MARRIAGE

CIVIL AND ECCLESIASTICAL

LEWIS STOCKTON

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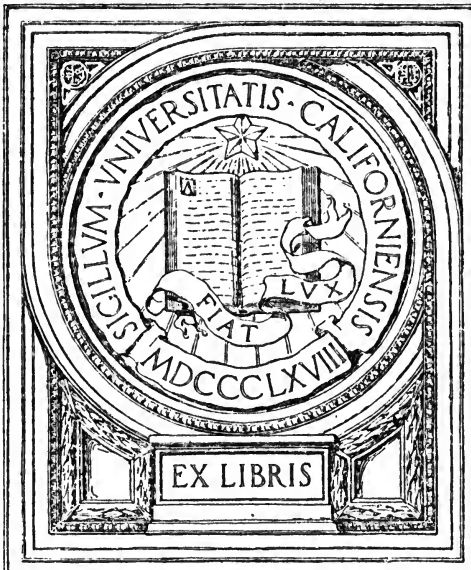

MARRIAGE

Considered from Legal and Ecclesiastical Viewpoints

In connection with
the recent Ne Temere decree of the
Roman Catholic Church

With
Suggestions for the Improvement
of State Marriage Laws

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Preface

The Ne Temere decree of the Sacred Congregation of the Council, in conjunction with a Pontifical Commission, set forth by the special order of Pope Piux X "is the most important disciplinary decree of the Roman Catholic Church since the Council of Trent" (A. D. 1563).

This decree was issued August 2, 1907, to take effect April 19, 1908, and has been promulgated in the United States, where it is now in force, and where it creates a new situation.

The question whether this canonical decree has civil effect has been under consideration by the civil courts of Canada, and conflicting decisions have been rendered.

The Canadian minister of justice has pointed out that there are now five decisions of Quebec Courts declaring that the Court is bound to give legal effect to decrees of nullity of marriage pronounced by Roman Catholic Bishops and there are three decisions to the contrary.

For the intelligent consideration of this matter there should be accurate information. Marriage is a matter of universal concern. The question of the relation of Church and State is of great interest. The claims of the Church of Rome as affecting National and State authority and personal rights in the United States, are also vital to be understood. The law of the land should be clearly set forth. The function of the solemnizing officiant; the spiritual or sacramental character of marriage; the essence of legal marriage and the consensus of Christians as to the essential features thereof; the solemnization of matrimony from a civil and from a religious viewpoint and the institution of marriage as regarded by the temporal law, are all of signal importance.

At the base of our modern civilization is the family. Mar-

riage is both the ceremony that legally creates the relation of husband and wife and also the institution upon which the family is founded.

For these reasons a lucid examination of the whole subject is timely. Publicity in regard to this question is hardly to be expected in the newspapers.

Indebtedness is especially acknowledged to S. H. Blake, K. C., of Toronto, and to the authors of Holmested's Marriage Laws of Canada and Bishop on Marriage and Divorce, whose works have been freely used.

CHAPTER I

Marriage Before the Reformation

The first marriage of which Holy Writ speaks, is the marriage of Adam and Eve.

Father Paul in his history of the Council of Trent, volume 7, says, that at the session on the 9th of February, 1563, and following days, Maillard, Dean of the Sorbonne, said among other things, "The first marriage between Adam and Eve, which was the model of others, was without witness." Pallavacino, declares the above statement as to what was said, is a fabrication. Nevertheless, the statement seems to be a correct version of the account given in the Holy Scripture, humanly speaking.

It is also true that men and women have from time immemorial, united together for a common life. Mutual consent now, is generally considered to constitute the essence of the marriage. The inherent right to mate and marry is limited by the action of the state that, in the public interest, regulates marriage as to formalities in the solemnization, as to the age and affinity of those legally competent to marry, as to the officiant or presiding witness and as to the civil effects of the institution.

Professor W. C. Robinson, dean of the Faculty of Law at the Roman Catholic University, very truly says, "Further, the state permits no such *status* to be created by any power other than itself and recognizes no church organization or society or individuals as capable of making or unmaking such *status.*" Marriage should also, properly be considered in relation to religious teachings and beliefs, for these have great influence on human conduct.

Lord Stowell in Lind vs. Belisario, 1 Hagg. Con. R. 216, remarks: "Opinions have divided the world as to the nature of the contract. It is held by some persons that marriage is a contract merely civil, by others that it is a sacred religious and spiritual contract."

Others have considered that "Christian" marriage is both a civil and a religious contract involving civil duties and rights

and involving spiritual rights and duties and that it is only when the spiritual side is fully apprehended that the contract can be properly performed.

In the Jewish Community.

Under the Hebrew theocracy, marriage was practically without religious ceremony. We find no civil or religious form of marriage presented by the Mosaic law. After the exile, confession and forgiveness of sins on the part of the bridal pair became a part of the ceremony, but not at the hands of the rabbi; nor was the rabbi called in until the fourteenth century of the Christian era, and then not as priest, but as a learned man, to put important religious questions to the man and woman about to marry.

At and prior to the time of Christ, in the ordinary Jewish marriage processions, the bridegroom, accompanied by his groomsmen and friends went to the bride's house, and thence conducted the bride, with her attendant maidens and friends into his own or his parents' home.

(Edersheim, *Life and Times of Christ,* volume 2, 435).

The festivities were as follows:

1st. Merry sounds of music.

2nd. Distribution of wine, oil and nuts among the children.

3rd. The bride covered with the veil, her hair flowing, surrounded by her companions was led by "the friends of the bridegroom," and "the children of the bride chamber."

Festive array with torches, myrtle branches and chaplets of flowers.

4th. Arrived at her new home she was led to her husband.

This formula was spoken "Take her according to the law of Moses and of Israel." The bride and bridegroom are then crowned with garlands.

5th. A formal legal instrument was signed (Kethutah) in which it was set forth that the bridegroom undertook to work for her, to honor, keep and care for her, to give her a sum of money and to increase her own dowry by one-half, at least.

6th. Washing of hands and benediction.

7th. The marriage supper followed. Cups were filled, and a solemn prayer of bridal benediction was offered.

8th. "The friends of the bridegroom" then led the bridal pair to the bridal chamber and bed. (Idem. Vol. 1, 355).

It is noteworthy that, according to Edersheim (Vol. 1, p. 352), "the marriage conveyed to the Jews much higher

thoughts than merely those of festivity and merriment. The pious fasted before the marriage, confessing their sins. It was regarded almost as a Sacrament. Entrance into the marriage state was thought to carry the forgiveness of sins, and the bridal pair on the marriage day, symbolized the union of God with Israel.

In the Jewish community the germ of the idea of the sacrament was present and the marriage ceremony was planned to bear the impress of sanctity. (Idem. Vol. 1, 352).

The Christian Church is the spiritual successor to the Jewish community. The Hebrew theocracy and the Levitical priesthood were not conspicuous for disclaiming jurisdiction or authority. And we may conclude from these facts that up to the birth of the Christian Church and for many years thereafter, in the Jewish Community, a religious ceremony by a clergyman of religion was not regarded as a divinely appointed pre-requisite to valid marriage.

In the Christian Church.

"The Christian religion, by confining marriage to pairs and by rendering that relation indissoluble, has by these two things done more toward the peace, happiness, settlement and civilization of the world than by any other part in this whole scheme of Divine wisdom" says Edmund Burke. (*Letters on a Regicide Peace.*) The same great statesman remarks, that "Matrimony was instituted not only for propagation of men, but for their nutrition, their education, their establishment, and for the answering of all the purposes of a rational and moral being." (Works, Vol. 6, 160).

"Under the feudal system the over lord had a "right to interfere in the marriage of the heiress who inherited the feud * *. The male heir himself was obliged to marry according to the choice of the lord * *. In fact, marriage was publicly set up to sale * * *. Some women purchased by heavy fines the privilege of a single life, some the free choice of a husband."

This was because it was of importance to the over lord that the person who received the feud should be submissive to him.

Magna Charta, in England, took off some of the burdens which had been laid on marriage, whether compulsory or restrictive, and thereby prevented that shameful market.

The claim of the Crown to reliefs and wardships was not abolished in England until the Restoration (1660-1667).

MARRIAGE IN THE WESTERN CHURCH—OUTSIDE OF ENGLAND.

It will be more convenient first to consider briefly, the matter of marriage, in the Christian Church in Western Europe prior to the Reformation outside of England, because the separation of temporal and spiritual courts and the strongly conservative habit of holding to ancient ways, renders the English history of matrimonial judicature anomalous; also, because the laws of the United States largely take character from the laws of England. "In the twelfth century the unblessed marriage is a marriage," according to Pollock and Maitland.

"Not until the thirteenth century, as a general rule, does a priest appear with authority, as one especially qualified by his religious office to solemnize the nuptials." (Howard, *History of Matrimonial Institutions,* Vol. 1, p. 325). The seven sacraments (including marriage) were first set forth in Peter Lombard's sentences (1164) and were approved in the Council of Florence (1439) and afterwards in the Council of Trent (1563).

Hallam observes that the principles which the Church inculcated (with regard to canonical impediments and the papal power to grant dispensation thereof resulting from affinity) were in appearance the very reverse of laxity, yet they led indirectly to the same effect. (*Middle Ages,* Vol. 2, p. 198). "The multiplication of impediments made the formation of a valid marriage a matter of chance." *History of English Law,* Pollock and Maitland, Vol. 2, p. 383.

It was the disposal of Papal dispensations which was the immediate cause of the Reformation in continental Europe. It was the dispensation granted by Pope Julius to Henry VIII, authorizing him to violate "God's Law" (Lev. XVIII), by marrying his brother's widow, which led to the English Reformation. It was the attempt of James II to dispense with law which led to the English Revolution of 1688.

The right to grant dispensations is derived from the Imperial principle of government "that which the Prince wills is law." The Anglican principle opposing it is, that not even the king has any inherent power to dispense with any law.

We find no doctrine set forth on the continent by the Christian Church for the first fifteen hundred years, that a religious ceremony was an essential part of marriage. The Church uniformly held that the mutual consent of parties, competent to contract, to take each other as husband and wife, was what really constituted marriage, and was the essential element from a religious viewpoint.

Solemnization of marriage by the Church was however enjoined from time to time and the disregard of the injunction was visited with ecclesiastical censures.

Howard's Matrimonial Institutions, Vol. 1, pp. 339, 351, is authority for the statement that the Popes expressly ruled that marriage by mutual consent, was just as valid and effectual and as indissoluble by the parties, as if solemnized in the face of the Church.

Christian marriage was regarded as the union of one man and one woman for life to the exclusion of all others.

Re Bethell vs. Hilyard, 58 L. T., 674.
Hyde vs. Hyde, L. R., 1 P. & D., 130.

and in this respect Christian marriage differs from marriages which admit of more than one spouse or are not for life.

The general law of Western Europe, prior to the Council of Trent, was that mutual consent was alone necessary to constitute true and lawful matrimony in the contemplation, both of Church and state.

See per Willes J., in Beamish vs. Beamish, H. L. 9 at p. 306.

From Bacon's Abridgment tit. Marriage B., it is clear that according to the civil law, a marriage was contracted by mutual consent of the parties *per verba de presenti* to take each other as husband and wife, and that any subsequent attempt on the part of either, in the lifetime of the other, to marry another person, on the first marriage being established, would be a mere nullity.

This then, was the law of the Christian Church in Western Europe outside of England.

But the contract of marriage has been confused with the ceremony or act by which it is solemnized or witnessed.

Marriage as a Sacrament.

While the Church regarded marriage as a sacrament (after 1164 A. D.) nevertheless the presence of a priest was not essential to its validity in Western Europe outside of England.

See De Burgh's Pupilla Occuli, quoted in 10 Cl. and Fin., pp. 581-2. See per Tindal C. J. Reg. vs. Millis, 10 Cl. and F., pp. 683-4.

The great doctor, Thomas Aquinas (in quattuor libros sententias; Lib. IV, Dist. XXVI, Qu, unic. Art. 1) and Duns Scotus (Lib. IV, Dist. XXVI, Qu, unic.), both hold that no minister other than the parties contracting is necessary for

they for the most part minister the sacrament to themselves either the one to the other or each to themselves. *"Verba exprimenta consensum de praesenti sint forma hujus sacramenti, non autem sacerdotis benedictio quae non est de necessitate sacramenti, sed de solemnitatae."* (Aquinas).

"Ut plurimum ipsimet contrahentes ministrant sibi ipsis hoc sacramentum vel mutuo vel uterque sibi." (Duns Scotus).

According to Viner's Abridgement (tit. Marriage F.) the religious solemnization of marriage was not used prior to the beginning of the thirteenth century and neither Church nor Pope had assumed to say that any religious rite was essential to a valid marriage.

Innocent III indeed forbade clandestine marriages—(i. e. those not solemnized in the face of the Church) but he did not declare that clandestine marriages were null and void but merely that those who contracted them were subject to discipline.

See Pothier, Traité du Contrat de Mariage, Pt. II, s. 3.

The essential matter, from a religious viewpoint, outside of England, down to the reforming Council of Trent was the consent of the parties competent to contract and not the religious ceremony. The decrees of the Council of Trent in regard to marriage did mark an advance as to the religious aspect of marriage, in the Roman Catholic Church, in requiring the ceremony to be solemnized by a clergyman.

But the Council of Trent was not regarded by the English nation or Church as a general council of the Church and its decrees were never accepted, civilly *or* ecclesiastically in England.

Clergymen of religion, then, so far as the practice of the Christian Church on the western continent of Europe, prior to the Reformation, is concerned could not be said to sustain, by virtue of their religious office, any special relation whatever as necessary from an ecclesiastical viewpoint, to the marriage ceremony.

We have referred to the fact that Christian marriage is often regarded and spoken of, as being a "sacrament" and we have given citations from Catholic theologians of high repute, in which it is laid down that the sacrament of marriage does not consist in any rite or ceremony which is done or performed by the priest who may solemnize the marriage, but it is administered by the parties to themselves, or each to the other.

The validity of the sacrament of Baptism does not necessarily depend upon its administration by a clergyman. In extreme and exceptional cases it is admitted that a layman may administer this sacrament. So also in the Holy Communion the "sacrament" in most people's minds is considered essentially to consist in the sacramental elements that are consecrated and given to communicants, and to the inward and spiritual grace conferred by these elements so consecrated.

The word "sacrament" is not a scriptural word. It is derived from the latin word "sacramentum" which means an oath of fidelity taken by the Roman soldier.

So in Holy Matrimony the parties explicitly or implicitly make vows of fidelity to each other. The sacramental view of these vows seems to involve:

(1) That the vows once made between competent parties are irrevocable and the contract is indissoluble.

(2) That the violation of this sacramental vow is not a mere breaking of contract, but an act of sacrilege.

A minority of the Council of Trent were of opinion that the council had no power to nullify so sacred an obligation merely for the reason that the solemnization was not made before a priest. The position of the 56 prelates who formed this minority can be more readily understood when we recall that the Church had always previously held the solemnization before a priest to be an unessential, though a desirable ceremony.

The historic Church teaches that Holy Matrimony is a sacrament.

"The sacrament of matrimony knitteth man and wife in perpetual love" says the authorized book of "Godly and wholesome Doctrine" of the Anglican Church.

Saint Augustine teaches its indelible character, as does Saint Ambrose. The Roman Catholic and the Eastern Church regard matrimony as a sacrament. While there has been no continuity of teaching in the Church as to the administration of the sacrament by clergymen in the face of the Church, yet there is a consensus of historic Christianity as to the sacramental character of matrimony, that the outward sign is the consent together of the man and the woman in holy wedlock and that Christian marriage is a symbol of the mysterious union in unity that is between Christ and His Church. The instinct of self preservation may be trusted to constrain all Christians and society generally, to uphold the sanctity of marriage and to maintain the distinctive Christian doctrine that

death alone terminates the union, that adultery violates it, but that to Christians it is indissoluble and that it cannot be too carefully safeguarded and surrounded by the religious ceremony, administered by a clergyman, in a sacred edifice with all seemly rites; with prayers, benedictions, outward tokens of rings and joining of hands, words of betrothal, plighting of troth and solemn vows of a sacramental nature made in the presence of God and His Church.

CHAPTER II.

Decree of the Council of Trent Concerning Marriage.

The Council of Trent is responsible for the antagonism between "legality" and "validity." Here was a sacrament; a holy mystery which Christ himself had given the Church. How could the Church legislate concerning this mystery without suggesting also the external and human nature of the relation? And if this external and human relation were admitted, how could the right of the civil authority to exercise control in the civil field over these external relations be denied?

This difficulty was raised but was not solved at Trent. The door was left open for civil regulation. France first, legislated civilly and in due time other countries of Europe followed the lead of France. Pothier says: "The Council of Trent was not able to be received in France notwithstanding the efforts made by the Court of Rome and the clergy to have it received. All Catholics recognized and have always since acknowledged, that the decisions of the Council upon the dogma are the faith of the Church; but the blow which it gives in its disciplinary decrees to the rights of the secular power, and to our maxims on a great number of points was and always will be an insurmountable obstacle to the reception of the Council in this Kingdom * * *. The decree of the Council was not able to remedy the abuse of clandestine marriages in France where this Council was never received and where consequently its decrees have no authority." (Pothier, Pt. IV, s. 5.)

Marriage has existed in all ages and probably in all nations. It certainly was not the invention of the state, but it arose from human instincts, checked by the necessities of society as dictated by experience. Marriage by conquest, and marriage based on the contract of sale[1] in due time gave way to marriage based on consent. "Marriage had, before the Council of Trent, the character of a sacrament, for it is a misapprehension to suppose that this intervention (of a priest)

[1](Aethelb. 82) (according to Schmid's translation), "If a man forcibly abducts a maiden, let him pay 50 shillings to him to whom she belongs, and then buy her at the will of him to whom she belongs."

was required as a matter of necessity even for that purpose," said Lord Stowell. See also Dalrymple vs. Dalrymple 2, Hagg. Const., 54; Regina vs. Millis, 10 Clark & Fennelly, 534-907; Hallet vs. Collins, 10 How. U. S., 174.

The Council of Trent had originally assembled in 1545. There was an interval of ten years from 1552 and in 1562 it met again. After the second assembly the Council was directed to the purpose of equipping and renovating the Roman Communion. In the interval much had happened. The Reformation was now an accomplished fact. "The resolution which was dominant was to crush Protestantism not to parley with it."

"The number of Italian bishops in attendance during the culminating session was 187. The number of bishops from all the world beside was 81. Of these Ireland sent but three, Germany but two and England but one."

See *"Seven Great Statesmen,"* A. D. White, p. 32, and authorities quoted in note.

These figures as Mr. White says, are the best answer to the claim that this Council represented the Universal Church.

In the session, November 11, 1563, a decree on matrimony in ten chapters and eleven canons was set forth. The most notable points were the assertion of the absolute right to make laws affecting marriage and "to constitute impediments to destroy matrimony" (besides the forbidden degrees of the Levitical code), and to dispense with such impediments.

The 24th clause of the Sixth session of the Council of Trent (1563) touching the reformation of marriage reads: "If any one should say that the Church could not constitute impediments destroying matrimony or that the Church has erred in so constituting matrimony, let him be anathema." (See Appendix B.)

Thus the Church of Rome has claimed for three hundred and fifty years the moral right to the power to destroy matrimony. The clause is in its terms absolute. It is not limited to time or place. It runs wherever there exists the power to make the decree effective. In the compendium of Moral Theology by P. J. Gury, S. J., the text book at Maynooth College, the matter is thus stated:

"Ques. Is a marriage valid when the contracting parties leave a place where the decrees of the Council of Trent are in force, so as to go to another place where they are not?

Answer. No it is not valid.

Ques. Is it valid when one leaves a place where these decrees are not in force, so as to contract marriage in another place?

Ans. No, even if contracted while passing through the place only.

Ques. Should heretic marriage be considered as valid in places where those decrees are now in force?

Ans. Positively no, for the following reasons:

1. Because in all countries where decrees have been proclaimed, they oblige all persons indiscriminately, heretics or Catholics; as the former are subject also to the jurisdiction of the Roman Church.

2. Because if heretics were excluded from this general law of the Roman Church they would be granted privileges for their rebellion, which would be absurd."

The legislation of the Council of Trent then, is responsible for the antagonism which is the subject of this inquiry although its decrees are only now for the first time generally promulgated in the United States.

Marriage in England.

But although the Church in Western Europe outside of England never contended, before the Council of Trent, that a religious ceremony was essential to a valid marriage, it appears that in England, from the time of Edmund (A. D., 940) the temporal law required that marriage, in order that it be perfect and sufficient, for civil purposes, and be recognized by the state, should be solemnized in the presence of a priest. See Ancient Laws, p. 505, Thorpe's Ed. (Marriage Law of Canada, Holmested, p. 18).

"At the nuptials there shall be a mass priest by law, who shall with God's blessing, bind their union to all posterity.

"Well it is also to be looked to, that it be known that they, through kinship, be not too nearly allied, lest they be afterwards divided which before were wrongly joined."

"This however was in order to give temporal effect to the marriage, but not to make it valid as a sacramental act, or from the religious standpoint." Bracton's rule was that no woman can claim dower unless endowed at the Church's door. Bracton, f. 302, 304.

