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The nature and importance of the Catholic marriage ceremony is best understood in the light of historical antecedents. With such a perspective, the canon law is not likely to seem arbitrary.

HISTORICAL NOTES ON THE CANON LAW ON SOLEMNIZED MARRIAGE

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THE law of the Catholic Church requires, under pain of nullity, that the marriages of Catholics shall be celebrated in the presence of the parties, of an authorized priest and of two witnesses.¹ That law is the product of an historical development. The present legislation considered apart from its historical antecedents can be made to seem arbitrary. Indeed, if the historical background is misconceived, the present law may be seen as tyrannical.²

This essay briefly states the correlation between the present canons and their antecedents in history. For clarity, historical notes are not put in one place, but follow each of the four headings under which the present Church discipline is described.

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¹Can. 1088, § 1, 1094 C.I.C.; Can. 79, § 1, 85 M.P. The initials C.I.C. (*Codex Iuris Canonici*) designate the CODE OF CANON LAW, effective May 19, 1918, which governs the marriages of Catholics of the Latin Rite. M.P. designates the MOTU PROPRIO, *Crebrae allatae sunt*, which, since May 2, 1949, regulates the marriages of Catholics of the Eastern or Oriental Rites. English translation of the Canons here cited from the Latin CODE, together with commentary thereon, will be found in BOUSCAREN AND ELLIS, CANON LAW (1951), and in WOYWOOD-SMITH, A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW (1952). English translation of the Canons of the MOTU PROPRIO is found in POSPISHIL, INTERRITUAL CANON LAW PROBLEMS (St. Basil's, Chesapeake City, Md., 1955); no complete English commentary on these Canons has come to our attention.

² See, e.g., the article of Professor Gardner, *Liberty, the State, and the School*, 1 THE CATHOLIC LAWYER 285 (1955). The law requiring celebration of marriage before an authorized priest is there alleged to signify that the Church has abandoned the doctrine that consent of the parties is the effective cause of marriage; that the law was enacted in assumption of an unwarranted authority over marriage; that the law should be abrogated as it puts the welfare of the Church above that of the family, and that the prelates who opposed adoption of the law in the Council of Trent did so precisely because they saw in it the same difficulties as are now alleged by Professor Gardner, *supra* at 289, 291, 295.

The Presence of the Parties When Consent Is Exchanged

To validly contract marriage, the parties must express their matrimonial consent in each other's presence, personally or by proxy.³ To be effective, the proxy's commission must be a special mandate to contract marriage on behalf of his principal with a determined person, and the commission must be executed and witnessed in the form prescribed.⁴ The marriage is null if the proxy does not personally perform his commission, or if the principal, even without notice to his proxy or to the other party, revokes the commission before it is performed.⁵

It should be noted that the requirements of these Canons affect the marriages of all baptized persons. The general canonical rule is that the marriages of all baptized Christians are subject not only to Divine Law, but also to Canon Law.⁶ This follows from the more general principle that

by baptism a man is endowed with juristic personality in the Church, with all of the duties of a Christian.⁷ Some of the laws of the Church regarding marriage exempt from their application persons who have received baptism at the hands of non-Catholics.⁸ No such exemption is made in the Canons which require presence of the parties when consent is exchanged.

The Church cannot legislate upon the marriages of unbaptized persons,⁹ as they are not members of the Church in any sense. The State can bind the consciences of such persons by reasonable regulations within the limits of natural law. In adjudicating upon such marriages, as the ecclesiastical courts are required to do when a party thereto wishes subsequently to marry in the Church, the courts of the Church must test the validity of the marriages upon the principles of natural law as expressed in divine revelation, and upon the competent civil law.¹⁰

³ Can. 1088, § 1 C.I.C.; Can. 79, § 1 M.P. The expression of consent should be verbal and not by signs, unless the parties cannot speak. Can. 1088, § 2 C.I.C.; Can. 79, § 2 M.P.

⁴ Can. 1089, §§ 1 and 2 C.I.C.; Can. 81, §§ 1 and 2 M.P. The principal must subscribe, if he can write. In either case, the commission must be subscribed by the pastor or Ordinary of the place where the mandate is made, or by two witnesses; if the principal cannot sign his name, an additional witness must sign.

⁵ Can. 1089, §§ 3 and 4 C.I.C.; Can. 81, §§ 3 and 4 M.P. Marriage is made by the consent of competent parties, expressed according to law, and if their consent be lacking it can be supplied by no human power. Can. 1081, § 1 C.I.C.; Can. 72, § 1 M.P. The Sacrament is the marriage contract itself. Can. 1012 C.I.C.; Can. 1 M.P. These are direct declarations of fundamental doctrine. One necessary consequence of these principles is the nullity of a marriage contracted by a proxy whose mandate has been revoked.

⁶ Can. 1016 C.I.C.; Can. 5 M.P.

