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This is the first of two articles designed to enable the common law lawyer to distinguish civil annulments for fraud from Roman Catholic declarations of nullity on grounds of defective consent.

FRAUD AND ERROR IN THE CANON LAW OF MARRIAGE

WILLIAM F. CAHILL, B.A., J.C.D.*

A READER OF THE CATHOLIC LAWYER has asked for a statement of the Canon Law on fraudulent marriage. The direct answer is that there is no Canon Law on the subject because fraud, as such, makes marriage neither void nor even voidable in the law of the Catholic Church.¹

It is understandable that lawyers who are familiar with civil annulments — particularly as they are granted in New York State — might well misunderstand the grounds upon which the Catholic Church grants declarations of nullity. It is possible, for instance, that a marriage which has been annulled on grounds of fraud by a civil court might also be declared null and void from its inception by an ecclesiastical court on the grounds that error had vitiated the consent of one of the parties at the time of the marriage.

The fact that the error was the result of fraudulent representations is immaterial. The court will examine the nature and effect of the error, not its cause. In consequence, this paper will discuss the Canon Law in terms of error, not fraud.

It is an ancient principle that fraud or error inducing consent does not invalidate matrimonial consent actually given. This rule of the Canon Law was applied in a case decided by Pope Urban III (1185-1187) and the decision was canonized as a binding precedent by its incorporation in the Decretals of Gregory IX.² A bailiff had contracted an invalid marriage and had entered his suit for declaration of nullity before a local ecclesiastical judge. He then moved to another place, where he deceived a woman and so induced her to marry him, saying that the decree of nullity had been granted. Actually the case was still pending at the time of the

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¹ As in American common law, so in Canon Law, fraud in the inducement does not make a contract void. If an act or a contract is induced by fraud, Canon 1684, §1 affords the remedy of judgment for rescission; the marriage contract, however, is excluded from the category of rescissible contracts. *Cf.* Can. 1069, §2; 1118-1127.

² C. 18, X, De sponsal. et matr., IV, 1.

bailiff's second marriage. When the decree declaring the first marriage a nullity was granted, the second marriage was discovered, and the Pope was asked to pronounce on its validity. He answered, "The bailiff and the second woman consented to each other . . . let the man be given a penance and deprived of marital cohabitation during that period; after that they may remain in marital association."³

Error and Matrimonial Consent

CANON 1081. §1. Marriage is effected by the consent of the parties lawfully expressed between persons who are capable according to law; and this consent no human power can supply.

§2. Matrimonial consent is an act of the will by which each party gives and accepts a perpetual and exclusive right over the body, for acts which are of themselves suitable for the generation of children.

The principles of Canon 104 regarding the effect of error upon the validity of acts are the following: error invalidates the act if it is an error concerning the substance of the act; error invalidates the act if the error is not substantial but is made a condition *sine qua non* of the act; no other error nullifies an act unless that error is given invalidating effect by some explicit provision of law. These principles are specifically applied to marriage in Canons 1082-1086, and the effect of conditions attached to matrimonial consent is set down in Canon 1092.

³ There is no question of dissolving the marriage by dispensation; the scanty statement of facts indicates that the second marriage had been consummated, so that it would have been useless to ask for such a dispensation.

Fraud is related to error. Every successful fraud causes error in its victim. By the knowingly false representation, he is deceived. But error may exist as a result of a man's ignorance or as a result of his incorrect inference, without any fraud practiced upon him by another person. Error affects consent, for the will in an act of consent elects an object presented to it by the mind. If the mind is in error, the object is imperfectly or incorrectly presented and choice made upon such a premise is not always the same choice that would have been made if the object were correctly known. Because of this intimate influence of error upon consent, and because it is consent that makes marriage,⁴ the Church will examine the validity of a marriage alleged to have been contracted through error. It is only error that truly destroys consent that makes a marriage void. We shall draw the outlines of the canonical doctrines concerning errors which nullify marriage.

Error of Personal Identity

CANON 1083. §1. Error regarding the person makes marriage invalid.

Error concerning the partner in marriage is the subject of Canon 1083. An error of identity of that person invalidates marriage. From the very concept of matrimonial consent,⁵ which is defined as an act of will by which *each party gives to and accepts from the other* the marital right, it follows that the act of consent is a mutual act between two persons, each of whom is known to and identified by the other. Certainly, if A intends to give such

⁴ Cf. Can. 1081.

⁵ Can. 1081, §2.

consent to B and to receive B's consent in return, A cannot by that same act give such consent to C.

The classical case of mistaken identity in marriage is that recorded in the Book of Genesis, Chapter 29, verses 18 to 24. Jacob had served his Uncle Laban for seven years, in expectation of being rewarded with the hand of Rachel, the beautiful younger daughter whom Jacob had kissed on their first meeting. Laban craftily substituted Lia who "was blear-eyed," bringing her to Jacob at night. Jacob discovered the fraud in the light of morning and protested to his uncle, who alleged the local custom of giving elder daughters in marriage before their younger sisters. Jacob acquiesced and served another seven years for Rachel. St. Thomas⁶ says that Jacob and Lia were "not married by their lying together, which happened by error, but by the consent given later."

A case of mistaken identity in marriage rarely occurs, but there is one reported in which the Roman Rota affirmed nullity of the marriage. John Wang, a very busy farmer, wished to marry a widow, Cecilia Lu. He had not met her, but his son Paul reported to him that she was well-to-do and comely. John sent his agent to negotiate for the marriage. When the agent approached Cecilia through an intermediary, she professed herself content with her widowhood, but suggested that Anastasia Sang might be honored to receive John's proposal. The intermediary made arrangements with Anastasia, and John's agent thought it not necessary to advise his principal of the substitution. John met Anastasia for the first time at the altar, but it

was only after the ceremony, when the bride's heavy veil was lifted, that John perceived that the woman was not Cecilia.⁷

It cannot be said that John consented to marry Anastasia "because he believed her to be Cecilia." His erroneous belief, that the woman beside him in church was Cecilia, caused him to go through a ceremony with Anastasia; but it did not, in any sense, cause him to consent to marry Anastasia. He therefore was not married to Anastasia.

