MARRIAGE AND THE ROMAN CATHOLIC CHURCH.

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NO institution has influenced human life more widely or more deeply than the family. All the interests of man—social and political, moral and religious—gather around the family home. These interests, however, reach their highest emotional intensity in that relation of the sexes, out of which the family takes its origin; and therefore the well-being of mankind has always been intimately bound up with the moral and religious usages, the social and civic regulations by which this relation has been safeguarded. Accordingly, in all the highest civilisations the bond of man and wife has been fortified by the most solemn motives that act upon the human soul, the sanctities of a religious rite. Among Christian communities at the present day the marriage ceremony is almost always performed by a minister of religion, purely civil marriages are in general regarded as "irregular," and they certainly form a very small proportion of the matrimonial transactions. Christian sentiment on the subject has taken its most definite form in the Roman Catholic doctrine, which makes marriage one of the "sacraments" of the Church. The technical significance of this dogmatic theory or of the controversies which it has originated does not concern us here; but even the most violent Protestant cannot shut his eyes to the fact, that it gives the Roman Catholic Church a position of peculiar advantage in enforcing the inviolable sacredness of the marriage bond. It has even been claimed at times, and by Catholics of philosophic culture like Mr. W. S. Lilly, that "the only real witness in the world for the absolute character of holy matrimony is the Catholic Church."* This statement, though it might be qualified, is not here

* See an article by Mr. Lilly on "Marriage and Modern Civilisation" in *The Nineteenth Century* for December, 1901, p 919.

called in question. The benign influence of the Catholic Church as a living witness for the sanctity of marriage is rather ungrudgingly recognized. It is in fact for this reason that attention is here drawn to the indications of a tendency which is calculated to mar the general influence of the Church upon the institution of marriage.

This tendency has appeared in the Canadian Province of Quebec, where the Catholic Church holds a somewhat unique position. That position has given her a peculiar power in controlling the marriage-law of the whole Dominion. For, in the Act of Confederation which forms the Constitution of Canada, her influence went with the wisest convictions of Protestant statesmen towards keeping the laws affecting marriage within the sphere of the Federal Government. The Act, indeed, provides that each of the several Provinces entering into confederation shall retain its existing laws till these are amended by subsequent legislation. But four of the Provinces, New Brunswick, Nova Scotia, Prince Edward Island, and British Columbia, had Divorce Courts at the time when they joined the Dominion; and as the Federal Parliament has in general avoided unnecessary interference with Provincial freedom, those courts have never been abolished. In the other Provinces, however, divorce is still impossible by ordinary process of law; it can be obtained only by a special Act of Parliament, and only on proof of conjugal infidelity.

But it is in the courts of the Province of Quebec rather than in the Parliament of the Dominion, that the influence of the Catholic Church on the marriage question has taken its most interesting form. To understand this it is necessary to bear in mind that the laws of France at the time of the cession of Canada remain the laws of Quebec, except in so far as they have been modified by change of sovereign or by subsequent legislation. Now, as a Catholic country at the period in question, France governed her marriage-law by the Catholic doctrine, as formulated by the Council of Trent. The provincial law in Quebec has of course been amended to secure the validity of marriage between persons who do not belong to the Catholic Church; and the whole marriage-law, as thus amended, has been embodied in the Civil Code of the Province, which was promulgated in 1867. So far as the marriage of non-Catholics is concerned, the interpretation of the Code seems to have met with no serious difficulty. But a perplexing legal problem has arisen out of the fact, that occasionally persons belonging to the Catholic Church have been married, not (as their Church requires) by one of her own priests, but by a Protestant minister. According to

many legal authorities, this fact does not invalidate the marriage of Catholics before the civic law, as the Code seems to require merely that a marriage must be celebrated before witnesses and by any officer duly qualified; but Catholic jurists in general contend that, in the case of Catholics, the marriage-ceremony must be performed in a Catholic church and by a qualified Catholic priest. This point involves merely a disputed interpretation of provincial law; but the problem is complicated by an additional contention of far more serious import. For, as marriage is for Catholics a religious sacrament, some of the provincial judges have decided that, whenever any question with regard to the validity of a marriage is brought before the civil courts, they should refer it to the bishop of the diocese and await his decision before pronouncing judgment in regard to the civil effects of the marriage. This decision has very naturally been opposed, not only by legal authorities, but by the unanimous sentiment of the community outside of the Catholic Church. Unfortunately none of the cases that have come before the Canadian courts have been appealed to the Privy Council in England, so that no approach has yet been made towards an authoritative settlement of the questions involved. The situation is therefore one that calls for earnest reflection with the view of finding whether some solution of the problem at issue may not be reached without regard to the disputed interpretation of the law.