⁷ Can. 87 C.I.C. From invalidating and incapacitating laws; those which expressly or equivalently declare an act null or a person incapacitated (Can. 11 C.I.C.); no ignorance excuses, unless the law contains express provision to the contrary. Can. 16, § 1 C.I.C.

⁸ Cf. text *infra* at p. 13.

⁹ Cf. Can. 12 C.I.C.

¹⁰ Cf. BOUSCAREN AND ELLIS, CANON LAW 463 (1951). For example, a Church court considering a non-ceremonial or "common law" marriage of two unbaptized persons contracted in New York, would hold the marriage null if it were contracted after April 28, 1933, but would hold the same marriage valid if it had been contracted between January 1, 1908 and April 29, 1933. LAWS OF N.Y. 1901, c. 339, § 19 had made common law marriages invalid. That provision was repealed by Laws of N.Y. 1907, c. 742 (eff. Jan. 1, 1908). The clause which declares, "No marriage shall be valid unless solemnized . . ." was inserted into N. Y. DOM. REL. LAW § 11 by LAWS OF N.Y. 1933, c. 606 (eff. April 29, 1933).

HISTORICAL NOTE

In the Oriental Church before 1949, only a few Rites had explicit provision for proxy representation of one or both parties in the celebration of marriage.¹¹ In the West, proxy marriage was explicitly permitted by the law of the Decretals,¹² and that law was construed to permit marriage by letter.¹³ The present Canons do not admit of such construction.

Marriage Celebrated Before an Authorized Priest and Witnesses

The Code of Canon Law for the Latin Church establishes that: "Only those marriages are valid which are contracted before the pastor or Ordinary of the place, or a priest delegated by either, and at least two witnesses. . . ."¹⁴ Canon 85 of the *Motu Proprio*¹⁵ has the same requirement.

Canon 1095 of the Code and Canon 86 of the *Motu Proprio* limit the valid assistance of the pastor or Ordinary,¹⁶ acting in

¹¹ GALTIER, *LE MARIAGE ORIENTALE ET OCCIDENTALE* 206 (1950).

¹² C. 14, X, 3, 32 (Innocent III).

¹³ IV-I WERNZ, *JUS DECRETALIU* 61 (1911). The nature of contract does not require presence of the parties when the agreement is made. It is for competent authority to reasonably restrict that natural liberty when a social necessity requires. That marriage be certain and provable justifies the canonical regulations respecting proxies.

¹⁴ Can. 1094 C.I.C.

¹⁵ The term *MOTU PROPRIO*, when used herein without qualification, refers to the *MOTU PROPRIO, Crebrae allatae sunt*, which governs marriage in the Catholic Churches of the Oriental Rites. See note 1 *supra*.

¹⁶ These Canons speak only of the pastor and Ordinary of the place as empowered by their office to assist at marriage. Referring to other Canons, it becomes clear that a number of officials, other than the priest who is pastor of the parish

virtue of their office, to the territory attached to that office. Valid assistance of a delegate¹⁷ is limited to the territory of his principal. Usually,¹⁸ a priest validly assists at those marriages only in which at least one party is a subject of the Rite in which the priest holds office, or in which the prelate delegating him holds office.

The Canons explicitly waive the presence of a priest at the celebration of marriage in specified extraordinary circumstances, but they do not, even then, relax the requirement that marriage shall be celebrated before at least two witnesses. The marriage is validly celebrated before the common witnesses only, where it is impossible for the parties to have or to approach an

and the Bishop who rules the diocese, are included in the terms "pastor" and "Ordinary." "Local Ordinary" includes not only the residential Bishop, but also his Vicar General, and it includes others who rule diocesan or quasi-diocesan territories but who have not the title of bishop of the diocese. Among these latter are Administrators Apostolic and Vicars Capitular of vacant dioceses, and Vicars and Prefects Apostolic in mission territories. Can. 198 C.I.C. The Administrator of a vacant parish, the Vicar Coadjutor of an incapacitated pastor, the Vicar Substitute of an absent pastor, and priests charged with pastoral care of the military, share with the local pastor authority to celebrate marriages in the parish. *Cf.* Can. 451, 472-475 C.I.C. Vicars Assistant, appointed because the size of the parish requires that the pastor have help in his ministry, have not, *ex officio* authority to assist at marriages. *Cf.* Can. 476 C.I.C.

¹⁷ Vicars Assistant may be delegated by the pastor or Bishop to assist at all marriages in the parish to which they are assigned. Can. 1096, § 1 C.I.C.; Can. 87, § 1, 20 M.P. With that exception, any delegation to assist at marriage must be given expressly to a certain priest, for a certain and determinate marriage. Can. 1096, § 1 C.I.C.; Can. 87, § 1, 10 M.P.

