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CHRISTIAN ARCHAEOLOGY.

(Continued.)

III. PUBLIC WORSHIP.

The pentecostal firstfruits of New Testament Christianity were not gathered in the streets of Jerusalem by a band of Salvationists, but in a meeting of the disciples who *were all with one accord in one place*,[1] sitting in a house,[2] probably one of the thirty halls connected with the temple. We know that the 120 who formed the nucleus of this first Christian congregation, men and women, had been accustomed to meet for prayer and supplication.[3] At this pentecostal meeting, the *wonderful works of God*[4] were proclaimed, and Peter, standing up with the eleven, lifted up his voice and preached the gospel of Christ crucified and glorified.[5] There were those who *gladly received his word*,[6] which could not have been known to the apostles but by a profession of faith, which the new converts made before they *were baptized*.[7]

Here, then, we have the various acts performed in the first meeting of the first congregation of primitive Christianity: the preaching of the word, the administration of a sacrament, confession of faith and prayer. Nor was this

1) Acts 2, 1. 2) Acts 2, 2. 3) Acts 1, 14. 4) Acts 2, 11.
5) Acts 2, 14 ff. 6) Acts 2, 41. 7) Acts 2, 41.

MARRIAGE AND DIVORCE.

I. MARRIAGE.

(Continued.)

The parties.

Marriage, as defined in an earlier chapter, is a joint status of one man and one woman. This is the doctrine both of the Divine law and of American law. The parties to the marriage enacted in Eden were one man, Adam, and one woman, Eve.[1] And Adam, seeing through the nature of the institution thus established, says, *Therefore shall* A MAN *leave his father and his mother, and shall cleave unto* HIS WIFE.[2] Christ also, pointing to the order of things established in the beginning, describes the ordinance of marriage as a union of a man and his wife in which THEY TWAIN *shall be one flesh*.[3] Monogamy, not polygamy or polyandry, not the union of one man and two or more women, or of one woman and two or more men, but a union, a joint status, of twain, one man and one woman, is marriage as determined by the moral law inscribed into the human heart. According to the statutes of our States, polygamy, or the offense of having two or more husbands or wives at the same time, is not only illegal, invalid, and a tort against the innocent party, but a statutory crime which makes the offender liable to criminal procedure under an indictment by the grand jury, and, on conviction, to confinement in the state's prison. "So generally," says Tiedeman,[4] "and naturally is the evil character of polygamy recognized that the leading American authority on the law of marriage, without any qualification or preliminary explanation, defines marriage to be 'the civil status of *one man* and *one woman* united in law for life,'" etc.[5]

1) Gen. 1, 27; 2, 22; 3, 8. 20. 2) Gen. 2, 24. 3) Matt. 19, 5.
4) *Limitations of Police Power*, p. 539.
5) Bishop, Mar. and Div., § 3.

The law, however, the law of God as well as the law of the State, has not only determined the number of persons to be joined together in wedlock, but has also placed certain restrictions upon the choice of a partner in marriage, prohibiting certain persons from mutually becoming husband and wife. This leads us to treat of

Impediments of marriage.

a. *Existing marriage.*

Marriage being, as determined by law, essentially a status of two parties, the joint status of one man and one woman, every additional man or woman entering into sexual relation to the party of the other part does not really enter into the state of marriage. A husband who has a wife living cannot contract a real marriage with a second wife, and a woman having a husband living cannot contract a valid marriage with a second husband. The purported second marriage does not invalidate the first and valid marriage, though its consummation by carnal intercourse may be claimed as a cause of divorce by the innocent party to the first marriage. Hence, as a valid betrothal is, *in foro ecclesiae*, tantamount to marriage, as will be shown at length under a later head, a subsequent betrothal, while the first is in force, does not invalidate the first, but leaves it in full force, and binding on both parties. A second marriage may be valid after the dissolution of the first marriage by a valid divorce. Divorce is valid when it has been decreed as a final and absolute divorce *a vinculo* by a court which has jurisdiction over the case and in accordance with the laws determining the case. But the secular courts have no jurisdiction in the church, and the secular laws are not *lex fori* in the church. The church, on the other hand, has no jurisdiction in the State and over the civil status of its members. Hence a divorce may be valid and a second marriage lawful before the State, while the same divorce and remarriage may be unlawful before the church. In the Jewish

State under the political Mosaic law divorce by a bill of divorcement was legal and valid and subsequent remarriage likewise.[1] Yet, judged according to the moral law, this same remarriage was adultery in both parties, μοιχᾶσθαι, the union of a married woman with a man not her husband, and the union of a married man with a woman not his wife, before God.[2] In such cases a union sanctioned by the State must be condemned by the church. The Christian pastor cannot consistently solemnize a sin, and the Christian congregation cannot grant absolution to the sinner while he or she persists in what God stamps as adultery, though the State may have stamped it marriage. The church must insist upon the separation of the parties thus joined together, though after their separation the State will still consider them a married couple, and the return of either party to cohabitation with the spouse of the former marriage would be adultery before the State unless the second marriage had been previously dissolved by valid divorce and the first marriage restored by what would appear as a third marriage before the State. How a divorce might be obtained in such cases does not come under this head. What concerns us here is that after a first valid marriage a Christian cannot marry again unless the first marriage have previously been dissolved either by death or by a divorce which is valid and lawful both before the law of God and the law of the State.