The whole problem has found its clearest expression in one of the more recent cases, which, in virtue of its peculiar features, excited an unusual degree of interest throughout Canada. Other cases of similar purport had been the subject of legal controversy before, and at least one has been adjudicated since; but as the one specially referred to is singularly free from side-issues in which the main issue might be obscured, it may be taken as peculiarly representative of the principle involved in them all. The facts of the case are these: The petitioner was a young man named Edouard Delpit, who had been baptised and brought up as a Catholic; the defendant, a young woman named Marie Cote, likewise baptised and brought up in the Catholic Church. In 1893, when the former was twenty-three, and the latter only sixteen years of age, they were married by a Unitarian clergyman in Montreal in accordance with all the forms required by law of the officiating minister. After the two had lived together as man and wife for seven years, and three children had been born to them, Delpit applied to the Archbishop of Quebec to inquire into the validity of his marriage; and the Vicar General of the diocese, to whom the adjudication of mat-

rimonial causes was delegated, pronounced the marriage null on the ground of clandestinity. This decision was, on appeal, confirmed in Rome; and an application was then made to the civil court to confirm the judgment of the ecclesiastical court, and to annul the marriage as to its civil effects. The application was of course opposed, and the case went to trial before Mr. Justice Archibald. He had to face several decisions of the court, in which petitions similar in purport to that of Delpit had been granted, and especially one of great learning and argumentative ability, which had been rendered some years before by Mr. Justice Jette. In dismissing the petition Mr. Archibald's judgment became thus, almost of necessity, substantially if not formally, a review of the previous decisions, to which it was opposed in principle. On the other hand, a decision by Mr. Justice Lemieux in a more recent case is substantially a review of Mr. Archibald's judgment. The continuance of such a judicial debate is certainly undesirable; but it is only fair to acknowledge that the tone, in which it has been hitherto conducted, may give some legitimate satisfaction to the Canadian people. It may be questioned whether the judges of any other country could have sustained such a debate with higher dignity or more perfect courtesy. It may be added, that the learning and dialectical skill, displayed by advocates as well as judges, reflect the highest honor on the Bar and the Bench of Quebec; and if the question at issue is ever carried to the Privy Council, the judges of that court will probably find that the whole material has been thoroughly threshed, and every particle of grain carefully sifted, by their colonial confreres.

This is not the place, and it would be futile for a layman, to discuss the problem before the Canadian courts in its legal aspects. But even if it were to receive final adjudication from the Supreme Court of the Empire, that would settle merely the actual state of the law, while the moral and religious interests involved would still offer a serious problem, which might call for legislative action. It is therefore worthy of consideration whether, even in the present state of things, nothing can be done either to prevent such marriages altogether or to prevent them from becoming subjects of controversy in the civil courts or in the periodical press. Such a result may be rendered far from impossible by a fair amount of judicious action on both sides.

First of all, on the part of the Protestant people it is but an obligation of justice to accord the fullest respect to those peculiarly sacred sentiments, with which marriage as a religious sacrament