¹⁸ In some circumstances, where the hierarchy of the Rite to which the persons belong is not estab-

authorized priest, provided that *either* of these conditions is verified: one party is in danger of death, *or* it is foreseen that no authorized priest will be available for at least a month.¹⁹

HISTORICAL NOTES

Before the Council of Trent

The law of the Gospel did not establish a necessary ceremonial form of marriage, nor did the civil society in which the early Church found herself regard any public act as essential to the validity of a marriage

lished in the place, local Ordinaries or pastors have power to assist at the marriages of persons not of their own Rite. Cf. Can. 86, 87 M.P.

¹⁹ An *unauthorized* priest, if one is available, should be asked to assist with the common witnesses, but marriage in the presence of the witnesses alone is valid though such priest be not invited, or being invited, does not assist. Can. 1098 C.I.C.; Can. 89 M.P.

Although the Canons grant explicitly no other waiver of celebration, the obligation of the law requiring the active assistance of an authorized priest and the assistance of witnesses is held waived, at least in a case of extreme hardship affecting the entire community. The Holy Office declared that the Catholics of China are not bound to observe the law of form of marriage as long as the circumstances created by the Red regime continue. The Private Reply, dated January 27, 1949, is published in 3 BOUSCAREN, CANON LAW DIGEST 408.

A dispensation from the law, since it requires intervention of competent authority in a given case, is distinct from a waiver contained in the law itself (Can. 1098 C.I.C.; Can. 89 M.P.), or predicated upon general doctrines of equity or *epikeia* (such as the declaration for China). The Canons describe two powers of dispensing the law of the form of marriage.

Where one party is in danger of death and marriage is necessary for the sake of conscience, the local Ordinary can dispense from the law of form, so that marriage can be contracted by the consent of the parties expressed to one another, without any priest or other witness present. If the Ordinary cannot be reached, the pastor, (the delegated

contract. For the Romans, the only formal act which itself constituted marriage was the patrician ceremony of *confarreatio*.²⁰ Other ceremonies, such as that of leading the wife to her husband's house, satisfied the requirements of common proof, but only in so far as they indicated the "marital mind" of the parties.²¹ However, since Christian marriage, in contrast with Roman marriage, was not to be dissolved by the will of the parties, and because the Church was much concerned with the moral implications of marriage, the Christians soon felt a need for the intervention of the ecclesiastical authorities in the celebration of marriage.

Vicar Assistant under the MOTU PROPRIO, but not under the CODE OF CANON LAW), the confessor and the *unauthorized* priest assisting under Can. 1098 C.I.C. or Can. 89 M.P., are empowered to grant this dispensation. Can. 1143, 1144 C.I.C.; Can. 122, 123 M.P.

Where consent *de praesenti* has been expressed in an invalid ceremony, if that consent still perdures in the minds of the parties, a dispensation from the Holy See or its delegate may remove the obligation to renew consent *de praesenti* before an authorized priest and/or witnesses. (Cf. Can. 1094, 1098, 1133, 1134 C.I.C.; Can. 85, 89, 122, 123 M.P.) There the consent once expressed and now persisting effects a valid marriage as of the time the dispensation is granted. This dispensation is known as a *sanatio in radice* of the invalid marriage; the American Bishops are delegated to dispense in many cases of this sort. Can. 1138-1141 C.I.C.; Can. 127-130 M.P.

²⁰ The term derives from the early Latin word *far*, designating a coarse wheat, a cake of which was sacrificed to Jupiter. The parties were required to speak certain solemn words in the presence of ten witnesses; the *pontifex maximus* and the priest of Jupiter presided. The religious import of the ceremony was the transfer of the woman from the household worship of her father's family to that of her husband's. Cf. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 113 and notes at 548, 549 (1952).

²¹ IV-I WERNZ, JUS DECRETALIUM 199 (1911).

The oldest genuine testimony concerning the position of the Church in this matter is found in the Epistle of St. Ignatius to St. Polycarp.

For those of both sexes who contemplate marriage it is proper to enter the union with the sanction of the bishop; thus their marriage will be acceptable to the Lord and not just gratify lust.²²

Tertullian, Pope Siricus, St. Ambrose, Pope Innocent I, all indicated the desire of the Church that her members contract marriage in a public manner, with ecclesiastical approbation in the nature of a blessing.²³ Marriages not so celebrated were called secret or clandestine. Tertullian's condemnation of clandestine marriages represents the general Christian feeling of the time and of the subsequent centuries.

