in tali ætate quis possit generare, ad omne majus limitat potestatem adoprandi usque ad illam ætatem, quasi ante possit naturaliter non generare: & sic Adoptio in hoc imitatur naturam. *Insti. de adop. §. minorem. ff. de adop. l. Arrogator. §. penul. C. ff. de ali. leg. l. Mala.* ubi etiam dicit in multis spectandos 14. annos quantum ad plenam pubertatem, & ad hoc facit *Extra. de regula. quis in injul.* & cum hac opinione *Inno. C. Hosti. concordant Petrus de Ancho. d. c. puberes. C. Fr. An.* & propterea si in naturaliter frigido vel maleficiato expectamus triennium, quod dicitur *Extra. de frigi. C. malef. c. laudabilem.* multo magis hoc erit in illo in quo non apparet per aspectum ariditas vel defectus in membro: sed solum temporale vitium ubi desequum forte naturæ infirmitatem, vel aliam causam quæ non est consideranda in Matrimonio. *ut l. sed est quæsitum. C. l. si quis posthumus. ff. de li. C. post.* Ubi dicitur, quod natura in homine & consuetudo spectanda potius est quam temporale vitium aut valetudo. *per* quam inducitur homo quandoque à generandi facultate.

f Coniungantur. Ratio est, quia tales sæpe regunt & prædicatione ducti à consaliibus illis recedunt, quod satis licet: & tamen remanet quoddam vinculum sive quidam nexus ex quo inducitur Iustitia publicæ honestatis, propter quâ reuter de consanguinitate illius Spūsali poterit illam sic repudiatam ducere, nec se, ille Spūsus poterit aliquam ducere de consanguinitate Spūsali. ut patet *Extra. de spons. c. Furoris. & c. Sponsa.* Alia ratio est, quia damnosum est & publicæ tot pestiferas impediri per huiusmodi Spūsalia sic ad libitum dissolvenda.

e Urgente necessitate. Et sic urgente necessitate alias prohibita conceduntur. facit *c. licet. Extra. de feris.* ubi de hoc. Sed quis cognoverit utrum subistat necessitas, sive non? Dicit *Jo. An. post Hostien.* quod Diocetianus, sine cuius licentia non debent contrahere, ut *Extra. eo. c. ubi. & c. contingatur. & c. duo pueri.* similiter contracta non debent sine eius Auctoritate dissolvi. *Extra. c. c. accessit. & c. de illis. cum 3. c. seq.* Et hæc quidem, se. de licentia obtinenda in contrahendo & dissolvendo secundum *Petrum de Ancho. & Jo. An.* sunt observanda etiam in majoribus propter multa pericula animarum, ut patet *Extra. de spons. cum in tua. & de clauic. de spons. c. si. &* ut in hoc sit simile Matrimonium carnale Matrimonio spirituali. *Extra. de insti. c. 3. de renun. admonet. & c. quod in dubiis.* & multo magis secundum eos illa locum habent quando extraneus ignotus venit ad aliquam Civitatem: dicit eamque *Jo. An.* quod ratione Sacramentorum tantum subiacet Laicus extraneo, quod sicut Clericus non est recipiendus sine licentia ab extraneo, *Extra. de cleri. non resi. c. fraternitati.* sic nec Laicus:

Extra. de paroch. c. nullus. de peni. & remiss. c. annu. & expellit dicitur de Laico. *de cons. di. 5. non oportet.* Quærit ergo debet Sacerdos ne Parochianam suam desponsa extraneo inconstituito Curato ipsius extranei vel Ecclesia. Quilibet enim Pastor debet agnoscere ovem suam, & propriam, non extraneam curam habere; hoc tamen, ut dicit *Hosti.* male prædicatur & pejus servatur. Et ut dicit *Petrus de Ancho. Extra. eo. c. ubi ad se expediret* hoc in multis locis prædicari: quia dicit se vidisse unum Virum qui simul habuit viventes quatuor Mulieres, cum quibus publice contraxit in Ecclia, viz. unam in Rhodo, aliam in Insula Creta, tertiam in Pyrano, & quartam Venetiis: & cum prima legitima probabatur mortua, voluit remansisse cum quarta, quæ tamen recubabat & au fugit ab eo cum hoc scivit. & pro ea facit *Extra. de eo qui duxit uxorem, & c. 1.* & ibi de hoc.

a Bono pacis. Hæc enim est una de causis secundariis, quare contrahatur Matrimonium, secundum *Hosti.* qui de hoc tractat in *de matr. 9. & quare. in summa sua in prim.* Sunt namque duæ principales causæ quare contrahatur Matrimonium. Una est susceptio sobolis, alia est vitatio fornicationis, 32. q. 2. §. *bi ita.* secundariæ vero causæ sunt multæ; scilicet Personarum conjunctio, Amicorum & Divitiarum acquisitio, Pacis reformatio, Uxoris pulchritudo, & similia.

Causæ
Matrimo-
nii contra-
bendo.

De clandestina Desponsatione.

Denunciatur frequenter in frequenti populo à Suffraganeis, omnes Sacerdotes Matrimonii, non præhabitis tribus Edilibus seu Bapnis, interesse aut præesse præsumentes, triennio ab Officio suspendendos. Item extra Ecclesiam Parochialem sine Diocesani venia solemnizantes, anno ab Officio suspendendos.

Simon Mepham.

Quia ex Contractibus Matrimonialibus absque Bannorum editione præhabita initis, nonnulla pericula evenerunt, & manifestum est indices provenire, Omnibus & singulis Suffraganeis nostris Præcipimus Statuendo, quod Decretalem *Cum inhibitio.* (Qua prohibetur, nè qui Matrimonium contrahant, Bannis non præmissis in singulis Ecclesiis Parochialibus suæ Diocesis pluribus diebus solennibus, cum major populi affuerit multitudo) exponi faciant in vulgari, & eam firmiter observari, quibusvis Sacerdotibus etiam non Parochialibus, qui Contractibus Matrimonialibus ante solennem editionem Bannorum initis præsumserint interesse, penam Suspensionis ab Officio per triennium infligendo, & hujusmodi contrahentes, etiam si nullum subit impedimentum, pena debita percellendo. Quis etiam Sacerdos, five Sæcularis five

^a Regularis extiterit, qui
ⁱ Solemnizationem Matrimo-
 nii extra ^a Ecclesiam Paro-
 chialem abique ⁱ Episcopi Di-
 ocesani ^a speciali licentia
 celebrare protumpserit, aut
 • eidem • interesse, per an-
 num ^a integrum ab Officio sit
 suspensus.

Divisio:

^b **Q** *Vis ex contractibus.* Hæc est Constitutio *Simonis Mepham*, & habet tria dicta: In primo ponit motivum Constitutionis edendæ. In secunda ibi, *Omnibus*, procedit ad Constitutionem penalem contra Sacerdotes, qui intersunt contractibus Matrimonialibus Banais non editis. In tertia ibi, *Quibus*, statuit contra Sacerdotes solemnizantes Matrimonium extra Ecclesiam Parochialem absque licentia Diocesani.

^c *Contractibus Matrimonialibus.* Qui non solum possunt fieri utraq; parte presente, sed altera absente; ut viz. contrahatur Matrimonium per Procuratorem, sicut legitur & notatur. *de procur. c. ult. li. 6.* & in hoc casu requiritur Mandatum speciale, ut ibi dicitur: nec potest talis Procurator alium substituere, ut ibi dicitur, absque speciali Mandato; & si revocetur Mandatum talis Procuratoris etiam ipso ignorante re integra non tenebit contractus, ut ibi dicitur. Ratio est, quia deficit consensus Mandatis; & sic videtur, quod ubicunque actus gelli per Procuratorem debet adesse verus consensus Domini pro substantia actus non est necesse quod revocatio transeat in notitiam Procuratoris. Secus tamen dici potest, ubi non requiritur consensus verus, sed sufficit fictus, sicut est in Judicis, quia tunc oportet, quod transeat in notitiam Procuratoris vel Judicis. De quo vide quod legitur & notatur. *de procur. c. 2. li. 6.* & in *Clem. cum illuso. de renum.* Scias tamen, quod quando quis contrahit per Nuncium, vel per Epistolam cum absente, tunc sive in contractu Matrimonii, sive in aliis contractibus sufficit revocatio ante contractum, etiam si non transeat in notitiam Procuratoris vel Partis; quia censetur revocatum Mandatum, nec postea obligatur, ut *l. si pater. ff. de ma. vindicta.* & est ratio, quia Nuncius vel Epistola solum præbet ministerium nudum, ut pica vel organum. *ff. de consi. pecunia. l. 1. & licet. C. si quis sibi vel alteri. l. multum interst. ubi de hoc.* Deficiente ergo consensu tempore Præsentationis, nihil agitur etiam si Nuncius non fuerit certioratus, licet *glo. in l. 1. ff. de contrahen. emp.* etiam in Nuncio vel Epistola teneat contrarium; ubi autem aliquis contrahit per Procuratorem vel Syndicum, tunc quia non suo, sed alterius factio & ministerio obligatur, ut notatur in *d. l. multum interst.* & *Instit. de inust. si pu. §. alteri.* illum in quem consensum suum transtulit necesse est certiorari. *ff. quod iustu. l. 1. & glo. ibi solus;* & ad idem facit *ff. mandatu. l. si mandasset. ff. de publi. l. si quis prohibuerit. ff. de condi. ob causam. l. si pecuniam. §. 1.* Fallit tamen in casu dictæ *Decreti. 2. de procur. li. 6.* In aliis vero casibus, nunquid sit necesse contrahentem certiorari, recurrit ad notata in *c. ex parte Decani. de rescrip. super glo. sic in tertia. per Jo. An.* Ratio autem specialitatis illius *c. 1.* exprimitur ibi in Textu, viz. quia loquitur in contractibus, in quibus requiritur consensus utriusque Partis: notatur per *Paulum & Wyl. in Clem. 1. de renum.* Ex hoc videtur, quod in omnibus casibus, in quibus libellet illa ratio, procederet dispositio illius *c. ult. de procur. li. 6.* Et ita dicit ibi *Jo. de Inola tenere Cj. in l. mandatum. C. mandati.* Et de illa materia vide per *glo. & alios Scribenes. d. c. unico. de renum. in Clem.*

d *Bansorum*. i. e. Proclamationum publicanarum. *Ext. a. c. c. cum inbibitis* vel die *Bansorum*, i. e. Denunciationum: sic exponitur *Extra. de spons. c. cum inbibitis*. Vel *Banna* postura dici *Edicta* publice proposita, ut notat *Petrus de Ancharanis. d. c. cum in bibitis*.
e *Pericula*. Sc. Animarum quæ se, insurgunt ex diversis impedimentis, propter quæ *Martinoniam* non potest inter tales contrahi.

f *Manifestum est*. Sc. per experientiam, & rei evidentiam. Cui concordant notata per *Jo. An. de usuris. c. 1. ver. manifestum. li. 6.*

g *Indies*. Id est, de die in diem.

h *Omnia*. Secunda pars?

i *Cum inbibitis*. *Extra.*

ca. ii.

k *Ecclesie Parochiales*. Quorum Jus Parochiale consistit in multis, puta, quod in diebus Festivis Parochiani in ipsis

Missas audire debent, & non alibi. Item in *Poenitentis*, *Sepulturis*, *Benedictionibus*, *Nubentium Oblationibus*, & *Decimis* persolvendis, sicut notatur per *Jo. An. Extra. de Parochis super Rubricam*.

ca.

l *Pluribus*. Et si duo ad minus. *ff. de testibus. l. ubi numerus.*

m *Solemnibus*. Id est, Festivis.

n *Multitudo*. Et sic non sit aliquis, qui possit pretendere ignorantiam.

o *Faciunt*. Non ergo tenentur hoc facere personaliter.

p *In vulgari*. Sc. idiomate omnibus intelligibili.

q *Es enim*. Sc. *Decretalium*.

r *Sacerdotibus*. Idem intelligit *Jo. An. de Clericis*, sicut patet *d. c. cum inbibitis. ver. sacerdos*. Et concordat ibi *Hostiensis*, qui dicit, quod etiam Laici ex mente illius Constitutionis non debent talibus interesse. facit ad hoc *C. de fals. mone. l. 1. de sen. extor. c. quant. a.*

s *Non Parochialibus*. Id est, non habentibus Curam animarum.

t. *Solemne Editionem*, i.e. Publicam, secundum formam dicti c. *cum inibitio*. Vel potest dici *Solemne*, quando fit tribus diebus Solennibus se, paratim à se distantibus. Et sic approbat Consuetudo quae in hoc servanda est, secundum *Hoffm. d. c. cum inibitio. ver. competenti*, maxima si Synodalis Constitutio super hoc facta sit. Et sicut in carnali Matrimonio contrahendo debent praeferri Banna publica, ut hic; sic etiam in Matrimonio spirituali contrahendo. *de elec. c. si. li. 6.* Sed in hoc est differentia, quia ibi Confirmatio non praemissa Editio non tenet; hic vero tenet, quia non est tanta potestas Papae in dissolvendo carnale Matrimonium, sicut spirituale: Sicut quod notatur *de convers. conjug. c. ex publica*. Sed quarto ubi debet fieri huiusmodi Editio Bannorum? *Inno. in dicto c. cum inibitio. dicit, quod debet proponi in omnibus Ecclesiis illius loci, ubi contrahere volentes habitant, vel Latrem in pluribus earum; quod maxime servari debet, quando sunt diversarum Parochiarum: tamen secundum Hoffm. hoc non servatur, immò fit in una Ecclesia tantum ut plurimum; & sufficit, quod fiat publice, secundum eum, ita quòd ad omnes pervenire possit. Extra. de postulato. c. 1.* Et licet Textus in *d. c. cum inibitio*, dicat in Ecclesiis Banna edi debere; sufficit tamen si extra Ecclesiam in locis competentibus, puta, Praedicationibus, proponantur. *de sen. excom. c. Responsio*. Sed ideo dictum est de Ecclesiis, quia ibi, ut plurimum conveniunt homines. Facit ad hoc quòd notatur in *Cle. causam. de elec. & notatur in d. c. cum inibitio. per Jo. An. in addi. ver. in Ecclesiis. & c. ver. per Petrum de Ancharano. ver. secundo quare*. Sed quid si illi, qui contracturi sunt, habitent in uno loco, & sint de alio oriundi ipsi & Parentes eorum, ubi fiet Bannorum Editio? Videatur quòd in Ecclesiis habitationis Parentum, quia ibi melius tenetur veritas Parentela, si aliqua sit, & ibi tenet debet investigatio, ubi melius sciri potest. *de elec. c. scriptum. de purga. ca. c. cum P.* Tutius tamen est, quòd fiat in utroque loco. Nam expedit in loco habitationis Parentum, quia ibi de Parentela, si qua viget, habebitur plenior notitia. In loco vero habitationis Partium habebitur certitudo, an cum aliis ibi contraxerunt. Et hic bene attende secundum intellectum *Inno.* quòd Constitutio *cum inibitio*, in illegitimitate prolis puniit non solum eos, qui contra dictam Constitutionem deteguntur contraxisse in gradu prohibito, sed etiam quocunque alio impedimento Canonico Matrimonium appareat postea non tenere, ut filii inde nati reputentur illegitimi, quantumcumque Parentes contraxerunt bona fide, si non servaverint dictam Constitutionem. Et sic licet dicta Constitutio tractet de impedimento ratione Consanguinitatis, habet tamen locum in quocunque alio impedimento Canonico, ut eo detecto filii censentur illegitimi, si non fuerit haec forma servata. Et hoc videtur *Jo. An. Extra. qui si. sine le. c. ex re. no. ubi de hoc per Petrum de Ancharano.*

a. Interesse. Sacerdotes namque non debent interesse actui qui geritur contra Jura. Similiter nec Testis Testamento Usurarii manifesti. *de usur. c. quoniam. li. 6.* Et facti ad hoc Lex *Subemus. S. bis Tabellionibus. C. de epij. & cler.* nec refert, an Sacerdotes huiusmodi sint Regulares vel Saeulares. Nam etià exemptio non prodest talibus in delictis: quòd dicit, ut legitur & notatur *de privi. l. 1. li. 6.*

b *Ab officio.* Et per consequens Beneficium, quod sine Officio non consistit 81. *di. c. si quis auro.* & *c. si quis Sacrosantum.* & 1. q. 1. *si quis objecerit.* Quid autem si prima Suf. ensione durante interfit aliis Matrimonii prohibitis; An secundæ Suspensionis triennium incipiet finito primo triennio, & tunc finito secundo; & sic de singulis, vel una in reliquam confundatur, quatenus concurrunt Dic ut in *Cle. r. de Magistris, per Job. An.* Et vide circa hoc quod notatur *Extra. de elec. c. cum in cunctis.* & *f. ad Turpill. l. senatus.*

c *Infigendo.* Per Sententiam, ut notat *Job. An. dicto c. cum inibitio. in addi. ver. suspendatur.* Et sic hoc, quod dicit, *infigendo*, refertur ad Episcopum in sua Diocesi, qui ad hoc est executor illius Constitutionis, *Cum inibitio.*

d *Contrahentes.* Sc. Bannis Solenniter non permittis.

e *Etiamsi nullum.* Scil. impedimentum, quod est *infra.* Simile habes dicto *c. cum inibitio. ver. sed bis.*

f *Pena debita.* i. e. Condigna. Et erit arbitraria, cum non exprimat. *Extra. de offi. deleg. c. de causis.* Et sic habes quod contrahentes etiam licite puniuntur, si contempserint Statutū Ecclesie. Sic etiam Miles inobediens Magistro Militum punitur; etiam si culpa licitem habuerit exitum. *f. de re mili. l. 3. §. in bello.* Magna namque præsumptio est transgredi Canones, ut *d. c. cum inibitio. de maja.* & *abe. c. illud.* Hodie verò sic contrahentes, ut aliqui volunt, sunt ipso facto excommunicati. Quod sic ut legitur & notatur *infra. c. c. proxi. §. clandestina.*

g *Quis etiam.* Tertia pars.

h *Regularis.* Etiam exemptus, ut dixi *suprà. §. proxi. ver. interesse.*

i *Solennizationem.* Quæ non debet fieri nisi post Banna Canonice edita, & non potest fieri à prima Dominica Adventus usque ad Octavas Epiphaniæ exclusivè; & à Dominica 70. usque ad primam Dominicam post Pascha inclusivè; & à prima die Rogationum usque ad septimum diem Festi Pentecostæ inclusivè, licet quoad vinculum his diebus contrahi possit. *Extra. de feriis. c. Capellanus. in fi.* Ex quo Textu, quicquid ibi dicant *Hofsi.* & alii *Docti.* apparet, quod in Dominica Trinitatis licite possunt Nuptiæ celebrari: nec obstat ratio *Hofsi.* quam ponit de tribus Hebdomadis computandis à die lune in Rogationibus; & sic secundum eum Dominica Trinitatis est ultimus dies trium Septimanarum. Unde non possunt Nuptiæ celebrari usque ad diem lune post dictam Dominicam, secundum eum & sequaces suos; quia dico, quod sufficit Legislatorem contrarium declarasse & determinasse, ut viz. in Dominica proxima post Pentecostea possit hujusmodi solennizatio fieri. *f. qui & à quibus. l. præfixio.* nec commendo illam expositionem, quam ibi ponit *Hofsi.* in Dominica, i. e. post Dominicam, sc. in crastino Dominicæ; quia si Papa sic intellexisset, sic expressisset. *de deci. c. ad audientiam.*

k *Ecclesiam Parochialem.* Cujus nomine intelligitur etiam Capella habens Jura Parochialia: ut patet *infra. c. c. proxi. ad fi.*

l *Episcopi Diocesani.* Et sic Archidiaconi & alii Ordinarii inferiores hanc licentiam dare non possunt. Nam quod de uno conceditur, per consequens de altero denegatur. *f. de condi. & de. l. cum sit legatum. ff. de legi. l. cum lex.*

in *Speciali licentia*. i. e. Nominatim & in specie facta, sic vix
 ut in hac specialitate specificentur tam Personæ Solennizationem hu-
 jusmodi celebratura, quàm Personæ inter quas fieri debet Solenni-
 zatio; cui dicto in simili concor. Jo. An. de privil. c. religiosi. con-
 speciali. in Glo. & sic fieri tantum est. Arg. ad hoc de do. & consu-
 c. 2. de sen. excam. c. Consultationem. li. 6. de senten. excom-
 muni. c. gratis. in Clemen.