is invested in the eyes of their Catholic fellow-citizens. And it is but fair to the Protestant people to acknowledge that this obligation of justice is ungrudgingly recognized. There is therefore ground for the hope that they will readily do their part to avoid any interference with the doctrine and practice of the Catholic Church in regard to marriage. Now, it is not necessary to reflect, in the faintest manner, on the action of the Protestant clergy with regard to Catholic marriages in the past. That may in all cases admit of some reasonable explanation. But now the Protestant minister knows that, if he performs the ceremony of marriage between two Catholics, his action may be declared null by the civil courts after the injury resulting from it has become irreparable. For this injury, 'tis true, he does not appear to be legally responsible. His sufficient warrant for performing the ceremony is the license which the parties exhibit. But this is only a license; it only gives him liberty to perform the ceremony of marriage between the persons whom it names. It does not impose on him any obligation to perform the ceremony if he has any scruples. On the contrary, the Code takes care to provide that "none of the officers authorised can be compelled to solemnise a marriage, to which any impediment exists according to the doctrines and beliefs of his religion, and the discipline of the church to which he belongs." It is therefore perfectly competent for a Protestant clergyman, when persons unknown to him apply for marriage, to inquire whether they are Catholics; and if they profess to be such, he is explicitly authorised by law to refuse to perform the ceremony, for he can plead as an insuperable impediment to their marriage those universal obligations of justice, which are the common doctrines of all the churches. He may even dismiss their application as something of a personal insult to himself. For, unless they are incredibly ignorant, they must be aware that the ceremony, which they ask him to perform, cannot, in their faith, be a marriage at all; that they expect him to sanction, by a solemn farce, their entering into a relation with one another, which must, in their eyes, be profoundly immoral.*

*It is but fair to note that, that in the case of *Delpit and Cote*, the defendant in her demurrer denies that she and her husband were Catholics, and alleges "that the petitioner professed to be non-Catholic while he was courting her; that she, as well as the circle of friends with whom he associated, had always considered him as such; that at the time of the celebration of the marriage, the petitioner, professing to be non-Catholic, requested that the ceremony should be performed by a minister of the Unitarian Church, as being the church which came nearest to the beliefs of the defendant; that she, on her part, was non-Catholic, Protestant, and was recognised as such."

While such an attitude would be reasonable on the part of the Protestant clergy, it may fairly be expected that the Catholic Church will do her part in overcoming the difficulties of the situation. And what is that part? In the first place, it is important that the sentiment of Protestant society in regard to this matter should not be misunderstood. That sentiment is in no sense anti-Catholic. It is simply the sentiment of honorable men, whatever their religious faith may be,—the sentiment which forces them to act on the homely principle, that their word is as good as their bond. This sentiment expressed itself in clear and vigorous form with reference to the case of *Delpit and Cote*. And not unnaturally, in view of the facts of the case. A young man, after some months' courting, had persuaded a young girl—a very young girl, just entering on her seventeenth summer—to plight to him her troth. They seek, in a way prescribed by law, a license for their marriage. They appear before one of the officers whom the law authorises to perform the ceremony, and are united in accordance with the usual formalities. The husband enjoys the love of his wife for seven years, and receives the dearest pledge of her love in three children who call him their father. He does not complain of any failure of wifely duty on her part. He never hints at the faintest disloyalty, even in thought. He does not plead the most trivial excuse for seeking to brand his wife and children with the stain of illegitimacy. He merely contends, with a *naïveté* which is astoundingly frank, that, in spite of his monstrous disloyalty to the Catholic faith on the occasion of his marriage, he must still be regarded as having been a Catholic at the time; and, as his marriage was undoubtedly null before the law of the Catholic Church, he petitions to have it declared null before the civil law of his country.

Is it wonderful that such a petition should have stirred a painful excitement in Canadian society? All gentlemen can surely understand the indignant scorn which the conduct of the petitioner has awakened. The revulsion of feeling would not have been so deep if he had frankly gone over to one of the neighbouring States, where divorce is obtained on conveniently easy terms, and rid himself in that way of the encumbrance of his wife. True, it is difficult to conceive what plea could have been urged in his case to satisfy even the most facile of divorce courts; and a divorce, obtained in that way, would not have allowed him to marry another woman in Canada without risk of prosecution for bigamy. But a simple divorce would at least have left wife and children free from any social smirch, and would have avoided the painful shock of using

a sacred doctrine and ritual to evade the honorable obligations of a marriage-contract. For the facts cannot be ignored, that to the ordinary lay mind, untrained in legal dialectic, it is merely the effect of the ecclesiastical judgment that is understood. And that effect is seen to be practically the same as a divorce, with the aggravation that the union is dissolved for a reason which no divorce-court in the world would have entertained, that the woman, who had believed herself to be an honorable wife, is reduced to the legal status of a concubine, and that her children are subjected to the consequent degradation. To all who have the faintest sympathy with the testimony of the Catholic Church to the indissolubility of the marriage-tie, it must surely be a matter of profound regret that she should have lent her influence to assist any man in inflicting such a cruel wrong on an innocent woman and on innocent children by applying her doctrine to provide him with an easy method of escaping from his marriage-contract.

