THE ANGLICAN LAW OF MARRIAGE and THE AMERICAN MARRIAGE LEGISLATION OF 1946 - 1949

by Spencer Ervin, Esq.

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TO MY SON
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of the Philadelphia Bar,
a reliable counsellor
in letters as in law

The justification offered for this essay is a double one: first, that there seems not to be available to Anglicans any concise statement of the marriage law of the western Church as accepted by the Anglican Communion; and second, that it is important for Anglicans to become more keenly aware than they appear to be of the conflict between this law and the radical departure from it made by the American legislation of 1946 and 1949.

The canon law of Holy Matrimony is largely customary, and where provincial canons deal with it, they often merely codify custom. But both in codification and in such adjustments as may be warranted by changing social conditions it is essential to keep in mind fundamental principles and to avoid semantic traps.

With this introduction we now submit an annotated outline of the Anglican canon law of marriage, with indication of areas of difference of opinion or practice; and a condensed narrative of the American legislation on marriage to date.

1. In monogamous societies marriages are made by the consent of the two parties, who are, in theological terminology, the ministers of the marriage: i.e., those who effect what is done. Such marriages the Church recognizes whatever the rites by which they have been performed. (1) To prevent clandestinity, both Church and State usually require the presence of witnesses, but it seems that apart from a requirement, their presence is not essential to validity.

2. "From the earliest age of Christianity the priestly benediction was a usual accompaniment of marriage between Christians"; (2) and from an uncertain date it was a disciplinary requirement: (3) that is, an obligation imposed upon the parties as Christians by the Church. But in the Western Church the benediction was never essential to the validity of

(1) Oscar D. Watkins, Holy Matrimony (London: Rivington, Percival & Co., 1895), 90-91, 99, 101; E. O. James, Marriage and Society (London, &c., Hutchinson's University Library 1952), 105; T. A. Lacey, Marriage in Church and State (revised ed. by R. C. Mortimer, London, S.P.C.K. 1947), 23, 40-42, 44; Kenneth E. Kirk, Marriage and Divorce (2nd ed. London, Hodder & Stoughton, 1948), 28; The Church and the Law of Nullity of Marriage (Report of the Archbishops' Commission, London, S.P.C.K. 1955), 9-10.

(2) Watkins, 99, 101 (quoted); James, 106-107; Kirk, 26; Pollock & Maitland, The History of English Law Before the Time of Edward I (2nd ed., Camb. Univ. Press and Little, Brown & Co., Boston, U.S.A., 1899) II, 369.

(3) Lacey, 139.

the marriage. [4] Was it made so for Roman Christianity by the decree Tametsi of the Council of Trent in 1563, requiring the presence of three witnesses, one of whom must be the parish priest of one of the parties, or a deputy appointed by him or by the Ordinary, and invalidating marriages performed without the presence of this priest or of his surrogate?

Tametsi was aimed at the evil of clandestinity, and its penalty was purely disciplinary: a means of preventing evasion. [5] It did not directly attack the consensus of the parties as the essence of marriage. [6] The analysis of the scope of Tametsi by Canon Lacey [7] deserves quotation:

> The Tridentine reform required a marriage to be contracted in the presence of the parish priest of one of the parties with two other witnesses. Failing this, the marriage was to be null. For the validity of the marriage the priest was required only as witness; no ritual was needed, and no official act. A marriage might be clandestine in all other respects; there might be no publication of banns, no previous notification of any kind; the parties might at any moment spring upon the parish priest and two other witnesses, declaring themselves man and wife; the marriage would be valid. Such is the purport of the decree Tametsi. But the strict requirement of the intervention of the parochus, or of some other priest deputed by him, especially when construed with the words Ego coniungo vos of the Roman ritual, encouraged the idea, foreign to all theology, that marriage is in some sort effected by the act of an official; and this idea became fruitful of consequences.

Tametsi was clarified and substantially repeated in the Ne Temere decree of Pius X in 1907, now found in slightly altered form in #1094 of the Roman Codex.

Although Tametsi caused much confusion and was not enforced in countries of predominantly non-Roman population, it was unfortunately,

(4) Watkins, 101; Kirk, 26; Pollock & Maitland, II, 370-373; Phillimore, The Ecclesiastical Law of the Church of England (2nd ed., London, Sweet & Maxwell, and Stevens & Sons, 1895), I, 551-552.
As to the East see Watkins, 91; The Church and the Law of Nullity, 12.

(5) See the quotations and discussion in the article Mariage En Droit Occidental, by R. Naz, in Dictionnaire de Droit Canonique VI (Paris 1957), 747-749.

(6) However, articles LXVI and LXXIII of the famous Syllabus of Errors issued by Pius IX in 1864 do attack it.

(7) Op. cit. 140-141.

imitated in England by an Act of Parliament cordially accepted by the Church of England and enforced in its courts: Lord Hardwicke's Act of 1763, [8] requiring, save in the case of Quakers and Jews, the royal family, and marriages beyond the seas, marriage in the Anglican parish church of one of the parties after due publication of banns, and making all other marriages null and void, saving the right of the Ordinary to dispense with banns and of the Archbishop of Canterbury to dispense by special license with time and place. Fortunately the discontent of Dissenters and the movement toward the separation of Church and State brought about an Act of 1836 permitting marriage before a Registrar [9] (a civil official), thus in effect restoring the true and ancient principle that the consent of the parties, and not the purely disciplinary requirement of the nuptial blessing, determines the validity of a marriage.

3. To the requirements of monogamy and consent imposed by secular civilized society the Church added baptism as a condition precedent for Christians. Since it is baptism which brings a person into the Church, this requirement is obvious and generally recognized, and applies to both parties to the marriage, [10] unless, "on the rarest possible occasions", a dispensation has been granted for one of them. [11]

4. That the Christian marriage rite is a sacrament, at least in the sense of Lacey's phrase that it is "closely connected with the evanglical scheme of salvation", is generally conceded in Anglicanism, which views the priestly prayers and blessing as conveying grace. [12]

5. Whether consummation is essential to the validity of a marriage has been the subject of two opposing views closely connected with the topic of nullity to be considered later. [13]

(8) 26 Geo. II, c. 33. As to its acceptance by the Church of England see Kirk, 26-27, and Lacey, 166-168.

(9) 6 & 7 William IV, c. 85. See the comment in Kirk, 27-28, and Lacey, 173-174.

(10) Watkins, 78, 448, 500, 579; James, 104; Lacey, 190-191; Kirk, 144-145. See the admirable exposition by Lacey, in the passage here cited, of the reasons for requiring that both parties have been baptized.

(11) Kirk, 144. The American Episcopal Church requires only that one of the parties have been baptized: an indefensible anomaly.

(12) Watkins 20, 137-150; James 97-98, 189, 200, and elsewhere; Lacey, 17, 30, 36 (with the quotation given above); Kirk 24-25.

(13) Consummation essential to validity: Watkins 112-128, 133-135, 392 (reviewing the differences of opinion in the past but concluding in favor of consummation); James 114 (seemingly in agreement with Watkins); The Church Times (London) (see the last paragraph below).
Consent is sufficient: Lacey 201 (but see his statements at 29 and 198-200); Kirk 19, 41-43; The Church and the Law of Nullity of Marriage (Archbishops' Commission Report), 11, 30, 34, 38; Phillimore, I, 551, 552, citing Lord Stowell.
The Church Times of May 27, 1955, in its leading editorial opposes the position taken in the Report of the Archbishops' Commission. Correspondence in succeeding issues includes views on each side.