Error of Quality Equivalent to Error of Person

CANON 1083. §2. Error regarding a quality of the person, even though it is the cause of the contract, invalidates marriage in the following cases only:

1°. If the error regarding the quality amounts to an error regarding the person.

• • •

The second paragraph of Canon 1083 indicates that an error concerning a quality of the person may amount to an error of person. St. Alphonsus⁸ set down three rules for determining whether, in a given case, the error of quality is such as to invalidate the marriage because that error is equivalent to an error of person. It is so when (1) the quality is made a condition upon whose verification the matrimonial consent depends, (2) the quality, being found in only one individual, identifies the person, (3) when the prevailing intent is to marry a person endowed with such quality, so that the intent to marry an individual is subordinated to the purpose of having a

⁷ S. R. Rota, coram Heiner, 16 April 1913, Dec. XXI, Vol. V, p. 242.

⁸ II Theologia Moralis nn. 1013-1016 (Prato 1839).

⁶ Summa Theologica, Suppl., q. 51, a. 1, ad 4.

wife or husband so endowed. That the rules were worked out by speculation, *a priori*, is evidenced by the fact that it is extremely difficult to find reports of cases in which the second and third rules were applied. Cases under the first rule are common enough, and some of them will be discussed below, under the heading "Error of Personal Quality Made a Condition of Consent."

A decision of the Sacred Congregation of the Council, 9 Aug. 1817,⁹ illustrates the second rule. Cassandra Luci alleged the nullity of her marriage to Vincent Venturini, the son of Stephen Venturini, because she married him on his representation that he was Vincent Bellonch, son of Stephen Bellonch, and nephew of a very wealthy Spanish clergyman named Bellonch. Cassandra knew Vincent Venturini personally; in fact, she alleges that she was unwilling to marry him because she found him "horrible to look at," and that her abhorrence was overcome only by the consideration that he was the nephew of a wealthy man. But the decision accepts the argument made by the Defender of the Marriage Bond; that she gave her marital consent to a man present and known to her, so that her error regarding his family connections did not enter into the determination of his identity.

If Cassandra had never known either Vincent Venturini or Vincent Bellonch, and had arranged to marry Vincent Bellonch, identified as the nephew of the wealthy Spaniard, and if Vincent Venturini had appeared at the wedding, calling himself Vincent Bellonch, the marriage would have

been void. Her error regarding the man's name and family connections would then have been equivalent to an error of person.

The third rule was applied by the Rota in a 1941 decision.¹⁰ We can find no other decision under this rule. The plaintiff had married soon after his conversion to Christianity, and while he was still living with his tribesmen between Mt. Everest and the Ganges. According to their custom, there were only two classes of marriageable women; one not a virgin was a widow. The arrangements for marriage, in reference to property, differed markedly according to the bride's classification. The plaintiff made a friend his agent to arrange a virgin marriage, and the agent so contracted in the plaintiff's behalf with a man who was guardian of a nubile sister-in-law. The bride showed reluctance to fulfill her guardian's contract, showing resistance even during the marriage ceremony. After her guardian intervened and spoke to her out of hearing of the other participants, she permitted the ceremony to be completed. Tribal custom demanded that the first month of marriage be spent by the bride in the home of her own people, and that cohabitation with her husband be not had until after that period. The plaintiff's bride had gone to her guardian's home after the marriage. She was later visited there by her husband's agent, sent to investigate reports that she was weeping incessantly. The agent discovered that she was pregnant by her guardian brother-in-law, and when this fact was reported to the plaintiff he refused to take her into his house.

The Rota found that the intention of

⁹ The decision is reprinted in VI Codicis Iuris Canonici Fontes, 229, N. 3954 (Gasparri ed. 1932). We know of no decision affirming nullity on this ground.

¹⁰ S. R. Rota, coram Heard, 21 June 1941, Dec. XLVIII, Vol. XXXIII, p. 528.

the plaintiff was to have a virgin marriage, and that he was so influenced by tribal concepts that this intent prevailed over the intent to marry any specified person. In explaining this application of the third rule stated by St. Alphonsus, the Court said that the virginal status of the bride was a condition implied in the plaintiff's matrimonial consent. This remark of the Court indicates the real difficulty of distinguishing cases under this rule from cases under the rule of conditioned consent. One may speculate that if the case had arisen in Europe, where conditioned consent is more generally understood than in India, the case might have been taken under the first rule. Conversely, the absence of any very rigid European mores classifying brides with reference to their personal qualities, may be one reason why the third rule is illustrated by the canonical writers only by reference to hypothetical situations.

Error of Servile Condition

CANON 1083. §2. Error regarding a quality of the person, even though it is the cause of the contract, invalidates marriage in the following cases only:
 . . .

2°. If a free person contracts marriage with a person whom he or she believes to be free, but who is on the contrary in a condition of slavery in the proper sense.

Thus the Canon establishes that if a free person contract marriage with one whom he thinks free, whereas the person is bound to slavery in the strict sense, the marriage is invalid. It is hardly necessary to remark that it is not the fact of slavery, but the erroneous belief regarding freedom, which is the basis of the impediment; a

free man can validly marry a slave if he knows of her bondage.¹¹ Application of the Canon demands no inquiry as to whether the free man would have married if he had known of the other's slavery.

There remain very few regions where slavery is in use, and the enactment has, consequently, little practical application. However, slavery may exist in some remote regions, as is indicated by a canonist writing in China in 1936, "In China there is no, or scarcely any, slavery strictly so called."¹² Canon 1083, §2, 2° has behind it the inertia of very ancient law, and will probably remain in the law of the Church until the world can show no vestige of slavery. The Canon has one characteristic which merits close attention. It contains a positive canonical enactment which makes of a matter of knowledge a direct impediment invalidating marriage. All other defects of knowledge affect the validity of marriage only when they vitiate consent. Error as to servile condition makes marriage invalid even when it has nothing to do with the identity of the person and is not made a condition of consent. If at the time of the marriage this erroneous belief exists, the marriage is null by the law of the Church, though the consent given is sufficient by the law of nature.

