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NULLITY OF MARRIAGE IN ECCLESIASTICAL COURTS

JOHN B. GEST*

MANY LAWYERS have had some indirect experience with marriage cases in which one or both of the parties has been in a proceeding in a Court of the Roman Catholic Church for a declaration of nullity of marriage. Legal periodicals usually do not discuss such proceedings and it has been suggested that a resumé of the law and practice involved should be of interest to members of the Bar. The law, the terminology and the procedure (largely influenced by Roman law), are all quite different from that to which we are accustomed in our civil courts in this country.

It is well at the start to state some fundamental ideas. The Code of Canon Law was promulgated by Pope Benedict XV,¹ effective May 19, 1918, and a very few amendments have been added. It has been decreed that the Code is the sole source of canon law, that is, of positive ecclesiastical law, for the Latin rite of the Church. The Church claims jurisdiction over all baptized persons, and its legislation with respect to marriage applies to all marriages in which one or both parties are validly baptized,

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¹The Code of Canon Law is, for the most part, a codification of already existing law found in many different sources, including Decrees, Decretals, Councils, decisions of the Rota and Papal Constitutions and Bulls.

It may be superfluous to remind lawyers that nullity either does or does not exist *ab initio*, and so it is incorrect to speak of a canon law court *nullifying* or *invalidating* a marriage. When the issue is validity, the court's decision is that nullity, from the time of marriage, has or has not been proven.

For those interested in the cultural background of Canon Law, see "History of the Sources of Canon Law," Part II, of *Canon Law*, by Archbishop Cicognani (References).

While the decisions of the Ecclesiastical Courts have no bearing on the civil status of marriage in this country, it is otherwise in some foreign countries, which give such decrees binding effect in civil law.

whether Catholic or not. Certain provisions of the law are, however, expressly limited to those baptized in the Catholic Church, as, for example, those prescribing the "Form of Marriage," which will be discussed later.

It is important to bear in mind that the various provisions of the Code are sometimes: (a) explanations or applications of natural law principles, as when the purposes and essential qualities of marriage are stated—(b) the same as to divine positive law, as in statements concerning the sacramental character of marriage, and—(c) purely positive (ecclesiastical) legislation, as, for example, the provisions for certain impediments and certain validating conditions, when such impediments or conditions would not exist in the absence of legislation. The natural law and the divine positive law cannot be changed, but the Church can change and dispense from her own laws.

Marriage is held to be a contract having its origin in the natural law. The canon law states that the primary object of marriage is the procreation and education of offspring, and secondary purposes are mutual assistance and the remedy of concupiscence. The essential qualities of marriage are unity and indissolubility.

The Church holds that marriage is always a sacrament when validly contracted by two baptized persons.² This includes all validly baptized persons, Protestant as well as Catholic. When one or both of the parties are unbaptized, the marriage is not sacramental, but it is nonetheless a natural contract. It is held to be beyond the power of

the state to change the essential nature of marriage or to give the right of remarriage to any one who has been validly married, during the life of the spouse. In the case of unconsummated marriage, and of non-sacramental marriage (that is, when one or both of the parties are unbaptized), the Church claims the right under authority of Scripture and tradition to dissolve such marriages under certain conditions. One of these concerns what is called the Pauline privilege. However, these are unusual and involve principles not within the scope of this article, which is concerned solely with declaration of nullity.

When one of the parties is baptized, the Church does not recognize any right in the state to set up conditions for the validity of the marriage. It does, however, recognize the right of the state to pass reasonable laws providing for the civil effects of all marriages. In the case of the marriage of two unbaptized parties canon law does not apply except to the extent that it is an application of natural law principles. In such case the Church recognizes the right of the state to prescribe conditions for the validity of marriage not inconsistent, of course, with natural law. And in such marriages, that is of the unbaptized, the validity of the marriage would be dependent upon conformity with requirements of the natural law, and the laws of the state in which the marriage took place provided the latter do not contravene natural law principles. In general, natural law would require contractual capacity of the parties, free mutual consent manifested, and freedom from natural impediments such as existing marriage, or consanguinity—very much as would be required at common law in our civil courts.