Marriage being a status determined by law, the law determines the parties which may lawfully unite in wedlock also in other ways than by restricting their number to two. Thus the Divine law has drawn certain lines within which marriage shall not be contracted. These are the

b. *Prohibited degrees.*

The prohibited degrees within which marriage shall not be contracted are of two kinds, degrees of *consanguinity* and degrees of *affinity*.

1) Deut. 24, 1. 2.

2) Matt. 5, 32; 19, 9.

Consanguinity is the relationship which results from a common ancestry; affinity is relationship through marriage, or through carnal knowledge, whereby a man and a woman become one flesh.

Consanguinity is either *lineal* or *collateral*. Lineal consanguinity is the kinship of persons one of whom is the ancestor or descendant of the other, as between father and son, mother and son, father and daughter, mother and daughter, grandfather and grandson or granddaughter, grandmother and grandson or granddaughter. Collateral consanguinity is the relationship of persons descended from a common ancestor, but not from one another, as brothers and sisters, uncle and niece, aunt and nephew, cousin and cousin. These kinships are the same, whether they be of the *full blood* or of the *half blood*, i. e., whether the persons be descended from the same father and mother, or only from the same father or only from the same mother. And consanguinity is the same, whether it have arisen in wedlock or out of wedlock. But no consanguinity exists between children with no common ancestor. Thus when the widower A has a son, Y, by his first marriage, and widow B has a daughter, Z, by her first marriage, and A and B marry, no consanguinity exists between Y and Z. If, however, a child, M, is born to A and B, this child, M, is related by consanguinity, not only to A and to B, but also to both Y and Z.

Affinity is the kinship arising from the carnal knowledge of a man and a woman, whereby they become one flesh, either in[1]) or out of[2]) wedlock. Thus, if the widow B have a daughter, Z, by her first marriage, and A marry B, then A and Z are related by affinity, though they are not related by consanguinity. But the marriage of A and B is supposed to have been consummated by coition; for this, not the marriage consent, forms the basis of affinity. Hence the affinity remains in force, even though the *vinculum*

1) Gen. 2, 24. Matt. 19, 5. 2) 1 Cor. 6, 16.

matrimoniale which has been established by the mutual consent of the parties, have been dissolved by divorce or death.

The *degrees of consanguinity and affinity* are most readily determined or computed by the rule laid down in the 18th chapter of Leviticus[1] and the applications of this rule contained in the same chapter, which is the chief seat of the doctrine of prohibited degrees.

The wording of the rule in the original Hebrew is:—

אִישׁ אִישׁ אֶל-כָּל-שְׁאֵר בְּשָׂרוֹ לֹא תִקְרְבוּ לְגַלּוֹת עֶרְוָה אֲנִי יְהוָה׃

which, literally translated, says, *Every man shall not approach to all flesh of his flesh to uncover nakedness. I am the Lord.*[2] That the words שְׁאֵר and בָּשָׂר jointly and severally signify kinship is out of question in view of the subsequent, specializing context, which specifies a long series of relationships; and that the words stand for both consanguinity and affinity is clear from the fact that throughout Lev. 18 these two kinds of kinship are mentioned promiscuously,[3] and from the use of שְׁאֵר and בָּשָׂר for degrees of consanguinity[4] and affinity.[5] That both שְׁאֵר and בָּשָׂר must be taken in the strictest sense is clear from the nature of the statute, which is not, as Lev. 25, 49 and Numb. 27, 11, an *enlarging* statute, intended to extend the limits of the law, but a *restrictive* statute intended to draw the line within which marriage shall not be lawful, the limit beyond which, as far as this rule is concerned, marriage shall be free. Thus, then, שְׁאֵר or בָּשָׂר is consanguinity or affinity of the first degree, as all lineal consanguinity,[6] or the nearest collateral consanguinity, as it exists between brother and sister,[7] or sister and sister;[8] or the nearest affinity, as between husband and wife.[9] Accordingly, שְׁאֵר בְּשָׂרוֹ describes

1) Lev. 18, 6. 2) Lev. 18, 6.
3) Lev. 18, 7. 9. 10. 11. 12. 13. 17. — 8. 14. 15. 16.
4) Lev. 18, 12. 13. 17; 21, 2. 3. Numb. 27, 11. Gen. 29, 14; 2, 23.
5) Gen. 2, 24; cf. Matt. 19, 5. Eph. 5, 29.
6) Lev. 18, 10. 17; 21, 2. 3. 7) Lev. 18, 12.
8) Lev. 18, 13. 9) Gen. 2, 24; 18, 8.

