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Nullity

By The Bishop of Rochester[1]

MARRIAGE

THERE is no difference between Church and State in England as to the meaning of marriage.

According to the *Lambeth Conference Resolution* 1920, which was confirmed by the subsequent Conference of 1930 :

> " Our Lord's principle and standard of marriage [is] a life-long and indissoluble union, for better, for worse, of one man with one woman, to the exclusion of all others on either side ".

The Civil Law of England (as declared by Lord Penzance, in 1866), is to the same effect :

> " Marriage is the voluntary union for life of one man and one woman to the exclusion of all others ".

From this it follows that marriage is a contract resulting in a relationship : which the Church (in the Marriage Service) terms " a holy estate ", and the Civil Law a " status ".

The contract is " plighted " by the two parties who take each other for better or worse, and thereby enter upon the relationship of " the holy estate of matrimony ". It must, therefore, be clearly understood that it is the bridegroom and bride who perform the marriage : not the officiating priest, or the Civil Registrar. Though matrimony is not a " Sacrament of the Gospel " (to quote Article XXV), yet it possesses " the nature of a sacrament " ; for it is an outward and " effectual " sign of the two joining themselves together into one, which is the marriage bond. Thus, the marriage act, the two becoming one *flesh*, is sacramental of the oneness of *personality* thereby effected : even as St. Paul emphasizes (in 1 Cor. vi. 16), when speaking (be it noted) of an illicit union. For this reason, in Roman Canon Law, " there has been a general tendency to regard a non-consummated marriage as in some degree less indissoluble than a consummated one " (Kirk, *Marriage and Divorce*, p. 58). But, according to the general Christian view, the marriage union begins immediately the contract is made between two persons ; though consummation is held to strengthen the union already effected.

So it is that the formal covenant " betwixt them made ", whereby the bridal couple give themselves each to the other, and each takes the other, is sacramental of the marriage relationship which thenceforth conjoins them. In ecclesiastical parlance they are the " Ministers of their own Sacrament of Marriage ". Indeed, in Scotland, till quite recently, if two persons expressed their intention, before witnesses, of living together as man and wife, they thereby contracted a valid marriage. The officiating priest at a marriage, pronounces the parties married in the sight of God, and invokes the blessing of God upon their marriage. But he is not necessary to the marriage. The Roman

[1] The Paper read at the Oxford Conference of Evangelicals, 1956.

Church, however, with the object of making the priest essential to the marriage, gets over the difficulty by decreeing there to be no marriage at which a priest is not one of the witnesses to the marriage : for witnesses have always been necessary, even for a Scotch marriage. Thus, incidentally, seeing that the Roman Church does not recognize Anglican Orders, all Church of England, and English Civil, marriages can easily be dissolved by one of the parties turning Roman ; when the marriage can be pronounced null and void, and a new alliance be happily blessed by a Roman priest.

Such then is marriage. It is a contract made before witnesses between two persons, who thereby immediately enter upon a relationship of oneness, one with the other, that is intended to be permanent : " till death us do part ".

Divorce and Nullity

It will now be easy to discern the difference between divorce and nullity. Divorce is to disrupt the *relationship* which has come into being ; and it is occasioned by some factor that has intervened *subsequently* to the marriage. Nullity concerns the *contract*. It relates to circumstances, or conditions, *prior* to the purported marriage ; and means that for some reason the contract was defective, with the result that the marriage relationship never came into being. Nullity, then, does not so much concern the law of marriage as the law of contract. A contract, to be a contract, must possess certain essentials. What, then, are the essentials in a contract for marriage, the absence of which must be fatal, to constitute the marriage relationship ?

There are two requisites for a contract to be a contract. It requires mutual consent ; and it requires ability to fulfil the contractual conditions.

Thus, there are certain defects which render marriage *void* from the beginning. There are, also, other defects which render the marriage *voidable*, if one of the parties desire to take appropriate action in the courts.

Void Marriages

There are two defects which render a marriage void—namely, lack of consent and lack of capacity.

(1) *Lack of Consent* may be occasioned in three ways :
   (a) *By a mistake*, which includes such fraud as caused the mistake.
   (b) *By duress* : that is when a person is constrained to go through a ceremony of marriage by threats which destroy the reality of the consent. Such cases are extremely rare in English courts.
   (c) *By Insanity*, which precludes the giving of a genuine consent.