The question is thus forced upon us, whether such tragedies are really unavoidable,—whether they are really necessitated by the claims of Catholic doctrine. The action of the Church in such cases proceeds on the assumption, that, even if two Catholics defy the doctrine of their faith by contracting marriage before an heretical minister, they are still to be regarded as members of the Catholic Church. Now, such conduct may not be called an explicit renunciation of Catholic faith, if explicitness is to be interpreted only as implying expression in words. But it is a familiar commonplace, that a man may at times express what he means far more explicitly by action than by speech. "*Majus est consentire facto quam verbo*," as St. Thomas puts it in reference to a cognate question.* This is surely the case with Catholics who elect to be married before an heretical clergyman. Even if they do not verbally renounce their faith, inasmuch as they seek to be married, and know that in this way they cannot be married as Catholics, do they not declare, in a manner more significant than any form of words, that they wish to be considered Catholics no more? As a matter of fact, they are subject to excommunication; and the Archbishop of Montreal has, in a recent pastoral, very properly reminded his people of their danger in this respect. Is it too much to ask of the ecclesiastical courts, that persons, who contract such marriages, shall be by their very act excommunicated? Their marriage would then come under

* *Summa Theologica*, Suppl., Quæstio 46, Art. 2.

the laws applicable to non-Catholic marriages, and the problem before the civil courts of Canada would be solved.*

By such an attitude the Catholic Church has nothing to lose, but rather everything to gain. It is not of course implied that persons married in this way would be permanently cut off from the communion of the Church. On the contrary, their reconciliation with the Church would be greatly facilitated by her adoption of the attitude suggested. For obviously a serious and unnecessary obstacle is placed in the way of returning penitents when it is made a condition of their return, that their marriage and its fruits shall be degraded by the social stigma of illegitimacy. Nor does this attitude involve any strained dialectic, from which an honourable mind need shrink in its interpretation of law. The dialectic is rather of a kind which an honourable interpretation of law has always enforced. For it has been recognized from of old that, owing to the imperfection of human foresight and human language, it is impossible to provide by legislative enactment for all the complications of right and wrong, that may arise out of the social relations of men. It is therefore a commonplace of general experience, as well as of scientific jurisprudence, that laws must be interpreted in the spirit rather than in the mere letter of their requirements,—interpreted in the light of the universal principles of justice which they embody rather in the light of any grammatical meaning which may be wrung out of their language, or forced into it, by an ingenious philology. The opposing pleas in any court of justice indicate the conflicting interpretations of law, to which men are led

* In this article, as already stated, the legal aspects of the question at issue are avoided. But it is not out of place to note, that, while the Catholic Church may formulate the conditions of communion with her, which carry the right to her spiritual blessings, the State has also a right to formulate the conditions under which a man may claim or forfeit the benefits of such communion in its civil effects. This point does not appear to have come up for specific discussion in any of the cases under consideration here. It is, however, incidentally referred to in the judgment of Mr. Justice Archibald. After proving by a great array of authorities, that in law the presumption in favor of the validity of a marriage is far stronger than that in favor of other facts, and can be negatived only by disproving every other possibility, he goes on to observe that, "if Catholics could not be married before a Protestant minister, their seeking marriage before such minister would be presumed to be a renunciation of the Catholic faith." I venture to suggest that a celebrated case in Canadian law has already claimed for the civil courts a right to decide whether a person is or is not, for civil purposes, a member of the Catholic Church. A French-Canadian Catholic, named Guibord, a member of the *Institut Canadien*, died while that institute was under excommunication. On appeal the Privy Council decided that excommunication, directed against a corporate body, did not affect its individual members, who must be named individually in the excommunication to give it any effect upon them. Accordingly Guibord was pronounced to have been in law still a member of the Catholic Church, and entitled to the civil rights flowing from such membership. By parity of reasoning the Court might decide when a man is *not* a Catholic for civil purposes.

when they start from different points of view; and the pleadings and judgments in the causes to which this article refers form a singularly interesting illustration of legal dialectic moving within irreconcilable spheres of jural thought, and forced by logical necessity to irreconcilable conclusions.