Invalidity of the marriage of baptized

² A sacrament is defined as an outward sign instituted by Christ to give grace. The Church teaches that there are seven sacraments, Baptism, Confirmation, Holy Eucharist, Penance, Extreme Unction, Holy Orders and Matrimony.

persons may result from (a) the existence of an impediment, (b) defect of consent or, (c) in the case of those baptized in the Catholic Church, from failure to observe the form of marriage prescribed by Canon Law.

Impediments

Under canon law the impediments to marriage are:

1. Impedient (impeding) impediments, which make marriage unlawful but not invalid; and
2. Diriment (from the Latin *dirimere*, to destroy, frustrate, take apart) impediments which render a marriage invalid.

As this discussion is confined to nullity cases, we are not here concerned with the first class, impedient impediments.³

Diriment impediments (which invalidate marriage) are those concerning age, impotency,⁴ existing valid marriage bond, disparity of cult, holy orders, solemn vows, certain kinds of abduction, crime (i.e., adultery or conjugicide, both under specified conditions), consanguinity, affinity, public propriety and spiritual and legal relationship.⁵

³ The two classes of impediments are analogous to the conditions in civil law, some affecting lawfulness, and others the validity, of the marriage. An example of the first class (impediment), is a simple vow of celibacy by a layman.

⁴ Sterility is not an impediment of any kind.

⁵ It is impossible in the space available to discuss these terms except very generally. *Consanguinity* relates to marriage of second cousins or closer relatives. *Affinity* relates to marriage with first cousins or closer relatives of a deceased spouse. *Public Propriety* forbids the marriage of a man with the close relatives of one with whom he has lived in public or notorious concubinage. *Spiritual relationship* exists between a baptized person and the minister and sponsors at the baptism. *Legal relationship* exists where the civil law declares

Some impediments exist purely by reason of ecclesiastical legislation (canon law) and a dispensation therefrom can be granted for a sufficiently grave cause. Disparity of cult (or worship), i.e., between a baptized Catholic and an unbaptized person, is an example. Affinity is another example, as when a man obtains a dispensation to marry his deceased wife's sister.⁶ The impediment of existing valid marriage may be taken as an example of one from which a dispensation cannot be granted because it exists under divine law independently of legislation.

Matrimonial Consent

Canon law requires that the consent of the parties be duly manifested. This consent is a free act of the will by which the parties mutually give the perpetual and exclusive right to the acts suitable for the procreation of children.

The law provides that error as to the person renders a marriage invalid. An error, however, as to a quality, for example, wealth, lineage, virtue, which did not amount to an error of the person, would not invalidate the marriage.

Error as to the unity, indissolubility, or sacramental character of marriage does not vitiate the consent. However, it is provided in the Code that if one or both of the parties *by a positive act of the will* excludes marriage or an essential property of marriage the contract would be null. The distinction is important. For example, if one mistakenly

parties incapable of marrying on account of legal adoption. The Canon Law adopts the civil law in this impediment. *Disparity of Cult* is in marriage between a baptized Catholic and an unbaptized person.

⁶ Henry VIII argued unsuccessfully that his marriage to his deceased brother's widow was against natural law and that the dispensation was therefore invalid.

believes that divorce and remarriage are consistent with the nature of marriage, his marriage is valid. That is an interpretive error in the understanding, and is not in the will. But if he understands that marriage is indissoluble and deliberately restricts his intention by excluding that essential of marriage, then his marriage is invalid by defect of consent.⁷

The law further provides that marriage is null when it is contracted because of violence or grave fear, caused unjustly by an external agent, to free himself from which one is compelled to choose marriage.

The parties to the marriage must be present, either personally or by proxy, and the matrimonial consent must be manifested by words if the parties can speak; otherwise, signs are used.