(2) *Lack of Capacity* to enter upon a marriage contract may be absolute or relative.
   (a) *Absolute Incapacity* is where the party cannot marry at all ; by reason either of being married already, or of being under the age when marriage is permitted by law.
   (b) *Relative Incapacity* operates when the marriage is impossible with some particular person, because the parties concerned come within the prohibited degrees, which are now agreed

both by Church and State. It will be remembered that the State in 1907 allowed marriage with a deceased wife's sister or a deceased husband's brother ; and that the Church by a Canon, in 1946, arrived, independently, at the same conclusion.

Voidable Marriages

We come now to Voidable Marriages, that is where lack of consent, or lack of capacity, discoverable after the marriage, are pleaded by one of the parties as rendering the contract defective.

Lack of Consent, by the Matrimonial Causes Act 1937, has been stretched to include unsoundness of mind, mental defectiveness, recurrent fits of insanity or epilepsy, venereal disease, and pregnancy by some other man. It is considered that such petitioners are the victims of fraud, for had they known what was kept from them, they would not have consented to contract the marriage.

Such marriages, on the other hand, may be approbated. That is to say the wronged person in question may consent to remain married. For example, the adoption of a child is taken as approbating a marriage that might otherwise be pronounced void. For this reason, such marriages are termed "Voidable". They *can* be void: but need not be.

Voidable marriages through *Lack of Capacity*, occur, where either party is impotent, and so cannot perform the marriage act necessary for having children, which is a principle purpose of marriage. Here again the marriage can be approbated ; and, in the case of older people, it is considered to have been so from the first.

Now, under this category of *Lack of Capacity*, a new ground for voidability was added in the Matrimonial Cause Act 1937, which has caused much difficulty and controversy, namely, " Wilful refusal to consummate the marriage ".

This new ground for nullity is a radical departure from the accepted principle that void, or voidable, marriages depend on defects which existed at the time when the marriage was contracted : any *subsequent* ground for the dissolution of a union being a matter for divorce, not nullity. Wilful refusal to consummate the marriage does not exist when the marriage is contracted between two persons who are capable of consummating it. Wilful refusal is, instead, a post-nuptial event ; and thus a marriage, which was valid when entered into, can now be treated as null and void. There is no logic in such a provision ; which might, indeed, become a precedent for the extension of nullity to make what is really divorce more respectable. It is not, therefore, surprising that experienced lawyers in the divorce courts were much exercised over the matter. As they explained to the *Archbishop's Commission on Nullity*, before 1937 the fact of wilful refusal to consummate a marriage had been generally accepted as indicating impotence from some psychological incapacity to consummate the marriage with a particular spouse ; and, as such, a decree of nullity was usually granted. Meanwhile, in 1938, both Houses of the Convocation of York, and the Upper House of the Convocation of Canterbury, accepted all the new grounds of nullity laid down in the 1937 act, " wilful refusal to consummate " included. Only the Lower House of the Convocation of Canterbury refused to accept them without further consideration, and

asked that a Committee be appointed to consider the whole question of the law of nullity. It was, indeed, this Resolution which in the first place led to the setting up of a Commission in 1949. But it was the revision of Canon Law which brought the matter to a head; for the late Dr. K. E. Kirk, Bishop of Oxford (though he had, apparently, made no objection to the inclusion of "wilful refusal to consummate" as a ground of nullity, in 1938) then proposed an addition to the Canons on Marriage, refusing subsequent marriage in Church to any who had obtained a decree of nullity on this plea. The difficulty, however, has been more happily resolved; for the Commission on Nullity was able to make strong representations to the Royal Commission on Marriage and Divorce, which was then in session. These were strengthened by similar representations by leading lawyers; with the result that the Royal Commission has resolved that "wilful refusal to consummate the marriage" ought no longer to be a ground for nullity.

NULLITY AND BOGUS DIVORCE

Having now stated the law of nullity as it exists in England, both as regards Church and State, I can pass on to put before you the real issue before the Nullity Commission of 1949—namely, whether the Church of England should follow the example of the Church of Rome and, while rigorously forbidding divorce, afford relief to hard cases by deeming them to come under nullity. Two proposals have been made which work towards this end. In 1949 the suggestion was put forward in the York Convocation that the Church might recognize (as does the Roman Church) "Defective Intention" as a ground for nullity of marriage. Then, also, the first draft of the Revised Canons gave power to the Bishop of a diocese, sitting with his Chancellor, to allow a marriage in church after a divorce, where there seemed good grounds for the marriage, instead, to have been declared null and void. Let me now deal with each of these proposals.