Statutory Nullity of Marriage Induced by Fraud

A Georgia statute offers an interesting parallel to this invalidating impediment created by Canon Law. Canon 1083, §2, 2°, as we have seen, makes a marriage void by operation of law when a free person

¹¹ 2 Gasparri, De Matrimonio 25-26 (1932).

¹² 2 Payen, De Matrimonio 42 (1936).

entertains the erroneous belief there specified. Section 53-103 of the Georgia Code provides, "To constitute an *actual contract of marriage*, the parties must consent thereto voluntarily and *without any fraud practiced on either . . .*," and Section 53-104 declares "Marriages of persons . . . unwilling to contract or *fraudulently induced* to contract shall be void."

This law of Georgia is quite different from most of the state enactments regarding fraud in marriage. Typical is the enactment of the New York Domestic Relations Law, Section 7, subdivision 4, which provides: "*Voidable marriages*. A marriage is void *from the time its nullity* is declared by a court of competent jurisdiction *if* either party thereto: . . . Consent to such marriage by reason of force, duress, or fraud." The Georgia enactment, like the Canon Law on error respecting condition of servitude, makes the marriage so contracted *void ab initio*. In *Mackey v. Mackey*,¹³ the Supreme Court of Georgia denied an action for nullity because certain legislative and constitutional provisions "impel us to the conclusion that the constitutional and legislative declarations manifest a resolute intent that resort may not be had to a court of equity for annulment of a *de facto* marriage by a single verdict upon any ground which the law makes a ground for divorce in an action at law."¹⁴ Yet the Court does not deny the void character of such marriages, implied in the further language of Section 53-104:¹⁵ "The issue of such marriages,

before they are annulled and declared void by a competent court, shall be legitimate. In the latter two cases [marriages of persons unwilling to contract, or *fraudulently induced* to contract], however, a subsequent consent and ratification of the marriage, freely and voluntarily made, accompanied by cohabitation as husband and wife, *shall render valid* the marriage." (Emphasis supplied.)

If, for example, two unbaptized persons had contracted a marriage in which consent was induced by fraud, and one of them, on becoming a Catholic, sued for a decree of nullity in a Church court, the tribunal would have to take cognizance of the competent state legislation. It is certain that the state has power to establish reasonable impediments to the marriages of the unbaptized, who are, because they lack baptism, in no way subject to the authority of the Church.¹⁶ If the fraudulent marriage had taken place under the Georgia jurisdiction, the Church court would find it a nullity because of the antecedent impediment competently established.¹⁷ If the fraudulent marriage had taken place in the New York jurisdiction, the tribunal could not, on the basis of the statute, find the marriage null, for the New York statute makes such marriages "voidable" only. In New York, the law does not prevent the marriage coming into existence; it attempts to put into the hands of the courts a power to dissolve the marriage. The Church can recognize no power of human origin to dissolve an existing marriage, consum-

¹³ 198 Ga. 707, 32 S.E. 2d 764, 767 (1945).

¹⁴ The Code of Georgia, §30-102, recites: "The following grounds shall be sufficient to authorize the granting of a total divorce: . . . 4. Force, menaces, duress, or fraud in obtaining the marriage."

¹⁵ Quoted in *Mackey v. Mackey*, *supra* note 13, at 766.

¹⁶ I Gasparri, *De Matrimonio* 146 (1932).

¹⁷ In determining what quality of fraud makes a marriage void under the Georgia statute, the Church court would have to follow the intent of the Georgia Legislature, particularly as that intent may be indicated by holdings of the Georgia courts.

mated or not. In the hypothesis of such a marriage occurring in New York, the Church court could find the marriage null only if the fraud had effected an error of personal identity or an erroneous condition *sine qua non*. The Church, bound by natural and divine law, can take cognizance of the power of human law to make a marriage void, but the Church can recognize no human power to make a valid marriage voidable.

Error in a Condition *Sine Qua Non*

The term "condition *sine qua non*" is, of course, adopted from the phraseology of the logicians.¹⁸

An erroneous belief regarding some quality of the partner may accompany marital consent, or may motivate marital consent, or it may be an indispensable requirement for the existence of marital consent. Only in the last mentioned case is there an erroneous condition *sine qua non*; in this circumstance alone is consent withheld by the fact that the condition postulated is not verified.

Error of Personal Quality Made a Condition of Consent

According to Canon 1083, §2, error concerning personal qualities of the partner, even if such error be the motive for marry-

ing, does not invalidate the marriage; except the error concern freedom or be equivalent to an error of identity. This is simply an application of the first principle set forth in Canon 104; errors respecting qualities of a marriage partner are not substantial errors. But such errors will nullify the marriage, according to the second principle of Canon 104, if they are postulated by the party in error as indispensable antecedents to his matrimonial consent.

In one case which was successful before the Roman Rota,¹⁹ there was evidence that before arrangements for the marriage were complete the husband had had serious doubts of the good character of the defendant. She was six years older than he, and his friends were emphatic in urging him not to marry a woman whose virtue they had reason to question. The seriousness and perplexity of his mind on this matter were indicated by evidence that he had directly and through others warned her not to marry him if she were not a virgin, that he had made this the test by which the fault-finding friends would be silenced, and that he had repeatedly threatened her that if he found her not intact he would "put her out of the house and have nothing to do with her." He did put her out a few days after the marriage and proclaimed his reason for doing so. He never saw her again until the trial in the diocesan court, which was begun six years after the marriage was celebrated. The Rota found that the plaintiff had made the fact of her probity and the specific fact of her virginity indispensable conditions to his act of matrimonial consent.