⁷ Two cases which attracted much attention may be cited to illustrate the difference between an interpretive misunderstanding of the nature of marriage on the one hand, and the wilful exclusion of the essential quality of permanence on the other.

In 1895 Count de Castellane married Anna Gould. After eleven years she secured a divorce and remarried. The Count sought a declaration of nullity on the ground of a condition contrary to the perpetuity of the bond placed by Anna before and at the time of marriage. There was a great deal of testimony showing that the bride believed in the possibility of divorce. After much study the final decision of the Rota was that there was not a positive act of the will or *conditio sine qua non* excluding a perpetual union. This was an interpretive error.

The Marconi case was different. In 1905 he had married Beatrice O'Brien. They were divorced in 1924. There was an explicit pre-nuptial agreement between the couple and between the groom and the bride's mother that there would be a divorce should the union not prove happy. In other words their contract of marriage was made with a reservation of the right to divorce. This was not an interpretive error and the marriage was held invalid.

(Condensed from Ayrinhac-Lydon, 230, 231, see References).

The Code also lays down certain principles or rules for determining the validity of marriage when a condition is placed upon the consent.

Failure to meet the canon law requirements relating to consent is broadly spoken of as an impediment, but the correct designation is a defect of consent.

Form of Marriage

The Code contains provisions concerning the "Form of Marriage," obligatory on persons baptized in the Catholic Church, as a necessary condition for validity. This requires the presence, under ordinary circumstances, of a duly authorized priest and two witnesses. That is why the marriage of a Catholic before a minister, judge or other official is invalid.

The requirement of the form of marriage (presence of priest and two witnesses) is only binding on those baptized in the Catholic Church and therefore only affects marriages in which one or both of the parties are baptized Catholics. Since the form of marriage is a requirement of ecclesiastical law, and not of natural law, a dispensation can be obtained under certain conditions. And so far as concerns *form*, the marriages of other than Catholics are valid if they satisfy natural law requirements (and also State requirements in cases in which neither party is baptized).⁸

⁸ Before the decree "Ne Temere," in 1908, canon law did not require the presence of the priest as a condition for validity of Catholic marriage in large parts of this country, and prior to a change in the code effective January 1, 1949, it was not required of a baptized Catholic whose parents were not Catholic and who had not been brought up as a Catholic.

Marriage is in the free exchange of consent of the parties, mutually expressed; in sacramental

The Court

Each diocese is bound to have a tribunal for hearing and deciding ecclesiastical cases. It is presided over by the Officialis (President Judge) appointed by the Bishop, and associated with him may be one or more Vice-Officiales (Judges). There are also a number of Synodal, or pro-Synodal judges.⁹

Nullity cases, except where they can be determined by summary process (see Procedure, *infra*) are tried by a court of three Judges (Collegiate Tribunal). One of the Judges must be the Officialis, or a Vice-Officialis (Presiding Judge). He may designate a Ponens whose duty is to report on the case and write the Sentence (or Judgment).

An Auditor is appointed, either permanently or for a particular case. He is usually chosen from among the Judges. He summons and examines witnesses, and has such other duties as may be assigned to him by the terms of the mandate of his appointment, for example, to sign citations, examine and compare documents and administer oaths. His position is somewhat like that of a Master in our civil divorce practice, but in forwarding the record to the Judges he does not make findings, conclusions or recommendations.¹⁰

marriages the parties are the ministers of the sacrament. The presence of the priest and the witnesses are validating requirements by legislation, not by natural or divine law.

Marriage defective in required form is often referred to as "clandestine."

⁹ Synodal judges are those appointed at a diocesan Synod which is an extraordinary convocation of the diocese, presided over by the Bishop. He is the sole legislator. Prosynodal judges are those appointed between Synods. The term of office of these judges is for ten years unless a Synod is held sooner.