Defective Intention

The Roman Church recognizes Defective Intention and Conditional Consent, as constituting grounds for nullity, in certain circumstances. Such circumstances are, for example, where the intention is to terminate the marriage if it is not successful; or where it is agreed never to have a child, by a recourse to contraceptives; or where there is a condition that either or both of the parties must never have a lover or mistress. As can be seen, such private intentions, or conditions, invalidating marriage, can be stretched to an extent that renders divorce unnecessary. Indeed, the late Dr. K. E. Kirk (*Marriage and Divorce*, p. 67) in a polite, but evident, understatement, has written regarding the "Latin Church of to-day" that "an uneasy suspicion lingers in many minds that nullity suits are still sometimes (*sic*) used as convenient substitutes for that divorce which Western Canon Law so stringently forbids". Our English courts will have none of this. In English Ecclesiastical Law no agreement or private determination is allowed to nullify a marriage, even though it may frustrate one of the principle ends of matrimony, such as having children. English law holds the contracting parties to the public consent and profession they

make before witnesses, as against any private derogation of the same. As Lord Stowell laid down in 1811, when sitting as an ecclesiastical judge in a Church Court : " The parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and law ". Obviously, too, it would be an offence against public morals, if marriage after marriage, with all the bridal accessories of a wedding in church, were possible for the same Hollywood debauchee, simply by making it privately known, in each case, that he or she did not really mean the nuptial promises they had solemnly avowed in public.

Ecclesiastical Courts

The other proposal with regard to " hard cases " that needs to be considered, is that of Canon XXXVI of the Revised Canons as tentatively suggested by the 1947 Report. It envisaged a procedure in which a couple who had been granted a divorce (when they might, possibly, have obtained a decree for nullity) might be allowed a marriage in church by a Bishop, after he has taken what legal advice he might desire. Such genuine cases are few and far between. They occur occasionally when parents are unwilling to bastardize their children, which is the effect of no marriage having existed ; or, more generally, in cases of " incompetence " (the most usual ground for nullity), when one of the parties is unwilling for the necessary medical examination, or the man does not wish to advertise his sterility.

But there can be no doubt that behind the proposal there lurks the further intention of helping " hard cases " of what can only be divorce, while still maintaining the rigorist view of the ontological indissolubility of the marriage relationship. That this desire is widespread is evident from the statement of an outstanding Church lawyer, such as the Honourable Mr. Justice Vaisey, who when Vicar General of the Province of York, wrote in an Appendix to the *Church and Marriage Report*, 1935 : that " if the choice lay between the hypocrisy of ' fictitious ' annulments and the hypocrisy of ' arranged ' divorces, the former might well be considered to be preferable to the latter in that it preserves, at least in theory, what the latter repudiates—the *principle* of the indissolubility of marriage ". As a matter of fact, " arranged " divorces have ceased to exist, with the extended grounds of divorce of the Matrimonial Causes Act 1937 ; though the Act has increased the desire for divorce to become " fictitious " annulment. The 1949 Commission on the Church and the Law of Nullity and Marriage, were thus called upon to consider two definite proposals—namely, that of an Ecclesiastical Court to review cases of divorce granted by the Civil Courts ; and also that of a Bishop deciding himself such cases as might be brought to him. The Commission ruled out both suggestions quite decidedly.

First, with regard to the setting up of an Ecclesiastical Court. Such a court could not demand the attendance of witnesses ; and, to be efficient, the cost would be beyond the means of ordinary people. As it would be challenging the decisions of the Civil Court, it would need to be impartial and efficient beyond question ; but for this it would possess neither the powers nor the financial resources.

Then could it be left to a Bishop to exercise his own personal discretion? It would be quite intolerable if forty-three bishops were empowered to exercise their discretion, as it seemed good to each of them. Their judgments would inevitably differ; and recourse would be made to the one known to be most clement and obliging. Moreover, such a procedure is against Canon Law as it already exists. Canon 106 (1603/4) lays down the principle that "no sentence shall be given . . . for annulling of pretended Matrimony, but in open Court, and in the seat of Justice"; and Canon 105 insists on the need of additional evidence and proof to the statement of the parties themselves, "that the truth may (as far as possible) be sifted out by the deposition of witnesses, and other lawful proof and evictions". If Ecclesiastical Courts would not be able to command the essential evidence demanded, still less would individual Bishops. They would be even more limited than such Courts in the exercise of judgment upon what is a question of fact and law, and would be deprived of the advantage such courts might possess of seeming to be impartial.