6. For the first three hundred years of our era the Church in both East and West knew no rule save that of a lifelong bond. The Matthean exception for adultery was not recognised "as having any bearing on the question of remarriage". (14)

7. The right to separate from an adulterous spouse was however recognised, (15) and if the wife were the guilty one, separation was obligatory for the husband until the wife repented. (16)

8. From c. A.D. 300 the marriage law of East and West began to diverge, and by the reign of Justinian I (emperor 522-565) the East, under the influence of the Byzantine court, recognised a number of grounds of complete divorce which were increased as time went on. (17)

9. In the West, including North Africa, from about A.D. 500, the various barbarian invaders, by the adoption of Roman codes or the retention of their own tribal customary law, allowed divorce rather easily, and from A.D. 500 to c. 1150 the Church at times gave way and in some of its regional councils relaxed the traditional rule. But from the time of Gratian's Decretum (1139-1142) the original rule was victorious throughout Western Europe. (18)

10. In England, the Norman conquerors brought with them the traditional rule, which has ever since then been the rule of the Church of England. (19)

(14)Watkins, Holy Matrimony (&c.), 225-226, 344, 356, 435-436 (the quotation is from 435); Felix L. Ciriot: Christ and Divorce (Trafton Publishing Co., Lexington, Ky., U.S.A., 1945) 23, 43, 151. Ciriot thinks that the period extended "very possibly" to c. A.D. 500: id. 45, 48, 151.
K. E. Kirk, while in agreement (Marriage and Divorce, 2nd ed., 43) points out the existence of some laxity as early as the beginning of the third century: id. 34, as does also E. O. James (Marriage and Society, 105).

(15)Watkins, 219-221; Ciriot, 11, 44-45.

(16)Watkins, ibid.

(17)Watkins, 317, 347-348, 352-362; Ciriot, 45; James, 111-113; Edward Westermarck, A Short History of Marriage (MacMillan, London &c., 1930), 291 and see also his The History of Human Marriage (3 vols., 5th ed., Allerton Book Co., N.Y. 1922) III, 333-334.

(18)Watkins, 380-383, 392-394.

(19)Watkins 425-426.
Canon CVII of 1604 states the rule indirectly, by a caution that when a sentence of divorce a mensa et thoro (judicial separation) is granted the parties shall not re-marry.
In June 1938 both Convocations adopted a declaration of the original rule, recorded in A. F. Smethurst and H. R. Wilson: Acts of the Convocations of Canterbury and York (&c.) (S.P.C.K. 1948), 90; id., rev. ed. 1961, 90-91.
Draft canon XXXVI of the Report of the Archbishops' Commission on Canon Law (S.P.C.K. 1947, p. 125) also states it. In the course of the as yet unconcluded consideration of the draft, changes of wording but not

11. The marriage of persons closely connected by blood (consanguinity: e.g., brother and sister), or closely connected by marriage (affinity: e.g., a widower and his wife's mother) has been prohibited in all developed societies for the protection of the family. The Christian Church took over the prohibitions of Leviticus (chs. xviii and xx) and of Deuteronomy (ch. xxvii) as it understood them, and added those of Roman law. On these bases were constructed, with alterations from time to time, tables of prohibition of absurd scope, to which were added those of a doctrine of "spiritual" affinity based on baptismal sponsorship. The inevitable result, if there were to be any marriages at all in a time of limited transportation and small communities, was a general practice of dispensation from the prohibitions, the only limit to which was that imposed by the "divine law" to which the primary prohibitions were ascribed. Such prohibitions were believed beyond the power of the Church to dispense, but the limits of the divine law were uncertain and in dispute. (20)

The Church of England adopted in 1563 a table of prohibited degrees bearing the name of Archbishop Parker and affirmed it by Canon XCIX of 1604. Lacey says of it: (21)

> There seems to be no doubt that Parker, like many predecessors in canonical legislation, based his rule on the Levitical prohibitions, but enlarged them by a method of parity of reasoning derived from the Christian principle of the complete equality of the sexes. How widely this method of interpreting the Levitical rule differs from that current among the Jews is shown by the fact that while Parker

(Note 19, ctd.)
of principle have been made provisionally.
On the other hand there has been, from the beginning of the English Reformation, an undercurrent of opposition to the traditional rule the course of which is described in detail by A. R. Winnet in Divorce and Re-Marriage in Anglicanism (MacMillan, London, 1958), The opposition seems to have been in part a reaction from the mediaeval rules of consanguinity and affinity and the abuse of the nullity rule; in part due to the supposed Dominical character of the Matthean exception; in part the product of sympathy for hard cases; and in part, recently, the expression of the views of Modernists such as Bishops Hensley Henson and E. W. Barnes.

(20)On Leviticus and Deuteronomy, and Roman law, as the sources of the prohibitions, see Watkins 636-655, 668-673, 680-681, 700-703; James 65, 87-88, 116.
On the absurd scope of prohibitions and their effect see Watkins 697, 700-703, 706; Lacey 75-76, 80, 137-139; James 115-117, 120-122.
On the fact of changes from time to time in the list of prohibitions see Lacey 136, 183; James 116 (addition of deceased wife's sister by Council of Elvira, A.D. c. 305).
On the protection of the family see James 18-21, 64-65.
On the uncertainty of the limits of "divine law" see Watkins 646-647, 708; Lacey 87.

(21)At 159-160. Parker's table is given by Watkins 646-647. And see his comment there and at 708, and James 124, Phillimore, I, 566-578.

> forbids equally the marriage of nephew with aunt and of niece with uncle, the Jews condemn only the the former, and positively approve the other.

Parker's table was made statutory in 1835. In 1946 the English Convocations simplified and somewhat softened it, especially by omission of the prohibitions against marriage with a deceased husband's brother or with a deceased wife's sister. (22)

The other provinces of the Anglican Communion have adopted varying rules based originally on or reproducing Parker's tables, revising them from time to time.

12. A marriage within the prohibited degrees which had not been or could not be dispensed was void, (23) and would on application be formally so declared: it was, that is to say, a nullity: something which had never existed. The same was true when one or both parties were incapable by law of contracting marriage, as being below the age of puberty, or already married, or insane. In all the cases thus far mentioned an impedient or obstructive (irremovable) impediment was said to exist. In a different category were cases which perhaps may be subsumed under absence of true consent: (24) mistaken identity, force, fraud, and purpose not to effect a real marriage. To these the term diriment or destructive (removable) impediment has traditionally been applied. Such impediments enabled the injured party to have the marriage declared null. On the other hand it could be validated by words or conduct.

Alike in cases of impedient and of diriment impediments the Church could and on application did grant a decree of nullity, making the parties free to marry "again", since there had been no true prior marriage. Always however the impediment must have been in existence at the time of the marriage, (25) although its existence then could sometimes be inferred from later circumstances.

13. "The two exceptive clauses in St. Matthew are not regarded now by the generality of scholars as part of the original teaching of our Lord." (26)

(22)The text of the revision of 1946 is given in Smethurst & Wilson: Acts of the Convocations (&c., cited supra), 89-90, (both editions). And see Lacey, 194-196, and The Church and the Law of Nullity (&c., cited supra) 17-18.

(23)A dispensation could be granted after the event: Kirk 63.

(24)On the difficulty of definition see Kirk 60-61.

(25)On impediments and nullity see Watkins 103-108, 136-137 (impediments); Lacey 23-28, 131-137 (impediments); Kirk 36-37, 40-42, 60-61; and The Church and the Law of Nullity (&c.) 15-16, 19-23, 24-29, 35-36, 38-41.

