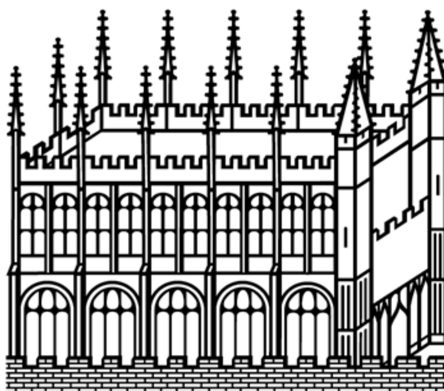

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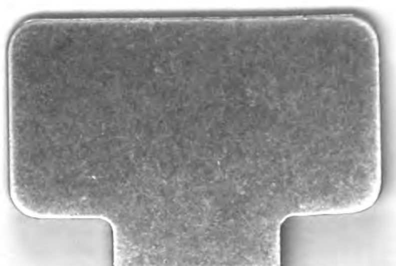

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MARRIAGE LAW
AS AFFECTING THE CHURCH.

A PAPER READ AT THE CHURCH CONGRESS,
AT SHEFFIELD, ON OCTOBER 2ND, 1878.

BY

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MARRIAGE LAW AS AFFECTING THE CHURCH.

Mr. J. Theodore Dodd.

Marriage is not merely a contract recognized by the State, and therefore only a civil contract, but it is a natural contract, having among Christians the sanction of religion, and hence it is a religious contract.*

Acts of Parliament can neither make nor unmake a marriage.

Consequently the law which *compels* the Church to allow her buildings and Services to be used for the marriage of divorced persons, whom the Church has never declared to be unmarried, is an infringement of the rights of the Church, and ought to be repealed.

The Archbishop of Canterbury has clearly pointed out, in answer to a petition on this subject, that if churchmen want a thing *done* they must do it themselves, through their representatives in Parliament.†

I have spoken of marriage as a religious contract; but I am well aware that marriage before the registrar is a good and valid marriage, both according to the old Canon Law of the Christian Church, as well as in the eye of the State.

The old maxim was *consensus facit matrimonium*, and the intervention of a priest was not considered absolutely necessary according to the ancient Canon Law. See the judgment of Lord Stowell in Dalrymple *v.* Dalrymple, 2 Hag., Consist. 64. The Scotch law, which to this day requires, as a matter of necessity, neither the presence of any minister of religion, nor of any public officer, is here identical with the old Canon Law. It is said, however, that the presence of a priest, or since the Reformation, of a deacon, was

* The Report of the Royal Commissioners, published in 1868, contains much valuable information. A large number of witnesses were examined, and a circular letter, signed by Lord Chelmsford on behalf of the Commissioners, was addressed to all the bishops and a selection of the clergy of the United Kingdom, Protestant and Roman Catholic, as well as to certain Ecclesiastical Officers and other individuals suggested as likely to give important practical information on the subject of the inquiry. This is the report to which I refer several times, both in the text and notes.

† It is only fair to His Grace to add, that since the above was written, the Bishops have announced their resolution *not* to grant Licenses for the Marriage of Divorced persons. (Note appended December 2nd, 1878.)

always necessary to a valid marriage in England.* Nevertheless, it is most desirable to induce all Church people to marry in the church, first—that they may have the benefit of the Church's blessing, and secondly—because such a practice tends to strengthen the Church. I think, therefore, every obstacle in the way of Church marriages should be removed, or at least they should be made as easy as civil marriages. A civil marriage, inclusive of the notices, costs seven shillings. The cheapest method of marriage by Banns costs, in most Churches, 1s. 6d. or 2s. 0d. more than a civil marriage: often the cost is still greater. This should be reduced. Complaints were made as to the amount of fees for Church marriages in England by Dean Hook (Report, p. 13), and the Bishop of Rochester (p. 14). Sir G. Clark stated that he believed the principal reason why many Northumberland people were irregularly married in Scotland was to avoid the expense of the marriage fees in their own Parish Churches (p. 132). Before leaving the subject of fees, I may remark that it would appear from the law books, notwithstanding the provisions of the rubrics, that a clergyman has *not* a right to refuse to marry because the fees are not paid.† Moreover, the fee must be a reasonable one. In an agricultural parish, ten shillings for the clergyman and three shillings for the clerk has been declared unreasonable.‡

