Church Law and State Law.

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IN the much-discussed Banister-Thompson case, it has been decided that it is not legal for an incumbent to refuse the Holy Communion to those who have taken advantage of the Act legalizing marriage with a deceased wife's sister. The decision has caused grave searchings of heart among Church-people. The ground of this *sæva indignatio* is the supposed attempt of the State to dictate the terms on which the Church of England is to admit her members to Communion. The situation is not without its grim humour. At the time of the passing of the Act in question, not a few were found to hint darkly that much of the driving force behind the agitation in its favour was supplied by those who foresaw such a development, and for various reasons wished to bring it about. Whether this be a libel or no, the pit has been dug, and, like Gabriel Oak's flock on a famous night, the obedient sheep are tumbling over one another in their eagerness to precipitate themselves therein.

Now, let it be admitted at once that if the protesters' view of the situation were correct, their protest would be almost unanswerable. It would be disastrous tamely to allow the State to override the laws of God or even the real law of the Church, and to compel the admission to Communion of those who had committed a flagrant breach of both. The whole question at issue is: Has this really happened?

We may lay down one or two general principles which will meet with wide, if not universal, assent.

1. It is impossible to overrate the paramount importance of preserving the purity of marriage and of family life; the writer would regard this as fundamental. But there may be differences of opinion as to how this end may best be attained.

2. The Church has the right to determine and enforce the law of God; but, being in fact divided, it can no longer speak

with a united voice, so far as its formal pronouncements are concerned. Besides the great local divisions, there are cross-divisions in the same country. Not only may the Church say one thing in Italy and another in England; but the different religious bodies in England may give varying verdicts on the same question. This fact lessens considerably the authority of the voice of the Church. A clear and authoritative pronouncement of a united Christendom on a question of morals would have tremendous weight; we might fairly claim that a Christian State should accept such a pronouncement. But not only do the "unhappy divisions" of the Church detract from its influence in the eyes of the world; to a less extent they affect the authority with which it can speak to its members. Of course there are in certain Communions some who will hold that their own Communion is the only authentic organ of the Spirit, at any rate in their own country, and they will not be influenced by the fact that the voice of their Church is, in fact, the voice of only a fraction of Christendom. But many who believe quite firmly in the position of their own Church, as being on the whole the soundest, believe also that other Communions are living branches of the Church; they will listen to what the Spirit says to and through these Churches, and will not be inclined to lay too great a stress on any pronouncement, which, though it may express the mind of their own Communion, does not commend itself to the Christian conscience as it expresses itself elsewhere. As loyal members of their Church they will bow to the decision, but they will not be too positive of its correctness; they will claim no sort of infallibility for it. Under these circumstances they may be ready to see in the existence of a Christian State the compensating gift of Providence. They will regard it as focussing the consciences of the various Churches, and speaking, at any rate on some points, with an authority which, singly, they can hardly claim for themselves.

3. At the same time, we must admit that each religious community may fairly claim the right to enforce its own terms of Communion, and lay down for its members its interpretation

of the "law of God." The question will be to what extent it will be wise for it to do so.

4. There are some questions of morals on which the Christian and civilized conscience has arrived at what may be regarded for practical purposes a final and "absolute" decision; there are others on the border-line, where we cannot speak of an absolute right and wrong. On the former class of questions the Church *must* have its law, whether implicit or definitely formulated; on the latter, it *may*, but if it sees fit, it *need not*. It will simply be a question of expediency as to whether it cannot on these border-line matters accept the decision of a Christian State.

Is marriage with a deceased wife's sister contrary to the "law of God"? This question was discussed *ad nauseam* before the passing of the Act which legalized it, and the answer was so decisive that it might seem unnecessary to labour the point further. We need not raise any question as to the "absolute" validity of the Mosaic law, since the old interpretation of the passage in Leviticus which used to be quoted as forbidding the marriages in question is now abandoned by every competent scholar. It simply prohibits a special form of polygamy, the marrying of two sisters at the same time. There is no other passage in Scripture bearing directly on the point—except the story of Jacob! The law of the Church has varied with regard to these marriages, and the general conscience of Christendom gives no decided answer as to their morality. To quote the words of the Archbishop of Canterbury: "There are many good Christian men who believe that these marriages, now sanctioned by the law of the land, are also compatible with what they regard as a true interpretation of the teaching of Scripture, and even of the Early Church, respecting marriage." But perhaps the most decisive answer, from the point of view of many of the objectors, is to be found in the attitude of the Roman Church. There dispensations are freely granted for these marriages, practically, it would seem, as a matter of course, as soon as formal application is made—and, presumably, the proper fee is paid. This implies that they are not considered as contrary to

