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CANONICAL AND CIVIL MATRIMONIAL ACTIONS: A COMPARISON

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THIS PAPER WILL COMPARE the canonical matrimonial action with matrimonial actions in the secular courts of our country. Mention will be made frequently of the statutes and common law of the State of New York. This will permit a more precise description of the correlation between the two systems. At the same time it is felt that the law of New York is representative of law of the other states at least as far as the various points to be discussed are concerned.

When the American colonies adopted the common law of England, neither the court of law nor the court of equity in England had jurisdiction over marriage. Marriage jurisdiction was in the Anglican ecclesiastical courts which had inherited it from the Catholic tribunals at the time of the Reformation. Our early courts, therefore, considered themselves as having no jurisdiction over matrimonial matters. Such jurisdiction over the subject matter of marriage eventually was granted by statute. In many cases the state legislatures granting such jurisdiction, must have looked to the Anglican ecclesiastical courts for some guidance. The similarity is so great that it could hardly otherwise be explained.

A good example of similarity is found in the definition of marriage. Section 10 of the New York Domestic Relations Law states: "Marriage, so far as its validity is concerned, continues to be a civil contract, to which the consent of the parties capable in law of making a contract is essential." Canon 1081, Section 1, states: " 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."

Both laws agree that marriage is a contract, that it comes into existence by the consent of the parties, and that the parties must have the legal capacity to contract. The New York law adds that it is a civil contract, but it does not deny any religious significance which the contract might have for individuals. As a matter of fact, provision is made for the celebration of the marriage by duly ordained ministers or clergymen affiliated with any religion which is listed in the most recent

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federal census of religious bodies.

The statute in New York does not specify the terms to which the parties must agree. Case law in New York indicates that the contract is between one man and one woman, that they contract to live together as husband and wife with the object of constituting a family, for the preservation of moral and social purity, for the continuance of the race, for family welfare, and for the general good of society.

Canon 1081, Section 2, of the Code of Canon Law, spells out in detail the terms of the marriage contract: "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." In canon law, the obligations to live together and to provide for the education of the children are considered effects which follow from the primary obligations of marriage, rather than terms of the contract. They do not affect the validity.

According to canon law, the right with the corresponding obligation to the conjugal act is the main term of the contract. Indissolubility and fidelity are considered essential properties of the conjugal rights, *i.e.,* so joined to the conjugal rights that they cannot be excluded from the consent. If the right to the conjugal act is excluded, or if the indissolubility or fidelity is excluded, the marriage is null and void. This is true if the exclusion is done in good faith, deliberately, fraudulently, or even with the consent of both parties. There is no such thing in canon law as consent by estoppel as far as marriage is concerned. If the right to the conjugal act, or to an essential property either of indissolubility or of fidelity is excluded, the marriage is null. When a canonist speaks of nullity in regard to marriage, he means null and void "ab initio," and the marriage can only be made valid by a new exchange of vows according to the canons. No passing of time will cause a marriage to be canonically valid which originally was invalid when contracted. There is no statute of limitations for matrimonial actions in canon law.

The necessity of a new solemnization of marriage, a new exchange of marriage vows before an authorized priest, when a marriage is null and void in canon law, is similar to the situation in New York law when a marriage is void "ab initio," *e.g.,* an incestuous marriage between sister and brother, father and daughter, uncle and niece, or a marriage where one of the parties has a prior spouse living and undivorced. In New York law, the continuing to live in a bigamous marriage after the death of the prior lawful spouse does not cause the bigamous marriage to become valid—a new marriage ceremony is needed. The same is true for all the invalidating causes in canon law, both lack of consent and invalidating impediments; a new canonical exchange of marital consent is necessary after the cessation of the invalidating cause. This is quite different from *voidable* marriages in New York law which are no longer voidable after they have been ratified by a failure to bring an action of nullity.

A difficult situation arises when a spouse has given invalid consent according to canon law, but the proof of the invalidity is not available. The marriage is definitely null and void, but because of

the occult nature of the invalidity, proper consent can be given privately, *i.e.*, without a new public solemnization of the marriage. The same solution is available when there is an impediment which is dispensable, but occult because it cannot be proved. After a dispensation is granted, consent can be renewed privately but the consent is necessary for canonical validity even in the internal forum of conscience.