Dicunt tamen Jo. An.
 & Paulus in dicto c. reli-
 giosi quòd sufficit, ut Paro-
 chiano, detur licentia facta
 specificatione Sacramenti,
 licet non exprimatut nomē
 Sacerdotis: & quòd Sacer-
 doti detur licentia facta
 specificatione Sacramenti,
 licet nomina contrahentium
 non exprimatut. Arg.
 ad hoc de tempo. ordi. c. 1.
 de offi. vica. c. ult. de pra-
 ben. c. si Episcopus. li. 6.

Quicquid autem ipsi di-
 cant, tutius tamen est, ut
 hæc specificatio prout præ-
 dixi. Et sic sentit Gess. in
 dicto c. religiosi. Sed quarto, *Quæstio.*
 quid si cupientes inter se

Matrimonii solennizari, dicunt se ab Episcopo Diocesanos obtinuisse
 hanc licentiam, nunquid Sacerdos, a quo petitur, hanc solennizationē
 fieri, debeat eis credere? Jo. & Pau. dicto c. religiosi. videntur con-
 cludere, quòd sic, per id quod notatur de pe. di. 6. placuit. quia
 Sacramenta, de quibus loquitur illud c. religiosi. dantur propter
 recipientes tantum, ut dicunt: & propterea cum Sacramenta præ-
 dicta concernant Forum conscientie, credendum est eorum assertio-
 ni. 1. q. 7. sancimus. de Homicid. c. significasti. 11. contra hoc ta-
 men facit: nam in Sacramento Ordinis, ut conferatur à non suo E-
 piscopo, requiritur, quòd hæc plena fides de licentia, & quandoque
 de causa, de tempo. ordi. c. 1. & 2. li. 6. cum Concordantibus. Sed hoc
 secundum eos ideo fit; quia illud est Sacramentum dignitatis. 1. q.
 1. §. si ergo. & Ecce si Clericus. & facit quod notatur de conjug.
 seruo. c. 1. in glo. 2. nec Sacramentum Ordinis datur alicui propter
 se tantum, sed propter alios. Ecce si bene concipio, mihi videtur,
 quòd ratio Jo. An. & Pauli quam ponunt, quare sit credendum Pa-
 rochiano asserenti se habere licentiam à Curato suo, quòd possit re-
 cipere dicta Sacramenta sacerdote etiam Religioso, bene procederet
 in duobus Sacramento Eucharistie, scilicet in Sacramento extreme
 Unctionis, & Sacramento Eucharistie, quæ duo Sacramenta pec-
 nitentibus, & in Foro conscientie ministrantur, & propter ipsos re-
 cipientes tantum. Sed in tertio Sacramento ibi posito, scilicet Solenni-
 zationis Matrimonii, mihi videtur, quòd non concernit Forum con-
 scientie magis quam Sacramentum Ordinis, de quo prædixi; nec
 concernit recipientes tantum, sed etiam alios, viz. prolem. sive so-
 bolem inde suscitandam pro eorum legitimatione; & propterea, sicut
 in Sacramento Ordinis, requiritur, ut hæc plena fides de licentia, ut
 prædixi; sic etiam in Sacramento Matrimonii, cum eadem sit
 ratio ergo idem erit Jus. ff. ad l. Aquil. l. illud.

n. Eisdem. So. Solennizationi.

o. Interesse. Sc. extra Ecclesiam Parochialem, vel Capellam ha-
 bentem Jura Parochialia.

p. Interim. Computandum à tempore sententiæ Declaratoriæ super hoc ferendæ, in quantum pœna, que sequitur, est sententiæ latoris. Alioquin si sit sententiæ ferendæ, computabitur à tempore quo fertur Sententiæ: pro quo vide quod dicam. *infra. glo. prox.*

q. Si suspensus. Sc. ipso facto, ut patet *infra. c. prox. ad finem. Quando* Sed quia *Glossæ* variz sunt, quando Canon, vel Constitutio dicatur *Canon* de sententiæ latoris, & quando ferendæ: scias, quod quandoque Canon, casus Sen- vel Lex loquitur per participium præteriti temporis, & tunc regu- tentia la- lariter est sententiæ latoris. sic stat *Glossa. de elec. c. cupientes. §. ca. 1a* & quod- icrum. *ver. suspensus. per. fo. li. 6.* Et hoc verum, maximè quando do ferendæ ponitur cum adjuncto, ut eo ipso, vel ipso facto, vel si dicat *Autoritate* hujus *Constitutionis* sit ipso *Fure* privatus: sic stat *Textus* & *Glossa. de elec. c. licet Canon. li. 6.* & ibi per *fo. in vers. privatus.* & facit ad hoc *Glo. de hæreticis. c. quicumque.* Ubi hæc verba, *si innodatus*, important Excommunicationis Sententiæ ipso Jure: ut ibi notat *fo. An. ver. innodatus.* Fallit tamen hoc, ubi alio Jure apparet, quod sit ferendæ, ut in *c. 2. de foro. compe.* ubi ista verba, *si Sequens* fratris, sunt sententiæ ferendæ & non latoris. Quandoque verba non præteruntur in præteritum & tunc, si sint verba propria sive declaratoria, est Canon latoris Sententiæ, verbi gratia, cum dicitur sic: *Decernimus* viribus *carere*, maximè si addatur omnino, ut *d. c. licet Canon.* ubi sic notatur per *fo. in verb. carere.* vel si dicat *Decernimus* non *vivere.* *de elec. c. si cui. ver. vatre. per. fo. li. 6.* Si verò verba sint dispositiva, tunc si verba loquantur in futurum, & respiciunt actum Judicis, verbi gratia *priventur, excommunicentur,* & similia: debet intelligi indubio ferendæ Sententiæ, ut notat *fo. An. de elec. c. cupientes. §. si vero. ver. priventur. li. 6.* facit ad hoc *Glossa. de reg.*

Fur. c. in penis. li. 6. Fallit tamen hoc, quando junguntur hæc verba, vel similia, eo ipso, vel ipso facto, ut dicit *Glo. fo. d. c. in penis.* & est *Textus* cum *glo. de elec. si religiosus. li. 6.* ibi, ipso facto *vivitus* vacuetur. Idem si dicat, *omnino* priventur. *de penis. c. in quibusdam.* vel si dicat, *provisu,* ut notat *glo. fo. d. c. penis.* & hæc intellige vera, nisi ex sequentibus vel præcedentibus appa- teat, quod sint latoris Sententiæ, ut est *Textus* de *elec. c. ne pro defectu.* & *c. n. quisquis.* in *Textu* junctis *Glossis.* Si verò verba non respiciunt actum Judicis, & talia sint, quod possint trahi ad præteritum & futurum; quia in futurum possunt intelligi prout puniunt factum de futuro; sed factum quando erit factum possunt concernere ut de præterito; tunc si verba reperiantur in simili declarata, quod sint latoris sententiæ. late intelliguntur, etiam in simili materia. Sic stat *glo. Extra. de crimine falsi. c. dura. & in c. Clericis. ne Clerici vel mo.* junctis *Loz. ibi,* & juncto *Textu. 17. q. 4. si quis suadente.* Si verò non reperitur declaratum, tunc in dubio intelliguntur ferendæ, nisi jungatur tale verbum in oratione cum verbo quo adjicitur in alia pœna verbum ipso jure, quia tunc qualificatur utraque pœna, ut est *Textus* de *ni. §. bone. cler. c. 1. li. 6.* & facit ad hoc *Lex jam hoc jure. §. de vul. §. pu. subst.* Sed si verba diriguntur ad Canonem promulgatum, intelliguntur latoris sententiæ; maxime si additur verbum *totaliter,* vel simile. *de elec. cupientes. §. ceterum.* & ibi per *fo. in verbo occidentes.* ubicunque autem cadit probabilis dubitatio, an sit ferendæ, an latoris, in dubio debet intelligi ferendæ. Quia hæc est mitior pœna, ut notatur dicto *c. cupientes. §. si vero. ver. priventur. per. fo. An. li. 6.* Hæc Theoricam ponit *Antonius. Extra. de foro. compe. c. si diligenti. ver. §. ex hoc nota.*

TIT. III c.2

Quicumque Matrimonia prohibita non ritè solennizant, de facto excommunicentur, & quater singulis annis publicentur. Non ritè autem solennizant etiam hi, quicumque extra locum legitimum id faciunt.

Johannes Stratford.

• **H** Umana concupiscentia, • & infra. Præsentis auctoritate Concilii Statuimus, quòd • exnunc • Matrimonia contrahentes, & ea inter se • solennizari facientes, quæcumque • impedimenta Canonica in ea parte • scientes, aut • præsumptionem verisimilem • corundem habentes; • Sacerdotes quoque, qui Solennizationes Matrimoniorum • prohibitorum hujusmodi, seu etiam • licitorum inter alios quàm • suos Parochianos in posterum scienter fecerint, • Diœcesanorum vel • Curatorum ipsorum contrahentium • super hoc • licentiâ • non obtenta; • Clandestina etiam Matrimonia in • Ecclesiis, • Otoris, vel • Capellis, solennizari • vi vel metu in posterum • facientes, ac Matrimoniorum • prædictorum • hujusmodi Solennizationi • interessentes, • conscii præmissorum majoris Excommunicationis sententiam incurrant ipso facto. • Et quòd quater annis singulis in genere Excommunicati publicè nuncientur, pœnisque aliis contra • celebrantes Matrimonia, • Bannis non editis, vel • aliis clandestinè • statutis, à Jure • nihilominus arceantur.

• Sanè quia Constitutio bonæ memoriæ *Simonis Mepham*, quondam *Canuariensis* Archiepiscopi, Prædecessoris nostri proximi, quæ incipit, *Item* ^b *Quia ex contractibus*, juxta verborum suorum ^c corticem opinione ^d multorum in ^e sui fine videtur ^f dubia seu ^g obscura, ipsam Constitutionem reddere pro futuro cupientes indubiam, eam sic intelligendam fore, hoc approbante Concilio, ^h Declaramus, quòd quivis Sacerdos, Sæcularis vel Regularis, qui Solennizationi Matrimonii extra Parochialem Ecclesiam ⁱ vel Capellam habentem ^k Jura Parochialia sibi competentia, ^l ab antiquo, interesse præsumpserit, pœnam in ea latam subeat ipso facto.

Divisio.

^a **H** *Umana concupiscentia*. Ista est Constitutio Domini *Johannis Stratsford* Archiepiscopi *Canuariensis* & habet quinque partes. In prima statuit contra contrahentes Matrimonia scientes aliquod impedimentum subesse Canonum, vel de eo præsumptionem verisimilem habentes. In secunda ibi, *Sacerdotes*, statuit contra Sacerdotes solennizantes talia Matrimonia prohibita, vel etiam licita inter non suos Parochianos. In tertia ibi, *Clandestina*, statuit contra contrahentes Matrimonia clandestina, & ea fieri procurantes, & eis interessentes, adjiciendo pœnam in singulis calibus supradictis. In quarta ibi, *Et quod quater*, mandat pœnam hujusmodi quater annis singulis publicari. In quinta ibi, *Sane*, declarat Constitutionem Prædecessoris sui, alias editam in Concilio Provinciali circa Contractus Matrimoniales.

^b *Ex infra*. Hic deciduntur quedam pericula, & abusiones, quæ sæpius contingebant in Contractibus Matrimonialibus, contra quæ hic providetur.

^c *Exnunc*. Sic itaque futura respicit, & non præterita.

^d *Matrimonia*. Nunquid idem dicendum sit in Sponsalibus de futuro? dic quod non: quia hæc Constitutio, cum sit pœnalis, non excedet casum suum; sic sentire videtur *Fo. in Coll. Extra. de. c. cum inhibito*. Ex etiam *Fo. An. in addi.* qui dicit, quòd non sine Mysterio Author ulus est hoc vocabulo, *Matrimonia*. Ex aliud est promittere contrahere & aliud contrahere, secundum eum *Hosliensis* tamen dicit, quòd ex mente Statuentis idem dicendum est: quam multis modis talia Sponsalia tacite confirmantur, & transeunt in Matrimonium præsumptum. *Extra. de spons. c. adolescentes.* & sic eadem ratio probationis remanet, ergo idem Jus, *Extra. de translat. epif. c. inter corporalia*, sed quòd prius dixi, puto verius in casu hujus Constitutionis.

e Solennitari facientes. Sed quid si tantummodo contraxerunt, sed non processerunt ad Solennizationem, nunquid incidant in poenam hujus capituli? videtur quod non: quia illa littera requirit duo, scilicet Contractum & Solennizationem, ergo non sufficit alterum intervenire sine reliquo. *Ar.* eorum que leguntur & notantur, *de re judi. c. 1. li. 6.* & ibi per *Cardi. ver. justitiam.* & per *Jo. An. ver. prodigur.* In contrarium tamen facit, quia sciens impedimenta Canonica ratione quorum prohibetur contrahi Matrimonium, ex solo contractu obligantur ad poenam, licet ulterius processum non fuerit. *de consang. & affi. c. 1. in Clem.* & hoc tunc verius est in hoc casu. Ratio est, quia copula hic posita copulat inter ea que tendunt ad eundem finem, sive effectum; & ideo sufficit alterum eorum intervenire, secundum ea que solent notari per *Dacti. de rescrip. c. 2.* & ibi optime per *Antonium.* Secus tamen esset, si tenderent ad diversos effectus, ut etiam ibi facile notari.

f Impedimenta Canonica. Nedum Divina, sed etiam humana, prout notatur *35. q. 2. §. hi ita, in glo. Extra. de nec. spol. c. litterar. ver. Divina lege.* & impedimenta hujusmodi plura sunt, prout notatur per *Inno. Extra. de spons. c. juvenis, prope fi. & in sum. Jo.*

An. super li. 4. Decr. Quid ergo si Sententia lata est in Causa *Quæstio*
Matrimoniali pro Matrimonio, a qua Appellatum est si Appellans pendente Causa Appellationis nubat alteri, nunquid incidit in poenam hujus Constitutionis? Effectus hujus questionis est, nunquid talis Sententia possit dici impedimentum Canonicum? videtur

quod sic: quia talis sententia ostendit illum, contra quem lata est, fore verum Matricum ejus pro qua lita est, quo præsupposito pro vero non potest tenere Contractus cum alia. *Extra. de spons. c. cum inter.* facit ad hoc quia res iudicata pro veritate accipitur. *ff. fam. her. l. cum putarunt.* & quia ex Sententia sic Jus

inter partes, *Extra. de re judi. cum inter.* & quia pro Sententia Judicis præsumendum est, secundum ea que leguntur & *no. de reman. c. in presentia.* Sufficit enim, quod se contrahens habeat suspicionem verisimilem de impedimento, ut *infra* dicitur in Textu. In contrarium tamen facit; quia Constitutio illa loquitur de impedimento perpetuo, tali viz. quod non solum impedit Matrimonium contrahendum, sed quod dirimit jam contractum: sed impedimentum proveniens ex Sententia non est hujusmodi, maxime quando est ab ea Appellatum, ergo &c. Hoc patet, quia si dicamus quod Appellatio suspendat sive extinguat pronunciatum, prout legitur & *no. ff. ad Turpil. l. 1.* satis possibile est Sententiam ipsam posse infirmari, aut ex eisdem Actis, aut ex de novo in Judicium deducendis, juxta *l. per hanc. C. de temp. & repa. appella.* Sententia igitur non potest dici impedimentum perpetuum, nisi ex eventu quo fuerit confirmata. In quo etiam casu non transiret omnino in rem iudicatum in præjudicium alterius Matrimonii veri. *Extra. de re judi. c. lator.* Et hanc partem puto veritatem, & quod sic contrahens, sciens Sententiam prius contra se latam, non incidit in poenam hujus Constitutionis, nisi hoc faciat lapsu tempore ad prosequendum; & finitendum suam Appellationem, & negligens tuerit in ea prosequenda. Nam tunc Sententia prius lata rata manet, *de appel. c. cum sit.* & *c. reprehensibilis.* & *c. sepe.* nec obstat quod dicitur, res iudicata pro veritate accipitur, & quod ex Sententia sic Jus inter partes; quia illa vera sunt, quando non est Appellatum, sed Sententia transiit in rem iudicatum, ut patet *d. c. cum inter.* nec obstat, quia præsumitur pro sententia Judicis. Nam illa præsumptio bene recipit probationem in contrarium, ut patet dicto *c. in presentia.* Fateor tamen, quod talis, qui facit contra raticum Interdictum Ecclesie, aliis est arbitrariè puniendus, secundum ea que leguntur & notantur *de spons. c. veniens.* & *c. sum Apostolica.*