kinship of the next, the second degree, the collateral consanguinity existing between a son and his father's sister,[1] a son and his mother's sister,[2] or affinity of the second degree, as between a man and his stepmother,[3] a father and his daughter-in-law,[4] a brother and his brother's wife,[5] a widower and his wife's daughter or granddaughter.[6] All these are not his flesh, akin in the first degree, but the flesh of his flesh, related in the second degree. What is beyond this degree, as, the daughter of his father's brother, or the daughter of his mother's sister, is the flesh of the flesh of his flesh, related to him in the third degree, and does not come within the prohibitory rule.

That the degrees of kinship encompassed by the rule Lev. 18, 6 are by this statute designated as prohibited degrees, within which marriage shall not be lawfully contracted, is also clear from the nature of the statute and the specifications following. The general statute as well as the special prohibitions annexed expressly state a certain limit of relationship within which the persons so related shall not become one flesh. This cannot mean extra-connubial intercourse, or fornication pure and simple, which is unlawful everywhere and lawful in no degree. What sense would there be in such legislation as this: *Thou shalt not murder thy wife, for she is thy flesh. Thou shalt not murder thy mother, for she is thy father's wife. Thou shalt not murder thy sister, for she is thy mother's child*, etc. And thus the meaning of the statutes of Lev. 18 cannot be: *No man shall commit fornication with the flesh of his flesh. That is to say, Thou shalt not commit fornication with thy mother, for she is thy mother*, etc. The summary of the English Bible at the head of the chapter is, therefore, correct when it says, "*Unlawful marriages.*"

Thus, likewise, the prohibition of marriage within the prohibited degrees of affinity specified Lev. 18, 8. 14. 15. 16,

1) Lev. 18, 12. 2) Lev. 18, 13. 3) Lev. 18, 8.
4) Lev. 18, 15. 5) Lev. 18, 16. 6) Lev. 18, 17.

to marry one's stepmother, uncle's wife, daughter-in-law, brother's wife, cannot refer to adulterous unions, while the reason given is the kinship; for adultery irrespective of kinship is expressly proscribed in a commandment of the decalogue and in the statute, *Thou shalt not lie carnally with thy neighbor's wife.*[1] The supposition is evidently this that the marriage in which the affinity arose has been dissolved by divorce or death and the kinship remains and forms a bar to a marriage within the prohibited degree.

The various kinships in prohibited degrees specified in Lev. 18 are those of a man and his mother,[2] his stepmother,[3] his sister or half sister,[4] his son's daughter,[5] his daughter's daughter,[6] his stepmother's daughter,[7] his father's sister,[8] his mother's sister,[9] his uncle's wife,[10] his daughter-in-law,[11] his brother's wife,[12] his wife's daughter or granddaughter.[13] That the specification is not intended to be exhaustive, and that the omission of a case is not a license, appears from the fact that the marriage with one's mother-in-law, which is not specified as incestuous in Leviticus, is proscribed with other incestuous unions in Deuteronomy,[14] and in view of the silence of all Scripture concerning the prohibition of a father's marriage with his daughter, which no sane man will consider exempt from the law of prohibited degrees. On the contrary, we know that such marriage is forbidden inasmuch as it comes under the general rule Lev. 18, 6 and the same degree is covered by special statutes, as vv. 7 and 10, stating the nearness of kinship as the reason for the prohibition. In like manner a man's marriage with his deceased wife's sister comes under the general rule, v. 6, she being the flesh of his flesh, and a parallel kinship, that of a man and his brother's wife, also made up of one degree of consanguinity and one of affinity,

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1) Lev. 18, 20. 2) v. 7. 3) v. 8. 4) v. 9.
5) v. 10. 6) v. 10. 7) v. 11. 8) v. 12.
9) v. 13. 10) v. 14. 11) v. 15. 12) v. 16.
13) v. 17. 14) Deut. 27, 23.

is specified in v. 16. Again, the explicit prohibition of marriage with the daughter-in-law[1] implies a prohibition of marriage with the mother-in-law, the two kinships being likewise equidistant and made up of the same elements of consanguinity and affinity.

That these statutes are precepts of the moral law binding upon all men appears from the repeated reference to the Gentiles who had practiced and still practiced the abominations prohibited in these statutes, and from the reference to the Divine punishment inflicted upon such Gentiles for such abominations.[2] The Gentiles are nowhere said to have incurred Divine punishment and defiled the land by not observing the Jewish Sabbath, or by eating pork, or by letting their cattle gender with diverse kind.[3] One who is not under a law cannot offend against that law and cannot be punished for that whereby he does not offend.