In our secular courts, equity has the principle that a plaintiff may not come into court with "unclean hands." Undoubtedly, this came from the influence of the clerical chancellor at the King's court. In marriage cases, the Code of Canon Law provides that the person who is the direct and culpable cause of the nullity cannot bring the action. This does not mean that the Church will consider the marriage as valid if it is actually null and void. Sometimes the innocent party will be the plaintiff. Sometimes, the Promoter of Justice, whose duties resemble those of a district attorney, will act as plaintiff. The Church frequently dispenses from the incapacity caused by "unclean hands" if the plaintiff is now repentant.

Both canon law and the law of the State of New York hold that a marriage is contracted by consent; that subsequent consummation is not required for the validity of the contract. In canon law non-consummation permits a dissolution or a breaking of the bond. In New York law non-consummation by itself does not give rise either to a divorce or to a decree of nullity, but there could easily arise an action of nullity for prior fraud. The New York courts also are more inclined to find other grounds if a marriage has not been physically consummated. Consummation in canon law requires both some penetration and some insemination. Mere pressure against the female membrane together with insemination is not sufficient as some criminal courts have held in cases of rape.

The New York common law on contracts recognizes as valid a contract made by one who even at the time has no expectation or hope of fulfilling it. One having no present interest therein could contract to sell the Empire State Building. The contract could be considered binding and the failure to give title would give an action for breach of contract. This concept of being able to contract to do what one is actually unable to do seems to have had its influence on the Domestic Relations Law on the contract of marriage. In New York law, physical impotence either on the part of the male or on the part of the female does not of itself cause nullity. New York cases impose a positive obligation to reveal such a condition, and failure to do so can give rise to an action of nullity for fraud. If no action is brought, the marriage continues to be valid. The New York Domestic Relations Law also permits an action to be brought within five years after the marriage on the grounds of physical incapacity. The statute specifies that the marriage is null from the time its nullity is declared. Again, if no action is brought within the period of the statute of limitations, the marriage continues to be considered valid.

Canon law, at least as far as the marriage contract is concerned, takes the attitude that a person cannot contract to do what he is incapable of doing. A male or a female lacking the necessary organs for copulation cannot validly contract to marry. Impotence, therefore, causes a

marriage to be invalid as long as it is antecedent and perpetual.

A recent Rota case found that the marriage of a nymphomaniac was null and void because the wife, inflicted with nymphomania, was incapable of fulfilling the essential property of fidelity. Nymphomania is a feminine disease characterized by a morbid and uncontrollable sexual desire. This case appears to be another application of the general principle that one cannot give valid consent to do what he is incapable of doing. This case of the nymphomaniac seems to be a case of first impression. Might it not be possible to find additional applications of this principle? Is it possible that a homosexual might be capable of consummating a marriage once or a few times but incapable of giving "perpetual rights"?

Canon law has the impediments of nonage, consanguinity and prior marriage as does New York State law. The age of consent in canon law is 16 years for the male and 14 for the female. In canon law, continuing to cohabit after age of consent does not cause the marriage to become valid. As an impediment, consanguinity is extended to all marriages between ancestors and descendants; for other relatives, up to the degree of second cousins. A dispensation is not possible to permit ancestors and descendants, or brothers and sisters to marry; for serious reasons uncle and niece have been dispensed, but such a dispensation is discouraged because of conflict with the New York law. In canon law, for a prior marriage to be an impediment, the marriage must have been valid according to canon law; the fact that a civil divorce or a civil annulment has been obtained does not cause the prior marriage to cease to be an impediment. Force and fear, also called duress, cause a marriage to be canonically null and void. As in the civil law, the duress must be grave, unjust and incurred from without.

There are other canonical impediments still found in canon law which no longer exist in New York law, *e.g.,* affinity, crime of adultery or murder, and seduction; still others are especially religious in character, *e.g.,* the spiritual relationship between a baptized and a non-baptized person; between a godfather or the one baptizing and the person baptized.

A special word is in order concerning the effect of fraud on the marriage contract. In the New York courts, fraud is undoubtedly the most common ground for a decree of nullity. An action for annulment because of fraud "in the inducement" is provided by New York statutes, but generally, the equity powers of the court are considered to permit a similar action. The fraud must concern the "essentials" of the marriage to constitute grounds for annulment.

Canonically, fraud does not have the effect of nullity, unless it is fraud "in the execution." There are two instances when *error* can cause a marriage to be canonically void: error about the identity of the person; and error about a condition of slavery. Both of these are very rare in our day.