the "law of God." If they were, no Bishop or Pope could give a dispensation for them, any more than could Parliament. This very awkward fact makes completely untenable the position of those who claim that "the Church" considers these marriages "absolutely" wrong. There are some who in many points are ready to out-Roman the Romans. It is so in this case; it is curious to speculate as to how the extremist would treat Romans married under dispensation who afterwards joined the Anglican Communion. If the marriage is incestuous they must be repelled from the altar, in spite of the fact that a great branch of the Church has sanctioned their action; if they are not repelled, it is admitted that the marriage is not absolutely wrong.

It may be well to state quite clearly that there are prohibited degrees within which marriage should be considered as absolutely and always wrong, and therefore forbidden by the law of any Church. The direct teaching of Scripture, reasonably interpreted, the practically universal consent of the civilized conscience, and the teaching of physiology and sociology, agree in this conclusion. But there is a border-line where the advisability of intermarriage is an open question. The marriages we are considering stand on this border-line. Many people fear that to admit the existence of such a border-line is in the end to sweep away all prohibited degrees, and to deny the ultimate distinction between right and wrong. The fear is groundless. Because you are not sure whether some marine growth should be called animal or vegetable, you are not driven to admit that there is no difference between a horse and a horse-radish; or because you admit a cat into your drawing-room, you are not bound to make a pet of a tiger, merely because it belongs to the same genus. There is, indeed, a good deal to be said for the position that the decision of what marriages on this border-line should be allowed is ultimately a question which should be left to the physiologist and sociologist; the Church should concentrate her attention on preserving the purity of the marriage once it has been formed. Was not this implicitly the attitude of Christ? He was, as we know, questioned on one

occasion about the case of a woman who had successively married seven brothers. No doubt the primary object of the question was to entangle Him in a difficulty as to her position in the Resurrection life. But it is most probable that His critics were also trying to draw from Him some pronouncement as to the advisability of the Levirate law which ordered such marriages. Its validity and application were keenly debated in the Rabbinical schools of His day. At any rate, in His answer He pointedly ignores this side of the problem, though there was an obvious opening for a pronouncement, if He thought that teaching was needed. Nowhere does He discuss the degrees of marriage, nor do His immediate successors, except St. Paul, when in 1 Corinthians he deals with a clear case of incest. Contrast the attitude of Christ on the divorce question. When that is brought before Him He answers unhesitatingly and decisively. Surely, then, we are justified in distinguishing between breaches of the marriage-tie and cases of incest on the one hand, and the debatable ground of the precise degrees within which marriage is to be forbidden on the other. The one class is covered by what have become to us the rules of an absolute right and wrong; in the other we may fairly be guided by experience and expedience.[1]

Many will admit the force of these considerations, but they feel a difficulty as to the "law of the Church." Now, it is well to emphasize the fact that the State has in no way tampered with the rubric governing the refusal of Communion. It has simply decided that certain people do not come within its scope. It has not said, "You are to admit evil livers to Communion," but, "These people are not open and notorious evil livers." But has not Parliament tampered with the marriage-law of the Church, and practically repealed one clause of it without her concurrence? We ask, What is this law of the Church, and where is it to be found? For us of the Church of England it

[1] The Report of the Lambeth Conference (1908) points out that in the United States the Church has no list of prohibited degrees, these being left to be dealt with by each State.