Among us, secret marriages, i.e., such as are not publicly professed before the Church, are in danger of being condemned as adultery and fornication.²⁴

The condemnation of secret marriage was repeated by the Fathers of the local councils of the West, and was assimilated into legislation for the whole Latin Church in the Fourth Council of the Lateran in 1215, under Pope Innocent III. That Council imposed serious penalties upon the parties to any clandestine marriage, and upon any priest who should dare to assist thereat.²⁵ While secret marriages were thus con-

demned and punished, the Church still expressly asserted that such unions were valid marriages.²⁶

The condemnation of clandestine marriages is reflected also in the Eastern Fathers and Councils. The Emperor Leo VI decreed (circa 893 A.D.) that marriages should be null which were not contracted with the blessing of the Church. That his decree was accepted by competent Church authority, as it would have to be in order to have effect as Canon Law, is extremely doubtful.²⁷

Until the *Motu Proprio* of 1949, the Eastern Catholic Church had, in general, no form of marriage obligatory on pain of nullity. Aside from the Catholic Armenians, it is doubtful that any Oriental Rite, by its synods or its customs, imposed such an obligatory form of celebration. The necessary form instituted in the West by the Council of Trent, in its Decree *Tametsi*, was made binding in only a very few of the Eastern Rites. It is not certain that the Decree *Ne Temere* had effect in any community of the Oriental Rites.²⁸

The Decree Tametsi of the Council of Trent

The efforts to discourage secret marriage by imposing censures had proved ineffective.²⁹ The Fathers of the Council of Trent were moved to impose a more severe sanction by the sight of sins of injustice and

²² *Epistle of Ignatius to Polycarp*, in THE EPISTLES OF ST. CLEMENT OF ROME AND ST. IGNATIUS OF ANTIOCH 98 (Kleist ed. 1946).

²³ JOYCE, CHRISTIAN MARRIAGE 162-163 (1948).

²⁴ TERTULLIAN, *Liber de Pudicitia*, c. 4, in QUINTI SEPTIMI FLORENTIS TERTULLIANI (Migne ed. 1844).

²⁵ JOYCE, CHRISTIAN MARRIAGE 112 (1948).

²⁶ *Id.* at 116.

²⁷ *Id.* at 196.

²⁸ Cf. 3 COUSSA, DE IURE ECCLESIASTICO ORIENTALE 211-235 (1950).

²⁹ The censures had not the desired effect chiefly because there was no uniform system for punishing non-compliance. AYRINHAC-LYDON, MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW 235 (2d rev. ed. 1952).

adultery which multiplied as husbands abandoned the wives with whom they had married secretly, to contract new unions by public celebration.³⁰

The first reform draft introduced in the Council on July 20, 1563 proposed that in the future, marriages contracted in secret and without witnesses should be null and void. That one necessary witness should be a priest was first proposed in the fourth draft which was brought in on November 11, 1563. This fourth proposal was finally adopted and it is important to note that the priest's assistance is treated with different legal effect in different sections of the Decree. Following immediately upon the preamble, the *dispositive* part of the decree *re-enacts* the law of the Fourth Lateran Council, requiring the publication of banns, and directing that the pastor shall ask for and be certain of the consent of the parties *in facie ecclesiae*, and that he shall use a ritual form to declare the parties joined in marriage. After then establishing procedure for publication of banns in unusual circumstances, the decree sets forth distinctly its *invalidating* clause. A marriage is not null for omission of the banns, or of the pastor's interrogation, or of his ritual declaration. The marriage is null only if it is celebrated without "the presence of the pastor or of another priest licensed by the pastor or the Ordinary and of two or three witnesses."³¹

³⁰ The preamble of the Decree adverts to these conditions. See the text in DENZINGER-BANNWART, ENCHIRIDION SYMBOLORUM n. 990 (1928).

³¹ DENZINGER-BANNWART, *op. cit. supra* note 30 n. 992. This important distinction, between the Decree's merely directive reference to the ritual to be performed by the priest and its voiding provision as to marriage contracted without the presence of the priest and witnesses, was clearly pointed out by the greatest of the post-Tridentine

The deliberations of the Council upon this matter were disturbed by several controversies.³² No decree which could be drafted would please everyone, and it is

canonists, Prospero Lambertini, in his work published after his elevation to the Papacy. BENEDICTUS XIV, DE SYNODO DIOCESANA lib. viii, c. xiii (1767). Professor Gardner quotes an abbreviated translation of the Decree from KOEGEL, COMMON LAW MARRIAGE 22 (1922), apparently without realizing the import of the distinction pointed out by Benedict XIV.

³² One of the controversies was that precipitated by the assertion that the priest, not the parties, is the minister of the Sacrament of Matrimony. Benedict XIV (*loc. cit. supra* note 31) tells us that this thesis was defended at Trent by a very few of the theologians. It had originated with William of Paris and derived nearly all of its prestige at Trent from the fact that it was accepted by the great Dominican, Melchior Cano. The Council not only did not accept Cano's view, but implicitly asserted the contrary position, that the parties are ministers of the Sacrament. The Decree asserts solemnly that clandestine marriages theretofore contracted were "rata et vera . . . matrimonia." Now, as Benedict XIV points out, the term *ratum* applied to marriage is a word of art, at least since its employment in that respect by Innocent III in the DECRETALS (c. 7, X, 4, 19). So applied, it means *Sacramental*. Thus, as Benedict concludes, the Decree declares that the parties to the marriages in question administered the Sacrament to each other.