Both ecclesiastical law and secular law hold that marriage is indissoluble, but for neither is this indissolubility absolute. New York law permits divorce in the case of adultery and most other states have additional grounds. From a canonist's point of view, the voiding of a voidable marriage in secular law differs little from

a divorce. Canon law permits the dissolution of a marriage (1) which has not been consummated physically, and (2) where at least one of the parties has remained unbaptized during the entire time of cohabitation. This latter dissolution is in the interest of a convert or for the preservation of the faith of a member of the Church. Both canon law and American civil law agree that such divorces or dissolutions can only be granted validly by the respective public authority, the Church or the state, but canon law has an interesting exception even to this rule. In the privilege granted by St. Paul, which is restricted to the case where both parties were unbaptized at the time of the marriage, the convert could contract a new valid marriage without the intervention of ecclesiastical authority provided that he verified the "departure" of the one who remained unbaptized. Ordinarily, however, the priest assisting at the new marriage would require that the conditions necessary for the use of the Pauline Privilege be verified by ecclesiastical authority.

We turn now to adjective law. Every diocesan court has jurisdiction over the subject matter of marriage—except for the marriages of heads of states, including governors. Where will the venue lie? The action can always be instituted at the situs of the contract. It can also be brought in the diocese of the domicile or quasi-domicile of the defendant, but not in the forum of the plaintiff. However, a wife almost always has a legal domicile with her husband, with the result that a husband can bring the action in his own place of domicile. Canon law recognizes the possibility of multiple domiciles. In addition to domicile, canon law recognizes quasi-domicile. A quasi-domicle requires actual residence with the intention of remaining the greater part of a year. To avoid collusive suits, there are some restrictions on the bringing of an action in the place of the quasi-domicile of the defendant.

The court itself is obliged to consider whether or not the venue is correct, and on its own initiative it must dismiss the complaint of nullity if the venue is incorrect. However, if the court is in error about the venue, and if an objection is not timely made, the objection cannot be raised later.

The action of nullity is started by the plaintiff's presenting to the competent tribunal a bill of complaint of nullity, called a libel. If the court concludes either that the venue is not correct, or that the facts alleged do not constitute a cause of action, it must dismiss the action. As a practical matter, many courts will also dismiss the action if the plaintiff shows no indication of being able to prove the facts alleged. If the court concludes that the venue is correct and that the facts alleged do constitute a cause of action, it will admit the libel to trial. This is called the accepting of the libel. This decree as to the sufficiency of the libel seems to be final in canon law so that, after the libel has been accepted, the trial must proceed to its end unless the plaintiff abandons or renounces the action by voluntary discontinuance. It seems that Section 3211 of the New York Civil Practice Law and Rules provides a better rule, permitting the court to dismiss at any time if the facts alleged do not state a cause of action. Occasionally, in a canonical court it happens that the original plead-

ings state a cause of action, but when the plaintiff himself appears in court and explains the facts he alleged, it then becomes clear from his own admissions that there is no cause of action. If the ecclesiastical court could dismiss during the trial on the ground that there was no longer a cause of action, some useless trials could be avoided. For the protection of the individual's rights, an appeal to the higher court from the decree of dismissal could be provided.

Similar to federal practice, the canonical summons issues from the court itself. If the venue is correct, the summons can be served on the parties even outside of the territory of the court, if necessary. The assistance of other tribunals can also be requested for the serving of a summons elsewhere. The joinder of issue is effected by the court in the presence of the parties or their attorneys.

The canonical action is not a trial by lay jurymen, but by a bench of three priest-judges. The hearings are in private. All three judges are not required to be physically present for the hearing of the testimony. The testimony can be taken by a referee (auditor) who, unless he is also a judge, is exclusively a referee "to inquire and report," and not a referee "to determine." The Presiding Judge or the referee will propose the questions. Neither the Defender of the Bond nor the attorneys may interrogate the parties or witnesses, but they may propose questions to be asked. All of the evidence must be reduced to writing by a court clerk, and the judges must form their opinions from the written record. It is a canonical principal that "What is not in the record, does not exist."

For a decision, the three judges meet; they discuss the law and the facts. A majority of two is sufficient for a decision. The vote, however, is secret, and it can never be determined whether the decision was unanimous or split. One and only one opinion of the court is written, and it is signed by all three.