¹⁸ A condition of this kind is phrased, for example, "Unless Anna is honest, John will not marry her"; whereas a condition *sine qua* is put this way, "If Anna is wealthy, John will marry her." The *sine qua non* antecedent is described as irreplaceable or indispensable. The *sine qua* antecedent is replaceable. Where the antecedent is replaceable, the proposition asserts one reason which will induce John to marry Anna; lacking that reason, he may still marry her. Where the antecedent is irreplaceable, the proposition asserts that he will marry her *only* if she is honest; if she is not honest, we infer from the proposition itself that John will not marry her. Cf. Hartman, A Textbook of Logic 128 (1936).

¹⁹ S. R. Rota, coram Massimi, 13 June 1924, Dec. XXV, Vol. XVI, p. 223, and the definitive sentence in the same case, coram Hindringer, 1 April 1925, Dec. XX, Vol. XVII, p. 149.

Another case illustrates a condition postulating the partner's sincerity in a special promise of future conduct. The case originated in French North Africa. The bride's grandfather was an Alsatian, and it was shown that her whole family were intense in their French patriotism. Before the marriage, she required the groom, an Italian subject, to swear upon her father's portrait and in the presence of her Alsatian grandfather that he would become a French citizen as soon as possible. She was pregnant soon after the marriage, and left her husband within fourteen months from the date of the ceremony, charging him with insincerity in his sworn promise, as he had taken no steps to change his citizenship. On leaving him, she immediately secured a decree of annulment in a civil court and regained her French citizenship. She refused pleas for reconciliation as long as ten years after the marriage, always alleging no other ground than his insincerity in that one matter.

Monsignor Grazioli, writing for the Court in the second decision,²⁰ points out that the condition placed by Helen was a true condition *sine qua non*. He notes that her intention was not simply to make her husband a French citizen; rather it was to save herself from permanent loss of French citizenship, which she could never recover as the wife of an Italian subject. Thus, she made her consent to be wife to Francesco depend indispensably upon the *sincerity* of his promise to renounce his Italian allegiance and become a Frenchman. When the promise is proved to have been insincere, the consent which depended upon its sincerity is seen not to have operated. In

the earlier decision,²¹ the Court saw in the evidence warrant for the conclusion that the promise was regretted by the patriotic Italian officer, but no sufficient proof that he gave it insincerely.²²

Errors of Quality Tabulated

Monsignor Doheny has tabulated the decisions of the Rota given in the years 1909 to 1938.²³ One hundred five of these decisions were given in cases where the allegation of nullity was predicated on some error of quality, (of personal quality or of fortune), or of sincerity in some promise. The allegation was, of course, that the quality in question had been made an irreplaceable condition of matrimonial consent. In these decisions, nullity of the marriage was affirmed in only thirty-one instances. The conditions postulated included: legitimacy of the bride's birth; her virginity; that she had had illicit relations with no one but her fiance; that the man was father of the child she carried; that one or the other was free from venereal disease, or from epilepsy or other diseases; that the husband was not a Freemason; that one or the other was sincere in promises respecting the practice of the Catholic religion or the Catholic upbringing of children, respecting the future domestic arrangements, respecting pursuit of a special profession or business; that one or the other was wealthy,

²⁰ S. R. Rota, coram Grazioli, 17 Dec. 1942, Dec. LXXVIII, Vol. XXXIV, p. 815, 825.

²¹ S. R. Rota, coram Wynen, 1 Feb. 1937, Dec. VIII, Vol. XXIX, p. 55, 64.

²² As the decisions were not in accord on this ground of nullity, the case was not successful on this count. Both decisions, however, agreed that the solemnization of the marriage was defective, so that the second sentence made nullity definitive on that ground.

²³ Doheny, *Canonical Procedure in Matrimonial Cases, Formal Procedure* (1948).

or of noble blood, or of good character; that the husband had no illegitimate child. At least one decision affirmed nullity on each of the grounds enumerated.

No decision was affirmative where the grounds alleged were: conditions predicating capacity to beget a child, desistance from addiction to drink or narcotics, abandonment of a military career.²⁴

It will be seen that the specific quality of person or of fortune, or the specific subject matter of the promise, is of no substantial concern to the court. The subject matter of the condition is important as a matter of evidence, because proof that matrimonial consent truly was made to depend upon verification of the postulate will depend upon indications that the matter weighed very heavily in the mind of the person asserted to have made it a condition. This, it may well be said, is a subjective standard of nullity, difficult of proof, and full of menace to the rights of the other party.

Problems Arising from Conditional Consent

Yet the rule, that nullity of marriage is the consequence when a fact made the irreplaceable antecedent of matrimonial consent is not verified, arises out of the very laws of human thought. A man's consent does not exist if he makes its existence depend upon the pre-existence of a fact which does not subsist. Matrimonial consent is the only cause which can affect a marriage; there is no human power which can supply consent, making a marriage where no consent exists.²⁵

Human power, exercised through com-

petent law, can bind a man to behave in society as if he were married. This is the effect of the Canons which forbid a person in such case from entering a new marriage, or neglecting his social duties to husband or wife, without a decree of nullity.²⁶ The children of such a marriage are legitimate if either spouse had a bona fide belief in validity of the marriage at the time of their conception or of their birth.²⁷ Other Canons establish rules of procedure and evidence which require the person seeking a declaration of nullity to present proof of a very high standard.²⁸

That the law of nature permits a man to give his matrimonial consent, subject to verification of a condition, follows from the fact that man's will is physically free. As it is said in the Book of Ecclesiasticus, "God made man from the beginning, and left him in the hands of his own counsel."²⁹ Nevertheless, the moral dangers arising from the practice of entering marriage conditionally are evident, and have given concern to the authorities of the Church wherever that practice has arisen. Generally, they have been content with warning

²⁴ Can. 1069, §2. Even though the former marriage be invalid or dissolved for any reason, it is not therefore allowed to contract another until the nullity or dissolution of the former shall have been established according to law and with certainty. *Cf.* Can. 1019-1021, 1030, 1103, 470, 1107, 379, 1118-1127, 1813-1816, 1960-1992, 1933.