In Scotland, the amount of the fees often deters persons from incurring the expense of a regular marriage, and so they are content with an irregular one, or none at all: so that a reduction is much needed there. There are three forms of "irregular" marriage in Scotland, viz.:—(1) *Per verba de presenti.* (2) Promise of marriage, with subsequent cohabitation. (3) Habit and repute.—See Report, pp. xviii., xxxi. The Act, 41 and 42 Vict., c. 43, has just been passed to encourage regular marriages in Scotland. It comes into operation on Jan. 1st, 1879. It enables ministers, clergymen, and priests to celebrate marriages on registrar's certificate; and enacts that any marriage so celebrated shall be deemed to be a regular marriage, as if it had been celebrated after banns. The entire cost of the registrar's certificate is 2s. 6d. The Act (sec. 12) contains a provision for punishing with a fine any person otherwise entitled to celebrate a marriage, who shall celebrate a marriage in Scotland *with a religious ceremony* unless the parties produce either certificates of due proclamation of banns or registrars' certificates. The Act will, I believe, cheapen regular marriage in Scotland.

* R. *v.* Millis, 10 C. and F. 534. Beamish *v.* Beamish, 9 H. L. Cas. 274. See Catteral *v.* Catterall, 1 Rob. Ecc: Rep. 580.

† Cripps, 699. See also Lindwood, Lib. v. tit. 2, p. 279. It would seem from Escott *v.* Mastin, 4 Moore, P.C.C. 104, that the Court will construe rubrics according to the old law, where reasonably practicable.

‡ Bryant *v.* Foote, 3 L. R. Q. B. 497.

Great complaints are also made by the Roman Catholics in England, of the expense caused by their being compelled to have a registrar present at their weddings, whose fees must be added to the offerings made to the priest. I think that both in the case of Romanists and Dissenters, the priest, or licensed minister, ought to be allowed to marry without the registrar, just as the clergy of the Established Church are allowed.

I would, in the next place, suggest that the hours during which marriages may be solemnized should be extended. Instead of from eight to twelve, they should be from eight to three o'clock. The old rule was probably made because the newly-married couple always received the Holy Communion: as this was done fasting, the breakfast always took place after the wedding.

Besides reduction of the *cost* and enlargement of the *time* of marriage, all difficulty about the *place* of marriage should be removed. In towns like Sheffield, where the old parish has been divided and sub-divided into many separate districts or parishes, the question is often asked, whether the marriage may take place in the old Church, in cases where neither bride nor bridegroom reside within the district still attached to it, but do live in what *was* part of the original parish?

A feeling, perhaps a sentimental one, hangs round our Old Church. Our fathers and grandfathers married there, and their descendants would fain do the same. Many generations of our forefathers sleep there in hope of the resurrection, and this alone gives in our eyes a Consecration to that spot which no other can acquire.

There is therefore often a strong desire expressed by persons in favour of their marriage taking place in the old Parish Church. Sometimes also people belonging to the congregation of some Church other than that of the district in which they live, not unnaturally wish that the Church, in which they worship habitually, should be the place where they take their life-long vows.

As the law stands now, both in *distinct* and *district* parishes constituted under the Acts passed in the 58th and 59th years of George III., the marriage *must* take place in the district Church, and *not* in the old Parish Church.* The same rule holds good for the consolidated Chapelries.† In the case of New Churches, built and constituted under the Ecclesiastical Commissioners' Acts, the question is more doubtful, as those Acts, like most of our Ecclesiastical Laws, are rather confused. It seems, however, that where the Commissioners have authorized marriages, and the Incumbent of the New Church is entitled to the whole of the fees, then the New Church is the only place where the inhabitants of such districts may marry.‡

* Phillimore's Ecclesiastical Law, pp. 763, 767, 2181. Cripps, 678.

† Phillimore, 2182.

‡ 19 and 20 Vic., c. 104, ss. 14, 15.—(Lord Blandford's Act.) Phill., 2176.

The Bishop's authorization of marriage has not the same effect as that of the Commissioners.* Happily, no marriage can be invalidated by reason of non-residence;† but in the case of minors marrying without consent of parents, non-residence may occasion a forfeiture of property.‡ The clergyman who knowingly marries non-residents is liable to punishment, and it is his duty to make reasonable inquiry, according to the size and circumstances of his parish, as to whether the persons intending to marry are really residents. I should suggest, as an amendment of the law, that any two persons should be allowed to marry at any Church within the County, or Riding, after having had their Banns put up at their respective district churches.