¹⁰ The duties of the Auditor should be of interest

There is a Promoter of Justice, usually appointed permanently, for each diocese. His duty is to intervene in cases in which the public good is concerned and to safeguard procedural law.

The Defensor Vinculi, or Defender of the Bond, is appointed by the Bishop either permanently or for a particular case. His presence is usually required at the examination of witnesses, although he may be excused at the discretion of the Auditor. His duty is to present all facts and argument in favor of the validity of the marriage, and to prepare the questions to be presented to all who are cited to give testimony in the case.¹¹

There are also Procurators (attorneys) and advocates available. In this country they

to those concerned with reform of our Divorce Law. In a note in the *University of Pennsylvania Law Review*, June, 1953, p. 1204, The Administration of Divorce, it is said:

"It is apparent that many masters seriously misapprehend their statutory function. Many lawyers conceive the function of the master to be merely to decide whether a case has been made out; even judges are sometimes inclined to consider it sufficient that the interests of both parties have been protected, overlooking the state's interest in the matter. Some lawyers even feel that the master should aid the plaintiff in the presentation of his case and the occasional master who diligently probes the plaintiff's allegations is likely to find himself the object of other lawyers' criticism for treating the plaintiff 'like a defendant in a criminal trial.'" (1222, 1223).

¹¹ The duties of the Defender of the Bond suggest those of the Proctor in the English Court. It is said in the same note (*supra*) that:

". . . In England the public interest is protected by an officer known as the Proctor, who intervenes, instructs counsel when so directed by the court and investigates the possible existence of collusion. In the United States less than half the jurisdictions have any provision for an office which resembles the Proctor, and those statutory provisions which do exist generally cut down the scope of the office." (1224)

are always members of the clergy. A Procurator (attorney) is appointed for each case from the list of advocates, with authority to represent the Libellant, and to accept service of notice and other papers. One may be appointed for the Respondent. One or more advocates may also be appointed to file briefs and present argument on points of law involved.

These officers of the Court usually have degrees in canon law and have been trained in Rome or in the Graduate School of the Catholic University of America.

There is also at each trial a Notary designated by the Presiding Judge. His duty is to commit the questions and answers to writing, to attest the record and certify copies, to be present at the drafting of process and its discussion and so forth.

The Proceeding

There are two procedures for a declaration of nullity, their applicability depending upon the nature of the case. The more simple form, summary process, applies to cases in which it is known from sure and authentic documents that a marriage was made invalid by an impediment of disparity of cult, holy orders, solemn vow of chastity, previous marriage bond, consanguinity, affinity or spiritual relationship, and it is certain that no dispensation has been obtained. Then the Bishop or his delegate can declare the nullity of the marriage after summoning the parties and giving the Defender of the Bond an opportunity to examine into the case.

By far the greater number of declarations of nullity are under this summary process. All other cases go before the tribunal of three Judges.

A marriage may be impugned (i.e., validity questioned) by one or both of the

parties unless they have been the cause of the impediment. The Promoter of Justice may impugn the marriage in the case of impediments of a public nature, or when a marriage has been denounced by a party not entitled to impugn it and the public good demands it.

When a party believes there is ground to question the validity of his or her marriage the advice of the local parish priest is usually sought. The party is then referred to the Officialis and he in turn will designate one of the advocates to make a preliminary report. The party may, however, go directly to any of the advocates in the first instance.¹²

An Auditor is then appointed. He makes a preliminary report on the facts as submitted and the competency (jurisdiction) of the Court and submits the same to the Officialis. If there is probable cause for the action, the Libellant signs a mandate to an attorney, similar to a power of attorney, and one or more advocates may be appointed. A libel is prepared, signed by the plaintiff or the attorney, and filed with the Officialis. He then designates the collegiate tribunal of three judges and they determine the jurisdictional question and the right of the plaintiff to act and they either accept or reject the libel. If the libel is rejected for defects which can be corrected, an amended libel may be filed.