Before the Council of Trent, it appears that a marriage, in England, was not valid, civilly, unless consummated in the

presence of a priest, or later in the presence of a deacon, and this law derived its authority from the state and not from the Church. The religious obligation seems to have been necessary solely to give effect to the civil obligation.

The ecclesiastical law is set forth in the case known as Richard de Anesty's Case (A. D., 1143) which is discussed in Palgrave's Commonwealth 11 p. V-XXVII. (Pollock and Maitland's History of English Law, 1.137-138). The rule of ecclesiastical law therein, was established viz., that consent per verba de presenti unconsummated and unhallowed, had precedence over a later solemn and consecrated union. (Ibid., 11,365).

And this was the law until Lord Hardwicke's act (1753). This act was proposed as "A bill for the better prevention of clandestine marriages," and provided for publicity, banns, ceremony in canonical hours before an Anglican clergyman in an Anglican Church or chapel, with two or more witnesses, and the act provided for registry.

The act applied to all dissenters (including Roman Catholics) except Quakers and Jews. In 1836 dissenters were relieved by a civil marriage act.

The civil statute, 32 Hen. VIII, c., 38, provided as to what degrees of relationship are alone to constitute impediments to marriage and expressly declared "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the levitical degrees; and that no person of what estate, degree or condition soever he or she be, shall after the first day of the said month of July (1540) aforesaid be admitted in any of the spiritual courts within this King's realm or any of his Grace's other lands and dominions to any process, plea or allegation contrary to aforesaid Act."

Lord Hardwicke's act also (26 Geo. II, ch. 33, s. 13) finally took away from the Ecclesiastical Courts in England all power to give effect to precontracts.

It will be noted, then, that in England, by the temporal power, and not by the spiritual power (5-6, Wm. ch., 54) all marriages within the prohibited degrees of consanguinity or affinity, are declared absolutely null and void; also, that formerly by the ecclesiastical law, a marriage in England not solemnized in the presence of a clergyman in Anglican orders was regarded as complete as between the parties themselves, but the parties obtained no civil rights under the temporal law until the contract had been solemnized in the presence of a clergyman. And even from the middle of the twelfth century down to the

Reformation in England no religious ceremony and no priest was necessary in ecclesiastical law. See Pollock and Maitland's History of English Law.

The Tametsi decree of the Council of Trent was not to have effect in any country until it was promulgated. (See Appendix B) and it never was promulgated in England, nor in many other parts of Europe. The decree enacted that "clandestine" marriages were void so far as their ecclesiastical character is concerned. The decree, as for the first time claiming the power to annul matrimony, is noteworthy.

In the case of Queen v. Millis it was settled, that to constitute a valid marriage by the common law of England it must have been celebrated in the presence of a clergyman in holy orders.

DuMoulin vs. Druitt, 13 Ir. C. L. R., 212.
Beamish vs. Beamish, 9 H. L., 274.

In the Anglican Church it has been held that the directions of the rubric e. g. the adjuration, the putting on the ring, etc., are not absolutely essential. The essential part of the service is the reciprocal taking each other for wedded wife and wedded husband.

Beamish vs. Beamish, Supra, 337.

In England, the Crown was once the one legislator and the supreme arbiter of all causes. Jurisdiction has been, in times past, delegated by the Crown to the archbishops and bishops of the English Church to hold courts in the sovereign's name.

There are those who contend that the English Church hath authority in matters of faith and that the Royal supremacy doth not extend to doctrine or discipline, but this contention is not the law of England since the English Reformation. The Church of England may indeed, warn its members not to violate God's word as to marriage (as it does in the admonition or adjuration in its order of solemnizing matrimony). That Church of course may discipline its members up to ex-communication. The Episcopal Church in the United States does in fact decline to recognize the moral validity of certain legalized remarriages of divorcees (both parties living).

Canon 39, §IV, of the American Episcopal Church plainly implies the authority of a Bishop to exclude such persons from communion, as not married in accordance with the word of God and the discipline of that Church, but the American Episcopal Church does not claim the right to interfere with the legal

status of any marriage recognized by the law of the land. To discipline up to ex-communication and to refuse to recognize the moral validity of certain marriages is well within the rights of conscience. No church can be compelled to connive in its spiritual relations with persons who have contracted what it believes to be a morally invalid marriage.

This is a very different matter from assuming to declare officially, by a judicial judgment, that such marriages are invalid, if by the law of the land they are valid. It raises a new issue when a church assails a legal marriage by making, and for the first time in this country promulgating, its decree purporting to invalidate such marriage.

In the United States the marriage decrees of the Council of Trent, prior to the promulgation of the Ne Temere decree, had no force or validity. They were not binding on the Roman part of the Christian Church in this country because they had never been generally promulgated. The Ne Temere decree, like the laws of any voluntary society, is even now without coercive jurisdiction, not enforcible by temporal penalties of any kind, and is subject to the power of the civil government to legislate to prevent any practice socially disturbing. To give to any religious body coercive jurisdiction would be contrary to the fundamental principle of religious freedom without discrimination or preference, and Congress, is prohibited from making any law respecting an establishment of religion by the Constitution of the United States. (Amendments Article 1.) By the promulgation of the Ne Temere decree, the Tridentine legislation is for the first time given binding force generally in the United States upon Roman Catholic citizens.

It may be remarked that the English law of marriage is peculiar in another respect. By the civil law of Europe, children born out of wedlock might be made legitimate by the subsequent marriage of their parents. This law had been approved by the Roman Church and the Bishops of the Church of England desired it in the reign of Henry III, to be made the law of England, but the attempt failed as appears from the statute of Merton, when the Barons of England with one consent declared that they were unwilling to change the laws of England.

Holmested, Marriage Law of Canada, p. 21.

In England, owing to the breach which existed between the Church of England, and the Church of Rome, the Council of

Trent never having been regarded as having any force, the secular rulers following France in due time enacted laws on the subject of clandestine marriage (26 Geo. II, c. 33) as has been mentioned above.

Marriage in the United States.

When the United States became an independent nation it took its laws from England. The English common law, generally speaking, prevailed unless it had been changed by statute. Bishop, the author of a leading legal text book on Marriage and Divorce, says that English decisions are referred to with deference. There was no power as to marriage and divorce delegated to the general government within State lines, and there is a more general recourse to English decisions on that account.

The sovereign power possessed by the Crown of England as to marriage, passed in the United States, within State lines, to the people of the several States as successor to the Crown, and its exercise resides in the several State legislatures, except so far as the exercise of such sovereign power has been limited by the State constitutions adopted by the people, acting in their sovereign capacity, and by decisions of the courts construing the constitutions; the courts, being of course, vested with the final right of declaring the law as to the meaning of the several State constitutions.

The principle that the power of the civil authority is, in a legal sense, over the action of various religious bodies in the matter of matrimony, is as much in force in the United States as a matter of law, as it is in England. Thus the Mormon cases decide that the commission of acts which, though justified by the tenets of a religious body, are socially disturbing, may be penalized. "The state cannot allow to be done under the name of religion, things that assail public order." (Gladstone, Letters on Church and Religion, Vol. 2, p. 41). The principle of religious liberty in England has extended the former exclusive right of clergymen in Anglican orders, to ministers of any religious body. (Beamish vs. Beamish, Supra at p. 33).

The magistrate in the United States supersedes the clergyman; that is to say, the clergyman or some other person acting as magistrate, is the only legal officiant and he need only take notice that the parties are before him to be married and pronounce them husband and wife. If the temporal authority

allows all marriages without exception, to be solemnized by persons designated to act as magistrates, then a marriage between Roman Catholics solemnized according to the requirements of the temporal law is legal and binding notwithstanding that the parties have violated the ecclesiastical law of that Church and no Church has the legal power to annul it. No one however can well question that the authorities of the various religious bodies to which the parties belong have the moral authority to censure or discipline offenders, according to the internal rules of such body. (See p. 36.)

We have seen that neither in Jewish, nor in Christian Church, except in the Roman Catholic Church since Trent (1563) in parts where the decree of that Council have been promulgated, was religious ceremony or priest required to a valid marriage. The Christian Church certainly did not originate the marriage institution. The sacredness of marriage, proceeds from its own nature and not from any religious ceremony, nor from the ecclesiastical character of the officiant. The ceremony of blessing adds not one iota to the legal character of the marriage. It does, quite properly, accentuate the religious solemnity of the vows. The legal right of the clergyman to officiate is a right to act as an official witness, and this right is given by the State alone. The State recognizes the propriety of permitting clergymen to act in that capacity, because religious people, whether Roman or non-Roman, rightly regard marriage as not merely a civil form, but as religious in character, and they properly desire the ceremonial blessing of their church because it adds solemnity to the great responsibilities undertaken.

See the Right Hon. James Bryce, *Studies in Jurisprudence and History* (p. 858). But the clergyman as such, has no authority to solemnize a legal marriage, except such authority as he gets from the state.

It is difficult to believe that any Church could refuse its religious sanction to a legal marriage without being recreant to its duty. And it is a manifest abuse, to make the performance of such a sacred duty, the basis of driving a bargain or of exacting a promise for sectarian advantage.

The statute law of the State of New York is definite. "No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate."

Domestic Relations Law, Art. 3, §12. (See Appendix L.)

The State itself regulates marriage but it does not marry the man and woman. The Church blesses marriage but does not marry. The man and woman marry each other. If the magistrate who is the public officiant, happens to be a clergyman, still, the officiant acts as magistrate. He is not necessary to the essence of the marriage; he may not annul the marriage, and he acts as an official witness.

Nor is the issue under consideration one of morals, but of discipline. If a marriage in Austria, where the Roman Catholic Church, is by law established, is valid, even without any religious ceremony, and is recognized as valid by the Roman Catholic Church, a marriage so solemnized, cannot be morally invalid for Roman Catholics in the State of New York; a mixed marriage solemnized in Germany by a non-Roman clergyman cannot be morally valid there and morally invalid here unless moral laws have geographical limitations.

So long as a Church limits her activities to the field of morals and internal discipline, and does not violate the law of the land in so doing, the functions of the Church and of the state are not in the same sphere and cannot conflict. It is only where two ride horseback that one must ride ahead.

"Whatever the form of ceremony and even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof" of binding marriage, "and this has become settled doctrine of the American Courts," said Cooley, J., in Hutchkins v. Kinmet, 31 Mich., 126.

This rule was adopted in Meister v. Moore (1877) 96 U. S., 76-83.

In New York State there is a clear statute absolutely repudiating common law marriage. (See Appendix L, §11 (4).

In France the mayor of the commune, regularly celebrates; in Germany the registrar of the district in which one party resides or some civil officer, designated by the registrar in writing, acts as the official witness.

In England the district registrar's presence was at one time required even at a religious ceremony when it was not conducted according to the rites of the Church of England.

The following is related to illustrate the then peculiarity of the Roman position in England. "At that time all Roman

Catholic marriages were made valid in the eye of the law by the presence of the civil registrar. A nobleman was to be married and there was to be pontifical high mass in the nobleman's private chapel. In the middle of the creed, which was being sung, the registrar came to the bridegroom and said: "My lord, I do not know how much longer this is going on, but it is five minutes before twelve, and if you are not married before twelve the marriage will be illegal." "What shall we do?" was the question. "Just step into the drawing room, give your consent there and then return." This was done, and after the civil marriage in the drawing room the couple returned into the chapel and the marriage service which had been going on during their absence, still proceeded. I asked a Roman priest, "Which of those was the sacrament of marriage?" He said, "They never told the bishop." "Never mind that," was my answer. "Which ceremony was the sacrament?" "Of course," he replied, "the consent before the Registrar." "Then," said I, "the second consent was an iteration of the sacrament and sacrilege." "Ah,—let me see," said the priest, "before the Registrar they withheld their interior consent. I think that will do." "Then," was the reply, "the marriage is illegal as being after canonical hours." "I think," said the other, "we had better talk no more about it."

A most important suggestion has been made that grant be made to the general government by amendment to the Constitution of the United States, of the right to legislate concerning marriage and divorce. Surely the subject matter is important enough for calling a convention to amend the Constitution of the United States to propose amendments for this purpose.

Inasmuch, as a constitutional convention may, in the not distant future, be called to amend the Constitution of the United States (for other purposes) it is suggested that this convention might well consider the question of proposing an amendment granting power over marriage and divorce.

CHAPTER III.

The Ne Temere Decree (1907-8).

(See Appendix A.)

The Ne Temere decree of the Roman Catholic Church was issued in August 2, 1907, to take effect on April 19, 1908. It has been promulgated in the United States, and in every State thereof.

It decrees that "only those marriages are valid" which are contracted according to the provisions of the decree.

The decree also declares that the said laws "are binding on Catholics if they contract betrothal or marriage with non-Catholics."

And finally, the decree (See Appendix A) is to have force "all things even those worthy of special mention, to the contrary notwithstanding."

The German Empire was excepted by the Bull Provida (See Appendix D), (A. D., 1906), and mixed marriages there, before Protestant ministers and State officials, are valid after Easter 1908.

In the United States however "marriage of a Catholic to a Protestant before a minister or civil magistrate will be no marriage at all," according to the New Marriage Legislation (page 63, paragraph 10). This pamphlet contains the text of the decree in latin and English and a commentary by John T. McNicholas, O. P., S. T. Lr., and is set forth by authority. (See Appendix C.)

The intention of this decree, as gathered from the words legally understood, is to set up the judicial decree of the Church of Rome as against the law of the land. This is the legal meaning of the words "only those marriages are valid." This of course, would have the effect of attacking the civil authority of the State governments.

The intention of the Ne Temere decree, as gathered from the words ecclesiastically understood, is to affect the conscience of the Roman Catholic member of a mixed marriage to regard said marriage as invalid. This however cannot be done

without having a civil effect, viz. upon the personal rights of the non-Roman member of a mixed marriage. For if the Church of Rome officially impugns the validity of a marriage, it asperses the marriage for both members of the same. In either civil or ecclesiastical sense of the phrase "only those marriages are valid," the decree therefore, either invades the authority of the law of the land, or it invades the personal right of citizens.

In the recent Canadian decision (Hebert-Clouatre Case, Feb. 22, 1912) (See Appendices G and H). Judge Charbonneau concluded the judgment thus: "Personally, I cannot believe that the Roman Congregation which enacted that decree ever intended to give it any civil effect." Upon this opinion, it is judicially declared by the civil court that "the decree of the Archbishop (Bruchesi) of the (Roman Catholic) Diocese of Montreal, dated Nov. 12, 1909, has no judicial effect in said case." (See Appendix H.) There is here, of course, an implied admission that the Archbishop's decree based on the Ne Temere decree did have civil effects according to the lower court, even if none were intended by the Roman Congregation.

It will be observed that the authorized commentator McNicholas says that marriages of Catholics to Protestants "before a minister or civil magistrate will be no marriage at all." It cannot be said therefore that the decree in question affects Roman Catholics only. It will thus be seen that the decree is not purely one of internal ecclesiastical discipline. The statement of the authorized commentator must be taken either as the interpretation of the words in a legal sense (and then it is an attack on the law of the land) or else in an ecclesiastical sense (in which case it is an attack upon personal rights).

Even if two Roman Catholics marry according to the law of the land, but not in accord with the terms of the decree, and both are subject to the discipline of that church would the Roman Catholic Church recognize the marriage as valid if contracted contrary to the laws of their Church? It is stated that it would not. Suppose one of the Roman Catholic members of such marriage returns to that Church and one does not, could not the one who returns be married "because the Church would not recognize the previous marriage as valid?" It is stated that the returned one could be married with that Church's sanction if the former marriage were judicially

annulled. Here there would be a civil effect on the Roman Catholic who did not return. His personal rights would be invaded.

Men and women according to the law in the United States and as Judge Charbonneau has said (Appendix H) according to the law in Canada, are essentially married when they consent together for a common life. This consent constitutes the essence of the marriage and is a personal right of every citizen. The state and the state alone can declare officially what marriages are legally valid and what marriages are legally null and void. The state acts in the public interest and limits the personal rights of its citizens to mate and marry on grounds of public policy.

The Church blesses the sacrament, which is not the religious ceremony. The union of the man and woman as husband and wife, is the sacrament when performed according to the civil law. The Church wisely re-inforces the personal consents and the legal formalities by her blessing.

No church has a right in morals or in law, to base upon her blessing a claim of a right to exact prenuptual promises for sectarian advantage.

And no church has a right in morals or law, to base on her blessing a claim either to declare a marriage duly solemnized according to civil law, between a Roman Catholic and a Protestant, invalid in law or to annul in law any marriage performed according to the law of the land because it is not in accord with such church's judicial decree.

The Ne Temere decree is said to have been enacted as a measure designed to check abuses and to safeguard the sacredness of marriage, but it would seem that its effect would inevitably be, in countries not wholly Roman Catholic, to disturb the peace of families and to lead to the waging of a covert war against human liberty in its most intimate private relation. One example will suffice.

A young lady of St. Louis named Helen O'Brien was in September, 1910, married in New Jersey to a Protestant named Howland. The marriage was solemnized by a Baptist minister.

In the Western Watchman of St. Louis, November 10, 1910, there appeared an editorial in which it was said that Mrs. Howland having returned to St. Louis sought the advice of her parish priest who referred her to the Ordinary.

In obedience to his direction she caused the following letter to be read in one of the St. Louis Churches.

"Dear Father:—In submission to the obligation laid on me by His Grace the Most Reverend Archbishop, in publicly repairing the scandal I have given, I confess to the world, as a Catholic, I was married by a Baptist minister September 5, 1910. I expect pardon of God for my sin and the grace of sincere repentence.

Sincerely,

HELEN O'BRIEN."

The Western Watchman said that the letter "was signed by her maiden name, thus giving all to understand that neither by the Church nor by herself was the marriage regarded as a valid and binding sacrament."

A few months later a divorce was granted in the usual way by the Civil Court of Missouri.

It is said that "the decree was issued to render easier for the universal church the substantial form of matrimony," but the substantial form of matrimony is the personal consent and legal union of the man and woman as husband and wife. The decree does not make this substantial form of matrimony easier.

It is further said that there has been an unending antipathy on the part of the Church to "clandestine" marriage. It will be remembered however that "clandestine" has a technical meaning. A marriage in an non-Roman Church in the presence of a great congregation, between a Roman Catholic and a non-Roman Catholic, or between two Roman Catholics, would be "clandestine." It is alleged that "each society has a right to make laws which are calculated to promote the best interest of its subjects." This must be qualified by the right of the State to intervene, where such society's acts are socially disturbing though in accord with its religious tenets.

"The Church," it is said, "derives her power to legislate not from the State but from Christ."

When a church says it derives its power to legislate as to marriage not from the state but from Christ, and that it acts by divine right and has superior jurisdiction to the state because of divine origin and authority and the State says that marriage is valid when solemnized according to the law of the

land, which authority is to decide the question of precedence, the church or the state? If the church, which church? Manifestly the state and the state alone can decide the question if there is a conflict of authority.

Suppose a marriage has been duly solemnized according to the law of the land, and a church assumes to annul such marriage because not in accord with such church's judicial decree. Each religious body must, I presume, be allowed to have the same right. It then becomes a question as to "what is God's will in regard to marriage?" and we may have over one hundred and fifty answers from as many religious bodies (who ought to be united in this matter, if God's will is clear). Who is to decide? Obviously, in the interest of external order the decision must be made by the State.

The Christian Church in the United States is in the same position as the primitive Church was in the Roman Empire before the age of Constantine and after persecution had ceased. Owing to divisions in the Church, the States are unable to accept the views of any fraction of the Church in matters of a religious character wherein the whole community is concerned. Marriage is such a question.

To commit such a question to the Courts of any one part of the Christian Church would not be satisfactory to the other parts. To commit such questions to each part of the Church would end in chaos.

Marriage is not merely a matter of concern to individuals as members of a Church, it also concerns individuals as citizens, because it involves their status, before the law; their legal obligations and duties as husband and wife and the rights of the issue of the marriage.

It does not help matters to say that marriage "was instituted of God; is subject to divine law, and cannot be rescinded by human law," because we have seen that marriage was instituted of God, without the aid of the Christian Church or the state; is subject in its civil aspect to the law as declared by the state; and if there is any other final authority in the matter than the state then there are over one hundred and fifty final authorities in the United States all claiming to know God's will and not in agreement. And this leads to nothing else than anarchy. It may well be considered that God's will is more clearly gathered from human law than from such discordant views of various religious bodies. The external rela-

tion created by the authority of human law *can* be rescinded by human law.

Again it proves nothing to say that "human society originated by marriage, not marriage by human society." For the question is not how society originated but whether in its civil aspects and in its external relations, a marriage performed according to the temporal law of society can be invalidated by a religious organization which is subject, in its enternal relations, to the temporal law of society.

"The Church," it is said, "is the divinely appointed custodian of Christ's teachings." This may be admitted to be quite true, but is the state to recognize one body out of one hundred and fifty, as the Church? Has "coercive jurisdiction" been granted to any fraction of the whole Church?

Says the Rt. Hon. James Bryce, "the effort to base legal rules on moral and religious principles, leads naturally to casuistry and away from that common sense view of human transactions, and recognition of practical convenience, which ought to be the basis of law." (*Studies in Jurisprudence and History*, p. 916.)

