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CHRISTIAN ARCHAEOLOGY.

(Continued.)

IV. CHRISTIAN BENEFICENCE.

When, in the early days of Christianity, Christ crucified was preached in Judea and Samaria and Galilee and to Gentiles in Asia and in Europe, the gospel was chiefly preached to the poor. Not that the gospel had been an esoteric doctrine restricted to an inner circle. No, the gospel was preached to the masses. But the masses were poor in the days of Caligula and Nero. There was wealth in the Roman empire, but it was in the hands of comparatively few, and of these not many entered the ranks led by men who had left all and followed Christ. Some there were, such as the city treasurer of Corinth and the councilman of Athens, and the men and women of honorable estate at Berea. But as has been said before,[1] the masses of the early churches were largely recruited from the lower walks of life, and where they were assembled, the poor had the gospel preached to them. In the writings of the apostles to the churches and their teachers we meet with but few admonitions to the rich, simply because there were but few in these churches to whom such admonitions would apply. St. Paul writes to Timothy: *Charge them that are rich in this world that they be not highminded, nor trust in uncer-*

1) P. 12 of the present volume.

MARRIAGE AND DIVORCE.

I. MARRIAGE.

The contract.

(Continued.)

To constitute marriage, the mutual consent of the parties must be a concurrent willingness in both *to be to each other husband and wife in a life-long union*. The willingness of a man and a woman to dwell in the same house, or the willingness of a man, A, to support a certain woman, B, and the willingness of the woman, B, to cook and wash for the man, A, does not constitute marriage, though it may otherwise be a valid contract. They must agree *to be one flesh*.[1] Thus a willingness to be espoused but not to consummate the marriage is not marriage consent, and where real espousals with intent to marry existed, persistent refusal to consummate the marriage by connubial cohabitation is tantamount to a withdrawal of the marriage consent, or a species of desertion. Thus, also, a profession of marriage consent by a person who knows himself or herself permanently unfit for sexual intercourse and inveigles the other party into a union which can never become consummated marriage, is not real marriage consent and does not superinduce the state of marriage. But while incurable impotence existing and unknown to the other party at the time of marriage so called may operate as a badge of fraud, or may make such marriage void[2] or voidable[3] by statute, its bearing upon the validity of marriage is such that in most states it has been made a ground for divorce by statute and had better be considered under that head.

The marriage consent must, furthermore, contemplate a permanent connubial union, a union for life. An agreement to cohabit for five years, or as long as both parties may

1) Gen. 2, 24. Matt. 19, 5. Eph. 5, 31.
2) N. J., Va., N. C., Ky., Tex., Ga.
3) Vt., N. Y., Mich., W. Va., Ark., Cal., Ida.

desire, is not marriage. The permanence of the union being of the very essence of marriage, no special agreement as to this point is necessary where marriage is professedly intended, and the words of the marriage ceremony, "as long as you both shall live," are not essential to the validity of the marriage. But any special stipulation to the contrary is void or renders the marriage void.[1]

The consent, in order to constitute marriage, must be known to the parties as actual and mutual consent. That A should desire B for a wife and B desire A for her husband does not constitute marriage. There must be an offer and an acceptance here as everywhere to make a contract. Marriage is not the tacit or expressed willingness of one party followed at some time by the tacit or expressed willingness of the other party, the two halves constituting a whole. It is the concurrence of the offer and the acceptance which makes the parties husband and wife. When a man proposes marriage to a woman, the proposal does not make him the woman's husband and does not make that woman his wife. Getting a wife is not a game of tag. If the woman is free to accept or reject an offer of marriage, the man must also be free until his offer has been accepted, and if he withdraw his offer before it is accepted, there is no breach of a marriage bond. Neither is it correct to say that the man's offer makes him a husband and the woman's acceptance makes her a wife. If it did, the man would be a husband before the woman became a wife, which cannot be, since there can be no husband where there is no wife. When a man honestly proposes marriage, he intends to become a husband. But while he is not actually a husband, that is, before his offer has been accepted, he may change his mind. Circumstances may arise or come to his knowledge which may determine him either not to marry at all for the time being, or not to marry the woman to whom he has proposed, and if, for reasons sufficient to himself, he decides to revoke