The examination of the parties and witnesses is conducted by the Auditor. The

¹² The names and addresses of all the members of the court and the advocates for the Philadelphia diocese are published in the Catholic Directory in Philadelphia. No doubt similar publicity is effective in all dioceses. Parties seeking advice should be referred to the Officialis, or one of the Advocates. The investigation of a case of invalidity of marriage includes the question of a possible validation having taken place.

Judges do not attend. The Promoter, the Defender and the Notary are present, and only one witness at a time. Ordinarily the parties (with their attorneys or advocates) are not admitted while not actually testifying, but exceptions to this rule may be made in the discretion of the Auditor. Questions, which may be supplemented by the Auditor, are prepared in writing by the Defender of the Bond in advance of the trial and submitted in a sealed envelope and opened by the Auditor in the Court room. The Procurator and the Promoter of Justice may also submit questions to the Defender of the Bond for submission by the latter to the Auditor, and further questions may be presented during the examination.

The Notary commits to writing all the questions and answers. Each witness is sworn both before testifying and after reading the answers, or having them read to him, and signing the written record. The oath is similar to that of our civil courts and affirmation is acceptable on the part of any witnesses who are opposed to swearing.

After the completion of the hearing or hearings, a brief is prepared by the Procurator (attorney) representing the party in action (plaintiff), and one or more of the advocates may file briefs. The defendant or his attorney may also file a brief. These are delivered to the Defender of the Bond and he prepares a brief presenting any reasonable grounds in favor of the marriage, and submits the record and briefs to the Court.

The judges then study the record and briefs and each separately prepares an opinion. They then meet at a fixed time, and after discussion, if an agreement is reached the sentence (judgment) is written by the Ponens (Recording Judge). If no decision can be reached, further examination of wit-

nesses might be directed, and other judges can be appointed. In nullity of marriage the sentence is "Constat de Nullitate" when nullity is proved, or "Non Constat de Nullitate" when nullity is not proved.

The Instructions issued from Rome provide that if an impediment is of such a nature that the consent of the consort suffices to remove the obstacle to the marriage, the Officialis should submit the matter to the Bishop, who, according to circumstances, may instruct the pastor or other priest to seek to induce the consort to validate the marriage.¹⁸

If the court of first instance decides that the marriage is invalid, the Defender of the Bond is obliged to appeal to another court. This is usually the Metropolitan (Archbishop's) Court, unless this court was the court of first instance, in which case the Court of Appeal would be that of the particular Bishop or Archbishop whose court has been chosen by the Archbishop and approved by the Holy See as a permanent Court of Appeal for such cases. The appeal can be taken directly to the Rota. If the Court of Appeal confirms the sentence of the court of first instance against the validity of the marriage, the Defender of the Bond may acquiesce, unless he conscientiously thinks that a further appeal ought to be taken.

If there is no appeal from the second judgment of invalidity within ten days, then the parties are free to marry. The result of the

¹⁸ Referring to our civil divorce law, the above mentioned note "The Administration of Divorce" states:

"One fault with present divorce procedure is the absence of any provision for an attempt to heal the marital rift. This need has been recognized by recent proposals for reforming divorce procedure . . ." (1224)

trial is noted on the baptismal and marriage records of the parties. The opinions of the diocesan judges are preserved and kept secret for ten years and then destroyed.

The expenses borne by the parties in a nullity case are established by the court, and they are actually less than the clerical expenses of the trial and considerably less than the expense of a civil divorce case. The judges receive no compensation other than their regular salaries as priests. Parties who certify that they cannot pay are exempt. In the summary process referred to the fee is nominal and, again, does not cover the actual expense.

The Rota

Appeals may be taken from the Diocesan Court to the Rota in Rome, which is the highest court of appeal. This consists of sixteen judges who are Doctors of Theology and of Canon Law and they are known as Auditors. They hear matrimonial trials in groups of three or more judges, but cases may also be heard by the entire court. Advocates appear for the parties and file briefs.¹⁴

¹⁴ The decisions of the Rota have not always had a good press in this country and misunderstanding has often resulted. An example is the famous Marlborough-Vanderbilt case which attracted attention on account of the prominence of the parties.