Even yet, the Church has not found occasion to define the proposition that Christian spouses are ministers of the Sacrament of Matrimony. Still, that proposition is a reasonable inference from two official declarations of Catholic doctrine. The General Council of Florence, on November 22, 1439, made a practical decree for the guidance of the dissident Armenians who contemplated return to the unity of the Catholic Faith. That Decree sets forth the teaching of the Church regarding the seven Sacraments. The qualifications of the minister of each Sacrament, except Matrimony, are described. The term "minister" is not used with reference to Matrimony; the decree simply states, "The efficient cause of matrimony is regularly the mutual consent expressed *per verba de praesenti*" (DENZINGER-BANNWART, *supra* note 30 at n. 702). No one can doubt that the person who efficiently causes a

not surprising that many men voted against the Decree who did not oppose its principal enactment.³³ The Decree was adopted

Sacrament is its minister. Pope Pius IX, on December 8, 1864, published his SYLLABUS OF ERRORS which included this condemned proposition: "The sacrament of matrimony is only accessory to the contract and is separable therefrom, the sacrament consists in the nuptial blessing only." (DENZINGER-BANNWART, *op. cit. supra* note 30 at n. 1766).

³³ There was a three-sided division of opinion as to the effect of the Decree upon the "form" of the Sacrament. Most of the prelates held that the form of the Sacrament was the consent exchanged between the parties, but maintained that the Decree made no change in the form; they relied upon the clause which declared that the new law affected the capacity of the parties to the contract—making them incapable of contracting except in the presence of the priest and witnesses. Some took the view that, while the nature of the Sacrament as divinely instituted could not be changed, the form (including all external acts required to effect the contract) could be changed by the Church. That was considered a very radical thesis at that time, and had little well reasoned support. Cf. JOYCE, CHRISTIAN MARRIAGE 130 (1948). Finally, there were some who held the form could not be changed, and that the Decree (despite the clause referring to incapacity of the parties) purported to change it. Cf. JOYCE, *op. cit. supra* at 126.

Others were dissatisfied with the declaration that secret marriages contracted before the Decree were *sacramental* and *valid*. Those who accepted Cano's thesis that the priest is the sacramental minister would insist that the clandestine marriages were not sacramental. And the followers of Nicholas de Brys held that clandestine marriages were void even in the law of nature, because the consent of parents was not obtained.

Lastly, there was the anxiety expressed by Lainez, the Jesuit General, that the Decree would do vast practical harm by invalidating the marriages of baptized persons who were outside the Church in good faith; though the marriages of such persons contracted without the presence of a priest would not be sinful in the consciences of the parties, they would be invalid in fact and would therefore not confer Sacramental Grace. Against this was weighed the consideration of evils resulting from secret marriages. DENZINGER-BANNWART, *op. cit. supra* note 30 at n. 990.

by vote of one hundred fifty to fifty-five.³⁴

The procedure for promulgating the Decree considerably limited the scope of its effectiveness. It was required that it be published three times during the first year it was in force. The Decree would have effect in any parish only thirty days after publication in the parish church. The local publication thus required was withheld in many areas where Protestantism prevailed. In such countries there was either no publication of the Decree, as in England and Scotland, or the publication was restricted to relatively small areas, as in the United States.³⁵

Another aspect of the Decree created many difficulties in its observance. The term "pastor" in the invalidating clause was consistently interpreted to require the presence of the *proper pastor* of at least one of the parties.³⁶

A person acquired his *proper pastor* or *Ordinary* by reason of his domicile or quasi-domicile. One acquired domicile by actually

³⁴ Several of the opponents submitted their votes to the judgment of the Pope. JOYCE, *op. cit. supra* note 33 at 126.

³⁵ In this country, publication was made in the Ecclesiastical Province of Santa Fe, excluding the northern part of the territory of Colorado; in the entire Province of New Orleans; in the Province of San Francisco and, with some exceptions, in the territory of Utah; in the Diocese of Vincennes, Indiana; in the City of St. Louis and in a few towns within that Archdiocese; in several towns in the present Diocese of Belleville, Illinois. In the rest of the country it was never published. Cf. Heneghan, *Cases and Studies*, 3 THE JURIST 318 (1943).