It comes to this, that while it is asserted for the Roman Catholic Church that it does not attack the civil authority, yet it does set up its own authority in such a way as to contravene either the authority of the State or the civil rights of individuals, and this by a judicial decree which affects the non-Roman Catholic members to a mixed marriage. Members of the Roman Catholic Church who are loyal to the civil government will hope to see the civil authority of the State upheld as to legal marriage, and that the natural and legal rights of citizens, whether members of that Church or not, are not adversely affected by a disciplinary decree set forth as such, and not as a definition of any article of faith *ex cathedra.*

If no action is taken by the Roman Catholic Church to modify its present disciplinary decree, it would seem proper, that the personal rights of citizens and the authority of the State should be asserted in definite terms, as suggested hereafter in chapter seven. It should be clearly apprehended that this matter has nothing to do with laxity of divorce laws; and is not based on sectarian animosity. It is a question of human rights and civil liberty and upholding the principles of our institutions.

Authority of ecclesiastical Courts must of necessity be confined to spiritual censures and discipline for they have ceased

to have any coercive power. To compel Roman Catholic citizens to submit their rights in regard to marriage to the adjudication of a purely spiritual court where the ultimate appeal lies to Rome, would be virtually depriving them of an inalienable right, viz: if they desire it, to justice administered by the temporal courts under the law of the land. Their rights would also be violated by a civil court's delegating or permitting its functions to be delegated to Roman Catholic Bishops or Roman Catholic authorities in Rome. For a temporal court to give or purport to give, without statutory authority, a legal sanction to the decree of what are in fact Papal Courts would be a violation of fundamental law.

It would of course, be a violation of the rights of liberty and conscience, if the state undertook to give orders respecting the religious position of divorced persons in the several Christian bodies, but neither the liberty of conscience of any religious organization, nor of the individual members thereof, is in any way infringed by the state's permission of remarriage of divorced persons. The state may not abrogate the rights of conscience inhering in any religious body. Nothing herein written is intended to challenge the right of a church to decline to acknowledge the moral validity of a divorce granted by the State for causes which such church does not sanction.

It is within the province of a church to declare that no civilly divorced person can, according to the law of that church, be morally reunited in wedlock to another person with the sanction of that church, unless such church has taken action to recognize, ecclesiastically, the divorce by the State.

Such is the position taken by the Orthodox Eastern or Russo-Greek Church, a religious body numbering nearly 100 millions adherents with Apostolic Order, Jurisdiction, Faith and Sacraments, a church that is certainly as much a part of Christ's historic Catholic Church as any other Christian body.

On the other hand a church, not content with its liberty of moral judgment and discipline may not claim the right to exercise judicial power in external relations. It is not necessary for Roman Catholics to regard marriage as essentially a civil contract which may be broken for any of a dozen reasons. According to Roman Catholic canon law, the legal validity of marriage is a primary condition of the material validity of the sacrament of marriage in the Church.

Whenever baptised persons contract marriage according to

the civil law "they necessarily receive the Sacrament of Marriage." Catholic Dictionary by Addis, Arnold and Scannell.

"So far as the discipline of a church is concerned it cannot externally affect any person except by the express sanction of the civil power, or by the voluntary submission of the particular person (Middleton vs. Crofts (1736), 2 Ark., 650), but for the purpose of enforcing discipline within the church, any religious body may constitute a tribunal to determine whether the rules of the body have been violated by any of the members or not and what shall be the consequences of such violation (Long vs. Cape Town, 1 Moo. P. C., (N. S.) 411, 461). The decision of such tribunal will be binding and will be enforced by the courts of law, when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, if not, has proceeded in the manner consonant with the principles of justice, but if any member of such a body has been injured as to his rights in any matter of a mixed spiritual and temporal character, the courts of law will, on due complaint being made, inquire into the laws and rules of the tribunal which has inflicted the injury, and will ascertain whether any sentence pronounced was regularly pronounced by competent authority and will give such redress as justice demands."

Halsbury's Laws of England, Vol. II, p. 366, §698.

CHAPTER IV.

Nationalism vs. Imperialism.

(By the Rev. James W. Ashton, D. D.)

When we see that any, to a considerable number, are unaware of the existence of a situation which impairs their attachment to their own Church, in any particular, it becomes our duty to apprise them of the fact, to enlighten them, as much as it may be in our power to do so, of the position they hold in the eyes of their own Church and to put them, if possible, upon their guard against any encroachment upon their liberty under the Gospel and under the law of the land of which they are citizens.

The position of the Church of Rome is set forth in the decree known as Ne Temere.

1. There are special reasons arising from the history of the Episcopal Church in this country, which make it important that we should remind our communicants of their rightful attitude towards this and any other question which may come before them in regard to their relations to the Church of Rome or any other Church existing in name or in fact, with theirs in the land.

The American Episcopal Church is the daughter, as we say, of the Church of England. That means that the language and literature of the latter have received their sanction as the language and literature of the former, by legislative enactments of its ecclesiastical Councils and Conventions, so that the relation referred to, is not sentimental but vital, as much so as the bond which unites a mother to her child in the order of nature.

The result of this union is that the same spirit breathes in both. And when we come to inquire what that spirit is, we find that its essential principle is one of nationality.

Now the opposing principle of the Church of Rome is one of imperialism; it is on that basis of a world-inclusion that she promulgates a decree which is intended to affect all countries where she may have adherents.

The principle of nationality as applied to both religion and political conditions in English history are so well understood

by those who have made a study of them that we take no time to go over the ground.

The Reformation of the Church of England was taken up on that ground and carried forward to a successful conclusion, before the conveyance by that Church to this continent of her traditions and laws.

The "Protestant Episcopal Church in the United States of America" came into the possession of these traditions and laws and has not changed or modified any of them, in so far as they have had no relation to the political differences existing between the two lands and their respective governments.

With the traditions and laws has gone the spirit of nationalism, which is mentioned as the distinctive feature of the two Communions considered as one body, as opposed to the distinctive feature of the Church of Rome as representing and embodying the principle of imperialism.

This being the case, it is pertinent to ask whether or not there is anything in the Ne Temere decree which violates the fundamental principles of nationalism which co-exist and cohere in the constitutions of the Church and the State allied from their birth in a common history of resistance to the opposing idea.

If so, then, upon the basis of our civilization, we should refuse to accede to any provisions which deny the right of the Church, or of the State within whose borders the Church may exist, to legislate for the welfare of their respective constituents.

This is not making a claim that the Church can legislate for the State, or the State for the Church; but that they both represent the same spirit and proceed upon the same line of obligation in this country, as they did in the Mother country, and, that no foreign power of the Church should have a right to interefere with the discharge of these duties, any more than a foreign political power would have the right to do so.

There is a sort of Monroe Doctrine of the English-American-Anglo-Saxon community, wherever it exists in the world, which forbids such an intrusion. It is the civilization of the modern world which is brought into antagonism with that of the imperialism, the Cæsarism, the Absolutism of the Ancients. Nationality was born with Christianity and lay dormant for centuries, until the revival of learning and religion in the Fifteenth century.

If you object that I am virtually indentifying Church and State in this country, I reply that as a matter of fact, the

Episcopal Church in the United States, does not do so; it is the spirit and not the form of identification as it is in England, that she claims as her heritage; she is entirely separated from the state, as every other Church in the United States has to be, in order to exist within our commonwealth; but nevertheless she is the embodiment as a matter of history, of the idea and fact of nationalism.

Whereas the Church of Rome is identified with the state; she is a Papal state; she has her curia, her Cardinals, her Court of temporal administration and judicature; she is now in captivity, as she avers, only because she is incapable of exerting the power which is incorporated in her ecclesiastical constitution; her very decree in this instance is a promulgation of her joint power and authority as an ecclesiastical and a civil government; in certain countries, where this union has been recognized in the organic law of the land, she is obtaining this sanction, and putting into effect the decree under the operation of both ecclesiastical and civil penalties; and this is the fact to be noted in this connection—that if she had the power in the United States to do this thing, if, in other words she dared to enforce her decree by civil process, she would do so. She is prevented only by the principle of nationalism inherent in our Constitution and our Constitutions; and of this principle the American Episcopal Church is the historic representative.

We Churchmen are in duty bound to take the initiative—the lead, which our traditions and our body of laws oblige us to assume; and to resist the assumptions and encroachments that a Church, (really a State-Church), is making. The intention of the Church of Rome is that her decree should apply in every land, as it does apply in the lands where she holds civil sway; that it does not apply in our land is due to the fact of the limitation of her powers, not to the decree itself, which if it did apply would break up and wipe out entirely the national character of our body and spirit of laws which we inherited from our fathers of both the English and the American Church. The fact that it does not apply to any other than her own communicants, as she claims for it, does not really exist, for whatever affects the rights of the members of other Communions to be recognized as legally married under the laws of the land, applies to them as belonging to a state of society which she does not recognize as having any right or power to

exist, because it does not recognize her right to say what that state of society shall be.

It is on this ground that the application of the decree should be opposed by every free-born American; and if not so opposed by all, then it behooves the members of the Church which recognizes their rights and their religion as resting upon the freedom of their civil institutions and the sanctity of law constitutionally expressed, to take a stand against oppression.

The Church of Rome lays great stress upon intention in the interpretation of her doctrine; so do we in the understanding of her decree.

2. On the same ground we should, as Churchmen and citizens, refuse to concede the claim of any Church to impugn the legal status of an individual in any marriage relation conformable to the law of the State and to the individual conscience.

This proposition implies the existence of a social order and connotes the personal liberty of an individual living under it, abiding in peace and quietness—assenting to the fundamental principle of democracy; that political economy upon which we as a nation stand. The Church's duty is to govern its own members; they may or may not be prohibited to make such alliances outside of their own communions; it is for the Church to say for itself alone; its disciplinary powers expire with an excommunication. It has no right to go beyond that point; to adjudicate upon the personal act of one outside of its organization, which it does by demanding a corresponding act invalidating a preceding status, virtually declaring it to be immoral, and a status that the law governing in such matters punishes as criminal.

That point is one of creating a commotion against the authority of the law by whose sanction it enjoys its own liberty. Such influence is seditious, similar to the influence which it would exert against our system of public education by the appropriation of public money for the support of parochial schools. By the exertion of this influence in some local Boards, the Church of Rome has driven out the English Bible from the Schools. It would drive out the common law from the Courts. It proposes to drive out the canon law of every ecclesiastical organization but its own, from the land.

By the same influence it would invalidate other social institutions. In the matter of matrimony by the terms of the Ne Temere, it invalidates every marriage not solemnized by a Roman Catholic priest, and where such a marriage occurs, it practically publishes that it is immoral and criminal.

The tergiversation in which it is involved in order to maintain its ground in this particular is astonishing.

Its position is like that of a masked battery; it is there whether it makes a noise or not. Its agents are there to enforce its requisitions. They are not obliged to explain all that it implies. It is only in places where it is allowed to thunder that its voice is heard. The powder and the shot are in the gun ready for execution.

The instances which have come under our observation, of the operation of this decree, have disclosed the fact that the priests of that Church are adepts in the art of concealment. Like Cardinal Gibbons who tells only a part of the truth of the Church of Rome, in what is so liberally quoted by his reporter under the flaming head of the Cardinal's "Views on American Democracy" in the Outlook of November 4th, 1911; and which the editors of the magazine have endorsed.

But what else is the position of the Church of Rome but one of the sedition? Webster definies that word to mean "the raising of a commotion in a state; conduct tending to treason —but without an overt act; excitement of discontent against the government, or of resistance to lawful authority." "Seditions" belong to the class of evils denominated in Scripture as "works of the flesh." The evil of it was forseen without doubt by Christ when he said "Render unto Caesar the things which are Caesar's, and unto God the things which are God's." For he was addressing the individual conscience which the Church of Rome ignores outside of itself, and that corporate conscience which is not of its own making.

It is a species of hypocrisy to grasp by the hand a man and say he is a good citizen and at the same time to say in an underbreath that he is an outlaw. A Church that practices any sort of hypocrisy for the sake of a convenience, of courtesy or custom is incapable of being a safe guide of human conscience or true guardian of social morals. Its subterfuges of policy, its juggleries, chicanery and unscrupulousness, make it in fact, and will prove it to be in the end, a blind leader of

the blind. American citizenship implies a responsibility for the respectability, at least, of the laws under which it thrives and an effort to see that they are respected, and not covertly despised.

(See pastoral of the House of Bishops of the Church of England in Canada, Appendix J.)

CHAPTER V.

The Ne Temere Decree Canonically Considered.

(By the Rev. Francis J. Hall, D. D.)

I. THE DECREE ITSELF.

The Decree Ne Temere was issued by the Prefect of the Sacred Congregation of the Council in Rome on August 2nd, 1907, and went into effect, except in Germany and a few minor countries, throughout the Roman Communion on Easter Day, 1908, being in the meantime generally published by transmission to the Ordinaries of that Communion throughout the world.

Germany was excepted from the application of its provisions by a Decree of the Sacred Congregation of the Council, issued February 11, 1908, in which it was declared that the Bull "Provida" of 1906 should continue in force. This Bull had published the Decree *"Tametsi"* (see Appendix B) in Germany, but with an exemption of mixed marriages in that country from its requirements. See Cath. Encyc., s.v. "Clandestinity," *fin.* Similar exemptions have been granted in Hungary, Croatia, Slavonia, Transylvania, and Fiume and to the Uniates (Cath. Encyc., s.v. "Marriage, Moral and Canonical Aspect of," p. 701). So far as the writer can ascertain, no other country or province is exempted.

The Decree Ne Temere is declared to have force, "all things ..... to the contrary notwithstanding." That is, previous canons and dispensations which are inconsistent therewith are nullified. It is deemed to apply to all who have been baptized in, or converted to, the Roman Catholic Church, even if they have subsequently abandoned the Church; in particular to such as contract betrothal or marriage with non-Catholics, even when a dispensation has been granted, "unless the Holy See has decreed otherwise for some particular place or region." (See Art. XI.)

The more significant provisions of the Decree are as follows:

In order that a matrimonial engagement should be valid—that is, for the purposes of canonical discipline— it must be made in writing and signed both by the parties concerned and by stipulated witnesses. (See Art. 1.)

"Only those marriages are valid which are contracted before the parish priest, or the Ordinary of the place, or a priest delegated by either of these, and at least two witnesses, in accordance with the rules laid down in the following articles" (Art iii), except in danger of death, when the priest cannot be had but the marriage is necessary (Art. vii), and in places where the impossibility of obtaining the priest continues for a month (Art. viii).

The meaning is that marriages not thus performed are "clandestine," and null and void—that is, adulterous.

II. HISTORICAL BACKGROUND.

1. *Clandestinity.*

Previous to the meeting of the Council of Trent the Roman See acknowledged the validity of clandestine marriages, although condemning them as sinfully performed, provided no impediments or other causes existed to make them invalid. A clandestine marriage, in Roman terminology, "is one that is contracted without the solemnities which are prescribed by the Church." Thos. Slater, S. J., *Manual of Moral Theol.,* Vol. II, p. 323. Thus purely civil marriages, and those performed by Protestant ministers, are for Roman Catholics clandestine.

The Council of Trent erected such clandestinity into an impedimentum dirimens, an impediment rendering the marriage null and void. In Sess. XXIV. cap. i, it was decreed (Decree *Tametsi*), "Those who attempt to contract matrimony otherwise than in the presence of the parish priest or of another parish priest with leave of the parish priest or of the Ordinary, and before two or three witnesses the Holy Synod renders altogether incapable of such a contract, and declares such contracts null and void."

This Decree was to have force only where canonically published, and it was not published in all countries. In United States of America it was published in only a limited number of dioceses, where the catholic population was large. It was not published in Germany until 1906. Moreover, various exceptions and dispensations were granted from time to time,

reducing the whole subject to some confusion. See Cath. Encyc., s.v. "Clandestinity," for fuller details.

The Decree Ne Temere is designed to end this confusion, and to extend a uniform legislation against clandestinity (in the ecclesiastical sense) to all parts of the Roman Communion —an intention partly defeated by the exception made in Germany's favor. It enunciates no new requirements, but makes an existing law more specific and more universal.

In places, however, where the Decree *"Tametsi"* has never been published, it creates a new situation, e. g. in Western New York, and in the larger part of United States.

2. *Mixed Marriages* (*Matrimonia mixta*).

Technically these are marriages between (Roman) Catholics and non (Roman) Catholics when the latter have been baptized, but marriages with unbaptized infidels are also in ordinary speech so described. Anciently neither form of mixed marriage was regarded as invalid, although all mixed marriages have ever been treated by the Christian Church as undesirable, because prejudicial to the Christian significance of matrimony (as a type of the union between Christ and His Church), and to the religious training of the children of such unions.

The feeling against mixed marriages gradually had the effect of creating belief that *mixta religio* (as between Catholics and baptized heretics) and *disparitatis cultus* (as between Christians and infidels) constituted impediments, making these unions unlawful for Catholic Christians. The Eastern Church Council in Trullo, held at Constantinople, A. D. 692, enacted in Canon 72, "An orthodox man is not permitted to marry an heretical woman, nor an orthodox woman to be joined to an heretical man. But if anything of this kind appears to have been done by any [we require them] to consider the marriage null, etc. This seems to make *mixta religio* an *impedimentum dirimens;* but according to Henry Percival (Ecumenical Councils, p. 387), the Eastern Church today, which regards the Trullan canons as binding, in practice permits marriages between the Orthodox and Lutherans, whom it declares to the heretics.

In the Decretum Gratiani (c. 28 q. 1.) published in the 12th century, *disparitas cultus* was made an *impedimentum dirimens.* Henceforth marriages of baptized Christians with

infidels were treated as null and void in the West, unless dispensation had previously been granted.

Mixta religio, or a condition in which one of the parties is a baptized Roman Catholic and the other a baptized non-Roman Catholic, constituted a prohibitory impediment, making marriage without special dispensation unlawful, but not rendering it invalid unless other causes of invalidity existed. The Decree Ne Temere makes no ostensible change in this regard, but has the effect of making it practically impossible for *matrimonia mixta* without previous dispensation to escape nullification through the impediment of clandestinity. This is so because no priest can lawfully perform such a marriage unless dispensation has been granted, and unless he does lawfully perform it, it is "clandestine"—null and void.

It is also a requirement, not affected by the new Decree, when mixed marriages are permitted by dispensation, that the non-Roman Catholic party shall promise to leave the other party the free exercise of his (or her) religion; that both parties shall promise to bring up the children in the (Roman) Catholic faith; and that the Catholic party shall promise to endeavor to convert the non-Roman Catholic party. In many dioceses these promises have to be made in writing.

III. THEORETICAL BACKGROUND.

1. *What it is.*

This is partly the doctrine concerning matrimony and partly a claim of absolute jurisdiction over Christian marriage.

Christian marriage is declared to be at once a contract and a sacrament. As a sacrament it is a means of grace and constitutes a religious union, which is seriously prejudiced by religious differences between the parties to the union. Moreover, in this sacrament each baptized party becomes a minister of grace to the other; and it is deemed wrong that a Catholic should extend grace to a heretic. Therefore mixed marriages ought to be permitted only for the gravest reasons, when the conditions preclude any other form of marriage; and, for the protection of the sacrament, they ought not to be entered upon without formal dispensation from the proper ecclesiastical authority.

The Bishop of Rome claims spiritual jurisdiction over all

Christians, as divinely appointed head of the Church on earth. Inasmuch as marriage is a sacrament and religious union, it is deemed a spiritual matter, coming under his spiritual jurisdiction. Therefore, while the civil authority can legislate with reference to "the civil effects of marriage, such as the property rights of married people, rights of inheritance and succession, titles of nobility, and similar matters," "questions which affect the bond of marriage, and the capacity of the parties to contract marriage, belong exclusively to the Church." Thos. Slater, S. J., *Moral Theol.* Vol. II. pp. 273, 274. Slater acknowledges that "The civil authority probably has power over marriages of non-baptized subjects."

2. *Criticism.*

There is an element of truth in the Roman Catholic theory and claim, but there are also elements of error and of unlawful stretching of authority.

Marriage has three aspects. (*a*) It is natural union, governed by the laws of human nature, which are ordained of God and may not be disregarded by society. The multiplication of the species depends upon it; and, subject to decency and social order, the natural rights and duties connected with its achievement and maintenance may not be interfered with by human authority.

(*b*) Marriage has to be regulated by organized society—by society as a whole—because such society cannot otherwise protect itself from subversion, and such protection is of elementary obligation. Thus marriage becomes a civil or legal union, so soon as human society in a given country becomes an organized entity.

(*c*) Religion is social as well as individual, and its interests are vitally affected by social relations, especially by the marriage relation. Therefore God has elevated the marriage of Christians to a religious status constituting it a religious union, and giving it a vital place in the propagation of true religion from generation to generation and in the conservation of religion in its social aspect. The family is, in brief, to constitute a religious as well as a legal association. In order to secure this, organized religious society—the Church—must regulate marriage, so far as it is a religious institution, and in relation to its own privileges. See *General Conv. Journal,* 1886, App. XIII. To give an example: this Church forbids the

re-marriage of many divorcees who are permitted to re-marry by the state, believing the re-marriages which she forbids to be contrary to divine law and adulterous. See *Digest* of 1910. Can. 39. §III.