Yet while marriage in all these degrees covered by the formula of Lev. 18, 6, שְׁאֵר בְּשָׂרוֹ, is a moral offense, we must not overlook a distinction made by the Divine Lawgiver in dealing with the various carnal unions which come under the rule of prohibited degrees. According to Lev. 20, 11. 12. 14. 17 the death penalty was imposed upon the offenders against Lev. 18, 7. 8. 9. 15. 17, while of the offenders against Lev. 18, 12. 13. 14. 16 the Lord says, *they shall bear their iniquity, they shall die childless*.[4] Such marriages, when once contracted and consummated, were not to be dissolved. It is, therefore, consistent with the Divine prohibition as well as with the Divine concession, when we refuse to sanction the act of marrying a deceased wife's sister, but permit the status of marriage to continue undissolved, after the marriage has been consummated, just as God prohibited the parallel act of marrying the deceased brother's wife,[5] and yet suffered such marriage, when once brought about and consummated, to continue, not as an incestuous

1) Lev. 18, 15. 2) Lev. 18, 24—30. 3) Lev. 29, 19.
4) Lev. 20, 19—21. 5) Lev. 18, 16.

abomination, but as wedlock, though reserving to himself the denial of offspring to those who had entered such status against his will.[1])

This is, in its various bearings, the scriptural doctrine of prohibited degrees. The laws of our States are in many respects less, in some respects more, strict than the Divine law. Thus the Laws of Illinois, while prohibiting the marriage of first cousins by blood as "incestuous and void," knows of no prohibited degrees of affinity whatever, so that, according to the Illinois Statutes, marriage with the stepmother or the stepdaughter is not marriage within prohibited degrees. The same glaring inconsistency prevails in Missouri and a number of other States. The marriage of first cousins is prohibited by statute in New Hampshire, Ohio, Indiana, Kansas, Arkansas, Nevada, Washington, N. and S. Dakota, Montana, Wyoming, Illinois, Arizona, Louisiana, Oklahoma, Oregon, and Missouri, and, perhaps, by recent legislation, in a few other States. Marriage is prohibited between a man and his niece, or a woman and her nephew, by blood, in N. H., Mass., Me., Vt., R. I., Ct., N. J., Pa., O., Ind., Ill., Mich., Wis., Io., Minn., Kan., Neb., Md., Del., Va., W. Va., N. C., Ky., Tenn., Mo., Ark., Tex., Cal., Ore., Nev., Col., Wash., Dak., Ida., Mon., Wy., S. C., Ala., Miss., N. M., Ariz.—In Del. and Ky. no man can marry the daughter of his brother's or his sister's child, and no woman the son of her brother's or her sister's child.—In Wis., Minn., N. C., and Ore. no marriage can be contracted "by parties nearer of kin than first cousins," whether of whole or of half blood. In O., Ind., Nev., Wash., Mon., not by persons nearer of kin than second cousins; in Ga. "not within the Levitical degrees." These prohibited degrees of consanguinity apply whether either person be legitimate or not, in N. Y., Ill., Kan., Neb., Ky., Mo., Ark., Cal., Col., Dak., Ida., Wy.,

1) Lev. 20, 21.

Ala., La., N. M., Ariz.—As to affinity, a man may not marry his father's widow, nor a woman her mother's husband, nor a man his wife's daughter, nor a woman her husband's son, in N. H., Mass., Me., Vt., R. I., Ct., N. J., Pa., Mich., Io., Md., Del., Va., W. Va., Ky., Tenn., Tex., Wash., S. C., Ga., Ala., Miss.—A man is not allowed to marry his grandfather's widow, nor a woman her grandmother's husband, nor a man his wife's granddaughter, etc., in Mass., Me., Vt., R. I., N. J., Pa., Mich., Io., Md., Del., Va., W. Va., Ky., Tenn., Tex., S. C., Ga., Ala.—A man may not marry his son's widow, nor a woman her daughter's husband, nor a woman her husband's father, etc., nor a man his mother-in-law, in N. H., Mass., Me., Vt., R. I., N. J., Pa., Mich., Io., Md., Del., Va., W. Va., Ky., Tenn., Wash., Ga., Ala.; nor a man his grandson's widow, nor a woman her granddaughter's husband, and inversely, in N. H., Mass., Me., Vt., R. I., N. J., Mich., Md., Del., Ky., Tenn., Wash., S. C.—In Va. and W. Va., a man cannot marry his wife's stepdaughter, nor a woman her husband's stepson, nor a woman her niece's husband. In W. Va., a man is also barred from marrying his nephew's widow, and in Ala. from marrying his uncle's widow. It seems that in Virginia, according to the construction of the Statute by the courts, marriages with the deceased brother's wife and the deceased wife's sister are still unlawful. Marriage with lineal ancestors or descendants, or between brothers and sisters of the half or the whole blood, is prohibited in all the States.