The secrecy as to the voting of the judges, and the lack of a minority opinion, is a limitation. A minority opinion might encourage certain parties to appeal when at present they do not. If the parties know that an opinion was unanimous, they might be discouraged from making useless appeals.

Rule 3212 of the New York Civil Practice Law and Rules permits a summary judgment only for the *defense* in a matrimonial action. In canonical practice, summary judgment is available also for the plaintiff for specified types of cases, *e.g.*, prior bond, disparity of worship, sacred order, solemn vow of chastity, consanguinity, affinity or spiritual relationship. It is not available for grounds other than those specified by the canon. Where summary judgment is permitted, the nullity is evident by reason of documents and simple affidavits. The decision is given by one judge, usually the Bishop himself, after he has consulted the Defender of the Bond. There is no necessary appeal by the Defender of the Bond. If any serious question of law or of fact arises, the case must be tried by the ordinary court of three judges.

The New York Civil Practice Law and Rules restricts the use of the declaratory judgment to judiciable controversies. However, declaratory judgments are available for the determination of certain

matrimonial rights. In these instances, a declaratory judgment is proper even though there is no "controversy" in the sense that the action is not contested. The Code of Canon Law also has restrictions on declaratory judgments—all judicial processes must be controversies. To avoid the possibility of an uncontested matrimonial action in canon law, there is always present the Defender of the Bond to argue for the validity of the marriage.

There is one reason why an attorney is not as important in a canonical matrimonial trial as he is in the secular courts. Canon 1618 permits the court, on its own initiative, to call for documents and witnesses, and to interrogate the parties and witnesses whenever the action is concerned with the salvation of souls. Certainly, the outcome of a marriage trial can affect the salvation of souls. The court can act in the defense of the marriage bond. For this reason it can be questioned whether the office of the Defender of the Bond warrants the time and skill of the man power presently committed to the argument for the validity of the marriage.

There are four rules of evidence which make it particularly difficult for the canon law court to find for the plaintiff. The first of these is that the parties to the suit are disqualified as witnesses. The parties are permitted to testify, and what they say can be the basis on which the proof is laid, but their testimony is not considered proof. This is the general rule. There are indications in Rotal decisions that some weight is given to the testimony of the parties, but certainly the testimony of the parties alone would never be sufficient evidence to permit a court to declare a marriage null. This rule, regarding the parties as totally disqualified, was formerly the law of New York, but today it is overruled by statute (Section 4512 of the Civil Practice Law and Rules).

The second rule of evidence is "One witness is no witness." In other words, the operative facts which cause invalidity must be proved by the direct testimony of two witnesses, other than the parties. There are found in Rota cases a few exceptions to the "two witnesses" rule, especially in force and fear cases, because the one using duress is accustomed to try to hide his doing so. One witness with very strong circumstantial evidence might suffice in exceptional cases.

Thirdly, canon law gives a specific legal presumption for the validity of a marriage. In New York law, marriage also has a presumption for its validity. But presumptions differ in strength. The presumption for the validity of marriage in canon law is somewhat similar to the presumption for the legitimacy of a child in New York law. In *Matter of Findlay*, the New York court said that the presumption of legitimacy will not fail "unless common sense and reason are outraged by the holding that it abides." Almost the same thing might be said for the presumption for the validity of marriage in canon law.

Fourthly, in the canonical action, the plaintiff must produce evidence which makes it morally certain that the marriage is invalid. Canonical moral certitude is similar to the rule of evidence, "beyond a reasonable doubt," which our secular courts require in criminal trials.

When all of these rules are joined together, *i.e.*, that there is a strong presumption of law for the validity of the marriage,

and that the operative facts must be proved "beyond a reasonable doubt" by at least two witnesses, other than the parties themselves, it is evident that in the canon law court the proof of nullity of the marriage must be substantial.

The Church has held to these rigid rules making it difficult to prove a marriage invalid on the argument that the public good is involved in marriage. New York law also agrees that society has an interest in every marriage, and in an uncontested matrimonial action other convincing proof is demanded, but the "fair preponderance of credible evidence" rule still remains. There is some desire for a mitigation of the canonical rules of evidence. It is argued that while it is true the public order must be upheld, it is likewise true that there should be a greater concern for the salvation of individual souls. In urban society, public order is not affected by decrees of nullity as in rural society. One frequently does not know the neighbors in the adjoining apartment.