Briefly while the state has authority over all marriages in their civil and temporal aspects, and no subject of the state can claim exemption from this authority, a Church has authority to regulate the marriages of its members in their spiritual aspects, and to enforce its regulations by spiritual consequences. This right depends neither upon the soundness of the Church's doctrine of marriage, nor upon the merits of her discipline, but legally speaking, upon its right as a licit volunteer society to impose any conditions (not contrary to the laws which the state legitimately enacts) upon the good ecclesiastical standing of its members. But, although the Church is more than a mere volunteer society, being a divine institution as well, it has no coercive jurisdiction. Its membership is voluntary, and one who abandons the Church's hierarchy ceases to be under its jurisdiction, except that the Church may determine his restoration to good standing by considerations based upon his conduct while out of communion with it.

In particular, the Church may, and practically has to, determine for its own discipline what are valid marriages, spiritually considered, and may register her mind, whether old or new, in canon law, and declare the conditions which must be fulfilled in order to make them valid in relation to her spiritual discipline. The Roman Catholic Church has a right to declare all marriages to which its members are parties, invalid that do not fulfill its doctrine of validity. But that Church may not, as a Church, interfere with the legal status of marriage, or extend even its spiritual jurisdiction over those who repudiate that jurisdiction.

IV. CONSEQUENCES

The consequences of the Roman Canon law for members of this Church are as follows:

(*a*) No such member can marry an obedient Roman Catholic without promising to have his (or her) children by such marriage brought up in the Roman Catholic Church—a promise which cannot be given without an abdication of

parental duty to bring them up in what he (or she) believes to be true religion.

(*b*) He (or she) is liable to have such marriage declared null and void, adulterous, unless a Roman dispensation has been obtained, and unless the marriage has been performed by the Roman priest who is authorized to act, in the presence of at least two witnesses. It is true that a declaration of nullity by a Roman Catholic ecclesiastic has no legal effect in this country as against a marriage performed in accordance with the law of the land; but

(c) If the other, or Roman Catholic, party to the marriage is loyal to his (or her) religion, he (or she) will feel under moral obligation to separate from his (or her) wife (or husband) and a painful situation will result, fraught with moral disaster. * * * *

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You have asked me to explain more fully my statement, "The Roman Catholic Church has a right to declare all marriages, to which its members are parties, invalid that do not fulfil its doctrine of validity"; and have put to me a series of questions with reference thereto. The tenor of your questions helps me to see wherein I have been obscure, and I shall now try to make my point more clear.

You ask, "(1) As to 'validity' has the word any other meaning than this, that a marriage which is not valid is null and void *ab initio?*"

I answer, "The word itself has no other *meaning;* but the practical significance and the effect of declaring a marriage to be null and void *ab initio* depends upon the jurisdictional sphere within which, and the authority by which, such a declaration is made. If it were made by which competent civil authority it would mean that the marriage was regarded, and would be dealt with, by the state as not fulfilling the conditions of legal recognition. Defiance of such decision would render the offender liable to criminal consequences. But if it were made by purely ecclesiastical authority, it would mean that the marriage was regarded, and would be dealt with by the Church, as not fulfilling the conditions of ecclesiastical recognition. Defiance of such a decision by those subject to ecclesiastical jurisdiction would render the offenders liable to spiritual discipline, and to such discipline only.

You ask, "(2) The 'Ne Temere' decree makes no exception of marriages consummated according to civil law. Do the words 'All things, even those worthy of special mention, to the contrary notwithstanding,' include the laws of the land?"

I answer. In practical effect, Yes. The clause was probably intended to abrogate the ecclesiastically granted exceptions which had reduced the application and effect of the previous decree "Tametsi." But the clause is absolute, and its terms plainly preclude the pleading of any reasons as validating for the Church the marriages which the new decree declares invalid. It cannot, of course, nullify civil law as such.

You ask, "(3) Has the Roman Catholic Church (considered as a licit society) the right to declare invalid a civil as well as a religious status which the state declares to be valid? (*a*) With reference to its own members who admit their membership and (*b*) with reference to baptized infants who, having grown up, consider themselves no longer, even nomially, Roman Catholics?"

I answer, No Church can declare invalid a civil status, which the state declares to be valid, for this is exclusively under civil authority. In some countries the control of marriage, even in its civil aspects, has been conceded to the Church. In such countries the Church's decisions touching the validity of marriage have civil force, but only because they are in effect the decisions of the state. In this country no Church can determine the civil status or legal validity of a marriage.

But a Christian marriage constitutes a moral and religious status as well as a civil one. Thus a marriage may conceivably be treated as valid by the state,—i. e., constitute a valid civil status—which, regarded from the Christian standpoint, constitutes concubinage, not less so because legalized by the state. Some states, for instance, allow polygamy. Such a circumstance should not compel a Church, in relation to its own discipline, to alter its practice of declaring polygamous marriages to be null and void in the sight of God. Such declaration, however, will not affect their civil status as valid civil marriages, but it will determine the discipline of the Church towards those who take advantage of the legal license to enter into what it believes to be adulterous unions.

You ask, "(4) Has any Church or individual the right to disparage a marriage as invalid—void ab initio—and adulterous, which has been consummated according to the law of the land?"

I answer, Your question, dealing as it does with a status which has both civil and ecclesiastical aspects, appears to be ambiguous. If by "invalid—void ab initio—and adulterous" you mean legally (i. e. in its civil status) void and "criminal," certainly not. But if you mean invalid as Christian matrimony and morally adulterous, an affirmative answer must be given. The right of a Church, or of an individual, to be governed in a moral question by conscience is inalienable. The conscience may of course err, and a particular Church may err in its moral judgments; but, whatever legal penalties may be incurred thereby, no individual or Church is justified in acting or speaking contrary to conscientious convictions concerning right and wrong. To do, or to condone, what one believes to be sinful is obviously wrong, even if subsequent education should prove that the belief in question was unwarranted. Ecclesiastical recognition of a marriage as valid (I mean ecclesiastically valid), carries with it the sanction of social relations with the parties involved which the Christian conscience could not ap-

prove, if the marriage was thought to be in fact immoral. To illustrate: I could not righteously treat a re-married divorcee—divorced, say, for cruelty,—as having, in the second legal marriage, achieved a valid Christian marriage, but my conviction, or declaration based thereupon, would not in any way touch the question of its civil validity. To put it in a nutshell, civil legality will determine the civil status of a marriage and the temporal rights involved; but it cannot determine its moral permissibility for Christians—i. e., its validity as a Christian marriage. The Church has jurisdiction within the moral and spiritual sphere to determine for the purpose of its own discipline whether a legal marriage is also valid as a Christian marriage. And in the exercise of such jurisdiction it must be governed by its own standpoint. What the Church cannot do is to make its own decisions have civil force—i. e., unless the state concedes such force to them, which is not the case in this country. If, for instance, the Church undertook to treat a marriage as valid which the state declared void, those who acted on the basis of the Church's decision would, I suppose, be liable to criminal persecution. It is in fact a generally accepted ecclesiastical doctrine and practice that in organized society, marriage must be legally consummated in order to be valid as a moral and ecclesiastical status. The Church can neither give civil authority to a marriage which the state declares to be invalid, nor nullify the civil validity and status of a marriage which the state declares to be valid. If she declares such a marriage "invalid", her declaration has real force, but only in relation to the moral and ecclesiastical status of the marriage as a Christian marriage. It leaves the civil status unaffected.

You ask, "(5) As the 'Ne Temere' decree is intended to be merely a disciplinary decree, affecting members of the Roman Catholic Church only, would it not properly stop at the spiritual discipline of its members, and not assume to declare a legal marriage invalid?"

I answer, The question is debatable. For centuries, and (until modern times) throughout Western Europe, the business of declaring even the civil status of marriages was conceded by the state to ecclesiastical tribunals. Long continued custom on this basis has stereotyped the judicial forms and terms of ecclesiastical pronouncements concerning marriage, which, I understand, still preserve their former civil authority in some countries. The Roman curia is controlled as to termin-

ology by precedent, and by the survival in some countries of conditions which require the terms used and make them free from any even apparent excess of meaning. That curia could hardly be expected—especially in view of its unwillingness to surrender the civil authority over the marriage bond which it has so long been permitted to wield—to qualify its declarations in the way you indicate.

These conditions are ancient; and, human nature and Roman claims being what they are, they constitute a situation which cannot be suddenly altered, and with which we have to reckon. We cannot expect Roman tribunals to adopt what to them would be a novel terminology, and one which might be misunderstood by many and construed as reducing the force of curial decisions in countries where they retain their former civil force.

How are we to reckon with the situation? I believe the right way is to recognize the distinction I have been indicating (it is an old one) between the legal status of marriage and its ecclesiastical status; but to maintain that, in this country at least, Roman Catholic decrees as to validity and invalidity of marriage have force only in relation to ecclesiastical discipline—having no force whatever to change the legal status as declared by the state.

To answer your question directly, I should say it would, theoretically speaking, be much better if the terms employed in the "Ne Temere" decree were modified or qualified so as to make clear the limits of their force and meaning in lands in which the Roman curia has ceased to have jurisdiction over marriage as a legal status. But practically the conditions which determine the phraseology actually employed are (from the Roman standpoint) well-nigh compelling. Therefore we must resort to interpretation, insisting upon the finality of state decisions in this country, so far as they affect the civil status of marriages in this land.

You ask, "(6) Admitting the right of the Roman Catholic Church to say under what conditions a Roman Catholic priest may refuse to solemnize marriage, is it advisable to admit the right of that Church to declare a marriage duly consummated as the civil law requires, invalid, where one of the persons is a non-Roman Catholic?"

I answer, with an explanation, Yes. *Ex hypothesi* one of the parties to the marriage is a Roman Catholic, and therefore in spiritual matters is under Roman Catholic jurisdiction. The

marriage of such an one is not deprived of its spiritual aspects and effects by being entered into with a non-Roman Catholic. If such a marriage is, according to Roman Catholic doctrine, morally sinful for the Roman Catholic party, it comes under Roman discipline so far as that Roman Catholic party is concerned. The Roman Catholic Church may have to determine whether that party, living sinfully according to its teaching, shall be admitted to Communion. It must necessarily determine the question according to its own doctrine touching the immorality of the marriage in question.

Bearing in mind, therefore, the limited meaning and effects, as I have endeavored to explain, of an ecclesiastical declaration of validity, and granting that such declarations can rightly be made at all, I infer that they may be made in all cases where they are deemed necessary in order to determine the spiritual status of those who are, or may become, subject to ecclesiastical discipline.

You ask, "(7) Do you see anything amiss with the following statement; 'The Ne Temere decree not merely regulates the solemnization or ceremony of marriage, it interferes with the marriage *status* after it has been freely and legally entered into, and after resultant obligations and liabilities have been incurred.'" I answer, I should, in view of the distinction and considerations above explained, word the statement differently —somewhat as follows: "The Ne Temere decree imposes requirements for the ecclesiastical validity of marriages in which either party has been baptized in the Roman Catholic Church which are not required by the state. Thus it declares certain marriages which have a valid legal *status* to be ecclesiastically invalid, and this fact is liable to cause very serious complications. To prevent the occurrence of such complications non-Roman Catholics should either avoid marrying Roman Catholics, or take precautions to have the extra-legal requirements of the 'Ne Temere' decree correctly fulfilled."

To return to the statement in my previous syllabus, which has suggested your questions; If you will kindly take note of the general context in which that statement occurs, and the answers given in this letter, you will probably see that the following paraphrase expresses by meaning.

"The Roman Catholic Church has a right to declare ecclesiastically invalid—that is, decline in formal terms to recognize in the discipline of its own members—marriages which are not consummated in a manner agreeing with her doctrine of Christian marriage."

I trust that my care to set forth the right of the Roman Catholic Church to determine the moral validity, of marriages with reference to its own internal discipline and according to its own doctrine, will not convey the impression that I accept the doctrinal assumptions of the "Ne Temere" decree. I do not accept them. But that has no bearing on the right of a Church to be guided by its own doctrine in its own discipline.

To override such right implies that one may override, for instance, the right of a Church to decline to recognize the moral validity of certain legalized re-marriages of divorcees, both parties living. Marriage is one of those things which have to be dealt with by both Church and state. If the state disregards the moral convictions of Churchmen (of whatever name) in such matters, complications will of course, arise. In such case no solution will clear the air which violates the rights of conscience. It is a violation of such rights to compel one silently to connive socially, and in spiritual relations, with what one believes to be a marriage which is unlawful in the sight of God. Our conviction that Roman doctrine is in certain respects open to criticism can hardly abrogate this principle.

My reason for adding more is that certain statements which you make seem to indicate that I have failed to make a rather vital point clear. If it were a personal argument, I should let it go, for I imagine neither of us have time or desire for unnecessary debate. * * * * *

It is of course true that the civil status is in organized society an essential part of the "matter" of the sacrament of matrimony. But no weighty ecclesiastical writer will assert that it invariably constitutes the whole of the "matter." It does so only when the law of God, as understood and defined by the Church, is complied with so that no nullifying impediment is disregarded. I could not use such a phrase as that the legal status "is paramount over the ecclesiastical status." Their mutual relation is not one that can be described by calling either "paramount." Both are in their several spheres, absolutely unassailable if achieved in each case according to the several authorities under which they fall.

The matter of the sacrament of matrimony includes every external condition and action that makes the marriage valid in the spiritual sphere. Normally the legal status will supply these conditions, but if it does not, the rest must be supplied.

This statement can be most clearly illustrated by an external case. Suppose the state gave a legal status to marriage between the son and daughter of the same parents. It has done so in days gone by in certain Oriental lands. If it did so, could that require Christian people, or the Christian Church, to treat such marriages as true Christian marriages? I reckon not. They could not, of course, disturb its legal status, except by the indirect methods of agitation for better marriage laws; but they both could and ought to refuse to deal with their participants in the Church as truly married in God's sight. And the principle involved is not less firmly to be maintained in less gross contradiction between what the state treats as marriage and what Christians of a given Church can conscientiously believe to be such in God's sight.

Marriage is one of various matters that have to be handled from both the legal and the ecclesiastical standpoint. It may be handled mistakenly from either or both; and therefore conflict may arise. What is the effect of conflict? Let me boil my points into brief propositions.

(*a*) The marriage in controversy will be at once legally valid and ecclesiastically invalid. It is not likely to be at once ecclesiastically valid and legally invalid, for Christian Churches always treat legal validity as a primary condition—not sum total—of material validity in the Church.

(*b*) Civil law on marriage and legal status binds in its own sphere—determining legal status—but cannot bind in the moral sphere when disregarding moral principles, nor in the ecclesiastical sphere when conflicting with ecclesiastical principles. That is, while the Church has no authority to impugn legal status, it has authority to determine for its adherents whether a legal marriage is morally lawful or adulterous before God. It is here postulated that moral principles—i. e. principles for conscience—cannot be abrogated for those who believe in them, by civil legislation.

(*c*) The obedience of a Christian in case of conflict between civil law and his conscience is twofold; 1st, to obey conscience in word and deed; 2nd, to submit to the penal consequences imposed by the State where he cannot resist without sedition. These are Christian platitudes—not open to dispute among those who have seriously faced the whole question of obligations of conscience. It was this principle which led ancient Christians to refuse obedience to the law requiring pagan sacrifices, and yet to submit to martyrdom rather than engage in sedition.

The situation is this. The principles which govern modern states in marriage legislation no longer agree in all respects with the moral convictions of Christian everywhere. This is partly due to the divisions of Christendom, and the consequent divergence between Christian bodies in their beliefs with reference to marriage in the sight of God. Conflict is therefore to some extent unavoidable. We cannot impugn the authority of the state in the temporal and legal status of marriage, and no one who really apprehends the rights of conscience can impugn the authority of Churches (over their own adherents) to determine the moral status of marriage—i. e. the conditions which must be satisfied to achieve a non-adulterous union.

From the legal standpoint the legal status is to be defended and from the religious standpoint the moral conditions must be satisfied—conditions determined not by the State but by Christian conscience. * * *

I believe in view of the conflict of genuine rights (of the law and of Roman Catholic conscience) involved—that reserve should be adopted in reference to the principles involved.

* * * * I assume that you have not understood me to overlook the fact that the Roman See theoretically claims exclusive jurisdiction to determine what is valid marriage—even as a civil status. That branch of the claim is not, however, either expressed in, or created by, the decree Ne Temere. * * * * * * But no Roman Catholic decree of nullity in our land could alter the legal status of the marriage; and I hardly think Roman prelates would fail to perceive the situation, and govern their decrees so as to avoid an issue with the State."

If one of our people marries a Roman Catholic in a legal (civil law) manner, his or her marriage cannot in fact be legally nullified by the Roman Church. But it can be much embarrassed. * * * * * *.

Note by the lay author on the foregoing exposition of the Canon law. If there is a real conflict between the civil law and the Roman Catholic Canon law of marriage, the temporal law is over the Canon law so far as external relations are concerned.

While there are concepts of morality beyond the commandments of the temporal law of marriage there are also rules of the temporal law outside of the direct precepts of morality as to marriage. As a matter of fact, the flighty fancies of the Roman Catholic Canon law and the logic misapplied to the doctrine of "one flesh" has resulted in a maze which has

worked incalculable harm in the past. And it may well be wondered whether really strong religious feeling has always prevailed over the exercise of mental ingenuity in working over its intricate rules.

Judged by the past, to entrust to ecclesiastics, the right to annul or to declare marriage invalid, is to accept an unfit administration of marriage laws, because the practical effects and consequences upon mankind of ecclesiastical theories are recklessly disregarded, and men and women are made mere pawns of a game. What guaranty is there that the phrase 'only those marriages are valid' will not be misapplied?

It is proper to be said that the state does not ignore the spiritual side of marriage, but it expressly recognizes the religious aspect of marriage by permitting clergymen to act as official celebrants at the marriage ceremony. The state cannot properly recognize more than the consensus of Christians. The only Christian consensus as a matter of fact, that exists in the United States, is that marriage is ordained of God; and has a religious element which is properly accentuated by a clergyman of religion. The state cannot legislate upon the basis of doctrines which are not generally accepted, such as that the Church marries the man and woman, or that the man and woman are joined together by the Holy Ghost operating through the priest, or that the union is an indissoluble relation or that a Church may invalidate or annul a legal marriage for ecclesiastical reasons, because there is no consensus of Christian belief as to these doctrines. The state can only be expected to recognize as God's will concerning marriage that which the various Christian bodies agree to be God's will concerning marriage.

As to the legal marriage ceremony, the temporal law is over any canon law. The state cannot properly go further than to authorize the clergyman who solemnizes, to officiate as a representative of the civil authority. The state properly insists that the relations created by the marriage ceremony are to be regarded as external relations and that the external *status* of marriage comes under the sole jurisdiction of the state. It recognizes "no Church organization or society or individuals as capable of making or unmaking such *status*."

And even in matters of internal discipline the practices of a religious body in regard to marriage, the state properly declares, must not be socially disturbing.

CHAPTER VI.

The Common Law of Marriage—A Summary.

The source of American law is England. The English law, but not the English Courts, were brought to the Colonies. Thus we never established ecclesiastical courts though the ecclesiastical law (derived from civil law, canon law, common law and statute law) came to us as a branch of the unwritten law of England.

The Revolution which separated us from the mother country did not change any law on the subject of marriage and that law for example, was the same in 1772, before the Revolution as after it in 1800 and 1809, except as changed either by the written State Constitutions, statutes or Court decisions.

"Marriage" means:

(*a*) The Solemnity;
(*b*) The *Status.*

"Agreement to marry" means:

1st. Either the contract to marry at a future time, or
2nd. The solemnization itself.

"Contract to marry" never means executed marriage, while "contract of marriage" often does. There are these separate things:

1. Agreement to enter into marriage.
2. Agreement of present marriage.
3. *Status* of marriage as consequence of marriage ceremony.

The Constitution of the United States, amendments, Article I, provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Mormon Cases.

This provision has been construed by the Supreme Court of the United States. In the case of Reynolds vs. United States,

98 U. S., 145, the Court said: "It is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." (Marriage.)

The Court decided that the Constitutional provision did not prevent Congress from penalizing the commission of acts which though justified by the tenets of a religious sect are socially or politically disturbing or are generally reprobated by the moral sense of civilized communities.

In the case of Davis vs. Beason, 133 U. S., 342, the Court said: "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. The laws of society designed to secure its peace and prosperity and the morals of its people are not interefered with."

In Maynard vs. Hill, 125 U. S., at page 211, the Court, by Justice Field, said: "Marriage is the foundation of the family of society, without which there would be neither civilization nor progress." Marriage is more than a mere contract "the relation once formed the law steps in and holds the parties to various obligations and liabilities."

Constitution of New York.

The Constitution of the State of New York, Article 1, §3 provides: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall forever be allowed in this State to all mankind. * * * * but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this State." In Wade vs. Kalbfleisch, 58 N. Y., 284, it is said marriage "partakes more of the character of an institution regulated and controlled by public authority upon principles of public policy for the benefit of the community."

The power to legislate as to marriage in the United States within State lines is in the several States; outside of State lines, in Congress.

We have in this country no separate series of matrimonial cases. A contract between two marriageable persons made in the form prescribed by law, if it has any, creates the *status* of marriage which is not a contract.

The law imposes marriage only on mutually consenting parties. At each moment they must be either married or single, there is no "twilight land." The agreement must be in the present time to constitute a marriage, no moment is to intervene between it and the resulting *status*. The thing agreed to must be what the law holds to be marriage.

