Confidential

N O T E

ARCCM 26

by

Chancellor The Revd E. Garth Moore

I

Not having had the advantage of being present at the earlier meetings of the Commission, I have had to gather what I can from the papers with which I have been supplied. Unfortunately. the one upon which I was expected to comment, namely one by a Roman Catholic on diriment impediments, has not at the time of writing reached me. I, therefore, in this Note confine myself to making some comments on the FIRST INTERIM REPORT and then going on to advance some thoughts of my own.

II

My main comments arise from what appears on p.4 under the heading, ANGLICAN PROCEDURE IN NULLITY CASES, for this section seems to me to contain several implied errors.

By reason of the Establishment, it is wrong to write about "the Queen's Court", meaning thereby a secular court, and it is wrong to refer to a secular court as a "civil" court. It is not very probable that a bishop would seek to find grounds for nullity after the secular court had granted a decree of divorce. It is also improbable that the bishop would "receive assistance from his diocesan Chancellor" in such an exercise. Nor is the chancellor to be likened to a recorder.

The Queen has two sets of courts which are parallel to each other, her temporal (or secular) courts and her spiritual courts. Neither is superior to the other. A chancellor may not enjoy the prestige of a judge of the High Court (though some have enjoyed very high prestige); but

his status (or "standing") is very different from that of a recorder and can be more closely equated to that of a judge of the High Court. He is virtually irremovable and his judgments are reported in the ordinary law reports and form a body of binding case-law. His function is primarily judicial and, although it is conceivable that a bishop might consult him on a qestion concerning marriage, the chancellor would be slow to involve himself in such a question. For that matter, so would the bishop, because, just as points of secular law arise for determination in the ecclesiastical courts, so do points of canon law arise for determination in the secular courts, for the dichotomy between the two sets of royal courts is far from a sharp one.

Nor is it correct to say that "a decree of nullity... would be accepted by the bishop". It would usually be accepted (and, indeed, the bishop really has no choice but to accept it), for the grounds of nullity are, with one exception, those which were accepted by the ecclesiastical courts. The one exception is due to the legislation commonly known as "A.P. Herbert's Act", which introduced the new ground for nullity of wilful refusal to consummate. This has caused difficulty as running counter to the theological view that nullity can arise only on a ground existing at the time of the ceremony of marriage and not on a ground arising after the ceremony.

This is by no means the first time that the question of consummation has raised theological difficulties, and I venture respectfully to suggest that it is an area which the Commission might with advantage explore further. When examined in depth, it raises, among other questions, the question of the moment of marriage: is it when the parties mutually take each other and the priest declares that they be man and wife, or is the true moment the moment of consummation, rendering the priest's pronouncement precipitate?

I say no more about consummation here, as it is too deep a subject for so short a treatment as can here be accorded it. I pass over as probably a slip of the pen the observation on p.9 that to bring up children in the Roman Catholic Church is "not essential, but vitally important", understanding by vitally no more than very. I leave to a further section of this Note the important question raised at the top of p. 3, namely, whether someone living with a second partner after a divorce is "living in adultery", and this brings me to the nub of the matter.

III

The Church's authority springs from the bestowal of the Power of the Keys, the power to bind and to loose. Wide as is this authority, it is (in the language of the English lawyer) an authority delegated by God to a subordinate legislature. It is, therefore, a limited authority. If it purports to go beyond the bounds of divine law, it is ultra vires. Applying this to the field of matrimony, one finds that the nature of marriage is determined by God in the Creation and, therefore, it is not within the scope of the Church's authority in any way to vary this. The authority of the Church is limited to the incidentals of marriage, such as the nature of a valid ceremony, the need or otherwise for witnesses, the age of consent, the prohibited degrees, the time and the place of marriage. These are all within the scope of the Church's authority and may be varied by the Church from time to time and place to place. But the nature of marriage is God-given and cannot be varied by the Church.

The nature of marriage is succinctly described by a Roman Catholic writer, F.J. Sheed, in the opening pages of his book, NULLITY OF MARRIAGE. In effect he there says that in the eyes of both Church and State, marriage springs from a contract and results, in the eyes of the State, in status, but, in the eyes of the Church, in a relationship. Although the word, relationship, is perhaps not happily chosen, his meaning is clear. Status is man-made and can by man be unmade. Relationship is (in Sheed's language) God-given, as in the

relationship between parent and child and between brother and sister, and, being God-given, cannot be unmade by man. Since the nature of marriage is the union of one man with one woman for their joint lives, it is ultra vires man to grant a divorce releasing the parties so that they can respectively marry again, and it is ultra vires the Church to recognise such second unions as marriages. It is, however, within man's power to vary the legal incidents of a relationship, though not to touch the relationship itself. A child in need of care and protection may be taken away from the parents and put into the care of the local authority: the relationship remains, but the incidents are gone. So the State may grant a divorce having the effect of a decree of judicial separation, but, theologically, not having the effect of freeing the parties to contract fresh marriages.