DIVORCE

In conclusion the use of "bogus" nullity by the Western Church to permit divorce, while still teaching the ontological indissolubility of marriage, raises acutely the question as to the rightness of the principle thus upheld at the cost of truth and honesty.

Dr. K. E. Kirk (*Marriage and Divorce*, p. 34) states that after the third century "no branch of the Christian Church . . . has been without some recognized loophole or safety-valve". The Eastern Church believes that the Matthæan Exception teaches the possibility of the "death of marriage"; and the Western Church had "bogus" nullity. But the truth is that there has never been a time when the possibility of divorce has not been recognized. As early as A.D. 55, only eighteen years after the Ascension, St. Paul, while upholding our Lord's principle and standard of the permanent nature of marriage, yet allowed a Christian deserted by an unbelieving spouse to marry again; for so the Church has always interpreted the Pauline Privilege (see 1 Cor. vii. 10-17, cf. vi. 16). The Matthæan Exception also (Matt. v. 31-2 and xiv. 3-9), though it may not be regarded as reporting the actual words of Christ, yet must mean, by its inclusion in Holy Scripture, that under the direction inspiration of the Holy Spirit it represents what the Church believed to be the mind of Christ regarding persistent adultery. Moreover, however much the fulminations against divorce by the Early Fathers during the ascetic centuries may be quoted, they can only mean (according to Bishop Edward King of Lincoln) that the practice of divorce was widespread in the Church, to occasion them. For the rest, as Bishop Mandell Creighton has summed up the position: "The medieval system was a mass of fictions, or dispensations, and subterfuges. The question (of divorce) has always troubled the English Church. Cranmer, Andrewes, Laud, alike had no fixed principles." Is not therefore the true position as follows? Our Lord Jesus Christ affirmed, as a natural law from the beginning, the principle of the monogamous character, and life-long permanence, of marriage. It is, therefore, the responsibility of the Church to uphold this standard

steadfastly ; and this the Church of England has done by ruling against a second marriage in church, where a former partner in matrimony is still alive. But our Lord never *legislated*. He declared *principle*, and entrusted to the Church the responsibility of legislating to uphold the principle in the best way possible under the contemporary circumstances of the time ; and for this the guidance of the Holy Spirit is promised. Therefore it is that God Who allowed divorce for " the hardness of men's hearts " (for Moses speaks with the voice of God), cannot but allow the same, as long as there are hard hearts in the world ; and we are called upon to legislate for the eternal welfare of men and women, and their children : recognizing that by the sin of one, or both partners in marriage, its personal relationship can be so completely destroyed as to be equivalent to the dissolution of the marriage bond by death. That being so it cannot be against the will of God that the possibility of divorce should exist, as the lesser of two evils.

Communicating the Gospel in a Secularized Society

By The Rev. Canon H. G. G. Herklots, M.A.

IN the England of our day, technological applications of scientific discoveries have made possible new pleasures and greater ease at a time when full employment and social planning have brought the products of this inventiveness within the reach of great numbers of people.

The *malaise* of disillusioned scientists has not reached the masses : there is a time-lag in these matters. Most people in England are giving themselves up to the *enjoyment* of living in a secularized society. They are not interested in ideological conflicts. What they are out for is a good time ; not a selfish good time, but one shared with others. Their operative faith is a generous hedonism. They do not want to be told about unpleasant things. The old fears of unemployment and of poverty in old age have largely been assuaged. The fear of death remains. Best to forget it : best not to name it. The anticipation of death is masked by such a phrase as " when anything happens to Mum ". It is well, however, to remember that one reason why the early Church won its way was because it had something clear to say about death. A Church speaking in the same terms to-day might also win its way. When people feel that they can expect nothing from it they turn readily to the sects and spiritualists. They know so little of Christianity that they cannot tell the genuine from the spurious ; nor judge what speaks with authority and what does not.

Behind the technological advances from whose achievements we profit—and whose benefits we quickly take for granted—there lie far greater changes than are apparent on the surface. We talk glibly of