The mutual present consent lawfully expressed, makes the marriage; what is called "consummation" adds nothing to the legal effect.

There is no particular manner in which mutual consent to present matrimony, without which there can be no marriage, must be expressed. A concurrence of the inner mind, must be actual, whatever the form or want of form. An exception generally exists where one party meaning fraud, not marriage, concurs in terms with one who believes him sincere and permits him to enter upon what marriage implies. Here the law will hold the marriage good.

There is a distinction of consents into

1. *Per verba de presenti;*
2. *Per verba de futuro cum copula.*

Without consent there is no marriage and the seeming marriage is void, not voidable.

Statutory provisions prescribing forms are strictly construed. In the absence of any statute, only consent is indispensable.

Legislation commanding formalities will not render a marriage had in disregard of it, void, unless the statute expressly or by necessary implication declares this consequence. This does not apply to a statute authorizing marriage of persons before incompetent; such statute is strictly construed.

Where the mind is overcome by fraud, error, duress or does not in fact consent to an apparent marriage, the law will deem it to be no marriage. The marriage of an infant of sufficient age is good though the parent does not consent. In the absence of a clause of nullity, a marriage in disobedience of parents is valid though the participators may be subject to punishment.

There must be mental capacity but legal majority is not recognized as the age required for consent. Different ages of consent for different States are fixed by statute. In New York the age of consent is eighteen. Insanity of one of the parties renders any formal solemnization ineffectual to make the parties husband and wife.

The public interests are properly considered in marriage.

In matrimony, said Dr. Samuel Johnson, "there is a third party —society, and it if be considered as a vow—God."

In the most of our States the party in the wrong as well as the one in the right, is permitted after a divorce to marry—Polygamy is inconsistent with the common law view of marriage. It is therefore impossible for a person already legally married—the marriage not being dissolved by death or divorce —to enter into a second one and such seeming new marriage is a mere nullity. In some States legislation comes to the relief of the children—by rendering them legitimate.

The laws relating to consanguinity or affinity as impediments to marriage (the former founded on nature, the latter on the theological concept) comes to us from statutes of Henry VIII (*27* Henry VIII, c. 75, § 7 (a) and *32* Henry VIII, c. 38) with the English courts' interpretation thereof, and we have State statutes defining degress, determining whether marriages are void or voidable, and some making children of void marriages legitimate.

The ability to become a parent is not an essential element in marriage. This question turns in the Courts, on the ability for sexual connection. All marriages are good until pronounced void judicially for some valid reason as for example, for lack of sexual ability, and the marriage is meanwhile valid for all legal purposes.

In the absence of forbidding statutes, the courts accept as good, the marriages of all competent persons who have arrived at their respective ages of consent, however violative of law was their manner of marrying. There are penal and indictable offenses created by statute while the marriage may still be valid.

Rules as to Legislative confirmation of good marriages vary, but marriage being a *status* and being a public as well as private institution, legislative power over it is, perhaps, omnipotent, so that if nuptuals are found to be void they may be made good by statute. This extends only to the *status*. Vested right cannot be divested by statute but in other respects marriage is an universal institution and in substance identical, especially in Christian countries. The general rule is, that when the laws of the country recognize a marriage, it will be accepted as a marriage in every other country. On the other hand no forms

which come short of constituting a valid marriage in the one country will bring it within the law making it a valid marriage elsewhere.

Persons dwelling together in apparent matrimony are presumed in the absence of any counter presumption to be, in fact, married. The law presumes that its sworn public officers will do their duty and when a registry of marriage is required by law, a fact set down therein is prima facie accepted as true. But it may be shown to be false. Ecclesiastical records duly kept under ecclesiastical law are commonly admitted in evidence.

The record does not prove identity. Identity must be established by other evidence.

A foreign marriage generally is constituted only when that is done by the foreign law in the foreign land which makes the parties husband and wife. Marriage is of course an element in pedigree and legitimacy. Marriage by the rules of common law, invests the husband with all such property of the wife as is available for the support of herself and the family. Almost everywhere within the domain of the common law, statutes have preserved to the wife her antenuptial property and entitled her generally to her earnings and imparted to her some power of contract.

The visitation of God whereby a husband or wife becomes insane, does not change the rights and duties which the parties sanely assumed at their marriage. The public is in effect a party to every marriage. So that bargainings, made by and between married parties are nugatory. There is however no public interest which forbids a husband from maintaining his wife or which invalidates a contract to provide her support. Therefore agreements of separation are good as provisions of maintenance but not as a bar to cohabitation.

If the husband is civilly dead, the wife is freed in like manner as by his natural death; and so, to some extent, when a married woman goes abroad and lives there as *sole,* her husband not accompanying her, if she is permanently separated.

To entice away a husband from his wife is an injury and the States, generally, authorize her by statute, to sue in her own name for redress.

Wrongfully to alienate a wife's affection from her husband

or to allure her away from him, is a harm for which he may maintain a suit at law. The amount recoverable varies with the particular case.

It is held, with some dissent (on the ground that such divorces discriminate between the privileges and right of those who go into Court and those who are divorced by legislature) that there is no provision in the Constitution of the United States forbidding divorce by a State legislature. State constitutions differ. Some prohibit these divorces expressly, some by implication, others are partly prohibitory, partly not. Such divorce dissolves the *status*. The State legislatures cannot divest vested rights of property.

Annulment of marriage can only be decreed by reason of some fact or impediment existing at the time of the marriage or pretended marriage, e. g., the physical incapacity of either party; the kinship of the parties within the "prohibited degrees" so called, or some other fact rendering the marriage void or voidable ab initio.

In this country the several States have the sole right legally to annul marriage and to grant legal separation and divorce.

A divorce is the legal dissolution of marriage. Prior to the Reformation, marriages between competent parties were held to be indissoluble. There was divorce "a mensa et thoro," but an absolute divorce "a vinculo matrimonii" was not grantable by any Court of England prior to the Reformation.

This book is not the place to give any summary of the law of divorce in the several States. It will be noted that marriage laws do not greatly vary in the different States. That divorce laws do greatly differ, is not in point here, though it may be remarked that laxity of divorce laws is not relieved by an ecclesiastical claim of a moral right to invalidate or annul marriages which have been solemnized according to the law of the land.

Emma Eames was married to Julian Story, both being Protestants. Emilio Gorgorza a Roman Catholic was married to a Jewess. Emma Eames afterwards became a Roman Catholic. The Roman Catholic Church, in the year 1911, annulled the prior marriages of both Emma Eames and Emilio Gorgorza and they have since married each other in a foreign land.

CHAPTER VII.

Suggestions for Remedial Legislation.

In the "New Marriage Legislation" pamphlet, at page 53, it is said: "The Church knows that as long as Catholic young men and young women, associate with Protestant young men and women, we shall have mixed marriages and unfortunately many of these will be celebrated before ministers and State officials. Considering the great number that take place and will take place, likewise weighing every consideration bearing on the case, would it be better for Catholicism in the United States to have marriages before State officials recognized as valid? If an affirmative reply be made by our Bishops, it will rest with them to ask for the extension to the United States either of the decree Provida or a modification of the Provida best suited to our conditions, and it rests with the Holy See to decide whether or not the same will be granted."

Since the promulgation of the Ne Temere decree in the United States, there has been no public protest or disavowal by Roman Catholic citizens nor has the Bull Provida (Appendix D) been extended to the United States or modified as suggested above.

It is not out of place, therefore, to consider here how State marriage laws may be put on a more satisfactory footing from the point of view of loyal citizens. For obedience to the Ne Temere decree seems to involve a conflict of loyalty.

It is alleged that there are Roman Catholics who openly or secretly admit a superior authority, viz.: of their Church authorities in Rome, in the matter of the external relations of marriage to the authority of the civil government, or of the law of the land.

Certainly it is a fact, made clear by history and traditions, that the hierarchy which has managed the destines of the Roman Catholic Church has not been conspicuously modest in its claims. The binding force and effect of history and tradition are admitted; their effect may be observed in recent European history. There are, it is said, in the United States,

ecclesiastics who afford just reason for the supposition that their action in the political field, is controlled by foreign authority. On the other hand, we know that there are many American Roman Catholics both clerical and lay, who, in the political field, have no divided allegiance.

It is always possible promptly to disavow improper ecclesiastical aggression and publicly to challenge the authority of those whose action is not consistent with the principles of our free government; and to make it clear that such assaults on the temporal power are not made with the acquiescence of equally devout members of the Roman Catholic Church. If this had been done there would be no desire to propose any remedial legislation.

1. It should be clear that no ecclesiastical body or person has any legal power or authority to create any prohibitions, or any jurisdiction to dissolve or annul any de facto marriage in any State, and a penalty should be imposed on all persons publishing or promulgating any ecclesiastical decree, judgment or sentence purporting to annul or dissolve any de facto marriage of any person in such State made or purporting to be made, by any person whomsoever, without due authority of civil law, for it is evident that even if such sentences, judgments or decrees have no legal effect (as may be contended), yet the public has a right to protection against annoyance based upon any pretended or usurped exercise of jurisdiction.

Draft of Proposed Legislation.

"Any person hereafter publishing any sentence, judgment or decree purporting to annul the legally valid marriage of any persons in this State or to grant any divorce to any person or persons resident in this State, which sentence, judgment or decree shall have been made, or purported to have been made, by any person, power or authority whatever, not having jurisdiction under the law of the land to make such sentence, judgment or decree, is guilty of a misdeameanor and renders himself liable to a fine and imprisonment."

2. Some legislation is necessary to be imposed on persons authorized to solemnize matrimony as magistrates, restraining them from directly or indirectly making use of their office for an ulterior purpose.

Certain clergymen authorized by statute to solemnize matri-

mony, make a practice of using the public authority conferred upon them, to propagate their peculiar tenets, by requiring prenuptual promises from persons coming before them for the solemnization of their marriage. This is a clear abuse of a power conferred by civil statute. And no one should be permitted to use a statutory power as a means of promoting any particular form of religious belief.

It may be said that no one need give any such promise. But lovers are of all people in the world the least likely to realize what such acquiescence implies. Some clergymen make a practice of trading on the youth, inexperience and ignorance of young people desiring to marry each other. It is represented to such a young man or young woman that a marriage is invalid unless it is solemnized according to a certain rite or by a clergyman of a certain faith, or a clergyman refuses to solemnize marriage except upon conditions which yield sectarian advantage. It is clear that the authority conferred by the civil government is here misused as a proselytizing agency. This practice should be restrained by law.

Draft of Proposed Legislation.

"Any person authorized to solemnize marriage who shall exact or require, directly or indirectly from either of, the persons desiring to have their marriage solemnized before him, any promise or agreement whatever touching the religious training of the children that may be the issue of such marriage or touching the particular faith and belief of such persons desiring to marry or either of them, as a condition of solemnizing the marriage, is guilty of a misdeameanor.

"Any promise exacted or required or given or made contrary to this section, is hereby declared null and void and of no force or effect whatever."

3. To impeach, assail, impugn or asperse, either overtly or covertly, the legal validity of a mixed marriage is an attack on the civil rights of the member of such mixed marriage who does not belong to the same communion as the person impeaching such marriage.

The State is responsible for external order and is alone competent finally to determine what is or is not, to take place in that external order. The State must be its own master and it is perfectly competent to declare what marriage is, in the view of the State. Moreover the State is perfectly com-

petent to require any religious body to respect its civil institutions and should not allow itself to be put in a false position by any sophistry. To allow any religious body officially to declare its judgment so that it operates externally, would be to admit that the State is not in fact its own master in such matters.

Draft of Proposed Legislation.

"Any person who overtly or covertly impeaches the legal validity of marriages which have been duly solemnized according to the law of this State and either overtly or covertly by the aspersion or disparagement of such legal marriage disturbs the peace of a family or incites to the setting aside of a marriage duly solemnized according to the laws of this State is guilty of a misdeameanor and shall be on conviction be liable to a penalty of $——— to be recoverable by any person damaged thereby who shall sue for the same.

(See Appendix I.)

4. Criticism may properly be made against the temporal law as violating the Divine law (or what is believed to be the Divine law). But loyal action will direct its efforts to securing better accord between the temporal law and the Divine law, and not to setting up the authority of any religious body as against the authority of the State or as against any personal rights which ought to be secured by the State.

Whatever the effects of a pre-contract may be from an ecclesiastical standpoint, from a legal standpoint, it would seem to be desirable that a marriage duly solemnized should not be impeached by a pre-contract.

Draft of Proposed Legislation.

"No marriage which has been duly solemnized according to the law of this State shall be impeachable by reason of the existence of any precontract of marriage which was not solemnized according to the law of this State."

5. It has never been seriously contended that in the United States, the common law derived from England, had the effect of giving any jurisdiction in law, to Bishops of the English Church or to Bishops of the American Episcopal Church, an independent organization. Nor can it be seriously contended that any jurisdiction in law has been given to the bishops or authorities of any other religious body, domestic or foreign.

In case the authority of the Roman curia is asserted, where did it get authority superior to the authority of the Anglican Church?

The Roman Catholic Church appears to have failed to recognize that by reason of the disassociation of state and Church, the courts of that Church have no jurisdiction as part of the administration of justice in the United States.

Mr. Justice Charbonneau in discussing the alleged judicial authority of the Roman Catholic bishop says: "It must be noted that the annulling of the marriage is the exercise of judicial power; whether such exercise is called a decree or a judgment, it is the same effect; judicial power is a part of public authority, and can be conferred only by the law, which entrusts the functions thereof to a certain class of citizens, * * * * according to certain laws enacted by the legislative power to that effect."

Draft of Proposed Legislation.

"No spiritual Court has any legal jurisdiction, power or authority in this State to annul any de facto marriage or to grant a divorce in this State."

6. "Would it be better," asks the commentator McNicholas, "for Catholicism to have marriages before State officials recognized as valid?" In other words:

Shall all clergymen be deprived of authority to act as official celebrants of marriage representing the State? Shall civil marriages be quite separated from religious ceremonies and each religious body have the right to solemnize the marriage by religious rites, according to the ritual of each church?

There is no doubt that a large proportion of the community has definite religious views as to the spiritual and sacred aspect of marriage. This is greatly to the advantage of the State, because it makes for the stability of the marriage relation. Any action that would serve to relax this realization of the spiritual aspect of marriage would not be conservative of the best interests of society.

The mere "civil contract" theory of marriage would tend to become more and more generally accepted. Would it be wise for the State to take such action as would naturally result in a loss of the religious solemnities attaching to the public attesting of vows, as before God, in a sacred edifice in the presence of a congregation? Does any one suggest that the

spiritual and religious aspects of marriage are of themselves, detrimental to society? Are not the religious ceremonies best calculated to mark and accentuate the religious character of the marriage obligations incurred?

Chief Justice Joseph G. Donnelly of the Milwaukee Civil Court has recently made a public statement emphasizing the advantages of public religious ceremonies of marriage in Church. Judge Donnelly says:

"There should be first of all, parental consent. Then there should be the ceremony performed by a minister in a church before the friends of both the man and the woman. There should be the ring and the wedding march, and all the other little touches, call them sentimental if you will, that go with the acceptance of a sacred responsibility. And it should have the proper setting.

"Take the other side of the picture. The young couple rush to the license clerk; possibly just before closing time to keep it out of the papers. They turn to the nearest judge and apply for a special dispensation. They are taken into his chambers. There is nothing here to remind them of the nature of the contract into which they are about to enter. A few musty law volumes; the smell of stale tobacco in the air; perhaps a few minutes before a woman of the underworld has sobbed out a pitiful story of sordid shame to a calloused lawyer. What is there in this enviroment to maintain the impressiveness of the beautiful sacrament of marriage? Will the average man and woman regard the ceremony performed in a law office with that feeling of awe and reverence that must come when two persons meet at God's altar to plight their troth?

"Sentiment is a strong safeguard and I believe that if more marriages were performed in churches there would be fewer divorces."

It is admitted that many have corrosive views favoring laxity of marriage vows. And these very persons are the ones who would be likely to dispense with the religious ceremony and be satisfied with the civil marriage. Are they not the ones who, most of all, need to be reminded of the solemnity of their vows?

Marriages based on ceremonies thus divorced from religion, are afterwards the more easily made the subject of invasion, on the ground that they are mere human and civil contracts made by mutual consent, without religious sanction and without God.

Religion should be the state's strongest bulwark. It is desirable to emphasize the importance and sacredness of the relation of marriage, because the welfare of society depends upon the desire generally to uphold the indissolubility of marriage. It is essential to the well being of society to insist that parental duties do not end with bringing children into the world, but continue in the obligations of rearing offspring in sound morals, with sound minds in sound bodies. Religious people should uphold the grant of the statutory power to all clergymen to officiate at marriage ceremonies, as representing the state as a power ordained of God. And the Church as the custodian of sacred things, should be present at every marriage ceremony to witness the holiest vows that man can make, and to bless the relation between man and woman that typifies, to Christians, the union and love between Christ and His Church.

APPENDIX A.

NE TEMERE DECREE.

THE TEXT OF THE LAW.

Decree of the Congregation of the Council.

The Council of Trent (Cap. I, Sess. XXIV, de reform, matrim.) made prudent provision against the rash *celebration of secret marriages*—which the Church of God has always deprecated and forbidden—when it decreed that "those who attempt to contract marriage otherwise than in the presence of their parish priest or of another priest acting with the license of the parish priest or of the Ordinary, and in the presence of two or three witnesses, *become thereby incapable of marrying validly, since the Council declares that all such contracts are null and void.*

As the Sacred Council prescribed, however, that the above decree should be published in every parish, and was to have force only in those places in which it should be promulgated, it has happened that many places in which the publication has not

Decretum S. Congregationis Concilii.

Ne temere inirentur clandestina coniugia, quae Dei Ecclesia iustissimis de causis semper detestata est atque prohibuit, provide cavit Tridentinum Concillium, *cap. I, Sess. XXIV de reform. matrim.* edicens; "Qui aliter quam praesente parocho vel alio sacerdote de ipsius parochi seu Ordinarii licentia et duobus vel tribus testibus matrimonium contrahere attentabunt, eos Sancta Synodus ad sic contrahendum omino inhabiles reddit, et huiusmodi contractus irritos et nullos esse decernit."

Sed cum idem Sacrum Concillium praecepisset, ut tale decretum publicaretur in singulis paroeciis, nec vim haberet nisi iis in locis ubi esset promulgatum; accidit ut plura loca, in quibus publicatio illa facta non fuit, beneficio tridentinae legis caruerint,

been made have been deprived of the benefit of the Tridentine law, and, being still without it, they continue to be subject to the doubts and inconveniences of the old discipline.

Nor did all difficulty cease in those places where the new law has been in force. For often there have arisen grave doubts in deciding who is to be regarded as the parish priest before whom a marriage must be celebrated. The canonical discipline did indeed decide that he is the parish priest in whose parish one or other of the contracting parties has his or her domicile or quasi-domicile. But as it is sometimes difficult to say whether a quasi-domicile really exists in a given case, many marriages are exposed to the danger of nullity; whilst many others, through ignorance or fraud, were rendered quite illegitimate and void.

These deplorable results have occurred more frequently in our own time on account of the greater facility and celerity of communication between different countries, no matter how widely separated they may be. Hence, in the judgment of wise and learned men it has been deemed expedient to introduce some change into the law *regulating the form*

hodieque careant, et haesitationibus atque incommodis veteris disciplinae adhuc obnoxia maneant.

Verum nec ubi viguit nova lex, sublata est omnis difficultas. Saepe nam-que gravis exsitit dubitatio in decernenda persona parochi, quo praesente matrimonium sit contrahendum. Statuit quidem canonica disciplina, proprium parochum eum intelligi debere, cuius in paroecia domicilium sit, aut quasi domicilium alterutrius contra-hentis. Verum quia nonnunquam difficile est udicare, certo ne constet de quasi-domicilio, haud pauca matrimonia fuerunt objecta periculo ne nulla essent; multa quoque, sive inscitia hominum sive fraude, illegitima prorsus atque irrita deprehensa sunt.

Haec dudum deplorata, eo crebrius accidere nostra aetate videmus, quo facilius ac celerius commeatus cum gentibus, etiam disiunctissimis, perficiuntur. Quamobrem sapientibus viris ac doctrissimis visum est expedire ut mutatio aliqua induceretur in iure circa formam celegrandi connubii. Complures etiam sacrorum Antistites omni ex

of celebrating marriage, and many bishops in all parts of the world, but especially in the more populous centres where the need of such legislation urges with greater force, have petitioned the Holy See to this end.

parte terrarum, praesertim e celebrioribus civtatibus, ubi gravior appareret necessitas supplices ad id preces Apostolicae Sedi admoverunt.

It has been requested, also, by many bishops in Europe, as well as by others in various regions, that provision be made to prevent the inconveniences arising from betrothals, that is, mutual promises of marriage, when privately made. For experience has sufficiently shown the many dangers of such espousals, in that they are an incitement to sin and the cause of misleading inexperienced girls, besides involving subsequent dissensions and endless disputes.

Flagitatum simul est ab Episcopis, tum Europae plerisque, tum aliarum regionum, ut incommodis occurreretur, quae ex sponsalibus, idest mutuis promissionibus futuri matromonii privatum initis, derivantur. Docuit enim experientia satis, quae secum pericula ferant eiusmodi sponsalia: primum quidem incitamenta peccandi causamque cur inexpertae puellae decipian tur; postea dissidia ac lites inextricabiles.