(26)The Church and the Law of Nullity (&c.), 4. And see id. 5, 8-9, and the footnote p. 69. Cf. Watkins 435; Kirk 53, 56, 70-72, 81 (consensus of scholars), 112; Cirlot 39, 60; Lacey 20-23.

Those who have come to this opinion are not however always in agreement upon the details of the textual and historical considerations leading to it. (27)

Before the change in opinion had become general some Anglican provinces had incorporated the Matthean exception into their canon law or practice but all have now abandoned it, the last to do so being the American Episcopal Church in 1946.

14. The Pauline privilege (28) has traditionally been interpreted to mean

> that when one of two unbelieving partners to a marriage is converted to the Christian religion and the remaining unbelieving partner is not content to dwell peaceably with the Christian convert, the latter is free to contract a new marriage with another Christian. Two things are clear and definite. First, that St. Paul is here giving his own opinion on a practical issue concerning which he has no applicable saying of the Lord (cf. 1 Cor. 7,8,9,12). Secondly, that he holds that a Christian convert is not bound to community of life with a pagan partner if the latter is unwilling to dwell with the convert. It is not, however, so certain that the Christian partner is set free to marry again. Such would, in many ways, seem the most natural interpretation of the passage, for otherwise it is not easy to see why the matter should be discussed at such length. It is the interpretation by the bulk of Christian tradition. St. Paul does not say explicitly that the departure of the pagan partner leaves the convert free to marry again. It has, however, been for many centuries the practice in the greater part of Christendom to interpret the words "the brother or the sister is not under bondage in such cases" as meaning that he or she is free to marry again. The principle is clearly of great importance in the work of the Church, particularly in pagan countries. It is technically known as "the Pauline privilege". (29)

(27)Cirlot, writing in 1945, notices the views of some fifteen scholars, one or two of whom adhere to the Matthean exception. Winnet, at 193-195, dates the change in opinion from c. 1900 and notices four scholars.

(28) I Cor. 7:12-16 or 12-17.

(29)The Church and the Law of Nullity (&c.), 6. An explanation of the origin of the privilege in St. Paul's thought follows at 6-8.

But the Pauline privilege, like the Matthean exception, is contrary to "the principle of the permanence of the marriage bond . . . unequivocally affirmed" in the New Testament. (30)

15. Whether in our Lord's sayings on marriage He was legislating, or stating a moral fact, or setting an ideal, is constantly debated. The first two views lead to the same result: the bond of marriage is until death. The third tends toward experimentation in canonical legislation, or in practice, or both. (31)

16. That the Church will not allow the use of its marriage service in the case of any person having a former spouse still living, unless the former marriage was null, has been decided by both English Convocations (32) and endorsed by the Church Assembly. (33) This rule is general in the Anglican Communion except to the extent noted later in the case of the American Episcopal Church.

17. Whether "remarried" persons one or both of whom has a former spouse still living may be admitted to the sacraments is a question on which there is great variety of rule and practice. Logic might seem to demand exclusion, (34) but the Church generally has been unwilling to exclude such persons permanently. (35) It is obvious however that unless

(30)Id. 8-9. The same position is taken by Kirk, 21-25; and less strongly by Ciriot, 124-125.
The interpretation of I Cor. 7:12-16 and of some doubtfully cognate passages, and the rulings in East and West by Councils, Fathers, and Popes, are given at length by Watkins, 440-590.
The problems which polygamy presents to the Church are noticed by the Lambeth Conference of 1958 (S.P.C.K. and Seabury, 1958), Part 1, #120, p. 58, and Part 2 pp. 154-155.

(31)Some more recent instances of these three views will be found in Winnet, Divorce and Re-Marriage in Anglicanism (cited supra), 195-200, 207-208, 210, 215-217, 220-222; Ciriot 67-69, 100-109, 198-199; Kirk 72-78.

(32)Smethurst & Wilson (both editions), 90-91 (June 1938); Winnet 244-245, recording resolutions of Canterbury Convocation of 1953 and 1957.

(33)Report of Autumn 1937 p. 591, cited by Winnet, 227. The report refers to an indication of opinion prior to the definite action in 1938.

(34)Kirk, at 118, challenges the premise of the rigorists, which assumes that our Lord's prohibition of re-marriage extends also to discipline, whereas actually He has left the latter to the Church.

(35)The rules of the English Convocations are given in Smethurst & Wilson, 91 (York) and 92-94 (Canterbury), 1937-1938, id. rev. ed., 1961, 91 (York), 93-94 (Canterbury), and in Winnet, 244-246, 1953 and 1957.
For variant views in England see Winnet 228-230; Kirk 116-119, 137-141; Lacey 211-212.
Lambeth 1948, Resolution 96, re-affirming Lambeth 1930, leaves the matter to each bishop, subject to provincial or regional regulations, which it thinks should be uniform: Report, Part I, 49. Lambeth 1958 has no resolution on the subject, nor has its Committee on the Family in Contemporary Society save as it reprints Resolution 96 of Lambeth 1948: Report, Part II, 170-171.

practice in this matter is controlled by reasonably stringent provincial or regional regulation, admission could cause grave scandal and undermine the prohibition of remarriage.

It is believed that the main principles of monogamous marriage and of Christian marriage as these developed in history have now been stated, and orthodox Anglican doctrine as it stands today, while the existence of an undercurrent of laxer theory has been recognised. Before proceeding to an outline of current problems of Anglican marriage polity it is desirable to notice variant meanings attached to the terms indissoluble and divorce.

In a report on The Church's Discipline in Marriage by a committee of the Lambeth Conference of 1948 (36) it is stated:

> The Lambeth Conferences both of 1920 and 1930 affirmed "as our Lord's principle and standard of marriage, a life-long and indissoluble union."
>
> There is a difference of opinion about the exact meaning to be attached to this expression, and we consider that continued controversy about the significance of such a term as "indissolubility" is not likely to lead to useful results. (37)

The term divorce has long had two meanings:

> In the Middle Ages (and indeed thereafter) the term divorce (divortium) was used in two senses:
>
> (a) divortium a vinculo in cases of Nullity, where the Court declared the parties never to have been married and therefore each to be free to marry another;
>
> (b) divortium a mensa et thoro, where, in cases of adultery and cruelty, the Court pronounced a decree of Separation, but the marriage subsisted.

(36)S.P.C.K. 1948. Part 1, 96 f.

(37)Id. 98. The text goes on to assert that marriage is for Christians a life-long obligation, whatever may be the theological interpretations of "indissolubility". Later in its report (104-105) the committee states the two opposed views of Christian marriage: one, that the marriage relationship by its very nature persists till death; the other, that it can be destroyed by sin, with the result that divorce, though always to be deplored, cannot always be ruled out; and concludes that "while recognizing a difference of theological opinion, we are yet agreed on the matter of Marriage Discipline," (which is stated at 100).
Kirk, at 13, notes the ambiguity of the word "indissoluble": "It may of course mean that marriage ought not to be dissolved . . . But it may mean also that marriage cannot be dissolved."

> Divorce, in the modern sense of the term, was known to the pre-Reformation Canon Law only in the case of the Papal dissolution of an unconsummated marriage. (38)

Today the common meaning of "divorce" is certainly the dissolution of a marriage with the right to remarry, (39) although Lacey complains that it is an abuse to use the term for anything but separation a mensa et thoro. (40)

We come now to some of the current problems of Anglican marriage polity.