can only be that part of the pre-Reformation Canon Law which has been in some way deliberately adopted by her and enshrined in her formularies. To rest on some arbitrary selection from the vague floating mass of Canon Law, with its out-of-date absurdities, its mediævalisms and contradictions, is unjustifiable both in common sense and in law, and is clean contrary to the principles of the Reformation. Very well, then; but what about the "Table of Kindred and Affinity," printed on the last page of our Prayer-Book, and exhibited in our churches? The marriages in question are clearly forbidden in that. It is worth while looking closely at its exact wording and authority. It speaks of those "who are forbidden *in Scripture and our laws* to marry together." Marriage with a deceased wife's sister is not, as we have seen, forbidden in Scripture, nor is it *now* forbidden in "our laws." The reference in the last words is clearly not to the Canon Law, but to the selection from it which had been made by Parliament. To quote Professor Maitland:[1] "From 1540 onwards the marriage-law which they [the spiritual courts] administer is in great measure dictated by an Act of Parliament which has at one stroke, and with many opprobrious words, consigned to oblivion vast masses of intricate old Canon Law relating to consanguinity and affinity." Or, in the words of the Lambeth Conference Report: "The law embodied in the Table is *based upon earlier Statute Law* (32 Henry VIII., c. 38)." The Table, then, does not pretend to be an independent pronouncement of the law of the Church; it may be regarded as simply a summary of the law of the land, which itself purported to be based on Scripture. This view is borne out by the history of its origin. It was, in fact, set forth by Archbishop Parker on his own initiative, in 1560, and afterwards inserted in the Prayer-Book without authority. It does not, as many would naturally presume, represent "the mind of the Church" deliberately and

[1] The passage from which these words are taken is quoted at length by Canon Henson, "The National Church," p. 150. I am indebted to the same source for much else, particularly on the Canon Law, and would refer my readers to the Canon's clear and, to my mind, unanswerable discussion of the whole subject.

formally expressed by its representatives in Convocation or elsewhere. It is true it was adopted by the Canons of 1604, and those who speak of "Church Law" in this connection are ultimately driven to rest their case on them. They are not a strong basis. A discussion of their origin and precise validity would be long and technical; nor does the present writer feel competent to undertake it. But the following points seem clear, and are quite sufficient for our purpose. At the most they are only binding on the clergy: The Lambeth Conference of Bishops (1908 Report, p. 142) admits that Canon 99, which deals with prohibited marriages, "binds the clergy, but does not *proprio vigore* (in law as distinct from conscience) bind the laity." Again, it is pretty generally admitted that the Canons have no validity whatever where they are opposed to Statute Law; and, in fact, many of them are practically obsolete. It is, indeed, ludicrous to see how some of our friends have recourse to their own selection of them in the ecclesiastical squabbles of the day, while they conveniently ignore the rest.

The fact is that much confusion is caused by using such terms as "the law of the Church" or "the law of Christ" in two senses. They sometimes mean the ideal code—the principles of the Christian life; the law of the Sermon on the Mount or the law of love are obvious examples. We may be quite ready to admit that the marriages we are considering are . . . as being possibly inexpedient . . . offences against Christian law as so understood. Law in this sense is a ruling principle for the individual conscience; its observance is a proper subject for the exhortations of the clergy; breaches of it are sins which must be brought home to the conscience of the offender, and be atoned for by confession to God, and, where possible, reparation. But they are not properly questions for external discipline; you cannot excommunicate the man who breaks the law of love.

But law is also used in a narrower sense of a body of rules, sanctioned by a legislative authority, and enforced by courts of some sort, breaches of it being punished by definite external

penalties. The real question is the relation in which Church Law in this sense stands to the law of the State. We may take as our starting-point a paragraph from the annual letter of the secretary of the English Church Union, which has been widely quoted, and has led to much wild language. "The issue[1] can be easily appreciated from a question put to the Attorney-General in the Divisional Court by Mr. Justice Darling, as follows: 'You must admit that your argument involves this, that the moral law alters from time to time according to the will of Parliament. Suppose Parliament declared that murder was not a crime, could the priest refuse to communicate the murderer?' The Attorney-General answered in these words: 'He could not. Some old-fashioned people might be offended, but the murderer must be admitted.'" No doubt this is one of the *obiter dicta* of the trial, to which the Archbishop of Canterbury recently referred;[2] it has not necessarily the force of law. But it raises the issue in an acute form, and, without presuming to suggest what was actually in the minds of the eminent legal authorities concerned, we may analyze the possible implications of the position taken up. If Parliament legalized murder, is the murderer to be admitted to Communion? What does the question really mean? If it supposes the State to sanction all forms of killing, the reply is obvious. A State which did that would put itself outside the pale not merely of Christianity, but of civilization. No Church could have any sort of commerce with such a State; it would be the duty not only of the Christian, but of every civilized man, to work by every legitimate means for its overthrow. The supposition is grotesque enough, but it is of value in helping us to face the real position, which is surely this: If the State were to legalize widely acts condemned, not only by the clear teaching of the Bible, but by the civilized conscience,[3] the question of Establishment and Church Law

