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RULES OF EVIDENCE IN CASES INVOLVING LACK OF DISCRETION

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IN THIS PAPER we shall treat (1) the concept of matrimonial consent, (2) the elements affecting matrimonial consent relative to the validity of the marriage contract, and (3) the various rules of evidence employed in formal trials which hear allegations of nullity on the basis of mental incompetence.

Concept of Matrimonial Consent

Canon 1081 points out that the *efficient cause* of the matrimonial contract—the factor that brings marriage into being—is the mutual consent of the contractants.

The first section of this Canon states that the legitimately manifested consent of the parties, who otherwise are free of any legal impediments (*iure habiles*), brings the marriage into being. The second paragraph gives the legal definition of matrimonial consent. It states that matrimonial consent is a mutual act of the will by which the perpetual and exclusive right to acts of normal sexual intercourse is granted. While this right is the stated object of the contract, because marriage is between human beings, and the ends of marriage as stated in Canon 1013, are the procreation and education of children, and because the essential properties of marriage are unicity, or exclusiveness, and indissolubility, it is apparent that the proper object of the marriage contract is the person himself. The individual alone is the fit subject to assume, to sustain, and to fulfill the rights and obligations of marriage. This is reflected in the liturgical formula for the exchange of consent: "I, N.N., take thee, N.N., for my lawful husband (wife), etc."

Although the Code of Canon Law specifically has not stated norms

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to guide judges in evaluating the mental competence of parties entering marriage, Rotal jurisprudence has certain guide-lines to assist tribunals in this difficult area.

Originally, the Rule of Sanchez, named for the renowned commentator, professed that since "mere use of reason" was sufficient for the positing of a human act (such as the commission of a mortal sin) it should also be considered as the critical test for giving valid consent. According to this theory, so long as a person is functioning at a rational level and has the minimal knowledge required in Canon 1082 (namely, that marriage is a permanent union from which children are born) he is capable of entering a valid contract.

In a decision rendered in 1911, not only the use of reason, but also the question of requisite knowledge of marriage and its obligations, were seen as the critical points. In 1919, the Rule of Sanchez was formally rejected in favor of the norm of St. Thomas Aquinas. At first, this norm was interpreted as a test of knowledge. However, as cases were subsequently presented wherein it was obvious that the person had sufficient knowledge but, nevertheless, was simultaneously defective concerning his internal liberty, it was seen that both spiritual faculties—intellect and will—are involved in the question of giving valid consent. It was then recognized that just as the functioning of the intellect can be disrupted (*e.g.*, by a disordered imagination), so also the functioning of the will can be affected by emotional factors, by pathological phobias, by obsessions, etc.

The proper functioning of the rational faculties sufficient for valid consent has, in recent Rotal jurisprudence, been reflected in the use of the terms "due discretion" and "mature judgment" so that, in addition to "mere use of reason," there is presently demanded the "critical" or "discretionary" faculty as an indispensable quality for true marital consent. This latter faculty consists in the power of balanced judgment and logical deduction, and implies the ability not only to know the obligations of the marriage contract but also an appreciation of one's ability to assume these obligations. It is also generally conceded that this due discretion comes not at the age of puberty but during a person's mental development in later years.

Conditions Affecting the Validity of Matrimonial Consent

In general, any condition which seriously impairs or completely destroys the normal functioning of the intellect or will automatically renders consent inefficacious. Thus, ignorance of the nature and obligations of marriage, lack of consciousness at the time of marriage, substantial error regarding the identity of the other party, and certain mental disorders and illnesses vitiate proper consent on the part of the intellect.

Insofar as the will is concerned, consent may be rendered inefficacious by reason of undue duress or fear, by a positive exclusion of the marriage itself, or any of its essential properties, as well as by conditional consent which affects the substance of the marriage contract, and, as mentioned above, by emotional factors such as phobias and obsessions.

For the purpose at hand, we shall concentrate on the area of mental illness as it affects a person's contractual ability. In

general, this condition is called insanity and affects a person's ability to elicit an integral act of consent. Ecclesiastical jurisprudence generally employs the term "insanity" as referring to an habitual or chronic condition which deprives the subject of the ability to use his rational faculties. The term "lack of due discretion," on the other hand, is all-inclusive, in the sense that it embraces all psychic disorders, whether chronic or transitory, which render marriage null. This same jurisprudence, without reference to the clinical psychiatric classifications of various illnesses, has grouped all psychic disorders into the following three categories:

1. *Habitual insanity* — this group comprises all mental disorders which are permanent and totally debilitating;
2. *Mental disturbance* — this group includes those illnesses which are per se temporary, regardless of whether they are totally or partially incapacitating;
3. *Mental weakness or feeble-mindedness* — this category embraces all mental defects which, per se, only partially incapacitate, regardless of whether the incapacity is permanent or temporary.