So far the great weight of Anglican theology is at one with Roman theology. Differences have arisen between Anglicans and Romans on a number of related points. Among them is a difference as to what is meant by "the Church". By "the Church" Anglicans mean, in England, the Church of England. They are not so clear as to what they mean by "the Church" in, say, Egypt. But for England the Anglican position is clear as are its requirements concerning the incidentals of a valid marriage. The Church of England does not regard as valid a marriage which does not comply with the requirements of the secular law. In other words, it requires the same incidentals as to time and place, for example, as does the secular State. Furthermore, not only does the Church of England require the same incidentals as does the State, it is also satisfied by the same incidentals. Regarding marriage as in the natural order and not as something specifically Christian, it recognises the validity of a marriage contracted before a registrar. But, despite the Establishment (and in the face of a considerable strain

thereby imposed on the whole concept of Establishment), the Church of England cannot recognise as a valid marriage one which has been contracted with due observance of ~~the~~ all the incidentals by persons one of whom has a partner by a former union still living.

What, then, does the Church of England say about such second unions? Does it say (to quote p. 3 of the REPORT), that the parties to such second unions are "living in adultery"? A great many Anglicans would say, "Yes". Some would not only say, "No", but would go further and say that such second unions can somehow be regarded as valid marriage and would wish to be free to celebrate such marriages in church.

It is the burden of my argument that neither view is right, and I now put forward for the consideration of the Commission my own suggestion of a middle course, not by way of compromise (for I do not think that compromise is here possible), but as a realistic appraisal of the facts.

Let us not ask whether the parties in such cases are living in adultery". Let us ask the deeper question, <u>are they living in sin?</u> To this I would reply, "Not necessarily". I would maintain that such unions are not marriages, but yet are not necessarily sinful. To view the situation aright, it is helpful to look further afield than Western society. In Muslim countries it is not uncommon to find a man living faithfully with two women whom he calls his wives. The Church cannot regard such unions as marriages; but to dub them as sinful is to use exaggerated language. The majority of Muslims in fact live faithfully with only one woman for life. It is an even greater exaggeration to describe such unions as sinful. Yet it is difficult to see how the Church can regard such a union as a marriage, for the parties did not enter upon it with the intention that it should be either monogamous or necessarily for life. My argument might even be reinforced by reference to the cases of polygamy and concubinage in the Old Testament. An overall view seems to lead to the conclusion that, while marriage, whether Christian

or in the natural order is the highest form of union between a man and a woman, other types of union do not necessarily fall under condemnation, save insofar as the good is to be condemned for not being the best.

If this line of argument be right, it follows that the Church must maintain the Western Catholic doctrine of marriage as the union of one man with one woman for their joint lives with no possiblity of there being a second marriage after a secular divorce; but it also follows that the Church should not necessarily condemn all second unions as sinful, though it can never allow them to be contracted as marriages in church. Each case will call for its own consideration. There will be some cases which the Church will be unable to countenance at all. There will be others where the Church may with propriety bestow a blessing.

I must, however, emphasise that I am advancing the above argument for the consideration of the Commission. It is, so far as I am aware, entirely and only my own. It goes some way to meet those Anglicans who are doubtful about the inflexibility of the Western Catholic attitude to which, so far, the Church of England has adhered (and to which I adhere). It does not accord with the suggestion advanced in MARRIAGE, DIVORCE AND THE CHURCH, which seems to me to be inconsistent with the Western Catholic position.

IV

In conclusion I would raise one point which may turn out to be of practical importance. Unease has been felt in some Anglican quarters over the apparent willingness of Roman tribunals to grant a decree of nullity very easily on the ground that the parties were psychologically in no position at the time of the ceremony to appreciate the true nature of their vows. The question in this context which I should like to raise is whether Roman Canon Law has anything corresponding to the English Common Law doctrine of estoppel, whereby a person can, by his or her conduct, preclude himself or herself from relying on a state of affairs which he or she has led others to believe did not exist. To put the matter

succinctly within the context of the present inquiry; if two persons of sound mind solemnly enter into vows coram publico, can either of them afterwards be heard to advance some form of psychological immaturity as a ground for claiming that the apparently valid ceremony was in fact invalid?