These circumstances have induced the Holy Father, Pope Pius X, in his solicitude for all the churches, to advise some modifications with the object of removing the abovementioned difficulties and dangers. Accordingly he committed to the S. Congregation of the Council the task of examining into the matter and of suggesting such measures as it might deem opportune.

His rerum adiunctis permotus SSmus D. N. Pius PP. X pro ea quam gerit omnium Ecclesiarum sollicitudine, cupiens ad memorata damna et pericula removenda temperatione aliqua uti, commissit S. Congregationi Concilii ut de hac re videret, et quae opportuna aestimaret, Sibi proponeret.

He was pleased, also, to ascertain the opinion of the Commission which has been appointed for the codification

Voluit etiam votum audire Consilii ad ius canonicum in unum redigendum constituti, nec non Emorum Cardinalium

of Canon Law, as well as of the Cardinals chosen on this special Commission to prepare the new code. These and the S. Congregation of the Council have held for the purpose frequent consultations. Finally, having obtained the reports of these bodies, *His Holiness ordered the Sacred Congregation of the Council to issue a decree embodying the new laws, approved by himself on sure knowledge* and after mature deliberation, by which the discipline in respect of engagements and marriage is to be regulated for the future, so that the celebration of them may be carried out in a secure and orderly manner.

qui pro eodem codice parando speciali commissione delecti sunt; a quibus quemadmodum et a S. Congregatione Concilii, conventus in eum finem saepius habiti sunt. Omnium autem sententiis obtentis, SSmus Dominus S. Congregationi Consilii mandavit ut decretum ederet quo leges a Se, ex certa scientia et matura deliberatione probatae, continerentur, quibus sponsalium et matrimonii disciplina in posterum regeretur, eorumque celebratio expedita, certa atque ordinata fieret.

Pursuant, therefore, to the Apostolic mandate the S. Congregation of the Council hereby ordains and decrees:

In executionem itaque Apostolici mandati S. Concilii Congregatio praesentibus litteris constituit atque decernit ea quae sequuntur.

Engagement or Bethrothal.

I. Only those matrimonial engagements are considered to be valid and to beget canonical effects which have been made in writing, signed by both the parties, and by either the parish priest or the Ordinary of the place, or at least by two witnesses.

De Sponsalibus.

I.—Ea tantum sponsalia habentur valida et canonicos sortiuntur effectus, quae contracta fuerint per scripturam subsignatam a partibus et vel a parocho, aut a loci Ordinario, vel saltem a duobus testibus.

In case one or both of the parties be unable to write, this fact is to be noted in the document, and another wit-

Quod si utraque vel alterutra pars scribere nesciat, id in ipsa scriptura adnotetur; et alius testis addatur, qui cum

ness is to be secured to sign the contract as above, together with the parish priest or the Ordinary of the place, or the two witnesses.

II. By parish priest, as used in the present decree, is to be understood not only the priest who legitimately presides over a parish that is canonically erected, but also, in localities where parishes are not canonically erected, the priest to whom the care of souls has been legitimately entrusted in any specified district, and who is equivalent to a parish priest; and also, in missions where the territory has not yet been perfectly divided, every priest generally deputed for the care of souls in any station by the superior of the mission.

Marriage.

III. *Only those marriages are valid which are contracted* before the parish priest, or the Ordinary of the place, or a priest delegated by either of these, and at least two witnesses, in accordance with the rules laid down in the following articles, and with the exceptions mentioned under VII and VIII.

IV. The parish priest and the Ordinary of the place validly assist at a marriage:

(i) from the day on which

parocho, aut loci Ordinario, vel duobus testibus, de quibus supra, scripturam subsignet.

II.—Nomine parochi hic et in sequentibus articulis venit non solum qui legitime praeest paroeciae canonice erectae; sed in regionibus, ubi paroeciae canonice erectae non sunt, etiam sacerdos cui in aliquo definito territorio cura animarum legitime commissa est, et parocho aequiparatur; et in missionibus, ubi territoria necdum perfecte divisa sunt omnis sacerdos a missionis Moderatore ad animarum curam in aliqua statione universaliter deputatus.

De Matrimonio.

III.—Ea tantum matrimonia valida sunt, quae contrahuntur coram parocho vel loci Ordinario vel sacerdote ab alterutro delegato, et duobus saltem testibus, iuxta tamen regulas in sequentibus articulis expressas, et salvis exceptionibus quae infra n. VII et VIII ponuntur.

IV.—Parochus et loci Ordinarius valide matrimonio adsistunt,

§ 1. ° a die tantummodo

they have taken possession of their benefice or entered upon their office, unless they have been by a public decree excommunicated by name or suspended from the office;

adeptae possessionis beneficii vel initi officii, nisi publico decreto nominatim fuerint excommunicati vel ab officio suspensi;

(ii) but only within the limits of their territory. And in this territory they assist validly at marriages not only of their own subjects, but also of outsiders;

§ 2. ° intra limites dumtaxat sui territorii; in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide absistunt;

(iii) provided, when invited and requested, and not compelled by violence or grave fear, they ask and receive the consent of the contracting parties.

§ 3. ° dummodo invitati ac rogati, et neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum.

V. They assist licitly:

V.—Licite autem adsistunt,

(i) after they have ascertained, according to the prescribed forms, that the contracting parties are free to marry, and that they have duly complied with the conditions laid down by the law;

§ 1. ° constito sibi legitime de libero statu contrahentium, servatis de iure servandis;

(ii) after they have ascertained moreover, that one of the contracting parties has a domicile, or at least has lived for a month in the place where the marriage takes place;

§ 2. ° constito insuper de domicilio vel saltem de menstrua commoratione alterutrius contrahentis in loco matrimonii;

(iii) if this condition be lacking, the parish priest and the Ordinary of the place, to assist licitly at a marriage, require the permission of the parish priest or the Ordinary of one of the contracting parties, unless it be a case of grave necessity, which excuses from this requirement.

§ 3. ° quod si deficiat, ut parochus et loci Ordinarius licite matrimonio adsint, indigent licentia parochi vel Ordinarii proprii alterutrius contrahentis, nisi gravis intercedat necessitas, quae ab ea excuset.

(iv) Except in cases of necessity, it is unlawful for a parish priest to assist at the marriage of persons without fixed abode (*vagus*) until the matter has been duly reported to the Ordinary or to a priest delegated by him, so as to obtain permission to assist at the marriage.

§ 4. ° Quoad *vagos,* extra casum necessitatis parocho ne liceat eorum matrimoniis adsistere, nisi re ad Ordinarium vel ad saceredotem ab eo delegatum delata, licentiam adsistendi impetraverit.

(v) In every case let it be held as the rule that the marriage is to be celebrated before the parish priest of the bride, unless some just cause dispenses from this rule.

§ 5. ° In quolibet autem casu pro regula habeatur, ut matrimonium coram sponsae parocho celebratur, nisi aliqua iusta causa excuset.

VI. The parish priest and the Ordinary of the place may grant permission to another priest, specified and certain, to assist at marriages within the limits of their district.

VI.—Parochus et loci Ordinarius licentiam concedere possunt alio sacerdoti determinato ac certo, ut matrimoniis intra limites sui territorii adsistat.

The delegated priest, in order to assist validly and licitly, is bound to observe the limits of his mandate and the rules laid down above in IV and V, for the parish priest and the Ordinary of the place.

Delegatus autem, ut valide et licite adsistat, sevare tenetur limites mandati, et regulas pro parocho et loci Ordinario n. IV et V superius statutas.

VII. When danger of death is imminent, and where the parish priest, or the Ordinary of the place, or a priest delegated by either of these, cannot be had, in order to provide for the relief of conscience, and (should the case require it) for the legitimation of the off-spring, a marriage may be contracted validly and licitly before any priest and two witnesses.

VII.—Imminente mortis periculo, ubi parochus, vel loci Ordinarius, vel sacerdos ab alterutro delegatus, haberi nequeat, ad consulendum conscientiae et (si casus ferat) legitimationi prolis, matrimonium contrahi valide ac licite potest coram quolibet sacerdote et doubus testibus.

VIII. Should it happen that in any district the parish priest, or the Ordinary of the place, or a priest delegated by either of them, before whom marriage can be celebrated, is not to be had, and that this condition of affairs has lasted for a month, marriage may be validly and licitly entered upon by the formal declaration of consent made by the contracting parties in the presence of two witnesses.

VIII.—Si contingat ut in aliqua regione parochus locive Ordinarius, aut sacerdos ab eis delegatus, coram quo matrimonium celebrari queat, haberi non possit, eaque rerum conditio a mense iam perseveret, matrimonium valide ac licite iniri potest emisso a sponsis formali consensu coram doubus testibus.

IX. (i) After the celebration of a marriage the parish priest, or he who takes his place, is to register at once in the book of marriages the names of the couple and of the witnesses, the place and day of the celebration of the marriage, and the other details, according to the method prescribed in the ritual books or by the Ordinary. This obligation holds likewise when another priest delegated either by the parish priest himself or by the Ordinary, has assisted at the marriage.

IX.—§ 1. ° Celebrato matrimonio, parochus, vel qui eius vices gerit, statim describat in libro matrimonium nomina coniugum ac testium, locum et diem celebrati matrimonii, atque alia, iuxta modum in libris ritualibus vel a proprio Ordinario praescriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

(ii) Moreover, the parish priest is to note in the book of baptisms the fact that the married person contracted marriage on a certain day in his parish. If the married persons was baptised elsewhere, the parish priest who has assisted at the marriage is to send notice of the

§ 2. ° praeterea parochus in libro quoque baptizatorum adnotet, coniugem tali die in sua parochia matrimonium contraxisse. Quod si coniux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se, sive per curiam episcopalem trans-

marriage, either directly or through the episcopal curia, to the parish priest of the place where the person was baptised, in order that the marriage may be inscribed in the book of baptisms.

mittat, ut matrimonium in baptismi librum referatur.

(iii) Whenever a marriage is contracted in the manner described under VII and VIII, the priest in the former case, the witness in the latter, are bound conjointly with the contracting parties themselves to provide that the marriage be entered as soon as possible in the prescribed registers.

§ 3. ° Quoties matrimonium ad normam n. VII aut VIII contrahitur, sacerdos in priori casu, testes in altero, tenentur in solidum cum contrahentibus curare, ut initum coniugium in praescriptis libris quam primum adnotetur.

X. Parish priests who violate the rules here laid down are to be punished by their Ordinaries according to the nature and gravity of their transgression. Moreover, if they assisted at the marriage of anybody in violation of the rules given under (ii) and (iii) of No. V, they are not to appropriate the stole-fees, but must remit them to the parish priest of the contracting parties.

X.—Parochi qui heic hactenus praescripta violaverint, ab Ordinariis pro modo et gravitate culpae puniantur. Et insuper si alicuius matrimonio adstiterint contra praescriptum § 2 i et 3 i num. V, emolumenta *stolde* sua ne faciant, sed proprio contrahentium parocho remittant.

XI. (i) *The above laws are binding on all persons baptised in the Catholic Church,* and on those who have been converted to it from heresy or schism (even when either the latter or the former *have fallen away* afterwards from the Church), in all cases of betrothal or marriage.

XI.—§ 1. ° Statutis superius legibus tenentur omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi (licet sive hi, sive illi ab eadem postea defecerint), quoties inter se sponsalia vel matrimonium ineant.

(ii) The same laws are binding, also, *on such Catholics,* if they contract bethrothal or marriage *with non-Catholics,* baptised or unbaptised, even after a dispensation has been obtained from the impediment *mixtae religionis* or *disparitatis cultus;* unless the Holy See have decreed otherwise for some particular place or region.

(iii) Non-Catholics, whether baptised or unbaptised, who contract *among themselves* are nowhere bound to observe the Catholic form of bethrothal or marriage.

The present decree is to be held as legitimately published and promulgated by its transmission to the Ordinaries, and its provisions begin to have the force of law from the solemn feast of the Resurrection of our Lord Jesus Christ, next year, 1908.

Meanwhile let all the Ordinaries see that this decree be made public as soon as possible, and explained in the parish churches of their diocese, so that it may be known by all.

These presents are to have force by the special order of our Most Holy Father Pope Pius X, *all things, even those worthy of special mention, to the contrary notwithstanding.*

§ 2. ° Vigent quoque pro iisdem de quibus supra catholicis, si cum acatholicis sive baptizatis, sive non baptizatis, etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus, sponsalia vel matrimonium contrahunt; nisi pro aliquo particulari loco aut regione aliter a S. Sede sit statutum.

§ 3. ° Acatholici sive baptizati sive non baptizati, si inter se contrahunt, nullibi ligantur ad catholicam sponsalium vel matrimonii formam servandam.

Praesens decretum legitime publicatum et promulgatum habetaur per eius transmissionem ad locorum Ordinarios; et quae in eo disposita sunt ubique vim legis habere incipiant a die solemni Paschae Resurrectionis D. N. I. C. proximi anni 1908.

Interim vero omnes locorum Ordinarii curent hoc decretum quamprimum in vulgus edi, et in singulis suarum dioecesium parochialibus ecclesiis explicari ut ab omnibus rite cognoscatur.

Praesentibus valituris de mandato speciali SSmi D. N. Pii PP. X, contrariis quibuslibet etiam peculiari mentione dignis minime obstantibus.

Given at Rome on the second day of August, in the year of 1907.

VINCENT, Card. Bishop of Palestrina, *Prefect.*

C. DE LAI, *Secretary.*

Datum Romae die 2a mensis Augusti anni 1907.

VINCENTIUS Card. Ep. PRAENEST. *Praefectus.*

C. DE LAI, *Secretarius.*

Note—Italics in English version are not in original.

APPENDIX B.

DECREE OF TRENT.

The Tametsi Decree.

(a) In the year 1563, the decree of the Council of Trent "touching the reformation of marriage" was passed.

(b) The power claimed is seen from the following clause 24 of the 6th Session of the Council:

"If any one should say that the Church could not constitute impediments destroying matrimony, or that the Church has erred in so constituting impediments destroying matrimony, let him be anathema."

The Tametsi.

This decree, called the "Tametsi," is partially quoted in the "Ne Temere" decree, but the earlier portion is omitted, and therefore the reason for the name does not appear. Quoting from the edition of the decrees of the Council of Trent published in 1694 by Verdussen of Antwerp, we find that a portion of the omitted clause reads as follows:—

"Tametsi dubitandum non est, clandestina matrimonia, libero contrahentium consensu facta rata et vera esse matrimonia, quandu Ecclesia ea irrita non fecit; et proinde jure damnandi sint illi, ut eos Sancta Synodus anathemare damnat, qui ea vera ac rata esse negant, quique falso affirmant, matrimonia a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata vel irrita facere posse: nihilominus Sancta Dei Ecclesia ex justissimis causis illa semper detestata est atque prohibuit."

Which is thus translated:—

"Although it is not to be doubted that clandestine marriages, made by the free consent of the contracting parties are valid and true as long as the Church has not made them invalid; and (although) they are to be rightly condemned, even as the Holy Synod condemns and anathematises them, who deny that they (clandestine marriages) are true and valid, and who falsely affirm that marriages contracted by children without the consent of their parents are invalid, and that parents can make them valid or invalid; nevertheless the Holy Church of God for most just causes has always abhorred and prohibited them."

This omitted clause amply corroborates the conclusion arrived at,

as to the state of the marriage law before the passing of the Tametsi decree. This clause of the decree states that it cannot be doubted that a so-called clandestine marriage entered into with the free consent of the contracting parties is a true and lawful marriage.

How the Tridentine Decree Went Into Force.

This decree did not proprio vigore go into force, as is shown by the next section:—

"And lest these so wholesome injunctions be unknown to any, it enjoins on all ordinaries that they, as soon as they are able, take care that this decree be published and explained to the people in every parish church of their respective dioceses, and that this be done as often as possible during the first year; and afterwards, as often as they shall judge it to be expedient." It decrees, furthermore, that this decree shall begin to have effect in each parish at the expiration of thirty days to be reckoned from the day of its first publication made in the said parish.

It is not to begin to have its effect in any parish until the expiration of thirty days from the day of its first publication in the said parish.

This decree was never promulgated in England. It was never promulgated in most parts of Europe. It was never accepted in France.

APPENDIX C.

Extracts from "The New Marriage Legislation," a pamphlet containing a commentary on the decree Ne Temere, by John T. McNicholas, O. P., S. T. Lr., set forth by authority.

"Again, a Catholic man, for instance, wishes to marry a Methodist woman. The latter is bigoted and under no consideration will she consent to be married by a priest. They become engaged, even subscribe to the above formula of engagement and have the same witnessed by two friends, under the condition, however, that the marriage take place before a Methodist minister. Unless some modification in the new decree be made, the aforesaid engagement would be invalid, for one cannot bind himself to commit a sacrilege or subject the Sacrament of Matrimony to nullity." (page 20.)

"It might be asked whether parties who have declared their mutual consent according to this exceptional provision (hence truly and licitly married before God), may, if no State official can be found, allow a schismatical or heretical minister to legalize their marriage. If they make the protestation to the minister that they seek his presence only as a State official and moreover if they absolutely exclude the ceremony or ritual of every sect, this, in our opinion, might be justified; but such a course should not be encouraged." (page 35.)

"We think the excommunication of the third Baltimore Council (n. 127, p. 65) was not intended for such a case. The parties in the case above given are married validly and licitly in the eyes of the Church and before God. They present themselves to the minister for the sole reason that he is a State official, so that their children may not be illegitimate before the State. Such a protection is due the wife

especially; for unconscientious men could leave their wives and marry again; and for the innocent party there would be no redress, because the State recognized no marriage.'' (Note, page 35.)

Those Affected by the Decree.

The following persons are affected by the decree in making a formal engagement and in entering the married state:

1. All Catholics of good standing, baptized as infants in the Faith.
2. All adults (never previously baptized) baptized in the Catholic Church.
3. All converts to the Catholic Church from any sect or denomination.
4. All Catholics baptized as infants but who have fallen away from the Church.

''The decree clearly distinguishes between those baptized in, or received into, the Catholic Faith, and those baptized in any sect. The former, irrespective of age at the time of baptism, or subsequent relapse into heresy, schism, or infidelity, continue to be bound by the decree as long as they live. The latter are regarded as the only class of heretics exempted by the decree. This differs from a former interpretation (S. C. Apr., 1859) of the Benedictine declaration.'' (Page 48 and note.)

5. All adults (never previously baptized) who were baptized in the Faith but who have fallen away from the Church.
6. All converts to the Catholic Church from any Protestant sect who have relapsed or have lost all faith.

''There will be many of the fourth class amongst us. Baptized children falling into the hands of Protestants, growing up as Protestants, knowing nothing of the law of the Catholic Church which declares their marriage invalid unless celebrated before a duly authorized priest, will be living (though not culpably so) in concubinage, and not in lawful wedlock.'' (Page 49).

''The Church in terms that cannot be mistaken, announces to the world: 'I, and I alone, know the power and authority that Christ communicated to me, and I now reiterate the declaration to the world that among Christians there is no distinction between the marriage contract and the Sacrament of Matrimony, and I declare that I alone can impose the condition under which Christians can or can not receive this Sacrament. I declare that the State can no more administer the Sacrament of Matrimony, or impose conditions for its administration, than it can administer any of the other Sacraments entrusted to my keeping. I now decree for the Universal Church a certain form absolutely essential which will give every marriage publicity. I decree that this form is necessary for Catholics among themselves, and for Catholics who marry non-Catholics, whether the latter are baptized or non-baptized. I decree every other form, whether approved by the State or by any schismatical or heretical sect, to be invalid.'' (Page 52).

''Unless this extension be made, after Easter of 1908, the marriage of Catholics with schismatics, heretics, or non-baptized persons, before ministers and State officials, will certainly be invalid in all parts of the United States, without any exception whatever, even though the dispensation *'mixtae religionis'* or *'disparitatis cultus'* had been

obtained. We have said 'without any exception whatever' advisedly, and we wish to emphasize this point, because the only doubt that existed for us, was whether the Benedictine Declaration, applicable to certain districts of the United States, was really a dispensation. This doubt has been removed by a cabled answer from Rome announcing that the Benedictine Declaration is now without force.'' (Pages 53-54).

''Marriage of all fallen-away Catholics (who have become Protestants or infidels) before a minister or civil magistrate will be no marriage at all.''

''Marriage of a Catholic to a Protestant (one never baptized in a Catholic Church) before a minister or civil magistrate, will be no marriage at all, unless the Holy See makes a special law for the United States.'' (Page 63.)

APPENDIX D.

Provida—Apostolic Bull.

By which all Catholic marriages in Germany are subjected to the decree ''Tametsi,'' mixed marriages and those of Protestants exempted.

Therefore, from certain knowledge and plentitude of our power, in order that we may preserve the sanctity and stability of matrimony, the unity and constancy of discipline, 'the certitude of law,' a more expeditious reconciliation of penitents and finally 'the public peace and tranquility,' we declare:—

''1. Although in very many places in the whole German Empire of today the decree Tametsi of the Council of Trent has certainly not yet been promulgated and introduced either by express publication or by proper observance, nevertheless from Easter Day, the 15th day of April of this year 1906, it binds all Catholics, even those not hitherto bound by the Tridentine Law, so that they may not contract valid matrimony among themselves, save in the presence of the parish priest and two or three witnesses.