²⁷ Can. 1015, §4; 1113-1115.

²⁸ *Cf.* especially Can. 1960-1992; Can. 1014, 1015, §e, and 1086 (on presumptions favoring the validity of marriage); Can. 1968, 1969, 1984, 1986, 1987, 1990-1992 (on the intervention of the Defender of the Marriage Bond). The innocent spouse is protected from the adventurer, as far as the law can afford such protection, by the canon which denies standing in court to a plaintiff who was the guilty cause of nullity. Can. 1971, §1, n. 1.

²⁹ Ecclesiasticus XV, 14.

²⁴ *Cf.* Doheny, *op. cit. supra* note 23, at 1006-1014.

²⁵ Can. 1081, §1.

against the moral dangers involved. The practice was never common among Catholics of the Oriental rites or among Protestants.³⁰ Yet, the synods of some Oriental rites followed Latin precedents in regulating matrimonial conditions.³¹ The new Canon Law for the Catholic Oriental Churches, effective May 2, 1949, enacts, "Marriage cannot be contracted under condition."³² The Canon is interpreted as a prohibition merely, not as annulling all marriages contracted subject to condition.³³

Cardinal Gasparri, who was president of the Papal Commission charged with preparation of the Code of Canon Law for the Latin Church, published in 1917, relates that the Commission had under consideration a canon which would have invalidated any marriage contracted subject to any condition whatever. The canon, which had been written by Father Wernz, and upon which all of the Commissioners were agreed, disappeared from later drafts, and there was substituted for it a draft canon which was promulgated in the official text of the Code as Canon 1092. No explanation of the substitution made in the drafts is recorded in the minutes of the Commission.³⁴

The Instruction of the Sacred Congregation of the Sacraments, 29 June 1941, establishes procedure for parish priests investigating the free state of persons to be married. The ninth paragraph of that

instruction directs the priest to attempt to discourage the parties from placing conditions by which their consent may be suspended or invalidated. If there is some condition which the parties feel they may lawfully attach, the priest is to consult the local Bishop and to follow his directions in the matter.³⁵

Effects of Conditional Consent

CANON 1092. A condition once placed and not revoked:

- 1°. If it is a condition regarding a future event which is necessary, or impossible, or immoral but not contrary to the substance of marriage, it is to be considered as not having been made;**
- 2°. If it concerns the future and is contrary to the substance of marriage, it makes the marriage invalid;**
- 3°. If it concerns the future and is licit, it suspends the validity of the marriage;**
- 4°. If it concerns the past or the present, the marriage will be valid or not according as the matter concerning which the condition is made, exists or not.**

Canon 1092 of the Code of Canon Law of the Latin Church does not explicitly forbid one to attach a condition to his matrimonial consent. The first section of the Canon states a presumption of law that conditions postulating future events that are necessary or impossible or immoral are considered not to have been attached to the consent. The law presumes that a man is not serious when he postulates the inevitable, saying, "I marry you if the sun will rise tomorrow"; or the impossible,

³⁰ Wernz, *Ius Matrimoniale* n. 294 (Giachetti, Prato 1912).

³¹ Coussa, *De Iure Ecclesiastico Orientali*, *De Matrimonio* 179 (1950).

³² Can. 83, *Motu Proprio Crebrae allatae sunt*.

³³ Galtier, *Le Mariage, Orientale et Occidentale* 213 (1950).

³⁴ 2 Gasparri, *De Matrimonio* 73, n. 2 (1932).

³⁵ English translation of the text of this Instruction is found in 2 Bouscaren, *Canon Law Digest* 253 *et seq.* (1942).

saying, "I marry you if the sun rises twice tomorrow." The presumption of law is also that a man does not seriously mean to make the validity of his marriage depend upon some immoral action in the future, as, for example, "I marry you if in sexual intercourse I shall find you a virgin." Nevertheless, if there is proof that the condition was meant seriously and not verified, the condition invalidates the consent. That is the holding of the Rota in a number of cases.³⁶

If the condition postulates a future event that is licit, for example, "I marry you if you shall get your father's blessing," the consent is suspended until the father gives his blessing; the parties are not married until the blessing is given, but the moment it is given their consent becomes effective and they are married.³⁷ They must, of course, abstain from any use of marital rights in the interim. If the event postulated is one past or present, the marriage is valid or not according as the postulated fact exists or does not.³⁸ Most of the facts postulated in the cases tabulated by Monsignor Doheny, and discussed above, were of this nature. That the bride was a legitimate daughter, for example, is a past fact; that she is now not an epileptic is a present fact.

Error of Law; the Nature of Marriage

Up to this point, our attention has been given to errors of fact; errors of personal identity, of qualities of person or of fortune, errors regarding promises, are all of that

sort. The nature of the marriage relation and its essential qualities are said to be matters of law, and errors concerning these things are called errors of law.

CANON 1082. §1. In order that matrimonial consent may be possible it is necessary that the contracting parties be at least not ignorant that marriage is a permanent society between man and woman for the procreation of children.

§2. This ignorance is not presumed after puberty.

Marriage is by nature a permanent society of man and woman for the purpose of begetting children.³⁹ No man can marry if he does not know what marriage is. Whether he simply lacks knowledge of the nature of marriage,⁴⁰ or is in positive error regarding its nature,⁴¹ he cannot validly consent to marry. Thus, the Rota has found a marriage null where it was shown that the man did not know the nature of the marriage relation.⁴² The parties had married when he was thirty and the girl only thirteen. After the pagan marriage ceremony in which the parties together worshipped the skies and the earth, the couple kept a common home for four years. Canon 1082, §2 states that ignorance of the nature of marriage is not presumed to exist after puberty, but the evidence in this case showed that this man was simple minded, if not actually imbecillic, and that in the four years of their cohabitation he manifested a complete lack of interest in and understanding of his rights and duties as a husband. As the parties were pagans when

³⁶ Cf., e.g., S. R. Rota, coram Hindringer, 1 April 1925, Dec. XX, Vol. XVII, p. 149, 150; we have discussed this case above, p. 89.