1) Matt. 19, 3—6. Gen. 2, 24. Rom. 7, 2 f. 1 Cor. 7, 39.

his offer before it was accepted, he may communicate notice of revocation and thus cancel his offer. If a time has been fixed within which the offer shall be accepted or refused, the offer lapses at the expiration of the stipulated period, and notice of its revocation communicated before the expiration of the period terminates the offer. Such withdrawal, if made for good and sufficient reason, is morally proper, and even if without just cause, though it be a breach of good faith, a culpable rescission of an agreement, it is not a breach of a marriage bond, as what does not exist cannot be broken.

Again, marriage consent, in order to constitute marriage, must be *unconditional*. Conditional consent may become but is not *de facto* consent. Otherwise the condition would not be a condition, a presupposition on which or the realization of which the realization of the thing thereon conditioned must depend. A conditional agreement is so far from being an actual agreement, a *de facto* concurrence of two wills in the same thing, that the condition rather enters in between and separates the offer and the acceptance, this being the very object and purpose of the condition, to prevent or avoid a final agreement before the question as to the condition has been settled to mutual satisfaction. A conditional marriage consent is an agreement that there shall be *no* marriage unless or until the condition or conditions shall be fulfilled and known to be fulfilled.

Conditions may be attached to the offer, or to the acceptance, or to both. The acceptance of a conditional offer regardless of the condition, or a conditional acceptance of an unconditional offer, is not *de facto* acceptance. The conditional offer implies the refusal to receive or entertain an acceptance unless the condition be fulfilled, and where this refusal is ignored, there is no concurrence of the two contracting minds, no actual consent. The conditional acceptance of an unconditional offer is tantamount

to a refusal to accept such offer as it stands, or a refusal to accept it at all unless a condition or several conditions be fulfilled. "Yes, if—" is substantially the same as "No, unless—," and is certainly not actual consent, not a real acceptance of an offer. When a woman answers a proposal of marriage by saying, "Yes, if—," this is in substance a rejection of the offer made to her and the substitution of a new offer, which the party to whom it is made may accept or reject. To exemplify: John, an officer in the navy, asks Jane, "Will you be my wife?" Jane answers, "Yes, if you will quit the navy and become a partner in my father's bank." Here we have a real and actual proposal, John, the naval officer, offering himself as a husband to Jane. But Jane's answer is not an acceptance. It does not make John an accepted suitor. On the contrary, his offer, as it stands, was rejected by an answer which says that the woman will *not* have John, the naval officer, for a husband. But while she has refused to accept his offer, she has made him a new offer by declaring her willingness to take John the civilian and the banker, and he has now the option of either accepting or declining her proposal, which is, however, a conditional offer and can be accepted only by clearing the conditions. John might now say, "I will meet you half way. I will leave the navy, but I will not be a banker. I will take up the profession of a civil engineer. Will you then be my wife?" This, too, would be a refusal of the offer now under consideration, and a new conditional proposal, which Jane might either accept or decline. During all this time, John is no more a husband than Jane is a wife, and if they keep on making conditional offers and conditional acceptances, they will both die as single as they were born. Even where the condition attached to an offer or an acceptance might be declared already fulfilled, it will operate as a condition and leave the other party free to concur or refuse to concur. Thus, if John had asked Jane, "Will you be my wife?" and Jane should answer,

"Yes, if you are worth over fifty thousand dollars," the fact that John were a millionaire would not make that answer an acceptance. For while there is an *if*, a condition, in the woman's mind, there is no *de facto* acceptance, and there being yet no mutual consent, the man would still be free to withdraw his proposal after learning that the woman would not have him as he had offered himself, regardless of his value in dollars and cents.

Where in case of a conditional offer the condition was dropped before the proposal was accepted, or where after a conditional acceptance the condition was dropped while the proposal was upheld, the unconditional offer and the unconditional acceptance constitute the contract, actual mutual consent. On the other hand, a condition added by either party after the unconditional acceptance of an unconditional proposal is of no significance and cannot rightfully undo what has been established by the mutual consent.