All these marriages within prohibited degrees are, either by the explicit statement of the Statutes, or by terms which imply the same, proscribed as void *ab initio*. Where they are declared "incestuous and void," and incest is an indictable offense, the offender makes himself liable also to criminal prosecution.

This is, as far as we can ascertain, the sum and substance of American statute law of prohibited degrees. That

it diverges in various points from the Divine law is plain. But divergence of laws is not necessarily a conflict of laws. Thus, the Divine law neither enjoins nor prohibits the marriage of cousins, and where the State prohibits such marriage, Christians will submit to such prohibition[1] and abstain from such marriage or make their domicile in a State which has no such prohibition in its statutes, unless the statute provides that the marriage of first cousins domiciled in the State, if contracted in a State in which their marriage is valid, shall be held valid also in the State in which they are domiciled. Again, where the secular law knows of no prohibited degrees of affinity, while the Divine law prohibits marriage with "the flesh of one's flesh," also by affinity, there is no real conflict of laws, and a Christian will submit to the Divine law and abstain from such prohibited marriage. But where the State, in accordance with its statutes, has, through its authorized agent, pronounced and holds those husband and wife whose married state is prohibited by the moral law, there is a real conflict of laws, and the Divine law must prevail, and the church must demand a separation.[2] How, in such cases, a separation may be effected under the secular law must be considered under "*Divorce.*"

c. *Mixed marriages.*

There have been those who held the words of St. Paul, *Be ye not unequally yoked together with unbelievers*,[3] to imply a prohibition of marriage between a Christian and an infidel, or between an adherent of the true religion and a person addicted to a false religion. If this were within the meaning of the apostle's words, then his admonition, *Wherefore come out from among them, and be ye separate*,[4] would make it a duty to a Christian husband or wife to leave the unbelieving spouse to whom he or she were joined

1) Rom. 13, 1. 2. 5.
2) See also *supra*, pp. 29—31.
3) 2 Cor. 6, 14.
4) 2 Cor. 6, 17.

in wedlock. But this would be in flat contradiction to what the same apostle had previously written to the same congregation, saying, *If any brother hath a wife that believeth not, and she be pleased to dwell with him, let him not put her away. And the woman which hath an husband that believeth not, and if he be pleased to dwell with her, let her not leave him. For the unbelieving husband is sanctified by the wife and the unbelieving wife is sanctified by the husband.*[1]) That these mixed marriages are not likely to be happy marriages while the difference of religion lasts is taught by reason and experience. The hope of winning over the heterodox party is outweighed by the danger of apostasy to which the orthodox party is exposed. The education of the children of mixed marriages is an extremely difficult problem for all the parties concerned. For these and other reasons such marriages should be most earnestly dissuaded by pastors and parents, and the latter will in most cases act wisely and well in withholding their consent. But where parental consent has been granted and valid betrothal has ensued, it must stand and not be rescinded.

There is, however, another kind of mixed marriages which is prohibited by the laws of some of our States. Thus in Ind., Md., Del., Va., N. C., Ky., Tenn., Ark., Cal., Nev., Col., Ida., S. C., Fla., all marriages between a white and a negro or mulatto are prohibited; so in Mo. marriages between a white and a negro; in Tex., Ga., Ariz., between a white "and an African or descendant of Africans;" in Neb., Ore., Miss., Fla., between a white and "a person having one fourth;" in Ind., Mo., Fla., "one eighth, of negro blood;" in Md., N. C., Tenn., Ala., this prohibition extends to the third generation, inclusive. In N. C., Nev., S. C., all marriages between a white and an Indian, in Nev. and Ariz. between a white and a Chinese or Mongolian, in Ore. all marriages between a white and a

1) 1 Cor. 7, 12—14.

person having one fourth Chinese or Kanaka blood or one half of Indian blood, and in N. C. all marriages between an Indian and a Negro, are prohibited. In Michigan, where the law expressly pronounces marriages between a white person and one wholly or partially of African descent valid in all respects, and probably in all the States where the laws are silent on this point, such marriages, however repugnant they may be to the feelings of most people, are lawful, if not illegal for some other cause. Nor is difference of race an impediment of marriage according to the moral law. It should be noted, however, that these marriages, though valid where contracted, are not valid everywhere. Though married in a State where their marriage is lawful, the parties may be indictable for living together where it is not, and ignorance or mistake of law is not accepted as a defense for the offense of miscegenation.

d. *Other impediments.*

We have dealt with the impediments of marriage hitherto considered under the head of "*The Parties*," for the obvious reason that these impediments are such by the will of the Lawgiver or lawgivers that these persons shall not intermarry, even if they so desired and agreed. It is the will of God and of the State that marriage shall be monogamous, and therefore the law prohibits the marriage of a person already married. For reasons sufficient to God, and for reasons of public policy sufficient to the State, it is the will of God, or the will of the State, or the will of both, that persons already united by certain bonds of kinship or persons separated by barriers of race shall not be mutually parties to the same marriage, and hence the law prohibits such marriages.