³⁷ Can. 1092, n. 3.

³⁸ Can. 1092, n. 4.

³⁹ Can. 1082.

⁴⁰ Can. 1082.

⁴¹ Can. 104.

⁴² S. R. Rota, coram Prior, 14 Nov. 1919, Dec. XIX, Vol. XI, p. 170.

they married and throughout their cohabitation, the decision rests on no positive law of the Church, for she cannot legislate for the unbaptized. The Canon, therefore, is taken only as a formulation of the natural law, and the decision is that the man lacked such knowledge of the married state as nature requires of one who is to give real consent to a marriage.

In other cases, the Rota has said that parties must know that children are begotten in marriage by some bodily act between man and woman, though the parties may not know before marriage what organs are employed in this act and may be ignorant of the manner in which the organs are used for this purpose. Thus the Rota rejected the suit of a young man who alleged that the girl he married had not sufficient knowledge of the nature of marriage to make her capable of true marital consent. She was twenty-three when she married, she had had a high school course in biology, she had frequented the cinema, and she admitted that she had enjoyed being kissed by her fiance. She testified that she had known that children were carried before birth inside the bodies of their mothers, but she asserted that she had thought the children came there only as a result of divine blessing. There was no evidence to support her assertion of belief in such divine intervention, and the Court found no evidence to prove her ignorant that procreation occurs through mutual corporal acts of man and woman.⁴³

⁴³ S. R. Rota, coram Jullien, 21 Dec. 1938, Dec. LXXVII, Vol. XXX, p. 715; affirming the sentence coram Heard, 26 Oct. 1937, Dec. LXVI, Vol. XXIX, p. 655; reversing sentences of the Metropolitan Court of Krakow in Poland, given 20 June 1934 and 4 April 1935; the Defender of the Marriage Bond in the Court at Krakow had appealed to the Rota.

Error of Law; the Validity of Marriage

CANON 1085. The knowledge or belief that the marriage is null does not necessarily exclude matrimonial consent.

Erroneous opinion, by which a person contracting marriage believes that marriage void, has not the effect of invalidating the marriage.⁴⁴ A plaintiff before the Rota alleged that because he had been raised and educated in Bogota, Colombia, until he came to the United States at the age of sixteen, he was firmly of the opinion that a Catholic could not validly marry except before his pastor. That was the law of solemnization enacted by the Council of Trent and promulgated at an early date in South America. The marriage attacked in this case had been contracted before a civil official at Allentown, Pennsylvania, on February 10, 1908 when the plaintiff was nineteen. The law of Trent was never promulgated in the State of Pennsylvania or in most of the American states. The decree *Ne Temere*, by which the law requiring the presence of an authorized priest and two witnesses for the validity of the marriages of Catholics anywhere in the world, although published August 2, 1907, was not effective until April 19, 1908. Actually, therefore, the law of the Church controlling this marriage did not require, on pain of nullity, that it be solemnized before a priest. The Court declared that the plaintiff's opinion in the matter did not nullify his consent. His error, it was pointed out, did not touch the substance of the marriage but only its external form or solemnity.

However, the marriage was held a nullity because the plaintiff had gone through the

⁴⁴ Can. 1085.

ceremony only to satisfy the importunity of the lady and there was adequate evidence he had not intended a real marriage. That he believed the civil ceremony to have no effect, and that he left her without consummating the marriage, were among the evidentiary facts confirming his assertion that his consent was no more than apparent.⁴⁵

Erroneous Opinion Regarding Divorce

CANON 1084. Simple error regarding the unity, or indissolubility, or sacramental dignity of marriage, even though it is the cause of the contract, does not vitiate matrimonial consent.

Distinct from the nature of marriage, yet intimately related to it, are the essential qualities of Christian marriage. These are enumerated in Canon 1084: that marriage is exclusive or monogamous, that it is indissoluble, and that it is a sacrament when both parties are baptized Christians. But the Canon declares that erroneous opinions with respect to these essential qualities of marriage are no obstacle to the validity of the marriage of one holding such opinion.

The Canon cited describes such erroneous opinion as "simple error," and declares that it does not nullify marriage even when that simple error is the cause which motivates a person to enter marriage. The doctrine was applied in the famous Gould-Castellane case.⁴⁶ It was perfectly clear that the defendant Anna Gould believed that

marriage may be dissolved by divorce, at least in certain circumstances. Although her father was opposed to divorce, and had raised her in that opinion,⁴⁷ she had explicitly declared that she considered she had a right, as a Protestant⁴⁸ and as an American,⁴⁹ to divorce Castellane if and when she should find it necessary to her happiness. Yet the Rota said the woman was in the same condition as one who might marry a girl because he believed her wealthy; in spite of such error, and in spite of its having been the motive for the marriage, the marriage was valid.⁵⁰

The Court⁵¹ based this doctrine on an instruction given by the Congregation of the Holy Office to a missionary Bishop in 1874.⁵² The Bishop had asked how he was to view marriages contracted by the natives of his territory where the prevailing opinion was that marriage is dissoluble, and where the practice of divorce was very common. The Holy Office replied that such beliefs did not make the marriages invalid, and cited a decision it had given in 1680, wherein it had pointed out that the same view of marriage had prevailed among the Romans at the time of the Apostles, and that St. Paul clearly indicates a conviction that the marriages of pagans were true

⁴⁵ S. R. Rota, coram Prior, 16 July 1921, Dec. XVIII, Vol. XIII, p. 174; affirming the sentence coram Cattani, 9 Feb. 1920, Dec. V, Vol. XII, p. 30.