The Church has authority to declare both the law and the discipline of marriage for its members and for those seeking membership. To what extent should this law and discipline be uniform for all Anglican areas?

If on all questions of marriage the truth were apparent, uniformity would certainly be desirable. But neither in the case of marriage nor in any other is truth completely available to us. On the other hand there is a wide field in which the Church may reasonably believe that under the guidance of the Holy Spirit it has achieved certainty. This last statement is true of the more obvious prohibitions of kinship and affinity; of other well-established impediments; and of such discipline as necessarily results from adherence to these. Liberty to experiment cannot be allowed to affect these rules without causing scandal and weakness.

But how are rules, even if made uniform, to be enforced, and how are uncertain cases to be adjudicated? Canonical provisions declare, but do not enforce or adjudicate. Should there be nullity courts? So lately as 1948 the Lambeth Committee on The Church's Discipline in Marriage, reporting the uncertainty of the English Convocations and the divided opinion in the English membership of the Committee on the desirability of nullity courts, could add that "in other provinces and regions of our Communion, anxious thought is being given to the same matter, though as yet without definite decisions." (41)

English hesitation about nullity courts is due in part to the relationship between Church and State in England. (42) But in England there are

(38)The Church and the Law of Nullity (&c.), 14.

(39)Committee on The Church's Discipline in Marriage, Lambeth 1948 Report, Part II, 104, note 1.

(40)At 83.

(41)Report, Part II, 102. Lambeth 1958 is silent on the matter.

(42)See The Church and the Law of Nullity (&c.) 37-38, 41-46; Smethurst & Wilson (both editions) 92, 95; Kirk 126-127; James 135-136.

also general considerations, influential everywhere. Among those which make against the establishment of nullity courts are the recollection of mediaeval abuses and of some notorious cases in Quebec and before the Roman Rota; (43) the extreme care necessary in testing the evidence, (44) and the great number and complexity of the circumstances which may require examination. (45) There is also the fact that the secular community does not understand the difference between divorce (in its popular meaning) and annulment, and "is surprised and mystified when the Church allows the religious ceremony to those who have been parted from their original spouse by a nullity decree, whilst refusing it to those who have chosen the method of divorce". (46)

In favor of nullity courts is the consideration that law cannot function save through tribunals. The Church has a law of marriage, so that the provision of tribunals for cases arising under it, with prescription of personnel, authority to make and alter rules of procedure, and a requirement of records, is inescapable. Moreover with courts come precedents, which stabilise and unify. And on the human side, justice requires that annulment be decreed where grounds for it exist. (47) Indeed, without adequate provision for declarations of nullity the whole system of prohibitions is likely to break down.

> A cast-iron and tyrannical discipline is almost inevitably bound to overreach itself. Either it produces hypocrisy and evasion on a vast scale, or else the body which exercises it shrinks gradually to the dimensions of a tiny Puritan sect -- an academy of eccentrics -- whose influence upon the moral well-being of society as a whole is negligible. (48)

The Committee report of Lambeth 1948, already mentioned, expressed the opinion that "though hasty action is to be avoided, the time has come when the matter [of nullity courts] should be carefully considered." Such courts are now in existence in Wales, South Africa, Canada, and the British West Indies. (49)

(43)Kirk, 67-69; Winnet 234.

(44)Kirk, 123-125; Lacey 206.

(45)Some of these appear in Lacey, 205-207; The Church and the Law of Nullity (&c.), 38-41.

(46)Kirk, 132.

(47)See Kirk, 120-122; Lacey, 207.

(48)Kirk, 118.

(49)Wales: Chapter XI, No. 97, of the Constitution as revised in 1956 (Western Mail & Echo Ltd., Cardiff), makes the ecclesiastical law as existing in England on March 30th 1920 binding on members of the Church of Wales. In The Setting of the Constitution of the Church in

It may be that nullity courts exist in other Anglican areas. Canonical provisions establishing courts with power to enforce discipline are usual, but no safe inference as to nullity jurisdiction can be drawn from them. (50)

We pass to a brief mention, without discussion, of two other problems in matrimonial polity, and then to a major one.

What of Anglicans who marry civilly? Their marriage is valid, but lacks the Church's blessing, to which they have manifested indifference. Is discipline to be applied, and if so, of what nature?

Should the Church bless the marriage of a divorced person? Is there a distinction in this matter between those who at the time of the re-marriage were communicants of the Church, and those who were not, but desire to enter the Church and to receive its blessing? It seems clear that if this blessing is to be authorised, the grounds for granting it need careful examination and statement and the practice such limitations as will prevent scandal. (51)

Wales (Sweet & Maxwell, Ltd., London 1937) the late Archbishop (C.A.H.) Green states at pp. 312-313 "the principal grounds on which a Decree of Nullity is given in this country," conforming generally to the practice of the eighteenth century.

South Africa: Constitution and Canons, 1960 (Church House, Cape Town, 1962) Canon XXIX A. A nullity court is to be set up when necessary in each diocese; its personnel, powers, and a list of impediments are given.

Canada: Handbook of the General Synod, 1960 (Church House, Toronto, 1960), Canon XXVII, Part II. The bishop may, after inquiry, allow marriage in church of one who has obtained a decree of annulment by a civil court on any of eight stated grounds.

British West Indies: Constitution and Canons 1959 (no publisher listed), Canon XXXVIII, 5. When the bishop, having taken the advice of canonists, considers that a decree of nullity could have been granted a divorced person, he submits the case to the archbishop, who appoints two other bishops to review, with himself, the facts, and if they concur that a decree of nullity could have been granted the applicant, his bishop may exercise his discretion and admit to the sacraments.

(50) An invaluable storehouse of precedents in matrimonial causes exists in the decisions of the English ecclesiastical courts from 1753 to 1857, fortunately available in large law libraries in the English Reports Reprints, Vols. 161 to 167 inclusive. Headnotes enable the reader to pick out the nullity cases without loss of time.

In Niboyet vs. Niboyet, Court of Appeal, 1878 (1 P.D. 1, 4-7) the opinion of James, L. J., rules in substance that since the Act of 1857 transferring to the Court for Divorce and Matrimonial Causes (now the Probate, Divorce and Admiralty Division of the High Court of Justice) all matrimonial causes, that court acts upon the principles developed by the Church courts. But today this ruling would have a more limited scope because of the intervention of statutes on matrimony some of which have not been accepted by the Church.

Henry Charles Coote: The Practice of the Ecclesiastical Courts (Henry Butterworth, London, 1847), has a valuable collection of pleadings and forms of decrees in matrimonial causes.

(51) See Kirk 135-137 and the report of the resolution and discussion in the Convocation of Canterbury in The Church Times (London) of October 16, 1953, pp. 734-735.

The major problem in Anglican matrimonial polity referred to above is that posed by the marriage legislation of the Episcopal Church in the United States of America, enacted in 1946, with slight amendment in 1949. This we shall now review as briefly as may be.

In 1808 the two Houses of the General Convention adopted a joint resolution declaring

> That it is the sense of this Church, that it is inconsistent with the law of God, and the Ministers of this Church, therefore, shall not unite in matrimony any person who is divorced, unless it be on account of the other party having been guilty of adultery. (52)

The first formal legislation was in 1868: a brief canon framed on the principle of the joint resolution of 1808 and reading as follows:

> No minister of this Church shall solemnize Matrimony in any case where there is a divorced wife or husband of either party still living; but this Canon shall not be held to apply to the innocent party in a divorce for the cause of adultery, or to parties once divorced seeking to be united again.