''2. Mixed marriages which are contracted by Catholics with heretics or schismatics have been gravely prohibited, and remain so unless a grave canonical cause be present, in which case proper assurances are to be given formally and fully by both parties and a dispensation of the impediment ''*mixtae religionis*'' should be obtained for the Catholic party. The dispensation having been obtained, these marriages should by all means be celebrated according to the prescriptions of the Church, before the parish priest and two or three witnesses; otherwise that they sin gravely who contract matrimony before a non-Catholic minister, or even before a civil magistrate, or in any other secret manner; nay more, if any Catholic seek or allow the service of a non-Catholic minister in the celebration of such a mixed marriage, he commits another sin and is subject to canonical censure.

''We will, nevertheless, and expressly declare, define, and decree as valid the mixed marriages already contracted without the Tridentine form, or which (God forbid!) may be contracted without aforesaid form in any province or place whatever of the German Empire, even in those localities where up to the present (according to the decisions of

the Roman Congregations) the Tridentine Law was certainly promulgated, provided there be no other canonical impediment and further, that the sentence of nullity has not been legitimately pronounced before the Feast of Easter of this year, and further, provided the mutual consent of the man and wife has preserved to the aforesaid day.

"3. That a safe rule may be at hand for all ecclesiastical judges, we declare, determine and decree the same thing under the same conditions and restrictions concerning the marriages of non-Catholics, whether heretics or schismatics, contracted or to be contracted in the future among themselves in the above mentioned provinces and places, even when they have not observed the Tridentine form, so that if one or both of the married parties (non-Catholics) should be converted to the Catholic faith, or a controversy should arise in the ecclesiastical courts concerning the validity of the marriage of the two non-Catholics in connection with a question concerning the validity of the marriage contracted, or to be contracted by some Catholic, these same marriages, all else being equal, are likewise to be considered valid."

APPENDIX E.

The Quasi Provida Decree of Pope Benedict XIV.

In 1740, Pope Benedict XIV, found in the federated states of Belgium and Holland uncertainty and dissatisfaction connected with the question of marriage amongst both Roman Catholics and Protestants. Under these circumstances a decree was by him issued and promulgated in these states on November 4th, 1741. It was stated that the rule which Rome thought to enforce by the Tridentine decree aimed at what were called "clandestine" marriages, and, in order to prevent such marriages, it was ordered that the ceremony should take place in the presence of the parish priest, his appointee, or of the ordinary in the church, and in the presence of two or three witnesses. All other marriage contracts were declared null and void.

Pope Benedict met the objections raised to the introduction of the Marriage Laws of the Council of Trent. He issued a quasi "Provida" decree which decreed that the above rule:—

"(a) Did not apply at all to Protestants;

"(b) That consequently it could not apply to the marriage of a Protestant with a Roman Catholic, as in such case it would be interfering with the marriage of a Protestant, the right to which interference the civil power was not prepared to admit;

"(c) Therefore, in the interest of the public peace and tranquility mixed marriages were permitted."

There was no requirement as to the minister who should perform the marriage ceremony.

APPENDIX F.

No judge in the Province of Quebec who has dealt with the question of marriage in that Province, has covered so fully the ground as did Mr. Justice Archibald in the case of Delpit v. Coté.

The conclusions given by him on this subject should be carefully considered. They are as follows:—

"(a) Considering that there exists in this Province no established Church, but that all denominations of Christians are perfectly free and equal;

"(b) Considering that marriage is a contract of natural law, and belongs to the whole body of the population without distinction of religious belief;

"(c) Considering that our law relating to marriage was enacted without reference to the religious beliefs of any section of the population, but as a general law to secure the publicity of marriage, and the authenticity of its proof;

"(d) Considering that neither the Code, nor the authority of England since the cession of this country, nor of this country under the French regime, required any religious ceremony as an essential of the validity of the marriage;

"(e) Considering that marriage is a civil contract, the obligation of which, however, has, with most Christian nations, been reinforced by considerations relating to religion;

"(f) Considering that in the interpretation of any law relating to marriage, every presumption must tend towards the validity of marriage;

"(g) Considering that articles 128 and 129 of the Civil Code require that marriage be solemnized publicly and before a competent officer, and that all persons authorized to keep registers of civil status are competent officers, and that the literal interpretation of these articles would exclude any limitation such as that set up by the plaintiff;

"(h) Considering that there is no ground to limit the general application of the articles in question, except such as would be based upon the supposition that the law intended to confer upon the particular religious bodies an obligatory jurisdiction over their members, which is absolutely contrary to the complete freedom of religious profession prevailing in this country;

"(i) Considering, therefore, that the said Rev. W. S. Barnes was not an incompetent officer to receive the consent of the parties to the marriage in question;

"(j) Considering that at the cession of this counutry the functions of all courts in previous existence absolutely ceased and determined, and could not be revived or re-established without the expression of the will of the new sovereignity;

"(k) Considering that since the said cession the new sovereign authority has never constituted any ecclesiastical court in this country, and that no such court has existed, or does exist therein;

"(l) Considering that all the different religious organizations in this country are purely voluntary associations, free and independent of the State with regard to all matters of faith and doctrine, but having no coercive jurisdiction over any of their members;

"(m) Considering that actions for annulment of marriage are civil actions, and are specially confided to the courts of civil jurisdiction;

"(n) Considering, therefore, the decree of the ecclesiastical authority, pleaded by the plaintiff, as being null and void and of no legal effect;

"(o) Considering plaintiff's action wholly unfounded and defendant's demurrer well founded, doth maintain said demurrer, and dismiss plaintiff's action with costs."

APPENDIX G.

The Hebert Case.

The case of Hebert v. Clouatre was determined in the Superior Court of the Province of Quebec on the 23d of March, 1911.

The parties to the litigation having been baptized and having lived as Roman Catholics were married on the 14th of July, 1908, before a Protestant minister of Montreal in good standing, who duly married them and gave the certificate of marriage prescribed by law.

Under these circumstances, the following was the finding of the Court:—

"Que dans les circonstances le demandeur et la défenderesse ne *pouvaient se marier qu'á l'église catholique,* et ce en presence de leur propre curè en suivant les formalitités de la loi et les reglements de l'église catholique Romaine á laquelle les parties appartienent, que le Reverend William Timberlake, ministre protestant de Montreal, n'avait pas droit d'agir comme curé des dits contractants vu que ceux-ci sont catholiques et que ce dernier est protestant; que le dit marriage contracté a Montréal le 14 juillet, 1908, à été déclaré nul et invalide quant au lien par décret de l'autorité ecclesiastique competente; que le demandeur est bien fondé a en demander l'annulation quant à ses effets civils; que pour ces raisons le *dit mariage est illégal et nul et droit être déclaré tel;*

Considérant que le demandeur à établ les allegations de sa déclaration, tant par la preuve litterale que par la preuve testimoniale;

Declare nul et invalide quant à ses effets civils le dit mariage contracté par le demandeur et la défenderesse, lequel mariage à été prélablement annulé par l'autorité religieuse dont ils rélévent; confirme à toutes fins que de droit le dit décret de l'autorité ecclesiastique prononcant la *nullité du dit mariage quant au lien,* et lui donne plein force et effet au point de vue civile, sans frais."

We have, in this case, the following matters determined:—

"1. That in the Province of Quebec a marriage by a Protestant minister duly appointed to perform the marriage ceremony, is not in the eye of the Church of Rome a legal marriage, when the contracting parties belong to the Roman Catholic Church.

"2. (a) The marriage of Roman Catholics must take place in the Roman Catholic Church.

"(b) In the presence of their own parish priest.

"(c) According to the regulations of the Roman Catholic Church.

"3. That the ecclesiastical authority has the power to declare any other marriages between Roman Catholics illegal and that the civil courts are bound to confirm such finding with all the results as to property and otherwise which flow therefrom.

APPENDIX H.

Extracts from the judgment of Mr. Justice Charbonneau of the Superior Court, February 22, 1912, reversing Judge Larendeau's ruling in the Hebert-Clouatre case, Province of Quebec, Dominion of Canada.

The Court after hearing the parties on the inscription of the opposant, and of the third opposant for final judgment on the two opposants, and having also heard the witnesses and examined the documentary proof, renders judgment as follows:—

"The plaintiff and the defendant in this case were baptized in the Catholic religion, the wife at Fall River, on June 7, 1883, and the husband in the parish of St. Valentin on May 28, 1880. They were married on July 14, 1908, in Montreal, their home, before the Rev. William Timberlake, Protestant minister of the Methodist religion, who received their declaration of marriage and gave it force in virtue of a license dated July 9, 1908, issued under the Grand Seal of the Province and signed by the Lieutenant-Governor. From this marriage Catharine Blanche Eva was born, for whom the mother as tutor is third opposant in the proceedings, which will be dealt with hereafter.

"On November 12, 1909, Monsegnieur, the Archbishop of Montreal, acting on the appeal of the husband, declared this marriage null and invalid for the reason that the Rev. William Timberlake, Protestant minister, was not competent to celebrate the marriage in view of article 3 of the Ne Temere decree, which declares that the only valid marriages of Catholics are those contracted before the parish priest of the place.

"On June 13, 1910, the husband, as plaintiff before this Court, alleged that this marriage 'having been annulled by religious authority should now be declared null and void as to its civil effects and that the said decree of the ecclesiastical authority pronouncing the nullity as to the bonds should be recognized and confirmed for all purposes of law, and that all power be given him to this effect from the civil point of view.' "

Needs Judicial Power.

"It must be noted that the *annulling of a marriage is the exercise of judicial power;* whether such exercise be called a decree or a judgment, it is to the same effect; *judicial power is a part of the public* authority and can be conferred only by the law, which entrusts the functions thereof to a certain class of citizens, acting ex-officio, or by the crown acting according to certain laws enacted by the legislative power to that effect. This authority is now here given in the code, or in the laws preceding it so far back as the conquest."

A Precedent Quoted.

After stating that this question is now hardly contested, and referring to judgments of the Court of Review rendered in the same sense, the judge quotes from the following summary of the principles governing the matter as laid down by Justice Cozeau in the case of La Rue v. Burgess:—

"This marriage, or if you prefer it this contract, has no other existence, *but that given it by the human law;* civil justice adjudicates as to its validity. The action of the civil courts as to said marriage

is perfectly independent of all other authorities, even religious authorities.''

No Legal Value.

The learned judge then remarks as follows:—''The decree has, therefore no legal value whatever. It would not ever be of any use as proof of the judicial facts needed to establish a case, not being in the form of a document to which the law gives any authentic value or in the form of evidence given under oath by an expert in the matter.''

We should, therefore, conclude that the first part of the Laurendeau judgment, confirming the ecclesiastic law, was unfounded, and that the second part, concerning the civil effect of the marriage, was unfounded as to facts, since there was no proof and was also unfounded in law, since the marriage had not been annulled or declared null, either by the religious authority, which was not competent, or by the court, of whom this had not been asked. This would justify the setting aside of the judgment and the dismissal of the action.

However, as above mentioned, the demand of the defendant opposant and of the tierse opposant to declare the marriage valid, force this Court to decide on the whole merits of the case, notwithstanding the insufficiency of the conclusions of the declarations.

The Questions.

Then came the main point at issue, and the judge said:—''The question in this case is to know whether two Catholics, presenting a license from the Crown, which disposes with previous publications such as banns, can validly be married before the ministry of a Protestant sect, or must be united by a curé of their parish after previous publication in said parish or dispensation by the Catholic religious authorities; in a word, is there respective jurisdiction or concurrent jurisdiction of all officers authoritzed to keep the civil registers, and can the Crown license dispense with the publication of banns for Catholics as well as the other religious denominations.

What Constitutes Marriage.

''Before going over the articles of the code concerning this matter, it may be well to make a distinction as regards the functions performed by the priest or minister in connection with the marriage. Daguesseau, in one of his pleadings, indicates, the three elements of marriage. 'Marriage,' he says, '*owes its institution to nature, its perfection to law, and its holiness to religion.*' What essentially constitutes marriage is the consent of a man and woman to unite together for common life, and the preservation of humanity. That is not only the basis of the contract, but it is the contract itself.

''The sacrament is simply a form which gives it solemnity, and the civil function is but another form which gives it publicity, authenticity and civil effect.''

The Two Functions.

''We must, therefore, distinguish between the two functions performed by the priest or minister in this matter. *When he blesses the marriage he performs his religious function. When he receives the*

consent of the parties and gives it authentic form by entering it on the registers, under the authority given him by law, he fulfills purely ministerial functions, which must be entrusted to him by the civil power.

Under Law's Control.

"There can hardly be any question as to the nature of the authority exercised by those officers. It is certainly not for fault or negligence in the performance of their religious duties that articles in the law stipulate penalties against them, and willing or not, they have had to remain under the direct and absolute control of the law, to preserve the privilege of this civil function which they claim. They are, as mentioned in the report of the codifiers, civil officers for that object.

What The Code Says.

"Marriage," the judge continues, "is an *act of the civil state* which must be entered in the register of the civil state, the same as the birth and death, with which it constitutes the three essential acts of human life. For the present case, the marriage being attacked as clandestine and for want of competency, we must look for the jurisdiction of this court to pronounce its nullity in the civil code, the only one which gives authority in the matter.

"The article dealing with marriage reads as follows: 'Every marriage which has not been contracted openly nor solemnized before a competent officer, may be contracted by the parties themselves, and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances.'

Retains Authority.

"The last part, which gives the court such extensive discretion, should apply only to such facts as may constitute clandestineness, or to certain irregularities, which, while strictly disqualifying the officer, leave with him, nevertheless, the color of office, and the defacto authority which would prevent one of the consorts from asking nullity against the other consort, having contracted in good faith; but such direction cannot be extended so far as to deprive an officer of the incontestable authority given him by law, or ignore the value recognized by law of the dispensation of the license exempting from the publication of banns.

Hebert Marriage Facts.

"As, in the present case, no bad faith can be charged against the defendant, since none was found, and she must then be presumed in good faith, and as the marriage was celebrated publicly, under the authority of the Crown license, presuming the power to exempt the consorts from the publication of banns, and before an officer enjoying his power under the eye of the law, and without any restriction of religious denomination, it seems that one could logically conclude that the good faith of the parties, the public possession of the office, and the sanction of the Crown prevent such a contract from being taxed with invalidity without it being necessary to search the legal and real extent of the license of the powers of the officer.

Would Be An Insult.

"This doctrine could be supported by numerous authorities, but it would be an insult to our code to let it be supposed that one can assume, under the color of its articles, an authority or a privilege which one does not really possess.

"Let us then, examine by following the most simple, but still the best method, that of reading the law, whether the officer who received the marriage declaration of the parties was competent, and whether the license authorizing the marriage without publication of banns was valid.

The Law Dictates.

"Although distinct, these two questions are one, as may be seen by putting together the articles that must settle the point. Article 128 says: 'Marriage must be solemnized openly by a competent officer, recognized by law.' Article 129 says: 'All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage. But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion and discipline of the church to which he belongs.'"

Laid Down by Articles.

Article 42 indicates what are those registers which must be kept in duplicate; article 45 the formalities under which they must be authenticated; and articles 47 and 48 those under which they must be endorsed by the prothonotary, an exclusively civil officer. Article 63 says: "The marriage is solemnized at the place of the domicile of one or others of the parties. If solemnized elsewhere, the person officiating is obliged to verify and ascertain the identity of the parties."

That is all that concerns marriage proper. As regards the competency of the officer, what results from those articles is evidently not of special respective and exclusive jurisdiction, but a general jurisdiction, common to all the officials and concurrent.

Exclude Differences.

If we turn to the form of the marriage itself, the authentic document of the civil register, we find in the depositions or article 65 which gives the essential elements of that contract, the same well fixed intention to exclude the difference of religion from any law regulating the jurisdiction of the officers.

In this case the intervention of the religious authority in the matter was made because of the rule of the ne temere decree, which decree is the sole motive of the religious judgment confirmed by the judgment of this court. This court is of opinion that the incompetency of the officer, or non-observance, of the formalities needed for a Catholic marriage is not an impediment such as is understood by the code, and is not one of the impediments aimed at.

Full Powers to Act.

Judge Charbonneau next remarked that, from his analysis of the law, he had came to the conclusion that all the officers of civil register,

without any distinction of creed, may legally celebrate the marriage of Catholics as well as Protestants, of consorts of different denominations, as well as those of the same creed. That in order to have the marriage considered as celebrated publicly, it is sufficient that it be made by such public officer under the authority of a license from the Crown, which is sufficient for all marriages, even without any dispensation, if the validity of the act is simply considered, and entered in the public register.

No State Religion.

The deduction that the law fixed the Catholic idea of the formality and celebration of marriage for Catholics, and another for everybody else, did not seem to him to be logical.

Judge Charbonneau contended that the Vict. 14-15 wiped out with one stroke any State religion in Canada, and with it naturally the civil effect of its laws. Thus was preserved for all, the liberty of worship. (The foregoing is from the Toronto Mail and Empire, February 23, 1912.)

Validity First Question To Be Settled.

As in most cases the two parties agree in demanding the annulling of their marriage, the Court finds itself charged solely with defending the matrimonial bond, and it is often a painful and ungrateful task of the judge who presides. In this case, however, it might be said that the plaintiff had ranged himself on the side of public order in desisting from the action which he had taken that it would seem to suffice for the Court to give effect to his desistement; but it still remains to know, always looking at it from the same standpoint, if the plaintiff could by his simple consent, reconstitute the marriage which he had declared null; in a word, whether or not the judge is the competent officer to receive a consent of marriage. The Court having doubts on this new jurisdiction, believes it preferable to decide first of all, whether the marriage is valid or not, and that within the limits of the Court's ordinary and non-contested jurisdiction.

The Real Intention of the Marriage Act.

If we pass now to the form of the Marriage Act, the authentic document of the civil registers, we find that the principle of Article 65 which gives the essential elements of this contract, the same intention to exclude the difference of religion from all law regulating the jurisdiction of the officer performing the marriage. Nothing in it indicates that one should have to declare to what religion he belongs, which would have been essential to establish the jurisdiction of the officer, if really such jurisdiction should have been exclusive, which would have been absolutely useless as soon as one admits concurrent jurisdiction.

Another clause of Article 39 forbids the introduction in civil acts of anything else that has been declared by the contracting parties. We must then, conclude, it seems to me, that here again the legislature indicates clearly that it is not necessary to give jurisdiction to the officer celebrating the marriage, that he be a minister of the same religion as the contracting parties.

Difference of Religion a Minor Impediment.

If the impediments of Article 125 and 126 have been made to disappear almost without a flight, who shall oppose the same line of conduct with the impediments of Article 127? Why should the impediments of affinity or relationship, spiritual or physical, the difference of religion between the two parties, and a lot of other minor impediments under Article 127, be further excluded from this jurisdiction than the disqualifications of brother-in-law to sister-in-law, or uncle to niece, by alliance? Should the federal government decide to say, in the face of all existing laws and regulations contrary followed by the different religious creeds, that there are no other impediments, other than age, error, first marriage still existing, relationship and affinity to such and such a degree, on what could be based opposition to its jurisdiction?

What Constitutes a Valid Marriage.

The Court conscientiously believes that it has taken into account all the articles of the Code which may have reference to the question now under examination. The net result of this analysis is the officers of civil registers, without distinction of creed, may legally celebrate marriage of Catholics as well as Protestants of contracting parties of different denominations, as well as of the same creed; that all that is necessary in order that such marriage may be considered to have been publicly celebrated is that it be made by such public officer, under authority of license from the Crown, sufficient for all marriages or even without any dispensation, if we take the simple point of view of the validity of the act, and such marriage be entered into, the public registers which are the registers of acts of the civil state.

It has been said that this is not the ideal organization as a system to prevent clandestine marriages. It has been said, and with reason, that the law was enforced before the Conquest, that is to say, the law established by the ordinance of Blois and other subsequent ones, (including that of 1667 which organizes civil registers), and that said law was superior from that point of view. Only one place for the publication of the banns and only one place for the celebration of the marriage, the Catholic Church of the domicile of the parties, only one functionary recognized to receive the consent and to perform the act (the parish priest), only one register to enter such act and which can only be kept in the parish where the marriage is celebrated.

It has been deduced from this that the codifiers should have adopted this ancient law for the marriage of Catholics and had, in effect adopted it, enacting at the same time a separate legislation for all other religious denominations.

This deduction does not appear to us to be logical. It is a bad method of interpretation to start from an ideal which one has created from a point of view unique and often exclusive, in order to find out what might have been the intention of the legislator, without taking account of all the laws already in existence, of the exigencies of diverse factions or of the abuses which may have been introduced through custom —in a phrase, of the state of the country at the time the law was passed; and even this point of view of general interest, though not so bad as that mentioned above, is still by no means a certain criterion. The legislator does not always do what he wants to, but what he is able to

do. What is pretentiously called his intention, may be the result of so many diverse wills, often contradictory, so many unknown and indeterminable factors, that it is impossible to say what this intention was, and it is even more impossible to affirm that the law, as enacted, is actually the true expression of this intention.

It is almost a useless work, if it results in confirming the literal interpretation and making for ill results, if it contradicts it. I am, however, unable to avoid entering upon this ground of argument, in view of the fact that the contrary precedents appear to have been based almost exclusively upon this theory.