In 1894 Consuelo Vanderbilt married the Duke of Marlborough in an Episcopalian Church in New York. There was discord from the beginning. A separation took place in 1905 and a civil divorce was obtained in 1920. After both had remarried, Consuelo, in 1926, brought a proceeding for nullity in the Court of the Catholic Diocese of Southwark. The decision was for nullity. It was appealed to the Rota and affirmed. There was ample testimony showing that the bride's mother used

The rights of the poor are carefully protected. Canon Law provides that those who are unable to bear the expense of their case have a right to be relieved of all costs, and those who are partially unable have a right to a reduction of the costs. There is a roll of advocates entitled to practice in the Rota. Their fees are quite moderate and are all regulated by a schedule. Some laymen, especially trained in canon law, are on the roll of advocates. The sentences, i.e., the decrees, with review of facts and law, are published in bound volumes after ten years from date of deliverance.

The records of the Rota decisions for 1953, published in the May, 1954, issue of the official "Acta Apostolicae Sedis," show that 172 cases involving the validity of marriage were decided in that year. Nullity

coercion, threatened that a refusal to marry the groom would cause her death through heart failure and practically imprisoned the bride in order to force her to marry him. The Court held that the marriage was contracted because of grave fear within the meaning of the Code of Canon Law. A question raised was whether cohabitation had not supplied consent. On this the law provides that for validation of an invalid marriage the renewal of consent must be a new act of the will ratifying a marriage known to have been null. In the absence of this knowledge there is only a continuance of the same consent. There was no proof or presumption of such knowledge and no validation since the requirements for validation had not been met. (It should be noted again that the Code of Canon Law not only states natural law but legislates positive law). (See Ayrinhac-Lydon, para 215, References).

The cynical suggestion that money had anything to do with the case should be easily dispelled. Consuelo Vanderbilt Balson, the plaintiff in the case, writes in "The Glitter and the Gold" that the accusation is completely false, saying:—"Counsel fees and costs of collecting evidence were the only disbursements and were much less than the charges of a real divorce."

was declared proven in 65 cases and not proven in 107 cases.¹⁵

The following further facts concerning these 172 cases may be of interest:

Cases in which the advocate collected a fee	106
Cases in which no fees or costs were collected	66
Total	172
Affirmative decisions with fee	40
Negative decisions with fee	66
Affirmative decisions (nullity) without fee or costs	25
Negative decisions (nullity not proved) without fee or costs	41
Total	172

The breakdown on the basis of averred causes of nullity was as follows:

Basis of Nullity	Affirmative (Nullity)	Negative (Nullity Not Proved)	Total
Impediments:			
Bond of previous marriage	2	1	3
Consanguinity	—	1	1
Affinity	—	1	1
Impotency	3	16	19

¹⁵ The analysis of the 1954 figures are not available as this goes to press, but the totals are available unofficially:

245 marriage cases were decided by the Rota in 1954 of which the decision was affirmative (nullity proven) in 131, and negative (nullity not proven) in 114 cases. Of the total of 245, 55 were free cases.

Basis of Nullity	Affirmative (Nullity)	Negative (Nullity Not Proved)	Total
Defects of Consent:			
Force and Fear	21	33	54
Insanity	1	1	2
Defect of Liberty	1	—	1
Simulated Consent	9	12	21
Conditions			
(Unspecified) ..	3	12	15
Intention or Condition			
Against Unity of Marriage	3	4	7
Against Indissolubility	17	9	26
Against Procreation	23	36	59
Total	83	126	209

The total of 209 exceeds the total cases of 172 because more than one ground was averred in a number of cases, and the decision is simply that nullity is or is not proven on one of the claimed bases.

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