§ *Scienter*. Secundum rei veritatem. Et hæc scientia potest com-
prehendi ex auditu. 3. q. 4. omnibus. in principi. cum glo. 1. de iure-
jur. c. ex literis. per Innoc. & similiter si scienti non subvenitur,
quia seipsum decipit. ff. quod cum falso tu. l. 1. in fi. & sic habes,
quod ignorantes non ligat hæc Constitutio: quod intellige verum
in ignorantia facti probabili, & non affectata, scilicet quia ignorant
inter eos fore impedimentum aliquod. Si vero ignorat Jus, na-
scentes illud, quod est impedimentum, sunt impedimentum, utpu-
tatur, sciunt se esse et arguuntur in quarto gradu, & sic sciunt gradum,
ignorant tamen in illo gradu contrahere fore prohibitum, tunc li-
gat ipsos Constitutio. de re. jur. ignorantia. li. 6. cum suis con-
cordantiis. Si vero alter contrahentium solus hoc sciat, ille solus
ligatur: facit ad hoc 34. q. 2. non satis. C. so. ma. si ignorans,
quia si contraxerint ignorantes, postea tamen sciunt impedimentum,
& cohabitantes, non ligantur, cum hæc Constitutio non puniat
cohabitantes, sed contrahentes, & inter se Matrimonium solen-
nitari faciunt; tunc ad hoc ff. de hi qui no. infam. l. quid er-
go. in principi. C. de usuc. transfor. l. 1. ad fi. ff. de usuris. l. 1.
qui scit. in fine. ff. de hu. liber. l. qui cum major. & de anno. l. 3.
§. scio. Sic tamen contrahentes & cohabitantes, carnaliter com-
municantes peccant. Argu. ad hoc 2. q. 2. cas. in fi. de fisco-
rum. C. de ince. nupt. l. cum ancil. de senten. excom-
municata. Inquisitioni. & pro hac materia vide notata ff. de
hu. An. de consangu. & affini. c. cas. ver. scienter. in
Glu.

MS. Sc.
ten.
+ attin-
gentes

h *Præsumptionem verisimilem*. Scita namque, & scita debent
æquiparantur. ff. de acquirit. her. l. si dno.

i *Eorundem*. Sc. impedimentorum.

k *Sacerdotes*. Secunda pars,

l *Prohibitorum hujusmodi*. Etiam inter suos Parochianos, ut
differat à casu sequenti.

m *Licitarum*. Id est, non prohibitorum. Edictum namque de
Matrimonio contrahendo est prohibitorium certarum Persona-
rum. de spons. c. cuos apud. alias dici debet permissorium, quia
quilibet admittitur qui non prohibetur. Quandoque est Ed-
icta sunt regulariter permissiva; & tunc omnes admittuntur qui
non prohibentur: & tale est Edictum de Matrimoniis; & de Procura-
toribus. ff. de procura. l. invitus. §. 1. Quandoque Edicta sunt pro-
hibitiva, & in illis omnia sunt prohibita, nisi sint expresse concessa
& ita est illud de Collegiis illicitis, & quod notatur de transla. E-
pif. c. inter corporalia. §. sed neque.

n *Suos Parochianos*. Quando viz. neuter contrahentium subest
ipsi Solennizatio Matrimonium Jure Parochiali.

Quæstio.

Quid ergo si unus contra-
here volentium sit Paro-
chianus suus, alius verò est
de aliena Parochia, an tra-
hebit licetum pena hujus
Constitutionis, si non in-
tervenerit licentia eorum
quorum interest, ut infra
dicitur? Videtur quod non;
quia istud Statutum quod
est penale stricte debet in-
telligi. Unde cum plura in-
ter loquatur de Parochia-
nis, videtur quod non ha-
beat locum in uno: ad quod
facit l. detestatio. §. si. ff. de verb. sig. In contrarium tamen facit
ff. de vi bo. resp. l. 2. §. sed & si unus. & c. l. §. quid ait Prater. ff.
de neg. gest. l. 3. & hæc puto verius. Ar. dictarum Legum que vo-
lunt, quod Statutum loquens de delicto plurium, habeat etiam lo-
cum in delicto unius; & sic sentit Bart. in dicto §. sed & si unus.
prealle.

b *Diacesanorum*. Qui cum habeant eorum in solium per totam Diocesim, possunt licentiam, de qua sequitur, concedere ubique per totam Diocesim: *Ar. ad huc Extra. de success. ab intesta. c. si. de sepul. c. 2. per Fr. An. dic. pro hoc ut notatur 10. q. 1. in summa.* fallit tamen in de consuetudine vel Privilegio Episcopus non possit immediate aliter, sed inferior, ut Archidiaconus. *de offi. ordi. pastoralis. per Fr. An. super glo. 1. §. c. 11. c. cum Episcopus. in no. li. 6.*

c *Curatorum*. Quoad suos Parochianos tantum; circa quod vide quod scripti *supra. c. c. 1. ver. urgente necessitate.*

d *Super hoc*. Sc. super Solemnizatione etiam Matrimonii liciti, e *Licentia*. De qua scilicet. consilare poterit per Epistolam, vel per Testes. quod die ut dicit *supra. c. c. 1. ver. specialis licentia.*

e *Non obtenta*. L. sic non sufficit petere licentiam. nisi resister obliueatur. Quandoque tamen sufficit petere licentiam, licet non obliueatur. *Extra. de regu. c. licet. glo. magna.*

*Multi
modis Ma-
trimonium
dicitur
Clande-
stinum.*

f *Clandestina*. Tertia pars. Et licet scias, quod Matrimonium dicitur *Clandestinum* multis modis. Primo, quando fit sine Testibus, *Extra. c. 2. Secundo, quando fit sine Solemnitate publica. 10. q. 3. aliter* quia sc. Spontanea non petitur ab habentibus eam in Domino, sive potestate, nec traditur dotari; nec postquam ducta est ablinent contrahentes a commixtione carnali biduo, vel triduo. Sitamen omnia haec non intervenierint, non est peccatum. *30. q. 1. c. nostrates. in fi. Tertio, quia non praemittuntur publicae Denunciations, sive Banna publica. Extra. c. c. cum inhibito. & supra. d. e. c. quia ex contractibus.* alios tres modos ponit *Hossi. c. 11. c. 1. & Fr. An. in d. c. cum inhibito.* Et sunt hi in effectum. Primo, quando pubes alteri ligatus contrahit sine licentia Ecclesiae: *de spons. impube. c. accessit. & exonerabatur* Secundo, quando impubes contrahit, quamvis de primis Sponsalibus agatur. Tertio, si contrahit pubes contra Interdictum Ecclesiae specialiter factum, *Extra. de spon. duorum. c. 2. vel generaliter factum, Extra. de ma. contra. contra. inter. Eccl. c. 1. & per totum: & hoc sine Interdictum sit expressum, ut ibi, sive tacitum, ut quis Xis pendet, Extra. de spons. veniens. & c. cum Apostolica* Scias tamen, quod in quolibet casuum predictorum tenet Matrimonium contraetum quoad Deum, nisi aliud perpetuum impedimentum obliet; quod die ut notatur *Extra. de spon. duorum. c. penulti.*

g *Ecclesiis*. Sc. Parochialibus, vel aliis cum generaliter loquatur. i *Oratoris*. Haec vide quod scripti *supra. de decimis. c. quom. fit. ver. Oratoris.*

k *Capellae*. Sive Catam animarum habentibus, sive non.

l *Si vel metu*. Si ergo absque vi vel metu hoc fiat, non habet locum pena quae hic sequitur in casu Celebrationis Matrimonii *Clandestini*. Argumento sumptio à contrario sensu: & potest esse ratio; quia contrahentes clandestine, & sacerdotes Matrimonia huiusmodi solemnizantes, aliis satis puniuntur, secundum ea quae habes *Extra. co. c. cum inhibito*. Unde non non esset iustum rater duplici pena contenti, cum una sit sufficiens. *Extra. de jud. c. et si clerici, in fi.* Sed quia interpretatio Communis facte in contrarium, quae optatur, quod etiam contrahentes & solemnizantes Matrimonia clandestina, & eis scienter intercessentes, etiam nec vi nec metu interveniente incurrant in hanc penam, ut illam Communem interpretationem defendas, remitto te ad notata *supra. de cohab. cler. & mul. 1. ver. publice.* ubi scripti quando fallit argumentum à contrario sensu sumptum.

m *Facientes*. i. e. Complices, & intelligas hoc, sive vi sive metu adhibeatur Sacerdoti solemnizanti, sive ipsi contrahentibus, sive ipsorum Parentibus, aut amicis, sine quorum consensu forsam ipsi contrahentes talem Solemnizationem non subierint.

n *Prædictorum*. Sc. clandestinorum, maxime Bannis non praemissis. aliis potes intelligere de quibuscunque Matrimoniis contrahi prohibitis ratione alicuius impedimenti Canonici, ut dictum est in *vers. 1. & 2. ut viz. facientes vi vel metu talia Matrimonia solemnizari, vel eis intercessentes, & conscii eorundem, incurrant penam huc limitatam: sed quod prius dixi reputo verius ex mente Statuentis, & hoc satis apparet ex litera quae sequitur.*

o *Hujusmodi Solemnizationi*, &c. Quæ ict.iri habet ad Solemnizationem factam vel metu, de qua proximè dixit.

p *Interessentes*. Reperere quòd est *suprà*. *scienter*, & sic intelligi potest quod sequitur.

q *Conscii præmissorum*. ut exponatur sic, *scienter præmissa*. vel potes dicere

conscii præmissorum, etiam si non interfine, sed fuerint absentes, volentes tamen, & consentientes, quòd talia fiant. Nam consentientes & agentes pari poena puniendi sunt. *Extra. de offi. deleg. c. 1. cum concor. ibi in glo.* Sed secundum hunc intellectum oportet, quod habeas in litera sic, & *conscii præmissorum*, Communis tamen litera sic habet *interessentes conscii præmissorum*, & hæc litera est planior, quia secundum hanc literam nihil subintelligitur quoad interessentes, sed declarat qualis interessentia reprobatur: sed si interponatur hæc Copula, & sic ut copulat diversa, & ut comprehendat etiam absentes conclusus talis Solemnizationis, tunc quoad interessentes, oportet subintelligere scienter, ut *suprà* dixi, & ideo planior est litera quæ potest stare sine subintellèctu.

r *Et quòd quater*. Quarta pars.

s *Celebrantes*. i. e. Contrahentes vel solemnizantes: & sic hæc dicitio *Celebrantes* potest referri tam ad eos qui invicem contrahunt, quam ad eos qui contractum solemnizant: & puto quòd in hoc loco sub vocabulo *Celebrantium*, etiam talibus Solemnizationibus interessentes, & eas approbantes contineantur. Nam & hoc importat significatio vocabuli *Celebrare*. Est enim *Celebrare* idem quòd *Festivare*, *Solemnizare*, *Frequentare*, vel *Celebris agere*, quæ omnia locum habent approbative in ipis qui talia approbando interfunt: faciunt ad hoc notata *suprà*. *ne cle. vel mo. c. presentis. ver. interstit. in prim.*

t *Bannis non editis*. Secundum exigentiam *Decr. cum inhibiti. extra. eo.* vel aliàs secundum exigentiam Statuti Provincialis in ea parte editi, vel Consuetudinis certum modum hujusmodi Bannorum Editionis limitantis, ut dixi *suprà*. *eo. c. 1. ver. solemnem editionem.*

u *Aliàs*. Sc. quàm Bannis non editis: & hoc contingere potest quinque modis, ut dixi *suprà*. *eo. ver. clandestina.*

x *Statutis a Jure*. Hic habes scire, quòd contrahens Matrimonium clandestine contra Solemnitatem illius *c. aliter. de qua dixi supra. e. ver. clandestina.* & non aliter, modicam poenam meretur hæc parte Juris, nisi in hoc, quòd sine Benedictione Solemni, vel sine Oblatione in Ecclesia more solito factâ, Sponsus Sponsam suam carnaliter cognoverit. Nam tunc uterque peccat, quia venit contra Consuetudinem generalem Ecclesie, & Contemptor Ecclesiasticæ Consuetudinis, sicut Prævaricator Legis Divinæ, puniunt. *et. di. in his.* Illi verò, qui contrahentes clam sine Testibus solum delinquit, merentur aliquando poenam perpetuæ Excommunicationis, aliquando perpetuæ Adulterii, sc. si antequam Contractum inter eos initium publicaverint, ad hæc omnia vox transierint. *de sen. excommunic. c. inquisitioni. de res. stat. c. literas. §. porro.* In tertio casu, sc. quando non eduntur Banna, tunc habet locum quod legitur *Extra. c. 11. c. cum inhibiti.* In quarto casu, quando sc. Pubes contraxit sine licentia Episcopi, qui prius fuit alteri obligatus, etiam solum ex contractu sponsalicio, puniendi sunt contrahentes arbitrarie, & etiam alii suam presentiam exhibentes sceleris, secus tamen si ignoranter. *Arg. ad hoc de despons. impu. c. duo pueri. in fi. de divor. c. porro. 33. q. 1. Saeculares.* In quinto casu, c. quando impubes contrahit sine licentia Episcopi, dic, ut legitur & notatur *de despons. impube. c. si infanter li. 6.* In sexto casu remitto te ad ea quæ leguntur & notantur *de intro. contra. contra intro. Eccle. per totum.*

MS. E.
12a.
† Obligatus.

y *Nihilominus accensur.* Sic ergo hinc habet, quod Lex nova *Pena Legis nova* supercerro delicto, non videtur tollere antiquam penam, sed potius statore accumulativè: pro quo vide *glo. Job. An. in c. licet non tollit antiquam* *Canon. de elec. l. 6. vers. priusius. ver. Et duo.* Iuxta quæ *Glossam* notat ibi *Dominicus de Sancto Geminiano*, quod ubi una Constitutio imponit penam ipsi Jure super actu per antiquam Legem etiam damnato, non intelligitur sublata Lex antiqua, nec pena antiquæ Legis, quæ potest concurrere cum pena novæ Legis.

a *Sane.* Quinta pars.

b *Quia ex Contractibus.* Hanc Constitutionem habes *supra.*

c. *proximum.*

c *Corticem.* i. e. Superficialem intellectum.

d *Multorum.* Supple, minus bene sapientiam.

e *Sui sine.* Ibi scilicet ubi dicitur, *Quisvis etiam Sacerdos, &c. usque in fi.*

f *Lubia.* Quia potest habere duos intellectus divinos, ut scilicet. unius intellectus sit, sicut littera jacet, quoad Ecclesias Parochiales Matrices, extra quas non debeat fieri Solennizatio, de qua dicit hic. Et sic in Capella etiam Curata dependente ab Ecclesia Parochiali non posset hoc fieri, inveniendo quod Capella licet Curata, non tamen dici potest Ecclesia Parochialis, cum à seipsa Principalitatem non habeat, sed ab Ecclesia Parochiali tanquam Matrìci dependeat, secundum ea quæ alias dixi *suprà. de Consuetudinibus. c. quævis Lex natura. ver. una Ecclesia.* Alius intellectus posset esse, ut etiam talis Capella contineretur sub nomine Ecclesiæ Parochialis. Et iste intellectus hic approbatur, saltem quantum ad eos qui subjacent tali ¶ Ecclesiæ jure Parochiali.