There is one condition to make or waive which is not within the choice of the parties, but which is imposed by the moral law when God says, *Thou shalt honor thy father and thy mother.* Children whose parents are living and in sound mind are not *sui juris*, free to give themselves away regardless of the parents' will. To give a daughter in marriage is a parental right which must not be set aside.[1] Other conditions may be dropped at will by the party who made them; but an agreement conditioned on the *consensus parentalis* can become valid and binding only by the clearing of the condition by the parental consent to or acquiescence in the will of the parties proper to be man and wife. There is but one consideration which can ratify a marriage to which a parent persistently objects, viz., when such objection is explicitly or implicitly tantamount to a total prohibition of marriage imposed upon a son or daughter, in violation of the word of Scripture, *To avoid fornication, let every man have his own wife, and let every woman have*

1) 1 Cor. 7, 38.

her own husband.[1]) And it should be noted that parental consent once granted cannot be withdrawn after the espousals sanctioned thereby have become in form and substance a mutual marriage consent, or if it be subsequently withdrawn, such withdrawal cannot invalidate the marriage.

When the existence of an unpurified condition is alleged by the one party and denied by the other party, the burden of proof must ultimately rest with the party alleging the unconditional consent, not with the party alleging the unfulfilled condition. For inasmuch as the parties were undoubtedly free in the absence of actual mutual marriage consent, they must be considered free until they have been proved mutually bound by unconditional marriage consent, and the party alleging the marriage must furnish the proof. Here as elsewhere circumstantial evidence may serve the purpose. Thus, accepting and wearing an engagement ring, permitting herself to be presented to others as a certain man's affianced, making preparations for the wedding and purchases for housekeeping, would seem to leave little or no reasonable doubt as to the existence of unconditional marriage consent. Yet even such *prima facie* evidence may not be conclusive. A condition made and upheld may have been looked upon as fulfilled, while it was not. Fraud on the one side or contributory negligence on the other may complicate the case, and the most careful sifting and weighing of the evidence may fail to establish beyond a doubt the one thing which must be proved to establish marriage, the actual marriage consent.

The celebration.

The celebration of marriage comprises all the formalities, religious, civil, or social, whereby the existence of actual and lawful marriage consent between the parties and the right and propriety of their conjugal cohabitation are publicly declared and acknowledged before the church, the

1) 1 Cor. 7, 2.

state, and society at large. These formalities, whether they be religious, or civil, or social, do not make the marriage, either whole or in part. The parties may be married without a celebration, or they may be unmarried though they may have gone through all the formalities which would constitute a celebration but for the absence of what properly constitutes marriage. Yet it seems that among all nations, civilized and barbarian, among Jews and Gentiles, it has been deemed proper or expedient to mark the act of marriage by certain rites or observances whereby it should be made known that a certain man and a certain woman would and should be thenceforth considered husband and wife, and volumes have been filled with the descriptions of these national or sectional usages connected with the assumption of the married state.

The first marriage recorded was attended with a celebration, words of divine blessing, wherewith *God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth.*[1] This blessing was never intended for others than married people, and was, therefore, pronounced over our first ancestors when God had joined them in wedlock. Even the heathen Greeks and Romans celebrated their marriages with solemn sacrifices and other religious rites, and it is certainly meet and right that the marriage of Christians should be solemnized with religious ceremonies, should be *sanctified by the word of God and prayer.*[2] And again, it is a most improper demand upon a minister of the church that he should pronounce or invoke divine blessing upon a marriage contracted in open violation of the holy will of God. A religious solemnization of marriage, while it is not a sacramental act and does not make the marriage, is a public and solemn recognition and declaration of the marriage so celebrated as being valid and legal according to the law of God and in *foro ecclesiae.*

1) Gen. 1, 28. 2) 1 Tim. 4, 5.