Now, the Catholic doctrine of marriage itself furnishes the data, by which an honorable interpretation might prevent such cases as that of *Delpit and Cote* from ever disturbing a civil court. For, as has just been pointed out, Catholics, who contract marriage in the way supposed, practically renounce their faith by perpetrating a sin which, they know, renders them liable to excommunication. Their marriage may, therefore, fairly be dealt with by the canons which relate to non-Catholic marriages. But it must be borne in mind that the requirement, which makes the presence of a Catholic priest indispensable to a valid marriage, is a qualification of Catholic doctrine, introduced by the Council of Trent. Moreover, this is a condition of valid marriage only for Catholics, and even for Catholics only in those countries where the decrees of the council have been officially promulgated. For the marriage of non-Catholics, or of Catholics not bound by Tridentine law, the old doctrine of the Catholic Church remains the norm. But in that doctrine the constituent factor of a marriage is the mutual consent of the contracting parties. Even yet the teaching of the Catholic Church continues, naturally and properly, to be dominated by this conception of the spiritual substance of the marriage-bond. Thus Mr. Lilly takes occasion twice* in the course of his article already mentioned, to observe, that the essence of marriage is the free consent of the man and woman contracting. In the admirable handbook—the *Summa Philosophica*† of Cardinal Zigliara, which is extensively used in the colleges of Quebec, the doctrine, that "*mutuus consensus conjugum est causa efficiens matrimonii*," is expounded as if it still embodied the substance of Catholic teaching. In his preface the Cardinal professes to follow in the footsteps of St. Thomas, acknowledging himself to be "Angelici Doctoris doctrinis addictissimus;" and certainly in all literature it would be difficult to find a more spiritual conception of the marriage-bond than that which runs through the teaching of the great mediaeval thinker. For him everything is subordinated to the spiritual fact of the mutual internal consent of the contracting persons, expressed

* *Nineteenth Century*, Dec. 1901, p. 909 and p. 912, note.

† Vol. III., pp. 196–8.

by some unmistakable external sign. Thus, on the ground of the phrase quoted above, that consent may be expressed by deed more decisively than by word, he held that a mere betrothal, that is, an expression only of future consent, if followed by cohabitation, though without any verbal expression of present consent, constitutes marriage in its spiritual essence. It is not difficult, therefore, to conceive what St. Thomas would have thought of the ecclesiastical decisions which have attracted attention in the Province of Quebec. That two persons, who have declared their consent to be man and wife, who have done so in presence of capable witnesses, whose mutual consent has been officially recorded in a public register kept for the purpose in accordance with the laws of their country, who have lived together, in good faith, as man and wife for years, and given birth to several children, should yet be pronounced to have been never married at all, and so pronounced, not by a civil court on the ground of some technical defect in external forms, but by the Church which is expected to look beyond external forms to the spiritual intent of actions,—such a decision, it is not too much to say, would have shocked the great master of Catholic thought as eliminating the spiritual kernel of the Catholic doctrine of marriage, and making the efficacy of a holy sacrament depend on a comparatively trivial detail in its ceremony.*

But even if the doctrine of the Catholic Church does not admit of an interpretation which would leave the marriages in question intact, it is still difficult to understand how her discipline could ever allow her courts to render such a verdict as that in the case of *Delpit and Cote*. For that verdict is not merely a formal judgment pronouncing the supposed marriage to be null, but it carries with it a certificate of liberty to the two parties, declaring "that they are freed from all matrimonial ties whatever, and that they may, if they think proper, marry again." This may appear at first to be simply a logical issue of the judgment annulling the marriage. But it is not. For the judgment is not that of a civil court, treating the two parties purely as citizens who had made a civil contract with one another, and not at all as members of any particular church. If the contract had been declared invalid on the ground