MS. *Æ-*
ton.
¶ Capellæ.

g *Obscura.* Hæc obscuritas colligitur eadem ratione quæ & dubietas, de qua præfertur in Glossa præcedenti.

h *Declaramus.* Sic ergo Successor declarat Constitutionem Prædecessoris sui: pro qua materia vide quod scripsi *suprà. de consuetudinibus. c. statutum. §. hac autem. ver. interpretatione.*

i *Vel Capellam.* In hoc habet locum Declaratio, ut scilicet appellatio *Ecclesia Parochialis* contineatur & Capella habeat Jura Parochialia.

k *Jura Parochialia.* Quæ & in quibus consistant, notatur plenius per *Joh. An. Extra. de Parochiis. super Rubricis* & citigi supra hoc *c. 1. c. 1. ver. Ecclesiis Parochialibus.*

Ab antiquo. Sc. per spatium 40. annorum ad minus, cum Or-
 dinatione Episcopi à principio. 16. q. 1. *quia in cunctis.* ubi pæ-
 tet, quòd ad solum Episcopum spectat constituere Ecclesiam, vel
 Capellam Parochialem. Et hoc verum puro in his Capellis qui-
 bus instituitur aliquis ut perpetuus Curatus ejusdem, licet de-
 pendeat talis Capella ab Ecclesia superiori, ut notatur 16. q.
 1. c. *plures. in princ. per Archid.* Tales namque Capellæ possunt
 præscribere Decimas, & alia Jura Spiritualia contra Matricem Ec-
 clesiam. *de præscrip. c. ex transmissa.* Sin autem in tali Capella non
 sit institutus proprius Curatus perpetuus, sed remotivus ad
 libitum Prælati majoris Ecclesie, potest nihilominus in casu
 talis Capella habere Jura Parochialis, videlicet ex Consuetu-
 dine præscribere. ¶ Consuetudo namque multum potest in tran-
 serendo Jus unius Ecclesie ad aliam. *Extra. de Decimis. c.*
dudum. & c. & ad Apostolica. & c. cum in tus. & c. cum
fiat. Similiter hoc fieri potest ex Compositione. *Extra. de*
Decimis. c. ex multiplici. Item ex Privilegio. *de Deci. c. ex*
transmissa. & c. à nobis. Item ex Præscriptione, ut dicto c.
cum in tua. & de præscrip. c. de quæta. cum similibus. Et
 circa hanc materiam, videlicet quomodo ad Capellam subdi-
 eam Ecclesie Matrici possunt pertinere Decimæ, & alia Jura
 Parochialis, vide, si placeat, notata per *Anto. de Butrio.*
de Decimis. c. cum contingat. vers. tenio igitur ad secundum.
ss. vers. sequentibus.

FINIS Quartæ.

APPENDIX B

**REFORMATIO
LEGVM ECCLESIASTI-
CARVM, EX AVTHORITA-**

te primum Regis Henrici. 8. in-

choata: Deinde per Regem Edo-

uardum 6. prouecta, aduictaq;

in hunc modum, atq; nunc ad

plenioram ipsarum refor-

mationem in lucem

edita.

LONDINI

Ex officina Johannis Daij Anno

salutis humanæ, 1571.

Mense Aprili.

TITULUS I - DE HAERESIBUS

Cap. 20. De matrimonio.

Jam inde a primis Ecclesiæ temporibus magna fuit hæreticorum turba, quæ matrimonium auersabatur ut sædam rem et inquinatam, et vel funditus e cœtu fidelium aufercbant, vel, si semel imbecillitati nostræ permitteretur¹, tamen illud nullo modo repetendum esse putabant; quorum sententia quoniam a regula pietatis, quæ sacris in literis lucet, vehementer abhorrebat, Ecclesiæ censura veteri jam olim explosa est. Sed diabolus pro hac impietate aliam subiecit, nimirum ut omnes qui solitariam vitam profiterentur, aut ad Ecclesiæ administrationem aggregarentur, matrimonii contrahendi facultatem in omne tempus amitterent. Quod eorum iniquum institutum, quoniam pugnat cum sacris scriptis, aboleri penitus, et pro nullo volumus haberi.

¹ permitteretur.

TITULUS V - DE SACRAMENTIS*Cap. 7. Nuptias solemniter celebrandas esse.*

Nuptiarum solemnnes ritus in oculis omnis Ecclesiae summa cum gravitate et fide collocari statuimus, quibus si quicquam absit eorum, quae nos in illis sancivimus⁴, pro nullis statim haberi placet.

⁴ nullis sancimus.

TITULUS VIII - DE MATRIMONIO*Cap. 1. Matrimonium quid sit.*

Matrimonium est legitimus contractus, mutuam et perpetuam viri cum femina conjunctionem Dei jussu inducens et perficiens, in quo tradit uterque alteri potestatem sui corporis, vel ad prolem suscipiendam, vel ad scortationem evitandam, vel ad vitam mutuis officiis gubernandam. Nec ullis² promissis aut contractibus matrimonium posthac procedere volumus, quocumque verbis et quibuscumque concurrentibus, nisi fuerit hac formula celebratum³, quam hic subiiciendam esse curavimus.

² Nam nullis.

³ celebratum om.

Cap. 2. Matrimonium quomodo contrahatur.

Principio, qui minister est Ecclesiae, tribus Dominicis, aut saltem tribus festis diebus, publice futuras nuptias in Ecclesia populo denuntiet. Deinde sponsus et sponsa se palam in Ecclesia collocabunt, et coram ea⁴ ceremonias et ritus obibunt, quae nostrae de rebus divinis sanctiones in hoc genere postulant. Huic autem formulae tantam auctoritatem damus, ut quicquid praeter eam dictum gestumve fuerit, quacumque ratione matrimonium in eo non¹ possit existere, sed omnia hujusmodi praeparationes sint, aut praelusiones quaedam ad matrimonium, non autem ipsum matrimonium in illis inest. Itaque liberae solutaeque sunt² utraque personae, nec altera potest ab altera matrimonii jus ullum postulare, donec adhibito legitimo ceremoniarum apparatu mutuam fidem coram Ecclesia certis verbis dederint et acceperint.

⁴ eas.

¹ non om.

² libere soluteque sint.

Cap. 3. *Corruptores mulierum quomodo puniendi.*

Nec tamen illorum sæda libido gravi pœna carere debet, qui simplicitatem puellarum et mulierum innocentiam circumveniunt, et illarum castitatem promissis et blanditiis obsident³, donec turpissimo corporibus earum tandem illudant. Nam cum pudicitie thesaurum illis detrahant⁴, omnibus reliquis opibus et copiis pretiosiores, in graviorem⁵ illos æquum est pœnam incidere, quam fures, quorum in rebus externis peccat improbitas. Ex ecclesiis⁶ igitur illos excommunicationis telo præcipimus exturbari; nec ullum ad eas reditum illis esse, nisi velint illas uxores ducere, quibus abutebantur prius ut scortis. Verum hoc si forte fieri non potest, iudices illorum bona agnoscent, et ex eorum diligenti consideratione tertiam partem ad mulieres revocabunt, quæ libidine sunt illorum inquinatæ. Quod si bona partitionem hanc non ferant, tamen ad prolem suis impensis sustentandam damnabuntur. Et præterea tantas sibi pœnas impositas habebunt, quantas iudex ecclesiasticus ad Ecclesie tollendam offensionem satis esse putabit, si divulgatum crimen eorum fuerit.

³ obsiderint.

⁶ Ecclesie.

⁴ detrahunt.

⁵ graviores.

Cap. 4. *Matrimonium sine consensu parentum non valere.*

Quoniam sacræ Scripturæ, pietati, justitiæque conveniens est, ut matrimonia damnentur, et pro nullis habeantur, quæ vel liberi vel orphani, nec scientibus nec consentientibus aut parentibus aut tutoribus, contrahunt, præcipimus, ut nec liberi nec orphani uxores ducant aut nubant¹, nisi auctoritas illorum intercesserit in quorum potestate sunt; quod si fecerint, tales nuptias omnino non valere sancimus, et ad nihilum recidere. Quod si parentes vel tutores in providendis nuptiarum conditionibus nimium cessaverint, aut in illis proponendis nimium duri et acerbi extiterint, ad magistratum ecclesiasticum confugiatur, a quo partes eorum in hujusmodi difficultatibus agi volumus, et ejus æquitate totam causam transigi.

¹ nubant.

APPENDIX B

Cap. 5. *Ætas, tempus, et locus matrimonii² quæ sint.*

Sequitur, ut certam ætatem ponamus in qua nuptiæ concludi possint, et tempora designemus ad quæ revocari debeant. Igitur fœmina cum ad duodecimum annum plene pervenerit, virum sponsum, vir cum ad annum decimum quartum ascenderit, fœminam sponsam, accipere potest. Nec annos his³ inferiores ullo modo nuptiarum participes esse sinimus. Tempora vero nulla sint⁴ excepta ad celebrandas nuptias, modo sint hujusmodi, ceremonias⁵ ut admittant⁶ in hac lege nostra comprehensas⁷. In loco vel (ut vocant) parœcia semper hoc servari placet, ut is sumatur ad nuptias in quo vel sponsa vel sponsus inhabitat. Et si quis minister illos in alio loco matrimonio conjunxerit, in pœnam¹ excommunicationis incurret.

¹ conjunxerit. pœnas. ² matrimoniis. ³ hic. ⁴ sunt.
⁵ ceremoniar. ⁶ admittunt. ⁷ comprehensar.

Cap. 6. *De prohibendis nuptiis.*

Cum in Ecclesiam² sponsus et sponsa convenerint ut matrimonio jungantur, si se quispiam interposuerit eo tempore, causamque afferat, aut afferre possit dicat, cur in matrimonio esse non possint, et hanc rem intra mensem proxime consecuturum se probaturum esse spondeat, et nisi ita faciat satisfacturum se pleno pro omni apparatu qui fuerat in celebratione nuptiarum futurus, et ad id non solum se, sed etiam pro se fidejussores locupletes obligaverit, tum demum audiatur, et matrimonium totum mensem differatur. Hæc tamen dilatio quoniam aliquando dolum malum habere potest, et fraudem, ut interim novis nuptiis locus esse possit, ad tollendam astutiam omnem hoc ista lege præcavetur, ut pendente controversia prioris matrimonii, totum mensem exitum illius expectent, nec ad ullas interim novas nuptias divertant. Quam constitutionem nostram si levitate sua violaverint, novum³ omne hujusmodi matrimonium⁴ damnatum et tollimus, et persona, quæ rea fuerit hujus defectionis, excommunicationis pœnam sustinebit, donec personæ satisfecerit a qua descivit.

⁴ matrimonii.

² Ecclesia.

³ novum.

Cap. 7. Quæ matrimonium impediunt.

Quorum natura perenni aliqua clado sic extenuata est, ut prorsus Venoris participes esse non possint, et hoc^s conjugom lateat, quanquam consensu mutuus extiterit, et omni reliqua ceremonia matrimonium fuerit progressum, tamen verum in hujusmodi conjunctione matrimonium subesse non potest; destituitur enim altera persona beneficio suscipiendæ proliæ, et etiam usu conjugii caret. Verum si nota sit utrique peruersitas hæc corporis, et tamen mutuus perduret de matrimonio consensus, nuptiæ procedant, quoniam volentibus nulla injuria potest fieri. Par est ratio corporum maleficis artibus excantatorum et enervatorum, in quibus quoniam fructus nuptiarum tollitur, ipsas quoque nuptias detrahi necesse est. Præterea matrimonium dissolvetur, si uni personæ de altera non constiterit, vel quæ fuerit, vel qua conditione fuerit, conditionem autem hoc in loco capimus vel pro libertatis statu, vel servitutis.

^s hoc om.

Cap. 8. Quæ difficultates non impediunt matrimonium.

Mutis et surdis, qui mente consistunt, matrimonium permittimus, quoniam signis inter se voluntatem et consensum testificari possunt: furiosi vero, nisi quædam habeant furoris intervalla, quibus res suas ratione moderari possint, omnino sunt¹ a nuptiis summovendi. Cum his qui non sunt Christiana fide, Christianis matrimonium non instituetur. Nam cum liberos Christianos in fide Christiana par sit enutrirî, magnus est metus, ne id, nisi utroque Christiano parente, ita esse non possit. Sed si contingat, ut eorum qui jam sunt conjuges diversa religio fuerit, non temere distrahentur hujusmodi personæ, sed juxta Pauli doctrinam respectu Christianæ charitatis tam diu cohærebunt, quam diu persona quæ aliena religione est una vivere ac cohabitare sustinebit.

¹ sunt om.

Cap. 9. Omnibus permittendum esse matrimonium.

Quoniam matrimoniorum² legitimus et pius usus est, et turpitudinem multorum flagitiorum excludit, illa quoties opus erit, modo rite fiant, repeti posse volumus. Nec ullas personas, cujuscunque sint conditionis, ordinis, aut ætatis, a nuptiis abarcemus. Tamen Christianis fœminis quæ grandes sunt, et ætate multum provectæ, consilium damus, et illas etiam magnopere cohortamur, ne se velint cum adolescentibus matrimonio conjungere, tum quia¹ liberos ex illis habere non possint, tum quia² in illa levitate magna sit et multiplex perversitas.

² matrimonium.¹ tumque.² possunt, tumque.*Cap. 10. Polygamiam esse vitandam.*

Polygamiam autem profligari legibus nostris volumus, et in eisdem nuptiis solum ponimus unum, atque adeo unicum par; sic enim matrimonium fuit a Deo primo fundatum. Itaque si quis plures uxores acceperit, omnes posteriores amandet³, et solum retineat quam sumpsit primam, (si maritum velit illum agnoscere;) ceteris vero, quibus abeundum est, singulis dotem dispertiat, et Ecclesiæ præterea satisfaciat, affectus illa pœna quam judex tanto sceleri convenire existimabit. Tum mulierum etiam nequitia supplicio castigabitur, si scientes ad eundem se virum contulerint, et si illarum in eo maleficio culpa ulla⁴ deprehendi possit.

³ amendet.⁴ illa.

Cap. 11. Propter contentiones et rixas non tolli matrimonium.

Concluso jam matrimonio, si tales rixæ, contentiones, injuriæ, concertationes, acerbitates, contumeliæ, luxus, pravitates multiplicis generis tam vehementer exæstuant, ut in eisdem ædibus conjuges commorari noliunt, nec cetera matrimonii jura sibi mutuo præstare, poenis impliceantur ecclesiasticis, et in eisdem ædes compellantur, et otiam revocentur ad pia inter se communicanda matrimonii officia, modo nulli tales casus inciderint, propter quos ipso jure divortium petere liceat.

Cap. 12. Matrimonia vi et metu contracta non valent.

Summatim hoc ad omnia matrimonia pertinere volumus, ut si vis et metus illa coegerint, modo tanta fuerint ut in viros constantes juxta juris civilis doctrinam cadere potuerint, omnino tales violentes nuptiæ distrahantur, et pro nullis habeantur. Quamquam difficillime quidem et vix hæc difficultates ad matrimonium irrumpere possunt, si legitimos omnes ritus habeat, et tota perpolitum sit illa forma quam ante posuimus, tamen vis et metus, si ulla ratione irruerint, matrimonium ex illis expressum prorsus dissolvi placet.

Cap. 13. Ut matres propriis uberibus infantes alant.

Inveteravit in uxorum moribus nimium mollis et delicata consuetudo, suam ut prolem a propriis uberibus ablegent, et ad alias nutrices amendent. Quæ res cum plerumque nullis probabilibus causis nitatur, sed tenera quadam suorum corporum indulgentia fiat¹, ut sibi ipsæ parcant, et honestos et naturales educationis labores subterfugiant, et cum hæc inhumana matrum et degener ignavia multorum causam malorum afferat, ad officium concionatorum nostrorum arbitramur pertinere, matres ut cohortentur ne prolem in lucem editam inhumaniter destituant, et beneficium illis uberum suorum negent, quibus paulo ante beneficium impartiverunt suorum uterorum et viscerum.

¹ fit.

TITULUS IX - DE GRADIBUS IN MATRIMONIO PROHIBITIS*Cap. 1. Inter personas non legitimas non debere
matrimonium esse.*

Quoniam matrimonium est legitima viri cum fœmina conjunctio, magna cautio adhiberi debet, ne tales personæ contra jus et fas ad nuptias accedant, et earum vinculo colligentur, quales divinæ leges ad hujusmodi convictus¹ societatem admitti nolunt. Nam id si contingeret², regnum nostrum et Ecclesias in illo dispositas incestus contaminaret, deinde personas ipsas nefariis congressibus turpificatas, necesse esset in Dei summum odium incurrere.

¹ conjunctionis. ² contigerit.

Cap. 2. Consanguinitas et affinitas quid sint.

Multiplices consanguinitatis et affinitatis gradus sunt, in quibus matrimonium consistere non potest. Primum autem ut ipsa capita cognoscantur, consanguinitas in illis intelligatur qui majoribus eisdem procreati sunt, quibus nos generati sumus, vel propagatione carnis et sanguinis a nobis³ descenderunt. Affinitas vero per conjunctionem maris et fœmiuæ ingreditur. Hæc autem duo capita consanguinitatis et affinitatis sic comparata sunt, ut primum divinæ leges, deinde civiles certos⁴ in utroque genere gradus, annotarint, in quos matrimonium intrare nullo modo debet.

³ a nobis om. ⁴ certos du.

Cap. 3. *Dicium jus in matrimonio prohibendo quale sit.*

Deus in¹ his gradibus certum jus posuit Levit. xviii. et xx. capito; quo jure nos et omnem nostram posteritatem teneri² necesse est. Nec enim hæc illorum capitum præcepta veteris Israelitarum reipub. propria fuerunt, (ut quidam somniant,) sed idem auctoritatis pondus habent, quod religio nostra decalogo tribuit, ut nulla possit humana potestas quicquam in illis ullo modo secus³ constituere. Itaque pontifex Romanus illam impie sibi facultatem arrogat: et conscientias suas graviter consauciant, quicumque vel a pontifice Romano, vel a quocunque alio, tales in hac causa dispensationes (ut vocant) conquirunt. Hoc tamen in illis Levitici capitibus diligenter animadvertendum est, minime ibi omnes non legitimas personas nominatim explicari. Nam Spiritus sanctus illas ibi personas evidenter et expresse posuit, ex quibus similia spatia reliquorum graduum et differentiarum inter se facile possint conjectari et inveniri. Quemadmodum, exempli causa, cum filio non datur uxor mater, consequens est, ut ne filia quidem patri⁴ conjunx dari possit⁵. Et si patris non licet uxorem in matrimonio habere, nec cum avunculi profecto conjuge nobis nuptiæ concedi possunt.