³⁶ Some canonists felt that this requirement of assistance by the *proper pastor* was contained in the Decree itself, by implication. Others held that the requirement was not contemplated by the Decree as enacted, but was added by subsequent authoritative interpretation. Cf. IV-I WERNZ, *JUS DECRETALIMUM* 257-258 (1911).

living in a place with intent to remain there permanently, that is, unless some occasion for moving should arise. He acquired quasi-domicile by actually living in a place with intent to remain there for the greater part of a year. In either case, his subjective intent was an essential element, and it was not always easy to determine. An official Instruction of 1867 established a presumption of law as to quasi-domicile, where a person had in fact resided in a place for a month; that presumption was rebuttable. But when this Instruction was extended to the United States in 1886, the presumption was made irrefutable.³⁷

The Decree Ne Temere.

To meet the difficulty arising out of the *proper pastor* construction of the Decree *Tametsi*, and to solve other problems which will be examined later, the Decree *Ne Temere* was promulgated by Pope St. Pius X. It was made effective throughout the Latin Church (with a few territorial exceptions to be noted later), and was operative from the date April 19, 1908. Under this law, the pastor or Ordinary in whose presence marriage must be contracted was the pastor or Ordinary of the place where the marriage was celebrated. Either could delegate other priests within his territory. These officials and their delegates could validly celebrate any marriage in their territory, and no local pastor or Ordinary had authority, *ex officio*, to celebrate the marriages of his subjects unless they were in his territory. In other places, the pastor or Ordinary of the parties could assist at a marriage only as delegate of the pastor or ordinary of those places.³⁸

³⁷ IV-I WERNZ, *op. cit. supra* note 36 at 261.

³⁸ *Id.* at 283-300.

As to waiver, in emergency circumstances, of the required celebration of marriage before the pastor and two witnesses, there was no explicit provision in the Decree *Tametsi* of Trent. From the works of the commentators and from official instructions of less than general application, it is clear that marriage was validly celebrated before witnesses only, if it was foreseen that the pastor could not be reached for a month.³⁹ Some of the approved authors held that a marriage contracted in danger of death, without the pastor or any other witness, was probably valid.⁴⁰

The Decree *Ne Temere* explicitly provided for both emergencies, but upon terms rather more rigid than the provisions of the present Canons. The impossibility of reaching the pastor must be common in the region, and not due to individual circumstances of the parties alone; that impossibility must have existed for a month *before* marriage could be contracted before witnesses. The danger of death had to be critical and had to be accompanied by a need for marriage for the sake of conscience or to legitimate children, and some priest must assist with the witnesses.⁴¹

The Role of the Priest Assisting

The present Canons require that the assistance of the authorized priest shall be *active*. In the Latin law, the requirement is that he shall "ask and receive the consent of the contracting parties without being coerced either by force or by grave fear."⁴²

³⁹ *Id.* at 250.

⁴⁰ 3 SANCHEZ, DE MATRIMONII SACRAMENTO 261 (Lib. III, Disp. XVII, n. 3) (1624).

⁴¹ 5 CAPPELLO, DE SACRAMENTIS 683 (*De Matrimonio* n. 697) (1947).

⁴² Can. 1095, § 1 C.I.C.

The law for Oriental Catholics has the same requirement and, in addition, demands that the priest assisting shall perform some sacred rite, at least a blessing.⁴³

HISTORICAL NOTE

Reference has been made to the ancient Christian custom which commanded that the parties procure a priest's blessing upon their marriage. That custom is so deeply rooted in the Orient, that the people of the Eastern Rites cannot conceive of a priest assisting at a marriage merely in the character of a witness. Therefore, their priests must perform some religious ritual; a blessing is the minimum requirement for validity of their assistance at marriage.⁴⁴

The Germanic customs of Western Europeans tended to foster the celebration of marriage before witnesses. The ceremonial and probative effectiveness of handing over the bridal gifts and the sword and the reading aloud of the marriage and dower contracts, required that such things be done publicly. At the same time, the commercial and military overtones of the business precluded its being done in the church itself. Therefore, marriages were celebrated in medieval France and England at the door of the church, literally *in view of the church and before the church; in conspectu sive in facie ecclesiae*. Only after they were thus married would the parties enter the church to assist at Mass and receive Holy Communion.⁴⁵

Probably because of the influence of

⁴³ Can. 86, § 1, 3^o and Can. 85 M.P.

⁴⁴ Cf. 3 COUSSA, *DE IURE ECCLESIASTICO ORIENTALE* 195 (1950).