The Rural Deanery has been suggested as a better limit than the County. But lay-people do not, as a rule, know the boundaries of Rural Deaneries. The Poor-law Union would be preferable in the country, and perhaps the Borough, in towns. Or persons might be allowed to marry within (say) ten miles from the district Church where the Banns of either of them were put up.

Another consequence which seems to flow from the fact that marriage is not a contract deriving its efficacy from the civil power is, that no failure to comply with the preliminaries to marriage which the State requires (such as Banns or Licence) ought to invalidate a marriage.

The law, unfortunately, is somewhat different; but the Royal Commissioners, in 1868, proposed to alter it, so that no failure, or fraud, with respect to Banns, should invalidate the marriage of people, who have actually gone through the ceremony of marriage before an authorized minister of religion, or civil officer.

This will, I consider, be a great improvement. Of course, the people committing the fraud, or wilfully disobeying the law, ought to be punishable, and in some cases highly punishable; but that is very different from declaring people not married when they really are.

If a man or woman is married by banns under a false name, given fraudulently, and with the knowledge of the other party, such marriage is at present null and void. This was decided in the case of *Midgeley, falsely called Wood, v. Wood.*§ There the wrong Christian name had been given. In the Appendix to the Report, page 48, several cases on wrong names are cited. It should, however, be remembered that *R. v. the Inhabitants of Tibshelf*|| was decided by Lord Tenterden, under 26 George II. c. 33, and not under

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* Reg. *v.* Perry, 3 E. and E. 640, 6 and 7 Wm. IV., c. 85. Phill., 2177, 765.

† 4 Geo. IV., c. 76, s. 26.

‡ Ibid: s. 23.

§ 30 L. J., Mat. Cas. 57.

|| 1 B. and Ad. 190.

4 George IV. c. 76, the Act now in force* A marriage solemnized after an undue publication of banns will not be null and void under the provisions of the Marriage Act of 1823, unless it be shown that both parties "knowingly and wilfully" concurred in such undue publication.†

What would be the position of a Clergyman who was asked to re-marry a person who had repudiated his marriage on account of some error about banns, even though such error was known to the other party?

Of course it may be said that every one knows the laws,‡ and that therefore the parties must have *known* that the whole marriage was a nullity.

I reply that the maxim certainly *ought* not to apply to Ecclesiastical Law, for it was stated by the Lord Chief Justice Cockburn that the Privy Council were *not* familiar with Ecclesiastical Law; and if such is the case with judges of known and tried learning in other branches of legal study, how can knowledge, with any fairness, be imputed to ignorant people of the poorer classes? The Commissioners in their Report§ speak very seriously of the dangers which may result from the application of this maxim to the marriage law.

Another consequence which follows from the view that marriage is not merely a civil contract is, that it is essentially the same in every country.

It is therefore irrational, as well as inconvenient, that the marriage laws should be different in England, Scotland, and Ireland.

The Royal Commissioners on the marriage law strongly advise that the law of the three countries, England, Scotland, and Ireland, should be rendered uniform; || and I quite agree with them, that such a course would be most beneficial, if practicable.

In the case of Ireland the difficulty would not be great, as England has long taken upon itself to arrange the matrimonial affairs of the Irish, in about as complicated and unreasonable a manner as could well be conceived; and any change would be for the better.

But in Scotland the case is different.

Here, we have no conquered country subject to uncongenial laws, but we have a land which, with a deadly hate of all that savours of Rome in the way of dogma or ritual, is most deeply imbued with the Law by which Rome has in fact ruled most of the nations of Europe, centuries after her legions have been vanquished.

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* See Chitty's Statutes, vol. iii., p. 250. See also for cases, Fisher's Digest, 2340, 4362. Templeton *v.* Tyree, L. R. 2 P. and M. 420.

† Gompertz *v.* Kensit, L. R. 13, Eq. 369.

‡ As to the real meaning of this maxim, see R. *v.* Tewkesbury, L. R. 3 Q. B. 629.

§ Pp. x., xix.

|| Report, p. xxiv.