These three concepts conveniently comprehend all possible psychotic disorders or defects whatever may be, medically speaking, their clinical diagnosis, etiology, duration or gravity. This trichotomy is utilized in procedural law to ascertain the effect of mental illness on the validity of the marriage bond. This is seen in the correct application of principles and presumptions. For example, the presumption of perpetuity and continuity is valid in cases of habitual insanity but is not valid in cases of mental disturbance. Again, the hereditary factor might provide admissible evidence in cases of mental deficiency but not in the case of passing or temporary disturbance.

Rules of Evidence

Evidence in cases involving mental incompetence in marriage may be classified in four categories: documents; presumptions; testimonial evidence; and opinions of the tribunal's psychiatric experts.

Documents

Under the first heading may be grouped any records pertaining to the respondent which may have a bearing on the case. Of first importance are the authentic medical records of any treatments received either before or after the marriage. Other pertinent documents are school and employment records as well as any possible criminal history.

Presumptions

A presumption is defined in canon law as a probable inference about an uncertain matter. Some presumptions are specifically stated in the law, and these are called legal presumptions; others are deductions by the judge himself, and these are called personal presumptions.

An example of the former is to be found in Canons 1014 and 1015. There it is stated that marriage enjoys the presumption of validity and, if the partners live together after marriage, of consummation. Canon 1814 states that public documents, whether ecclesiastical or civil, are presumed to be genuine. Obviously, such presumptions admit proof to the contrary.

Personal presumptions vary in force, directness and probability. In this matter, the jurisprudence of the Sacred Roman Rota is an important guide; *e.g.*, proven insanity shortly before and after marriage

strongly indicates the existence of insanity at the time of marriage.

The importance of presumptions as proof is seen especially in cases involving mental illness. Obviously, marriages involving a mentally ill person would not exist if the respondent had exhibited clear and readily recognized signs of illness at the moment of the contract. Tribunals are concerned with such cases simply because the layman does not generally recognize the symptoms of a disturbed mentality. Certitude of the respondent's condition at the moment of contract can be achieved, for the most part, by relying on well-founded presumptions which arise from established facts.

Testimonial Evidence

Pertinent testimony is usually found in the depositions of the plaintiff, of members of the respondent's family, of co-workers and associates, and of physicians who treated the respondent.

Sworn testimony is recorded before a judge or a panel of three judges. Every diocese is required by law to have specific accommodations for the recording of this testimonial evidence. Besides accommodations for the personnel of the court and the witnesses, a crucifix must be displayed and a Bible must always be available.

Ordinarily, all formal testimony must be taken at the site of the tribunal. From this rule, however, distinguished ecclesiastical and civil officials are exempt. Cardinals and Bishops may select a location of their own choice, and persons prevented from coming to the tribunal because of illness or their particular state in life receive special consideration. Cloistered nuns are permitted to testify in their convent surroundings. Witnesses who live a great distance from the tribunal or who reside outside the jurisdiction of a diocese, may testify before a delegated tribunal in their own vicinity.

The judicial examination is conducted solely by the judge, and each witness is interrogated in private. It is a rare exception when a plaintiff, or his Advocate, may be permitted to attend the hearings of witnesses. The officials usually present at hearings are the examining judge (or judges), the Defender of the Marriage Bond, and a Notary. It is the duty of the Notary to record the verbal testimony as given and to transcribe the statements for inclusion in the acts of the case.

The interrogation of a witness is preceded by the taking of an oath. If the case warrants, an admonition by the judge concerning the sacred character of an oath and the nature of the ecclesiastical penalties for deliberate perjury is given. A lay witness who is guilty of perjury is punishable by personal interdict, which disqualifies him from worthy reception of the sacraments, the sacramentals, and from ecclesiastical burial; moreover, he is thereafter considered suspect in any ecclesiastical trial. While the testimony of a witness who refuses to take an oath may be informative, his testimony cannot be accorded great probative force. For proper evaluation of such a statement, however, notation of the refusal to testify under oath must be made.

The interrogation of a witness is performed in accordance with a questionnaire, prepared previously by the Defender of the Bond, which is submitted to the judge in a sealed envelope at the hearing. This questionnaire contains general questions pertaining to the individual's identification

(address, date and place of birth, parents' names, religion, and occupation) and particular questions designed to elicit the witness's knowledge pertaining to the case at hand.

While the judge is obliged to follow the Defender's formulary, in the interest of obtaining full information, he is always free to propose, *ex officio,* additional pertinent questions. Not infrequently in cases involving mental illness, the judge would be remiss if he did not ascertain precisely what the witness observed, *e.g.,* when the oddity or symptom was observed, what occasioned the oddity, and who else was present at the specific time of the occurrence.

The law is specific in its rules governing the interrogation of witnesses. First of all, a witness must never be forewarned as to the questions about to be proposed. The primary purpose of all interrogations is to ascertain the truth; hence, not even the plaintiff's Advocate is permitted to prompt his client as to the nature of the testimony he should give. In the second place, all questions must be simple and direct. The judge must never badger, harass, or embarrass a witness, but must always conduct himself with decorum and sympathetic understanding. Testimony must be given orally and without reference to manuscript. At times, however, as in the case of an expert or physician who has treated a party, the judge may permit a witness to consult written reports or records. Leading questions which suggest answers are strictly forbidden. Irrelevant questions —those not pertinent to the case or not understandable by a given witness—are also specifically forbidden.