⁴⁵ IV-I WERNZ, *JUS DECRETALIUM* 202-203 (1911).

such Germanic usage, the Decree of Trent did not, in its invalidating clause, require that the priest participate *actively*, but only that consent be exchanged in his presence and that of two or three witnesses. This left room for development of an abuse which came to be known as "marriage by surprise." That the device was well known is illustrated by the reference made to it in Manzoni's great novel *I Promessi Sposi*. In the sixth chapter of the work, Renzo finds himself frustrated by the pastor's hesitation to celebrate Renzo's marriage with Lucy, because a local nobleman also aspires to her hand. Renzo proposes that he and Lucy, with their two witnesses, should suddenly present themselves to the pastor: "I shall say 'This is my wife.' and Lucy will say 'This is my husband.' Thus the marriage will be accomplished."⁴⁶

The requirement that the assisting priest shall freely ask and receive the consent of the parties came into the law through the Decree *Ne Temere*.⁴⁷

Marriages Subject to the Catholic Law of Form

The requirements of the Canons, that marriages shall be celebrated before an authorized priest and two witnesses, with the priest actively participating in the ceremony, or before the witnesses alone in extraordinary cases, are described as "the law of form," or "the law of essential form of marriage." These terms do not include

⁴⁶ In the first year of the reconstituted Roman Rota, the court declared null a "marriage by surprise" attempted in 1897, on the ground that the pastor in the case did not in any way understand the parties' hurried declarations of marital consent. S. R. ROTA, *coram Sincero*, 28 May 1909, Dec. VI, Vol. I, p. 50.

⁴⁷ IV-I WERNZ, *op. cit. supra* note 45 at 300.

the canonical requirement that the parties be present, personally or by proxy, when consent is exchanged. It has been pointed out that the law requiring presence of the parties applies to all marriages of baptized persons.⁴⁸ The law of form does not apply so extensively.

Persons who have been baptized in the Catholic Church, or who have been received into the Church as converts from heresy or schism, are bound to the Catholic form of marriage, whether they contract with fellow Catholics, or with baptized non-Catholic persons, or with persons not baptized.⁴⁹ Baptized non-Catholics, when they marry other baptized non-Catholics or unbaptized persons, are explicitly exempted from the obligation of observing the Canons which prescribe that marriage be celebrated in the presence of a priest and/or in the presence of witnesses.⁵⁰

HISTORICAL NOTE

When a form of marriage obligatory under pain of nullity was first enacted, in the Council of Trent, the greater part of the Christian world was Catholic, and there was good hope that those Christians who had separated from the Church might soon return. For that reason, no special provision was made in the Decree *Tametsi* to exempt non-Catholics from its operation. Some accommodation was attempted in the manner of the publication of the Decree, promulgation being withheld in areas which were largely Protestant. In the course of time, several decrees were made which exempted from the law of Trent marriages in which one or both parties were baptized

non-Catholics; all of these exceptive decrees were of regional application. Most notable of the decrees thus favoring non-Catholics was the *Benedictine Declaration* of November 4, 1741.⁵¹

Under the *Benedictine Declaration*, Catholics who married non-Catholics in the United States, even in areas subject to the law of Trent, were not obliged under pain of nullity to celebrate their marriages before the proper pastor and two witnesses. The Decree *Ne Temere* of 1908, like the Decree of Trent and like the present Canons, imposed the obligations of the law of form upon all Catholics, regardless of the religious status of persons with whom they contracted marriage.⁵²

Official Instructions subsequent to the Council of Trent had extended the exemption from the obligatory form of marriage to persons who had been baptized in the Catholic Church, but who had been raised in a non-Catholic sect.⁵³ This extension was abrogated by the Decree *Ne Temere* of 1908,⁵⁴ but was restored in the

⁵¹ The Declaration was extended to those regions of the United States, except the Ecclesiastical Province of Santa Fe, which the Decree *Tametsi* of the Council of Trent had been published. Heneghan, *Cases and Studies*, in 3 THE JURIST 318, 322 (1943); cf. note 35 *supra*.

⁵² IV-I WERNZ, *op. cit. supra* note 45 at 304. But the Decree *Ne Temere* continued in effect the local exemptions of the CONSTITUTION, *Provida sapientique*. Those exemptions affected the marriages of Catholics contracting with baptized non-Catholics in the German Empire and in Hungary. Until the CODE of 1918 did away with all regional exemptions, such marriages were not void though celebrated without the Catholic form. IV-I WERNZ, *op. cit. supra* note 45 at 307-311.

⁵³ 5 CAPPELLO, DE SACRAMENTIS 691 (*De Matrimonio* n. 704) (1947).

⁵⁴ IV-I WERNZ, JUS DECRETALIMUM 304-307 (1911).

⁴⁸ Cf. text *supra*, p. 2.

⁴⁹ Can. 1099, § 1 C.I.C.; Can. 90, § 1 M.P.

⁵⁰ Can. 1099, § 2 C.I.C.; Can. 90, § 2 M.P.

Code of Canon Law of 1918. Canon 1099 exempted from the obligation of the Catholic form those born of at least one non-Catholic parent, who had been baptized in the Catholic Church, but who, after the age of seven, had not in any way adhered to the Catholic religion. Application of this exception involved considerable difficulty because it required proof of a negative fact, that of non-adherence to the Catholic faith after canonical infancy. Consideration of that difficulty chiefly motivated the *Motu Proprio, Abrogatur*, which, as of January 1, 1949, repealed this exception.⁵⁵

CONCLUSION

The power of the Church to legislate upon the form of marriage is denied by all who, like the Reformers, do not regard marriage as a Sacrament. Luther denied that Matrimony is a Sacrament,⁵⁶ and the same denial is contained in the twenty-fifth of the Thirty-Nine Articles of the Anglican Church.⁵⁷

⁵⁵ English translation of this *MOTU PROPRIO* is presented in 3 BOUSCAREN, *CANON LAW DIGEST* 463 (1953).