There is no doubt, in view of the clandestineness of marriages, the law of the French regime, like the English laws, was preferable to the system of the codifiers, which, with its multiplicities of jurisdiction, renders certain marriages liable to remain unknown to the public, but there remains to be solved other problems more important, which claimed the attention of the legislators. There was Catholicism, with liberty of existence and of action assured to it under the capitulation, the Treaty of Paris, and the Act of Quebec, and which claimed to carry with this liberty under the new regime all the numerous privileges and exclusive jurisdiction which had been conferred upon it as the state religion under the French regime.

There was the Anglican Church, the state religion of the conquering people, which claimed to preserve this predominant authority with all the rights and privileges with which it had been endowed in the country by the new sovereignity. There was also—because it is a characteristic trait of this period of our legislation between the time of cession and the codification of our laws—the independence demanded by the other Protestant denominations from the Anglican Church at the price of serious struggles against what was considered to be an intolerable yoke, struggles which had been one of the principal causes of the rebellion of '37 in Upper Canada, and through which these different denominations obtained, among other things, the right for their ministers to hold registers of citizenship, a privilege which necessarily carried with it authority to officiate at marriage ceremonies, and the right recognized by law, that is to say, to celebrate the marriage civilly at the same time as he made the religious celebration. There were still further, certain customs which were introduced, probably by the colonists of New England, which became established in the country after the conquest, and under which we find marriages solemnized before judges of the peace and other officers having no authority actually given by the law. We find traces of these various customs in the remediary laws which were passed on several occasions during that period.

Ministers of All Creeds Are On Same Footing.

From this moment the authority exercised by the ministers of the various creeds, as officers de facto became a legal authority. Observe from this very moment also, this authority is universally spread over the various officials and is not limited or restricted. The authority of the Catholic priest is universal, just as it was before the Cession; he can still officially certify the birth of the child when he is baptizing it, the consent of the parties when performing a marriage ceremony, similarly as the death when he is holding the burial service, and that for anybody,

whatever may be their belief. The only difference between his civil jurisdiction of the present day and that which he used to have before the Cession is that his power is no longer exclusive. All the ministers of the other creeds are placed exactly on the same footing. It is true that a question arose as to what particular Protestant congregations were referred to in this statute, but this has nothing to do with the case now in litigation. In regard to the marriage question, it is to be observed that in the form which is given to the act relating to marriage, no question of the religion of the parties is mentioned any more than in Articles 64 and 65 of the Code.

Validity of Mixed Marriages Recognized.

The theory of Judge Loranger and Mr. Mignault, in their commentaries on civil law, takes as granted that the marriage cannot be celebrated except by the local priest in the locality itself, and as a consequence no other official of the registers of the civil status is competent. That indeed was the law existing before the conquest. But as an interpretation of the actual law, this point of view is in formal contradiction with article 63 of the Civil Code, which evidently allows the marriage to be celebrated elsewhere than in the place of residence of the contracting parties; and by another official than a priest or the minister of the said place of residence, because it compels the official in this case who is entrusted with the marriage ceremony, to verify and to establish the identity of the contracting parties. We must notice in passing that Mr. Mignault, as well as Judge Loranger, admits the validity of mixed marriages before a Protestant Minister. (Loranger II, No. 223, Mignault I., page 376.) Authority which it is difficult to reconcile either with marriage being compulsorily performed by the priests of the place of residence, or with the Decrees of the Council of Trent.

The precedence in favor of concurrent powers which can be found in our reports are first of all a judgment of Mr. Judge Torrance (Burn and Lafontaine, 4 Revue Legale, page 163); in this case the marriage was annulled because of a pre-existing marriage, which was declared valid in spite of the fact that the contracting parties were Catholics and that it was solemnized by a Protestant minister.

In the case of Delpit vs. Coté, 20 C. S., page 338, Judge Archibald made a long and complete study of this question, coming to the logical conclusion that the marriage was legal. And it might be possible to add to these precedents the judgment of Judge Lynch in the case of Durocher and Degre, if it had not been reversed by the Court of Revision by the Honorable Judges Mathieu, Curran and Lemieux (C. S. 20, page 456).

Judge Lemieux alone furnished notes which were also very elaborate and very complete, I may almost say, excessive. In examining, however, the facts of this case, it must be admitted that the question was quite different from that in the case now under consideration. As a matter of fact, in this case, two minors, subject to the laws of Lower Canada and without the consent of their relatives, or without any public notice or dispensation, went to the United States and were married before a minister calling himself "Minister of the Gospel," returning to their home the next day. This minister of the Gospel in the United States could not be one of the officials, competent to keep civil registry in our province. The question then to decide from the point of view of legality and publicity, was whether the marriage celebrated outside of Lower

Canada had been so under the forms customary at the place where it was celebrated and if the parties did not actually go there for the sole purpose of evading the law. The application of article 135 of the Code was necessary in this case. And a rather curious thing is, that this case does not seem to have been discussed on a basis which nevertheless could have been the only possible basis to consider. The facts mentioned above will allow easily a coincidence in the judgment rendered in deciding simply that these two minors, who left without the consent of their relatives for the purpose of getting clandestinely married in a foreign country, did so for the purpose of evading the law, and that is probably the conclusion which was reached by the two other judges who did not personally express their opinions.

Church Has No Authority to Annul Marriages.

It seems that the distinction made above between the marriage so called sacrament, and the civil act of marriage, must give certain rights to this theory. The Code has certainly not created the civil marriage, but on the other hand it has not merely given civil effects to a religious marriage. It has legislated in respect with the civil side of marriage, treating those celebrating the sacrament as civil officials under the jurisdiction of civil courts of justice. Far from having stated that the civil courts of justice are not competent to declare marriages null and void, it devotes a whole chapter to establishing the causes and to limiting the extent of this power, and it has neither organized nor recognized the existence of any religious jurisdiction for the hearing and judging of these cases.

In order to reach the same conclusion, the Hon. Judge Jette, goes back to the very beginning of our legislation on the matter, being persuaded that one of the surest ways of ascertaining the spirit of the law, is to go back to its very beginning, to examine the circumstances which gave rise to it, and to note those that may have modified it, finally to refer to history itself. If we can say with Lord Herschell in the case of Vaglino and the Bank of England, cited by Judge Archibald, that it is a bad way of interpretation, "to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear an interpretation in conformity with this view, it is indeed in the case where the articles concerning the competence of the civil official celebrating the marriage are so clear that there is not even the slightest ground for serious doubt.

It is a rule admitted as being absolute, both in regard to the interpretation of laws and in regard to the interpretation of contracts that nothing agreed upon or drawn up before the final contract which makes the law between the parties or the law has been passed, can be used for the purpose of attacking this contract or for the purpose of contradicting this law. And besides this is what section 2613 of the Civil Code provides for in formal terms; "The laws which are in force when the Code itself becomes in force, are abrogated in case where there is a distinct statement in reference to the particular matter of which this law treats." In face of this section of the law, and of the expressed provisions which have been made in regard to the competency of the civil official celebrating the marriage, provisions which are quite clear and complete, this court does not think it necessary or even possible to go back to the old

law or to make a study of the circumstances which prevailed at the passing of the law in order to contradict them or to make them valueless.

Declares Marriage In This Case Valid.

Leaving to these provisions all their legal value, this Court therefore believes it its duty to declare the marriage of a Protestant in this case valid and indissoluble, from the civil point of view. But the opposant to the judgment, who is also third opposant, has gone much further than this first conclusion, which is the only essential one. She has demanded the nullifying of the religious decree, which had supposedly rendered this marriage null and void, and of the Ne Temere decree, on which it is founded, and this, not only from a civil point of view, but even as a religious law.

Taking first the decree of the Ordinary, her contention is that it upsets the essential basis of all the traditional proceedings, in that she, the defendant party, was not called upon to answer the petition of her husband, for invalidating the marriage has not been heard on the question at all. She has further stated that this ordinance was based exclusively on the Ne Temere decree, which was proclaimed by a Congregation in Council on the 2nd of August, 1907, and which was published in the Diocese in a circular dated March 16, 1908.

She has argued that this decree is unjust, oppressive, contrary to the existence of public order, of good morals or of public welfare in the country, that this decree is not purely and simply a religious ordinance, a law merely affecting the spiritual side, but that the intention of the authorities who drew it up, was to give it a civil effect, that the religious authorities of this Diocese are endeavoring and have endeavored to give it this civil effect, by claiming to have the power of annulling marriages generally and absolutely, by basing the ground for their authority on this decree. In order to establish the relations of this decree in regard to the civil effect, paragraph 2 and 3 of article eleven of the decree were quoted, where it is held that these laws will only apply in the case of mixed marriages, where there has been a dispensation to permit them, but they will not apply to non-Catholics who contract a marriage between themselves.

An Extended Reference To Ne Temere Decree.

Indignant complaint has been made in regard to paragraph I of article eleven which would take away from those baptized in the Roman Catholic religion or those converted to it, the power and the right of ever leaving it, contrary to the liberty of creed and the liberty of conscience. Points of secondary importance have also been brought up which this Court has not considered, because these questions can only be of very slight importance from a legal point of view, and belonging rather to religious or political polemics. Exception has even been taken to the words, and legislation used in the Decree in the circulars promulgating it and in the commentaries of the ecclesiastical authorities.

The court believes it opportune to remind the brilliant lawyers of the opposant, that they are mistaken in their interpretation of the value and the tendency of that Decree. What is taken as an affirmation of civil authority in the Decree is nothing but a matter of literature, of style. Catholicism is all tradition; the principles, habits and education are full

of it. Everything is immutable. Invariability is one of the strongest proofs that can be offered for the infallibility of a doctrine. Then we must not be surprised if even the language we are using now, has kept its form of the old days. The whole misunderstanding is there, and it seems that it is comparatively easy to make it disappear. If we translate the article referred to, as having in our mother language a tendency of affirming civil authority, it is easy to see that it means only that such a decree will concern only Catholics and concern them only as Catholics—that is to say, that there is not affirmed in the decree any other authority than a spiritual one over the members of the Roman Catholic Church.

Such was the interpretation of summaries of the Catholic Bishopry and the learned lawyers would have only to consult the daily press of the last few months to find the truth of it.

Decree Has No Influence Over Civil Power.

It is not within the province of this tribunal to follow them on that ground or to direct them. Personally I cannot believe that the Roman congregation which enacted that Decree ever intended to give it any civil effect. However it is sufficient for the needs of this case to declare for reasons which have been analysed in the judicial examination of the question, that this decree has not the slightest influence over the civil solemnization of marriage in this case or rather over the qualification of the officer before which was received the consent to marry. That rule would be true even in the theory of those who are willing to give article 127 of our code power over those matters, since in this case and according to the same authorities, said article would only give civil effect to religious rules already established when the Code was written. It is only a religious decree. Very wise in many of its dispositions but binding only on the conscience of the members of the Roman Catholic Church. As such it is absolutely beyond the jurisdiction and the competency of this court. The existence and the practice of Catholicism in its fullness, even with all its spiritual absolutism must be respected. Its rights are based not only on the good will of the legislators, but also on the faith of treaties and of the most solemn charters. The Courts can do nothing in the matter and we may add without any disrespect that the legislator would not dare touch it because it would be a violation of the good faith of treaties and of the rights of the people.

As to the decision of the Ordinary. It has the same value but no more than the Ne Temere decree on which it is based. It is not necessary to examine that document from a judicial point of view. Placed in the environment in which it is, through the examination which was just made of this case, it merely declares that this was not a Catholic marriage which was already evident, and the lawyers of the opposant could, without any great effort, admit its validity. One of the contracting parties, having thought fit to take the matter before the Bishop, the question is settled for them except for higher authority if there is any, in the same jurisdiction; but there is no appeal against abuse of power in the civil courts. The recourse disappeared at the same time as officials having civil powers and at the same time as the State religion, which was the source and raison d'etre of both jurisdictions.

It is in this sense and only in this sense, that the dictum of the Privy Council, in the case of Guibord vs. La Fabrique, must be in-

terpreted. The Bishops have over their subordinates the powers which the discipline of their church gives them from a spiritual point of view. The decisions rendered within the limits of this jurisdiction have already been judged by the civil courts.

The Court, basing itself upon the motives detailed above, renders void the judgment of March 23, 1911, and declares that the marriage of the said Eugene Hebert and Dame E. Clouatre, celebrated on July 14, 1908, before Rev. William Timberlake, upon production of a license under date of July 9, 1908, good and valid. The Court declares that the decree proclaimed by the Congregation of the Roman Catholic Church, August 2nd, 1907, beginning with these words, "Ne Temere inireutur" has no civil effect whatever upon the said marriage: that the decree of the Ordinary of the Diocese of Montreal under date of November 12th, 1909, and produced in this case by the complainant, has no judicial effect in this case, and rejects the plea of the opposing defendant and of the tierce opposante, with reference to the other conclusions that are therein taken, each party paying its own costs from the date of the two inscriptions of the opposing defendant and of the third opposant, viz., December 5th, 1911.

(From the text of the Judgment as printed in the Montreal Star, February 22, 1912.)

APPENDIX I.

Extract from the Italian Criminal Code.

Clause 173. "Any minister who, in the exercise of his priestly office, censures and abuses the institutions and laws of the state or the enactments of the authorities, renders himself liable to a fine and imprisonement."

Clause 174. "A priest, who abusing the moral power derived from his office, incites to the setting aside of the institutions and laws of the state, or in any other way to the neglect of duties due to the country or inherent in a public office, or who damages legitimate private interests and disturbs the peace of families, renders himself liable to a fine, imprisonment, and perpetual suspension from office, or from the endowments of his office."

APPENDIX J.

Pastoral Letter from the House of Bishops.

To be read in all of our Churches throughout Canada on the third Sunday in May (May 21st), 1911.

We, the Archbishops and Bishops of that Branch of the Catholic Church known as the Church of England in Canada, to the faithful in Christ Jesus, Greeting:—

Whereas, the minds of many have been greatly disturbed by a

decision in the Courts of the Province of Quebec annulling a marriage between two members of the Roman Church, solemnized by one authorized by the State to officiate at marriages, and by the enforcement of the decree known as the "Ne temere" decree by the Bishop of Rome; and

Whereas we believe the said decision to be contrary to the Christian ideal of marriage, to involve grave civil injustice, and to be in its consequences destructive to the home life of the people:

We deem it our duty to address you upon this subject.

We desire to remind you that the Anglican Church in Canada has ever taken the strictest view regarding the sanctity of marriage. It is a holy ordinance, instituted by God, and is the foundation of our social and family life. The Church and State must unite to guard the marriage bond and to preserve its indissolubility. To this end our General Synod has decreed that no Clergyman of our Church shall officiate at the marriage of any divorced person during the lifetime of the former partner in the marriage.

It is most desirable that those who enter the holy estate of matrimony should realize its solemnity, and have due regard to its blessings and mutual responsibilities. We greatly deplore the lowering of the ideals and purposes of marriage which is so common in many quarters. It is of the greatest moment that those who enter into this estate should be married by a Clergyman of the Church before proper witnesses, and, wherever possible, in the Church building, and that they should be in agreement concerning their religious convictions. Mixed marriages are ever to be deprecated, as they deprive husband and wife of that mutual help which the one should be to the other in life, and make the religious training of the children in the home most difficult.

Nevertheless, we emphatically assert the validity of such marriages when duly solemnized, and we maintain that once consummated, they are indissoluble.

No marriage should be annulled because of the divergent religious convictions of the parties; nor because of the ecclesiastical connection of the one solemnizing the marriage.

The Church and the State, though separated by law, must unite in protecting those who have been married by a duly competent officer authorized by the State for the solemnization of marriages, and in upholding their civil status and rights. Nor should the State permit marriages to be annulled for an ecclesiastical offence, or because it is contrary to the Canon Law of the Church of Rome, or contrary to the laws, rules and regulations of any religious organization whatsoever.

At the same time we fully admit the right of any ecclesiastical or religious body to make and enforce such spiritual penalties as may be in accordance with its own rules; but without impeaching or interfering with the civil status of the parties concerned.

We do not desire to express any opinion on the civil law. We leave that to our final Court of Justice. But we would remind you that decisions of various Judges have differed upon this question in the Province of Quebec. It is in the interests of all our citizens to have the law clearly defined.

Whatever may be the proper interpretation of the existing law,

it is of the greatest importance that there should be one uniform marriage law for the whole Dominion.

In conclusion, we urge upon all the duty of safeguarding in every way the sanctity of marriage, and we deprecate and deplore all interference with legally sanctioned family life as fraught, not only with injustice, humiliation and suffering to the parties concerned, but as imperilling the fundamental basis of our social system.

We commend you to the grace of God, and pray that His Holy Spirit may in all things direct and rule your hearts.

Signed on behalf of the House of Bishops of Canada:

S. P. RUPERTSLAND,
Primate.

CHARLES OTTAWA,
Archbishop of the Ecclesiastical Province of Canada.

APPENDIX K.

Bill of Rights.

1. Will and Mary, s. 2, c. 2 (1689).

Preamble.

Whereas the late King James II, by the advice of divers evil counsellors, judges and ministers employed by him, did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of this Kingdom;

And whereas the said late King James II, having abdicated the government, and the throne being thereby vacant, His Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this Kingdom from Popery and arbitrary power);

* * * * * *

9. And whereas it has been found by experience that it is inconsistent with the safety and welfare of this Protestant Kingdom to be governed by a Popish priest or by any King or Queen marrying a Papist, the said Lords Spiritual and Temporal and Commons do further pray that it may be enacted that all and every person and persons that is, are, or shall be reconciled to or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded and be forever incapable to inherit, possess, or enjoy the Crown and government of this realm and Ireland and the Dominions thereunto belonging or any part of the same, etc.

The Act of Settlement.

12 and 13 Will. III, chap. 2 (1700-01).

IV. And whereas the laws of England are the birthright of the people thereof, and all the Kings and Queens who shall ascend the

throne of this realm ought to administer the government of the same according to the said laws, and all their offices and ministers ought to serve them respectively according to the same; the said Lords Spiritual and Temporal and Commons, do therefore further humbly pray, that all the laws and statutes of this realm for securing the established religion, and the rights and liberties of the people therof, and all other laws and statutes of the same now in force, may be ratified and confirmed; and the same are by his Majesty, by and with the advice and consent of the said Lords Spiritual and Temporal and Commons, and by authority of the same ratified and confirmed accordingly.

APPENDIX L.

Extracts, Laws of New York.

AN ACT relating to the domestic relations, constituting chapter fourteen of the consolidated laws.

Became a law February 17, 1909, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Chapter 14 of the Consolidated Laws—Domestic Relations Law.

ARTICLE 1.

Short Title; Definitions.

§ 1. Short title. This chapter shall be known as the "Domestic Relations Law."

§ 2. Definitions. A minor is a person under the age of twenty one years. A minor reaches majority at that age.

ARTICLE 2.

Marriages.

Section 8. Marriage after divorce for adultery.

§ 5. Incestuous and void marriages. A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

1. An ancestor and a descendant;
2. A brother and sister of either the whole or the half blood;
3. An uncle and niece or an aunt and nephew.

If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.

§ 6. Void marriages. A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person;
2. Such former husband or wife has been finally sentenced to imprisonment for life;
3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time.

§ 7. VOIDABLE MARRIAGES. A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years;
2. Is incapable of consenting to a marriage for want of understanding;
3. Is incapable of entering into the married state from physical cause;
4. Consents to such marriage by reason of force, duress or fraud;
5. Has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time.

Actions to annul a void or voidable marriage may be brought only as provided in the code of civil procedure.

§ 8. Marriage after divorce for adultery. Whenever a marriage has been or shall be dissolved, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall only be made upon satisfactory proof that five years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good. But this section does not prevent the remarriage of the parties to the action.

ARTICLE 3.

Solemnization, Proof and Effect of Marriage.

§ 10. Marriage a civil contract. Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential.

§ 11. By whom a marriage must be solemnized. The marriage must be solemnized by either:

1. A clergyman or minister of any religion, or by the leader or either of the two assistant leaders, of the society for ethical culture in the City of New York.

2. A mayor, recorder, alderman, city magistrate, police justice or police magistrate of a city, except that in cities which contain more than one hundred thousand and less than one million inhabitants, a marriage shall be solemnized by the mayor, or police justice, and by no other officer of such city, except as provided in subdivisions one and three of this section:

3. A justice or judge of a court of record, or of a municipal court, or a justice of the peace; except that justices of the peace in cities which contain more than one hundred thousand and less than one million inhabitants, shall have no power to solemnize marriages; or,

4. A written contract of marriage signed by both parties and at least two witnesses who shall subscribe the same, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged by the parties and witnesses in the manner required for the acknowledgement of a conveyance of real estate to entitle the same to be recorded, provided, however, that all such contracts of marriage must in order to be valid be acknowledged before a judge of a court of record. Such contract shall be recorded within six months after its execution in the office of the clerk of the county in which the marriage was solemnized.

The word "clergyman," when used in the following sections of this article, includes each person referred to in the first subdivision

of this section. The word "magistrate," when so used, includes any person referred to in the second or third subdivision.

§ 12. Marriage, how solemnized. No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.

The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practiced in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.

APPENDIX M.

Proposed Amendment to the Marriage Act, Dominion of Canada.

1. The Marriage Act, chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married, and without regard to the religion of the person performing the ceremony.

2. The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.

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Appendices