¹ id.² tenere.³ secus om.⁴ patria.⁵ potest.Cap. 4. *Regulæ observandæ in jure Levitico.*

Ut ergo pellantur omnes errores, reliquæ nobis enumerandæ sunt et intexendæ personæ, quæ paribus graduum finibus conjunctæ sunt cum illis personis quarum sacræ Scripturæ mentionem apertam⁶ faciunt. In quo duas regulas magnopere volumus attendi; quarum una est ut qui loci viris attribuuntur, eosdem sciamus fœminis assignari, paribus semper proportionum et propinquitatum gradibus. Secunda regula est, ut vir et uxor unam et eandem inter se carnem habere existimentur, et ita quo quisque gradu consanguinitatis quemquam contingit, eodem ejus¹ uxorem continget affinitatis gradu, quod etiam in contrariam partem eadem ratione valet. Et istis finibus si nos tenebimus, plures non inducemus illegitimas personas quam sacræ Scripturæ constituunt, et illos gradus integros et inviolatos conservabimus de quibus nobis Deus præcepit.

¹ jus.⁶ certam.

Cap. 5. Enumeratio personarum in Levitico prohibitarum.

In Levitico dispositæ personæ citantur his nominibus, mater, noverca, soror, filia filii, filia filiæ, amita, matertera, uxor patrui, nurus, uxor fratris, filia uxoris, filia filii uxoris, filia filiæ uxoris, soror uxoris. Personæ vero quas prætermittit Leviticus hæc sunt: socrus, avia, et quæ supra eam² sunt directa via, quoniam omnes hujusmodi matrum loco nobis esse videntur. Et ex altera parte filia proneptis, et quæcunque infra sunt et ex illis procreantur; a quibus quoniam filiarum similitudinem habent³, nos abstinere debemus. Adjiciuntur fratris filia, sororis filia, et quæ recta linea descendendo ex eis procreantur, uxor filii fratris, uxor filii sororis, filia fratris uxoris, filia sororis uxoris, soror patris uxoris⁴, soror matris uxoris, filius leviri, filius gloriæ, maritus sororis patris, maritus sororis matris, maritus filia fratris, filius privigni, filius privignæ.

² ca.³ habcant.⁴ soror patris uxoris om.*Cap. 6. Quæ consideranda sint in superiore catalogo.*

Et hi superioris legis antegressi gradus duplicem considerationem habent. Primum enim non solum in legitimis matrimoniis talem habent dispositionem qualem jam posuimus, sed eundem in corporum illegitima conjunctione locum habent. Filius enim quo jure matrem non potest uxorem sumere, eodem nec patris concubinam habere potest, et pater quomodo filii non debet uxorem contractare, sic ab illa se removeri debet, qua filius est abusus. Qua ratione mater nec cum filia marito jungi debet, nec etiam cum illo congregari qui filiam¹ oppresserit. Secunda ratio² est, non solum istas maritis adhuc superstibus disjungi personas quas diximus, sed etiam illis mortuis idem perpetuo valere. Quemadmodum enim horribile flagitium est in vita patris, fratris, patrui, aut avunculi, audere illorum uxores violare, sic post mortem illorum matrimonium cum illis contrahere parem turpitudinem habet.

¹ quæ filium.² cautio.*Cap. 7. Cognatio spiritualis non impedit nuptias.*

Spiritualis illa quæ vulgo dicitur necessitudo, cum nec inducta sit sacris Scripturis, nec ullis fulciatur solidis et firmis rationibus, matrimonii cursum prorsus impedire non debet.

TITULUS X - DE ADULTERIIS ET DIVORTIIS*Cap. 1. Adulteria secrete punienda esse.*

Turpitudine tam horribilis adulteriorum est, ut aperte decalogi præcepto confossa sit, et etiam veteribus divinis legibus per Mosen latis publica populi lapidatione obruta et consepulta esset; denique jure civili etiam capite plecteretur. Rem igitur Deo tam odiosam et a sanctissimis majoribus nostris singulari cruciatu confixam¹, ecclesiastici judices nostri non debent sine gravissima pœna dimittere.

¹ crucifixam.

Cap. 2. Ministri de adulterio convicti quomodo puniendi sunt.

Ordiamur ab ecclesiarum ministris, quorum vita præcipua quædam integritas esse debet². Itaque si quis ex illis adulterii, scortationis, aut incestus convictus fuerit, si propriam habuerit uxorem, omnes ejus opes et bona devolventur ad eam et ad liberos, si qui sint ex ea, vel ex aliquo priore matrimonio legitime nati. Si vero nec suam uxorem nec liberos habeat, omnes ejus facultates, arbitrato judicis, vel inter pauperes dispertientur, vel in alia pietatis officia conferentur. Deinde si quod illi beneficium fuerit, postquam adulterii vel incestus vel scortationis convictus fuerit, ex eo tempore protinus illud amittat, nec illi potestas sit³ ullum aliud accipiendi. Præterea vel in perpetuum ablegetur exilium, vel ad æternas carceris tenebras deprimatur.

² deberet.

³ sit om.

Cap. 3. Laicus quomodo puniendus.

Laicus adulterii damnatus uxori suæ dotem restituito; deinde bonorum universorum dimidiam partem eidem uxori concedito. Præterea, vel in perpetuum exilium ito, vel æternæ carceris custodiae mancipator.

Cap. 4. Uxores sive ministrorum sive laicorum quomodo puniendæ.

Uxores, ex contraria parte, tam laicorum quam ministrorum, si crimen adulterii contra illas probatum fuerit, et iudex adversus illas pronunciaverit, dotibus carebunt, et omnibus emolumentis quæ vel ex¹ ullo regni nostri jure vel consuetudine vel pacto vel promisso poterant ex bonis maritorum ad illas descendere, tum etiam vel in sempiternum exilium ejicientur, vel perpetuæ carceris custodiæ mandabuntur.

¹ ex om.

Cap. 5. Integra persona transit ad novas nuptias.

Cum alter conjunx adulterii damnatus est, alteri licet innocenti novum ad matrimonium (si volet) progredi. Nec enim usque adco debet integra persona crimine alieno premi, cœlibatus ut invite possit obtrudi. Quapropter integra persona non habebitur adultera, si novo se matrimonio devinxerit, quoniam ipse causam adulterii Christus excepit.

Cap. 6. Reconciliationem esse optandam.

Quoniam in matrimonio summa conjunctio rerum omnium est, et tantus amor quantus potest maximus cogitari, vehementer optamus ut integra persona damnatæ veniam indulgeat, et illam ad se rursus assumat, si credibilis melioris vitæ spes ostendatur. Quam animi mansuetudinem licet nullæ possint externæ leges præcipere, tamen Christiana charitas sæpe nos ad eam adducere potest. Quod si damnata persona non possit ad superiorem conditionem admitti, nullum illi novum matrimonium conceditur.

Cap. 7. Nemo conjugem arbitrata suo potest relinquere.

Magna res est et ingentem affert totius familiae perturbationem, cum uxor a viro distrahitur. Quapropter adulterii respectu, nemo suam a se conjugem autoritate propria removeat, et aliam adsciscat, nisi iudex ecclesiasticus totam causam rite prius cognoverit et definiverit. Quod si facere quispiam ausus fuerit, jus omne agendi adversus conjugem amittat. Iudex autem, quoties alterum conjugem adulterii condemnat, alteri sinceræ personæ libertatem denunciare debet ad novum matrimonium transeundi; cum hac tamen exceptione, certum ut tempus assignet, in quo superiorem ad conjugem (si velit) redire possit; quod si tempore jam absumpto recuset facere, tum ad aliud matrimonium descendere potest. Et hoc tempus quod iudex indulgebit, omnino volumus anni spatium vel sex mensibus definiri.

Cap. 8. Divortium propter desertum matrimonium.

Cum alter ex conjugibus aufugerit, seque abalienavit ab altero, si persona absens possit inveniri, consiliis, hortationibus, et pœnis cogatur ut ad conjugem se rursus adjungat, et una cum illo convenienter vivat. Quam ad rem si nulla ratione potest adduci, contumax in eo persona debet accipi, legumque divinarum et humanarum contemptrix: et propterea perpetuæ carceris custodiæ dedatur, et deserta persona novarum potestatem nuptiarum ab ecclesiastico iudice sumet. Cum autem conjunx¹ non possit absens investigari nec crui, no² locus ullus in hoc crimine levitati vel temeritati relinquatur, primum absentem personam nominatim requiri volumus illa juris formula, quam viis et modis appellant; quo tempore si se non ostenderit aut ejus aliquis vicarius qui causam ejus velit agere, iudex illi biennium vel triennium indulgebit, in quo persona possit absens se representare. Quo tempore consumpto, si se ipse non sistat et justas afferat absentiae tam diuturnæ causas, destituta persona nuptiarum vinculis liberabitur, et novum sibi conjugem (si velit) assumet³. Desertrix autem persona, si, iudicio jam peracto novisque consecutis nuptiis, sero post biennii vel triennii spatium expletum sui potestatem fecerit, in æternas carceris tenebras detrudatur, et secundum matrimonium plcuissimo juro valeat.

¹ contumax.² nec.³ sumat.

Cap. 9. *Divortium propter nimis longam conjugis absentiam.*

Quando non aufugerit conjunx, sed militiam aut mercaturam aut aliquam habet hujusmodi legitimam et honestam peregrinationis suæ causam, et abfuerit diu domo, nec illius vel de vita vel de morte² quicquam certo sciatur, largientur alteri conjugi iudices (si quidem hoc ab illis requirat) biennii vel triennii spatium, in quo mariti reditum expectet. Quo tempore toto si non revertatur, nec de vita possit illius aliquid esse explorati, cum diligentissimo de ea fuerit interim perquisitum, alteri conjugi novas concedi nuptias æquum est; cum hac tamen conditione, prior ut maritus si tandem se repræsentet, uxor illum rursus ad se recipiat, si quidem ostendere possit culpa sua factum non esse, quod foras tam diu peregrinatus sit. Tantam enim et tam longi temporis absentiam nisi plene³ magnaque cum ratione possit excusare, custodiam in perpetuam carceris dimittatur, nullum ad uxorem reditum habeat, et illa secundis in nuptiis rite permaneat.

² de morte om.

³ plena.

Cap. 10. *Inimicitia capitales divortium inducunt.*

Inter conjuges si capitales intercedant inimicitia, tamque vehementer exarserint, ut alter alterum aut insidiis aut venenis appetat, aut aliqua vel aperta vi vel occulta peste vitam velit eripere, quamprimum tam horribilo crimen rite in iudicio prolatum fuerit, divortio volumus hujusmodi personas distrahi. Majorem enim conjugi facit injuriam persona, quæ salutem et vitam oppugnat, quam ea quæ ex consuetudine se conjugis eximit, aut corporis sui potestatem alteri facit. Nec inter illos ullum consortium esse potest, inter quos capitale periculum cogitari cœpit et metui. Cum igitur una non possint¹ esse, juxta Pauli doctrinam matrimonium² dissolvi par est.

¹ una possunt.

² matrimonium om.

Cap. 11. *Mala tractationis crimen tandem divorcium inducit.*

Si vir in uxorem sæviat, et acerbitatem in ea nimiam³ factorum et verborum expromat, quam diu spes ulla placabilitatis est, cum illo iudex ecclesiasticus agat, nimiam ferociam objurgans; et si non potest monitis et hortationibus profici, pignoribus oblati, aut fidejussoribus acceptis, cum cavero compellat de nulla vehemente⁴ conjugii inferenda injuria, et de illa tractanda quomodo matrimonii intima conjunctio postulat. Quod si ne pignoribus quidem aut fidejussoribus coerceri potest maritus, nec asperitatem velit isto modo deponere, tum capitalem illum conjugis inimicum esse existimandum est, et illius vitam infestare. Quapropter divortii remedio periclitanti succurrendum erit, non minus quam si vita manifesto fuisset oppugnata. Nec tamen præterea juris dempta esto¹ potestas coercendi uxores quibus modis opus fuerit, si rebelles, contumaces, petulantes, acerbæ sint et improbæ; modo rationis et æquitatis fines mariti non egrediantur. Et cum in hoc, tum in² superioribus delictis hoc teneri placet, ut solutæ personæ novas (si velint) nuptiarum condiciones legant, convictæ vero priorum criminum vel exiliis perpetuis, vel æterna carceris custodia plectantur.

³ nimia.

⁴ vehementi.

¹ est.

² in his sup.

Cap. 12. *Parvæ contentiones, nisi perpetuæ sint, divorcium non inducunt.*

Si minores quædam contentiones aut offensiones obrepserint in matrimonio, Pauli sententia moderatrix earum esse debet, ut aut uxor marito se reconciliet, quod omnibus pœnarum et hortationum ordinariis et extraordinariis viis procurari debet, aut absque novo conjugio maneat; id quod et viro pariter faciendum statuimus.

Cap. 13. *Perpetuus morbus non tollit matrimonium.*

Si forte conjugum alteruter perpetuum aliquem morbum contraxerit, cujus nulla levatio possit³ inveniri, tamen matrimonium in omnibus hujusmodi difficultatibus perdurabit. Quoniam hoc unum esse debet præcipuum et eximium matrimonii commodum, ut mutua⁴ mala mutuis conjugum officiis sedari lenique possint.

³ potest.

⁴ multa.

Cap. 14. Durante lite quomodo rei persona sustentabitur.

Quoniam saepe magnam controversiam habent et longissimi sunt temporis lites adulteriorum, veneficiorum, capitalium insidiarum, et malæ tractationis, vir uxorem interim honestis et convenientibus impensis sustentet, habita ratione dignitatis et conditionis in qua est.

Cap. 15. Pœna falsæ accusationis.

Multorum libidines hujusmodi pruritus habent, ut nova subinde matrimonia consecutur, et ad varias uxores devolare concupiscant. Quapropter falsas innocentibus calumnias struent adulteriorum, et aliorum hujus generis criminum, nisi sceleribus illorum suppliciorum acerbitate fuerit occursum. Itaque si vir uxorem adulterii vel veneficii ream fecerit, et post causa cadat, dimidia bonorum pars ad uxorem revocetur: nec in illis vendendi, distrahendi, legandi, permutandi, donandi, vel alienandi quacunque ratione jus ullum habeat, nisi uxor in id consentiat. Et uxor ex altera parte, si maritum adulterii, veneficii, capitalis injuriæ, vel malæ tractationis postulaverit, et litem amittat, dote primum careat; deinde orbetur omni emolumento, quod jure per maritum debuit ad illam pervenire, nisi maritus illi sponte voluerit aliquid aspergere. Postremo matrimonium inter illos ita ut erat integrum conservetur.

Si non conjunx conjugem, sed alterum ex his externa quædam persona reum faciat, et in judicio succubuerit, ecclesiasticus judex illum arbitrato suo magna tamen et acri pœna feriat, et etiam conjugi satisfaciat cui damnum dedit. Denique calumniatores hujusmodi nec ad Ecclesiam redeant, nec admittantur ad sacramenta, nisi famam ejus personæ, quam calumnia et mendacio dedecoraverunt, plene restituerint quantum possunt¹, et pœnitentia scelere digna perfuncti fuerint. Et has in hoc genere pœnas omnibus sive laicis sive clericis communes esse volumus.

¹ adulterii, vel.¹ possint.

Cap. 16. Mariti pœna suadentis uxori adulterium.

Si maritus uxori susor aut author ulla ratione fuerit adulterii committendi, damnabitur illa quidem adulterii, sed et maritus lenocinii reus pronunciabitur, et matrimonii conjunctione neuter liberabitur. Quod et de uxore similiter intelligi volumus.

Cap. 17. Quæ pœna sit cum par adulterium est in utroque conjugè.

Si persona quæ fuerit adulterii convicta, crimen in altero conjugè possit idem ostendere, et ostenderit, priusquam conjunx ad novas nuptias diverterit, utriusque conjugis culpa par in pares incidet pœnas, et prius inter illos firmum manebit matrimonium.

Cap. 18. Receptorum et fautorum adulterii quæ pœna sit.

Ne illi quidem iudicum² ecclesiasticorum diligentiam subterfugere debent qui receptatores sunt adulterorum³, aut illorum flagitia ope, opera, vel consilio quacunque ratione procurant. Quo in genere sunt, exempli causa, qui domum adulteris scientes expediunt, vel locum qualemcunque, qui sermonum, literarum aut munerum⁴ cujuscunque generis sint internuncii. Quapropter omnem hominum⁵ hujusmodi faciem quæ cœnum adulterii quacunque parte commovet, ecclesiasticis pœnis et arbitrariis etiam iudicis constringendum esse decernimus.

² iudicium.³ adulteriorum.⁴ numerum.⁵ hominum om.*Cap. 19. Separatio a mensa et thoro tollitur.*

Mensæ societas et thori solebat in certis criminibus adimi conjugibus; salvo tamen inter illos reliquo matrimonii jure. Quæ constitutio cum a sacris literis aliena sit, et maximam perversitatem habeat, et malorum sentinam in matrimonium comportaverit, illud auctoritate nostra totum aboleri placet.

Cap. 20. *Incestus et scortationes laicorum quomodo puniuntur.*

Incestus omnis¹, nominatim autem is qui primum ad gradum ascendit, afficitur pœna sempiterni² carceris. Deinde scortationes et vagæ licentiosæque libidines omnis generis magna suppliciorum acerbitate comprehendantur³, ut tandem aliquando radicitus ex regno nostro extirpentur. Ecclesiastici igitur iudices diligenter evigilent, ut quascunque personas et cujuscunque sexus flagitiosis et impuris libidinum congressibus implicatas in excommunicationem ejiciant, nisi mature moniti resipuerint. Et licet se ipsi correxerint, tamen publice cogantur Ecclesiam satisfacere. Præterea decem libras in pauperum cistam Ecclesie suæ propriam imponant, vel si minores illorum facultates sunt, tantum imponant quantum de bonis illorum commode detrahi potest.

¹ omnis om.

² sempiterna.

³ comprehendatur.