⁵⁶ *De Captivitate Babylonica*, in *OPERA* Tom. VI, p. 550 (Weimar 1888) [quoted in JOYCE, *op. cit. supra* notes 1 and 2, at 179]. But the Reformers' abandonment of religious concern for Matrimony did not "release" the family from captivity. (Cf. Gardner, *Liberty, the State and the School*, 1 *THE CATHOLIC LAWYER* 285, 291). For the same Luther proclaimed that the civil ruler is God's vice-regent, and when he pronounces a marriage dissolved, the sentence is not man's but God's! *WERKE* Tom. XLI, p. 241 (Erlangen ed.) [quoted in JOYCE, *op. cit. supra* at 410].

⁵⁷ Quoted in JOYCE, *op. cit. supra* note 56 at 181. Immediately after the adoption of the Calvinist reform in Scotland, in August 1560, divorce for adultery was held to be the law of the land, and divorce for abandonment was enacted by statute in 1573 [JOYCE, *op. cit. supra* note 56, at 418]. The English ecclesiastical courts

The principle that the marriages of Christians are in the jurisdiction of the Church, while the state is competent only to regulate the "civil effects" of marriage,⁵⁸ was part of the common-law jurisprudence of ancient England. The King's courts would give dower, a civil effect of marriage, only if the woman had married *in facie ecclesiae*,⁵⁹ but the King's courts did not presume to adjudicate upon the essential validity of clandestine marriage.⁶⁰ A theory founding claims of power in the State to reach by its law the validity of marriage was advanced by an apostate Catholic Bishop patronized by James I. In the book which he dedicated to the King,⁶¹ was contained the teaching that the King, and not the Church, had all power to adjudicate upon validity, divorce and separation in marriage. That theory of civil supremacy in marriage was not applied, in the book, to the matter of celebration—the book was published a generation before the Council of Trent. But within a century after Trent, Parliament, without any ecclesiastical concurrence, enacted a law of form of marriage which purported

retained jurisdiction of divorces *a thoro et mensa* until that jurisdiction, together with power to grant divorces *a vinculo*, was conferred upon the lay courts in 1857, by 20 & 21 VICT., c. 85. But long before the English courts had statutory power to dissolve marriages by divorce, Parliament, by private acts, gave leave for remarriage to persons who had obtained decrees of separation in the courts of the Church of England. The earliest of these acts was, apparently, the Marquis of Northampton's Act in 1551.

⁵⁸ Can. 1016 C.I.C.; Can. 5 M.P.

⁵⁹ BRACTON, *DE LEGIBUS*, lib. II, c. XXXIX, n. 4 (Rolls Series 1879) Vol. II, p. 50.

⁶⁰ 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 621-622 (1931).

⁶¹ DE DOMINIS, *DE REPUBLICA ECCLESIASTICA* (London, 1617).

to bind all baptized Christians in England.⁶²

Because Matrimony as a natural contract is of divine origin, it is always subject to the law of God.⁶³ Since every baptized person is a member of the Church and so subject to the law of the Church in religious matters,⁶⁴ the marriages of such persons are regulated by Canon Law, as well as by Divine Law.⁶⁵ Marriage between baptized persons is always a Sacrament.⁶⁶ The Sacraments, as the chief

⁶² Lord Hardwicke's Marriage Act, 26 GEO. 2, c. 33 (1753); Jews and Quakers, by provision in § 18 of the Act, were exempt from the law's requirement as to celebration.

⁶³ Matt. 19, 3-12; Mark 10, 2-12; Luke 16, 14-18.

⁶⁴ Can. 87 C.I.C.

⁶⁵ Can. 1016 C.I.C.; Can. 5 M.P.

⁶⁶ Can. 1012, § 2 C.I.C.; Can. 1, § 2 M.P.

means of sanctification and salvation, are to be received and administered with the greatest care and reverence.⁶⁷

It is for these reasons that the Church has a double duty in respect to Matrimony. The Church must teach the law of marriage as established by God, and it must implement that law by preventing abuse of the Sacrament of Matrimony entrusted to its special care. The Church is bound by the Divine Law she teaches; she cannot change the nature of marriage from what it is by divine ordination. At the same time, the Church must use its discipline to bar from marriage those who would assume that state without consideration of its sacred responsibilities. The law of form is enacted in fulfillment of that second duty.

⁶⁷ Can. 731 C.I.C.



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