In 1877 the canon of 1868 was replaced by a canon of five sections. The first of these repeated the declaration of the marriage service that marriages contrary to God's Word are not lawful. The second repeated the canon of 1868. The third allowed the bishop to admit divorced persons to the sacraments by "his godly judgment" in cases referred to him by the priest. The fourth made the bishop the judge of questions of fact arising under the second. The fifth declared that the canon, "so far as it affixes penalties", should not apply to cases occurring before it should become effective.

The canon of 1877 stood until 1904. It was then replaced by a canon of four sections. Section 1 of 1877 was dropped in favor of a warning to ministers to observe the law of the State. Section 2 required the presence of at least two witnesses and the registration of the names, ages, and residences of the parties. Section 3 repeated the substance of section 2 of 1877 (the exception for the innocent party in a divorce for adultery) without the provision for parties once divorced but seeking to be re-united, and with the addition of a waiting period of one year before application, and of a requirement of "satisfactory evidence touching the facts in the case." It also

(52) This is the text as in Perry's edition of the early canons, I, 348 (and see 347, 358). Bioren's edition: Journals 1785-1814, 254 (and see 261) gives a law, which is almost certainly wrong.

incorporated the provision of the fourth section of 1877 for a judgment by the bishop, but strengthened it by requiring that the bishop take legal advice and put his judgment in writing, and tacked on a proviso that any minister might decline to solemnize any marriage. Section 4 repeated section 3 of 1877 on admission of the divorced to the sacraments. Section 5 of 1877 was omitted.

Convention of 1913 adopted a resolution establishing a Joint Commission of five bishops, five priests, and five laymen, "to report to the next General Convention suitable legislation whereby the discipline of this Church and other matters relating to Holy Matrimony shall be plainly set forth." The occasion of the resolution was a proposal in the House of Deputies, with which the bishops did not agree, to express sympathy with efforts to procure an amendment to the Constitution of the United States permitting enactment of a uniform law on Marriage and Divorce. The bishops thought it better to support a current movement for a uniform law on divorce in the several States.

The Commission so established, reporting to Convention of 1916, agreed that

> Marriage, according to God's design, to which we are recalled by our Lord Jesus Christ, is the life-long union of one man with one woman, to the exclusion of all others on either side.

Though noting that because some marriages are contracted "in ignorance of the Church's law, and while not subject to the Church's discipline", and of "the practical impossibility in many cases, without greater wrong, of the breaking up of a family . . . there must be a power of discretion, very carefully exercised, to admit or readmit persons to the Sacraments", to "rest with the Minister of the congregation and the Bishop of the Diocese, as the chief minister of discipline", the commission yet felt

> justified in recommending an entire refusal to solemnize with the Church's blessing the marriage of any person who has a divorced partner still living. The doubtfulness of the supposed exception in the Gospel according to St. Matthew, the extreme difficulty of determining the innocence of either party to a divorce, and of maintaining the disciplinary safeguards of our existing Canon, and the confusion which these introduce into the Church's law, make it clear, in the judgment of the Commission, that the wise course is to refuse the Church's rites of benediction upon any marriage after divorce, during the lifetime of the other party to the original marriage.

The commission recognised the distinction between annulment and a

"divorce from (sic) any cause arising after marriage" but found itself unable, "in view of the many difficult problems attending a Table of Prohibited Degrees", to recommend enactment of one. It noted that the secular law forbade many types of consanguineous and affinal marriage. It recommended changes as follows in the existing canon:

For the section prohibiting the solemnization of the marriage of a divorced person, with its exception for the innocent party in a divorce for adultery, a prohibition against solemnization in the case of those "divorced for any cause arising after marriage", but allowing solemnization on satisfactory evidence that the divorce was for causes arising before the marriage, "such a Divorce being in fact a Decree of Annulment".

For the section on the admission of the divorced to the sacraments a better-worded section to the same effect.

One bishop dissented from these changes. A priest dissented only from a conclusion that "it is not desirable that the General Convention should pronounce an opinion as to the comparative advantages of State or Federal legislation on the subject of Marriage and Divorce". Thus fourteen of the fifteen members were in favor of the changes just reviewed.

But when the first part of the first recommendation of the commission, for a flat prohibition of the solemnization of the marriage of a person divorced for any cause arising after marriage, came before the House of Deputies, it was defeated in the lay order, and never came before the bishops. All that was done was to continue the commission.

The commission, with the same membership as in 1916, less one priest, reporting to Convention of 1919, repeated its recommendation of 1916 prohibiting solemnization in the case of those divorced for any cause arising after marriage; dropped the provision for annulment; and amended the provision for admission of the divorced to the sacraments by a clause requiring the bishop to consult his legal adviser. One priest, dissenting, proposed to amend the existing canon by substituting for its provisions a simple prohibition of solemnization of the marriage of a divorced person. One layman, in a separate opinion, concurred with the majority only on the ground that their proposals relieved the priest of the obligation imposed by the existing canon to inquire into the matrimonial status of the parties, difficult to ascertain because of the confused condition of the secular law. But he went on to dissociate himself from the views of the majority on the nature of marriage implied in their recommendations.

The proposals of the commission for amendment of the existing canon came to a vote in the House of Deputies before they had been considered by the bishops. The Deputies' Committee on Canons, to which they had been referred, voted six to five against recommending them. When a vote was there taken on the minority report recommending the commission's proposals, these were defeated decisively in the clerical and overwhelmingly in the lay order. The bishops then adopted a resolution for the discharge of

the commission, but not until the next to last day of the session and it did not arrive in the Deputies until near the end of the last day and was never voted on there.

Without the intervention of any Joint Commission, Convention of 1922 amended section III of the existing canon of 1904 by inserting, after the opening prohibition to the priest regarding re-marriage of the divorced, a corresponding prohibition to the parties.

Convention of 1925 established the first of a new series of Joint Commissions (53) dealing with matrimony. This one was asked "to study the whole problem of divorce -- its conditions and causes", and to report in 1928.

Reporting to Convention of 1928, the Commission said that the fundamental causes of the world-wide increase in divorces were sex tensions between husband and wife and the fact that the family was no longer the economic unit of life. It noted that divorces were mainly among the unchurched. Emphasizing the importance of character-training and of right ideals, the Commission said:

> Hence one of the first responsibilities of the Church is to hold up the ideal of marriage presented by Christ himself, viz: the life-long union of one man with one woman. This ideal is based on the physical and spiritual laws of human society. Indeed many of our thinkers feel that the monogamous family is the final term in a long evolutionary series. Clearly the family is the most fundamental of our institutions.

The Commission, continued in existence by Convention of 1928, reported to Convention of 1931 at great length proposing a new canon with two important new features: a list of nine impediments with provision for decrees of nullity by an ecclesiastical court to be set up in each diocese; and permission for the re-marriage of divorced persons to be granted by the same court after the lapse of a year following an inquiry by the court

> into the characters and personalities of the parties to the previous and proposed marriages and the conduct of the parties concerned in the divorce, and whether or not the applicant did what he or she reasonably could have done to avoid the separation;

and a determination "that the spiritual welfare of the applicant will be best served by" a re-marriage. The first proposal was supported by the whole

(53)A Joint Commission, unlike a Joint Committee, need not be composed solely of members of the Convention.

commission of fourteen; the second by eleven, three members objecting "to the re-marriage of divorced persons by a Priest of the Church and to the use of the Marriage service for such remarriage". The report of the commission shows the influence upon the thinking of the majority of Canon Streeter ("no scholar stands higher in England"), and of the marriage law of the Orthodox Church.