Another consideration is that of appeal. If the court finds for the validity of the marriage, the plaintiff may appeal. Appeal is *required* by canon law if the court has found for nullity. Some canonists today would prefer a discretionary appeal if the Defender is a qualified canonist. With the exception of the cases which are decided by summary judgment, an ecclesiastical decree of nullity does not permit the plaintiff to remarry unless it has been confirmed by a higher court. A matrimonial action never becomes res judicata, but if there are two conforming opinions for nullity, the plaintiff may then remarry. If subsequent evidence should indicate that the conclusions of the courts were not correct, the decree can be attacked directly by appeal, even after the lapse of a long period of time.

In a matrimonial action, the canonical appeal court is principally concerned with the sufficiency of the evidence. Generally, the law is clear and unquestioned, but there are exceptions. Reviewing the facts, the appeal court looks at the evidence, weighs it, and gives its findings of fact just as if it were acting as the court of trial. At least in the canons themselves, there is no suggestion of the use of the principle of "judicial restraint" based on the consideration that the trial court would be in a better position to estimate the credibility of the witnesses and the implications of their testimony. In other words, the appeal court will substitute its own discretion for the discretion of the trial court without hesitation. When it reviews the case in third instance, the Sacred Roman Rota also will freely use its own discretion, recognizing no obligation to agree or disagree either with the trial court or with the intermediate appeal court.

Another peculiarity of canonical practice is that the appeal court frequently will reinterrogate the parties or witnesses, or hear new witnesses. For this purpose the case is not remanded to the trial court as is the practice in our secular courts. Remanding the case to the trial court for additional testimony, and for the giving of a new decision on all the evidence including that which has been added, might have its advantages. It would instruct the trial court in better methods of procedure, and it could frequently avoid the necessity of cases going

to the higher levels of appeal. We might also ask whether two courts actually have given conforming opinions if some evidence was considered and used by the second court which was never before the first court for its deliberations.

One frequently hears it said that the canonical court does not have the principle of "stare decisis." This is true but it does not, therefore, follow that the lower courts are free to ignore the jurisprudence of the higher courts, especially that of the Sacred Roman Rota. Canon 20 of the Code specifies that when there is no canonical directive about a particular point, the practice of the Roman Curia must be considered. (The Rota is part of the Roman Curia.) Secondly, appeals are more common in the canonical than in the secular court. Naturally, the higher court will follow its own jurisprudence when it decides the case on appeal. Consequently, the trial court, rendering a decision, will always bear in mind the jurisprudence of the higher court.

Our comments so far have been concerned almost exclusively with the substantive law of marriage, and with the use of the ecclesiastical forum to clarify marital rights. Might the local ecclesiastical court be used for other actions? At least in theory, the answer must be affirmative. As a matter of fact, there is a general prohibition against summoning a cleric before a civil court in any sort of an action. Therefore, a tort action or a contract action against a priest should be in the local ecclesiastical court, and the substantive law to be followed by the ecclesiastical court would be the prevailing secular law, *i.e.,* the common law, statutes, principles of conflict of laws, etc. As a practical matter, it is better to obtain permission from the local Bishop to use the secular forum. The ecclesiastical court would have to use its own adjective law, *i.e.,* the plaintiff would have the burden of proving his case "beyond a reasonable doubt"; the testimony of the parties would not be evidence; the testimony of the plaintiff's spouse or other close relative would not be admissible as evidence. Although it was given with the utmost diligence and in the best of good faith, the result in the ecclesiastical court could easily be the opposite from that in the secular court.

Canon 1552 states that the object of the judicial process is the pursuing and vindication of rights and the determination of operative facts. We are all conscious of the vital part played by our secular court system in the matter of civil rights. In our day, the ecclesiastical tribunal generally is not used for the vindication of ecclesiastical rights, except in relation to marriage. The Church finds, and rightly so, that the administrative decision is most expeditious and effective even in contentious matters. But the history of the Church indicates that all of its members are human, and that error is possible. It is my conviction that the ecclesiastical tribunal should always be available for judicial review, and for the clarification and vindication of all ecclesiastical rights. Only the slower and more deliberate judicial procedure, with its safeguarding formalities and its rights of appeal can be expected to provide complete justice, especially when the facts in issue are many and complex, or the law is obscure.