⁴⁶ S. R. Rota, coram Lega, 9 Dec. 1911, Dec. XLIV, Vol. III, p. 507; coram Cattani, 1 Mar. 1913, Dec. XVI, Vol. V, p. 173; coram Prior,

8 Feb. 1915, Dec. III, Vol. VII, p. 20. The third decision is summarized in 1 Bouscaren, Canon Law Digest 535, and in Doheny, *op. cit. supra* note 23, at 849.

⁴⁷ S. R. Rota, coram Prior, 8 Feb. 1915, Dec. III, Vol. VII, p. 20, 29.

⁴⁸ *Id.* at 32-33.

⁴⁹ *Id.* at 35.

⁵⁰ *Id.* at 33.

⁵¹ *Id.* at 25.

⁵² Instructio S. Officii, 9 Dec. 1874, ad Ep. S. Alberti, Collectanea S. C. de Propaganda Fide, Vol. 2, n. 1427.

marriages and that pagans could contract lawful marriages with Christians. The Court says further⁵³ that persons contracting marriage are presumed to intend a marriage in the sense that God made marriage, and this presumption stands in the face of any errors to the contrary fostered by civil legislation or the teaching of religious sects. Anna Gould had testified,⁵⁴ "I married as one ordinarily marries. I thought of nothing else."

One witness, a friend of the plaintiff Castellane, had deposed, "She [Miss Gould] told me . . . that she was not sure of her fiance's affection, and feared to make a mistake in marrying him, and she explicitly declared that she married him on condition of being free to get a divorce . . . and she asked me to communicate that declaration to him."⁵⁵ The Court sets forth the principle of law that the marriage would be invalid only if, by an explicit act of will, Anna Gould should have absolutely intended to exclude a perpetual bond. This would be the case if the exclusion of a perpetual bond had actually been made a condition *sine qua non* of her matrimonial consent.⁵⁶ The assertion of this witness stands alone, and it is not supported by the testimony of other witnesses who, according to his story, were informed of it by the intermediary. The Court therefore rejected the contention that Miss Gould's consent was so conditioned, on the rule that no fact telling against the validity of marriage can be taken as proved by one witness unsupported and uncorroborated.

⁵³ *Id.* at 37.

⁵⁴ *Id.* at 29.

⁵⁵ *Id.* at 39.

⁵⁶ *Id.* at 38.

Conditions Regarding the Essential Qualities of Marriage

From the reasoning of the Court in the Gould decision it is clear that errors regarding the monogamous character of marriage, its perpetuity, and its sacramental character, are governed by the second principle set forth in Canon 104, the principle which is applied to errors of personal quality which do not involve identity of the person. Such errors do not go to the substance of the act of marital consent, and will affect it only when they are made conditions *sine qua non*. If Miss Gould's intent had been "Unless I am free to get a divorce, I do not marry Castellane," her erroneous belief would have been made an indispensable condition to her consent. If a person who abhorred the very notion of a supernatural order married with the intent, "Though both of us are baptized, I consent to this marriage only if it is not a sacrament," the marriage would be invalid. If another person, say a Mohammedan, married with this intent, "I marry this woman only if I remain free to take another wife later on," the result would be the same.

All of these conditions, and conditions predicating a denial or limitation of the marital right to acts of natural intercourse suited for the begetting of children, are called "conditions contrary to the substance of marriage." Canon 1092, n. 2 states that future conditions of this sort render marriage invalid; the reason is because such conditions positively exclude from the consent of the person so attempting to contract, some obligation which is of the essence of marriage. The conditions are usually classified according as they oppose one or other of the "*bona*" or "goods" of marriage — children, fidelity, indissolu-

bility.⁵⁷ Conditions or intentions contrary to the *bona* were considered by the Rota in 252 decisions given in the period 1909 to 1938, tabulated by Monsignor Doheny. In the first class, of 153 decisions, 56 affirm nullity.⁵⁸ Of eight decisions concerned with conditions or intentions assertedly rejecting the obligation of fidelity, only one affirmed nullity.⁵⁹ In 91 decisions on cases where the intention or condition allegedly touched the indissoluble character of marriage, nullity of the marriage was affirmed in 26 instances.⁶⁰

The Canonical Rule of Error — The English Rule of Fraud

The canonical doctrines of error in marriage are of special interest to the American lawyer because these doctrines are an historical antecedent of the modern American legal doctrine of fraud in marriage. The doctrines we have here explained are the same as those received in the English ecclesiastical courts at the Reformation. After the Reformation, the doctrine on conditional consent fell into disuse, but all the other canonical principles on error were applied in those courts under the Anglican canon law. Ayliffe⁶¹ sets forth the doctrine which we find today in the Code of Canon Law of the Catholic Church. He says, in part: "... the principal thing required to a legal marriage is the consent of the parties contracting, which is

sufficient alone to establish such a marriage. And tho' there is nothing more contrary to consent than error, yet every error does not exclude consent. . . . [T]here are four species of error. . . . The first is stiled error personae. . . . an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. . . . A second species is stiled error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman . . . by the canon law such an error is an impediment to a matrimonial contract. . . . The third species is what we call error fortunae; and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But 'tis otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousands pounds, and the condition is not made good. The last species is stiled an error of quality — viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Bertha, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflower'd or of mean parentage. But . . . this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deem'd to be simply voluntary as to the nature and substance of it, though in respect of the accidents 'tis not voluntary." These are, says Sir F. H. Jeune, President of the Probate Division, "the principles of the

⁵⁷ Termed technically, *bonum prolis, bonum fidei, bonum sacramenti*.

⁵⁸ Doheny, *op. cit. supra* note 23, at 959-978.

⁵⁹ *Id.* at 978-982.

⁶⁰ *Id.* at 988-1003.

⁶¹ Ayliffe, *Parergon Juris Canonici Anglicani* 361 (1726), quoted in extenso in *Moss v. Moss*, [1897] P. 263, 271-273.