[1] The reference, of course, is to the Banister-Thompson case.

[2] Letter to Dr. Inge (The *Times*, February 8, 1910).

[3] Some will be ready to say this has already been done by the divorce laws; the State allows the remarriage of divorced persons. But with regard to the marriage of the innocent party, we are again on admittedly debatable

would enter on a new phase. The State would have become definitely anti-religious and immoral. Needless to say there is no indication of such a thing in England. Matters of debate are all on the dividing-line where Christians themselves differ in opinion. In these things the law of the land must be acquiesced in so far as the "law" and discipline of the Church are concerned. It may try to influence the law of the land, and propound its own higher ideal to the world, and still more to the conscience of its own members, but it cannot treat those who on disputed questions of ethics obey the law of the land as notorious evil-doers, and claim to visit them with external penalties.

It is, however, possible that what is in the minds of those who talk about "the admission of murderers to Communion" is the case where the State may decide by its courts that a certain person does not come within the definition of "murderer." A Cabinet Minister might kill a Suffragette, and a jury bring in a verdict of "justifiable homicide," and yet a not inconsiderable body of opinion might hold him morally guilty. What is the Church to do in such a case? Is it to accept the verdict? Undoubtedly, so far as its official attitude is concerned. The only body which has authority to give a decision has done so. The State has not said, "You are to admit murderers to Communion"; it has merely said, "So-and-so is not a murderer." The verdict may be wrong, but it must be regretfully acquiesced in. In point of fact, unsatisfactory verdicts of this nature are given continually in the case of suicides. The Christian conscience revolts at the use of the Burial Service in many

ground; the authority of Christ's words as they stand may be claimed for the permission; only a "Higher Critic" has really any right to take the stricter view. With regard to the guilty, surely the position of the State is this: For the sake of the children, and legal questions affecting property, and so on, it is better to recognize facts, however much we deplore them, and legalize the union which would probably take place in any event. The Church is allowed to treat the parties as evil livers, and the best social opinion of the day agrees with her in doing so. Whether the action of the State is right or wrong, it does not, *in intention*, violate the sanctity of marriage. It merely considers a certain course of action as being, on the whole, the least inconvenient way of dealing with some very regrettable facts.

cases, where a weak-kneed jury has brought in the usual verdict. But so long as the rubrics remain as they are, there can be no alternative but to accept that verdict, unless the Church is to try the case over again. It is obvious that a formal verdict, however wrong-headed, cannot be set aside by the incumbent or the Bishop, acting on hearsay evidence and general impressions. The present position is perfectly clear; the State does not compel the clergy to bury those guilty of *felo de se*, but, by the action of its juries, encouraged by a sentimental public opinion, it removes from that category many who should probably be included in it. The parallel with what has happened in the Banister-Thompson case is obvious; we repeat once more, it has simply been decided that a certain class of persons cannot fairly be included in the category of open and notorious evil livers.[1] Surely, even if the Church were disestablished, and the rubric remained unaltered, they would still have to be admitted to Communion, on pain of an action for libel, or something of the sort.