* It is not necessary here to dwell upon the fact, which still ought not to be overlooked in this connection, that church courts are not any more than civil courts exempt from the common frailties of humanity. But it may be observed that Mr. Lilly, in those scholarly studies which he has given us in his *Renaissance Types* has described with historical impartiality the notorious condition of the Roman Curia at the period to which he refers. See pp. 208, 283-4; and compare pp. 54 55. Similar language is used in his *The Claims of Christianity*, p. 140.

of some impediment insuperable in natural or civil law, that would have been an end of it; the contracting parties would have been freed from all the legal obligations of the contract, or rather it would have appeared that there had not been, in fact, any legal contract at all. But it is very different with the case, to which this judgment refers. The judgment is based on the assumption that the contracting parties were Catholics, and it falls to the ground whenever that assumption is invalidated. The petitioner therefore cannot pose as a Catholic in order to claim freedom from the matrimonial tie, and at the same time renounce the Catholic communion because it interferes with that freedom. But such interference is precisely what Catholic discipline enforces. Whatever judgment may be necessitated by Catholic doctrine in regard to the petitioner's marriage, the discipline of the Church is inexorable in refusing just such a freedom as is granted in his certificate of liberty. For the ceremony, in which the petitioner took part, was undoubtedly a contract at least. It is in fact spoken of as a contract of marriage; for Catholic doctrine distinguishes, in the abstract at least, between the contract of marriage and the marriage itself.* But, in whatever terms the contract be described, it *is* a contract; and no power in the universe can annul the fact, that the petitioner did make such a contract. A court may, by the logic of its laws, be forced to decide that the contract in itself was not a marriage; but it cannot make the contract to be *not* a contract. Now, the discipline of the Catholic Church, as (it may be presumed) of all churches, requires that her members shall fulfill their contracts, unless they are released from the obligation in an honourable way. But the petitioner in this case makes no pretense of having been released, it is inconceivable in fact that he could be honourably released, from the obligation of his contract. The discipline of his Church, therefore, cannot allow his liberty to marry again. It demands rather that, if he is to be considered a Catholic, and to plead before her courts as such, he must do his duty as a Catholic by fulfilling a contract which he has solemnly made, and which he cannot set aside without inflicting an appalling wrong on his innocent consort and children.

The truth is, that, in claiming to be a Catholic at the time of his marriage, the petitioner knows that he has already done such a wrong. And here again the requirements of Catholic discipline

* This distinction is referred to repeatedly in the pleadings and judgments of the Canadian courts. Its real purport is explained, with singular clearness, by Cardinal Zigliara in *Summa Philosophica*, Vol. III., p. 209.

are perfectly explicit. The sin of a clandestine marriage, as already stated, exposes the guilty parties to excommunication; and they can retain, or recover, their position in the Church only by solemn absolution from their sin. It is worth observing that, in one of his pastorals on the subject, the Archbishop of Montreal warns his people, that he reserves to himself the power of absolution in such cases. But the discipline of the Catholic Church is strangely misunderstood, if it does not require from every wrong-doer the fullest possible reparation of the wrong he has done as an indispensable preliminary to absolution. To my mind, as already explained, the only adequate reparation, which the Church can enforce in the case supposed, is to treat the marriage as that of persons who had cut themselves off from her communion, and to restore them, on proof of penitence, by the disciplinary procedure which is applicable to persons excommunicated. But if such a complete reparation cannot be enjoined by the Church, her discipline itself stands in the way of a judgment which leaves the wrong-doer free to make his wrong utterly irremediable by contracting another marriage. Instead of such a certificate of liberty her discipline demands that the wrong-doer shall repair the wrong he has done by celebrating in valid canonical form the marriage which he had contracted irregularly. By enforcing her discipline in this direction the Church would have avoided the appearance, which she has created, undoubtedly in the outside world, if not among her own people, of having for the moment forgotten her sacred mission in regard to family-life, and inadvertently lent herself as an instrument to those who are endeavoring to relax the marriage-bond.