There is, however, another class of impediments of marriage, which are also commonly enumerated under the head of "*The Parties*" in the text books, though they properly belong to a different chapter. The impediments

of the former class are such because the parties thus debarred *shall* not marry or intermarry; those of the latter class work as impediments of marriage because the persons in whom they are found are such that they *cannot* marry while these impediments exist. The persons thus incapacitated for marriage are infants, idiots, maniacs and other insane persons, and the hopelessly impotent, persons legally or actually incapable of entering into any valid contract at all, or in a manner physically defective to preclude their being a party to a contract which is to superinduce the state of marriage. The impediments of this class will, therefore, be taken up in the course of the subsequent chapter.

The contract.

Marriage is the status *superinduced and sustained by the lawful mutual consent of the parties to be and remain to each other husband and wife in a life-long union.* This mutual consent is the very essence of the act of marriage and remains the very essence of the state of marriage. Without this consent there is no marriage and can be no marriage. Without it a marriage ceremony is a mere form without substance, a sham or mock marriage which is marriage in no sense at all. Without this consent sexual intercourse is extra-connubial. *Consensus, non concubitus, facit matrimonium.* When this mutual consent is *de facto* lawfully complete and known to be so by the parties, marriage is essentially complete, even without a consummation. And in the absence of such lawful consent, no marriage exists, even with what may bear the semblance of a consummation with all its physical consequences.

This is the doctrine of Scripture. When the first woman had consented to be brought to the first man and the first man had accepted her, they were *the man and his wife*, even before a consummation had ensued.[1] Jacob, on the

1) Gen. 2, 22—25.

strength of their mutual understanding, claimed Rachel as his *wife* even before he had *gone in unto her*.[1] When *Mary was espoused to Joseph, before they came together*,[2] Joseph was *her husband*,[3] and she was *his wife*.[4] In Deuteronomy we read: *If a damsel that is a virgin be betrothed unto an* HUSBAND, *and a man find her in the city, and he lie with her, then ye shall bring them both out unto the gate of that city, and ye shall stone them with stones that they die; the damsel, because she cried not, being in the city; and the man, because he hath humbled his neighbor's* WIFE.[5] Here the man who has lain with a *virgin* who was betrothed to an *husband* is said to have humbled his neighbor's *wife*, though a consummation of the marriage had neither preceded the crime nor could ensue afterwards, because of the penalty to be inflicted. And this penalty was the same as that imposed upon an adulterer who had been found lying with a woman married to a husband in consummated marriage.[6] On the contrary, if a man had deflowered a *virgin which was not betrothed*, she was not by that act made his wife, but was in due process to *be his wife*, and they were not to be put to death as guilty of the crime of adultery.[7]

But the marriage consent, in order to constitute the essence of marriage, must, in the first place, be real and *de facto* CONSENT, the concurrence and coincidence of two wills. Where there is no will, or but one will, there *can be* no consent; and where there are two wills, but no mutual concurrence, no *idem velle*, there *is* no consent. Will is the conscious self-determination of an intelligent being. Where there is no intelligence, as in an idiot, or no consciousness, as in a person who is in a state of stupor, or sleep, or delirium, or beastly intoxication, there can be no volition, and hence, no consent. But an insane person

1) Gen. 29, 21. 2) Matt. 1, 18. 3) Matt. 1, 19. 25.
4) Matt. 1, 20. 24. 5) Deut. 22, 23. 24. 6) Deut. 22, 22.
7) Deut. 22, 28 f.

may, in a lucid interval, when there is both intelligence and consciousness, exercise that self-determination which constitutes an act of the will and the concurrence of such will with another will, which is the essence of consent. Of course, the possibility of consent is not yet *de facto* consent, and where, permanent insanity being shown, consent during a lucid interval is claimed, two things must be proved, the lucid interval and the act of consent, and the burden of proof rests with the party making the allegations. On the contrary, where only occasional mental incapacity is proved, or drunkenness is alleged in denial of consent, the presumption is for mental capacity and the burden of proof lies on the party pleading incapacity at the time of the alleged marriage.