A prolonged struggle in Convention resulted in the adoption of the list of traditional impediments proposed by the commission but permission to marry in church was confined to cases of true nullity, although permission was given for the blessing of other marriages at the discretion of the bishop. A new canon with these and some other altered features was adopted and the Commission was continued with power to add to its number and to fill vacancies.

The report of the Commission to Convention of 1934 mentioned

> a growing feeling that there should be some method of dealing with divorce other than on strictly legalistic grounds. The underlying causes of marital infelicity are so personal and intimate, and physical, mental, and moral deficiencies are often so hard to determine, that a court runs the gravest danger of doing a Christian injustice if obliged to render a decision based on specific causes.

But the Commission favored retaining the legislation of 1931 for the present with but one slight amendment which need not concern us. Convention acted accordingly and continued the Commission.

To Convention of 1937 the Joint Commission proposed two clarifying amendments; the addition of undisclosed sexual perversion to the list of impediments; and permission for the bishop to allow the re-marriage in church of a divorced person "if, in equity and good conscience, he shall choose to do so" after a specified wide-ranging inquiry. Two members of the commission dissented from the last proposal. It was decisively defeated in the Convention, which however adopted one clarifying amendment and the additional impediment, and after rejecting innumerable other amendments proposed by its members continued the commission.

The commission reported in 1940 a partly re-arranged and re-written canon with some revision of the impediments, omission of the exception for adultery, and a modification of the previously proposed, and defeated, permission for the re-marriage of the divorced: divorce was now to work forfeiture of communicant status, but the divorced person might after the lapse of one year apply for restoration of status and the bishop or marital court might authorise the priest to bless the parties to the re-marriage, "using such parts of the Office for the Solemnization of Matrimony as are pertinent thereto". Other suggested changes need not detain us. Convention discharged

the commission without accepting its proposals and established a new one to be composed of five members of each order "to consider afresh and in the light of Christian teaching and principles the entire subject of Christian marriage, together with their implications as to divorce and the remarriage of divorced persons" and to submit "a suitable canon or canons" based on the essentials of Christian marriage: a charge clearly pointing toward conservatism.

The new Joint Commission, reporting to Convention of 1943, recommended the repeal of the existing canon and the enactment of two new ones. In these the impediments were again revised, and other changes suggested, but the major recommendation was one which embodied, more clearly and explicitly, an idea of the commissions which had reported in 1934 and 1937: defects of character as an impediment justifying annulment. After a preliminary section allowing applications to marry in church, the new proposal read:

> If the Bishop finds that the former contract could not be the spiritual union taught by Christ, because of (a) the existence of any of the impediments specified . . , or (b) the existence of abnormalities, defects, or deficiencies of character sufficient to prevent the fulfillment of the marriage vows, or (c) the existence of an irremediable mental, moral, or spiritual deterioration or incapacity, the causes of which were latent before the previous contract and exposed by the marital relationship, and that these causes as far as they can be determined are not present in a proposed marriage, he shall grant the applicant's request.

Long debate and many counter-proposals followed upon presentation of the Commission's report. A conservative substitute offered in the House of Deputies narrowly failed of adoption in the clerical order but was easily defeated in the lay, and therefore never was considered by the bishops, but the bishops did approve, by a vote not recorded, the general principles of the Commission's report. Agreement on any proposal proved impossible and Convention continued the commission. The existing canon was however divided into two canons and one section of it was transferred to a canon on the laity.

The report of the Commission to Convention of 1946 and the two new canons it proposed reflected the same conception of marriage presented in 1943. We need here quote only part of one sub-section of these canons:

> . . . but when facts are shown to exist or to have existed which manifestly establish that no marriage bond as the same is recognized by this Church exists, the same may be declared by proper authority.

The House of Bishops of 1946 voted by 66 to 47 to adopt the canon from which the foregoing is quoted, but this vote was followed by the proposal of many amendments. The House referred all of these to a special committee of five bishops to report the next morning. This committee brought in, unanimously, a revision of the existing canons which the House unanimously adopted. The House of Deputies also adopted it by an overwhelming vote. The revision included the matter quoted above and other provisions to the same effect.

When one recalls the large minority in the House of Bishops of 1946 opposed to the recommendations of the Commission, and the large minority in the House of Deputies of 1943, what is the explanation of the adoption, virtually without contest, of legislation effecting a complete departure from the traditional definition of nullity in favor of one which allowed the annulment of a marriage for causes arising after its celebration, and these, too, of an indeterminate character? The explanation is surprisingly simple. Conservatives in both Houses relied upon the approval given the legislation by the one conservative bishop on the special committee of five, and failed to examine it carefully. The one benefit they received, and that was of little value in view of the wide scope of the new annulment rule, was the omission of the exception for adultery.

Convention of 1949 amended the new canons by requiring of the parties to a church marriage a declaration that they "hold marriage to be a lifelong union of husband and wife" as declared in the marriage service and by the restoration of a provision of 1937 against the re-marriage of the divorced, significantly altered by the omission of the words "for any cause arising after marriage". And it extended the benefit of the new nullity to cases in which the divorced person was a non-member of the Church.

Further changes proposed by further commissions were rejected and the legislation of 1946-1949 still stands.

Commenting on the new legislation, at an interim meeting of the bishops of November 1956, Bishop Scarlett (retired, formerly of Missouri), a member of the special committee of five bishops of 1946, stated that the existing legislation on marriage was "frankly a compromise" drawn to be interpreted in different ways. At the same time Bishop Carruthers of South Carolina reported the result of questions addressed to all bishops having jurisdiction. Eighty-four of ninety replied. Thirty-eight said they used the nullity principle, twenty-one admitted causes arising after the first marriage, seventeen used both approaches. Clearly the third group must be aligned with the second, so that what we have is thirty-eight bishops adhering to the traditional rule and thirty-eight accepting its extension.

By authorizing each bishop to grant, to divorced applicants for permission to remarry in church, the benefit of the "compromise" mentioned above, and to do so without reference to any objective standard, the American Church has in effect made the permanence of a prior marriage depend

upon the marital domicile of one of the parties to it. By giving complete latitude of decision to each bishop, it has elected to make an escape from law. Such escapes have often been made in human history, but to what? The only choice, once law has been abandoned, is between tyranny and the caprice which produces anarchy. It might be better to endure the "hard cases" of Anglican marriage law than to embrance either of these alternatives.

At a second interim meeting held in mid-September 1957 the bishops voted to ask the Joint Commission of the day to "prepare a copy of our Canon (sic) on Marriage for study at the Lambeth Conference . . ." The Commission, meeting the same month, asked Bishop Bayne (then of Olympia, now Executive Officer of the Anglican Communion) to draw up a paper to be used at Lambeth unofficially with the report requested by the bishops. When he had done so the commission edited and then warmly approved it and requested him to have sufficient copies printed to send to each member of the Lambeth Conference. (54)

Bishop Bayne's paper is an able presentation of the American marriage legislation in which account is taken of ambiguities and objections. But the passages now to be quoted evidence an interpretation which is contradicted by the legislation itself and by other passages in the same paper.