Cap. 21. *Filius non legitimus quomodo sit alendus.*

Filius ex adulterio susceptus, aut ex simplici scortatione, quemadmodum appellant, patris impensis alatur, si quidem is inveniri poterit. Qui si non poterit erui, mater suum ipsa fœtum propriis impensis sustentet.

THE
CONSTITUTIONS
AND
CANONS ECCLESIASTICAL

MADE IN THE YEAR 1603

LXII. *Ministri sine bannis rite indictis, vel legitima dispensatis matrimonium celebrare prohibiti.*

Nullus minister, sub pena suspensionis per triennium ipso facto incurrendæ, matrimonium inter ullas personas celebrabit, absque facultate seu licentia ab aliquo eorum, s qui in hiis constitutionibus nostris inferius designantur, indulta et concessa; nisi banna matrimonialia per tres dies dominicos separatim fuerint denunciata, idque publice in ecclesiis parochialibus aut capellis, ubi partes predictæ commemorantur, ac tempore divinorum, prout in libro publicæ liturgiæ habetur. Neque ullus minister, sub pena simili, inter qualibet personas, quantumvis ejusmodi facultatem seu indulgentiam habentes, quocumque prætextu matrimonium solemnizabit vel tempore aliquo incongruo, sed duntaxat intra horas octavam et duodecimam ante meridians; vel in loco privato, sed in ecclesiis tantummodo vel capellis, ubi partium altera commemoratur, idque similiter tempore precum publicarum; vel omnino (etiamsi trina bannorum indictio præcesserit, nec ulla proinde dispensatio requiratur) priusquam parentes aut gubernatores contrahentium, si vicesimum primum ætatis suæ annum non compleverint, consensum suum vel personaliter, vel per testimonium luculentum dicto ministro significarint.

LXIII. *Ministri in locis exemptis sine bannorum iusta indictione, vel dispensatione legitima matrimonium celebrare prohibiti.*

Quilibet minister, qui contra atque in constitutionibus hiis nostris cautum est, inter personas quascunque matrimonium celebrabit, sub prætextu cujuscumque immunitatis, quæ certis ecclesiis ac capellis arrogatur, per loci ordinarium, in quo sic offensum erit, triennali suspensione punietur; si quis autem minister ex loco, ubi sic deliquerit, ante latam contra ipsum suspensionis sententiam, se transtulerit; tunc per episcopum diocesanum, vel ordinarium loci, in quo residebit (ab altero ordinario, cujus jurisdictioni se subduxit, ea de re sub ipsius manu et sigillo certiore factum) eadem omnino censura ferietur.

XCIX. *Intra gradus prohibitos matrimonium contractum ipso jure nullum.*

Nemo matrimonium contrahat intra gradus divino jure prohibitos, ac expressos in tabula quadam ex auctoritate publica anno Domini M.D.LXIII. edita; omniaque matrimonia taliter contracta, incesta et illegitima judicabuntur, et proinde, ut ab initio vacua, sive nulla, dissolventur, partesque ita conjunctæ per juris processum separabuntur. Tabulam autem predictam in singulis ecclesiis parochianorum sumptibus publice proponi, atque affigi volumus.

LXII. *Ministers not to marry any Persons without Banns, or License.*

No minister, upon pain of suspension per triennium ipso facto, shall celebrate matrimony between any persons, without a faculty or license granted by some of the persons in these our Constitutions expressed, except the banns of matrimony have been first published three several Sundays, or holy-days, in the time of divine service, in the parish-churches and chapels where the said parties dwell, according to the Book of Common Prayer. Neither shall any minister, upon the like pain, under any pretence whatsoever, join any persons so licensed in marriage at any unseasonable times, but only between the hours of eight and twelve in the forenoon, nor in any private place, but either in the said churches or chapels where one of them dwelleth, and likewise in time of divine service; nor when banns are thrice asked, (and no license in that respect necessary,) before the parents or governors of the parties to be married, being under the age of twenty and one years, shall either personally, or by sufficient testimony, signify to him their consents given to the said marriage.

LXIII. *Ministers of exempt Churches not to marry without Banns, or License.*

Every minister, who shall hereafter celebrate marriage between any persons contrary to our said Constitutions, or any part of them, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended per triennium by the ordinary of the place where the offence shall be committed. And if any such minister shall afterwards remove from the place where he hath committed that fault, before he be suspended, as is aforesaid, then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate under the hand and seal of the other ordinary, from whose jurisdiction he removed, execute that censure upon him.

XCIX. *Nones to marry within the degrees prohibited.*

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 adjudged 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.

C. *Minores 21. annis obque parentum consensu matrimonium contrahere prohibiti.*

Nullis liberis, qui vicesimum primum ætatis suæ annuum nondum compleverint, absque consensu parentum, aut, si defunctis parentibus, tutorum sive gubernatorum suorum, conjugia, sive sponsalia licebit contrahere.

CI. *Facultates pro bannis matrimonialibus emittendis, per quos, et quibus sint concedendæ.*

Nulla in posterum facultas sive indulgentia, pro matrimonio absque trina bannorum denunciatione juxta librum publicæ liturgiæ inter quoslibet celebrando, per quamvis personam jurisdictionem ecclesiasticam exercentem, vel privilegia ulla ecclesiæ suæ nomine sibi vendicantem, nisi tantum per eos, qui episcopalem auctoritatem obtinent, vel per commissarium ad facultates, vel sede plena, per archiepiscopum, et episcoporum vicarios generales, aut sede vacante, per custodes spiritualitatis, vel ordinarios episcopalem jurisdictionem de jure exercentes, et non per alios concessetur; idque duntaxat illustri, ac claræ conditionis hominibus, suæ respective jurisdictioni subditis, interposita etiam idonea et sufficienti cautione.

CII. *In facultatibus pro bannorum omissione concedendis cautio interponenda, et sub quibus conditionibus.*

Dicta cautio conditiones hæc complectetur. Primo, quod tempore ejusdem dispensationis concedendæ nullum existit impedimentum ratione præcontractus, consanguinitatis, affinitatis, vel alterius causæ cujuscunque de jure prohibita, quod dicto matrimonio occurrere, aut obstare possit. Secundo, quod nulla controversia, lis, seu querela mota sit vel pendeat in aliqua curia coram ullo iudice ecclesiastico super aliquo contractu vel matrimonio alterius utrius dictarum partium cum alia quavis persona. Tertio, quod parentum, modo sint in vivis, vel alias tutorum sive gubernatorum suorum expressum consensum hæc in parte obtinuerunt. Postremo, quod dictum matrimonium in ecclesia parochiali, vel capella, ubi contrahentium alter commoratur, et non alias, idque publice in facie ecclesiæ inter horas octavam et duodecimam curabunt solemnizari.

C. *None to marry under Twenty-one Years, without their Parents' consent.*

No children under the age of one and twenty years complete shall contract themselves, or marry, without the consent of their parents, or of their guardians and governors, if their parents be deceased.

CI. *By whom Licences to marry without Banns shall be granted, and to what sort of Persons.*

No faculty or licence shall be henceforth granted for solemnization of matrimony betwixt any parties, without thrice open publication of the banns, according to the Book of Common Prayer, by any person exercising any ecclesiastical jurisdiction, or claiming any privileges in the right of their churches; but the same shall be granted only by such as have episcopal authority, or the commissary for faculties, vicars general of the archbishops and bishops, *sede plena*; or, *sede vacante*, the guardian of the spiritualities, or ordinaries exercising of right episcopal jurisdiction in their several jurisdictions respectively, and unto such persons only, as be of good state and quality, and that upon good caution and security taken.

CII. *Security to be taken at the granting of such Licences, and under what Conditions.*

The security mentioned shall contain these conditions: First, That, at the time of the granting every such licence, there is not any impediment of precontract, consanguinity, affinity, or other lawful cause to hinder the said marriage. Secondly, That there is not any controversy or suit depending in any court before any ecclesiastical judge, touching any contract or marriage of either of the said parties with any other. Thirdly, That they have obtained thereunto the express consent of their parents, (if they be living,) or otherwise of their guardians or governors. Lastly, That they shall celebrate the said matrimony publicly in the parish-church or chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon.

CIII. *Eadem conditiones ob majorem cautelam iurejuranda suffulcit.* 30

Ut omnis deinceps frans et dolus in obtinendis ejusmodi facultatibus evitetur; statuimus insuper et ordinamus, quod ante obtentam facultatem pro matrimonio absque bannis celebrando, judici constabit de expresso consensu parentum, vel parentis, eorum altero defuncto, aut tutorum vel tutoris, per juramentum duorum fide dignorum testium, quorum unus vel judici ipsi, vel alii cuiuspiam bonæ existimationis tum presenti, ac eidem etiam judici cognito, pro tali innoscet. Et ulterius, ut alter contrahentium juramentum subeat, ac credere, nullum legitimum impedimentum ratione præcontractus, consanguinitatis, affinitatis, vel alterius causæ cujuscunque de jure prohibite obstare, nullamque litam aut controversiam in foro aliquo ecclesiastico, motam esse, quominus dictum matrimonium, juxta tenorem ejusdem facultatis, ad effectum procedat.

CIV. *Parentum consensus viduis contrahentibus remissus.* 15

Quodsi uterque contrahentium in viduitate constitutus pro bannis omittendis dispensationem petierit, tunc clausulam prædictam, per quam parentum consensus requiritur, licebit prætermitti, ita tamen ut parochie, in quibus utraque pars commoratur, in dispensatione exprimentur, atque illa parochia nominatim designetur, in qua ejusmodi matrimonium sit postea celebrandum. Siquis vero commissarius ad facultates, vic. generalis, aut dictorum ordinariorum aliquis in præmissis, aut quolibet præmissorum deliquerit, is pro singulis ejusmodi delictis ab executione officii sui per spatium semestre submoveatur, et licentia sive indulgentia hujusmodi viribus vacua, et pro nulla ad omnem juris effectum habebitur, ac si omnino non fuisset concessa; partesque ejusdem virtute in matrimonio conjunctæ penis illis subiacebunt, quæ in nuptias clandestinas sunt constitutæ.

CV. *Pro conjugio dirimendo nuda partium confessio non audienda.*

Quoniam matrimoniales causæ inter graviores semper habitæ fuerint, et propterea majorem cautelam desiderant; siquando in judiciis veniant disceptandæ, præsertim cum matrimonium in ecclesia debite solemnizatum, quovis nomine separari, vel nullum pronunciarî postulatur; stricto mandamus et præcipimus, ut in omnibus divortiorum et nullitatis matrimonii processibus circumspicte et deliberate procedatur, ac quantum fieri poterit, rei veritas testium depositionibus aliisque probationibus legitimis eruatur, nec soli extrajudiciali, aut judiciali et juratæ partium confessioni fides habeatur. 10

CIII. *Oaths to be taken for the Conditions.*

For the avoiding of all fraud and collusion in the obtaining of such licences and dispensations, we further constitute and appoint, That before any licence for the celebration of matrimony without publication of banns be had or granted, it shall appear to the judge by the oath of two sufficient witnesses, one of them to be known either to the judge himself, or to some other person of good reputation then present, and known likewise to the said judge, that the express consent of the parents, or parent, if one be dead, or guardians or guardian of the parties, is thereunto had and obtained. And furthermore, That one of the parties personally swear, that he believeth there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the foresaid licence.

CIV. *An Exception for those that are in Widowhood.*

If both the parties which are to marry being in widowhood do seek a faculty for the forbearing of banns, then the clauses before mentioned, requiring the parents' consent, may be omitted: but the parishes where they dwell, both shall be expressed in the licence, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars general, or other the said ordinaries, shall offend in the premises, or any part thereof, he shall, for every time so offending, be suspended from the execution of his office for the space of six months; and every such licence or dispensation shall be held void to all effects and purposes, as if there had never been any such granted; and the parties marrying by virtue thereof shall be subject to the punishments which are appointed for clandestine marriages.

CV. *No Sentence for Divorce to be given upon the sole Confession of the Parties.*

Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution, when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required, upon any suggestion or pretext whatsoever, to be dissolved or annulled: we do straitly charge and enjoin, That in all proceedings to divorce, and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out by the deposition of witnesses, and other lawful proofs and evictions; and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the court. 15

CVI. *Sententiæ divortii et separationis non nisi pro tribunali ferendæ.*

Nullæ in posterum sententiæ vel separationis a thoro et mensa, vel nullitatis matrimonii prætensi ferantur, nisi publice, ac pro tribunali, et de scientia ac consensu vel archiepiscopi infra provinciam suam, vel episcopi infra propriam diœcesim, decani de archibus, judicis audientie Cantuariensis, aut vicariorum generalium, aliorumve officialium principalium, vel sede vacante, custodum spiritualitatis, aut aliorum ordinariorum, quibus de jure competit, in suis respective jurisdictionibus, ac curiis, atque inter suæ jurisdictionis subditos tantum.

CVII. *Separatis, utrum altero imperstite, nova copula interdicitur.*

In sententiis, quando ad separationem thori et mensæ tantum interponuntur, monitio, et prohibitio in ipso contextu sententiæ late fiet, ut a partibus abinvicem dissociatis caste vivatur, nec ad alias nuptias, alterutra vivente, convolvetur. Denique quo postremum illud firmiter observetur, sententiæ separationis non ante pronuntiabitur, quam qui eam postulabunt, idoneam cautionem interposuerint, ac contra dictam monitionem et prohibitionem nihil commissuros.

CVIII. *Sanctio in iudices contra præmissa delinquentes.*

Quodsi quis iudex sententiæ separationis, seu divortii tulerit, et præmissa omnia non præstiterit, per annum integrum ab executione officii sui per archiepiscopum, vel episcopum diœcesanum suspendetur. Et sententiæ separationis, contra formam prædictam lata, pro nulla ad omnem juris effectum habebitur, ac si omnino lata non fuisset.

CVI. *No Sentences for Divorce to be given but in open Court.*

No sentence shall be given either for separation a thoro et mensa, or for annulling of pretended matrimony, but in open court, and in the seat of justice; and that with the knowledge and consent either of the archbishop within his province, or of the bishop within his diocese, or of the dean of the arches, the judge of the audience of Canterbury, or of the vicars general, or other principal officials, or, sede vacante, of the guardians of the spiritualities, or other ordinaries to whom of right it appertaineth, in their several jurisdictions and courts, and concerning them only that are then dwelling under their jurisdictions.

CVII. *In all Sentences for Divorce, Bond to be taken for not marrying during each other's Life.*

In all sentences pronounced only for divorce and separation a thoro et mensa, there shall be a caution and restraint inserted in the act of the said sentences, That the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with any other person. And, for the better observation of this last clause, the said sentence of divorce shall not be pronounced, until the party or parties requiring the same have given good and sufficient caution and security into the court, that they will not any way break or transgress the said restraint or prohibition.

CVIII. *The Penalty for Judges offending in the premises.*

And if any judge, giving sentence of divorce or separation, shall not fully keep and observe the premises, he shall be, by the archbishop of the province, or by the bishop of the diocese, suspended from the exercise of his office for the space of a whole year; and the sentence of separation, so given contrary to the form aforesaid, shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced.

THE CANON LAW OF THE CHURCH OF ENGLAND

1947

Being the Report of the Archbishops' Commission
on Canon Law

XXXVI

Of Holy Matrimony

THE Church of England affirms, as our Lord's principle and standard of Marriage, a life-long and indissoluble union, for better or for worse, till death them depart, of one man with one woman, to the exclusion of all others on either side, for the procreation and nurture of children, and for the mutual society, help, and comfort, which the one ought to have of the other both in prosperity and adversity.

2. If in regard to a marriage which has been duly dissolved by secular law the Bishop of a diocese, sitting with his Chancellor, is satisfied that there were good grounds upon which such marriage could, instead of being dissolved, have been declared to be null and void, it shall be lawful for such Bishop in his discretion to allow either of the parties to such marriage, although the other of them is still living, to marry, or to be married to, another person, according to the rites and ceremonies of the Church of England, in like manner as if such first mentioned marriage had been declared to be null and void.

B.C.P. *Office of Solemnization of Matrimony*, mutual stipulation: Resolution, Convocation of Canterbury (1936).

UNION—*Luke xvi. 18: C. 27, Q. 1, c. 42.*

CHILDREN—*C. 32, Q. 1, c. 22.*

COMFORT—*C. 32, Q. 2, c. 22, X, iv. 5-7.*

We dissent from the proposal in section 2. Cyril Ebor., Claude Jenkins, E. F. Jacob.

XXXVII

Of the Marriage of Unbaptized Persons

BAPTIZED—*C. 28, Q. 1, c. 15.*

NO Minister shall allow Matrimony to be celebrated in his Church between two persons neither of whom has been baptized; and if two persons, one of whom has not been baptized, desire to be married in his Church, he shall refer the matter to the Bishop of the Diocese and obey therein his order and direction.

XXXVIII

Of Certain Impediments to the Solemnization of Matrimony.

C. 27. Q. 2. c. 13.

NO person who has already been married but whose marriage has been dissolved by secular authority shall marry, except as provided by CANON XXXVI, so long as the husband or wife to whom that person was married is still living.

Agde (306), Canon 61 (C. 15. Q. 3 & 3. c. 8): Lat. (1215), Canon 30 (X. iv. 14. 8): 1603, Canon 99 (as amended, 1946).

2. No person shall marry within the degrees expressed in the following Table, and all marriages purported to be made within the said degrees are by the judgement of the Church of England void from the beginning.