Ecclesiastical Courts which, in nullity cases, are the guide of this tribunal.”⁶² Today, the English statutes give an action for avoidance of marriage to a petitioner who was ignorant, at the time of the marriage, of certain facts respecting the spouse.⁶³

Fraudulent Marriage Void or Voidable in America

It was natural that the lay courts of England accepted and felt themselves bound by the canonical rule of error. They expressed the rule in terms of fraud and put it in this form: “fraud . . . as a ground for avoiding a marriage . . . is limited to such fraud as procures the appearance without the reality of consent.”⁶⁴ The lay jurisdiction of marriage in England derives from the Victorian statute which expressly withdrew the matrimonial jurisdiction from the ecclesiastical courts, vested that jurisdiction in the Crown, and declared that it should thereafter be exercised by the lay court created by the same statute.⁶⁵

The reason why this traditional rule should have had any influence in America is to be found in nothing so obvious as the Statute of Victoria. The American state statutes conferring matrimonial jurisdiction on the courts never recite that an ecclesiastical authority is withdrawn and vested in

the state. The American states, adopting the Constitution, conferred upon the federal courts none of the states’ jurisdiction of domestic relations.⁶⁶ The justices of the Supreme Court, writing in explanation of that principle, have intimated that the state courts, at the time the Constitution was adopted, had no matrimonial jurisdiction.⁶⁷

Some of our early American judges entertained the view that matrimonial jurisdiction was conferred upon the courts of the states by devolution or reverter from the ecclesiastical courts which had competence in such matters in the colonies.⁶⁸ Other judges held the theory which has come to be accepted quite generally in later times, that marriage as a civil contract was inherently subject to the Chancery jurisdiction in England and our state courts obtained matrimonial competence as the direct heirs of the English Chancery.⁶⁹ In some states the proposition asserting devolution or reverter from the church courts was overcome by statutory enactment;⁷⁰ in others it was adopted in combination with the theory of Chancery competence.⁷¹

It is not difficult to perceive why, in jurisdictions where the ecclesiastical theory had been advanced, the traditional fraud rule was applied in cases of nullity. In other

⁶² *Moss v. Moss*, [1897] P. 263, 270.

⁶³ Marriage is voidable at the petition of a party thereto who became aware only after the marriage that the other party when entering the marriage was: mentally deficient or subject to periodic fits of insanity or epilepsy, infected with communicable venereal disease, or pregnant by a person other than the petitioner. Matrimonial Causes Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 57, §7; Matrimonial Causes Act, 1950, 14 Geo. VI, c. 25, §8.

⁶⁴ *Moss v. Moss*, [1897] P. 263, 268-269.

⁶⁵ 20 & 21 Vict., c. 85, §6 (1857).

⁶⁶ *Ohio ex rel. Popovici v. Agler*, 280 U. S. 379, 384 (1930).

⁶⁷ Holmes, J., in the *Popovici* case cited in the preceding note, and Daniel, J., in *Barber v. Barber*, 21 How. 583, 605 (U. S. 1858).

⁶⁸ Kent, Ch., in *Wightman v. Wightman*, 4 Johns. Ch. 343, 346 (N. Y. 1830).

⁶⁹ Sandford, Ch., in *Ferlat v. Gojon*, 1 Hopkins Ch. 478, 495 (N. Y. 1825).

⁷⁰ *Cf.*, e.g., New York Revised Statutes of 1827-1828, Ch. VIII, Tit. I, §4.

⁷¹ *Carris v. Carris*, 24 N. J. Eq. (9 C.E. Green) 516, 518-522 (1873).

states where the courts took no notice of that theory but relied upon a statutory jurisdiction, the traditional rule of the church courts was still invoked, probably because it was the only recorded formula for testing the validity of the marriage where fraud was involved.⁷²

Where the issue became that of voidability of marriage, rather than nullity of marriage, the ecclesiastical rule, as such, was not directly applicable. This concept of voidable marriage, unknown to the Canon Law and to the common law, was introduced by statute,⁷³ or by application to marriage of the equity doctrine of contract rescissible for fraud in the inducement.⁷⁴ Yet the old rule had some influence when the courts attempted to define the

"essentialia" of marriage for the essence or substance of marriage was the core of the traditional rule. Inevitably the concept of the "essentialia" was expanded in this application, but the phrase "appearance without the reality of consent" was a point of departure, at least.

Though we find nowhere in the American decisions explicit reference to the canonical doctrine of conditional consent, yet the now familiar test of materiality "Would the party have married if he knew the true fact of the matter?", is not entirely dissimilar to the canonical test for error made a condition of consent, "Did the party make the matter upon which he was in error a condition *sine qua non* of his consent?"⁷⁵

These problems of relation, comparison and contrast between the Canon Law rule of error and the American fraud rules will be examined in an article to appear in the July issue of THE CATHOLIC LAWYER.

⁷² Reynolds v. Reynolds, 85 Mass. (3 Allen) 605, 607 (1862).

⁷³ New York Revised Statutes of 1827-1828, cited *supra*, note 70.

⁷⁴ Carris v. Carris, 24 N. J. Eq. (9 C.E. Green) 516, 526; compare the dissent of Van Syckel, J., *id.* at 529 ff.

⁷⁵ Cf. *supra* p. 89.



First Red Mass — 1928. Left to right: Edward Reynolds, Julian A. Ronan, Ignatius Wilkinson, Matthew Troy, Victor Dowling, Msgr. Cashin, Borgia Butler, Edward Mahar, Salvatore Cotillo, Cardinal Hayes, Helen Corbett, Thomas Aurilio, David Broderick, John P. Maloney, Carroll Hayes, William J. O'Shea, John P. O'Brien, Edward O'Toole, Paul McCauley, Edward Keefe, Walter Kennedy, Edward Q. Carr, Arthur McGivney, William Caffery.