Want of capacity for the marriage consent is also presumed in infants, persons not sufficiently mature in years to understand the nature of marriage and its consequences, or to prompt their own acts in concurrence with rather than in submission to the will of others. At what age capacity may or must be assumed must, in the absence of law, be determined by the circumstances of each case. At common law a marriage of a person under seven years was void, a marriage of a male person between the ages of seven and fourteen, or of a female person between seven and twelve years of age was voidable, and a marriage of a male over fourteen, or of a female over twelve, was valid. This common law rule continues in States where the statutes are silent, or where they make it the statute law, as in N. H., Va., W. Va., Ky., La. In other States the limits of the age of consent are drawn higher. Thus the law declares the age of consent to be sixteen years in the male and fourteen in the female in Io., N. C., Tex.; seventeen in the male and fourteen in the female in Ill., Ark., Ga., Ala.; eighteen in the male and fifteen in the female in Wis., Minn., Cal., Ore., N. Dak., S. Dak., N. M.; eighteen in the male and sixteen in the female in O., Ind., N. Y., Mich., Neb., Nev.,

Ida., Wy., Ariz.; twenty-one in the male and eighteen in the female in Wash. and Mont. In Nev. males under twenty-one and females under eighteen, and in Md. and S. C. females under sixteen years must first obtain the consent of their fathers, mothers, or guardians. Other restrictions as to age are embodied in statutes in the form of directions to clerks or magistrates or persons empowered to solemnize marriages, forbidding them to issue licenses or certificates to or to solemnize the marriages of persons under a statutory age. Such statutes should be carefully heeded by ministers, although in the absence of nullity clauses they do not always affect the validity of the marriage, but may only affect its legality, and every one should thoroughly inform himself as to the state of the law in the State or States in which he may be called upon to officiate. Such age limits are recommended by reasons of public policy, to protect the young members of society against their own indiscretion and the evil designs or carelessness of others by certain rules, the application of which may easily decide what might otherwise be a very difficult question if the decision should depend upon the investigation of the mental capacity of such young persons in each individual case. The church, which is not endowed with legislative authority, cannot establish such rules, and it may become necessary, where the validity of betrothal is at issue, to base the decision on an investigation of the nature and circumstances of the case, as, f. ex., where a father and mother have prevailed upon a child of tender age to acquiesce in an engagement while real and actual consent may be doubted or denied. In all such cases it must be maintained that without actual and real consent there is no marriage or betrothal; that consent is not the *yea* of the mouth, but the compliance of the will, and that the one may be where the other is not; that volition presupposes a knowledge of that about which the will is concerned, and that there can be no marriage consent without a knowledge of what marriage is. With these principles

before them, those whose task it may be to investigate will know along what lines the investigation will have to proceed in order to ascertain the *facultas consentiendi*.

Yet in these and other cases it must also be remembered that *a posse ad esse non valet consequentia*. The capacity to consent is not tantamount to or proof of actual consent. If it were, then all who are capable of marriage would be actually married, which is absurd. A person may even be all the less inclined to marry the better he or she knows what marriage in general or a particular marriage implies. Consent is essentially an act of the will, and no amount of knowledge, which is essentially a matter of the understanding, can supply what the will alone can afford. Hence, where the will is not permitted to act, but is rather suppressed and overcome by *duress*, which is constraint by force or menace, there is no consent, though the lips have said *yea* where the heart has persistently said *nay*. Even going through a marriage ceremony under compulsion does not *eo ipso* constitute marriage, and a woman who, having for fear of death unwillingly performed her part in a ceremony and subsequently, under the same constraint, submitted to carnal intercourse, would, in the absence of real consent, be still unmarried, not a wife, but a ravished woman. And here it should be noted that duress is not an absolute quantity. The kind and amount of force or menace which may work as constraint in one case may utterly fail in another. What might have left a strong, robust and resolute woman undaunted and in the full exercise of her will, may overpower the will of a weak and timid, irresolute girl so as to wring from her lips what was never in her heart. On the other hand, not every exercise of constraint precludes real consent. If a father would say to the ravisher of his daughter: "Unless you marry the girl, I will have you sent to the penitentiary for rape," the man could not plead duress if he had yielded. He would have suffered no wrong if he had been imprisoned for his crime. He had no right, but only

an opportunity to escape punishment, and the choice between marriage and imprisonment was his own voluntary act.

Actual consent may also be excluded by mistaken identity, *error personae*, inasmuch as marriage consent is not willingness to marry in general, but willingness to marry a certain person. But *error personae* is not a mistake as to *what*, but as to *who* the party is. If a man has consented to marry Anne thinking her the heiress of a large estate, and afterwards learns that her sister Kate is the heiress and Anne is penniless, this is not *error personae*. Nor is mere mistake of name, as when a woman has consented to marry a certain son of the widow Jones and afterwards discovers that his name is Smith, he being a son of his mother by her first marriage. But if the widow had two sons, one Smith and one Jones, and the girl, willing to marry Smith and not Jones, had mistaken the one for the other, this would be *error personae* nullifying the consent, though no intended deception had been practiced by any party concerned.