A TABLE

OF

KINDRED AND AFFINITY

WHEREIN WHOSOEVER ARE RELATED ARE FORBIDDEN BY THE CHURCH OF ENGLAND TO MARRY TOGETHER

A man may not marry his

A woman may not marry with her

Mother
 Daughter
 Father's mother
 Mother's mother
 Son's daughter
 Daughter's daughter
 Sister
 Father's daughter
 Mother's daughter
 Wife's mother
 Wife's daughter
 Father's wife
 Son's wife
 Father's father's wife
 Mother's father's wife
 Wife's father's mother
 Wife's mother's mother
 Wife's daughter's daughter
 Wife's son's daughter
 Son's son's wife
 Daughter's son's wife
 Father's sister
 Mother's sister
 Brother's daughter
 Sister's daughter

Father
 Son
 Father's father
 Mother's father
 Son's son
 Daughter's son
 Brother
 Father's son
 Mother's son
 Husband's father
 Husband's son
 Mother's husband
 Daughter's husband
 Father's mother's husband
 Mother's mother's husband
 Husband's father's father
 Husband's mother's father
 Husband's son's son
 Husband's daughter's son
 Son's daughter's husband
 Daughter's daughter's husband
 Father's brother
 Mother's brother
 Brother's son
 Sister's son

This Table shall be in every Church publicly set up and fixed at the charge of the Parish.

C. 30. Q. 2. c. 13:
 X. iv. 2. 13:
 Lynd. p. 272:
 Age of Marriage Act, 1929, s. 1.

3. No person who is under sixteen years of age shall marry, and all marriages purported to be made between persons either of whom is under sixteen years of age are void.

C. 30. Q. 3. c. 3:
 1603, Canon 100:
 Guardianship of Infants Act, 1925, s. 3.

4. Persons under twenty-one years of age (except they be persons in widowhood) ought not to marry against the will of their parents or of their guardians lawfully constituted.

XXXIX

Of the Preliminaries to the Solemnization of Matrimony

Lat. (1215), Canon
51 (X, iv. 3. 3):
Lynd. pp. 271, 272.

IT shall be the duty of the Minister, when application is made for Banns of Matrimony to be published or for Matrimony to be solemnized in his Church, either to satisfy himself that the two persons who desire to be married have been baptized, or in an appropriate case to refer the matter to the Bishop as provided in CANON XXXVII, and in every case to satisfy himself that there is no other impediment why such persons should not be joined together in Matrimony, and to explain to them the life-long nature of the bond of Christian Marriage and the need of God's grace in order that they may discharge aright their obligations as married persons.

1603, Canons 100,
101, 102.

2. No licence for the celebration of Matrimony without publication of banns shall be granted by any ecclesiastical authority unless one of the parties shall make oath or solemn declaration that both of such parties have been baptized, and that there is no impediment of consanguinity, affinity (as by the Table in Section 2 of CANON XXXVIII), or other lawful cause to hinder the said marriage; and, further, that there is no suit pending in any court touching any contract of marriage of either of the said parties

with any other; and, further, that, if minors, they have obtained thereto such consents as are by law required: Provided always that persons having ecclesiastical authority to grant such licences may with the leave of the Bishop but not otherwise grant a licence where only one of the parties is baptized, but no persons having such authority shall grant a licence where either of the parties has been previously married to some other person who is still living, except as provided by CANON XXXVI.

XL

Of the Publication of Banns of Matrimony

BANNS of Matrimony may lawfully be published in all Churches and Chapels where Matrimony may be solemnized.

2. No Minister shall be obliged to publish the Banns of Matrimony between any persons whatsoever, unless the persons to be married shall, seven days at least before the time required for the first publication of such Banns respectively, deliver or cause to be delivered to such Minister a notice in writing, dated on the day on which the same shall be delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively.

Marriage Act, 1823,
s. 7: *Wynn v.*
Davies and Weever
(1835), 1 Curt. 69,
at pp. 83, 84.

3. All Banns of Matrimony shall be published by the officiating Minister from a Register Book of Banns, in an audible manner, in the Church or Chapel belonging to such Parish or Ecclesiastical District wherein the persons to be married shall dwell, or, in addition to such publication, in the Church or Chapel of the Parish or Ecclesiastical District wherein the names of the said persons or of either of them are entered on the Church Electoral Roll (although neither of the said persons dwells in such Parish or Ecclesiastical District), according to the form of words prescribed by the rubric preceding the Office of Solemnization of Matrimony contained in the Book of Common Prayer, upon three Sundays preceding the Solemnization of Matrimony, during the time of morning service, or of evening service (if there is no morning service in the Church or Chapel upon the Sunday upon which Banns shall be so published), and after publication shall be signed by the Officiating Minister or by some person under his direction.

1603, Canon 62:
B.C.P. Office of
Solemnization of
Matrimony, rubric:
Marriage Act, 1823,
s. 2, 6: Marriage
Measure, 1930,
s. 1, 3.

Banns of Marriage
Measure, 1934, s. 1.

4. Whenever upon any Sunday in any Church or other building in which Banns of Matrimony may for the time being lawfully be published a Minister does not officiate at the service at which it is usual in that Church or building to publish Banns, then such publication may be made therein either

- (A) by a Minister at some other service at which Banns of Matrimony may lawfully be published, or
- (B) by a layman, but in the latter case only if the following conditions are complied with (that is to say):
 - (i) such publication must be made during the course of a public reading authorized by the Bishop of a portion or portions of the service of Morning or Evening Prayer, such public reading being at the the hour when the service at which it is usual to publish Banns is commonly held, unless the Bishop shall authorize otherwise;
 - (ii) the Minister of the said Church or building, or some other Minister nominated in that behalf by the Bishop, must, before the first of such publications, have made or authorized to be made the requisite entry in the Register Book of Banns of the said Church or building.

5. Whenever a layman shall have published Banns of Matrimony he shall sign the Register Book of Banns, and a certificate of due publication of such Banns, signed by the Minister of the Church or other building in which the publication shall have been made or by some Minister nominated in that behalf by the Bishop, shall be equivalent to a like certificate given by a Minister who has published Banns.

Banns of Marriage
Measure, 1934, s. 2.

XLI

Of the Granting of Marriage Licences

THE Archbishop of Canterbury may grant a special licence for the Solemnization of Matrimony without the publication of Banns at any convenient time or place not only within the Province of Canterbury but throughout all England.

Stat. (1533-4), 25 Hen. VIII, c. 21 (Exoneration from Roman Exactions), s. 3, 4; Marriage Act, 1823, s. 20.

2. The Archbishop of each Province, and the Bishop of every Diocese, may grant a common licence for the Solemnization of Matrimony without the publication of Banns at a lawful time and in a lawful place within his Province or Diocese as the case may be; and the Archbishop of Canterbury may grant a common licence for the same throughout all England.

Zouche (1347), Const. 7; Lynd. p. 274; Stat. (1533-4), 25 Hen. VIII, c. 21 (Exoneration from Roman Exactions), s. 9.

3. No common licence under Section 2 of this Canon shall be granted by any Archbishop or Bishop for the Solemnization of Matrimony in any

Marriage Act, 1823, s. 10, 14; Marriage Measure, 1930, s. 1, 3, 5.

other Church than in the Church of the Parish or Ecclesiastical District within which the usual abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence, or in the Church of the Parish or Ecclesiastical District wherein the names of the said persons, or of either of them (not being resident in such Parish or Ecclesiastical District), are entered on the Church Electoral Roll.

XLII

Of the Solemnization of Matrimony

Lynd. p. 274; Marriage Act, 1823, s. 3; Marriage Act, 1836, s. 26; Marriage (Licensing of Chapels) Measure, 1930, s. 1.

MATRIMONY may be celebrated in all Parish Churches and in any other Church or Chapel licensed for the Solemnization of Matrimony by the Bishop of the Diocese under his hand and seal, and in no other place whatsoever except the persons to be married have a special licence from the Archbishop of Canterbury.

Lat. (1285), Canon 51 (X, iv, 3-3); Lynd. pp. 271, 275, 276; Zouche (1347), Const. 7; 1603, Canon 62; B.C.P. Office of Solemnization of Matrimony, rubric; Marriage Act, 1836, s. 1; Marriage Measure, 1930, s. 1, 4, 5, 7.

2. No Minister shall celebrate Matrimony between any persons without a licence or certificate, granted by such persons as have authority so to do, except the Banns of Matrimony have first been published on three several Sundays in the time of Divine Service in the Church or Chapel of the Parish or Ecclesiastical District wherein the said parties respectively dwell, or, in addition to such publication, in the Church or Chapel of the Parish or Ecclesiastical District wherein the names of the said parties, or of either of them, are entered on the Church Electoral Roll, although neither of the said parties dwells in such Parish or Ecclesiastical District.

Marriage Act, 1823, s. 2.

3. In all cases where Banns shall have been published, Matrimony shall be celebrated in one of the Parish Churches or Chapels where such Banns shall have been published, and in no other place whatsoever save under the statutory provisions in this behalf for the time being in force.

4. In the case of Matrimony to be celebrated after the publication of Banns between two persons dwelling in different Parishes or Ecclesiastical Districts, the Minister of the one Parish or Ecclesiastical District shall not proceed to celebrate Matrimony between two such persons without a Certificate of the Banns being thrice asked from the Minister of the other Parish or Ecclesiastical District; neither shall any Minister proceed to celebrate Matrimony after the publication of Banns between two persons in the Church or Chapel of a Parish or Ecclesiastical District wherein the names of the said persons, or of either of them, are entered on the Church Electoral Roll (neither of them dwelling in such Parish or Ecclesiastical District) without a certificate or certificates of such other publication of Banns from every Minister who has published the same.

*B.C.P. Office of
Solemnization of
Matrimony, rubric:
Marriage Act, 1823,
s. 2; Marriage
Measure, 1930, s. 1.*

5. Wherever Matrimony shall not be had within three months after the complete publication of Banns, no Minister shall proceed to celebrate the same until the Banns have been republished on three several Sundays, unless by a licence or certificate granted by such persons as have authority so to do; and, whenever Matrimony shall not be had within three months after the grant of a licence or certificate, no Minister shall proceed to celebrate the same until a new licence or certificate shall have been obtained, unless after the publication of Banns.

*Marriage Act, 1823,
s. 9, 19; Marriage
Act, 1836, s. 15.*

6. No Minister shall celebrate Matrimony between two persons at any unseasonable hours, but only between the hours of eight in the forenoon and six

*1603, Canon 62
(as amended, 1887,
1936); Marriage
Measure, 1930, s.
1, 5.*

in the afternoon, nor in any private place, but in the Church or Chapel of the Parish or Ecclesiastical District, wherein one of them dwells, or where the name of one of them is entered on the Church Electoral Roll, except they have a special licence from the Archbishop of Canterbury.

7. Every Marriage shall be solemnized in the presence of two or more credible witnesses besides the Minister who shall celebrate the same.

8. When Matrimony is to be celebrated in any Church, it belongs to the Minister to decide what music shall be played, what hymns or anthems shall be sung, or what furnishings or flowers shall be placed in or about the Church for the occasion.

XLIII

Of Divine Service after Civil Marriage

Marriage and
Registration Act,
1856, s. 12.

If any persons have contracted Marriage before the Civil Registrar under the provisions of the Statute Law, and shall afterwards desire to add thereto the service for the Solemnization of Matrimony contained in the Book of Common Prayer, the Minister of the Parish or Ecclesiastical District wherein such persons dwell, or where the name of one of them is entered on the Church Electoral Roll, may, if he see fit, perform the said service, with appropriate modifications, in the Church or Chapel or in any other place within his Cure, without the publication of Banns or any licence or certificate authorizing the Marriage: Provided however, first, that the Minister be duly certified of the civil contract; and, secondly, that he be satisfied that there is no lawful impediment to the Marriage of the parties and that neither of them has been previously married to some other person who is still living; but such Marriage, so celebrated, shall not be entered by him in the Register Books of Marriages provided by the Registrar General.

APPENDIX E

YORK DIOCESAN SYNOD: SATURDAY, 9th MARCH 1985
AT THE UNIVERSITY OF YORK: PRESIDENTIAL ADDRESS
BY THE ARCHBISHOP OF YORK, DR. JOHN HABGOOD

"THE MARRIAGE OF DIVORCED PEOPLE IN CHURCH"

The 1971 Root Commission on Marriage, Divorce and the Church concluded that a change in the Church's discipline could be justified if there was evidence of a moral consensus in favour of it. For the last 14 years we have sought in one way or another to build such a consensus, and it is now clear from the latest discussions in the dioceses, in the House of Bishops and in the General Synod, that it does not exist.

The 1981 vote in the General Synod to the effect that "there are circumstances in which second marriages may take place in church" was in my view more an expression of frustration than the adoption of a new policy. The hollowness of the vote, and its inherent ambiguity, have been amply revealed by the Church's inability to agree how to implement it in practice. I do not therefore regard it as offering us any more than minimal guidance in our present dilemma.

The Synod's clear rejection of all attempts in February to change the existing Convocation rules means that these stand as the only agreed expression of the Church's mind concerning the marriage of those who have previously been divorced. Nothing that the Bishops went on to say in their report to the Synod about the legal rights of clergy in the matter, must be allowed to hide the fact that the Church still officially discourages such marriages.

The recognition that some clergy will use their freedom under the law more extensively than they have in the past, is no more than an admission that frustration, disappointment and the social pressures built up by the 1981 vote, will inevitably have their effect. The Bishops were aware of the dangers of anarchy, also of the feelings of unfairness which different policies in different parishes are likely to engender. Hence their offer to give advice. But I want to stress that it is advice, not an invitation to use a loophole which the Church did not intend should exist, and which it has never officially sanctioned.

The main general advice I would want to offer clergy on this particular option is:

1. Recognize the divided state in which recent decisions have left the Church, and do not use your legal rights in a way which will create manifest unfairness, and cause embarrassment to other parishes.
2. Observe the proper residence qualifications for marriage. Failure to observe these may in some cases put a question mark over the legality of the marriage, but it will almost certainly also cause deep offence in the parishes from which the couples come.
3. The clearest cases justifying a second marriage in Church are those in which a nullity could have been granted in respect of the previous marriage had the lawyers given appropriate advice. It is not for us to set ourselves up as nullity tribunals, but it seems to me that there are a few cases in which there is no real doubt that a nullity could have been obtained.

4. A useful general principle is that the further a divorce lies in the past, the less personal and social weight it is likely to carry in relation to a second marriage. Legal obligations relating to a first marriage, such as the care of children and financial arrangements, are another important factor to take into account.
5. For specific advice on individual cases, clergy should consult their area bishops.

My hope is that the loophole will be used sparingly, and that generally within the diocese we shall make a positive response to the pastoral needs of those wanting to marry again through a liberal use of services of prayer and dedication following a civil marriage.

It seems to me that the service hitherto used in the diocese for this purpose is much too negative. I am therefore circulating for temporary use copies of a revised service which I hope will make the whole occasion

seem more attractive, joyful and emotionally satisfying. The House of Bishops will in due course be issuing a form of service prepared by the Liturgical Commission, but this is still in process of revision and we may not have it in its final form for about a year.

Such services have come in for a good deal of criticism as being hypocritical. They are, of course, a compromise, but a compromise may be the best one can have when opinions are deeply divided. I therefore ask those who have been wary of such services in the past to think again, and ask themselves whether this does not offer the best way forward.

As I see it, to understand what such a service is saying about marriage it is important to distinguish the two elements in any marriage service, the personal element and the public element.

The personal element is what the marriage means to the couple themselves. They have decided on it. They make

the marriage. And they look to the church for the personal support, care and religious depth which the ceremony in church, in one of its aspects, represents. This is what a service of prayer and dedication can provide both for the couple and for the family and their friends.

But every marriage is also a public witness to the church's teaching on marriage, and this is the level on which a second marriage after divorce confuses the message. In refusing actually to solemnize the marriage the church is saying that, in its public aspects, this particular marriage falls within the provisions made by the State, not those made by the Church. This is not to condemn the couple, nor is it to imply that a second marriage is somehow inferior in terms of its personal quality. No human rules can set limits on God's power to forgive, and recreate and make the new wine better than the old. But however good its quality, the one thing a second marriage cannot do is to witness publicly to the permanence of marriage.

It seems to me that services of prayer and dedication provide a means of drawing this distinction. Through them we say to the couple, 'You have made your choice, and we now ask God to bless it'. And we say to the world, 'This is a personal choice which we respect and bless. It witnesses to the reality of God's forgiveness and to our hopes for the future, but it cannot by its very nature witness to the life-long character of marriage, so we do not actually solemnize it'. My experience is that when the discipline is explained in these terms, couples readily take the point, and find great help in the services.

I have referred to a liberal policy in the use of such services. I see no reason why they should be confined to regular churchgoers.

My hope is that they can be used as a pastoral opportunity to help people who are often in desperate need to work their way through past traumas and to find some reassurance about the future. A liberal policy would

not compromise the church's witness, for reasons I have already stated. But it would avoid the invidious discriminations between couples which were such an objectionable feature in the earlier marriage proposals.

I can see only two major reasons for refusing a service of prayer and dedication:

1. when the divorce and second marriage have caused open scandal;
2. when the second marriage has been in some direct and unmistakable sense a reason for the breakdown of the first.

If there is any doubt in the matter the area bishops are very willing to give advice and support.

We are in a transitional period. Many emotions have been aroused and we are conscious of deep difference of opinion. My hope is that we can now leave the subject for a bit, make the best use of the discipline which we

have, and concentrate on the more positive side of strengthening marriage and improving the preparation for it.

In time, no doubt, a new discipline will emerge. But for the present, living with our failure to agree is going to make demands on our forbearance, sensitivity and charity.

BIBLIOGRAPHY

1. SOURCES

The Constitutions and Canons Ecclesiastical (Made in the year 1603 and Amended in the years 1865, 1887, 1936 and 1947), London, S.P.C.K., 1960, 68p.

The Canons of the Church of England: Canons Ecclesiastical Promulgated by the Convocations of Canterbury and York in 1964 and 1969, London, S.P.C.K., 1969, 94p.

The Canons of the Church of England: Canons Ecclesiastical Promulgated by the Convocations of Canterbury and York in 1964 and 1969 and by the General Synod of the Church of England from 1970, London, C.I.O. Publishing, 1981, 132p.