> (After quotation of the vows in the American marriage service and the declaration required of the parties that they hold marriage to be a life-long union). Thus, the teaching of the Episcopal Church follows, in basic structure, classic Western moral theology.
>
> In basic structure, this is 'an annulment canon'.
>
> The principal provisions of the doctrine and discipline of the Episcopal Church with respect to Holy Matrimony have been outlined, and some indication given as to the more debatable, and debated, sections. From this, it should be clear that there is no reluctance on the part of the Episcopal Church to declare its firm adherence to the traditional and Biblical standards of marriage as Christians understand it.
>
> . . . it would be agreed by the great majority of the bishops who administer the discipline of the Church, that the present Canons, imperfect as they are, . . . do permit approximate justice to be done

(54)For the facts related in this and the next preceding paragraph see the Journal of General Convention of 1958 pp. 493-494 and THE LIVING CHURCH of December 2, 1956.

> without corroding our witness to Christian standards.

The Lambeth Conference of 1958 made no reference to Bishop Bayne's paper, although, as we have seen, this was to have been and no doubt was sent to each member of the Conference. What Lambeth did do was to reaffirm, in its Encyclical, "the permanence of the marriage bond"; to emphasise in its Resolution 114 the importance of teaching "our Lord's principle of life-long union as the basis of all marriage"; in Resolution 119 to recite its belief "that the Resolutions of the 1948 Lambeth Conference concerning marriage discipline have been of great value as witnessing to Christ's teaching about the life-long nature of marriage", and to urge "that these Resolutions, and their implications, should continue to be studied in every Province". The Conference's Committee on The Family in Contemporary Society, of which Bishop Bayne was chairman, said, in connection with "Christ's teaching about marriage", that "the tie between husband and wife is, by God's ordinance, a life-long one, not to be broken by any act of man", and that the Committee "fully and wholeheartedly makes its own the conclusions" of the report of the Committee on Marriage of the Conference of 1948. (55) Further, the committee of 1958 asserted "the imperative duty of the Church to bear faithful witness to life-long monogamy as the standard of its teaching; we cannot challenge the world with any lesser standard than the one our Lord gave us". And in two other passages the same committee mentions "the Christian principle of life-long monogamous marriage", and "the faithful, life-long promise of each to the other, 'forsaking all others' ". (56)

The Committee on The Family mentions the American marriage legislation in the following passage: (57)

> The Committee notes the experience of the Church in the United States in attacking the difficult and ambiguous problem of the marriage where "there is no marriage bond recognized by the Church." [A foot-note at this point cites Resolution 94 of Lambeth 1948, in which the quoted phrase occurs. But it is to be noted that this Resolution is preceded

(55)Among these were that the committee, "while recognizing a difference of theological opinion" was "yet agreed on the matter of Marriage Discipline" (Official Report, Part II, 105); and as to this discipline, that "the Church has a duty to the community at large to uphold 'our Lord's principle and standard of marriage' as 'a life-long and indissoluble union' "(id. 100).

(56)The quotations from Encyclical, Resolutions, and Committee report will be found in the official report of the Conference at Part I, pp. 22, 57, 58; Part II, pp. 143-144, 153-154, 154, 156.

(57)Official Report, Part II, pp. 153-154, immediately following the passage endorsing the conclusions of the Committee on Marriage of the Conference of 1948.

> by Resolution 92, which affirms that "marriage always entails a life-long union and obligation".] In particular, the procedure of that Church in exploring the degree of freedom and competence to marry in a given situation seems to permit the gathering of helpful evidence leading toward better preparation for marriage and deeper pastoral care; and we commend to all our provinces a study of this procedure and its results.

This passage in the Committee's report is misleading. "The difficult and ambiguous problem" of which the Committee speaks is non-existent save in the American Episcopal Church, which has created it by allowing divorce under the guise of an extension of nullity. But nullity cannot be extended to causes arising after marriage without ceasing to be nullity. Nor is it apparent why better preparation for marriage and deeper pastoral care are dependent upon legislation giving ecclesiastical favor to divorce. One can however heartily second the Committee's wish that all Anglican provinces should study the procedure under this legislation and its results.

The reader now has before him, we hope at no greater than necessary length, the problem posed by the American marriage legislation. We conclude by referring him to the eloquent concluding passage of an essay by G. W. O. Addleshaw, the learned English canonist and historian, on the responsibility which the constitution of the Anglican Communion lays upon each constituent Church in maintaining the unity of the whole. This unity can be maintained only by each part refraining from any action which disregards the rights of the other parts, for there exists no means of coercion save refusal to continue communion and to invite the bishops of the disruptive Church to Lambeth: (58)

> It is at this point that the excellence of the constitution of the Anglican Communion becomes apparent. The categories of law and compulsion are left behind, and the question becomes an ethical one. The various parts of our communion are held together by a unity which is built up as each part grows in charity and in conviction that the common Faith is the truth. It is a unity which comes from each part deliberately refraining from any action which disregards the rights of the other parts; but this depends on a charity which desires to understand the ways of the other parts, to interchange ideas and experiences, to learn from them, to work

(58) The Law and Constitution of the Church Overseas, in E. R. Morgan and Roger Lloyd: The Mission of The Anglican Communion (S.P.C.K. 1948), 97-98.

> together with them in the mission of Anglicanism to the world. The observance by each part in its relationship with the others of the four principles laid down by past Lambeth Conferences both begins in charity between the various parts and creates an atmosphere, a relationship, in which that charity can grow and deepen. Each part of the Anglican Communion has bound itself, either in a constitution or through the acceptance of certain service books and formularies, to a particular kind of Christianity, with four essential features. But the unity which this common acceptance of a particular kind of Christianity implies is but the bare bones, the groundwork of unity. It demands from each part of the Anglican Communion an adoring study of this common Faith in all its depth and mystery. The maintenance of unity thus becomes a spiritual and moral thing, not springing from compulsion, from utilitarian grounds, but from a burning conviction that the Christianity which the Churches of our communion confess, with its biblical foundations, its creeds, its sacraments, and its ministry, is the fairest expression of Christianity that this earth has seen and the surest way by which mankind will be led to the truth.

APPENDIX

To obviate interruption of the narrative I have reserved for this Appendix two excerpts which throw light upon the legislation of 1946-1949 and upon Bishop Bayne's exposition of it in the paper prepared for Lambeth 1958. The excerpts which now follow are from a document headed Report of the Special Committee of the House of Bishops on Procedure under Marriage Legislation. This committee was appointed by the chairman of the House of Bishops pursuant to a resolution adopted at the General Convention of 1946 by the bishops on their own account but in connection with the legislation on marriage then enacted by both Houses, which joined in making an appropriation for its expenses. The bishops appointed to the Committee numbered three. (1)

The Committee reported to a "special meeting" of the House of Bishops of November 1947. Discussion, and action on proposals for changes in the canons on marriage enacted in 1946 followed. (2) The bishops then adopted the following resolution sponsored by the Special Committee: (3)

> That the House of Bishops reaffirm the statement adopted by the last General Convention "that the Church's steadfast purpose is to hold to its traditional position on Christian marriage and that the present changes are to strengthen this purpose and more perfectly to attain the Christian ideal."

But no such statement was adopted by the General Convention of 1946. The House of Bishops did, at the instance of the Bishop of Western New York (Cameron J. Davis) unanimously adopt a direction to the committee in charge of the Pastoral Letter to include such a statement in the Letter, (4) but it does not appear therein. (5)

(1) Journal of 1946, 252-254.

(2) Journal of 1949, 68-69. The "Special Meetings of the House of Bishops" are actually meetings not of the Upper House of the Convention but of the collective episcopate of the national Church. They are regularly reported in the Journal of the next following Convention under the title just quoted.