In some churches the publication of banns (*Aufgebot*) with intercessory prayer in public worship is practiced as a preliminary to the celebration proper. Of this custom the law in several of our States takes cognizance as standing in lieu of a license; and where such is the case, the banns must be read in some church within the hundred (or county, except in Delaware) of the bride's residence on two Sundays, as in Ohio and Delaware, or on three Sundays, by some minister residing in the county, as in Maryland, and in the latter State the church in which banns are read must be duly recorded as such in the office of the clerk of court, or the banns are not good.

So also the religious celebration proper, the ceremony in the course of which the parties declare their marriage consent and are pronounced husband and wife by the officiating minister, is recognized by all the States of the Union according to the Statutes of the several States. But in most States, a minister, or preacher of the Gospel, to be authorized to solemnize a marriage, must have been ordained (or "licensed," as in Ct., Tex., Col.) according to the usage of his church or denomination; so in N. H., Mass., Me., Vt., R. I., Ct., N. J., O., Ill., Mich., Wis., Io., Minn., Neb., Md., Del., N. C., Ky., Tenn., Mo., Ark., Tex., Nev., Col., Wy., Ala., Miss., Fla., N. M., Ariz., D. C. In some States he must be licensed to marry; so in Me., O., Wis., Minn., Kan., Del., Va., W. Va., Ky., Ark., Nev., Ala., D. C. A minister will be so licensed on giving proof of his ordination and a bond, as in Va., W. Va., Ky. In Wis., Minn., Ark., Nev., he must file a copy of his credentials of ordination, or other proof of his official character, with the clerk of the Circuit Court (or the recorder of deeds, as in Del. and Ark., or the judge of probate, as in O.) of some county in the State, who shall record the same and give a certificate thereof. In Wis., Minn., and Ark., the place where such credentials are recorded must be indorsed upon the certificate of marriage and recorded with it. In D. C.,

the license is issued by the clerk of the Supreme Court, in Me., by the governor. In N. H., Mass., Vt., R. I., O., Ind., Mich., Ore., Wash., Mon., the minister must be a resident in the State, or, as in Vt. and Mich., he must be statedly laboring in the State as a minister or missionary. In Mo. he must be a citizen of the United States.

In most States, a special permit to solemnize a particular marriage is required by statute and issued in form of a *License*. This certificate is generally a permit for any person authorized to perform marriages, allowing such person to join in marriage the parties named in the License, and to perform such marriage in the town or county named, or in any town or county where he is authorized to solemnize marriages. Other directions, as to recording the marriage or issuing a certificate of marriage to the parties, are generally printed on the certificate of license for the information of the officiating minister or officer.

A celebration is now prescribed by the statutes of all our States. But the question has been largely discussed whether these statutes must be construed as mandatory or as directory only. Says Bishop:—"The principle is by no means universal, that, when a statute commands a thing to be done in a particular way, it is void if done in any other way; sometimes it is, not always. A statute construed as mandatory makes it void, not one interpreted as directory. And in considering whether or not a provision is to be deemed of the one class or of the other, not only its words, but the nature of the subject, should be taken into the account. Marriage existed before the statutes, it is of natural right, it is favored by the law. Hence, in reason, any commands which a statute may give concerning its solemnization should, if the form of words will permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void what is done in disregard thereof. Consequently the doctrine has become established in authority, that a marriage good at the common law is good notwith-

standing the existence of any statute on the subject, *unless the statute contains express words of nullity.*''[1] And Stewart says:—''Unless such statutes state that marriages not in conformity with their provisions shall be void, such marriages are valid if valid by the pre-existing law. Kentucky is the only State in America where the marriage statutes as to celebration contain words of nullity. Disregard of such statutes, however, renders the parties concerned liable to fine and other punishment.''[2] In only three States it is perfectly settled that a celebration is necessary to make marriage valid before the law, in Kentucky by statute, and in Maryland and Massachusetts by pre-existing law. In some states the law is in so unsettled a condition that a case coming up might be decided either way. In Ala., Cal., D. C., Ga., Ill., Io., La., Mich., Minn., Miss., Mo., N. H., N. J., N. Y., O., Pa., S. C., Wis., the decisions are that no celebration is necessary to make a marriage valid where the parties have taken one another by mutual consent with the understanding that they are thereby husband and wife. But while in peculiar cases it may be of great value to know this, lest persons be charged with and disciplined for concubinage or fornication while they actually lived in wedlock, yet all Christians should know that it is their duty, for conscience' sake, to observe the laws under which they live, mandatory as well as directory. Besides, it may be difficult to maintain the existence of marriage in the absence of a celebration in a given case. Thus, if a couple who were engaged to be married had cohabited or had sexual intercourse while they were looking forward to a regular marriage with a ceremony, or while they looked upon their intercourse as illicit before the law, the state would refuse to consider them married and would stamp their intercourse extra-connubial and their offspring illegitimate.