No doubt the retort will be made that, if we were disestablished, we should alter our rubrics freely, and define our terms of discipline so as to exclude explicitly offenders of this type; the members of our Communion would probably be compelled to bind themselves to abide by the decisions of our ecclesiastical courts, so long as they retained their membership. They would, in fact, contract themselves out of certain of their civil rights in order to secure their ecclesiastical privileges. Exactly; this is the issue to which we have been working all along. The claim to have a separate Church Law on social questions, pushed to its logical and necessary conclusion, can only mean this. It means a complete code of Church Law, with an organized system of Church courts. You cannot have a law with external penalties without recognized and impartial tribunals to try each individual case. Let us face this conclusion, and realize what it implies. Has the past history of ecclesiastical

[1] In this case it has probably decided rightly, and this makes the duty o obedience even clearer than it is in the case of the burial of suicides.

courts been such that we would readily revive them? Have not the conflicts between the civil and spiritual courts been a source of endless confusion? Where the two exist side by side there must be a condition of unstable equilibrium. The State could not allow a powerful corporation, such as the Church of England would be, even when disestablished, to ignore the decisions of its courts. Such an *imperium in imperio* would be fatal. Either the Church would be crushed, or the State, and that would mean political power in the hands of ecclesiastics once more, a new "Holy Roman Empire."

Further, it may fairly be asked whether this desire for ecclesiastical courts on social questions (and let it be repeated that a distinct Church Law must in the end imply Church courts) is not contrary to the spirit of the New Testament? It is a commonplace to point out that Christ, St. Paul, and St. Peter all insist on a willing and whole-hearted obedience to the State, whenever it is not directly opposed to the law of God, and that this State was the heathen Roman Empire. *A fortiori*, it is our duty to obey now. It is really difficult to keep one's patience when one reads the language sometimes used about Parliament, as "un-Christian," as largely consisting of Jews, Unitarians, Agnostics, and the rest of it. It is perfectly true that a large proportion of its members are not adherents of the Church of England, but from an ethical point of view Parliament is far from un-Christian. On moral and social questions, it represents as a whole a steadily rising standard. We have no right whatever on such matters implicitly to confine "the Christian conscience" to members of the Church of England! It is represented quite as truly by Nonconformists, as well as by many who would not call themselves Christian at all, simply because the moral atmosphere they breathe is impregnated with centuries of Christian teaching. On a question of ethics, the view of a Henry Sidgwick may be as high and as Christian in spirit as that taken by any Bishop on the bench. And our administration of justice is as a whole the envy of the world; the historian would probably admit that there has never been a

system of ecclesiastical courts which could compare with it for a moment. This side of things needs emphasizing; it is what Dean Church would call one of "the gifts of civilization"; to the Christian it represents the working of the Spirit of God. No doubt there is room for improvement, and it is our duty as citizens to work for that. What we should not do is to sneer at it and despise it as merely "secular." We have no business lightly to cast such a gift aside, and to presume in the face of the teaching of history that the Church could build up something better.

Of course it is, as we have already admitted, quite conceivable that a different state of things might arise; our social and legal system might become, on its ethical side, definitely un-Christian, leaving the Church no choice but to sever its connection with it as far as possible, and to risk the evils attendant on a double system of courts. But there is no sign in England of any such development at present. *Nec deus intersit nisi dignus vindice nodus.* The crisis to-day does not justify any such *deus ex machina* as the establishment of separate Church Law and courts to deal with ethical questions. Parliament has ignored no absolute principle of right and wrong; it has simply taken one side (possibly the wrong side) on a disputed point of morals. If the Church values good citizenship, she must acquiesce so far as her discipline is concerned. She may still discourage the marriages of which she disapproves, by appeals to the conscience, and by insisting on the higher ideal law (principles, not code) of Christ.

It may be well, in conclusion, to say a few words about the Report of the 1908 Lambeth Conference of Bishops, which, to a great extent, bears out the contentions of this paper.

As is pointed out in its "Encyclical Letter" (p. 38), it has made no direct pronouncement on the difficulty created by our recent legislation with regard to marriage with a deceased wife's sister, on the ground that this type of question must be dealt with separately by each Church. But the report of the Committee appointed to consider marriage problems has some

important remarks on the subject (pp. 139 *ff*). It admits that in England, "as a matter of legal obligation, the unrepealed prohibition now, strictly speaking, binds the clergy only." It proceeds as follows: "In any case, we are of opinion that marriage with a deceased wife's sister, where permitted by the law of the land, and at the same time prohibited by the Canon of the Church, is to be regarded, not as a non-marital union, but as a marriage, ecclesiastically irregular, while not constituting the parties 'open and notorious evil livers.' This is especially the case in countries such as Japan and India, where marriage with a deceased wife's sister is not only permitted, but is, in many cases, a matter of customary obligation. In conclusion, we have to place upon record our opinion that it is within the competence of a local Church to make its own conditions with regard to prohibited degrees, so that they be not repugnant to the law of God. But we earnestly invite all Churches to unite in withstanding the prevailing flood of laxity of practice and thought in all matters affecting marriage. To do so with real effect, our rebuke must be firm and strong; but strong it cannot be unless it is also measured."