(3) Id. 72.

(4) Journal of 1946, 42.

(5) The Pastoral Letter is printed at id. 58-62.

In the House of Bishops of the General Convention of 1949 "Bishop Davis reported for the Special Committee on Marriage, and the resolutions contained in his report were referred to the Committee on Canons", says the Journal, (6) but there is no record of a report on them. The report of the Special Committee is printed as an appendix. (7) Excerpts from it now follow.

After stating its opinion that "the less the Canons are changed at this time the better, since the Church's experience with them has covered too short a time for definite and final conclusions as to details of procedure", the Committee continues:

> Another factor which has guided the Committee in its recommendations has been the report of the Lambeth Conference in respect to the Church's Discipline in Marriage. Our Committee, at the request of the Presiding Bishop, prepared and submitted to the Lambeth Committee a statement regarding our Canons and the principles which they embody. We are told that this statement was duly considered, supported as it was by the two members of our Committee who were also appointed to the Lambeth Committee. While Lambeth has no legislative authority your Committee believes it has moral authority, and has consequently given its pronouncements great weight. (8)

The excerpt which next follows (9) is best understood in relation to the Lambeth passages to which it refers and to relevant passages which it omits. I have therefore reproduced side by side the excerpts from the report of the Special Committee, and the Lambeth passages referred to or omitted. In the former there are a number of errors and misquotations which I have retained just as they appear in the Journal from which they are taken.

(6) Journal of 1949, 33.

(7) Id. 436-441, Appendix 19.

(8) Id. 437. The Lambeth Committee referred to is that on The Church's Discipline in Marriage, on which sat the Bishop of Ohio (Beverly D. Tucker) and the Bishop of New Jersey (Wallace J. Gardner), two of the three members of the Special Committee of three bishops.
There seems to be no record in the Journals of the request by the Presiding Bishop mentioned in the quotation.

(9) Id. 439-440.

SPECIAL COMMITTEE EXCERPT

(Journal of 1949, 439 - 440)

The Canon recognizes two points of view as legitimate:one, that if one or more of the impediments existed before marriage, no marital bond was created; the other, that if one of the impediments arises after marriage, the marital bond is broken. It is well known that in two other branches of the Catholic Church, the one holds that only when causes have existed before marriage, which make the marriage null and void, can a second marriage be solemnized; the other, that certain causes arising after marriage may dissolve the marriage bond. The Anglican Communion has heretofore held to the latter although it has recognized only one cause, namely, physical adultery, as sufficient to break the bond. Our own branch of the Anglican Communion in its former discipline recognized, as does the present Canon, both the doctrine of nullity and of divorce. Our present Canon differs from the previous one only in its recognition that the same causes which nullify a marriage can also break the marital bond if they appear after marriage, and in that it does not specify adultery. Our present discipline recognizes the spiritual nature of a marital union and recognizes causes in the field of the spirit and of personality both as impediments and also as destructive of the bond. The Lambeth Conference gave its approval to the position of our Canons as follows: Resolution 94 states, "The Conference affirms that the marriage of one whose former partner is still living may not be celebrated according to the rites of the Church unless it has been established that there exists no marriage bond recognized by the Church." Furthermore, the Conference also supports the theory that causes arising after marriage can destroy the bond, for on page 98 of the reports, after affirming the lifelong character of the obligations of marriage for Christians, the Committee says, "We are, however, bound to admit a union which is indissoluble by divine intention may be wrecked by sin; and that by the sin of one or both of the parties the personal relationship in marriage can be completely destroyed." And in the Encyclical Letter of Lambeth (page 25) it is stated, "The Church will not marry anyone who has been previously married save where no marriage bond as recognized by the Church still exists." (Italics ours). The use of the word still indicates that the bond did once exist . . .

The Canon admittedly relies upon the pastoral rather than the judicial approach and in the opinion of a majority of your Committee freedom to hold either point of view works to the advantage of the discipline of the Church . . . (The Bishop of New Jersey dissents; affirming that only one point of view, that of the Doctrine of Nullity, should be in the Canon.)

[Editorial note: The Bishop of New Jersey was Wallace J. Gardner.]

LAMBETH 1948 PASSAGES

(Official Report, S.P.C.K. 1948; pages as indicated in parentheses)

Resolution 92, (Part I, 49); not mentioned by the Special Committee:

92. Faced with the great increase in the number of broken marriages and the tragedy of children deprived of true home life, this Conference desires again to affirm that marriage always entails a life-long union and obligation; it is convinced that upon the faithful observance of this divine law depend the stability of home life, the welfare and happiness of children, and the real health of society. It calls upon members of the Church and others to do their utmost by word and example to uphold the sanctity of the marriage bond and to counteract those influences which tend to destroy it. It is convinced that maintenance of the Church's standard of discipline can alone meet the deepest needs of men; and it earnestly implores those whose marriage, perhaps through no fault of their own, is unhappy to remain steadfastly faithful to their marriage vows.

(Resolution 93 is on the pastoral care of those who are married or are about to be married).

Resolution 94, (Part I, 49):

94. The Conference affirms that the marriage of one whose former partner is still living nay not be celebrated according to the rites of the Church, unless it has been established that there exists no marriage bond recognized by the Church.

Report of the Committee on The Church's Discipline in Marriage (Part II, 98). The passage excerpted below includes what is quoted (and in part misquoted) by the Special Committee and passages immediately preceding and following it:

The Lambeth Conferences both of 1920 and 1930 affirmed "as our Lord's principle and standard of marriage, a life-long and indissoluble union."

There is a difference of opinion about the exact meaning to be attached to this expression, and we consider that continued controversy about the significance of such a term as "indissolubility" is not likely to lead to useful results. [A foot-note to the word

"indissolubility" reads: e.g. The Church in the United States uses the phrase that marriage is "in intention" life-long, but makes provision for the bishop to give judgment as to the marital status of those who have been divorced by civil authority.]

We are, however, agreed that (whatever the theological interpretations) the "indissolubility of marriage," as declared by our Lord, imposes upon those who marry a life-long obligation, and that for Christians this obligation has an absolute character. To repudiate such an obligation is always deplorable in the extreme; and re-marriage after divorce,

during the life-time of a former partner, must always involve a departure from the true principle of marriage. We are, however, bound to admit that a union which is indissoluble by divine institution may in fact be wrecked by sin; and that by the sin of one or both partners the personal relationship in marriage can be completely destroyed. In marriage, therefore, as in other moral issues, the whole history of the Church affords continuous evidence of the conflict between the absolute will of God and the fulfilment of His divine purpose in the face of human frailty.

We cannot condone what our Lord condemns. We believe that in the confused situation of the present time there is urgent need to proclaim to all men and women everywhere the fact that marriage always entails the obligation of a life-long union. More particularly would we earnestly implore those whose marriages are unhappy to remain steadfastly faithful to their marriage vows, relying on the unfailing resources of God's grace.

The Encyclical Letter (Part I, at 25). The excerpt below includes the passage quoted by the Special Committee and the four sentences following it:

The Church will not marry anyone who has been previously married save where no marriage bond as recognized by the Church still exists. It bids its members to uphold faithfully the life-long obligation of the marriage vow and to give no occasion for sin. But it cannot exclude from the

love of Christ, nor does it exclude from its own fellowship, those who have come through bitter experience and look for help. About this matter there is a special urgency. But in every sphere of human life there is an insistent call to every Christian at this time to bear clear witness to the character of Christ and the principles of conduct which he enjoins.