The essentials of a celebration of marriage, then, are, 1) two parties competent to marry one another and willing

1) Marr. & Div. I, § 283. 2) Marr. & Div., § 91.

to be married by such celebration; 2) a third person, the celebrant, who must not only be present, but attend as the celebrant; and 3) an act whereby the parties to be married express their present marriage consent and the celebrant takes notice thereof and pronounces them husband and wife. No particular form is required. But the parties cannot marry themselves by reading a form; the celebrant must be a third person. For the same reason a minister cannot marry himself.

The celebration is good, even if the celebrant should neglect one or several of the formalities prescribed by the law, though such neglect may expose the offender to fine or other punishment. Thus, if a minister had solemnized a marriage before he had filed his credentials of ordination, or if he failed to make the return or record of the marriage when celebrated, such marriage is valid if contracted in good faith by the parties, though such neglect of the celebrant may cause difficulty in proving the marriage.

The consummation.

The consummation of a marriage is the actual assumption or exercise of the rights and performance of the duties of husband and wife, especially, the conjugal cohabitation of the parties or sexual intercourse between them. Such intercourse does not constitute the marriage, nor a part thereof. *Consensus, non concubitus facit matrimonium.* Of course, the *consensus* which constitutes the essence of marriage, must be marriage consent, the willingness of the parties to be one flesh with each other. But the exercise of the right and the performance of the duty of sexual commerce are functions based upon the consent which renders such intercourse legitimate.[1] The refusal to grant such intercourse is, under ordinary circumstances, the denial of a right and the neglect of a duty assumed by marriage,[2]

1) Gen. 2, 24. Matt. 19, 5. 1 Cor. 7, 2—5.
2) 1 Cor. 7, 2—5.

but does not in itself invalidate the marriage. A marriage may be valid, though one of the parties refuse to have or grant intercourse, or abandon the other at once, though such refusal or abandonment, if persisted in, may lead to or constitute a rescission of the marriage bond created by the marriage consent.[1])

That the act which, in the presence of marriage consent, is the consummation of marriage does not constitute marriage or a part thereof is also apparent when we remember that the same act in the absence of marriage consent is not marriage but rape or fornication. Thus when Shekem had defiled Dinah, she was not thereby his wife, as appears from his subsequent and unsuccessful endeavors to obtain her for his wife.[2]) According to the Mosaic law it became the duty of a man who had violated a virgin to make her his wife,[3]) which again shows that by carnal knowledge she had not become his wife. Even seduction with a promise of marriage does not constitute marriage. Though an obligation to marry the woman whom he has so seduced accrues to the seducer, yet the parents of either party may have sufficient reason to refuse their consent, and the subsequent marriage of either party with a third person is not adultery or bigamy, but valid marriage, which must not be set aside, unless it be invalidated by other reasons. The consummation is *lawful* sexual intercourse, lawful because between persons who are, at the time of such intercourse, husband and wife. Intercourse between parties who intend to become husband and wife after such intercourse, and which the parties know to be illicit, is not consummation of marriage, but unlawful intercourse, or simply fornication. Where present marriage consent is given after the *copula*, the state of marriage begins with the consent, not with the *copula*, though the issue conceived or even born before the subsequent marriage is thereby made legitimate.

A. G.

1) 1 Cor. 7, 15. 2) Gen. 34, 1 ff. 3) Deut. 22, 28 f.