CARDWELL, E. (ed.), The Reformation of the Ecclesiastical Laws as Attempted in the Reigns of King Henry VIII, Edward VI and Queen Elizabeth, Oxford, University Press, 1850, lviii-344p. Being a copy of Reformatio Legum Ecclesiasticarum.

_____ , Synodalia - A Collection of Articles of Religion, Canons and Proceedings of Convocations in the Province of Canterbury, 1547-1717, Oxford, University Press, 1842, 2 vols.

_____ , Documentary Annals of the Reformed Church of England, Oxford, University Press, 1844, 2 vols.

LYNDWOOD, W., Provinciale seu Constitutiones Angliae cui adjiciuntur constitutiones legatinae D. Othonis et D. Othobonis cardinalium et Sedis Apostolicae in Anglia legatorum, cum profundissimis annotationibus Johannis de Athona, Oxford, Ric. Davis, 1679, [xiv], 356, 155 [19], 77p. Reprinted by Gregg International, Farnborough, England, 1968.

MANSI, J., Sacrorum Conciliorum nova et amplissima collectio, Paris, Welter, 1901, 35 vols.

Great Britain, Laws, Statutes, etc., Ecclesiastical Law, being a reprint of the title Ecclesiastical Law from Halsbury's Laws of England, 3rd edition, London, Church House Book Shop, 1957, 777p., Supplement 1965.

Church Acts and Measures, London, Church House Book Shop, 1969, 1575p.

The Book of Common Prayer, Cambridge, University Press, 1926, 629p.

The Alternative Service Book: Services Authorized for use in the Church of England, Sevenoaks, Kent, Hodder and Stoughton, 1980, 1290p.

2. REPORTS

A. Lambeth Conference

Encyclical Letter from the Bishops of the Anglican Communion with the Resolutions and Reports, London, S.P.C.K., 1920, xiv-161p.

The Lambeth Conference 1930: Encyclical Letter from the Bishops with the Resolutions and Reports, London, S.P.C.K., 1930, 200p.

The Lambeth Conference 1948: Encyclical Letter from the Bishops with the Resolutions and Reports, London, S.P.C.K., 1948, 120p.

The Lambeth Conference 1958: Encyclical Letter from the Bishops with the Resolutions and Reports, London, S.P.C.K., and Seabury Press, 1958, 237p.

The Lambeth Conference 1968: Resolutions and Reports, London, S.P.C.K., and Seabury Press, 1968, 158p.

Report of the Lambeth Conference 1978, London, C.I.O. Publishing, 1978, 127p.

B. Commissions and Synods

Ecclesiastical Courts Commission, Report of the Commission appointed to enquire into the Constitution and Working of the Ecclesiastical Courts, London, Eyre and Spottiswoode, 1883, 2 vols.

Church and State: Being the Report of the Archbishop's Commission on the Relations between Church and State, London, Church Assembly, 1935, 183p.

Kindred and Affinity as Impediments to Marriage: Being the Report of the Commission appointed by the Archbishop of Canterbury, London, S.P.C.K., 1940, 155p.

Dispensation in Practice and Theory: Being the Report of a Commission appointed by the Archbishop of Canterbury in 1935, London, S.P.C.K., 1944, xv-181p.

The Canon Law of the Church of England: Being the Report of the Archbishops' Commission on Canon Law, London, S.P.C.K., 1947, xv-244p.

The Church and the Law of Nullity of Marriage: Report of a Commission appointed by the Archbishops of Canterbury and York in 1949 at the request of the Convocations, London, S.P.C.K., 1955, 79p.

Synodical Government in the Church of England: Being the Report of a Commission appointed by the Archbishops of Canterbury and York, London, C.I.O. Publishing, 1966, 138p.

Putting Asunder - A Divorce Law for Contemporary Society: Report of a Group appointed by the Archbishop of Canterbury, London, S.P.C.K., 1966, 172p.

Marriage, Divorce and the Church: Report of a Commission appointed by the Archbishop of Canterbury to prepare a Statement on the Christian Doctrine of Marriage, London, S.P.C.K., 1972, xiii-170p.

Marriage and the Church's Task: The Report of the General Synod Marriage Commission: Being a Commission set up by the Archbishops of Canterbury and York, London, C.I.O. Publishing, 1978, vi-183p.

Marriage and the Standing Committee's Task: The Standing Committee's Response to the Motion carried by the General Synod in July 1981 Requesting a Report setting out a Range of Procedures for cases where it is appropriate for a divorced person to marry in Church during the lifetime of a former partner, London, C.I.O. Publishing, 1983, 77p.

General Synod Report, July 1983, (Volume 13, number 2), London, C.I.O. Publishing, 1984, 24p.

No Just Cause: The Law of Affinity in England and Wales: Some Suggestions for Change. A Report by a Group appointed by the Archbishop of Canterbury, London, C.I.O. Publishing, 1984, vi-151p.

Marriage in Church after Divorce: The General Synod Debate in July 1984: An Extract from the Report of Proceedings, London, C.I.O. Publishing, 1984, 76p.

3. BOOKS

ATKINSON, D., To Have and to Hold, London, Collins, 1979, 209p.

BLAKE, S., Law of Marriage, Chicester, Barry Rose Publishers, 1982, 280p.

BOX, H., The Principles of Canon Law, London, Oxford University Press, 1949, 76p.

BRIGHTMAN, F., The English Rite, London, Rivingtons, 1921, 2 vols.

BROMLEY, P., Family Law, London, Butterworths, 6th ed., 1981, 703p.

BROWNHILL, J., Principles of English Canon Law, London, Kegan, Paul, Trench and Company, 1883, 218p.

BULLARD, J., Standing Orders of the Church of England, London, Faith Press, 1934, viii-135p.

BULLIMORE, J., Pushing Asunder, Bramcote, Notts., Grove Books, 1978, 24p., (Grove Booklets on Ethics, No. 41).

CRETNEY, S., Principles of Family Law, London, Sheed and Maxwell, 4th ed., 1984, lxxx-1018p., (1st ed., 1974).

CRUSE, J., and GREEN, E., Marriage, Divorce and Repentance in the Church of England, London, Hodder and Stoughton, 1949, 61p.

DAVIDSON, Lord, (ed.), The Six Lambeth Conferences 1867-1920, London, S.P.C.K., 1920, 446, 161p.

DIBDIN, L. Sir, and CHADWYCK HEALEY, C. Sir, English Church Law and Divorce, London, John Murray, 1912, 180p.

3. BOOKS

DOMINIAN, J., Make or Break, London, S.P.C.K., 1984, 180p.

_____, Marriage, Faith and Love, London, Collins, 1984, 279p.

FLINDALL, R., The Church of England 1815-1948, London, S.P.C.K., 1972, 497p.

FLOOD, P., O.S.B., The Dissolution of Marriage: Non-Consummation as a Ground for Annulment or Dissolution of Marriage. A Study of English Civil and Church Law compared with Canon Law, London, Burns and Oates, 1962, 129p.

GARBETT, C., Church and State in England, London, Hodder and Stoughton, 1950, 320p.

HAW, R., The State of Matrimony, London, S.P.C.K., 1952, 211p.

HELMHOLZ, R., Marriage Litigation in Medieval England, Cambridge, University Press, 1974, 246p.

HOPKINS, F., Formation and Annulment of Marriage, London, Oyez Publishing, 1976, 101p., (Oyez Practice Notes 64).

HOULBROOKE, R., Church Courts and the People during the English Reformation 1520-1570, Oxford, University Press, 1979, 293p.

JACKSON, J., The Formation and Annulment of Marriage, London, Butterworths, 1969, xlvi-468p.

_____ (ed.), Butterworths Matrimonial Law Statutes, London, Butterworths, 1971, pagination given as 2003-2547, (reprinted from Rayden on Divorce - XI Edition).

JAMES, E., Marriage and Society, London, Hutchinson's University Press, 1952, 215p.

JOHNSON, J., A Collection of the Laws and Canons of the Church of England: From its Foundation to Henry VIII, Oxford, John Henry Parker, 1851, 2 vols. in 3.

JOYCE, J., Acts of the Church 1531-1885: The Church of England her own Reformer, London, Whitaker, 1886, 383p.

KELLY, K., Divorce and Second Marriage, London, Collins, 1982, 111p.

KEMP, E., An Introduction to Canon Law in the Church of England, London, Hodder and Stoughton, 1948, 160p.

KIRK, K., Marriage and Divorce, London, Hodder and Stoughton, 1948, 160p.

LACEY, T., Marriage in Church and State, London, 1912. This edition revised by R.C. Mortimer, London, S.P.C.K., 1947, 219p.

LATEY, W., The Tide of Divorce, Aberdeen, Longmans, 1970, xi-172p.

LATHBURY, T., A History of the Convocation of the Church of England, London, J. Leslie, 1853, 538p.

LITTLE, W., Holy Matrimony, London, Longmans, 1913, 296p.

MacMILLAN, A., What is Christian Marriage?, London, MacMillan, 1944, 146p.

MAKOWER, F., The Constitutional History and Constitution of the Church of England, London, Swan Sonnenschein and Company, 1895, 545p.

MAITLAND, F., Roman Canon Law in the Church of England, London, Methuen, 1898, 184p.

MANCHESTER, A., A Modern Legal History of England and Wales 1750-1950, London, Butterworths, 1980, 419p.

MAYFIELD, G., The Church of England: its members and its business, London, Oxford University Press, 1963, 211p.

MCGREGOR, O., BLOM-COOPER, L., and GIBSON, C., Separated Spouses, London, Duckworth, 1970, 281p.

MCGREGOR, O., Divorce in England, London, Heinemann, 1957, 220p.

MOORE, E., An Introduction to English Canon Law, Oxford, Clarendon Press, 1967, 176p.

MORGAN, D., The Bishops Come to Lambeth, London, Mowbray, 1957, 142p.

MORTIMER, R., Western Canon Law, London, Adam and Charles Black, 1953, 92p.

MULLETT, J., A Church Service Following a Second Marriage, Luton, Courtney Publications, 1983, 16p.

MYLNE, R., The Canon Law, London, Morrison and Gibb, 1912, xxiv-212p.

NASH, A., Education for Christian Marriage, London, Student Movement Christian Press, 1939, 304p.

O'DONOVAN, O., Marriage and Permanence, Bramcote, Nottinghamshire, Grove Books, 1978, 24p., (Grove Booklets on Ethics, no. 26).

OGLE, A., The Canon Law in Medieval England, London, John Murray, 1912, 220p.

O'MAHONY, P. (ed.), Catholics and Divorce, Edinburgh, Thomas Nelson and Sons, 1959, 116p.

OPPENHEIMER, H., The Bond of Marriage, Leighton Buzzard, The Faith Press, 1976, 110p.

PASSINGHAM, B., The Divorce Reform Act 1969, London, Butterworths, 1970, 60p.

PATEY, E., I Give You this Ring, London, Mowbray, 1982, 64p.

PULLER, F., Marriage with a Deceased Wife's Sister, London, Logmans, Green, 1912, 194p.

SACHS, L., Thomas Cranmer's Reformatio Legum Ecclesiasticarum of 1553 in the Context of English Church Law From the Later Middle Ages to the Canons of 1603, Washington D.C., Catholic University of America, 1982, 262p., (Canon Law Studies, No. 509).

SMETHURST, A., Convocation of Canterbury, London, S.P.C.K., 1949, 116p.

_____, and WILSON, H., Acts of the Convocations of Canterbury and York, London, S.P.C.K., 1948, 139p.

STEVENSON, K., Nuptial Blessing: A Study of Christian Marriage Rites, London, S.P.C.K., 1982, ix-258p.

STEVICK, D., Canon Law: A Handbook, New York, Seabury Press, 1965, 241p.

VAN VLIET, A., and BREED, C., Marriage and Canon Law, London, Burns and Oates, 1964, 308p.

WARNER, H., Divorce and Remarriage, London, George Allen and Unwin Ltd., 1954, 95p.

WESTERMARK, E., A Short History of Marriage, New York, MacMillan, 1930, 325p.

WILSON, H., Constitutions and Canons Ecclesiastical 1604, Oxford, Clarendon Press, 1923.

WINNETT, A., Divorce and Remarriage in Anglicanism, London, MacMillan, 1958, 284p.

_____, The Church and Divorce, London, Mowbray and Company, 1968, 110p.

4. ARTICLES

CHENEY, C., "William Lyndwood's Provinciale", in The Jurist, 21(1961), pp. 405-434.

COULTER, J., "The Common Law Term 'Voidable': Its use in Canonical Jurisprudence", in Studia Canonica, 13(1979), pp. 465-485.

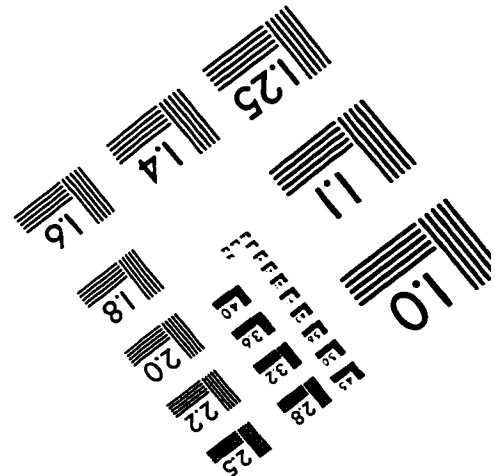
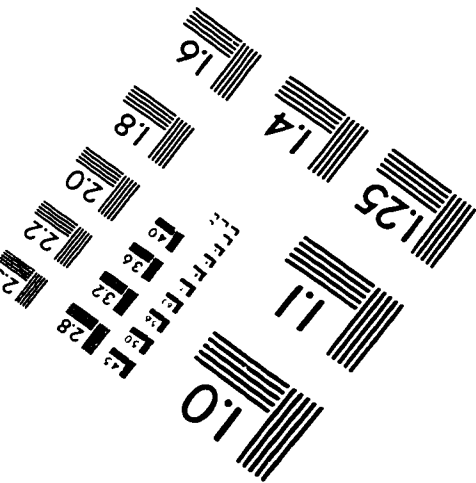
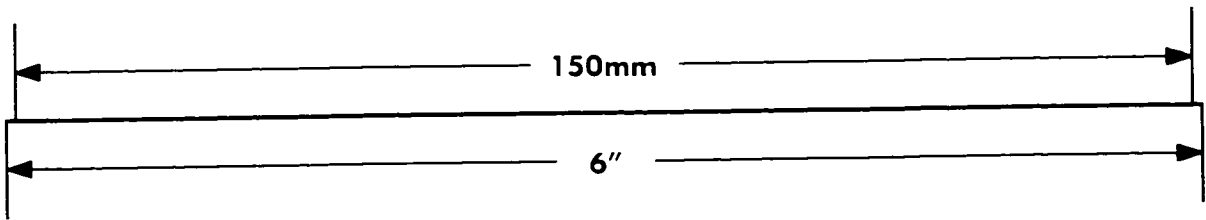
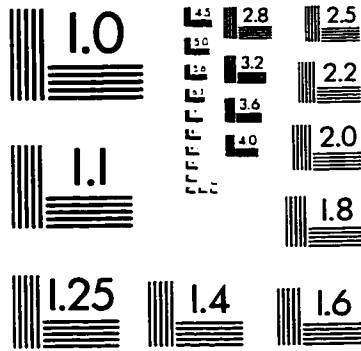
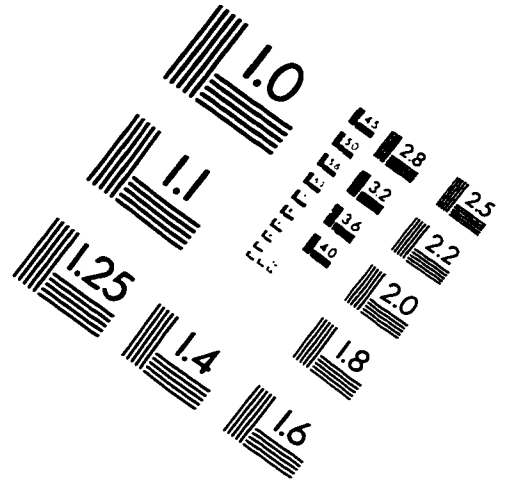
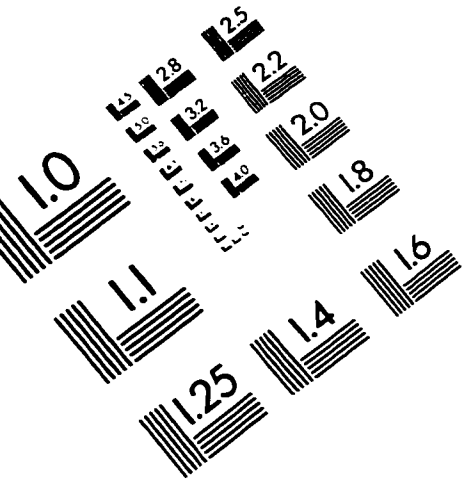
BIOGRAPHICAL NOTES

Michael Patrick Saunders was born on February 1, 1951 in Birmingham, England where he received his primary and secondary education. He entered All Hallows College, Dublin, Ireland in 1973 and completed his philosophical and theological studies in 1979.

On June 16, 1979 he was ordained a priest for the Diocese of Clifton, England by The Right Reverend Mervyn Alexander. After five years pastoral and tribunal experience he undertook studies in Canon Law at Saint Paul University, Ottawa, in 1984.

He received a national award for philosophical studies in 1976 (Dublin, N.C.E.A.); a Baccalaureate in Sacred Theology (Saint Patrick's University, Maynooth) in 1978, and a Baccalaureate in Canon Law (Saint Paul University, Ottawa) in 1985. He is now Secretary to the Bishop of Clifton.

IMAGE EVALUATION TEST TARGET (QA-3)



APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989

© 1993, Applied Image, Inc., All Rights Reserved