And just as the Civil Law influences Scotland, so does the Canon Law.* The English marriage law is also to some extent founded upon the Canon Law; and of course, as the great majority of Irish are Roman Catholics, they would readily accept any alterations from the old Canon Law; although it differs considerably from the modern Canon Law now enforced by the Papacy.

I think, therefore, our best chance of obtaining uniformity is to return, as far as we reasonably can, to the common original. Of course no one proposes to return to the absurd prohibitions of certain marriages, which the Canon Law contained, and which it sometimes increased, and sometimes relaxed.

It is, however, only fair to say that its greatest folly, the prohibition of marriage between god-parents and god-children, and their respective relations, was in truth not an invention of its own, but borrowed from the primitive Roman law forbidding the marriage of Guardian and Ward;† for by Roman, and, indeed, by Aryan or Indo-Germanic law, adoption really made the person adopted a son or daughter,‡ as far as a legal "fiction" could do.

Through the judicial fairness and learning of the Lord Chief Justice Cockburn, the works of the great Ecclesiastical Lawyers Ayliffe and Gibson are being restored to their rightful place, and I trust the marriage laws, like all branches of Church Law, will feel the influence of the revival of the learning of the Canon Law. To the names I have mentioned, we would gladly add Lyndwood, Johnson, and others. Our own more modern Ecclesiastical Lawyers have tried in vain to grope their way. The result has been, often uncertainty and inconsistency in judicial decisions; sometimes, it may be, a failure of English justice towards an individual clergyman. I refer especially to the case of One who is now no longer living. His was not a case of any excess in ritual. He was suspended for simply doing what he believed to be his duty.

We must remember that the Canon Law of England is part of the law of England as well as the Common Law and Statute Law,

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* For some interesting remarks on the general influence of the Canon Law, see Maine's Ancient Law, p. 286, and the Early History of Institutions, by the same writer, p. 213. In the latter work (p. 62), Sir Henry Maine speaks of the origin of the Canon Law as an interesting and yet unsettled problem. He adds, "The truth seems to be that the Imperial Roman Law did not satisfy the morality ot the Christian Communities, and this is the most probable reason why another body of rules grew up by its side and ultimately almost rivalled it." For an account of its influence in England against conditions in restraint of marriage, see judgment of Lord Thurlow in Scott *v.* Tyler, 2 Dick., 716. The influence of the Canon Law in Scotland is much greater than in England.

† Maine's Early History of Institutions, p. 239.

‡ Maine's Ancient Law, p. 131. History of Institutions, p. 231.

and as such deserves the respect of every Englishman.* The view of the ancient Canon Law and the present Scotch law is, that marriage depends on the consent and intention† of the parties, and that it depends no more on Acts of Parliament than Birth or Baptism. A child is baptized, though registration is omitted; and we cannot doubt that a person is born, and continues to be so, although his careless parents have illegally omitted to notify the happy event to the Registrar-General. It is, therefore, the wisdom of the civil power to make the requirements to legal marriage as easy and simple as possible; otherwise the Scotch will never cordially agree to it. And if the requirements of the law are so simple and easy, it is a very strong presumption, almost overwhelming, in all ordinary cases, that those who neglect them did not intend marriage. I should, therefore, recommend that marriage should be made cheaper, and the law simplified, so as to render it more consonant to common sense; and as Common Sense in England, Scotland, and Ireland is much the same, the natural result will be that the Marriage Laws of the three countries will be rendered more uniform.

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* The whole *foreign* Canon Law does not form part of the Law of England. And, of course, both the Anglo-Canon Law and the Common Law have been, in many respects, altered by Statute. The Anglo-Canon Law consists of portions of the *general* Canon Law, and of Provincial Constitutions, and Canons passed by the Clergy and confirmed by the Crown in Convocation. As Justice Whitlock observed in Evans *v.* Owen, Godbolt's Reports, 432: "There is a Common Law Ecclesiastical as well as our Common Law." See also judgment of Lord Justice James, in Niboyet *v.* Niboyet. (*Times*, November 19th, 1878.)

† As to *intention* being necessary to irregular marriage in Scotch law, see Steuart *v.* Robinson, L. R. 2 H. L. C. 534, and the Report of the Commissioners, pp. xx., xxi. As to the English law, see the remarks of Sir R. Phillimore in Sottomayor *v.* De Barbos, 2 P. and D. 86. His judgment was reversed on another point—3 P. and D. 1.

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