Consent may, furthermore, be nullified by *fraud*, the deliberate deception of one party by another with or without accomplices. A person cannot be supposed to have willed what had never entered his mind, or to have willed against his will. Being made a party to a marriage ceremony declared to be in jest, and before a magistrate whose official character was denied, did not imply or express marriage consent, though the party who practiced the deception intended marriage. When A has asked B to be his wife and B has declared her willingness to have A for her husband, there is an apparent marriage consent. But when A afterwards learns that at the time of their agreement B was pregnant by another man, A is by such fraudulent concealment justified in declaring that marriage with a woman in such condition had never entered his mind and could never have been his will. But not every deception which may have contributed toward bringing about the consent

of the party deceived is sufficient to nullify such consent, which may have been prompted by other reasons. Where the deceived party, by a neglect of due care in so important a business, stands open to the charge of contributory negligence, the fraud is not sufficient cause to set aside the marriage. Least of all can the deceiving party plead his or her deceit to invalidate the other party's consent. For as no one must be allowed to profit by his own carelessness, so no one has a right to profit by his own wrong. Neither can the party to whom fraudulent statements were made, but who consented knowing them to be false or having reason to doubt their veracity, disclaim the validity of such consent, which was real and actual consent in the face of attempted fraud, consent which, once given, cannot rightfully be withdrawn. Thus the doctrine that fraud which totally excludes actual consent to a particular marriage invalidates such marriage is very simple and plain. But the application of the doctrine is often extremely difficult because of the difficulty of getting at the facts, especially since, as we shall presently see, the consent which was absent at an earlier period may have been given at a later time. Thus a case which has been complicated in the beginning may grow more and more intricate in its progress, until, at last, nobody in the world can say what, perhaps, nobody ever knew, whether there is or ever was marriage in the case or not.

There is no marriage where there is no marriage consent, whatever else there may be. It is only inasmuch as they exclude real and actual marriage consent that duress, error, and fraud are impediments of marriage. Hence marriage may ensue where, in the absence of other impediments, these preventives have ceased to operate. When constraint has been removed or overcome, when error has been detected, when fraudulent words or devices no longer deceive, the will may decide to acquiesce in what has been brought about by duress, fraud, or error, to accept the situation

which it might repudiate, and thus to make marriage what was not marriage before this compliance of the will. A woman may have been inveigled into a relation or condition which, while it is not marriage for want of consent on her part, was intended for marriage by the other party and places her before the alternative of repudiating the marriage at the cost of much annoyance and distress, or of yielding to prevailing circumstances and consenting to the marriage. If she choose the latter, she has made it marriage and cannot afterwards withdraw her consent because of fraud or duress experienced before she gave it. And if, having originally given a *quasi*-consent under compulsion or deception, she afterwards accepts an engagement ring and other presents, allows herself to be presented as the man's affianced, prepares her bride's outfit, and assists in buying the furniture, and all this when constraint was no longer exercised and fraud could no longer deceive, it is reasonable to assume that she has now given real consent and has bound herself when she might have claimed her freedom. What has been looked upon as the most emphatic, perhaps conclusive, confirmation of consent after duress, error, or fraud, is voluntary *copula carnalis*. But this doctrine must be received and applied with caution and restriction. Carnal knowledge may be due to incontinence with or without marriage consent, and though where it has taken place the presumption should not be for the sin and crime of fornication, but for intercourse under marriage consent, if such assumption is possible, yet the fundamental doctrine must stand that *consensus*, not *concubitus*, is the essence of marriage, and the one is not and cannot supply the other. To hold or admit that the status of marriage could be imposed upon or assumed by a non-consenting person would throw the law of marriage and its application into hopeless confusion. On the other hand, while the doctrine stands that where there is mutual marriage consent, and nowhere else, there is marriage, the question of law

remains plain and simple, and whatever obscurity there may be must be sought in the questions of fact. Where these questions cannot be satisfactorily settled, one of two courses only can be pursued. The one is determined by a maxim of expediency, the other by a maxim of justice. The maxim of expediency is, *Semper praesumitur pro matrimonio*. The maxim of justice is, *De occultis non judicat ecclesia*. In the administration of civil government, expediency must often be allowed to prevail. Marriage being a most important part of the groundwork of human society, it is wise and expedient to sustain marriage where it can be sustained, and in doubtful cases a court may find for marriage rather than against it. In the church, wherever the law, the unalterable norm of right and wrong, must be applied, the question can never be, What is expedient? but must always be, What is right before God? Hence, *in foro ecclesiae*, marriage must not be presumed, but must be proved, before a person can be held bound in marriage or guilty of having broken the marriage bond. Where fraud or duress is charged in defense, these charges, too, must be proved before they can serve to justify that for which the defense was set up. Where neither the existence nor the absence of lawful mutual consent can be proved, the church can neither condemn nor justify, but must dismiss the case for lack of evidence, leaving it to God and to the conscience of each party to adjudicate whereof the church cannot judge. This amounts to an acquittal as far as the unsustained charges are concerned, and the parties so accused but not convicted must be treated as if the charges had never been made. But such acquittal is not properly a justification, not a declaration that no duress or fraud on the one part or no breach of marriage consent on the other part had been committed; the questions of fact and the judgment thereon are left to Him who knows all things.

(*To be continued.*) A. G.