No doubt some might have preferred a more definite pronouncement, but the implications of the report are fairly clear. Since the parties to the marriages in question are not "open and notorious evil livers," they are presumably not to be repelled from Communion. Since local Churches may make their own conditions as to prohibited degrees, there must be some degrees which are not matters of absolute right and wrong, but stand, as we have contended, on the border-line; it is clearly implied that marriage with a deceased wife's sister is one of them. And if a local Church is to alter its laws with regard to such degrees, it must obviously do so in such a way as to bring them into line with the law of the State, since we assume that no Church would be so wrong-headed as to introduce conflict and confusion quite gratuitously where no law of God is involved.

At any rate, the remedy for the present difficulty becomes

fairly obvious. Many will contend that, in view of the actual history and wording of the Table of Affinity, the prohibition in question is *ipso facto* repealed by the Act legalizing the marriage, since that marriage is neither "forbidden in Scripture nor by our present laws." But for the sake of the tender conscience, the Church might herself exercise her power of revision, adding, if she will, a note to the effect that she still considers these marriages inexpedient.

There is, of course, an alternative in the revival of the power of dispensation. Bishop Creighton was fond of pointing out that Church Law became, in fact, unworkable when this power was lost. But whether its restoration is much to be desired is a very grave question. It is a comparatively small point that it might become an excuse for the exaction of substantial fees, creating one law for the rich and another for the poor. The serious objection is that it carries within itself the seeds of that continual collision between Church and State, which a Christian country should be able to avoid. It can avoid it if it will remember that the whole of the contents of the "moral law" are not, and never have been, fixed and absolute; no student of ethics or of history can deny that they do, in fact, vary from time to time. We should recognize frankly that the State, expressing its views through its authorized channels, is for practical purposes at once the best index of such variations as have in fact approved themselves to the conscience and also a main factor in producing variations. If we had a single united and really "Catholic" Church, the case might be altered; the State might readily bow to its authority on doubtful points of morals. But we cannot escape the penalty of our disunion. Must we not recognize that on many points the State, at least in England, is the best expression of the collective Christian conscience which existing conditions allow?

To sum up: We have admitted, and we are ready to emphasize the admission, that the Church of England and every other religious community has the *right* to legislate for its members. We repeat that it is quite conceivable that

circumstances might arise which compelled the exercise of this right at the cost of a collision with the State. But no such justification can be found, either in the legalizing of a marriage, forbidden neither in Scripture nor by the unanimous voice of Christendom, or in the interpretation which has been placed by the courts on a rubric of the Prayer-Book. No doubt some will be ready to seize any occasion for a conflict, in order to vindicate the rights of the Church and to hasten the issue which, in their view, cannot long be delayed. They are apocalyptists, and have seen a vision of an impending struggle between Christ and Anti-Christ, in which the State is cast for the less desirable rôle. But others of us are ready, so long as possible, to seek peace and ensue it. We hold that the practical inconveniences of such collisions, whether in an established or disestablished body, are so grave, and that the confusion to which they would lead, if they became at all frequent, would be so intolerable, that they should not be entered upon except under the pressure of absolute necessity. Till such necessity arises we are glad, in England at least, to be able to take a view which is not without good authority, and to believe that the powers that be, after all, ordained by God.

Some Chapters in the History of the Early English Church.

By the Rev. ALFRED PLUMMER, D.D.

III. Augustine and Aidan.

THE conversion of the English to Christianity is an epoch in the history of England; it is the beginning of the Church of England. But it also forms an epoch in the history of Christianity; it is the first distinctly *foreign* mission of the Western Church. Hitherto the Gospel in the West had not spread beyond the limits of the Roman Empire. The Teutonic