Upon the completion of the hearing, the witness must read the transcript of his testimony, and he is permitted to add, delete, correct or change whatever he may wish.

The actual method of transcribing testimony is left to the discretion of the individual tribunal, provided two requirements are met: (1) an exact copy of the testimony must be made available to the witness for his perusal and signature; (2) the transcript must be available before the party finally leaves the tribunal. When a witness has stated that he has nothing further to add, delete or change, he is required to take an oath affirming the truth of his statements and promising to observe secrecy with reference to the testimony given until the completion of the case.

The law requires that the testimony of the plaintiff in a case be taken before that of the witnesses, unless grave reason suggests otherwise. Pertinent information will be sought from the witnesses mentioned by the plaintiff in his petition. Other witnesses not mentioned by the plaintiff may be called *ex officio* by the judge if, in the opinion of the tribunal, they can offer pertinent testimony. A witness should possess knowledge concerning the facts about which he is to testify, and he should also possess probity and honesty of character.

All persons may be witnesses unless they are expressly debarred by law. Canon law debars three classes of persons: (1) the unfit; (2) the suspect; and (3) those who are disqualified. Those who have not attained the age of puberty (fourteen for a boy, twelve for a girl), and persons who are feeble-minded or mentally ill, are regarded as unfit. Among the mentally unfit are idiots, imbeciles, morons and

psychotics. Persons who have been excommunicated, perjurers, or those of ill-repute are classified as suspect. Also grouped in this category are persons of such debased character that they are considered unworthy of belief, as well as public and implacable enemies of either party. The law considers the following as disqualified: the parties in a case and those who act in their stead. Among the latter would be the Advocate for the plaintiff, the Guardian for the respondent, the personnel of the court, and all confessors, even though released from the sacramental seal.

Certain individuals are exempt from giving testimony unless released from professional secrecy. In this group will be found priests who received information outside of sacramental confession, civil magistrates, physicians and civil lawyers.

Witnesses appearing voluntarily and without citation may be permitted to testify at the discretion of the judge. Since witnesses ordinarily do not volunteer, the judge must reject their offer if it appears certain that their motive is but to delay the proceedings or to obstruct justice.

The probative value of testimony naturally depends on its proximate and true reflection of the important facts in a case. A point of paramount importance is the precise time when certain facts occurred. It is a recognized fact that when parties learn that there may be a slight possibility of impugning the validity of an unhappy marriage they develop a dangerous and uncanny ability to distort the truth. Hence, canonists have designated a certain period as a suspect time (*tempus suspectum*). This may be defined as the time when marital difficulties first arose, or when either party first discovered the possibility of impugning the validity of their marriage. The general principle in canon law is that statements made by the parties at non-suspect times are to be accorded greater credence than statements made at suspect times.

Because the cumulative effect of mere numbers can often prove misleading, judges should be particularly wary when weighing statements that have but one common source.

In order to avoid all suspicion of perjury, the veracity of the witnesses must be ascertained. In evaluating the testimonial evidence, the judge should also give heed to the status of a witness and to his reputation for probity as well as to his fidelity to religious practice. The judge should ascertain whether testimony is derived from personal knowledge or merely based on hearsay; whether a witness is consistent or vacillating. The testimony of the relatives of a mentally ill person is often suspect because of their general inability or unwillingness to observe signs of unusual speech or behavior. The statements of a qualified witness, when testifying to what has been done in his official capacity, are considered to be indisputable proof.

Opinions of Psychiatric Experts

Church courts are enjoined by law to engage the services of psychiatric experts. They must be men of integrity and religious character, and they must be eminently skilled in the intricacies of their profession.

Wherever possible, the experts should conduct a personal examination of the respondent and evaluate the available evidence relating to his mental compe-

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tence. Following this, the experts should submit written reports of their findings and then give oral testimony relative to their conclusions.

Although the general law of the Church demands that physicians, expert in the field of psychiatry, be engaged by the tribunal to evaluate available evidence, the judges are enjoined to evaluate their conclusions carefully. Where expert opinion is based on proven facts, it would be rash indeed for the judge to reject such findings. By the same token, if the experts have not logically and properly arrived at their conclusions from factual evidence surrounding the circumstances in a given case, it would likewise be gravely erroneous for the judge to accord such findings favorable acceptance. In nowise are experts to be considered co-judges. They are to be considered as expert witnesses, skilled in their particular profession, whose knowledge has been placed at the disposal of the tribunal.

Summing up this discussion, the following points may be made:

1. Marriage comes into being by the rational consent of the contracting parties;

2. Consent and, therefore, the validity of a marriage may be rendered invalid by mental illness;

3. The ability to give valid consent is couched in the phrase "due discretion proportionate to the marriage contract";

4. The focal point in all trials involving mental illness is the respondent's condition at the moment of the exchange of consent;

5. In cases of alleged invalidity of the marriage contract due to mental